**No. 21-1697**

**IN THE UNITED STATES COURT OF APPEALS**
**FOR THE FOURTH CIRCUIT**

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**JERRY DAVIDSON,**

*Plaintiff-Appellant*,

v.

**UNITED AUTO CREDIT CORPORATION,**

*Defendant-Appellee*.

---

On Appeal from the United States District Court
For the Eastern District of Virginia
District Court No. 1:20-cv-01263

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# MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* OF SEVEN CURRENT OR FORMER MEMBERS OF CONGESS IN SUPPORT OF DEFENDANT-APPELLEE AND IN SUPPORT OF AFFIRMANCE

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John C. Redding
Alston & Bird LLP
101 South Tryon St.,
Ste. 4000
Charlotte, NC 28280
Tel: (704) 444-1070
john.redding@alston.com

Sam Bragg
Alston & Bird LLP
2200 Ross Ave,
Ste. 2300
Dallas, TX 75201
Tel: (214) 922-3437
sam.bragg@alston.com

Lane Zuraw
Alston & Bird LLP
560 Mission St.,
Ste. 2100
San Francisco, CA 94105
Tel: (415) 243-1000
lane.zuraw@alston.com

Attorneys for *Amici Curiae*

## MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* WITH CONSENT OF ALL PARTIES

*Amici* are the following current and former members of Congress, listed in alphabetical order:

1. Rep. Andy Barr (R-KY, 6th Dist.)
2. Senator Norm Coleman (R-MN, 2003-2009)
3. Rep. Barry Loudermilk (R-GA, 11th Dist.)
4. Rep. Jeff Miller (R-FL, 1st Dist., 2001-2017)
5. Rep. Pete Sessions (R-TX, 17th Dist.)
6. Rep. William Timmons (R-SC, 4th Dist.)
7. Rep. Joe Wilson (R-SC, 2nd Dist.)

Pursuant to Federal Rule of Appellate Procedure 29, *Amici Curiae* respectfully request leave to file the accompanying amicus brief in support of Defendant-Appellee and affirmance. Both Defendant-Appellee and Plaintiff-Appellant consent to the filing of the accompanying brief.

*Amici curiae* are currently serving, or have previously served, as members of the U.S. Congress. All, with the exception of Rep. Timmons, served as members of Congress during the consideration and passage of the Military Lending Act (MLA), or amendments thereto, and its exemption for vehicle loans. 10 U.S.C. § 987(i)(6). *Amici* are in a unique

position to describe the intended scope of the MLA's exemption for vehicle loans. All *amici* then serving voted on the passage of the MLA or amendments thereto. And as people who have dedicated much of their lives to public service, *amici* share a strong interest in the protection of military servicemembers through proper application of the MLA.

*Amici Curiae* submit this brief to explain that Congress's intent when it passed the MLA was that the MLA should not apply to vehicle loans such the retail installment contract at issue in this appeal. In support, this brief discusses Congress's views regarding the MLA's plain language and legislative history.

*Amici Curiae* therefore respectfully request that the Court grant their motion for leave to file the accompanying amicus brief.

Dated: March 24, 2022

Respectfully submitted,

***s/ John C. Redding***

John C. Redding*
Alston & Bird LLP
101 South Tryon St., Ste. 4000
Charlotte, NC 28280
Tel: (704) 444-1070
john.redding@alston.com

*Attorney for Amici Curiae*

*Admitted in California and D.C. but not yet admitted in North Carolina

**IN THE UNITED STATES COURT OF APPEALS**
**FOR THE FOURTH CIRCUIT**

**No. 21-1697**

Jerry Davidson v. United Auto Credit Corporation

## CERTIFICATE OF SERVICE

I, John C. Redding, hereby certify that today, March 24, 2022, I have caused a true and correct copy of the foregoing Amicus Brief to be electronically filed with the Clerk of the Court for the United States Court of Appeals for the Fourth Circuit by using the appellate CM/ECF system. Counsel of record are active registered CM/ECF users who will be served by the appellate CM/ECF system.

