IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

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

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

Plaintiff(s),

v.

PHILIP J. WEISER, Attorney General of the State of Colorado, and MARTHA FULFORD, Administrator of the Colorado Uniform Consumer Credit Code,

Defendant(s),

DEFENDANTS' RESPONSE IN OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

Defendants Philip J. Weiser, Attorney General of the State of Colorado, and Martha Fulford, Administrator of the Colorado Uniform Consumer Credit Code (collectively "Defendants") respond to Plaintiffs' Motion for Preliminary Injunction (Doc. 24, Apr. 2, 2024) as follows:

INTRODUCTION

States, including Colorado, have a long history of protecting their citizens from predatory interest rates. But despite its best efforts, Colorado has faced attempts by lenders to avoid its protections. For example, EasyPay, a financial technology company, partnered with Utah-chartered TAB Bank to offer loans to Colorado consumers at rates of up to 199% on amounts up to $5,000, until EasyPay agreed with

Defendants to stop lending in Colorado.[1] Because Colorado had not yet opted out of preemption, TAB Bank pointed to federal law to justify lending to Colorado consumers at rates permitted by Utah, which does not have rate caps.

Federal law explicitly permits the States to opt out of the preemption of their interest rate laws applicable to state-chartered banks. In 2023, Colorado's General Assembly passed an opt-out from certain interest rate preemption provisions imposed by federal statute. That law takes effect July 1, 2024. Plaintiffs seek to deny Colorado the choice expressly provided by federal law.

FACTUAL BACKGROUND

In 2023, Colorado's General Assembly duly passed a law ("Opt-Out") opting out of certain interest rate preemption provisions of the federal Depository Institutions Deregulation and Monetary Control Act ("DIDMCA[2]"). Doc. 25-2; Doc. 25-1. DIDMCA permits state-chartered banks to charge interest on a loan at the "rate allowed by the laws of the State . . . where the bank is located" (or a specified federal rate) and preempts contrary state rate limits. Doc. 25-1, at § 521 ("Section 521"). DIDMCA, however, expressly permits the States to opt out from—that is, negate or reverse—its interest rate preemption provisions. *Id.* at § 525 ("Section 525"). Plaintiffs now ask this Court to fashion a judicial remedy in a pre-enforcement posture, attempting to protect its members' profits.

[1] Exhibit A, Fulford Decl. at ¶ 6.
[2] In case law, the statute is often referred to—interchangeably—as either DIDA or DIDMCA.

LEGAL STANDARD

A plaintiff seeking a preliminary injunction must establish: (1) a substantial likelihood-of-success-on-the-merits; (2) they will suffer irreparable injury absent the injunction; (3) the balance of equities favors the plaintiff; and (4) an injunction is in the public interest. *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7, 20 (2008). The plaintiff bears the burden of proving that each factor tips in its favor. *Heideman v. South Salt Lake City*, 348 F.3d 1182, 1188-89 (10th Cir. 2003). "The [likelihood of success and irreparable harm] factors of the traditional standard are the most critical." *Nken v. Holder*, 556 U.S. 418, 434 (2009). The last two factors, balance of equities and public interest, "merge when the Government is the opposing party." *Id.* at 435. Failure to establish these merged factors is sufficient to defeat preliminary injunctive relief. *Winter*, 555 U.S. at 23.

Above all, "[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). And, "because a preliminary injunction is an extraordinary remedy, the right to relief must be clear and unequivocal." *Greater Yellowstone Coalition v. Flowers*, 321 F.3d 1250, 1256 (10th Cir. 2003).

Plaintiffs face a heightened burden when seeking a disfavored injunction. *Free the Nipple-Fort Collins v. City of Fort Collins*, 916 F.3d 792, 797 (10th Cir. 2019). A disfavored injunction exhibits any of three characteristics: (1) it mandates action; (2) it changes the status quo; or (3) grants all the relief that the moving party could

expect at trial, and the injunction's effect cannot be undone. *Id.* at 797 n. 3. When seeking a disfavored injunction, the moving party faces a heightened burden on the "likelihood-of-success-on-the-merits and the balance-of-harms factors." *Id.* As discussed in Section III, *infra,* Plaintiffs seek a disfavored injunction because it grants all the relief that the moving party could expect at trial and its effects cannot be undone should they lose at trial.

