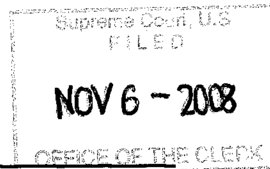

No. 08-453

In the
Supreme Court of the United States

ANDREW M. CUOMO,
ATTORNEY GENERAL OF NEW YORK,
Petitioner,

v.

THE CLEARING HOUSE ASSOCIATION, L.L.C., ET AL.,
Respondents.

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

BRIEF FOR THE STATES OF NORTH CAROLINA, ALABAMA, ALASKA, ARIZONA, ARKANSAS, CALIFORNIA, COLORADO, CONNECTICUT, DELAWARE, FLORIDA, GEORGIA, HAWAII, IDAHO, ILLINOIS, INDIANA, IOWA, KANSAS, KENTUCKY, LOUISIANA, MAINE, MARYLAND, MASSACHUSETTS, MICHIGAN, MINNESOTA, MISSISSIPPI, MISSOURI, MONTANA, NEBRASKA, NEVADA, NEW HAMPSHIRE, NEW JERSEY, NEW MEXICO, NORTH DAKOTA, OHIO, OKLAHOMA, OREGON, PENNSYLVANIA, RHODE ISLAND, SOUTH CAROLINA, SOUTH DAKOTA, TENNESSEE, TEXAS, UTAH, VERMONT, VIRGINIA, WASHINGTON, WEST VIRGINIA, WISCONSIN AND WYOMING AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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Attorney General v. Michigan Nat'l Bank, 312 N.W.2d 405 (Mich. Ct. App. 1981), *rev'd on other grounds*, 325 N.W.2d 777 (Mich. 1982) 20

Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984) . . . . . . *passim*

Clearing House Ass'n, L.L.C. v. Cuomo, 510 F.3d 105 (2d Cir. 2007) . . . . *passim*

Diamond v. Charles, 476 U.S. 54 (1986) 23

First Nat'l Bank of Bay City v. Fellows, 244 U.S. 426 (1917) 9

First Nat'l Bank of St. Louis v. Missouri, 263 U.S. 640 (1924) 8

Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132 (1963) 7

Geier v. Am. Honda Motor Co., 529 U.S. 861 (2000) 7

Gregory v. Ashcroft, 501 U.S. 452 (1991) 13

Guthrie v. Harkness, 199 U.S. 148 (1905) 4

Medtronic, Inc. v. Lohr, 518 U.S. 470 (1996) .. 9, 12

Nat'l Bank v. Kentucky,
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New York v. United States, 505 U.S. 144 (1992) . 13

Printz v. United States, 521 U.S. 898 (1997) 13

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Solid Waste Agency v. United States Army Corps of Eng'rs,
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State of Alaska v. First Nat'l Bank of Anchorage,
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State of Arizona v. Sgrillo,
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State of Minnesota v. Fleet Mortgage Corp.,
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State of New York v. Citibank, N.A., 537 F. Supp. 1192 (S.D.N.Y. 1982) 20

State of West Virginia v. Scott Runyan Pontiac-Buick, Inc., 461 S.E.2d 516 (W. Va. 1995) 20, 21

State of Wisconsin v. Ameritech Corp., 517 N.W.2d 705 (Wis. Ct. App. 1994) 20

United States v. Wheeler, 435 U.S. 313 (1978) . . . 23

Wachovia Bank, N.A. v. Burke, 414 F.3d 305 (2d Cir. 2005), *cert. denied*, 127 S. Ct. 2093 (2007) 7

Watters v. Wachovia Bank, N.A., 550 U.S. 1, 127 S. Ct. 1559 (2007) 12, 17, 18, 19

FEDERAL STATUTES AND CODE

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12 U.S.C. § 482 (2006) 4

12 U.S.C. § 483 (2006) 4

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12 U.S.C. § 484(a) (2006) 3

12 U.S.C. § 485 (2006) 4

12 U.S.C. § 486 (2006) 4

12 C.F.R. § 7.4000 (2008) 2, 3, 13

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12 C.F.R. § 7.4000(a)(2)(iv) (2008) 3

