

No. 24-50

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

SMALL BUSINESS FINANCE ASSOCIATION,

Plaintiff–Appellant,

v.

CLOTHILDE HEWLETT, solely in her official capacity as Commissioner of the
California Department of Financial Protection and Innovation,

Defendant–Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

The Honorable R. Gary Klausner
D.C. No. 2:22-cv-08775-RGK-SK

**BRIEF OF THE RESPONSIBLE BUSINESS LENDING COALITION
AS *AMICUS CURIAE* IN SUPPORT OF DEFENDANT-APPELLEE &
AFFIRMANCE OF THE OPINION BELOW**

Kevin R. Budner
Annie M. Wanless
LIEFF CABRASER HEIMANN
& BERNSTEIN, LLP
275 Battery Street, 29th Floor
San Francisco, CA 94111
Telephone (415) 956-1000

Counsel for Amicus Curiae Responsible Business Lending Coalition

AMICUS CURIAE DISCLOSURE STATEMENT

The Responsible Business Lending Coalition is not a corporation and thus makes no disclosure pursuant to Federal Rules of Appellate Procedure 26.1 and 29(a)(4)(A). The Coalition is composed of the following members:

- Accion Opportunity Fund
- Aspen Institute
- Bluevine
- Camino Financial
- Community Investment Management
- LendingClub
- National Association for Latino Community Asset Builders
- National Community Reinvestment Coalition
- Opportunity Finance Network
- Small Business Majority

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STATEMENT OF INTEREST OF *AMICUS CURIAE*¹

Amicus curiae the Responsible Business Lending Coalition (“RBLC”) is a leading national voice on small business financial protection. RBLC and its members represent over 1,000 small business groups, for-profit lenders, nonprofit community development financial institutions, civil rights and community groups, and tens of thousands of small businesses. These companies and nonprofits have come together to stop the rise of irresponsible small business financing and to encourage the innovation of more and better financing options for small businesses. To that end, RBLC developed the Small Business Borrowers’ Bill of Rights, a cross-sector consensus on responsible practice standards for small business financing, which includes standards for transparent pricing and terms.² RBLC worked with the California legislature to enact these transparency standards into law in Senate Bill 1235, resulting in the disclosure regulations at issue in this case.

¹ Pursuant to Rule 29(a)(4)(E) of the Federal Rules of Appellate Procedure, *amicus* states that no party or counsel for a party wrote this brief in whole or part or made a monetary contribution that was intended to fund its preparation or submission, and that no person other than *amicus* or their counsel made such a contribution. Defendant-Appellee consented to the filing of this brief; Plaintiff-Appellant Small Business Finance Association did not.

² The Small Business Borrowers’ Bill of Rights can be found at <http://www.borrowersbillofrights.org/bill-of-rights.html>. Since the creation of the Bill of Rights in 2015, nearly 60 lenders, brokers, and marketplaces have agreed to abide by the Rights.

As small business financing providers, RBLC’s members have an interest in the creation and enforcement of laws that ensure that all financiers are held to the same responsible standards, thereby protecting small businesses from predatory practices and fostering healthy price competition. RBLC submits this amicus brief to explain why disclosure regulations like California’s are necessary to help curtail abuse, enable price competition, and allow product comparison in the small business financing industry, all without placing undue burden on the financiers. This background will assist the Court’s analysis of the third prong of *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985), which considers whether the regulations are justified and not unduly burdensome.

In addition, to aid in the Court’s review, RBLC submits as **Exhibit A** a glossary of common terms in the small business financing industry.

I. INTRODUCTION

Before the passage of Senate Bill 1235 (“SB 1235”) in 2022, small businesses in California had no straightforward way to compare financing options when they needed money. Since the 2008 financial crisis, new products have proliferated in the small business financing industry. Small businesses now have more options when they need cash than ever before: They can take out a loan, a merchant cash advance (“MCA,” described in more detail below), a loan that works like a merchant cash advance, factoring financing, or lease financing, among

other options. Any of these options might be good for the small business if the financing company adheres to responsible practices, but obtaining financing is risky when a borrower cannot effectively compare products to pick the option that makes the most sense for their business needs. On top of that, before California's disclosure requirements took effect, the new financing frontier was vulnerable to predatory lending practices that obscured high rates and fees.

California sought to solve this problem with the passage of SB 1235, a “truth in lending” law for small businesses. California passed the law precisely because the disclosures previously used by certain financiers, including members of Plaintiff-Appellant Small Business Finance Association (“SBFA”), were widely considered to be insufficient. Without standardized disclosures that explained how repayment would operate and that calculated an Estimated APR, small business owners were inhibited in comparing financing options. As a result, small business owners were selecting options that they incorrectly believed to be more affordable than others, which led them to pay unnecessary interest and fees that reduced their ability to grow, to hire and create new jobs, or to build wealth for their families. Increasingly, small businesses were falling into unaffordable financing that contributed to their businesses' failure.

