No. 09-2083

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

MIDWEST TITLE LOANS, INC.,
Plaintiff-Appellee,

v.

JUDITH G. RIPLEY,
Defendant-Appellant.

On Appeal from the United States District Court
for the Southern District of Indiana, No. 1:07-cv-01479-SEB-DML

BRIEF OF *AMICI CURIAE* CENTER FOR RESPONSIBLE LENDING, AARP, CONSUMER FEDERATION OF AMERICA, NATIONAL CONSUMER LAW CENTER, PUBLIC CITIZEN, INDIANA LEGAL SERVICES, INC., AND NOTRE DAME LEGAL AID CLINIC IN SUPPORT OF DEFENDANT-APPELLANT AND ARGUING FOR REVERSAL

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CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 09-2083

Short Caption: Midwest Title Loans, Inc. v. Judith Ripley

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party or amicus curiae, or a private attorney representing a government party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

The Court prefers that the disclosure statement be filed immediately following docketing; but, the disclosure statement must be filed within 21 days of docketing or upon the filing of a motion, response, petition, or answer in this court, whichever occurs first. Attorneys are required to file an amended statement to reflect any material changes in the required information. The text of the statement must also be included in front of the table of contents of the party's main brief. **Counsel is required to complete the entire statement and to use N/A for any information that is not applicable if this form is used.**

[ ] **PLEASE CHECK HERE IF ANY INFORMATION ON THIS FORM IS NEW OR REVISED AND INDICATE WHICH INFORMATION IS NEW OR REVISED.**

(1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P 26.1 by completing item #3):

Center for Responsible Lending

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

None

(3) If the party or amicus is a corporation:

i) Identify all its parent corporations, if any; and

Center for Community Self-Help

ii) list any publicly held company that owns 10% or more of the party's or amicus' stock:

None

Attorney's Signature: [signature] Date: July 21, 2009

Attorney's Printed Name: Daniel Paul Mosteller

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). Yes [X] No [ ]

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CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: No. 09-2083

Short Caption: Midwest Title Loans, Inc. v. Judith G. Riply

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(1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P 26.1 by completing item #3):

AARP

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

Mary Ellen Signorille

(3) If the party or amicus is a corporation:

i) Identify all its parent corporations, if any; and

None

ii) list any publicly held company that owns 10% or more of the party's or amicus' stock:

AARP is not a publicly held company.

Attorney's Signature: /Mary Ellen Signorille/ Date: July 17, 2009

Attorney's Printed Name: Mary Ellen Signorille

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). Yes [X] No [ ]

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CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

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(1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P 26.1 by completing item #3):

Consumer Federation of America

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

N/A

(3) If the party or amicus is a corporation:

i) Identify all its parent corporations, if any; and

N/A

ii) list any publicly held company that owns 10% or more of the party's or amicus' stock:

N/A

Attorney's Signature: Rachel Weintraub Date: 7/20/09

Attorney's Printed Name: Rachel Weintraub

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). Yes [ ] No [X]

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CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

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(1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P 26.1 by completing item #3):

National Consumer Law Center, Inc.

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

National Consumer Law Center, Inc.

(3) If the party or amicus is a corporation:

i) Identify all its parent corporations, if any; and

N/A

ii) list any publicly held company that owns 10% or more of the party's or amicus' stock:

N/A

Attorney's Signature: [signature] Date: 7/17/09

Attorney's Printed Name: Chi Chi Wu

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** [X] **No** [ ]

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(1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P 26.1 by completing item #3):

Public Citizen, as amicus curiae in support of Defendant-Appellant

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

Public Citizen Litigation Group, a division of Public Citizen

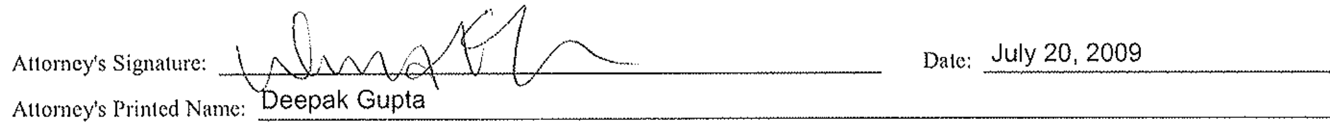
(3) If the party or amicus is a corporation:

i) Identify all its parent corporations, if any; and

Public Citizen has no parent corporations.

ii) list any publicly held company that owns 10% or more of the party's or amicus' stock:

No publicly held company owns any of Public Citizen's stock.



Attorney's Signature: ______________________ Date: July 20, 2009

Attorney's Printed Name: Deepak Gupta

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** [ ] **No** [X]

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CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

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(1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P 26.1 by completing item #3):

n/a

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

n/a

(3) If the party or amicus is a corporation:

i) Identify all its parent corporations, if any; and

None

ii) list any publicly held company that owns 10% or more of the party's or amicus' stock:

None

Attorney's Signature: [signature] Date: July 20, 2009

Attorney's Printed Name: John E. Brengle

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** [ ] **No** [X]

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CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

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(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

(3) If the party or amicus is a corporation:

i) Identify all its parent corporations, if any; and

University of Notre Dame

ii) list any publicly held company that owns 10% or more of the party's or amicus' stock:

Attorney's Signature: [signature] Date: July 16, 2009

Attorney's Printed Name: Judith Fox

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** [ ] **No** [X]

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INTEREST OF *AMICI CURIAE*

This brief is filed with the consent of both parties. Fed. R. App. P. 29(a).

The Center for Responsible Lending ("CRL") is a non-profit policy, advocacy, and research organization dedicated to exposing and eliminating abusive consumer lending practices. CRL is an affiliate of Self-Help, a non-profit lender that has provided more than $5 billion in financing to help more than 50,000 low-wealth borrowers buy homes, build businesses, and strengthen community resources.

