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UNITED STATES COURT OF APPEALS  
TENTH CIRCUIT  
NO. 07-3289

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QUIK PAYDAY INC.,  
Petitioner/Appellant,

v.

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

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BRIEF OF APPELLEES

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Appeal From The United States District Court  
For The District Of Kansas  
The Honorable John W. Lungstrum  
Case No. 06-2203-JWL

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Oral Argument Is Not Requested.

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**STATEMENT OF RELATED CASES**

There are no prior or related appeals.

**STATEMENT OF ISSUES**  
**PRESENTED FOR REVIEW**

1. Was the District Court correct in finding that the Kansas Uniform Consumer Credit Code (UCCC) does not violate the *Pike* balancing test by determining that compliance costs less than \$1,000 per year are not unduly burdensome to Quik Payday, a company that made over \$400,000 in fees and finance charges from its transactions with Kansas consumers?

2. Did the District Court properly rely on Congress's express grant to the states to regulate interest rates for consumer credit and this Court's decision in *Aldens v. Ryan* which grants each state the right to regulate consumer loans with its citizens and thereby dismiss Quik Payday's national unity argument?

3. Was the District Court correct in relying on Quik Payday's numerous contacts with Kansas citizens to conclude that Quik Payday's loans with Kansas consumers did not occur completely outside of Kansas?

## STATEMENT OF THE CASE

### **I. QUIK PAYDAY’S CLAIMS**

This case concerns Quik Payday’s challenge to a Kansas statute, K. S. A. § 16a-1-201,<sup>1</sup> which grants Kansas the right to regulate consumer loans when they are induced by “solicitation in this state by any means, including but not limited to: Mail, telephone, radio, television or any other electronic means.”<sup>2</sup> After receiving a consumer complaint about Quik Payday on June 15, 2005, the Office of the State Bank Commissioner (hereinafter the “OSBC”) began an investigation into Quik Payday’s business activities.<sup>3</sup>

The results of the investigation revealed that Quik Payday had made 3,079 payday loans in the amount of \$967,550 in principal to people who they knew were Kansas residents prior to making the loans. Quik Payday charged \$485,165 in fees to Kansas consumers.<sup>4</sup> The gross number of violations compelled the OSBC to issue 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”<sup>5</sup> (hereinafter the “Summary Order”).

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<sup>1</sup> Aplt. App. 281-282.

<sup>2</sup> K.S.A. §16a-1-201(b)

<sup>3</sup> Aplt. App. 60.

<sup>4</sup> Aplt. App. 58.

<sup>5</sup> Aplt. App. 287-290.

After the OSBC issued the Summary Order, Quik Payday filed this lawsuit under 42 U.S.C. § 1983, claiming that the OSBC had violated *inter alia* the dormant Commerce Clause by attempting to regulate payday loans that were knowingly made to Kansas residents. On June 18, 2007, Quik Payday moved for summary judgment seeking to invalidate K.S.A. § 16a-1-201(b) because: 1) it subjected Internet lending to inconsistent state regulations, 2) K.S.A. §16a-1-201(b) on its face and as applied to Quik Payday constitutes extraterritorial regulation, and 3) as applied, K.S.A. §16a-1-201(b) failed the balancing test set forth in *Pike v. Bruce Church, Inc.*,<sup>6</sup> The brief that Quik Payday filed in support of its motion for summary judgment also tried to invalidate K.S.A. §16a-1-201(b) based on due process and vagueness arguments.<sup>7</sup> The OSBC filed its own motion for summary judgment opposing all of Quik Payday's claims.<sup>8</sup>

## II. GRANT OF SUMMARY JUDGMENT AND APPEAL

The District Court had little trouble dismissing all of Quik Payday's claims, finding that Quik Payday's business easily fits within this Court's analysis and

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<sup>6</sup> Aplt. App. 63, 64.

<sup>7</sup> Aplt. App. 63-342.

<sup>8</sup> Aplt. App. 343.

rationale in the *Aldens* cases.<sup>9</sup> By relying on the evidence that both parties stipulated to, the District Court concluded that complying with the Kansas UCCC would cost Quik Payday less than \$1,000 per year, far less than the \$160,500 it cost Aldens when this Court found that Oklahoma did not violate the dormant Commerce Clause by regulating consumer loans made with its citizens.<sup>10</sup>

Quik Payday's extraterritoriality argument was similarly easy to dismiss because Quik Payday's conduct didn't occur wholly outside of Kansas. Quik Payday knowingly made loans to Kansas residents, and directly solicited Kansas consumers to make new loans and pay off outstanding loans.<sup>11</sup> The discrete and direct nature of the contacts between Quik Payday and its Kansas customers led the District Court to the logical conclusion that both as a matter of law and fact, Quik Payday's behavior was not extraterritorial.<sup>12</sup>

Quik Payday, licensed by the state of Utah, also argued for a national unity test for all Internet regulation. In essence, Quik Payday argued that this Court's decision in *ACLU v. Johnson* invalidated any attempt by the state of Kansas to regulate payday loans that Quik Payday entered into with Kansas citizens.

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<sup>9</sup> Aplt. App. 500.

<sup>10</sup> Aplt. App. 501.

<sup>11</sup> Aplt. 58, 59.

<sup>12</sup> Aplt. App. 504-506.

The District Court distinguished the instant case from *ACLU v. Johnson* because *inter alia* Quik Payday's lending was always knowingly directed to a resident of a particular state. Unlike in *ACLU v. Johnson*, Quik Payday only incurred the regulatory obligations of Kansas when they chose to make a payday loan with a Kansas consumer. Quik Payday's website didn't violate the Kansas UCCC; their choice to make payday loans without being licensed by the OSBC did.

