



**OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS**

Kwame Raoul
ATTORNEY GENERAL

April 21, 2021

VIA ELECTRONIC MAIL

Hon. Charles E. Schumer
Majority Leader
U.S. Senate

Hon. Nancy Pelosi
Speaker
U.S. House of Representatives

Hon. Mitch McConnell
Minority Leader
U.S. Senate

Hon. Kevin McCarthy
Minority Leader
U.S. House of Representatives

Hon. Sherrod Brown
Chairman
U.S. Senate Committee on Banking,
Housing and Urban Affairs

Hon. Maxine Waters
Chairwoman
U.S. House Committee on Financial Services

Hon. Pat Toomey
Ranking Member
U.S. Senate Committee on Banking,
Housing, and Urban Affairs

Hon. Patrick McHenry
Ranking Member
U.S. House Committee on Financial Services

**Re: Use of Congressional Review Act to Invalidate OCC True Lender
Rule That Facilitates Predatory Lending**

Honorable Congressional Leaders,

On behalf of the 25 undersigned State Attorneys General (the “States”), we write to express our strong and bipartisan objections to the so-called “True Lender Rule”¹ (the “Rule”) finalized by the Office of the Comptroller of the Currency (“OCC”) on October 30, 2020. That

¹ See OCC, *National Banks and Federal Savings Associations as Lenders*, 85 Fed. Reg. 68,742 (Oct. 30, 2020) (codified at 12 C.F.R. § 7.1031), available at <https://www.govinfo.gov/content/pkg/FR-2020-10-30/pdf/2020-24134.pdf>.

Rule would sanction high-cost lending schemes devised to evade state usury laws. A growing number of states continue to pass state usury interest-rate caps on high-cost small-dollar loans in an effort to protect their consumers from predatory financial products. The OCC's Rule would be exploited by lenders seeking to circumvent these state interest-rate caps and invite, indeed welcome, predatory consumer-lending partnerships between banks and lightly regulated non-depository lenders. We urge you to use the Congressional Review Act, 5 U.S.C. §§ 801-808 ("CRA"), to rescind the OCC's True Lender Rule and safeguard states' fundamental sovereign rights to protect their citizens from financial abuse.

The Rule would sanction the use of so-called "rent-a-bank" schemes in which banks, regulated by federal agencies like the OCC, enter into sham relationships with non-bank entities for the principal purpose of allowing the non-banks to evade state usury laws. To facilitate these arrangements, the Rule heedlessly licenses non-bank entities to preempt state usury laws, notwithstanding the fact that Congress delegated this privilege exclusively to banks. Such sham rent-a-bank schemes have been widely scrutinized by courts to determine whether the bank is, in fact, the "true lender" of the loans. In order to identify the true lender, courts look to the substance rather than the form of the loan, examine the relationship between the bank and the non-bank and the totality of the circumstances surrounding the transaction.

Numerous courts across the United States have held that non-banks cannot escape state usury prohibitions under the guise of rent-a-bank schemes.² Courts have not hesitated to apply the "true lender doctrine" when a bank is named as the nominal principal party to a loan transaction but the transaction involves a non-bank participant attempting to skirt state usury limits.³ For example, in applying the doctrine, the West Virginia Supreme Court of Appeals, relying on a long line of federal circuit court holdings, held that the "predominant economic interest" test is the proper standard to use when determining who *is* the "true lender" and thus whether state law is preempted.⁴ This test examines which party (be that the bank or non-bank

² See, e.g., *Cnty. State Bank v. Strong*, 651 F.3d 1241, 1260 (11th Cir. 2011) (concluding that federal banking law does not immunize a bank from state usury law "if it is not the true lender of the loan"); *Think Fin.*, 2016 WL 183289, at *13 (same); *Spitzer v. Cnty. Bank of Rehoboth Beach*, 45 A.D.3d 1136, 1138 (3d Dep't 2007) (holding that "the true lender," rather than "the written characterization that the parties seek to give" the transaction, determines whether a bank or a non-bank would be treated as the lender); cf. *CashCall, Inc. v. Morrissey*, No. 12-1274, 2014 WL 2404300, *7, 14-15 (W. Va. 2014) (affirming judgment finding that unlicensed entity "was the de facto or true lender" and thus violated state licensing and usury laws).