Respectfully submitted,

***s/ John C. Redding***

John C. Redding*
Alston & Bird LLP
101 South Tryon St., Ste. 4000
Charlotte, NC 28280
Tel: (704) 444-1070
john.redding@alston.com

*Attorney for Amici Curiae*

*Admitted in California and D.C. but not yet admitted in North Carolina

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John C. Redding
Alston & Bird LLP
101 South Tryon St.,
Ste. 4000
Charlotte, NC 28280
Tel: (704) 444-1070
john.redding@alston.com

Sam Bragg
Alston & Bird LLP
2200 Ross Ave,
Ste. 2300
Dallas, TX 75201
Tel: (214) 922-3437
sam.bragg@alston.com

Lane Zuraw
Alston & Bird LLP
560 Mission St.,
Ste. 2100
San Francisco, CA 94105
Tel: (415) 243-1000
lane.zuraw@alston.com

Attorneys for *Amici Curiae*

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## STATEMENT OF INTEREST

*Amici curiae* are currently serving, or have previously served, as members of the U.S. Congress. All, with the exception of Rep. Timmons, served as members of Congress during the consideration and passage of the Military Lending Act (MLA), or amendments thereto, and its exemption for vehicle loans. 10 U.S.C. § 987(i)(6). *Amici* are in a unique position to describe the intended scope of the MLA's exemption for vehicle loans. All *amici* then serving voted on the passage of the MLA or amendments thereto. And as people who have dedicated much of their lives to public service, *amici* share a strong interest in the protection of military servicemembers through proper application of the MLA. *Amici* are the following current and former members of Congress, listed in alphabetical order:

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6. Rep. William Timmons (R-SC, 4th Dist.)

7. Rep. Joe Wilson (R-SC, 2nd Dist.)

No counsel of the parties authored this brief in whole or in part and no one other than these amicus curiae and their counsel contributed money to fund the preparation or submission of this brief. This brief is submitted pursuant to Fed. R. App. P. 29 and Local Rule 29, and it is accompanied by a motion for leave to file.

## INTRODUCTION

When Congress passed the MLA, it did not intend for it to apply to vehicle loans such as the retail installment contract at issue in this appeal. Though Congress authorized the Department of Defense (DOD) to define the term "consumer credit," which generally controls what types of loans the MLA covers, Congress withheld authorization for the DoD to define "consumer credit" in a way that would bring vehicle loans under the MLA's regulatory umbrella.

Yet in this appeal, Appellant argues for exactly that result. Specifically, Appellant argues that under the DoD's definition of "consumer credit" and under the DoD's withdrawn interpretive guidance, any vehicle loan containing a Guaranteed Asset Protection Waiver (GAP Waiver) is subject to the MLA. Appellant's reasoning is that the MLA's purpose is to protect service members, and from Appellant's perspective, including GAP Waivers in vehicle loans is harmful to servicemembers, so the MLA should apply to vehicle loans containing GAP Waivers.

The Court should not accept Appellant's argument because it is rooted in policy, not law. It errs in several ways.

***First***, Appellant's argument overrides the plain language of the MLA. The MLA's plain language reflects Congress's intent to exclude vehicle loans from the MLA, including those containing GAP Waivers. Appellant's reading of the MLA is contrary to that intent.

***Second***, Appellant's argument contradicts the MLA's legislative history. Nothing in the MLA's legislative history suggests Congress has ever been concerned with vehicle loans containing GAP Waivers. To the contrary, the legislative history demonstrates that Congress passed the MLA to protect servicemembers from loans carrying triple-digit annual interest rates. Such loans could expose servicemembers to financial hardship and possibly lead to a loss of their security clearance. GAP Waivers pose no such risk.

***Third***, Appellant's argument ignores that GAP Waivers can and often do offer valuable financial protection to servicemembers. When a servicemember buys a vehicle, the car's market value will depreciate significantly immediately following the sale. If, after the sale, the vehicle is totaled or stolen, insurance will usually pay only the depreciated market value of the vehicle, not the purchase price. This can leave the servicemember with a significant and unexpected debt. GAP Waivers

address this problem by waiving the remaining amount of the servicemember's debt. Thus, despite Appellant's characterization to the contrary, purchasing a GAP Waiver can protect the financial interests of servicemembers, which aligns with the purpose of the MLA.

For these reasons, the Court should affirm.

## ARGUMENT

### I. Congress Never Intended the Military Lending Act to Apply to Retail Installment Contracts for the Purchase of Vehicles.

#### A. The Military Lending Act's Plain Language Exempts Retail Installment Contracts for the Purchase of Vehicles, Including Those Containing a GAP Waiver.