Vagueness and due process violations were also alleged by Quik Payday; however, as the District Court noted, Quik Payday did not move for summary judgment based on its due process claims,<sup>13</sup> and even if it did the OSBC's "regulation of internet payday lenders under the Kansas UCCC comports with due process."<sup>14</sup> The District Court was equally dismissive of Quik Payday's vagueness claim because Quik Payday did not indicate "the manner in which the phrase 'solicitation in this state' is vague or ambiguous, or how the phrase might reasonably be interpreted in different ways."<sup>15</sup> Quik Payday has since abandoned their claims that K.S.A. §16a-1-201(b) is unconstitutionally vague or violates the due process clause.

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<sup>13</sup> Aplt. App. 511.

<sup>14</sup> Aplt. App. 512.

<sup>15</sup> Aplt. App. 512.

**STATEMENT OF UNCONTROVERTED FACTS**

1. From 1999 until February 2006, Plaintiff Quik Payday, Inc., was registered under Utah's Check Casher Statute and was in the business of making short term "payday" loans over the Internet to thousands of consumers in dozens of states. From May 2001 to January 2005 Quik Payday made 3,079 payday loans to 972 consumers who listed Kansas addresses on their loan applications. The term of Quik Payday's Kansas loans varied from four days to 18 days but always ended on the borrower's next payday.<sup>16</sup>

2. Quik Payday made its loans in increments of \$100, up to a maximum of \$500; it assessed a finance charge of \$20 for each \$100 borrowed. Quik Payday charged its borrowers \$20 for each returned check and allowed its borrowers to refinance their payday loans, up to three times, by paying an additional charge of \$20 for each \$100 refinanced. Quik Payday made about \$967,550 in payday loans to Kansas consumers and charged them about \$485,165 in fees and finance charges. The annual percentage rate on Quik Payday's Kansas payday loans always exceeded 400%, and sometimes exceeded 1,000%.<sup>17</sup>

3. Quik Payday's loans to Kansas consumers were initiated and made over the Internet as electronic transactions. 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 third party lead generators gathered application information from

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<sup>16</sup> Aplt. App. 58.

<sup>17</sup> Defendants' counsel have calculated these interest rates on Quik Payday's payday loans to Kansas consumers from the stipulated loan term figures given in the Stipulated Facts. Aplt. App. 58.

potential customers, and then electronically forwarded those applications to Quik Payday at its Utah office. Quik Payday then contacted the Kansas consumers it had learned about from the lead generators, and directed those consumers to its website, on which the consumers could apply for a payday loan. Quik Payday also sometimes solicited previous borrowers by email. The consumer then applied for a loan online, at Quik Payday's website, and provided his or her address, birth date, employment information, driver's license number, bank account number, social security number, and references. If Quik Payday approved the Kansas consumer's application for a payday loan, the borrower "signed" Quik Payday's loan contract electronically and returned that contract to Quik Payday over the Internet. In a small number of cases Quik Payday sent its contract to the consumer in Kansas by fax, and the consumer signed the contract and faxed it back to Quik Payday.<sup>18</sup> Quik Payday would then deposit the loan proceeds into the Kansas consumer's bank account.<sup>19</sup>

4. If a Kansas consumer defaulted on a Quik Payday loan, Quik Payday's representatives, or a third party collection agency, contacted the consumer in Kansas by regular mail, email, or telephone to seek repayment. Quik Payday's office, employees, and loan records were in Utah, not in Kansas, so the payday loan applications, contracts, and loan payments were received by Quik Payday in Utah.<sup>20</sup>

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<sup>18</sup> Aplt. App. 59.

<sup>19</sup> Aplt. App. 58, 59.

<sup>20</sup> Aplt. App. 59.

5. To get a license from the OSBC under the Kansas UCCC as a “supervised lender” allowed to loan money at annual percentage rates above 12%,<sup>21</sup> Quik Payday would have had to complete a short application, pay an application fee of \$425 (\$325 for annual renewal), and acquire a surety bond costing about \$500 per year. The OSBC then runs a criminal background check and credit check on license applicants. Unlike some other states, Kansas does not assess any additional examination fees. Quik Payday was never licensed as a “supervised lender” under the Kansas UCCC.<sup>22</sup>

6. On June 15, 2005, a Kansas consumer complained to the OSBC about Quik Payday. The OSBC ordered Quik Payday to provide information about its Kansas payday loan business. On August 12, 2005, Quik Payday revealed to the OSBC that it had made thousands of payday loans to Kansas consumers.<sup>23</sup>

7. On March 13, 2006, pursuant to K.S.A. § 16a-6-108, the OSBC issued the Summary Order against Quik Payday.<sup>24</sup> The OSBC alleged that since May 2001, Quik Payday made at least 3,079 payday loans to at least 972 Kansas consumers, and had collected payments on those loans, without having obtained

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<sup>21</sup>See K.S.A. § 16a-1-301 (44), (45) and (46) (defining “Supervised financial organization,” “Supervised lender” and “Supervised loan,” respectively).

<sup>22</sup> Aplt. App. 60.

<sup>23</sup> Aplt. App. 60.

<sup>24</sup> Aplt. App. 287-290.

the statutorily-required supervised lender's license. The Summary Order required that Quik Payday stop violating the Kansas UCCC, pay restitution and \$5,000,000 in fines, and be barred from licensure as a supervised lender. On March 29, 2006, Quik Payday timely sought a hearing on the Summary Order's allegations and penalties.<sup>25</sup>

8. On May 22, 2006, Quik Payday moved to stay the administrative proceedings initiated by the OSBC's Summary Order until this Court resolves the present lawsuit. The presiding officer, John Wine, Jr., granted Quik Payday's stay motion, so the administrative hearing sought by Quik Payday has not taken place.<sup>26</sup>

9. Utah's version of the Uniform Consumer Credit Code (Utah Code § 70C-1-101) has a fundamentally different regulatory philosophy for payday loans compared to the Kansas UCCC. Quik Payday's assertion that Utah regulates payday loans similarly to Kansas is misleading.<sup>27</sup> Utah's regulations, to the extent that they exist, embody a laissez-faire approach to payday loan regulation. The Quik Payday argument that Kansas and Utah have similar regulatory schemes is debunked by their own Table A in their motion for Summary Judgment.<sup>28</sup> Some of the most notable differences between Kansas and Utah are: (1) Utah does not run a

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<sup>25</sup> See Aplt. App. 60 and Aplt. App. 287-290.

