IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 09-2083

MIDWEST TITLE LOANS, INC.,
Plaintiffs/Appellee,

v.

DAVID H. MILLS, In His Official Capacity as Director of the
Indiana Department of Financial Institutions,
Defendant/Appellant.

On Appeal from the United States District Court for the
Southern District of Indiana, No. 1:07-cv-01479-SEB-DML
The Honorable Sarah Evans Barker, Judge

REPLY BRIEF OF APPELLANT DAVID H. MILLS

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JURISDICTIONAL STATEMENT REPLY

In its jurisdictional statement, the State pointed out that Midwest Title had originally pled a due process claim in addition to a Commerce Clause claim, but that the district court had not expressly disposed of the due process claim. This should have no impact on the finality of the decision below, the State said, because Midwest Title never presented a due process argument below and, therefore, had waived it. In its own jurisdictional statement, Midwest Title says that it has not in fact waived its due process argument because it dropped a footnote using the words "due process" in one of its district court briefs.

It is black-letter law that a plaintiff does not preserve a claim by formalistically reciting code words in a footnote. *Casteel v. Piesheck*, 3 F.3d 1050, 1051 n.2 (7th Cir. 1993) ("While the . . . plaintiffs originally asserted several other claims . . . , they waived those issues on appeal by failing to present them. The cursory footnote in the appellants' brief is insufficient to preserve those claims."); *Freeman United Coal Mining Co. v. Office of Worker's Comp. Programs*, 957 F.2d 302, 305 (7th Cir. 1992) ("[The court has] no obligation to consider an issue that is merely raised, but not developed, in a party's brief") (citing *Zelazny v. Lyng,* 853 F.2d 540, 542 n.1 (7th Cir.1988)). Rather, to preserve a claim, a plaintiff must put the district court on notice that the claim remains in the case and articulate cogent arguments in support of the claim. *Estate of Moreland v. Dieter*, 395 F.3d 747, 759 (7th Cir. 2005) ("Perfunctory or undeveloped arguments are waived") (citing *Colburn v. Trustees of Ind. Univ.,* 973 F.2d 581, 593 (7th Cir.1992); *Hunter v. Allis-*

Chalmers Corp., 797 F.2d 1417 (7th Cir.1986)); *U.S. v. Dunkel*, 927 F.2d 955, 956 (7th Cir. 1991) ("A skeletal 'argument,' really nothing more than an assertion, does not preserve a claim. Especially not when the brief presents a passel of other arguments") (citations omitted). Midwest Title did not do this, and the Court should declare that the judgment below was final because Midwest Title waived its due process claim.

In the alternative, the Court has appellate jurisdiction under 28 U.S.C. § 1292(a) because the district court issued an order permanently enjoining enforcement of a state statute.

ARGUMENT REPLY

State laws are per se invalid under the Commerce Clause only where they (1) regulate wholly extraterritorial commercial activity and (2) do not advance *legitimate* state interests. Because the Indiana Uniform Consumer Credit Code ("IUCCC") advances traditional, legitimate state interests in protecting consumers from abusive business practices and contains no hint of business protectionism, it does not fall under the per se invalidity standard. Rather, because of the validity of Indiana's interest in protecting its consumers, this court should apply at most *Pike* balancing, which asks whether a law's impact on interstate commerce is clearly excessive and outweighs the public benefit to the enacting State. *See Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970).

Indiana has a well-recognized interest in protecting its residents from unfair business practices such as predatory lending, and in particular from title loans with

impossibly high interest rates. *See, e.g.*, Richard A. Posner, *A Failure of Capitalism* 290-91 (2009) (suggesting that state usury laws may even help to protect the economy from another recession). In contrast, as the district court observed, Midwest Title's predatory lending practices "at least approach being abusive and unconscionable." App. at 22. The Commerce Clause does not provide a right for a company to reach into a State to recruit customers and to perfect and foreclose liens without following that State's laws. Accordingly, the IUCCC is valid under the Commerce Clause.

I. The Commerce Clause Has Been Used to Invalidate Business Protection Statutes, Not Consumer Protection Statutes

As Midwest Title agrees, MWT brief at 29, the question that the Court must answer is whether the Commerce Clause provides greater leniency (through a balancing test) to consumer protection laws than it provides to laws that improperly protect in-state business interests. While it is true that in *Dean Foods Co. v. Brancel*, 187 F.3d 609, 619 (7th Cir. 1999), this Court used a "contracts" test to find that a regulated transaction took place wholly outside the regulating State (Wisconsin) when the offer and acceptance occurred in another State (Illinois), it is also true that courts have looked to the locus of contract formation only when invalidating statutes that advance State interests in economic protectionism, not when reviewing statutes that protect a State's consumers. Since this is a case about consumer protection, *Dean Foods* should not apply.

