

13-3769

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

THE OTOE-MISSOURIA TRIBE OF INDIANS, a federally-recognized Indian Tribe, GREAT PLAINS LENDING, LLC, a wholly-owned tribal limited liability company, AMERICAN WEB LOAN, INC., a wholly-owned tribal corporation, OTOE-MISSOURIA CONSUMER FINANCE SERVICES REGULATORY COMMISSION, a tribal regulatory agency, LAC VIEUX DESERT BAND OF LAKE SUPERIOR CHIPPEWA INDIANS, a federally-recognized Indian Tribe, RED ROCK TRIBAL LENDING, LLC, a wholly-owned tribal limited liability company, LAC VIEUX DESERT TRIBAL FINANCIAL SERVICES REGULATORY AUTHORITY, a tribal regulatory agency,

Plaintiffs-Appellants,

v.

NEW YORK STATE DEPARTMENT OF FINANCIAL SERVICES, BENJAMIN M. LAWSKY, in his official capacity as Superintendent of the New York State Department of Financial Services,

Defendants-Appellees.

On Appeal from the United States District Court
for the Southern District of New York

**BRIEF OF *AMICI CURIAE* NINE ADVOCACY ORGANIZATIONS
IN SUPPORT OF DEFENDANTS-APPELLEES URGING CONFIRMANCE
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The Central New York Citizens in Action, Inc., an organizational amicus curiae, is a non-profit, non-stock corporation. It has no parent corporations, no publicly held corporations have ownership interests in it, and it has not issued shares.

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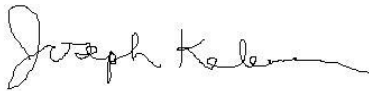
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INTERESTS OF AMICI CURIAE

Amici curiae are not-for-profit organizations that work with and/or provide legal services to poor, elderly, disabled and working New Yorkers.¹ *Amici* regularly advocate for people who have obtained internet payday loans with high costs that far exceed New York State's criminal usury cap. In addition to providing legal advice and representation to persons who are the subject of collection actions arising from payday loans, *Amici* engage in outreach and education activities to their clients and constituents concerning such loans. Many of the *Amici* have also been engaged in efforts to forestall repeated attempts by the industry to push legislation that would weaken New York's laws regarding interest rate caps and permit usurious loans within the state. The central issue of this appeal, whether New York has the authority and responsibility to act against internet payday lenders that violate New York's usury laws, has a broad impact on the tens of thousands of New York residents for whom *Amici* advocate.

Amici urge the Court to affirm the District Court's decision, and to conclude that Plaintiffs-Appellants are *not* entitled to a preliminary

¹ As Local Rule 29.1(b) requires, *Amici* disclose that no party or party's counsel authored any part of this brief or contributed money intended to fund preparing or submitting this brief; *Amici* counsel alone authored this brief; and only *Amici*, their members or counsel contributed money intended to fund preparing or submitting this brief.

injunction enjoining the New York State Department of Financial Services (DFS) from taking action to protect lower-income New Yorkers by preventing internet payday lenders from violating New York's usury laws.

CAMBA Legal Services, Inc. ("CAMBA") is a non-profit community-based organization located in the Flatbush neighborhood of Brooklyn. CAMBA provides free legal services to low income residents of Brooklyn in the areas of housing, foreclosure, immigration, domestic violence assistance, and consumer law. Through its consumer law project CAMBA has provided brief advice and full representation to thousands of New York City residents who are victims of debt collection abuses, are being sued in court, or are experiencing other consumer law issues. CAMBA Legal Services has worked with numerous clients whose lives have been negatively impacted by internet payday loans.

Central New York Citizens in Action, Inc. was developed from the Utica Citizens in Action, a multi-issue public interest association affiliated with Citizen Action of New York. It was founded in 1997 to address critical social, economic and environmental issues facing residents of Oneida, Herkimer, and Madison Counties. Members of the group worked to empower low- and moderate-income Central New York residents to participate in shaping the policies that affect their lives, such as economic

justice, environment, housing, education, economic development, health care, public benefit programs, and consumer issues. Its projects include research and policy development, public education on a wide range of public policy issues, development of educational materials, community outreach and grassroots organizing, coalition development, training, and lobbying. The organization has worked on redlining and discrimination in lending and is preparing a study of payday lending in the Utica area. Many of the residents in the Utica area of upstate New York are low-income and have been victimized by payday lenders.

District Council 37 Municipal Employees Legal Services

("MELS") is a union-sponsored prepaid legal plan providing benefits to some 120,000 employees of the City of New York and 35,000 retirees. MELS has been offering representation in a range of civil legal matters for more than 30 years, and its coverage includes consumer, financial and debt matters. MELS' lawyers represent persons who are the subject of collections activities based on payday loans. MELS also engages in education and outreach activities, including, for example, educating union members and senior citizens about their rights with respect to payday loans and other financial products. The issues raised in the instant litigation are of vital interest to MELS' clients and the members and retirees of District Council

37, because they have been harmed by the high-cost loans given by payday lenders.