³ See *Daniel v. First Nat'l Bank of Birmingham*, 227 F.2d 353, 357 (5th Cir. 1955) (holding a National Bank was liable for usury because the transaction involved "a loan or extension of credit to which the Bank was privy throughout" even though the contract was assigned to the bank after the transaction closed); *Ubaldi v. SLM Corp.*, 852 F. Supp. 2d 1190, 1203 (N.D. Cal. 2012) (denying motion to dismiss in case alleging that Sallie Mae, not a National Bank, was the true lender); *Goleta Nat'l Bank v. O'Donnell*, 239 F. Supp. 2d 745, 747, 755 (S.D. Ohio 2002) (concluding that if a non-bank was the "true lender," then it would "unquestionably [be] subject to" state usury law, even though a different entity "is clearly listed as the lender on the loan documents"); *Goleta Nat'l Bank v. Lingerfelt*, 211 F. Supp. 2d 711, 717-18 (E.D.N.C. 2002) (same); *Salazar v. Ace Cash Exp., Inc.*, 188 F. Supp. 2d 1282, 1285 (D. Colo. 2002) (same); *Eul v. Transworld Sys.*, No. 15 C 7755, 2017 WL 1178537, at *6 (N.D. Ill. Mar. 30, 2017) ("Because Plaintiffs allege that [a National Bank] was not the true originator of their loans, the Court is not persuaded that NBA preemption applies here.").

⁴ *Cashcall* at 14-15; citing *Goleta Nat. Bank v. Lingerfelt*, 211 F.Supp.2d 711(E.D.N.C.2002); *Colorado ex rel. Salazar v. Ace Cash Exp., Inc.*, 188 F.Supp.2d 1282 (D.Colo.2002); *Flowers v. EZPawn Oklahoma, Inc.*, 307 F.Supp.2d 1191(N.D.Okla.2004).

entity) has the predominant economic interest in loans “made” by a bank, considering factors such as which party uses its own money to fund the transaction and who holds the ultimate financial risk.⁵ The predominant economic interest test, employed by courts across the country, examines the substance, not just the form, of rent-a-bank lending agreements.⁶ Moreover, scrutinizing a transaction for the “true lender” in order to determine if parties are attempting to evade state usury limitations is a modern application of the *centuries* old anti-evasion doctrine.⁷ Recently, Georgia codified this test in state law to prevent rent-a-bank schemes from violating that state’s usury cap.⁸

In direct contradiction to this reasoned judicial analysis, the OCC has issued a harmful Rule that establishes a simplistic standard to *redefine* the meaning of “true lender”. Under the OCC’s Rule, regardless of the totality of the circumstances surrounding a bank and non-bank relationship, the national bank will be viewed as the true lender “when, as of the date of origination, it (1) is named as lender in the loan agreement or (2) funds the loan.” This superficial approach allows free rein for the predatory rent-a-bank lending artifice to expand into and thrive within every state regardless of state consumer protection laws.

In an attempt to halt the application of the Rule, the State Attorneys General from New York, California, Colorado, District of Columbia, Massachusetts, Minnesota, New Jersey and North Carolina⁹ have filed a multistate lawsuit against the OCC for its wholesale disregard of regulatory law and administrative procedure in promulgating the Rule.¹⁰ While that litigation remains pending, and may take years to resolve, a high cost will be borne in needless consumer

⁵ *Cashcall* at 14, footnote 19:

Courts have also applied the “predominant economic interest” test in deciding cases on the merits. For example, in *Spitzer v. County Bank of Rehoboth Beach*, 846 N.Y.S.2d 436 (N.Y.App.Div.2007), New York’s Attorney General brought an enforcement action against payday lenders who had entered into rent-a-bank arrangements. In *Spitzer*, the Attorney General alleged that the payday lenders were the true lenders and that their agreements with a rent-a-bank were a scheme to circumvent New York’s usury laws. The *Spitzer* court noted that the payday lenders purchased ninety-five percent of each of the bank’s loans, assumed all risks of the loans, and indemnified the bank against any loss arising from a loan transaction. The *Spitzer* court then found that a totality of the circumstances must be used to determine the identity of the “true lender,” with the key factor being who had the predominant economic interest in the transactions. *Id.* at 438–39. Ultimately, the bank and the payday lender in *Spitzer* entered into a \$5.2 million settlement agreement with New York’s Attorney General. *See also Andrews v. Cramer*, 256 Ill.App.3d 766, 195 Ill.Dec. 825, 629 N.E.2d 133, 136 (Ill.App.1993) (quote omitted); *Ghirardo v. Antonioli*, 8 Cal.4th 791, 35 Cal.Rptr.2d 418, 883 P.2d 960, 965 (Cal.1994) (citations omitted) (stating that the trier of fact must look to the substance of the transaction, rather than its form, and must determine whether such form was a mere sham and subterfuge to cover up usurious transactions); *Williams v. Powell*, 216, 214 Ga.App. 216, 447 S.E.2d 45, 48 (Ga.App.1994) (quote omitted).

