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UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

EUGENE DIVISION

NATIONAL ASSOCIATION OF INDUSTRIAL BANKERS, ONLINE LENDERS ALLIANCE, and AMERICAN FINANCIAL SERVICES ASSOCIATION, Plaintiffs, v. SEAN O'DAY, in his official capacity as Director of Oregon Department of Consumer and Business Services, Defendant.	Case No. COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

Plaintiffs National Association of Industrial Bankers ("NAIB"), Online Lenders Alliance ("OLA"), and American Financial Services Association ("AFSA") complain against Defendant

Sean O'Day, acting in his official capacity as Director of the Oregon Department of Consumer and Business Services ("DCBS"), as follows:

INTRODUCTION

1. This lawsuit seeks a declaratory judgment and injunctive relief with respect to Section 1, subsection 3 of Oregon House Bill 4116, codified at Or. Rev. Stat. § 725.015. It is preempted by federal law because it impermissibly seeks to regulate the interest rates charged on consumer finance loans made in other states by state banks in conformity with their home states' laws and federal banking law. Also, Section 1, subsection 3(b) violates the dormant Commerce Clause to the extent it applies to consumer finance loans made by out-of-state state banks to borrowers who are not present in Oregon when the loan is made to them.

2. Section 521 of the Depository Institutions Deregulation and Monetary Control Act of 1980 ("DIDMCA"), Pub.L. No. 96-221, 94 Stat. 132, 164-65 (1980), provides that a state-chartered bank may make interstate loans at interest rates up to the higher of (a) the rate allowed by the laws of the state "where the bank is located," or (b) 1% above the Federal Reserve discount rate in the Federal Reserve district where the bank is located. 12 U.S.C.§ 1831d(a). Significantly, Section 521 expressly preempts any lower interest rate caps that may be imposed by state law in the borrower's state. *Id.* ("[If] the applicable rate prescribed in this subsection exceeds the rate [a] bank ... would be permitted to charge in the absence of this subsection ... any State constitution or statute ... is hereby preempted for the purposes of this section ...").

3. Under Section 521 of DIDMCA, a state bank may "export" its home state interest rates when making interstate loans from its home state to borrowers in other states, and any lower interest rates in the borrowers' states are expressly preempted by Section 521.

4. Section 525 of DIDMCA (94 Stat. 167), which is codified in the "Effective Date" note to Section 1831d, allows a state to opt-out of Section 521 by adopting a law stating that it "does not want [Section 521] to apply *with respect to loans made in such State*." 12 U.S.C. § 1831d note (Effective Date) (emphasis added).

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5. For purposes of Section 525 of DIDMCA, a loan is "made" by the bank, not the borrower, and is "made in" the state where the bank is located and performs its loan-making functions. The loan is not "made in" the borrower's state. *See Nat'l Ass'n of Indus. Bankers v. Weiser*, 737 F.Supp.3d 1113 (D. Colo. 2024), *en banc* appeal pending, No. 24-1293, 2026 U.S. App. LEXIS 9563 (10th Cir.). Thus, an opt-out by a state does not authorize it to regulate the interest rates charged to its residents by out-of-state state banks that make interstate loans in their home states in conformity with their own states' laws. *Id.* Instead, a state's exercise of its opt-out right only allows it to eliminate the federal interest rate and exportation authority conferred on its *own* state banks by Section 521 of DIDMCA.

6. On March 6, 2026, the Oregon Legislature passed House Bill 4116, which was signed by the Governor on April 7, 2026. The effective date was June 5, 2026.

7. House Bill 4116 amends the Oregon Consumer Finance Act. Section 1, subsection 2 of the Bill exercises the right conferred by Section 525 of DIDMCA to opt-out of Section 521 of DIDMCA, and thus precludes state banks *located in Oregon* from continuing to exercise the federal interest rate authority allowed by Section 521 and from "exporting" Oregon interest rates in their interstate loans to borrowers outside Oregon.

8. However, Section 1, subsection 3 of House Bill 4116 goes even further and purports to apply Oregon's 36% interest rate ceiling (ORS § 725.340(1)(a)(A)) to consumer finance loans[1] of $50,000 or less made by state banks in *other* states to consumers who reside in or maintain a domicile in Oregon.

9. As held in *NAIB v. Weiser*, a state's effort to employ an opt-out as a basis to regulate the interest rates charged by out-of-state state banks on the interstate loans they make in their home states is not authorized by Section 525 of DIDMCA and is expressly preempted by Section 521 of DIDMCA.

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[1] Under the Consumer Finance Act, a "'[c]onsumer finance loan' means a loan or line of credit that is unsecured or secured by personal or real property and that has periodic payments and terms longer than 60 days." ORS § 725.010(2).

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10. Also, Section 1, subsection 3(b) of House Bill 4116 violates the dormant Commerce Clause because it impermissibly applies Oregon law on an extraterritorial basis to loans made by state banks in other states even when the borrower is likewise located outside of Oregon.

