No. 08-453

IN THE

Supreme Court of the United States

ANDREW M. CUOMO, in his Official Capacity as Attorney General for the State of New York,

Petitioner,

v.

THE CLEARING HOUSE ASSOCIATION, L.L.C. and OFFICE OF THE COMPTROLLER OF THE CURRENCY,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

Brief of Central New York Citizens in Action, Inc., Empire Justice Center, Lawyers' Committee for Civil Rights Under Law, Long Island Housing Services, Inc., National Community Reinvestment Coalition, National Fair Housing Alliance, Neighborhood Economic Development Advocacy Project, Progressive Research & Action Center, Inc., Public Citizen, Inc., South Brooklyn Legal Services, U.S. PIRGs: Federation of State PIRGs, and Washington Lawyers' Committee for Civil Rights and Urban Affairs as *Amici Curiae* in Support of Petitioner

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November 6, 2008

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INTEREST OF *AMICI CURIAE*

Amici are consumer rights and civil rights groups committed to the effective enforcement of antidiscrimination and consumer protection laws. More details about the individual *amici* are included in the Appendix.[1]

SUMMARY OF ARGUMENT

This case presents issues of enormous legal and social importance warranting this Court's review. From the beginning, this Court has emphasized that national banks are subject to regulation by the states in which they do business. Congress, too, has repeatedly recognized the important role states play in protecting the interests of their consumers and communities.

Recognizing this central role for state law makes sense. States are ideally positioned to respond quickly and effectively to the particular needs facing local communities, and state legislation has long proved a powerful tool for vindicating consumers' rights. Prior to the promulgation of the rule at issue

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[1] Pursuant to Supreme Court Rule 37.2, *amici* provided timely notice of their intent to file this brief to counsel of record for both petitioner and respondents. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae* or their counsel made a monetary contribution to its preparation or submission. Letters reflecting the consent of the parties have been filed with the Clerk.

in this case, state agencies had brought numerous enforcement actions against national banks for violations of state law, resulting in a number of landmark victories.

The 2004 decision by the Office of the Comptroller of the Currency to displace states' longstanding enforcement power with respect to state consumer protection and antidiscrimination laws severely disrupts states' traditional law enforcement regimes. It directly contravenes this Court's precedents and turns a fundamental principle of federalism on its head. The notion that valid and binding *state* laws may be enforced only by the *national* government is both perplexing and contrary to principles of federalism embedded within the Constitution. Moreover, this arrangement thwarts the political accountability upon which democratic government depends.

Full enforcement of the laws at issue in this case is particularly important today. Predatory and discriminatory lending pose a serious threat to consumers. In recent years, predatory lending in the mortgage market, much of it by national banks, has contributed to a surge in foreclosures across the country, with devastating consequences for both individual borrowers and their communities. Discrimination in the lending market also remains a serious concern, with minority borrowers denied equal access to credit at reasonable terms.

The OCC's displacement of state enforcement authority has already undermined, and will continue to undermine, effective enforcement of these critical state laws. In contrast to state agencies, the OCC lacks the mission, expertise, or structure to enforce

these laws vigorously. This Court should grant review to restore states to their traditional role as enforcers of their own applicable consumer protection laws.

REASONS FOR GRANTING THE WRIT

This case warrants the Court's attention because it raises issues of tremendous importance and because the decision below unsettles traditional law enforcement practice throughout the United States.

I. Predatory And Discriminatory Lending Pose A Serious Problem In Many States.

1. The financial industry offers a dizzying array of consumer products, creating a serious risk that vulnerable and financially unsophisticated borrowers will be exploited. Predatory loans are one such dangerous product. These loans typically involve exorbitantly high interest rates, excessive or hidden fees, or penalties for prepayment that trap borrowers in high-cost loans. U.S. GEN. ACCOUNTING OFFICE, CONSUMER PROTECTION: FEDERAL AND STATE AGENCIES FACE CHALLENGES IN COMBATING PREDATORY LENDING 18-19 (2004) (hereinafter GAO, COMBATING PREDATORY LENDING). Predatory lenders often lure in borrowers with low teaser rates that eventually skyrocket. Gretchen Morgenson, *Beware of Exploding Mortgages*, N.Y. TIMES, June 10, 2007, at 31. Indeed, in some cases the monthly loan payments ultimately exceed the borrower's total monthly income, thus forcing the borrower into default. GAO, COMBATING PREDATORY LENDING 19; TREASURY TASK FORCE ON PREDATORY LENDING, U.S. DEP'T OF HOUS. & URBAN DEV., CURBING PREDATORY

HOME MORTGAGE LENDING 22 (2000) (hereinafter HUD-TREASURY REP.).[2]

A key player in predatory lending is the banking and mortgage industry. The "overwhelming majority" of predatory loans involve subprime mortgages, those to "borrowers who have poor or no credit histories or limited incomes, and thus cannot meet the credit standards for obtaining loans in the prime market." GAO, COMBATING PREDATORY LENDING 21; *see* HUD-TREASURY REP. 17-18. Subprime lenders "may use aggressive sales and marketing tactics to convince consumers who need cash to enter into a home equity loan with highly disadvantageous terms." GAO, COMBATING PREDATORY LENDING 22. Subprime lending has thus "encouraged people to get into financially precarious positions, often precisely at the time when they [are] least able to afford it." Mark Whitehouse, *"Subprime" Aftermath: Losing the Family Home*, WALL ST. J., May 30, 2007, at A1.