Legal Services NYC (“LSNYC”) is the nation’s largest provider of free civil legal services to the poor. For more than 40 years, LSNYC has provided expert legal assistance and advocacy to low-income residents of New York City. Each year, LSNYC’s neighborhood offices across New York City serve tens of thousands of New Yorkers, including homeowners, tenants, the disabled, immigrants, the elderly, and children. LSNYC’s offices in Brooklyn, Manhattan, the Bronx, Queens and Staten Island provide assistance to New York City consumers facing abusive debt collection, and its low-income clients are particularly vulnerable to the abuses associated with payday lending.

MFY Legal Services, Inc. (“MFY”) was founded on the principle of equal access to justice through community-based legal representation of poor New Yorkers. Working in concert with neighborhood social service providers and community advocates, MFY provides advice and representation to over 8,500 New Yorkers each year, and initiates affirmative litigation that impacts many thousands of people. MFY’s client population is comprised of persons with mental and physical disabilities, seniors, and low-wage workers. Through its Consumer Rights and Low-

Income Bankruptcy projects, MFY provides advice, assistance, and representation to New Yorkers on a range of issues, including bankruptcy, debt collection harassment, collection lawsuits, financial scams, student loans, improper judgment enforcement, and predatory lending.

New Economy Project (formerly Neighborhood Economic Development Advocacy Project) works with New York City groups to promote community economic justice and to eliminate discriminatory economic practices that harm communities and perpetuate inequality and poverty. As part of its Financial Justice Law Project, New Economy Project provides direct services to thousands of low-income New Yorkers through a legal hotline; builds the capacity of legal services and community-based organizations to address consumer financial justice issues; and advocates for systemic reform. The issues raised in this litigation are of vital interest to the individuals and communities that New Economy Project serves, as they have been harmed by usurious internet payday lending.

New York Public Interest Research Group (“NYPIRG”) was formed in 1973 as a non-profit, non-partisan student directed organization to effect social change in the public policy arena while training students and other New Yorkers to effectively participate in civic life and public policy decision making. NYPIRG is New York State's largest student directed

organization that works on issues such as consumer protection, environmental preservation, voter registration and matters affecting public health, including lead paint poisoning. NYPIRG has a long history of involvement in consumer protection, including working to prevent abusive debt collection practices; investigating banks' community lending practices, including so-called "redlining;" providing information to consumers on banking options, account features and fees; advocating for consumer protections against predatory mortgage lending; and operating a consumer hotline that provides free information, assistance and procedural counseling to New Yorkers with small claims court and other consumer disputes.

Teamsters Local 237 Legal Services Plan is a prepaid Legal Services Plan created in 1975 by Teamsters Local 237, a New York City public employee union, for its members. The intent then, and now, is to provide free legal services for the union's working members. Although employed, most union members cannot afford an attorney and they earn too much for other free legal services. The Legal Services Plan represents approximately 24,000 New York City workers and over 6,000 retirees in a wide range of private civil legal matters. Included in the representation is advice and representation to consumers who are harassed by debt collectors, sued in New York courts, and affected in various ways by consumer issues.

Local 237 Legal Services Plan attorneys represent persons who are the subject of collections activities based on payday loans. The issues raised in the instant litigation are of vital importance to Teamsters Local 237 members and retirees, because they have been harmed by the high-cost loans given by payday lenders.

Western New York Law Center (“Law Center”) is a not-for-profit organization that provides free civil legal services to residents of the Western part of New York State, including Buffalo and Niagara Falls. Attorneys from the Law Center litigate class actions on behalf of low-income clients, and defend foreclosure actions. Law Center attorneys also provide assistance to hundreds of consumers facing unfair debt collection practices each year through a free CLARO (Civil Legal Advice and Resource Office) consumer clinic located in the Buffalo community. Many of these consumers have payday loans at interest rates exceeding 1000%. Because of the direct and profound impact this issue has on the clients of the Law Center, the Law Center has a substantial interest in this case.

SUMMARY OF ARGUMENT

In this appeal, Plaintiffs-Appellants argue that the District Court decision was wrong because the Court failed to conduct an interest-

balancing test among federal, tribal and state interests; under that analysis, they claim that they are likely to prevail because the State has failed to identify any particularized harm caused by internet payday lending by tribes in New York. *See* Plaintiffs-Appellants' Brief at 2-3, 18, 22-23. Defendants-Appellees, New York State Department of Financial Services (DFS) and Superintendent Benjamin Lawsky, respond that an interest-balancing analysis is not required, but that even if it were, the State has a compelling interest in protecting its vulnerable residents from predatory financial products. *See* Defendants-Appellees' Brief at 41.