11. This lawsuit is brought under the Supremacy Clause and Commerce Clause of the United Sates Constitution; *Ex parte Young*, 209 U.S. 123 (1908); and 42 U.S.C. § 1983 as to the dormant Commerce Clause claim. Plaintiffs seek a declaratory judgment that Section 1, subsection 3 of House Bill 4116 is preempted to the extent it purports to limit the interest rates charged by state banks located outside Oregon, and subsection 3(b) also violates the dormant Commerce Clause to the extent it applies to loans made by banks in other states to Oregon residents who are not present in Oregon when the loan is made to them by the bank. Plaintiffs also seek preliminary and permanent injunctive relief barring DCBS Director Sean O'Day from enforcing the statute against out-of-state state banks. In addition, Plaintiffs seek reasonable attorneys' fees pursuant to 42 U.S.C. § 1988(b) with respect to the § 1983 claim.

PARTIES

A. Plaintiffs.

12. Plaintiff NAIB is a Utah-based trade association representing industrial loan companies (ILCs). ILCs, or industrial banks, which have been an integral part of the U.S. financial system for over a century, provide critical access to credit opportunities for those traditionally underserved by large national financial institutions. NAIB champions innovative financial services for Americans by expanding access to credit, guaranteeing consumer choice, and providing unique banking services. NAIB members include ILCs chartered by states other than Oregon that offer a wide variety of useful, familiar, consumer credit products to Oregon consumers, either directly or via partner platforms, including retailers, manufacturers, finance companies, software as a service (SaaS) providers, and financial technology (Fintech) companies. These products include, for example, personal installment loans, BNPL loans to fund single purchases at the point of sale, and store-brand credit cards. While NAIB's state bank members offer these products at a range of rate and fee options, their consumer finance loans to Oregon residents have sometimes included interest

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rates or finance charges higher than those allowed under Oregon's Consumer Finance Act but legal in the institutions' home states.

13. Plaintiff OLA is a Virginia-based trade association for the online lending industry whose members offer innovative and trustworthy credit products to the consumers who need them. OLA's members include state banks, entrepreneurs, credit bureaus, payment providers, advertisers, marketing companies, compliance professionals, software developers, and others who are leveraging technology to serve consumers seeking financial options. OLA members represent accessible and responsible financial technology products, are committed to the highest standards of conduct and compliance, and are dedicated to ensuring a fair and favorable experience for their customers. OLA members include state banks chartered by states other than Oregon that offer a wide variety of useful, familiar, consumer credit products to Oregon consumers, either directly or via partner platforms, including retailers, manufacturers, finance companies, software as a service (SaaS) providers, and financial technology (Fintech) companies. While OLA's state bank members offer credit products at a range of rate and fee options, their consumer finance loans to Oregon residents have sometimes included interest rates or finance charges higher than those allowed under Oregon's Consumer Finance Act but legal in the institutions' home states.

14. Founded in 1916, Plaintiff AFSA is the primary trade association for the consumer credit industry, protecting access to credit and consumer choice. AFSA members provide consumers with many kinds of credit, including traditional installment loans, direct and indirect vehicle financing, mortgages, payment cards, and credit for non-vehicle retail purchases. AFSA members do not offer payday or vehicle title loans. AFSA's mission is to promote safe, ethical lending to responsible, informed borrowers and to improve and protect consumers' access to credit. AFSA's members include a variety of state-chartered and national banks, as well as many non-bank state-licensed financial institutions. AFSA believes in and supports competition among various types of financial institutions, and its members include state banks chartered in states other than Oregon that offer consumer finance loans to Oregon consumers—sometimes at rates higher

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than those allowed under Oregon's interest-rate caps but legal in those institutions' home states. A list of AFSA's Board of Directors is available at https://afsaonline.org/about-afsa/leadership/.

15. Plaintiffs' state bank members are already expending considerable resources and costs to comply with House Bill 4116. If Section 1, subsection 3 of House Bill 4116 is enforced against Plaintiffs' members they will also: (i) lose revenue as a direct result of needing to lower interest rates; (ii) lose both revenue and goodwill through strained or lost relationships with customers (to whom they may need to cease lending), retailers (for which they offer store cards or point-of-sale financing), and other strategic partners; (iii) lose opportunities for new customer, retailer and partner relationships, including losing customers, retailers and partners to the national banks against which they compete, who are unaffected by House Bill 4116; and (iv) incur ongoing compliance costs. These costs and lost revenues cannot be recovered from the State because of sovereign immunity and thus constitute irreparable harm.

16. The foregoing irreparable harms can be avoided if the Court enters a declaratory judgment, preliminary injunction and permanent injunction holding that Section 1, subsection 3 of House Bill 4116 is preempted with respect to consumer finance loans made by state banks in other states, and subsection 3(b) also violates the dormant Commerce Clause with respect to consumer finance loans made by state banks in other states to residents or domiciliaries of Oregon who are not present in Oregon when the loans are made to them.

17. Plaintiffs have associational standing to challenge Section 1, subsection 3 of House Bill 4116 because "(a) [their] members would otherwise have standing to sue in their own right; (b) the interests [they] seek to protect are germane to the organization's purpose; and (c) neither the claim[s] asserted nor the relief requested requires the participation of individual members in the lawsuit." *Vasquez Perdomo v. Noem*, 148 F.4th 656, 676 (9th Cir. 2025) (quoting *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 600 U.S. 181, 199 (2003)). Also, just as in *Vasquez Perdomo*, "neither the claim asserted nor the relief requested requires the participation of the [Plaintiffs'] individual members in this lawsuit ... [B]ecause Plaintiffs seek only prospective injunctive relief (not damages), individual participation is not necessary for

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effective relief." 148 F.4th at 677. *See NAIB v. Weiser*, 737 F.Supp.3d at 1124-26 (finding that NAIB, AFSA, and another bank trade association had associational standing to challenge Colorado opt-out statute).

