No. 24-1293

In the United States Court of Appeals for the Tenth Circuit

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

Plaintiffs-Appellees.

v.

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

Defendants-Appellants.

On Appeal from the U.S. District Court for the District of Colorado
No. 24-cv-812, Hon. Daniel D. Domenico

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF APPELLEES ON REHEARING EN BANC

Janet Galeria
Matthew P. Sappington
U.S. CHAMBER LITIGATION CENTER
1615 H Street NW
Washington, D.C. 20062

Grace Greene Simmons
MCGUIREWOODS LLP
1075 Peachtree Street N.E., 35th Floor
Atlanta, GA 30309

Jonathan Y. Ellis
MCGUIREWOODS LLP
501 Fayetteville Street
Suite 500
Raleigh, NC 27601
(919) 755-6688
jellis@mcguirewoods.com

Counsel for Amicus Curiae
Chamber of Commerce of the United States of America

CORPORATE DISCLOSURE STATEMENT

The Chamber of Commerce of the United States of America (the "Chamber") is a non-profit, tax-exempt organization incorporated in the District of Columbia. The Chamber has no parent corporation, and no publicly held company has 10% or greater ownership in the Chamber.

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IDENTITY AND INTEREST OF AMICUS CURIAE[1]

The Chamber of Commerce of the United States of America is the world's largest business federation. The Chamber represents approximately 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases, like this one, that raise issues of concern to the nation's business community.

The Chamber's members include businesses that are subject to federal regulatory schemes that preempt state and local laws. These members routinely conduct business across multiple States, and they have a strong interest in ensuring that federal preemption is enforced correctly, clearly, and uniformly nationwide. The Chamber is thus well suited to offer a broader perspective on preemption, including the presumption against preemption, which makes it more difficult for Congress to enact nationwide regulatory schemes and threatens to breed a patchwork of legal regimes that burden the ability of multistate businesses to operate efficiently and effectively.

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[1] Counsel of record for all parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no person or entity other than *amicus*, its members, or its counsel made a monetary contribution that was intended to fund the preparation or submission of this brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

The en banc Court should affirm the decision below. Through the Depository Institutions Deregulation and Monetary Control Act of 1980 (DIDMCA), Congress established a national standard for interest rates, ensuring that state banks can compete with national banks on those terms. Congress made clear that it intended to preempt state law, and to what extent: "[N]otwithstanding any State constitution or statute," a state bank may adopt the same interest rate as a national bank. 12 U.S.C. § 1831d(a). "[A]ny State constitution or statute … is hereby preempted for the purposes of this section." *Id.* A State may opt out, but only "with respect to loans made in such State." 12 U.S.C. § 1831d note (Effective Date). The vacated panel opinion misinterpreted this preemption provision, its reading tainted by the presumption against preemption. The en banc Court should give that presumption no weight in interpreting the DIDMCA.

The presumption against preemption functions akin to a clear statement rule, requiring Congress to have acted clearly and unambiguously in preempting state law. The presumption has no role to play in interpreting an express preemption provision. By expressly preempting state law, Congress has confirmed its intent to preempt and delineated that preemption. The preemption provision should thus be given its best and natural reading, absent any thumb on the scale. That is especially

so where, as here, the federal government has strong interests and has long regulated in a space.

The district court recognized this below: "[W]hen interpreting [an] express preemption clause, [the] court must 'focus on the plain wording of the clause, which necessarily contains the best evidence of Congress's pre-emptive intent,' and [that] inquiry begins and ends with statutory language when its meaning is plain." *Nat'l Ass'n of Indus. Bankers v. Weiser*, 737 F. Supp. 3d 1113, 1128 (D. Colo. 2024) (quoting *Puerto Rico v. Franklin Cal. Tax-Free Tr.*, 579 U.S. 115, 125 (2016)). Judge Rossman likewise recognized that this Court had to seek the "single, best meaning" of the statute, "construe[ing] the language so as to give effect to the intent of Congress." *Nat'l Ass'n of Indus. Bankers v. Weiser*, 159 F.4th 694, 727 (10th Cir. 2025) (Rossman, J., concurring in part) (internal quotation marks omitted).

