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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

EUGENE DIVISION

NATIONAL ASSOCIATION OF INDUSTRIAL BANKERS, ONLINE LENDERS ALLIANCE and AMERICAN FINANCIAL SERVICES ASSOCIATION, Plaintiffs, v. SEAN O'DAY, In his official capacity as Director of Oregon Department of Consumer and Business Services, Defendant.	Case No. 6:26-cv-01201-AA DEFENDANT'S OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

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I. INTRODUCTION

Banking and consumer protection are core areas of state governments' historic police powers. For that reason, when Congress enacted a law allowing state-chartered banks to override the interest-rate limits of other states, Congress also included a provision expressly allowing affected states to opt out and reassert their traditional authority over interest rates. Oregon has exercised its right to opt out by enacting House Bill 4116, in order to protect Oregon borrowers from predatory high-interest lending practices. Despite that opt-out, Plaintiffs contend that Oregon can never *fully* opt out, and that Oregon must continue to allow banks chartered in other states to override Oregon's laws. Plaintiffs are wrong.

Plaintiffs' Supremacy Clause claim fails because federal law does not preempt Oregon from reasserting its authority to regulate loans made to Oregonians. To the contrary, Congress expressly authorized affected states to opt out of the interest-rate exportation scheme at issue here. Oregon has opted out. An opt-out is an opt-out. Plaintiffs' argument to the contrary defies the text, context, and purpose of federal law. Plaintiffs' dormant Commerce Clause claim fails because House Bill 4116 does not regulate any commerce that occurs wholly outside of Oregon and therefore is not an impermissible extraterritorial regulation.

For those reasons, as further explained below, Plaintiffs are not likely to succeed on the merits of either of their claims. Moreover, Plaintiffs cannot establish that they will suffer an imminent and irreparable harm warranting the extreme measure of a preliminary injunction. As described below, the typical timeline between the referral of a consumer financial lender to the enforcement unit and the commencement of an enforcement action is several months, and DCBS has no consumer finance related enforcement actions on the immediate horizon. Finally, the equities and the State's interest in protecting its residents from predatory loans far outweighs any harm the risk of enforcement has on Plaintiffs. Plaintiffs' requested injunction—which would prevent Oregon from fully exercising its express right to opt out, reasserting its traditional authority, and protecting Oregonians from predatory lending practices—should be denied.

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II. BACKGROUND

A. The National Bank Act of 1864 (NBA)

The United States has a dual banking system, consisting of "parallel federal and state banking systems." *Cantero v. Bank of Am., N.A.*, 602 U.S. 205, 209 (2024). A bank may opt in to either the federal system or the state system by obtaining a federal or state charter. *Id.* at 210. A federally chartered bank operates under federal supervision, while a state-chartered bank operates primarily under state regulation. *Lacewell v. Off. of Comptroller of Currency*, 999 F.3d 130, 135 (2d Cir. 2021); *NAIB v. Weiser*, 159 F.4th 694, 699 (10th Cir. 2025), *vacated, en banc reh'g granted*, 171 F.4th 1203 (10th Cir. 2026).

Before the establishment of a federal banking system, banking was "squarely within the ambit of the states' . . . powers." *Greenwood Tr. Co. v. Massachusetts*, 971 F.2d 818, 828 (1st Cir. 1992) (citations omitted). The National Bank Act of 1864 (NBA) established a national banking system, which exists in tandem with the state banking system. *See* 12 U.S.C. § 21 et seq.

Section 85 of the NBA allows national banks to charge interest on loans at a rate up to the greater of (1) 1% above "the discount rate on ninety-day commercial paper in effect at the Federal reserve bank in the Federal reserve district where the bank is located" or (2) the rate allowed by the laws of the state where the bank is located. 12 U.S.C. § 85. Section 85 preempts state law, thus conferring two benefits to national banks. First, it allows a national bank to override state interest-rate caps through access to the national "discount-plus-one rate." *Weiser*, 159 F.4th at 700. Second, Section 85 allows a national bank to "export" the interest rates permitted by the state "where the bank is located" to out-of-state borrowers, even if the rate charged exceeds the rate permitted by the borrower's state. *Id.; Marquette Nat'l Bank of Minneapolis v. First of Omaha Serv. Corp.*, 439 U.S. 299, 300 (1978).

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B. The Depository Institutions Deregulation and Monetary Control Act of 1980 (DIDMCA)

In 1980, Congress enacted the Depository Institutions Deregulation and Monetary Control Act (DIDMCA). *See* 12 U.S.C. § 1831d. Section 521 of DIDMCA, codified in 12 U.S.C. § 1831d, extends the national interest-rate standard to state banks. Using language drawn from Section 85 of the NBA, Section 521 of DIDMCA permits a state-chartered bank to charge interest on loans at a rate up to the greater of (1) the discount-plus-one rate or (2) the rate allowed by the laws of the state where the bank is located. 12 U.S.C. § 1831d(a).[1] This standard preempts state law if the interest rate under Section 521 "exceeds the rate" that a state bank "would be permitted to charge in the absence of this subsection." 12 U.S.C. § 1831d(a).

But unlike the NBA, DIDMCA includes an opt-out provision for states to assert control over interest-rate regulation. The opt-out provision appears in Section 525 of DIDMCA, which is codified in the Effective Date note to 12 U.S.C. § 1831d. Under Section 525's opt-out provision, Section 521 will not apply to loans made in a state if that state adopts a law that "states explicitly and by its terms that such State does not want [Section 521] to apply with respect to loans made in such State." 12 U.S.C. § 1831d note (Effective Date).[2]

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[1] 12 U.S.C. § 1831d(a) provides in full:

> In order to prevent discrimination against State-chartered insured depository institutions, including insured savings banks, or insured branches of foreign banks with respect to interest rates, if the applicable rate prescribed in this subsection exceeds the rate such State bank or insured branch of a foreign bank would be permitted to charge in the absence of this subsection, such State bank or such insured branch of a foreign bank may, notwithstanding any State constitution or statute which is hereby preempted for the purposes of this section, take, receive, reserve, and charge on any loan or discount made, or upon any note, bill of exchange, or other evidence of debt, interest at a rate of not more than 1 per centum in excess of the discount rate on ninety-day commercial paper in effect at the Federal Reserve bank in the Federal Reserve district where such State bank or such insured branch of a foreign bank is located or at the rate allowed by the laws of the State, territory, or district where the bank is located, whichever may be greater.