Amici believe that Defendants-Appellees are correct. New York has a compelling state interest in regulating high-cost loans that harm its residents. Payday loans are harmful financial products marketed as short-term loans that will help people, but which in reality ensnare borrowers in long-term debt traps, leaving them much worse off than if they had not taken out the loans. New York has long prohibited usurious loans, and has consistently taken action to enforce its usury laws and keep payday lending out of the state, with the support of New York advocates and New York residents alike. Internet payday lenders such as Plaintiffs-Appellants should not be permitted to undermine New York's longstanding consumer protections by making usurious loans to New York residents.

ARGUMENT

NEW YORK HAS A COMPELLING STATE INTEREST IN ENFORCING ITS USURY LAWS TO KEEP PAYDAY LENDING OUT OF NEW YORK

A. Internet Payday Loans Cause Extraordinary Harm to New York Residents, Particularly Lower-Income New Yorkers

Payday loans are an exorbitantly expensive financial product, carrying high fees that typically amount to an annual percentage rate (APR) ranging from 390% to 780%.² Because of the astronomically high rates that accompany the loans, payday lending violates New York's civil and criminal usury laws. *See* N.Y. Banking Law § 14-a and Gen. Oblig. Law § 5-501 (imposing a civil usury cap of 16%); N.Y. Penal Law § 190.40 (imposing a criminal usury cap of 25%). Loans that exceed the State's usury caps are void and unenforceable in New York. N.Y. Banking Law § 356. As a result, payday loans are not available in New York through traditional, "brick and mortar" storefronts; however, New Yorkers do sometimes obtain payday loans over the internet. Internet payday loans can be even more costly than traditional payday loans, carrying a typical APR of about 650%.³

²Consumer Fed'n of Am., *How Payday Loans Work*, Payday Loan Consumer Information, <http://paydayloaninfo.org/facts#1>.

³ CONSUMER FED'N OF AM., CFA SURVEY OF ONLINE PAYDAY LOAN WEBSITES 4 (Aug. 2011), *available at* <http://www.consumerfed.org/pdfs/CFAsurveyInternetPaydayLoanWebsites>.

Like traditional payday loans, internet payday loans ensnare borrowers in debt traps, leaving them in a much worse position than if they had never taken out the loans in the first place.⁴ Although payday lenders market their loans to potential borrowers as “short-term” in nature, in reality, payday loans are structured to make repayment difficult, if not impossible, for most borrowers.⁵ Payday loans are also made without any consideration of the borrower’s ability to repay. Whereas most traditional loans are underwritten – meaning that the lender takes into account the borrower’s income, as well as any other obligations and expenses – payday loans are not underwritten to take into account whether the borrower can afford the loan.⁶

pdf; CONSUMER FINANCIAL PROTECTION BUREAU, PAYDAY LOANS AND ADVANCE DEPOSIT PRODUCTS: A WHITEPAPER OF INITIAL DATA FINDINGS 10, 17 (Apr. 2013) [hereinafter CFPB WHITEPAPER], *available at* http://files.consumerfinance.gov/f/201304_cfpb_payday-dap-whitepaper.pdf (internet loans “tend to be offered with fees equal to or higher than storefront loans”).

⁴ Jean Ann Fox, *Research Findings Illustrate the High Risk of High-Cost Short-Term Loans for Consumers*, CONSUMER FED’N OF AM. (Feb. 18, 2009),

http://www.paydayloaninfo.org/elements/www.paydayloaninfo.org/File/CF A_Fringe_Loan_Product_Harm_Research.pdf.

⁵ CFPB WHITEPAPER, *supra* note 3, at 43; URIAH KING & LESLIE PARRISH, CTR. FOR RESPONSIBLE LENDING, PAYDAY LOANS, INC.: SHORT ON CREDIT, LONG ON DEBT 1 (2011) [hereinafter PAYDAY LOANS, INC.], *available at* <http://www.responsiblelending.org/payday-lending/research-analysis/payday-loan-inc.pdf>.

⁶ PEW CHARITABLE TRUSTS, PAYDAY LENDING IN AMERICA: POLICY SOLUTIONS 27 (October 2013), *available at* <http://www.pewstates.org>

The only thing that matters to a payday lender is whether a loan applicant receives a regular check. It need not even be a paycheck: payday lenders also make loans to those who subsist on Social Security benefits, pensions, Supplemental Security Income, or other fixed benefit payments.⁷

Most payday loan borrowers live paycheck to paycheck – or benefit check to benefit check – and cannot pay both their essential expenses, such as rent, food, and utilities, and the high costs of a payday loan.⁸ The loans are structured so that they come due on the borrower’s next payday, generally two weeks after the loan is made. However, most borrowers are unable, in this tight time-frame, to repay the entire principal of the loan plus the fees. Consequently, most borrowers roll the initial loan into a new loan, incurring additional exorbitant fees.⁹ The industry is built around these rollovers; indeed, more than 75% of all payday loans are the result of “churning” borrowers from one loan to the next each pay period.¹⁰

/uploadedFiles/PCS_Assets/2013/Pew_Payday_Policy_Solutions_Oct_2013.pdf; CFPB WHITEPAPER, *supra* note 3, at 9, 44.