Predatory lending is a particularly serious problem among vulnerable populations, especially minorities, the elderly, the poorly educated, and those with low incomes. *See* HUD-TREASURY REP. 22-23, 71-72; Dan Immergluck, *From the Subprime to the Exotic*, 74 J. AM. PLAN. ASS'N 1, 1, 3 (2008). Predatory loans have likewise had a particularly severe impact on low-income immigrants, especially

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[2] For a more extensive discussion of common predatory lending practices, see DAN IMMERGLUCK, CREDIT TO THE COMMUNITY: COMMUNITY REINVESTMENT AND FAIR LENDING POLICY IN THE UNITED STATES 122-24 & tbl.5.5 (2004).

those with limited command of English. Jonathan Karp & Miriam Jordan, *House of Cards: How the Subprime Mess Hit Poor Immigrant Groups*, WALL ST. J., Dec. 6, 2007, at A1.

2. In addition to problems with predatory lending, the lending market also has a long history of invidious discrimination against racial minorities. For much of the twentieth century, many banks "redlined" minority neighborhoods, denying residents any access to credit. *See* IMMERGLUCK, *supra*, at 87-92. Even when loans have been available, however, black and Latino borrowers are significantly more likely to receive higher-rate subprime loans than similarly situated white borrowers, even after controlling for typical measures of creditworthiness such as income and location. *See, e.g.*, Debbie Gruenstein Bocian et al., *Race, Ethnicity, and Subprime Home Loan Pricing*, 60 J. ECON. & BUS. 110, 110-11, 121, 123 (2008);[3] U.S. DEP'T OF HOUS. & URBAN DEV., UNEQUAL BURDEN: INCOME AND RACIAL DISPARITIES IN SUBPRIME LENDING IN AMERICA (2000). The lack of equal access to credit at reasonable terms remains a substantial problem today. *See* Jennifer 8. Lee, *Study Notes Fewer Loans to Hispanics and Blacks*, N.Y. TIMES, Oct. 28, 2008, at A26; IMMERGLUCK, *supra*, at 103-08.

3. Not only does predatory lending have tragic consequences for individual borrowers, it also can have devastating consequences for entire

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[3] The Bocian study is based on the same Home Mortgage Disclosure Act data that led the New York Attorney General to open the investigation that led to this case. *Cf.* Pet. App. 3a.

communities. One major consequence of default in predatory mortgage loans is that borrowers lose their homes through foreclosure. Foreclosed homes often end up vacant or abandoned, causing a significant decline in home values throughout local neighborhoods. *See generally* KAI-YAN LEE, FED. RESERVE BANK OF BOSTON, FORECLOSURE'S PRICE-DEPRESSING SPILLOVER EFFECTS ON LOCAL PROPERTIES: A LITERATURE REVIEW (2008). Such a decline makes it harder for neighbors to refinance and to keep their properties. Thus, "higher numbers of foreclosures and stalling or declining home values can become mutually reinforcing trends." Immergluck, *supra*, at 12. Foreclosures also impose significant costs on public agencies, discourage investment in local businesses, and erode the local tax base. *See generally* WILLIAM C. APGAR & MARK DUDA, HOMEOWNERSHIP PRES. FOUND., COLLATERAL DAMAGE: THE MUNICIPAL IMPACT OF TODAY'S MORTGAGE FORECLOSURE BOOM (2005).

4. The effects of predatory lending go beyond the fiscal. For example, higher foreclosure levels lead to significantly higher levels of violent crime. *See, e.g.*, Dan Immergluck & Geoff Smith, *The Impact of Single-Family Mortgage Foreclosures on Neighborhood Crime*, 21 HOUSING STUD. 851 (2006); John Accordino & Gary T. Johnson, *Addressing the Vacant and Abandoned Property Problem*, 22 J. URB. AFFS. 301, 306-07 & tbl.4 (2000). Children in families forced to leave their homes are separated from their schools and friends, and the absence of stable housing has a detrimental effect on child health. *See* PHILLIP LOVELL & JULIA ISAACS, FIRST FOCUS, THE IMPACT OF THE MORTGAGE CRISIS ON CHILDREN AND

THEIR EDUCATION 1 (2008); *cf.* Elizabeth Warren, *Bankrupt Children*, 86 MINN. L. REV. 1003 (2002). Predatory loans have also taken a severe mental and emotional toll on an increasing number of borrowers. *See* Kelli Kennedy, *Suicides From Financial Crisis Cause Concern*, ASSOCIATED PRESS, Oct. 14, 2008, *available at* http://www.boston.com/news/nation/articles/2008/10/14/suicides_from_financial_crisis_cause_concern/.

5. The surge in foreclosures from predatory lending plays a significant role in the current financial crisis. The development of a secondary market for subprime, often predatory, loans in the mid-1990s made it possible for unscrupulous lenders to issue vast numbers of unsustainable loans while shifting the risk of default onto unsuspecting third parties. GAO, COMBATING PREDATORY LENDING 72, 76. Securitization "weakened the link between the lender and the borrower," creating a pernicious incentive for predatory lending activity and thereby exacerbating the problem. Greg Ip & Damian Paletta, *Lending Oversight: Regulators Scrutinized in Mortgage Meltdown*, WALL ST. J., Mar. 22, 2007, at A1.

Market forces alone have been insufficient to weed out these practices. As former Federal Reserve chairman Alan Greenspan recently explained, federal regulators have long "put too much faith in the self-correcting power of free markets" to effectively police the lending markets. Edmund L. Andrews, *Greenspan Concedes Flaws In Deregulatory Approach*, N.Y. TIMES, Oct. 24, 2008, at B1.

II. State Laws Provide A Critical Bulwark Against Predatory And Discriminatory Lending.

In light of the significant social and personal costs that discrimination, loan defaults, and foreclosures exact, state policymakers have a substantial interest in combating predatory lending. Dan Immergluck & Geoff Smith, *The External Costs of Foreclosure: The Impact of Single-Family Mortgage Foreclosures on Property Values*, 17 HOUS. POL'Y DEBATE 57, 75 (2006). For nearly a century, states have quite properly responded by enacting and enforcing antidiscrimination and fair lending laws like those at issue in this case. While states learn from and cooperate with one another in protecting consumers, they can also tailor legislation to handle distinctive problems that arise in different jurisdictions.

