

Oppose H.R. 3299 (McHenry) and S. 1642 (Warner),
Protecting Consumers' Access to Credit Act of 2017

November 29, 2017

Dear Members of Congress:

The undersigned **202 national and state organizations** write in strong opposition to H.R. 3299 (McHenry) and S. 1642 (Warner), the Protecting Consumers' Access to Credit Act of 2017. The primary impact of this bill will be enabling nonbank lenders to make high-cost loans that exceed state interest rate limits by using a bank to originate the loan. The bill poses a serious risk of enabling predatory lending and unsafe lending practices. Unaffordable loans have devastating consequences for borrowers—trapping them in a cycle of unaffordable payments and leading to harms such as greater delinquency on other bills.

Specifically, the bill makes it easier for payday lenders and other nonbanks to use rent-a-bank arrangements to ignore state interest rate caps and make high-rate loans. The bill overrides the Second Circuit's *Madden v. Midland* decision, which held that a debt buyer purchasing debts originated by a national bank could not benefit from the National Bank Act's preemption of state interest rate caps. The *Madden* decision did not limit the interest rates that banks may charge on credit cards and other forms of credit, but it does limit nonbanks from evading state interest rate caps. Reversing the Second Circuit's decision, as this bill seeks to do, would make it easier for payday lenders, debt buyers, online lenders, fintech companies, and other companies to use "rent-a-bank" arrangements to charge high rates on loans.

The bill provides that "a loan that is valid when made as to its maximum rate of interest ... shall remain valid with respect to such rate regardless of whether the loan is subsequently sold, assigned, or otherwise transferred to a third party, and may be enforced by such third party notwithstanding any State law to the contrary." In other words, if a bank originates a loan that exceeds state interest rate caps, and then sells or assigns the loan to a nonbank, that nonbank can continue to charge a usurious rate.

This bill could open the floodgates to a wide range of predatory actors to make loans at 300% annual interest or higher. The bill could bless arrangements such as the partnership between the payday lender Elevate and Republic Bank, through which Elevate is making high-cost loans that exceed state interest rate caps. Through its Elastic brand, Elevate offers purportedly open-end loans in 39 states and the District of Columbia.¹

¹ See <https://www.elastic.com/FAQs/> (answer to "What states are currently served by Elastic?").

Elevate does not disclose an APR, but a \$380 advance repaid with monthly minimum payments would cost \$480 to repay over five months.² Including all fees, the annual rate for this extension of credit is about 100%, which is nearly three times the 36% legal interest rate approved by voters in Montana, one of the states where the lines of credit are offered. Through its Rise brand, Elevate also makes closed-end loans at rates up to 365% in states where those rates are permitted,³ and it could attempt to expand to other states.

Enova, dba NetCredit, also offers high-cost installment loans in a number of states through a rent-a-bank partnership. Enova, like Elevate, relies on Republic Bank and Trust to facilitate this scheme.

Other payday lenders have regularly attempted to avoid state usury caps through rent-a-bank arrangements. For example, CashCall has attempted to partner with banks to make usurious loans in several states. Courts have struck down those arrangements, finding that CashCall had to comply with state interest rate caps.⁴ The bill could undermine these decisions, by stating that a loan's interest rate remains valid even if a loan is transferred or assigned to a third party and "may be enforced by such third party notwithstanding any State law to the contrary." This could allow high-rate lenders to use banks to originate and then immediately transfer usurious loans.

This bill is a massive attack on state consumer protection laws. In a letter by 20 State Attorneys General opposing provisions in another bill that would have overturned the *Madden* decision, the state law enforcement officers warned that the bill "would restrict states' abilities to enforce interest rate caps. It is essential to preserve the ability of individual states to enforce their existing usury caps and oppose any measures to enact a federal law that would preempt state usury caps."⁵ In fact, the Colorado Attorney General is in the midst of challenging online lenders' use of a rent-a-bank scheme to make loans in violation of the state's usury limits.⁶ This bill aims to thwart actions like these that seek to enforce state laws.

The potential costs and damage to consumers are significant. In about 34 states, a \$2,000 loan, 2-year installment loan at an APR exceeding 36% would be illegal.⁷ This bill risks making high-cost loans permissible across the country. The bill also could potentially expand short-term payday lending to the 15 states plus the District of Columbia whose state interest rate limits currently save borrowers over \$2.2 billion annually in payday loan fees.