"[T]he plain language of a statute is the best evidence of Congressional intent." *McMellon v. United States*, 387 F.3d 329, 339 (4th Cir. 2004); *see also Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 544 (2012) ("[T]he best evidence of Congress's intent is the statutory text."). And by its plain language, the MLA does not apply to "loan[s] procured in the course of purchasing a car . . . when that loan is offered for the express purpose of financing the purchase and is secured by the car." 10 U.S.C. § 987(i)(6). A retail installment contract for the purpose of purchasing a vehicle falls squarely within this exemption. Thus, the

MLA's plain language demonstrates that Congress did not intend for the MLA to apply to such retail installment contracts.

The MLA's plain language also demonstrates that Congress did not intend for the MLA's vehicle loan exemption to be stifled when additional items like GAP Waivers are purchased and financed as part of the vehicle purchase transaction. The vehicle loan exemption applies to all loans offered for the "express purpose" of financing the purchase of a vehicle. If, as Appellant asserts, Congress intended to exempt only vehicle loans with the "sole" or "exclusive" purpose of financing the purchase of a vehicle, it would have done so by using those words. *See, e.g.*, 12 U.S.C. § 347 (addressing "loans made *solely for the purpose* of facilitating the purchase or delivery of securities offered for public subscription" (emphasis added); 42 U.S.C. § 9604(k)(10) (requiring that "each loan made under this subsection shall . . . be subject to an agreement that . . . requires that the recipient use the [] loan *exclusively for purposes specified* in . . . ."") (emphasis added). Instead, Congress used the word "express"—a different word with a different meaning—to accomplish a different intent. *See* Henry J. Friendly, *Mr. Justice Frankfurter and the Reading of Statutes*, in Benchmarks 224 (1967) ("[W]hen Congress

employs the same word, it normally means the same thing, when it employs different words, it usually means different things.").

"Express" does not mean "exclusive" or "sole," and attempting to give it such meaning would be contrary to its common definition and necessarily frustrate Congress's intent to exempt vehicle loans from the MLA's regulatory scheme. *See Express*, *Cambridge Dictionary*, (defining "express" as "clearly and intentionally stated")[1]; *Express*, *Merriam-Webster.com Dictionary*, (defining "express" as "directly, firmly, and explicitly stated")[2]; *Express*, *Black's Law Dictionary* (11th ed. 2019) (defining "express" as "[c]learly and unmistakably communicated; stated with directness and clarity"); *see also Express*, *Garner's Modern American Usage* (3d ed. 2009) (explaining that when used adjectivally, "express" means "specific, definite, and clear" and serves as an antonym of "implied").

If, as Appellant and amicus curiae in support of Appellant would have this Court find, "express" meant "exclusively" or "solely," it would render the vehicle loan exemption unreasonably narrow and be contrary

[1] https://www.dictionary.cambridge.org/us/dictionary/english/express.

[2] https://www.merriam-webster.com/dictionary/express.

to the intent of Congress. In that instance, the MLA would apply to any vehicle loan that contained an amount beyond the vehicle's purchase price less any down payment. Said differently, the addition of any item or amount to a vehicle purchase loan, beyond the physical vehicle itself, would take the entire loan outside the exemption and place it squarely under the MLA's regulatory scheme. This would happen whether the additional item was related to, or "inextricably intertwined" with, the vehicle purchase, *see Juarez v. Drivetime Car Sales Co.*, No. 3:19-cv-1132-BJD-JRK, 2021 U.S. Dist. LEXIS 103702, at *7 (M.D. Fla. June 1, 2021), and regardless of the fact that the vehicle loan is the exact type of loan Congress intended to exempt from the MLA.

Instead, a proper reading of "express" to mean "explicitly stated," "clearly communicated," or the opposite of "implied" would achieve Congress's intent. Vehicle loans explicitly stating or clearly communicating that they were offered for the purpose of financing the purchase of a vehicle would be exempt from the MLA. And they would remain exempt even if additional items like GAP Waivers are purchased and included in the vehicle loan, particularly where the GAP Waiver is an amendment to, and thus an integral part of, the retail installment

contract as is the case here. Where such additional items are directly related to and purchased in connection with the purchase of a vehicle, including them in the vehicle loan does not alter the loan's express purpose. *See Juarez*, 2021 U.S. Dist. LEXIS 103702, at *7.

