IN THE SUPREME COURT OF FLORIDA

Case No. SC04-1825

Lower Tribunal No. 4D03-3268

McKENZIE CHECK ADVANCE OF FLORIDA, LLC,
d/b/a NATIONAL CASH ADVANCE,
STEVE A. MCKENZIE and BRENDA G. MCKENZIE

Petitioners,

v.

WENDY BETTS, on behalf of herself
and all others,
similarly situated,

Respondent.

BRIEF *AMICI CURIAE* OF AARP, NATIONAL ASSOCIATION OF CONSUMER ADVOCATES AND NATIONAL CONSUMER LAW CENTER IN SUPPORT OF RESPONDENT

FILED BY THE CONSENT OF ALL PARTIES

ON APPEAL FROM THE FOURTH DISTRICT COURT OF APPEAL

Deborah Zuckerman
(*Pro Hac Vice* Motion Pending)
AARP Foundation
601 E Street, N.W.
Washington, DC 20049
(202) 434-2060

Lynn Drysdale (FBN 508489)
(Counsel of Record)
Jacksonville Area Legal Aid, Inc.
126 Adams Street
Jacksonville, Florida 32202
(904) 356-6371

Counsel for *Amici Curiae*

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STATEMENT OF INTEREST

AARP, National Association of Consumer Advocates (NACA), and National Consumer Law Center (NCLC) ("*amici*") are organizations that devote a considerable amount of work to protecting consumers from exploitation in the credit marketplace, including advocacy for the enactment and enforcement of strong state laws. *Amici* recognize that low-income consumers, those whom mainstream lenders consider "high risk" borrowers, and those on fixed incomes, often have difficulty finding credit on reasonable terms. They typically are relegated to high-cost lenders and non-traditional sources of credit, where they often are subject to deceptive and unfair lending practices, such as hidden fees, exceedingly high interest rates, oppressive collection practices, and extreme default penalties.

Payday loans are just one in an array of products in a burgeoning industry that targets necessitous borrowers, the very people for whose protection usury and other interest rate limits exist. Because products in these markets are particularly exploitative, *amici* have assisted in efforts to enact protections for borrowers. Moreover, in response to payday lenders' arguments that they do not make loans or otherwise are not covered by usury laws or other interest limits, *amici* have filed *amicus* briefs urging federal and state courts not to countenance these efforts and instead to

enforce these laws.

AARP is a non-partisan, non-profit organization with more than 35 million members, approximately 2.6 million of whom live in Florida. As the largest membership organization dedicated to the needs and interests of people aged 50 and older, AARP is greatly concerned about unfair and deceptive financial products and services targeted at vulnerable consumers. Older Americans are disproportionately victimized by many of these practices, leading to AARP's support of laws and policies to protect their rights in the marketplace. Because of its concerns about lending abuses, AARP has published reports on the issues involved and measures needed to protect consumers, as well as a model payday loan law. *See, e.g.*, Sharon Hermanson & George Gaberlavage, AARP, *The Alternative Financial Services Industry* (2001), and Elizabeth Renuart, AARP, *Payday Loans: A Model State Statute* (2000). In addition, AARP attorneys represent payday borrowers alleging a fraudulent, predatory scheme, *Favors v. Stewart Fin. Co.*, No. 2002-CV-55526 (Ga. Super. Ct. Fulton County filed July 9, 2002), and were counsel in class actions alleging that a payday lender's interest rates violated federal and state laws and that the lender partnered with a national bank to evade usury and other state laws. *See, e.g., Purdie v. ACE Cash Express, Inc.*, CA No. 301-CV1754-L (N.D.