AARP is a non-partisan, non-profit organization with nearly forty million members aged fifty and older, over 900,000 of whom live in Indiana. AARP is greatly concerned about high-cost lending practices that take advantage of borrowers already in financial distress by imposing exploitive terms, such as astronomical annual percentage rates, oppressive collection practices, and extreme default penalties. Because older persons are disproportionately victimized by these practices, AARP Indiana advocated for the passage of the statute that is at issue in this case.

Consumer Federation of America ("CFA"), an organization of 280 national, state, and local consumer groups representing more than 50 million consumers, advances the interests of consumers through advocacy and education. One of CFA's priorities is protecting consumers who are targeted by businesses making high-cost, short-term loans. CFA has published several reports on the auto title and payday loan industries. S*ee, e.g.*, Amanda Quester & Jean Ann Fox, *Car Title Lending: Driving Borrowers to Financial Ruin* (2005); Jean Ann Fox & Elizabeth Guy, *Driven*

into Debt: CFA Car Title Loan Store and Online Survey (2005). CFA is particularly concerned that consumers who must use these businesses have effective legal protections.

The National Consumer Law Center ("NCLC") is a national research and advocacy organization focusing specifically on the legal needs of low income, financially distressed, and elderly consumers. NCLC is recognized nationally as an expert in consumer credit issues, including usury and small dollar loan regulation, and has drawn on this expertise to assist federal and state legislatures, administrative agencies, and the courts for over thirty-six years. NCLC was the primary author of the Small Dollar Loan Products Scorecard, a state-by-state analysis of lending limits for payday loans, auto title loans and installment loans for all 50 states, issued by Consumers Union in August 2008.

Public Citizen is a non-profit consumer advocacy, lobbying, and litigating organization founded in 1972. Public Citizen has a longstanding interest in defending the authority of states to enact and enforce laws that protect their citizens from unfair or deceptive practices, including predatory lending practices like those at issue in this case.

Indiana Legal Services, Inc. ("ILSI") provides poor residents of Indiana with a wide variety of aggressive, quality legal services to help them gain equal access to the courts; empower them to control their lives; and impact on the major causes and effects of poverty. As part of this mission, ILSI regularly represents clients in a wide variety of consumer matters, such as debt collection, unconscionable loans,

credit card defense, foreclosure and repossession defense, and bankruptcy. This case will significantly affect the rights of low income persons in Indiana, who deserve protection from unfair and unconscionable practices of out-of-state car title lenders.

The Notre Dame Legal Aid Clinic provides free legal services to low income consumers, especially those from vulnerable populations who are victims of predatory payday lending practices. Notre Dame law students and their clinical faculty represent clients in cases involving mortgage foreclosures, fraud, predatory lending, land contract scams, foreclosure rescue scams and debt collection and work with local community agencies to provide consumer education.

SUMMARY OF ARGUMENT

Midwest Title Loans, Inc. ("Midwest Title") seeks a ruling that the dormant Commerce Clause invalidates Indiana's law that restricts it from charging Indiana residents more than 36% on car title loans. *See* Ind. Code. § 24-4.5-3-508(2) (providing for such a limit); *Livingston v. Fast Cash USA, Inc.*, 753 N.E.2d 572 (Ind. 2001) (interpreting the 36% rate cap). Instead, it wants to continue charging rates as high as 372% so long as Indiana residents sign the loan paperwork while in its Illinois storefronts.

Midwest Title's constitutional attack on Indiana's law fails. The law is valid under the dormant Commerce Clause's standard interests-balancing test because of the harms caused to borrowers by car title loans, the efforts of car title lenders to skirt laws restricting their operation, and states' longstanding and continuing right

to protect their residents from usury. Moreover, the law is not *per se* unconstitutional as "*wholly* extraterritorial" regulation because this lender engaged in multiple loan-related activities *in Indiana* that were critical elements of its car title lending to Indiana residents and without which it would have been unable to consummate these loans. These activities included sending advertisements and direct mail into Indiana to solicit Indiana residents to take out usurious loans, using Indiana state motor vehicle officials to process and perfect security interests in Indiana car titles, and engaging in collection actions in Indiana, including the repossession and auction of Indiana cars. Consequently, this Court should reverse the district court's ruling that Indiana's law violated the dormant Commerce Clause.

ARGUMENT

I. INDIANA'S INTEREST IN PROTECTING ITS RESIDENTS FROM THE HIGH-COST DEBT TRAP OF CAR TITLE LOANS OUTWEIGHS ANY BURDEN THE REGULATION IMPOSES.

A. Car Title Lenders Charge Unconscionably High Interest Rates for Loans Secured by Essential Property, Creating a Vicious Cycle of Unaffordable Debt.

Car title loans are small loans secured by a borrower's vehicle that typically carry triple digit interest rates. Although marketed as small emergency loans, in reality car title loans trap borrowers in a cycle of debt at sky-high interest rates, which exacerbate their financial woes and make them captive to title lenders. These loans generally provide borrowers only a small amount of cash, although they obligate borrowers to pay substantial interest. As a result, in the first year

borrowers pay more in interest than they receive in principal. For instance, a recent study of car title loan collection cases filed in Cook County, Illinois determined that the median amount owed by defaulting title loan borrowers was $5,462, but the median principal amount of the loans was only $1,500. Woodstock Inst. & Pub. Action Found., *Debt Detour: The Automobile Title Lending Industry in Illinois* 2 (2007), *available at* http://www.responsiblelending.org/other-consumer-loans/car-title-loans/debtdetour_sept2007_egan.pdf.