Without question, "the core concern of the dormant commerce clause [is] protectionism—that is, 'differential treatment of in-state and out-of-state economic

interests that benefits the former and burdens the latter.'" *Tenn. Scrap Recyclers Ass'n. v. Bredesen*, 556 F.3d 442, 449 (6th Cir. 2009) (quoting *Or. Waste Sys., Inc. v. Dep't of Envtl. Quality,* 511 U.S. 93, 99 (1994)). In other words, economic or business protectionist statutes invalidated under the Commerce Clause impermissibly protect in-state business interests from legitimate interstate competition. The Commerce Clause's restriction against wholly extraterritorial application of statutes is directly related to this concern. *See Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth.*, 476 U.S. 573, 579-80 (1986).

Forbidden trade, economic, or business *protectionism* of that sort is thus obviously different from legitimate exercises of *parens patriae*, such as antitrust, trademark and labor laws, *see* MWT brief at 30, which protect businesses from unfair trade practices, consumers from marketplace confusion, and workers from inequitable employment conditions. More relevant to this case, business protectionism is (for the same reason) also substantially different from traditional consumer protection laws, such as predatory lending prohibitions. So to answer Midwest Title's question as to why consumers deserve more protection than businesses, MWT brief at 8, the answer is that laws such as the IUCCC protect consumers from abusive business practices, not local businesses from legitimate competition, and that makes all the difference under the Commerce Clause.

A. Midwest Title's cases show that consumer protection laws are treated differently from economic protectionism cases

Midwest Title has been unable to cite even one modern case where a court has invalidated a state consumer protection statute under the Commerce Clause.

The path remains clear for this Court to conclude that the Commerce Clause is more tolerant of extraterritorial application of consumer protection statutes than of extraterritorial application of business or economic protectionist statutes, whether because a regulated contract was not complete upon execution in another state or because, site of contracting aside, the regulating state has sufficient contacts with the transaction and a sufficient regulatory interest to govern the transaction.

1. In each modern consumer protection case that Midwest Title cites, the court upheld the state's law against a Commerce Clause challenge. *See, e.g.*, *Quik Payday, Inc. v. Stork*, 549 F.3d 1302 (10th Cir. 2008) (interest rates); *A.S. Goldmen & Co. v. N.J. Bureau of Sec.*, 163 F.3d 780 (3d Cir. 1999) (blue sky securities law); *Aldens, Inc. v. Ryan*, 571 F.2d 1159 (10th Cir. 1978) (interest rates); *Aldens, Inc. v. LaFollette*, 552 F.2d 745 (7th Cir. 1977) (interest rates); *Aldens, Inc. v. Packel*, 524 F.2d 38 (3d Cir. 1975) (interest rates).

Midwest Title observes that in each of these cases part of an affected contract was formed by someone "physically present in the regulating state." MWT brief at 39. Even if so, the courts plainly did not base their decisions on the location of contracting. Instead, each court specifically focused on the State's obvious interest in protecting its citizens as the justification for upholding the statute. *See Quik Payday, Inc.*, 549 F.3d at 1310; *A.S. Goldmen & Co.*, 163 F.3d at 789; *Aldens, Inc. v. Ryan*, 571 F.2d at 1161; *Aldens, Inc. v. LaFollette*, 552 F.2d at 751 n.11; *Aldens, Inc. v. Packel*, 524 F.2d at 42, 49.

Evidently aware of this shortcoming, Midwest Title further attempts to distinguish *Quik Payday* on a series of increasingly tenuous hypothetical details, including a hypothetical borrower's *mens rea* when traveling to the lender's state, the likely percentage of regulated loans consummated in the regulating state, and the court's supposed inference that depositing money in a bank account was actually the final step in the contracting process. MWT brief at 36-39. Indeed, as to the last point, Indiana citizens borrowing from Midwest Title may well deposit their loan checks in Indiana banks, so it is hard to even see that as a distinguishing characteristic.

What is clear, instead, and not refuted by Midwest Title, is that the Tenth Circuit found Quik Payday's *contacts* with the State of Kansas, not the location where the contract was signed, to be of paramount importance in the Commerce Clause analysis of whether a regulated consumer transaction occurred "wholly" in one state. *Quik Payday, Inc.*, 549 F.3d at 1308. The same analysis should apply here.

2. Moreover, the cases relied upon by Midwest Title invalidating state laws under the Commerce Clause are mostly[1] business protectionism cases that do

[1] For the State's analysis of three non-protectionism Commerce Clause invalidation cases cited by Midwest Title, see Part I.B., *infra.* In addition, in *National Solid Waste Management Association v. Meyer*, 63 F.3d 652 (7th Cir. 1995), a case cited by the district court, App. at 12, but not by Midwest Title, this Court applied *Healy* and *Brown-Forman* to invalidate a trash-processing regulation that was, in effect, a protectionist (in the sense of protecting a state resource—landfills—from out-of-state users) embargo on out-of-state trash that would have required communities in other states to adopt Wisconsin's recycling program in order to ship trash to Wisconsin landfills, even if not all their trash would go to Wisconsin landfills. *Id.* at 658. Here, Indiana's law applies only where Midwest Title's loans go to Indiana residents. There is no extraterritorial overbreadth.