Tex. settlement approved Dec. 11, 2003). AARP also has filed *amicus* briefs in numerous cases involving payday lenders' efforts to evade usury and other interest caps. *See, e.g., Cardegna v. Buckeye Check Cashing, Inc.*, No. SC02-2161 (Fla. Sup. Ct. Br. filed June 10, 2003); *Bankwest, Inc. v. Baker, Att'y Gen.*, No. 04-12420-C (11th Cir. Br. filed June 23, 2004) and 324 F. Supp. 2d 1333 (N.D. Ga. 2004). In addition, the AARP Florida State Office was actively involved in the state legislature's efforts to regulate payday lenders. While AARP advocated for stronger provisions than those eventually enacted as the 2001 amendments to the Money Transmitters' Code, AARP recognizes that the law provides more consumer protection than that afforded by the laws of most other states (e.g., statewide data tracking system, credit counseling).

The National Association of Consumer Advocates (NACA) is a non-profit organization whose members are private and public sector attorneys, legal services attorneys, law professors, and law students whose primary practice and areas of specialty involve the protection and representation of consumers. NACA's mission is to promote justice for all consumers by maintaining a forum for information sharing among consumer advocates across the country and to serve as a voice for its members, as well as consumers, in the ongoing struggle to curb unfair and abusive business practices.

The National Consumer Law Center, Inc. (NCLC) is a non-profit corporation established in 1969 to conduct research, education, and litigation regarding significant consumer matters. One of NCLC's primary objectives is to assist attorneys in representing the interests of their low-income and elderly clients. A major focus of NCLC's work has been to increase public awareness of, and to promote protections against, high-cost loans and other forms of abusive credit extended to low-income consumers. NCLC publishes *The Cost of Credit: Regulation and Legal Challenges* (2d ed. 2000 & Supp. 2004), and *Truth in Lending* (5th ed. 2003), among its many other treatises, to assist attorneys whose clients have been victimized by unfair, fraudulent, or deceptive lending practices. In addition, NCLC has directly assisted attorneys in scores of cases brought under federal and state credit protection statutes. The Federal Trade Commission (FTC) designated NCLC as the consumer representative in proceedings that led to the promulgation of Rules on Preservation of Consumers' Claims and Defenses, 16 C.F.R. § 433, and Credit Practices, 16 C.F.R. § 444.

Amici submit this brief in support Mrs. Betts to assist the Court in its disposition of the appeal by discussing the exploitative practices of payday lenders, and the importance to Florida's vulnerable borrowers of a ruling that Florida's

usury law applies to payday loans made prior to the 2001 amendments to the Money Transmitters' Code.

SUMMARY OF ARGUMENT

Low-income consumers and those whom mainstream lenders consider "high risk" often cannot find credit in the traditional market and rely on high-cost lenders and non-traditional sources of credit. Payday loans, refund anticipation loans (RALs), and automobile title pawns, are the most common products offered in this market, typically at triple digit and higher annual percentage rates (APRs). These lenders target low-income and working poor consumers, minorities, and those with blemished credit histories -- consumers most vulnerable to exploitation and least able to protect their interests. This has resulted in a two-tiered economy, often referred to as a system of "financial apartheid" or a "second-class" market, in which middle-income and affluent consumers are served by federally-insured and regulated banks and other lenders, and the poor and near-poor are relegated to expensive and, in many cases, poorly regulated alternatives. *See* Lynn Drysdale & Kathleen Keest, *The Two-Tiered Consumer Financial Services Marketplace: The Fringe Banking System and its Challenge to Current Thinking About the Role of Usury Laws in Today's Society*, 51 S.C. L. Rev. 589, 591 (2000) [hereinafter *Two-Tiered Marketplace*].

Poorer consumers often have little choice but to turn to these lenders because of limited bargaining power and financial desperation, and are among those with the greatest need for enforcement of usury and other laws enacted for their benefit. Florida courts have a long history of recognizing the role of usury laws to protect borrowers, *see, e.g.*, *Chandler v. Kendrick*, 146 So. 551, 552 (Fla. 1933) (stating purpose of usury laws is to "bind the power of creditors over necessitous debtors and prevent them from extorting harsh and undue terms in the making of loans."), and *amici* urge the Court to continue this tradition by affirming the court of appeals' ruling that the payday loans at issue were subject to the state usury law. *Betts v. McKenzie Check Advance*, 879 So. 2d 667 (Fla. 4th DCA 2004). *See* App. A.