Title lenders routinely charge extremely high interest rates and require repayment over a short term. *See* Office of the Comptroller of the Currency, OCC Advisory Letter 2000-11: Title Loan Programs 2 (2000), *available at* http://www.occ.treas.gov/ftp/advisory/2000-11.doc (noting interest rates on title loans are often 25% or more *per month* and loan terms are as short as one month). Title lending surveys have found annual interest rates well into the triple digits to be typical. *See* Jean Ann Fox & Elizabeth Guy, *Driven into Debt: CFA Car Title Loan Store and Online Survey* 11 (2005), *available at* http://www.consumerfed.org/pdfs/Car_Title_Loan_Report_111705.pdf (finding a mean 294.25% APR in surveying eighty-one car title lenders in eleven states); Ill. Dep't of Fin. Insts., *Short Term Lending: Final Report* 26 (1999), *available at* http://www.idfpr.com/dfi/ccd/pdfs/Shorterm.pdf (finding an average annual percentage rate of 290% for Illinois title loan companies). Borrowers are particularly vulnerable to car title loans obtained from Illinois car title lenders

because Illinois is unusual in permitting title lending with no cap on interest rates.[1] *See* Stephen Franklin, *Car Title Loans Snare Victims at 300% Rates; Illinois Trails Other States in Regulation of Growing Industry*, Chi. Tribune, June 22, 2008, at 1.

These unconscionably high rates are even more unjustified because car title loans are highly over-secured, meaning their high rates are not necessary to compensate for high risk. Most title loans are made for much less than the value of the car that secures the loan, typically for only about one-third of the car's value, and are generally made only to borrowers who have free and clear title to the car. S*ee* Ill. Dep't of Fin. Insts., *supra*, at 4 (noting a loan for 33% of the car's value "seems to be the industry norm"). This means that car title lenders charge a rate more than thirty times those charged for standard finance companies' purchase-money used car loans despite having a much greater equity cushion. *See* Fed. Reserve Bd., *Statistical Release G.20: Finance Companies* (June 25, 2009), *available at* www.federalreserve.gov/releases/g20/ (detailing average 101% loan-to-value ratio with average annual interest rate of 9.71% for used-car purchase loans). Because car title loans are so over-secured, the lender is well protected even if the borrower defaults. As the then-Attorney General of Florida once explained, "[t]he most secure loan in the state of Florida is a title loan." *60 Minutes: Legal Loan Sharking?* (CBS Television Broadcast Jan. 2, 2000).

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[1] There is no question that Midwest Title made car title loans at 372% to Indiana residents, and that it understands they are illegal if Indiana's law applies. *See* App. at 25 ¶4 ("Annual percentage rates of interest on the [Midwest Title] Loans are typically approximately 300% (but may be more or less) compared with the 36% per annum rate limitation under the Indiana [law]."); Docket 43-3 at 5-31; Docket 43-4 at 1-26 (detailing the APR for Midwest Title's loans to Indiana residents, including many loans at 372%).

Title lenders often make their short-term, high-interest loans with little or no regard to borrowers' ability to repay the loans. *See* Michael S. Barr, *Banking the Poor*, 21 Yale J. on Reg. 121, 166 (2004). Lenders advertise that they do not perform credit checks, that loans can be completed on the spot, and that the application will take only a few minutes. The failure to consider ability to repay is particularly egregious because title lenders target borrowers with low or fixed incomes who can ill afford such high-cost short-term loans. *See* Ill. Dep't of Fin. Insts., *supra*, at 26 (finding the average salary of Illinois title loan borrowers was less than $20,000); *id*. at 27 (noting people living on fixed incomes are among those targeted by short-term lenders). Targeting these populations virtually guarantees that many of the loans will fail. Moreover, simple logic dictates that borrowers who are desperate enough to sign over their car titles for minimal amounts of cash are unlikely to be able to repay the cash advance when compounded by triple-digit interest.

The combination of high rates and short terms in car title loans makes it very difficult for borrowers to repay their loans, often forcing them to renew and extend repayment on, or "rollover," their title loans several times while continuing to accrue interest at a triple-digit rate. *See* Office of the Comptroller of the Currency, *supra*, at 2 ("It is common that a borrower will roll over a title loan several times."); Office of Mo. State Auditor, *Performance Audit: Division of Finance and Regulation of Instant Loan Industry*, Auditor Report No. 2001-36, at 4 (2001), *available at* http://www.auditor.mo.gov/press/2001-36.pdf ("[O]n average, title and payday

lenders make 3.5 times more renewal loans than new loans each month.”). Consequently, borrowers find themselves sucked into a spiral of debt, paying more and more interest while the principal on the loan remains largely unchanged. The Illinois Department of Financial Institutions concluded in 1999 that “title loans are rarely paid off within the initial term of the loan” but were instead rolled over repeatedly. Ill. Dep’t of Fin. Insts., *supra*, at 8. As the Department noted:

> Industry members . . . have referred to their customers as average citizens who encounter unexpected financial hardships. What they have failed to mention was that the financial strains placed on consumers were rarely short-lived. Customers playing catch-up with their expenses do not have the ability to overcome unexpected financial hardships because their budgets are usually limited. The high expense of a short term loan depletes the customer’s ability to catch-up, therefore making the customer “captive” to the lender.

Id. at 30.

Car title loans not only charge unconscionably high interest rates but put at high risk an asset that is essential to the well-being of working families—their vehicle. While borrowers generally keep possession of the car during the term of the loan, the lender takes a security interest in their car. The lender may also demand a copy of the keys to facilitate repossession. If the borrower is unable to keep up with this debt treadmill, the lender repossesses the car. This is not an idle threat, as ten to twenty percent of car title loans regularly end in repossession. *See SAL Leasing, Inc.* v. *State ex rel. Napolitano,* 10 P.3d 1221, 1228 (Ariz. Ct. App. 2000) (“About 18% of [one title lender’s] customers forfeited cars they had owned free of liens before doing business with [the title lender], and [the title lender’s] transactions put their remaining customers at risk of suffering the same fate.”); Fox

& Guy, *supra*, at 5 (detailing an approximately 10% repossession rate by a Kansas title lender).