<sup>26</sup> Aplt. App. 61.

<sup>27</sup> Appellant's Opening Brief p. 16.

<sup>28</sup> Aplt. App. 93-102.

criminal background check on principals of businesses prior to allowing them to make consumer credit loans, as Utah relies on applicants to disclose their criminal history; (2) Utah does not check the financial situation of any of its applicants prior to allowing them to make loans; (3) Utah does not require their registrants to acquire a bond in the event that the lender harms Kansas citizens through illegal acts; and (4) Utah does not limit the principal amount that can be loaned in a payday loan or the interest rate that can be charged. Unlike Utah, Kansas runs criminal and financial background checks on supervised lenders, limits the interest rates on payday loans, and limits the principal amount of those loans. Kansas also requires its licensees to obtain a bond to protect Kansas consumers in the event that Kansas consumers are harmed by the licensee's unlawful activity. A cursory examination of the two regulatory structures reveals that there are substantial differences between how Kansas and Utah choose to regulate payday loans.

## SUMMARY OF ARGUMENT

Regulating the Internet is not the issue in the instant case. The issue is whether or not individual states can continue to regulate consumer loans made with its citizens. The District Court properly decided that Kansas can continue to regulate payday loans even when they are originated on the Internet. In deciding that *ACLU v. Johnson* stands for regulating Internet content, the District Court properly distinguished between the former case, where the mere act of posting an image on the Internet could unknowingly violate different laws in different states, and the instant case where the only time Quik Payday encounters the regulatory burden of a specific state is when they choose to do business there.

The District Court properly observed that the payday loan industry is similar in nature to the insurance industry in that it has to conform to the laws of its customer's state of residence. The import of this observation is that it is illogical to advocate a national unity test when Congress has already ceded the power to regulate interest rates on consumer lending to the states. The practical outcome of Quik Payday's national unity argument is that Utah would dictate consumer lending laws to every state in the Union.

The District Court's reliance on the *Aldens* case underscores the long held principle that it is the obligation of the individual state to regulate consumer

lending. This Court concurred in its own decision in *Aldens v. Ryan* that consumer lenders are required to comport with the regulatory scheme of every state where they do business. Indeed, this reasoning is rooted in the Federal Truth in Lending Act<sup>29</sup> where Congress left the power to regulate interest rates for consumer loans to the states. Quik Payday is trying to obscure what remains clear: that the entire payday loan industry has to comply with every state's regulation where they do business. Having a presence on the Internet should not exempt Quik Payday from the same laws to which every payday lender must adhere.

The District Court properly applied the *Pike* balancing test when it found that K.S.A. § 16a-1-201 does not pose an undue burden on interstate commerce. The balancing test the District Court applied is consistent with what this Court has already decided. The state's interest in regulating consumer loans with its citizens by out-of-state lenders does not put an undue burden on interstate commerce. In this case, Quik Payday would incur a cost of less than \$1,000 a year to comply with the Kansas UCCC. This is a small fraction of the \$485,165 that Quik Payday charged Kansas consumers in fees and finance charges. Although Quik Payday contends that they will incur other costs, they were unable to produce any evidence of what those costs might be, if any. Even if there is additional cost, this Court in

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<sup>29</sup> 15 U.S.C. §1610(b)

*Aldens v. Ryan* recognized that treating loans differently depending on where the payday loans are originated does not violate the dormant Commerce Clause.

Regarding extraterritoriality, the District Court properly relied on the stipulated facts which revealed that the payday loans did not occur wholly outside of Kansas. Several activities concerning each loan occurred in Kansas: filling out the payday loan application, the receipt of funds, payment of funds, and numerous collection activities. The vast majority of the above-mentioned activities had to have occurred in Kansas.

Accordingly, the District Court did not err in awarding Summary Judgment to the state of Kansas, and in denying Quik Payday's Summary Judgment Motion.

## ARGUMENT

### **I. THE DISTRICT COURT PROPERLY APPLIED THE *PIKE* BALANCING TEST**

#### **A. The Kansas UCCC Does Not Excessively Burden Interstate Commerce**

State laws that do not facially discriminate against interstate commerce may nonetheless run afoul of the dormant Commerce Clause if they are not based on legitimate state goals or if their burdens on interstate commerce are “clearly excessive” in relation to their legitimate justifications.<sup>30</sup> Quik Payday asserts that the Kansas licensing scheme violates the dormant Commerce Clause because it is excessively burdensome on interstate commerce.<sup>31</sup> If a state statute “regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits.”<sup>32</sup> As the party challenging Kansas’s application of its lender licensing law to Quik Payday, Quik Payday has the burden of proving the statute’s excess.<sup>33</sup>

In this case, Quik Payday cannot carry that burden. To begin with, the Kansas lender licensing laws have a clear rational basis in important and legitimate state

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<sup>30</sup>See p. 9 & n.13, supra.

<sup>31</sup>See Appellant’s Opening Brief p. 36.

<sup>32</sup>Pike, 397 U.S. at 142.

