IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 1:24-cv-812-DDD-KAS

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

Plaintiffs,

v.

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

Defendants.

AMICUS CURIAE BRIEF OF THE FEDERAL DEPOSIT INSURANCE CORPORATION IN SUPPORT OF DEFENDANTS

Dated: April 23, 2024

HARREL M. PETTWAY
General Counsel
FLOYD I. ROBINSON
Deputy General Counsel
B. AMON JAMES
Assistant General Counsel
J. SCOTT WATSON
Senior Counsel
MINODORA D. VANCEA
Counsel
MICHAEL K. MORELLI
Senior Attorney

FEDERAL DEPOSIT INSURANCE CORPORATION
3501 N. Fairfax Drive, VS-D7004
Arlington, VA 22226-3500
Tel: (571) 501-4021
Fax: (703) 562-2496
Email: mmorelli@fdic.gov

CORPORATE DISCLOSURE STATEMENT

The Federal Deposit Insurance Corporation is a federal corporation established under 12 U.S.C. § 1811. It has no parent corporation and no publicly held corporation owns 10 percent or more of its stock.

Dated: April 23, 2024

/s/Michael K. Morelli
Michael K. Morelli
Attorney for FDIC

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INTEREST OF THE AMICUS AND SUMMARY OF ITS ARGUMENT

The Federal Deposit Insurance Corporation (FDIC) submits this brief as amicus curiae to address important legal issues related to the "opt-out" provision contained in Section 525 of the Depository Institutions Deregulation and Monetary Control Act (DIDMCA).[1] Unlike the language used in Section 521 of DIDMCA—which, inter alia, authorizes state banks to make loans charging interest at the maximum rate permitted by the state where *the bank is "located"*—Section 525 permits a state to opt out of Section 521's interest-rate regime with respect to *loans "made" in that state*. Under well-established principles of statutory construction, these different terms must be given different meanings. This is particularly appropriate where, as here, the differences in language reflect differences in congressional intent. Congress enacted Section 521 to enable state banks to compete with national banks. But it balanced that economic objective with Section 525 and its objective to enable states to override the federal interest-rate preemption in Section 521 and thereby maintain a meaningful measure of control over the usury rates applicable to "loans made in such State."

Plaintiffs' challenge to Colorado's efforts to opt out turns on the meaning of Section 525's opt-out language; namely, what it means for a loan to be "made" in Colorado. In their proposed interpretation of Section 525, Plaintiffs rely heavily on FDIC General Counsel Opinion 11 (Opinion 11),[2] which does not address opt-out or Section 525. Plaintiffs nevertheless argue that Opinion 11's test for determining where a bank is located under Section 521 should also be applied to determine where a loan is made for Section 525 purposes. Given Plaintiffs' significant reliance on Opinion 11, the FDIC submits this amicus brief to underscore that

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[1] Pub. L. No. 96-221, § 525, 94 Stat. 132, 167 (1980).

[2] *See generally* General Counsel's Opinion No. 11, Interest Charges by Interstate State Banks, 63 Fed. Reg. 27,282 (May 18, 1998).

Opinion 11 is inapplicable to the opt-out issue. As discussed more fully in Part III.A below, Plaintiffs' reliance on Opinion 11 is misplaced because where a loan is made under Section 525 cannot be equated with where a bank is located under Section 521, as demonstrated by the differing text, purpose, and history of those sections, well-established principles of statutory construction, and prior interpretive pronouncements by the FDIC. Contrary to Plaintiffs' assertions, none of these tools of statutory construction support their interpretation. For example, Plaintiffs' reliance on the legislative history of the 1994 Riegle-Neal Act is inapposite because such history of a later act does not control the interpretation of an earlier act such as DIDMCA. And prior pronouncements by the FDIC actually reject Plaintiffs' position that where a loan is made under Section 525 should be determined based on where a bank is located under Section 521.