This is what Congress intended: for vehicle loans to be exempt from the MLA's regulatory scheme, even if they include additional items like GAP Waivers. In fact, though Congress charged the DoD with implementing the MLA, Congress did not intend for DoD to define "consumer credit" in a way that would take vehicle loans outside of the vehicle loan exemption. *See* 10 U.S.C. § 987(h). Specifically, Congress instructed DoD to define "'consumer credit' under paragraph (6) of subsection (i), *consistent with the provisions of this section*." 10 U.S.C. § 987(h)(2)(D) (emphasis added). Yet "this section" defines "consumer credit," and the definition expressly states that it "does not include" vehicle loans. *See id.* § 987(i)(6).

Simply put, if Congress had intended for a vast swath of vehicle loans to be swept under the MLA's regulatory scheme simply for including additional items like GAP Waivers, it would have said so; it would not have relied on "a secondary dictionary definition" of the word

"express." *See United States v. Campbell*, No. 20-4256, 2022 U.S. App. LEXIS 566, at *19 (4th Cir. Jan. 7, 2022) (rejecting interpretation of "prohibit" that would "sweep into criminal statutes a vast swath of conduct based on a secondary dictionary definition."). "Congress . . . does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes." *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001).

Accordingly, the Court should enforce the plain language of the MLA as set forth above and affirm the ruling of the district court. *See Sayyed v. Wolpoff & Abramson*, 485 F.3d 226, 229–30 (4th Cir. 2007) ("[W]here . . . the statute's language is plain, the sole function of the courts is to enforce it according to its terms.").

### B. Legislative History Confirms Congress Was Not Concerned with GAP Waivers in Retail Installment Contracts for the Purchase of Vehicles.

At no point in the legislative history of the MLA has Congress expressed concerns with GAP Waivers in retail installment contracts for the purchase of a vehicle. With the MLA, Congress's primary focus has been protecting servicemembers from what might be perceived as potentially predatory loans carrying triple-digit annual interest rates.

GAP Waivers pose no such risk. In fact, GAP Waivers are intended to help prevent potential financial devastation to consumers, including servicemembers, who could find themselves in a situation where their vehicle is totaled or stolen, but insurance pays an amount less than the total amount still due on the vehicle. In those instances, absent a GAP Waiver, servicemembers may find themselves (i) with a significant outstanding debt for a vehicle they can no longer drive, and (ii) unable to afford another vehicle. GAP Waivers help mitigate the risk of such devastation.

Congress passed the MLA in response to a 2006 Department of Defense report that argued entities it characterized as predatory lenders were targeting servicemembers in a manner that "undermine[d] military readiness, harm[ed] the morale of troops and their families, and add[ed] to the cost of fielding an all-volunteer fighting force." U.S. Dep't of Def., *Report on Predatory Lending Practices Directed at Members of the Armed Forces and Their Dependents* 9 (2006), https://go.usa.gov/xtrJH (DoD Report).[3] The DoD Report described an increasing prevalence of what it

[3] *Amicus Curiae* do not necessarily agree with the characterization that the identified loans referenced in this or the other reports and letters cited are predatory in nature, but cite to such reports and letters in an

characterized as predatory lending around military communities. *See id.* at 10. And Congress recognized that "military personnel and their families [were] particularly attractive targets," because they were "often young and financially in-experienced." *A Review of the Department of Defense's Report on Predatory Lending Practices Directed at Members of the Armed Forces and Their Dependents: Hearing Before the S. Comm. on Banking, Hous. & Urban Affs.*, 109th Cong. 1 (2006) (statement of Sen. Richard C. Shelby).

The DoD Report specifically identified "payday lending, internet lending, car title lending, military installment lending, rent-to-own programs, tax refund anticipation loans, and coercive collection actions" as areas of concern. *See* DoD Report at 2. The DoD's selection of these types of loans for inclusion in the Report was not random and instead the loans "were selected through feedback from military financial counselors and legal assistance attorneys." *Id.* As the DoD Report explained, "[t]he predatory lenders reviewed as part of this report provide short term loans

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effort to help the Court understand the environment within which Congress acted when passing the MLA.

(payday, car title, and tax refund anticipation loans) and installment loans (unsecured loans focused on the military and rent-to-own)." *Id.* at 4.