⁷ CFPB WHITEPAPER, *supra* note 3, at 6, 9, 19.

⁸ CFPB WHITEPAPER, *supra* note 3, at 17-18.

⁹ PAYDAY LOANS, INC., *supra* note 5, at 2, 5.

¹⁰ Press Release, Ctr. for Responsible Lending, Phantom Demand: Payday Lenders Create Their Own Demand with Loan Terms That Generate Rapid Re-borrowing (July 9, 2009), *available at* <http://www.responsiblelending.org/media-center/press-releases/archives/phantom-demand-unfair-payday-loan-terms-generate-most-of-loan-volume.html>; Letter from national, state, and local advocacy

Lower-income borrowers quickly become trapped in a cycle of debt, continuously renewing their loans and paying high fees, often repaying the initial loan multiple times over, yet never making a dent in the principal allegedly owed. And because the lenders electronically debit their hefty fees directly from the borrower's bank account on the day the borrower receives her paycheck or benefits payment, the lenders pay themselves first, often leaving borrowers short of the funds they need for their rent, food, medication, and other necessities.¹¹

Tellingly, even one of the Plaintiffs-Appellants, The Otoe-Missouria Tribe of Indians, appears to have recognized the dangers of the very payday loans it markets and sells. When the tribe announced its partnership with a Kansas City-based payday lender in the winter of 2010, it stated that its loans would not be available to its own tribal members.¹² Refusing to make payday loans to their own tribal members may be standard practice among tribal lenders. As one media outlet reported, a consultant pitching the payday

groups to members of U.S. Congress (Apr. 26, 2012), *available at* http://www.nclc.org/images/pdf/high_cost_small_loans/payday_loans/letter426-house.pdf.

¹¹ Letter from national, state, and local advocacy groups to members of U.S. Congress (May 11, 2011), *available at* http://www.nclc.org/images/pdf/high_cost_small_loans/payday_loans/letter-consum-lending-internet.pdf.

¹² Heather Sarles, *Tribe Launches Online Loan Company*, WORAGE STORIES OF THE PEOPLE: THE OTOE-MISSOURIA TRIBAL NEWSLETTER 3, Winter 2010, *available at* <http://www.omtribe.org/assets/files/Otoe%20Winter%2010.pdf>

lending business to the tribal council of the Wakpamni District of the Oglala Sioux tribe in South Dakota gave the following advice during his pitch: “My advice is don’t take out a payday loan...Let [other] people take out the loan and let us make money off them.”¹³ This may be because Native Americans themselves have felt the harmful consequences of payday loans: a survey of attendees at a National American Indian Housing Council meeting found that 67% of respondents believed that payday loans were a problem in their communities.¹⁴

As the following stories illustrate,¹⁵ New York payday loan borrowers have likewise felt the harmful consequences of payday loans. In *Amici*’s experience, New Yorkers typically take out payday loans because they are looking for temporary financial assistance, but instead find themselves caught in a long-term cycle of debt that includes escalating fees, repeated

¹³ Eamon Javers, *How Some Payday Lenders Charge Over 700% on Loans*, CNBC, Sept. 17, 2012, http://www.cnbc.com/id/49035819/How_Some_Payday_Lenders_Charge_Over_700_on_Loans.

¹⁴ Nathalie Martin & Joshua Schwartz, *The Alliance Between Payday Lenders and Tribes: Are Both Tribal Sovereignty and Consumer Protection at Risk?*, 69 WASH. & LEE L. REV. 751, 799 fn. 256 (2012); FIRST NATIONS DEVELOPMENT INSTITUTE, BORROWING TROUBLE: PREDATORY LENDING IN NATIVE AMERICAN COMMUNITIES 2 (2008), available at www.aecf.org/~media/Pubs/Topics/Special%20Interest%20Areas/Other/BorrowingTroublePredatoryLendinginNativeAmeri/borrowing%20trouble.pdf.

¹⁵ All of the personal stories in this brief are from *Amici*’s clients or constituents, and are representative examples of the many stories *Amici* have heard from New Yorkers about the harms of payday loans. In some cases, their full names have not been used in order to protect their privacy.

bank overdraft charges, seizure of exempt funds, harassment by debt collectors, and exclusion from the banking system, making the borrowers worse off than if they had never taken out the loans to begin with.