ARGUMENT

I. Colorado's Opt-Out is not preempted by federal law

A. *Plaintiffs cannot overcome the presumption against preemption*

Under the Supremacy Clause's preemption doctrine, "federal law preempts contrary state law." *United States v. Supreme Court of New Mexico*, 839 F.3d 888, 917 (10th Cir. 2016) (cleaned up). Preemption can arise in three categories: express, conflict, and field preemption. *Id.* Courts must start with "the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *In re MDL 2700 Genentech Herceptin Mktg. & Sales Practice Litigation*, 960 F.3d 1210, 1224–25 (10th Cir. 2020).

While Section 521 expressly preempts state rate limits, Colorado opted out of that preemption by the explicit means provided by Congress in Section 525. In this context, courts should uphold state law where the state acts within the authority delegated by Congress. *See Sheehan v. Peveich*, 574 F.3d 248, 252 (4th Cir. 2009)

(cleaned up) ("There can be no preemption . . . where Congress expressly and concurrently authorizes state legislation on the subject.")

B. *States' regulation of interest rates predates the Constitution by 150 years*

Following from antecedent—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 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).

It's little wonder then that the U.S. Supreme Court has "readily accept[ed] the submission that . . . banking and related financial activities are of profound local concern. . . . [and that] 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 Investment Managers, Inc.*, 447 U.S. 27, 38 (2009).

In sum, state-imposed usury limits are a foundational feature of our Republic and represent the default rule, not the exception.

C. *Structural and textual differences in the National Bank Act and DIDMCA show different tests apply*

Originally passed in 1863, the National Bank Act ("NBA") permits national banks to charge "interest at the rate allowed by the laws of the State . . . where the bank is located" to borrowers residing in a different state, superseding lower rate limits in borrower's state. 12 U.S.C. § 85. The NBA does not contain an opt-out

provision like Section 525. In *Marquette National Bank of Minneapolis v. First of Omaha Service Corp.*, 439 U.S. 299 (1978), the Supreme Court addressed the scope of NBA preemption where the law of the national bank's home state permitted a higher rate than allowed by the state where the borrower resided. The Court's analysis turned in large part on the meaning of "located" as used in the NBA. Consistent with the NBA's text, the Court focused on the physical location of the bank designated in its organization certificate in determining the bank's location. *Id.* at 308–11.

Following *Marquette*, Congress passed DIDMCA in 1980, preempting state law and, in Section 521, providing that state-chartered banks could lend at the rate limit provided by the law of the state where the "bank is located". In stark contrast to the NBA however, Congress explicitly provided the States with the ability to opt out of DIDMCA's rate preemption provisions, in Section 525, for loans "made in" the opting out state.[3] Key to the dispute here is the fact that Congress did not define "made in" anywhere in DIDMCA's text.

Following DIDMCA's passage, a number of States, including Colorado, opted out of Section 521 preemption via Section 525. Federal Interest Rate Authority, 85

[3] Plaintiffs contend Section 525 is limited to a state's own in-state banks, Doc. 24 at 13, but the structure of Section 525 in relation to Section 521, legislative history, and even Plaintiffs' arguments cut against this claim. *See* H.R. Conf. Rep. No. 96-842, at 78–79 ("State usury ceilings on all loans made by Federally insured depository institutions . . . will be permanently preempted, subject to the right of affected states to override [preemption] at any time."); Doc. 24 at 19-20 (arguing DIDMCA followed *Marquette*, which addressed loans made by out-of-state banks). The legislative history Plaintiffs cite, Doc. 24 at 13, illustrates that legislators were concerned with their own in-state banks competing with national banks through interest exportation (subject to state opt-outs).