The panel majority took a different approach. It "start[ed] with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress," "particularly in those [cases] in which Congress has legislated in a field in which the States have traditionally occupied." *Weiser*, 159 F.4th at 712 (quoting *Wyeth v. Levine*, 555 U.S. 555, 565 (2009)). Colorado's opt-out here, the panel reasoned, "implicates two areas which are squarely within the ambit of the states' historic powers—banking and consumer protection." *Id.* (internal quotation marks omitted). "So absent clear intent from Congress to intrude on these police powers," the majority "declin[ed] to

read § 1831d as continuing to preempt the laws of an opt-out state." *Id.* "[P]rimed against preemption," *id.* at 721, the panel majority disregarded "the plain statutory text" and "mistakenly dr[o]ve a wedge between" the DIDMCA's provisions, *id.* at 730 (Rossman, J., concurring in part).

The en banc Court should not make the same misstep. The presumption against preemption is not implicated here. And the best reading of the statute, in light of its text, context, and purpose, "is the one advanced by the Banks and endorsed by the district court," that a consumer loan is "made" in "the place where the lending bank is chartered or performs its non-ministerial loan making functions," "not … where the borrower is located." *Id.* at 728-29 (Rossman, J., concurring in part). The decision below should be affirmed.

ARGUMENT

I. No Presumption Against Preemption Should Be Used in Interpreting the DIDMCA's Express Preemption Provision.

The presumption against preemption has no application in this express-preemption case. Where, as here, Congress has explicitly preempted state law and carefully delineated the scope of that preemption, its direction should be construed according to the ordinary tools of statutory construction, without any bias against preemption.

A. The presumption against preemption is not grounded in the Constitution's text, history, and structure.

At the outset, it is important to recognize that the presumption against preemption rests on a shaky foundation. Although this Court is, of course, bound to apply it according to the Supreme Court's dictates, the presumption finds little support in the Constitution's text, history, and structure.

1. The presumption is not found in the Constitution's text. Under the Supremacy Clause, "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. This "blanket instruction" is clear and unconditional. *Fla. State Conf. of NAACP v. Browning*, 522 F.3d 1153, 1168 (11th Cir. 2008). "It does not contemplate any special requirement to trump state law." Jack Goldsmith, *Statutory Foreign Affairs Preemption*, 2000 Sup. Ct. Rev. 175, 184; *accord* Marin R. Scordato, *Federal Preemption of State Tort Claims*, 35 U.C. Davis L. Rev. 1, 30 (2001).

2. There is likewise no "significant support in constitutional history for the conclusion that the framers intended any such presumption." Scordato, *supra* at 30. In the Supreme Court's early cases, the Court "inquired whether a state law 'interfer[ed] with,' was 'contrary to,' or 'c[a]me into collision with' federal law' … without ever invoking a 'presumption.'" *Wyeth*, 555 U.S. at 624 n.14 (Alito, J., dissenting) (quoting *Gibbons v. Ogden*, 9 Wheat. 1, 210 (1824)).

Indeed, the Supremacy Clause was designed and intended by the Founders to *overcome* any presumption against implied repeals. The Clause treats "federal law as effectively repealing contrary state law." *PLIVA, Inc. v. Mensing*, 564 U.S. 604, 621 (2011) (plurality). "The phrase 'any [state law] to the Contrary notwithstanding' is a *non obstante* provision," a provision commonly used in enactments at the time "to specify the degree to which a new statute was meant to repeal older, potentially conflicting statutes in the same field." *Id.* at 621-22 (citing Caleb Nelson, *Preemption*, 86 Va. L. Rev. 225, 238-240 & n. 43-35, 252-53 (2000)). The *non obstante* provision "acknowledged that the statute might contradict prior law and instructed courts *not* to apply the general presumption against implied repeals." *Id.* at 622 (citing Nelson, *supra* at 241-42) (emphasis added).