B. Defendant.

18. Defendant Sean O'Day is Director of DCBS and is responsible for, *inter alia*, enforcement of the Consumer Finance Act. He is sued in his official capacity.

JURISDICTION AND VENUE

19. This action arises under the Supremacy Clause and Commerce Clause of the U.S. Constitution; 42 U.S.C. § 1983 with respect to the dormant Commerce Clause claim; the Court's equitable powers under *Ex parte Young*, 209 U.S. 123 (1908); and Section 521 of DIDMCA. This Court has subject-matter jurisdiction over this action under 28 U.S.C. § 1331 because Plaintiffs' claims arise under the Constitution and federal law.

20. This lawsuit presents an actual case or controversy within the Court's jurisdiction, and the Court has authority under the Declaratory Judgment Act, 28 U.S.C. §§ 2201-2202, and *Ex parte Young* to decide this dispute and award declaratory and injunctive relief.

21. This Court has personal jurisdiction over Sean O'Day. Venue is proper in this District under 28 U.S.C. § 1391(b)(1) & (2) and the Eugene Division is proper under LR 3-2.

LEGAL BACKGROUND

Oregon's Opt-Out

22. Section 1 of House Bill 4116 amended ORS 725.015 to state as follows:

> SECTION 1. ORS 725.015 is amended to read:
>
> 725.015. (1) Except as provided in subsection (2) of this section, this chapter does not limit a person's rights, powers or privileges under another law of this state or of the United States that regulates lending money or extending credit if the person complies with the other law.
>
> (2) The Legislative Assembly hereby declares that this state does not want any of the amendments set forth in section 521 of the Depository Institutions Deregulation and Monetary Control Act of

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> 1980 (P.L. 96-221, 94 Stat. 132) to apply to consumer finance loans made in this state.
>
> (3) A person is subject to this chapter if the person engages in the business of making consumer finance loans of $50,000 or less or if the person acts as an agent, broker or facilitator for a person that engages in the business of making consumer finance loans of $50,000 or less to a consumer who resides in or maintains a domicile in this state and the consumer:
>
> (a) Negotiates, agrees to the terms of or enters into or executes a contract for a consumer finance loan of $50,000 or less in person, by mail, by telephone or via the Internet while the consumer is physically present in this state; or
>
> (b) Makes a payment on a consumer finance loan of $50,000 or less in which:
>
> (A) A person debits an account that the consumer holds in this state at a financial institution or trust company, as those terms are defined in ORS 706.008; or
>
> (B) The consumer makes the payment by means of a negotiable instrument drawn on a financial institution or trust company, as those terms are defined in ORS 706.008.

23. Section 1, subsection 3 casts an unconstitutionally overbroad net. So long as the borrower resides in or is domiciled in Oregon, the statute applies, even if the out-of-state state bank makes the consumer finance loan in its own state in conformity with its own state's laws.[2] What's more, subsection 3(b) also applies even if the borrower is not present in Oregon when the out-of-state state bank makes the loan, and indeed it applies even if the borrower is present in the bank's state, or a different state with interest rates above Oregon's 36% interest rate ceiling, so long as the borrower makes a payment on the loan by debiting an account at a financial institution

[2] Not only does the text of subsection 3 make clear that it extends to consumer finance loans made by out-of-state state banks in their home states, the June 4, 2026 press release issued by the DCBS sets forth its position that the statute precludes those banks from continuing "to export other states' interest rates" in their loans to Oregon borrowers. https://apps.oregon.gov/oregon-newsroom/OR/DCBS/Posts/Post/high-interest-loans.

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or trust company in Oregon, or by using a negotiable instrument drawn on a financial institution or trust company in Oregon.

24. Oregon now becomes one of only four jurisdictions that is currently opted-out of Section 521 of DIDMCA–the others are Colorado, Iowa, and Puerto Rico. It is noteworthy that five other states (Maine, Massachusetts, Wisconsin, Nebraska, and North Carolina) originally opted-out but subsequently repealed their opt-outs because they realized that the opt-outs were harming their own state banks and consumers.

Federal Banking Law

25. Section 85 of the National Bank Act, 12 U.S.C. § 85, governs national banks. It provides that national banks may charge "interest at the rate allowed by the laws of the State ... where the bank is located, or at a rate [1% higher than the federal discount rate], whichever [is] ... greater." 12 U.S.C. § 85.

26. In 1978, the Supreme Court unanimously held in *Marquette Nat'l Bank v. First of Omaha Serv. Corp.*, 439 U.S. 299, 311-12 (1978), that Section 85 of the National Bank Act allows a national bank to charge the interest rates permitted in the state where the national bank is "located" when making loans to consumers who reside in other states. The Court ruled that a national bank headquartered in Nebraska was permitted to make credit card loans to residents of Minnesota using Nebraska interest rates, and Minnesota's lower interest-rate limits were preempted.