² See <https://www.elastic.com/what-it-costs/> (Fees and Charges).

³ See <http://www.risecredit.com>.

⁴ See, e.g., *CashCall, Inc. v. Maryland Com'r of Financial Regulation*, 139 A.3d 990 (Md., Ct. App. 2016); *CashCall, Inc. v. Morrissey*, 2014 WL 2404300 (W. Va. May 30, 2014).

⁵ Letter from Eric T. Schneiderman, New York Attorney General, to Paul Ryan, Speaker, U.S. House of Representatives, et. al. (June 7, 2017), available at https://ag.ny.gov/sites/default/files/6.7.2017_choice_act_letter.pdf.

⁶ "Colorado Moves to Dismiss Lawsuits by Banks Seeking Judgment in Online Lending Cases", LENDIT NEWS (May 1, 2017), available at <http://www.lendit.com/news/2017/05/01/colorado-moves-dismiss-lawsuits-banks-seeking-judgement-online-lending-cases>.

⁷ See Carolyn Carter et al., *National Consume Law Center, Installment Loans: Will States Protect Borrowers from a New Wave of Predatory Lending?* (July 2015). Since this report, South Dakota voters capped interest rates at 36%.

Fintech lenders also should not be allowed to make loans that exceed state interest rate caps. State interest rate caps have not impacted responsible marketplace loans. The leading marketplace lenders do not make loans above 36% and the vast majority of their loans are well below that rate, comfortably within state interest rate caps. But the mere fact that a lender uses the label “fintech” or “marketplace lender” does not ensure that it is a safe or affordable loan. For example, OnDeck, a lender focused on small business lending, offers term loans up to 99%.⁸

Moreover, many marketplace lenders make very large loans of \$30,000 to \$50,000 or higher, and even 36% is a very high rate for such loans. Many states have tiered rate structures in recognition that interest becomes more unaffordable the larger the loan. Iowa, for example, caps interest at 21% for loans over \$10,000.

There are also signs that some online lenders may not be appropriately underwriting their loans to ensure that the loans are affordable, and that many borrowers may not have the ability to repay, especially if the economy sours. Recent news reports and SEC filings show that delinquency and charge-off rates at these marketplace lenders are rising.⁹ One online lender apparently failed to verify a borrower’s income for a full two-thirds of its loans in 2016.¹⁰ Another lender has had so many of its loans fail, that it has had to repay investors for their losses in the last three securitizations of the loans it bundled up and sold to Wall Street.¹¹

This bill would weaken lenders’ incentive to underwrite properly by making it easier to make high-rate loans. High interest rates result in misaligned incentives that can lead to lender profits but borrower catastrophe.¹² Skewed incentives are already a problem in the marketplace loan industry. Moody’s credit-rating firms liken this industry to mortgage lending in the years leading up to the 2008 financial crisis—“because the companies that market the loans and approve them quickly sell them off to investors,” relieving themselves of the risk of the loan later going bad.¹³ This bill could make that problem worse.

The bill is not necessary to ensure access to affordable credit. Proponents of this bill claim that the *Madden* decision has had an adverse impact on access to credit. They point to a study that showed a drop in marketplace lending by three lenders in the Second Circuit after the

⁸ On Deck Capital, Inc. Annual Report, Form 10-K, p. 7 (Mar. 2, 2017) (“The APRs of our term loans currently range from 6.0% to 99.0%.”).

⁹ See, Corkery, “Pitfalls for the Unwary Borrower Out on the Frontiers of Banking, New York Times (Sept. 13, 2015), <https://www.nytimes.com/2015/09/14/business/dealbook/pitfalls-for-the-unwary-borrower-out-on-the-frontiers-of-banking.html?mcubz=0>.

¹⁰ Matt Scully, “Biggest Online Lenders Don’t Always Check Key Borrower Data”, BLOOMBERG (June 14, 2017), available at <https://www.bloomberg.com/news/articles/2017-06-14/biggest-online-lenders-don-t-always-check-key-borrower-details>.

¹¹ Steve Daniels, “Online lender Avant’s reboot still hasn’t yielded profit”, CRAIN’S CHICAGO BUSINESS (May 27, 2017), available at <http://www.chicagobusiness.com/article/20170527/ISSUE01/170529902/online-lender-avants-reboot-still-hasnt-yielded-profit>.