"Traditionally, courts went to great lengths attempting to harmonize conflicting statutes, in order to avoid implied repeals." *Id.* "A *non obstante* provision thus was a useful way for legislatures to specify that they did not want courts distorting the new law to accommodate the old." *Id.* "[I]n its historical context" then, Nelson, *supra* at 303, "[t]he *non obstante* provision of the Supremacy Clause indicates that a court need look no further than the ordinary meaning of federal law, and should not distort federal law to accommodate conflicting state law." *PLIVA*, 564 U.S. at 623 (internal quotation marks omitted).

3. The presumption finds no support in our constitutional structure. For one, the presumption raises serious separation-of-powers concerns. The presumption

"counterbalances Congress's own enactments," requiring Congress to be more explicit than necessary to achieve its regulatory objectives and "mak[ing] it difficult for Congress to preempt state law to the extent it wants." Nelson, *supra* at 292, 300-01. It is Congress, not the courts, "that preempts state law," and the "task as judges 'is to ascertain Congress' intent in enacting the federal statute at issue.'" *Atay v. Cnty. of Maui*, 842 F.3d 688, 699 (9th Cir. 2016) (internal quotation marks omitted). A presumption against preemption "systematically favor[s] one result over another," "disrupt[ing] the constitutional division of power between" Congress and the courts and "risk[ing] … illegitimate expansion of the judicial function." Viet D. Dinh, *Reassessing the Law of Preemption*, 88 Geo. L.J. 2085, 2092 (2000); *accord* Goldsmith, *supra* at 186.

The presumption also disrupts the federal-state balance. In preempting state law, Congress walks the line between advancing important federal interests—including preserving national markets, providing uniformity, and reducing compliance burdens—while still respecting areas of state regulation. Nelson, *supra* at 300. "Congress's chosen level of deference to state interests will be reflected in the language that Congress enacts." *Id.* at 302. "Once Congress has decided upon the proposal that it will enact, however, the political safeguards of federalism have done their work." *Id.* at 300. "For courts always to adopt narrowing constructions of the language that Congress enacts would be to give the political safeguards of federal-

ism a kind of double weight." *Id.* It would also interfere with the federal government's ability to legislate without undue interference from conflicting state regimes. Robert R. Gasaway & Ashley C. Parrish, *The Problem of Federal Preemption: Toward a Formal Solution* 219, in *Federal Preemption* (Richard A. Epstein & Michael S. Greve, eds., 2007).

B. The presumption against preemption is inapplicable to express preemption provisions.

Against that backdrop, there is no grounds for reaching to apply the presumption in this case. To the contrary, it is well-established that the presumption against preemption has no role "in express-preemption cases." *Thornton v. Tyson Foods, Inc.*, 28 F.4th 1016, 1023 (10th Cir. 2022). As the Supreme Court has explained, where a "statute contains an express pre-emption clause, [it] do[es] not invoke any presumption against pre-emption." *Franklin*, 579 U.S. at 125 (quoting *Chamber of Com. of the U.S. v. Whiting*, 563 U.S. 582, 594 (2011)). This Court has repeatedly followed that command. *See, e.g.*, *Thornton*, 28 F.4th at 1023; *Boyz Sanitation Serv., Inc. v. City of Rawlins*, 889 F.3d 1189, 1198 (10th Cir. 2018); *EagleMed LLC v. Cox*, 868 F.3d 893, 903 (10th Cir. 2017). And all but one of the courts of appeals to have passed on the issue follow the same approach.[2]

[2] *See Northwestern Selecta, Inc. v. González-Beir*, 145 F.4th 9, 15 (1st Cir. 2025); *Buono v. Tyco Fire Prods., LP*, 78 F.4th 490, 495 (2d Cir. 2023); *N. Va. Hemp & Agric., LLC v. Virginia*, 125 F.4th 472, 492-93 (4th Cir. 2025); *Young Conservatives*

The "touchstone" for preemption is Congressional intent. *Altria Group, Inc. v. Good*, 555 U.S. 70, 76 (2008). So "[e]vidence of pre-emptive purpose is sought in the text and structure of the statute at issue." *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 664 (1993). With express preemption, "Congress defines explicitly the extent to which its enactments pre-empt state law." *Emerson v. Kansas City So. Ry. Co.*, 503 F.3d 1126, 1129 (10th Cir. 2007). So "the best evidence of … preemptive intent" is "necessarily" "the plain wording of the" statute. *Franklin*, 579 U.S. at 125.