27. In 1980, Congress enacted DIDMCA to create a level playing field between state-chartered depository institutions and the national banks against which they competed in their home states. The sponsors of DIDMCA were Senators Pryor and Bumpers of Arkansas, which had a 10% usury ceiling. However, notwithstanding that limit, national banks in Arkansas were authorized under Section 85 of the National Bank Act to make loans to Arkansas residents at 1% above the Federal Reserve discount rate, which was then 12%. Inflation was soaring, and state banks in Arkansas could not afford to make loans to Arkansas residents within the 10% Arkansas usury ceiling. Thus, they could not compete with the national banks.

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28. To eliminate this competitive inequality, Congress incorporated in Section 521 of DIDMCA the same language long used in Section 85 of the National Bank Act. State banks were authorized by Section 521 to "charge ... interest" at the "greater" of (1) the federal rate ("not more than 1 per centum in excess of the discount rate on ninety-day commercial paper in effect at the Federal Reserve bank in the Federal Reserve district where such State bank ... is located"); or (2) "the rate allowed by the laws of the State, territory, or district where the bank is located." 12 U.S.C. § 1831d(a).

29. Section 521 specifically states in its preamble that its purpose is "to prevent discrimination against State-chartered insured depository institutions ... with respect to interest rates," 12 U.S.C. § 1831d(a), by giving them the same federal interest rate authority that national banks have long held under Section 85 of the National Bank Act.

30. Section 521 expressly "preempt[s]" "any State constitution or statute" that would limit the interest rates allowed under Section 521.

31. Section 521 empowers state banks, like their national bank counterparts, to make interstate loans at their home state interest rates to borrowers in other states, whose potentially lower interest rate ceilings are expressly preempted. *Greenwood Tr. Co. v. Massachusetts*, 971 F.2d 818 (1st Cir. 1992).

32. Congress was mindful of federalism concerns, and thus it provided in Section 525 of DIDMCA that a state could opt out of the preemption provisions in Sections 521-523[3] "with respect to loans made in such State."

33. Section 525 of DIDMCA provides, in pertinent part, as follows:

> The amendments made by sections 521 through 523 of this title shall apply only with respect to loans made in any State during the period beginning on April 1, 1980, and ending on the date ... on which such State adopts a law ... which states explicitly and by its terms that such State does not want the amendments made by such sections to apply *with respect to loans made in such State...*

[3] Sections 522 and 523 of DIDMCA preempted state interest rate cap laws with respect to state-chartered savings and loan associations and credit unions, respectively.

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94 Stat. 167 (emphasis added).

34. The opt-out right conferred by Section 525 of DIDMCA could be exercised if states, as sovereign masters over their *own* state-chartered lending institutions, wanted to reimpose their usury ceilings *on loans made by those institutions in their own states*. For example, Arkansas could opt-out under Section 525 and thereby once again restrict Arkansas state banks to the Arkansas 10% usury ceiling, eliminating their right under Section 521 to charge 1% above the Federal Reserve discount rate, which was 12% when DIDMCA was enacted. But an opt-out by a state does *not* empower it to encroach on *other* states' sovereign powers to regulate the interest rates charged on interstate loans made in those states by their own state banks.

35. Section 521 allows state banks to "charge on any loan or discount made" by them the interest rates allowed by the law of the state "where the bank is located," and makes no reference to the borrower's location. There is nothing in Section 521 or Section 525 to support the illogical assertion that although a state bank's permissible interest rates are dependent solely on the bank's location for purposes of Section 521, the interest ceilings of the borrower's location must also be taken into account if the borrower resides in an opt-out state.

36. Because interest rates for "any loan or discount *made*" pursuant to Section 521 are based solely on the bank's location, the phrase "loans *made* in such State" in Section 525 similarly must refer only to the state where the bank is located. Stated differently, where a loan is "made" under Section 521 should not differ from where that loan is "made" under Section 525. Those contemporaneously-enacted provisions should be construed in harmony with each other.

37. It also bears emphasis that Section 525 refers just to a *single* state where a loan is "made" ("loans made in *such State*"). This belies the notion that, under Section 525, a loan is "made" in both the bank's state and the borrower's state.

38. *Nothing* in the legislative history demonstrates that Congress enacted Section 525 in order to enable an opt-out state to limit the interest rates charged to its citizens on *interstate* loans made by *out-of-state* state banks in their home states in conformity with their home states' laws. Congress enacted DIDMCA in 1980, at a time of rampant inflation and sky-high interest

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rates, to assist state banks in states like Arkansas with low usury ceilings by allowing them to *increase* their interest rates to 1% above the discount rate – there was no discussion about a need to *lower* the interest rates that could be charged by *any* state banks.

39. Also, an interpretation of Section 525 that would allow an opt-out state to limit the interest rates charged by out-of-state state banks would obviously disadvantage those state banks vis-à-vis out-of-state national banks, whose ability under Section 85 of the National Bank Act to export their home states' interest rates in making loans to opt-out state borrowers would be unaffected by a Section 525 opt-out. This flies in the face of the overriding Congressional intent "to prevent discrimination against State-chartered insured depository institutions," which is expressly set forth in the preamble of 12 U.S.C. § 1831d.