¹² Lauren Saunders et al., National Consumer Law Center, Misaligned Incentives: Why High-Rate Installment Lenders Want Borrowers Who Will Default (July 2016), <https://www.nclc.org/issues/misaligned-incentives.html>.

¹³ See, Corkery, “Pitfalls for the Unwary Borrower Out on the Frontiers of Banking.”

Madden decision for subprime borrowers, especially for those with FICO scores below 644. However, the study showed that these lenders offered only miniscule amounts of credit in the low FICO range even before the *Madden* decision.¹⁴ Thus, the impact on access to credit was trivial. Moreover, it is likely that the credit extended before the decision at the lower end of the FICO spectrum was made to borrowers who had trouble repaying, and that lenders were relying on high interest rates on large loans to compensate for high default rates.

The bill wipes away the strongest available tool against predatory lending practices. Strong state rate caps, coupled with effective enforcement by states, remain the simplest and most effective method to protect consumers from the predatory lending debt trap.¹⁵ Contrary to what lenders often claim, robust state loan laws do not drive people to find loans online. In fact, illegal online lending is more prevalent in states that do not effectively regulate predatory lending than it is in states that enforce state interest rate caps.¹⁶

Accordingly, we urge you to reject this bill. For more information, contact Lauren Saunders at lisaunders@nclc.org or Scott Astrada at Scott.Astrada@responsiblelending.org.

Action NC
Albany Center for Economic Success, Inc.
Allied Progress
Americans for Financial Reform
Arbor Farm Press
Arizona Community Action Association
Arizona PIRG
Arkansans Against Abusive Payday Lending
Ashe County Habitat for Humanity
Asheville Area Habitat for Humanity
Baker Organizing School South.
Baltimore Neighborhoods, Inc
Billings First Congregational Church
Brazos Valley Affordable Housing Corp.
Bucks County Women's Advocacy Coalition
Business Outreach Center Network, Inc.
California Reinvestment Coalition
CALPIRG
Capital Good Fund
CARECEN- Central American Resource Center

¹⁴ Colleen Honigsberg et al., *The Effects of Usury Laws on Higher-Risk Borrowers*, Columbia Business School Research Paper No. 16-38 (Dec. 2 2016), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2780215 (see Before *Madden* and After *Madden* chart on page 44).

¹⁵ Diane Standaert and Brandon Coleman, “Ending the Cycle of Evasion: Effective State and Federal Payday Lending Enforcement”, Center for Responsible Lending (November 2015), *available at* http://www.responsiblelending.org/payday-lending/research-analysis/crl_payday_enforcement_brief_nov2015.pdf.

¹⁶ “Does state regulation of small-dollar lending displace demand to internet lenders?”, nonPrime101 (January 22, 2015), *available at* <https://www.nonprime101.com/wp-content/uploads/2013/10/Does-State-Regulation-of-Small-Dollar-Lending-Displace-Demand-to-Internet-Lenders-1.22.15.pdf>.

Carolina Behavioral Health Alliance
Carolina Jews for Justice
CASH Campaign of Maryland
Catalyst Miami
Catholic Charities of Southern New Mexico
CCCS of WNC, Inc. DBA OnTrack Financial Education & Counseling
Cedar Grove Institute for Sustainable Communities
Center for Economic Integrity
Center for Economic Integrity - New Mexico Office
Center for Financial Social Work
Center for Global Policy Solutions
Center for Responsible Lending
CEO Pipe Organs/Golden Ponds Farm
Children First/Communities In Schools of Buncombe County
Church Women United in North Carolina
Clarifi
CO PIRG
Coalition on Homelessness and Housing in Ohio
College Park: An American Baptist Church
Colorado Center on Law & Policy
Communications Workers of America (CWA)
Community Capital New York
Community Council of Metropolitan Atlanta
Community Economic Development Association of MI (CEDAM)
Community Loan Fund of the Capital Region Inc.
Connecticut Association for Human Services
Connecticut Legal Services, Inc.
ConnPIRG
Consumer Action
Consumer Federation of America
Consumers Union
Covenant House of WV
Credit and Homeownership Empowerment Services Inc (CHES, Inc.)
Credit Counseling Agencies of NC
Creighton College Democrats
Davidson Housing Coalition
Demos
Disability Rights North Carolina
Durham Regional Financial Center
East LA Community Corporation
Ecumenical Poverty Initiative
Empire Justice Center
Faith in Action Alabama
Faith in Texas
Fayetteville Area Habitat for Humanity
Federation of Democratic Women DAC
Financial Pathways of the Piedmont
Florida Alliance for Consumer Protection
Florida Alliance for Retired Americans
Florida Consumer Action Network
Florida PIRG