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Conference Report for Riegle-Neal Interstate Branch Banking and Branching Efficiency Act of 1994, H.R. Rep. No. 103-651 (1994), reprinted in 1994 U.S.C.C.A.N. 2068 9

Preemption Determination, OCC Docket No. 01-10, 66 Fed. Reg. 28,593 (May 23, 2001) 16

Preemption Determination and Order, OCC Docket No. 03-17, 68 Fed. Reg. 46,264 (Aug. 5, 2003) 16, 17

SECONDARY SOURCES

Edmund L. Andrews, *Fed Shrugged as Subprime Crisis Spread*, N.Y. TIMES, Dec. 18, 2007 22

Timothy K. Armstrong, *Chevron Deference and Agency Self-Interest*, 13 CORNELL J.L. & PUB. POL'Y 203 (2004) . . . 15

Paul Beckett & Joseph T. Hallinan, *Household May Pay $500 Million Over 'Predatory' Loan Practices*, WALL ST. J., Oct. 11, 2002 23

Robert Berner & Brian Grow, *They Warned Us: The Watchdogs Who Saw the Subprime Disaster Coming - and How They Were Thwarted by the Banks and Washington*, BUSINESS WEEK, Oct. 20, 2008 23

Ernest Gellhorn & Paul Verkuil, *Delegation What Should We Do About It?* Controlling Chevron-Based Delegations, 20 CARDOZO L. REV. 989 (1999) 15

John Hawke, Jr., Remarks to Women in Housing and Finance (Feb. 12, 2002), reprinted in OCC News Release 2002-10 (http://www.occ.gov/ftp/release/2002-10a.doc) 15

Greg Ip & Damian Paletta, *Lending Oversight: Regulators Scrutinized in Mortgage Meltdown - States, Federal Agencies Clashed on Subprimes as Market Ballooned*, WALL ST. J., Mar. 22, 2007 22

Damien J. Marshall, Note, *The Application of Chevron Deference in Regulatory Preemption Cases*, 87 GEO. L.J. 263 (1998) . . 11

Nina A. Mendelson, *Chevron and Preemption*, 102 MICH. L. REV. 737 (2004) 14

Nina A. Mendelson, *Ordering State-Federal Relations Through Federal Preemption Doctrine: A Presumption Against Agency Preemption*, 102 NW. U. L. REV. 695 (2008) 11

Christopher L. Peterson, *Federalism and Predatory Lending: Unmasking the Deregulatory Agenda*, 78 TEMPLE L. REV. 1 (2005) 22

Recent Cases, *Federal Preemption - Chevron Deference - Second Circuit Finds National Bank Operating Subsidiary Exempted From State Law - Wachovia Bank v. Burke*, 119 HARV. L. REV. 1598 (2006) 11

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 ANN. REV. BANKING & FIN. L. 225 (2004) 16, 23

INTEREST OF *AMICI CURIAE*[1]

Throughout this Nation's history, the States have exercised their police powers by promulgating and enforcing laws to protect consumers from abusive and unfair practices in the financial marketplace. Until the Office of the Comptroller of the Currency ("OCC") began its recent preemption crusade, national banks traditionally were subject to the States' consumer protection jurisdiction and the States were able to conduct investigations and to bring legal actions against national banks with minimal controversy.

The OCC's expansive interpretation of its visitorial powers under the National Bank Act, as upheld by the Second Circuit below, significantly limits this historic function of the States.[2] The Second Circuit's decision therefore is of great concern to the States, because it undermines core principles of federalism and interferes with the States' ability to enforce their own laws and to protect their own citizens. As noted by Judge Cardamone in his dissenting opinion, "[b]y leaving state substantive law in place, while at the same time denying the state any role in enforcing that

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[1] As required by Supreme Court Rule 37.2(a), counsel of record for all parties received notice at least ten days prior to the due date of *amici curiae's* intention to file this brief.