A. State Legislation Has Long Responded To Predatory And Discriminatory Lending.

For nearly a century, states have taken the lead in enacting consumer protection and antidiscrimination statutes. *See, e.g.*, WIS. STAT. § 100.18 (1913) (consumer protection); CONN. GEN. STAT. § 36a-737 (1958) (discrimination in mortgages); GA. CODE. ANN. § 7-6-1 (1975) (discrimination in banking). As Massachusetts Commissioner of Banks Steven Antonakes testified: "Nearly every consumer protection regulation that exists at the federal level, or that Congress is currently contemplating, has its roots at the state level." *Improving Federal Consumer Protection in Financial Services: Hearing Before the H. Comm. on Fin. Servs.*, 110th Cong. 128

(2007) (Testimony of Steven Antonakes at 6) (hereinafter Antonakes Testimony), available at http://www.house.gov/apps/list/hearing/financialsvcs_dem/htantonakes032707.pdf

States continue to perform that critical role today. In particular, over the last decade, "many states and localities have passed laws designed to address abusive mortgage lending by restricting the terms or provisions of certain loans . . . . and have undertaken enforcement activities under existing consumer protection laws and regulations to combat abusive lending." GAO, COMBATING PREDATORY LENDING 58. As of 2004, "25 states and the District of Colombia had passed laws that were specifically designed to address abusive lending practices." *Id.* at 59. By 2007, at least forty states, counties, and municipalities had done so. Christopher L. Peterson, *Preemption, Agency Cost Theory, and Predatory Lending by Banking Agents: Are Federal Regulators Biting Off More than They Can Chew?*, 56 AM. U. L. REV. 515, 516 n.3 (2007) (listing predatory lending statutes).[4]

States have shown considerable flexibility and resourcefulness in refining their laws to respond to emerging problems. In 1999, for example, legislators in North Carolina — a major banking state — enacted a law curtailing predatory lending. That law reflected "a consensus of banks, mortgage bankers

[4] Fair lending laws are laws of general applicability applying to a wide range of lenders doing business within the state; they do not single out national banks for special treatment.

and brokers, nonprofit organizations, and other stakeholders" to address "lending abuses that were not prohibited by federal statutes and regulations." GAO, COMBATING PREDATORY LENDING 63; *see* 1999 N.C. Sess. Laws 332. And when predatory practices continued after the law's enactment, the state responded quickly, amending the statute to increase its efficacy. *See* 2001 N.C. Sess. Laws 393. The GAO found that the 2001 amendments succeeded "in reducing the number of abusive brokers and individual loan originators." GAO, COMBATING PREDATORY LENDING 65; *see also* IMMERGLUCK, *supra*, at 234 ("[D]etailed studies suggest that the laws[] are having the intended consequences of decreasing the prevalence of predatory practices and shifting market share to more responsible lenders."). Thus, by creating and revising lending laws, states play a pivotal role in preventing predation and discrimination in the lending markets.

B. State Enforcement Has Been An Effective And Powerful Tool.

1. State agencies have been markedly effective in enforcing state lending laws. For instance, in 2001, the North Carolina Attorney General's office obtained a $20 million predatory lending settlement against Citigroup. *See* Peterson, *supra*, at 522 & n.29. Similarly, "in 2002[,] a settlement of up to $484 million with Household Finance Corporation resulted from a joint investigation begun by the attorneys general and financial regulatory agencies of 19 states and the District of Columbia." GAO, COMBATING PREDATORY LENDING 62-63. These cases are only examples. One congressional survey found that in

2003, state agencies, after conducting initial investigations, initiated over four thousand enforcement actions "in the area of abusive mortgage lending practices alone." STAFF OF H. COMM. ON FIN. SERVS., 108TH CONG., VIEWS AND ESTIMATES ON MATTERS TO BE SET FORTH IN THE CONCURRENT RESOLUTION ON THE BUDGET FOR FISCAL YEAR 2005, at 16 (Comm. Print 2004). And in 2006, states initiated nearly 3700 enforcement actions against mortgage brokers and lenders. Antonakes Testimony at 13.

The landmark predatory lending settlement against Providian National Bank illustrates the critical role that states play in enforcing their lending laws even when the OCC is involved.[5] The San Francisco District Attorney began investigating Providian after receiving numerous customer complaints. Eventually the OCC supplemented the state's enforcement action with administrative proceedings, working concurrently with the state.[6]

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[5] For a full account of the Providian settlement, *see* Arthur E. Wilmarth, Jr., *The OCC's Preemption Rules Exceed the Agency's Authority and Present a Serious Threat to the Dual Banking System and Consumer Protection*, 23 AM. REV. BANKING & FIN. L. 225, 316 & n.357 (2004).

[6] The former general counsel of Citigroup described the situation more colorfully: "A California state prosecutor . . . embarrassed the OCC into taking action against Providian [National] Bank for telemarketing and pricing practices that bordered on the criminal. . . . For a decade Providian had been well known in the [credit] card industry as the poster child of abusive consumer practices, but apparently not to the OCC." Duncan A. MacDonald, Letter to the Editor, *Comptroller Has*

See Patrick McGeehan, *Soaring Interest is Compounding Credit Card Woes for Millions*, N.Y. TIMES, Nov. 21, 2004, at 1 (describing how the "two agencies joined forces"); Nicholas Kulish, *Providian to Pay at Least $300 Million To Settle Allegations on Card Operations*, WALL ST. J., June 29, 2000, at B12 (describing the "joint investigation"). The OCC's 2004 rule would have foreclosed the state action that led to this landmark consumer victory.

2. State agency enforcement has been a necessary and vital tool for vindicating consumers' rights when national banks have transgressed state law. For instance, in the typical credit fraud case where lenders engage in misleading advertising or direct misrepresentations to potential credit cardholders, state attorneys general have frequently turned to litigation to enforce state consumer protection laws. *See, e.g.*, *State ex Rel. Woods v. Sgrillo*, 859 P.2d 771 (Ariz. Ct. App. 1993) (enforcing state Consumer Fraud Act).