For instance, Mr. R, a Utica resident and constituent of Central New York Citizens in Action, Inc., turned to internet payday loans for temporary help at a time when he was struggling to pay his bills, only to become mired for *four years* in the classic payday loan trap: he would repay one loan, but the loan payments would leave him short of money to pay his bills, and so he would take out another payday loan to cover the next month's bills. Mr. R ended up taking out at least two dozen payday loans in all. His final loan was from a tribal payday lender that took \$250 from his credit union account every two weeks, of which it applied \$200 to the fees, and only \$50 to the principal. Eventually, no longer able to keep up with the debits but reluctant to take out yet another payday loan, Mr. R was forced to close his credit union account. Although he had paid back the principal several times over, the payday lender continued to harass him with round-the-clock phone calls to collect additional fees.

Likewise, Patricia O, a Buffalo resident and client of Western New York Law Center, ended up paying half of her income every pay period to internet payday lenders. After incurring unanticipated medical expenses, she

obtained five internet payday loans, including one from a tribal lender, to help pay her bills. The loans' APRs ranged from about 620% to about 990%. Although the loans totaled only \$2,000, the lenders took close to \$600 – half of Ms. O's income – from her bank account every two weeks. After she had repaid more than the principal amounts of the loans, she closed her bank account to stop the lenders' debits.

The case of Ms. B, a 71-year-old Manhattan resident and client of New Economy Project whose only income is her Social Security benefits and her pension, illustrates the particular dangers of payday loans for the elderly and others living on a fixed income. In November 2012, Ms. B borrowed from three payday lenders to help pay her bills, but immediately struggled with the payments, causing her to fall further behind on her rent and other bills, which led to her taking out another payday loan in January 2013. Fortunately, she was able to stop the lenders' debits by closing her bank account, but the lenders have continued to harass her by phone and by emails, even threatening to sue her on the illegal loans.

Breaking this cycle can be especially difficult with internet payday loans. If the borrower's bank account does not have enough funds to cover a debit request by a payday lender, the borrower's bank may pay or reject the overdraft, depending on the borrower's account agreement; in either case,

the bank charges the borrower an overdraft fee. If the payday lender's debit request is returned unpaid, the payday lender resubmits the request, often multiple times, triggering a cascade of bank fees that cause the borrower's bank account to quickly spiral into a high negative balance.¹⁶ Then, when accountholders are unable to pay their banks' overdraft fees, the banks typically close their accounts and report them to ChexSystems, a consumer reporting agency, for their failure to pay.¹⁷ The negative ChexSystems reports, in turn, prevent borrowers from opening accounts at other banks. In this manner, payday loan borrowers often end up locked out of the mainstream banking system.

The story of Ivy Brodsky, a retail worker from Brooklyn and client of New Economy Project, shows the toll that internet payday lenders' debits can take on borrowers' bank accounts. Ms. Brodsky took out six internet payday loans, some of which carried APRs of 782%, to help pay her bills. The payday lenders' debits continuously drained her bank account, often triggering bank overdraft fees; in a two-month period, the payday lenders

¹⁶ Jessica Silver-Greenberg, *Major Banks Aid in Payday Loans Banned by States*, N.Y. TIMES, Feb. 23, 2013, at A1, available at http://www.nytimes.com/2013/02/24/business/major-banks-aid-in-payday-loans-banned-by-states.html?_r=0.

¹⁷ Jessica Silver-Greenberg, *Over a Million Are Denied Bank Accounts for Past Errors*, N.Y. TIMES, July 30, 2013, at A1, <http://dealbook.nytimes.com/2013/07/30/over-a-million-are-denied-bank-accounts-for-past-errors/>.

attempted to debit her account 55 times, and her bank charged her \$1,500 in overdraft fees.¹⁸ Because Ms. Brodsky was unable to pay the overdraft fees, her bank reported her to ChexSystems, blocking her access to the mainstream banking system.

Subrina Baptiste, also of Brooklyn and a client of New Economy Project, had her exempt child support funds seized by her bank after she took out three internet payday loans to help pay her bills. The lenders debited hefty fees from her bank account twice a month – sometimes as much as \$168 per debit. Meanwhile, her bank charged her about \$800 in overdraft fees as a result of the repeated debits and illegally seized more than \$600 in child support funds to cover the fees.¹⁹ Although she asked the payday lenders to stop debiting her account, they refused. Ms. Baptiste’s bank finally closed her account, but then proceeded to call her relentlessly to pay the overdraft, and reported her to ChexSystems.

Cynthia J, a city worker, single mother living in the Bronx, and client of New Economy Project, turned to internet payday loans when she fell behind in her rent, but ended up losing thousands of dollars to the lenders. Over a period of months, Ms. J borrowed eight payday loans, including from tribal lenders, and soon found her entire paycheck swallowed by payday

¹⁸ *Id.*

¹⁹ *Id.*

loan fees and her bank account in overdraft status. Ms. J's bank charged her \$1,390 in overdraft fees, took \$721 in child support funds, closed her account, and reported her to ChexSystems. Even today, two years later, debt collectors continue to harass Ms. J to repay these illegal loans.