[2] The States are unanimous in their support for the New York Attorney General's petition for a writ of certiorari: forty-nine States have joined in this amicus brief.

law, § 7.4000 [the OCC regulation at issue] erodes a key aspect of state sovereignty, confuses the paths of political accountability, and allows a federal regulatory agency to have a substantial role in shaping state public policy." *Clearing House Ass'n, L.L.C. v. Cuomo*, 510 F.3d 105, 130-31 (2d Cir. 2007) (Cardamone, J., dissenting). The *amici* States are particularly concerned that this intrusion on their sovereign powers has been accomplished by administrative fiat, not by congressional action or independent statutory interpretation by the courts. Moreover, the current economic crisis, caused in large part by reckless subprime mortgage lending, has demonstrated the need for consumer protection and regulatory oversight in the area of mortgage lending.

REASONS FOR GRANTING THE PETITION

At the core of this case is whether the OCC's interpretation of the visitorial powers provision of the National Bank Act, 12 U.S.C. § 484, is entitled to substantial deference under the *Chevron* doctrine.[3] The *amici* States believe that resolution of this case requires independent judicial determination of sensitive legal issues relating to federal jurisdiction and state police powers. Responsibility for deciding such significant issues of federalism should not be

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[3] *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

ceded to the OCC, particularly given its self interest in the preemption of state laws and state enforcement rights.

The Second Circuit's deference to the OCC in this case pushes the *Chevron* doctrine beyond its intended and reasonable limits. The Second Circuit's application of *Chevron* will deprive States of the power to enforce their own valid laws and will cede to the OCC the exclusive right to enforce state laws with respect to national banks. Such a result represents a major alteration of the balance of power between federal and state authority and merits the attention of this Court.

THE SECOND CIRCUIT DECISION PUSHES *CHEVRON* DEFERENCE BEYOND ITS INTENDED LIMITS BY ALLOWING A FEDERAL AGENCY TO OVERRIDE THE SOVEREIGN POWERS OF THE STATES TO ENFORCE NONPREEMPTED STATE LAWS.

A. Introduction and Background.

The OCC regulation at issue, 12 C.F.R. § 7.4000, defines "visitorial powers" to include "[e]nforcing compliance with any applicable federal or state laws" relating to banking activities. 12 C.F.R. § 7.4000(a)(2)(iv) (2008). The regulation prohibits state officials from exercising any visitorial powers,

specifically including "inspecting or requiring the production of books or records of national banks, or prosecuting enforcement actions." 12 C.F.R. § 7.4000(a)(1) (2008).

The Second Circuit acknowledged that the OCC "expansively interpreted" the visitorial powers provision of the National Bank Act. 510 F.3d at 109. The relevant statute, 12 U.S.C. § 484(a), states, in pertinent part, that "[n]o national bank shall be subject to any visitorial powers except as authorized by Federal law [or] vested in the courts of justice." The provision is contained in a subchapter of the Act entitled "Bank Examinations." 12 U.S.C. § 481 *et seq.* (2006). The surrounding sections of the subchapter cover other specific bank examination matters such as appointment and payment of examiners, special examinations, and waivers of examination requirements. 12 U.S.C. §§ 481-83, 485-86 (2006). Contrary to the OCC's expansive view, "visitorial powers" is a concept closely related to *regulatory examinations* of national banks consistent with the OCC's mission of ensuring the safety and soundness of the national banking system. *See Guthrie v. Harkness*, 199 U.S. 148, 158 (1905) (visitation is the "act of a superior or superintending officer, who visits a corporation to examine into its manner of conducting business, and enforce an observance of its laws and regulations").

The instant case arose when the New York Attorney General's Office ("NY AGO") began investigating allegations that high-rate mortgage loans were being made disproportionately to African-American and Hispanic homeowners in New York. As part of its investigation, the NY AGO sent "letters of inquiry" to banks requesting data relating to compliance with a New York fair lending law. Instead of cooperating with the NY AGO or initiating its own investigation into the alleged discriminatory practices, the OCC responded by filing a lawsuit to enjoin the NY AGO's investigation. The OCC acknowledged that the New York fair lending law was not substantively preempted but nevertheless took the position that any efforts by the Attorney General to enforce fair lending laws against national banks represented an unlawful exercise of visitorial powers. In other words, in the OCC's view, laws enacted by a state legislature and within the enforcement jurisdiction of a state attorney general can be enforced only if the OCC chooses to enforce them itself.