Before delving into these issues, this brief first analyzes Section 525's opt-out provision and identifies the scope of loans affected when a state chooses to exercise it. As discussed in Part II below, loans are made in a state for purposes of Section 525 if either the borrower or the lender enters into the transaction in that state. Therefore, loans as to which a Colorado borrower enters into the transaction while physically present in Colorado fall within the scope of the federal term "loans made in such State" (Colorado) in Section 525, and Plaintiffs are incorrect in claiming otherwise.

ARGUMENT

I. Colorado has opted out for any loans that fall within the scope of the federal term "loans made in such State" in Section 525 of DIDMCA

Section 521 of DIDMCA amended the Federal Deposit Insurance Act (FDI Act) by adding Section 27 (codified at 12 U.S.C. § 1831d), which authorizes state banks to make loans charging interest at the maximum rate permitted by the state where the bank is "located," or at a

federal rate not exceeding the 90-day commercial paper rate plus one percent, whichever is greater.[3] National banks have been permitted to charge the same rates as those allowed by Section 521 since 1864, under what is now Section 85 of the National Bank Act (12 U.S.C. § 85). Before DIDMCA's enactment in 1980, Section 85 gave national banks a competitive advantage over state banks. To ensure parity between state banks and national banks, DIDMCA allows state banks to charge the same rates as those allowed by Section 85. For these reasons, the two sections are interpreted *in pari materia*.

But DIDMCA was not concerned solely with the parity between state and national banks provided by Section 521. Rather, to preserve principles of federalism, Section 525 of DIDMCA gives states the ability to opt out of Section 521 with respect to any "loans made in such State."[4] Colorado's H.B. 23-1229 opts out of Section 521 with respect to "consumer credit transactions in this state."[5] Because consumer credit transactions are a category of loans, H.B. 23-1229 satisfies Section 525's requirement that the law "explicitly and by its terms" state that Colorado does not want Section 521 to apply to loans made in such State. This legislation effects an opt out with respect to any loans falling within the scope of the federal term "loans made in such State" in Section 525. The relevant inquiry is therefore what loans fall within the scope of the federal term "loans made in such State" in Section 525. That issue is addressed in the next section.

[3] *Id*. §521. While Section 521 of DIDMCA is the same as Section 27 of the FDI Act, for simplicity FDIC refers here to Section 521.

[4] *Id*. § 525 (emphasis added).

[5] H.B. 23-1229, Section 3, 74th Gen. Assemb., Reg. Sess. (Co. 2023).

II. For purposes of Section 525, loans are made in a state if either the borrower or the lender enters into the transaction in that state

Because the term "loans made in such State" appears in a federal statute, it must be interpreted as a matter of federal law.[6] Such interpretation must "start, as always, with the language of the statute." *Williams v. Taylor*, 529 U.S. 420, 431 (2000). The statute does not define the term "loans made in such State" and no court decisions interpret it as used in Section 525. Absent a definition provided by Congress, the statute is interpreted according to the ordinary meaning of its words. *BP Am. Prod. Co. v. Burton*, 549 U.S. 84, 91 (2006).

Courts have already developed a fairly consistent set of federal principles addressing where loans and other contracts are made in the context of applying the (dormant) Commerce Clause of the U.S. Constitution. According to that jurisprudence, loans are ordinarily understood to be made in the states where the parties enter into the loan transaction. Thus, if the parties enter into a loan transaction in the same state, the loan is made in that state. *See Midwest Title Loans, Inc. v. Mills*, 593 F.3d 660, 669 (7th Cir. 2010) (where Indiana borrower traveled to lender's state (Illinois) to obtain loan, "contract was, in short, made and executed in Illinois"). But when the parties enter into a loan transaction in two different states (*i.e.*, a borrower physically present in one state transacts by mail, phone, or internet with an out-of-state lender), such transaction is made in both states, and both states can regulate it. That is, "[w]hen an offer is made in one state and accepted in another, we now recognize that elements of the transaction have occurred in each state, and that both states have an interest in regulating the terms and performance of the contract." *A.S. Goldmen & Co. v. N. J. Bur. of Sec.*, 163 F.3d 780, 787 (3d Cir. 1999).