ARGUMENT

I. STATE LAWS MUST PROTECT VULNERABLE CONSUMERS EXPLOITED BY FRINGE LENDERS.

A. The Nature of the Marketplace

In order for the Court to fully appreciate the implications of its decision, it is important to understand the nature of the market in which payday loans are made. These loans are part of an industry popularly referred to as "fringe banking" or the "alternative financial sector" (AFS). *See* Roger Swagler, et al., *The Alternative Financial Sector:*

An Overview, 7 Advancing the Consumer Interest 7, 7 (1995); John R. Burton, et al., *The Alternative Financial Sector: Policy Implications for Poor Households*, 42 Consumer Interests Annual 279, 279 (1996). Fringe bankers target low-income, working poor, and minority consumers, and those with blemished credit histories, who cannot obtain money, credit, or certain consumer goods from traditional sources. While many consumers have other ways to obtain short-term, unsecured loans, such as credit cards and checking accounts with overdraft lines of credit, the poor and near-poor typically do not qualify for these loans. Coupled with the decline in the availability of small, unsecured loans from banks and finance companies, many consumers with modest incomes or impaired credit find fringe bankers their only source of credit. Well aware that they are one of the few sources of quick cash for these consumers, fringe bankers argue they merely fill the gap left by traditional lenders. Even if this were a legitimate argument, and *amici* do not concede it is, the provision of a necessary service neither justifies the industry practices that harm the very consumers these lenders purport to help nor supports reducing or evading consumer protections.

A primary segment of the fringe market offers products that allow consumers to obtain a relatively small amount of cash with repayment deferred for a relatively short period,

usually two weeks. The three main forms of these cash advances -- payday loans, refund anticipation loans (RALs), auto title pawns -- are extremely expensive, typically imposing triple digit APRs, far in excess of state usury limits. Even in states with permissive payday loan laws, the industry seems unable to comply with federal and state laws, or even the industry's own "best practices." *See* Creola Johnson, *Payday Loans: Shrewd Business or Predatory Lending?*, 87 Minn. L. Rev. 1, 26-98 (2002) [hereinafter *Shrewd Business*].

In addition to high APRs, fees paid for "roll overs," when the borrower cannot repay the loan, lead to significantly higher costs that borrowers can ill afford, and an even greater gap between the cost of these loans and alternative sources of credit. *See* Woodstock Inst., *Unregulated Payday Lending Pulls Vulnerable Consumers Into Spiraling Debt*, Reinvestment Alert, Mar. 2000, at 4. Moreover, rollovers often result in finance charges that exceed the original amount borrowed, and the borrower still owes the face amount of the check. This case illustrates the cost implications of rollovers, where Mrs. Betts paid National Cash Advance (NCA) $1240 in "fees" (and $225 in verification fees) to use NCA's $300 for eighteen months. *See* Resp't's Answer Br. at 3. *See*

also Johnson v. The Cash Store, 68 P.3d 1099 (Wash. Ct. App. 2003) (borrower wrote a post-dated check for $575, received $500, and did fifteen rollovers in seven months, each time paying $75; she thus paid $1125 *just in fees* for a $500 loan).[1]

B. The Evolution of Payday Loans Shows Their Abusive Nature

1. Payday Lenders & Their Antecedents Always Have Used Exploitative Practices

Payday loans have direct precursors in loans made against a borrower's wages. As salaries increased to the point they covered necessities and left a surplus to pay principal and interest on debts, "prospective salaries and wages became assets, however inchoate, against which loans could be made." Rolf Nugent, *The Loan-Shark Problem*, 8 Law & Contemp. Probs. 3, 4 (1941). The "five-for-six-boys" lent $5 at the beginning of the week, to be repaid with $6 on the borrower's next payday, one or two weeks later. *See Two-Tiered Marketplace*, *supra*, at 618. In some instances, "salary buyers" would "buy" the borrower's next wage packet at a discount, for example, advancing $22.50 in exchange for the "sale" of a $25 paycheck