The District Court, deferring to the OCC regulation under the *Chevron* doctrine, found that the NY AGO's enforcement activities constituted "visitorial powers," and enjoined the Attorney General from investigating the national banks' residential lending practices. The Second Circuit, in a 2-1 decision, upheld the injunction. While granting *Chevron* deference to the OCC regulation, the Second Circuit

observed that the case was "at or near" *Chevron*'s "outer limits." 510 F.3d at 119. For the reasons set forth below, review of that decision is warranted.

B. The OCC's Visitorial Powers Regulation, Which Preempts Sovereign Enforcement Rights of the States, Is Not Entitled to Ordinary *Chevron* Deference.

The Second Circuit's decision in this case merits review by this Court because it extends *Chevron* deference to an unreasonable extreme. In deferring to the OCC's preemption ruling, albeit with misgivings, the Second Circuit erred in several significant respects. First, the court failed to apply the well-established presumption against preemption in areas of established state involvement. Second, the court failed to recognize the inappropriateness of *Chevron* deference in cases where sensitive issues of federalism are at stake. Third, the court erred by failing to consider the OCC regulation in its proper context of agency bias and a self-serving preemption agenda.

1. A Presumption Against Preemption Should Apply in this Case.

As a first step in its *Chevron* analysis, the Second Circuit considered whether a presumption against preemption applied to the OCC regulation. *See Rice v.*

Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947) (assumption that historic police powers of the States not to be superseded without showing that such preemption "was the clear and manifest purpose of Congress"); *see also Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 908 (2000) (the presumption against preemption is "crucial" when assessing the preemptive effect of an administrative regulation) (Stevens, J., dissenting). Despite acknowledging that there is a presumption against preemption in areas of traditional state authority, the Second Circuit found that the presumption did not apply in this case because the field of national bank regulation has been "substantially occupied by federal authority for an extended period of time." 510 F.3d at 113 (quoting *Wachovia Bank, N.A. v. Burke*, 414 F.3d 305, 314 (2d Cir. 2005), *cert. denied*, 127 S. Ct. 2093 (2007)).

The Second Circuit erred in its determination of this threshold question. Enforcement of nonpreempted state consumer protection laws is not a field that traditionally has been occupied by the Federal Government. In fact, as more fully argued below, enforcement of these laws has been primarily a state responsibility for many years. *See Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 150 (1963) (refusing to intrude upon States' "traditional power to enforce otherwise valid regulations designed for the protection of consumers" without evidence of clear intent of Congress). While the OCC is the

primary regulator of national banks, the States' power to enforce their nonpreempted laws through legal actions against national banks has been recognized for many years. As Judge Cardamone pointed out in his dissent, "[c]onsiderable authority supports the proposition that states have the authority to enforce such laws against national banks." 510 F.3d at 129.

Further, the New York Attorney General was not intruding upon any areas of traditional federal regulation. He was not seeking to regulate or examine the safety and soundness of any national bank. Instead, the Attorney General exercised a traditional state law enforcement function by making a narrowly tailored request for information on banks' compliance with a valid and nonpreempted state law.

State enforcement of nonpreempted state law against national banks has been permitted by this Court since the enactment of the National Bank Act. In 1869, the Court observed that national banks "are subject to the 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." *Nat'l Bank v. Kentucky*, 76 U.S. (9 Wall.) 353, 362 (1869). In *First National Bank of St. Louis v. Missouri*, 263 U.S. 640 (1924), this Court held that the Missouri Attorney General could prosecute an action against a national bank to enforce a state law prohibiting branch banking. *Id.* at 659-60. The Court rejected the argument of the United States,

as *amicus curiae*, that the State's legal action was an attempt to exercise visitorial powers reserved to the Comptroller. *Id.* at 645. In *First National Bank of Bay City v. Fellows*, 244 U.S. 416, 426 (1917), this Court held that the Michigan Attorney General could sue a national bank in state court to enforce state antitrust laws.

This, therefore, is the type of case in which the presumption against preemption should apply. If the presumption is properly applied, there should be minimal *Chevron* deference because, as the Second Circuit acknowledged, there is no unambiguous expression of congressional intent to displace state enforcement in § 484 of the National Bank Act. In fact, congressional intent appears to be to the contrary. *See* Conference Report for Riegle-Neal Interstate Branch Banking and Branching Efficiency Act of 1994, H.R. Rep. No. 103-651, at 53 (1994), *reprinted in* 1994 U.S.C.C.A.N. 2068, 2074 (identifying "legitimate interest" of States in protecting consumers and disclaiming any intent to "weaken States" authority to protect the interests of their consumers, businesses, or communities"); *see generally Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996) (courts assume that Congress did not intend to supplant historic police powers of the States in the absence of clear congressional intent to the contrary).