The DoD Report identified these types of loans as being of concern because they often had excessive triple-digit annual interest rates or were structured in a way that payments profited the lender without meaningfully paying down the loan's principal. *See* DoD Report at 2–3 (describing characteristics of predatory loans); *see also id.* at 13 (describing predatory loan's "[t]riple digit interest rate . . . [of] 400% APR and higher"). As a result, the DoD believed that many servicemembers who took out these loans experienced financial problems and defaulted on their loans.

To Congress, this was problematic because a servicemember's default on a loan could result in "military sanctions, including the loss of security clearance." *A Review of the Department of Defense's Report on Predatory Lending Practices Directed at Members of the Armed Forces and Their Dependents*, *supra* at 1 (statement of Sen. Richard C. Shelby); *see also id.* at 4 (statement of Sen. Elizabeth Dole) ("This practice not only creates financial problems for individual soldiers and their families, but also weakens our military's operational readiness. Military conduct codes

stress financial solvency, and bad credit can prevent service members from having the security clearances they need to perform their duties."). In fact,"[f]inancial issues account[ed] for 80 percent of security clearance revocations and denials for Navy personnel," DoD Report at 45, and that "[b]etween 2000 and 2005, revoked or denied security clearances for Sailors and Marines due to financial problems [] increased 1600 percent," *id.* at 87.

Given the DoD's concerns, Congress passed the MLA to protect servicemembers specifically from the loans mentioned in the Report that could leave servicemembers in a financially precarious position or result in a default, which might cause them to lose their security clearance.

To this end, Congress created a regulatory scheme that would apply to extensions of "consumer credit" to servicemembers, and authorized DoD to define "consumer credit" in a manner that would protect servicemembers from the loans mentioned in the Report. But at the same time, Congress limited the MLA's scope. Congress did not intend for the MLA to regulate all forms of lending for servicemembers or to prevent servicemembers from accessing credit to buy residential homes, vehicles, or other types of credit not mentioned in the Report. Hence, Congress

specifically exempted vehicle loans from the MLA's regulatory scheme. *See* 10 U.S.C. § 987(i)(6).

Exempting vehicle loans containing GAP Waivers is entirely consistent with Congress's intent to both protect servicemembers and maintain servicemembers' access to credit to buy vehicles. GAP Waivers do not carry triple-digit annual interest rates or pose a risk to the servicemember's finances. Rather, GAP Waivers address the potentially devastating loss a servicemember might otherwise suffer if their vehicle were totaled or stolen and insurance proceeds were insufficient to cover the remaining debt. Absent a GAP Waiver, it is possible a servicemember could suffer the very harms Congress intended to prevent when passing the MLA.

By 2013, concerns arose within the DoD that creative lenders were adopting new tactics to avoid the MLA. DoD testified before Congress that rather than comply with the MLA, unscrupulous lenders were "utilizing procedures or modifying" their loans in an effort to "fall outside" the statute and its regulations. *Preserving the Rights of Serv. Members, Veterans, and their Fams. in the Fin. Marketplace: Hearing Before the S. Comm. on Veterans' Affs.*, 113th Cong. 17 (2013) (statement of Colonel

Paul Kantwill). And in the Conference Report accompanying H.R. 4310, it was noted that while "the law has been largely effective in curbing predatory . . . lending to covered borrowers" there was evidence that "predatory lenders have modified their products to avoid coverage." H.R. Rep. No. 112-4310 (2012) (Conf. Rep.), 158 Cong. Rec. H7133 (daily ed. Dec. 18, 2012).[4] *See also* Pam Bondi, *et al.*, Comment Letter on Limitations on Terms of Consumer Credit Extended to Service Member s and Dependents (June 24, 2013), https://www.regulations.gov/commen t/DOD-2013-OS-0133-0002 ("For example, by requiring that payday loans be for a minimum of $2,001, or have a minimum repayment period of 92 days" lenders were able to avoid the MLA).

Later in 2013 and 2014, Congressmen, State Attorney Generals and Senators wrote letters encouraging the DoD to expand the definition of "consumer credit" under the MLA. But even amongst the groups advocating for an expansion of the MLA, their conception of what was covered by the act largely remained the same. In particular, these groups argued that the MLA should cover loans like payday loans, vehicle title

[4] https://www.govinfo.gov/content/pkg/CREC-2012-12-18/pdf/CREC-2012-12-18-pt1-PgH6869-5.pdf#page=1.

loans, refund anticipation loans, or other types of loans with characteristics like triple digit APR similar to those three types of loans. *See, e.g.*, Senator Jack Reed, *et al.*, Comment Letter on Limitations on Terms of Consumer Credit Extended to Service Members and Dependents (Aug. 21, 2013), https://www.regulations.gov/comment/DOD-2013-OS-0133-0036.