Fed. Reg. 44146, 44148 n. 18; *see also*, Act of July 1, 1981, § 1, 1981 Colo. Sess. Laws 400 (repealed 1994). Today, Iowa and Puerto Rico remain opted out of Section 521 and Colorado will join them effective July 1, 2024. *See* Act of Apr. 30, 1980, § 32, 1980 Iowa Acts 547–48; and P.R. LAWS ANN., tit. 10, § 998*l* (1980).

D. *Plaintiffs cannot meet their high burden of proving Colorado's Opt-Out is preempted*

i. Plaintiffs' reading of "made in" contravenes the federalism principles at the core of DIDMCA's opt-out

DIDMCA's passage represented a sea change in the Nation's long-standing tradition of state-imposed rate limits. *See*, Response Sec. I(B), *supra*. In response to double-digit interest rates and high inflation, Congress passed DIDMCA, preempting state rate caps so state-chartered banks could export the higher rates permitted by the bank's home state. Importantly however, Congress provided an avenue for the States to opt out of DIDMCA's preemption in Section 525. When viewed in the context of States' extensive and historically rooted usury restrictions, Colorado's Opt-Out represents a straightforward return to the status quo ante.

Eschewing the federalism principles at the core of Section 525, Plaintiffs ask this Court to fashion—from whole cloth—a new federal test for determining where a loan is made, drawing on dicta from *Marquette*. *See Petrella v. Brownback*, 787 F.3d 1242, 1268 (10th Cir. 2015) ("it is manifestly not the province of a federal court to manufacture from whole cloth a novel set of rights that would upend a carefully crafted and comprehensive [statutory regime]."). The thrust of Plaintiffs' request is

that this Court should treat Section 525 as coextensive with the NBA—notwithstanding the significant daylight between the statutes' text and structure—and apply *Marquette's* definition of "located" to DIDMCA's use of "made in." But Congress is presumed to know existing law when legislating. *Kenney v. Helix TCS, Inc.*, 939 F.3d 1106, 1110 (10th Cir. 2019). If Congress wanted the opt-out in Section 525 to use *Marquette's* location test, it would have said so. Instead, Section 525 focuses on where the loan is "made," making a physical location framework conspicuous by its absence.

ii. Colorado's Opt-Out does not exceed the scope of Section 525

To create a facial conflict, Plaintiffs cite to section 5-1-201 of Colorado's Uniform Consumer Credit Code ("UCCC"), which provides that the UCCC applies to consumer credit transactions[4] made in this state. Colorado's Opt-Out however didn't reference section 5-1-201 or suggest that it intended to expand the scope of Colorado's Opt-Out beyond that authorized in Section 525. Similarly, the UCCC's definition of "consumer credit transaction" does not incorporate section 5-1-201 or otherwise reflect Colorado's intent to stray from the scope of Section 525.

To confirm this point, the Administrator has issued an administrative interpretation. Exhibit A, Fulford Decl. at ¶ 4. The Administrator publicly binds herself to the interpretation, stating that the Opt-Out applies only to those

[4] An umbrella term defined in the UCCC to include consumer credit sales, consumer loans, and consumer leases. COL. REV. STAT. § 5-1-301(12).

transactions that DIDMCA authorizes. *Id.* The Administrator's interpretation has great relevance here because the Court may properly rely on it to conclude that the conflict Plaintiffs identify does not exist. *E.g., Ward v. Rock Against Racism*, 491 U.S. 781, 795–96 (1989) (in First Amendment challenge, "administrative interpretation and implementation of a regulation are, of course, highly relevant to our analysis, for in evaluating a facial challenge to a state law, a federal court must . . . consider any limiting construction that a state court or enforcement agency has proffered"); *Quik Payday, Inc. v. Stork*, 549 F.3d 1302, 1308 (10th Cir. 2008) (adopting administrative interpretation and denying Dormant Commerce Clause challenge to state consumer lending laws).

iii. *The FDIC's historical interpretation of DIDMCA supports Defendants' view on the effect of a state's Section 525 opt-out*

The Federal Deposit Insurance Corporation ("FDIC") is a federal agency and the "primary regulator of . . . federally insured, state-chartered banks". *Sawyer v. Bill Me Later, Inc.*, 23 F. Supp. 3d 1359, 1366–67 (D. Utah 2014). The FDIC may issue regulations implementing the Federal Deposit Insurance Act ("FDIA"). 12 U.S.C. § 1831g(b). In 2020, the FDIC published a final rule that explicitly disclaimed Plaintiffs' proposed test. 85 Fed. Reg. 44146, 44147–48 and 44153 (July 22, 2020).

