

**No. 24-1293**

**IN THE  
UNITED STATES COURT OF APPEALS  
FOR THE TENTH CIRCUIT**

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

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 Administrator of the Colorado Uniform Consumer Credit Code,

Defendants-Appellants.

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**On Appeal from the United States District Court  
for the District of Colorado  
(D.C. No. 1:24-CV-00812-DDD-KAS)**

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**BRIEF OF AMICUS CURIAE  
THE OFFICE OF THE COMPTROLLER OF THE CURRENCY  
IN SUPPORT OF PLAINTIFFS-APPELLEES AND AFFIRMANCE  
OF THE PRELIMINARY INJUNCTION UPON EN BANC REVIEW**

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**GLOSSARY**

DIDMCA ..... Depository Institutions Deregulation and Monetary  
Control Act of 1980 (DIDMCA, Pub. L. No. 96-221,  
94 Stat. 132 (1980))

FDIC ..... Federal Deposit Insurance Corporation

OCC ..... Office of the Comptroller of the Currency

## INTRODUCTION

With the passage of the National Bank Act over 150 years ago, Congress established a dual banking system in which national banks “co-exist and compete” with state banks. *Cantero v. Bank of Am., N.A.*, 602 U.S. 205, 209-10 (2024). In the ensuing years, Congress has, on occasion, adjusted the competitive balance within this system to ensure that both national banks and state banks are well positioned to meet the financial needs of consumers and business in every community and to fuel the American economy.

At issue in this case is a law that Congress enacted in 1980 to equalize state banks’ and national banks’ ability to lend at competitive interest rates. Depository Institutions Deregulation and Monetary Control Act of 1980 (“DIDMCA”), Pub. L. No. 96-221, § 521, 94 Stat. 132, 164-65 (1980) (“Section 521”) (codified at 12 U.S.C. § 1831d); *see also* 12 U.S.C. § 85 (“Section 85”) (setting permissible rates for national banks). This provision, intended “to prevent discrimination against State-chartered insured banks,” Section 521, put state banks on equal footing with national banks regarding their interest rate authority and expressly preempted contrary state law. *See Hillsborough Cnty. v. Automated Med. Labs., Inc.*, 471 U.S. 707, 713 (1985) (“It is a familiar and well-established principle that the Supremacy Clause . . . invalidates state laws that ‘interfere with, or are contrary to,’ federal law.”) (citation omitted). At the same time, and consistent with the principles of federalism, Congress included in DIDMCA a narrow exception that allows a state to forgo Section 521’s parity provision for “loans made in such State.” DIDMCA § 525 (reproduced at 12 U.S.C. § 1831d, “Effective Date” note) (“Section 525” or “opt-out”).

In 2023, Colorado exercised its opt-out authority through Colorado Revised Statute § 5-13-106. In doing so, Colorado interpreted its authority to opt out not only for state banks located in Colorado but for any state bank located in any state that lends to borrowers in Colorado. By focusing on the borrower’s location, the state’s interpretation conflicts with Section 521’s focus on the bank’s location, effectively undermines the competitive equality goals of Section 521 and far exceeds the narrow exception that Congress provided in Section 525. If allowed to stand, this interpretation would enable Colorado to foist the effects of its opt-out decision on state banks across the country.

In granting Plaintiffs-Appellees’ motion for a preliminary injunction, the district court correctly concluded that Plaintiffs-Appellees were likely to succeed on the merits of their claim that the Colorado law exceeds the narrow opt-out permitted by Section 525. The en banc Court should affirm the district court’s holding that, according to “the plain meaning” of DIDMCA, “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.” *Nat’l Assoc. of Indus. Bankers v. Weiser*, 737 F. Supp. 3d 1113, 1133 (D. Colo. 2024). Because the reasoning of the district court is consistent with the text, history, and purpose of DIDMCA and supported by controlling precedent and long-standing interpretations, the Court should affirm the issuance of the preliminary injunction.