For example, in an August 1, 2013 letter, several Congressmen asked the DoD to expand the definition of consumer credit so that it continued to protect service members "from predatory payday loans, vehicle title loans, and refund anticipation loans . . . . regardless of the duration or structure of the loan." Congresswoman Tammy Duckworth, *et al.*, Comment Letter on Limitations on Terms of Consumer Credit Extended to Service Members and Dependents (Aug. 1, 2013), https://www.regulations.gov/comment/DOD-2013-OS-0133-0035.

Similarly, a group of Senators explained that because of "the narrow definition of consumer credit, certain lenders are offering predatory loan products to service members at exorbitant triple digit effective interest rates and loan products that do not include the additional protections envisioned by the law." Senator Jack Reed, *et al.*,

Comment Letter on Limitations on Terms of Consumer Credit Extended to Service Members and Dependents, *supra*. So, the Senators continued, "the Department [should] consider modifying the definition of consumer credit to ensure that it is broad enough to protect service members from all forms of deceptive, abusive and/or high-cost credit, regardless of the duration or structure of the loan." *Id*.

Lastly, several state AGs suggested that the DoD make similar changes to MLA regulations to eliminate "large loopholes that permit lenders to fashion abusive or predatory transactions that avoid the MLA's protections" and to ensure that the rules "apply uniformly to the full range of consumer credit loans that present dangers similar to those already covered, including rent-to-own transactions and overdraft loans." Pam Bondi, *et al.*, Comment Letter on Limitations on Terms of Consumer Credit Extended to Service Members and Dependents, *supra*.

In response to these letters' call, Congress amended the MLA to expand enforcement, and the DoD amended its regulations to expand the definition of "consumer credit" under the Act. *See* Nat'l Defense Authorization Act for Fiscal Year 2013, Pub. L. No. 112-239, § 662, 126 Stat 1632. Specifically, the DoD expanded the definition of "consumer

credit," which had previously been limited to particular kinds of payday, vehicle title and refund anticipation loans, to encompass other forms of "credit offered or extended to a covered borrower primarily for personal, family, or household purposes." *See Limitations on Terms of Consumer Credit Extended to Service Members and Dependents*, 80 Fed. Reg. 43,560-01, 43,563 (July 22, 2015).

DoD's change to the "consumer credit" definition, however, did not change Congress's intent when it enacted the MLA: to protect servicemembers from the specific types of loans outlined in the Report. And while the 2013 amendments expanded the range of loans to which the MLA applies, they did not sweep vehicle loans under the MLA's regulatory umbrella.

As a result, the MLA's legislative history confirms that the MLA was not intended to apply to GAP Waivers that are included in a retail installment contract for the purchase of a vehicle. The MLA targets specific loan types. GAP Waivers are not predatory, and do not pose a serious risk to servicemembers' finances. In fact, they provide a distinct benefit to a servicemember who may suffer a total loss or vehicle theft but whose insurance company fails to pay the full amount due from the

financing of that vehicle, otherwise leaving the servicemember financially vulnerable. And the MLA exempts vehicle loans, of which GAP Waivers are an integral part. For this reason, the Court should affirm.

## II. The Court Should Not Extend the Military Lending Act to Achieve Any Perceived Policy Goal.

### A. Congress is Responsible for Making Policy Decisions, Not the Judiciary.

"The responsibilities for assessing the wisdom of such policy choices and resolving the struggle between competing views of the public interest are not judicial ones: Our Constitution vests such responsibilities in the political branches." *Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837, 866 (1984). Here, such responsibility rests with Congress and, to the extent Congress has authorized it, the DoD.[5]

In 2017, the DoD issued an interpretive rule concerning its definition of "consumer credit." *See* 82 Fed. Reg. 58739-01, 58740 (Dec.

[5] *Amici Curiae* do not concede that Congress authorized the DoD to define "consumer credit" in a way that would bring retail installment contracts for the purchase of a vehicle that include a GAP Waiver under the MLA. But to the extent that the Court concludes that Congress has so authorized the DoD, the DoD has not effectively exercised that authority, and the Court should not do so on the DoD's behalf.

