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<tr><td>DISTRICT COURT, CITY AND COUNTY OF DENVER, COLORADO
1437 Bannock Street
Denver, CO 80202</td><td rowspan="2">▲ COURT USE ONLY ▲</td></tr>
<tr><td>MARTHA FULFORD, ADMINISTRATOR, UNIFORM CONSUMER CREDIT CODE,

Plaintiff,

v.

MARLETTE FUNDING, LLC, d/b/a BEST EGG; WILMINGTON TRUST, N.A., not in its individual capacity, but solely as trustee for certain trusts; and WILMINGTON SAVINGS FUND SOCIETY, FSB, not in its individual capacity, but solely as trustee for certain trusts,

Defendants,

And CROSS RIVER BANK,

Intervenor Defendant.</td></tr>
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Courtroom 269

Div.:</td></tr>
<tr><td colspan="2">BRIEF OF AMICI CURIAE THE BANK POLICY INSTITUTE, AMERICAN BANKERS ASSOCIATION, AND LOAN SYNDICATIONS AND TRADING ASSOCIATION IN OPPOSITION TO PLAINTIFF'S MOTION PURSUANT TO C.R.C.P. 56(h) FOR DETERMINATION OF LAW</td></tr>
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The Bank Policy Institute, American Bankers Association, and Loan Syndications and Trading Association hereby submit this brief as *amici curiae* in the above-captioned action in opposition to Plaintiff's Motion Pursuant to C.R.C.P. 56(h) for Determination of Law ("Motion" or "Mot.").[1] *Amici* are associations whose members provide credit to the consumers and small businesses that form the backbone of the U.S. economy. *Amici* have a substantial interest in this action, which implicates a state-chartered, federally regulated bank's right to originate and sell loans to third parties pursuant to a "cardinal" rule—recognized by law for hundreds of years—that a loan validly originated cannot become invalid because it is subsequently sold or assigned to another party. The positions taken by Plaintiff in this action, if accepted, would undermine this cardinal rule at great harm to the modern, multi-trillion dollar U.S. credit markets and to *amici*'s members.

SUMMARY OF ARGUMENT

For hundreds of years, the U.S. credit markets have relied on a cardinal rule that a loan that is not usurious in its inception cannot be rendered usurious subsequently, including by being sold or transferred to a third party. That rule was effectively incorporated into the National Bank Act ("NBA"), which preempts state usury claims against national banks, and the Federal Deposit Insurance Act ("FDIA"), which provides materially identical preemption for loans originated by federally insured state-chartered banks. Both the Office of the Comptroller of the Currency ("OCC") and the Federal Deposit Insurance Corporation ("FDIC")—the federal agencies responsible for implementing the NBA and the FDIA, respectively—recently published draft regulations reaffirming

1 Descriptions of *amici* associations appear in the Appendix to this brief. None of the *amici* associations is a subsidiary or affiliate of any publicly owned corporation. *Amici* affirm that no counsel for a party authored this brief in whole or in part, and no person other than *amici* or their counsel contributed any money to fund its preparation or submission. Intervenor Cross River Bank is a member of the American Bankers Association, but did not author this brief in whole or in part and did not contribute any money to fund its preparation or submission.

the cardinal rule and making clear that the NBA's and FDIA's preemption provisions extend to non-bank assignees of loans originated by a national bank or a state-chartered bank.