2. Because Legal Analysis of Sensitive Issues of Federalism Is Required, Courts Should Interpret the Preemptive Effect of the Visitorial Powers Provision of the National Bank Act Without Deference to the OCC.

In this case, the Second Circuit struggled with whether to extend *Chevron* deference to the pertinent OCC regulation. The court noted that the OCC's preemption rule was based "almost entirely" on the agency's "interpretation of case law, legislative history, and statutory text." 510 F.3d at 118. The panel was troubled by the lack of evidence of administrative expertise in the OCC's rulemaking record:

> [T]he OCC does not appear to have found any facts at all in promulgating its visitorial powers regulation. It accretes a great deal of regulatory authority to itself at the expense of the states through rulemaking lacking any real intellectual rigor or depth. Indeed, there is very little about the OCC's rather cursory analysis that, in a different context, could justify this Court's deference under *Chevron*.

Id. at 119. However, despite these misgivings, the Second Circuit majority considered itself bound to uphold the OCC's rule under the *Chevron* framework.

As a number of commentators have observed, deference to an agency's legal analysis is particularly inappropriate when sensitive issues of federalism are involved. *See, e.g.*, Nina A. Mendelson, *Ordering State-Federal Relations Through Federal Preemption Doctrine: A Presumption Against Agency Preemption*, 102 NW. U. L. REV. 695, 698 (2008); Damien J. Marshall, Note, *The Application of Chevron Deference in Regulatory Preemption Cases*, 87 GEO. L.J. 263, 279 (1998) (noting that "it is highly problematic to assert that agencies have expertise in determining the proper balance between federal and state power"); Recent Cases, *Federal Preemption – Chevron Deference – Second Circuit Finds National Bank Operating Subsidiary Exempted From State Law – Wachovia Bank v. Burke*, 119 HARV. L. REV. 1598, 1601 (2006) (observing that recent scholarly literature "has called into question whether *Chevron's* rationales retain much persuasive force in preemption contexts" and noting that "when preemption issues arise, agencies lose much of their expertise advantage relative to courts").

This Court has questioned, but has not resolved, whether, absent a clear statement of congressional intent, *Chevron* deference is due to an agency interpretation of a federal statute's preemptive effect. In *Smiley v. Citibank (South Dakota), N.A.*, 517 U.S. 735, 744 (1996), the Court assumed, but declined to decide, that the preemptive effect of a statute must be

determined *de novo* by the courts. In *Medtronic, Inc. v. Lohr*, 518 U.S. 470 (1996), Justice O'Connor stated that "[i]t is not certain that an agency regulation determining the pre-emptive effect of any federal statute is entitled to deference." 518 U.S. at 512 (O'Connor, J., concurring in part and dissenting in part). Most recently, in *Watters v. Wachovia Bank, N.A.*, 550 U.S. 1, 127 S. Ct. 1559, 1572 (2007), the Court found it unnecessary to decide whether another OCC preemption regulation was entitled to *Chevron* deference. The dissenting justices in *Watters* noted, however, that "when an agency purports to decide the scope of federal preemption, a healthy respect for state sovereignty calls for something less than *Chevron* deference." 127 S. Ct. at 1584 (dissenting opinion of Stevens, J., joined by Roberts, C.J. and Scalia, J.).

This Court has expressly declined to grant *Chevron* deference where doing so could implicate serious constitutional and federalism issues. In *Solid Waste Agency v. United States Army Corps of Engineers*, 531 U.S. 159 (2001), the Court articulated an "assumption that Congress does not casually authorize administrative agencies to interpret a statute to push the limit of congressional authority." *Id.* at 172-73. The Court went on to note that its concern "is heightened where the administrative interpretation alters the federal-state framework by permitting federal encroachment upon a traditional state power." *Id.* at 173.