not implicate state consumer protection statutes: *West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186 (1994) (protecting dairy farmers); *Healy v. Beer Inst.*, 491 U.S. 324 (1989) (protecting brewers and importers); *Brown-Forman*, 476 U.S. at 573 (protecting liquor wholesalers); *Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333 (1977) (protecting apple sellers); *Pike*, 397 U.S. at 137 (protecting the reputation of Arizona growers); *H.P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525 (1949) (protecting milk dealers); *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511 (1935) (protecting dairy farmers); *Carolina Trucks & Equip. Inc. v. Volvo Trucks of N. Am., Inc.*, 492 F.3d 484 (4th Cir. 2007) (protecting automobile dealer franchises); *Alliant Energy Corp. v. Bie*, 330 F.3d 904 (7th Cir. 2003) (protecting utility companies); *Dean Foods*, 187 F.3d 609 (7th Cir. 1999) (protecting small dairies).

Midwest Title suggests that the Supreme Court rejected extraterritorial application of a consumer protection statute in *Baldwin v. G.A.F. Seelig*, 294 U.S. 511 (1935), but that is not a fair reading of that case. Rather, in *Baldwin* the Supreme Court merely refused to accept a phony consumer protection justification for a statute transparently designed to protect in-state dairy farmers. The Court struck down a New York law prohibiting milk dealers from re-selling in New York milk purchased outside the state at prices lower than the minimum required to be paid to New York dairy farmers. *Id.* at 519, 528. New York tried to defend the statute on consumer protection grounds, suggesting that it was necessary in order to maintain "a regular and adequate supply of pure and wholesome milk[.]" *Id.* at 523. The Court rejected that argument as transparently disingenuous, deducing

that the state was really saying that "its farmers and merchants and workmen must be protected against competition from without, lest they go upon the poor relief lists or perish altogether." *Id.*; *see also id.* at 519 (stating that the statute existed so as "[t]o keep the system unimpaired by competition from afar[.]"). Hence, as with other cases rejecting "extraterritorial" state laws on Commerce Clause grounds, *Baldwin* rejected a statute geared for business protectionism, not consumer protection.

Similarly, while Midwest Title contends that the Fourth Circuit in *Carolina Trucks & Equipment, Inc. v. Volvo Trucks of North America, Inc.*, 492 F.3d 484 (4th Cir. 2007), invalidated the notion of predicating applicability of a state's law on advertising within the state, that case, too, is about business protectionism rather than consumer protection. The South Carolina statute at issue "provid[ed] that a vehicle manufacturer generally 'may not sell, directly or indirectly, a motor vehicle to a consumer in this State,' except through its authorized franchises[.]" *Id.* at 486. The Fourth Circuit, unsurprisingly, concluded that the purpose of the statute was to "limit[] competition with local vehicle dealerships from both manufacturers and other dealers." *Id.* at 488. Indeed, the plaintiff in the case was a South Carolina truck dealer seeking to apply the statute to prohibit sales from a Georgia dealer to South Carolina residents. *Id.*

Under those circumstances, it is hardly remarkable that the Georgia dealer's advertisements in South Carolina were insufficient to trigger the application of South Carolina law. *Id.* at 491. That holding, however, says nothing about whether

Indiana may choose to limit application of otherwise lawful consumer protection statutes to businesses that advertise in the state. That is, while in-state advertising may not justify applying a *business-protectionism* statute that otherwise violates the Commerce Clause (*Carolina Trucks*), in-state advertising may still be used as a trigger for a *consumer-protection* statute that is otherwise *consistent* with the Commerce Clause (this case).

B. *Southern Pacific Co. v. Arizona* and *CTS Corp. v. Dynamics Corp. of Am.,* confirm the State's theory

Even assuming that the contracts at stake here are wholly extraterritorial (and they are not), the State's theory is that *Healy* and *Brown-Forman* require per se invalidation of wholly extraterritorial statutes only where there is no legitimate government interest at stake; otherwise, *Pike* balancing applies. *See* Director's brief at 18-23. Midwest Title claims the State's argument is "internally inconsistent" because the State relies in its opening brief on *Southern Pacific Co. v. Arizona*, 325 U.S. 761 (1945), "where the Supreme Court invalidated a state law that plainly had a legitimate purpose." MWT brief at 31. The State's whole point in citing *Southern Pacific*, however, is that it was not a *per se* invalidity case, but rather a *balancing test* case. There, as Midwest Title concedes, Arizona did indeed advance a legitimate consumer protection safety interest in its statute regulating the length of trains. The key point is that, even though the state lost, the Court applied a balancing test rather than per se invalidity. *See S. Pac. Co.*, 325 U.S. at 770-71.