This remains true where, as here, an express preemption provision provides a limited opportunity for a State to opt-out of that preemption. In defining the contours of preemption, including any "express exemption from preemption," *Oxygenated Fuels Ass'n Inc. v. Davis*, 331 F.3d 665, 668 (9th Cir. 2003), Congress has made both its intent to preempt and the desired scope of that preemption clear, *English v. Gen. Elec. Co.*, 496 U.S. 72, 78 (1990); *see, e.g.*, *Davis*, 331 F.3d at 668 (applying plain reading in interpreting "express statutory exemption for" States from "express preemption provision" in the Clean Air Act, 42 U.S.C. § 7545(c)(4)(A)-(B)).

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of Tex. Found. v. Smatresk, 73 F.4th 304, 311 (5th Cir. 2023); *Bio Gen LLC v. Sanders*, 142 F.4th 591, 600 (8th Cir. 2025); *Assurance Wireless USA, LP v. Reynolds*, 100 F.4th 1024, 1032 n.4 (9th Cir. 2024); *Daniels v. Exec. Dir. of Fla. Fish & Wildlife Conservation Comm'n*, 127 F.4th 1294, 1305 (11th Cir. 2025); *but see Lupian v. Joseph Cory Hldgs. LLC*, 905 F.3d 127, 131 n.5 (3d Cir. 2018) (holding that the presumption applies to express preemption provisions "involving areas historically regulated by the states").

In that situation, "the courts' task is an easy one." *English*, 496 U.S. at 78. To interpret the express-preemption provision, a court should "examine the plain meaning of the [statute] and apply the canons of construction as [it] ordinarily would," absent any "presumption against preemption." *Voter Reference Found., LLC v. Torrez*, 160 F.4th 1068, 1081 (10th Cir. 2025). The "inquiry into preemption both begins and ends with the language of the statute itself," *EagleMed*, 868 F.3d at 903, understood in light of its "statutory context and … overall purpose," *Triumph Foods, LLC v. Campbell*, 156 F.4th 29, 50 (1st Cir. 2025).

C. Colorado's interests in banking and consumer protection provide no sound basis for applying the presumption.

The vacated panel opinion nevertheless reasoned not only that the presumption against preemption applied here but that it did so "with particular force" because the DIDMCA "intrudes on a field traditionally occupied by the States," namely "banking and consumer protection." *Weiser*, 159 F.4th at 721. That was wrong. Although the Third Circuit has similarly applied the presumption to "claims involv[ing] areas historically regulated by states," *Lupian*, 905 F.3d at 131 n.5, the Supreme Court has been clear that the presumption has no place in express preemption, *Franklin*, 579 U.S. at 125, no matter the regulatory "context," *Medicaid & Medicare Advantage Prods. Ass'n of P.R. v. Emanuelli Hernández*, 58 F.4th 5, 12 n.5 (1st Cir. 2023) (collecting cases and declining to follow the Third Circuit); *see Dialysis Newco., Inc. v. Cmty. Health Sys. Grp. Health Plan*, 938 F.3d 246, 258-59

(5th Cir. 2019) (same). The presumption has even less force where, as here, strong federal interests outweigh limited state interests. Congress has historically overseen both state and federal banks and has long sought uniformity in the interstate banking system. Colorado's "regime cannot be saved by invoking the State's traditional power to regulate in [these] area[s]." *Gobeille v. Liberty Mut. Ins. Co.*, 577 U.S. 312, 325 (2016).