In this litigation, Appellant SBFA tries and fails to argue that California's disclosure regulations force financiers to say something untrue. But the disclosures

simply require financiers to state a truth they would rather not share: that their products are more costly than they would like small business borrowers to believe. Small businesses need these disclosures to effectively compare products and pick the best option to allow business to thrive. Moreover, when the price of financing products is obscured from comparison, those financing products are not subject to price competition. This may prevent prices from being driven down and reduce market incentive for innovations that could lower the price of financing for all.

California's disclosure regulations apply to a broad range of financing options—be it a traditional loan, open-end credit, or sales-based financing—to ensure that small business owners receive standardized, straightforward information when taking on a big financial commitment. The disclosure regulations enable small business owners to pick the best, most affordable option. The resulting savings are crucial for these small businesses to grow, create jobs, and in some cases, even remain solvent.

Disclosure regulations are also critical to protect small businesses from predation and enable more effective comparison between financing options. It is no coincidence that the entities that oppose transparent price disclosure in small business financing are a subset of financing companies who tend to charge high prices and—prior to the disclosure regulations—did not disclose those high prices transparently. As the past two years have demonstrated, California's disclosure

regulations impose no undue burden on financiers while greatly assisting small businesses' ability to pick the best option to meet their financial needs.

II. ARGUMENT

As small businesses gained access to more financing options in recent years, they also became susceptible to new predatory lending schemes. A key problem was that some financial products were offered using terms that obscured the true price of accepting money. Small businesses were therefore handicapped in comparing products and inadvertently accepted money with higher rates, especially as high-cost products crowded the lending space and directly targeted small business owners. After regulators and small businesses pushed for transparency, California passed SB 1235, which requires small business financiers to provide a disclosure that uses commonly understood terminology and to calculate Estimated APR (among other terms) so that borrowers can make a more informed choice. California's disclosure regulations enable healthy price competition and protect small businesses without unduly burdening financiers.

A. Before California's Disclosure Regulations, the Small Business Financing Market Offered Many Options but Few Protections.

Today, the small business financing industry is more diverse than ever. Following the development of new, innovative products, small businesses can now borrow money in a variety of ways. But along with a proliferation of products came a proliferation of predatory lending practices. Before the disclosure

requirements took effect, small businesses struggled to carefully navigate the range of financing options.

1. **In Recent Years, the Small Business Financing Market Has Grown to Include More Financial Offerings Than Ever Before.**

Non-traditional lending sources can be critical for small businesses' success. Despite having financing needs like larger businesses, small businesses have historically struggled to access cash from traditional lenders such as banks. This is in part because small businesses need smaller loans: The vast majority of small businesses—over 70 percent—seek loans under \$250,000. Karen Mills & Brayden McCarthy, *The State of Small Business Lending: Innovation & Technology & the Implications for Regulation*, Working Paper 17-042, Harvard Business School, at 6 (2016).³ More than 60 percent want loans under \$100,000. *Id.* These smaller loans require essentially the same costs to administer as much larger loans, but with more risk and less potential for profit.⁴ Ben Wieder, *Their Bakery Faced a Cash Crisis. The Solution Nearly Cost Them the Business.*, McClatchy DC (July 5,

³ Accessible at: https://www.hbs.edu/ris/Publication%20Files/17-042_30393d52-3c61-41cb-a78a-ebbe3e040e55.pdf.

⁴ Small businesses are generally seen as riskier borrowers because they have higher failure rates and fewer assets to put up as collateral for loans. *See, e.g.*, Mills & McCarthy, *supra*, at 37. While this risk profile may justify marginally higher interest rates, it does not justify deception about the true nature of interest rates.

2023).⁵ During the 2008 financial crisis, small business lending by traditional banks came to a “virtual standstill,” and has not fully recovered. Barbara Weltman, *10 Years After the Financial Crisis: The Impact on Small Business*, Investopedia (Feb. 27, 2023).⁶ Thus, while some small businesses are able to obtain loans from traditional lenders, many are not.

As the recession ended, a plethora of new financing products beyond standardized bank loans emerged in the small business financing market. These included offerings by financial technology (“fintech”) firms, a growth of community development financing from nonprofits, and other alternative lending offerings. The rise of new financing options “almost perfectly offset the reduction in bank lending across counties” during the recession. Manasa Gopal & Philipp Schnabl, *The Rise of Finance Companies and FinTech Lenders in Small Business Lending*, 35:11 Rev. Fin. Stud. 4859, 4862 (Nov. 2022).⁷ Though virtually non-existent before 2010, these “alternative” lenders accounted for nearly 60 percent of the small business lending market by 2016. *Id.* at 4860.