Similarly, state agencies have brought actions against national banks under a variety of other state laws. *See, e.g.*, *SPGGC, LLC v. Blumenthal*, 505 F.3d 183 (2d Cir. 2007) (Connecticut Gift Card Act); *State ex rel. McGraw v. Scott Runyan Pontiac-Buick, Inc.*, 461 S.E. 2d 516 (W. Va. 1995) (Consumer Credit and Protection Act); *Att'y Gen. v. Mich. Nat'l Bank*, 312 N.W.2d 405 (Mich. Ct. App. 1981) (Michigan Consumer Protection Act).

Duty to Clean Up Card Pricing Mess, AM. BANKER, Nov. 21, 2003, at 17.

States often work cooperatively to enforce their laws. In March 2002 and January 2003, for example, "national banks entered an agreement with 29 states in connection with judicial proceedings brought *by the states* concerning telemarketing practices and the disclosure of cardholder information to third parties." U.S. GOV'T ACCOUNTABILITY OFFICE, OCC PREEMPTION RULES: OCC SHOULD FURTHER CLARIFY THE APPLICABILITY OF STATE CONSUMER PROTECTION LAWS TO NATIONAL BANKS 17 (2006) (emphasis added) (hereinafter GAO, OCC RULES AND STATE LAWS).

3. The 2004 rule disrupted states' traditional enforcement regimes, creating unprecedented challenges and roadblocks to the enforcement of state laws that the OCC acknowledges continue to apply to national banks. In 2006, the GAO surveyed state officials regarding the effects of the new rule and found evidence that it had "limited the actions states can take to resolve consumer issues and negatively affected the way national banks respond to consumer complaints and inquiries from state official." GAO, OCC RULES AND STATE LAWS 17. The GAO further found that "some national banks . . . became less responsive to actions by state officials to resolve consumer complaints" and "declined to submit to state examinations or relinquished their state licenses." *Id.*; *see also id.* at 21 (noting that the 2004 rules "have in effect precluded the state from obtaining information from national banks that could assist the state in protecting consumers" as they had in the telemarketing case discussed above).

The OCC's rulemaking has changed the consumer protection landscape, putting consumers at tremendous risk.[7] Before, states could take effective legal action to penalize violations of state law or to obtain remedial settlements. Now, however, the 2004 rules empower banks to disregard state law and seek injunctions against state enforcement, as occurred in this case. *See also, e.g.*, *Nat'l City Bank of Indiana v. Turnbaugh*, 367 F. Supp. 2d 805 (D. Md. 2005) (enjoining enforcement of Maryland law).[8]

III. Exclusive Enforcement Of State Laws By The OCC Threatens To Undermine Principles Of Federalism And Effective Enforcement Of State Law.

A. This Court And Congress Have Long Recognized The Centrality Of State Law In Regulating Banks.

1. This Court has long recognized the importance of state law in the regulation of national banks. Shortly after the first national banks were

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[7] In addition to risk, exclusive enforcement by the OCC may hinder recovery in the lending markets. Investors' ability to rely on state regulators to maintain the integrity of the lending markets would significantly bolster investor confidence and contribute significantly toward unfreezing the credit markets.

[8] Like *Turnbaugh*, this case demonstrates the need to resolve the dispute over the OCC's 2004 rule now. Given the scope and importance of the rule, and potentially needless and contentious litigation costs, no one benefits from letting this issue percolate in the lower courts.

chartered in 1864, the Court made clear that federal banks "are subject to laws of the State, and are governed in their daily course of business far more by the laws of the State than of the nation." *National Bank v. Commonwealth*, 76 U.S. (9 Wall.) 353, 362 (1869).

Since *National Bank*, this Court has consistently adhered to this principle. In *First National Bank in St. Louis v. Missouri*, 263 U.S. 640 (1924) ("*St. Louis*"), for example, the Court allowed Missouri to enforce one of its statutes against a national bank, reiterating that "national banks are subject to the laws of a state in respect of their affairs, unless such laws . . . conflict with the paramount law of the United States." *Id.* at 656. Similarly, in *Anderson National Bank v. Luckett*, 321 U.S. 233, 248 (1944), the Court held that Kentucky's attempt to enforce a generally applicable state statute regulating abandoned deposits fell within the state's police power. *See also Atherton v. FDIC*, 519 U.S. 213, 222-23 (1997) (affirming a state's enforcement of state law and listing cases in which this Court "found numerous state laws applicable to federally chartered banks").

2. This Court recognizes that states have a sovereign right to enforce their own laws. To be sure, Congress clearly could preempt such statutes. But when it comes to the kinds of consumer protection and antidiscrimination laws at issue here, Congress has not done so.

Thus, the OCC concedes that the state laws at issue in this case have not been preempted and that they continue to govern the conduct of nationally chartered banks.[9] Yet the 2004 rule prevents state agencies from effectively policing predatory and discriminatory lenders by stripping states of their sovereign enforcement powers. Indeed, it is difficult to conceive how a state can ever make binding laws if deprived of its power to enforce them. *Cf. Duro v. Reina*, 495 U.S. 676, 685 (1990) (noting that a "basic attribute" of sovereignty "is the power to enforce laws against all who come within the sovereign's territory").

The OCC's displacement of state enforcement authority flouts this Court's analysis in *St. Louis*. There, after concluding that Missouri's substantive law applied to national banks doing business within the state, the Court explained:

> [S]ince the sanction behind [the law] is that of the state and not that of the national government, the power of enforcement must rest with the former and not with the latter. *To demonstrate the binding quality of a*

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[9] *See* Pet. App. 64a ("The OCC does not challenge the applicability of the state's anti-discrimination law to national banks' lending practices, nor does it question whether national banks must comply with state fair lending laws."); *Review of the National Bank Preemption Rules: Hearing Before the S. Comm. on Banking, Hous. & Urban Affairs*, 108th Cong. (2004) (statement of John D. Hawke, Comptroller of the Currency, at 7), available at http://banking.sen.gov/public/ index.,cfm? Fuseaction=Hearings.Detail& HearingID=0aae2beb-535f-4c3e-9193-c1a632ac16b2..