The FDIC stated that its interpretive letters on bank location patterned after interpretations of the NBA are inapplicable to loans made in an opt-out state. *Id.* at 44153. The FDIC specifically noted that General Counsel Opinion Number 11, on which Plaintiffs rely, would not apply if a state opted out. *Id.* Instead, the FDIC stated

that "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." *Id.*

The FDIC has stated that "[t]he determination of where a loan is made should be based upon an analysis of the facts surrounding the extension of credit." FDIC Interpretive Letter, 1988 WL 583093, at *2 (1988). Plaintiffs cite the FDIC's 1988 letter for the proposition that Section 525 necessitates a uniform federal definition of where a loan is made, omitting that the FDIC rejected applying the bank location test from Section 521 to interpreting where the loan is made for purposes of Section 525. What Plaintiffs describe as "federal law," however, is untethered from the statute and is inapposite—the Court would break new ground by adopting it.

iv. *The Plain Meaning of "Made In" in Section 525 Includes the Borrower's Physical Location*

This Court need not determine the meaning of "made in" in Section 525 because it lacks a full factual record before it to make such a determination.[5] But Plaintiffs are not likely to prevail on the merits because the test they advocate violates the plain meaning of the text of Section 525 and is inconsistent with federal court decisions. The plain meaning of the textual phrase "made in any state" or "made in such State" in Section 525 includes a focus on the location of the borrower. For example, Black's Law Dictionary's definition of "Make" includes "delivering."

[5] Should this Court accept Plaintiffs' invitation to convert their Motion to a summary judgment motion—Doc. 24 at n. 5—Defendants request additional briefing.

BLACK'S LAW DICTIONARY (11th ed. 2019) ("To legally perform, as by executing, signing, or delivering (a document) <to make a contract>."). Plaintiffs' interpretation of the banks' location focuses too narrowly on "made" and reads out that "made" modifies "in [such] state" from the text of Section 525. Interpreting "made in the state" to mean the borrower's residence effectuates Section 525.

The Tenth Circuit, interpreting federal 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. *Quik Payday, Inc. v. Stork*, 549 F.3d 1302, 1308 (10th Cir. 2008); *accord* C.R.S. § 5-1-201(2) ("Notwithstanding paragraph (b) of subsection (1) of this section, unless made subject to this code by agreement of the parties, a consumer credit transaction is not made in this state if a resident of this state enters into the transaction while physically present in another state."). Because Colorado opted out under Section 525, Colorado law applies to loans made to borrowers physically present in Colorado.

E. *The Dormant Commerce Clause does not apply when Congress acts and a nondiscriminatory local law is beneficial*.

Congress passed Section 525 authorizing states to opt out and, because it acted, the dormant commerce clause does not apply. "Once Congress acts, courts are not free to review state taxes or other regulations under the dormant Commerce Clause." *Nw. Airlines, Inc. v. County of Kent, Mich.*, 510 U.S. 355, 374 n.20 (1994). "When Congress has struck the balance it deems appropriate, the courts are no longer needed to prevent States from burdening commerce, and it matters not that the

courts would invalidate the state tax or regulation under the Commerce Clause in the absence of congressional action." *Id.* Congress struck this balance for state-chartered banks. It is irrelevant that Congress treated national banks differently under the NBA.