<sup>33</sup>*Dorrance v. McCarthy*, 957 F.2d 761, 763 (10th Cir. 1992).

interests: protecting Kansas consumers by vetting the character, honesty, and financial responsibility of those who make short term consumer loans at high interest rates (stereotypically the bailiwick of underworld loan sharks and racketeers) and enhancing competition among lenders by encouraging banks, credit unions, and other presumably reputable well-funded sources of consumer credit to enter markets they have traditionally avoided. Indeed, the entire Kansas UCCC has a clear basis in protecting consumers against a variety of lender deprecations. Many cases have acknowledged that each state has “an important interest in enforcing its consumer protection statutes”<sup>34</sup> including a state’s “vital interest in protecting its citizens from predatory lending, usury, and other forms of deceptive trade practices.”<sup>35</sup>

The important consumer protection interests at stake in this case are in distinct contrast to the state interests asserted as justification for regulatory laws that have been held to impose excessive burdens on interstate commerce in violation of the dormant Commerce Clause. The leading cases have involved asserted state interests that were either relatively trivial, as in *Pike v. Bruce Church, Inc.*, in which the state of Arizona tried to justify a cantaloupe-packing regulation

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<sup>34</sup> See, e.g., *Cedar Rapids Cellular Tel., L.P. v. Miller*, 280 F.3d 874, 879-80 (8th Cir. 2002).

<sup>35</sup> *Goleta Nat’l Bank v. Lingerfelt*, 211 F. Supp. 2d 711, 716 (E.D.N.C. 2002).

by asserting the regulation would enhance the reputation of Arizona growers for quality produce,<sup>36</sup> or asserted state interests that were concededly important but not actually furthered by the challenged regulation, as in *Southern Pacific Co. v. Arizona*, in which the state's restriction on train length was found to have had the perverse effect of reducing safety.<sup>37</sup>

Moreover, the burdens that compliance with the Kansas lender licensing law would have caused Quik Payday to suffer are minimal, certainly in comparison to the burdens that were held excessive in the leading Supreme Court cases, or in comparison to the profits Quik Payday stood to receive from its Kansas payday loans. In *Pike*, the packing regulation would have cost the cantaloupe grower \$200,000 to comply with,<sup>38</sup> and in *Southern Pacific* the train length regulation not only had a negative impact on safety, but cost the railroad \$1,000,000 annually.<sup>39</sup> In the present case, by contrast, it would have cost Quik Payday less than \$1,000 annually to comply with the Kansas licensing law. That is but a tiny fraction of the regulatory financial burdens at issue in *Pike* and in *Southern Pacific*; it is also but a tiny fraction of the finance charges and fees Quik Payday charged its Kansas payday loan customers. Such an incidental burden on Quik Payday's Kansas

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<sup>36</sup>397 U.S. at 143.

<sup>37</sup>325 U.S. 761, 779 (1945).

<sup>38</sup>397 U.S. at 139, 144.

<sup>39</sup>325 U.S. at 775-76.

Internet payday loan business is simply not enough to violate the dormant Commerce Clause.

Illustrative of this point is an apposite case, *Aldens, Inc. v. Ryan*,<sup>40</sup> in which the Tenth Circuit rejected an out-of-state seller's dormant Commerce Clause challenge to the Oklahoma Uniform Consumer Credit Code interest rate ceilings applicable to credit sales. In *Aldens*, it would have cost the plaintiff who claimed immunity from Oklahoma's regulations about \$160,500 annually to comply with the interest rate ceilings; that cost was approximately seven percent of the plaintiff's gross annual Oklahoma sales of about \$2,250,000.<sup>41</sup> The Tenth Circuit rejected the plaintiff's dormant Commerce Clause challenge; it concluded rather summarily that, "[w]e agree with the trial court that, on balance, a conformance with the Oklahoma cost of credit rules would not constitute an undue burden on interstate commerce."<sup>42</sup>

In *Aldens* this Court also summarily rejected the plaintiff's argument, essentially identical to an assertion Quik Payday makes in this case, that it was a per se violation of the Commerce Clause for Oklahoma to regulate the credit sales of an entity whose offices were in Illinois, and which was never physically

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<sup>40</sup>571 F.2d 1159 (10th Cir. 1978).

<sup>41</sup>*Id.* at 1161.

<sup>42</sup>*Id.* at 1162.

present in Oklahoma.<sup>43</sup> The *Aldens* Court explained that “physical presence of Aldens in Oklahoma is not required to subject its credit rates to state regulation in transactions with Oklahoma residents.”<sup>44</sup> In this passage the Court was discussing the plaintiff seller’s argument that, because the seller had never been physically present in Oklahoma, due process restrictions barred Oklahoma from regulating the seller’s credit sales to Oklahoma consumers. But the *Aldens* Court went on to explain that “[t]he ‘per se’ approach of *Aldens* to the Commerce Clause must be rejected for the grounds above referred to [as a basis for rejecting the plaintiff’s near-identical due process arguments]. The states can, of course, pass Acts which affect commerce unless the burden so imposed greatly exceeds the extent of the local benefits.”<sup>45</sup> Three other Circuits have rejected essentially identical Commerce Clause and due process challenges, brought by the same seller, and upheld states’ regulation of credit sales made to those states’ consumers.<sup>46</sup> *Aldens* in itself provides a sufficient basis for this Court to reject Quik Payday’s dormant Commerce Clause attack on the Kansas lender licensing

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<sup>43</sup>*Id.*

<sup>44</sup>*Id.* at 1161.

<sup>45</sup>*Id.* at 1162.

<sup>46</sup> See *Aldens, Inc. v. Miller*, 610 F.2d 538 (8th Cir. 1979); *Aldens, Inc. v. LaFollette*, 552 F.2d 745 (7th Cir. 1977); and *Aldens, Inc. v. Packel*, 524 F.2d 38 (3d Cir. 1975).

rules and other UCCC provisions that the OSBC is attempting to enforce for the benefit of Quik Payday's Kansas borrowers.

