24-1293

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

PHILIP J. WEISER, in his official capacity as Attorney General of the State of Colorado, and MARTHA FULFORD, in her official capacity as Administrator of the Colorado Uniform Consumer Credit Code,

Defendants – Appellants,

v.

AMERICAN FINTECH COUNCIL, NATIONAL ASSOCIATION OF INDUSTRIAL BANKERS, and AMERICAN FINANCIAL SERVICES, ASSOCIATION,

Plaintiffs – Appellees.

On Appeal from the United States District Court, District of Colorado
The Honorable Daniel D. Domenico
District Judge

District Court Case No. 1:24-cv-00812-DDD-KAS

DEFENDANTS-APPELLANTS' OPENING BRIEF

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STATEMENT OF RELATED CASES

None.

GLOSSARY

ANCA	Airport Noise and Capacity Act of 1990, 49 U.S.C. §§ 47521
DIDMCA	Depository Institutions Deregulation and Monetary Control Act of 1980, Pub. L. No. 96-221, 94 Stat. 132 (1980)
FAA	Federal Aviation Administration
FDIA	Federal Deposit Insurance Act, 12 U.S.C. § 1811, *et seq*.
FDIC	Federal Deposit Insurance Corporation
NBA	National Bank Act, 12 U.S.C. § 21, *et seq*.
OCC	Office of the Comptroller of the Currency
UCCC	Colorado Uniform Consumer Credit Code, Colo. Rev. Stat. § 5-1-101, *et seq*.

INTRODUCTION

Since the early days of our Republic, states have enacted usury laws to protect their residents from predatory interest rates. State law controlled the terms of a loan between a lender and a borrower residing in two different states, though precisely which state law applied would often turn on the principles of conflicts of laws.

Over the years, Congress has created two exceptions to the general rule. First, in the National Bank Act ("NBA"), 12 U.S.C. § 85, Congress permits a nationally chartered bank to lend at rates authorized by the state in which it is located, or one percent above the federal discount rate, whichever is higher. The NBA preempts all state laws to the contrary, with no exceptions or options for the states to countermand preemption.

Congress enacted the second exception in the Depository Institutions Deregulation and Monetary Control Act of 1980 ("DIDMCA"), Pub. L. No. 96-221, 94 Stat. 132 (1980); App. Vol. II at 231-35,[1] which Congress modeled after the NBA. DIDMCA also allows a state-chartered bank to charge interest authorized by the state where the bank is located, or one percent above the federal discount rate. But, unlike the NBA, Congress permitted the states to reject DIDMCA's preemptive effects for all loans "made in" the opt-out state. Last year, Colorado passed a law opting out of DIDMCA. Effective July 1, 2024,

[1] Citations to Colorado's appendix shall read: App. [volume number] at [page number].

DIDMCA no longer provides an exception to the general rule for loans made in Colorado.

The Banks do not dispute that DIDMCA allows the states to opt-out, or that Colorado correctly opted out. But the banks nonetheless argue that DIDMCA continues to preempt Colorado law, claiming they are the ones who "make" a loan and they somehow manage to do so without a borrower. Since they contend a bank "makes" the loan by itself, a loan is "made" wherever the bank is located.

DIDMCA's text does not support the Banks' position. Congress wrote the preemption provision of DIDMCA to hinge on the bank's location. If Congress wanted the opt-out provision to function similarly to the preemption provision, they would have used the same language. But the opt-out focuses on where the *loan is made*, not where the *bank is located*, meaning Congress intended a different test to apply.

The straightforward interpretation, urged by Colorado and the Federal Deposit Insurance Corporation ("FDIC"), is that a loan is "made in" a state if either the bank or borrower are in that state when the parties agree to the loan. If either the borrower or the lender agrees to the loan while present in an opt-out state, the applicable interest rate cap is determined under state law, just as it had been before DIDMCA.

Colorado's interpretation recognizes the truth that a loan requires two parties: the lender *and* the borrower. Since the loan is "made" by the agreement of both parties, the making of the loan occurs in whatever states the parties are in when they reach that agreement. Significantly, this interpretation accords with federal precedent interpreting where interstate transactions are made. Moreover, it reflects Congress' choice to use different text in the opt-out language and it achieves the purpose of the opt-out provision because it returns the authority to regulate usury back to the states. In contrast, the Banks' definition actively frustrates the purpose of the opt-out because DIDMCA's preemptive effects would persist within a state's borders despite that state's decision to opt-out.

The District Court erred when it agreed with the Banks and preliminarily enjoined Colorado's enforcement of the Colorado Uniform Consumer Credit Code ("UCCC") against state-chartered banks who provide certain loans to Coloradans. DIDMCA's text, structure, and purpose all lean in Colorado's favor. The District Court's decision should be reversed.

JURISDICTIONAL STATEMENT

The District Court has federal question jurisdiction under 28 U.S.C. § 1331 because this case arises under a federal statute, DIDMCA. This Court has appellate jurisdiction under 28 U.S.C. § 1292(a)(1) because this appeal is from an interlocutory order of the district court entering a preliminary injunction. App. Vol. II at 442-69. The District Court entered the preliminary injunction on June 18, 2024. *Id.* Colorado timely filed a notice of appeal on July 18, 2024. App. Vol. III at 536-38.

STATEMENT OF THE ISSUES

1. Whether federal law permitting Colorado to opt-out of preemption for loans "made" in the state applies to loans made to Colorado borrowers and by Colorado banks?[2]

2. Whether the Court should imply additional equitable relief when Congress provides a comprehensive enforcement regime and a specific private right of action?[3]

3. Whether the District Court correctly balanced the harms of a disfavored preliminary injunction?[4]

STATEMENT OF THE CASE

I. Statutory and Regulatory Background.

A. Absent preemption by Congress, interest rate limits are controlled by state law.

Following from ancient examples of strict loan pricing regulations by both religious and government institutions, the Massachusetts colony adopted the first American usury law in 1641, predating the Constitution

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[2] App. Vol. I at 170-79; App. Vol II. at 455-64.

[3] App. Vol I at 180-82; App. Vol. II at 452-55.

[4] App. Vol. I at 185-86; App. Vol. II at 465-66.

by nearly 150 years. Stephen M. Graves & Christopher L. Peterson, *Usury Law and the Christian Right: Faith-Based Political Power and the Geography of American Payday Loan Regulation*, 57 Catholic U. L. Rev. 637, 648-49 and 665 (2008). "[A]lthough the Founding Fathers of the United States disagreed on many issues, they were virtually unanimous in their support of reasonable limits on the prices of loans. Indeed, each delegate to the Constitutional Convention returned home to a state with aggressively enforced usury limits [of 5% to 8%]." *Id.* at 665.

The U.S. Supreme Court has "readily accept[ed] the submission that . . . banking and related financial activities are of profound local concern . . . sound financial institutions and honest financial practices are essential to the health of any State's economy and to the well-being of its people." *Lewis v. BT Inv. Managers, Inc.*, 447 U.S. 27, 38 (1980); *see also* Donna C. Vandenbrink, *Usury Ceilings and DIDMCA*, 9 Fed. Res. Bank of Chi. Econ. Persp. 25 (1985) ("Colonial legislatures adopted usury laws based on English precedent, and the regulation of interest ceilings initially became a responsibility of individual states.") [hereinafter "Vandenbrink, *Usury Ceilings and DIDMCA"*]. In sum, state-imposed usury limits represent the default rule, rather than the exception.

In the absence of federal preemption, the interest rate limit on a particular loan is determined under state law. And subject to constitutional limits, a state is free to determine whether a given matter is governed by its laws, or those of some other forum. *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496-97 (1941); *see generally Nat'l Pork Producers Council v. Ross*, 598 U.S. 356, 369 (2023).

Eleven states, including Colorado, regulate the interest rates charged on consumer credit transactions based on a modified version of the UCCC. Gary D. Spivey, *Regulation of Consumer Loans Under Uniform Consumer Credit Code*, 73 A.L.R. 6th 425, § 1 n.5 (2012). The National Conference of Commissioners on Uniform State Laws first approved the UCCC in 1968. *Id.* § 1. The drafters developed the UCCC to create a modern, simple structure for the regulation of credit that was "fair to both consumers and creditors." 7A UNIFORM LAWS ANNOTATED, *Unif. Consumer Credit Code, 1974 Act, Prefatory Note* 88 (1985), https://rb.gy/znnr2w (follow "UCCC1974.pdf" hyperlink). Colorado originally adopted a version of the UCCC in 1971 and continued to modify it throughout the years, including in 1975 and 2000. *Id.* at n.1;

see also Unif. Consumer Credit Code, 2000 Colo. Legis. Serv. Ch. 265 (H.B. 00-1185, 62nd Gen. Assemb., 2d Reg. Sess. (Colo. 2000)).

Colorado's UCCC sets the maximum permissible finance charge, and it applies to both bank and nonbank lenders. Colo. Rev. Stat. §§ 5-2-201, 5-1-301(46). Federal courts, including the Tenth Circuit, have already upheld consumer credit codes with territorial applications practically indistinguishable from Colo. Rev. Stat. § 5-1-201, the Colorado UCCC provision challenged here. *See, e.g., Quik Payday, Inc., v. Stork*, 549 F.3d 1302 (10th Cir. 2008); *Aldens, Inc. v. Ryan*, 571 F.2d 1159 (10th Cir. 1978); *Aldens, Inc. v. Miller*, 610 F.2d 538 (8th Cir. 1979); *Aldens, Inc. v. LaFollette*, 552 F.2d 745 (7th Cir. 1977); *Aldens, Inc. v. Packel*, 524 F.2d 38 (3d Cir. 1975). Although these cases do not involve banks, they help illustrate the *status quo* absent DIDMCA: a state can choose to regulate interest rates charged to its residents, even if a lender has no other footprint within the forum state. A forum state's decision to do so "goes to the wisdom or social utility of [the forum state]'s choice of law, not to its constitutional power to make that choice." *Packel*, 524 F.2d at 43.

B. *Marquette* is a narrow exception to states' ability to regulate interest rates for national banks.

In *Marquette*, a nationally chartered bank located in Nebraska challenged a Minnesota law that imposed a lower interest rate cap than Nebraska law permitted. *Marquette Nat'l Bank of Minneapolis v. First of Omaha Serv. Corp.*, 439 U.S. 299, 302-03 (1978). The Nebraska bank argued that the Minnesota law was preempted by the NBA, a federal law that says national banks may charge "interest at the rate allowed by the laws of the State . . . where the bank is located" or "at a rate of 1[%] in excess of the [federal] discount rate . . . ." *Id.* at 301 n.1, 307-08 (quoting 12 U.S.C. § 85). The Court held that Section 85 "plainly provides" that a national bank can charge interest at the rate allowed by the laws of the state in which it is "located," so the Court's analysis then turned to the meaning of "located" as used in the NBA. *First of Omaha Serv. Corp.,* 438 U.S. at 307-13.

The Court determined Omaha Bank was "located" in Nebraska for purposes of the NBA because the charter address listed on the bank's organization certificate was in Nebraska. *Id.* at 308-10. The Court further held that the NBA preempted Minnesota usury laws with respect to loans offered by Omaha Bank to Minnesota consumers, noting that, for over a century, the NBA had been interpreted to give national banks advantages over state-chartered banks. *Id.* at 313-19. The Court noted that Congress' "debates surrounding the enactment of [the NBA] . . . occurred in the context of a developed interstate loan market" and found it "implausible . . . that Congress meant through its silence to exempt interstate loans from the reach of [the NBA]." *Id.* at 317-18.

Marquette, which carved out the first exception to the state's general police power to regulate interest rates, set off a legislative race to the bottom where national banks relocated to states—e.g., Delaware, Nevada, South Dakota, and Utah—that permitted any interest rate agreed to by contract, substantially undermining state usury laws. Adam J. Levitin, *Rent-A-Bank: Bank Partnerships and The Evasion of Usury Laws*, 71 Duke L.J. 329, 349-52 (2021) ("By 1988, eighteen states had removed interest rate ceilings for bank transactions.").

C. DIDMCA extends preemption to state-chartered banks, but Congress allows states to opt-out from its preemptive effects.

In 1980, Congress carved out one additional exception to the nation's longstanding tradition of state-imposed usury laws by passing DIDMCA. Section 521 of DIDMCA was intended "to prevent discrimination against State-chartered insured banks . . . with respect to interest rates" and authorizes state-chartered banks—notwithstanding contrary state law—to charge interest on a loan at the higher of: (1) the rate allowed by the laws of the state where the bank is located; or (2) up to 1% above the federal discount rate ("discount-plus-one rate"). DIDMCA, Pub. L. No. 96-221, § 521, 94 Stat. 132 (1980). Section 521 provides:

> State bank or such insured branch of a foreign bank may, notwithstanding any State constitution or statute which is hereby preempted . . . take, receive, reserve, and charge on any loan or discount made . . . interest at a rate of not more than [1%] in excess of the discount rate . . . or at the rate allowed by the laws of the State, territory, or district *where the bank is located*, whichever may be greater.

Id. (emphasis added).

A bank's location for Section 521 depends on where it is chartered, where it has branches, and where it conducts its loan making functions. Consistent with interpretations of the NBA, the FDIC has determined that a state-chartered bank conducts loan making functions wherever it performs three "non-ministerial" functions—loan approval, disbursal of the loan proceeds, and communication of the decision. Federal Interest Rate Authority, 85 Fed. Reg. 44,146, 44,148 (July 22, 2020).

But, in stark contrast to the NBA, Congress provided an avenue for states to opt-out of DIDMCA's preemptive effect in Section 525. The opt-out provision provides:

> The amendments made by sections 521 through 523 of [DIDMCA] shall apply only with respect to loans made in any State during the period beginning on April 1, 1980, and ending on the date, on or after April 1, 1980, on which such State adopts a law . . . which states explicitly and by its terms that such State does not want the amendments made by such sections to apply *with respect to loans made in such State*, except that such amendments shall apply to a loan made on or after the date such law is adopted . . . if such loan is made pursuant to a commitment to make such loan which was entered into on or after April 1, 1980, and prior to the date on which such law is adopted . . . .

DIDMCA, § 525 (emphasis added). Section 521 is the "direct lineal ancestor" to Section 85 of the NBA. FDIC Gen. Counsel's Op. No. 11, Interest Charges by Interstate State Banks, 63 Fed. Reg. 27,282, 27,283 (May 18, 1998). But Section 525 has no comparator. Section 525 "acceded to the states' historical role in regulating usury ceilings and their concerns about the consumer protection function of ceilings" by permitting "states to override the federal action and reassert their jurisdiction" with "no time limit on the privilege of states to override [Section 521]." Vandenbrink, *Usury Ceilings and DIDMCA* at 26-28 and 30.