In some cases these new, tech-based lenders have expanded access to the

⁵ Accessible at: <https://www.mcclatchydc.com/news/nation-world/national/article212524749.html>.

⁶ Accessible at: <https://www.investopedia.com/small-business/10-years-after-financial-crisis-impact-small-business/>.

⁷ Accessible at: <https://academic.oup.com/rfs/article/35/11/4859/6607597>.

financial market. As one Federal Reserve research paper concluded, “Overall, fintech lenders have a potential to create a more inclusive financial system, allowing small businesses that were less likely to receive credit through traditional lenders to access credit and to do so at lower cost.” Giulio Cornelli, Jon Frost, Leonardo Gambacorta & Julapa Jagtiani, *The Impact of Fintech Lending on Credit Access for U.S. Small Businesses*, Fed. Res. Bank of Philadelphia, WP22-14 at 1 (Apr. 2022).⁸ One fintech lender that partnered with a nonprofit noted “5x and 4x the representation of minority-owned- and women-owned businesses, respectively, in our small business lending, compared to traditional banks.” *Our Impact-LendingClub’s 2022 Envir., Social & Corp. Gov. Report*, LendingClub (2022).⁹ “New tech-based alternative lenders are providing easy to use online applications, rapid loan underwriting, and a greater emphasis on customer service. Many are developing data driven algorithms to more accurately screen creditworthy borrowers.” Mills & McCarthy, *supra*, at 6. In various ways, more small businesses have more access to cash than ever before.

⁸ Accessible at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4093443.

⁹ Accessible at: https://www.responsibilityreports.com/HostedData/ResponsibilityReports/PDF/NY_SE_LC_2022.pdf.

2. **Without Regulation, However, Bad Actors in the Financing Industry Can Readily Prey on Small Businesses.**

While the small business financing industry is poised to produce better options for small businesses, it is also rife with predatory practices. Most small business owners run one-person shops and may not have a CFO or any specialized financial knowledge. Yet, “[s]mall business borrowers [were historically] not afforded protections that consumer borrowers rely on,” such as the Truth in Lending Act. *See Wieder, Their Bakery Faced, supra*. Thus, the “emergence of ‘bad actors’ and worrisome practices has gained the attention of a number of the regulatory bodies,” including, of course, California. *See Mills & McCarthy, supra*, at 4. One set of products in particular is often associated with predatory practices: sales-based financing (“SBF”), especially the merchant cash advance (“MCA”). Notably, this is the same product that Appellant SBFA most ardently argues is incompatible with California’s disclosure laws.

An MCA is a type of SBF in which lenders “buy” a percentage of the small business’s future sales. *See Ex. A (Glossary)*. In essence, the lender gives the business a large upfront payment, and then collects that sum—plus fees and other charges—by collecting a portion of the small business’s subsequent sales directly from the business’s bank account or credit card payment system. Ben Wieder, *Even Finance Whizzes Say It’s Impossible to Compare Online Small Business Loan*

Options, McClatchy DC (June 19, 2023).¹⁰ The lender is able to withdraw “repayments” daily. These products have proliferated in recent years: While MCAs totaled \$8.6 billion in small business funding in 2014, by the end of 2019 the amount had more than doubled to \$19.2 billion. Noel Sanchez, *Small Companies, Big Dreams: How Predatory Lending is Destroying Small Business*, LinkedIn (Feb. 3, 2021).¹¹

The dearth of regulations governing SBFs rendered them susceptible to abuse. SBFs are identified by Federal Reserve researchers as “higher-cost and less transparent credit products.” *Small Business Credit Survey: Report on Minority-Owned Firms*, Fed. Res. Bank of Atlanta, at IV (Dec. 2019).¹² Indeed, MCAs commonly have APRs ranging from 60 to 350 percent, with rates up to 800 percent reported. *See Zeke Faux & Zachary Mider, Cash-Advance Pioneer Yellowstone Sued by New York for \$1.4 Billion*, Bloomberg (Mar. 5, 2024)¹³; Eric Weaver, *Unaffordable and Unsustainable: The New Business Lending on Main Street*,

¹⁰ Accessible at: <https://www.mcclatchydc.com/news/nation-world/national/article212491199.html>.

¹¹ Accessible at: <https://www.linkedin.com/pulse/small-companies-big-dreams-how-predatory-lending-noel-sanchez-cfe/>.

¹² Accessible at: <https://www.atlantafed.org/community-development/publications/partners-update/2020/01/200108-report-on-minority-owned-small-businesses>.