**B. The Kansas UCCC Puts A Minimal Burden On Interstate Commerce While Still Insuring That Kansas Consumers Are Protected From Transacting Payday Loans With Felons**

In an attempt to prove that the Kansas UCCC excessively burdens interstate commerce, Quik Payday asserts that the OSBC has offered no evidence that regulating Internet payday lending accomplishes any of the stated or obvious goals of the Kansas UCCC.<sup>47</sup> These allegations are easily disproved, as the Kansas UCCC is specifically tailored to achieve its goals while placing the least amount of burden on commerce. The first goal, to ensure that payday loans are not being transacted by felons, is accomplished by a nationwide criminal background check. The advantages of Kansas consumers not giving felons their most sensitive financial information and access to their bank accounts resonates with common sense and requires little explanation. The next goal of the Kansas UCCC is to ensure that Kansas consumers who are harmed have recourse. The Kansas UCCC achieves this by requiring payday lenders to have a bond in the amount of \$100,000. A bond ensures that a Kansas consumer can be made whole if the lender harms them by violating the Kansas UCCC.

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<sup>47</sup> See Appellant's Opening Brief p. 39.

Quik Payday also mischaracterizes the financial requirements the Kansas UCCC imposes on payday lenders by stating that the Kansas UCCC requires payday lenders to have a sufficient net worth.<sup>48</sup> The Kansas UCCC does not impose a net worth requirement on payday lenders; it only requires holding the aforementioned bond. The net worth requirement is for supervised lenders who “engage in making loans secured by an interest in real property or contracts for deed”.<sup>49</sup> Quik Payday did not engage in this type of lending behavior, and thus would not be required to meet any net worth requirement.

Finally, Quik Payday continues to repeat the false analogy that if New Mexico’s interest in protecting children from pornography was held insufficient in *ACLU v. Johnson*, then surely the OSBC does not have any interest in protecting adults from Internet payday loans.<sup>50</sup> The idea that the two cases are similar is inaccurate. In *ACLU v. Johnson*, New Mexico’s interest was not insufficient; their ability to effectively enforce the law was. The law in *ACLU v. Johnson* was invalidated because it was ineffective in protecting children from pornography, and thus the *Pike* balancing test necessarily invalidated the law.<sup>51</sup> In the instant case, the Kansas UCCC is not protecting adults from Internet payday loans; it protects

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<sup>48</sup> See Appellant’s Opening Brief p. 37.

<sup>49</sup> See K.A.R. 75-6-35(a), KS ADC 75-6-35(a).

<sup>50</sup> See Appellant’s Opening Brief p. 36.

<sup>51</sup> *ACLU v. Johnson* 194 F.3d 1149, 1162-63 (10th Cir. 1999).

adults from transacting Internet payday loans with felons and financial institutions without a bond. These protections are necessary because Kansas consumers cannot determine the legitimacy of Internet payday lenders by themselves. The Kansas UCCC licensing requirements accomplish this in an efficient and unobtrusive manner. The balancing test in this case should be whether requiring a licensing fee that costs less than \$1,000 a year is excessively burdensome in light of the benefit that licensing provides to ensure Kansans do not transact loans with felons or with financial institutions that are not bonded with the OSBC.

*Aldens v. Ryan* provides this Court with the appropriate framework to analyze this balancing test. In *Aldens*, it would have cost the plaintiff over \$160,000 a year to comply with the interest rate ceilings that Oklahoma imposed on consumer loans made with Oklahoma residents.<sup>52</sup> Quik Payday contends that *Aldens* is not apposite because, unlike in *Aldens*, Quik Payday did not direct its activities to any physical location in Kansas.<sup>53</sup> However Quik Payday did direct their activities to Kansas when they loaned almost \$1,000,000, to borrowers they knew were located in Kansas.<sup>54</sup> The Stipulated Facts show that Quik Payday, or a third party lead generator, would also actively solicit Kansas consumers to make payday loans, and that Quik Payday engaged in extensive collection efforts that were aimed at Kansas

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<sup>52</sup> *Aldens v. Ryan*, 571 F.2d 1159,1161 (10th Cir. 1978).

<sup>53</sup> See Appellant's Opening Brief p. 38.

<sup>54</sup> Aplt. App. 58.

consumers.<sup>55</sup> Another similarity is that consumers in both cases applied for a loan in their home state. The result of the number and similarity of contacts between the two cases led the District Court to conclude that the amount of contacts is commensurate in both cases.<sup>56</sup>

The other point that Quik Payday makes in an attempt to distinguish the instant case from *Aldens* is that the plaintiff in *Aldens* did not have to get licensed, but rather merely adhere to the interest rate caps that Oklahoma had on consumer loans.<sup>57</sup> Quik Payday is essentially contending that compliance with a regulatory scheme that costs over \$160,000 a year is somehow less onerous than complying with a licensing requirement that costs less than \$1,000 a year. The burden on interstate commerce in the instant case pales in comparison to the burden in *Aldens v. Ryan*. Finally, Quik Payday argues that if forced to comply with state regulation, Internet payday lenders will move their business offshore.

Notwithstanding Quik Payday's claim that several mortgage companies have moved their customer support offshore,<sup>58</sup> there has been no evidence presented that Internet payday lenders will move their companies offshore in an attempt to avoid

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<sup>55</sup> Aplt. App. 58, 59.

<sup>56</sup> Aplt App. 502.

<sup>57</sup> Appellants' Opening Brief p. 42.

<sup>58</sup> See *Many Top Firms Have Offshored National Mortgage News*, May 15, 2006 (noting that 15 of the top 20 U.S. mortgage lenders moved their customer service departments offshore) (Aplt. App. 307).

state regulation. However, there are compelling reasons to allow the state of Kansas to continue to regulate consumer loans: Congress has specifically given that grant of power to the states. The Federal government operates on the premise that it is the state's responsibility to enforce consumer lending laws. Internet payday lenders should not be allowed to flout state lending laws based on one newspaper article stating that some mortgage companies have customer support departments offshore.