Relying on the Second Circuit's decision in *Madden* v. *Midland Funding, LLC*, 786 F.3d 246 (2d Cir. 2015), Plaintiff contends that the FDIA's preemption provisions do not apply to a loan that is originated by a bank if that loan is sold or assigned to a non-bank. But as the OCC and United States Solicitor General ("SG") powerfully explained in an *amicus* brief to the Supreme Court, *Madden* was fundamentally erroneous because, among other things, it contradicts the cardinal rule and the NBA/FDIA. Indeed, courts both before and after *Madden* have emphatically rejected *Madden*'s erroneous reasoning. *See Olvera* v. *Blitt & Gaines, P.C.*, 431 F.3d 285, 289 (7th Cir. 2005); *Krispin* v. *May Dep't Stores Co.*, 218 F.3d 919, 924 (8th Cir. 2000); *FDIC* v. *Lattimore Land Corp.*, 656 F.2d 139, 148–49 & n.17 (5th Cir. Unit B 1981); *In re Rent-Rite Superkegs West, Ltd.*, 603 B.R. 41, 66–67 (Bankr. Colo. 2019).

Adopting *Madden* here would not only sow further error into the case law, but it would introduce further uncertainty and costs to the loan purchase markets. Those effects will spread upstream to the loan origination market, reducing the availability of credit and thereby harming the U.S. financial system and economy. Indeed, economic research shows that *Madden*'s unintended and negative impact is already being felt in the Second Circuit's marketplace. Extending *Madden* here would import this observed harm into Colorado.

ARGUMENT

Plaintiff argues, relying on *Madden*, that "Section 27 [of the FDIA] does not allow state banks to sell their interest rate exportation rights to non-banks." (Mot. at 9; *see also* Am. Compl. ¶ 29 (citing *Madden* for the proposition that Defendants "and other non-banks cannot . . . enforce a bank's federal interest rate exportation rights when they purchase loans from banks because banks cannot validly assign such rights to non-banks.").) But *Madden*, which is obviously not binding on this Court, was "contrary" (as Plaintiff admits, Am. Compl. ¶ 29) to prior decisions of other Courts of Appeals, is clearly erroneous as a matter of law, and has led to harmful economic effects on the loan markets—especially, as empirical analysis has confirmed, in the extension of credit to low-income individuals.

I. *MADDEN* CONTRADICTS IMPORTANT, LONG-SETTLED EXPECTATIONS CONCERNING THE LOAN MARKETS.

A. For Over Two Hundred Years, It Has Been Well-Established That a Valid Loan Cannot Be Rendered Usurious by Selling or Assigning It to a Third Party.

Courts have long recognized the valid-when-made doctrine as a fundamental legal principle. *See*, *e.g.*, *Watkins* v. *Taylor*, 16 Va. (2 Munf.) 424, 436 (1811) (opinion of Coalter, J.) ("[I]f it was not usury *at the time* when the contract was entered into, no *after* circumstance can make it so; and any argument, therefore, drawn from after circumstances, would be improper." (emphasis in original)); *Tuttle* v. *Clark*, 4 Conn. 153, 157 (1822) (holding that a "note, free from the taint of usury, in its origin," did not become usurious by a subsequent sale); *Tate* v. *Wellings* (1790) 100 Eng. Rep. 716, 721 (K.B.) (opinion of Buller, J.) ("[I]t must be shewn that it was usurious at the time when it was entered into; for if the contract were legal at that time, no subsequent event can make it usurious."); 1 William Blackstone, Commentaries on the Laws of England 379–80 n.32 (18th ed., W.E. Dean 1838) ("[U]sury must be part of the contract in its inception . . . .").

The U.S. Supreme Court recognized this rule in 1828, when it held that a non-usurious loan could not become usurious by reason of its sale or assignment. *Gaither* v. *Farmers & Mechs. Bank of Georgetown*, 26 U.S. 37, 43 (1828). In 1833, the Supreme Court confirmed that it was a "cardinal rule" of usury that the determination of whether a loan is usurious occurs at the time of origination. *Nichols* v. *Fearson*, 32 U.S. 103, 109 (1833). To hold otherwise, the Court noted, would mean that "a contract, wholly innocent in its origin, and binding and valid, upon every legal principle, [would be] rendered, at least, valueless, in the hands of the otherwise legal holder." *Id.* at 110.