Midwest Title asserts that *CTS Corp. v. Dynamics Corp. of Am.,* 481 U.S. 69 (1987), "turned on 'the fact that state regulation of corporate governance is

regulation of entities whose very existence and attributes are a product of state law.'" MWT brief at 40 n.13 (quoting *CTS*, 481 U.S. at 89). The Court in *CTS*, however, distinguished the Indiana Control Shares Acquisition Act from the Illinois statute invalidated in *Edgar v. MITE Corp.*, 457 U.S. 624, 642 (1982) (striking down an Illinois law regulating hostile takeovers of corporations based in Illinois that applied even if the target company had zero Illinois shareholders), based on the fact that "every application of the Indiana Act will affect a substantial number of Indiana residents, whom Indiana indisputably has an interest in protecting." *See CTS*, 481 U.S. at 93. Thus, the Indiana act could, consistent with the Commerce Clause, apply to control share acquisition contracts executed entirely outside of Indiana. *See id.* at 88. And while the IUCCC applies regardless of the lender's state of incorporation, each transaction that it applies to will have other substantial Indiana contacts.

Further, this Court has said that "the key factor" in distinguishing *MITE* and *CTS* is not the place of incorporation, but that "the regulations in *MITE* in some instances regulated extraterritorial transactions for no reason while providing no protection for any legitimate state interest, whereas the statute[] in *CTS* . . . never affect[s] extraterritorial transactions without providing a corresponding and significant protection for a legitimate interest of local residents." *Alliant Energy Corp. v. Bie*, 336 F.3d 545, 549 (7th Cir. 2003). Thus, the main point is that *CTS* demonstrates that place of contracting is not critical under the Commerce Clause—other contacts with the regulating state are important too. Protecting Indiana

consumers from predatory loans in this case is no more suspect than protecting Indiana shareholders from predatory tender offers in *CTS*.[2]

Together, *Southern Pacific Co.* and *CTS* also demonstrate why Midwest Title's reliance on *Shafer v. Farmer's Grain Co.*, 268 U.S. 189, 201, 203 (1925) (MWT brief at 17 n.5) is unavailing. In that case, the Court invalidated a non-discriminatory North Dakota law mandating particular buying practices, record-keeping requirements, bonding, and price structures for wheat produced in that state (*i.e.*, the wheat and the dockage had to be priced separately to ensure North Dakota farmers received value for the dockage). Because 90% of North Dakota wheat was sold interstate, the Court held this to be a per se unconstitutional burden on interstate commerce, *i.e.*, a burden that could not be justified by any state interest whatever. *Shafer*, 268 U.S. at 201. There can be little doubt, however, that, were this same case to come before the Supreme Court today, the Court would at least consider the strength of North Dakota's regulatory interests, in the manner of *Pike* balancing.

By the time of *Southern Pacific Co.*, only twenty years after *Shafer*, the Court was already balancing regulatory interests against interstate burdens rather than rejecting such burdens outright. *S. Pac. Co.*, 325 U.S. at 770-71. And in its decision in *CTS*, the Court blessed a scheme that regulated buying practices for control

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[2] This Court's comments on extraterritorial application in *Glass v. Kemper*, 133 F.3d 999, 1001 (7th Cir. 1998), are fully consonant with the State's theory. There, the Court suggested that Illinois' wage payment act could not, consistent with the Commerce Clause, apply to the benefit of an employee who worked in a foreign country, even though the employer was located in Illinois. The upshot is that Illinois had no interest in protecting an employee not resident in that state. *Id.* Here, in contrast, Indiana is protecting consumers that reside *in Indiana.*

share tender offers that plainly occurred in interstate commerce. *CTS*, 481 U.S. at 93; *see also Exxon Corp. v. Md.*, 437 U.S. 117, 127 (1978) ("We cannot, however, accept appellants' underlying notion that the Commerce Clause protects the particular structure or methods of operation in a retail market.").

This Court has previously acknowledged the difficulty of relying on Commerce Clause cases from the late nineteenth and early twentieth centuries. *In re Brand Name Prescription Drugs Antitrust Litig.*, 123 F.3d 599, 613 (7th Cir. 1997) (acknowledging that state antitrust laws may now constitutionally apply to interstate transactions—though not to transactions where both the buyer and the seller are in different states—even though they could not under earlier Commerce Clause doctrine). Accordingly, the Court should give no credence to *Shafer*, *Am. Express Co. v. Iowa*, 196 U.S. 133 (1905), and *N.Y., Lake Erie & W. R.R., Co. v. Pa.*, 153 U.S. 628 (1894). *See* MWT brief at 17 n.5.

C. *Marquette National Bank v. First of Omaha Service Corp.* and *Bigelow v. Virginia* are not Commerce Clause cases

Midwest Title has also relied on two Supreme Court cases where the Commerce Clause was not even at issue, *Marquette National Bank v. First of Omaha Service Corp.*, 439 U.S. 299 (1978), and *Bigelow v. Virginia*, 421 U.S. 809 (1975).

