



THE STATE OF COLORADO
OFFICE OF THE ATTORNEY GENERAL

THE COMMONWEALTH OF MASSACHUSETTS
OFFICE OF THE ATTORNEY GENERAL



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June 27, 2018

Hon. Mitch McConnell
Majority Leader
317 Russell Senate Office Building
Washington, DC 20510

Hon. Charles E. Schumer
Minority Leader
322 Hart Senate Office Building
Washington, D.C. 20510

Hon. Mike Crapo
Chairman
Committee on Banking, Housing, &
Urban Affairs
239 Dirksen Senate Office Building
Washington, DC 20510

Hon. Sherrod Brown
Ranking Member
Committee on Banking, Housing, &
Urban Affairs
534 Dirksen Senate Office Building
Washington, D.C. 20510

Dear Majority Leader McConnell, Minority Leader Schumer, Chairman Crapo, and Ranking Member Brown:

The states have long held primary responsibility for protecting American consumers from abuse in the marketplace. As state attorneys general, we write in bipartisan opposition to HR 3299 ("Protecting Consumers' Access to Credit Act of 2017") and HR 4439 ("Modernizing Credit Opportunities Act"). If passed, these bills would allow non-bank lenders to sidestep state usury laws and charge excessive interest rates that would otherwise be illegal under state law. In essence, HR 3299 and HR 4439, if passed, would undermine the states' ability to enforce our consumer protection laws.

HR 3299 and HR 4439, which expand the scope of federal preemption to include non-bank entities, would legitimize the efforts of some non-bank lenders to circumvent state usury law. Many of these companies contract with banks to use the banks' names on loan documents in an attempt to cloak themselves with the banks' rights to preempt state usury limits. The loans provided pursuant to these

agreements are typically funded and immediately purchased by the non-bank lenders, which conduct all marketing, underwriting, and servicing of the loans. The banks do not pay the expenses of the lending program and bear no risk of borrower default. As compensation for their nominal role, the banks receive only a small fee. The lion's share of profits belong to the non-bank entities that, under these bills, would be exempt from state usury limits.

Congress did not intend to authorize such arrangements when it created national banks with the National Bank Act in 1864, which also gave national banks the right to preempt state usury laws. As the Comptroller of the Currency explained in 2002:

The benefit that national banks enjoy by reason of this important constitutional doctrine cannot be treated as a piece of disposable property that a bank may rent out to a third party that is not a national bank. Preemption is not like excess space in a bank-owned office building. It is an inalienable right of the bank itself.

Not only do these arrangements constitute an abuse of the national charter, but they are highly conducive to the creation of safety and soundness problems at the bank, which may not have the capacity to manage effectively a multistate loan origination operation that is in reality the business of the payday lender.

Press Release, Office of the Comptroller of the Currency ("OCC"), Comptroller Calls Preemption a Major Advantage of National Bank Charter (Feb. 12, 2002) (attached). More recently, the OCC stated in a May 23, 2018 Bulletin that it "views unfavorably an entity that partners with a bank with the sole goal of evading a lower interest rate established under the law of the entity's licensing state(s)." OCC Bulletin 2018-14, Core Lending Principles for Short-Term, Small-Dollar Installment Lending.

Consistent with this view of bank preemption, the Second Circuit held in *Madden v. Midland Funding, LLC* that a non-bank debt buyer cannot purchase a national bank's right to preempt state usury law. 786 F.3d 246, 251 (2d Cir. 2015), *cert. denied*, 136 S.Ct. 2015. The Second Circuit determined that the defendants in that case could purchase the subject consumer debt, but they could not invoke the benefits of state law preemption, which belongs only to banks. *Id.* at 250.

Courts have also rejected arrangements between banks and non-banks—like those described above—because banks that do not bear the predominant economic interest in their loans are not the lender of those loans for preemption purposes.

E.g., Cmty. State Bank v. Strong, 651 F.3d 1241, 1260 (11th Cir. 2011) (federal preemption does not apply if the bank “is not the true lender of the loan”); *Penn. v. Think Fin., Inc.*, 2016 WL 183289, at *13 (E.D. Pa. Jan. 14, 2016) (same).

By statutorily overriding this authority, HR 3299 and HR 4439 would constitute a substantial expansion of the existing preemption of state usury laws. States have, over time, crafted laws that create a careful balance between access to credit and protecting consumers. Both Congress and the Supreme Court have rejected efforts to circumvent those laws and limit enforcement of them, including state actions against national banks. See 12 U.S.C. § 25b(b), (e), and (h); *Cuomo v. Clearing House Ass’n, L.L.C.*, 557 U.S. 519, 536 (2009) (overturning federal regulation that prevented states from prosecuting state law enforcement actions against national banks). It is even more important to preserve state law and allow enforcement of those laws against non-bank entities, many of which are regulated primarily at the state level. Congress should not now override state-granted protections in this important sphere of state regulation.

The proponents of HR 3299 assert that the holding in *Madden* is contrary to the “longstanding principle” known as the “contractual doctrine of valid when made.” This assertion is incorrect. The “valid when made” doctrine, recognized in *Nichols v. Fearson*, 32 U.S. 103, 106 (1833), addresses a very different legal principle. It provides that a valid loan is not invalidated by a later usurious transaction involving that loan.¹

The *Nichols* decision thus would have been relevant to the *Madden* decision if the consumer borrower in *Madden* had argued that the bank sold her loan to a debt buyer at a usurious discount, and that this usurious loan from the debt buyer to the bank somehow invalidated the consumer’s own loan. But she did not. She argued instead that the bank could not convey its preemptive rights to a non-bank. *Madden*, 786 F.3d at 249.

To conclude, state usury laws have long served an important consumer protection function in America. This vital state function will be substantially eroded if HR 3299 and HR 4439 are enacted. The undersigned attorneys general therefore

¹ Specifically, *Nichols* involved a \$101 loan owed to the defendant. The defendant then sold the right to receive payment on the loan to the plaintiff for the discounted price of \$97. *Nichols*, 32 U.S. at 103. The discount between the \$97 and the amount the defendant could have received in repayment of the loan was treated as interest, and the interest was high enough to be usurious. The decision in *Nichols* addressed whether the obligation on the original \$101 loan was invalidated merely because the subsequent sale of that loan involved a usurious interest rate. The Supreme Court held that it was not; the non-usurious loan remained valid despite the second, usurious, transaction. *Id.* at 109.

respectfully ask you to work to ensure that HR 3299 and HR 4439 do not become law.

Respectfully submitted,



Cynthia H. Coffman
Colorado Attorney General



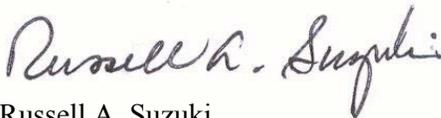
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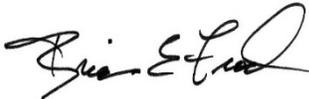
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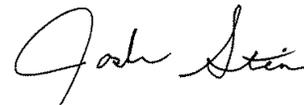
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