No. 07-3289

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

QUIK PAYDAY, INC., d/b/a QUIK PAYDAY.COM, QUIK PAYDAY.COM FINANCIAL SOLUTIONS ONLINE, WWW.QUIKPAYDAY.COM, QUIK PAYDAY,

Plaintiff/Appellant,

v.

JUDI M. STORK, in her official capacity as Acting Bank Commissioner and KEVIN C. GLENDENING, in his official capacity at Deputy Commissioner of the OFFICE OF THE STATE BANK COMMISSIONER, STATE OF KANSAS,

Defendants/Appellees.

On Appeal from the United States District Court
For the District of Kansas
The Honorable Judge John W. Lungstrum
D.C. No. 2:06-cv-2203

APPELLANT QUIK PAYDAY'S OPENING BRIEF

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Oral Argument is requested.

CORPORATE DISCLOSURE STATEMENT

No publicly held corporation owns 10% or more of Quik Payday, Inc. stock.

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JURISDICTIONAL STATEMENT

Plaintiff and Appellant Quik Payday, Inc. ("Quik Payday") respectfully appeals from the Judgment of the United States District Court for the District of Kansas entered on September 7, 2007, (Aplt. App. 492-514) (hereinafter "Mem. Op."), denying Quik Payday's motion for summary judgment and granting Defendants' motion for summary judgment on all of Quik Payday's claims. The District Court had jurisdiction over the action for declaratory and injunctive relief pursuant to 42 U.S.C. § 1983.

This Court has jurisdiction over this appeal under 28 U.S.C. § 1291 and Federal Rule of Appellate Procedure 4 because the appeal arises from a final judgment of the District Court, entered on September 7, 2007, from which Quik Payday filed a timely notice of appeal on September 27, 2007. (Aplt. App. 516-17).

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Did the Court err in applying the national unity test, when it failed to find a violation of the dormant Commerce Clause notwithstanding the fact that the 1999 Amendment, on its face and as applied by Defendants, subjects interstate use of the Internet by Quik Payday to inconsistent state regulations? Did the District Court err in reading this Court's *Johnson* decision as limited only to regulation of Internet content, and not to regulation of Internet commerce?

2. Did the District Court err in applying the *Pike* balancing test, when it failed to find a violation of the dormant Commerce Clause notwithstanding the unrefuted evidence of the burden Quik Payday would bear were it required to comply with multiple, conflicting state regulations on the same loan transaction? Did the District Court err by relying on the Fifth Circuit's *Ford Motor* decision, which deals only with incidental Internet regulation, and on this Court's *Aldens* decision, which does not deal with the Internet at all, rather than on this Court's *Johnson* decision, which deals with purposeful and direct regulation of interstate Internet commerce such as the 1999 Amendment at issue here?

3. Did the District Court, by ignoring the practical effect of the 1999 Amendment, err in its application of the extraterritoriality test?

STATEMENT OF CASE

This action arises from an unconstitutional effort to project Kansas' laws beyond its borders through the regulation of interstate Internet commerce. Kansas' Acting and Deputy Bank Commissioners (hereinafter "Defendants") have fined Quik Payday $5 million, ordered it to return all the fees it has collected over several years, and banned it from all lending within the state, merely for having made Internet consumer loans to Kansas residents – from the State of Utah and in full compliance with Utah law. The dormant Commerce Clause to the United States Constitution, as defined through a century and a half of jurisprudence, reserves for Congress exclusive control of such interstate commerce.

In 1999, in response to "concern over the growing use of the Internet," Kansas revised its Consumer Credit Code to expressly cover Internet lending transactions between out-of-state lenders and persons claiming Kansas residence – regardless of where those transactions actually take place. *See* 2000 Comment to Kan. Stat. Ann. § 16a-1-201 (hereinafter the "Official Comment") (Aplt. App. 281-82). Before 1999, the Kansas Consumer Credit Code (hereinafter the "KCCC") applied only to consumer credit transactions "made in this state." Kan. Stat. Ann. § 16a-1-201 (emphasis added). That year, however, the Legislature amended subsection 1(b) of the statute to expand the meaning of "in this state" to include transactions outside the state, where "the creditor induces the consumer who is a

resident of this state to enter into the transaction by solicitation in this state by any means, including ... electronic means." Kan. Stat. Ann. § 16a-1-201(1)(b) (hereinafter the "1999 Amendment").

On March 13, 2006, the Kansas Banking Commission, after receiving only a single complaint from one of Quik Payday's customers, took advantage of its expanded powers and issued to Quik Payday a "SUMMARY ORDER TO CEASE AND DESIST, PAY A CIVIL PENALTY (FINE), TO BAR FROM FUTURE APPLICATION FOR LICENSURE, AND TO PAY RESTITUTION FOR VIOLATIONS" (*hereinafter* the "Summary Order") (Aplt. App. 287-90). Although payday lending is legal in Kansas, the Commission nevertheless took the position that Quik Payday's failure to become licensed in the State of Kansas, even though it was already licensed in the State of Utah, warranted severe sanctions. Namely, the Summary Order directed that Quik Payday:

> … immediately cease and desist engaging in the business of making, and/or undertaking direct collection of payments from, supervised loans, as defined by K.S.A. 2005 Supp. § 16a-1-301(46) with Kansas consumers. All signage for payday loans/advances to Kansas consumers must be removed and any advertisements, including electronic internet solicitation, must be withdrawn from circulation.
>
> … pay a civil penalty (fine) in the amount of $5,000,000.00 made payable to the Kansas Office of the State Bank Commissioner.
>
> … be barred from future application for licensure as a supervised lender pursuant to the Code.

> … pay restitution to 972 Kansas consumers in the form of refunding all profits and/or interest or service fees received as the result of engaging in the business of making and/or undertaking direct collection of payments from at least 3,077 supervised loans, as defined by K.S.A. 2005 Supp. § 16a-1-301(46), with these 972 Kansas consumers, and shall pay interest to these 972 Kansas consumers on all said profits and/or interest or service fees at the rate of 8% per annum from May 11, 2001. …

(Aplt. App. 289).[1]

Quik Payday timely sought a hearing with the Office of the State Bank Commissioner, and, after the instant action was filed, the administrative proceeding was stayed pending the outcome of this suit. Since the Summary Order issued, Quik Payday has shut down. (Aplt. App. 60, § 10). On May 19, 2006, Quik Payday filed the instant lawsuit asserting, *inter alia,* violations of the Commerce Clause and alleging that § 16a-1-201 of the KCCC is unconstitutional. (Aplt. App. 11-24). Quik Payday later moved for summary judgment. (Aplt. App. 63-342). In its motion, Quik Payday sought: (a) a declaration that the 1999 Amendment, Kan. Stat. Ann. § 16a-1-201(1)(b), both on its face and as applied by

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[1] Curiously, the District Court declined to consider the terms of the Summary Order, on the ground that it was not "among the documents listed in the stipulation as available for the Court's consideration." (Aplt. App. at 495, n. 3). Nothing in that Stipulation, however, limited the District Court's consideration to only those documents, and Quik Payday filed the Summary Order with its summary judgment motion, without objection from Defendants. To the extent necessary, Quik Payday requests that this Court take judicial notice of the Summary Order, which is a public document.