> *statute, but deny the power of enforcement involves a fallacy made apparent by the mere statement of the proposition, for such power is essentially inherent in the very conception of the law.*

263 U.S. at 660 (emphasis added).

Under the OCC's 2004 rule, however, while state law ostensibly retains its "binding quality," it no longer falls within the ambit of state enforcement. This turns the "very conception of the law," as contemplated in *St. Louis*, on its head.

3. Further, the OCC's regulation runs afoul of the principles of federalism embedded in our constitutional structure. *Amici* are aware of no other instance, except perhaps the Assimilative Crimes Act, 18 U.S.C. § 13, where *state* law provides the substantive constraint but *federal* agencies possess exclusive enforcement rights. Indeed, the OCC's rule presents the flipside of the executive commandeering condemned by this Court in *Printz v. United States*, 521 U.S. 899 (1997). There, the Court held that the federal government cannot conscript state and local officials to execute federal laws, because the Constitution "contemplates that a State's government will represent and remain accountable to its own citizens." *Id.* at 920 (citing *New York v. United States*, 505 U.S. 144, 168-69 (1992)).

Here, state officials seek to ensure the vigorous public enforcement of their fair lending laws, which the state views as vital for the protection of its residents. To be sure, these laws "can always be pre-empted under the Supremacy Clause if [they are] contrary to the national view, but in such a case it is

the Federal Government that makes the decision in full view of the public[.]" *New York*, 505 U.S. at 168. By contrast, if the OCC claims exclusive authority to enforce state law but fails to do so adequately, "it may be state officials who will bear the brunt of public disapproval." *Id.* at 169. Blurring this separation between state and federal responsibility would critically undermine "one of the Constitution's structural protections of liberty." *Printz*, 521 U.S. at 921.

4. Congress has long acknowledged and recently reaffirmed the centrality of state law to consumer protection and antidiscrimination in lending. On many occasions, Congress has expressly deferred to state law in the regulation of national banks. *See* 12 U.S.C. § 36(f) (1969); *First Nat'l Bank in Plant City v. Dickinson*, 396 U.S. 122, 132-33 (1969); *Brown v. Clarke*, 878 F.2d 627, 632 (2d Cir. 1989); *State ex rel. State Banking Bd. v. First Nat'l Bank of Fort Collins*, 540 F.2d 497, 500 (10th Cir. 1976).

Congress continued this tradition in the Riegle-Neal Interstate Banking and Branching Efficiency Act of 1994, Pub. L. No. 103-328, 108 Stat. 2338, and the Riegle-Neal Amendments Act of 1997, Pub. L. No. 105-24, 111 Stat. 238. As petitioner notes, *see* Pet. 5-8, 32, Riegle-Neal was intended to *supplement* state enforcement by requiring additional OCC enforcement of state laws regarding community

reinvestment, consumer protection, fair lending, and interstate branching.[10]

In stark contrast to the OCC's 2004 rule displacing state enforcement authority, Riegle-Neal was *not* intended to "weaken States' authority to protect the interests of their consumers, businesses, or communities." H.R. Rep. No. 103-651, at 53 (1994) (Conf. Rep.), *reprinted at* 1994 U.S.C.C.A.N. 2068, 2074 ("Conf. Rep."). When Congress expanded interstate banking in Riegle-Neal, it preempted certain state laws, but, understanding the importance of other generally applicable state laws, went out of its way to *extend* to the newly permitted institutions the understanding espoused in *St. Louis* — that state laws apply to national banks unless preempted. *See* Conf. Rep. at 53 (noting that the Act "emphasizes" the applicability of community reinvestment, consumer protection, and fair lending laws). Had Congress wanted to make federal enforcement authority exclusive, it certainly knew how to do so, as it has often done with other *federal* statutes. *See, e.g.*, 2 U.S.C. § 437d(e) (providing FEC with exclusive civil enforcement authority under the Federal Election Campaign Act); 15 U.S.C. § 78o-7(c)(1) (providing the SEC with "exclusive authority to enforce" requirements related to nationally recognized statistical rating organizations). Particularly in light of "well-established judicial principles," Conf. Rep. at 53,

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[10] The Equal Credit Opportunity Act is to the same effect, 15 U.S.C. § 1691d(f) (requiring lenders to follow state antidiscrimination law).

Riegle-Neal's requirement that the comptroller enforce state law should therefore be understood to confer *concurrent*, rather than exclusive, enforcement authority.

Given Congress' reaffirmation of the role played by state law and the traditional understanding that the sovereign that enacts substantive rules normally is best positioned to enforce those rules, it is not surprising that members of the House Committee on Financial Services asked the OCC to delay its proposed displacement of state enforcement authority. Faced with the 2004 rule, twenty-three committee members asked the OCC to wait until Congress could hold hearings on whether the rules would undermine the congressional intent to promote vigorous enforcement of antidiscrimination and consumer protection laws. These representatives expressed concern that the proposed rules would "adversely and substantially impact the ability of the states to protect consumers," and emphasized a "deep[] concern[] that [the rules] represent a fundamental shift in bank regulation that goes to the very heart of the federal system." Letter from H. Comm. on Fin. Servs. to the Office of the Comptroller of the Currency (Feb. 11, 2004), *available at* http://governmentdocs.org/docs/upl198/foi236/doc1188/1188.pdf (PDF pages 1504-06). The OCC refused the request.

