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.

PLAINTIFFS' RESPONSE TO DEFENDANTS' MOTION FOR STAY OF THE PRELIMINARY INJUNCTION PENDING APPEAL

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Federal Cases

Federal Statutes

State Statutes

Other Authorities

INTRODUCTION

The hollowness of Defendants' motion is best evidenced by its timing. On the one hand, Defendants claim irreparable harm if a stay is not entered. Mot. (Dkt. 76) 14. On the other hand, Defendants waited an entire month to appeal the Court's preliminary injunction and to ask the Court to stay that injunction pending appeal. And that request came nearly three weeks *after* the statute's July 1, 2024, effective date. Delay aside, Colorado cannot satisfy any of the factors that would support this Court dismantling the injunctive relief it just granted to Plaintiffs' members. The Court should deny Colorado's motion.

First, the Court has already determined that Plaintiffs are likely to prevail on the merits—even under a heightened standard for "disfavored" injunctions, Order (Dkt. 69) 6-7, which does not apply. Colorado offers no new arguments to alter that conclusion, much less carry its *own* heightened burden to show a strong likelihood of reversal on appeal.

Second, Colorado has not shown and cannot show that maintaining the status quo—by permitting Plaintiffs' members to continue lending at the rates authorized by Congress and offered by national banks—will cause irreparable harm. To the contrary, *granting* the requested stay would cause irreparable harm to Plaintiffs' members, as the Court found in issuing the preliminary injunction in the first place.

Third, for the same reason, Colorado cannot show that the public interest favors reversing the preliminary injunction. Doing so would not only harm Plaintiffs' members; it would also harm Colorado consumers by removing credit options that out-of-state, state banks provide to Colorado borrowers. At the same time, similar credit products would continue to be offered by national banks at similar interest rates, reducing competition.

ARGUMENT

To obtain a stay pending appeal under Federal Rule of Appellate Procedure 8(a)(1), Colorado must demonstrate to this Court "(1) its strong position on the merits of the appeal; (2) irreparable injury if the stay were denied; (3) that a stay would not substantially harm other parties to the litigation; and (4) that the public interests favor a stay." *Sec. Inv. Prot. Corp. v. Blinder, Robinson & Co.*, 962 F.2d 960, 968 (10th Cir. 1992); *see also Battle v. Anderson*, 564 F.2d 388, 397 (10th Cir. 1977) (stating movant must make a "strong showing" that it "is likely to prevail on the merits of the appeal"); *Evans v. Bd. of Cnty. Comm'rs*, 772 F. Supp. 1178, 1181 (D. Colo. 1991). Colorado cannot satisfy any of those factors.

I. Colorado Offers No Reason For The Court To Reverse Its Determination That Plaintiffs' Claims Are Likely To Succeed.

In its ruling on Plaintiffs' preliminary injunction motion, the Court held that Plaintiffs "made a strong showing that they are substantially likely to succeed on the merits of their claim" because the "plain meaning of Section 1831d's opt-out provision is that what state a loan is 'made in' depends on where the bank is located and performs its loan-making functions and does not depend on the location of the borrower." Order 23. In so holding, the Court rejected the arguments Colorado reprises here. *Id.* at 14-19. Because Colorado provides no reason why the Court should reverse course, it is not "likely to prevail on the merits of the appeal." *Battle*, 564 F.2d at 397.

The Court's interpretation of the scope of Section 525 of DIDMCA is correct. The Court already carefully considered all parties' (including two *amici*'s) arguments regarding the text of Section 525, the statutory context of Section 521 and the rest of Title 12 of the U.S. Code, legislative history, and the relevant regulatory guidance, concluding:

> Taken as a whole, the consistent use of "make" and "made" throughout the statutory text indicates that the plain and ordinary answer to the question of *who* "makes" a loan is the bank, not the borrower. It follows, then, that the answer to the question of *where*

> a loan is "made" depends on the location of the bank, and where the bank takes certain actions, but not on the location of the borrower who "obtains" or "receives" the loan.

Order 18; *see id.* at 15-23. Colorado fails to offer any basis for the Court to reconsider this decision.