40. Nor is there anything in the legislative history of DIDMCA reflecting any Congressional concern about the interest rates charged by out-of-state state banks in their interstate loans. Indeed, that is hardly surprising, because state bank credit card and other interstate consumer lending programs did not take off until *after* they finally obtained the same federal interest rate authority as national banks through enactment of DIDMCA in March 1980.

41. That delay in interstate lending resulted from the fact that most of the state banks desiring to expand their interstate consumer lending programs were then located in states like New York that had relatively low usury ceilings and there were severe restrictions on a bank chartered in one state being affiliated with a bank chartered in another state. Those hurdles were not overcome until *after* DIDMCA's enactment, when South Dakota and Delaware enacted legislation deregulating their usury laws and authorizing out-of-state banks to establish affiliated credit card banks in their states. Various other states then followed suit in ensuing years.

Section 1, Subsection 3 of House Bill 4116 Exceeds Oregon's Opt-Out Rights Under Section 525 of DIDMCA and Is Preempted

42. As stated above, Section 525 of DIDMCA allows a state to opt-out of Section 521 only "with respect to loans made in such State."

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43. In the only decision construing Section 525 of DIDMCA, the District Court for the District of Colorado held that Colorado's opt-out statute was preempted to the extent it purported to regulate the interest rates charged to Colorado residents by state banks located in other states. The court ruled that "[t]he 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." *NAIB v. Weiser*, 737 F.Supp.3d at 1133.[4]

44. The court in *NAIB v. Weiser* reasoned as follows:

> Congress's use of "made" puts the focus on the act of making a loan. In plain parlance, it is the lender who *makes* a loan; nobody thinks of themselves as "making a loan" when they borrow money from a family member or put a charge on a credit card. Had Congress sought to put the focus on the borrower, as the State argues, it could have done so in many ways. Most easily, for example, by allowing states to opt out as to loans "made to borrowers in such State." Or without even changing the structure of the sentence, Congress could have simply used a borrower-focused word like "accepted" or "obtained" "in such State." Instead, it put the focus on where a loan is "made," which puts the focus on the lender…

Id. at 1129 (emphasis in original).

45. The court in *NAIB v. Weiser* stated that its conclusion that "only the bank 'makes' a loan" is "more consistent both with the ordinary colloquial understanding of who 'makes' a loan, and, more importantly, with how the words 'make' and 'made' are used consistently throughout the text of the Federal Deposit Insurance Act, including the DIDA amendments, as well as throughout the rest of Title 12 of the United States Code, which governs 'Banks and Banking' and includes the National Bank Act." *Id.* at 1129 (citing numerous provisions). In stark contrast, there

[4] On appeal, a divided panel of the Tenth Circuit reversed the District Court's decision. *NAIB v. Weiser*, 159 F.4th 694 (10th Cir. 2025). But the Tenth Circuit granted rehearing en banc and vacated the panel's decision. *NAIB v. Weiser*, No. 24-1293, 2026 U.S. App. LEXIS 9563 (10th Cir. April 2, 2026). The *en banc* appeal is pending. It is noteworthy that the Oregon Legislature enacted House Bill 4116 after the Tenth Circuit's divided panel decision but *before* it was vacated upon the grant of rehearing en banc. The Division of Financial Regulation of the DCBS submitted written testimony to the Legislature that relied heavily on the Tenth Circuit's panel decision, which was subsequently vacated. *See* https://olis.oregonlegislature.gov/liz/2026R1/Downloads/PublicTestimonyDocument/227091 at p. 6.

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are no statutory provisions in the Federal Deposit Insurance Act or elsewhere in Title 12 of the United States Code where the word "made" is used to describe the borrower's conduct with respect to a loan.

46. Just three months before the 96th Congress enacted DIDMCA, the same session of Congress enacted a different banking statute preempting state usury laws but allowing states to override preemption as to certain FHA loans "made *or executed*" in such State. Act of Dec. 21, 1979, Pub.L. No. 96-153, title III, Sec. 308, 93 Stat. 1113-14, codified at 12 U.S.C. § 1735f-7 (emphasis added).

47. This was very similar to a different amendment to the National Housing Act three years earlier that likewise allowed states to override federal preemption of state law interest limitations with respect to certain "loans, mortgages, or other interim financing *made or executed* in" such State. Veterans Housing Act Amendments of 1976, Pub.L. No. 94-324, Sec. 8, 90 Stat. 722-23, codified at 12 U.S.C. § 1709-1a(b) (emphasis added).

48. Thus, Congress knew full well how to be explicit on this issue, and its decision to use only the lender-centric word "made" in Section 525 without also adding the more bilateral term "executed" as it had done just three months earlier in 12 U.S.C. § 1735f-7 and three years earlier in 12 U.S.C. § 1709-1a(b) is highly significant. *See Wisconsin Cent. Ltd. v. United States*, 585 U.S. 274, 279 (2018).

49. Moreover, Congress's use of the disjunctive phrase "made *or* executed" in both 12 U.S.C. § 1735f-7 and 12 U.S.C. § 1709-1a(b) demonstrates that Congress did *not* view the terms "made" and "executed" as synonymous. *See, e.g., Garcia v. United States*, 469 U.S. 70, 73 (1984); *FCC v. Pacifica Found.*, 438 U.S. 726, 739-40 (1978).