Defendants to Quik Payday, violates the United States Constitution; and (b) an injunction permanently enjoining Defendants from enforcing the Summary Order or otherwise seeking to impose Kansas regulatory requirements on Quik Payday's Utah lending activities. *Id.*

The basis for Quik Payday's Constitutional objection is the Constitution's Commerce Clause. Specifically, the Supreme Court has explained that the Commerce Clause "has a negative sweep ... [which] prohibits certain state actions that interfere with interstate commerce." *Quill Corp. v. North Dakota*, 504 U.S. 298, 309 (1992). This has come to be known as the "dormant" Commerce Clause. *Id.* Among other things, the dormant Commerce Clause means that: "no State may force an out-of-state merchant to seek regulatory approval in one State before undertaking a transaction in another." *Healy v. Beer Inst.*, 491 U.S. 324, 337 (1989) (emphasis added). That is because the practical effect of permitting such regulation would be "to create just the kind of competing and interlocking local economic regulation that the Commerce Clause was meant to preclude." *Id.* The issue now before this Court is whether the fifty states can constitutionally regulate the manner by which out-of-state parties conduct themselves on the Internet, and thereby export their policies beyond their respective borders.

That question has already been answered in this Circuit. In *ACLU v. Johnson*, 194 F.3d 1149, 1161 (10th Cir. 1999), this Court – expressly adopting

American Libraries Ass'n v. Pataki, 969 F. Supp. 160 (S.D.N.Y. 1997) – invalidated a New Mexico statute under three separate Commerce Clause grounds, any one of which would have been sufficient by itself to establish the statute as unconstitutional: "(1) it regulates conduct occurring wholly outside of the state of New Mexico; (2) it constitutes an unreasonable and undue burden on interstate and foreign commerce; and (3) it subjects interstate use of the Internet to inconsistent state regulation." 194 F.3d at 1161.

Defendants also filed a motion for summary judgment. (Aplt. App. 343-44). On these cross motions for summary judgment, the District Court granted Defendants' motion and denied Quik Payday's motion.

On national unity, the District Court found – contrary to the stipulated facts – that Quik Payday had not proven that its loans were subject to Utah regulation, and thus that adding Kansas law on top of that would not lead to inconsistent state regulation. In doing so, the District Court ignored unrefuted record evidence concerning the substantial burdens that would operate as an economic bar to any Internet lender who sought to maintain an national lending practice. The Court further mistakenly distinguished this Court's *Johnson* decision, and the *Pataki* decision on which it relies, as applicable only to the regulation of Internet content, but not, paradoxically, actual Internet commerce.

On *Pike* balancing, the District Court relied on this Court's 1978 *Aldens*

decision, which involved the mail order catalog business, over this Court's far more recent and more on-point *Johnson* decision, which held that Internet commerce should be treated the same as railways or interstate highways; *i.e.*, with nationally consistent regulation. The District Court held that the costs to *Aldens* of complying with the Oklahoma law imposing a maximum limit on finance charges were analogous to the burden placed on Quik Payday. However, the District Court never addressed the enormous regulatory burden that would be imposed on Quik Payday if it has to comply with the different and inconsistent laws of fifty states, let alone the sheer impossibility of complying with multiple, inconsistent state laws on the same loan. The Court also accepted at face value and without evidence Defendants' claims of a substantial interest in protecting adult Kansas consumers from access to online credit. Finally, the Court mistakenly relied on *Ford Motor*, a Fifth Circuit decision addressing only "incidental" Internet regulation, and not the direct and purposeful Internet regulation at issue here.

On extraterritoriality, the District Court found the argument "easily rejected" because it purportedly "cannot be said that plaintiff's conduct occurred wholly outside of Kansas." The District Court confused residency with physical location at the time of solicitation and dismissed the difficulty in ascertaining the latter in internet transactions as mere "hypothetical[s]." It also relied on inapposite case

law addressing contracts formed by parties *in* different states and never grappled with the "practical effect" of the 1999 Amendment.

Quik Payday now appeals from the decision of the District Court.

STATEMENT OF FACTS

Quik Payday maintained a physical presence only in Utah, and, from Utah, made short-term consumer loans to persons exclusively over the Internet. Some of the consumers claimed a Kansas address in their loan applications. (Aplt. App. 287-88, §§ 1-2). Defendants conceded, in their Opening Brief in Support of their Motion for Summary Judgment (Aplt. App. 345-77) that the commercial activity Kansas seeks to regulate takes place via the Internet. "In Quik Payday's typical transaction with a Kansas consumer, the consumer either discovered Quik Payday through an Internet search, or learned of Quik Payday when solicited by a third party 'lead generator.' The consumer then applied for a loan online, at Quik Payday's website. … If Quik Payday approved the Kansas consumer's application, the borrower 'signed' Quik Payday's loan contract electronically and returned the contract to Quik Payday over the Internet." (Aplt. App. 351).

The Internet

"The Internet is a decentralized, global medium of communication that links people, institutions, corporations and governments around the world. It is a giant computer network that interconnects innumerable smaller groups of linked computer networks and individual computers." *Johnson*, 194 F.3d at 1153. One research report estimates that by next year, approximately one billion persons will have access to the Internet worldwide. *See* Siobhan Chapman, *Worldwide PC*

Numbers to Hit 1B in 2008, Forrester Says (June 11, 2007) (Aplt. App. 106-07). An earlier report by the same analytical firm estimated that by 2004, Internet commerce had already reached $6.8 trillion dollars in volume. *See* Forrester Research, *Forrester Findings: Worldwide eCommerce Growth* (Feb. 2002) (Aplt. App. 109-11).

Payday Lending

This case centers on one part of the world of Internet commerce: online "payday loans." Payday lenders make small, short-term loans to mostly moderate income households excluded from access to more traditional lines of credit. A typical payday loan is about $300 for two weeks. Prior to the advent of the Internet business model, the payday lender would ask for two recent pay stubs as proof of employment, along with a recent bank account statement. The borrower would secure the loan with a post-dated personal check for the loan amount plus fees. When the loan matured, the lender would deposit the post-dated check. On the Internet, the same process is effected with no paper exchange, but rather through the use of bank account and routing numbers and the wire transfer of funds. *See* Sheila Bair, *Low Cost Payday Loans: Opportunities and Obstacles*, (June 2005) (*hereinafter* "Bair") (Aplt. App. 113-84).