1. Even when it would otherwise apply, the presumption against preemption "is not triggered when the State regulates in an area where there has been a history of significant federal presence," *United States v. Locke*, 529 U.S. 89, 108 (2000), and "the field … has long been dominated by federal interests," *US Airways, Inc. v. O'Donnell*, 627 F.3d 1318, 1325 (10th Cir. 2010). This Court has labeled this the "federal-interest exception." *Helfrich v. Blue Cross & Blue Shield Ass'n*, 804 F.3d 1090, 1105 (10th Cir. 2015). In such instances, "[t]he federalism concern … behind the presumption against preemption has little purchase." *Id.*; *see Pharma. Rsch. & Mfrs. of Am. v. McCuskey*, 171 F.4th 675, 688 (4th Cir. 2026).

So it is here. "Congress has legislated in the field from the earliest days of the Republic, creating an extensive federal statutory and regulatory scheme" for banking. *Locke*, 529 U.S. at 108. To be sure, to respect the States' historic role in banking, *see Weiser*, 159 F.4th at 736 (Rossman, J., concurring in part), the "United States maintains a dual system …, made up of parallel federal and state banking systems," *Cantero v. Bank of Am., N.A.*, 602 U.S. 205, 209 (2024). But given the

importance of a sound banking system, Congress has long imposed requirements on all banks, state and federal. Federal law requires deposit insurance and "safety-and-soundness standards," 12 U.S.C. §§ 1814, 1831p-1; imposes FDIC oversight, 12 U.S.C. § 1811; and regulates mergers, affiliate transactions, and tying relationships, 12 U.S.C. §§ 371c-1, 1972. Federal law also mandates compliance with national consumer-protection requirements, including the Electronic Fund Transfer Act, 15 U.S.C. § 1693a(9), the Equal Credit Opportunity Act, 15 U.S.C. § 1691a(e)-(f); and the Truth in Lending Act, 15 U.S.C. § 1602(d), (g).

As relevant here, Congress has also historically acted to ensure an interstate banking system free from discrimination. Congress passed the first National Bank Act in the 1860s to protect national banks from intrusive state regulation and acted again in the 1980s with the DIDMCA to protect interstate lending by state banks. *Weiser*, 159 F.4th at 736-38 (Rossman, J., concurring in part) (detailing this history). "[T]o ensure competitive equality between state and national banks," Congress imposed a national standard with "uniform nationwide application," unless a particular State opts out for its own banks. *Id.* at 728, 740 (internal quotation marks omitted). The goal is to avoid a "patchwork approach" that is utterly "[un]administrable in our world of interstate, online banking." *Id.*

The presumption against preemption is thus doubly inapplicable here, as banking is an area with a "significant federal presence" and strong "federal interests." *Locke*, 529 U.S. at 108; *US Airways*, 627 F.3d at 1325; s*ee, e.g.*, *KalshiEX,*

LLC v. Flaherty, 172 F.4th 220, 230 (3d Cir. 2026) (declining to apply the presumption against preemption because "the federal government has regulated the derivatives market for over a century," and has "delegated that regulation to" a federal agency with "expertise").

2. Colorado's interests in "banking and consumer protection" cannot overcome those serious and longstanding federal interests to justify applying a presumption against preemption here. No doubt, Colorado has a legitimate interest in regulating its own banks and protecting its own borrowers. But even with the opt-out, national banks can continue to lend to Colorado borrowers at the higher national rates. And for all Colorado's claims of a strong historical interest in banking, it has not shown "that the particular aspect of banking at issue in this case—namely, a state's ability to regulate interest rates charged by out-of-state, state-chartered banks—is a field which the States have traditionally occupied." *Weiser*, 159 F.4th at 729 (Rossman, J, concurring in part) (quoting *Wyeth*, 555 U.S. at 565). Historically, "state-chartered banks … primarily focused on lending within their home states." *Id.* at 737 (Rossman, J., concurring in part). "Interstate lending by state banks did not mature until years after DIDMCA," in the 1990s and 2000s. *Id.* While "[h]istory certainly supports the conclusion that states had the power to regulate their *own* state-chartered banks," Colorado "has not identified historical evidence suggesting that power extended extraterritorially." *Id.* at 736 n.11 (Rossman, J., concurring in part); *see Churchill Downs Tech. Initatives Co. v. Mich. Gaming Control Bd.*, 162

F.4th 631, 641 n.5 (6th Cir. 2025) ("[T]he regulation of *interstate* gambling isn't a traditional area of state regulation," so "the presumption against preemption doesn't apply.").