[2] 12 U.S.C. § 1831d note (Effective Date) provides in full:

> Section 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

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Thus, if a state has not opted out, an out-of-state state-chartered bank may either charge the discount-plus-one-percent rate or export the interest rate allowed in the bank's home state, even if such rate exceeds the rate allowed by the state where the loan is made. But if a state opts out, then any loan "made in" the opt-out state is subject to that state's interest rate cap, even if that cap is lower than the rate that would be allowed under Section 521. *See* 12 U.S.C. § 1831d note (Effective Date); *Weiser*, 159 F.4th at 701–02.

C. Oregon's House Bill 4116 (2026)

In 2026, the Oregon Legislature enacted House Bill 4116 (HB 4116). Two subsections of that law are relevant here.

Section 1(2) of HB 4116 expressly opts out of Section 521 of DIDMCA and declares that Oregon does not want that provision to apply to consumer finance loans made in Oregon. *See* HB 4116 § 1(2) ("The Legislative Assembly hereby declares that this state does not want any of the amendments set forth in section 521 of the Depository Institutions Deregulation and Monetary Control Act of 1980 (P.L. 96-221, 94 Stat. 132) to apply to consumer finance loans made in this state."). Oregon has thus exercised its right to opt out of Section 521, as conferred under the opt-out provision of Section 525.

Section 1(3) of HB 4116 provides that certain consumer finance loans are subject to the Oregon Consumer Finance Act (OCFA), which is codified in ORS chapter 725. The OCFA imposes certain limitations on consumer finance loans, including a maximum interest rate of 36 percent expressed as an annualized percentage rate. ORS 725.340(1)(a)(A). A lender is

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which such State adopts a law or certifies that the voters of such State have voted in favor of any provision, constitutional or otherwise, 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 or such certification is made 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 or such certification is made, see section 525 of Pub. L. 96–221, set out as an Effective Date of 1980 Amendment note under section 1785 of this title.

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"subject to" that interest rate limit if the lender makes a loan that falls within the terms of Section 1(3):

> (3) A person is subject to this chapter [ORS chapter 725] if the person engages in the business of making consumer finance loans of $50,000 or less or if the person acts as an agent, broker or facilitator for a person that engages in the business of making consumer finance loans of $50,000 or less to a consumer who resides in or maintains a domicile in this state and the consumer:
>
> (a) Negotiates, agrees to the terms of or enters into or executes a contract for a consumer finance loan of $50,000 or less in person, by mail, by telephone or via the Internet while the consumer is physically present in this state; or
>
> (b) Makes a payment on a consumer finance loan of $50,000 or less in which:
>
> (A) A person debits an account that the consumer holds in this state at a financial institution or trust company, as those terms are defined in ORS 706.008; or
>
> (B) The consumer makes the payment by means of a negotiable instrument drawn on a financial institution or trust company, as those terms are defined in ORS 706.008.

HB 4116 § 1(3).

Thus, a person is subject to the OCFA, including the 36% interest rate limit, if the person makes a consumer finance loan of $50,000 or less to an Oregon resident, and the Oregon resident borrower either (a) negotiates or enters into the loan while "physically present in [Oregon]" or (b) makes a payment on the loan by "debit[ing] an account that the consumer holds in this state at a financial institution or trust company" or "by means of a negotiable instrument drawn on a financial institution or trust company." HB 4116 § 1(3)(a), (b)(A)–(B).

D. Plaintiffs' Complaint and Motion for Preliminary Injunction

Plaintiffs' complaint claims that Section 1(3) of HB 4116 is unconstitutional as applied to state-chartered banks. Compl. ¶ 1, ECF No. 1. Plaintiffs assert two claims.

First, Plaintiffs claim that Section 1(3) is preempted by federal law under the Supremacy Clause. Compl. ¶¶ 68–77, ECF No. 1. Although Oregon has opted out of DIDMCA Section 521, Plaintiffs claim that Section 521 continues to allow out-of-state banks to override Oregon's

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interest rate limits and preempts Oregon's attempt to regulate interest rates on loans made to Oregon residents. Compl. ¶¶ 71–73, 77, ECF No. 1. Plaintiffs contend that, so long as the bank itself "performs its loan-making functions" in another state, then the loan is "made in" that state, and not in Oregon, and therefore Oregon can never opt out of letting those banks export their home states' interest rates into Oregon. Compl. ¶¶ 72–73, ECF No. 1.

Second, Plaintiffs claim that Section 1(3)(b) violates the dormant Commerce Clause. Compl. ¶¶ 78–83, ECF No. 1. Plaintiffs claim that, to the extent that subsection would apply to a situation where the Oregon resident borrower was not physically present in Oregon when the loan was initially made, the subsection impermissibly regulates commerce occurring wholly outside of Oregon's borders. Compl. ¶¶ 82–83, ECF No. 1.

Plaintiff's Motion for Preliminary Injunction seeks an injunction barring Defendant from enforcing Section 1(3) of HB 4116 "with respect to consumer finance loans of $50,000 or less made by out-of-state state banks in their home states." Pls.' Mot. for Prelim. Inj. (MPI) 39, ECF No. 15.

Plaintiffs also "move to 'advance trial on the merits and consolidate it with the hearing' on the preliminary injunction." MPI 8, ECF No. 15 (quoting Fed. R. Civ. P. 65(a)(2)).

III. LEGAL STANDARD

A preliminary injunction is "an extraordinary and drastic remedy, one that should not be granted unless the movant, *by a clear showing*, carries the burden of persuasion." *Lopez v. Brewer*, 680 F.3d 1068, 1072 (9th Cir. 2012) (quotation marks omitted) (citation omitted). To obtain a preliminary injunction, a plaintiff must establish that "(1) they are likely to succeed on the merits; (2) they are likely to suffer irreparable harm in the absence of preliminary relief; (3) the balance of equities tips in their favor; and (4) an injunction is in the public interest." *Short v. Brown*, 893 F.3d 671, 675 (9th Cir. 2018) (citing *Winter v. Nat. Res. Def. Council*, 555 U.S. 7, 20 (2008)). When the government is a party, courts consider the last two factors together,

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because the defendant's equities merge with the public interest. *See Nken v. Holder*, 556 U.S. 418, 435 (2009).

IV. ARGUMENT

Plaintiffs are not entitled to the extraordinary remedy of a preliminary injunction. They have not satisfied any of the four preliminary-injunction factors under *Winter*. First, Plaintiffs have not shown a likelihood of success on either of their claims. Plaintiffs' Supremacy Clause claim relies on a reading of DIDMCA that conflicts with its text, context, and purpose. Plaintiffs' dormant Commerce Clause claim fails because HB 4116 does not regulate any conduct that occurs wholly outside Oregon. Second, Plaintiffs have not shown that they are likely to suffer irreparable harm in the absence of an injunction. Any enforcement action would likely take several months before even the issuance of an initial notice order, let alone a final order of enforcement. As for the third and fourth factors, the equities and public interest strongly favor denial of the injunction. Plaintiffs' requested injunction would prevent Oregon from fully exercising its express right to opt out of DIDMCA, reasserting its traditional authority, and protecting Oregonians from predatory lending practices.