**C. Quik Payday's Potential Regulatory Burden In Other States Does Not Invalidate the Kansas UCCC**

**1. The District Court Was Correct To Ignore Quik Payday's Hypothetical Argument About Kansas Consumers Leaving Kansas To Obtain a Payday Loan**

Quik Payday goes to great lengths in their opening brief to pose hypothetical situations wherein the Kansas UCCC might be inapplicable to certain payday loan transactions originating in another state.<sup>59</sup> Even if the Kansas UCCC would allow the OSBC to regulate this type of transaction, this argument still fails because the Kansas UCCC does not regulate when or where Kansas consumers can get Internet payday loans. The Kansas UCCC regulates the conduct of Internet payday lenders who choose to make payday loans with Kansas consumers while they are in Kansas. Additionally, Quik Payday mistakenly assumes that the Kansas UCCC

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<sup>59</sup> Appellant's Opening Brief p. 29.

must be applied to Kansas residents who are out-of-state. This argument incorrectly interprets the Kansas UCCC and it also assumes a jurisdictional question that is not an issue in this case.<sup>60</sup> This is why the District Court found it easy to dismiss Quik Payday's argument.

Quik Payday's hypothetical argument about Kansas consumers who acquire a payday loan in another state has several faulty premises, and does not invalidate the legality of applying the Kansas UCCC to loans originated because of solicitation that occurred in Kansas. As the District Court noted, the first problem with Quik Payday's hypothetical arguments about a Kansas consumer leaving Kansas to acquire a payday loan is that the argument is merely a hypothetical. Quik Payday did not provide the District Court with any evidence that this situation ever actually occurred.<sup>61</sup> The second problem with this argument is that Quik Payday's challenge to K.S.A. § 16a-1-201 dealt with whether, on its face or as applied, K.S.A. § 16a-1-201 violated the dormant Commerce Clause. Quik Payday's challenge precludes their hypothetical scenario because in order for the Kansas UCCC to apply, solicitation has to occur within Kansas. Far flung hypotheticals should not detract from the issue that Quik Payday brought in this suit: whether, on its face or as applied, K.S.A. 16a-1-201 violates the dormant

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<sup>60</sup> See *State v. Heckel*, 143 Wash.2d 824, 839, P.3d 404 (2001).

<sup>61</sup> Aplt. App. 506.

Commerce Clause. If solicitation occurs in Kansas and a consumer loan results from that solicitation, then the Kansas UCCC applies. Otherwise, the loan is not subject to the Kansas UCCC. The District Court could not invalidate K.S.A. § 16a-1-201 based on factual scenarios that did not happen.<sup>62</sup> This is especially true when the OSBC would not try to apply the Kansas UCCC to loans that occur under the circumstances that Quik Payday outlined. When there has not been any solicitation made in Kansas to induce a Kansas consumer into making a consumer loan, the OSBC does not attempt to regulate the loan. The District Court was correct in ignoring this argument.

The OSBC is not imposing their regulatory structure for payday loans onto citizens of other states, or into other states. Several cases have struck down state legislation that projected itself on commerce that occurred wholly outside of the state.<sup>63</sup> The only activity that the OSBC is regulating is payday loans with Kansas citizens. The OSBC never ordered Quik Payday to take down its website, nor does the OSBC issue orders against Internet payday lenders who do not do business with Kansas consumers. The sole focus of the OSBC's regulatory efforts is with lenders who are not exempt from the Kansas UCCC and who choose to transact payday loans with Kansas citizens.

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<sup>62</sup> *Id.*

<sup>63</sup> See *Healy v. Beer Institute Inc.*, 491 U.S. at 332, 109 S.Ct. 2491 (1989).

## **2. The District Court Properly Interpreted This Court's Ruling In Dismissing Quik Payday's Assertion That Compliance With Multiple States' Regulations Would Be Prohibitive**

There are two reasons why the District Court dismissed Quik Payday's claim that the regulatory burden of complying with multiple states' payday lending laws violates the dormant Commerce Clause. The first reason is that the Tenth Circuit has already addressed the issue of companies being required to treat consumer credit transactions differently based on where the consumer resides. In *Aldens v. Ryan*, the Tenth Circuit noted that there would be a burden on Aldens "to sort out the Oklahoma credit transactions, and accord them somewhat different treatment."<sup>64</sup> The instant case is no different. The District Court correctly relied on the reasoning in *Aldens* because the facts in this instant case are strikingly similar, and the District Court found that the number of contacts Aldens had with Oklahoma is commensurate with the number of contacts that Quik Payday had with Kansas.<sup>65</sup> Quik Payday is an out-of-state lender who wants to ignore the attendant regulations of transacting consumer loans with Kansas citizens. However, the Tenth Circuit has already looked at the burden that complying with a state's consumer lending laws will cost businesses, and decided that it does not impose an undue burden on interstate commerce. This Court held in *Aldens* that the cost of compliance with Oklahoma's consumer lending laws which were in excess of \$160,000 a year did not outweigh Oklahoma's interest in "the cost of credit for goods sold to its residents."<sup>66</sup>

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<sup>64</sup> *Aldens, Inc. v. Ryan*, at 1162.

<sup>65</sup> Aplt. App. 502.

<sup>66</sup> *Id.*

The second reason why the District Court dismissed Quik Payday's contention is that Quik Payday failed to provide any evidence that compliance costs would force them out of business. In fact, Quik Payday failed to provide any proof of what the costs might be.<sup>67</sup> The lack of any proof makes it impossible for this Court to perform any balancing test on this claim.

For decades states have regulated companies that make consumer loans with their citizens, regardless of where the company is located. All of the *Aldens* cases affirm a state's right to regulate companies that intentionally reach into a state to transact consumer loans with its residents.<sup>68</sup> There is nothing novel about Quik Payday's claims. The only difference is that the medium Quik Payday used to solicit Kansas consumers was the Internet rather than the mail or phone. That fact does not obviate decades of jurisprudence granting states the right to regulate its citizens' consumer loan contracts.

## **II. THE DISTRICT COURT PROPERLY INTERPRETED THE NATIONAL UNITY TEST**

The District Court properly interpreted *ACLU v. Johnson* as regulating Internet content. Quik Payday contends that Kansas should not be allowed to regulate payday loans with Kansas consumers when a payday loan is initiated on the Internet. Several Internet pornography cases stand for the proposition that

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<sup>67</sup> Aplt. App. 501.