This loss of a car can have a devastating impact on borrowers' lives that extends far beyond the massive direct monetary costs of car title loans. Lack of transportation is widely recognized as one of the most significant barriers to obtaining and maintaining employment. *See, e.g.,* Tami Richards & Donald Bruce, *Car Access and Employment Outcomes for Tennessee Welfare Recipients: A Report to the Tennessee Department of Human Services* (2004), *available at* http://cber.utk.edu/TDHS/ffjun0400.pdf. As Congress has recognized, "two-thirds of all new jobs are in the suburbs" where public transit options are slim to none, and "even in metropolitan areas with excellent public transit systems, less than half of the jobs are accessible by transit." Transportation Equity Act for the 21st Century, Pub. L. No. 105-178, § 3037(a), 112 Stat. 107, 387 (1998). Thus, the loss of car caused by title lending can make it impossible for borrowers of limited means to keep a job, attend school, or obtain health care.

In addition to the substantial human impact, title lenders' summary repossession and sale of the vehicles exact other intolerable financial costs on borrowers. After selling the vehicle, "some lenders retain the proceeds of the sale even if the value of the automobile exceeds the loan amount." Office of the Comptroller of the Currency, *supra*, at 2. This equity can be sizeable because the loans are so over-secured. In other cases, when exorbitant interest charges have more than consumed the car's value, some title lenders have even held borrowers

personally liable for additional amounts after taking their vehicles. Keith Rush, a Belleville, Illinois snow cone stand owner, took out a $200 title loan from Midwest Title in 2002 after his five-year-old daughter had heart surgery. Mike Fitzgerald, *Cycle of Debt: Payday and Car Title Loans*, Belleville News-Democrat, Feb. 29, 2004. The $200 loan was secured by a 1988 Chevrolet Cavalier, which Mr. Rush valued at approximately $800. *Id.* After he fell behind on his payments, Midwest Title repossessed the car and then demanded an additional $1,200 on the loan. *Id.* Midwest Title ultimately extracted $2,000 from Mr. Rush—ten times its $200 loan. *Id.*

The disastrous effects of title loans are not limited to the borrowers who ultimately lose their cars. Even those who manage to keep their cars live from month-to-month fearing that they will lose their most valuable possession and often pay much more than they can afford to ensure that that does not happen.

B. Car Title Lenders Routinely Mischaracterize the Nature of Transactions and Engage in Other Ruses To Evade State Interest Limits.

This case spotlights one more device in a long series of attempts by car title lenders to avoid usury laws. This Court should reject this effort and follow the many courts that have rejected car title lenders' prior schemes.

Early on, car title lenders structured their products as "sale and leaseback" agreements to circumvent usury laws. In those deals, the borrower pledged the title and the lender "leased" the car back to the consumer. *See* Lynn Drysdale & Kathleen Keest, *The Two-Tiered Consumer Financial Services Marketplace: The*

Fringe Banking System and Its Challenge to Current Thinking About The Role of Usury Laws in Today's Society, 51 S.C. L. Rev. 589, 598 (2000). Because courts overwhelmingly rejected these sale and leaseback transactions as failed attempts by car title lenders to charge higher interest rates than allowed by state usury laws, *see*, *e.g.*, *Pendleton v. Am. Title Brokers, Inc.*, 754 F. Supp. 860 (S.D. Ala. 1991); *SAL Leasing,* 10 P.3d at 1227-28; *Aple Auto Cash Express, Inc. of Okla. v. State ex. rel. Okla. Dep't of Consumer Credit*, 78 P.3d 1231, 1237 (Okla. 2003), car title lenders have abandoned this device.

Next, car title lenders characterized their product as a pawn transaction exempt from some state usury laws. Car title loans, however, are fundamentally different than traditional pawn transactions, as the latter are typically for small sums and critically, require the borrower to surrender the collateral to the pawnbrokers until the loan is repaid. *See*, *e.g.*, Cash Am. Int'l, Inc., Form 10K, at 5 (2009), *available at* http://www.cashamerica.com/Files/Annual%20reports/Cash%20America%20Annual%20Report%202008.pdf (stating that average pawn loan balance was $120). Pawn borrowers are forced at the time of origination to confront the jeopardy to their car in having to surrender it. As a result, the fact that the pawnbroker holds the collateral for the duration of the loan makes pawn much less exploitive than car title loans. Accordingly, many courts have rejected attempts to treat title loans as pawn transactions. *See*, *e.g.*, *State ex rel. McGraw v. Pawn Am.*, 518 S.E.2d 859, 862 (W. Va. 1998); *In re Schwalb,* 347 B.R. 726, 739-40 (Bankr. D. Nev. 2006).

Finally, some title lenders have moved away from the "pawn" label and have instead characterized title loans as open-end credit to take advantage of exceptions in usury laws. *See, e.g.*, Frank Santiago, *Senator Seeks Ban on Car Title Loans*, Des Moines Register, Jan. 28, 2005. Although these usury exceptions were drafted to permit credit card companies to charge the same rates nationwide when extending *unsecured* revolving credit through credit cards, *see* Joseph W. Gelb & Peter N. Cubita, *Credit Card Application and Solicitation Disclosure Legislation: An Approach to the Rate Ceiling Approach*, 43 Bus. Law. 1557, 1569 (1988) (discussing the Virginia statute's application to credit cards), car title lenders have adapted their newly named "motor vehicle equity lines of credit" to extract uncapped interest in highly *secured* car title loans.