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[6] *Dickerson v. New Banner Inst., Inc.*, 460 U.S. 103, 119 (1983); *NLRB v. Nat. Gas Util. Dist. of Hawkins Cty.*, 402 U.S. 600, 603 (1971). Plaintiffs agree that the question is one of federal law.

Accordingly, courts have concluded that loan transactions between parties in different states are made in the state where the borrower enters into the transaction just as much as they are made in the state where the lender enters the transaction, and that the borrower's state does not violate the Commerce Clause when seeking to regulate such interstate loan transactions. For example, the Tenth Circuit agreed that the Kansas Uniform Consumer Credit Code (UCCC) did not impermissibly apply to loans involving a lender outside of Kansas because "the borrower's physical location" when entering into the transaction was in Kansas—even if the lender was outside Kansas. *Quik Payday Inc. v. Stork*, 549 F.3d 1302, 1308 (10th Cir. 2008). The Tenth Circuit held that the borrower's state (Kansas) has the power to regulate such loan transactions, and that the Kansas UCCC did not apply extraterritorially in violation of the Commerce Clause. *Id.*; *see also, e.g.*, *Swanson v. Integrity Advance, LLC*, 870 N.W.2d 90, 95 (Minn. 2015) (Minnesota law applying to loans between out-of-state lenders with no physical presence in Minnesota and Minnesota borrowers who entered into the transaction "while physically located in the state of Minnesota" did not violate Commerce Clause).[7] But where a party from State A physically crosses state lines and travels to the other party's state (State B) to enter into the transaction there, the transaction is made in State B because both elements of the transaction (offer and acceptance) occur in State B.[8]

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[7] *See also People v. Fairfax Fam. Fund, Inc.*, 235 Cal. App. 2d 881, 885 (Cal. Ct. App. 1964) (concluding that California has authority to regulate an out-of-state lender); *South Dakota v. Wayfair, Inc.*, 585 U.S. 162, 176–77 (2018) (South Dakota law applying to online retailer that lacked physical presence in South Dakota did not violate Commerce Clause).

[8] *See Midwest Title Loans*, 593 F.3d at 669; *Dean Foods Co. v. Brancel*, 187 F.3d 609, 620 (7th Cir. 1999) (where seller physically transports milk across state lines from Wisconsin to buyer in Illinois, the transaction was made in Illinois: "[t]his is not a case where 'elements of the transaction have occurred in each state'").

These established federal principles for determining where a loan or contract is "made" can be applied equally to Section 525. As the cases demonstrate, it is reasonable to conclude that interstate loans are made in the state in which the borrower enters into the transaction and in the state in which the lender enters into the transaction.[9] It would be arbitrary and artificial to select *one* state when the parties enter into the transaction in *two* different states. *A.S. Goldmen & Co.*, 163 F.3d at 786-87 ("A contract between Goldmen in New Jersey and a buyer in New York does not occur 'wholly outside' New Jersey, just as it does not occur 'wholly outside' New York."). And because such loans are made in both states, either or both states can opt out with respect to such loans under Section 525. Once one state opts out, Section 521 does not apply to loans made in that state. The opt-out puts the state in the same position it would have been in had Section 521 never been enacted: to have the interest-rate applicable to loans made in that state decided under state law rather than Section 521. Congress intended that all "affected states" have a meaningful opportunity to opt out. *See* H.R. Conf. Rep. No. 96-842, at 78-79 (1980) (stating that under DIDMCA, "[s]tate 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") (emphasis added).

Plaintiffs incorrectly claim that Colorado's opt-out statute would apply to loans that are not made in Colorado because it covers transactions between Colorado borrowers and out-of-state creditors that merely advertise in the state. Pls.' Mot. Prelim. Inj., ECF 24 (Mot.) at 16. But such loans are made in Colorado under federal law if the borrower is physically present there when entering into the transaction. As discussed above, courts interpreting federal law have concluded that interstate contracts, including loans, are made both in the state in which the

[9] This brief discusses the most common scenario: the two-party contract. The FDIC recognizes that in some circumstances loans could involve multiple lenders or borrowers.

