January 20, 2022

Hon. Phil Murphy
Office of the Governor
State House
P.O. Box 001
Trenton, NJ 08625

Re: Concerns on Earned Income Access Legislation

Dear Governor Murphy:

The Appleseed Foundation and the undersigned Appleseed Justice Centers are writing to express our opposition to legislation that would pave the way for a new form of payday lending in New Jersey, undermine New Jersey's long-standing strong consumer credit protections and potentially have harmful ramifications across the country.

Our concern was sparked by legislation (S3611/A3450) in the recently concluded session that had passed the Assembly in January 2021 and seemed poised to pass both houses on the session's last day, January 10. Fortunately, that did not happen but we fully expect the legislation will be reintroduced in the new session. Thus, we are writing to you now, as we had planned to do to urge you to veto the bill if it had made its way to your desk and was awaiting your signature. At some point, you will likely be faced with that decision and we hope to get an early start on convincing you that a veto would be justified.

**Background**

The Appleseed Network, with its 17 Justice Centers, has a multi-decade history of advancing systemic reforms at primarily the state, but also the national, level. Our efforts focus on building solutions to reduce poverty, combat discrimination, and invigorate democracy. Among the founders of the New Jersey Center, based in Newark, was Rutgers Law Professor Arthur Kinoy, a famed civil rights attorney known for standing up to McCarthyism in the 1950s and 1960s and for serving as appellate lawyer for the Chicago 7.

Many centers in the Network have been engaged in long-standing efforts to support fair consumer lending policies and combat the ills of payday and auto title lending, as well as other high-cost consumer loans. These loans exploit desperation and financial hardship and leave individuals, families, and local economies worse off.

The fight against predatory consumer lending has been a "whack-a-mole" effort, with new innovations to evade usury laws coming as fast as organizations can address them, and sometimes overpowering our work to build out better community solutions. We remain deeply committed to combating predatory loans and encouraging positive market options, because we see every day both the harms of bad credit and the benefits of positive options—options that are affordable, based on an ability to repay, and compliant with usury limits and state and federal lending protections.

**The Proposed Legislation Would Be Harmful to Working New Jersey Residents and Have Concerning Implications for Other States**

The legislation that prompts our concern has to do with earned wage access (EWA) providers, third-party companies that provide pre-payday access to already earned wages by way of arrangements made through the employer or directly with workers. EWA companies typically charge fees or solicit "tips" in amounts that appear small but given the short duration of the advances, tend to work out to an extremely high annual percentage rate, or APR, as much as 10 times higher than New Jersey's 30% criminal usury cap. The cumulative impact of these fees or tips becomes an even greater burden given the tendency of those workers who resort to EWA to do so repeatedly, as the repayment of each advance creates its own shortfall come the next payday and the need for another advance, in a perpetual cycle of borrowing and fees.

The "optional" or "tips" model employed by some EWA providers might appear more benign at first glance but is deeply concerning because it is being used across multiple products targeting financially vulnerable working individuals, from overdrafts to small dollar loans. Though presented as "optional," in fact, the systems are often set up to default to an amount that, if measured as an APR, is 100% or higher, and, once set, is very hard to change. The result is an expensive loan with a lack of transparency that is intentionally structured to evade usury and lending protections.

The fundamental problem with S3611/A3450, which will likely continue to be a problem with any renewed iteration of those bills, is twofold. First, they would have carved out an exception from consumer credit laws, including usury laws, for EWA companies, at least those that operate through employers, by defining the advances as something other than loans even though they share the essential characteristics of payday loans—money advanced by a third party secured by wages that is to be repaid on the next payday. The legislation purported to exempt EWA loans from state consumer credit laws as well as the federal Truth in Lending Act.

We would like to point out that proponents of S3611/A3450 and similar legislation have incorrectly relied on an advisory opinion from the Consumer Financial Protection Bureau for the proposition that EWA products are not loans. On January 18, the CFPB wrote to NJ Appleseed and other consumer groups clarifying that the advisory opinion should not be cited in support of S3611/A3450, because the opinion is "limited to circumstances in which the 'the employee makes no payment, voluntary or otherwise . . . and the provider or its agents do not solicit or accept tips or any other payments from the employee.'" The CFPB letter is available here.

Second, while freeing the EWA industry from consumer credit laws, the bills themselves imposed no limit on the fees that could be charged. A late (January 6) amendment to S3611 merely raised the possibility in a confusing and seemingly ineffectual provision that said fees and "voluntary

payments" could not exceed an average cap established by the Department of Banking and Insurance (DOBI) following receipt of annual reports from the companies regarding the fees and other payments they received. Yet, there was no language in the bill expressly directing DOBI to establish such a cap, and to the extent that the legislation can be read as requiring such action, it contains no meaningful criteria for setting it, other than it being an average, nor even a time frame in which that must be done. In addition, basing the average cap on reported fees would seem to allow EWA companies to effectively decide what the cap should be and, in fact, incentivize them to maximize the fees they charge in order to establish a high baseline or range for establishing the cap. And they would be free to do so, once the legislation freed them from usury caps, disclosure requirements and other laws meant to protect consumer borrowers.

We are further concerned that defining EWA—a third-party loan secured with earned wages and with fees attached, whether presented as "voluntary" express fees or "tips" or in another form—as something other than a loan or credit transaction would create a dangerous carveout from New Jersey's consumer credit laws and set a precedent that could open the door to further erosion of your state's strong protections.

And, most important for the undersigned state advocates, **a bill, such as S3611/A3450, could also have national ramifications as industry lobbyists pushing for similar laws in other states could point to the example of New Jersey to justify undermining usury caps and consumer credit protections in those states.**

Many state- and city-based Appleseed Centers have worked for a decade or more to protect state usury caps, adopt fair standards for consumer loans, and enact a 36% or lower APR interest rate cap. Most recently, a 36% APR rate cap was adopted by voter referendum in Nebraska and through the legislature in Illinois, payday lending reforms were adopted in Hawaii, and in South Carolina and Texas, we have expended great effort to stop rollbacks in usury protections and adopt policies that help to close the racial wealth gap and promote financial resilience for working individuals and families.

**Conclusion**

For all the above reasons, we respectfully urge you to oppose any future version of S3611/A3450, not only to protect New Jersey's most financially vulnerable workers but those elsewhere, so it cannot serve as a model for other states, and possibly set off a domino effect causing serious harm to low-wage workers throughout the country.

EWA products can exist and thrive within the parameters of lending protections, as in fact they currently do. Some additional regulation of the EWA industry might be called for but the kind of free pass that S3611/A3450 would have provided would set a bad precedent that could undermine efforts across the country to ensure fair practices that build equity and financial resilience. We hope you will stand with us in our work in support of individuals, families, and communities, and carefully scrutinize any future EWA bills.

Sincerely,

/s/ Benet Magnuson, Executive Director
Appleseed Foundation

/s/ Ann Baddour
Director, Fair Financial Services Project
Texas Appleseed

/s/ Susan Berkowitz, Director
South Carolina Appleseed Legal Justice Center

/s/ Ken Smith
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/s/ Malcolm Rich, Executive Director
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