⁶ *Id.* at 15, relying on *Carper v. Kanawha Banking & Trust Co.*, 157 W.Va. 477, 207 S.E.2d 897 (478, 901) (1974).

⁷ *See, De Wolf v. Johnson*, 23 U.S. 367 (1825) (“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.”); *see also Scott v Lloyd*, 34 U.S. 418, 446-47 (1835).

⁸ *See, e.g., Ga. Code. Ann. § 16-17-2(b)(4)* (creating totality of the circumstances test to determine when “a purported agent shall be considered a de facto lender” for purposes of state usury laws);

⁹ These states are also signatories to this letter.

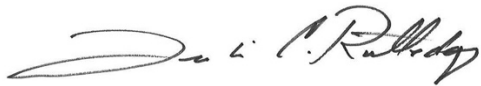
¹⁰ *See New York v. OCC*, Case No. 1:21-Civ.-00057-SHS (S.D.N.Y.), complaint available at https://ag.ny.gov/sites/default/files/01.05.21_complaint_doc._no._1.pdf.

hardship and waste of precious time, during which predatory lenders, under cover of the OCC's Rule, will propagate their rent-a-bank schemes.

The most efficient course to prevent unrestrained abuse and avert immediate and ongoing consumer harm would be for Congress to invalidate the Rule pursuant to its remedial oversight powers under the Congressional Review Act.¹¹

Americans spanning all political alignments are demanding that lenders who impose unconscionably exorbitant interest rates be subject to more, not less, regulation.¹² Currently, 45 states and the District of Columbia cap interest rates on installment loans, depending on the size, at a median rate of 38.5% for a \$500, 6-month loan and 32% for a \$2,000, 2-year loan.¹³ During an unprecedented economic downturn, brought on and exacerbated by Covid-19, the OCC seeks to *expand* the availability of exploitative loans that trap borrowers in a never-ending cycle of debt. We urge Congress to use its powers under the Congressional Review Act to invalidate the OCC's True Lender Rule and safeguard the right of sovereign states, and the ability of an independent judiciary, to safeguard our citizens from rent-a-bank schemes designed to work end-runs around essential consumer protections.

Respectfully submitted,



LESLIE RUTLEDGE
Arkansas Attorney General

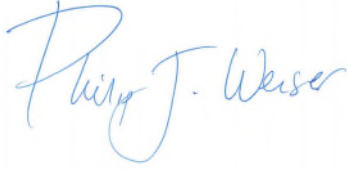


MATTHEW RODRIGUEZ
California Acting Attorney General

¹¹ 5 U.S.C. §§ 801-808.

¹² For example, when South Dakota voted on an interest rate cap in 2016, the payday loan industry spent over a million dollars lobbying against the measure, which was ultimately approved by 76% of voters in what one opponent of the cap conceded was a “landslide.” See Bart Pfankuch, *Payday Loans Gone, But Need for Quick Cash Remains*, Capital Journal (Pierre, S.D.), Mar. 23, 2018. See also Megan Leonhardt, *Nebraska becomes the latest state to cap payday loan interest rates*, CNBC.com., Nov. 4 2020. Roughly 83% of Nebraska voters approved Measure 428 supporting a ballot initiative that caps rates on payday loans at 36% throughout the state. <https://www.cnbc.com/2020/11/04/nebraska-becomes-the-latest-state-to-cap-payday-loan-interest-rates.html>