Following DIDMCA's passage, seven states, (Iowa, Colorado, Maine, Massachusetts, Nebraska, North Carolina, and Wisconsin), and the Commonwealth of Puerto Rico, opted out of DIDMCA preemption. Federal Interest Rate Authority, 85 Fed. Reg. 44,146, 44,148 n.18 (July 22, 2020); *see also* Act of July 1, 1981, § 1, 1981 Colo. Sess. Laws 400 (repealed 1994). Most of the states that originally opted out via Section 525 later opted back in, including Colorado. Federal Interest Rate Authority, 85 Fed. Reg. at 44,148 n.18 (July 22, 2020). Today, Iowa and Puerto Rico remain opted out of Section 521. *See* Act of Apr. 30, 1980, § 32, 1980 Iowa Acts 547-48; and P.R. Laws Ann. tit. 10, § 998*l* (1980). Colorado rejoined them, effective July 1, 2024. Colo. Rev. Stat. § 5-13-106.

II. **Factual Background**.

Colorado usury law protects Coloradans from predatory interest rates. But Colorado has faced repeated attempts by lenders to avoid those protections. For example, EasyPay, a financial technology company, partnered with Utah-chartered TAB Bank to offer predatory loans to Colorado consumers. The loans went up to $5,000 and had rates as high as 199%. EasyPay and TAB Bank only stopped this predatory lending in

Colorado after they entered into an agreement with Colorado. App. Vol. I at 191-92, ¶ 5, and 195-204. Because Colorado had not yet opted out, TAB Bank could rely on Section 521 of DIDMCA's preemption of Colorado's rate caps, allowing the bank to lend under Utah law, which does not impose interest rate caps.

In 2023, the Colorado General Assembly took action to end this high-rate lending by out-of-state banks. Colorado invoked DIDMCA's opt-out provision in Section 525 to state that "Colorado does not want" DIDMCA Section 521 preemption to apply in Colorado. Colo. Rev. Stat. § 5-13-106. The opt-out's effective date was July 1, 2024. *Id.*

The Plaintiffs are the National Association of Industrial Bankers, American Financial Services Association, and American Fintech Council (collectively, the Banks), who are trade associations whose members include (or partner with) state-chartered, FDIC-insured banks that engage in consumer lending. On March 25, 2024, the Banks filed suit. The Banks named as defendants the State of Colorado officials who are responsible for enforcing Colorado's usury protections, the Colorado Attorney General, and the Administrator of the UCCC (collectively, Colorado). On April 2, the Banks moved for a preliminary injunction.

The Colorado UCCC is enforced by the Administrator, who is appointed by the state Attorney General. Colo. Rev. Stat. §§ 5-6-103 through -105. On April 22, 2024, the Administrator issued an interpretive letter in which she stated that she "understands and interprets § 5-13-106's language of 'in this state' to be wholly congruent and identical with the opt-out authorized by Section 525 for loans 'made in' the state." App. Vol. I at 194; *see also* Colo. Rev. Stat. § 5-6-104(1)(b) (authorizing the Administrator to issue interpretive letters counseling groups on their rights and duties under the code).

Although the Banks' unamended complaint alleged two counts, the Banks relied upon only Count One (Supremacy Clause) as a basis for their motion for a preliminary injunction.[5] Specifically, the Banks contended that the Colorado opt-out violates the Supremacy Clause because it "purports to impose Colorado rate caps on loans not 'made in' Colorado according to federal law, and thus not subject to the Section 525 opt-out." App. Vol. I at 55. Though the Banks couched their Supremacy

[5] Count Two alleged a violation of the Commerce Clause. The Banks removed Count Two from their First Amended Complaint, which they filed two weeks after the District Court granted the preliminary injunction. App. Vol. I at 12, 35; App. Vol. III at 474, 503.

Clause claim as one against H.B. 23-1229[6], the law Colorado passed to opt-out of DIDMCA, the District Court held that they are really challenging the territorial application of the Colorado UCCC, Colo. Rev. Stat. § 5-1-201—a law Colorado passed more than two decades ago. *See* App. Vol. I at 53, 62; App. Vol. II at 467 ("[A]lthough the plaintiffs' motion asks to enjoin enforcement of Colorado's opt-out law, the preempted statute is actually the Colorado UCCC[.]").

The Banks' position was that the borrower's location is irrelevant for purposes of determining where a loan is made under Section 525. Instead, the Banks contended that loans are necessarily made in the state where a bank is chartered "unless all three 'non-ministerial' functions involved in making that loan—(1) loan approval; (2) disbursal of loan proceeds; and (3) communication of the credit decision—physically occur in another state." App. Vol. I at 59 (emphasis omitted). In contrast to this position, Colorado and the FDIC, as amicus curae, argued that, for purposes of Section 525, a loan is "made" in a state if either the borrower or the lender enters into the transaction in that state.

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[6] H.B. 23-1229, 74th Gen. Assemb., 1st Reg. Sess. (Colo. 2023).

On June 18, 2024, the District Court granted the Banks' motion for a preliminary injunction. After acknowledging Section 525's challenging grammatical structure, the District Court held that "[t]he plain language of Section 1831d's opt-out provision, viewed in the context of the statutory scheme as a whole, indicates that loans are 'made' by the bank, and that where a loan is 'made' does not depend on the location of the borrower." App. Vol. II at 460.

With respect to loans made by plaintiff trade associations' members, Colorado is preliminarily enjoined from enforcing the interest rate limits in Colorado's UCCC unless the loan is "made in" Colorado under the district court's interpretation of the term. App. Vol. II at 469. Specifically, under the District Court's interpretation, a bank loan is "made in" a state for purposes of Section 525 only if the bank "performs its loan-making functions" in that state. App. Vol. II at 443 and 459. The loan-making functions consist of the decision to extend credit; the extension of credit; and the disbursal of the loan proceeds. App. Vol. II at 444-45.

SUMMARY OF THE ARGUMENT

Usury laws are one of the states' oldest police powers. And states exercise that police power to protect their residents from predatory interest rates. "It suffices to note that it is necessary for the states to enact reasonable consumer credit legislation to protect this public interest, for 'in the power of the lender to relieve the wants of the borrower lies the germ of oppression.'" *Miller*, 610 F.2d at 539-40 (citation omitted). Though Congress passed DIDMCA to prevent discrimination against state-chartered banks, Congress also expressly gave states the rights to reject DIDMCA's preemptive effects to preserve principles of federalism. Colorado has now exercised that right so that interest rate caps on loans made by state-chartered banks to Colorado borrowers once again turn on questions of state law. The Banks challenge Colorado's right to do so.

Where a loan is "made" for purposes of the DIDMCA opt-out is an issue of first impression. Because a loan is nothing more than an agreement between parties for the lending of money at interest, Colorado and the FDIC argue that a loan is "made" in a state if either the bank or the borrower are present in that state when the parties execute the agreement. If a party makes the loan in an opt-out state, the interest rate applicable to the loan is decided under state law just as it would have been prior to DIDMCA. If neither party to the transaction is in an opt-out state, DIDMCA preempts state law.

According to the Banks and the District Court, only banks "make" loans. The borrower is irrelevant to the "making" of the loan, so loans are only "made" where the bank is located. The District Court erred in adopting the Banks' statutory interpretation.

Section 525, the DIDMCA opt-out provision, does not turn on the location of the bank—it turns on where the loan is "made." DIDMCA's material change in focus from the bank's location in the preemption provision, to the location of the loan in the opt-out provision, is clear evidence that Congress wanted a different test to apply when determining where a loan is "made." Congress instead used the passive voice to obscure the parties involved in loan making. It did so to keep the focus on the loan itself rather than one party to the loan. Congress' use of the passive voice does not suggest one party to the transaction is more important than the other. In fact, the omission of *both* the lender and the borrower from the opt-out provision suggests the locations of both parties are equally important considerations.

Further, it is impossible for a bank to "make" a loan without a borrower. Every dictionary definition of a "loan" contemplates one party transferring something to another. Similarly, a loan is a contract, and a contract cannot be "made" with just one party. Restatement (Second) of Contracts § 9 (Am. Law Inst. 1981).

Additionally, focusing solely on the bank's location frustrates the structure and purpose of DIDMCA. The District Court's interpretation of "made in" renders the opt-out practically meaningless. States pass usury laws to protect their citizens from predatory lenders. Under the District Court's holding, Colorado is powerless to stop out-of-state lenders from charging interest rates that the General Assembly has determined are usurious, even after opting out. But a series of challenges to consumer protection laws shortly before Congress passed DIDMCA confirms states could regulate interest rates charged to their residents in the manner that Colorado seeks to, even if the lender's operations are totally outside the borrower's home state.

The straightforward application of the statute under Colorado's interpretation would place the parties in the same position they would be without DIDMCA. By contrast, the District Court's interpretation gives out-of-state, state-chartered banks a preemption defense—even in states that have expressly rejected DIDMCA preemption via opt-out. If that were Congress' intent, DIDMCA would not have an opt-out at all.

The District Court's statutory interpretation is also inconsistent with federal precedent, because interstate contracts are "made" in whichever states the parties are physically present at the time they execute the contract. *A.S. Goldmen & Co., Inc., v. N.J. Bureau of Sec.*, 163 F.3d 780, 787 (3d Cir. 1999). If the parties are in two different states, then the transaction occurs in both states. The District Court's interpretation ignores these principles by arbitrarily focusing only on the bank's location.

The District Court erred not just in its statutory interpretation. It also erred by finding the Banks have a cause of action in the first place, because as *Armstrong* makes clear, the Supremacy Clause contains no private right of action. The Banks must point to some other statute creating such a right. The Federal Deposit Insurance Act (FDIA)—which DIDMCA modifies—contains no such right.

Lastly, the District Court erred in granting the preliminary injunction because it failed to properly balance the harms to the parties. The Banks sought a disfavored injunction because it granted all the relief they could expect from a trial win, which could not later be undone. *Free the Nipple-Fort Collins v. City of Fort Collins, Colo.*, 916 F.3d 792, 797 (10th Cir. 2019). The District Court found that Colorado usury laws would only provide "marginally more" protection to the public because nationally-chartered banks could still lend at rates above what the Colorado UCCC authorizes under the NBA. But doing so was clear error because the Banks provided no evidence regarding the number of loans offered by either state-chartered banks or national banks with interest rates prohibited by Colorado law, so there were insufficient facts to find only a "marginal benefit" to the public.

STANDARD OF REVIEW

This Court reviews a preliminary injunction for abuse of discretion. *Prairie Band of Potawatomi Indians v. Pierce,* 253 F.3d 1234, 1243 (10th Cir. 2001). A district court abuses its discretion to enter a preliminary injunction if "it rests on an erroneous legal conclusion or lacks a rational basis in the record." *Free the Nipple-Fort Collins,* 916 F.3d at 796. This Court reviews the District Court's legal conclusions de novo, and its factual findings for clear error. *Id*. at 796-97.

ARGUMENT

I. DIDMCA's text, structure, and purpose make clear that a loan is "made" in a state if either the bank or borrower are in the state.

Section 521 preempts state law and authorizes state banks to export the interest rate of their home state, or to charge at the discount-plus-one rate, whichever is greater. But to preserve the principles of federalism, Section 525 permits states to countermand federal preemption for loans "made in such State." The text, structure, purpose, relevant uses of "made" elsewhere in Title 12 of the U.S. Code, legislative and regulatory history all point towards one conclusion: a loan is "made" in the state(s) where both the borrower and the lender enter into the transaction. If the lender and borrower enter into the loan in the same state, the loan is made in one state. If they are in separate states, then it is made in both. Where either party enters into the transaction while in an opt-out state, DIDMCA preemption is countermanded and the applicable interest rate is decided under state law.

A. Meaningful variations between Sections 521 and 525 of DIDMCA show loans are not "made" solely at the bank's location.

The Banks' challenge to Colorado's opt-out turns on two sections within DIDMCA: Section 521 and Section 525. Notably, Section 521 uses the active voice—"State bank or such insured branch of a foreign bank" are the subjects; "take, receive, reserve, and charge" are the verbs; and "interest" is the object. There are many prepositional phrases, but the most important are: "on any loan or discount made" (modifying the verbs "take, receive, reserve, and charge"); "at a rate of not more than [1%] in excess of the discount rate" (modifying the object "interest"); and "at the rate allowed by the laws of the State . . . where the bank is located" (also modifying the object "interest").

Congress did not draft Section 521 in a vacuum—it pulled the language directly from Section 85 of the NBA. *See* App. Vol. II at 444; App. Vol. I at 149-50; *accord, e.g., Greenwood Tr. Co. v. Massachusetts*, 971 F.2d 818, 826-27 (1st Cir. 1992) (holding that Congress made the "conscious choice" to model Section 521 on Section 85 of the National Bank Act). Section 521 is not the only provision of DIDMCA that turns on the location of the lender; Section 522 also hinges on the location of the "institution." App. Vol. II at 233; *see also Gavey Properties/762 v. First Fin. Sav. & Loan Ass'n*, 845 F.2d 519, 520 (5th Cir. 1988). Section 523 likewise turns on the location of the "credit union." App. Vol. II at 234; *see also Gavey Properties,* 845 F.2d at 520. Section 525 is the outlier.

It turns not on where the *lender* is located, but instead on where the *loan* is made. "[W]here a document has used one term in one place, and a materially different term in another, the presumption is that the different term denotes a different idea." *Sw. Airlines Co. v. Saxon*, 596 U.S. 450, 457-58 (2022) (quoting Antonin Scalia & Brian A. Garner, *Reading Law: The Interpretation of Legal Texts* (2012)).

According to the Banks and the District Court, a bank makes a loan on its own, irrespective of a borrower, so loans are "made" for purposes of Section 525 wherever the bank is located. *See, e.g.*, App. Vol. I at 13, 57-59; App. Vol. II at 457. Practically speaking, their definition of where a loan is "made" is no different from where a bank is "located" under *Marquette* and its progeny. *See* App. Vol. I at 57-59; *see also* App. Vol. II at 459. But if Congress wanted to the opt-out to turn solely on the bank's location, Section 525 would read, "such State does not want this section to apply with respect to *banks located in such State*." Congress' decision to pivot away from the location of the lender in Section 525—and only in Section 525—is clear evidence that loans are not made solely at the lender's location.

B. Congress' focus on the "loan" rather than the bank's location drove its use of passive voice.

Congress chose to make "the loans," rather than the bank, the subject of the operative clause in Section 525, and this drafting choice drove the use of passive voice. William Strunk Jr. & E.B. White, *The Elements of Style* 18 (4th ed. 2000). ("The need to make a particular word the subject of the sentence will often . . . determine which voice is to be used."). The use of passive voice in the text de-emphasizes the performer/agent (by the bank) and emphasizes the subject (the loans). *See Chicago Manual of Style* § 5.118 (17th ed. 2017) (choice of passive voice reflects which point of view is desired).