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[1] The Florida legislature recognized this problem and, in enacting the Deferred Presentment Act, provided that "[n]o deferred presentment provider or its affiliate may engage in the rollover of any deferred presentment agreement." § 560.404(18), Fla. Stat. (2004).

two weeks later (with an APR of 311%). *Id.* at 618-19. *See also* Joe B. Birkhead, *Collection Tactics of Illegal Lenders*, 8 Law & Contemp. Probs. 78, 86 (1941) (discussing practice of lender holding as "security" a check covering principal and interest drawn on bank in which borrower did not have account; lender returned the check when borrower repaid loan but deposited check and threatened to prosecute if borrower defaulted and bank refused payment).

These loans were short-term, with two weeks the most common period. William H. Simpson, *Cost of Loans to Borrowers Under Unregulated Lending*, 8 Law & Contemp. Probs. 73, 73 (1941). While the interest rates on these loans were usurious, borrowers generally did not know their rights or have court access, resulting in few challenges. "'The one who suffers most at the hands of high-rate lenders is the borrower, yet he is almost the only member of society who has done nothing about his plight. . . . .'" *Two-Tiered Marketplace*, *supra*, at 619-20 (citation omitted). Financial distress forced borrowers to renew these loans despite high costs, causing a downward spiral mirrored by today's payday borrowers. *Id.* at 620. The borrowers' dire situations led to legislation to regulate the lenders; what emerged was a legal framework that permitted a high enough return to attract

legitimate businesses into the small loan market, with sufficient safeguards to prevent abuses seen among "loan sharks." *Id.* at 621. Lenders argued that transactions were property purchases not governed by usury laws, but the Uniform Small Loan Laws adopted by many states between 1916 and 1935 defined them as cash lending subject to small loan regulation. *See* John P. Caskey, *Fringe Banking: Check Cashing Outlets, Pawn Shops, and the Poor* 31-32 (1994) [hereinafter *Fringe Banking*].

2. Payday Loans Are Costly and Exacerbate Borrowers' "Debt Trap"

There has been an explosive growth in payday lending since the industry emerged in the early 1990s. *See* Scott A. Schaaf, *From Checks to Cash: The Regulation of the Payday Lending Industry*, 5 N.C. Banking Inst. 339, 339 (2001) [hereinafter *From Checks to Cash*]. An Arkansas investment firm recently predicted a base of 22,000 stores generating $6 billion annually in *fees alone*. Stephens Inc., *Undiscovered Companies Serving Underbanked and Unwanted Consumers*, The 3U Consumer Fin. Monthly 2 (Mar. 29, 2004). It also forecast a growth of 12-18% and annual loan volume of $40 billion. *Id.*

This growth has been tied to the deregulation of the banking industry, the absence of traditional lenders in the small loan, short-term credit market, and the elimination of

interest rate caps. *See* Lisa B. Moss, *Modern Day Loan Sharking: Deferred Presentment Transactions & the Need for Regulation*, 51 Ala. L. Rev. 1725, 1732 (2000) [hereinafter *Modern Day Loan Sharking*]. Deregulation in the 1980s led banks to eliminate less profitable services, such as free checking and small balance accounts, leaving low-income households with little access to free financial services. *Id.*