### **STATEMENT OF INTEREST**

The Office of the Comptroller of the Currency (“OCC”) is an independent bureau of the U.S. Department of the Treasury. The OCC has chartering and supervisory responsibility for national banks under the National Bank Act of 1864, 12 U.S.C. § 1 *et*

*seq.*, as amended, and for Federal savings associations under the Home Owners' Loan Act of 1933, 12 U.S.C. § 1461 *et seq.*, as amended.<sup>1</sup> Among other things, these Acts address the rate of interest that OCC-chartered banks may charge. *See* 12 U.S.C. § 85; *see also id.* § 1463(g); 12 C.F.R. §§ 7.4001, 160.110. State banks have parallel interest-rate authority pursuant to Section 521.

The Comptroller of the Currency is also a member of the Board of Directors of the Federal Deposit Insurance Corporation (“FDIC”). 12 U.S.C. § 1812(a). The FDIC is the primary federal regulator of state banks that are not members of the Federal Reserve System. *See* 12 U.S.C. § 1813(q). It administers the Federal Deposit Insurance Act, where Section 521 is codified. In both capacities, the Comptroller has an interest in ensuring that the federal interest-rate framework in DIDMCA Section 521 is appropriately understood and applied, including because it is interpreted *in pari materia* with Section 85 of the National Bank Act. Doing so ensures that state banks receive the full benefits of federal law, thereby enhancing parity between state banks and OCC-chartered banks and strengthening the dual banking system. The OCC is authorized generally to represent itself in litigation by 12 U.S.C. § 93(d) and to appear as *amicus curiae* in this Court by Federal Rule of Appellate Procedure 29 and Tenth Circuit Rule 29.

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<sup>1</sup> While Sections 522 and 523 of DIDMCA gave comparable authority to insured savings and loan associations and insured credit unions, respectively, this brief focuses on the authority granted to state banks, given the issues before the Court.

## BACKGROUND

### **I. Prior to Congress’s Enactment of DIDMCA, National Banks Enjoyed a Competitive Advantage Over State Banks as to Permissible Interest Rates.**

In the National Bank Act, Congress vested national banks with authority to charge “interest at the rate allowed by the laws of the State . . . where the bank is located[.]” 12 U.S.C. § 85. During the Great Depression, Congress amended that statute to also allow national banks to charge an alternative reference rate set at one percent above a certain Federal Reserve discount rate in effect where the bank is located. *See* Banking Act of 1933, Pub. L. No. 73-66 § 25, 48 Stat. 162, 191 (1933). Section 85 also permits a national bank to export a permissible interest rate when lending to a borrower located in another state, regardless of the state usury limits in the state where the borrower is located. *See Marquette Nat’l Bank of Minneapolis v. First of Omaha Serv. Corp.*, 439 U.S. 299, 313-14, 318 (1978).

While this authority has evolved over time, it remains a core feature of the federal banking system. Its clarity and certainty have permitted national banks to effectively engage in interstate lending, meeting the credit needs of borrowers in communities throughout the nation unencumbered by a complex patchwork of state usury laws. *See Smiley v. Citibank (S.D.), N.A.*, 517 U.S. 735, 745 (1996). Because there was no comparable federal authority for state banks, Section 85 gave “advantages to National banks over their State competitors” for over a century. *Marquette*, 439 U.S. at 314 (citation omitted).

## II. **Congress Passed DIDMCA to Level the Playing Field.**

Soaring inflation in the late-1970s exacerbated the competitive disadvantage regarding interest rate authority faced by state banks. In certain states, the relevant usury cap meant that state banks could not lend without losing money. In contrast, national banks could continue to lend profitably by relying on the alternative reference rate in Section 85 based on the Federal Reserve discount rate, which at the time was often higher than the rates permitted under state usury laws. *See Greenwood Tr. Co. v. Massachusetts*, 971 F.2d 818, 826 (1st Cir. 1992).

To address this “insuperable competitive disadvantage” during “a devastating credit crunch,” *id.*, Congress enacted DIDMCA in 1980. Its purpose was “to prevent discrimination against State-chartered insured banks” by providing state banks with interest rate authority modeled on Section 85. *See* DIDMCA § 521 (12 U.S.C. § 1831d). As a result, state banks, like national banks, were now authorized to charge interest at the rate permitted by the laws of the state in which they are located or the alternative reference rate and to export this rate to borrowers in any state. *See Greenwood Tr.*, 971 F.2d at 827.