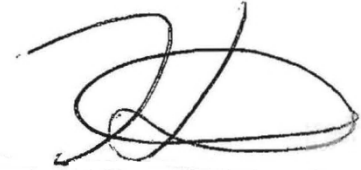
¹³ See National Consumer Law Center, *State Rate Caps for \$500 and \$2,000 Loans (March 2021)*, <http://bit.ly/state-rate-caps>. These states include Nebraska, where a 36% rate cap passed by ballot measure on November 3, 2020, with 83% of the vote. Nebraska Initiated State Statute 45-901 *et seq.*, 2020 Initiative 428. Montana passed its 36% consumer loan rate cap in 2010. Montana Deferred Deposit Loan Act, Mont. Code Ann. 31-1-701. Arkansas set a 17% interest rate cap in 2010, even including this rate cap in its state constitution. Ark. Const. Amend. 89 § 3. South Dakota passed a 36% interest rate cap on consumer loans, including title loans, in 2016. S.D. Codified Laws 54-4-36 *et seq.* Other states with a rate cap of 36% or lower include: Colorado, Connecticut, Illinois, Massachusetts, North Carolina, New Hampshire, New Jersey, New York, Pennsylvania, Vermont. Several other states cap the interest rate at 36% but allow a fee that can increase the APR on smaller loans: Arizona, Georgia, Maryland, Virginia and West Virginia. On Jan. 13, 2021, the Illinois General Assembly passed SB1792, the Predatory Loan Prevention Act. The legislation passed with a bipartisan vote in both chambers. This measure, signed into law on March 23, 2021, is largely mirrored on the Federal Military Lending Act, 10 U.S.C. 98, implemented by the Department of Defense, that protects active-duty military, their spouses and their dependents, with a 36 percent rate cap referred to as the Military Annual Percentage Rate. The Illinois Predatory Loan Prevention Act extends that same protection to veterans and all Illinois consumers who use financial products of under \$40,000 in value, including payday and car title loans.



PHILIP J. WEISER
Colorado Attorney General



WILLIAM TONG
Connecticut Attorney General



KARL A. RACINE
District of Columbia Attorney General



CLARE E. CONNORS
Hawaii Attorney General



STEPHEN H. LEVINS
Executive Director, Hawaii Office of Consumer Protection



KWAME RAOUL
Illinois Attorney General



TOM MILLER
Iowa Attorney General



AARON M. FREY
Maine Attorney General



BRIAN E. FROSH
Maryland Attorney General



MAURA HEALEY
Massachusetts Attorney General



DANA NESSEL
Michigan Attorney General



KEITH ELLISON
Minnesota Attorney General



DOUGLAS J. PETERSON
Nebraska Attorney General



AARON D. FORD
Nevada Attorney General



GURBIR S. GREWAL
New Jersey Attorney General



LETITIA JAMES
New York Attorney General



JOSHUA H. STEIN
North Carolina Attorney General



ELLEN F. ROSENBLUM
Oregon Attorney General



JOSH SHAPIRO
Pennsylvania Attorney General



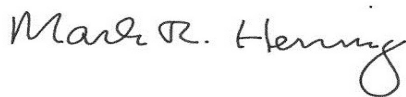
PETER NERONHA
Rhode Island Attorney General



JASON RAVNSBORG
South Dakota Attorney General



TJ DONOVAN
Vermont Attorney General



MARK R. HERRING
Virginia Attorney General



JOSHUA L. KAUL
Wisconsin Attorney General

cc (Electronic Mail):

Honorable Senators:

Hon. Tom Cotton – Arkansas	Hon. John Boozman – Arkansas
Hon. Dianne Feinstein - California	Hon. Alex Padilla - California
Hon. Michael Bennet – Colorado	Hon. John Hickenlooper - Colorado
Hon. Chris Murphy – Connecticut	Hon. Richard Blumenthal – Connecticut
Hon. Mazie Hirono – Hawaii	Hon. Brian Schatz - Hawaii
Hon. Chuck Grassley – Iowa	Hon. Joni Ernst – Iowa
Hon. Richard Durbin – Illinois	Hon. Tammy Duckworth – Illinois
Hon. Ed Markey – Massachusetts	Hon. Elizabeth Warren – Massachusetts
Hon. Ben Cardin – Maryland	Hon. Chris Van Hollen – Maryland
Hon. Susan Collins – Maine	Hon. Angus King – Maine
Hon. Debbie Stabenow – Michigan	Hon. Gary Peters – Michigan
Hon. Amy Klobuchar – Minnesota	Hon. Tina Smith – Minnesota
Hon. Richard Burr – North Carolina	Hon. Thom Tillis – North Carolina
Hon. Ben Sasse – Nebraska	Hon. Debra Fischer – Nebraska
Hon. Cory Booker – New Jersey	Hon. Bob Menendez – New Jersey
Hon. Jacky Rosen – Nevada	Hon. Catherine Cortez Masto - Nevada
Hon. Kirsten Gillibrand – New York	Hon. Ron Wyden – Oregon
Hon. Jeff Merkley – Oregon	Hon. Bob Casey - Pennsylvania
Hon. Jack Reed – Rhode Island	Hon. Sheldon Whitehouse – Rhode Island
Hon. John Thune – South Dakota	Hon. Mike Rounds – South Dakota
Hon. Tim Kaine – Virginia	Hon. Mark Warner – Virginia
Hon. Patrick Leahy – Vermont	Hon. Bernie Sanders – Vermont
Hon. Tammy Baldwin – Wisconsin	Hon. Ron Johnson - Wisconsin