Plaintiffs' claims also fail because the Opt-Out is not discriminatory towards interstate commerce. State laws only "offend the Commerce Clause when they seek to build up domestic commerce through burdens upon the industry and business of other States, regardless of whether Congress has spoken." *Nat'l Pork Producers Council v. Ross*, 598 U.S. 356, 369 (2023). However, "absent discrimination, a State may exclude from its territory, or prohibit the sale therein of any articles which, in its judgment . . . are prejudicial to the interests of its citizens." *Id.* If a state law does not discriminate, plaintiffs must show that the burden on interstate commerce is "clearly excessive" in relation to the local putative benefits. *Id.* at 377.

Plaintiffs do not make this showing, only discussing the dormant commerce clause in a footnote. Doc. 24 at 17, n. 4. Plaintiffs' Complaint alleges that Colorado's Opt-Out creates "inconsistent obligations" that burden commerce in excess of the local putative benefits Doc. 1 at ¶ 85. Plaintiffs do not assert that it is discriminatory to interstate commerce nor could they. Colorado's Opt-Out applies its interest rates equally to in-state and out-of-state banks for loans made in Colorado. That national banks are permitted to lend at higher rates is a result of Congress's action, not Colorado's.

Because Plaintiffs fail to prove that the Opt-Out violates the "very core" of the dormant commerce clause, they have a substantial burden under the balancing test. They must prove that the burdens on interstate commerce are "clearly excessive" of the Opt-Out's benefits. Plaintiffs however put forth no evidence of substantial burden, do not discuss the benefits[6], and do not engage in a balancing analysis:

> any balancing approach . . . requires evidence. It is impossible to tell whether a burden on interstate commerce is clearly excessive in relation to the putative local benefits without understanding the magnitude of both burdens and benefits. Exact figures are not essential . . . but it takes more than lawyers' talk to condemn a statute . . . .

Rocky Mountain Ass'n of Recruiters v. Moss, 541 F. Supp. 3d 1247, 1256 (D. Colo. 2021).

Finally, Plaintiffs reliance on *Brown-Forman* is misplaced. That case dealt with a discriminatory law—driven by economic protectionism—that attempted to lower prices in New York at the expense of other states. *Brown-Forman*, 476 U.S. at 580. Here, Colorado's Opt-Out is driven by consumer protection and is nondiscriminatory. It would have the same effect on in-state and out-of-state banks and apply the same rate cap to both.

---

[6] The Opt-Out's benefits are substantial in that it protects consumers against predatory lending. As noted in the Introduction, *infra*, Coloradans have faced lenders imposing rates up to 199%. After the Opt-Out however, lenders have no basis for charging predatory rates and doing so would be a clear violation of the law.

E. *Plaintiffs cannot use the Supremacy Clause to graft a private right of action for preemption onto DIDMCA*

Plaintiffs' first claim for relief seeks preemption under DIDMCA and the Supremacy Clause. However, the Supreme Court has rejected efforts to use the Supremacy Clause to "graft a private right of action for preemption" onto federal statutes without a private right of action. *Armstrong v. Exceptional Child Center., Inc.*, 575 U.S. 320, 324–25 (2015). In *Armstrong*, the Court held that the Supremacy Clause merely "creates a rule of decision: Courts . . . must not give effect to state laws that conflict with federal laws." *Id.* at 324. Further, "the Supremacy Clause is not the source of any federal rights, and certainly does not create a cause of action." *Id.* at 324-25 (cleaned up).

Plaintiffs' claim is also precluded in equity. "The power of federal courts of equity to enjoin unlawful executive action is subject to express and implied statutory limitations" and "courts of equity can no more disregard statutory and constitutional requirements and provisions than can courts of law." *Id.* at 327-28. Plaintiffs "cannot, by invoking [the court's] equitable powers, circumvent Congress's exclusion of private enforcement" because private enforcement creates the "risk of inconsistent interpretations and misincentives. . . ." *Id.* at 328–29.