borrower enters into the transaction and the state in which the lender enters into the transaction. Therefore, if the borrower is physically present in Colorado when entering the transaction, the transaction is made in Colorado even if the lender is outside of Colorado. Indeed, the Tenth Circuit has already rejected the notion that a loan is made solely outside a state simply because the creditor is outside that state. *Quik Payday,* 549 F.3d at 1308. And the Colorado UCCC provision regarding transactions between Colorado residents and out-of-state creditors only applies if the borrower enters into the transaction while "physically present" in Colorado.[10]

Plaintiffs' related argument that the borrower's location is irrelevant to determining where a loan is made because the loan is created by the bank (Mot. at 11) not only conflicts with this caselaw, but is also misguided because a loan is made between two parties and does not exist without a borrower. For a loan to be made, there needs to be both a borrower and a lender: both an offer by one of these parties and an acceptance by the other. An acceptance or offer by the borrower occurs in the state where the borrower is physically located when making that acceptance or offer, not in the state where it is received by the lender.[11] Therefore, such acceptance/offer by the borrower necessarily occurs in the state where the borrower is physically present when entering into the transaction, which further supports the conclusion reached by the Commerce Clause cases that interstate transactions are made both in the state in which the borrower enters into the transaction and the state in which the lender enters into the transaction.

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[10] Section 5-1-201(2) provides that a transaction between a creditor and a Colorado resident is *not* made in Colorado if "a resident of this state enters into the transaction while physically present in another state." Colo. Rev. Stat. § 5-1-201(2).

[11] *See, e.g., Crellin Techs., Inc. v. Equipmentlease Corp.*, 18 F.3d 1, 5 (1st Cir. 1994) (in contract made by telephone, acceptance occurs in state where the words of acceptance are spoken, not in the state where they are received); *Perry v. Mount Hope Iron Co.*, 5 A. 632, 633 (R.I. 1886) (offer accepted by telegraph will be deemed accepted where telegram is sent, not received).

III. General Counsel Opinion 11 and Plaintiffs' other authorities are inapposite

A. General Counsel Opinion 11 is inapplicable to the opt-out issue

Plaintiffs suggest that Opinion 11's analysis of Section 521 provides the relevant framework for discerning the meaning of Section 525. Mot. at 13. But Opinion 11 is inapplicable to the opt-out analysis for at least three reasons.

(i) Opinion 11 only interprets Section 521, which looks at where a "bank" is "located" not where a "loan" is "made"

First, Opinion 11 only addresses where a bank is "located" for purposes of Section 521 (12 U.S.C. § 1831d), which provides that a state bank may charge interest permitted by the state where that bank is "located." Opinion 11 does not address or reference Section 525 or opt-out rights. Because Opinion 11 addresses only the concept of where a bank is located under Section 521, it has no applicability to opt-out under Section 525. The two statutory provisions use considerably different language and serve completely different goals. Congress could have copied the language from Section 521 into Section 525 to provide that only the state where a bank is located can opt out, but it did not do so. Instead, in Section 525, Congress allowed opt out for the state where the loan is "made," and Congress' choice to use different language should be given effect. "Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Bates v. United States*, 522 U.S. 23, 29–30 (1997) (internal quotation marks omitted).

Had Congress intended to refer in Section 525 to the state where the bank was located, it presumably would have done so expressly, as it did in Section 521. "The short answer is that Congress did not write the statute that way," and therefore courts should "refrain from concluding ... that the differing language in the two subsections has the same meaning."

Russello v. United States, 464 U.S. 16, 23 (1983).