Notwithstanding the clear language from this unbroken line of precedent, Plaintiff argues that the valid-when-made doctrine "is a modern invention" and "does not . . . have firm rooting in the law." (Mot. at 10.) To support these arguments, Plaintiff cites an *amicus* brief filed in this action on May 8, 2018 in opposition to Defendants' Motion to Dismiss. (Mot. at 10–12 (citing *Amicus Curiae* Brief of Professor Adam J. Levitin in Support of Plaintiff at 5–8 (May 8, 2018) ("Levitin Brief")).) Plaintiff's assertions, and the *amicus* brief upon which they are based, are fundamentally erroneous.

First, the underlying premise of *amicus*'s brief is wrong. *Amicus* asserts that "there was no situation in which the 'valid-when-made' issue could have even arisen" before the NBA's enactment in 1864. Levitin Brief at 7. But there were substantial differences in usury laws among the states, and even within a state, depending on the type of borrower, lender, and loan. *See* Charles M. Horn & Melissa R. H. Hall, *The Curious Case of* Madden v. Midland Funding *and the Survival of the Valid-When-Made Doctrine*, 21 N.C. Banking Inst. 1, 3-4 (2017) ("Predictably, there is a wide variation among the states as to what interest rate is 'excessive,' [and] what types of loans are covered by the usury limits . . . . And, complicating the usury question is the fact that usury limits may have exceptions for certain types of businesses . . . or types of loans . . . ." (footnotes omitted)). Therefore, as the pre-1864 cases cited above illustrate, even before enactment of the NBA, a legally originated loan could be assigned or sold such that, without the cardinal rule, the loan would run afoul of another state's or another party's applicable usury laws. The valid-when-made doctrine was, in fact, commercially and legally necessary well before Congress passed the NBA.

Second, in a vain effort to overcome the binding precedent on this issue, *amicus* either ignores or misreads the nineteenth century decisions cited above, which make clear that the valid-when-made doctrine is centuries old. *Amicus* attempts to argue that the stated holdings in *Gaither* and *Nichols* should be disregarded, because "[t]he question posed in both cases is whether usury in transaction #2 affects the validity of transaction #1," whereas here the question relates to "whether the validity of transaction #1 affects the validity of transaction #2." Levitin Brief at 8. But this effort at distinction is unintelligible and meaningless. Plaintiff's action *would* render usurious and illegal collection on a loan that was undisputedly non-usurious and legal at origination (transaction #1), as a direct result of that loan's sale or assignment (transaction #2), which is exactly what *Nichols* and *Gaither* state Plaintiff cannot do. Indeed, *Gaither* and *Nichols* cited the "cardinal" rule that "a contract free from usurious taint in its inception" cannot be "rendered . . . valueless, in the hands of the otherwise legal holder." *Nichols*, 32 U.S. at 109–10. Thus, *Gaither* and *Nichols* recognized the valid-when-made doctrine as a "preexisting maxim" and "applied it to a certain set of facts." *See* Brian Knight, *Credit Markets Need Legislative Guidance After* Madden *Decision*, Mercatus Ctr. (Sept. 14, 2017), https://www.mercatus.org/%5Bnode%3A%5D/commentary/credit-markets-need-legislative-guidance-after-madden-decision.

Third, *amicus*'s assertion that "[o]ne can find no mention of the [valid-when-made] doctrine in any reported case or treatise or scholarly article prior to 2015" ignores not only the above-cited cases, but also the *three* modern U.S. Court of Appeals decisions—from the Fifth, Seventh, and Eighth Circuits—that applied the doctrine before *Madden*. Levitin Brief at 5; *see Olvera*, 431 F.3d at 289 (7th Cir. 2005) ("But once assignors were authorized to charge interest, the common law kicked in and gave the assignees the same right . . . ."); *Krispin*, 218 F.3d at 924 (8th Cir. 2000) ("[I]t makes sense to look to the originating entity (the bank), and not the ongoing assignee (the store), in determining whether the NBA applies."); *Lattimore*, 656 F.2d at 148–49 & n.17 (5th Cir. Unit B Sept. 1981) ("The non-usurious character of a note should not change when the note changes hands."). *Amicus* does admit, in a footnote, that "[a] handful of post-1980 cases arguably support the doctrine," but, in conclusory fashion, dismisses them as "founded on a misinterpretation" of a quote from *Nichols*. Levitin Brief at 6 n.1. To the contrary, these Court of Appeals decisions unanimously analyze and faithfully apply the prevailing historical and legal understanding regarding the valid-when-made doctrine. And to the extent *even more* decisions do not expressly reference the doctrine, that is because the doctrine was universally accepted and largely unchallenged:

> [T]he relative paucity of modern case law (that is, decisions from the mid-20th century and later) more likely reflects the fact that valid-when-made is a core, and generally accepted, principle of the law of loans and contracts that litigants have not felt necessary to challenge, or the courts to decide. Certainly, as a business matter, the valid-when-made principle has been universally relied on in the lending business, inasmuch as the ability of a loan transferee to rely upon the enforceability and collectability in full of a loan that is validly made is central to the stability and liquidity of the domestic loan markets, to say nothing of core principles of commercial dealing. And, prior to *Madden*, there was no reason to believe that the courts viewed the matter otherwise.

Horn & Hall, *supra*, at 7. Moreover, it is scarcely surprising that there were no "scholarly article[s]" on such a well-settled and (until *Madden*) unchallenged principle of law. *See* Levitin Brief at 5. Tellingly, the *amicus* cannot cite—out of the hundreds of years of precedent—even a single pre-*Madden* authority that in any way holds that the sale or transfer of a loan to a third party *can* render it usurious.

B. The NBA and FDIA Incorporate the Cardinal Rule and Preempt State-Law Usury Claims.

Section 85 of the NBA permits a national bank to "charge on any loan . . . interest at the rate allowed by the laws of the State . . . where the bank is located," 12 U.S.C. § 85, and "pre-empts" any "state-law claim of usury against a national bank," *Beneficial Nat'l Bank* v. *Anderson*, 539 U.S. 1, 9–11 (2003). Because the valid-when-made rule was entrenched in American jurisprudence when Congress enacted Section 85 of the NBA in 1864, Congress is also presumed to have incorporated that rule in Section 85. *See Astoria Fed. Sav. & Loan Ass'n* v. *Solimino*, 501 U.S. 104, 108 (1991).

When Congress enacted Section 27 of the FDIA in 1980—with the stated goal of "prevent[ing] discrimination against State-chartered insured depository institutions," 12 U.S.C. § 1831d—it extended to state-chartered banks the same federal preemption of state usury laws enjoyed by national banks under the NBA. Specifically, Section 27 provides that, if the interest rate "allowed by the laws of the State . . . where the bank is located" is greater than the rate permitted by "any State constitution or statute," that constitution or statute "is hereby preempted for purposes of this section." *Id.* This provision "borrow[s] from [Section 85] and incorporate[s]" its language to "achieve[] parity between national banks and their state-chartered counterparts." *Greenwood Tr. Co.* v. *Massachusetts*, 971 F.2d 818, 827 (1st Cir. 1992).[2] Courts have therefore held that Section 85 of the NBA and Section 27 of the FDIA "should be interpreted the same way." *Id.* Accordingly, under the FDIA, state-law usury claims against assignees of loans validly originated by insured state banks are preempted. *See* FDIC, Interpretive Letter No. 93-27, 1993 WL 853492, at *1 ("[W]e concluded

[2] *See also* FDIC, Interpretive Letter No. 93-27, 1993 WL 853492, at *1 (July 12, 1993) ("We have stated consistently that [Section 27 of the FDIA] was intended to give state-chartered FDIC-insured banks the same 'most favored lender' status and right to export interest enjoyed by national banks under . . . § 85 [of the NBA].").

that [Section 27 of the FDIA] preempts the laws of an out-of-state borrower's home state, to the extent that such laws purport to restrict the interest or fees . . . that an FDIC-insured state bank is authorized to assess by its chartering state.").