Colorado's criticisms of the Court's interpretation of the scope of Section 525 for the most part rehash the same arguments the Court already rejected: that because two parties—the bank and the borrower—are involved in a loan transaction, the word "made" must refer to the actions of both; and that, despite all indications to the contrary, Congress chose to refer to loans "made in" a state when it *actually* meant loans "received in" that state. Mot. 4-6; *see* PI Opp. (Dkt. 39) 10-11; MTD (Dkt. 52) 8. The Court was right to reject those arguments. Order 14-19; *see also* PI Reply (Dkt. 45) 4-7.

Colorado employs a new analogy in support of its textual argument—that although a bank may "make" a loan, it cannot do so "without a borrower any more than one hand can clap without the other." Mot. 4. Yes, but a borrower also cannot "receive" a loan without a lender. And yet "received" remains a borrower-focused term—just as "made" (whether past or present tense; active or passive voice, Mot. 4) is a lender-focused term. Accordingly, statutes throughout Title 12 frequently refer to lenders "making" loans and borrowers "receiving" loans. *See* Order 16-18.

Although Congress's consistent usage of the terms "make" and "receive" in banking-related laws reinforces their plain meaning, Colorado still urges the Court to ignore this context—insisting that Section 525 is somehow special and "should not be construed in the same manner" as other banking statutes. Mot. 9. But even if that dubious premise were correct, it would not help Colorado. DIDMCA itself elsewhere uses the word "made" in its ordinary sense: Section 521 ties the applicable interest rate for each "loan or discount made" by a bank to that bank's location. 12 U.S.C. § 1831d(a); *see also* Mot. 5-6.

Pivoting from textual arguments, Colorado argues that the Court's interpretation frustrates DIDMCA's purposes. But this Court already held that the "parties' differing views regarding the legislative purpose behind the opt-out provision are irrelevant" because the statute's plain language forecloses Colorado's interpretation of the opt-out. Order 23. In any event, Colorado is incorrect. According to Colorado, DIDMCA unsettled an imagined uniform national "status quo", under which only the borrower's state of residence governed interstate loans, while DIDMCA's opt-out provision gave "states the option to return to" this purported "status quo." *See* Mot. 6-7. This is wrong for two reasons.

First, there was no status quo to unsettle. As the Supreme Court recognized in *Marquette National Bank of Minneapolis v. First of Omaha Services Corp.*, 439 U.S. 299 (1978), it was only in the 1970s that lending had even begun to evolve beyond face-to-face transactions—and it was primarily *national* banks that began to lend across state lines through credit card lending. *See* Compl. (Dkt. 1) ¶¶ 21-39. Colorado provides no support for its claim—whether grounded in statute, case law, or history—that a uniform, pre-DIDMCA status quo existed for how each state's interest rate caps would have been applied to these then-novel types of transactions. *See* Mot. 7 (referring without authority to Congress's supposed intent to provide "states the option to return to the status quo that existed before DIDMCA").

Second, there is no reason to think that DIDMCA's opt-out was intended to restore this hypothetical "status quo." Colorado provides no evidence that Congress recognized any such status quo and enacted Section 525 to preserve it.[1] To the contrary, as Plaintiffs have explained,

[1] Rather than referencing case law or statutory, regulatory, or historical sources, Colorado cites only a statement by Plaintiff's counsel supposedly "conceding that state-chartered banks had to comply with [the borrower's] state law pre-DIDMCA." Mot. 6. Colorado points to a sentence fragment and ignores the rest of counsel's response, which explains why there *was* no such status

DIDMCA served a different purpose. It was enacted in response to the high interest rates set by the Federal Reserve in the 1970s and was intended to provide state banks access to the same (at-the-time higher) federal rate cap that national banks enjoyed. PI Mot. (Dkt. 24) 5-6; PI Reply 10-12. Section 525 allows a state to opt out of DIDMCA's federally imposed rates and regulate its own state-chartered banks' rates; DIDMCA does not allow an opting-out state to impose its banking regulations on other states' banks.[2] Colorado's complaint that "the laws of other states are forced on a state that has opted out of preemption," Mot. 6, therefore gets it backward. It is Colorado that seeks to force its own laws on states that have chosen not to opt out for *their* banks.

II. Colorado's Argument That Plaintiffs Lack A Cause Of Action Is Frivolous.

Defendants' argument that Plaintiffs lack a cause of action to ask the Court to enjoin applications of state law that are preempted by DIDMCA, Mot. 11-12, is nonsense. The Court correctly concluded that Plaintiffs have a valid cause of action "in equity under *Ex parte Young*, 209 U.S. 123 (1908)." Order 11-13.