Midwest Title's use of Illinois storefronts in an effort to legitimize car title loans that are consummated only through extensive activities in Indiana, including solicitation, recordation of title, and collection, is simply the latest subterfuge perpetuated by this industry. Indiana's decision to regulate Midwest Title's loans was a reasonable effort to address yet another effort to skirt state borrower protection laws.

C. Indiana's Interests in Regulating Car Title Lending Satisfies the Dormant Commerce Clause's Standard Balancing Test.

In light of the damage inflicted on borrowers by high-cost car title lending and the lengths car title lenders go to in order to continue peddling their harmful loans, it is unsurprising that the Indiana legislature sought to protect its residents from car title lenders that charge more than a 36% interest rate. Indiana's decision

to cap rates on car title loans is in accord with the majority of states, *see* Fox & Guy, *supra*, at 7-8, 19, and is consistent with federal law prohibiting car title lenders from charging military servicemembers and their families more than a 36% interest rate, *see* 10 U.S.C. § 987.

Moreover, protecting residents against usurious interest charges has long been a recognized power of states:

> The purpose of usury laws, from time immemorial, has been to protect desperately poor people from the consequences of their own desperation. Law-making authorities in almost all civilizations have recognized that the crush of financial burdens causes people to agree to almost any conditions of the lender and to consent to even the most improvident loans. Lenders, with the money, have all the leverage; borrowers, in dire need of money, have none.

Schneider v. Phelps, 359 N.E.2d 1361, 1365 (N.Y. 1977). Even in the modern economic world, Congress has recognized "that the maximum level of interest rates in consumer credit transactions is not a subject matter requiring a uniform national rule." *Aldens, Inc. v. Packel*, 524 F.2d 38, 46 (3d Cir. 1975) (citing 15 U.S.C. § 1610(b)).

State regulation typically is constitutional under the dormant Commerce Clause "unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970). Given the multiple harms caused by car title lending and the longstanding nature of states' interest in preventing usury, Indiana's interests outweigh the burdens this regulation imposes. Indeed, this Circuit has previously adopted the Third Circuit's reasoning that ruled state regulation of interest charged

by an out-of-state company was constitutional under *Pike* because "no case that we have been referred to has even so much as hinted that usury laws and related contract laws are not appropriate matters for local regulation. This despite the facts that such laws do burden interstate commerce, and that the burden is increased by the lack of uniformity." *Packel*, 524 F.2d at 48, *adopted by Aldens, Inc. v. LaFollette*, 552 F.2d 745, 749 (7th Cir. 1977).

Amici, therefore, agree with Indiana that its law is constitutional under the *Pike* balancing test typically applied to dormant Commerce Clause challenges. *See* Appellant's Br. 29-33.

II. INDIANA'S REGULATION IS NOT A *PER SE* VIOLATION OF THE DORMANT COMMERCE CLAUSE.

A. Overruling Indiana's Legislature Does Not Advance the Dormant Commerce Clause's Narrow "Extraterritoriality" Principle.

Dormant Commerce Clause jurisprudence arises from "a negative implication" in Congress's Article I authority to regulate interstate commerce. It "is driven by concern about *economic protectionism*—that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors. The point is to effectuat[e] the Framers' purpose to prevent a State from retreating into [the] economic isolation, that had plagued relations among the Colonies and later among the States under the Articles of Confederation." *Dep't of Revenue of Ky. v. Davis*, 128 S. Ct. 1801, 1808 (2008) (internal quotation marks and citations omitted) (brackets in original) (emphasis added). The dormant Commerce Clause is not a warrant for courts to broadly strike down state laws, because "[t]he

law has had to respect a cross purpose as well, for the Framers' distrust of economic Balkanization was limited by their federalism favoring a degree of local autonomy." *Id.*

One of the ways in which the dormant Commerce Clause prevents economic protectionism and Balkanization is to place limits on a state's ability directly to regulate the commerce of other states' residents. *See Healy v. Beer Inst.*, 491 U.S. 324, 336-37 (1989). This limit, commonly referred to as the "extraterritoriality" principle, arises from cases in which the Supreme Court invalidated state liquor laws that effectively dictated the prices paid by consumers in other states and a state anti-takeover law that restricted ownership transfers by companies incorporated in other states and whose shareholders were entirely out-of-state residents. *See id.*; *Brown-Forman Distiller Corp. v. N.Y. State Liquor Auth.*, 476 U.S. 573, 581-83 (1986); *Edgar v. MITE Corp.*, 457 U.S. 624, 642-43 (1982) (plurality opinion).

Because of the Supreme Court's limited application of the doctrine, the extraterritorial "aspect[] of the dormant Commerce Clause [is] unsettled and poorly understood." Jack L. Goldsmith & Alan O. Sykes, *The Internet and the Dormant Commerce Clause*, 110 Yale L.J. 785, 789 (2001); *see also* Peter C. Felmly, Comment, *Beyond the Reach of States: The Dormant Commerce Clause, Extraterritorial State Regulation, and the Concerns of Federalism*, 55 Me. L. Rev. 467, 492 (2003) ("The [lower federal] courts have . . . struggled to ascertain just where, if at all, the principle fits into the dormant Commerce Clause jurisprudence.

. . . Essentially, the lower federal courts, following the lead of the Supreme Court, have utilized the extraterritoriality principle without comprehending exactly what the principle is and without any clear understanding of how to define it.”). Accordingly, scholars have cautioned against formulations of the doctrine that are “clearly too broad” because “[s]cores of state laws validly apply to and regulate extrastate commercial conduct that produces harmful local effects.” Goldsmith & Sykes, *supra*, at 790.

