Legal Sidebar

En Banc Tenth Circuit to Consider Scope of DIDMCA Opt-Out Provision

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The United States has a dual banking system in which banks may obtain either a federal or a state charter. State-chartered banks are not, however, unaffected by federal law. In addition to imposing a range of regulatory requirements on state-chartered banks, federal law frees state banks from the strictures of some state laws. On April 2, 2026, the U.S. Court of Appeals for the Tenth Circuit (the Tenth Circuit) granted rehearing en banc in *National Association of Industrial Bankers v. Weiser*, a case involving federal preemption of state interest-rate limits as applied to state-chartered banks. *Weiser* raises an issue of first impression concerning states' ability to opt out of Section 521 of the Depository Institutions Deregulation and Monetary Control Act of 1980 (DIDMCA), which allows state-chartered banks to charge certain interest rates when extending credit notwithstanding contrary state law. This Legal Sidebar discusses the *Weiser* litigation and highlights considerations that may be of interest to Congress.

The *Weiser* Litigation

At issue in *Weiser* are two provisions in DIDMCA. The first, Section 521, allows state-chartered banks to charge interest on loans at a rate up to the greater of

- one percent more than the discount rate on 90-day commercial paper in effect at the Federal Reserve Bank in the Federal Reserve district where a bank is located (the "discount-plus-one" rate) or
- the rate allowed by the state where the bank is located.

Section 521 thus preempts state law in two respects. Section 521 allows a state-chartered bank to charge the discount-plus-one rate even if a state imposes a lower interest-rate limit. Section 521 also permits a state-chartered bank to charge the maximum interest rate of the state in which it is located, even when lending to borrowers in other states with lower interest-rate limits. This latter power is often referred to as interest-rate "exportation." Congress extended these powers to state-chartered banks to preserve their competitive parity with national banks, which possess such powers by virtue of Section 85 of the National Bank Act (NBA).

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The second provision at issue in *Weiser*, Section 525, allows a state to opt out of Section 521 with respect to loans "made in" such a state. The *Weiser* litigation involves the meaning of this language and the scope of the Section 525 opt-out right.

Colorado has exercised that right. In 2023, Colorado adopted a law opting out of Section 521 with respect to consumer credit transactions in the state. In connection with that opt out, Colorado announced its intent to enforce its interest-rate limits on loans made by out-of-state state-chartered banks to Colorado borrowers. In *Weiser*, several bank trade associations (the banks) sought an injunction barring Colorado from doing so. The banks argued that, under Section 525 of DIDMCA, a bank loan is "made" only in the state where *the bank* is located, regardless of the borrower's location. Thus, on the banks' reading, loans made by out-of-state banks to Colorado borrowers are not "made" in Colorado within the meaning of Section 525. The implication is that Section 525 allows a state to opt out of preemption with respect to loans made by state-chartered banks located in that state, but not with respect to loans made by out-of-state banks. Colorado disagrees. It contends that bank loans are "made" in Colorado under Section 525 if *either the bank or the borrower* is located in Colorado. Colorado thus maintains that it can enforce its interest-rate limits on loans made by state-chartered banks to Colorado borrowers—even if those banks are located in other states. This dispute raises an issue of first impression for the federal courts.

In 2024, a federal district court issued a preliminary injunction barring Colorado from enforcing its interest-rate limits on loans made by members of the plaintiff trade associations. In concluding that the banks were likely to succeed on the merits of their claim, the court explained that the banks' interpretation of Section 525 was consistent with the colloquial understanding that lenders—not borrowers—"make" loans. The court reasoned that this reading derived further support from other banking statutes that use the terms "make" and "made" in the same way—i.e., to refer to action by a lender.

In November 2025, a three-judge panel of the Tenth Circuit reversed the district court by a 2-1 vote. The panel majority determined that the district court erred in treating the terms "made" and "make" interchangeably. Focusing on the statutory term "made," the majority concluded that a loan is "made" within the meaning of Section 525 when it is "completed" or "executed." Because an executed loan requires a lender *and* a borrower, the majority reasoned, a loan is "made" in an opt-out state if either the lender or the borrower is located in that state. While the majority found Section 525 unambiguous, it indicated that an inquiry into statutory purpose confirmed the provision's plain meaning. In analyzing DIDMCA's legislative history, the majority explained that the language of Section 525 was derived from two statutes enacted in the 1970s that allowed state-chartered banks to charge certain interest rates, subject to a state's ability to opt out and enforce its own interest-rate cap. In the majority's view, this history suggested that Section 525 was intended to allow states to "override" and "reverse" the preemptive effect of Section 521 in its entirety.

In dissent, Judge Veronica Rossman criticized the panel majority for failing to read Sections 521 and 525 "harmoniously." She argued that textual and temporal links between the provisions suggest they share the same underlying policy—promoting competitive parity between state and national banks. Because the NBA does not contain a similar opt-out provision regarding national banks, Judge Rossman reasoned, Colorado's interpretation of Section 525 would place out-of-state state-chartered banks at a disadvantage relative to national banks when lending to Colorado borrowers. Judge Rossman found this implication inconsistent with the purpose of ensuring competitive equality between state and national banks. In addition, like the district court, Judge Rossman emphasized that the words "made" and "make" are used consistently in banking statutes to refer to a bank's act of making a loan. Judge Rossman also disputed the majority's reading of Section 525's legislative history, arguing that the 1970s statutes on which Section 525 was based focused on intrastate banking—not interstate lending or interest-rate exportation. As a result, she argued, those predecessor statutes do not illuminate the relationship between Sections 521 and 525 of DIDMCA.

On April 2, 2026, the Tenth Circuit vacated the panel decision and granted rehearing en banc—in this case, a rehearing before all of the Tenth Circuit's active judges who are not disqualified. Because the Tenth Circuit vacated the panel decision, the district court's preliminary injunction remains in effect.

Considerations for Congress

In addition to raising a novel question of statutory interpretation, the *Weiser* litigation implicates two issues that may be of interest to Congress: state usury law and competition between state and national banks.

In January 2026, President Trump proposed limits on credit-card interest rates, leading several Members of Congress to introduce legislation to that effect. While it remains to be seen whether federal interest-rate limits will gain traction, allowing states to opt out of federal interest-rate preemption is a related legislative option.

Other Members may be concerned about preserving competitive parity between state and national banks. An ultimate decision in favor of Colorado may prompt other states to opt out of Section 521 of DIDMCA. In April 2026, Oregon enacted a law opting out of Section 521 with respect to consumer finance loans made in the state. In doing so, it joined Colorado and Iowa as the only states that are currently exercising their opt-out rights. Rhode Island is also considering DIDMCA opt-out legislation. As discussed, in the *Weiser* case, Judge Rossman argued in dissent that Colorado's position would place state banks at a competitive disadvantage relative to national banks when it comes to interstate lending. If more states opt out of Section 521, that disadvantage may strengthen.

These concerns about competitive equality appear to be the motivating force behind legislation in the 119th Congress. The American Lending Fairness Act of 2026 (S. 3889 and H.R. 7866) would repeal Section 525 of DIDMCA and allow states to opt out of Section 521 only with respect to loans made by banks that they charter.

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