Fons Law Office, representing consumers
Georgia PIRG
Georgia Watch
Gowen Consulting
Greater Ward's Corner Area Business Association (Virginia)
Habitat for Humanity of Catawba Valley, Inc.
Habitat for Humanity of Davie County
Habitat for Humanity of Greater Greensboro
Habitat for Humanity of North Carolina
Heartland Alliance for Human Needs & Human Rights
Hispanic Baptist Convention of Texas
Hispanic Federation
HomesteadCS
Housing Consultants Group
IDA and Asset Building Collaborative of NC
Illinois People's Action
Illinois PIRG
Indiana Assets & Opportunity Network
Indiana Institute for Working Families
Indiana PIRG
Innovative Systems Group
Iowa PIRG
Jesuit Social Research Institute at Loyola University New Orleans
Just Harvest
Kentucky Equal Justice Center
La Casa de Don Pedro
Legal Aid Justice Center (Virginia)
Legal Aid Society of Milwaukee
Legal Services of Southern Piedmont
Long Island Housing Services, Inc.
Louisiana Budget Project
Lutheran Episcopal Advocacy Ministry NJ
Lutheran Advocacy Ministry-New Mexico
Maine Center for Economic Policy
Maryland Consumer Rights Coalition
Maryland PIRG
MASSPIRG
Metropolitan Milwaukee Fair Housing Council
MICAH
Mobilization for Justice, Inc.
Montana Organizing Project
Montebello Housing Development Corporation
MoPIRG
Mountain State Justice
NAACP
NAOMI
National Association of Consumer Advocates
National Association of Social Workers West Virginia Chapter
National Consumer Law Center (on behalf of its low-income clients)
National Rural Social Work Caucus
Native Community Finance

NCPIRG
New Economics for Women
New Economy Project
New Jersey Appleseed Public Interest Law Center
New Jersey Citizen Action
New Jersey Tenants Organization
New Mexico Fair Lending Coalition
NHPIRG
NJPIRG
North Carolina A. Philip Randolph Institute, Inc.
North Carolina Assets Alliance
North Carolina Council of Churches
North Carolina Housing Coalition
North Carolina Institute of Minority Economic Development
North Carolina Justice Center
North Carolina PIRG
North Carolina Rural Center
North Carolina State AFL-CIO
North Carolina United Methodist Conference
North Dakota Economic Security and Prosperity Alliance
OhioPIRG
Oklahoma Policy Institute
Oregon PIRG
PennPIRG
Pennsylvania Council of Churches
Pennsylvania Military Officers Association of America
Pennsylvania War Veterans Council
People's Action Institute
Philadelphia Unemployment Project
Piedmont Housing Alliance (Virginia)
PIRG in Michigan
Power New Mexico
Prince George's CASH Campaign
Prosperity Indiana
Prosperity Works
Public Justice
Public Justice Center
Public Law Center
Reinvestment Partners
Rural Dynamics, Inc.
Safety MD LLC
Samaritan Ministries
Sisters of Charity of Nazareth Congregational Leadership
Sisters of Charity of Nazareth Western Province Leadership
Sisters of Mercy South Central Community
Southern Poverty Law Center
Statewide Poverty Action Network
Step Up Savannah
Tabor Community Services
Tennessee Citizen Action
Texas Appleseed

TexPIRG
The AMOS Project
The Bell Policy Center
The Episcopal Diocese of North Carolina
The Midas Collaborative
The One Less Foundation
Tuscaloosa Citizens Against Predatory Practices
Tzedek DC
U.S. PIRG
Unitarian Universalist Pennsylvania Legislative Advocacy Network
UNITE HERE
United for a Fair Economy
University of Wisconsin Law School, Consumer Law Clinic
Virginia Citizens Consumer Council
Virginia Interfaith Center for Public Policy
Virginia Organizing
Virginia Poverty Law Center
Virginians Against Payday Lending
VOICE Oklahoma City
WASHPIRG
Watauga County Habitat for Humanity
WESST
West Virginia Center on Budget and Policy
West Virginia Citizen Action Group
WISDOM
WISPIRG
Women AdvaNce
Woodstock Institute
WV Citizen Action Group