Debt collectors who collect on internet payday loans often engage in egregious practices, as the story of Mr. A, a client of District Council 37 Municipal Employees Legal Services, demonstrates. Mr. A, a Brooklyn resident and retired construction worker whose income consists of Social Security and pension, took out two internet payday loans in 2012. After struggling for several months to make payments, he realized that he was unable to pay the loans and also meet his monthly living expenses, and stopped the automatic debits on the loans. Debt collectors followed up by repeatedly threatening him with arrest, which forced him to change his cell phone number. They then called his daughter, whose phone number they had from his loan application, and told her that her father would go to jail if he did not resume payments.

People who take out internet payday loans submit sensitive personal and financial information online or by fax, often to entities with which they have no prior relationship. *Amici's* clients have been the victims of "phishing" and other frauds caused by internet payday lenders who have

traded in or sold borrowers' personal and financial information.²⁰ For example, in the case of Cynthia J from the Bronx, described above, one company that debited money from her account had never even made her a loan, but simply obtained her personal and financial information from another lender and began electronically debiting her account. Other clients have found themselves at the receiving end of egregious debt collection harassment from entities attempting to frighten people into making "payments" on utterly fictitious loans.²¹

Even when borrowers are able to repay internet payday loans, the payday lenders may abuse their access to borrowers' bank accounts. James H, a 57-year-old Brooklyn resident and a client of Legal Services NYC, took out a \$700 payday loan from a tribal payday lender when he was behind in his rent. Two weeks later, the payday lender claimed he owed an additional \$199 in interest. Fortunately, Mr. H was able to repay the principal and the interest in full, and did not take out any more payday loans. A few months later, however, he learned that the same tribal payday lender had debited

²⁰ See, e.g., Press Release, Fed. Trade Comm'n, At the FTC's Request, Court Halts Alleged Phony Payday Loan Broker (Sept. 4, 2013), *available at* <http://www.ftc.gov/opa/2013/09/vantage.shtm>.

²¹ Letter from national, state, and local advocacy groups to members of U.S. Congress (Apr. 26, 2012), *available at* http://www.nclc.org/images/pdf/high_cost_small_loans/payday_loans/letter426-house.pdf.

several hundred dollars from his bank account. When Mr. H called the payday lender, it falsely claimed that he had taken out a second payday loan. His bank closed his account, but then allowed the lender to debit money from the account anyway, causing a \$399 overdraft. The bank then pursued Mr. H for the overdraft and reported him to ChexSystems, blocking Mr. H from opening another bank account.

The examples above demonstrate how internet payday lending substantially harms lower income New Yorkers in myriad ways, and why New York has a compelling state interest in protecting New Yorkers by enforcing the State's usury laws against internet payday lenders.

B. New York Has Historically Applied and Enforced Its Usury Laws to Protect Residents from High-Cost Loans

Plaintiffs-Appellants' claim that New York "has been content for years to allow its residents to take out 'payday loans'" is flatly incorrect. *See* Plaintiffs-Appellants' Brief, at 23.

In fact, New York's prohibitions on usury date back to the late 18th century, and have survived in substantially similar form to the present.²²

²² Compare An Act for preventing Usury (Feb. 8, 1787), reprinted in Laws of the State of New York, Revised and Passed at the Thirty-Sixth Session of the Legislature, Volume 1, 64 and The Revised Statutes of the State of New York, pt. 2, ch. 4, tit. 3, § 1 (1829) with N.Y. Gen. Oblig. Law § 5-501.

These prohibitions have kept storefront payday lending out of New York.²³ Nor are New Yorkers clamoring for internet payday loans, as Plaintiffs-Appellants seem to suggest: in states like New York that have no storefront payday lending, 95% of would-be borrowers choose not to use payday loans at all, and only 5% borrow online or elsewhere.²⁴

Moreover, the State has taken aggressive actions over the years to curb the payday lending industry's attempts to make loans in New York. In 1999 and again in 2000, DFS's predecessor, the former Banking Department, issued industry letters warning banks and other lenders against making payday loans in New York; the letter sent in 2000 notes that the Banking Department contacted one company that had been offering payday loans in New York, and secured the company's agreement to immediately stop taking applications for payday loans from New York State residents.²⁵

²³ PEW CHARITABLE TRUSTS, PAYDAY LENDING IN AMERICA: WHO BORROWS, WHERE THEY BORROW, AND WHY 21 (July 2012), *available at* http://www.pewstates.org/uploadedFiles/PCS_Assets/2012/Pew_Payday_Lending_Report.pdf; *see also* CALIF. REINVESTMENT COAL. ET AL., THE CASE FOR BANNING PAYDAY LENDING: SNAPSHOTS FROM FOUR KEY STATES 13 (2013), *available at* <http://www.nedap.org/documents/2013-6-3paydaylendingsnapshots.pdf>.