50. In the ongoing *NAIB v. Weiser* litigation concerning the Colorado opt-out statute, both the Federal Deposit Insurance Corporation ("FDIC") and Office of the Comptroller of the Currency ("OCC") filed amicus briefs in support of NAIB, AFSA, and the other plaintiff, and argued that Colorado's attempt to limit interest rates charged by out-of-state state banks was preempted. *See NAIB v. Weiser*, No. 24-1293 (10th Cir.) at Dkt. Nos. 146, 147, 197, 205.

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51. In 1983, just three years after the enactment of DIDMCA, the FDIC advised state banks that they "may rely on the federal law that incorporates the interest provisions of the state where the bank is located in extending credit to the residents of its state *and of other states,*" including "*when making loans to citizens of states that have rejected the federal preemption.*" FDIC Interp. Ltr. No. 83-16, 1983 WL 207393 (Oct. 20, 1983) (emphasis added).

52. The *Greenwood Trust v. Massachusetts* litigation in the First Circuit involved exportation of credit card late fees (which are considered "interest" under Section 521) by Greenwood Trust, a state bank located in Delaware, to its cardholders in Massachusetts. Consistent with its 1983 Interpretive Letter, the FDIC filed an amicus brief that argued as follows:

> The fact that a State has countermanded under section 525 should not affect the usury preemption of section 521 for a bank not located in that State, so long as the loan is not made in the State that has countermanded.
>
> Accordingly, *Section 525 clearly does not confer on states that elect to opt out of Section 521 extraterritorial authority to apply their own lending laws to loans made in other states by banks chartered in other states, merely because the borrower happens to be a resident.*

FDIC Amicus Brief, *Greenwood Tr. Co. v. Massachusetts*, 1992 WL 12577410, at *35-36 (1st Cir. Feb. 27, 1992) (emphasis added).

53. Oregon's opt-out does not empower it to regulate the interest rates charged on consumer finance loans made by state banks in other states. Therefore, Section 1, subsection 3 of House Bill 4116 is expressly preempted by Section 521 of DIDMCA. *See NAIB v. Weiser.*

Section 1, Subsection 3(b) of House Bill 4116 Also Violates the Dormant Commerce Clause

54. As set forth above, Section 1, subsection 3(b) of House Bill 4116 would apply to consumer finance loans made by out-of-state state banks to Oregon residents *regardless* of where the borrower is located when the loan is made by the bank, so long as the borrower made a payment on the loan by debiting an account at a financial institution or trust company in Oregon, or by using a negotiable instrument drawn on a financial institution or trust company in Oregon.

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55. Indeed, subsection 3(b) would apply the Oregon Consumer Finance Act even if the borrower was physically present in the bank's state or another state with interest rate ceilings above Oregon's 36% interest rate ceiling when the consumer finance loan was made by the bank.

56. This exterritorial application of Oregon law to conduct that occurs entirely outside the state violates the dormant Commerce Clause. *See, e.g., Healy v. Beer Instit.*, 491 U.S. 324, 336 (1989); *Sam Francis Found. v. Christies, Inc.*, 784 F.3d 1320, 1323-24 (9th Cir. 2015) (en banc); *Daniels Sharpsmart, Inc. v. Smith*, 889 F.3d 608, 615 (9th Cir. 2018).

Plaintiffs' State Bank Members and Oregon Consumers Will Be Harmed If Section 1, Subsection 3 of House Bill 4116 Is Enforced

57. Plaintiffs' state bank members who make consumer finance loans of $50,000 or less to Oregon residents will suffer irreparable harm if Section 1, subsection 3 of House Bill 4116 is allowed to be enforced.

58. In *Baird v. Bonta*, 81 F.4th 1036 (9th Cir. 2023), the Ninth Circuit held that "[w]hen an alleged deprivation of a constitutional right is involved, most courts hold that no further showing of irreparable injury is necessary." *Accord Arevalo v. Hennessy*, 882 F.3d 763, 766 (9th Cir. 2018).

59. As set forth above, Plaintiffs' state bank members who make consumer finance loans to Oregon residents have incurred compliance costs to comply with House Bill 4116. Plaintiffs' members will also (i) lose revenue as a result of lower interest rates; (ii) lose both revenue and goodwill through strained or lost relationships with customers, retailers, and other partners; (iii) lose opportunities for new customer and retailer relationships, including losing customers and retailers to national banks; and (iv) incur ongoing compliance costs.

60. In *NAIB v. Weiser*, the court granted the motion for a preliminary injunction against the Colorado opt-out statute filed by NAIB, AFSA, and their co-plaintiff after finding that, absent injunctive relief, they would suffer irreparable harm:

> [T]he plaintiffs have shown that their members will incur administrative costs, lost revenue, and lost customers and goodwill if they must comply with the interest-rate caps in the Colorado UCCC with respect to all loans made to Colorado consumers. While

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> some of those losses may in theory be the sort that are typically compensable with damages, monetary losses in this context are likely not recoverable because a state is generally immune from suit for retrospective monetary relief.... And the plaintiffs have presented evidence that absent an injunction, they will be forced to stop offering their loan products altogether to certain Colorado consumers, and once gone, those customers—and their goodwill along with that of the banks' business partners—may be gone forever. 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.... The plaintiffs have made a strong showing that their members will suffer irreparable harm if an injunction is not granted.

