138 scholars support repeal of OCC true lender rule

April 20, 2021

Senator Chris Van Hollen
U.S. Senate
Washington, DC 20510

The Hon. Jesus "Chuy" García
U. S. House of Representatives
Washington, DC 20515

RE: Support S.J. Res. 15 (Van Hollen) and H.J. Res. 35 (J. García), disapproving OCC's Rule on National Banks and Federal Savings Associations as Lenders

Dear Member of Congress,

The 138 undersigned academics from 43 states and the District of Columbia, including professors of banking law and consumer financial regulation, write in strong support of S.J. Res. 15 (Van Hollen) and H.J. Res. 35 (J. García), joint resolutions providing for congressional disapproval under the Congressional Review Act of the Office of the Comptroller of the Currency's ("OCC's") final rule, *National Banks and Federal Savings Associations as Lenders* (the "Rule"). The Rule usurps the critical role of states in limiting the interest charged to their citizens by nonbank lenders—a role that states have held since the founding of this country.

The Rule, enacted in October 2020, is a direct reversal of well-established case law. This short-sighted reversal effectively circumvents the long-standing principle of applying a "substance over form" analysis to prevent evasions of usury laws, a principle that has been endorsed by the Supreme Court and state courts since the earliest days of our nation.

Since the time of the American Revolution, states have had usury laws to protect people from the harms of usurious lending. After 1776, all of the states in the new union adopted usury laws.[1] Over the past two centuries, those laws have been amended and exceptions have been carved out in some states for short-term payday loans. More recently, the trend is for voters and legislators to reinstate interest rate caps, which have been broadly popular with voters on a bipartisan basis.[2] Today, forty-five states and the District of Columbia impose interest rate caps on at least some installment loans, depending on the size.[3]

Attempts to evade usury laws are as old as the laws themselves. From the earliest days of this country, courts have looked beyond the form of a transaction to its substance to assess whether usury laws are being evaded. In 1825, the Supreme Court remarked:

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[1] *See* James M. Ackerman, *Interest Rates and the Law: A History of Usury*, 1981 ARIZ. ST. L.J. 61, 85 (1981).
[2] *See, e.g.*, Megan Leonhardt, *Nebraska becomes the latest state to cap payday loan interest rates*, CNBC (Nov. 4, 2020, 12:44 PM), https://www.cnbc.com/2020/11/04/nebraska-becomes-the-latest-state-to-cap-payday-loan-interest-rates.html.
[3] *See* NAT'L CONSUMER L. CTR, STATE RATE CAPS FOR $500 AND $2,000 LOANS (2021), http://bit.ly/state-rate-caps.

> Usury is a mortal taint wherever it exists, and no subterfuge shall be permitted to conceal it from the eye of the law; this is the substance of all the cases, and they only vary as they follow the detours through which they have had to pursue the money lender.[4]

In 1835, Chief Justice Marshall explained in greater length in *Scott v. Lloyd*:

> The ingenuity of lenders has devised many contrivances, by which, under forms sanctioned by law, the [usury] statute may be evaded. Among the earliest and most common of these is the purchase of annuities, secured upon real estate or otherwise . . . . The purchase of an annuity therefore, or rent charge, if a bona fide sale, has never been considered as usurious, though more than six per cent profit be secured. Yet it is apparent, that if giving this form to the contract will afford a cover which conceals it from judicial investigation, the [usury] statute would become a dead letter. Courts, therefore, preceived [sic] the necessity of disregarding the form, and examining into the real nature of the transaction. If that be in fact a loan, no shift or device will protect it.[5]

Justice Marshall noted that "[t]hough this principle may be extracted from all the cases, yet as each depends on its own circumstances, . . . those circumstances are almost infinitely varied . . . ."[6]

Usury laws, and substance-over-form analysis, originally applied to all lenders, including banks. When the National Bank Acts were passed in 1863 and 1864, they gave national banks the choice of two alternative usury caps—a state one or a federal one—both of which were true usury caps.[7] Well into the mid-20th century, courts were applying substance-over-form doctrine when assessing whether national banks were attempting to evade usury laws:

> That public policy [against usury] cannot be defeated by the simple expedient of a written contract, but the real substance of the transaction must be searched out. . . . "No disguise of language can avail for covering up usury, or glossing over an usurious contract. The theory that a contract will be usurious or not, according to the kind of paper bag it is put up in, or according to the more or less ingenious phrases made use of in negotiating it, is altogether erroneous. The law intends that a search for usury shall penetrate to the substances."[8]