It is hard to see how Indiana’s regulation of Midwest Title’s lending practices solely with respect to Indiana residents runs afoul of the dormant Commerce Clause. Indiana’s regulation makes no distinction between Midwest Title as an out-of-state lender to Indiana residents and in-state lenders: None can make car title loans with an annual percentage rate of interest greater than 36%. *See* Ind. Code. §§ 24-4.5-1-201(1), -3-508(2). And Indiana’s regulation does not affect Midwest Title’s operations with respect to residents of any other state. Therefore, the regulation raises none of the concerns about economic protectionism or discrimination that motivates dormant Commerce Clause jurisprudence.

B. Midwest Title's Lending to Indiana Residents Is Not "*Wholly* Extraterritorial."

1. Indiana Responded to Multiple Troubling Aspects of Car Title Transactions that Occurred Within the State.

This Court has held that only "regulation of *wholly* extraterritorial transaction is *per se* invalid" under the dormant Commerce Clause.[2] *Alliant Energy Corp. v. Bie*, 336 F.3d 545, 547 (7th Cir. 2003) (emphasis added). Three aspects of Midwest Title's operations demonstrate its lending to Indiana residents is not *wholly* extraterritorial: the solicitation in Indiana for customers to take out usurious loans; the perfection of its security interest through the Indiana government; and the collection on those loans in Indiana.[3]

First, the solicitations that Midwest Title mailed to Indiana residents and placed in Indiana media markets demonstrate that the company enters into Indiana to promote the most beguiling features of the car title loans. Those solicitations tout the ease and speed with which Midwest Title originates title loans: One advertisement explains "how easy it is to get cash fast," Docket 43-4 at 27; another explains "It only took about fifteen minutes" with "no hassle," *id.* at 29; and a third

[2] Moreover, a wholly extraterritorial regulation is only *per se* invalid under the dormant Commerce Clause if it does not advance legitimate state interests. *See* Appellant's Br. 18-23.

[3] It is irrelevant to federal constitutional analysis that Indiana's law addresses only Midwest Title's solicitation ties to the state. *See Quik Payday, Inc. v. Stork*, 549 F.3d 1302, 1308 (10th Cir. 2008) (observing that although a similar territorial application provision in Kansas' commercial credit law "would not apply to . . . a loan transaction (because the solicitation was not in Kansas), the transaction would not be wholly extraterritorial, and thus not problematic under the dormant Commerce Clause" so long as some aspect of the transaction is linked to Kansas), *cert. denied*, 129 S. Ct. 2062 (2009).

stresses that Midwest Title requires "No Credit Check," *id.* at 31.[4] The ease of entering these loans, with quick underwriting (limited to valuing the collateral) leaving little time for borrowers to consider the loan's spiraling debt trap, is precisely the problem with these loans. *Cf.* 15 U.S.C. § 1639(b) (requiring a three-day cooling-off period after disclosing terms of high-cost mortgage loans and before such loans may be closed). Therefore, Indiana's approach reduces the harm to its residents from these in-state advertisements by restricting lenders who enter the state to place such advertisements from making loans with such exploitive features. By responding to the problematic nature of in-state solicitation of its residents, Indiana is regulating in-state, rather than extraterritorial, conduct.

Second, an integral element of Midwest Title's title loans is the perfection of a security interest on its borrowers' Indiana car titles. *See* App. at 27 ¶ 8(f). Without the security interest, which Midwest Title can perfect in an Indiana resident's car only through its in-state activities of having the Indiana Bureau of Motor Vehicles ("BMV") record its lien on the title, its loans cannot be consummated as title loans. Indeed, section 9-303(c) of the Uniform Commercial Code, adopted by both Indiana and Illinois, provides that "[t]he local law of the jurisdiction under whose certificate of title the goods are covered governs perfection, the effect of perfection or non-perfection, and the priority of a security interest in goods covered by a certificate of title from the time the goods become covered by the certificate of title until the goods cease to be covered by the certificate of title." Ind. Code § 26-1-9.1-303(c); 810

[4] The solicitations further seduce borrowers by promoting "No Payment for 60 days"—a feature that causes them to sink far into debt before having to face the reality of repaying it. Docket 43-4 at 29, 31.

Ill. Comp. Stat. 5/9-303(c). Indiana's regulation of these loans is not extraterritorial because Midwest Title is able to create a critical feature of the loan only through its in-state activities of recording liens.

Midwest Title seeks to reap the benefits of Indiana law by using it and its officials to perfect security interests in Indiana residents' cars, while at the same time claiming exemption from Indiana law that would constrain the ability to enforce loans that violate Indiana law. But fairness requires that Midwest Title choose either to take advantage of Indiana's creditor-rights laws only to enforce Indiana-compliant loans or to lend to Indiana residents without benefit of an Indiana-perfected lien.

Third, Midwest Title's collection efforts occur within Indiana. Midwest Title's "reminder and collection calls" are made to Indiana residents by calling them in Indiana; Midwest Title repossesses cars in Indiana by contracting with a "repossession company to effect repossession of the vehicle securing the Loan from wherever the vehicle may be located, including within Indiana"; and Midwest Title owns and stores repossessed vehicles in Indiana and sells them in Indiana through an Indiana auction house. App. at 27-28 ¶ 8(h). In fact, Midwest Title repossessed 341 cars in Indiana based on loans made to Indiana residents in 2006 and 2007,

representing over 10% of the 3136 title loans it made during that period.[5] *See* Docket 43-3 at 5-31; Docket 43-4 at 1-26.