When expressed in terms of annual percentage rates, the costs associated with payday loans appear high and tend to draw criticism. Indeed, Defendants

themselves, while purporting to draw upon stipulated facts, distort the figures in order to support their criticism of payday loans. For example, they claim that: "The annual percentage rate on Quik Payday's Kansas payday loans always exceeded 400%, and sometimes exceeded 1000%." (Aplt. App. 351). However, these are numbers generated from mere $20 finance charges. As the Online Lenders Alliance explained in its *amicus curae* brief filed with the summary judgment pleadings, using an annualized percentage calculation for a two-week loan is inappropriate and unhelpful. Just as nobody would use a taxi service to travel cross-country, or choose short-term parking at the airport for a month-long trip, nobody takes out a payday loan for a 12-month term. Applying this same metric, credit cards charge 700% or more, and even a $1.44 ATM fee amounts to 526% APR. (Aplt. App. 391).

In fairness, such rates also must be compared to the very high non-sufficient fund (NSF) fees that such households pay for bounced checks, retail service charges for returned checks, and late fees for missed rent or utility payments. In 2003, consumers paid banks $22 billion in NSF fees and $57 billion in late fees. Payday loans help consumers avoid those needless costs, and the corresponding damage to their credit scores from NSF transactions. (Aplt. App. 113-84). One recent study has even found that "payday credit can be profoundly beneficial, even lifesaving, in extraordinary events." Donald P. Morgan and Michael R. Strain,

Federal Reserve Bank of New York, "Payday Holiday: How Households Fare after Payday Credit Bans" (Nov. 2007), at 6.[2]

Quik Payday

Quik Payday was formed for the purpose of offering payday loans exclusively over the Internet. It is far more convenient to arrange a loan over the Internet than from a retail office in a face-to-face transaction, and online loan applications also allow for discreet transactions. From 1999 through 2006, Quik Payday engaged in lending transactions with consumers in dozens of states, including 972 consumers listing a Kansas residential address on their loan applications. (Aplt. App. 58, § 2).

To say that Quik Payday made loans to a Kansas resident does not mean that a Kansas resident actually applied for the Quik Payday loan over the Internet via a computer located within the borders of Kansas. To be a Kansas "consumer" for purposes of the Kansas Uniform Consumer Credit Code, one need only list a Kansas address "in any writing signed by the consumer in connection with a credit transaction." Kan. Stat. Ann. § 16a-1-201(6). To cite just one possibility, in the 2000 Census, some 78,293 Kansas residents reported working in the Kansas City,

[2] The Report was issued after the District Court's decision, and thus is not in the appellate record. The complete Report can be downloaded from the Federal Reserve at: www.newyorkfed.org/research/staff_reports/sr309.pdf.

Missouri metro area. U.S. Census Bureau, *County-to-County Worker Flow Files* **(**Aplt. App. 218-78). It is entirely possible for such persons to have applied for payday loans from their office computers as opposed to from their homes.

While the borrowers' locations may be indeterminable, Quik Payday's location certainly was not. It operated its Internet lending business solely from its offices in Logan, Utah. (Aplt. App. 57, ¶ 1). It does not now have – nor has it ever had – any offices, employees, or other physical presence in Kansas. (Aplt. App. 59, ¶ 4). All of its loan applications, loan contracts, and loan payments were received and/or processed in Utah (Aplt. App. 58-59 ¶ 3). All loans were underwritten and approved in Utah, and all records relating to Quik Payday's lending activities were maintained in Utah. *Id.* Furthermore, Quik Payday never availed itself of Kansas jurisdiction by filing suit in connection with a loan made to a consumer with a Kansas address. *Id.*

It is important to note that Quik Payday in no way contends that it has a right to operate free of all regulation. Rather, throughout the entire period of its operation, Quik Payday was fully licensed by the State of Utah, under Utah's Check Casher statute, to make payday loans to consumers. (Aplt. App. 57, ¶ 1). Defendants have not alleged in this matter that Quik Payday is acting in violation of Utah law in any respect.

Utah's Regulation Of Lenders

This Court may take judicial notice of the fact that Utah maintains a comprehensive regulatory scheme over its lenders. Utah, like Kansas, permits payday lending. *See* Utah Code Ann. §7-23-101 *et seq.*; Kan. Stat. Ann. § 16a-1-101 *et seq.* Utah and Kansas both have adopted versions of the Uniform Consumer Credit Code, which protects consumers from unfair and misleading credit practices. *See id.*; Utah Code Ann. § 70C-1-101 *et seq*. The Utah Department of Financial Institutions regulates and annually examines Utah-based lenders, including state-chartered depository institutions and deferred deposit lenders. *See* Utah Code Ann. § 7-23-107. The Utah Banking Act also provides consumers a similar remedy to Kansas laws, in that any Kansas citizen with a complaint against Quik Payday can contact a Utah regulator. *See* Utah Code Ann. § 7-23-106. Utah regulators, in turn, like Kansas regulators, have the power to resolve any unlawful or improper action by the lender that might occur. *Id.*

1999 Amendment To KCCC

For most of the State's history, Quik Payday's Utah-based lending would have been of no interest to Kansas. In 1999, however, in response to "concern over the growing use of the Internet," Kansas revised its Consumer Credit Code to expressly cover Internet lending transactions between out-of-state lenders and persons claiming Kansas residences – regardless of where those transactions

actually take place. *See* 2000 Comment to Kan. Stat. Ann. § 16a-1-201. (Aplt. App. 281-82). Specifically, prior to 1999, the KCCC applied only to consumer credit transactions "made in this state." Kan. Stat. Ann. § 16a-1-201 (emphasis added). In that year, however, the Legislature expanded the words "in this state" to include transactions outside the state, where "the creditor induces the consumer who is a resident of this state to enter into the transaction by solicitation in this state by any means, including ... electronic means." Kan. Stat. Ann. § 16a-1-201(1)(b).

The 1999 Amendment laid the groundwork for Kansas regulators to forge into new areas of interstate commerce. The Official Comment to the 1999 Amendment conveys exactly how radical and aggressive an expansion of Kansas' regulatory power the 1999 Amendment authorized:

> KANSAS COMMENT, 2000
>
> …
>
> 2. Under the original version of subsections (1) and (2) of this section, the issue of whether a transaction was deemed to have been made in Kansas … was dependent on the place at which the executed contract was received by the creditor and whether any face-to-face solicitations occurred in Kansas. As a result, creditors had a measure of control over the applicability of the U3C [the Kansas Uniform Consumer Credit Code] to their transactions and could arrange their interstate operations in a manner that minimized the operational difficulties arising from the variations in the laws of different states. This flexibility on the part of creditors … offered no threat to consumers because the CCPA [the Kansas Consumer Credit Protection Act] assured consumers that disclosure requirements would be substantially similar in all states.