B. Exclusive OCC Enforcement Of State Lending Laws Will Undermine Their Effectiveness.

The OCC's insistence that it should enjoy exclusive authority to enforce state laws against

national banks not only runs afoul of central principles of federalism, but it also threatens to undermine state law because the OCC lacks the structure or resources to provide effective enforcement.

The OCC is not a consumer protection agency, and thus cannot provide an adequate substitute for state consumer protection efforts. "Unlike consumer advocates and state attorneys general, OCC defines itself as a neutral arbiter in terms of assisting consumers." U.S. GOV'T ACCOUNTABILITY OFFICE, OCC CONSUMER ASSISTANCE: PROCESS IS SIMILAR TO THAT OF OTHER REGULATORS BUT COULD BE IMPROVED BY ENHANCED OUTREACH 23 (2006) (hereinafter GAO, CONSUMER ASSISTANCE). The OCC historically has focused on protecting banks, not consumers: "The primary mission and long-standing cultural focus of federal depository institution regulators has been monitoring the safety and soundness of their institutions, rather than consumer protection." Christopher L. Peterson, *Federalism and Predatory Lending: Unmasking the Deregulatory Agenda*, 78 TEMPLE L. REV. 1, 73 (2005); *see also* Ip & Paletta, *supra* ("Federal regulators . . . have tended to focus more on the solvency of the institutions they oversee and less on individual consumer complaints.").

In contrast to state agencies, the OCC's processes use enforcement tools that are not adapted to consumer protection. The OCC's "confidential[l]" bank supervisory process" that is largely invisible to the public. *See* Julie L. Williams, Acting Comptroller of the Currency, Remarks Before the New York Bankers Ass'n (July 14, 2005), available at

http://www.occ.treas.gov/toolkit/newsrelease.aspx?Doc=2GS3IJZU.xml. Transparency, however, is "necessary for the deterrent function of law enforcement to work. Secret enforcement, at whatever level, fails in some of the most essential purposes of law enforcement in the marketplace." Amanda Quester & Kathleen Keest, *Looking Ahead After* Watters v. Wachovia Bank*: Challenges for Lower Courts, Congress, and the Comptroller of the Currency*, 27 REV. BANKING & FIN. L. 187, 237 (2008). This is particularly relevant to consumer protection laws. The OCC's procedures "do not appear to provide any public notice or other recourse to consumers who have been injured by violations identified by the OCC." *Credit Card Practices: Current Consumer and Regulatory Issues: Hearing Before the H. Subcomm. on Fin. Insts. & Consumer Credit of the Comm. on Fin. Servs.*, 110th Cong. (2007) (statement of Arthur E. Wilmarth, Jr., Professor of Law, George Washington University Law School, at 13-14) (hereinafter Wilmarth Testimony), available at http://www.house.gov/apps/list/hearing/financialsvcs_dem/hr042607.shtml. In order for consumers to protect themselves, they need to know about the potential for abuse. The OCC's enforcement techniques, "shrouded in secrecy," *id.* at 13, lack this crucial function of consumer protection laws.

C. The OCC Lacks The Institutional Capacity For Exclusive Enforcement Of State Laws.

1. If past performance is any indication of future results, leaving enforcement of state consumer protection laws to the OCC will result in severe

underenforcement. *See* Quester & Keest, *supra*, at 235 (criticizing the OCC's enforcement record); Peterson, *Federalism and Predatory Lending*, *supra*, at 81 (describing OCC oversight as "relatively lax").

The OCC lacks the staff and expertise to effectively monitor lending threats in all fifty states. Consequently, the OCC has failed to perceive problems even long after states have confronted them. For example, as recently as 2005, the OCC maintained that there was no reason to worry about enforcement of predatory and abusive lending laws against national banks, because national banks simply did not engage in predatory and abusive lending practices. *Congressional Review of OCC Preemption: Hearing Before the H. Comm. on Fin. Servs.*, 108th Cong. (2004) (statement of Julie L. Williams, First Senior Deputy Comptroller and Chief Counsel, Office of the Comptroller of the Currency), available at http://commdocs.house.gov/committees/bank/hba93717.000/hba93717_of.htm; U.S. GOV'T ACCOUNTABILITY OFFICE, OCC PREEMPTION RULEMAKING: OPPORTUNITIES EXISTED TO ENHANCE THE CONSULTATIVE EFFORTS AND BETTER DOCUMENT THE RULEMAKING PROCESS 36 (2006) ("OCC maintained that national banks were not the source of predatory and abusive lending practices.") (hereinafter GAO, RULEMAKING).

A 2005 study, however, found that national banks were 4.15 times more likely to make higher-cost refinance loans to black borrowers than they were to white borrowers. CALIFORNIA REINVESTMENT COALITION, WHO REALLY GETS HIGHER-COST HOME LOANS? 3, 18 (2005), *available at* http://www.calreinvest.org/system/assets/14.pdf. Indeed, the

study concluded that national banks regulated by the OCC displayed the *greatest* disparities based on race, ethnicity, and income of all of the institutions studied. *Id.*

2. Given its resources, it is unsurprising that the OCC focuses on matters of *federal* law, while neglecting state law. Even during the 2004 rulemaking process, the preamble to the final rule stated only that national banks "would be regulated by strong *federal* standards and any abusive practices would not be tolerated," ignoring the presence of the state standards Riegle-Neal specifically endorsed. GAO, RULEMAKING 36 (emphasis added). Similarly, the OCC's handbook detailing fair lending examination procedures for its bank examiners fails to include any mention of state antidiscrimination laws. *See* OCC, FAIR LENDING EXAMINATION PROCEDURES: COMPTROLLER'S HANDBOOK (2006). In recent testimony before Congress, Comptroller John C. Dugan chronicled various federal laws that its examiners ensure national banks meet, but never once mentioned any effort to enforce state consumer protection laws. Most tellingly, he summarized OCC's consumer protection role as being "responsible for ensuring that national banks comply with applicable *federal* consumer protection laws." *Improving Federal Consumer Protection in Financial Services: Hearing Before the H. Comm. on Financial Services*, 110th Cong. (2007) (statement of John C. Dugan, Comptroller of the Currency at 128) (emphasis added) (hereinafter Dugan Testimony).