¹³ Accessible at: <https://www.bloomberg.com/news/articles/2024-03-05/cash-advance-pioneer-yellowstone-capital-sued-by-new-york-for-1-4-billion>.

Opportunity Fund, at 3 (May 2016).¹⁴ For reference, the loans backed by the U.S. Small Business Administration have a maximum APR of 16.5 percent. Sarah George, *Average Business Loan Interest Rates in 2024*, Bankrate (July 30, 2024).¹⁵

This problem is exacerbated by the fact that a subset of predatory firms use “high pressure sales tactics to entice unsuspecting small business owners into signing contracts that can be the gateway to financial ruin.” Renee Moore, *Small Business, Big Target: Predatory Lenders Take Aim at Struggling Businesses*, Daily Record (Nov. 27, 2023).¹⁶ These lenders hire brokers who call “truckers, contractors and florists across the country pitching loans with annual interest rates as high as 125 percent.” Zeke Faux, *Wall Street Finds New Subprime With 125% Business Loans*, Bloomberg (May 22, 2014).¹⁷ Such tactics work because, as the Federal Trade Commission has observed, “businesses desperate for funding often seek out MCAs in the short term because they are quick and easy to obtain, but then suffer negative long-term consequences.” FTC Bureau of Consumer Prot.,

¹⁴ Accessible at: https://aofund.org/app/uploads/2021/03/Unaffordable-and-Unsustainable-The-New-Business-Lending-on-Main-Street_Opportunity-Fund-Research-Report_May-2016.pdf.

¹⁵ Accessible at: <https://www.bankrate.com/loans/small-business/average-business-loan-rates/#average>.

¹⁶ Accessible at: <https://nydailyrecord.com/2023/11/27/small-business-big-target-predatory-lenders-take-aim-at-struggling-businesses-civil-litigation/>.

¹⁷ Accessible at: www.bloomberg.com/news/articles/2014-05-22/wall-street-finds-new-subprime-with-125-business-loans.

“*Strictly Business*” Forum: Staff Perspective, FTC.gov, at 6 (Feb. 2020).¹⁸

In short, “[t]his is the new predatory lending. And the predators, just as they did in the mortgage market, have gotten increasingly aggressive.” Faux, *supra*. As the small business financing industry grew, so too did the need to ensure small businesses had the tools to assess new products and pick the best financial offering for their firms.

B. California’s Disclosure Regulations Are Justified Because Some Lenders Offered Misleading Disclosures That Inhibited Product Comparison.

As financial product offerings continued to proliferate, small business owners’ dissatisfaction with those products’ disclosure terms became increasingly clear. Federal Reserve researchers and journalists suggest two themes: first, existing disclosures were misleading and made it challenging to compare financing products; and second, “[v]irtually all” small business owners “want[ed] clearly stated product features and costs and an easier way to compare product offerings.” See Barbara Lipman & Ann Marie Wiersch, *Alternative Lending Through the Eyes of “Mom-and-Pop” Small-Business Owners*, Fed. Res. Bank of Cleveland, at 3

¹⁸ Accessible at: https://www.ftc.gov/system/files/documents/reports/staff-perspective-paper-ftcs-strictly-business-forum/strictly_business_forum_staff_perspective.pdf.

(Aug. 25, 2015).¹⁹ Most often, small business owners suggested disclosing APR. *See id.* Without these clear disclosures, small businesses faced increasing harm, including bankruptcy.

1. **Without Disclosure Regulations, Irresponsible Lenders Hid the Fine Print.**

Before California enacted the regulations at issue, some financing companies made it difficult to understand how expensive or unfavorable their products were. One Federal Reserve research report on online lenders (including several companies associated with Appellant SBFA) found that many lenders—especially those offering MCAs—provided information about their financing products that was incomplete, confusing, and not standardized. Barbara Lipman & Ann Marie Wiersch, *Uncertain Terms: What Small Business Borrowers Find When Browsing Online Lender Websites*, Bd. of Govs. of the Fed. Res. Sys., at 1 (Dec. 2019).²⁰ For example, some lenders provided costs in the form of an annual rate excluding fees, some described actual costs but only for one product, and some used “nontraditional terminology” such as “factor rate,” “fee rate,” or “simple interest.” *Id.* at 17; *see Ex. A (Glossary)*. The only commonality among these

¹⁹ Accessible at: <https://www.clevelandfed.org/publications/cd-reports/2015/sr-20150825-alternative-lending-through-the-eyes-of-mom-and-pop-small-business-owners>.

²⁰ Accessible at: <https://www.federalreserve.gov/publications/files/what-small-business-borrowers-find-when-browsing-online-lender-websites.pdf>.

atypical representations was their propensity to market a percentage that is misleadingly lower than the APR, were it to be disclosed transparently.