²⁴ Pew Charitable Trusts, *supra* note 23, at 22.

²⁵ Letter from Elizabeth McCaul, Acting Superintendent of Banks, N.Y. State., to payday industry (June 29, 1999), *available at* http://www.dfs.ny.gov/legal/industry_circular/banking/il990629.htm; Letter from Elizabeth McCaul, Acting Superintendent of Banks, N.Y. State., to

In 2004, the New York Attorney General took actions against four different payday lenders that had been making usurious loans to New York residents.²⁶ All four payday lenders ultimately agreed or were ordered by a court to stop making usurious payday loans in New York. In 2009, after a long court battle, the Attorney General secured a \$5.2 million settlement from two of the payday lenders.²⁷

In February 2013, Governor Andrew Cuomo announced that DFS had sent letters to all debt collectors in New York stating that it is illegal to attempt to collect on payday loans, as such loans are illegal in New York. Governor Cuomo noted that “[s]tudies clearly show that payday loans are not a solution for people with low incomes, but rather a high cost debt trap.

payday industry (June 13, 2000), *available at*

http://www.dfs.ny.gov/legal/industry_circular/banking/il000613.htm.

²⁶ Press Release, N.Y State Office of the Attorney Gen., Payday Lender to Forgive Loans and Provide Refunds (Nov. 22, 2004), *available at* <http://www.ag.ny.gov/press-release/payday-lender-forgive-loans-and-provide-refunds>.

²⁷ *See id.*; *see also* People v. County Bank of Rehoboth Beach, 45 A.D.3d 1136 (3rd Dept. 2007); People v. JAG NY LLL, 18 A.D.3d 950 (3d Dept. 2005); People v. JAG NY LLL, No. 5302-04 (Albany Sup. Ct. 2004), *available at* http://www.nclc.org/images/pdf/unreported/AG_Decision_Payday_Lending.pdf; Geoff Williams, *New York Returns Money to 14,000 Payday Loan Customers*, Daily Finance, Nov. 17th, 2009, <http://www.dailyfinance.com/2009/11/17/new-york-returns-money-to-14-000-payday-loan-customers>.

That’s why they are illegal in New York, and the State will continue to protect consumers from these misleading loans.”²⁸

For many years, the State has also had to contend with the check-cashing industry’s repeated efforts to obtain a carve-out from New York’s usury laws and make high-cost, short-term loans in New York.²⁹ The State has successfully fought back. In April 2013, DFS came out in strong opposition to the industry’s aggressive efforts: in a letter to New York State Assembly Speaker Sheldon Silver, Superintendent Benjamin Lawsky noted that “New York State has been a leader in protecting consumers from predatory short-term, high-interest payday loans” and that “[c]onsumers who turn to [payday] loans for relief...often end up in a cycle of borrowing that

²⁸ Press Release, N.Y. State Dep’t of Fin. Servs., Governor Cuomo Announces Department of Financial Services Notifies Debt Collectors Not To Seek Collection on Illegal Payday Loans (Feb. 22, 2013), <http://www.dfs.ny.gov/about/press2013/pr1302221.htm>.

²⁹ See CALIF. REINVESTMENT COAL., *supra* note 23, at 13; see also Editorial, *Gouging the Poor in New York*, N.Y. TIMES, Mar. 15, 2013, at A20, available at http://www.nytimes.com/2013/03/16/opinion/gouging-the-poor-in-new-york.html?_r=0.

leaves them far worse off as a result.”³⁰ Assembly Speaker Silver also reportedly opposed the industry’s efforts.³¹

New York advocates have also worked hard for years to keep payday lending out of the state. *Amici* and their allies, as part of a statewide coalition called New Yorkers for Responsible Lending, with 161 organizational members, have successfully fought off the industry’s efforts to undermine the State’s usury caps.³² As a result of opposition from both the State and from advocates, as well as from media,³³ the New York State Legislature has declined, year after year, to allow usurious loans into the State.

³⁰ Letter from Benjamin M. Lawsky, N.Y. Superintendent of Financial Services, to Sheldon Silver, N.Y. State Assembly Speaker (Apr. 29, 2013), available at <http://nedap.org/programs/campaigns/documents/DFS4-29-13LettertoSpeakerSilver.pdf>.

³¹ Daniel Beekman, *Check cashing stores push Albany lawmakers to allow 200% APR loans*, N.Y. DAILY NEWS, Apr. 23, 2013, <http://www.nydailynews.com/news/politics/check-cashing-stores-push-offer-200-apr-loans-article-1.1325661>.