Further, Plaintiffs' requested injunction, which would apply to *all* out-of-state banks, is overbroad. If the Court were to enter any injunction, it should be limited to Plaintiffs and their members and limited to the specific subsection or subsections of HB 4116 that the Court concludes are unconstitutional.

Finally, Plaintiffs' one-sentence request to consolidate the preliminary injunction hearing with a trial on the merits should be denied. Consolidation at this early stage would severely prejudice Defendant's ability to fully present a defense.

A. Plaintiffs are unlikely to succeed on the merits of their claims.

1. HB 4116 does not violate the Supremacy Clause.

Plaintiffs claim that HB 4116, Section 1(3), is expressly preempted by Section 521 of DIDMCA. MPI 9, ECF No. 15. As explained below, it is not. Section 525 of DIDMCA

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expressly allows states to opt out of Section 521, and Oregon's HB 4116 is a valid exercise of that opt-out right.

Plaintiffs' arguments about this claim echo the reasoning of the district court opinion enjoining Colorado's opt-out law in *NAIB v. Weiser*. *See NAIB v. Weiser*, 737 F. Supp. 3d 1113 (D. Colo. 2024). Those arguments were addressed and rejected by the Tenth Circuit panel opinion in that case. *See Weiser*, 159 F.4th 694. Although the Tenth Circuit panel opinion has been vacated because of the pending en banc decision, this Court can still look to vacated decisions, as well as out-of-circuit decisions, as persuasive authority. *See Entler v. Gregoire*, 872 F.3d 1031, 1044 (9th Cir. 2017) ("[W]hile . . . there is no binding Ninth Circuit precedent, we may look to whatever decisional law is available, including relevant decisions of other circuits . . . ." (quotation marks omitted)); *Roe v. Anderson*, 134 F.3d 1400, 1404 (9th Cir. 1998) (concluding that a prior decision "remain[ed] viable as persuasive authority, notwithstanding the Supreme Court's vacatur"). And of course, no other decision of the district court or the Tenth Circuit in *Weiser* would bind this Court or limit this Court's ability to adopt the Tenth Circuit panel's reasoning as its own. *See Int'l Chem. Workers Union Council v. NLRB*, 467 F.3d 742, 748 n.3 (9th Cir. 2006) ("[O]ut-of-circuit authority . . . [is] not binding on us.").

Plaintiffs' arguments fail for the reasons explained by the Tenth Circuit panel and for the reasons further explained below.

a. Plaintiffs' narrow reading of the opt-out provision inverts the presumption against preemption.

The preemption doctrine is grounded in the Supremacy Clause of the Constitution, which provides that the laws of the United States "shall be the supreme Law of the Land . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const. art. VI, cl. 2. "Express preemption[] arises when the text of a federal statute explicitly manifests Congress's intent to displace state law." *See Valle del Sol Inc. v. Whiting*, 732 F.3d 1006, 1022 (9th Cir. 2013).

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"In considering the preemptive scope of a statute, congressional intent is the ultimate touchstone." *Miller v. C.H. Robinson Worldwide, Inc.*, 976 F.3d 1016, 1021 (9th Cir. 2020) (quotation marks omitted). Courts "primarily discern Congress's intent from the language of the pre-emption statute and the statutory framework surrounding it, but [courts] may also consult the structure and purpose of the statute as a whole." *Id.* (quotation marks omitted).

"The scope of a preemption clause is also tempered by the presumption that Congress does not intend to supplant state law, particularly in areas of traditional state regulation." *Id.* (quotation marks omitted). Courts "presume that Congress has not preempted the historic police powers of the States unless that was the clear and manifest purpose of Congress." *Id.* (quotation marks and alterations omitted).

Where, as here, "Congress has legislated in a field traditionally occupied by the States," the presumption against preemption "applies with particular force." *Altria Group, Inc. v. Good*, 555 U.S. 70, 77 (2008). Here, the federal law at issue concerns "two areas which are squarely within the ambit of the states' historic powers—banking and consumer protection." *Greenwood Tr. Co.*, 971 F.2d at 828 (citations omitted). *See also Ne. Bancorp, Inc. v. Bd. of Governors of Fed. Reserve Sys.*, 472 U.S. 159, 177 (1985) ("[B]anking and related financial activities are of profound local concern. . . . [O]ur country traditionally has favored widely dispersed control of banking." (quotation marks omitted)); *Valley Bank of Nev. v. Plus System, Inc.*, 914 F.2d 1186, 1196 (9th Cir. 1990) ("States have a legitimate interest in regulating banking."). Indeed, Congress itself recognized that DIDMCA risked encroaching on state government authority, and accordingly Congress included Section 525 to allow states to opt-out and reclaim their traditional role. Accordingly, the presumption against preemption applies with full force.

Further, "when the text of a pre-emption clause is susceptible of more than one plausible reading, courts ordinarily accept the reading that disfavors pre-emption." *Miller*, 976 F.3d at 1027 (quotation marks omitted). For example, in *Miller*, a federal statute preempted state law but also contained an express exception to the statute's preemptive scope. *Id.* at 1022 (citing 49

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U.S.C. § 14501(c)). While it was "possible" to construe the exception "narrowly," the Ninth Circuit "f[ou]nd it appropriate to interpret the [exception] broadly," given that "a narrower construction . . . would place a large body of state law beyond the reach of the exception." *Id.* at 1027–28. Here, similarly, Plaintiffs argue for a "narrow interpretation of the scope of [a state's] opt-out authority." MPI 21, ECF No. 15. Such a reading would turn the presumption against preemption on its head, and it would eviscerate the usefulness of the opt-out provision, as further explained below.

Moreover, even aside from the above principles disfavoring preemption, Congress's intent is clear. The plain text, context, and history of DIDMCA Sections 521 and 525 indicate that Congress did not intend to force states to import other states' rate limits. Instead, Section 525 allows a state to fully opt out of DIDMCA's rate-exportation scheme.

b. Plaintiffs' reading of DIDMCA defies the statute's text and purpose.

Oregon has exercised its right, under Section 525, to opt out of Section 521. HB 4116 § 1(2). Despite that opt-out, Plaintiffs argue that Oregon still must allow banks from every other state to export their interest rates into Oregon. Plaintiffs' argument conflicts with the plain meaning and context of DIDMCA's statutory language.