This protection is crucial to the proper functioning of the loan markets, which rely heavily on the ability of loan originators to sell or assign the loans to others.[3] As the OCC and SG have explained, the "power explicitly conferred on national banks . . . to originate loans at the maximum interest rate allowed by the national bank's home State" necessarily includes the "power to transfer a loan, including the agreed-upon interest-rate term, to an entity other than a national bank." Brief for the United States as *Amicus Curiae*, *Midland Funding, LLC* v. *Madden*, No. 15-610, 2016 WL 2997343, at 7–8 (U.S. May 2016) ("OCC/SG Brief").[4] "A national bank's federal right to charge interest up to the rate allowed by Section 85 would be significantly impaired if the national bank's assignee could not continue to charge that rate." *Id.* at 8. Therefore, "Congress's conferral of [a] federal right" to charge interest "up to the maximum rate allowed by the bank's home State" should "be understood to incorporate the understandings that (a) *sale of loans is an integral aspect of usual banking practice*, and (b) *a loan that was valid when made will not be rendered usurious by the transfer*. To the extent that application of [state] usury law would prevent [the bank] from fully

[3] *See* OCC, *Mortgage Banking: Comptroller's Handbook* 3, 38 (Feb. 2014), *available at* https://tinyurl.com/kt89bg2 ("Banks participate in the secondary market to gain flexibility in managing their long-term interest rate exposures, to increase liquidity, manage credit risk, and expand opportunities to earn fee income.").

[4] Indeed, "[w]hen Congress enacted Section 85's earliest statutory antecedent, it was already established that a bank's power to sell loans was a 'necessarily implied' corollary of the power to originate loans." OCC/SG Brief at 7–8 (quoting *Planters' Bank of Miss.* v. *Sharp*, 47 U.S. (6 How.) 301, 322 (1848)).

exercising the powers conferred by Section 85, state law is preempted." *Id.* at 9–10 (emphases added). The same logic and law, of course, applies to state-chartered banks.

In the face of the erroneous *Madden* decision, the FDIC and OCC have recently issued notices of proposed rulemaking reaffirming the valid-when-made doctrine, the protections of the FDIA and NBA, and the importance of federal preemption to the functioning of the U.S. economy. *See* Permissible Interest on Loans That Are Sold, Assigned, or Otherwise Transferred, 84 Fed. Reg. 64,229 (proposed Nov. 21, 2019); Federal Interest Rate Authority, 84 Fed. Reg. 66,845 (proposed Dec. 6, 2019). The proposed OCC rule would codify what everyone already knew: that, pursuant to Section 85 of the NBA, "when a bank sells, assigns, or otherwise transfers a loan, interest permissible prior to the transfer continues to be permissible following the transfer." 84 Fed. Reg. at 64,230. The FDIC's proposed rule similarly affirms these "longstanding principles regarding the ability of banks to sell loans." 84 Fed. Reg. at 66,850. The FDIC's proposed rule thoroughly and persuasively analyzes the history, purpose, and text of the NBA and FDIA, leading the FDIC to conclude that "a State bank's statutory authority under section 27 to make loans at particular rates necessarily includes the power to assign the loans at those rates." *Id,* at 66,848. As the FDIC explains, "[t]he ability of an assignee to rely on the enforceability and collectability in full of a loan that is validly made is . . . central to the stability and liquidity of the domestic loan markets," and "[r]estrictions on assignees' abilities to enforce interest rate terms would result in extremely distressed market values for many loans, frustrating the purpose of the [FDIA]." *Id.* Accordingly, the FDIC's proposed regulations state that "whether interest on a loan is permissible under section 27 would be determined at the time the loan is made, and would not be affected by subsequent events, such as . . . the sale, assignment, or other transfer of the loan." *Id.* at 66,845–46.