The phrase "loans made in such state" omits two key prepositional phrases: "*to the borrower"* and "*by the bank*." *See* Strunk & White, *supra*, at 18 (omitting phrases from sentences in passive voice makes them "indefinite"). Both prepositional phrases are key to the meaning. Both are equally omitted from the text, but naturally read into it. If banks (and their location) were the exclusive focus of the opt-out, Congress could have written banks as the subject of the sentence, *i.e.*, "with respect to loans *that banks make in such* State." But Congress did not do that. Instead, the operative clause omits both the performer and the recipient.

There is no indication from the text that only one party is relevant to the interpretation. A bank cannot make a loan without a borrower any more than one hand can clap without the other. Since a loan cannot be "made" without both the bank and the borrower, it is inconsistent with the text to ignore the location of the borrower when determining where the parties "made" a loan.

While the phrase "loan or discount made" also appears in Section 521, it does so in a prepositional phrase modifying the verbs "take, receive, reserve, and charge." *Marquette*, as well as the FDIC and OCC opinions the Banks cite, all analyze what state interest rate caps control loans offered by the banks.[7] The two prepositional phrases "at a rate of not more than [1%]" and "at the rate allowed by the laws" modify the object "interest," and both of those prepositional phrases turn on the location of the lender. Consequently, precedent analyzing what interest

[7] *See, e.g., Marquette*, 439 U.S. at 308 ("Section 85 thus plainly provides that a national bank may charge interest 'on any loan' at the rate allowed by the laws of the State in which the bank is 'located.' The question before us *is therefore narrowed* to whether [the bank is] 'located' in Nebraska and for that reason entitled to charge its Minnesota customers the rate of interest authorized by Nebraska law." (emphasis added)); FDIC Gen. Counsel's Op. No. 11, Interest Charges by Interstate Banks, 63 Fed. Reg. 27,282 (May 18, 1998) (clarifying where banks operating interstate branches are "located" for purposes of Section 27).

rate banks can charge naturally turns on where a bank is located, and thus precedent analyzing Section 521 (or Section 85 of the NBA) sheds no light on where a loan is "made" for the purposes of Section 525.

C. A loan is made by a lender and a borrower.

Section 525 turns on where a *loan* is "made." Courts give "words used by Congress their ordinary and common meanings." *In re Mallo*, 774 F.3d 1313, 1321 (10th Cir. 2014) ("Dictionary definitions are useful touchstones to determine the 'ordinary meaning' of an undefined statutory term."). And most, if not every, definition of a "loan" presupposes that there are two parties to the transaction. *See, e.g.,* Loan, Black's Law Dictionary (12th ed. 2024) ("1. An act of lending; a grant of something for temporary use. 2. A thing lent *for the borrower's temporary use*; esp., a sum of money lent at interest." (emphasis added)); *Loan,* Merriam-Webster.com, https://shorturl.at/rIf4d (last visited Sept. 10, 2024) (("1(a): money lent at interest; (b) something lent *usually for the borrower's temporary use*; 2: a transfer or delivery of money *from one party to another* with the express or implied agreement that the sum will be repaid regardless of contingency and usually with interest." (emphasis added)). Nor are a "loan" and a "loan contract" two different things.

Black's Law Dictionary defines a contract as both "an agreement between two or more parties creating obligations that are enforceable or otherwise recognizable at law" *and* as "the writing that sets forth such an agreement." Contract, Black's Law Dictionary (12th ed. 2024). And this Court has already held that "[a] loan of money involves an absolute *agreement* to return the sum borrowed at a future time." *Gen. Motors Acceptance Corp. v. Mid-W. Chevrolet Co.*, 66 F.2d 1, 5 (10th Cir. 1933) (emphasis added) (citing *In re Grand Union Co.*, 219 F. 353, 356 (2d Cir. 1914) ("A loan of money is a contract by which one delivers a sum of money to another and the latter agrees to return at a future time a sum equivalent to that which he borrows.")).

A loan is not a pre-baked cake sitting on a shelf waiting for a customer. *See* App. Vol. I at 213 (Banks arguing that a lender creates a loan like a baker bakes a cake). As the Banks explained in their declarations, the terms of each loan their members make vary depending on the prospective borrower's credit qualifications. *See, e.g.,* App. Vol. I at 70, ¶ 8 (Personal installment loans terms vary "depending on a consumer's credit qualifications"); App. Vol. I at 97, ¶ 8(a) (Personal installment loans' terms vary "depending on credit, income or other consumer-specific . . . factors"); App. Vol. I at 78-79, ¶ 9(a); App. Vol. I at 88-89, ¶ 10; App. Vol. I at 108, ¶ 10; App. Vol. I at 119, ¶ 11(c). And even after a bank develops the loan terms, the loan does not come into existence until a borrower accepts the loan. Until that happens, the bank has only offered a loan. Since a loan cannot be "made" without both the lender and the borrower, it is inconsistent with the text to ignore the location of the borrower when determining where the parties "made" a loan.

The District Court, relying on Section 525's reference to a "commitment to make a loan," drew a distinction between a loan and a loan contract. App. Vol. II at 460. In actuality, a commitment to make a loan refers to the use of a commitment letter prior to the execution of the actual loan contract. *See Postow v. OBA Fed. Sav. & Loan Ass'n*, 627 F.2d 1370, 1373 (D.C. Cir. 1980). In essence, a commitment letter is a separate contract where a lender agrees to certain loan terms with a specific borrower in exchange for a "commitment fee." *Id.* The loan agreement itself is executed at a later date, but the commitment contractually binds both the borrower and the lender to the loan terms. *Id.* at 1373-74. If the borrower ultimately refuses to take the loan out, the lender keeps the commitment fee. *Id.* at 1374. If the lender refuses to loan in accordance with the commitment's terms, the borrower can sue. *Id.* Section 525's use of the phrase "commitment to make such loan" therefore does not support the Court's interpretation of where a loan is "made." The phrase does nothing more than clarify that a commitment letter's execution date controls whether the DIDMCA amendments apply to that loan.

In sum, nothing in Section 525 supports the District Court's conclusion that loans are made *only* where the bank is located. Congress used the passive voice in Section 525, deemphasizing both parties and instead focusing on the loan itself. Congress did so because states have always had the authority to regulate both the terms of loans offered to its residents, and the conduct of the banks operating under their state charter. *See infra* Section I(D). Congress intentionally used the passive voice so that states who elected to opt-out of DIDMCA would once again be able to regulate interest rates offered by their banks, or offered to their residents, just as they could before DIDMCA.

D. <u>The structure and purpose of Section 525 require considering the location of both the borrower and the bank</u>.

Although the District Court said Colorado's argument that the purpose of the opt-out in Section 525 is to allow the states to return to the *status quo ante* was somewhat persuasive, the Court ultimately rejected it as "irrelevant" because the Court believes the plain language focused on the bank's location. App. Vol. II at 464. That is simply not true—Section 525's operative clause does not even reference the bank, let alone the bank's location. Section 525 hinges on where the loan is made, and the statute does not otherwise define where that occurs. "As commonly defined, 'made' has several alternative meanings, none of which is entirely free from ambiguity." *Tyler v. Cain*, 533 U.S. 656, 662-63 (2001). That is the definition of a vagueness or ambiguity in the statute.

Courts must consider the statute's purpose where there is ambiguity, because "the resolution of an ambiguity or vagueness that achieves a statute's purpose should be favored over the resolution that frustrates its purpose." Scalia & Garner, *supra* at 56. An act's purpose is an important consideration when a court must decide "which of various textually permissible meanings should be adopted." *Id.* at 57 (emphasis omitted).

"[I]f Congress intends to alter the usual constitutional balance between the States and the Federal Government, it must make its intention to do so unmistakably clear in the language of the statute." *Will v. Mich. Dept. of State Police*, 491 U.S. 58, 65 (1989) (internal citations omitted). This "plain statement rule" requires Congress to make its intention "clear and manifest" if it intends to preempt the historic powers of the states. *Gregory v. Ashcroft*, 501 U.S. 452, 460-61 (1991) (internal citations omitted). Courts should not "give the state-displacing weight of federal law to mere congressional *ambiguity*." *Id.* at 464 (emphasis in original) (internal citations omitted).

Accordingly, "[w]hen the text of an express pre-emption clause is susceptible of more than one plausible reading, courts ordinarily 'accept the reading that disfavors pre-emption.'" *Altria Grp., Inc. v. Good*, 555 U.S. 70, 77 (2008) (quoting *Bates v. Dow Agrosciences LLC,* 544 U.S. 431, 449 (2005)). That assumption applies "with particular force" if the federal law touches on an area traditionally regulated by the states, even in statutes containing an express preemption provision. *Good*, 555 U.S. 70 at 77. The District Court failed to do that, and as a result it adopted an interpretation that frustrates DIDMCA's purpose.

1. *States have broad authority to regulate interest rates charged by their banks or charged to their residents.*

DIDMCA and *Marquette* create two exceptions to the states' authority to regulate usury, but absent express preemption, determining which state's interest rate cap applied to an interstate loan offered by a state-chartered bank turns on choice of law principles. Some states include a statutory directive within their consumer credit codes that guide a court's choice of law analysis. Restatement (Second) of Conflict of Laws § 6 (Am. Law Inst. 1971) (courts will follow a statutory directive of its own state if it exists); *see also, e.g., Quik Payday*, 549 F.3d at 1304 (Kansas UCCC); *LaFollette*, 552 F.2d at 747 n.4 (Wisconsin Consumer Credit Code); *Ryan*, 571 F.2d at 1160 (Oklahoma Consumer Credit Code); *Miller*, 466 F. Supp. at 381 n.1, *aff'd*, 610 F.2d 538 (8th Cir. 1979) (Iowa Consumer Credit Code); *State ex rel. Meierhenry v. Spiegel, Inc.*, 277 N.W.2d 298, 299 (S.D. 1979), *appeal dismissed*, 100 S. Ct. 25 (Mem), 62 L. Ed. 2d 17 (1979) (South Dakota usury laws).

In states that have not passed choice of law provisions, the law of the state with the most significant relationship to the transaction will control. *See* Restatement (Second) of Conflict of Laws § 6; *see also id.* at § 188. But in either case, the applicable interest rate cap was decided under state law. Some states have choice of law provisions within their consumer credit codes that apply state interest rate caps on any loans offered to their residents. Those choice of law provisions routinely survived constitutional challenge from lenders, including multiple challenges by Aldens—a mail order merchant whose conduct "asymptotically approach[ed] that of the paradigm interstate trader." *LaFollette*, 552 F.2d at 750.

In the 1970s, Aldens sued Pennsylvania, Iowa, Wisconsin, and Oklahoma, alleging that the states' attempts to impose their respective usury laws on loans made to their residents were violations of the Commerce Clause and Due Process Clause. *Packel*, 524 F.2d at 38; *LaFollette*, 552 F.2d at 745; *Ryan*, 571 F.2d at 1159; *Miller*, 610 F.2d at 538. Aldens mailed all its advertisements from its Chicago headquarters, and sometimes Aldens extended credit to customers to facilitate the purchases. *Packel*, 542 F.2d at 41; *LaFollette*, 552 F.2d at 747-48; *Ryan*, 571 F.2d at 1160-61; *Aldens, Inc. v. Miller*, 466 F. Supp. 379, 380-81 (S.D. Iowa 1979), *aff'd*, 610 F.2d 538 (8th Cir. 1979). Aldens had no physical presence or employees working in any of the forum states. *See Packel*, 542 F.2d at 41; *LaFollette*, 552 F.2d at 747-48; *Ryan*, 571 F.2d at 1160-

61; *Miller*, 610 F.2d at 538-39. Aldens received credit applications, processed them, and made its credit decisions all from its Chicago office. *Miller*, 610 F.2d at 538-39. The credit agreements all specified Illinois law controlled, they all complied with Illinois law, but the interest rates were usurious under the laws of the borrowers' states. *Id.*

All four circuit courts rejected Aldens' arguments for similar reasons. The Third Circuit, acknowledging "the historical recognition" that states can pass usury and contract laws, noted that "no case that we have been referred to has even so much as hinted that usury laws and related contract laws are not appropriate matters for local regulation." *Packel,* 524 F.2d at 48-49. The Seventh Circuit held that usury laws fell within the state's historical police powers, and that this sort of regulation of interstate commerce is "a power often essential to a State in safeguarding vital local interests." *LaFollette*, 552 F.2d at 752. The Tenth Circuit similarly held that the state's interest in regulating interest rates charged to its residents is sufficient to overcome Due Process objections. *Ryan*, 571 F.2d at 1161. Aldens lost its final challenge in the Eighth Circuit, where the court noted Iowa had "considerable" interest protecting its citizens from usurious interest rates, regardless of the contract's choice of law provision. *Miller*, 610 F.2d at 539.

The Aldens litigation occurred contemporaneously with *Marquette* and shortly before Congress passed DIDMCA. In fact, the Eighth Circuit specifically rejected Aldens' attempt to extend *Marquette*'s interest rate exportation framework beyond national banks. *Miller*, 610 F.2d at 540. These cases clearly show that absent a federal law to the contrary, interest rate regulation falls to state law. Congress crafted Section 525 so that states could reject Section 521 and return to the *status quo ante* should they choose to do so.

Congress could have stopped with Sections 521 through 523 if it was solely concerned with creating a uniform national standard, but it did not. Since Section 521 has two functions, the discount-plus-one option as well as interest rate exportation, opting out of Section 521 should eliminate both functions. Colorado's interpretation does that because banks chartered in an opt-out state would no longer be able to lend at the discount-plus-one rate, and state-chartered banks would not be able to export interest rates to residents of the opt-out state. Interest rates would instead be determined under state law, just as they had been before DIDMCA.

2. *The District Court's interpretation ignores DIDMCA's structure and frustrates the purpose of Section 525 because it creates a partial opt-out.*

In contrast, the District Court's interpretation would prohibit states from ever returning to the *status quo* until all fifty states opted out. Under the District Court's interpretation, out-of-state lenders can continue to lend in Colorado at the state rate permitted in that bank's location or discount-plus-one rate, even though they could not lend at their location state rate or the discount-plus-one rate before DIDMCA as highlighted in the chart below:

	Without DIDMCA	Preemption (§ 521)	Opt-Out (§ 525)
In-state banks	*Colorado rate*	**Colorado rate OR Discount-plus-one rate**	*Colorado rate*
District Court: Out-of-state banks	*Colorado rate*	**Bank location state rate OR Discount-plus-one rate**	***Bank location state rate OR Discount-plus-one rate***
Colorado: Out-of-state banks	*Colorado rate*	**Bank location state rate OR Discount-plus-one rate**	*Colorado rate*

Focusing on the bank and ignoring the borrower leads to an outcome that cannot be drawn from the text. Under the District Court's holding, out-of-state banks lending to borrowers within an opt-out state can continue to do so at their location rate or the discount-plus-one rate under Section 521. So, the only change that results from opting out is that banks located in the opt-out state lose the ability to lend at the discount-plus-one rate.