14, 2017). This interpretative rule stated that GAP Waivers included in a retail installment contract for the purchase of a vehicle fall under the MLA's regulatory scheme. *See id.* But in 2020, the DoD withdrew its 2017 interpretive rule because of policy concerns raised by trade groups from both the automotive and banking industries.[6] *See* 85 Fed. Reg. 11842-02, 11843 n.6 (Feb. 28, 2020).

The key policy concern raised with the DoD was that under the 2017 interpretive rule, creditors would be unable to comply with the MLA if a vehicle purchase included a GAP Waiver, and as a result, automotive dealers would (and in fact, had) stopped offering GAP Waivers to servicemembers when they purchased an automobile. *See* 85 Fed. Reg. at 11843; *see also* National Automobile Dealers Association, Letter to William S. Castle, Esq., Principal Deputy General Counsel of the U.S. Department of Defense at 5 (Oct. 12, 2018) (NADA Letter) (describing how as a result of 2017 interpretive rule, "dealers throughout the country

[6] The DoD received formal requests to withdraw its 2017 interpretive rule from the National Automobile Dealers Association/American Financial Services Association, American Bankers Association, Consumer Bankers Association, National Association of Federally-Insured Credit Unions/Defense Credit Union Council, National Independent Automobile Dealers Association, and the Guaranteed Asset Protection Alliance.

have discontinued offering GAP Waiver to active duty service members").[7] In addition, concerns were raised about the ability of creditors to comply with the MLA at all if the purchase included other products, such that creditors may be unwilling to extend credit to servicemembers in those instances because they may be unable to take a security interest in the purchased vehicle. *See* NADA Letter at 4–5. The DoD "[found] merit in this concern and agree[d] additional analysis [was] warranted." *See* 85 Fed. Reg., at 11843. That is, the DoD acknowledged the existence of the policy concern, withdrew the 2017 interpretive rule, and affirmatively stated that additional analysis would be necessary for it to make an appropriate policy decision. *See id.*

Making an appropriate policy decision will require DoD to weigh numerous economic and regulatory factors. Among these are that: (i) automotive dealers may be unable to both offer GAP Waivers and comply with the MLA's duties and restrictions; (ii) the 2017 interpretive rule caused many dealers to stop offering GAP Waivers to servicemembers; (iii) servicemembers who incur a total loss often receive

[7] https://www.consumerfinancemonitor.com/wp-content/uploads/sites/14/2019/03/NADA-letter-to-Defense-Dept.pdf.

GAP benefits for amounts exceeding $3,000; (iv) in 2018, servicemembers purchased approximately 200,000 vehicles, of which 10,000 were totaled, leaving servicemembers with an estimated $30 million in debt that would have otherwise been eliminated had those servicemembers had GAP Waivers; (v) if GAP Waivers are included in a transaction, creditors may be unable to take a security interest in the vehicle and therefore be unwilling to finance the purchase of vehicles by servicemembers when the servicemembers seek the financial protection GAP Waivers provide; (vi) dealers cannot offer GAP Waivers as a separate, stand-alone product because GAP Waivers are an amendment to, and thus an integral part of, the retail installment contract; and (vii) GAP Waivers are different than GAP Insurance. *See* NADA Letter at 4–5, Attachments 2 & 3.

Further, the DoD will need to consider that, despite Appellant's characterization to the contrary, GAP Waivers can and often do offer valuable financial protection to servicemembers. It may not be a viable financial decision for a servicemember to buy a car when they have little money for a down payment and the car will depreciate significantly the moment is driven off the lot. Under those circumstances, an accident totaling the vehicle could be economically devastating to a

servicemember and their family. But with a GAP Waiver, they are able to purchase a vehicle and are also protected from potential economic ruin.

Weighing these economic and regulatory factors is not this Court's responsibility. *See Chevron*, 467 U.S. at 865. Yet if the Court accepts Appellant's arguments, it will be doing just that. Nothing in the plain language of the MLA requires or supports Appellant's reading of the MLA. The only bases for this reading are Appellant's policy arguments. But "[e]ven the most formidable policy arguments cannot overcome a clear statutory directive." *BP P.L.C. v. Mayor of Baltimore*, 141 S. Ct. 1532, 1542 (2021) (citation omitted). And here, that directive is that the MLA does not apply to retail installment contracts of the purchase of a vehicle, including those containing GAP Waivers. The Court should affirm.