The OCC and FDIC have also reiterated the importance of federal preemption under Section 27 of the FDIA in a joint *amicus* brief submitted in the U.S. District Court for the District of Colorado. *See Amicus* Brief of the FDIC and the OCC in Support of Affirmance and Appellee, *Rent-Rite Super Kegs W. Ltd* v. *World Bus. Lenders, LLC*, Case No. 1:19-cv-01552-REB, 2019 WL 4569774 (D. Colo. Sept. 10, 2019) ("FDIC/OCC Brief"). In the brief, the OCC and FDIC explain that "a bank's statutory authority to charge interest at the rate permitted by its home State must inherently encompass the power to convey that usury-exempted rate to an assignee." *Id.* at 17–18. "Any other interpretation would defeat the purpose of the statute," because "[b]anks need to be able to sell their loans in order to maintain adequate capital and liquidity, and to preserve their financial soundness." *Id.* Therefore, the OCC and FDIC conclude that because "Congress intended to confer on banks a *meaningful* right to make loans at the rates allowed by their home states," Section 27 "expressly preempts state restrictions on the assignability of such rates, including restrictions on the assignee's ability to enforce the rates." *Id.* at 19.

C. As the OCC and SG Have Recognized, the Second Circuit's Decision in *Madden* Constitutes Legal Error and Should Not Be Extended Here.

This Court should reject the invitation to extend *Madden* because, as decisions from other courts confirm—and as the FDIC, OCC, and SG have emphatically stated—the "court of appeals' decision [in *Madden*] is incorrect." OCC/SG Brief at 6; *see also* FDIC/OCC Brief at 23 ("*Madden*'s disregard of two centuries of established law—without even addressing such law—is not just wrong: it is unfathomable.").[5]

[5] The OCC and SG ultimately recommended that the Supreme Court deny *certiorari* in *Madden*, in part because of the "parties' failure to present the full range of preemption arguments below," and because Midland (which owned the debt) could still argue that New York usury law includes the valid-when-made doctrine. OCC/SG Brief at 17–20.

Madden is based on a fundamentally erroneous premise: "so long as application of [state] usury law to petitioners' collection activities would not entirely prevent national banks from selling consumer debt, state law is not preempted," and a loan that was not usurious at origination can become so upon transfer. OCC/SG Brief at 6. The *Madden* court purported to base its decision on Section 85 preemption grounds; however, in its incomplete analysis, the court failed to even reference, let alone discuss, the cardinal rule. *Madden*'s "analysis reflects a misunderstanding of Section 85 and of th[e Supreme] Court's precedents." *Id.* Rather, "[u]nder the long-established 'valid-when-made' rule, if the interest-rate term in a bank's original loan agreement was non-usurious, the loan does not become usurious upon assignment, and so the assignee may lawfully charge interest at the original rate." *Id.* at 8. Indeed, "[a] national bank's federal right to charge interest up to the rate allowed . . . would be significantly impaired if the national bank's assignee could not continue to charge that rate." *Id.*

II. ADOPTING *MADDEN* WOULD HAVE HARMFUL ECONOMIC CONSEQUENCES.

"[G]iven the significant costs that adopting the decision would entail, any jurisdiction contemplating implementing *Madden* must seriously consider the costs that necessarily accompany such a ruling." *See* Note, Michael Marvin, *Interest Exportation and Preemption:* Madden*'s Impact on National Banks, the Secondary Credit Market, and P2P Lending*, 116 Colum. L. Rev. 1807, 1848 (Nov. 2016). Extending *Madden* here would have substantial negative consequences for the credit markets and for the Colorado and national economies.