In light of these well-established principles of statutory construction, the FDIC has twice recognized the distinction between where a bank is located under Section 521 and where a loan is made under Section 525, and warned that the two terms should not be conflated. The FDIC did so first in an interpretive letter predating Opinion 11. *See* FDIC Advisory Opinion 88-45, Relationship of State Usury Preemption Laws, 1988 WL 583093 (June 29, 1988) ("1988 Interpretive Letter"). That letter was drafted in response to a bank's request for the FDIC to declare that only the state where a bank is located under Section 521 could opt out—*i.e.*, the same position that Plaintiffs advocate here. The 1988 Interpretive Letter emphatically rejected that position, explaining that a bank's location under Section 521 should not be equated with where a loan is made under Section 525 because the two sections use different language and serve different goals. The letter explained that "nothing on the face of the statute" indicates that the two different terms "are meant to say the same thing." *Id*. at *1. It also noted that the two terms should not be conflated because they each served a different goal: "Congress had economic objectives in mind when it adopted section 521; in particular, it was enacted in order to enable State banks to compete with national banks. By contrast, Congress adopted section 525 in an effort to preserve principles of federalism." *Id*. Plaintiffs fail to address this key part of the 1988 Interpretive Letter that refutes their reliance on authorities interpreting where a bank is located to interpret where a loan is made, while nevertheless citing the letter for the undisputed proposition that the statute must be interpreted as a matter of federal law.[12]

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[12] On a separate issue, to the extent the 1988 Interpretive Letter could be read as implying that the six factors in Section 188 of the Restatement of the Conflict of Laws inform where a loan is made, such an inference is not justified. Section 188 looks at the state with the "most significant relationship" with the transaction at issue to determine which of two states' law should apply to a transaction. Congress could have used language allowing states to opt out if they have the "most

The FDIC Board also recognized the distinction between where a bank is located and where a loan is made in a recent rulemaking. Specifically, the Board explained that a bank would not be permitted to charge the "higher" rate permitted by the state where the bank is located with respect to loans that are made in a state that has opted out, which indicates that the opting out state can be different from the state where the bank is located. *See* Federal Interest Rate Authority, 85 Fed. Reg. 44,146, 44,153 (July 22, 2020) (Final Rule) ("[I]f a State opts out of section 27, State banks making loans in that State could not charge [under federal law] 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.").[13]

(ii) By deeming banks to be located in their home states even if the loan was not made there, Opinion 11's own text shows that Opinion 11 did not equate a bank's location with where a loan was made

Second, Opinion 11's own text further underscores that it did not equate the state where the bank was "located" with the state where the loan was made for purposes of Section 525. Opinion 11 does not address Section 525 at all. Rather, Opinion 11 addressed a different question, specifically an ambiguity in Section 521 arising from the fact that a bank can have many locations—a bank is considered located in any state in which it has a branch.[14] It was

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significant relationship" with the loan at issue, but it did not. Instead, Congress said that states may opt out with respect to "loans made in such State." Therefore, those two different terms should not be conflated.

[13] In the event of an opt-out by the state where the borrower enters into the transaction, while the lender cannot charge the interest rate of the state where the lender is located under federal law, in some circumstances state-law choice-of-law rules might permit the lender to charge that rate under state law even on loans made in the opting-out state. *See* Section 203 of the Restatement (Second) of Conflict of Laws (1971). Again, the opt-out simply puts states in the same position they would have been in had Section 521 never been enacted, namely to have the interest-rate applicable to loans made in that state decided under state law. This amicus brief expresses no opinion on state-law choice-of-law issues applicable after opt-out; it highlights the issue to ensure that the state choice-of-law analysis is not conflated with the analysis under Section 525.

[14] Opinion 11, 63 Fed. Reg. at 27,283.

unclear which of the potential locations was intended to govern for purposes of Section 521.[15] Explaining that Section 521 is interpreted *in pari materia* with Section 85 of the National Bank Act, Opinion 11 adopts a three-part test developed in guidance letters from another federal banking regulator, the Office of the Comptroller of the Currency (OCC), interpreting Section 85 to determine a *bank's* location based on where the bank performed three lending "functions" related to a loan.[16]

While Opinion 11 suggested that the three functions help inform whether the loan was made in the home or host state,[17] a careful reading of Opinion 11 shows that Opinion 11 used "made" colloquially and did not mean to suggest that the loan was actually or exclusively made in the state in which the three functions were performed, much less that it was made in that state for purposes of Section 525. Indeed, Opinion 11 concluded that in some cases a bank would be considered "located" in its home state even if the bank performed the three functions *outside* that state (if those functions were performed in offices, not branches).[18] While this conclusion may be appropriate with respect to a *bank's location* under Section 521 (because a bank can always be deemed located in its home state), this conclusion makes little sense in the separate context of interpreting where the loan was made. It is outside any possible interpretive bounds of the term "loans made in such State" to suggest that a loan is "made" in the bank's home state even if the bank performed all the lending functions *outside* the home state and the borrower resided *outside* the home state. In such scenario, no element of the loan transaction (neither offer nor acceptance) occurred in the home state; therefore, the loan cannot be "made" in the home state.