In *Marquette National Bank*, the Court merely decided whether a Nebraska bank issuing a credit card to a Minnesota resident had to abide by Minnesota's interest rate *minimum* (itself suggestive of economic protectionism) under a federal statute allowing a national bank to charge "interest at the rate allowed by the laws

of the State, Territory, or District *where the bank is located*[.]" 439 U.S. at 308 (quoting 12 U.S.C. § 85); *see also* 439 U.S. at 310 (observing that legislative history demonstrated that a bank is "'located' for purposes of the [applicable federal statute] in the State named in its organization certificate"). It was a case about applying a federal statute. *Id.* at 301. There was no hint of Commerce Clause analysis, and the Court's statement that "[i]t has not been suggested that Minnesota usury laws would apply" simply points out that the argument did not arise. MWT brief at 18 (quoting *Marquette Nat'l Bank*, 439 U.S. at 310-311).

Next, in another attack on the Indiana statute's in-state advertising trigger (*see also* the discussion of *Carolina Trucks*, *supra*), Midwest Title contends that *Bigelow v. Virginia*, 421 U.S. 809 (1975), precludes Indiana from applying its title-lending statute. Midwest Title argues that "it is telling" that the State did not address *Bigelow* in its initial brief because "the District Court relied heavily on [it]." MWT brief at 20. The district court, however, cited *Bigelow* only once (and even then only with the signal "*see*"), App. at 19, and did not discuss it, probably because *Bigelow* is a First Amendment case, not a Commerce Clause case.

In *Bigelow*, a Virginia newspaper editor was convicted of publishing an advertisement for a New York clinic "encourag[ing] or prompt[ing] the procuring of abortion[.]" *Id.* at 812-13 (quoting Va.Code Ann. § 18.1-63 (1960)). At the time of the advertisement, abortion had been legal in New York, but not Virginia. *Id.* at 822. By the time of the decision, however, the Court had issued its decisions in *Roe v. Wade*, 410 U.S. 113 (1973), and *Doe v. Bolton*, 410 U.S. 179 (1973), declaring

abortion to be a constitutionally protected right, and the Court rejected the Virginia law on First Amendment grounds in part because the prohibited advertising content "pertained to constitutional interests." *Id.* at 822, 829. High-interest rate lending, of course, is not a constitutional right like abortion.

More fundamentally, in this case Midwest Title challenges Indiana's regulation of title loans to Indiana residents, not the fact that application of the statute is triggered by Midwest Title's advertisements in Indiana. MWT brief at 47-49. In *Bigelow*, the advertisement itself was the thing being regulated, which is why that was a First Amendment case rather than a Commerce Clause case. Here, the thing being regulated is not the advertisement, but the loan that the advertisement offers. The advertisement is simply the trigger for the loan regulation.

Midwest Title demonstrates its lack of understanding of this distinction by arguing that "post-contract formation conduct is irrelevant under the Indiana statute." MWT brief at 44. To the contrary, it is the inherent post-contract interactions between the lender and the borrower—including check deposits, lien perfections, payments and repossessions, among other things—that provide the rationale for the Indiana statute. But rather than regulate the entire universe of title loans made to Indiana residents through storefronts in other states, Indiana has chosen to regulate only those where the lender has first advertised in Indiana. And if Indiana may regulate all title loans extended to Indiana residents through a storefront in another state, then the Indiana legislature's decision to trigger

regulation by a lender's in-state solicitations is surely insignificant for Commerce Clause purposes. *Cf.* N.H. Rev. Stat. § 399-A:2 (not including a solicitation trigger but still prohibiting a business from making a title loan with any New Hampshire resident without obtaining a New Hampshire license). In any event, *Bigelow* does not hold otherwise.

II. A Long-Term, High-Interest Loan that Is Over-Secured By a Car Title Is an Ongoing Deal Such that the Place Where the Contract Is Signed Carries Reduced Regulatory Importance

The Court in *Bigelow* did say that "[a] State does not acquire power or supervision over the internal affairs of another State merely because the welfare and health of its own citizens may be affected when they travel to that State." *Bigelow*, 421 U.S. at 824. That, however, is not a fair characterization of Indiana's statute. Rather, Indiana's concern with predatory lending to its residents exists because the negative effects of predatory loans are felt exclusively in Indiana, without regard to where the loan was extended. A 24-month loan is an ongoing transaction that will continue to impact the state in the months and years ahead—when Indiana residents' cars are repossessed and they lose their jobs because of lack of transportation, it is Indiana that must come to their aid.