Nor does the OCC have established procedures either for identifying applicable state laws or for

monitoring compliance with state requirements. GAO, OCC RULES AND STATE LAWS 23, 42. By contrast, ensuring compliance with state laws is precisely the expertise of state attorneys general and consumer protection agencies.

3. Unlike state agencies, which have substantial manpower throughout the state, the OCC has few personnel available to enforce state consumer protection laws. Nationwide, the OCC has only a few hundred employees who work exclusively on compliance supervision. Julie L. Williams, First Senior Deputy Comptroller and Chief Counsel, Office of the Comptroller of the Currency, Preemption and the Evolving Business of Banking, Remarks Before the New York Bankers Ass'n Financial Services Forum (Mar. 25, 2003), available at http://www.occ.treas.gov/ftp/release/2004-25a.pdf. The attorneys detailed to compliance matters nationwide number only in the "dozens." *Id.* at 5.

The OCC receives roughly 70,000 complaints and inquiries on consumer issues each year. Dugan Testimony. With this incredible volume of incoming inquiries, responses to complaints have been staggeringly slow.[11] Moreover, the Customer Assistance Group (CAG) of the OCC, the "main division within OCC tasked with handling consumer

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[11] *See Improving Federal Consumer Protection in Financial Services: Hearing Before the H. Comm. on Financial Services*, 110th Cong. (2007) (statement of Travis B. Plunkett, Legislative Director, Consumer Federation of America), available at http://www.house.gov/apps/list/hearing/financialsvcs_dem/plunkett041708.pdf.

complaints," has only one single centralized location in Houston, Texas. GAO, CONSUMER ASSISTANCE 2. In 2005, the CAG employed only 50 full-time employees. Wilmarth Testimony, at 17.

4. Given these institutional and resource constraints, effective enforcement of state consumer protection laws against national banks requires that the OCC work in conjunction with state officials, rather than excluding them. The states acutely feel the collateral consequences of discrimination and consumer predation, *see supra* pp. 4-7, and are well-situated to pursue vigorous enforcement of their own laws. State "[a]ttorneys [g]eneral welcome the efforts of other law enforcement agencies to enforce consumer protection laws on behalf of victimized consumers . . . . Consumers need more consumer advocates to enforce the laws in this area, not fewer." Comments and Recommendations from Members of NAAG Regarding OCC Proposed Exemption Rule (April 8, 2003).

As former Federal Reserve chairman Alan Greenspan noted, the response to illegal mortgage lending "should be with the states' attorney[s] general." Jane Wardell, *Greenspan Defends Subprime Market*, ASSOCIATED PRESS, Oct. 3, 2007, *available at* http://edition.cnn.com/2007/BUSINESS/10/02/britain.greenspan.ap/index.html (quotation marks omitted). The OCC's 2004 rule gets this exactly backwards.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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November 6, 2008

APPENDIX

Description of Individual *Amici Curiae*

Incorporated in 2006, the **Central New York Citizens in Action, Inc.,** was established to advance the common good and general welfare of the Central New York area through public policy research, education, and civic action, promote social and economic justice through education and advocacy, and encourage and support residents of Central New York in pursuing a more prosperous life by educating citizens on policy issues affecting low and moderate income people, the elderly, the disabled and youth. The organization has been designated as a 501(c)(4) organization by the IRS.

Central New York Citizens in Action was developed from the Utica Citizens in Action, a grassroots group of local citizens concerned with the welfare of low income persons and families. It was founded in 1997 to address social and economic issues facing poor, disabled, and elderly residents and children of Oneida County of New York State. The group of citizens comprising the Utica Citizens in Action determined that the poor and distressed members of the community would benefit from the involvement of a charitable organization formed solely for the purpose of educating the public on local social and economic issues, advocating for specific legislation and public policies, and encouraging citizen involvement on shaping policy affecting low income people. To this end, they organized a new organization — the Central New York Citizens in Action, Inc. — and incorporated it under the laws of the State of New York. Activities of the Central New York Citizens in Action consist of public education on

a wide range of policy issues, workshops, news conferences, and forums on community issues, community outreach and grassroots organizing, advocacy, lobbying, coalition development, and citizen training. The group focuses on poverty, community reinvestment, health care, housing, and other issues affecting the poor, elderly, and disabled persons and households.

The **Empire Justice Center** is a public interest law firm with offices in Rochester, Albany, White Plains and Central Islip, New York. The Empire Justice Center is also the statewide support center for legal aid and legal services offices, providing technical assistance and training on substantive law issues, serving as an information clearing house and coordinating state wide substantive law task forces for civil legal service attorneys across New York State. In addition, we provide legal assistance to low income individuals in a wide variety of civil matters, including housing, consumer protection, and foreclosure prevention. Of particular concern to the Empire Justice Center is ending discriminatory home mortgage lending practices that harm low and moderate income individuals and families based on race, color national origin, gender, disability, marital status, age and other bases prohibited by federal, state and local civil rights laws.

The **Lawyers' Committee for Civil Rights Under Law ("Lawyers' Committee")** is a nonprofit civil rights organization that was founded in 1963 by the leaders of the American bar, at the request of President Kennedy, to help defend the civil rights of racial minorities and the poor. Among its other fields of specialization, the Lawyers' Committee works with

communities across the nation to combat, protest, and remediate discriminatory housing and lending practices. The Lawyers' Committee has independent local affiliates in Boston, Chicago, Denver, Los Angeles, Philadelphia, San Antonio, San Francisco, and Washington, D.C.