Under Section 521 of DIDMCA, if "any State constitution or statute" would otherwise limit "the [interest] rate . . . [a] State bank . . . would be permitted to charge," Section 521 allows that bank to charge the higher of two different rates: "a rate of not more than 1 per centum in excess of the discount rate on ninety-day commercial paper in effect at the Federal Reserve bank in the Federal Reserve district where such State bank . . . is located" or "the rate allowed by the laws of the State, territory, or district where the bank is located." 12 U.S.C. § 1831d(a). But Section 525 creates an exception: Section 521 does not apply to "loans made in any State" that has enacted a law saying that the state does not want Section 521 to apply to "loans made in such State." 12 U.S.C. § 1831d note (Effective Date).

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Plaintiffs contend that a state can opt out of Section 521 only with respect to "loans made in such State," and that "loans made in such State" refers only to loans made in the state where the bank is located—regardless of the location of the borrower. MPI 20, ECF No. 15. That reading conflicts with the plain meaning of the statute in multiple ways.

Most obviously, Plaintiffs' reading inserts words into the statute. Section 525 does not say that the opt-out applies only to loans made in the state where the bank is located. Instead, it says that a state may opt out with respect to "loans made in such State." 12 U.S.C. § 1831d note (Effective Date). The plain meaning of that phrase easily includes loans extended by a bank to borrowers in a state. *See NAIB v. Weiser*, 159 F.4th at 714 n.23 ("In plain parlance, if an individual asked, 'Does Bank ABC *make* loans *in* Colorado?' the natural understanding of the question posed is whether Bank ABC extended loans *to borrowers in* Colorado.").

Further, DIDMCA itself *does* use the phrase "the State . . . where the bank is located," in Section 521. 12 U.S.C. § 1831d(a). Section 521 allows a bank to charge interest "at the rate allowed by the laws of the State, territory, or district where the bank is located," if such rate is higher than "the rate such State bank . . . would be permitted to charge in the absence of [Section 521]." *Id.* Section 525, on the other hand, allows a state to opt out of this scheme with respect to "loans made in such State." 12 U.S.C. § 1831d note (Effective Date). Plaintiffs' reading would read those two distinct phrases, in the same statute, as identical in meaning. That reading is not tenable. "Where 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) (brackets and quotation marks omitted). As the Tenth Circuit noted in *Weiser*, "[t]he express reference to the bank's location in [Section 521] reinforces [the] view that 'loans made in such State' does not refer to only the lender's location. To hold otherwise would treat the express reference as meaningless." *Weiser*, 159 F.4th at 715–16.

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Despite the statute's use of two different phrases, Plaintiffs insist that "loans made in such State" must mean the same thing as loans made in the State "where the bank is located." MPI 20, ECF No. 15. Plaintiffs, echoing the district court opinion in *Weiser*, argue that "only the bank 'makes' a loan," and therefore the word "made" must be focused solely on the bank's location. MPI 20, ECF No. 15. As the Tenth Circuit noted, this argument "deviat[es] from the text" of the statute by "substitut[ing] 'make' for 'made.'" *Weiser*, 159 F.4th at 713. Plaintiffs' reading thus fails to "focus on the meaning of the word in the statute—'made.'" *Id.* "[I]n the past participle form, 'made' can function as either a participial verb *or* a participial adjective." *Id.* Plaintiffs "merely assume[] that 'made' function[s] as a passive participial verb, i.e., 'loans made [*by the bank*] in such State,' and cobble[] together extraneous words outside the statute's text to conclude that 'made in such State' refer[s] to only the lender's state." *Id.* That approach "place[s] an unwarranted focus on the lender by departing from the statute's text." *Id.* Instead, the Tenth Circuit concluded that '"made in such State'" is a "participial adjective phrase that modifies the word 'loans.'" *Id.* That reading "comports with the text of the statute as written, without any added or substituted words that [Plaintiffs] use[] to reach a different interpretation." *Id.* Further, given that "'made' refers to 'executed,'" and given that "an executed loan necessarily requires at least two parties—a lender and a borrower," the phrase "'loans made in such State' encompasses loans in which either the lender *or* the borrower is located in the opt-out state." *Id.* at 714.

Plaintiffs argue that if Congress had intended to put the focus on the borrower's location, or on where the loan is executed, then Congress could have done so expressly. MPI 23–26, ECF No. 15. But that argument also cuts the other way, given that the opt-out provision does not expressly focus on the bank's location, either. And again, Section 521 *does* expressly reference "the State . . . where the bank is located," while Section 525's opt-out provision conspicuously does not. 12 U.S.C. § 1831d(a); *id.* note (Effective Date).

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Attempting to read a reference to the bank's location into Section 525, Plaintiffs turn to other provisions of Title 12. Plaintiffs quote a passage from the *Weiser* district court opinion, listing provisions that purportedly indicate that the word "make" always puts the focus on the lender. MPI 22 n.6, ECF No. 15. The Tenth Circuit refuted the district court's arguments about each of those provisions in turn. *Weiser*, 159 F.4th at 718–20. As the court explained, many of those provisions, unlike Section 525, expressly refer to loans made "by" the lender, putting the focus on the lender and clearly turning the word "made" into a participial verb. *Id.* at 718; *contrast* 12 U.S.C. § 1831d note (Effective Date) ("loans made in such State"), *with* § 1828(o)(3) ("loan made *by an insured depository institution*" (emphasis added)), *and* § 2610 ("*by a lender* in connection with a . . . loan made *by it*" (emphasis added)), *and* § 4742(4) ("loan made *by a participating financial institution*" (emphasis added)). Other provisions expressly situate the lender as the subject and "make" or "making" as the verb. *Weiser*, 159 F.4th at 718–19 (citing 12 U.S.C. §§ 83(a), 143, 371(a), 1757(5), 1785(f)(1), 1831b(a)). The court's review of the statutes demonstrated that "various provisions use 'made' … in relation to only the borrower, in relation to only the lender, and in relation to both the borrower and the lender." *Id.* at 719–20. Given those varied uses of the word, the court "decline[d] to read a phantom reference to just the lender at every use of the word 'made.'" *Id.* at 720.

Plaintiffs further argue that the phrase "loans made in such State" refers only to a single state, and therefore it cannot encompass both the bank's and the borrower's location. MPI 21, ECF No. 15. The Tenth Circuit refuted this argument as well. As the court noted, "[t]he opt-out provision first discusses the application of [Section 521] 'to loans made in any State,' which ends once 'such State adopts a law' to opt out of [Section 521]." *Weiser*, 159 F.4th at 720 (quoting 12 U.S.C. § 1831d note (Effective Date)). "The opt-out provision then requires that the law 'states explicitly . . . that *such State* does not want this section to apply with respect to loans made in *such State*[.]'" *Id.* (quoting 12 U.S.C. § 1831d note (Effective Date)). "Used here, the word 'such' before the singular 'State' demonstrates that 'State' refers to a state that has opted

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out of [Section 521]; it does not cabin the opt-out state to only the lender's state." *Weiser*, 159 F.4th at 720–21.