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[15] *Id*.
[16] *Id*.
[17] *Id*.
[18] *Id*. at 27,285-86.

More generally, Opinion 11 uses the three functions—where the bank approved the loan, where it communicated the decision to the borrower, and where it disbursed the loan—to identify the bank branches with ties to a particular loan for Section 521 purposes, not to identify the state where the loan was made for Section 525 purposes. Where all three functions occur in one state, Opinion 11 deems the bank located in that state for Section 521 purposes.[19] Where the three functions do not all occur in one state, however, Opinion 11 and related OCC interpretive letters deem the bank to be located in *any* state in which any *one* of the three functions occurs.[20] Therefore, if the three functions occur in three different host states, the bank could be considered "located" in each one of the three host states, and also in the home state, and could charge the interest rates permitted by any of these *four* states.

Accordingly, while Plaintiffs suggest that an interpretation under which "a single loan could be deemed 'made in' multiple states" is "unworkable" (Mot. at 15), Opinion 11 itself allows a bank to be located in multiple states (four states) in some circumstances, and Plaintiffs do not suggest that approach has been unworkable. In any event, as the cases discussed in Part II above show, it is reasonable to view a loan to be made both in the state where the borrower enters into the transaction and where the lender does so. By contrast, Opinion 11's test does not work in the context of Section 525 because the location of the borrower is irrelevant to the application of that test. Therefore, Opinion 11's three-part test cannot be equated with the test for where a loan is made for Section 525 purposes because Section 521 focuses on the location of only *one* party (the bank), whereas the making of the loan requires *two* parties (borrower and bank). As discussed, the location of the borrower is relevant to understanding where a loan is made between the bank *and* the borrower. *See, e.g.*, *Quik Payday*, 549 F.3d at 1308.

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[19] *Id.*

[20] *See* OCC Interpretive Letter No. 822, February 17, 1998 at p.14; Opinion 11 at 27,285-86.

(iii) The legislative history of the 1994 Riegle-Neal Act cannot control the interpretation of an earlier act such as DIDMCA

Plaintiffs' reliance on the legislative history of the Riegle-Neal Interstate Banking and Branching Efficiency Act of 1994 (Riegle-Neal) is also inapposite. Just like Opinion 11, that legislative history dealt with where a bank is "located" for purposes of Section 521, not with the interpretation of Section 525. But even if that legislative history had addressed where a loan is made for purposes of Section 525, it is a well-established rule of statutory construction that "the view of a later Congress" (such as the Riegle-Neal Congress) "cannot control the interpretation of an earlier enacted statute" (such as DIDMCA). *O'Gilvie v. United States*, 519 U.S. 79, 90 (1996); *see also, e.g., Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 117 (1980) (finding the Congressional views expressed in the legislative history of a 1976 Act to be irrelevant to the meaning of a 1972 act because "the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one").

And because Opinion 11 derives its three-part test from the legislative history of the Riegle-Neal Act, that test—derived from the views of a later Congress—cannot inform, much less control, the meaning of Section 525.