NAIB v. Weiser, 737 F.Supp.3d at 1133-34. *See also Idaho v. Coeur d'Alene Tribe*, 794 F.3d 1039, 1046 (9th Cir. 2015) (finding irreparable harm because plaintiff could not recover money damages due to defendant's sovereign immunity).

61. Oregon consumers, particularly those who are unbanked and have considerable difficulty securing credit, will be harmed if Section 1, subsection 3 of House Bill 4116 is enforced. According to federal data, a substantial number of Oregon households are unbanked or underbanked, and they are disproportionately comprised of people in minority communities.[5]

62. The ability of out-of-state state banks to offer consumer finance loans at rates above the 36% Oregon rate cap but that are permitted under the banks' home states' laws and under Section 521 of DIDMCA allows them to provide much-needed credit to low-income consumers who would not otherwise have access to it because their credit profiles would be deemed too risky. Often, being able to charge a higher rate to account for risk of default makes all the difference between being able to offer a loan to borrowers with higher risk profiles and determining that it is too costly and risky to offer them credit at all.

[5] *See* FDIC National Survey of Unbanked and Underbanked Households (2023), https://www.fdic.gov/household-survey/2023-fdic-national-survey-unbanked-and-underbanked-households-appendix-tables at pp. 54, 74.

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63. Plaintiffs' members are highly regulated by the FDIC and their home states. They are committed to responsible and ethical lending, and to enhancing access to credit and consumer choice. But if Section 1, subsection 3 of House Bill 4116 is enforced, Plaintiffs' members will be forced to curtail or forego altogether their consumer finance loans to high-risk Oregon borrowers, thus reducing those borrowers' access to responsible, popular, and useful consumer credit products. Those borrowers who have long been served through responsible bank-fintech partnerships will now have either no access to credit or be forced to engage with predatory alternatives or national banks whose interest rates are not constrained by Oregon law and who will no longer face competition from state banks for these high-risk borrowers.

64. House Bill 4116 has no effect on national banks, whose interest rate authority is derived from Section 85 of the National Bank Act. By stifling competition from state banks located outside Oregon, Section 1, subsection 3 of House Bill 4116 will simply hand over a larger share of the market for consumer finance loans in Oregon to national banks and give them freer rein to charge higher interest rates allowed by their home states' laws.

65. In *NAIB v. Weiser*, the court emphasized that the Colorado opt-out had no effect on national banks' ability to charge interest at rates above the Colorado interest rate ceiling. 737 F.Supp.3d at 1134. "So, without an injunction, the plaintiffs' member state-chartered banks will be at a disadvantage with respect to national banks, but Colorado consumers will have only marginally more protection from higher interest rates." *Id.*

66. It is well-established that "preventing a violation of the Supremacy Clause serves the public interest." *United States v. California*, 921 F.3d 865, 893 (9th Cir. 2019). Likewise, courts have recognized that "the public interest favors a permanent injunction because Plaintiff has established a likelihood of success on its dormant Commerce Clause claim." *Ass'n for Accessible Meds. v. Bonta*, 562 F.Supp.3d 973, 989 (E.D. Cal. 2021). Conversely, the "enforcement of an unconstitutional law is contrary to the public interest." *Silvester v. Harris*, 2014 U.S. Dist. LEXIS 162771, at *13 (E.D. Cal. Nov. 20, 2014).

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67. The grant of injunctive relief will restore the *status quo ante* that existed since the enactment of DIDMCA 46 years ago in March 1980.

COUNT I

EX PARTE YOUNG, SECTION 521 OF DIDMCA

68. Plaintiffs incorporate by reference the allegations in paragraphs 1-67 above.

69. Oregon's opt-out goes far beyond what Section 525 authorizes. Enforcement of the 36% interest-rate ceiling in Oregon's Consumer Finance Act with respect to consumer finance loans made by state banks in other states in conformity with their own states' laws is expressly preempted by Section 521 of DIDMCA and thus violates the Supremacy Clause, U.S. Const. art. VI, cl. 2. Plaintiffs are therefore entitled to declaratory and injunctive relief against Defendant Sean O'Day pursuant to the Declaratory Judgment Act, 28 U.S.C. §§ 2201-2202, and the Court's equitable powers under *Ex parte Young*, 209 U.S. 123 (1908).

70. Under the Supremacy Clause, state laws that "interfere with, or are contrary to the laws of Congress, made in pursuance of the constitution," have no force or effect. *Gibbons v. Ogden*, 22 U.S. 1, 211 (1824).

71. Section 525 only authorizes states to opt-out from DIDMCA's preemption provisions, including Section 521, "with respect to loans *made in such State.*" 94 Stat. 167 (emphasis added). And Section 521 expressly "preempt[s]" "any State constitution or statute" that purports to limit the ability of state-chartered banks to make interstate loans in their home states and to export home-state rates to borrowers in other states with lower usury ceilings.

72. As correctly recognized in *NAIB v. Weiser*, under Section 525, a loan is "made" by the bank, not the borrower, and is "made in" the state where the bank is located and performs its loan-making functions, not the borrower's state.