In the Order, the Court laid out the applicable "three-step analysis," which requires courts to determine "(1) what alleged substantive rights the plaintiff is seeking to vindicate; (2) what putative causes of action the plaintiff is raising based on those rights; and (3) which, if any, of

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quo. *See* Tr. 58:8-21, attached as Exhibit A to the Declaration of David M. Gossett, dated August 9, 2024, filed with this brief.

[2] Colorado argues that "Congress was armed with the *Marquette* decision, and that "[i]f Congress wanted the Opt-Out to turn on the location of the bank, it could have simply written Section 525 to read, '. . . such State does not want this section to apply with respect to banks located in such State.'" Mot. 6. But Congress could also have "simply written" Section 525 to read "such State does not want this section to apply with respect to loans received by borrowers in such State" if it had intended to enact Colorado's interpretation. Beyond that, the opt-out provision focuses on loans made during a certain time period—making "loans made in" a more natural formulation than "banks located in," in the context of the provision here. Regardless, as the Court held, the focus should remain on the plain meaning of the word "made"—which, as the Court recognized, is lender-focused rather than borrower-focused.

those causes of action are viable with respect to the relief requested." *Id.* at 11 (citing *Safe Streets Alliance v. Hickenlooper*, 859 F.3d 865, 899 (10th Cir. 2017)). As the Court recognized, Colorado "does not raise any arguments as to these first two steps of the cause-of-action analysis." *Id.* at 11-12. Plaintiffs seek to vindicate their members' substantive right "to charge interest at the rates specified in Section 1831d," and assert an equitable cause of action under *Ex parte Young*.[3] *Id.* The Court then correctly rejected Colorado's argument that Congress intended to foreclose "'the equitable relief that is traditionally available to enforce federal law,'" including the power to "'issue an injunction upon finding … state regulatory actions preempted.'" Order 12-13 (quoting *Armstrong v. Exceptional Child Ctr., Inc.*, 575 U.S. 320, 326, 328-29 (2015)).

In response, Colorado repeats its failed argument that Congress silently prohibited banks from asserting preemption claims by enacting the Federal Deposit Insurance Act ("FDIA"). Mot. 11. Colorado bases this argument on a misreading of *Armstrong*, where the Supreme Court determined that Congress chose to "preclude[] private enforcement" of a specific provision of the Medicaid Act. 575 U.S. at 323, 328 (citing 42 U.S.C. § 1396a(a)(30)(A)).

Armstrong made clear that two particular features of that provision combined to preclude injunctive relief. First, Congress provided an express enforcement mechanism for the violation of this specific obligation: "the withholding of Medicaid funds by the Secretary of Health and Human Services." *Id.* at 328. Second, the relevant Medicare provision was "judicially unadministrable" as

[3] After the Court granted the preliminary injunction, Plaintiffs amended their Complaint to eliminate any confusion regarding the applicable cause of action. *See* First Am. Compl. (Dkt. 71). In response, Colorado appears to have abandoned its argument that the Supremacy Clause itself does not create a private right of action.

it conferred a "judgment-laden standard upon the Secretary alone[.]" *Id.* at 328-29.[4] Neither necessary condition is present here.

DIDMCA does not establish an exclusive—or, indeed, any—enforcement mechanism to address violations of its interest rate preemption provisions. Indeed, as this Court recognized, the "statutory enforcement mechanisms the State points to" are all remedies "*against* a bank for violations" of applicable laws, which are "not the rules or rights" Plaintiffs' bank members seek to enforce here. Order 13. Unable to identify an applicable enforcement provision, Colorado contends that the *existence of the FDIC* is sufficient to bar *Ex parte Young* claims because the FDIC has general regulatory authority over the FDIA. Mot. 11. Of course, Colorado ignores that the FDIC admitted it lacks authority to bring a preemption claim against a state:

> THE COURT: … [H]as the FDIC ever taken enforcement action against a state?
> MR. MORELLI: I'm not aware of any, Your Honor, no. The FDIC's enforcement authority under the FDI Act is limited to banks and those who work for them.

Tr. 54:15-20 (Gossett Decl., Ex. A at 3).