³² See CALIF. REINVESTMENT COAL., *supra* note 23, at 13; see also Alex Ulam, *Consumer Groups Call N.Y. Plan an Invitation to Usury*, AMERICAN BANKER, June 2, 2011, available at <http://nedap.org/programs/campaigns/documents/2011-06-02AmericanBanker.pdf>; Jonathan D. Epstein, *‘Payday Loans’ Draws Heated Debate*, THE BUFFALO NEWS, June 5, 2011, available at <http://nedap.org/programs/campaigns/documents/2011-06-05BuffaloNews.pdf>.

³³ See CALIF. REINVESTMENT COAL., *supra* note 23, at 13; Editorial, *Hurting Poor Borrowers*, N.Y. Times, Jan. 31, 2012, at A26, available at http://www.nytimes.com/2012/02/01/opinion/hurting-poor-borrowers.html?_r=1&s.

Nor do New York residents want any weakening of the State's usury protections. In a March 2013 poll conducted by Public Policy Polling, New York voters voiced overwhelming opposition to increasing the State's 25% usury cap.³⁴ New York's usury laws and enforcement actions have also clearly benefited New Yorkers even after they have taken out internet payday loans. In *Amici's* experience, many payday loan borrowers feel obligated to pay back their debts, and others believe they have no choice but to allow payday lenders to continue debiting exorbitant amounts from their bank accounts. But when they learn that payday loans are illegal in New York, they feel empowered to inform debt collectors that the debts they seek to collect on are illegal, and they seek their banks' help in blocking the payday lenders' debits. For example, Craig S. of Staten Island, a client of MFY Legal Services, took out a payday loan without realizing its true cost, and was shocked when he learned how much he would have to pay in fees. Fortunately, he came upon Governor Cuomo's February 2013 letter to debt collectors, which empowered him to dispute the loan as void under New York law. Others have voiced their concerns and shared their stories by

³⁴ New Economy Project, *New York Voters Voice Overwhelming Support for New York State's 25% Interest Rate Cap on Loans* (Mar. 2013) (sharing poll results from New York Survey by Public Policy Polling), *available at* <http://nedap.org/programs/campaigns/documents/PollResults.pdf>.

filing complaints with DFS and the Attorney General's office. Still others have had collection attempts cease simply because of the State's actions.

C. Usurious Short-Term Loans Are Not Available to New Yorkers through Other Sources

Plaintiffs-Appellants attempt to minimize the harm caused by payday loans made over the internet to New York residents, by claiming that usurious short-term loans are presently available through two other sources – licensed lenders, and state or federally chartered banks. This claim is patently incorrect.

Plaintiffs-Appellants' claim that licensed lenders in New York can make small-dollar loans in excess of the usury cap is misleading. In fact, lenders licensed under NY Banking Law § 351 can make loans in excess of New York's 16% civil usury cap for loans up to \$25,000, but these loans are still subject to the criminal usury cap of 25%.³⁵ State-chartered banks are prohibited from making loans at rates that exceed the civil or criminal usury limits. *See* N.Y. Banking Law § 14-a; Gen. Oblig. Law § 5-50; N.Y. Penal Law § 190.40.

³⁵ *See* N.Y. Banking Law § 351; *see also* Legal Staff Opinion from Elizabeth Nochlin, Assistant Counsel, N.Y. Dept. of Fin. Svcs. (Mar. 14, 2011), *available at* http://www.dfs.ny.gov/legal/interpret_opinion/banking/lo110314.htm.

It is also not correct, as Plaintiffs-Appellants claim, that any national banks are using their federal charter to circumvent New York’s usury laws and make high-interest, short-term loans like payday loans to New Yorkers. In early 2011, Wells Fargo announced a plan to introduce a payday loan-like product in New York (called “direct deposit advance”), but a coalition of labor, community, legal services, consumer, senior, and civil rights groups, and community development financial institutions convinced Wells Fargo that these loans violated the spirit of New York’s usury laws, and were not welcome in New York. Wells Fargo subsequently announced that it would not introduce the product.³⁶ To date, neither Wells Fargo nor any other national bank is offering any payday loan-like products in New York.

CONCLUSION

It is well documented that payday loans trap borrowers in a cycle of debt. In *Amici’s* experience, internet payday lenders do not provide a “service” to borrowers, as Plaintiffs-Appellants summarily claim. Instead, internet payday loans often have severe repercussions for borrowers, including exorbitant interest and fees, repeated bank overdraft charges,

³⁶ Press Release, New Economy Project, Wells Fargo Bank Backs Off Plan to Introduce Usurious Loans in New York (Feb. 17, 2011), *available at* <http://www.nedap.org/pressroom/documents/2-17-11-pressrelease.pdf>

seizure of exempt funds, harassment by debt collectors, and exclusion from the banking system, making borrowers worse off than if they had never taken out the loans to begin with. New York has a compelling state interest in enforcing its long-standing usury caps and protecting its residents from these harmful loans.

Certificate of Compliance with FRAP 32(a)

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 5,974 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2010 in Times New Roman 14-point font.

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