Thus, the plain meaning of the opt-out provision, read in the context of DIDMCA, indicates that "loans made in such State" is not limited to the state where the bank is located, but can refer to the borrower's location as well. Section 525 thus allows a state like Oregon to opt out of DIDMCA with respect to loans made by banks located in Oregon *or* made to borrowers in Oregon.

c. Plaintiffs' argument for a partial opt-out defeats the purpose of DIDMCA's opt-out provision.

In addition to the textual problems noted above, Plaintiffs' narrow reading of the opt-out provision conflicts with the purpose of that provision and would all but destroy its usefulness to an opt-out state. That is because, under Plaintiffs' reading, a state could *never* fully opt out of the interest rate exportation scheme created by Section 521. In contrast, reading "loans made in such State" to encompass both the bank's and the borrower's state effectuates Congress's purpose of allowing affected states to fully opt out and reassert their traditional authority to regulate interest rates.

Section 521 allows a bank in one state to override the interest rate limit of another state by exporting the interest rates permitted in the bank's home state. As the Tenth Circuit noted, the interest rate limits allowed by Section 521 (the federal discount-plus-one rate or the rate allowed by the state where the bank is located) preempt state law only if the higher of those two rates "exceeds the rate such State bank . . . would be permitted to charge in the absence of [Section 521]." 12 U.S.C. § 1831d(a); *see Weiser*, 159 F.4th at 716.[3] "The plain language of

[3] *See also Greenwood Tr. Co.*, 971 F.2d at 827 (explaining that Section 521 contemplates three different potential interest rate limits: "(1) the highest rate lawfully permitted without reference to section 521; (2) a rate not more than one percent above the discount rate on 90–day commercial paper in effect at the Federal Reserve Bank in the federal reserve district where the lender is located; or (3) the highest rate allowed by the laws of the state where the lender is located").

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[Section 521] thus contemplates that 'in the absence of [Section 521],' a state other than the one where the bank is located could regulate the interest rates that the bank may charge on its loans." *Weiser*, 159 F.4th at 716. "This provision makes [Plaintiffs'] position untenable, because it would create an absurd result: A bank could charge rates permitted by the borrower's non-opt-out state 'in the absence of' [Section 521], but an opt-out state that 'does not want [Section 521] to apply' must still abide by [Section 521's] preemptive force through interest-rate exportation." *Id.*

Such a reading would mean that, "even if a state opts out of [Section 521], the state can never *fully* opt out." *Id.* at 723. Instead, states would be restricted to "a mere partial opt-out, in which the exportation of interest rates conferred by [Section 521] continues to preempt state law despite the state's decision to opt out." *Id.* If that were the result of an opt-out, then an opt-out would be all but useless; "no state would ever opt out of [Section 521] if the opt-out meant that the state would only disadvantage its own banks for loans to out-of-state borrowers." *Id.* at 723. Thus, while Plaintiffs argue that a full opt-out would effectively override other states' decisions *not* to opt out, the reverse is more true. *See* MPI 28, ECF No. 15. If a state can never fully opt out of the exportation scheme allowed by Section 521, then every non-opt-out state can override the opt-out state's interest rate laws.

Plaintiffs argue that a narrow reading of the opt-out provision would comport with the purpose of Section 521 to put state banks on a level playing field with national banks. MPI 28, ECF No. 15. But even if that is the purpose of Section 521 itself, Congress has expressly authorized states to *opt out* of that provision. The question, then, is the purpose of the opt-out provision. The purpose of *that* provision was to allow states to take back control over an area traditionally regulated by states.

The language of the opt-out provision derives from the Brock Bill and the Borrowers Relief Act, two predecessor laws that provided partial relief from prohibited state interest-rate caps. *See Weiser*, 159 F.4th at 722 (citing Brock Bill, Pub. L. No. 93-501 § 202, 88 Stat. 1557,

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1558 (1974) (expired); Borrowers Relief Act, Pub. L. No. 96-104 § 102, 93 Stat. 789, 789 (1979) (expired)). Those laws included opt-out provisions in response to concerns about "federal encroachment on the states' regulations of interest rates." *Weiser*, 159 F.4th at 722.. With regard to the Borrowers Relief Act, congressmembers "feared that legislation setting federal interest-rate caps would 'encroach[] on the State's prerogative to set usury rates' and therefore provided 'an opportunity to reverse' the legislation" through an opt-out provision. *Id.*

"Because Congress adopted language from the Brock Bill and the Borrowers Relief Act for [Section 521's] opt-out provision, [the Tenth Circuit] presume[d] that Congress had intended for the construction of those laws to apply to the opt-out provision as well." *Id.* at 722–23 (citing *Georgia v. Public.Resource.Org, Inc.*, 590 U.S. 255, 270 (2020)). "So like the Brock Bill and the Borrowers Relief Act, [Section 525's] opt-out provision allows states to 'override' and 'reverse' [Section 521]." *Id.* at 723. Further, in the legislative history of DIDMCA itself, a House Conference Report on the opt-out provision explains that it would allow "affected states" to "override" DIDMCA's preemptive effect: "State usury ceilings on all loans made by federally insured depository institutions (except national banks) . . . will be permanently preempted *subject to the right of affected states to override at any time*[.]" *Id.* (quoting H.R. Rep. No. 96-842, 1980 WL 13128, at *78 (Conf. Rep.)).

Thus, Congress intended for affected states, like Oregon, to opt out of the interest rate exportation scheme created by DIDMCA. Under Plaintiffs' reading, an affected state like Oregon can never fully opt out, but *must* allow other states' interest limits to preempt its own, permanently. That reading "is not moored to the text, purpose, or legislative history of the statute." *Weiser*, 159 F.4th. at 723. If a state opts out, DIDMCA does not apply to "loans made in such State." 12 U.S.C. § 1831d note (Effective Date). This Court should reject Plaintiffs' attempt to restrict the opt-out provision by replacing the words "in such State" with "in the State where the bank is located." Instead, the Court should apply the statute as written.

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In short, an opt-out is an opt-out. Oregon has opted out. DIDMCA therefore does not preempt Oregon's authority to regulate interest rates for loans made to borrowers in Oregon.