As mainstream institutions moved out of the small loan market because of higher returns on larger loans, payday lenders filled the void. *Id. See also From Checks to Cash*, *supra*, at 340-41. In addition to an increase in stand alone payday lenders, the surge in the number of loans also can be attributed to the entry into the market of check cashing outlets, convenience stores, gas stations, and pawn shops, as well as offers on the Internet. *See* U.S. Pub. Interest Research Group & Consumer Fed'n of Am., *Show Me the Money! A Survey of Payday Lenders and Review of Payday Lender Lobbying in State Legislatures* 8 (2000), *available at* www.uspirg.org/reports/ paydayloans2000/showmethemoneyfinal.pdf. *See also* Jean Ann Fox & Anna Petrini, Consumer Fed'n of Am., *Internet Payday Lending: How High-priced Lenders Use the Internet to Mire Borrowers in Debt and Evade State Consumer Protections* (2004),

available at
www.consumerfed.org/internet_payday_lending113004.pdf (surveying 100 Internet sites offering payday loans and finding rapid growth in websites marketing and/or delivering small loans; also finding lenders often bypass state usury and other laws by operating without state licenses or locating in states without meaningful restrictions and claiming loans are subject to home state's law regardless of protections afforded by borrower's state).

Payday loans are marketed as a quick, easy way to obtain cash. Borrowers need only maintain a personal checking account, be employed for a specified period with their current employer, and show a pay stub and bank statement. Payday lenders do not make inquiries routinely made by mainstream lenders, e.g., credit checks, examinations of the borrower's ability to repay, assessments of the borrower's debt-income ratio. A key element of these loans is extremely high interest rates and associated costs. A recent report found typical APRs on two-week loans ranging from 390% to 780%, despite much lower state interest caps. Jean Ann Fox, Consumer Fed'n of Am., *Unsafe and Unsound: Payday Lenders Hide Behind FDIC Bank Charters to Peddle Usury* 2 (2004). Senator Joseph Lieberman (D-Conn.) hosted a December 1999 payday lending forum and unveiled two charts which show it is

virtually impossible for an average family to repay a payday loan when it comes due. One chart showed that a family with a household income of $35,000 and typical deductions (e.g., taxes) and expenses (e.g., food, housing) could not repay a loan as small as $168 at the end of two weeks. *See* Nat'l Consumer Law Center, 18 *NCLC Reports: Consumer Credit and Usury Ed.* 13-14 (2000). This helps illustrate the fiction that lenders intend the loans to be repaid in two weeks; instead, the industry is based upon the knowledge that rollovers will be necessary.

Rollovers lead to significantly higher costs that borrowers can ill afford and create a "debt treadmill" that exacerbates the borrower's financial situation. A recent study noted: "[b]ecause of the high fees and very short terms, borrowers can find themselves owing more than the amount they originally borrowed after just a few rollovers within a single year." Michael A. Stegman & Robert Faris, *Payday Lending: A Business Model that Encourages Chronic Borrowing*, 17 Econ. Dev. Q. 8, 19 (2003) [hereinafter *Chronic Borrowing*]. The authors conclude that "the business practices pursued by many payday loan companies can have the same wealth-depleting effect on financially fragile families as other abusive consumer credit practices." *Id.* at 25.

Similar problems result when lenders, sometimes to circumvent state restrictions on rollovers, allow "back-to-back" transactions in which borrowers pay off their first loan but must immediately take out another loan to meet their financial needs until their next payday. *See* Keith Ernst, et al., Center for Responsible Lending, *Quantifying the Economic Cost of Predatory Payday Lending* 3 (2004), *available at* www.responsiblelending.org/pdfs/CRLpaydaylendingstudy121803.pdf. "[P]ayday lenders collect the vast majority of their fees from borrowers trapped in a cycle of repeated transactions. . . . This cycle (the 'debt trap') locks borrowers into revolving, high-priced short-term credit instead of meeting the need for reasonably priced, longer-term credit." *Id.* at 2. Moreover, if these loans really were meant to address a temporary need for a small amount of money "one would expect to see industry revenues driven by one-time or other limited-use borrowers. For borrowers taking out five, ten, or even twenty or more loans per year, payday lending functions as chronic debt, instead of helpful credit." *Id.* at 6 (footnotes omitted). *See also Chronic Borrowing*, *supra*, at 25 ("despite its expanding customer base and notwithstanding industry denials, the financial performance of the payday loan industry, at least in North Carolina, is significantly enhanced by the

successful conversion of more and more occasional users into chronic borrowers.”); Ill. Dep’t of Fin. Insts., *Short Term Lending Final Report* 6 (1999) (on file with AARP) (“Customers rarely borrow a single time, in fact, repeat business is the main source of revenue. A single licensee may have a limited customer base, but if the customer regularly refinances a loan the store may be quite profitable.”).