### ARGUMENT

#### I. **Congress Borrowed Well-Understood National Bank Act Terms in Adopting DIDMCA Section 521.**

The interest rate permitted under Section 85 is based on “where the bank is located.” Consistent with Congress’s goal of ensuring competitive equality for state banks, DIDMCA incorporated this same focus. *Compare* DIDMCA § 521 (12 U.S.C. § 1831d) (a state bank may charge the greater of the permissible interest “rate allowed by the laws of the State . . .

where the bank is located” or the alternative reference rate in effect “where such State bank . . . is located”), *with* 12 U.S.C. § 85 (a national bank may charge the greater of the permissible interest “rate allowed by the laws of the State . . . where the bank is located” or the alternative reference in effect “where the bank is located”). By using the same operative language, Congress imported Section 85’s long history and well-established meaning. *Greenwood Tr.*, 971 F.2d at 827 (“when Congress borrows language from one statute and incorporates it into a second statute, the language of the two acts should be interpreted the same way”; National Bank Act “precedents must inform our interpretation of words and phrases that were lifted from [that Act] and inserted into [DIDMCA’s] text”; language from the original statute carries “portable soil” that “includes prior judicial interpretations of the transplanted language” (citations omitted)).

The 1980 enactment of DIDMCA occurred against the backdrop of a seminal 1978 Supreme Court case on interest rate exportation under Section 85. The case recognized that a national bank is “located” in, and may export from, the state where its main office is located (its home state). Thus, a national bank with a main office in Nebraska could charge interest to borrowers in Minnesota at the rate allowed in Nebraska, even if that rate exceeded the Minnesota usury cap. *See Marquette*, 439 U.S. at 313-14. The Court looked to the bank’s home state for its location, not where the bank solicited customers or where the customers were located. *Id.* at 309-11 (a bank “cannot be deprived of this location merely because it is extending credit to residents of a foreign State”).

The question of where a national bank is located for purposes of Section 85 became the subject of further discourse with the interstate branching permitted by the Riegle-Neal

Interstate Banking and Branching Act of 1994. Pub. L. No. 103-328, 108 Stat. 2338 (1994). In grappling with how to determine the location of an interstate national bank for purposes of Section 85, the OCC concluded that the bank may be located both in its home state and in any state where it has branches (host state)—with no consideration of the borrower’s location. *See, e.g.*, OCC Intr. Ltr. 822, 1998 WL 126800, at \*2 (Feb. 17, 1998). And, when considering whether the home state or a host state’s interest rate applies to a particular loan, the OCC focused on the bank’s location, i.e., where it conducted certain lending functions, “regardless of the state of residence of the borrower.” OCC Intr. Ltr. 822, at \*5. *See also* OCC Intr. Ltr. 1171, 2020 WL 8176065 (June 1, 2020); *Jessup v. Pulaski Bank*, 327 F.3d 682, 685 (8th Cir. 2003) (concluding that a related OCC opinion letter was reasonable and applying its analytical approach to identify where a loan was made). The FDIC has adopted an equivalent framework for determining where a bank is located, interpreting Section 521 *in pari materia* with Section 85—its “direct lineal ancestor.” *See* FDIC General Counsel’s Opinion No. 11, Interest Charges by Interstate Banks, 63 Fed. Reg. 27282, 27283-86 (May 18, 1998) (citing *Greenwood Tr.*, 971 F.2d at 830).

These authorities and long-standing interpretations have shaped the nation’s banking system for decades.<sup>2</sup> The consistent feature of these authorities through time and

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<sup>2</sup> Due to its essential importance to a safe and sound national banking system, the OCC has assiduously guarded the authority of national banks to extend credit nationwide at rates permissible under Section 85. *See, e.g.*, OCC Final Rule: Permissible Interest on Loans that Are Sold, Assigned, or Otherwise Transferred, 85 Fed. Reg. 33530 (June 2, 2020); *California v. OCC*, 584 F. Supp. 3d 844 (N.D. Cal. 2022) (upholding rule as valid). Congress has also taken care to protect the interest rate exportation scheme for national banks based on “where the bank is located,” for example, as part of the Dodd-Frank Wall

tests is the location of the bank, not the borrower. It is through this lens that the Court should interpret Section 525.