The District Court's reading, thus, gives Section 525 a minimal and specific effect only for Colorado banks, and only for a portion of Section 521—it has no impact on interest rate exportation *into* Colorado. A narrow and exclusive focus on Colorado banks does not flow from the text of Section 525. The text of Section 525 does not in any way limit its application only to in-state banks much less to in-state banks' lending at the discount-plus-one rate.

In addition, the District Court held that Congress' use of "made" put the focus on the lender, and that Congress could have put the focus on the borrower "by allowing states to opt out as to loans 'made to borrowers in such State,'" or using "a borrower-focused word like 'accepted' or 'obtained' in such State." App. Vol. II at 457. But Colorado does not argue loans are *only* made where the borrower is; a loan is made where *both* the lender and the borrower are located. Crafting the opt-out with a borrower-only focus as the District Court suggests would mean states could only opt-out of Section 521 with respect to loans offered to its borrowers.

However, Section 521 also allows state-chartered banks to lend at the discount-plus-one rate. If Congress made the opt-out effective only with respect to "loans made to borrowers in such State," then banks chartered in an opt-out state would be able to continue lending to residents of *other* states at the discount-plus-one rate. Though a state's interest lies primarily in protecting its residents, states still have a significant interest in the regulation of their state-chartered banks. *See Lewis,* 447 U.S. at 38 ("States have chartered banks and have actively regulated their activities" since the country's founding because banking and related financial activities are of "profound local concern."). That is still true when banks offer loans to residents of other states. Indeed, states often apply their consumer credit code either when a lender receives a loan agreement within the state, *or* when a lender solicits a borrower within their borders. *See, e.g., Quik Payday*, 549 F.3d at 1305 (transaction made in the state if creditor receives a signed loan agreement in Kansas, *or* a creditor induces a resident of the state to enter into agreement by any in-state solicitation); *LaFollette*, 552 F.2d at 747 n.4 (transaction made in Wisconsin if merchant receives agreement in Wisconsin, *or* merchant induces Wisconsin resident to enter agreement from in-state solicitation); Colo. Rev. Stat. § 5-1-201(1)(a) (loans are made in Colorado when creditor receives written agreement in the state, *or* creditor solicits Colorado resident). Congress used the passive voice in Section 525—and placed the emphasis on where the loan is made rather than the location of any one party—so that opt-out states can once again regulate lending within their borders like they could before DIDMCA.

E. Congress refers to borrowers and lenders when it uses "made" in Title 12.

Congress' use of the passive voice phrase loans "made" throughout Title 12 of the U.S. Code shows that a borrower and a bank are both required parties for the making of a loan, even where a statute does not explicitly reference both parties. Title 12 governs "Banks and Banking" and includes the NBA and FDIA. Congress in Title 12 has used "made" with both prepositional phrases, "to the borrower" and "by the lender." 12 U.S.C. § 3018(c) ("the Bank may guarantee all or any part of the principal and interest of any loan *made by any State or federally chartered lending institution to any borrower* (emphases added)); 12 U.S.C. § 5704(e)(7)(A)(iii) ("[The Bank] shall not allow the enrollment of a loan to a borrower that is a refinancing of a loan previously *made to that borrower by the financial institution lender*" (emphases added)).

But Congress also used just "made" and "to the borrower." 12 U.S.C. § 1706f(c)(1) ("loan or extension of credit *made to* a *borrower*" (emphasis added)); 12 U.S.C. § 2202b(a) ("If a Farm Credit *Bank* forgives . . . any of the principal outstanding on a loan *made to* any *borrower*" (emphasis added)); 12 U.S.C. § 2202d(b) ("*lender* may not require any borrower to reduce the outstanding principal balance of any loan *made to the borrower*" (emphases added)); 12 U.S.C. § 2202(b)(2) ("A borrower of a loan from a qualified lender that has received notice, under section 2201 of this title, of a decision to deny loan restructuring with respect to a *loan made to the borrower*" (emphases added)); 12 U.S.C. § 1715z-13b(c)(1) ("loan is *made only to a borrower*" (emphasis added)); 12 U.S.C. § 4745(p)(1)(C)(i) ("a participating financial institution *makes a loan to a borrower* that is a refinancing of a loan previously *made to the borrower by the participating financial institution* or an affiliate of the participating financial institution" (emphases added)). When Congress uses the phrase "loan made," it naturally pairs it with a prepositional phrase focused on the borrower.

In other circumstances, Congress also uses "made" with the phrase "by a lender/bank/financial institution" in Title 12. 12 U.S.C. § 4742(4) ("a loan *made by* a participating *financial institution*" (emphases added)); 12 U.S.C. § 2610 ("No fee shall be imposed . . . by a *lender* in connection with a . . . loan *made by* it . . . .") (emphases added); 12 U.S.C. § 2202a (b)(1) ("On a determination by a qualified lender that a *loan made by the lender* is or has become a distressed loan . . . ."). But the use of both prepositional phrases, sometimes together, sometimes just one, indicates that both are naturally read with "made." Where the statute says nothing, both "to the borrower" and "by the bank" are equally natural and relevant to consider from the text.

On the other hand, scattered references to "make" in Title 12 do not provide guidance on the interpretation of "made." The District Court cited these provisions but failed to recognize that they are about the authorities Congress permits banks to exercise. Because these provisions are about what the bank is permitted to do, Congress was explicit with every use of the word "make" to identify the bank and to use the active voice. S*ee, e.g.*, 12 U.S.C. § 83(a) ("No national *bank* shall *make* any loan" (emphases added)); 12 U.S.C. § 143 (an "*association* shall not increase its liabilities by *making* any new loans" (emphases added)); 12 U.S.C. § 371(a) ("Any national *banking association* may *make* . . . loans or extensions of credit" (emphases added)); 12 U.S.C. § 1757(5) ("A Federal *credit union* . . . shall have power . . . to *make* loans ." (emphases added)); 12 U.S.C. § 1785(f)(1) ("Every insured *credit union* is authorized to . . . *make* loans . . . ." (emphases added)). These provisions are about what kinds of activities Congress permits banks to do. They are only focused on the banks. But these cites, which use "make" and active voice, a different word and constructions from Section 525, have little relevance to what "made in" means in Section 525.

Where Congress used the passive "made" and omitted both prepositional phrases "to the borrower" and "by the bank," the common and ordinary meaning requires two parties to a loan. For example, the District Court cites a section that gives federal credit unions authority to "make loans" and also gives them authority to "make contracts." 12 U.S.C. § 1757(1), (5). But even a bank authorized by statute to make contracts cannot do so without a counterparty. And a bank authorized by statute to make loans cannot do so without a borrower. Restatement (Second) of Contracts § 9 (Am. Law Inst. 1981).

Nor is it relevant to the interpretation of what "made" means that Congress also uses other verbs like "receive" and "obtain" in relation to borrowers and loans elsewhere in Title 12. Congress uses other words to describe bank's activities related to loans as well. For example, banks also "originate" loans in Title 12. *See, e.g.*, 12 U.S.C. § 2018(a)(1)(A) ("Real estate mortgage loans *originated by a Farm Credit Bank*" (emphasis added)). Indeed, Congress has also used "approved" as the verb for the financial institution in same statutory provision where it used "made to a borrower." 12 U.S.C. § 2219d ("At the time a . . . loan originator . . . *approves* a loan *made to a borrower* . . . ." (emphasis added)). Title 12 makes clear that when Congress uses "loan made" both the bank and borrower are relevant.

F. <u>DIDMCA's legislative and regulatory history support both borrower and bank relevance to where a loan is made</u>.

Although both are less instructive than the text and structure of the statute, the legislative history and regulatory interpretations of

Sections 521 and 525 also support interpreting the different language in the two provisions to have different meaning.

1. *The legislative history shows Congress meant for Section 525 to return usury regulation to the states.*

The legislative history makes clear the relationship between Sections 521 and 525. For example, the Conference Report provides that Section 521 preempted "State usury ceilings on all loans made by Federally insured depository institutions" but it was "subject to the right of affected states to override [preemption] at any time." H.R. Rep. No. 96-842, at 78 (1980) (Conf. Rep.). Recognizing that "[u]sury laws have historically been the prerogative of the States," Section 525 permits states to override Section 521. 126 Cong. Rec. 7069 (1980) (statement of Sen. Robert Morgan). Senator William Proxmire of Wisconsin—Chairman of the Senate Committee on Banking, Housing, and Urban Affairs—was clear that Section 525 gave "each State the opportunity to reestablish its usury limitations if it desires to do so," remarking that a state override was "one of the most important parts of [DIDMCA]" and that Section 521's preemptive effect "does not derogate State authority" because "each State may reimpose its usury limits . . . . We do not take that away from the States." *Id.* at 6900, 6906, & 7070.

2. DIDMCA's regulatory history clarifies Sections 521 and 525 turn on different operative language.

The FDIC's regulatory history emphasizes the differences between Sections 521 and 525. Sections 521 and 525 amend the FDIA, which is implemented by the FDIC. The FDIC's interpretations highlight and clarify the textual differences between Sections 525 and 521. Although the District Court cites a legal newsletter from 1989 saying the meaning of Section 525 was unclear, the FDIC rejected the District Court's bank location interpretation of Section 525 as far back as 1988. App. Vol. II at 464. When it received an inquiry suggesting that Section 525 and Section 521 "should be read to be congruent," the FDIC rejected the interpretation, explaining that "Section 525 uses plain language . . . [that] differs considerably from that of section 521." FDIC Interpretive Letter, 1988 WL 583093, at *1 (June 29, 1988).

The FDIC also noted that the two sections served different purposes: Section 521 enabled state banks to compete with national banks, but Section 525 "preserve[d] principles of federalism" to "enable States to recover authority that section 521 had taken away." *Id.* The FDIC's recent analysis of Section 525 explained that Section 525 applies to out-of-state banks lending into an opt-out state. Federal Interest Rate

Authority, 85 Fed. Reg. at 44,153 ("If a State opts out of [Section 521], State banks making loans in that State could not charge interest at a rate exceeding the limit set by the State's laws, *even if the law of the State where the State bank is located would permit a higher rate*." (emphasis added)).

The District Court found FDIC interpretations supported that a loan is made in Section 525 is where the bank is located. To reach this conclusion, the District Court cherry picks from an FDIC interpretive letter that discusses where loans are made but ignores that these discussions are in the context of applying the bank location test in Section 521. *See, e.g.*, FDIC Gen. Counsel's Op. No. 11, Interest Charges by Interstate State Banks, 63 Fed. Reg. at 27,285. For example, in a passage quoted by the District Court, the FDIC noted that banks can transfer enforceable rights "in the loans they made" but the District Court omitted from the quotation that the discussion was limited to loans "under the preemptive authority" of Section 521. Federal Interest Rate Authority, 85 Fed. Reg. at 44,146. Within a statutory framework focused only on where the bank is located, where the bank conducts its activities determines where the loan is made. But these discussions have no bearing when Congress deliberately chose different language in Section 525.[8]

The District Court purports to reject the FDIC's interpretations and look only at the text of Section 525. In fact, it does rely on FDIC interpretations, just the wrong ones. The District Court found that where a loan is made in Section 525 depends on where the bank is located and performs its loan-making functions. App. Vol. II at 464. But the non-ministerial functions test is an FDIC interpretation of *Section 521*, which requires analysis of where a bank is located. To reach its conclusion, the District Court imports a complex and unrelated test developed by the FDIC for a different purpose. In so doing, it ignores what the FDIC itself has specifically said: banks making loans in an opt-out state "could not charge interest at a rate exceeding the limit set by the State's laws, even if the law of the State where the State Bank is located would permit a higher rate." 85 Fed. Reg. at 44,153. This technical and specific test may

[8] The District Court cited *Jessup v. Pulaski Bank* in passing, but the case is distinguishable. App. Vol. II at 463, n.8. The Eighth Circuit was applying a different statute that does not present the same federalism concerns as Section 525. The court applied an OCC letter without substantial analysis of the statutory terms at issue. The reliance on the letter and the bank location test may present perverse results.

be an appropriate interpretation of "located" in Section 521. To import it wholesale to determine where a loan is "made" under Section 525, however, makes no sense. After all, Congress deliberately used different language in Section 525, signifying its intent to provide for a different result. Rather than apply the text of Section 525 and reach the natural conclusion from it, the District Court applies the wrong regulatory test, one that was developed by the FDIC to interpret different statutory language. In so doing, it ignores the test recommended by the FDIC for this particular provision.

G. Under Federal precedent, parties enter into a contract wherever the offeror and offeree are physically located at the time the offer is accepted.

Although the question of where a loan is "made" for purposes of Section 525 is an issue of first impression, federal courts have already analyzed where contracts are "made" in the context of the dormant Commerce Clause. And while the Banks and the District Court gave short shrift to the federal dormant Commerce Clause cases cited by the FDIC and Colorado, doing so was misguided. Federal courts routinely consider precedent from other areas of law "so long as they speak to a matter relevant to the issue before us." *Hart v. Massanari*, 266 F.3d 1155, 1170 (9th Cir. 2001); *accord Cath. Charities of Sw. Kansas, Inc. v. PHL Variable Ins. Co.*, 74 F.4th 1321, 1323 (10th Cir. 2023) (courts look at "the general weight and trend of authority in the relevant area of law" when dealing with an issue of first impression under state law).

The primary question before this Court is to determine where a loan is "made." It logically follows, then, that federal precedent analyzing the territorial scope of a transaction—*i.e.*, where a transaction is "made"—could inform the questions presented here. Dormant Commerce Clause cases are useful to this analysis because the territorial scope of a transaction is a threshold question that guides the analysis. *See A.S. Goldmen*, 163 F.3d at 786.

With *A.S. Goldmen*, the Third Circuit addressed the "territorial basis" of a contract entered into by telephone between parties in two different states. *Id.* The court then compared historical and modern trends regarding the territorial scope of contracts between citizens of different states. *Id.* at 786-87. Under the historical approach, a contract was "made" in whatever state the offer was accepted. *Id.*; *see also Crellin Techs., Inc. v. Equipmentlease Corp.*, 18 F.3d 1, 5 (1st Cir. 1994) (where a contract is accepted over an interstate phone call, the contract is "made" in the state where the offeree spoke words of acceptance); Restatement (Second) of Contracts § 64 cmt. c (Am. Law Inst. 1981) ("the contract is created at the place where the acceptor speaks or otherwise completes his manifestation of assent."). Under the modern approach, "when an offer is made in one state and accepted in another, we now recognize that elements of the transaction have occurred in each state, and that both states have an interest in regulating the terms and performance of the contract." *A.S. Goldmen,* 163 F.3d at 787. The Third Circuit then applied the modern approach. *Id.*

Under either the historical or modern approach, the actions of the borrower in the lending context are critical, if not determinative, of where a loan is "made." Here, the state's definition of where a loan is "made" for purposes of Section 525 is most closely aligned with that of the modern approach. In contrast, the Banks' definition violates both the historical and modern approaches because it arbitrarily ignores the location of the borrower.