These confusing disclosures and the use of nontraditional terminology led small business owners toward more costly financing products. For instance, focus group participants studying alternative lenders' online offerings were often wrong about which products offered the best value. “[W]hen asked to compare a sample short-term loan product with a 9 percent ‘simple interest’ rate to a credit card with a 21.9 percent interest rate, most participants incorrectly guessed the short-term loan to be less expensive.” *Id.* at 19. Participants were also largely unable to guess the effective interest rate on a \$50,000 MCA with a factor rate of 1.2 and a total repayment of \$60,000. *Id.* While the effective rate of such a product (assuming daily payments and steady sales), would be around 40 percent, small business owners guessed anywhere from 10 to 50 percent. *Id.* This confusion favors higher-cost products with unclear terms, allowing irresponsible lenders to dominate the market and stifle price competition that naturally emerges in transparent markets.

Given the lack of transparency standards until the regulations were in place, it is no surprise that small business owners—many of whom are not finance experts—were being misled. In another study, small business owners were asked to evaluate several credit products using information provided on lenders' websites. Even those who said it would be “easy” to do so “expressed uncertainty or

answered questions incorrectly when making specific product comparisons.”

Lipman & Wiersch, *Alternative Lending, supra*, at 3. In another study, the “variation in product cost descriptions was confusing” to the surveyed small business owners. Lipman & Wiersch, *Uncertain Terms, supra*, at 17. It was “challenging to determine products’ actual costs to compare products when descriptions used unfamiliar or varying terminology.” *Id.* When asked to guess, small business owners universally underestimated the effective interest rate or APR of an MCA. *See* Lipman & Wiersch, *Alternative Lending, supra*, at 15.

As a result, small businesses may often inadvertently sign contracts for products with terms that differ from those for which they believed they had applied, and which may be more expensive than their other financing options. *See* Ann Marie Wiersch, Barbara Lipman, Kim Wilson & Lucas Misera, *Clicking for Credit: Experiences of Online Lender Applicants from the Small Business Credit Survey*, Fed. Res. Bank of Cleveland, at 13 (Aug. 16, 2022).²¹ These studies suggest that “small businesses may not fully understand the cost and terms of some online financing products until after they are approved or funded.” *Id.* at 14. Again, the only winners are the irresponsible lenders, who are able to charge high effective rates, knowing customers cannot compare their products to those offered

²¹ Accessible at: <https://www.clevelandfed.org/publications/cd-reports/2022/sr-20220816-clicking-for-credit-experiences-of-online-lender-applicants-from-sbcs>.

by responsible lenders.

2. **The Inability to Clearly Compare Financing Products Has Pushed Some Small Businesses to Bankruptcy.**

When small businesses unknowingly accept financing options that may not be the lowest cost or best fit for their needs, they suffer real harm. As one example, the number of bankruptcies associated with MCAs has risen considerably, with one analysis finding the number nearly quadrupled from 2013 to 2017. Wieder, *Their Bakery Faced*, *supra*. Over 100 businesses that filed for bankruptcy in 2023 “attributed their bankruptcies at least partly to cash advances.” Becky Yerak, *An Easy Financing Source Pushes Some Small Businesses Into Bankruptcy*, Wall Street J. (Feb. 19, 2024).²² This comes as no shock when one study found the *average* (and undisclosed) APR of a set of online financing products was 94 percent. Weaver, *supra*, at 3. As one U.S. bankruptcy judge has noted, MCAs “very often seem to be the . . . cause[] [of] the bankruptcy.” Yerak, *supra*.

Amicus RBLC’s small business members routinely uncover instances of small businesses paying rates that prove unaffordable and push them towards bankruptcy. So do journalists. For example, Bunnie Cakes Bakery needed cash for store repairs after it signed a contract with Whole Foods. But what should have been a huge opportunity turned into near ruin after Bunnie Cakes signed two

²² Accessible at: <https://www.wsj.com/articles/an-easy-financing-source-pushes-some-small-businesses-into-bankruptcy-c2b2ad1b>.

financing agreements and ended up with an effective annual rate of roughly 60 percent. Weider, *Their Bakery Faced, supra*. In another example, a veteran who started a refrigeration company borrowed money, not knowing that the true APR of the loan was 62 percent. Laura Shin, *Why Online Small Business Loans Are Being Compared to Subprime Mortgages*, Forbes (Dec. 10, 2015).²³ In yet another example, a small vegan-burger business took out what it thought was an \$85,000 loan from Credibly. But this “loan” was actually an MCA, through which Credibly collected \$577.40 daily from the owner’s bank account. Paolo Bicchieri, *This Popular Oakland-Based Vegan Burger Restaurant Has Filed for Bankruptcy Protection*, EaterSF (Mar. 21, 2022).²⁴ Whether the financing was a loan or an MCA, the business could not afford the terms to which it had unknowingly agreed.