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[4] De Wolf v. Johnson, 23 U.S. 367, 385 (1825).
[5] Scott v Lloyd, 34 U.S. 418, 446–47 (1835) (emphasis omitted).
[6] *Id.* at 447.
[7] *See* 12 U.S.C. § 38 (2018).
[8] Daniel v. First Nat'l Bank of Birmingham, 227 F.2d 353, 355 (5th Cir. 1955) (citations omitted) (quoting Pope v. Marshall, 78 Ga. 635, 4 S.E. 116, 118 (1887)); *see also* Anderson v. Hershey, 127 F.2d 884, 886 (6th Cir. 1942) (rejecting the purported form of the transaction as a "device" to collect usury because courts "look behind the form of the transaction to its substance"); First Nat'l Bank v. Nowlin, 509 F.2d 872, 876 (8th Cir. 1975) ("The [NBA usury] section has regard to substance, not merely to form . . . .)" (*quoting* Evans v. Nat'l Bank of Savannah, 251 U.S. 108, 118 (1919) (Pitney, J., dissenting); *see also* FDIC v. Lattimore Land Corp., 656 F.2d 139, 148 n.15 (5th Cir. 1981) (agreeing that in enforcing the NBA's usury provision, courts can look beyond disguises that conceal "the actual lender," but in the instant case there was no dispute about which party "was the lender in fact").

But after a Supreme Court decision in 1978 allowed national banks to charge, nationwide, any rate permitted in their home state,[9] and amidst the impacts of high inflation, a wave of deregulation resulted. In the 1980s and 1990s, law changes at the federal and state levels and a race to the bottom among states trying to retain their banks resulted in virtually no banks—federally or state chartered—being subject to any usury cap.[10]

Beginning in the late 1990s and early 2000s, payday lenders began trying to take advantage of banks' exemption from usury caps. Through "rent-a-bank" schemes, payday lenders formed superficial arrangements with banks, put the bank's name as a lender on the loan agreement, and used the bank as the nominal originator of the loan. In doing so, these high-cost lenders tried to charge borrowers interest rates that were otherwise illegal if the lender made the loan itself.

Applying traditional substance-over-form doctrine, courts analyzed whether the bank or the payday lender was the *true lender*. If the payday lender was the true lender, then state usury laws applied. For example, in *Bankwest v. Oxendine*,[11] the Court of Appeals of Georgia rejected the idea that it should look only at the form of the contract, and instead applied traditional substance-over-form doctrine to determine whether the nonbank was the "true lender":

> To determine if a contract is usurious, we critically examine the substance of the transaction, regardless of the name given it, or, stated another way, "[t]he theory that a contract will be usurious or not[,] according to the kind of paper-bag it is put up in, or according to the more or less ingenious phrases made use of in negotiating it, is altogether erroneous. The law intends that a search for usury shall penetrate to the substance."[12]

Courts continued to apply longstanding substance-over-form true lender analysis as high-cost installment lenders began trying to use rent-a-bank schemes to evade state usury laws. In *CashCall v. Morrisey*,[13] for example, the Supreme Court of Appeals of West Virginia quoted an earlier usury case and cited the 1895 case on which it relied:

> "The usury statute contemplates that a search for usury shall not stop at the mere form of the bargains and contracts relative to such loan, but that all shifts and devices intended to cover a usurious loan or forbearance shall be pushed aside, and the transaction shall be dealt with as usurious if it be such in fact."[14]

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[9] *See* Marquette Nat'l Bank of Minneapolis v. First Omaha Serv. Corp., 439 U.S. 299, 318-19 (1978).

[10] New Jersey is one state that retains a usury cap on its state-chartered banks, but that cap does not apply to out-of-state banks operating in New Jersey or those with federal charters.

[11] *See* BankWest, Inc. v. Oxendine, 266 Ga.App. 771, 779 (2004).