Colorado also makes no effort to show that preemption claims under DIDMCA are "judicially unadministrable." *Armstrong*, 575 U.S. at 328-29. DIDMCA authorizes state banks to lend at particular rates and preempts state laws that attempt to impose lower interest rate limits. Determining whether preemption applies therefore entails only a simple comparison between numbers—an "objective benchmark"—not a discretionary, "judgment-laden standard" like that in *Armstrong*. *Planned Parenthood of Kan.*, 882 F.3d at 1227.

[4] Underscoring *Armstrong's* narrow scope, the Tenth Circuit subsequently held that a different paragraph in the same statute *is* judicially administrable and therefore enforceable through a private right of action. *Planned Parenthood of Kan. v. Andersen*, 882 F.3d 1205, 1227 (10th Cir. 2018) (holding different provision of 42 U.S.C. § 1396a(a) was not "unadministrable" because it "is tethered to an objective benchmark").

Thus, Colorado cannot show that Congress chose to prohibit *Ex parte Young* preemption claims when it enacted DIDMCA, and Plaintiffs may assert such a claim here.

III. This Court Did Not Inappropriately Grant a "Disfavored" Injunction.

Colorado mischaracterizes the preliminary injunction as a "disfavored injunction," and argues that the Court failed to apply the heightened standard required to grant one. Mot. 12-13. Colorado is incorrect on both counts.

First, while the Court found it "doubtful" that the injunction sought by plaintiffs was disfavored, it also found that it "need not resolve that question, because … the plaintiffs have made a showing as to their likelihood of success on the merits and threatened irreparable harm sufficient to satisfy even the heightened standard for disfavored injunctions." Order 6-7. So whatever standard applies, Plaintiffs have met it.

Second, Colorado is in any event incorrect that a heightened standard applies here: The *preliminary* injunction does not *permanently* enjoin Colorado's interest rate caps, and it therefore does not afford Plaintiffs "all the relief that the moving party could expect from a trial win." *Free the Nipple-Fort Collins v. City of Fort Collins*, 916 F.3d 792, 797-98 & n.3 (10th Cir. 2019) (stating application of the heightened standard "was likely in error" because "if the plaintiffs lose on the merits after a trial, then [the defendant] may fully enforce its public-nudity ordinance"); *see also* Order 6 n.2.

Moreover, as the Tenth Circuit explained in one of the cases on which Colorado relies (Mot. 13), an injunction is disfavored only "if it would 'render a trial on the merits largely or completely meaningless'" because "the effect of the order, once complied with, cannot be undone." *Prairie Band of Potawatomi Indians v. Pierce*, 253 F.3d 1234, 1247-48 (10th Cir. 2001) (quoting *Tom Doherty Assoc., Inc. v. Saban Ent., Inc.*, 60 F.3d 27, 34 (2d Cir. 1995) (giving examples such as enjoining "the live televising of an event scheduled for the day on which

preliminary relief is granted" or "the disclosure of confidential information")). Here, the preliminary injunction lasts only until the Court finally determines Plaintiffs' entitlement to a permanent injunction, and unlike the cancellation of a live television event—can be undone. Colorado thus cannot show that the preliminary injunction renders a permanent injunction "meaningless."

IV. Colorado Has Not Demonstrated Irreparable Injury From The Preliminary Injunction, Or That The Public Interest Favors Undoing the Injunction Pending Appeal.

In addition to challenging the correctness of the preliminary injunction, Colorado also argues that a stay is necessary under the merged harm-to-the-movants and public-interest factors because the state and the public will suffer irreparable harm absent a stay. Mot. 14-15. This argument misrepresents the facts and the law.

First, an unconstitutional law is never in the public interest. *See Chamber of Com. of U.S. v. Edmondson*, 594 F.3d 742, 771 (10th Cir. 2010) ("[A state] does not have an interest in enforcing a law that is likely constitutionally infirm."). The Court has already determined that Colorado's interpretation of its opt-out rights is likely unconstitutional. Allowing Colorado to enforce the opt-out against Plaintiffs' members pending appeal therefore cannot be in the public interest.