2. HB 4116 does not violate the dormant Commerce Clause.

Plaintiffs' dormant Commerce Clause claim targets only Section 1(3)(b) of HB 4116. Compl. ¶ 82, ECF No. 1; MPI 30, ECF No. 15. As explained above, Sections 1(3)(a) and 1(3)(b) both apply to loans made to Oregon residents. Section 1(3)(a) applies if the Oregon resident borrower is physically present in the state when the loan is negotiated, agreed, or executed. Section 1(3)(b) applies if the Oregon resident borrower makes a payment on the loan by "debit[ing] an account that the consumer holds in this state at a financial institution or trust company" or "by means of a negotiable instrument drawn on a financial institution or trust company." Plaintiffs contend that Section 1(3)(b) violates the dormant Commerce Clause by regulating "conduct entirely outside [Oregon's] borders." MPI 30, ECF No. 15. As explained below, it does not.

The Commerce Clause provides that "Congress shall have Power . . . [t]o regulate Commerce . . . among the several States." U.S. Const. art. I, § 8. The dormant Commerce Clause is the "'negative' aspect" of the Clause, which "denies the States the power unjustifiably to discriminate against or burden the interstate flow of articles of commerce." *Or. Waste Sys., Inc. v. Or. Dep't of Env't Quality*, 511 U.S. 93, 98 (1994). The dormant Commerce Clause "precludes the application of a state statute to commerce that takes place wholly outside of the State's borders." *Edgar v. MITE Corp.*, 457 U.S. 624, 642 (1982).

Section 1(3)(b) of HB 4116 does not regulate commerce that takes place wholly outside of Oregon's borders. That subsection applies only to consumer finance loans to consumers who "resid[e] in or maintain[] a domicile in this state." HB 4116 § 1(3). The terms "reside" and "domicile," as used in Oregon law, are closely related, and they both refer to a person's permanent or long-term home. *See State v. Lafountain*, 299 Or. App. 311, 323 (2019) ("'[R]eside' is defined by *Webster's* as 'to dwell *permanently or continuously*: have *a settled*

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abode for a time: have one's residence or domicile."); *State ex rel Kristof v. Fagan*, 369 Or. 261, 278 (2022) (quoting *Reed's Will*, 48 Or. 500, 504 (1906)) ("To constitute domicile there must be both the fact of a fixed habitation or abode in a particular place, and an intention to remain there permanently or indefinitely[.]"); *Reed's Will*, 48 Or. at 504 ("To constitute domicile . . . [t]here must be: (1) *residence*, actual or inchoate; (2) the nonexistence of any intention to make a domicile elsewhere." (emphasis added) (quotation marks omitted)).

Thus, the law applies only to Oregon residents: individuals who either actually and currently reside in Oregon or whose home is in Oregon. The law would *not* apply, as amici states suggest, to a Utah resident who acquires property in Oregon. (*See* ECF 27-1 at 17.) Rather, it would apply only if Oregon, and not Utah, were the borrower's home. *See Kristof*, 369 Or. at 270 (quoting *Reed's Will*, 48 Or. at 505) ("Every person is assumed by the law to have one domicile and one only.").

In a similar situation, the Tenth Circuit recognized that applying a Kansas law to a loan made to a Kansas resident would not violate the dormant Commerce Clause, even if the borrower were not physically present in Kansas when applying for the loan. *Quik Payday, Inc. v. Stork*, 549 F.3d 1302, 1308–1309 (10th Cir. 2008). The court recognized that, "[e]ven if the Kansas resident applied for the loan on a computer in Missouri, other aspects of the transaction are very likely to be in Kansas—notably, the transfer of loan funds to the borrower would naturally be to a bank in Kansas." *Id.* at 1308. Although the Kansas statute, as written, would not apply in that situation, "the transaction would not be wholly extraterritorial, and thus not problematic under the dormant Commerce Clause." *Id.*

Here, similarly, applying an Oregon law to loans made to Oregon residents and loan payments made by Oregon residents would not be regulating a wholly extraterritorial transaction. Indeed Section 1(3)(b)(A) of HB 4116 applies only if the consumer is an Oregon resident and the consumer makes a payment on the loan by "debit[ing] an account that the consumer holds *in this state* at a financial institution or trust company." HB 4116 § 1(3)(b)(A) (emphasis added). Any

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transaction subject to that subsection would directly involve both people and money based in Oregon. The only possible application that might not involve both an Oregon borrower and an Oregon account would be under Section 1(3)(b)(B), which applies if the Oregon resident borrower "makes the payment by means of a negotiable instrument drawn on a financial institution or trust company." HB 4116 § 1(3)(b)(B). But that transaction would still involve a loan made to an Oregon resident and payments made by an Oregon resident, and regulation of such transactions does not violate the dormant Commerce Clause. In any event, to the extent that the Court concludes that either of those subsections might apply to conduct occurring wholly outside Oregon, those subsections are severable, as further explained below. *See infra* § IV.D.

B. Plaintiffs are not likely to suffer irreparable harm in the absence of a preliminary injunction.

A party seeking a preliminary injunction must "demonstrate that irreparable injury is *likely* in the absence of an injunction." *Park Vill. Apartment Tenants Ass'n v. Mortimer Howard Tr.*, 636 F.3d 1150, 1160 (9th Cir. 2011) (quotation marks omitted). This requires "a clear showing," *Winter*, 555 U.S. at 22, of "a likelihood of substantial and immediate irreparable injury." *Apple, Inc. v. Samsung Elecs. Co.*, 678 F.3d 1314, 1325 (Fed. Cir. 2012) (quoting *O'Shea v. Littleton*, 414 U.S. 488, 502 (1974); *accord Boardman v. Pac. Seafood Grp.*, 822 F.3d 1011, 1022 (9th Cir. 2016) (holding the threatened harm must be "immediate" in character). Alleged harms must not be speculative in nature. *Goldie's Bookstore, Inc. v. Super. Ct. of Cal.*, 739 F.2d 466, 472 (9th Cir. 1984).

Here, Plaintiffs have failed to make a clear showing that they are likely to suffer irreparable harm. To the extent that enforcement of HB 4116 would threaten harm to Plaintiffs or their members, no such enforcement is imminent, let alone so immediate that a preliminary injunction is necessary to prevent harm. As explained below, if a lender were in violation of HB 4116, and that lender was referred to enforcement, it typically takes between nine months and

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one-and-a-half years before an initial administrative order would be issued, followed by additional process before a final order would be issued. Bean Decl. ¶¶ 7–8, 11.