[12] *Id.* at 776 (quoting Pope v. Marshall, 78 Ga. 635, 640, 4 S.E. 116 (1887)) (refusing to follow an earlier decision that held that the bank "was the true lender despite the fact that ACE [Cash Express] was required to purchase a 95 percent participation interest in loans [the bank] made to ACE's customers"); *accord* Ga. Cash Am., Inc. v. Greene, 734 S.E.2d 67, 73 (Ga. Ct. App. 2012) (finding a triable issue as to whether the true lender was the payday lender or a bank exempt from the Georgia usury statute).

[13] CashCall, Inc. v. Morrisey, 2014 WL 2404300 (W.Va. May 30, 2014).

[14] *Id.* at *14 (quoting Carper v. Kanawha Banking & Tr. Co., 157 W.Va. 477, 478, 207 S.E.2d 897, 901 (1974)); *see* Crim v. Post, 23 S.E. 613, 616 (W. Va. 1895) (notwithstanding "the various shifts and devices that are often used to cover up the usury[,]… the law requires the lender on oath to discover the money really lent, and all bargains, contracts,

Federal courts of appeals have regularly endorsed looking beyond form to substance to assess whether a bank is the true lender, and thus exempt under federal banking law from the consumer's state interest rate cap, or whether a nonbank is the true lender.[15]

Rejecting this overwhelming history that courts can ignore contrivances and search instead for the truth in order to prevent evasions of usury laws, the OCC's Rule establishes two hard and fast rules that make the bank the lender for interest rate purposes regardless of other evidence:

> [A] bank makes a loan when the bank, as of the date of origination:
> (1) Is named as the lender in the loan agreement; or
> (2) Funds the loan.[16]

The Rule thus establishes that the bank is to be treated as the "true lender" irrespective of the economic realities of the transaction. The Rule allows nonbank lenders to engage in the same rent-a-bank schemes in which the nonbank lender would "rent" a bank's charter to evade state usury laws. Online nonbank companies accomplish this by partnering with a bank that serves as the nominal originator of the loan, even though the nonbank has designed, marketed, underwritten, and funded the loan product and holds the predominant economic risk on the loan.

The Rule signs off on this favored technique of high-cost online lenders. Under this Rule, so long as a national bank or federal savings association is indicated as the lender of record for the loan, it is the bank that functions as the entity of reference for application of state usury laws—and banks are largely exempt from state usury laws. As a result of this nominal involvement of a bank, the nonbank online lender can effectively be exempted from the usury laws designed to rein in usurious loan practices, thereby making usury laws obsolete.

These schemes enable unduly expensive loans. When nonbanks are allowed to charge uncapped interest rates, they often charge well over 100% APR on their loans, which are rarely underwritten based on borrowers' actual ability to repay and which frequently result in defaults. Households facing an acute financial crisis are targeted for these destructive forms of credit on these high-cost terms. These pricey loans often result in growing balances, default, and even bankruptcy—all of which have devastating long-term impacts on families who already struggle to make ends meet.

The practical effect of the OCC Rule is, however, to appropriate states' long-standing role in regulating interest rates. Under the Rule, as long as a bank's name is on the loan agreement, the

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or shifts relative to such loan; and makes them ineffectual, no matter how complicated such contracts may be. The law evidently intends that the search for usury shall penetrate to the substance.").

[15] *See, e.g.*, BankWest, Inc. v. Baker, 411 F.3d 1289 (11th Cir. 2005), *reh'g granted, op. vacated*, 433 F.3d 1344 (11th Cir. 2005*)* (en banc), *op. vacated due to mootness*, 446 F.3d 1358 (11th Cir. 2006); *accord* Cmty. State Bank v. Strong, 651 F.3d 1241, 1260 (11th Cir. 2011) (denying motion to dismiss RICO claim because plaintiff could "plead facts demonstrating that the Bank was not the actual lender"); Cmty. State Bank v. Knox, 523 Fed. Appx. 925, 929 (4th Cir. 2013) (rejecting complete preemption because the Federal Deposit Insurance Act "cannot apply" where the claims are "substantively aimed" at the payday lender and the plaintiff "disputes that [the bank] had authority over the loan terms and was the 'real lender.'").

[16] 12 C.F.R. § 7.1031(b) (2019).

interest rate laws of the state in which that bank is headquartered will govern the terms of the loan. A borrower in California can contract with a nonbank lender in California, for funds from California, and yet, under the Rule, if a bank in Utah is listed as the lender of record, the nonbank lender can charge whatever interest rate it desires, even if it is well in excess of the 36% allowed to nonbank lenders in California.