**II. The Scope of the Opt-Out Should Be Read Consistently with DIDMCA’s Section 521 Preemption Provision.**

The historical and legal context of DIDMCA’s interest rate provisions informs the proper reading of its statutory text. Properly informed, the unambiguous text of DIDMCA prompts the conclusion that the scope of Colorado’s opt-out authority must turn on the location of the bank, not the location of a borrower.

As an initial matter, the panel in its now vacated decision made an interpretive error by misapplying a presumption against preemption. *See Nat’l Assoc. of Indus. Bankers v. Weiser*, 159 F.4th 694, 721 (10th Cir. 2025). Congress plainly expressed its preemptive intent in Section 521. *See Arizona v. United States*, 567 U.S. 387, 399 (2012) (“There is no doubt that Congress may withdraw specified powers from the States by enacting a statute containing an express preemption provision.”). And as controlling precedent makes clear, when a statute “‘contains an express pre-emption clause,’ we do not invoke any presumption against pre-emption but instead ‘focus on the plain wording of the clause, which necessarily contains the best evidence of Congress’s pre-emptive intent.’” *Puerto Rico v. Franklin Cal. Tax-free Tr.*, 579 U.S. 115, 125 (2016) (citing *Chamber of Com. of U.S. v. Whiting*, 563 U.S. 582, 594 (2011)). As such, no presumption against preemption applies in this case because Congress expressly indicated its intent to preempt state law.

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Street Reform and Consumer Protection Act, Pub. L. 111-203, § 1044, 124 Stat. 1376, 2017 (2010) (codified at 12 U.S.C. § 25b(f)).

The scope of that preemption is measured by the statutory text without resort to any presumption. *See id.*; *Greenwood Tr.*, 971 F.2d at 831 (“section 521 provides with undeniable clarity that usury laws in effect in the borrower’s state may be preempted as applied to federally insured banks chartered in other states”).

With the presumption against preemption rebutted, the Court must turn to DIDMCA’s statutory text. As the starting point, Section 521 establishes a general rule focused on a bank’s location. The broad intent and preemptive effect of this general rule is evident from the statutory language:

In order to prevent discrimination against State-chartered insured depository institutions . . . [a] State bank . . . may, notwithstanding any State [law] which is hereby preempted . . . charge on any loan . . . interest at a rate [based on a Federal Reserve] discount rate . . . where such State bank . . . is located or at the rate allowed by the laws of the State . . . where the bank is located, whichever may be greater.

DIDMCA § 521 (12 U.S.C. § 1831d). Section 525 creates a narrow exception to this general rule:

[Section 521] . . . shall apply only with respect to loans made in any State [until such time as] such State adopts a law . . . which states explicitly . . . that such State does not want [Section 521] . . . to apply with respect to loans made in such State[.]

DIDMCA § 525. As an exception, the scope of Section 525 is necessarily informed and limited by the structure and meaning of Section 521. *Weiser*, 737 F. Supp. 3d at 1128 (Section 525 should not be analyzed “in isolation—‘the text of the whole statute gives instruction as to its meaning,’ and courts should ‘look to the provisions of the whole law’ to determine the meaning of the section at issue.” (citing *Star Athletica, L.L.C. v. Varsity Brands, Inc.*, 580 U.S. 405, 414 (2017))). The exception cannot be read broadly to displace

the general rule or create an analytical framework distinct from Section 521. Because the application of Section 521 hinges on the location of the bank, not the borrower, so too should the interpretation of Section 525. Indeed, when read in context Section 525 is unambiguous and only permits a state to opt out of Section 521's terms, which turn on the location of the lending bank.