Banks' ability to sell or assign the loans they originate provides them the liquidity to support their lending operations, and is therefore important to banks' safety and soundness. If loans could not be resold by banks, or the ability to do so was restricted, banks would be required to reduce the amount of credit they extend and to increase the costs for the reduced amount of credit they do extend. Adopting *Madden*, and thereby rejecting the cardinal rule, would have exactly this adverse effect, because loan purchasers would be exposed to a patchwork of state-law usury limits, such as the one Plaintiff seeks to enforce here. Given the risk of being limited to lower rates of interest than allowed on the face of the loan, and potentially the voiding of the loan, loan purchasers would pay less to loan sellers, or forgo loan purchases altogether.[6]

Judge Posner easily recognized this very danger in the Seventh Circuit's *Olvera* decision, reasoning that failure to enforce the valid-when-made rule

> would push the debt buyers out of the debt collection market and force the original creditors to do their own debt collection. Borrowers would not benefit on average, because creditors, being deprived of the assignment option as a practical matter (the statutory rates being far below the market interest rates for delinquent borrowers), would face higher costs of collection and would pass much of the higher expense on to their customers in the form of even higher interest rates.

431 F.3d at 288. The end result is "to make the credit market operate less efficiently." *Id.*; *see* Kirby M. Smith, *Banking on Preemption: Allowing National Bank Act Preemption for Third-Party Sales*, 83 U. Chi. L. Rev. 1631, 1681 (Summer 2016) ("[A] finding that preemption does not continue upon sale of a loan would harm all consumers by increasing the cost of credit and likely cutting some marginal debtors out of the market."). In other words, Plaintiff's suit would harm, not help, Colorado consumers and small businesses, who will end up paying higher interest rates or being denied credit.

[6] Sales of loans typically include representations and warranties that the loans are collectible in accordance with their terms and that the sale does not violate any law. Plaintiff's position, if accepted, would chill sellers from making such representations and warranties, further depressing the price of loans sold by originators or rendering sales infeasible. Even if a bank could research and determine that a loan being sold was not usurious under the laws of the state of the purchaser, the price would be reduced because of the constraints on the purchaser's ability to resell the loan. Moreover, Plaintiff's position would be particularly problematic for community banks who sell loans less frequently than larger banks and hence have less resources with which to research and continuously monitor the laws of 50 states.

Lower-income individuals and small businesses, which are more dependent on bank financing than large corporations, will naturally bear the brunt of these effects.[7]

Adopting Plaintiff's position would have other costly consequences. Colorado banks and other entities that previously purchased or sold Colorado loans, in reliance on the cardinal rule of usury law, could face a wave of legal disputes, brought both against loan purchasers for collecting interest as permitted in loan agreements and against loan sellers for the loss in value of the sold loans. Further, by threatening to reduce the value and liquidity of the multi-trillion-dollar portfolio of loans that banks currently hold, the decision could have adverse implications for the safety and soundness of the banking system.

The negative consequences of endorsing Plaintiff's attack on the valid-when-made rule are not just theoretical. Since *Madden* was issued five years ago, "[s]ome lenders have decided to exclude the Second Circuit states . . . from their marketing and lending programs." *See* Horn & Hall, *supra*, at 22.[8] Similar effects have been felt in the securitization market, as firms have removed loans made to borrowers in the Second Circuit from asset-backed securitizations due to usury concerns. *See id.*[9] A study on *Madden*'s effects published one year after the decision observed that *Madden*

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7 *See* William F. Baxter, *Section 85 of the National Bank Act and Consumer Welfare*, 1995 Utah L. Rev. 1009, 1023 (1995); Karen Gordon Mills & Brayden McCarthy, *The State of Small Business Lending: Credit Access during the Recovery and How Tech. May Change the Game* (Harvard Bus. Sch. Working Paper No. 15-004, 2014).

8 *See also* Joy Wiltermuth, *Usury worries hit Avant collateral*, Int'l Fin. Rev. (Aug. 21, 2015), 2015 WLNR 24859283.