Quik Payday likewise considers the territorial scope of a loan. In *Quik Payday*, this Court rejected an argument that Kansas' version of the Uniform Consumer Credit Code regulated extraterritorial conduct because the statute required both solicitation in Kansas and a loan to one of its residents. *Quik Payday*, 549 F.3d at 1306.[9] There, a Utah lender challenged modifications to the Kansas UCCC that deemed consumer-credit transactions to have been made in Kansas if the creditor induces a Kansas resident to enter into the transaction by solicitation in Kansas by any means. *Id*. at 1304-05. The lender was headquartered and chartered in Utah, and it had no physical presence in Kansas. *Id*. at 1304. Shortly after the Kansas Office of the State Bank Commission issued a summary order against the lender, it filed a lawsuit in federal court alleging, in part, that the modified UCCC was an impermissible extraterritorial regulation of conduct that happens entirely outside Kansas. *Id*. at 1308. This Court rejected the lender's argument, finding that aspects of the loan transaction would occur within Kansas. *Id*.

II. Congress foreclosed equitable relief under DIDMCA.

The District Court erred when it held that the Banks could pursue equitable relief under DIDMCA.

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[9] The Kansas UCCC law at issue in *Quik Payday* is nearly identical to the law the Banks challenge here. *Compare Quik Payday*, 549 F.3d at 1305 *with* Colo. Rev. Stat. § 5-1-201.

"Congress may displace the equitable relief that is traditionally available to enforce federal law" if the statute displays an "intent to foreclose" the availability of such relief. *Armstrong v. Exceptional Child Ctr., Inc.*, 575 U.S. 320, 328-29 (2015) (citation omitted). When determining if Congress intended to foreclose the Banks' claim in equity, courts consider: (1) whether there is congressional intent to provide a private right of action because "the express provision of one method of enforcing a substantive rule suggests that Congress intended to preclude others," and (2) whether there is a statutory framework that is so "complex" and "judgment laden" that it is "judicially unadministrable." *Id.* at 328.

First, Congress did not authorize the Banks to sue under Section 521. Rather, it authorized consumers to sue banks. 12 U.S.C. § 1831d(b). This omission has meaning. It shows that Congress did not authorize banks to sue under Section 521. *Armstrong*, 575 U.S. at 328 ("The 'express provision of one method of enforcing a substantive rule suggests that Congress intended to preclude others.'") (citation omitted). The FDIA is not set up for banks to sue under it. Rather, it creates the FDIC, and the FDIC enforces and administers it *against banks*. Under the

FDIA, the FDIC exists to insure deposits of banks and savings associations. 12 U.S.C. § 1811(a). Its powers broadly include the ability to sue "in any court of law or equity, State or Federal" and also to prescribe "such rules and regulations as it may deem necessary to carry out the provisions" of the FDIA. 12 U.S.C. § 1819(a). This authority specifically includes the ability to take action to ensure that the contours of federal law are clear, including provisions that preempt state law. *See* 12 C.F.R. § 331.1-331.4 (2020). *California v. Fed. Deposit Ins. Corp.*, 584 F. Supp. 3d 834, 840 (N.D. Cal. 2022). The FDIC has issued rules clarifying the scope of Section 521. Federal Interest Rate Authority, 85 Fed. Reg. at 44,146.[10]

By creating this structure and vesting power with the FDIC, Congress foreclosed actions by private parties such as the Banks. Indeed,

[10] Whether there is a private right of action under Section 521 after *Armstrong* is a matter of first impression. Prior to the Supreme Court's decision in *Armstrong*, two circuits considered bank lawsuits asserting that state laws were preempted by the Supremacy Clause and FDIA. *BankWest, Inc. v. Baker*, 411 F.3d 1289, 1299 (11th Cir.), *reh'g en banc granted*, opinion vacated, 433 F.3d 1344 (11th Cir. 2005, *vacated*, No. 04-12420, 2006 WL 1329700 (11th Cir. Apr. 27, 2006), and *vacated*, 446 F.3d 1358 (11th Cir. 2006); *Massachusetts*, 971 F.2d at 821 n.1. However, as both cases predated *Armstrong*, the courts never considered (and the parties never briefed) whether the plaintiffs could sustain their claims under the Supremacy Clause or FDIA.

when Congress did vest private parties with the right to sue regarding interest rates, it limited those claims to actions by borrowers to recover excess charges. 12 U.S.C. § 1831d(b). In other places, where it might seem a private action would exist, Congress removed any doubt and expressly prohibited it. *Id.* § 1831g(d) (prohibiting private right of action in provision involving contracts).

The District Court rejected this argument, App. Vol. II at 454, relying on *Friends of the East Hampton Airport, Inc. v. Town of East Hampton*, 841 F.3d 133, 146 (2d Cir. 2016). *Friends* dealt with the Airport Noise and Capacity Act ("ANCA"). *Id.* at 136. ANCA, similar to the FDIA, grants broad enforcement authority to the Federal Aviation Administration ("FAA"). *Id.* at 146. The court held that ANCA did not evince an intent to foreclose equitable relief because ANCA did not have a "sole remedy" like in *Armstrong* where the sole remedy was withholding Medicaid funding. *Id.* at 145-46. Instead, in addition to withholding funding, the Secretary of Transportation could also pursue legal remedies. *Id. Friends* is not persuasive here because the FDIA differs materially from ANCA. In the FDIA, there is no "congressional intent to create a private right of action." *Armstrong*, 575 U.S. at 331 (quoting

Alexander v. Sandoval, 532 U.S. 275, 289 (2001)). Unlike ANCA, Congress included an "express provision" granting a right to consumers, and *not* the banks. *Id.* at 328 ("express provision of one method of enforcing a substantive rule suggests that Congress intended to preclude others" (quoting *Alexander*, 532 U.S. at 290)); *see also Coal. for Competitive Elec., Dynegy Inc. v. Zibelman*, 272 F. Supp. 3d 554, 565 (S.D.N.Y. 2017), *aff'd sub nom. Coal. for Competitive Elec., Dynergy Inc. v. Zibelman*, 906 F.3d 41 (2d Cir. 2018) (distinguishing *Friends* holding because "Congress's decision to create a limited private cause of action suggests that the omission of a general private right of action in the [FPA] should . . . be understood as intentional.") (internal quotation marks omitted); *Vill. of Old Mill Creek v. Star*, No. 17 CV 1163 and No. 17 CV 1164, 2017 WL 3008289, at *9 (N.D. Ill. July 14, 2017), *aff'd sub nom. Elec. Power Supply Ass'n v. Star*, 904 F.3d 518 (7th Cir. 2018) (same).[11]

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[11] The District Court placed weight on the fact that Colorado relied on statutes and regulations that created laws "*against* a bank for violations of applicable laws or regulations." App. Vol. II at 454. This does not undermine Colorado's position, but rather supports it. If the provisions protect against bank violations, they do not establish "congressional intent to create a private right of action" for banks.

Second, the FDIA shows congressional intent for a single, coherent standard articulated by the governmental regulator that regulates the entire banking system, thereby avoiding the "inappropriate application of the statute in a private action" (as Colorado contends occurred here). *Armstrong*, 575 U.S. at 328-29. The *Armstrong* Court held that conferring enforcement on the agency alone establishes that "Congress 'wanted to make the agency remedy that it provided exclusive,' thereby achieving 'the expertise, uniformity, widespread consultation, and resulting administrative guidance that can accompany agency decisionmaking,' and avoiding 'the comparative risk of inconsistent interpretations and misincentives that can arise out of an occasional inappropriate application of the statute in a private action.'" *Id.* (quoting *Gonzaga Univ. v. Doe*, 536 U.S. 273, 292 (2002) (Breyer, J., concurring in judgment); *see also Vill. of Old Mill Creek,* 2017 WL 3008289, at *9 (as ground for finding against existence of equitable claim, "a coherent regulatory policy for interstate electricity markets is a desirable outcome, and it is one that private suits undermine"). This centralized system with substantial authority and discretion vested with the FDIC ensures that private litigants will not create "inconsistent interpretations and misincentives" in the banking system. This creates a "judgment-laden standard" that renders the FDIA judicially unadministrable. *See Smith v. Hickenlooper*, 164 F. Supp. 3d 1286, 1293 (D. Colo. 2016), *aff'd sub nom. Safe Streets All. v. Hickenlooper*, 859 F.3d 865 (10th Cir. 2017) (internal quotations omitted) ("There certainly can be no more 'judgment-laden standard' than that which confers almost complete discretion on the Attorney General . . . Allowing private litigants to interfere with that [discretion] would create precisely the type of 'risk of inconsistent interpretations and misincentives' which strongly counsel against recognizing an implicit right to a judicially created equitable remedy.").

Moreover, the holding in *Armstrong* does not call for the "application of a simple, fixed legal formula." 575 U.S. at 333 (Breyer, J., concurring). Courts applying *Armstrong* have recognized that "[t]he first factor alone—the existence of a comprehensive remedial scheme—can demonstrate Congress's intent to foreclose private equitable suits." *Lawrenceburg Power, LLC v. Lawrenceburg Mun. Utils.*, 410 F. Supp. 3d 943, 955 (S.D. Ind. 2019) (citing *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 73-74 (1996)); *Coal. for Competitive Elec.*, 272 F. Supp. 3d at 566, *aff'd sub nom. Coal. for Competitive Elec.*, 906 F.3d at 41 ("There is no indication in *Armstrong* that both factors must be satisfied in order to conclude that Congress intended to foreclose equitable relief to private parties.").

In sum, the Banks lack a private right of action and "cannot, by invoking the court's equitable powers, circumvent Congress's exclusion of private enforcement." *Armstrong*, 575 U.S. at 328. The District Court should be reversed.

III. The District Court did not balance the harms correctly in the preliminary injunction analysis.

A plaintiff seeking a preliminary injunction must establish: (1) a substantial likelihood of success on the merits; (2) that it will suffer irreparable injury absent the injunction; (3) that the balance of equities favors the plaintiff; and (4) that an injunction is in the public interest. *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). The last two factors, the balance of equities and the public interest, "merge when the Government is the opposing party." *Nken v. Holder*, 556 U.S. 418, 435 (2009). The plaintiff has an even higher burden when seeking an injunction that grants them all the relief they could expect at trial, and the relief cannot be undone. *Free the Nipple-Fort Collins,* 916 F.3d at 797 n.3.

Although the District Court analyzed the injunction as a "disfavored" one, the District Court initially doubted whether the disfavored injunction standard applies because a permanent injunction would affect "infinitely more loans." *See* App. Vol. II at 447, n.2. While it is true that a permanent injunction would impact more loans, that does not change the fact that the Court is powerless to reverse the harmful effects of usurious loans Coloradans agree to while the injunction is in place. If the Banks later lose at trial, Coloradans will have already paid interest on those loans at prohibited rates. Some Coloradans could default on the usurious loans, as well as other legal loans, because of the added financial strain of unlawful rates. The Banks therefore seek a disfavored injunction, and this Court should review the preliminary injunction under the heightened standard.

Further, the District Court committed clear error when it balanced the harms in the Banks' favor. The District Court found the public interest weighed in the Banks' favor because "the public interest favors enjoining enforcement of likely invalid provisions of state law." App. Vol. II at 466. For reasons set forth above, Colorado's laws are likely valid, and thus the Court committed clear error when it found the public interest favored the injunction on this basis.

Next, the Court found that Colorado law only provided "marginally more" protection to the public because the NBA still preempts state law for national banks. But the Banks—who have the burden of proof—proffered no evidence about the number of loans they sought to offer Coloradans with interest rates beyond what is authorized by state law, nor did they proffer any evidence regarding the number of loans national banks offer to Coloradans with interest above the Colorado UCCC caps. There is therefore insufficient evidence to conclude the Colorado UCCC interest rate caps provide only "marginal" protection to the public, and doing so was clear error.

CONCLUSION

The District Court's decision granting the Banks' Motion for Preliminary Injunction should be reversed. DIDMCA's text, structure and purpose are clear: a loan is "made" in a state if either the borrower or the lender are in the state. Congress did not provide a private right of action in the FDIA for the Banks' suit. The District Court failed to balance the harms correctly in granting the preliminary injunction.

STATEMENT IN SUPPORT OF ORAL ARGUMENT

Colorado believes that oral argument is appropriate and will assist the Court in reaching a decision.

Dated: September 16, 2024

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This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 12,984 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Judge Daniel D. Domenico**

Civil Action No. 1:24-cv-00812-DDD-KAS

NATIONAL ASSOCIATION OF INDUSTRIAL BANKERS;
AMERICAN FINANCIAL SERVICES ASSOCIATION; and
AMERICAN FINTECH COUNCIL,

Plaintiffs,

v.

PHILIP J. WEISER, in his official capacity as Attorney General of the State of Colorado; and
MARTHA FULFORD, in her official capacity as Administrator of the Colorado Uniform Consumer Credit Code,

Defendants.

**ORDER GRANTING MOTION
FOR PRELIMINARY INJUNCTION**

The plaintiffs—National Association of Industrial Bankers, American Financial Services Association, and American Fintech Council—are trade associations whose members include (or partner with) state-chartered, FDIC-insured banks that engage in consumer lending. A federal statute, 12 U.S.C. § 1831d, caps the interest rates that such banks may charge on loans, and that statute expressly preempts any lower interest-rate caps that may be imposed by state law. A state may, however, opt out of Section 1831d's application "with respect to loans made in" that state, and Colorado has done so.

The dispute here is over what it means for a loan to be "made in" Colorado. The plaintiffs contend that Colorado has attempted to exceed the scope of its opt-out authority by interpreting "loans made in"

Colorado to include all loans made to borrowers located in Colorado, regardless of where the lender is located, which the plaintiffs say is beyond the statutory scope of that phrase. They move to preliminarily enjoin the defendants—Colorado Attorney General Philip J. Weiser and Colorado Uniform Consumer Credit Code Administrator Martha Fulford (collectively, "the State")—from enforcing Colorado's lower interest-rate caps with respect to loans made by lenders that are not located in Colorado. Doc. 24.

For the following reasons, I agree with the plaintiffs that the determination of where a loan is "made" under Section 1831d depends on where the lender performs its loan-making functions, not the borrower's location. The plaintiffs' motion for a preliminary injunction is therefore granted, and the defendants are enjoined from enforcing the interest rates in the Colorado UCCC with respect to any loan made by the plaintiffs' members, to the extent the loan is not "made in" Colorado and the applicable interest rate in Section 1831d(a) exceeds the rate that would otherwise be permitted.