Once a matter is referred to the enforcement unit, the unit takes up to 90 days for an initial review, evaluation, and a decision regarding whether enforcement will be pursued. Bean Decl. ¶ 7. If it is determined that enforcement is appropriate, an enforcement file would be opened, and it could take up to an additional 180 days before an administrative order would be issued. Bean Decl. ¶ 7. If, after the initial 90-day evaluation, more information is needed, the matter would be promoted to investigation, and the investigation could take up to 270 days. Bean Decl. ¶ 8. That 270-day investigation period would be followed by the 180-day period for issuance of an administrative order. Bean Decl. ¶ 8. Thus, the process from referral to issuance of an order would be up to either nine months (90 days for the initial evaluation + 180 days for issuance of an order) or one-and-a-half years (90 days for the initial evaluation + 270 days for the investigation + 180 days for issuance of an order). Bean Decl. ¶ 8.

Enforcement actions are sometimes fast-tracked due to the egregiousness of the violations, significant consumer harm, or other factors that would cause the enforcement team to prioritize an expeditious issuance of an administrative order. Bean Decl. ¶ 10. But even in such a case, a reasonable estimate of the minimum amount of time for a case to move from a referral to issuance of an administrative order is three to four months. Bean Decl. ¶ 10. For cases that are factually or legally complicated, the estimated timeframe would be higher. Bean Decl. ¶ 10.

Further, the administrative order that would be issued at that point would not be the end of the process, but rather a notice order. The order would state the alleged violation, which the recipient would have the opportunity to contest before an administrative law judge in an administrative hearing, thereby adding significantly more time into the process before issuance of a final order against the lender. Bean Decl. ¶ 11.

Moreover, such enforcement actions are rare, and none are currently pending or contemplated. DCBS's Non-Depository Programs section rarely refers consumer finance

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matters to the enforcement group for enforcement proceedings. Garber Decl. ¶ 9. In the last five calendar years, DCBS issued a total of five enforcement orders against consumer finance companies. Bean Decl. ¶ 13. None of those enforcement actions were against state or nationally chartered banks. Bean Decl. ¶ 13. Currently, there are no immediate or pending enforcement actions contemplated against consumer finance companies, and no consumer-finance-related matters have been referred to the enforcement team for evaluation. Bean Decl. ¶ 14.

Thus, even if any of Plaintiffs' member banks were likely to engage in conduct that would violate HB 4116 (which they have not shown), and even if that member were referred to enforcement, it would likely be several months before issuance of an initial notice order, let alone a final order against that bank. Plaintiffs have not shown that the extraordinary remedy of a preliminary injunction is necessary to prevent harm to Plaintiffs or their members while this Court can consider the merits of this case. Plaintiffs have not satisfied the irreparable-injury factor under *Winter*.

C. The equities and public interest favor denial of Plaintiffs' motion.

Courts presented with a motion for preliminary injunction "must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief." *Winter*, 555 U.S. at 7, 24 (quotation marks omitted). As part of weighing these considerations, courts "should pay particular regard for the public consequences in employing the extraordinary remedy of injunction," including the impacts on non-parties. *Id.*; *League of Wilderness Defs./Blue Mountains Biodiversity Project v. Connaughton*, 752 F.3d 755, 766 (9th Cir. 2014). "Any time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury." *Maryland v. King*, 567 U.S. 1301, 1303 (2012) (citation omitted). Here, the equities and public interest clearly favor denying Plaintiffs' motion.

Plaintiffs argue that their likelihood of success on the merits also means that the equities and public interest favor an injunction. MPI 35–36, ECF No. 15. But even if a likelihood of

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success were enough, Plaintiffs have not established that initial factor. For the reasons explained above, Plaintiffs are not likely to succeed on either of their claims.

Pushing their argument further, Plaintiffs contend that even a showing of "serious questions going to the merits" would, by itself, entitle them to an injunction. MPI 35, ECF No. 15. Plaintiffs argue that, if they have shown "serious questions," that showing would also satisfy the equities and public-interest factors, which would mean that the "balance of hardships . . . tips sharply towards the plaintiff," satisfying the "sliding scale variant of the *Winter* test." MPI 35, ECF No. 15. That argument completely short-circuits the sliding-scale test. The sliding-scale test allows a plaintiff to rely on a showing of "serious questions"—which is "a lesser showing than likelihood of success"—*only if* the plaintiff also shows "a balance of hardships that tips sharply towards the plaintiff." *Flathead-Lolo-Bitterroot Citizen Task Force v. Montana*, 98 F.4th 1180, 1190 (9th Cir. 2024) (quotation marks omitted). If a showing of "serious questions" could by itself satisfy the "balance of hardships" factor, then the sliding-scale test would not be a "variant" of the *Winter* test, but rather an open shortcut around *Winter* itself.

Here, in any event, Plaintiffs have shown neither serious questions going to the merits, nor a balance of hardships that tips sharply towards Plaintiffs. Instead, the balance tips sharply against enjoining Oregon's exercise of its express right to opt out of DIDMCA and protect its residents from predatory lending practices.

Plaintiffs argue that HB 4116 will harm consumers by denying them access to high-interest loans. MPI 37, ECF No. 15. The Oregon legislature has concluded otherwise. Whether allowing lenders to make high-interest loans to Oregonians would be a benefit or a harm to consumers is a policy choice that is well within the Oregon legislature's authority to make. *See Ne. Bancorp, Inc.*, 472 U.S. at 177 ("[B]anking and related financial activities are of profound local concern . . . ."). Indeed, as explained above, DIDMCA itself included the opt-out provision precisely to allow states to make such policy decisions in this traditionally state-regulated area.

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Oregon has made that policy choice here through its democratically elected representatives. The public interest weighs strongly against enjoining that validly enacted law.

D. Any injunction should be narrowly tailored to the constitutional infirmity.

If the Court does conclude that a preliminary injunction is warranted, any injunction should be narrowly tailored to the constitutional infirmity. The injunction should apply only to enforcement against Plaintiffs and only to the applications of the law that this Court concludes would be unconstitutional.

First, any injunction should be limited to enforcement of the law against Plaintiffs. Plaintiffs' motion seeks an injunction that would apply to enforcement against any out-of-state state bank. MPI 39, ECF No. 15. But this is not a class action, and Plaintiffs do not purport to represent any banks other than their own members. *See* Compl. ¶ 74, ECF No. 1 (asserting that Plaintiffs have associational standing due to threatened harms to "their state bank members").

As the Supreme Court has explained, "[n]either declaratory nor injunctive relief . . . can directly interfere with enforcement of contested statutes or ordinances except with respect to the particular federal plaintiffs." *Trump v. CASA, Inc.*, 606 U.S. 831, 844 (2025) (quoting *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 931 (1975)). "The equitable tradition has long embraced the rule that courts generally may administer complete relief *between the parties*." *CASA, Inc.*, 606 U.S. at 851 (quotation marks omitted). Under that "complete-relief principle," the question is not whether a remedy will "offer[] complete relief to everyone potentially affected by an allegedly unlawful act"; rather, it is whether the remedy "will offer complete relief *to the plaintiffs before the court*." *Id.* at 852. Here, extending an injunction to cover anyone other than Plaintiffs "would not render [Plaintiffs'] relief any more complete." *See id.* at 853.