Honorable House Representatives

Arkansas	
Hon. Steve Womack	Hon. Rick Crawford
Hon. French Hill	Hon. Bruce Westerman
California	
Hon. Doug LaMalfa	Hon. Jaared Huffman
Hon. John Garamendi	Hon. Tom McClintock
Hon. Mike Thompson	Hon. Doris Matsui
Hon. Ami Bera	Hon. Jay Abernolte
Hon. Jerry McNerney	Hon. Josh Harder
Hon. Mark DeSaulnier	Hon. Barbara Lee
Hon. Jackie Speier	Hon. Eric Swalwell
Hon. Jim Costa	Hon. Ro Khanna
Hon. Anna Eshoo	Hon. Zoe Lofgren
Hon. Jimmy Panetta	Hon. David Valadao
Hon. Devin Nunes	Hon. Salud Carbajal
Hon. Mike Garcia	Hon. Julia Brownley
Hon. Judy Chu	Hon. Adam Schiff
Hon. Tony Cardenas	Hon. Brad Sherman

Hon. Pete Aguilar	Hon. Grace Napolitano
Hon. Ted Lieu	Hon. Jimmy Gomez
Hon. Norma Torres	Hon. Raul Ruiz
Hon. Karen Bass	Hon. Linda Sanchez
Hon. Young Kim	Hon. Lucille Roybal-Allard
Hon. Mark Takano	Hon. Ken Calvert
Hon. Nanette Barragan	Hon. Katie Porter
Hon. Luis Correa	Hon. Alan Lowenthal
Hon. Michelle Steel	Hon. Mike Levin
Hon. Darrell Issa	Hon. Juan Vargas
Hon. Scott Peters	Hon. Sara Jacobs
Colorado	
Hon. Lauren Boebert	Hon. Doug Lamborn
Hon. Joe Neguse	Hon. Diana DeGette
Hon. Jason Crow	Hon. Ed Perlmutter
Hon. Ken Buck	
Connecticut	
Hon. Jim Himes	Hon. Rosa DeLauro
Hon. Jahana Hayes	Hon. John Larson
Hon. Joe Courtney	
Hawaii	
Hon. Ed Case	Hon. Kaiali 'I Kahele
Illinois	
Hon. Bobby Rush	Hon. Robin Kelly
Hon. Marie Newman	Hon. Jesus Garcia
Hon. Mike Quigley	Hon. Sean Casten
Hon. Danny Davis	Hon. Raja Krishnamoorthi
Hon. Jan Schakowsky	Hon. Brad Schneider
Hon. Bill Foster	Hon. Mike Bost
Hon. Rodney Davis	Hon. Lauren Underwood
Hon. Mary Miller	Hon. Adam Kinzinger
Hon. Cheri Bustos	Hon. Darin LaHood
Iowa	
Hon. Ashley Hinson	Hon. Mariannette Miller-Meeks
Hon. Cynthia Axne	Hon. Randy Feenstra
Maine	
Hon. Chellie Pingree	Hon. Jared Golden
Maryland	
Hon. Andy Harris	Hon. A. Dutch Ruppersberger