Congress intended to foreclose private enforcement here, as it did in *Smith v. Hickenlooper*, 164 F. Supp. 3d 1286 (D. Colo. 2016) under the Controlled Substances Act ("CSA" or "Act"). The *Smith* court held that the CSA did not create a private right of action. *Id.* at 1290-93. There was "nothing in the CSA which expressly permits

private enforcement of the Act's provisions" and the CSA "implicitly precludes private enforcement" because "enforcement of the Act is expressly delegated to the Attorney General . . . with criminal liability being the principal enforcement mechanism." *Id.* This structure, combined with the "judgment-laded standard" that "confers almost complete discretion on the Attorney General", precluded a private right of action. *Id.* at 1293*; see also Allco Renewable Energy Ltd. v. Massachusetts Electric Co.*, 875 F.3d 64, 70 (1st Cir. 2017) (Public Utility Regulatory Practices Act only enforcement mechanisms expressly contemplated).

The FDIA expressly and impliedly precludes private enforcement actions, primarily vesting authority with the FDIC. *See, e.g.,* 12 U.S.C. § 1818(a) (termination of status); 12 U.S.C. § 1818(b) (cease and desist orders); 12 U.S.C. § 1818(e) (removal and prohibition orders). Thus, the FDIC is vested with substantial supervision and enforcement powers that are limited to the FDIC. Private rights of action are severely circumscribed, and limited to specific and unique circumstances, such as private rights of actions by consumers to recover excess interest. 12 U.S.C. § 1831d(b).[7] These exceptions are expressly authorized by Congress, and indeed, Congress even expressly *prohibited* private actions in some statutes. *See* 12 U.S.C. §§ 1831g(c)–(d) (limiting enforcement of contracts between state-charted banks and vendors to the FDIC and expressly prohibiting private actions). This structure makes sense because

[7] Notably, this section authorizes actions by consumers in states who have opted in to 12 U.S.C. § 1831d(b) when state-chartered bank charge excess interest. It does not authorize a private litigant to sue a state who has chosen to opt out.

the FDIA is a complex statute with extensive compliance requirements. Its regulation and enforcement is "centralized" with the FDIC, and gives the FDIC substantial authority and discretion, so state banks are not subject to the "risk of inconsistent interpretations and misincentives" from private litigants.

F. Plaintiffs lack standing and their claims are not ripe

For standing to exist, a plaintiff must prove they have "suffered an injury . . . fairly traceable to the challenged conduct . . . that is likely to be redressed by a favorable judicial decision." *Spokeo, Inc. v. Robins*, 578 U.S. 330, 338 (2016). To establish injury in fact, the plaintiff must show that they suffered "an invasion of a legally protected interest" that is "concrete and particularized" and "actual or imminent[.]" *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). The touchstone of this inquiry is whether a plaintiff suffers concrete harm: "no concrete harm, no standing." *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2200 (2021). Similarly, a case is not ripe where the harm asserted has not yet matured sufficiently to warrant judicial intervention. *Morgan v. McCotter*, 365 F.3d 882, 890 (10th Cir. 2004).

In a narrow category of cases, plaintiffs fearing enforcement of a challenged law may seek pre-enforcement review, as Plaintiffs do here. *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158-59 (2014). To preserve the concrete harm requirement however, pre-enforcement challenges are limited to cases where enforcement is "certainly impending, or there is a substantial risk that the harm will occur." *Id.* at 158. To maintain a pre-enforcement challenge, a plaintiff "must typically

demonstrate (1) an intention to engage in conduct arguably affected with a constitutional interest but proscribed by the challenged statute, and (2) that there exists a credible threat of prosecution thereunder." *Colo. Outfitters Ass'n v. Hickenlooper*, 823 F.3d 537, 545 (10th Cir. 2016) (cleaned up).

Plaintiffs do not challenge Colorado's *ability* to opt out via Section 525. Doc. 24 at 13 (acknowledging that Section 525 authorizes states to opt out). Rather, Plaintiffs claim that Colorado *exceeded* its authority by defining when a loan is "made in" Colorado more broadly than they believe Congress intended. Doc. 24 at 17–24. To show standing, Plaintiffs must therefore prove that their claimed injuries are "fairly traceable" to the loans Colorado seeks to regulate by exceeding what Plaintiffs believe DIDMCA permits. *Spokeo*, 578 U.S. at 338. Plaintiffs have not met that burden.