Long Island Housing Services, Inc. ("LIHS") is a private non-profit fair housing advocacy organization serving Suffolk County and Nassau County in Long Island and organized under the laws of New York with its principal place of business at 640 Johnson Avenue, Suite 8, Bohemia, New York 11716. LIHS' primary objectives are to promote equal housing opportunity, the racial and economic integration of Long Island and eliminate all forms of housing discrimination. These objectives include ensuring that people are treated equitably related to housing and the terms and conditions under which housing is secured and maintained. The housing search and lending transactions related to securing a mortgage and homeowner's insurance in the community of one's choice are key aspects of the agency's work and mission: the elimination of unlawful housing discrimination and promotion of decent and affordable housing through advocacy and education. LIHS seeks to join as an amicus organization as its experience informs of the tremendous need for enforcement and greater oversight to prevent lending abuses, so often perpetrated against those historically and currently disproportionately affected by illegal discrimination. Lack of ability to purchase homes with fair terms continues to severely impact racial and ethnic groups and hampers ability to increase wealth and move

from poverty. LIHS believes that the unfettered ability of the NY Attorney General is essential to allowing for proper enforcement of fair housing and fair lending laws to promote equal access to housing in Long Island.

The **National Community Reinvestment Coalition** is an association of more than 600 community-based organizations that promote access to basic banking services including credit and savings, to create and sustain affordable housing, job development and vibrant communities for America's working families. Our members include community reinvestment organizations, community development corporations, local and state government agencies, faith-based institutions, community organizing and civil rights groups, minority and women-owned business associations, local and social service providers from across the nation.

The **National Fair Housing Alliance ("NFHA")** is a consortium of private, non-profit fair housing organizations, state and local civil rights groups, and individuals. It was founded in 1988 to lead the battle against housing discrimination and to ensure equal housing opportunity for all people. Through leadership, education and outreach, membership services, public policy initiatives, advocacy and enforcement, the NFHA promotes equal housing, lending, and insurance opportunities.

The **Neighborhood Economic Development Advocacy Project (NEDAP)** is a resource and advocacy center that provides legal and technical support to community groups and individuals in low and moderate income neighborhoods and communities of color in New York City and State.

Founded in 1995, NEDAP's mission is to promote community economic justice, and to eliminate discriminatory economic practices that harm communities and perpetuate inequality and poverty. Through community education, legal and public policy advocacy, corporate accountability, and research and documentation, NEDAP works with grassroots organizations to ensure that communities have access to fair and affordable credit and financial services, necessary for equitable community development and financial security. For the past decade, NEDAP has been at the forefront of anti-predatory lending and foreclosure prevention efforts in New York City and State. NEDAP founded and chairs New Yorkers for Responsible Lending, a coalition of 141 non-profit organizations throughout New York State who are committed to fighting predatory practices in the financial services industry. NEDAP also convenes the New York City Anti-Predatory Lending Task Force.

The **Progressive Research & Action Center, Inc.** is a nonprofit New York corporation organized to conduct public policy research, education, and civic action. The organization will be submitting an application to the IRS to become a 501(c)(3) tax exempt organization. Among the services of the organization are: Providing education to moderate and lower-income persons and families by offering innovative leadership training programs that help solve social and economic problems of moderate and lower-income communities; facilitating a unified, comprehensive community action program aiming to eventually eliminate poverty; researching and studying poverty-related issues involving education,

employment, health care, environmental, and other social justice issues; informing people about public policy, including new research findings; and encouraging public participation in the democratic process by providing information, training programs, media, and encouraging citizen empowerment. Recently, PRAC spearheaded local efforts to file an application with the Federal Communications Commission to establish a community-based radio station and has conducted advocacy efforts on local media reform. The organization has conducted educational programs focused on developing local and state solutions to global warming and other environmental issues. Finally, PRAC has focused on issues related to rising utility rates, predatory lending, and the banking crisis.

Public Citizen is a consumer advocacy, lobbying, and litigating organization with approximately 80,000 members nationwide. It has a longstanding interest in limiting the reach of federal preemption to situations in which Congress has made clear its intent to oust state law to serve important federal objectives. Public Citizen believes that, in the circumstances of this case — where states are willing and able to enforce important, non-preempted fair lending laws and the federal authorities are lacking in resources and initiative — preemption is unjustified.

South Brooklyn Legal Services (SBLS) is committed to ending discriminatory home mortgage lending practices that harm low- and moderate-income individuals and families based on race, color, national origin, gender, disability, marital status, age, and other bases prohibited by federal, state, and

local civil rights laws. SBLS works to provide education, counseling, policy research, legal referrals and/or direct legal assistance, and public policy advocacy on a wide range of fair housing, affordable housing, and fair lending issues, including equal access to home mortgage financing. In furtherance of SBLS' commitment to fair lending, these organizations support broad enforcement of federal, state, and local fair lending laws.

U.S Public Interest Research Group serves as the **Federation of State PIRGs ("U.S. PIRG: The Federation of State PIRGs")** which are non-profit, non-partisan public interest advocacy organizations with a million members nationwide. U.S. PIRG and the state PIRGs have actively sought, through their research and advocacy, to maintain our longstanding federal system in which federal rules serve as a floor of consumer protection and the states are allowed to enact stronger laws. We have also published numerous reports on high bank fees and unfair bank practices and the failure of federal regulators to protect consumers.

The **Washington Lawyers' Committee for Civil Rights and Urban Affairs ("Washington Lawyers Committee")** is an independently-governed organization established in 1968 by members of the city's leading law firms in response to racial disturbances that had swept Washington and other cities. The Washington Lawyers' Committee addresses issues of discrimination and entrenched poverty in the Washington, D.C. metropolitan area. Leveraging its own broad expertise in discrimination litigation with the resources of Washington, D.C.'s private bar, the Committee's litigation has a national

impact in the areas of housing, lending, employment, public accommodations, education, immigrant and refugee rights, and other aspects of urban life.