Under the OCC regulation at issue, the Federal Government is the only entity that can enforce state laws with respect to national banks. Placing the enforcement and administration of state laws exclusively in the hands of the Federal Government severely strains principles of federalism and raises Tenth Amendment issues. As this Court has repeatedly emphasized, the Constitution "contemplates that a State's government will represent and remain accountable to its own citizens." *Printz v. United States*, 521 U.S. 898, 920 (1997); *see also New York v. United States,* 505 U.S. 144, 168 (1992) (cautioning against federal control that diminishes the accountability of state government to its citizens).

The OCC regulation undermines such accountability. Under 12 C.F.R. § 7.4000, the Federal Government has supplanted the States as the enforcer of state laws. Such a radical departure from the traditional balance between the role of the Federal Government and the role of the States should only occur when Congress has clearly expressed its intent to do so. *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991). Such an unequivocal expression of intent cannot be found to support 12 C.F.R. § 7.4000.

Whether or to what extent *Chevron* deference is due to agency preemption determinations is an important issue that should be resolved by this Court. Lower court decisions have not been uniform. As one

commentator has noted, in assessing agency interpretations of a statute's preemptive effect, lower courts "have wavered between applying only *Chevron* and interpreting a statute *de novo* notwithstanding an agency interpretation, following *Rice*." Nina A. Mendelson, *Chevron and Preemption*, 102 MICH. L. REV. 737, 740 (2004).

In the States' view, a federal agency is not the proper forum for resolving conflicts between federal and state authority. Federal agencies lack the expertise to properly weigh federalism concerns. Agency preemption determinations naturally will be affected by agency self-interest and institutional bias. Further, as the recent example of the OCC has shown, there is a clear risk that agencies will tend to claim exclusive regulatory and enforcement authority with the deliberate intent of minimizing existing state authority.

3. In View of the OCC's Self-Interest in Preempting State Law, the Courts Should Not Give *Chevron* Deference to the OCC's Preemption Rulings.

The OCC regulation at issue should be given even less deference under *Chevron* when viewed against the backdrop of the agency's unabashed self-interest in preempting state law to attract large national banks to its constituency. The OCC's self-interested

rulemaking is not the kind of impartial and disinterested rulemaking contemplated under *Chevron*. *See* Timothy K. Armstrong, *Chevron Deference and Agency Self-Interest*, 13 CORNELL J.L. & PUB. POL'Y 203, 265 (2004) (observing that the *Chevron* approach "presupposes that the agency's interpretation represents an impartial and disinterested exercise of its interpretative authority"); Ernest Gellhorn & Paul Verkuil, *Delegation What Should We Do About It? Controlling Chevron-Based Delegations*, 20 CARDOZO L. REV. 989, 1009 (1999) (maintaining that agency interpretations of statutes that implicate "agency self-interest" – either by advancing the agency's financial interests or by expanding the scope of its regulatory powers – should not receive *Chevron* deference and should be reviewed *de novo* by the courts).

In a speech given on February 12, 2002, then Comptroller John Hawke conceded that promotional considerations were a factor in the OCC's preemption push. Specifically, Comptroller Hawke observed: "The ability of national banks to conduct a multistate business subject to a single uniform set of federal laws, under the supervision of a single regulator, free from visitorial powers of various state authorities, is a major advantage of the national charter." John Hawke, Jr., Remarks to Women in Housing and Finance (Feb. 12, 2002), *reprinted in* OCC News Release 2002-10, at 2, available at http://www.occ.gov/ftp/release/2002-10a.doc.

The OCC's constituent banks strongly supported the OCC's preemption rules, and "the OCC's preemption initiatives are widely viewed by commentators as serving the interests of big, multistate national banks." *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 ANN. REV. BANKING & FIN. L. 225, 276 (2004). The OCC has a "strong incentive" to persuade major banks to retain or convert to national charters because the OCC's budget is almost entirely funded by fees paid by national banks. *Id.* By promoting a regime of *de facto* field preemption for national banks, the OCC is "clearly encouraging large multistate banks to select national charters for the purpose of avoiding the application of state laws, except for those helpful state laws that [support those banks.]" *Id.* at 276-77.