Second, if the Court concludes that HB 4116 violates the Constitution, then any injunction should be limited to the specific provision or application of the law that would be unconstitutional. Limiting the injunction to the extent of the constitutional infirmity would "offer complete relief" for any violation without enjoining valid law. *See id.* at 852.

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For example, Plaintiffs' dormant Commerce Clause claim challenges only Section 1(3)(b) of HB 4116. Compl. ¶ 82, ECF No. 1; MPI 30–32, ECF No. 15. If the Court concludes that Plaintiffs are likely to succeed on that claim, then any injunction should be limited to that subsection and to any specific provisions of that subsection this Court concludes are likely unconstitutional. Section 1(3)(b) and its sub-subsections are severable from the rest of HB 4116.

"Whether a statutory provision is severable is a question of state law." *Lee v. Walters*, 433 F.3d 672, 676 (9th Cir. 2005). "In Oregon. there is a presumption of severability." *Id.* If any part of a statute is held unconstitutional, the legislative intent is that the remaining parts of the statute shall remain in force unless:

> (1) The statute provides otherwise;
>
> (2) The remaining parts are so essentially and inseparably connected with and dependent upon the unconstitutional part that it is apparent that the remaining parts would not have been enacted without the unconstitutional part; or
>
> (3) The remaining parts, standing alone, are incomplete and incapable of being executed in accordance with the legislative intent.

ORS 174.040.

Here, none of the three exceptions to severability applies. First, HB 4116 does not provide that parts found to be unconstitutional are not severable. Second, the other parts of HB 4116 are not so essentially and inseparably connected and dependent upon Section 1(3)(b) that it is apparent that the legislature would not have enacted the statute without that subsection. Third, the rest of HB 4116 is complete and capable of being executed in accordance with the legislative intent. Sections 1(3)(a) and 1(3)(b) are both intended to protect Oregon borrowers: 1(3)(a) applies based on the location of the Oregon resident borrower, while 1(3)(b) applies based on certain payments made by the Oregon resident borrower. While an injunction of Section 1(3)(b) would limit the scope of the law's application, Section 1(3)(a) could still be enforced in accordance with the intent of protecting Oregon borrowers who "[n]egotiat[e], agree[] to the

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terms of or enter[] into or execute[] a contract for a consumer finance loan . . . while the consumer is physically present in this state." HB 4116 § 1(3)(a).

E. Consolidation of the preliminary injunction with the merits is not warranted at this early stage.

Plaintiffs' motion includes a motion to "'advance the trial on the merits and consolidate it with the hearing' on the preliminary injunction." MPI 8, ECF No. 15 (quoting Fed. R. Civ. P. 65(a)(2)). Defendant opposes consolidation, because it will prejudice Defendant's ability to fully present a defense.

"[I]t is generally inappropriate for a federal court at the preliminary-injunction stage to give a final judgment on the merits." *Univ. of Tex. v. Camenisch*, 451 U.S. 390, 395 (1981). A preliminary injunction is "an extraordinary and drastic remedy," *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997) (quotation marks omitted), which serves "merely to preserve the relative positions of the parties until a trial on the merits can be held," *Camenisch*, 451 U.S. at 395. "Given this limited purpose, and given the haste that is often necessary if those positions are to be preserved, a preliminary injunction is customarily granted on the basis of procedures that are less formal and evidence that is less complete than in a trial on the merits." *Id.*; *see also Arce v. Douglas*, 793 F.3d 968, 976 (9th Cir. 2015) ("[D]espite the court's power to grant summary judgment *sua sponte*, it is generally inappropriate for a court to issue such a final judgment on the merits of a claim at the preliminary injunction stage, because it is unlikely that the merits of a claim will be fully ventilated at the early stage of a litigation at which a preliminary injunction is normally addressed.").

"The decision about whether to consolidate is discretionary, as the rule simply states that the court 'may' advance and consolidate a trial on the merits." *Human Life of Wash., Inc. v. Brumsickle*, No. C08-0590-JCC, 2008 WL 11506796, at *2 (W.D. Wash. May 15, 2008). Courts are free to deny consolidation when they are not convinced that it would be appropriate. *See N.C. Right to Life, Inc. v. Leake*, No. 5:99-CV-798-BO(3), 2000 WL 36741021, at *1 (E.D.N.C.

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Mar. 13, 2000) (citing *Camenisch*, 451 U.S. 390) (denying motion to consolidate, "[i]n light of the Supreme Court's admonition that consolidation under Rule 65(a)(2) is generally inappropriate"). Consolidation is not appropriate when it risks prejudicing a party's ability to fully present a claim or defense. *See Glacier Park Found. v. Watt*, 663 F.2d 882, 886 (9th Cir. 1981) (district court may consolidate "so long as the procedures do not result in prejudice to either party").

Here, less than a month after the filing of the complaint, Plaintiffs have filed a motion for preliminary injunction that includes a one-sentence motion to consolidate. MPI 8, ECF No. 15. Plaintiffs' motion includes no explanation for why consolidation is appropriate at this early stage. As discussed above, there is no risk of imminent harm to the Plaintiffs that would justify consolidation, nor is consolidation appropriate here, where Plaintiffs have a significant upper hand having already litigated this same issue in Colorado.

Consolidation at this early stage would risk severe prejudice to Defendant's ability to fully defend the challenged law. Plaintiffs have been litigating substantially similar issues in *NAIB v. Weiser* for years, and their complaint and motion in this case rely on arguments that they have spent years developing in the District of Colorado and the Tenth Circuit. In contrast, Defendant has been litigating this issue for eight weeks. Plaintiffs have had ample time to determine and evaluate which arguments to make and which evidence they deem relevant. Accordingly, Plaintiffs might have little to lose by forgoing the ordinary course of litigation. But Defendant, who has not had a similar opportunity to investigate the facts, evaluate Plaintiffs' arguments, and prepare a defense, would be severely disadvantaged by losing the opportunity to fully litigate this case—as would the people of Oregon, whose representatives enacted the challenged law.

That said, Defendant does not anticipate that a trial on the merits will be necessary in this case. Defendant anticipates that this case can likely be resolved on summary judgment and is willing to agree to a timely and reasonable briefing schedule.

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V. CONCLUSION

For the reasons explained above, Plaintiffs' motion for preliminary injunction and motion to consolidate should be denied.

DATED August 11 , 2026.

Respectfully submitted,

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