Hon. John Sarbanes	Hon. Anthony Brown
Hon. Steny Hoyer	Hon. David Trone
Hon. Kweisi Mfume	Hon. Jamie Raskin
Massachusetts	
Hon. Richard Neal	Hon. Jim McGovern
Hon. Lori Trahan	Hon. Jake Auchincloss
Hon. Katherine Clark	Hon. Seth Moulton
Hon. Ayanna Pressley	Hon. Stephen Lynch
Hon. William Keating	
Michigan	
Hon. Jack Bergman	Hon. Bill Huizenga
Hon. Peter Meijer	Hon. John Moolenaar
Hon. Daniel Kildee	Hon. Fred Upton
Hon. Tim Walberg	Hon. Elissa Slotkin
Hon. Andy Levin	Hon. Lisa McClain
Hon. Haley Stevens	Hon. Debbie Dingell
Hon. Rashida Tlaib	Hon. Brenda Lawrence
Minnesota	
Hon. Jim Hagedorn	Hon. Angie Craig
Hon. Dean Phillips	Hon. Betty McCollum
Hon. Ilhan Omar	Hon. Tom Emmer
Hon. Michelle Fischbach	Hon. Pete Stauber
Nebraska	
Hon. Jeff Fortenberry	Hon. Don Bacon
Hon. Adrian Smith	
Nevada	
Hon. Dina Titus	Hon. Mark Amodei
Hon. Susie Lee	Hon. Steven Horsford
New Jersey	
Hon. Donald Norcross	Hon. Jefferson Van Drew
Hon. Andy Kim	Hon. Chris Smith
Hon. Josh Gottheimer	Hon. Frank Pallone Jr.
Hon. Tom Malinowski	Hon. Albio Sires
Hon. Bill Pascrell Jr.	Hon. Donald Payne Jr.
Hon. Mikie Sherrill	Hon. Bonnie Watson Coleman
New York	
Hon. Lee Zeldin	Hon. Andrew Garbarino
Hon. Thomas Suozzi	Hon. Kathleen Rice
Hon. Gregory Meeks	Hon. Grace Meng

Hon. Nydia Velazquez	Hon. Hakeem Jeffries
Hon. Yvette Clarke	Hon. Jerrold Nadler
Hon. Nicole Malliotakis	Hon. Carolyn Maloney
Hon. Adriano Espaillat	Hon. Alexandria Ocasio-Cortez
Hon. Ritchie Torres	Hon. Jamaal Bowman
Hon. Mondaire Jones	Hon. Sean Maloney
Hon. Antonio Delgado	Hon. Paul Tonko
Hon. Elise Stefanik	Hon. Claudia Tenney
Hon. Tom Reed	Hon. John Katko
Hon. Joseph Morelle	Hon. Brian Higgins
Hon. Chris Jacobs	
North Carolina	
Hon. George Butterfield Jr.	Hon. Deborah Ross
Hon. Gregory Murphy	Hon. David Price
Hon. Virginia Foxx	Hon. Kathy Manning
Hon. David Rouzer	Hon. Richard Hudson
Hon. Dan Bishop	Hon. David "Madison" Cawthorn
Hon. Alma Adams	Hon. Ted Budd
Oregon	
Hon. Suzanne Bonamici	Hon. Cliff Bentz
Hon. Earl Blumenauer	Hon. Peter DeFazio
Hon. Kurt Schrader	
Pennsylvania	
Hon. Brian Fitzpatrick	Hon. Brendan Boyle
Hon. Dwight Evans	Hon. Madeleine Dean
Hon. Mary Scanlon	Hon. Chrissy Houlahan
Hon. Susan Wild	Hon. Matt Cartwright
Hon. Daniel Meuser	Hon. Scott Perry
Hon. Lloyd Smucker	Hon. Fred Keller
Hon. John Joyce	Hon. Guy Reschenthaler
Hon. Glenn Thompson	Hon. Mike Kelly
Hon. Conor Lamb	Hon. Michael Doyle
Rhode Island	
Hon. David Cicilline	Hon. James Langevin
South Dakota	
Hon. Dusty Johnson	
Vermont	
Hon. Peter Welch	
Virginia	

Hon. Robert Wittman	Hon. Elaine Luria
Hon. Robert Scott	Hon. Donald McEachin
Hon. Robert Good	Hon. Ben Cline
Hon. Abigail Spanberger	Hon. Donald Beyer Jr.
Hon. Morgan Griffith	Hon. Jennifer Wexton
Hon. Gerald Connolly	
Wisconsin	
Hon. Bryan Steil	Hon. Mark Pocan
Hon. Ron Kind	Hon. Gwen Moore
Hon. Scott Fitzgerald	Hon. Glenn Grothman
Hon. Thomas Tiffany	Hon. Mike Gallagher