The result of the OCC Rule will be to strip states of their agency in regulating usurious lending by nonbanks to their citizens. Over 200 years of legal precedent from states and the U.S. Supreme Court will be eliminated by this ill-conceived and overreaching Rule.

It is critically important that Congress overturn the Rule in order to uphold the well-established doctrine of examining the substance of a usurious loan instead of the mere form, as well as the proper and legitimate role of the states in making their own decisions about high-cost lending. If this Rule is not undone, it will spell disaster for untold numbers of Americans who are trying to recover from this time of unprecedent health and economic disaster.

Therefore, we commend you for introducing the resolutions to disapprove of the OCC's true lender Rule, which will eviscerate the power of state interest rate caps and deprive state financial regulators and attorneys general of their most effective tool in combating usurious lending.

Yours very truly,

Alabama
Glory McLaughlin, Assistant Dean for Public Interest Law, University of Alabama School of Law

Arizona
James Ratner, Professor of Law Emeritus, University of Arizona James E. Rogers College of Law
Barbara Ann, Atwood Professor of Law Emerita, University of Arizona Rogers College of Law
Paul Bennett, Clinical Professor, University of Arizona, James E. Rogers College of Law

California
Steven M. Graves, Professor of Geography, California State University, Northridge
Lauren E. Willis, Associate Dean for Research & Professor of Law, LMU Loyola Law School
Ted Mermin, Executive Director, Center for Consumer Law & Economic Justice, UC Berkeley School of Law
Dalie Jimenez, Professor of Law, University of California, Irvine School of Law
Robert Fellmeth, Price Professor of Public Interest Law, University of San Diego

Colorado
Erik F Gerding, Professor of Law, University of Colorado Law School

Connecticut
Peter Kochenburger, Associate Clinical Professor of Law, Deputy Director of the Insurance Law Center University of Connecticut School of Law

Anika Singh Lemar, Clinical Professor of Law, Yale Law School
Jeffrey Gentes, George W. and Sadella D. Visiting Clinical Lecturer, Yale Law School
Annie Harper, Instructor, Yale School of Medicine, Department of Psychiatry

Delaware
Stephen Metraux, Associate Professor, University of Delaware
Cary L. Flitter, Adjunct Professor, Consumer Law, Widener University, Delaware Law School

District of Columbia
Peter Jaszi, Emeritus Professor of Law, American University Washington College of Law
Elliott Milstein, Emeritus Professor of Law, American University Washington College of Law
Hilary J. Allen, Associate Professor, American University Washington College of Law
Nancy Abramowitz, Professor of Practice, American University Washington College of Law
Jeffrey S. Lubbers, Professor of Practice, American University, Washington College of Law
William T. Vukowich, Professor Emeritus, Georgetown University Law Center
Adam J. Levitin, Anne Fleming Research Professor and Professor of Law, Georgetown University Law Center
Gary Peller, Professor of Law, Georgetown University Law Center
Matthew Bruckner, Associate Professor, Howard University School of Law
Elliott S. Milstein, Emeritus Professor of Law, American University Washington College of Law
Ann Shalleck Professor of Law, Faculty Director, Women and the Law Program American University, Washington College of Law
Arthur E. Wilmarth, Jr., Professor Emeritus of Law, George Washington University Law School

Georgia
Mark Budnitz, Bobby Lee Cook Professor of Law Emeritus, Georgia State University College of Law

Hawaii
Andrea Freeman, Professor, University of Hawaii William S. Richardson School of Law

Idaho
Deborah Thorne, Professor, University of Idaho

Illinois
Margit Livingston, Vincent de Paul Professor of Law, DePaul University
Colonel Paul E. Kantwill, US Army (Ret), Founding Executive Director, The Rule of Law Institute, Loyola University Chicago School of Law Loyola University Chicago
Lea Krivinskas Shepard, Professor, Loyola University Chicago School of Law
Thomas L. Eovaldi, Professor of Law Emeritus, Northwestern Pritzker School of Law
Robert M. Lawless, Max L. Rowe Professor of Law, University of Illinois

Indiana
Pamela Foohey, Professor of Law, Indiana University Maurer School of Law
Frank Emmert, John S. Grimes Professor of Law, Indiana University Robert H. McKinney School of Law