Second, Colorado's own actions demonstrate that it, and the public interest, will not be irreparably harmed if the Court leaves the preliminary injunction in place while this case is further litigated. The legislature itself clearly did not view the need to opt-out to be an emergency. Even though H.B. 23-1229 was enacted on June 5, 2023, and the rest of its provisions took effect on January 1, 2024, the legislature delayed the effective date of the opt-out provision for over a year, to July 1, 2024. *See generally* H.B. 23-1229, 74th Gen. Assemb., Reg. Sess. (Colo. 2023). Nor have Colorado's actions in this litigation demonstrated that there is a pressing need for the opt-out to go into effect while Colorado's appeal is pending. Colorado did not even file its notice of appeal

until the last possible day, July 18, 2024—well after the opt-out's July 1 effective date. It then brought this motion (on a non-expedited basis) the following day—over a month after the Court's June 18 order.

Third, Colorado's claim of irreparable injury because "[c]onsumers will pay interest at prohibited rates," Mot. 14, ignores that consumers will continue to be able to borrow at those rates from national banks regardless of the outcome of this motion (or indeed this lawsuit). Far from asking this Court to "second-guess the Congress and the General Assembly's decisions" by flagging this fact, Mot. 14, Plaintiffs are merely suggesting that the clear statutory authority for some parties to offer loans at rates above Colorado's cap means that Congress did not view the availability of such loans as posing an imminent, substantial threat to the public.

Fourth, although Plaintiffs' members may make some loans at rates higher than those Colorado permits, those members are—despite Colorado's insinuations to the contrary—responsible lenders that offer a wide variety of useful, everyday credit products to Colorado consumers. *See* PI Mot. 7-9. Colorado has not shown that its consumers are being harmed, let alone harmed irreparably, by continuing to have access to loan products offered by Plaintiffs' members while Colorado's appeal is litigated. Rather, granting Colorado's stay request would reduce Coloradans' access to choices among responsible, needed credit products that Plaintiffs' members offer, and perhaps even provide incentives for national banks to raise their rates in the state. *See* PI Mot. 18.

V. The Requested Stay Would Substantially Harm Plaintiffs.

Colorado argues that a stay of the preliminary injunction would not substantially harm Plaintiffs. Mot. 14-15. This argument is gobbledygook.

As this Court has already held: "Even if the plaintiffs' members could recover money damages from the State, loss of customers, loss of goodwill, and erosion of a competitive position

in the marketplace are the types of intangible damages that may be incalculable, and for which a monetary award cannot be adequate compensation." Order 24; *see also Sec. Inv. Prot. Corp.*, 962 F.2d at 968; *Edmondson*, 594 F.3d at 770-71 (recognizing costs of complying with law later held to be invalid are non-recoverable due to sovereign immunity and hence irreparable); *Kan. Health Care Ass'n v. Kan. Dep't of Soc. & Rehab. Servs.*, 31 F.3d 1536, 1543 (10th Cir. 1994).

Colorado does not contest the evidence demonstrating the myriad ways in which Plaintiffs' members will be harmed should Colorado's opt-out go into effect. Plaintiffs provided numerous declarations "detailing the loans that will be affected as well as the administrative costs, lost revenue, and intangible losses like lost customers and goodwill that the Plaintiffs' members will suffer if the full scope of Colorado's Opt Out is permitted to take effect." Mot. 14-15 (citing all seven of Plaintiffs' declarations); *see also* PI Opp. 19 (failing to contest existence of these harms). Instead, Colorado now simply declares: "This is not substantial harm." Mot. 15. Unmoored from any evidence or analysis, Colorado's *ipse dixit* flies in the face of the Court's conclusion that Plaintiffs made a "strong showing that they will be irreparably harmed if the State is not enjoined[.]" Order 25. Colorado's opinion that the affected loans are "not in the interests of Coloradans," Mot. 15, has nothing to do with the substantial and uncontested harms Plaintiffs' members will suffer if the Court disturbs the status quo by staying the injunction it only just granted.

CONCLUSION

The Court should deny Defendants' Motion for Stay of the Preliminary Injunction Pending Appeal.

Respectfully Submitted,

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CERTIFICATE OF TYPE-VOLUME COMPLIANCE

Plaintiffs hereby certify that the foregoing pleading contains 3,601 words, and thus complies with the type-volume limitation set forth in Judge Domenico's Practice Standard III(A)(1).

/s/ David M. Gossett
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CERTIFICATE OF SERVICE

I hereby certify that on this 9th day of August, 2024, I filed a true and correct copy of the foregoing document via CM/ECF, which will generate notice by electronic mail to all counsel who have appeared via CM/ECF.

/s/ David M. Gossett
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