9 Indeed, following the filing of this litigation, some firms exclude loans made to Colorado borrowers from new securitizations, along with loans made to borrowers in the Second Circuit. *See* Allison Bisbey, *Colorado raises the stakes in lawsuit against marketplace lenders*, Asset Securitization Report (Dec. 27, 2018), https://asreport.americanbanker.com/news/colorado-raises-the-stakes-in-lawsuit-against-marketplace-lenders ("Avant and Marlette are already excluding Colorado loans from new securitizations. . . . Marlette's latest securitization, Marlette Funding

especially "reduced credit availability for higher-risk," *i.e.*, lower-income, "borrowers." *See* Colleen Honigsberg *et al.*, *What Happens When Loans Become Legally Void? Evidence From a Natural Experiment* 29 (Columbia Bus. Sch. Research Paper No. 16-38, Dec. 12, 2016), *available at* https://tinyurl.com/Honigsberg (noting, *inter alia*, that "after *Madden*, loans to borrowers with FICO scores below 644 virtually disappeared"); *see also* Brian Knight, *Federalism and Federalization on the Fintech Frontier*, 20 Vand. J. Ent. & Tech. L. 129, 188 (2017) (noting that the "experience of marketplace lenders post-*Madden*" is one "where uncertainty about the legality of loans has crippled access to lending for certain borrowers"). Commentators have therefore observed that *Madden* "has cast at least a temporary pall on loan sales and trading activity," and that the decision's "adverse short-term impact" will only be "properly limited in its scope and impact" if rejected "by other state or federal courts." Horn & Hall, *supra*, at 1.[10]

Were this Court to reject the cardinal rule of usury and instead endorse *Madden*, the availability of credit would also be reduced in Colorado. Lenders nationwide, like *amici*'s members, would face increased uncertainty and costs. Those costs, ultimately, would be borne by borrowers and businesses seeking credit, and by the broader state and national economies that rely on that credit to function.

2018-4, does not contain a single loan to a borrower in Colorado, and all loans originated to borrowers in New York, Connecticut and Vermont are limited to the usury caps in those states."); Troubled Company Reporter, *FREED ABS 2020-1: DBRS Assigns Prov. BB(low) Rating on C Notes* (Jan. 26, 2020), 2020 WLNR 2563819 (noting that "[l]oans originated to borrowers in states with active litigation (Second Circuit (New York, Connecticut, Vermont), Colorado, and West Virginia) are excluded from the pool" for a recent securitization).

10 *See also* Marvin, *supra*, at 1840 ("The end result of th[e] price correction [caused by *Madden*] will be distorted investment decisions and concomitant inefficiencies.").

CONCLUSION

For the foregoing reasons, this Court, in deciding the pending Motion, should reject any reliance on the Second Circuit's decision in *Madden*, and affirm the long-established cardinal rule that all relevant parties—lenders, borrowers, loan purchasers, and loan sellers—can rely on the valid legal status of a loan when originally made.

Dated: February 11, 2020

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Certificate of Service

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APPENDIX

The Bank Policy Institute ("BPI") is a nonpartisan public policy, research, and advocacy group, representing the nation's leading banks. BPI's members include universal banks, regional banks, and major foreign banks doing business in the United States. Collectively, BPI members employ nearly two million Americans, make 72% of all loans, including nearly half of the nation's small business loans, and serve as an engine for financial innovation and economic growth.

The American Bankers Association ("ABA") is the principal national trade association and voice of the banking industry in the United States. Its members, located in each of the fifty states and the District of Columbia, include banks, savings associations, and nondepository trust companies of all sizes. The ABA's members hold a substantial majority of the U.S. banking industry's domestic assets and are leaders in all forms of consumer financial services.

The Loan Syndications and Trading Association is a not-for-profit financial trade services association whose mission is to promote a fair, orderly, efficient, and growing corporate loan market and to provide leadership in advancing and balancing the interests of all loan market participants. Its members include national and state-chartered banks as well as institutional lenders who make, purchase, and trade hundreds of billions of dollars in corporate loans.