Subsection (1)(b) was amended, however, in the 1999 legislative session to remove the "face-to-face" qualifier from the solicitation test. This amendment was driven primarily by a concern over the growing use of the Internet as a means of soliciting Kansas consumers to enter into credit transactions with out-of-state creditors. **However, this seemingly innocuous amendment sweeps well beyond the Internet and, if given an expansive interpretation, could have enormous potential consequences for out-of-state creditors.**

Under amended subsection (1)(b), the applicability of the U3C to a multi-state transaction turns on whether there is "solicitation in this state." No guidance is given on when a solicitation is made in Kansas or what role any solicitation that is deemed to have been made in Kansas must have played in the consumer's decision to enter into the transaction. …

It seems quite unlikely that a Kansas resident will locate an out-of-state creditor, travel to the creditor's state and consummate a consumer credit transaction with that creditor unless the creditor has "solicited" the consumer by the use of targeted telephone, mail or other direct marketing or general radio, television, or other non-individualized advertisements received or seen by the consumer in Kansas. Thus, as a practical matter, nearly all consumer credit extended by out-of-state creditors to Kansas residents would be deemed to have been made in Kansas if an expansive interpretation is given to amended subsection (1)(b). Under such an interpretation, the entire U3C (including its licensing requirements, its disclosure requirements and its substantive limitations) would apply to those transactions. As a result, much of the remainder of this section would be rendered surplusage -- there simply would be precious few transactions that slip past the broad net cast by such an interpretation of amended subsection (1)(b).

…

4. Creditors falling within the supervised lender category (part 3 of article 2) need to be licensed only in the state where the loan is made. As noted in Kansas comment 2 to this section, however, under an expansive interpretation of amended subsection (1)(b) virtually all supervised loans extended to Kansas residents would be deemed to have been made in Kansas and, as a result, out-of-state creditors

> extending those loans would need a Kansas supervised lender's license. … (Emphases added).

2000 Comment to Kan. Stat. Ann. § 16a-1-201. (Aplt. App. 281-82).

This is not an example of mere incidental regulation of Internet commerce. Rather, the whole purpose of the 1999 Amendment was to regulate interstate Internet commerce. As Defendants have conceded, the Kansas Legislature enacted the 1999 Amendment because it was "concerned about loans made over the internet by out-of-state lenders to Kansas borrowers." (Aplt. App. 354).

Kansas' Summary Order

The concerns expressed by the author of the Official Comment have now been realized. Defendants have adopted the most extreme, expansive reading of the 1999 Amendment imaginable, and have used it to bring the full might of the State of Kansas down upon Quik Payday, a lawful and licensed Utah lender making loans in Utah. On March 13, 2006, the Kansas Banking Commission issued the Summary Order described above, fining Quik Payday $5 million, and ordering it to cease all lending activities in Kansas. (Aplt. App. 60, ¶10).

SUMMARY OF ARGUMENT

The questions now before this Court are critical to the future of Internet commerce. If every state is permitted to regulate Internet commerce as aggressively as Kansas has done, there eventually will be little business left to regulate. Despite its relative newness, the subject matter of this lawsuit is not *terra incognita*. This Court, in its seminal decision in *ACLU v. Johnson*, 194 F.3d 1149 (10th Cir. 1999), has already held that these sorts of state regulatory incursions into the Internet unconstitutionally burden interstate commerce. The reasoning of *Johnson* squarely applies here. The District Court erred in not following that precedent in this case, but instead awarding judgment to Defendants.

On the national unity test, this Court held in *Johnson* that the dormant Commerce Clause is inherently violated by a law subjecting a party to multiple inconsistent state regulations. The 1999 Amendment plainly does just that. Quik Payday's loans to Kansas residents, having been made in Utah, were subject to Utah regulation. Defendants' position is that those same loans also should have been subject to Kansas' own, inconsistent regulations. Despite this, the District Court ignored record evidence and mistakenly found that Quik Payday had submitted no proof that it would be forced to comply with the laws of states other than Kansas, a fact to which the parties had stipulated. Further, the District Court

mistakenly construed *Johnson* and *Pataki* as applicable only to content-based First Amendment cases, and not to Internet commerce generally.

On the *Pike* balancing test, this Court held in *Johnson* that the dormant Commerce Clause is violated when a state regulation puts an unreasonable and undue burden on interstate commerce. The 1999 Amendment does just that. Its purported benefit (protecting adult residents of Kansas from access to online credit) does not justify the burden it places on Internet commerce by forcing online lenders such as Quik Payday to try to comply with mutually inconsistent state regulations on the same loan transaction. The District Court, again, failed to acknowledge this evidence. Nor did it consider the economic costs of complying with fifty different sets of state regulations, costs which render the business economically impractical. Equally important, the Court erred in applying the Fifth Circuit's *Ford Motor* decision to this case, when that case on its face discusses only incidental regulation. The 1999 Amendment, by contrast, as set forth in its Official Comment, was aimed directly at regulating Internet lenders and credit transactions. Therefore, *Johnson* and not *Ford Motor* sets the standard.

On the extraterritoriality test, the District Court concluded that the 1999 Amendment "does not regulate conduct occurring wholly outside Kansas" in order to reject Quik Payday's arguments. The District Court so concluded only by

ignoring the "practical effect" of the statute and conflating residency with a borrower's indeterminate physical location at the time of solicitation.

Accordingly, the District Court erred in awarding summary judgment to Defendants, and in denying summary judgment to Quik Payday. Whether measured under the national unity test, the *Pike* balancing test, or the extraterritoriality test, the 1999 Amendment violates the Constitution's dormant Commerce Clause.

STANDARD OF REVIEW

"An order denying summary judgment is reviewable when it is coupled with a grant of summary judgment to the opposing party." *Yaffe Cos., Inc. v. Great Am. Ins. Co., Inc.*, 499 F.3d 1182, 1184 (10th Cir. 2007) (internal quotations omitted). "On cross-motions for summary judgment, [this Court's] review of the summary judgment record is *de novo* and [it] must view the inferences to be drawn from affidavits, attached exhibits and depositions in the light most favorable to the party that did not prevail," in this case, Quik Payday. *Allen v. Sybase, Inc.*, 468 F.3d 642, 649 (10th Cir. 2006). "Whether the district court failed to consider or accord proper weight or significance to relevant evidence are questions of law [this Court] review[s] *de novo*." *Harvey by Blankenbaker v. United Transp. Union*, 878 F.2d 1235, 1244 (10th Cir. 1989) (*citing Pullman-Standard v. Swint*, 456 U.S. 273, 291, 292 (1982)).

ARGUMENT

THE 1999 AMENDMENT, BOTH ON ITS FACE AND AS APPLIED TO QUIK PAYDAY, VIOLATES THE DORMANT COMMERCE CLAUSE TO THE U.S. CONSTITUTION

In *Johnson*, this Court set forth three separate and independent tests for whether regulation of interstate commerce violates the dormant Commerce Clause: the "national unity test," the "Pike balancing test" and the "extraterritoriality test." The 1999 Amendment violates all three. Each test is addressed in turn below.