Finally, the panel's observation that Section 525's exception is, as a policy matter, an unattractive choice if read narrowly, *Weiser*, 159 F.4th at 723, carries no weight in this analysis. Colorado cannot override federal law and give its policy preferences effect through an unsupported and overreaching interpretation of the opt-out authority in Section 525. *See Pharm. Care Mgmt. Assoc. v. Mulready*, 78 F.4th 1183, 1209 (10th Cir. 2023) (to "meaningfully seek redress" to change federal preemption law, a state "may approach Congress . . . to take up the mantle"); *EagleMed LLC v. Cox*, 868 F.3d 893, 904 (10th Cir. 2017) ("policy reasons [disfavoring] . . . federal preemption . . . cannot trump the plain language of the statute").

### **III. An Interpretation of Section 525 that Permits One State to Regulate the Activities of State Banks Located in Other States Is Not Supported by the Statute's Purpose or History.**

Congress's purpose in enacting DIDMCA further supports the district court's narrow interpretation of the scope of Colorado's opt-out authority. The purpose of Section 521 was to put state banks on par with national banks regarding interest rate authority, including the ability to export its rates. Because Section 525 is an exception that allows a state to restore pre-DIDMCA competitive inequality, it should be interpreted narrowly, lest the exception swallow the rule and undermine congressional intent.

Otherwise, an opt-out state—Colorado, in this case—could effectively dictate the interest rate that a state bank located outside of Colorado may change, thereby extending the reach of the opt-out far beyond Colorado’s borders.

In the late 1970s, some states’ usury caps fell below the soaring interest rates. The effect was to cripple state banks’ ability to lend profitably, while national banks benefited from the interest rate options afforded to them by Section 85. 125 Cong. Rec. 30655 (1979). In December 1979, Arkansas Senators David Pryor and Dale Bumpers introduced a bill, which was later incorporated into DIDMCA, with the overarching purpose of “equaliz[ing] competition between State and national banks.” S. 1988, 96th Cong. (1979); S. Rep. No. 96-640 (1980) (Conf. Rep.). *See also Usury Lending Limits: Hearing on S. 1988 Before the Sen. Comm. on Banking, Housing, & Urban Affairs, 96th Cong. 19 (1979) (statement of Sen. Pryor) (“many people believe that . . . competitive equality is violated by the double standard applied to national banks . . . Our bill simply seeks to put all financial institutions on equal footing”).* Once incorporated in DIDMCA, the statutory text introduced by Senators Pryor and Bumpers retained an express purpose to promote competitive equality by “prevent[ing] discrimination against State-chartered insured banks[.]” DIDMCA § 521 (12 U.S.C. § 1831d(a)).

Section 525 must be read in light of this purpose and history and interpreted narrowly to avoid unduly frustrating the goal of competitive equality. The panel’s broad reading would, contrary to congressional intent, allow Colorado to export its policy goals to state banks across the United States.

**IV. In Any Event, Section 521 Is Clear and Its Meaning Is Not Before this Court.**

Notwithstanding the above, if the Court were to agree with the panel’s interpretation of Section 525, it should not disturb or otherwise question the longstanding interpretation of the phrase “where a bank is located” in Section 521. First, its meaning is not before the Court. Second, doing so could generate destabilizing confusion in the nation’s banking system as to the permitted rates of interest for state banks under DIDMCA. Third, the destabilizing effect may extend to national banks, given that the language in Section 521 is interpreted *in pari materia* with Section 85. This approach would preserve our robust system of interstate lending, which has provided borrowers across the country with access to credit. *See generally Marquette*, 439 U.S. at 312 (rejecting an overly “elastic” interpretation of the word “located” to avoid “throw[ing] into confusion the complex system of modern interstate banking”).

**CONCLUSION**

For these reasons, the Court should affirm the district court’s preliminary injunction.

Dated: June 4, 2026

Respectfully submitted,

*/s/ Peter C. Koch*

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**CERTIFICATE OF SERVICE**

I hereby certify that on June 4, 2026 I electronically filed the foregoing with the Clerk of the Court of the United States Court of Appeals for the Tenth Circuit by using the CM/ECF system and that a true and correct copy of the foregoing was served on counsel of record via the CM/ECF system.

June 4, 2026

*/s/ Peter C. Koch*  
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