Colorado cannot avoid preemption "simply because" banking and consumer protection are "matter[s] of special concern to the States." *Fid. Fed. Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 153 (1982). Federal statutes often preempt "substantial areas of traditional state regulation." *Gobeille*, 577 U.S. at 325. The States have vast police powers, and "[i]t is difficult to identify any state law" that could not be characterized as falling within that broad and amorphous category. *Dep't of Revenue of Ky. v. Davis*, 553 U.S. 328, 365 (2008) (Kennedy, J., dissenting). "The relative importance to the State of its own law is not material when there is a conflict with a valid federal law, for the Framers of our Constitution provided that the federal law must prevail." *Free v. Bland*, 369 U.S. 663, 666 (1962); *see Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 108 (1992) ("reject[ing] … that the State's interest … can save [its law] from … pre-emption").

II. The District Court Properly Interpreted the DIDMCA's Preemption Provision.

Divorced from the presumption against preemption, the statutory interpretation here is straightforward, as the district court and Judge Rossman recognized. The DIDMCA permits a State to opt out of the national scheme by "adopt[ing] a law … which states explicitly and by its terms that such State does not want this section

to apply with respect to *loans made in such State*." 12 U.S.C. § 1831d note (Effective Date) (emphasis added). Plainly read, a loan is "made" where the bank is located and acts to provide the loan, not where the borrower is located and receives the loan. *Weiser*, 737 F. Supp. 3d at 1130. As Appellees well explain, other provisions in the DIDMCA and Title XII confirm this reading, as do statutory history and purpose. *Weiser*, 159 F.4th at 733-40 (Rossman, J., concurring in part).

The panel majority erred in concluding to the contrary, apparently "drive[n]" by the presumption against preemption. *Altria Grp.*, 555 U.S. at 100 (Thomas, J., dissenting). "[P]rimed against preemption," the panel majority sought to read the DIDMCA's preemption provision as narrowly as possible. *Weiser*, 159 F.4th at 721. In doing so, the panel "arrived at a cramped and unnatural construction [of the statute] that failed to give effect to the statutory text." *Altria Grp.*, 555 U.S. at 95 (Thomas, J., dissenting); *see* Nelson, *supra* at 296-97 (explaining that courts have "consistently invoked the presumption at the outset of their process of interpretation," and so "used the presumption to reject interpretations that would otherwise be more natural than the one they adopt"). The en banc Court should interpret the statute "without any presumptive thumb on the scale." *Assurance Wireless*, 100 F.4th at 1032.

CONCLUSION

For the foregoing reasons, the decision below should be affirmed.

Dated: June 4, 2026

Respectfully submitted,

/s/Jonathan Y. Ellis
Jonathan Y. Ellis
MCGUIREWOODS LLP
501 Fayetteville Street
Suite 500
Raleigh, NC 27601
(919) 755-6688
jellis@mcguirewoods.com

Grace Greene Simmons
MCGUIREWOODS LLP
1075 Peachtree Street N.E.
35th Floor
Atlanta, GA 30309

Janet Galeria
Matthew P. Sappington
U.S. CHAMBER LITIGATION CENTER
1615 H Street NW
Washington, D.C. 20062

CERTIFICATE OF COMPLIANCE

This brief contains 3,722 words and was prepared using 13-point CenturyExpdBt, a proportionally spaced font.

/s/ Jonathan Y. Ellis

CERTIFICATE OF SERVICE

I hereby certify that on June 4, 2026, I electronically filed the foregoing document using the Court's electronic filing system, which will notify all counsel of record authorized to receive such filings.

/s/Jonathan Y. Ellis