Plaintiffs allege they will suffer three injuries if Colorado's Opt-Out is permitted to take effect: (1) compliance costs; (2) losing customer and client goodwill; and (3) losing revenue. Doc. 24 at 24-25. But Plaintiffs may suffer those losses even if Colorado's Opt-Out comports with DIDMCA because banks will always incur compliance costs when the law changes, relationships will strain where impacted, and some prior sources of revenue may be prohibited.

Simply put, Plaintiffs' alleged harms are too conjectural to confer standing in a pre-enforcement context because determining where a loan is "made," and even what rate applies, is necessarily fact intensive, and this Court cannot determine whether Colorado has exceeded Section 525's opt-out until it has an actual loan to

analyze. To illustrate, Plaintiffs claim Colorado's rate cap is 21%. Doc. 24 at 16. But Colorado's rate caps on closed-end loans are not so limited. The UCCC permits 36% on the first $1000 financed and the rate cap blends, permitting rates above 21% for loan amounts well-above $1000, depending on the loan term. C.R.S. § 5-2-201(2) (for example, Colorado would permit a 12-month closed-end loan of: $1,000 at 36%, $2,800 above 29%, and $8,950 above 21%). Plaintiffs therefore cannot claim that *every* loan made with a rate greater than 21% is prohibited because some of these loans will be legal even after the Opt-Out is effective. By ignoring the UCCC's blended rates, Plaintiffs overstate the amount of lending that would be affected by the Opt-Out.

As Plaintiffs acknowledge, banks tailor the terms of every loan to an individual consumer's credit profile. Doc. 24 at 16; Doc. 1 at ¶ 63. Many consumers will have credit profiles that make it economically practical to lend to them at a rate below Colorado's caps even absent the Opt-Out. Some consumers will have such risky credit profiles that Plaintiffs will not loan to them even if they could export higher rates. The 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 DIDMCA's definition of "made in" but are nonetheless subject to Colorado's caps by the Opt-Out. Even assuming there is daylight between DIDMCA and the Opt-Out, which Defendants do not concede, the number of loans affected could be a handful of loans, or none. Plaintiffs have not even attempted to quantify how many loans are affected by the Opt-Out and, therefore, Plaintiffs have failed to establish a

concrete harm sufficient to confer standing, or that their asserted harm has matured sufficiently to warrant judicial intervention.

II. Irreparable harm is absent here.

To prevail, Plaintiffs must establish that they will suffer irreparable harm that is both certain and great, not merely serious or substantial. *Prairie Band of Potawatomi Indians v. Pierce*, 253 F.3d 1234, 1250 (10th Cir. 2001). Plaintiffs who fail to demonstrate a substantial likelihood of success are not entitled to a presumption of irreparable harm. *See Schrier v. Univ. of Colorado*, 427 F.3d 1253, 1266 (10th Cir. 2005).

As discussed in Section I(F), *supra*, Plaintiffs allege they will suffer irreparable harm in the form of compliance costs, loss of goodwill, and lost revenue. *See* Doc. 24 at 24-25. But many of those "harms" occur from Colorado's Opt-Out within the scope of Section 525. Plaintiffs have done nothing to show the degree to which these alleged harms are attributable to what they claim is an impermissible expansion of the DIDMCA opt-out. Consequently, they have failed to establish that these irreparable harms are both "certain and great" rather than "merely serious or substantial." *Potawatomi Indians,* 253 F.3d at 1250.

III. The balance of equities and public interest weigh heavily in Colorado's favor.

The last two factors, the balance of equities and the public interest, "merge when the Government is the opposing party." *Nken*, 556 U.S. at 435 (2009). Failure to establish these merged factors is sufficient to defeat Plaintiffs' requested injunctive

relief. *See Winter*, 555 U.S. at 23. Where a party seeks a disfavored injunction, they face a higher burden of proof on the balance-of-harms test. *Free the Nipple-Fort Collins*, 916 F.3d at 797.