B. Like Opinion 11, *Marquette* is inapposite because it interprets Section 85, which looks only at where a bank is located and not where a loan is made

Plaintiffs' reliance on *Marquette Nat'l Bank v. First of Omaha Serv. Corp.*, 439 U.S. 299 (1978) is misplaced. *Marquette* merely held that the location of the borrower is irrelevant to the Section 85 analysis, as that provision looks only at where a *bank* is located. *Id*. at 310-313. Plaintiffs nevertheless argue that *Marquette* "determined where the bank was 'located' … by assessing where the loan was made." Mot. at 11-12. But *Marquette* did not assess where the loan was made—it did not use that term nor address that concept. Plaintiffs' *Marquette* quotations address a different issue instead: where the *bank* performed functions relating to the

loans at issue. *Marquette* held that "a national bank was 'located' for purposes of the section in the State named in its organization certificate" (*i.e*., its home state) and the bank "cannot be deprived of this [home-state] location" even if it extends credit to borrowers outside its home state. 439 U.S. at 310-312. *Marquette* listed the functions the *bank* performed in its home state as further support for the conclusion that the *bank* cannot be deprived of its home-state location:

> [Minnesota] contends that … 'In the context of a national bank which systematically solicits Minnesota residents … the bank must be deemed to be 'located' in Minnesota for purposes of this credit card program.' …
>
> We disagree… The congressional debates surrounding the enactment of § 30 [Section 85's predecessor] were conducted on the assumption that *a national bank was 'located'* for purposes of the section in the State named in its organization certificate…. *Omaha Bank cannot be deprived of this location* merely because it is extending credit to residents of a foreign State... Although the convenience of modern mail permits Minnesota residents holding Omaha Bank's BankAmericards to receive loans without visiting Nebraska, credit on the use of their cards is nevertheless similarly extended *by Omaha Bank* in Nebraska… Finance charges on the unpaid balances of cardholders are assessed *by the bank* in Omaha, Neb., and all payments on unpaid balances are remitted to the bank in Omaha, Neb. Furthermore, *the bank* issues its BankAmericards in Omaha, Neb., after credit assessments made *by the bank* in that city.

Id. (emphases added). Several of the functions described in *Marquette* as being performed "by the bank" in Nebraska do not relate to the making of the loan. Rather, they involve acts that occur after the making of the loan, such as assessing finance charges.

In sum, nothing in *Marquette*, which was decided before Section 525's enactment, interprets where a loan is made. And while *Marquette* was correct that the location of the borrower is irrelevant to the determination of where a national bank is located under Section 85, that is precisely why *Marquette* and Opinion 11 are irrelevant to the Section 525 analysis. *Marquette* and Opinion 11 interpret Section 85 and Section 521 respectively, which focus on the location of *one* party: the bank. By contrast, Section 525 looks at where a loan is made, which involves *two* parties: the bank and the borrower. As discussed in Part II above, the location of

the borrower is relevant to understanding where a loan is made. Indeed, Plaintiffs admit (Mot. at 12) that *Marquette* and the other sources on which they rely address "the steps involved in offering a loan." Thus, these steps are not dispositive to the making of a loan, which involves not just an offer of the loan by the bank, but also an acceptance of the loan by the buyer—and that acceptance, as discussed, necessarily occurs in the state where the borrower physically enters into the transaction.

MorEquity, Inc. v. Naeem, 118 F. Supp. 2d 885 (N.D. Ill. 2000) is also inapposite. As Plaintiffs admit, just like Opinion 11, that decision "interpreted DIDMCA Section 521" (Mot. at 14), and is therefore distinguishable for the same reasons.

C. *Jessup* is similarly inapposite

For similar reasons, Plaintiffs' reliance on the Eighth Circuit's decision in *Jessup v. Pulaski Bank*, 327 F.3d 682, 685 (8th Cir. 2003) is also inapposite. That decision interpreted a different statute—Section 731 of the Gramm-Leach-Bliley Financial Modernization Act of 1999, 12 U.S.C. § 1831u(f)—allowing Arkansas banks to charge the higher interest rates imported into Arkansas by out-of-state banks via those banks' Arkansas-based branches, but only with respect to loans "made" in Arkansas. After explaining that "[t]he statute does not define the term 'made,' and no cases have interpreted the term," *Jessup* proceeded to apply the OCC's three-part test for determining where a bank is located under § 85. *Id.* at 684. The court performed no independent analysis of the statutory term "made," but instead deferred to a 2001 OCC letter that appears to be publicly unavailable.