<sup>68</sup> See *Aldens, Inc. v. LaFollette*, 52 F.2d 745 (7th Cir. 1977), *Aldens, Inc. v. Miller*, 10 F.2d 538 (8th Cir. 1979), *Aldens, Inc. v. Packel*, 24 F.2d 38 (3d Cir. 1975), *Aldens, Inc. v. Ryan*, 571 F.2d 1159 (10th Cir. 1978).

content on the Internet cannot be regulated.<sup>69</sup> However, the instant case is not about regulating Internet content, it is about Kansas upholding its duty to regulate payday loans regardless of what medium is used to initiate a payday loan. As the District Court noted, consumer lending stands in distinct contrast to railroads or highways because Congress has granted to the states the authority to regulate consumer loans.<sup>70</sup> Since Congress has expressly granted the right to regulate consumer loans to the states, the result of Quik Payday's national unity test would allow the state of Utah to dictate consumer lending laws to every state in the Union.

Although Quik Payday contends that Kansas does not have the right to regulate Internet payday lending, substantial authority weighs against them. Every Circuit that has had an opportunity to review the question of whether a state has the right to regulate consumer loans to their citizens has answered the question in favor of the states.<sup>71</sup> One of the most compelling reasons for these decisions is that Congress has specifically authorized states to regulate interest rates on consumer

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<sup>69</sup> *ACLU v. Johnson*, 194 F.3d 1149 (10th Cir. 1999), *American Libraries Ass'n v. Pataki* 969 F.Supp. 160 (S.D.N.Y. 1997).

<sup>70</sup> Aplt. App. 509.

<sup>71</sup> See *Aldens, Inc. v. LaFollette*, 52 F.2d 745 (7th Cir. 1977), *Aldens, Inc. v. Miller*, 10 F.2d 538 (8th Cir. 1979), *Aldens, Inc. v. Packel*, 24 F.2d 38 (3d Cir. 1975), *Aldens, Inc. v. Ryan*, 571 F.2d 1159 (10th Cir. 1978).

credit.<sup>72</sup> The Commerce Clause cannot be used to invalidate a law when Congress has specifically authorized the action. “When Congress so chooses, state actions that it plainly authorizes are invulnerable to constitutional attack under the Commerce Clause.”<sup>73</sup> Since Congress gave states the authority to regulate payday loans, this invalidates Quik Payday’s national unity argument. As the District Court noted, it is not possible to have a national unity test when Congress has delegated the duty to the states.<sup>74</sup> This is why the District Court likened payday lending to the insurance industry and “any other industry in which a company must tailor its business to conform to the laws of its consumer’s state of residence.”<sup>75</sup>

K.S.A. § 16a-1-201(b) is constitutional because it only regulates payday loans made with Kansas consumers. The extraterritoriality provision of the Kansas UCCC does not affect Quik Payday’s website, or whether or not they can do business in other states. K.S.A. § 16a-1-201(b) permits Kansas to regulate consumer loans made with Kansas citizens.

A key distinction between *ACLU v. Johnson* and the instant case is that payday lenders choose where they want to do business, and can easily discern the

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<sup>72</sup> See 15 U.S.C. § 1610(b).

<sup>73</sup> See *Northeast Bancorp, Inc. v. Board of Governors*, 472 U.S. 159, 174 (1985).

<sup>74</sup> Aplt. App. 510.

<sup>75</sup> Aplt. App. 509.

attendant regulatory responsibilities that go along with that choice. The rationale used in *Pataki*: that people or businesses would be subject to inconsistent regulation that they were not aware of, is inapplicable.<sup>76</sup> Unlike messages or websites that can be accessed by anyone at anytime, the only time Quik Payday's activities would fall under the Kansas UCCC is when they choose to do business in Kansas. The Kansas UCCC does not attempt to regulate the content of the Internet, only consumer loans with Kansas consumers. The focus of K.S.A. § 16a-2-404 is to regulate payday loans in whatever form they appear, whether transacted in person, by telephone, by mail, over the Internet, or otherwise. The Kansas UCCC regulates non-exempt entities that choose to make payday loans to Kansas residents.

Relying on the District Court's distinction between Internet content and conduct is made easier because, prior to making a payday loan, Quik Payday knew where the loan applicant resided. The stipulated facts show that prior to approving a loan, Quik Payday required the loan applicant to submit *inter alia*, their address, birth date, employment, and their state driver's license number.<sup>77</sup> Since Quik Payday knew where the applicant resided prior to making a payday loan, they could not have been unknowingly subjected to state regulation. As the District

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<sup>76</sup> See *American Libraries Ass'n v. Pataki*, 969 F.Supp. 160, 168-69 (S.D.N.Y.1997).

<sup>77</sup> Aplt. App. 58.

Court noted, if Quik Payday did not want to comply with the Kansas UCCC, "...it need only refrain from making loans to persons who have applied with a Kansas address."<sup>78</sup> Quik Payday's choice not to do business in Kansas would not have any chilling effect on whether they did business in other states. Even if the state of Kansas were to pose too great of a regulatory burden, it would certainly not stop Quik Payday from doing business in any other state.<sup>79</sup>

The District Court correctly relied on *Ford Motor Co. v. Texas Dept. of Transportation* because following Quik Payday's reasoning results in overriding Congress's clear intent to allow states to regulate payday loans. It is illogical to rely on a national unity test when Congress has already decided not to regulate this particular field. Simply attaching the Internet to payday loan transactions should not eviscerate Kansas's power to regulate payday loans made to its citizens. Quik Payday's reliance on the national unity test espoused in *ACLU v. Johnson* would contravene the long held power of the states to regulate payday loans. Other circuits have opted not to invalidate state regulation even when the Internet was implicated, explaining that:

When considering laws that directly regulate internet activities, this alleged need for uniformity may well prevail. However, application of this principle in circumstances like the instant case would lead to absurd results. It would allow

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<sup>78</sup> Aplt. App. 503.