It is the pervasiveness of the contacts, and the ongoing nature of the relationship between the parties, that allows Indiana to regulate Midwest Title's loans to Indiana residents. In *Rahmani v. Resorts Int'l Hotel, Inc.*, 20 F. Supp. 2d 932, 934 (E.D. Va. 1998), *aff'd mem.*, 182 F.3d 909 (4th Cir. 1999), the plaintiff unsuccessfully argued that, because her home state of Virginia rendered gambling debts void, she should not have to pay a casino for debts she incurred in Atlantic

City. Gambling at an out-of-state casino—even during multiple trips over a period of years—does not imply the same sort of long-term ongoing transaction involving the borrower's home state as a 24-month title loan. A transaction involving years of payments, with the constant threat of repossession, is different from losing money on a hand of blackjack. This important distinction also explains away Midwest Title's concern that Indiana's constitutional theory would allow it to regulate New York City hotels and Michigan state parks.[3] MWT brief at 24 n.8.

For similar reasons, Midwest Title's contention that Indiana may not apply a licensing requirement to Midwest Title because "no State may force an out-of-state merchant to seek regulatory approval in one State before undertaking a transaction *in another*[,]" is also inapplicable here. MWT brief at 26 (quoting *Healy*, 491 U.S. at 337) (emphasis added). First, for that proposition Midwest Title cites only business protectionism cases, *Healy*, 491 U.S. at 324 and *Brown-Forman*, 476 U.S. at 573. MWT brief at 26-27. Second, at least for purposes of consumer protection statutes, the loan transaction between Midwest Title and an Indiana resident should not be understood as taking place "in another" state. Rather, the loan takes place *interstate* because of the many ongoing contacts that Midwest Title has with Indiana each time it lends to a Hoosier. *See Progress Tailoring Co. v. Fed. Trade Comm'n*, 153 F.2d 103, 105 (7th Cir. 1946) ("[E]very negotiation and dealing between citizens of different States which contemplates and causes [an importation

[3] Further, Midwest Title forgets, perhaps because it provides no analysis under *Pike*, that the State is not arguing for per se validity of its statute—only that consumer protection statutes such as this—which admittedly have some impact on interstate commerce, but which are not discriminatory—be evaluated under *Pike* balancing.

into one State from another], whether it be goods or information, is a transaction of interstate commerce."). Thus, the IUCCC may constitutionally apply to the transaction.

III. Applying Consumer Protection Statutes Based on Relevant Contacts with a State Would Maintain Harmony Between Commerce Clause and Due Process Doctrine

The *Dean Foods* contracts test has never been applied to strike down a consumer protection statute, other than in this case. Instead, courts look at the contacts between the regulating state and the regulated activity—drawing from due process and choice-of-law cases that apply a "minimum contacts" test for purposes of defining "legislative jurisdiction." More specifically, a court may apply a State's substantive law in accordance with the Due Process Clause when the State has a "significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair[.]" *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 312-13 (1981) (plurality opinion).

Midwest Title defensively suggests that Indiana has somehow waived the right to discuss the relationships among Due Process Clause, choice-of-law and Commerce Clause doctrines. MWT brief at 41-42 & n.14. If Midwest Title is suggesting that the State did not present a "minimum contacts" Commerce Clause theory below, it is plainly mistaken. Dkt. 42 at 15-17, Dkt. 46 at 3-5, 14-15. In fact, the district court expressly addressed it, App. at 16, n.9.

If instead Midwest Title is objecting that the State may not support its Commerce Clause arguments by reference to implications for other legal doctrines, Midwest Title plainly goes too far in trying to avoid having to address those

implications. Parties on appeal are not restricted to merely reproducing the briefs they filed in the district court. While parties may not raise new claims or defenses for the first time on appeal (particularly, as Midwest Title's cases show, where the new claim or defense would require additional factfinding), they may explore arguments made below in greater depth. *See Bailey v. Int'l Bhd. of Boilermakers*, 175 F.3d 526, 529-30 (7th Cir. 1999) (consistent with the general principle that an appellate court can review any issue ruled on by the trial court, even a "skeletal argument below" may be "fleshed out and emphasized on appeal" where it is clear that the trial court recognized and considered the issue). This surely includes the flexibility of the parties to explain—even if they did not do so below—the broader implications of each side's legal theories. *See id*.

In this regard, the State's point is that the Court should not apply *Dean Foods* and other business protection Commerce Clause cases to the consumer protection statute at issue here without first considering how doing so would create tension with minimum-contacts due process cases. Director's brief at 24-28. In due process extraterritorial application cases, which tend to feature consumer-protection laws (broadly understood), courts consider all manner of contacts between the affected individual or business and the regulating state, and in particular whether the extraterritorial business practices will have negative effects on the regulating state's citizens. *See, e.g., Allstate Ins. Co. v. Hague,* 449 U.S. 302, 312-13 (1981); *Watson v. Employers Liab. Assurance Corp.*, 348 U.S. 66, 72 (1954). Meanwhile, in the *Brown-Forman* and *Healy* line of Commerce Clause

extraterritorial application cases, which have addressed business protectionism laws exclusively, a negative impact on a regulating state's businesses does not justify regulating business activity occurring "wholly" in another state. *Healy*, 491 U.S. at 336.