Florence Wagman Roisman, William F. Harvey Professor of Law and Chancellor's Professor, Indiana University Robert H. McKinney School of Law
Prof. Dr. Frank Emmert, LL.M., FCIArb, John S. Grimes Professor of Law and Director of the Center for Int'l and Comparative Law, Indiana University Robert H. McKinney School of Law
Judith Fox, Clinical Professor, Notre Dame Law School

Iowa
Tony Smith, Professor of Philosophy (emeritus), Iowa State University
Christopher K. Odinet, Professor of Law, University of Iowa College of Law

Kansas
Andrea J. Boyack, Professor and Norman R. Pozez Chair of Business and Transactional Law, Washburn University School of Law

Kentucky
Chris Bradley, Associate Professor, University of Kentucky

Louisiana
Adam Feibelman, Sumter Davis Marks Professor of Law, Tulane Law School

Maine
Lois R. Lupica, Maine Law Foundation Professor of Law, Emerita University of Maine School of Law
Deirdre Smith, Associate Dean for Experiential Education & Professor of Law, University of Maine School of Law

Maryland
Michele Gilman, Professor of Law, University of Baltimore School of Law
Daniel L. Hatcher, Professor of Law, University of Baltimore School of Law
Cassandra Jones Havard, Professor of Law, University of Baltimore School of Law

Massachusetts
Patricia A. McCoy, Professor of Law, Boston College Law School
Ingrid Hillinger, Professor of Law, Boston College Law School
Elizabeth Miller, Adjunct Professor, Boston College Law School
Joseph William Singer, Bussey Professor of Law, Harvard Law School
Justin Steil, Associate Professor of Law and Urban Planning, Massachusetts Institute of Technology
Brook Baker, Professor, Northeastern U. School of Law
Rashmi Dyal-Chand, Professor of Law and Associate Dean for Research and Interdisciplinary Education, Northeastern University
Libby Adler, Professor of Law, Northeastern University
Richard Daynard, University Distinguished Professor of Law, Northeastern University
Michael Meltsner, Professor of Law, Northeastern University School of Law
James Rowan, Professor of Law, Northeastern University School of Law
Melinda Drew, Teaching Professor Emerita, Northeastern University School of Law

Emily Spieler, Edwin W. Hadley Professor of Law, Northeastern University School of Law
Lucy Williams, Professor of Law, Northeastern University School of Law
Kathleen Engel, Research Professor of Law, Suffolk University
Elizabeth Sweet, Associate Professor, University of Massachusetts Boston
Michael G. Hillinger, Professor Emeritus, University of Massachusetts School of Law

Michigan
Brian G Gilmore, Clinical Associate Professor, Michigan State University College of Law
John A.E. Pottow, John Philip Dawson Collegiate Professor of Law, University of Michigan
Terri Friedline, Associate Professor of Social Work, University of Michigan
Jeremy Kress, Assistant Professor of Business Law, University of Michigan Ross School of Business

Minnesota
Prentiss Cox, Professor of Law, University of Minnesota
Elizabeth R. Schiltz, John D. Herrick Professor of Law, University of St. Thomas School of Law (Minneapolis)

Missouri
Julie Birkenmaier, Professor of Social Work, Saint Louis University
Amy J. Schmitz, Elwood L. Thomas Missouri Endowed Professor of Law, University of Missouri School of Law

Montana
Craig Cowie, Assistant Professor of Law and Director of the Blewett Consumer Law and Protection Program, Alexander Blewett III School of Law at the University of Montana
Holly Hunts, Associate Professor of Consumer Economics, Montana State University

Nebraska
Kendra Huard Fershee, Professor of Law, Creighton School of Law
Wendy Wright, Professor & Kenefick Chair in the Humanities, History of Spirituality, Spiritual Theology, Creighton University
Jeanne A. Schuler, Professor of Philosophy, Creighton University
Thomas Kelly, Professor, Creighton University
Roger Bergman, Professor Emeritus, Creighton University
Patrick Murray, Professor of Philosophy, Creighton University
Kennth Washer, Professor of Finance, Creighton University
Sue Crawford, Professor, Creighton University
Carol Zuegner, Associate Professor of Journalism, Creighton University
Julie Kalkowski, Executive Director, Financial Hope Collaborative Creighton University Heider College of Business
Michaela White, Professor of Law, Creighton University School of Law
Catherine Lee Wilson, Associate Professor, University of Nebraska-Lincoln College of Law