C. Usury Laws Must Be Enforced to Protect Consumers From Fringe Bankers’ Exploitative Practices

Florida borrowers benefit from strong consumer protections that enhance their economic security. The growth of fringe banking, specifically targeting consumers most vulnerable to predatory practices and least able to protect themselves from abuse, warrants stronger regulation and the rejection of exploitative lenders’ attempts to evade these protections. Fringe banking customers frequently are at a distinct disadvantage because of limited education, bargaining power, and financial desperation. Vulnerable consumers like these need special protection, a role served by usury laws which have, for hundreds of years, been enforced to “protect the needy from the greedy.” *Two-Tiered Marketplace*, *supra*, at 657.

The Florida legislature has acted when it learned of the need to curb abuses in the financial services market. In

1993, the Florida Comptroller created a “Money Transmitter Task Force” to determine “whether the money transmitter industry should be subjected to enhanced government regulation in Florida.” Letter from Douglas E. Ebert, Chairman, to The Hon. Gerald Lewis, Comptroller of Florida (Nov. 1994) (accompanying *Comptroller Gerald Lewis Money Transmitter Task Force Final Report*) [hereinafter *Final Report*]. *See* Resp't's Answer Br. at App., Tab 2. The Task Force “determined that regulation was necessary and provided the Comptroller with specific statutory and administrative guidelines upon which the industry should be regulated. These recommendations came in the form of proposed legislation which . . . became law on May 25, 1994 and May 28, 1994 . . . .” *Final Report*, *supra*, at 3. The law gave the Division of Banking and Department of Banking and Finance authority to regulate the money transmitter industry, defined broadly to include check cashers. *Id.* at 1. The Task Force found a significant increase in the number of Florida check cashers, noting “yellow pages listings for check cashers grew by 110 percent . . . between late 1988 and early 1992, at a time when the industry grew by 11 percent in the state of Illinois and 22 percent in the state of New York.” *Id.* at 6.

The Report's silence about payday lending through deferred presentment transactions is not surprising, given

statements by industry representatives during Task Force meetings. For example, a Task Force member, the President of the Florida Check Cashers Association, said payday loans were not a "real problem."

> We as an association have taken a strong stance against it. Don't do it. This is usurous [sic]. . . . You're providing a loan and it's just a bad situation. So we have told people not to do it. If it is a member that is doing it, we boot them out. If we have information we will notify the State Attorney in that area that they are doing that.

Task Force Meeting, Sept. 2, 1993, at 168 (statement of Joseph M. Doyle).

A leading expert on check cashing and payday lending cautioned the Task Force against allowing check cashers to make payday loans:

> If you allow check cashing outlets to make payday loans where they're essentially in the small loan business, that is an area where there has historically been a great deal of abuse, consumer abuse. . . . [T]here is a strong need for consumer protection laws and also in collection policies. So I think the state should reasonably take the choice by saying that's something we want the check cashers to stay out of, leave that to the loan industry which is regulated in a different way.

Task Force Meeting, Oct. 5, 1993, at 225 (statement of Prof. John P. Caskey). Mr. Doyle responded: "The payday loans, we've talked about in previous meetings. We're totally

against that in Florida. Anything we can do to make it an illegal activity we're totally supportive of. . . . Well, if they're going to make loans they should get a license to do loans, period." *Id.* at 225-26.