BACKGROUND

Section 521 of the Depository Institutions Deregulation and Monetary Control Act of 1980 (often referred to in case law as "DIDA" or "DIDMCA") added a new Section 27 to the Federal Deposit Insurance Act, which is now codified at 12 U.S.C. § 1831d. Under Section 1831d, a state-chartered bank may charge interest on loans at a rate up to the greater of (a) 1% above the Federal Reserve discount rate in the Federal Reserve district "where [the] bank . . . is located" ("discount-plus-one rate"), or (b) the rate allowed by the laws of the state "where the bank is located." 12 U.S.C. § 1831d(a). Section 1831d expressly preempts any lower interest-rate caps that may be imposed by state law. *Id.* ("[I]f the applicable rate prescribed in this subsection exceeds the rate [a] bank

. . . would be permitted to charge in the absence of this subsection . . . any State constitution or statute . . . is hereby preempted for the purposes of this section . . . ."). The statute states that it was enacted "to prevent discrimination against" state-chartered banks, *id.*, because the National Bank Act similarly permits national banks to charge interest at a rate up to the greater of the discount-plus-one rate or the rate allowed by the laws of the state where the bank is located, 12 U.S.C. § 85. *See also FDIC Gen. Counsel's Op. No. 11*, 63 Fed. Reg. 27282-01, 1998 WL 243362, at *27283 (May 18, 1998) ("Section 85 has been recognized to be the 'direct lineal ancestor' of section 1831d . . . . Congress made a conscious choice to pattern section 1831d after section 85 to achieve competitive equality in the area of interest charges between state and national banks.").

One effect of these statutes is that a bank chartered in a particular state (its "home" state) may charge interest to borrowers in that state at the discount-plus-one rate, even if that rate exceeds the rate permitted by the home state's laws. Another effect is that a bank may "export" the interest-rate caps of the state "where the bank is located" (which is often, but not always, its home state) when lending to borrowers who reside in a different state (the "host" state), even if the rate cap of the state where the bank is located exceeds the rate permitted by the host state's laws. *See Marquette Nat'l Bank of Minneapolis v. First of Omaha Serv. Corp.*, 439 U.S. 299 (1978) (national banks); *Greenwood Tr. Co. v. Massachusetts*, 971 F.2d 818 (1st Cir. 1992) (state-chartered banks). The state "where [a] bank is located" for purposes of Section 1831d and Section 85 depends on the state in which the bank is chartered, the state(s) in which it maintains branches, and the state(s) in which three "non-ministerial" functions of loan-making occur: loan approval (*i.e.*, the decision to extend credit), extension of credit (*i.e.*, the first communication of final approval of the loan), and disbursal of the loan proceeds (which is distinguished from delivery of the disbursed funds to the borrower). *See FDIC Op. No. 11*, 1998 WL 243362, at *27285. A bank "is located" in its home state and may export its home state's interest-rate caps when lending to a borrower in a different state unless (a) all three non-ministerial functions are performed by a branch or branches located in the borrower's host state, or (b) at least one non-ministerial function occurs in the host state and "based on an assessment of all of the facts and circumstances, the loan has a clear nexus to the host state." *Id.*

Section 525 of DIDA, which, somewhat oddly, is codified not in a statutory section of the United States Code, but only in the "Effective Date" note to Section 1831d, allows a state to opt out of Section 1831d by adopting a law stating that it "does not want [Section 1831d] to apply with respect to loans made in" that state.[1] 12 U.S.C. § 1831d note (Effective Date). If a state opts out, then whenever a loan is "made in" the opt-out state by any state-chartered bank, that loan is subject only to the opt-out state's interest-rate caps, which may be higher or lower than that of the bank's home state or the federal discount-plus-one rate.

On June 5, 2023, Colorado adopted such an opt-out law, which states that, effective July 1, 2024, "the state of Colorado does not want the amendments to the 'Federal Deposit Insurance Act', 12 U.S.C. sec. 1811 et seq. . . . made by [12 U.S.C. § 1831d], prescribing interest rates and preempting state interest rates to apply to consumer credit transactions in this state." Colo. Rev. Stat. § 5-13-106. Defendant Fulford, as Colorado's UCCC Administrator, has issued an interpretive opinion letter regarding the scope of this opt-out statute, which states that she "interprets § 5-13-106 to apply only to consumer credit transactions 'made in'

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1 Section 85 of the National Bank Act does not contain any opt-out provision with respect to the preemptive federal interest-rate caps that apply to loans made by national banks. *See* 12 U.S.C. § 85.

Colorado in accordance with [12 U.S.C. § 1831d]"; she "understands and interprets § 5-13-106's language of 'in this state' to be wholly congruent and identical with the opt out authorized by Section [1831d] for loans 'made in' the state"; and she "will limit her enforcement, if any, of violations of the opt out, if any, to loans 'made in' Colorado, pursuant to § 5-13-106 and [12 U.S.C. § 1831d]." Doc. 39-1 at 5.

The plaintiffs agree with that, but they argue that the State interprets "made in" too broadly. They say that the determination of where a loan is "made" turns only on where the *bank* is located and performs the above-noted non-ministerial functions. The State contends that a loan is "made in" *both* the state where the *bank* enters into the transaction *and* the state where the *borrower* enters into the transaction. *See* Doc. 38-1 at 10-13 (FDIC's position, which the State explicitly adopted at the preliminary-injunction hearing). The plaintiffs' complaint alleges that any attempt by the State to enforce the interest-rate caps in the Colorado UCCC with respect to loans that are not "made in" Colorado (as that phrase is properly construed under federal law) would exceed the scope of Colorado's opt-out authority under Section 1831d and violate both the Supremacy Clause and the Dormant Commerce Clause of the United States Constitution. *See* Doc. 1.

The plaintiffs move to "preliminarily enjoin Colorado from taking any action to enforce or give effect to [the opt-out in Colo. Rev. Stat. § 5-13-106] with respect to loans not 'made in' Colorado as defined by federal law." Doc. 24 at 26. The plaintiffs' motion asserts only Supremacy Clause preemption arguments as the basis for preliminary injunctive relief. *See generally* Doc. 24. The motion is fully briefed, *see* Docs. 26-32, 39, 45; *see also* Docs. 38-1, 48, and a hearing was held on May 16, 2024, Doc. 56.

LEGAL STANDARD

"A preliminary injunction is an extraordinary remedy, the exception rather than the rule." *Mrs. Fields Franchising, LLC v. MFGPC*, 941 F.3d 1221, 1232 (10th Cir. 2019). One may be granted "only when the movant's right to relief is clear and unequivocal." *McDonnell v. City & Cty. of Denver*, 878 F.3d 1247, 1257 (10th Cir. 2018).

To succeed on their motion for preliminary injunction, the plaintiffs must show: (1) that they are "substantially likely to succeed on the merits"; (2) that they will "suffer irreparable injury" if the injunction is denied; (3) that their "threatened injury" without the injunction outweighs the State's under the injunction; and (4) that the injunction is not "adverse to the public interest." *Mrs. Fields*, 941 F.3d at 1232; *accord Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). The third and fourth preliminary-injunction factors "merge" where, as here, the government is the party opposing the injunction. *Nken v. Holder*, 556 U.S. 418, 435 (2009).

Movants seeking an injunction of a "disfavored" type face a heavier burden and must make a "strong showing" that the first and third factors weigh in their favor. *Mrs. Fields*, 941 F.3d at 1232. A disfavored preliminary injunction is one that: (1) mandates action (rather than prohibiting it); (2) changes the status quo; or (3) grants all the relief that the moving party could expect from a trial win. *Id.* The State contends that the injunction the plaintiffs seek here is of the third disfavored type. I find that doubtful,[2] but I need not resolve that question, because, as

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[2] The relief the plaintiffs seek in a final ruling would be to permanently enjoin the State from giving effect to Colorado's opt-out statute under the State's interpretation of "loans made in" Colorado, which would impact infinitely more loans than the temporary relief sought here.

discussed further below, the plaintiffs have made a showing as to their likelihood of success on the merits and threatened irreparable harm sufficient to satisfy even the heightened standard required for disfavored injunctions.

DISCUSSION

I. Subject-Matter Jurisdiction

As a threshold matter, the State contends that the plaintiffs lack standing and that their claims are not ripe. Doc. 39 at 16-19.

A. Standing

To demonstrate standing, the plaintiffs must show that: (1) they have suffered an injury in fact; (2) the injury is fairly traceable to the challenged conduct of the defendants; and (3) the injury is likely to be redressed by a favorable judicial decision. *Spokeo, Inc. v. Robins*, 578 U.S. 330, 338 (2016). The State challenges only the injury-in-fact prong of the standing inquiry, arguing that the plaintiffs have not shown a sufficiently concrete and imminent injury. The State does not challenge the plaintiffs' organizational standing to bring suit on behalf of their members. *See Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 600 U.S. 181, 199 (2023).

As to injury in fact, the plaintiffs assert that (1) their members are already incurring significant administrative costs to comply with the interest-rate caps in the Colorado UCCC and will continue to incur such costs in the event the State's interpretation of "loans made in" Colorado prevails and its asserted scope of the opt-out is found to be valid; and (2) their members will lose both revenue and customer goodwill if they can no longer profitably offer their loan products to certain Colorado consumers because of the lower interest-rate caps in the Colorado UCCC. Doc. 24 at 24-25. These injuries are sufficient to confer standing.

When plaintiffs take preventative measures and forego lawful conduct in order to avoid a credible threat of enforcement of an allegedly unlawful statute, then they have suffered a cognizable injury for standing purposes. *United States v. Supreme Ct. of N.M.*, 839 F.3d 888, 902-03 (10th Cir. 2016); *accord Consumer Data Indus. Ass'n v. King*, 678 F.3d 898, 902 (10th Cir. 2012) (cognizable injury where plaintiff association's members were "in an unenviable double-bind: submit to the preempted law and endure the costs of modifying otherwise uniform procedures, or violate the law and face the likelihood of lawsuits and penalties"). A threat of enforcement is generally credible where (1) a challenged statutory provision on its face proscribes the conduct in which a plaintiff wishes to engage, and (2) the state has not disavowed any intention of invoking the provision against the plaintiff. *Supreme Ct. of N.M.*, 839 F.3d at 901. "[T]he existence of a statute implies the threat of its enforcement . . . ." *Consumer Data*, 678 F.3d at 902.

The threat of enforcement of the Colorado UCCC against the plaintiffs' members if they continue to offer loans to Colorado consumers at interest rates above Colorado's caps after the July 1 effective date of the opt-out is a credible one. As discussed above, the State's interpretation of "loans made in" Colorado is at odds with what the plaintiffs contend is the correct statutory construction of Section 1831d's opt-out provision, so there is a live controversy. And the State has not disclaimed enforcement against the plaintiffs' members if they violate Colorado's interest-rate caps on loans that fall within the State's broader interpretation of "loans made in" Colorado. *See* Doc. 39-1 at 5. The plaintiffs' members need not risk actual enforcement to have standing to challenge the scope of the opt-out and the State's probable future enforcement of allegedly preempted Colorado UCCC interest rates. *Supreme Ct. of N.M.*, 839 F.3d at 901.

The State argues that the plaintiffs' asserted injuries are "too conjectural to confer standing in the pre-enforcement context because determining where a loan is 'made,' and even what [Colorado UCCC] rate applies, is necessarily fact intensive, and th[e] Court cannot determine whether Colorado has exceeded Section [1831d]'s opt-out until it has an actual loan to analyze." Doc. 39 at 17-18. The State notes that "[t]he only loans that could confer standing here are those that Plaintiffs' members would only offer if they could exceed Colorado's caps, *and* they must be loans that do not meet [Section 1831d]'s definition of 'made in' but are nonetheless subject to Colorado's caps by the Opt-Out," and argues that "the number of loans affected could be a handful of loans, or none." *Id.* at 18. It is true that to confer standing, a plaintiff's injury must be "concrete and particularized" and "actual or imminent, not 'conjectural' or 'hypothetical.'" *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158 (2014). But the plaintiffs have submitted declarations from their executive officers and from officers of several of their member banks detailing the loans that will be affected as well as the administrative costs, lost revenue, and intangible losses like lost customers and goodwill that the plaintiffs' members will suffer if the full scope of Colorado's opt-out (under the State's interpretation of "made in") is permitted to take effect. *See* Doc. 26 ¶¶ 11-19; Doc. 27 ¶¶ 14-22; Doc. 28 ¶¶ 12-19; Doc. 29 ¶¶ 13-20; Doc. 30 ¶¶ 10-17; Doc. 31 ¶¶ 10-13; Doc. 32 ¶¶ 8-15. The plaintiffs need not precisely quantify the number of loans that will be affected or the dollar amount of revenue that will be lost in order to demonstrate an injury in fact. The injuries asserted are sufficiently concrete and particularized.

As noted above, the State does not challenge the traceability and redressability prongs of the standing inquiry, and it seems uncontroversial that the asserted injuries to plaintiffs' members are traceable to the challenged opt-out statute, and that enjoining the Colorado Attorney

General and UCCC Administrator from enforcing Colorado UCCC interest-rate caps with respect to loans to which Section 1831d's preemption allegedly still applies would provide relief for the plaintiffs' members. The plaintiffs have successfully demonstrated standing.

B. Ripeness

As to ripeness, the State contends that the plaintiffs' asserted injuries have not matured sufficiently to warrant court intervention. Ripeness involves both constitutional and prudential components. *Supreme Ct. of N.M.*, 389 F.3d at 903. The requirements of standing and constitutional ripeness overlap—if an injury is sufficiently imminent to establish standing, as it is here, constitutional ripeness will necessarily also be satisfied. *Id.* Prudential ripeness turns on both the "fitness of the issues for judicial decision" and the "hardship to the parties of withholding court consideration." *Id.* Where the possibility of an enforcement action rests on uncertain or contingent future events, a claim may not be prudentially ripe for judicial review if waiting for those contingencies to play out would significantly advance a court's ability to deal with the legal issues presented. *Id.* at 904.

In this case, waiting would not aid the Court in resolving the parties' dispute. The plaintiffs' preemption claim turns on a matter of law that can be resolved without further factual development—the proper statutory construction of "loans made in" Colorado under federal law. Though the State is correct that the determination of where any particular loan is made will be a case-by-case factual inquiry, those factual distinctions make no legal difference as to the scope of the federal statue's opt-out language. To resolve the dispute in this case, I need only decide whether the location of the borrower is one of the facts that should be taken into account in deciding where a loan is "made" under the opt-out provision. The plaintiffs' claims are both constitutionally and prudentially ripe for review. *See Consumer Data*, 678 F.3d at 907 ("[R]ipeness is seldom an obstacle to a pre-enforcement challenge . . . where the plaintiff faces a 'credible threat' of enforcement, and 'should not be required to await and undergo [enforcement] as the sole means of seeking relief.'").