These stories are not isolated incidents. Just as in the lead up to the subprime mortgage crisis, when predatory financing options flood the market, unscrupulous financiers are able to use their inflated profits to pay higher rates for brokers, online advertising, and other lead generators to reach borrowers before lower-priced financing options can. This can have the effect of squeezing the lower-

²³ Accessible at: <https://www.forbes.com/sites/laurashin/2015/12/10/why-online-small-business-loans-are-being-compared-to-subprime-mortgages/?sh=460b11192889>.

²⁴ Accessible at: <https://sf.eater.com/2022/3/21/22989335/mailbus-oakland-vegan-burger-restaurant-bankruptcy>.

priced options out of the market. Small business owners typically do not care whether their products are loans, cash advances, or something else, but they care when misleading terms lead to harm. Transparent disclosure laws like California's—which apply to traditional loans and SBF products alike—are needed to stop the carnage.

3. **Small Businesses Advocated for Disclosure of Estimated APR to Effectively Compare Financial Products.**

When the real costs of financial offerings are not plainly disclosed, it becomes nearly impossible for small business owners to compare products. California's disclosure requirements enable these businesses to shop between financing options, especially by requiring financiers to disclose borrowers' most-requested tool: Estimated APR. When surveyed, small business owners have repeatedly requested standardized APR be used to describe all products. Wiersch et. al, *Clicking for Credit, supra*, 18; see also Lipman & Wiersch, *Alternative Lending, supra*, at 3. Federal Reserve researchers found that disclosure of even estimated or average costs would be useful. Wiersch et. al, *Clicking for Credit, supra*, at 14. This was true whether the product was a term loan or an MCA. “In practice, both of these credit products are unsecured and often carry effective interest rates that exceed those of traditional bank products.” Lipman & Wiersch, *Alternative Lending, supra*, at 4. The ability to compare products using APR was thus critical.

As one San Francisco small business owner explained, when estimated APR is not a required disclosure, sales-based financiers “do everything in their power to make sure that you can’t compare A to B.” Wieder, *Even Finance Whizzes*, *supra*. In short, “[w]ithout clearly advertised APRs, even small business borrowers that could qualify for better rates cannot easily compare loans to each other to find the cheapest loan or to decide for themselves if it’s worth it to pay more to receive the money quickly or to pay a higher APR in order to pay a lower total amount for their loan.” Shin, *supra*. By requiring disclosure of estimated APR, California’s regulations help small businesses comparison shop and better understand their financing options, thereby enabling healthy price competition within industry. These responsible disclosures have the potential to lower prices and produce innovation in the small business financing market.

C. By Using Common Sense Terminology and Requiring Calculation of Estimated APR, the California Disclosure Regulations Protect Small Businesses and Enable Product Comparison Without Unduly Burdening Financiers.

As more small businesses accessed new financial offerings and expressed discontent with the difficulty of comparing financing prices, California enacted SB 1235 “to ensure uniform disclosure of the costs of these less conventional offerings.” Wieder, *Their Bakery Faced*, *supra*. The law requires small business financiers to disclose basic information about the money borrowers will receive: the total amount of funds provided; the total dollar cost of the financing; the term

or estimated term; the method, frequency, and amount of payments; a description of prepayment policies; and the estimated APR. *See* Cal. Fin. Code §§ 22800, 22802(b). The language required by the disclosures comports with language already used in the small business financing industry. Moreover, while Appellant SBFA takes issue with disclosure of Estimated APR, financiers are already easily calculating this critical information.

1. **The Factual Disclosure Language Required by the Regulations Uses Common Sense Terminology that Small Business Financiers and Borrowers Understand.**

The terms used by California’s disclosure regulations are standard, accurate, and easy-to-understand. Appellant takes issue with required terms such as “owe,” claiming such terms are not appropriate in the sales-based financing market, because SBFs are not loans. *See* Dkt. 13.1 at 10. But a review of websites of financiers associated with Appellant SBFA reveals that even this group of alternative lenders regularly refers to sales-based financing products using common-sense loan terminology.²⁵ Indeed, on its website, SBFA itself explains