Perhaps demonstrating great prescience about NCA's practices, Professor Caskey observed that many states did not regulate check cashing but that if check cashers made loans they would "automatically fall under the small loan category. They say, 'I'm not making loans. I'm just cashing this check. The fact that I agree to hold it a week doesn't matter.' It clearly does matter. That's a loan transaction at that point." *Id.* at 226-27 (testimony of Prof. Caskey). Mr. Doyle stated, "We've always supported that." *Id.* at 227.

It thus was not surprising that neither the Task Force nor the legislature addressed payday lending in 1994. Check cashers and other vendors promptly began to engage in payday lending, almost mimicking Professor Caskey's testimony that they simply were "cashing checks" in accordance with the Money Transmitters' Code. The legislature later passed the Deferred Presentment Act (Act), §§ 560.401 to 408, Fla. Stat., to, among other things, "prevent fraud, abuse, and other unlawful activity associated with deferred presentment transactions." *Id.* at § 560.408.

While the Act is a recent enactment, Florida has long

recognized the role of usury laws to protect borrowers from unfair lending practices. Seventy years ago this Court noted: "The very purpose of statutes prohibiting usury is to bind the power of creditors over necessitous debtors and prevent them from extorting harsh and undue terms in the making of loans." *Chandler v. Kendrick*, 146 So. 551, 552 (Fla. 1933). *See also Jersey Palm-Gross, Inc. v. Paper*, 658 So. 2d 531, 534 (Fla. 1995) ("The Florida Legislature enacted Chapter 687, Florida Statutes (1993), to protect borrowers from paying unfair and excessive interest to overreaching creditors."); *Stubblefield v. Dunlap*, 4 So. 2d 519, 521 (Fla. 1941) ("it is entirely proper for us to bear in mind not only the letter but the spirit of the usury law and its prime purpose to protect needy borrowers by penalizing unconscionable money lenders.").

NCA's efforts to avoid compliance with Florida's usury law resemble contrivances devised by lenders to evade similar regulation.[2] Yet Florida courts have a long history of

[2] Courts routinely rejected lenders' early argument they did not make loans but merely charged "fees" to cash checks. *See, e.g.*, *Livingston v. Fast Cash USA, Inc.*, 753 N.E.2d 572 (Ind. 2001); *Quick Cash of Clearwater, Inc. v. State Dep't of Agric. & Cons. Servs.*, 605 So. 2d 898 (Fla. 2d DCA 1992). The U.S. Federal Reserve Board removed any doubt that it considered these transactions to be credit covered by the Truth in Lending Act when its revised Official Staff Commentary reiterated that "credit" includes "a transaction in which a cash advance is made to a consumer in exchange for the consumer's personal check, and where the parties agree either that the check will not be cashed or deposited or that the

looking at the substance of a transaction to determine if it is devised to evade usury. In *The Richter Jewelry Co. v. Schweinert*, 169 So. 750, 752 (Fla. 1936), this Court stated, "In determining usury courts will disregard the form of the transaction and look to its substance." The Court was more explicit in another decision the same year:

> "The cupidity of lenders, and the willingness of borrowers to concede whatever may be demanded or to promise whatever may be exacted in order to obtain temporary relief from financial embarrassment, as would naturally be expected, have resulted in a great variety of devices to evade the usury laws; and to