II. Preliminary-Injunction Factors

A. Likelihood of Success on the Merits

The plaintiffs have made a strong showing that they are substantially likely to succeed on the merits of their preemption claim. They have pleaded a viable cause of action, and their proffered construction of "loans made in" Colorado is likely to prevail over the State's proposed construction.

1. Cause of Action

The State unpersuasively contends that the plaintiffs' claim cannot proceed because there is no private right of action under the Supremacy Clause or Section 1831d. Doc. 39 at 14-16. A three-step analysis applies to the question of whether a plaintiff has a cause of action. A court must determine: (1) what alleged substantive rights the plaintiff is seeking to vindicate; (2) what putative causes of action the plaintiff is raising based on those rights; and (3) which, if any, of those causes of action are viable with respect to the relief requested. *Safe Streets Alliance v. Hickenlooper*, 859 F.3d 865, 899 (10th Cir. 2017) (citing *Davis v. Passman*, 442 U.S. 228, 239-41 & n.18 (1979)).

The right the plaintiffs are seeking to vindicate is that of their members to charge interest at the rates specified in Section 1831d on loans as to which Colorado cannot opt out of the statute's application. For a statute to create private rights, it must be phrased in terms of the persons benefited rather than focused on the persons regulated. *Id.* at 903. Section 1831d(a) satisfies this inquiry, as it states that its purpose is "to prevent discrimination against" state-chartered banks, and that such banks "may, notwithstanding any State constitution or statute which is hereby preempted for the purposes of this section . . . charge on any loan" the greater of the discount-plus-one rate or the rate allowed by the laws of the state where the bank is located. 12 U.S.C. § 1831d(a). The putative cause of action the plaintiffs raise is a claim in equity under *Ex parte Young*, 209 U.S. 123 (1908).[3] Doc. 1 at 26; Doc. 45 at 7-8. The State does not raise any arguments as to these first two steps of the cause-of-action analysis.

As to the third step, the State contends that the asserted cause of action is not viable because banks are not among the class of litigants that may enforce the rights created by Section 1831d. "Congress may displace the equitable relief that is traditionally available to enforce federal law" if the statute creating the rights at issue displays an "intent to foreclose" the availability of such relief. *Armstrong*, 575 U.S. at 328-29; *accord Davis*, 442 U.S. at 241 ("Statutory rights and obligations are established by Congress, and it is entirely appropriate for Congress, in creating these rights and obligations, to determine in addition, who may enforce them and in what manner."). The "express provision of one method of enforcing a substantive rule suggests that Congress intended to preclude others," particularly when Congress vests an agency with authority to administer a complex statutory scheme. *Armstrong*, 575 U.S. at 328-29. The State argues that is the case here because the Federal Deposit Insurance Act, of which Section 1831d is a part, "expressly

[3] Although the plaintiffs' complaint styles their claim as one for violation of the Supremacy Clause, *see* Doc. 1 ¶¶ 71-80, their reply brief clarifies that they are bringing an equitable claim under *Ex parte Young*. Doc. 45 at 7-8. The State is correct that the Supremacy Clause does not create a cause of action. *Armstrong v. Exceptional Child Ctr., Inc.*, 575 U.S. 320, 324-25 (2015).

and impliedly precludes private enforcement actions, primarily vesting authority with the FDIC." Doc. 39 at 15 (citing 12 U.S.C. § 1818 (FDIC may suspend or terminate bank's insured status or issue cease-and-desist order if bank violates applicable laws or regulations); 12 U.S.C. §§ 1831d(b), 1831g(c)-(d) (borrowers may bring civil action against bank to recover excess interest, but no private right of action to enforce bank compliance with requirement to engage in sound business practices)). The statutory enforcement mechanisms the State points to, however, are all remedies *against* a bank for violations of applicable laws or regulations. Those are not the rules or rights that the plaintiffs seek to enforce in this suit.

The plaintiffs, unlike the plaintiffs in *Armstrong* who sought affirmative relief in the form of additional Medicaid payments, instead seek to use *Ex parte Young* as a shield against allegedly preempted state action. *See Mich. Corr. Org. v. Mich. Dep't of Corr.*, 774 F.3d 895, 906 (6th Cir. 2014) (parties may use *Ex parte Young* as shield against enforcement of preempted state laws, "[b]ut matters differ when litigants wield *Ex parte Young* as a cause-of-action-creating *sword*"). "[I]f an individual claims federal law immunizes him from state regulation, the court may issue an injunction upon finding the state regulatory actions preempted." *Armstrong*, 575 U.S. at 326. That is precisely the type of equitable relief that the plaintiffs seek, and neither Section 1831d nor the Federal Deposit Insurance Act as a whole display congressional intent to foreclose the availability of such relief. The plaintiffs therefore have a viable cause of action. *Cf. Friends of the East Hampton Airport, Inc. v. Town of East Hampton*, 841 F.3d 133, 146 (2d Cir. 2016) (fact that Congress conferred broad enforcement authority on FAA and not on private parties did not imply intent to bar parties from bringing claim "not to enforce the federal law themselves, but to preclude a municipal entity from subjecting them to local laws enacted in violation of federal requirements").

2. "Loans Made In" Colorado

The effect of a state's opt-out of Section 1831d, how to determine where a loan is "made," and whether the opt-out provision permits states to reassert control over the interest rates charged by out-of-state banks to borrowers residing in those states have been open questions since the statute's inception,[4] as the opt-out provision uses language inviting uncertainty and disagreement. These questions have yet to be decided by any court.

a. Statutory Text

In cases of statutory interpretation, a court must "begin and end [the] inquiry with the text, giving each word its 'ordinary, contemporary, common meaning.'" *Star Athletica, L.L.C. v. Varsity Brands, Inc.*, 580 U.S. 405, 414 (2017); *accord Commonwealth of P.R. v. Franklin Cal. Tax-free Tr.*, 579 U.S. 115, 125 (2016) (when interpreting express preemption clause, court must "focus on the plain wording of the clause, which necessarily contains the best evidence of Congress's pre-emptive intent," and inquiry begins and ends with statutory language when its meaning is plain). The textual inquiry, though, is not limited to a specific section in isolation— "the text of the whole statute gives instruction as

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[4] *See* Jeffrey I. Langer & Jeffrey B. Wood, *A Comparison of the Most Favored Lender and Exportation Rights of National Banks, FSLIC-Insured Savings Institutions, and FDIC-Insured State Banks*, 42 Consumer Fin. L.Q. Rep. 4, 27-28 (1988), https://www.dltlaw.com/wp-content/uploads/sites/1602755/2020/06/FavorableLender-1.pdf ("[T]he application of a state override provision to an interstate loan made by a federally-insured state bank to a borrower residing in the opt-out state is . . . unclear."; noting that FDIC had issued conflicting opinion letters on the issue and advising state-chartered banks to "carefully evaluate their authority to export interest rates . . . into an opt-out state").

to its meaning," and courts should "look to the provisions of the whole law" to determine the meaning of the section at issue. *Star Athletica*, 580 U.S. at 414.

The opt-out provision reads:

> Section [1831d is] applicable only with respect to loans made in any State during the period beginning on April 1, 1980, and ending on the date, on or after April 1, 1980, on which such State adopts a law . . . which states explicitly and by its terms that such State does not want this section to apply with respect to loans made in such State, except that this section shall apply to a loan made on or after the date such law is adopted . . . if such loan is made pursuant to a commitment to make such loan which was entered into on or after April 1, 1980, and prior to the date on which such law is adopted . . . .

12 U.S.C. § 1831d note (Effective Date). Diagraming this provision is beyond the grammatical skills of this inferior court. *Cf. United States v. Rentz*, 777 F.3d 1105, 1106, 1109 (10th Cir. 2015) (providing simplified diagram of statutory sentence and noting: "That bramble of prepositional phrases may excite the grammar teacher but it's certainly kept the federal courts busy."); *United States v. Rosales-Garcia*, 667 F.3d 1348, 1356 (10th Cir. 2012) (Gorsuch, J., dissenting) ("This has to be a sentence only a grammar teacher could love. We have here our old nemesis the passive voice, followed by a scraggly expression of time . . . then a train of prepositional phrases linked one after another and themselves rudely interrupted by a pair of parenthetical punctuations."). Suffice it to say that the clause in dispute here is "made in such State," and that "made" in this context is a passive past participle of the verb "to make."

Both sides attempt to tie their argument to this text. *See, e.g.*, Doc. 39 at 10-11 ("made in such State" "includes a focus on the location of the borrower"); Doc. 45 at 9 ("where loans are 'made' . . . necessarily focuses on the party who 'makes' the loan"); Doc. 38-1 at 10 ("loans are ordinarily understood to be made in the states where the parties enter into the loan transaction"). In the State's view, a loan is "made" by two parties—the bank and the borrower. Doc. 38-1 at 13 ("For a loan to be made, there needs to be both a borrower and a lender . . . ."). But in the plaintiffs' view, while the borrower "obtains" or "receives" a loan, only the bank "makes" a loan. Doc. 45 at 9-10. And it is the plaintiffs' view that is more consistent both with the ordinary colloquial understanding of who "makes" a loan, and, more importantly, with how the words "make" and "made" are used consistently throughout the text of the Federal Deposit Insurance Act, including the DIDA amendments, as well as throughout the rest of Title 12 of the United States Code, which governs "Banks and Banking" and includes the National Bank Act.

While a passive past participle makes the interpretive task harder than it might have been, Congress's use of "made" puts the focus on the act of making a loan. In plain parlance, it is the lender who *makes* a loan; nobody thinks of themselves as "making a loan" when they borrow money from a family member or put a charge on a credit card. Had Congress sought to put the focus on the borrower, as the State argues, it could have done so in many ways. Most easily, for example, by allowing states to opt out as to loans "made to borrowers in such State." Or without even changing the structure of the sentence, Congress could have simply used a borrower-focused word like "accepted" or "obtained" "in such State." Instead, it put the focus on where a loan is "made," which puts the focus on the lender, as the plaintiffs argue.

This interpretation is supported by a look at the broader context, too. Section 1831d itself says that a "State *bank* . . . may . . . charge on any loan or discount *made*," interest up to the specified rates—which implies that it is the bank that "makes" a loan. 12 U.S.C. § 1831d(a) (emphases added). Other sections of the Federal Deposit Insurance Act consistently use "make" and "made" in the same way, *i.e.*, a loan is "made" *by* a bank *to* a borrower. *See, e.g.*, 12 U.S.C. § 1828(o)(3) ("a loan *made by* an *insured depository institution*[5] . . . ." (emphases added)); 12 U.S.C. § 1831b(a) ("No *insured depository institution* . . . [or] *bank* which is not an insured depository institution, shall *make* any . . . loan . . . ." (emphases added)).

Various other sections of Title 12 reinforce this understanding. *See, e.g.*, 12 U.S.C. § 83(a) ("No national *bank* shall *make* any loan . . . ." (emphases added)); 12 U.S.C. § 85 ("Any *association*[6] may . . . charge on any loan . . . *made* . . . interest at the rate allowed . . . ." (emphases added)); 12 U.S.C. § 143 (an "*association* shall not increase its liabilities by *making* any new loans" (emphases added)); 12 U.S.C. § 371(a) ("Any national *banking association* may *make* . . . loans or extensions of credit . . . ." (emphases added)); 12 U.S.C. § 1757(5) ("A Federal *credit union* . . . shall have power . . . to *make* loans . . . ." (emphases added)); 12 U.S.C. § 1785(f)(1) ("Every insured *credit union* is authorized to . . . *make* loans . . . ." (emphases added)); 12 U.S.C. § 2610 ("No fee shall be imposed . . . by a *lender* in connection with a . . . loan *made by* it . . . ." (emphases added)); 12 U.S.C. § 4742(4) ("a loan *made by* a participating *financial*

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[5] An "insured depository institution" includes "any *bank* . . . the deposits of which are insured by" the FDIC. 12 U.S.C. § 1813(c)(2) (emphasis added).

[6] An "association" means an "[a]ssociation for carrying on the business of *banking*." 12 U.S.C. § 21 (emphasis added); *accord* 12 U.S.C. § 37.

institution" (emphases added)).[7] In contrast, when Title 12 speaks to action by borrowers, it states that borrowers "receive" or "obtain"—but not "make"—loans. *See, e.g.*, 12 U.S.C. § 2279aa(7)(C) ("a loan . . . by a cooperative lender to a *borrower* that has *received* . . . a loan" (emphases added)); 12 U.S.C. § 4742(10)(A) ("depositing all required premium charges paid . . . by each *borrower receiving* a loan" (emphasis added)); 12 U.S.C. § 5602(b)(1) ("protecting *borrowers* with respect to the *obtaining* of . . . loans" (emphases added)).

Taken as a whole, the consistent use of "make" and "made" throughout the statutory text indicates that the plain and ordinary answer to the question of *who* "makes" a loan is the bank, not the borrower. It follows, then, that the answer to the question of *where* a loan is "made" depends on the location of the bank, and where the bank takes certain actions, but not on the location of the borrower who "obtains" or "receives" the loan.

The FDIC (whose position the State has adopted) argues, though, that a loan is "made" by both the lender and the borrower. Doc. 38-1 at 10-13. It bases this argument on what it says are "established federal principles" for determining where a contract is made, and it cites to various cases holding that, in the Dormant Commerce Clause context, when parties in two different states enter into a contract, the contract is made in both states. *See id.* Similarly, the State cites to *Quik Payday, Inc. v. Stork*, 549 F.3d 1302 (10th Cir. 2008), also a Dormant Commerce Clause case, for the proposition that "the Tenth Circuit, interpreting federal

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[7] *See also, e.g.*, 12 U.S.C. § 1706f(c)(1) ("loan or extension of credit *made to* a *borrower*" (emphases added)); 12 U.S.C. § 2202b(a) ("If a Farm Credit *Bank* forgives . . . any of the principal outstanding on a loan *made to* any *borrower*" (emphases added)) 12 U.S.C. § 2202d(b) ("*lender* may not require any borrower to reduce the outstanding principal balance of any loan *made to* the *borrower*" (emphases added)).

law, has held that where a borrower is in one state and the lender is in another, the loan is made in the state of the borrower's physical location, so that the borrower's state may regulate the loan." Doc. 39 at 11. But these Dormant Commerce Clause cases are of little value with respect to the statutory construction issue in this case, as they address the separate issue of when one state may constitutionally regulate an activity involving conduct that occurs in another state.