²⁵ SBFA’s current membership is unknown, as its “Members” webpage is currently blank: <https://sbfassociation.org/members/>. All companies mentioned here, however, have been publicly connected to SBFA. *See, e.g., Joe, Should You Take For a Financial Reviews With a Grain of Salt*, BusinessCredit (2024) (explaining Fora Financials CEO was a board member of SBFA), <https://www.businesscreditworkshop.me/articles/fora-financial-reviews/>; *Rapid Finance a Diamond Sponsor of B2B Finance Expo*, deBanked (Aug. 8, 2024) (Rapid Finance CEP describing company as “founding board member of the SBFA”), <https://debanked.com/2024/08/rapid-finance-a-diamond-sponsor-of-b2b->

that its “mission is to educate policymakers and regulators about the technology-driven platforms emerging in the small business *lending* market.” *What is the Small Business Finance Association?*, SBFA, <https://sbfassociation.org/> (last accessed Sept. 11, 2024) (emphasis added). In its complaint below, however, SBFA made a telling (and misleading) edit, representing that its “mission is to educate policymakers and regulators about the technology-driven platforms emerging in the small business *financing* market.” E.R. 1108 at ¶ 4 (Complaint). This surreptitious substitution speaks volumes. Although SBFA’s lawyers apparently now recognize it undermines their arguments, Appellant SBFA used—and continues to use—the word “lending” on its public-facing website because it is a truthful and widely accepted characterization of its members’ products. As SBFA’s statement implies, SBF products are routinely considered to be part of the lending market.

Additional examples abound. Fora Financial explains its revenue advance by stating: “You’ll *borrow* \$5,000 to \$1.5 million with variable terms against future revenue.... When sales are up, you’re *paying off* your advance faster.” *The*

finance-expo/; Steve Daniels, *SBFA Releases Best Practices for the Alternative Finance Industry*, SBFA (Apr. 12, 2016) (president of SBFA was also CEO of Capify); *An Insightful Conversation with Steve Denis of the SBFA: Regulations, Trends, and What’s to Come in 2024*, Elevate Funding (2024) (“Elevate Funding is a member of the SBFA”), <https://elevatefunding.com/interview-sbfa-regulations-trends/>.

Revenue Advance: Flexible Terms for Your Growing Business, Fora Financial, <https://www.forafinancial.com/loans-and-financing/revenue-advance/> (last accessed Sept. 11, 2024) (emphasis added). Similarly, Capify explains that its “Merchant Cash Advance program allows you to *pay back* your advance...” A *Simple Way to Finance Your Business*, Capify, <https://www.capify.us/> (last accessed Sept. 11, 2024) (emphasis added). Likewise, Elevate Funding explains that with revenue-based financing, a small business’s “*payback* percentage” will be fixed. *Is Revenue-Based Finance Right for Your Business?*, Elevate Funding, <https://elevatefunding.com/is-revenue-based-finance-right-for-your-business/> (last accessed Sept. 11, 2024) (also noting that “Revenue-Based Finance is formerly and alternatively known as Merchant Cash Advance, or MCA”). All these companies agree that small businesses “borrow” money that they must “pay back,” yet maintain the position that small businesses do not “owe” them anything.

The fact that money is “owed” in SBF transactions is especially apparent when small businesses fail to pay. Some financing firms quickly resort to abusive collection tactics. One prominent example is the use of the confession of judgment, a contractual clause (banned in consumer contracts) included in many MCA agreements that allows lenders to seize cash in the borrowers’ bank account without notice or evidence. Faux & Mider, *supra*; see **Ex. A (Glossary)**. The Federal Trade Commission has also accused MCA companies of making

“unauthorized withdrawals from consumers’ accounts and us[ing] unfair collection practices, including sometimes threatening physical violence.” *Merchant Cash Advance Providers Banned from Industry, Ordered to Redress Small Businesses*, Fed. Trade Comm. (Jan. 5, 2022).²⁶ The rush to collect this debt contradicts Appellant’s claims that small business owners do not “owe” the financing amount. Because small business financiers are already using loan terminology to speak to borrowers, the standard disclosure requirements are appropriate.

2. **Financing Companies Are Already Easily Computing Estimated APR.**

Complaints about calculating Estimated APR similarly lack credibility. APR is an algebraic formula that has been used nationally since the Truth in Lending Act passed in 1968, well before computers, or even electronic calculators, were widely available. Today, computing the APR for an SBF product can be automated or completed manually in a matter of seconds in common spreadsheet software such as Microsoft Excel. Although it may not be obvious, the estimated APR a small business is expected to pay is the same rate the financing company expects to earn. *See, e.g.*, 12 C.F.R. § 1026 (Reg. Z), Comment for 1026.22 – Determination of Annual Percentage Rate, at 4 (explaining APR can be calculated using internal

²⁶ Accessible at: <https://www.ftc.gov/news-events/news/press-releases/2022/01/merchant-cash-advance-providers-banned-industry-ordered-redress-small-businesses>.

rate of return).²⁷ Presumably, financing companies can calculate the yields they expect to earn on their transactions, and the disclosures simply require making this information available to financiers and borrowers alike.