### B. The Court Should Give No Deference to the 2017 Interpretive Rule or the DoD's Amicus Brief.

Before an agency can create a new substantive rule and impose it upon the marketplace, it must go "through a statutorily prescribed notice-and-comment process." *Children's Hosp. of the King's Daughters, Inc. v. Azar*, 896 F.3d 615, 619 (4th Cir. 2018). Interpretive rules that have not gone through this process, "do not have the force and effect of

law and are not accorded that weight in the adjudicatory process." *Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92, 97 (2015) (cleaned up). They are "merely a clarification or explanation of an *existing statute or rule*," *Children's Hosp of the King's Daughters*, 896 F.3d at 620 (emphasis in original) and are "entitled to respect only to the extent [they have] the power to persuade." *Carlton & Harris Chiropractic Inc. v. PDR Network, LLC*, 982 F.3d 258, 264 (4th Cir. 2020) (internal quotation marks omitted). The same is true of agency amicus briefs. *See DeMasters v. Carilion Clinic*, 796 F.3d 409, 422 n.7 (4th Cir. 2015).

Here, Appellant and the DoD propose a reading of the MLA that would effectively create a new substantive rule and impose it upon the marketplace. Yet this new substantive rule is not the result of notice-and-comment rulemaking. It is based solely on the since-withdrawn 2017 interpretive rule and the DoD's amicus brief.

The Court should not give any deference to either. To begin, the 2017 interpretive rule was withdrawn, but even if it had not been withdrawn, it still lacked the force and effect of law, as does the amicus brief. Moreover, the 2017 interpretive rule (and the amicus brief arguing the same interpretation), lack any power to persuade. In withdrawing the

2017 interpretive rule, the DoD admitted that the concerns raised by the concerns raised by trade groups from the automotive and banking industries had "merit" and that "additional analysis [was] warranted." *See* 85 Fed. Reg. at 11843. Despite this, the DoD has not provided any additional analysis to support its otherwise conclusory interpretation of the MLA, robbing it of any persuasive force.

Consequently, the 2017 interpretive rule and the DoD's amicus brief cannot serve as the foundation for the substantive rule Appellant and the DoD seek to impose upon the marketplace.

## CONCLUSION

For these reasons, *Amici Curiae* respectfully request that the Court affirm the ruling of the district court.

Dated: March 24, 2022

Respectfully submitted,

***s/ John C. Redding***

John C. Redding*
Alston & Bird LLP
101 South Tryon St., Ste. 4000
Charlotte, NC 28280
Tel: (704) 444-1070
john.redding@alston.com

*Attorney for Amici Curiae*

*Admitted in California and D.C. but not yet admitted in North Carolina

**IN THE UNITED STATES COURT OF APPEALS**
**FOR THE FOURTH CIRCUIT**

**No. 21-1697**

Jerry Davidson v. United Auto Credit Corporation

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***s/ John C. Redding***

John C. Redding*
Alston & Bird LLP
101 South Tryon St., Ste. 4000
Charlotte, NC 28280
Tel: (704) 444-1070
john.redding@alston.com

*Attorney for Amici Curiae*

Dated: March 24, 2022

*Admitted in California and D.C. but not yet admitted in North Carolina.

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I, John C. Redding, hereby certify that today, March 24, 2022, I have caused a true and correct copy of the foregoing Amicus Brief to be electronically filed with the Clerk of the Court for the United States Court of Appeals for the Fourth Circuit by using the appellate CM/ECF system. Counsel of record are active registered CM/ECF users who will be served by the appellate CM/ECF system.

Respectfully submitted,

***s/ John C. Redding***

John C. Redding*
Alston & Bird LLP
101 South Tryon St., Ste. 4000
Charlotte, NC 28280
Tel: (704) 444-1070
john.redding@alston.com

*Attorney for Amici Curiae*

*Admitted in California and D.C. but not yet admitted in North Carolina

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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| 101 South Tyron St., Suite 4000<br>Charlotte, NC 28280<br>Address | john.redding@alston.com<br>E-mail address (print or type) |

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| Alston & Bird LLP<br>Firm Name (if applicable) | 214-922-3853<br>Fax Number |
| 2200 Ross Ave, Suite 2300 | |
| Dallas, TX 75201<br>Address | sam.bragg@alston.com<br>E-mail address (print or type) |

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