<sup>79</sup> Aplt. App. 503.

corporations or individuals to circumvent otherwise constitutional state laws and regulations simply by connecting the transaction to the internet.<sup>80</sup>

Every payday loan company that does business in multiple states has to comply with the regulations of every state where they do business. This regulatory structure has been held as constitutional for decades. “Internet” should not become a buzzword to allow businesses to avoid legitimate regulatory efforts. Attaching the Internet to payday loans does not make otherwise constitutional laws unconstitutional.

With a lack of any Federal regulation of payday lenders, Quik Payday is advocating a system in which payday lenders can operate under any state’s regulatory scheme they choose, regardless of where they transact business. Utah’s laissez-faire regulatory practices provide an ideal business environment for payday lenders. The problem with such an approach is that this obviates the protections that the Kansas legislature gave to its citizens. In effect, Quik Payday’s approach would allow the state of Utah to dictate consumer rights for every state in the Union. Such an approach is contrary to the fundamental Federalist principles of the United States government. Businesses that operate in a state are bound to operate within the regulatory structure of that state.<sup>81</sup> The OSBC is attempting to even-handedly regulate all payday lenders who operate in Kansas.

### **III. The District Court Did Not Err In Its Interpretation of the Extraterritoriality Test**

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<sup>80</sup> *Ford Motor Co. v. Texas Dept. of Transp.*, 264 F. 3d 493, 504-05 (5<sup>th</sup> Cir. 2001).

<sup>81</sup> *Silver v. Wolf*, 539 F.Supp, 881, 889 (D.Conn.1982).

The Kansas UCCC can only be invalidated on extraterritoriality grounds if it has the practical effect of regulating commerce that occurs entirely outside of Kansas.<sup>82</sup> The contention that Quik Payday loaned \$967,550 in principal and collected approximately \$1,325,282 in principal and fees from Kansas consumers without having substantial contacts in Kansas is incorrect. As a matter of law, Quik Payday's loans with Kansas residents did not occur wholly outside of Kansas. The District Court properly pointed out that the "Kansas UCCC provides that a consumer credit transaction is "made" in Kansas if it is with a Kansas resident and induced by solicitation in Kansas."<sup>83</sup> K.S.A. § 16a-1-201(1)(b)." The District Court's analysis did not stop at an interpretation of the Kansas UCCC because this Court has already decided the extraterritoriality issue in *Aldens v. Ryan*. In *Aldens*, this Court has already rejected the idea that individual states cannot regulate consumer loans that "arise or are directed from outside its borders."<sup>84</sup>

Although the District Court's reliance on the *Aldens v. Ryan* case is enough to dismiss Quik Payday's extraterritoriality test, the District Court was correct in stating that both states have a regulatory interest when parts of a contract are performed in two states. When a contract is formed between citizens of two different states, both states have a regulatory interest in the contract. To determine

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<sup>82</sup> *Healy*, 491 U.S. at 322.

<sup>83</sup> Aplt. App. 505.

<sup>84</sup> *Aldens v. Ryan*, 571 F.2d at 1161.

if a state has a regulatory interest in a contract that one of its citizens entered into, the determining factor is where the actions of the parties to the contract took place. In *A.S. Goldmen & Co. v. New Jersey Bureau of Securities*,<sup>85</sup> the Court found that the State of New Jersey had a regulatory interest in securities sold from New Jersey to out-of-state residents. As the Third Circuit Court explained:

“Contracts formed between citizens in different states implicates the regulatory interests of both states. Thus, when an offer is made in one state and accepted in another, we now recognize that elements of the transaction have occurred in each state, and that both states have an interest in regulating the terms and performance of the contract.”<sup>86</sup>

In the instant case, both Kansas and Utah have a regulatory interest in the payday loans that Kansas consumers entered into with Quik Payday.<sup>87</sup> Although Quik Payday claims that all payday loan contracts were approved in Utah, this does not strip Kansas of its regulatory interest. The stipulated facts show that Kansas consumers’ performance of the contract occurred while in Kansas.<sup>88</sup> Since elements of the payday loan contract were performed in Kansas, the OSBC has an

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<sup>85</sup> 163 F.3d 780 (3dCir. 1999).

<sup>86</sup> *A.S. Goldmen & Co. v. New Jersey Bureau of Securities*, 163 F. 3d 780, 787 (3dCir. 1999).

<sup>87</sup> See also: *Travelers Health Ass'n v. Virginia*, 339 U.S. 643, 70 S.Ct. 927, (1950), *Hoopeston Canning Co. v. Cullen*, 318 U.S. 313, 63 S.Ct. 602, 87 L.Ed. 777 (1943).

<sup>88</sup> Aplt. App. 58, 59.

interest in regulating the payday loans that Quik Payday entered into with Kansas consumers, just as Utah has an interest in regulating Quik Payday because it is physically located in the state.

**CONCLUSION**

For the reasons set forth above, the OSBC requests that this Court affirm the judgment of the District Court.

**ORAL ARGUMENT STATEMENT**

The OSBC does not request oral argument because Kansas' right to regulate consumer loans with its citizens has been established for decades. Congress' mandate that states regulate consumer lending, coupled with this Court's decision that an individual state does not violate the dormant Commerce Clause by regulating consumer credit transactions with its citizens precludes the need for oral arguments.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY THAT ON January 22, 2008, I mailed a copy of  
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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 the Office of the State Bank Commissioner in the above-captioned case was prepared using Microsoft Word XP, in 14-point Times New Roman font and that it contains 7,230 words from the Statement of the Issues through the Conclusion, as determined by the Microsoft Word XP word-counting system.

/s/ Jacob D. McElwee

**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.

/s/ Jacob D. McElwee