Here, Plaintiffs must make a "strong showing" that the balance-of-harms test tilts in their favor because the injunction would grant Plaintiffs all the relief they could expect from at trial, and the effect of a preliminary injunction cannot be undone if should they lose at trial. If this Court enjoins Colorado's Opt-Out, Plaintiffs will be free to enter into contracts that include terms prohibited under the UCCC. Even if Plaintiffs later lose, Coloradans will have already paid interest at prohibited rates. Some Coloradans could default on the prohibited loans, as well as other legal loans, because of the added financial strain of unlawful rates. A judgment at trial in Defendants' favor would do nothing to remedy this harm.

Finally, Plaintiffs' requested relief would stymie the will of Coloradans, as expressed through its elected representatives and the Governor, who are in a better position than Plaintiffs or this Court to determine the public interest. *See Fish v. Kobach*, 840 F.3d 710, 755 (10th Cir. 2016) ("democratically elected representatives are in a better position than this Court to determine the public interest"). That is doubly true here, where the only harms Plaintiffs identify stem from their inability to offer loans at rates that the General Assembly determined are not in the interests of Coloradans.

WHEREFORE, Defendants respectfully request that the Court deny Plaintiffs' Motion.

Dated this 23rd day of April, 2024.

PHILIP J. WEISER
Attorney General

/s/ *Philip Sparr*

PHILIP SPARR, 40053*
NIKOLAI FRANT, 38716*
KEVIN J. BURNS, 44527*
Consumer Credit Enforcement Unit
Consumer Protection Section
Attorneys for Defendant(s)
Ralph L. Carr Colorado Judicial Center
1300 Broadway, 6th Floor
Denver, CO 80203
Telephone: 720-508-6245
philip.sparr@coag.gov

*Counsel of Record for Defendants

TYPE-VOLUME COMPLIANCE STATEMENT

I hereby certify that the foregoing pleading complies with the type-volume limitations set forth in Judge Domenico's Practice Standard III(A)(2).

/s/ *Philip Sparr*

CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of April, 2024, I electronically filed the foregoing with the Clerk of the Court using the CM/EFC system which will send notification of such filing to the following email Addresses:

Leslie B. Arffa
Sullivan & Cromwell
125 Broad Street
New York, NY 10004
202-956-7567
arffal@sullcrom.com

Tyler J. Bourke
Davis Wright Tremaine LLP
920 Fifth Avenue
Suite 3300
Seattle, WA 98104
206-757-8051
tylerbourke@dwt.com

Chava Brandriss
Davis Wright Tremaine LLP
1301 K Street NW
Suite 500 East
Washington, DC 20005
202-973-4258
202-973-4458 (fax)
chavabrandriss@dwt.com

Leah E. Capritta
Holland & Knight LLP
1801 California Street
Suite 5000
Denver, CO 80202
303-974-6646
303-974-6659 (fax)
Leah.Capritta@hklaw.com

David Morris Gossett
Davis Wright Tremaine LLP
1301 K Street NW
Suite 500 East
Washington, DC 20005
202-262-4156
davidgossett@dwt.com

Edwin G. Perlmutter
Holland & Knight LLP
1801 California Street
Suite 5000
Denver, CO 80202
303-974-6660
ed.perlmutter@hklaw.com

Morgan L. Ratner
Sullivan & Cromwell LLP
1700 New York Avenue NW
Suite 700
Washington, DC 20006-5215
202-956-7522
ratnerm@sullcrom.com

Matthew Alexander Schwartz
Sullivan & Cromwell LLP
125 Broad Street
New York, NY 10004
212-558-4000
schwartzmatthew@sullcrom.com

Christopher Swift
Davis Wright Tremaine LLP
560 SW 10th Avenue
Suite 700
Portland, OR 97205
503-778-5505
chrisswift@dwt.com

Christopher M. Walczyszyn
Davis Wright Tremaine LLP
1251 Avenue of the Americas
21st Floor
New York, NY 10020
212-402-4081
chriswalczyszyn@dwt.com

/s/ Mellisa Lambeth
Mellisa Lambeth