I. THE DISTRICT COURT ERRED IN ITS APPLICATION OF THE NATIONAL UNITY TEST

A. Under *Johnson*, Interstate Internet Commerce May Not Be Subjected To Inconsistent State Regulation

Quik Payday features its argument on the third dormant Commerce Clause test – the need for national unity in Internet commerce – because it presents an absolute bar to Kansas' enforcement of the 1999 Amendment, without resort to balancing. As noted above, the 1999 Amendment is Kansas' attempt to regulate "the growing use of the Internet as a means of soliciting Kansas consumers to enter into credit transactions with out-of-state creditors." (Aplt. App. 281). Thus, *Johnson* is squarely on point.

As this Court observed in *Johnson*, the Supreme Court has long recognized that certain types of commerce require national regulation. 194 F.3d at 1161. As long ago as 1886, that Court confronted state regulation of the nation's railways:

> Commerce with foreign countries and among the states, strictly considered, consists in intercourse and traffic, including in these terms navigation, and the transportation and transit of persons and property, as well as the purchase, sale, and exchange of commodities. For the regulation of commerce, as thus defined, there can be only one system of rules, applicable alike to the whole country; and the authority which can act for the whole country can alone adopt such a system. Action upon it by separate states is not, therefore, permissible.

Wabash, St. Louis & Pac. Ry. v. Illinois, 118 U.S. 557, 574-75 (1886) (emphasis added). The Supreme Court therefore struck the Illinois statute at issue, which purported to establish interstate railway rates, stating "that this species of regulation is one which must be, if established at all, of a general and national character, and cannot be safely and wisely remitted to local rules and regulations, we think is clear from what has already been said." *Id.* at 577.

By the middle part of the twentieth century, rail had given way to highways as the principal medium of interstate commerce, and the Supreme Court had to confront state regulation there as well. In *Bibb v. Navajo Freight Lines, Inc.*, 359 U.S. 520 (1959), the Court examined an Illinois statute that required the use of contour mudguards on trucks in Illinois. The Court took note of the fact that straight or conventional mudguards were permissible in most other states and actually required in Arkansas. *Id.* at 526. Recognizing the need for coordinated legislation, the Court held that "the conflict between the Arkansas regulation and the Illinois regulation … suggests that this regulation of mudguards is not one of those matters admitting of diversity of treatment, according to the special

requirements of local conditions." *Id.* at 528 (citation omitted). The Court struck the Illinois law as unconstitutional. *Id*.

In *Johnson*, this Court concluded: "We agree with the court in *Pataki*, when it observed, 'the Internet, like ... rail and highway traffic ..., requires a cohesive national scheme of regulation so that users are reasonably able to determine their obligations.'" *Id.* at 1162 (emphasis added) (citing *Pataki*, 969 F. Supp. at 182); Kenneth D. Bassinger, *Dormant Commerce Clause Limits on State Regulation of the Internet: The Transportation Analogy*, 32 Ga. L. Rev. 889, 904 (Spring 1998) ("The structure of the Internet bears a striking resemblance to a railroad, highway, or other means of interstate transportation.") (Aplt. App. 320).

Johnson is no aberration. Indeed, at least two other Circuit Courts, several District Courts, and the Federal Communications Commission (FCC) have all followed suit. In *Am. Booksellers Found. v. Dean*, 342 F.3d 96, 104 (2d Cir. 2003), for example, the Second Circuit held that: "We think it likely that the internet will soon be seen as falling within the class of subjects that are protected from State regulation because they imperatively demand[] a single uniform rule." (Citation omitted, emphasis added.) Similarly, in *In re Vonage Holdings Corp.*, 19 F.C.C.R. 22404, 22430 (Nov. 12, 2004), the FCC struck down a state regulation of Internet telephony on Commerce Clause grounds, holding that: "requiring Vonage to submit to more than 50 different regulatory regimes ... would eliminate this

fundamental advantage of Internet-based communication." *Accord Psinet, Inc. v. Chapman*, 362 F.3d 227, 239-40 (4th Cir. 2004); *Ctr. for Democracy & Tech. v. Pappert*, 337 F. Supp. 2d 606, 661-63 (E.D. Pa. 2004); *Cyberspace Commc'ns., Inc. v. Engler*, 55 F. Supp. 2d 737, 751-52 (E.D. Mich. 1999).

The reason uniformity is so important in the Internet sector, as explained in *Pataki*, is because: "Regulation on a local level ... will leave users lost in a welter of inconsistent laws, imposed by different states with different priorities." 969 F. Supp. at 182. "While states can and should serve as laboratories for different regulatory approaches, we have here a very different situation because of the nature of the service – our federal system does not allow the strictest regulatory predilections of a single state to crowd out the policies of all others for a service that unavoidably reaches all of them." *Vonage*, 19 F.C.C.R. at 22428.

If any case ever raised such a specter, this one does. No two states regulate payday lending identically. In Table A to its Brief in Support of its Motion for Summary Judgment (Aplt. App. 93-102), Quik Payday set forth a summary of the laws governing payday lending in the fifty states. If every state can now regulate not just its own lenders (as Kansas did through 1999), but also Internet lenders beyond its borders (as Kansas now purports to do), then the individual state power to regulate interstate commerce over the Internet will have become so great as to threaten the viability of the Internet as a practical medium for conducting many

diverse forms of business, and not just short term lending. Perhaps that is Defendants' goal, but it is not their judgment to make. The Constitution leaves that decision to Congress. Until Congress enacts uniform rules for Internet lending, the states may not fill the void, but rather must limit their regulations to their own lenders.

B. The 1999 Amendment Subjects Interstate Internet Commerce By Quik Payday To Inconsistent State Regulation

The District Court was required to apply *Johnson* as established precedent of this Circuit. Instead, the District Court tried to distinguish *Johnson* on two different grounds. First, it held that Quik Payday's Internet loans to persons listing a Kansas residence was conduct "directed specifically toward a particular state and does not necessarily implicate other states." (Aplt. App. 509). This is a rather remarkable conclusion, one unsupported by the record and one that misapprehends the core of Quik Payday's national unity argument. This case is not just about one transaction potentially pitting Kansas vs. Utah. It is about the cumulative effects of the District Court's decision on interstate Internet lending in fifty different states. If Kansas' right to impose unique restrictions on Internet lending is upheld, forty-nine other states may conclude they can implement their own unique regulatory schemes. The end result is chaos fostered by inconsistent state regulations that indeed operate, cumulatively, to prohibit any Internet lender from operating nationally. If, as suggested in the professional literature, the Internet is the railroad

of the new millennium, it becomes obvious why such practices would run afoul of the national unity test of the dormant Commerce Clause.