These doctrines, which account for the constitutionality of extraterritorial application of two different types of statutes, stand in harmony. There is no doubt, for example, that Commerce Clauses cases that have upheld extraterritorial application of consumer protection laws have drawn heavily on due process minimum-contacts ideas. *See Quik Payday, Inc.*, 549 F.3d at 1310; *A.S. Goldmen & Co.*, 163 F.3d at 789; *Aldens, Inc. v. Ryan*, 571 F.2d at 1161; *Aldens, Inc. v. LaFollette*, 552 F.2d at 751; *Aldens, Inc. v. Packel*, 524 F.2d at 42, 49.

If this Court applies a "minimum-contacts" type Commerce Clause analysis to the law at issue here, it will maintain that harmony. If instead it invalidates extraterritorial application of the IUCCC based solely on the place where the loan documents were signed, its holding will create tension between Commerce Clause doctrine and due process doctrine. That is, while due process doctrine would permit extraterritorial application of the IUCCC given the many contacts Indiana has with Midwest Title's loans to Indiana residents, Midwest Title's Commerce Clause theory would invalidate it. Yet, Midwest Title has not pointed to any cases with a parallel result, *i.e.,* where due process doctrine would *permit* extraterritorial application of a statute but Commerce Clause doctrine would *forbid* it. The Court should be

reluctant to provide what would apparently be the first such appellate court holding.

Nor should the Court view *Watson* and *Hague* as having been dealt with *sub silentio* in other Commerce Clause cases. Both do pre-date *Healy* and *Dean Foods*, but neither the Supreme Court in *Healy* nor this Court in *Dean Foods* had reason to account for the tension that arises here. In those cases, only business protectionism was at stake, and neither *Watson* nor *Hague* gives any support for upholding extraterritorial application of laws designed to protect in-state business interests from legitimate interstate competition.

Furthermore, *Healy* and *Dean Foods* did not somehow eradicate the minimum-contacts analysis courts typically apply to extraterritorial application of consumer protection statutes. This and other courts have decided several minimum-contacts due process legislative jurisdiction cases post- *Healy* and *Dean Foods*. *See, e.g., Nautilus Ins. Co. v. Reuter*, 537 F.3d 733, 738 (7th Cir. 2008) (applying Indiana law, considering all factors and stating that "[t]he place of contracting, standing alone, is often insignificant"); *Hinc v. Lime-o-Sol Co.*, 382 F.3d 716, 720 (7th Cir. 2004) (applying Indiana law and observing that "[w]hile the place of contracting favors Illinois, the place of negotiation, the place of performance, and the location of the subject matter of the contract all favor Indiana"); *Gerling Global Reinsurance Corp. of Am. v. Gallagher*, 267 F.3d 1228, 1237-38 (11th Cir. 2001) (holding that "there must be at least some minimal contact between a state and the regulated subject matter or transaction before the state can, consistent with the

requirements of due process, exercise legislative jurisdiction."); *Soo Line R.R. Co. v. Overton*, 992 F.2d 640, 644 (7th Cir. 1993) (applying Indiana law after considering the contacts between the parties).

The Supreme Court's punitive damages due process cases confirm the continuing relevance of regulating-state impact for the application of consumer protection law, including tort law. *Gore* addressed the operation of a statute "beyond the jurisdiction of that state[,]" and left open the possibility of applying Alabama's punitive damages law if the plaintiff could have established some negative impact of out-of-state conduct in Alabama. *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 572 n.16, 573 (1996). *Campbell* merely requires application of "the laws of [the] relevant jurisdiction[.]" *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 422 (2003). These statements suggest not that extraterritorial application is per se invalid under due process doctrine, but that the decision on choice-of-law must take into account the contacts with any implicated state.

Furthermore, in some states, choice-of-law rules apply the forum state's tort law in almost every case. *See, e.g.*, *Sutherland v. Kennington Truck Serv.*, 562 N.W.2d 466, 471 (Mich. 1997) (explaining the Michigan torts choice-of-law rule, "we will apply Michigan law unless a 'rational reason' to do otherwise exists. . . . If a foreign state does have an interest in having its law applied, we must then determine if Michigan's interests mandate that Michigan law be applied, despite the foreign interests."); *Brewster v. Colgate-Palmolive Co.*, 279 S.W.3d 142, 145 n.8

(Ky. 2009) (same). Hence, a far more restrictive Commerce Clause rule could force reconsideration of entire bodies of well-established choice-of-law doctrine.

IV. The Indiana Statute Does Not Create Interlocking Regulations

The Commerce Clause was created so as to avoid "competing and interlocking local economic regulation." *Healy*, 491 U.S. at 337. The Indiana statute creates no such interlocking regulations. Midwest Title is unable to argue that the law has any effect on the interest rates it charges borrowers from states other than Indiana, or that any loan Midwest Title makes to an Indiana consumer subject to the Indiana APR caps would be stymied by conflicting laws of other states. So instead it complains that problems could arise in, of all things, mortgage loan transactions between Indiana borrowers and Kentucky lenders. MWT brief at 34-35.