Nevada

Keith A. Rowley, William S. Boyd Professor of Law, William S. Boyd School of Law, University of Nevada at Las Vegas

New Jersey
Amy Widman, Assistant Clinical Professor, Rutgers Law School
Linda E Fisher, Professor of Law, Seton Hall Law School
Jon Romberg, Associate Professor, Seton Hall Univ. School of Law, Center for Social Justice

New Mexico
Richard Alderman, Professor Emeritus, Director-Center of Consumer Law, University of Houston Law Center
Nathalie Martin, Frederick M. Hart Chair in Consumer and Clinical Law, University of New Mexico School of Law

New York
David Reiss, Professor of Law, Brooklyn Law School
Winnie Taylor, Professor of Law, Brooklyn Law School
Kathryn Judge, Harvey J. Goldschmid Professor of Law, Columbia University
Saule Omarova, Beth and Marc Goldberg Professor of Law, Cornell University
Susan Block-Lieb, Cooper Family Professor in Urban Legal Issues, Fordham Law School
Martha Rayner, Clinical Associate Professor of Law, Fordham Law School
Norman Silber, Professor of Law, Maurice A. Deane School of Law, Hofstra University
Jeff Sovern, Professor of Law, St. John's University School of Law
Ann Goldweber, Professor of Clinical Education, St. John's University school of Law
Marianne Artusio, Associate Professor of Law, retired, Touro College, Jacob D. Fuchsberg Law Center

North Carolina
Eric M. Fink, Associate Professor of Law, Elon University School of Law
Kate Sablosky Elengold, Assistant Professor of Law, UNC School of Law
Melissa B. Jacoby, Graham Kenan Professor of Law, University of North Carolina at Chapel Hill

North Dakota
Alexandra Sickler, Associate Professor of Law, University of North Dakota School of Law

Ohio
Cathy Lesser Mansfield, Professor, Case Western Reserve University
Mark Cassell, Professor, Kent State University
Creola Johnson, President's Club Professor of Law, The Ohio State Univ. Michael E. Moritz College of Law
Emily Houh, Gustavus Henry Wald Professor of the Law and Contracts, University of Cincinnati College of Law
Kristin Kalsem, Charles Hartsock Professor of Law, University of Cincinnati College of Law

Oregon
David Friedman, Professor of Law, Willamette University

Pennsylvania
James J. Pierson, Chair, Program Director & Assistant Professor, Chatham University
Richard Frankel, Professor of Law, Drexel University Thomas R. Kline School of Law
Susan L DeJarnatt, Professor of Law, Temple University Beasley School of Law
Len Rieser, Program Coordinator, Sheller Center for Social Justice, Temple University Beasley School of Law
Amelia Boss., Trustee Professor of Law, Thomas R. Kline School of Law, Drexel University
Camille Z. Charles, Professor of Sociology and Africana Studies, University of Pennsylvania
Camille Zubrinsky. Charles Professor of Sociology, Africana Studies, & Education, University of Pennsylvania
Louis S. Rulli, Practice Professor of Law, University of Pennsylvania Carey Law School

South Dakota
Reynold F. Nesiba, Professor of Economics, Augustana University

Texas
Mary Spector, Professor of Law, SMU Dedman School of Law
Mark E. Steiner, Professor of Law, South Texas College of Law Houston
Neil L. Sobol, Professor of Law, Texas A&M University School of Law
Angela Littwin, Ronald D. Krist Professor of Law, University of Texas at Austin

Utah
Jacob S. Rugh, Associate Professor, Brigham Young University
Christopher Peterson, John J. Flynn Professor of Law, University of Utah
Robert N Mayer, Professor Emeritus, University of Utah
Linda F. Smith, Professor Emerita, University of Utah, S.J. Quinney College of Law

Virginia
Irene E. Leech, Associate Professor, Consumer Studies, Virginia Tech

West Virginia
Charles R. DiSalvo, Woodrow A. Potesta Professor of Law, West Virginia University
Nicole McConlogue, Associate Professor and Clinic Director, West Virginia University College of Law

Wisconsin
Sarah Orr, Director, Consumer Law Clinic, University of Wisconsin Law School

Wyoming
Dee Pridgen, Emeritus Professor of Law, University of Wyoming College of Law