A second problem arising from the District Court's conclusion that other states are not implicated is that such a conclusion is flatly inconsistent with the District Court's earlier acknowledgment in its decision – consistent with the Stipulated Facts – that Quik Payday in fact "was registered with Utah's regulatory authorities to provide such loans in accordance with Utah law." (Aplt. App. 494). In other words, Kansas was trying to regulate loans already regulated by Utah. The District Court further acknowledged that Quik Payday's only offices were in Utah, and that Quik Payday would "complete the execution of the [loan] contracts in Utah." (*Id.*) Thus, there is no basis for the District Court to conclude that Utah law is not implicated, let alone the laws of the remaining states.

This Circuit, in *Johnson*, established that a law violates the dormant Commerce Clause if "it subjects interstate use of the Internet to inconsistent state regulation." 194 F.3d at 1161. In its summary judgment briefing, Quik Payday demonstrated how the 1999 Amendment will subject interstate use of the Internet to inconsistent state regulation. (Aplt. App. 82). For example, a consumer who lives in Kansas and works in Missouri checks her email at home and receives a solicitation for a payday loan from an online lender licensed and operating in Utah. The next day, from her office computer, she submits the application via the

Internet listing her Kansas home address on the application. That same day in Utah, the application is reviewed, approved and processed. Under Kansas' view of the world, three states – Utah, Missouri, and Kansas law – could all claim the right to regulate that one loan, and presumably the lender would need to become licensed in each state, just to make that single loan. *See, e.g.*, Kan. Stat. Ann. § 16a-1-201(1); Utah Code Ann. § 7-23-103(1)(a).

But the licensing issue – the only type of regulation addressed by the District Court, to the exclusion of all others – is just the start of the problem. Suppose at the end of the term, the consumer cannot repay the loan in full and wants to roll it over. She goes to her computer at work in Missouri and, via the Internet, requests a rollover from her Utah lender. Kansas prohibits rollovers, Missouri allows up to six rollovers but caps the amount of fees and interest at 75% of the original loan amount, and Utah prohibits rollovers beyond twelve weeks after the loan agreement is executed. *See* Kan. Stat. Ann. § 16a-2-404; Mo. Rev. Stat. § 408.500.6; Utah Code Ann. § 7-23-105(1)(c). Which jurisdiction's regulation would apply? The District Court declined to grapple with these issues, let alone the most critical issue that inconsistent multi-state regulation will operate as a functional bar to development of an internet-based, national lending industry.

Other states' regulations are similarly inconsistent; indeed, many are all but impossible to reconcile. For example, Oklahoma consumers have a right to an

installment repayment plan in certain situations. Okla. Stat. tit. 59 § 3109.D. Similarly, Alaska requires that upon default, but before assigning the account to a collection agency, the lender shall attempt in good faith to contact the customer to discuss the delinquency and shall offer a payment plan. Alaska Stat. § 06.50.550. In contrast, Nebraska forbids lenders to "[r]enew, roll over, defer, or in any way extend a delayed deposit transaction by allowing the maker to pay less than the total amount of the check and any authorized fees or charges." Neb. Rev. Stat. § 45-919(f).

The District Court addressed none of this evidence, noting only in passing that "Plaintiff notes that the states have differing requirements for payday loans." (Aplt. App. 507-08). The District Court also cited the federal Truth in Lending Act, and the Third Circuit's finding of an "express congressional recognition of the appropriateness of a state role with respect to interest rates in the field of consumer credit." (Aplt. App. 509-10) (citing 15 U.S.C. § 1610(b)); *Aldens, Inc. v. Packel*, 524 F.2d 38, 46-47 (3d Cir. 1975). As discussed above, however, differing interest rates are the least of the regulatory morass here. The national unity test protects Internet commerce from this inconsistent regulatory environment.

C. The *Johnson* Decision Is Not Limited Merely To Content-Based Internet Regulation

The District Court also sidestepped the national unity test by finding that "the reasoning of the *Johnson* and *Pataki* courts extends only to regulation of the

content of the internet, and does not necessarily invalidate any regulation of commerce conducted over the internet." (Aplt. App. 509). The Court continued: "Instead, plaintiff must show that internet payday lending specifically represents the type of commerce that should only be subjected to nationally-uniform standard and not to inconsistent state regulations." (*Id.*)

The District Court cited no specific language in either *Johnson* or *Pataki* for this limitation, and this is because there is none. The best that can be said of it is that the District Court appears to have misread the two halves of the *Johnson* and *Pataki* decisions, substituting the content-based analyses necessary for the First Amendment rulings cases with the commerce-based analyses necessary for the Commerce Clause rulings. As to the latter, this Court made clear in *Johnson* that the "type" of commerce that requires a nationally-uniform standard is Internet commerce. 194 F.3d 1149, 1162 ("the Internet, like ... rail and highway traffic ..., requires a cohesive national scheme of regulation so that users are reasonably able to determine their obligations"). It is the role of the District Court to apply the controlling precedent of this Circuit, not to disassemble it.

Unable to find anything in this Circuit that supported its holding, the District Court declared that it had instead chosen to follow the Fifth Circuit's reasoning in *Ford Motor Co. v. Texas Department of Transportation*, 264 F.3d 493 (5th Cir. 2001). This was erroneous for a number of reasons, the most obvious being that

this Circuit is not the Fifth. *See United States v. Spedalieri*, 910 F.2d 707, 709 n.2 (10th Cir. 1990) ("A district court must follow the precedent of this circuit, regardless of its views concerning the advantages of the precedent of our sister circuits.").

In any event, the *Ford Motor* case is readily distinguishable. In that case, the Fifth Circuit found no Commerce Clause violation where: "the restriction on Ford's ability to advertise on their website is only incidental to [Texas' statutory] prohibition on Ford's right to engage in the economic activity of retailing automobiles." 264 F.3d at 506 (emphasis added). By contrast, the 1999 Amendment at issue here is anything but an "incidental" Internet regulation. As noted above, it was and is the very purpose of that statute. Indeed, not only does the 1999 Amendment directly regulate Internet commerce, but the Summary Order issued to Quik Payday is directed solely at Quik Payday's Internet activities.

In the Summary Order, Defendants commanded that: "All signage for payday loans/advances to Kansas consumers must be removed and any advertisements, including electronic internet solicitation, must be withdrawn from circulation." (Aplt. App. 289 (emphasis added)). The only signage here was on Quik Payday's web site. (Aplt. App. 58). The Summary Order cites the 1999 Amendment, Kan. Stat. Ann. § 16a-1-201(1)(b), as authority for imposing on Quik Payday the various punishments set forth therein (Aplt. App. 287-90). Thus, even

if the 1999 Amendment as written does not explicitly stop Quik Payday from maintaining a web site, the statute has had that same effect as applied by Defendants. It implicates the same concerns as in *Johnson* and *Pataki* and those concerns are not alleviated by the Fifth Circuit's distinguishable holding in *Ford Motor*.