First, this case is an as-applied challenge, not a facial challenge, *see* MWT brief at 1, App. at 4, Compl. at 1. Thus, neither Kentucky law, nor the IUCCC's possible application to Kentucky lenders, is relevant to whether Indiana can apply the IUCCC to Midwest Title's title loans from its Illinois stores to Indiana residents.

Further, in creating its convoluted example of a second mortgage loan between a Kentucky lender that solicited in Indiana and an Indiana borrower, Midwest Title failed to read the IUCCC in its entirety. Indiana Code 24-4.5-1-201(1)(e) says that "[a] sale, lease, or loan transaction does not occur in Indiana if a consumer who is a resident of Indiana enters into a consumer sale, lease, or loan transaction secured by an interest in land located outside Indiana." So, if the real estate securing the second mortgage is in Kentucky, the Kentucky lender would not need an Indiana license, would make the loan under Kentucky law (24% interest, no

origination fee), and the IUCCC would not apply. If instead the real estate was located in Indiana, the Kentucky lender would need to be licensed in Indiana, and make the loan consistent with Indiana law (21% interest, 2% origination fee). These laws do not interlock; they work together.

V. The Indiana Statute is Constitutional Under *Pike* Balancing

Even though the applicability of *Pike* balancing is the proper standard to use in this case, Midwest Title has provided no argument as to why it should win under that standard. MWT brief at 47. Under the *Pike* balancing test, a law is invalid only if its benefit to the state is *clearly* outweighed by its impact on interstate commerce. *See Pike,* 397 U.S. at 142.

While the State and its supporting *amici*, Brief of Amici Curiae Center for Responsible Lending et al. at 4-14, have thoroughly explained Indiana's strong interest in protecting its residents from predatory lending, Midwest Title has presented no evidence showing that the IUCCC's burden on interstate commerce is in any way disproportionate to the local benefits it provides. Its appellate brief asserts only that a small fraction (10%) of its business comes from Indiana residents, MWT brief at 3, and it has not made any attempt to demonstrate that the statute impacts any business other than itself, or has negative effects on interstate commerce generally. Thus, even if "there is a strong rationale for Illinois' differing legislative judgment[,]" MWT brief at 47, that is not sufficient to second-guess the Indiana General Assembly's judgment under *Pike* balancing.

Nor is the Zywicki *amicus* brief sufficient to carry Midwest Title's water on this point. First, Midwest Title had to make its own *Pike* argument for its supporting *amicus* to have any bearing on that issue. Second, the Zywicki brief provides economic analysis that has never been subjected to adversarial testing purporting to show that title lending is a good thing, but then does not even articulate why that analysis, even if given full credence, carries Midwest Title over the *Pike* goal line.

Furthermore, while experts may disagree as to the proper cost-benefit analysis for any given business regulation, such judgments are ultimately an issue for a state's legislature. *See Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 64 (1973) (courts should "not sit as a superlegislature to determine the wisdom, need, and propriety of laws that touch economic problems, business affairs, or social conditions."). If mere disagreement on economic grounds were enough to invalidate a state business regulation under *Pike*, a host of state laws would be vulnerable to attack. For example, in *Baude v. Heath*, 538 F.3d 608 (7th Cir. 2008), an *amicus* brief argued that the wine-shipment restriction at issue (requiring an initial in-person sale prior to direct shipment) was poor legislation from an economic perspective. *See* Brief of Amicus Curiae Vinsense at 7-8, *Baude v. Heath*, 538 F.3d 608 (7th Cir. 2008) (Nos. 07-3323 and 07-3328) ("It is hard to deny that competitive market forces would have a beneficial effect on price, as well as supply, were the legislature to permit [unlimited direct shipment] to happen."). Regardless, this

Court ignored the point and upheld the statute under *Pike*. *Baude*, 538 F.3d at 615. It should do so here as well.

CONCLUSION

The judgment of the district court should be REVERSED and the permanent injunction should be VACATED.

Respectfully submitted,

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CERTIFICATE OF WORD COUNT

I verify that this brief, including footnotes and issues presented, but excluding tables and certificates, contains 6,608 words according to the word-count function of Microsoft Word, the word-processing program used to prepare this brief.

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CIRCUIT RULE 31(e) CERTIFICATION

The undersigned hereby certifies that I have furnished a digital media version of this brief, pursuant to Circuit Rule 31(e), to both the Court and counsel for Midwest Title Loans, Inc.

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CERTIFICATE OF SERVICE

I certify that two copies of the Reply Brief of Appellant, along with a computer diskette containing the same, have been served this 24th day of September, 2009, by United States First Class Mail, postage prepaid, upon the following counsel for Midwest Title Loans, Inc.:

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