Unsurprisingly, then, many SBF companies already calculate APR—for profit. For example, Rapid Finance (one of Appellant SBFA’s founding board members) markets a software program that enables “business lenders and financing companies to quickly and easily produce compliant disclosure statements at a state-by-state level.” *Rapid Finance Announces Availability of API Service to Support State-Level Business Lending Disclosure Requirements*, Businesswire (Dec. 9, 2022).²⁸ The program “efficiently” calculates APR. *See id.* In addition, quite a few websites offer sales-based financing APR calculators, which consider the up-front amount, factor rate, payment structure, and estimated monthly sales to determine the APR.²⁹ *See, e.g., Merchant Cash Advance Calculator: Find the True Cost of an*

²⁷ Accessible at: <https://www.consumerfinance.gov/rules-policy/regulations/1026/interp-22/#22-a-1-Interp-2>.

²⁸ Accessible at: <https://www.businesswire.com/news/home/20221209005058/en/Rapid-Finance-Announces-Availability-of-API-Service-to-Support-State-Level-Business-Lending-Disclosure-Requirements>.

²⁹ Even when sales-based financing products do not have a set date by which the agreed upon amount must be repaid, the date that repayment will be complete is easily calculated using either the fixed daily payment amount required by the contract, or by projecting the business’s sales and determining how long it will take the business to repay the contractual amount owed. This repayment term is used to calculate Estimated APR. *See, e.g., Brief of Responsible Business Lending*

MCA, NerdWallet (Feb. 28, 2024).³⁰

APR is the “keystone” of a disclosure system intended to promote truth in lending. *See, e.g.*, Letter from Carolyn Carter, Deputy Director, National Consumer Law Center, to Louis Caditz-Peck, Public Policy & Regulatory Director, Lending Club, and Heidi Pickman, Associate Director, CAMEO (July 30, 2018).³¹ It is “designed to capture the true cost of credit, taking into account both the interest rate and flat fees.” *Id.* Estimated APR enables borrowers to make an “apples-to-apples” comparison between the cost of two products, even if those products are “different amounts, have a different mix of interest and flat fees, are repayable over different lengths of time, or have irregularities in the amounts of due dates of payments.” *Id.* There is nothing unduly technical, misleading, or otherwise burdensome about basic disclosure laws such as California’s. Arguments to the contrary are disingenuous.

Coalition, Community Reinvestment Alliance of Florida, and Center for Responsible Business Lending as Amicus Curiae Supporting Defendants, *Revenue Based Financing Coalition v. Consumer Fin. Protection Bureau*, No. 1:23-cv-24882-DSL, at 3-4 (S.D. Fla. 2024) (Dkt. 28-1).

³⁰ Accessible at: <https://www.nerdwallet.com/article/small-business/merchant-cash-advance-mca-calculator>.

³¹ Accessible at Appendix B (PDF pages 86-88): http://www.borrowersbillofrights.org/uploads/1/0/0/4/100447618/sb_1235_support_coalition_and_rbfc_comment_-_small_business_disclosures_file_no_pro_01-18.pdf.

III. CONCLUSION

As small businesses gained access to new forms of financing, the potential for predatory lending grew. In response, California's transparent disclosure regulations enable small businesses to effectively compare products and pick the best option to help their businesses thrive. These regulations use common sense terminology and do not ask financiers to do anything that would cause burden. The RBLC respectfully submits that the decision below should be affirmed.

Dated: September 19, 2024

/s/ Kevin R. Budner

Kevin R. Budner
Annie M. Wanless
Lieff Cabraser Heimann & Bernstein LLP
275 Battery Street, 29th Floor
San Francisco, CA 94111
Telephone: (415) 956-1000

*Counsel for Amicus Curiae Responsible
Business Lending Coalition*

CERTIFICATE OF COMPLIANCE

I am counsel for amicus curiae Responsible Business Lending Coalition.

This brief contains 5278 words, excluding the items exempted by Federal Rule of Appellate Procedure 32(f). I certify that this brief is an amicus brief and complies with the word limit of Rule 29(a)(5). The brief's size and typeface comply with Rules 32(a)(5) and (6).

Dated: September 19, 2024

/s/ Kevin R. Budner
Kevin R. Budner

CERTIFICATE OF SERVICE

I certify that, on September 19, 2024, Amicus Curiae Responsible Business Lending Coalition electronically filed the foregoing using the Court's ACMS system, which will serve all parties via their counsel of record.

Dated: September 19, 2024

/s/ Kevin R. Budner

Kevin R. Budner