Midwest Title's Indiana-based collection operations that threaten borrowers with the loss of their car are essential to obtaining repayment of its loans. Midwest Title's business model is built on the fact that Indiana residents will continue to pay extortionate and unaffordable rates when faced with the threat of in-state collection activities to take away their access to employment, school, and health care. Its ability to make loans without performing credit checks is based on the leverage it achieves through conducting collection efforts close to home in Indiana. Indeed, the application process requires Indiana borrowers to leave a set of keys "to assist . . . in effecting self-help repossession of the vehicle in the event of a default that does not get cured by the borrower." App. at 26 ¶8(a). Because Midwest Title contemplates and invokes its right to engage in Indiana-based repossession at the time when borrowers are in its Illinois offices, Indiana is not acting in a wholly extraterritorial manner by applying its state law to those transactions.

Moreover, Indiana's regulation of Midwest Title is akin to state regulation of out-of-state debt collectors that has been held to comport with the dormant Commerce Clause. *See Silver v. Woolfe*, 694 F.2d 8, 11-14 (2d Cir. 1982) ("While the methods of communication utilized by debt collectors may, as in [plaintiff's] case, be interstate, the perceived abuses and consequent harm . . . are almost entirely

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[5] The percentage of Indiana borrowers whose loans ended in repossession could be significantly higher because the record does not indicate how many of these 3136 transactions represented renewals of prior loans. *See* Office of Mo. State Auditor, *supra*, at 4 ("[O]n average, title and payday lenders make 3.5 times more renewal loans than new loans each month.").

localized."); *Commonwealth v. Allied Bond & Collection Agency*, 476 N.E.2d 955, 957-60 (Mass. 1985). In this case, Indiana is preventing an abusive in-state debt collection practice—giving a lender the ability to extort triple-digit interest with the threat of taking away the borrower's livelihood. Because this abuse is inherent from the very moment that the car title loan is originated, it is reasonable for Indiana to regulate the terms of the contract wherever it is formally signed.

2. The District Court Ignored Precedent by Adopting an Overly Narrow View of a Debt Transaction's Locus.

In holding that Indiana's regulation of Midwest Title was wholly extraterritorial, notwithstanding the Indiana-based solicitation, perfection, and collection, the district court adopted an overly narrow view of the locus of debt formation that has been rejected by this Court's precedent for purposes of dormant Commerce Clause analysis. The district court held that Indiana's regulation was extraterritorial because "no credit agreements were finalized within Indiana." App. at 16. But in *Aldens v. LaFollette*, this Court rejected a creditor's dormant Commerce Clause challenge against Wisconsin's regulation of credit terms even though the creditor's (mail order) business model meant that "[c]redit is granted only in Chicago." 552 F.2d at 748. Indeed, blackletter contract law dictates that no credit agreements were finalized within Wisconsin when Wisconsin residents mailed their credit applications to Aldens; instead, the credit agreements were only finalized in Illinois when Aldens chose to accept the application. *See* Restatement (Second) of Contracts § 63(a) (1981) ("[A]n acceptance made in a manner and by a medium invited by an offer is operative and completes the manifestation of mutual

assent as soon as put out of the offeree's possession . . . ."). Yet this Court held that the dormant Commerce Clause permitted Wisconsin to regulate the conduct because the credit statute at issue "merely regulates plaintiff's dealings with Wisconsin residents." *LaFollette*, 552 F.2d at 750; *see also Packel*, 524 F.2d at 49 (holding Pennsylvania's regulation of interest charged by out-of-state catalogue company did not violate the dormant Commerce Clause because it "merely seeks to afford uniform protection to all Pennsylvania residents with respect to [consumer credit interest] rates").

The district court in this case, however, chose to ignore *LaFollette* (along with the decisions from other circuits concerning state regulation of Aldens) because "in each of these cases, the customer was located in his or her home state when he or she ordered merchandise and entered into the purchase contract." App. at 17 n.10. However, those decisions placed no weight on that fact, and, as explained above, that fact is not legally relevant under blackletter contract law. Indeed, the Tenth Circuit explicitly "discarded, for these purposes, the established doctrines of reliance on place of sale, place of delivery, the 'presence' concept, place of contract,

and place of performance which may be well recognized for other purposes." *Aldens, Inc. v. Ryan*, 571 F.2d 1159, 1161 (10th Cir. 1978).[6]

Not only did the district court inappropriately disregard precedent, but it also gave inappropriate weight to *Dean Foods Co. v. Brancel*, 187 F.3d 609 (7th Cir. 1999). As an initial matter, this Court has previously held that the "reach of the language [in *Dean Foods*] should be confined to the type of facts in that case," *Alliant Energy*, 336 F.3d at 548, which dealt with discriminatory regulation that violates the core purpose of the dormant Commerce Clause, *see Dean Foods*, 187 F.3d at 611 ("Another apparent reason for the ban on these premiums is that smaller in-state processors are less likely to be able to pay them, thus threatening their future viability."). Moreover, *Dean Foods* involved the sale of physical goods governed by the Uniform Commercial Code, which has intricate, specific provisions that govern when and where a transaction occurs. *See id.* at 617. But the lending transactions at issue in this case are not governed by those provisions, and, more importantly, *LaFollette* dictates that the place of the transaction's consummation is irrelevant to determining whether a *lending transaction* is wholly extraterritorial. Just as the regulation in *LaFollette* did not violate the dormant Commerce Clause when it "merely regulates plaintiff's dealings with Wisconsin residents," the law at

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[6] Similarly, the district court erred in distinguishing the Tenth Circuit's holding that Kansas's regulation of out-of-state Internet payday lenders did not violate the extraterritorial principle on the ground that borrowers were physically present in Kansas at the time they applied for the loan. App. at 15-16. Although it is true that Kansas interpreted *its statute* to make "the borrower's physical location at the time of the solicitation . . . controlling," the Tenth Circuit noted even if this were not the case "other aspects of the transaction are very likely to be in Kansas" meaning "the transaction would not be wholly extraterritorial, and thus not problematic under the dormant Commerce Clause." *Quik Payday*, 549 F.3d at 1308.

issue here has no constitutional defect because it merely regulates plaintiff's dealings with Indiana residents.