Finally, the District Court implied in its decision that Quik Payday relied in its summary judgment briefing solely or principally on "internet pornography cases." (Aplt. App. 508). That is incorrect. In *Stroman Realty Inc. v. Antt*, 2005 U.S. Dist. Lexis 16048, *20 (S.D. Tex., July 28, 2005), for example, which Quik Payday cited in its opening summary judgment brief, California and Florida were attempting to enforce their licensing regulations with regard to an online time-share brokerage business based in Texas. The Court held this to violate the dormant Commerce Clause: "Even assuming that the California and Florida regulations materially helped consumers and did not materially hinder national trade, the risk of inconsistent requirements for a single transaction or a single broker would still make them impermissible." *Id.*

Quik Payday has demonstrated that the 1999 Amendment fails the national unity test of the dormant Commerce Clause. The District Court's decision below should be reversed.

II. THE DISTRICT COURT ERRED IN ITS APPLICATION OF THE *PIKE* BALANCING TEST

A. Under *Pike*, The Benefit Derived From The Statute Must Exceed Any Burden On Interstate Commerce

The *Johnson* decision also set forth that the balancing test enunciated in *Pike v. Bruce Church, Inc*., 397 U.S. 137, 142 (1970) is an independent ground to determine that a regulation violates the dormant Commerce Clause. The *Pike* test requires "a two-fold inquiry. The first level of examination is directed at the legitimacy of the state's interest. The next, and more difficult, determination weighs the burden on interstate commerce in light of the local benefit derived from the statute." *Pataki*, 969 F. Supp. at 177. State regulations that "directly burden interstate commerce ... are generally struck down unless the state can demonstrate that a legitimate local interest unrelated to economic protection is served by the regulation." *Kleenwell Biohazard Waste & Gen. Ecology Consultants v. Nelson*, 48 F.3d 391, 395 (9th Cir. 1995) (emphasis added).

Once again, this Court's decision in *Johnson* sets the tenor for the analysis. In that case, the statute in question sought to protect minors from the dissemination of pornographic materials. This Court agreed with New Mexico authorities that protection of minors is "an undeniably compelling governmental interest," yet still found that the means chosen to further that compelling interest unconstitutionally burdened interstate commerce, when measured against the local benefits conferred

by the statute. 194 F.3d at 1161. This Court's conclusion in *Johnson* stands in stark and helpful contrast to the facts underlying the present action: If the burden on Internet commerce outweighs a state's interest in protecting children from pornography, it surely outweighs a state's interest in protecting adults from the alleged perils of more convenient, if arguably expensive, credit.

B. The 1999 Amendment Imposes A Significant Burden On Interstate Internet Commerce

In its decision, the District Court acknowledged Quik Payday's contention that "the burdens of complying with every state's consumer lending laws would be great," but held that Quik Payday had provided "no evidence to support that allegation." (Aplt. App. 501). That is simply not the case. Indeed, the District Court's failure to acknowledge the record evidence demonstrating just the opposite underscores the error of analysis made below.

In Table A to its opening summary judgment brief (Aplt. App. 93-102), Quik Payday listed the diverse, often grossly inconsistent laws governing payday lending in the fifty states. Among other things, nine of the states in which Quik Payday consumers claim residence require their lenders to maintain a physical office in the state – a restriction which by itself eviscerates the principal economic benefit of operating as an Internet lender. Five states require their lenders to maintain a copy of their books and records in the state, while thirty-four others require their lenders to pay an administrative agent to travel to the lenders' home

office to inspect the books and records. And almost every state requires its lenders to post a sizable surety bond and pay various fees. (Aplt. App. 93-102). That evidence was all before the District Court, and yet it considered none of it.

Instead, the District Court mistakenly assumed that that the only cost Quik Payday would have incurred in submitting to Kansas licensing was a $1,000 annual fee. (Aplt. App. 501). Even focusing just on Kansas' licensing requirements, they entail a $100,000 surety bond, a showing of sufficient net worth, and administrative costs sufficient to monitor the on-line lender's compliance with Kansas law in each transaction with a Kansas consumer. *See Morgan v. Virginia*, 328 U.S. 373, 380 (1946) (holding that "Burdens upon commerce … may arise from other causes than costs ...."). Moreover, if Kansas can take the position it can regulate out-of-state lending, then so can every other state. Thus, the practical effect of the 1999 Amendment is to require an on-line lender to be prepared to license in every state, and thus the foregoing costs and burdens would have to be multiplied by fifty. No multi-state Internet payday lender could operate under so restrictive a regulatory scheme, nor would any even likely try to do so. The net effect of such caustic regulation is the eradication of Internet lending specifically, and a corresponding diminution in Internet commerce generally.

In furtherance of its decision, the District Court relied almost exclusively on the pre-Internet *Aldens* cases. Aldens, Inc. was a mail-order catalog company

which, in the 1970s, sued several states that sought to limit the interest rate it could charge on credit sales. *See, e.g. Aldens, Inc. v. Packel*, 524 F.2d 38 (3d Cir. 1975); *Aldens, Inc. v. LaFollette*, 552 F.2d 745 (7th Cir. 1977). All of the suits are essentially the same case, and the District Court cited several of them. For simplicity, Quik Payday will discuss principally *Aldens, Inc. v. Ryan*, 571 F.2d 1159 (10th Cir. 1978), the Tenth Circuit's version of the case.

The *Aldens* cases differ significantly from the Quik Payday situation. Aldens operated in the pre-Internet era. It was a mail order catalog company that, while domiciled in Illinois, directed its activities to the State of Oklahoma, having made routine direct mailings of flyers, credit applications, and charge account agreements to the Oklahoma addresses of 34,000 Oklahoma residents. 571 F.2d at 1162. By contrast, Quik Payday did not direct its activities to any physical location within Kansas; rather, it operated a web site equally available in Kansas as it was everywhere else. In its decision, the District Court rejected this distinction, holding that it "ignores the requirement of the [KCCC] that, for its loans to be subject to regulation, [Quik Payday] must have solicited business in Kansas." (Aplt. App. 502). This is circular reasoning, as Quik Payday only "solicited" in Kansas because the Legislature amended the KCCC to define in-state solicitation as including activities outside the state.

C. Defendants Put Forward No Evidence That The 1999 Amendment Confers Any Benefit

The District Court also failed to require of Defendants any evidence that the 1999 Amendment confers a countervailing benefit. In their summary judgment briefing, Defendants cited no benefit specific to the challenged 1999 Amendment, but instead focused on the "stated or obvious goals" of Kansas' overarching licensing regime. (Aplt. App. 359). Thus, their entire discussion was, at best, a *non sequitur*. Quik Payday is not seeking to invalidate the entire KCCC – only a very narrow portion of it, the 1999 Amendment, which purports to extend that Code to Kansas residents who obtain financing from out-of-state Internet lenders. Any generalized legislative "concern" over the Internet is not a sufficient basis for the District Court to have affirmed this regulation.