The effective-date context of the opt-out provision also undermines the argument that a loan is "made" in the state or states where the bank and the borrower enter into the loan contract. The provision provides that a state's the opt-out law does not apply

> to a *loan made* on or after the date such law is adopted . . . if such *loan is made* pursuant to a *<u>commitment to make</u> such loan* which was entered into on or after April 1, 1980, and prior to the date on which such law is adopted . . . .

12 U.S.C. § 1831d note (Effective Date) (emphases added). In other words, the contract or "commitment to make [a] loan" may be entered into at a different time than the "loan is made." So even if the State is correct that the contract for a loan is made by both the lender and the borrower, and in the state(s) where the lender and the borrower are located when they enter into the contract, that is not determinative of where the loan itself is "made" within the meaning of the statute.

The plain language of Section 1831d's opt-out provision, viewed in the context of the statutory scheme as a whole, indicates that loans are "made" by the bank, and that where a loan is "made" does not depend on the location of the borrower.

b. Policy and Legislative History

The statutory text, scraggly and bramble though it may be, ultimately reveals its plain meaning and supports the plaintiffs' interpretation, which is enough to resolve the question. *Franklin Cal. Tax-free Tr.*, 579 U.S. at 125 (statutory construction begins "with the language of the statute itself," and when its meaning is plain, that "is also where the inquiry should end"). I nevertheless will briefly address the parties' policy arguments and the persuasive authorities they cite. I find that these policy arguments and persuasive authorities are mostly inconclusive or irrelevant and therefore unhelpful. But to the extent they do shed light on the issues, they further support the conclusion that loans are "made" by the bank, and that where a loan is "made" therefore depends on where the bank is located and takes various actions but not on the location of the borrower.

Both sides cite to opinions, interpretive letters, and the like issued by the FDIC and other federal agencies involved in banking regulation. Neither side has addressed what level of deference, if any, must be given to these agency interpretations. Generally, when faced with a problem of statutory construction, a court should give "great deference to the interpretation given the statute by the officers or agency charged with its administration." *Colo. Public Utils. Comm'n v. Harmon*, 951 F.2d 1571, 1578-79 (10th Cir. 1991). But here, most of the agency interpretations in the record touch only tangentially on the Section 1831d opt-out provision and the issue of where a loan is "made" for purposes of that provision. Only one interpretive letter squarely addresses the question, and it does not resolve it. *See Interpretive Letter*, FDIC-88-45, 1988 WL 583093 (June 29, 1988) ("The determination of where a loan is made should be based upon an analysis of the facts surrounding the extension of credit," but "[t]his office is not in a position to analyze [the relevant factors] or determine whether we have all the facts in order to reach a conclusion."); Michael C. Tomkies, *Interstate Consumer Credit Transactions: Recent Developments*, 43 Consumer Fin. L.Q. Rep. 152, 157 (1989), https://www.dltlaw.com/wp-content/uploads/sites/1602755/2020/06/In terstateConsumerCredit-1.pdf (this letter "provide[s] no express direction regarding the precise method of analysis to be undertaken"). The agency interpretations in the record are therefore inconclusive and do not contain any statutory interpretation for me to defer to; they are persuasive at best.

To the extent the agency interpretations are helpful, they support the conclusion that in common parlance, a loan is "made" *by* a bank and therefore *where* the bank is located and performs its loan-making functions. *See, e.g.*, *FDIC Op. No. 11*, 1998 WL 243362, at *27285 ("If . . . [a] Bank [branch] *in a single host state* performs all the non-ministerial functions (approval of an extension of credit, extension of the credit, and disbursal of loan proceeds to a customer) related to a loan, it '*makes*' the loan *to* the customer . . . and the loan should be governed by the usury provisions of the *host state*."; "[The] distinction . . . of the 'disbursal' function between 'the actual disbursal of proceeds' and 'delivering previously disbursed funds to a customer' is indicative of the type of inquiry Congress intended in order to identify non-ministerial functions which effect *where a loan is made* for purposes of determining the state law to be applied to a loan." (emphases added)); Federal Interest Rate Authority, 85 Fed. Reg. 44146-01, 2020 WL 4192852, at *44146, *44148 to *44151, *44153 (July 22, 2020) (codified at 12 C.F.R. pt. 331) ("*banks* can transfer enforceable rights in the *loans they made*"; contrasting "a loan [that] cannot be said to be *made in* a host State" with one where a host-state branch "approves the loan, extends the credit, and disburses the proceeds to a customer"; "functions involved in *making* the loan"—"loan approval, disbursal of the loan proceeds, and communication of the decision to lend"—are "performed *by*" a bank; "the right to assign loans is a component of *banks'* Federal statutory right to *make* loans" (emphases added)). Though these agency interpretations do not directly address the statutory construction question at issue in this case, the FDIC's acknowledgment that they "use[] 'made' colloquially," Doc. 38-1 at 17, reinforces that the ordinary colloquial understanding of who makes a loan is the bank, and where a loan is made is where the bank performs its loan-making functions.[8]

Both sides also point to the legislative history behind Section 1831d and its opt-out provision, arguing that Congress's intended policy underlying the statute's enactment supports their proffered construction of "loans made in" a state. The State argues, somewhat persuasively, that the purpose of the opt-out provision was to allow individual states to "return to the status quo ante"—in other words, no federal preemption as to the interest rates that state-chartered banks, wherever located, could charge on loans to borrowers in an opt-out state. Doc. 39 at 7; *see also* Doc. 38-1 (FDIC arguing that "[t]he opt-out puts the state in the same position it would have been in had Section [1831d] never been enacted"). The plaintiffs argue that the purpose behind the opt-out provision was to "soften" Section 1831d's exercise of federal power by allowing opt-out states to "restore [their] ability to control the rates at which their own state banks loaned money by removing their ability to lend at the federal rate," but that it "was not intended as a tool to enable opting-out

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8 *See also Jessup v. Pulaski Bank*, 327 F.3d 682, 685 (8th Cir. 2003) (deferring to agency interpretation of "loan made in any State" in 12 U.S.C. § 1831u(f)(2)(A)(i), another section of the Federal Deposit Insurance Act, that where loan is "made" depends on where "the loan was approved, credit was extended, and loan proceeds were disbursed," "without regard to where the borrower resides"); Tomkies, *supra*, at 158 (arguing that because agency and D.C. Circuit previously "interpreted a provision similar to the [opt-out] provision used in section [1831d] in an analogous context to mean that a loan 'is made' where the loan is approved and funds disbursed, it may be presumed that Congress intended the language employed in section [1831d] to have the same meaning").

states to reach into *other* states to regulate those states' banks' interest rates." Doc. 45 at 15-16.

Ultimately, though, the parties' differing views regarding the legislative purpose behind the opt-out provision are irrelevant, because "policy reasons cannot trump the plain language of the statute." *EagleMed LLC v. Cox*, 868 F.3d 893, 904 (2017). Congress certainly could have been clearer regarding its intention behind the opt-out provision. *See* Tomkies, *supra*, at 157 ("The statute could have been written far more clearly by specifying that the state where the institution is located or the state where the borrower resides could [opt out], if either of these standards reflected the Congressional intent."). But courts cannot rewrite a statute to reflect their "perception of legislative purpose." *Shady Grove Orthopedic Assocs. v. Allstate Ins. Co.*, 559 U.S. 393, 403 (2010). "Any deficiency in the plain language of the statute or the scope of its [opt-out] coverage must be corrected by Congress, not this court." *EagleMed*, 868 F.3d at 904.

The plain meaning of Section 1831d's opt-out provision is that what state a loan is "made in" depends on where the bank is located and performs its loan-making functions and does not depend on the location of the borrower. The plaintiffs have therefore made a strong showing that they are substantially likely to succeed on the merits of their claim that Colorado cannot opt out of the preemptive federal interest-rate caps as to loans that plaintiffs' member banks make outside of Colorado, even if those loans are made to Colorado borrowers. To the extent the heightened standard for a disfavored injunction applies, the plaintiffs' showing on this factor is sufficient to meet that heightened standard.

B. Irreparable Injury

To show a threat of irreparable harm, a plaintiff must demonstrate "a significant risk that he or she will experience harm that cannot be compensated after the fact by money damages." *Fish v. Kobach*, 840 F.3d 710, 751 (10th Cir. 2016).

As discussed above, the plaintiffs have shown that their members will incur administrative costs, lost revenue, and lost customers and goodwill if they must comply with the interest-rate caps in the Colorado UCCC with respect to all loans made to Colorado consumers. While some of those losses may in theory be the sort that are typically compensable with damages, monetary losses in this context are likely not recoverable because a state is generally immune from suit for retrospective monetary relief. *Chamber of Com. of U.S. v. Edmonson*, 594 F.3d 742, 770-71 (10th Cir. 2010); *Kan. Health Care Ass'n v. Kan. Dep't of Social & Rehab. Servs.*, 31 F.3d 1536, 1543 (10th Cir. 1994). And the plaintiffs have presented evidence that absent an injunction, they will be forced to stop offering their loan products altogether to certain Colorado consumers, and once gone, those customers—and their goodwill along with that of the banks' business partners—may be gone forever. Even if the plaintiffs' members could recover money damages from the State, loss of customers, loss of goodwill, and erosion of a competitive position in the marketplace are the types of intangible damages that may be incalculable, and for which a monetary award cannot be adequate compensation. *Dominion Video Satellite, Inc. v. Echostar Satellite Corp.*, 356 F.3d 1256, 1264 (10th Cir. 2004).

The plaintiffs have made a strong showing that their members will suffer irreparable harm if an injunction is not granted.

C. Balance of Harms and the Public Interest

The third factor of the preliminary-injunction test requires balancing the harm to the plaintiffs' members of not granting an injunction against the harm to the State if an injunction is granted. *See Fish*, 840 F.3d at 755-56. And where, as here, the government is the opposing party, the balance-of-harms factor merges with the fourth factor, which requires that the injunction not be adverse to the public interest. *See Nken*, 556 U.S. at 435.

The State notes that if an injunction is issued, the plaintiffs' members "will be free to enter into contracts that include terms prohibited under the UCCC," and argues that "[e]ven if Plaintiffs later lose, Coloradans will have already paid interest at prohibited rates," which could not be remedied by a final judgment in the State's favor. The State and the public certainly have an interest in preventing usurious loans to Coloradans. But as the plaintiffs note, even if the State prevails and its asserted scope of the opt-out is found to be valid, it will not be able to prevent national banks from making loans to Coloradans at above-UCCC rates, because the National Bank Act does not contain any opt-out provision with respect to its preemptive federal interest-rate caps. *See* 12 U.S.C. § 85. So without an injunction, the plaintiffs' member state-chartered banks will be at a disadvantage with respect to national banks, but Colorado consumers will have only marginally more protection from higher interest rates. And the public interest favors enjoining enforcement of likely invalid provisions of state law. *Chamber of Com.*, 594 F.3d at 771.

On the whole, given the plaintiffs' strong showing that they will likely be successful on the merits and their strong showing that they will be irreparably harmed if the State is not enjoined, I find that the balance of harms weighs in the plaintiffs' favor. And to the extent that the heightened standard for a disfavored injunction applies, the plaintiffs' showing on this factor is sufficient to meet that heightened standard.

III. Terms of Preliminary Injunction

A. Actions to Be Restrained

In fashioning injunctive relief against a state official, a district court must ensure that the relief ordered is "no broader than necessary to remedy the [federal] violation." *EagleMed*, 868 F.3d at 905. In a preemption case, "enjoining Defendants from enforcing the preempted statute . . . [is] sufficient to remedy this federal violation." *Id.* at 905-06. Here, although the plaintiffs' motion asks to enjoin enforcement of Colorado's opt-out law, the preempted statute is actually the Colorado UCCC, and only to the extent the interest-rate caps therein exceed those in Section 1831d(a) and are applied to loans that are not "made in" Colorado. Consistent with the statutory interpretation outlined above, the State may only opt-out of Section 1831d for loans made by lenders in Colorado. It may not apply its UCCC to loans made to Colorado residents otherwise.

Injunctive relief also should generally be limited to the parties before the court. *See Dep't of Homeland Sec. v. New York*, 140 S. Ct. 599, 600 (2020) (Gorsuch, J., concurring) ("When a district court orders the government not to enforce a rule against the plaintiffs in the case before it, the court redresses the injury that gives rise to its jurisdiction in the first place. But when a court goes further than that, ordering the government to take (or not take) some action with respect to those who are strangers to the suit . . . . [that] raise[s] serious questions about the scope of courts' equitable powers under Article III."). That is a bit complicated here, because it is the plaintiffs' members, not the plaintiffs themselves, who would be harmed by enforcement of the preempted interest rates. "[A]ssociational standing creates a mismatch: Although the association is the plaintiff in the suit, it has no injury to redress. The party who needs the remedy—the injured member—is not before the court." *FDA v. Alliance for Hippocratic Med.*, Nos. 23-235, 23-236, 602 U.S. —, slip op. at 5 (U.S. June 13, 2024) (Thomas, J., concurring) (questioning current organizational standing doctrine that gives associations standing based on their members' injuries rather than their own). The Supreme Court's associational standing doctrine, though, has been "consistently applied," *id.* at 9, and is not challenged here, so the injunction will prohibit the State from enforcing the preempted interest rates against the plaintiffs' members.

B. Security

"The court may issue a preliminary injunction . . . only if the movant gives security in an amount that the court considers proper to pay the costs and damages sustained by any party found to have been wrongfully enjoined or restrained." Fed. R. Civ. P. 65(c). The parties have not briefed this issue. In the Tenth Circuit, district courts have "wide discretion" in determining whether to require security. *Winnebago Tribe of Neb. v. Stovall*, 341 F.3d 1202, 1206 (10th Cir. 2003). Where there is "an absence of proof showing a likelihood of harm" to the enjoined party, waiving security is permissible. *See id.* The State has not suggested that an injunction would cause it any monetary damages, nor has it requested any security. Given the current record, therefore, I find it appropriate to waive the security requirement in this case.

CONCLUSION

It is **ORDERED** that:

Plaintiffs' Motion for Preliminary Injunction, **Doc. 24**, is **GRANTED**;

Pending a final determination of the plaintiffs' claims on the merits, the defendants, their officers, agents, servants, employees, attorneys, and any others who are in active concert or participation with them are

PRELIMINARILY ENJOINED from enforcing the interest rates in the Colorado Uniform Consumer Credit Code with respect to any loan made by the plaintiffs' members, to the extent that (a) the applicable interest rate in 12 U.S.C. § 1831d(a) exceeds the rate that would be permitted in the absence of that subsection, and (b) the loan is not "made in" Colorado within the meaning of the Effective Date note to 12 U.S.C. § 1831d as explained above; the State may only apply its UCCC interest rates to loans made by lenders in Colorado, regardless of the location or residence of the borrower.

DATED: June 18, 2024

BY THE COURT:

Daniel D. Domenico
United States District Judge