C. Conflict of Laws Analysis Supports the Validity of Indiana's Usury Law.

The concept that states cannot apply their laws in a wholly extraterritorial fashion is not a concept exclusively found in the dormant Commerce Clause. *See* Donald H. Regan, *Siamese Essays: (I)* CTS Corp v. Dynamics Corp. of America *and Dormant Commerce Clause Doctrine; (II) Extraterritorial State Legislation*, 85 Mich. L. Rev. 1865, 1887-94 (1987) (finding aspects of the extraterritoriality principle in the Commerce, Privileges and Immunities, Due Process, and Full Faith and Credit Clauses, and ultimately determining it is not fully found in any particular Clause but in the "structure of our [Constitutional] system as a whole"). Moreover, cases involving extraterritorial application of state laws "form the bread and butter of the field of conflicts of laws." Goldsmith & Sykes, *supra*, at 790 n.26; *see also* Regan, *supra*, at 1885 ("There is one area of our jurisprudence in which extraterritoriality is regularly adverted to, namely conflict of laws.").[7] Therefore, any attempt to adjudicate whether a law is wholly extraterritorial for purposes of the dormant Commerce Clause should look toward conflict of laws analysis.

[7] There is substantial potential for constitutional tension to the extent that conflict of laws analysis and dormant Commerce Clause analysis deviate because conflict of laws analysis includes a constitutional component. S*ee* Goldsmith & Sykes, *supra*, at 806 (proposing a way to reconcile the dormant Commerce Clause extraterritoriality principle with constitutional limitations on choice of law); *see also* Appellant's Br. 24-28 (noting the constitutional tensions raised by the district court's ruling).

The Restatement (Second) of Conflict of Laws[8] applies the usury law of the state where the parties have the most "significant relationship" in cases involving interest "greatly in excess" of what is allowed under the forum's usury law. Restatement (Second) of Conflict of Laws §§ 188, 203 (1971). The Restatement looks to factors including "the location of the subject matter of the contract, and the domicil, residence, nationality, place of incorporation and place of business of the parties" to determine which state has the most significant relationship. *Id.* § 188. The application of those factors dictates that Indiana's usury law can apply to a contract signed outside of Indiana when, as here, Illinois law allows interest "greatly in excess" of interest allowable under Indiana law.

In contrast, the district court's formalistic reasoning on the locus of a debt contract would deem application of Indiana's usury law to any debt contract signed outside of Indiana to be a wholly extraterritorial exercise of power prohibited by the dormant Commerce Clause.[9] But as the Third Circuit has observed in rejecting a dormant Commerce Clause extraterritoriality challenge, "[w]hile a contract which covers multiple states may raise a difficult choice-of-law question, once that question is resolved there is nothing untoward about applying one state's law to the entire contract, even if it requires applying that state's law to activities outside the

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[8] Indiana has judicially incorporated the Restatement (Second) Conflict of Laws. *See*, *e.g.*, *Cooper Indus. v. City of South Bend*, 899 N.E.2d 1274, 1290-91 (Ind. 2009).

[9] Moreover, the district court's formalistic analysis would invalidate Indiana's "public policy" exceptions to the enforcement of a foreign law on dormant Commerce Clause grounds whenever the contract at issue is signed outside the state. *See*, *e.g.*, *Lake Shore & M.S. Ry. Co. v. Teeters*, 77 N.E. 599, 601-02 (Ind. 1906) (holding that a contract valid in New York, which waived a common carrier's liability for negligence, was unenforceable in Indiana as a violation of public policy).

state." *Instructional Sys., Inc. v. Computer Curriculum Corp.*, 35 F.3d 813, 825 (3d Cir. 1994).

Instead of considering the need to square the longstanding recognition and blessing of state usury laws with the Constitution, the district court blithely chided Indiana for drawing from interrelated legal principles, such as Due Process Clause jurisprudence. *See* App. at 16 n.9 (noting "[d]efendant at times seems to confuse a state's legislative reach with a state's judicial jurisdiction" allowed by the Due Process Clause). However, the Supreme Court has stated that due process analysis is quite relevant to application of the dormant Commerce Clause's extraterritoriality principle. *See Healy*, 491 U.S. at 336 n.13 (noting that the "limits on a State's power to enact substantive [extraterritorial] legislation" imposed by the dormant Commerce Clause "are similar to the limits on the jurisdiction of state courts"). Conflict of laws analysis is similarly relevant.

CONCLUSION

Given the many troubling features of high-interest car title loans, Indiana's legislature reasonably chose to protect its residents from them. Indiana is not acting *wholly* extraterritorially by regulating Midwest Title, which engages in substantial *Indiana-based* activities to promote, perfect, and collect on usurious car

title loans. The district court's opinion, which concluded otherwise, should be reversed.

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CERIFICATE OF COMPLIANCE

1. This brief contains 6,865 words and thus complies with the type-volume limitation of Fed. R. App. P. 29(d) because it is no more than one-half the maximum length authorized by Fed. R. App. P. 32(a)(7)(B).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and 7th Cir. R. 32(b), and the type style requirement of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaces typeface using Microsoft Office Word 2003 in 12-point Century.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of July 2009, I served two paper copies of the foregoing Brief for *Amici Curiae* in Support of Defendant-Appellant and Arguing for Reversal via First Class Mail, postage prepaid, on all parties herein to the following address:

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