Even if it were appropriate to equate the state where a loan is "made" with the state where a bank is located—in the context of § 1831u(f)—it is not appropriate to equate the two terms in the context of Section 525, for the three reasons discussed above. And it might be

inappropriate to equate the two terms even in the context of § 1831u(f). Indeed, the parties did not brief the court on all possible nuances of the OCC's three-part test, and the court may not have reached the same conclusion had those nuances been highlighted and briefed. For example, the court was not informed that applying the three-part test to a different set of facts where all three functions were performed at offices (not branches) outside Arkansas would lead to the untenable result that a loan is "made" in Arkansas even if the bank performed all three lending functions *outside* of Arkansas and the borrower entered into the transaction *outside* of Arkansas. *See* Part III.A(ii) above.

CONCLUSION

For these reasons, Plaintiffs' reliance on Opinion 11 and other authorities interpreting Section 521 (or its national bank counterpart) is misplaced.

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Respectfully submitted,

HARREL M. PETTWAY
General Counsel
FLOYD I. ROBINSON
Deputy General Counsel
B. AMON JAMES
Assistant General Counsel
J. SCOTT WATSON
Senior Counsel
MINODORA D. VANCEA
Counsel
/s/Michael K. Morelli
MICHAEL K. MORELLI
Senior Attorney
Federal Deposit Insurance Corporation
3501 N. Fairfax Drive, VS-D7004
Arlington, VA 22226
Tel: (571) 501-4021
Fax: (703) 562-2496
Email: mmorelli@fdic.gov

Attorneys for FDIC

CERTIFICATE OF TYPE-VOLUME COMPLIANCE

Excluding the portions of the motion excepted under DDD Civ. P.S. III(A)(3), the FDIC hereby certifies that the foregoing brief contains 5,498 words and thus complies with the type-volume limitation set forth in DDD Civ. P.S. III(A)(2).

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/s/Michael K. Morelli
Michael K. Morelli
Attorney for FDIC

CERTIFICATE OF SERVICE

I certify that on April 23, 2024, I electronically filed the foregoing motion on behalf of the Federal Deposit Insurance Corporation using the Court's CM/ECF system, which will generate notice to the following via electronic mail:

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

TYLER J. BOURKE
Davis Wright Tremaine, LLP
920 Fifth Avenue
Suite 3300
Seattle, WA 98104
(206) 622-3150
tyler.bourke@dwt.com

CHRIS SWIFT
Davis Wright Tremaine, LLP
560 SW 10th Avenue
Suite 700
Portland, OR 97205
(503) 276-5505
chrisswift@dwt.com

DAVID M. GOSSETT
CHAVA BRANDRISS
Davis Wright Tremaine, LLP
1301 K Street NW
Suite 500 East
Washington, D.C. 20005
(202) 973-4200
davidgossett@dwt.com
chavabrandriss@dwt.com

ED PERLMUTTER
LEAH E. CAPRITTA
Holland & Knight LLP
1801 California Street
Suite 5000
Denver, CO 80202
(303) 974-6552
ed.perlmutter@hklaw.com\
leah.capritta@hklaw.com

Attorneys for National Association of Industrial Bankers and the American Financial Services Federation

MORGAN L. RATNER
Sullivan & Cromwell LLP
1700 New York Avenue NW
Washington, D.C. 20006
(202) 956-7500
ratnerm@sullcrom.com

MATTHEW A. SCHWARTZ
LESLIE B. ARFFA
125 Broad Street
New York, NY 10004
(212) 558-4000
schwartzmatthew@sullcom.com
arffal@sullcrom.com

Attorneys for the American Fintech Council

KEVIN JAMES BURNS
NIKOLAI N. FRANT
PHILIP M. SPARR
Colorado Attorney General's Office
Ralph L. Carr Colorado Judicial Center
1300 Broadway
Denver, CO 80203
(720) 508-6000
(720) 508-6033 (fax)
Kevin.Burns@coag.gov
Nikolai.Frant@coag.gov
Philip.Sparr@coag.gov

Attorneys for Defendants Philip J. Weiser and Martha Fulford

Dated: April 23, 2024

/s/Michael K. Morelli
Michael K. Morelli
Attorney for FDIC