73. By purporting to limit the interest rates charged on consumer finance loans made in other states by out-of-state state banks, Section 1, subsection 3 of House Bill 4116 disregards the plain terms of DIDMCA, and impermissibly intrudes on the sole prerogative of other states to

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regulate interstate loans made within their own borders by their own state-chartered banks in conformity with their own laws.

74. Plaintiffs have associational standing to challenge House Bill 4116 because, absent the requested relief, their state bank members will suffer the harms described above. Those harms constitute an injury in fact. And that injury is fairly traceable to Oregon's constitutionally overbroad opt-out, which attempts to impose Oregon's interest rate limits on consumer finance loans made by out-of-state state banks in direct contravention of Section 521's express preemption provision. However, the injury can be redressed by the grant of declaratory and injunctive relief prohibiting Defendant from enforcing Section 1, subsection 3 of House Bill 4116 against out-of-state state banks.

75. The Declaratory Judgment Act authorizes "any court of the United States" to "declare the rights and other legal relations of any interested party seeking such declaration." 28 U.S.C. § 2201. The court may also grant any "[f]urther necessary or proper relief based on a declaratory judgment," including injunctive relief, "against any adverse party whose rights have been determined by such judgment." *Id.*

76. Under *Ex parte Young*, a plaintiff may bring suit against individual state officers acting in their official capacities if the complaint alleges an ongoing violation of federal law and the plaintiff seeks prospective relief.

77. As explained above, Section 1, subsection 3 of House Bill 4116 impermissibly attempts to impose Oregon interest rate limitations on consumer finance loans made by out-of-state state banks that are not "made in" Oregon. Those Oregon limitations are expressly preempted by Section 521. Declaratory and injunctive relief prohibiting Defendant from enforcing Oregon's interest-rate restrictions on consumer finance loans made by out-of-state state banks that are not "made in" Oregon is appropriate and warranted.

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COUNT II

EX PARTE YOUNG, DORMANT COMMERCE CLAUSE, 42 U.S.C. § 1983

78. Plaintiffs incorporate by reference the allegations in paragraphs 1-77 above.

79. The Commerce Clause of the Constitution grants Congress the sole authority "[t]o regulate Commerce ... among the several States." U.S. Const. art I, § 8, cl. 3. Plaintiffs seek to vindicate their rights under the Commerce Clause pursuant to 42 U.S.C. § 1983. *See Dennis v. Higgins*, 498 U.S. 439 (1991).

80. The dormant Commerce Clause "is a limitation upon the power of the States" which "prohibits discrimination against interstate commerce and bars state regulations that unduly burden interstate commerce." *Sam Francis Found. v. Christies, Inc.*, 784 F.3d 1320, 1323 (9th Cir. 2015) (en banc) (internal quotations omitted).

81. The Supreme Court has held that "the Commerce Clause precludes the application of a state statute to commerce that takes place wholly outside of the State's borders, whether or not the commerce has effects within the State." *Healy v. Beer Instit.*, 491 U.S. 324, 336 (1989); *see also id.* ("a statute that directly controls commerce occurring wholly outside the boundaries of a State exceeds the inherent limits of the enacting State's authority and is invalid."). *Accord Sam Francis Found.*, 784 F.3d at 1323-24:

> Here, the state statute facially regulates a commercial transaction that 'takes place wholly outside of the State's borders'... Accordingly, it violates the dormant Commerce Clause... 'Direct regulation occurs when a state law directly affects transactions that take place... entirely outside of the state's borders. Such a statute is invalid per se.'

(citations omitted).

82. Section 1, subsection 3(b) of House Bill 4116 violates the dormant Commerce Clause because it seeks to apply the Oregon Consumer Finance Act on an extraterritorial basis in instances where a loan is made by an out-of-state state bank in its home state to an Oregon resident or domiciliary who is not physically present in Oregon when the loan is made by the bank. Indeed,

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subsection 3(b) would apply even if the borrower is present in the bank's state or another state with interest rate ceilings above Oregon's 36% interest rate cap at the time the loan is made by the bank to that borrower.

83. Just as in *Healy* and *Sam Francis Found.*, this direct regulation of conduct that "takes place wholly outside of the State's borders" is invalid *per se* under the dormant Commerce Clause. Declaratory and injunctive relief prohibiting Defendant from enforcing Section 1, subsection 3(b) with respect to wholly extraterritorial conduct is appropriate and warranted.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully request that the Court:

1. Declare that any attempt by Defendant Sean O'Day and his agents and subordinates to enforce Section 1, subsection 3 of House Bill 4116 against state banks which make consumer finance loans of $50,000 or less in other states to Oregon residents or domiciliaries is preempted by Section 521 of DIDMCA and a violation of the Supremacy Clause, and that subsection 3(b) also violates the dormant Commerce Clause to the extent it applies to consumer finance loans made by state banks in other states when the borrower is also located outside Oregon;

2. Preliminarily and permanently enjoin Defendant Sean O'Day and his agents and subordinates from enforcing Section 1, subsection 3 of House Bill 4116 against state banks that make consumer finance loans of $50,000 or less in other states to Oregon residents or domiciliaries;

3. Enter judgment in favor of Plaintiffs; and

4. Award Plaintiffs all other relief the Court deems just and proper, including reasonable attorneys' fees under 42 U.S.C. § 1988(b) with respect to the dormant Commerce Clause and § 1983 claim.

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DATED: June 15, 2026

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