As for the purported "benefit" of payday lending regulations in general, the Federal Reserve Bank of New York has surveyed the economic data and found that such restrictions actually harm the moderate-income consumers such laws purport to protect, because they limit consumers' access to credit and thus increase their exposure to bounced check fees, late charges and damaged credit scores from unpaid bills. (Aplt. App. 188-216). Indeed, if payday loans effected half the evil detractors claim, one presumes Congress would have stepped in and enacted uniform regulations for such loans, just as it has done with respect to loans made to members of the military. *See* 10 U.S.C. § 987.

The lack of any hard economic data supporting Defendants' "consumer protection" claims is particularly significant to the Commerce Clause analysis. In *Granholm v. Heald*, 544 U.S. 460, 490 (2005), for example, the Supreme Court held that an unproven goal of keeping alcohol away from minors did not overcome an otherwise unconstitutional burden on interstate commerce:

> The States provide little evidence that the purchase of wine over the Internet by minors is a problem. Indeed, there is some evidence to the contrary. A recent study by the staff of the FTC found that the 26 States currently allowing direct shipments report no problems with minors' increased access to wine …. Without concrete evidence that direct shipping of wine is likely to increase alcohol consumption by minors, we are left with the States' unsupported assertions.

(Citation omitted).

As explained in *Stroman Realty Inc.*:

> A state's describing its regulatory schemes for … consumer protection does not mean that consumers are benefited in the actual operation or that an illegal end is not accomplished. Intentions do not matter. Labels are not substance. The American Constitution does not depend on the legislators' press releases.

2005 U.S. Dist. Lexis 16048, * 18 (emphasis added).

If the Federal Reserve Bank is correct, then the state's interest here is zero. But even assuming, *arguendo*, that such regulations do have some value, that alone is insufficient. Quik Payday as a Utah corporation was already compliant with the extensive lending regulations of the State of Utah, which, like Kansas' regulations, are based on the Uniform Codes promulgated by the National Conference of

Commissioners on Uniform State Laws. *See* Uniform Consumer Credit Code, Prefatory Note (1974) (Aplt. App. 292-305); Utah Code Ann. §7-23-101 *et seq.*; Kan. Stat. Ann. § 16a-1-101 *et seq.* The District Court, however, ignored Utah law entirely. It never found any difference between Utah and Kansas law such that piling on a second layer of regulations was necessary to further the state interest. Nor did it find that those, at most, incremental putative benefits would outweigh the significant burdens of such a multi-state regime.

Stroman Realty, supra, is directly on point. There, the Court held that California's and Florida's attempts to regulate online activity in Texas were unduly burdensome on interstate commerce, based in part on the fact that the licensing requirements at issue, while not identical, were "comparable across the country." 2005 U.S. Dist. Lexis 16048, at *34. Thus, the Court found that "there is not material benefit to multi-state licensing; on the other hand, the cumulative administrative cost and risk of inconsistent regulations makes the imposition of them conflict with the principle of a national economic union, even if there were substantial local no protectionist gains." *Id.* Likewise here, Kansas' interest in imposing its laws on out-of-state Internet lenders is minimal at best.

This conclusion becomes even more intuitive when one reconsiders the global nature of the Internet. In *Johnson*, this Court noted that:

> [The statute] will almost certainly fail to accomplish the Government's interest in shielding children from pornography on the

> Internet. Nearly half of Internet communications originate outside the United States and some percentage of that figure represents pornography. Pornography from, say Amsterdam will be no less appealing to a child on the Internet than pornography from [Albuquerque] and residents of Amsterdam have little incentive to comply with [the statute].

194 F.3d at 1162 (citation omitted). In light of the realities of online industries, New Mexico's interest in protecting children from pornography fell short when balanced against the resulting burdens on interstate commerce. *Id.*

Here again, *Johnson* resonates with the present facts. Kansas' regulation of online payday lending will not eliminate such online lending in Kansas, nor will it make online lenders on the whole more likely to adhere to Kansas regulations. At most, it will simply drive such business off shore. That has already happened in the mortgage lending industry, s*ee* National Mortgage News, *Many Top Firms Have Offshored* (May 15, 2006) (noting that 15 of the top 20 U.S. mortgage lenders moved offshore) (Aplt. App. 307), with grumblings that the online payday lending industry is not far behind. *See, e.g.,* Credit Slips: A Discussion On Credit And Bankruptcy, *Exporting Payday Loans* (Nov. 20, 2006) (noting proliferation of Internet payday lenders in Costa Rica and Grenada) (Aplt. App. 309-14). Given the global accessibility of the Internet, Kansas' regulatory efforts will ultimately amount to little or nothing. Thus, they should not be permitted to needlessly burden interstate commerce.

III. THE DISTRICT COURT ALSO ERRED IN ITS APPLICATION OF THE EXTRATERRITORIALITY TEST

The third, and independent, basis for invalidating the statute in *Johnson* on dormant Commerce Clause grounds was the extraterritorial effect of the statute—namely, the state's attempt to regulate interstate conduct occurring wholly beyond the state's borders. It is well-settled that "a state law that has the 'practical effect' of regulating commerce occurring wholly outside that State's borders is invalid under the Commerce Clause." *Healy*, 491 U.S. at 322; *accord Edgar v. MITE Corp.*, 457 U.S. 624, 642-43 (1982) ("Commerce Clause . . . precludes the application of a state statute to commerce that takes place wholly outside the State's border."). That is precisely what Kansas has done here because lenders, having no ability to determine the physical location of the consumer at the time of the solicitation, are forced as a practical matter to abide by the KCCC for all transactions with Kansas residents or refuse to lend to such residents altogether. The district court concluded otherwise only by ignoring the "practical effect" of the statute and conflating residency with a borrower's indeterminate physical location at the time of solicitation. This too was error and equally warrants reversal.

CONCLUSION

For all the foregoing reasons, the decision of the District Court granting Defendants' Motion for Summary Judgment and denying Quik Payday's Motion for Summary Judgment should be reversed, and the District Court should be directed instead to enter Summary Judgment in Quik Payday's favor.

ORAL ARGUMENT STATEMENT

Plaintiff-Appellant Quik Payday, Inc. requests oral argument for the purpose of addressing the important issues of constitutional law raised by this appeal.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on December 17, 2007, I mailed a copy of Appellant Quik Payday's Opening Brief to the following:

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CERTIFICATE OF COMPLIANCE

I hereby certify, pursuant to Rule 32(a)(7)(C) of the Federal Rules of Appellate Procedure, that the Brief for Quik Payday, Inc. in the above-captioned case was prepared using Microsoft Word XP, in 14-point Times New Roman font and that it contains 9,281 words from the Statement of the Issues through the Conclusion, as determined by the Microsoft Word XP word-counting system.

/s/ Jeremiah J. Morgan
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CERTIFICATE OF DIGITAL SUBMISSION

I hereby certify that all required privacy redactions have been made, and that with the exception of those redactions, every document submitted in digital form or scanned .pdf format is an exact copy of the written document filed with the clerk. The digital submissions have been scanned and are virus free.

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ADDENDUM