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consumer's deposit account will not be debited, until a designated future date." The FRB acknowledged this Commentary was not a change in the law. Official Staff Commentary § 226.2(a)(14)-2, *as published at* 65 Fed. Reg. 17,129 (Mar. 31, 2000); 12 C.F.R. § 226 (Supp. I, Cmt. 226.2(a)(14)-2. When lenders attempted to disguise other forms of credit, courts also found these ruses to be loans. *See, e.g., Cashback Catalog Sales, Inc. v. Price*, 102 F. Supp. 2d 1375, 1380 (S.D. Ga. 2000) (finding reasonable trier of fact could conclude gift certificates are usurious interest); *Sal Leasing, Inc. v. State ex rel. Napolitano*, 10 P.3d 1221 (Ariz. Ct. App. 2000) (finding auto sale and leaseback scheme was a loan); *State ex rel. Salazar v. The Cash Now Store, Inc.*, 31 P.3d 161 (Colo. 2001) (finding "assignment" of consumer's tax refund in exchange for cash constituted a loan); *Wilcox v. Moore*, 93 N.W.2d 288 (Mich. 1958) (finding "sale" of home to lender and land contract to "purchase" back the home was usurious loan); *Bantuelle v. Williams*, 667 S.W.2d 810 (Tex. App. 1983) (finding sale and repurchase agreement constituted a usurious loan). More recently, lenders began associating with national banks that can export their home states' interest rate to override usury limits in borrowers' states. This is referred to as "rent-a-bank" or "rent-a-charter" lending because the bank's only real role is to lend its name and charter to the transaction for a few days.

> frustrate such evasions the courts have been compelled to look beyond the form of transaction to its substance, and they have laid it down as an inflexible rule that mere form is immaterial, but that it is the substance which must be considered."

Beacham v. Carr, 166 So. 456, 459 (Fla. 1936) (quoting 27 R.C.L. 211 Sec. 12). *See also Kay v. Amendola*, 129 So. 2d 170, 173 (Fla. 2d DCA 1961) ("Our usury statutes show a clear legislative intent to prevent accomplishment of a usurious scheme by indirection, and the concealment of the needle of usury in a haystack of subterfuge will not avail to prevent its pricking the body of law into action.").

Inequalities between lenders and borrowers are more pronounced in the fringe banking industry than in the mainstream consumer credit market, and consumers who resort to these products are among those with the greatest need of the enforcement of laws enacted for their protection. Fringe lenders such as NCA should not be allowed to evade interest rate limits enacted to protect consumers from exploitative practices.

CONCLUSION

Amici respectfully urge the Court to rule that pre-2001 deferred presentment transactions were governed by the usury law.

Date: January 19, 2005 Respectfully submitted,

Deborah Zuckerman
(*Pro Hac Vice* motion pending)
AARP Foundation
601 E Street, N.W.
Washington, D.C. 20049
(202) 434-2060

Lynn Drysdale (FBN 508489)
(Counsel of Record)
Jacksonville Area Legal Aid
126 Adams Street
Jacksonville, FL 32202
(904) 356-8371, ext. 306

Counsel for *Amici Curiae*

CERTIFICATE OF SERVICE

I hereby certify that on this 19th day of January, 2005, I filed and served the foregoing Brief of *Amici Curiae* in Support of Respondent by sending an original and 7 copies via Federal Express, to the Clerk of the Court for the Supreme Court of Florida and 1 copy to counsel listed below:

Warren H. Husband
Metz, Hauser, Husband
& Daughton, P.A.
215 South Monroe Street
Suite 505
P.O. Box 10909
Tallahassee, Florida 32302

Virginia B. Townes
Akerman, Senterfitt
255 South Orange Avenue
Post Office Box 231
Orlando, Florida 32802

Christopher Casper
James, Hoyer, Newcomer
& Smiljanich, P.A.
4830 West Kennedy Blvd.,
Suite 550
Tampa, Florida 33609

Mitchell Berger
Berger Singerman
Suite 1100
350 East Las Olas
Boulevard
Ft. Lauderdale, Florida
33301

E. Clayton Yates
Yates & Mancini, LLC
311 South Second Street
Suite 101
37312
Fort Pierce, Florida 34950

Richard A. Fisher
Richard Fisher Law Office
1510 Stuart Road, Suite 210
Cleveland, Tennessee

____
Deborah Zuckerman
AARP Foundation
601 E Street, N.W.
Washington, DC 20049
(202) 434-2060

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing brief was prepared in Courier New, 12-point font in compliance with Fla. R. App. P. 9.210(a)(2).

Dated: January 19, 2005

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_Deborah Zuckerman
Counsel for *Amici Curiae*