The OCC regulation at issue here should not be viewed in isolation. It is part of a campaign by the OCC to use its regulatory and rulemaking authority to preempt state consumer protection laws as well as state enforcement with respect to national banks. *See, e.g.,* Preemption Determination, OCC Docket No. 01-10, 66 Fed. Reg. 28,593 (May 23, 2001) (preempting States from applying their consumer protection laws to non-bank agents, such as motor vehicle dealers, who originate loans for national banks); Preemption Determination and Order, OCC

Docket No. 03-17, 68 Fed. Reg. 46,264 (Aug. 5, 2003) (preempting state predatory mortgage lending laws); 12 C.F.R. § 7.4008(d) (2008) (preempting virtually all state consumer protection laws relating to lending activities, under the theory that such laws "obstruct, impair or condition" the ability of national banks to engage in consumer lending). These actions by the OCC are part and parcel of a regulatory agenda that has been anything but impartial and free of self-interest.

C. The Question Presented in the Petition was Left Open by *Watters v. Wachovia Bank.*

In deciding that the presumption against preemption did not apply, the Second Circuit relied in part on this Court's recent decision in *Watters v. Wachovia Bank, N.A.*, 550 U.S. 1, 127 S. Ct. 1559 (2007). While conceding that *Watters* did not directly address the ultimate issue before it, the court read the *Watters* decision to *imply* that investigation and enforcement by state officials could constitute visitorial authority. 510 F.3d at 116 (citing *Watters*, 127 S. Ct. at 1568-69).

The Second Circuit's reliance on *Watters* is misplaced. Although *Watters* dealt with the OCC and a preemption issue, it was a very different case from the one at bar. *Watters* did not construe the meaning

of visitorial powers and did not resolve the issue of whether *Chevron* deference should be accorded to the OCC in a preemption ruling. In *Watters*, the question was whether operating subsidiaries of national banks have the same status as the banks themselves for purposes of a preemption analysis. There was no dispute in *Watters* with respect to whether Michigan's mortgage lender licensing scheme constituted an exercise of visitorial powers. By contrast, the preemption issue here does not relate to traditionally visitorial licensing, supervision and examination activities, but to state enforcement of nonpreempted state laws governing discrimination in the pricing of credit.

The enforcement authority of a state attorney general typically differs from the core supervisory authority of a state banking commissioner. The state banking supervisor in *Watters* licensed and examined state-chartered financial institutions pursuant to a regulatory regime. Unlike a banking supervisor, an attorney general usually does not oversee banking operations on a routine or systematic basis. Instead, state attorneys general typically have authority to enforce state laws of general application, such as consumer protection laws, and conduct investigations only when there is good cause to believe those laws have been violated.

Moreover, the *Watters* decision was based on the court's direct interpretation of language in the National Bank Act, not on *Chevron* deference to the disputed OCC regulation concerning operating subsidiaries of national banks. The majority opinion in *Watters* expressly declined to consider the scope of administrative preemption authority, although the circuit court had decided the case based on *Chevron* deference. 127 S. Ct. at 1572 n.13. While the majority in *Watters* left this issue open, the dissenting justices made clear their view that *Chevron* deference is not warranted with respect to preemptive regulations. *Id.* at 1584 (dissenting opinion of Stevens, J., joined by Roberts, C.J. and Scalia, J.).

D. Deference to the OCC's Interpretation of Visitorial Powers will Deprive the States of Their Historic Role in Enforcing State Consumer Protection and Fair Lending Laws Against National Banks.

State attorneys general have an established history of enforcing state consumer protection laws, and national banks have received their share of attention. Many of these actions resulted in settlements or assurances of voluntary compliance without banks asserting that the actions were "visitorial" or subject to the exclusive enforcement

jurisdiction of the OCC.[4] As Judge Cardamone noted in his dissent, "virtually from the inception of the National Bank Act the term [visitorial powers] was not understood to preclude state enforcement of nonpreempted state laws." 510 F.3d at 129. In fact, until recently, most banks cooperated in the resolution of these actions without interference from the OCC. These attorney general actions, which benefitted consumers and promoted fair business practices in the banking industry, have not threatened or interfered with the OCC's enforcement authority and have not significantly interfered with the lawful operations of national banks.

In some cases, in order to obtain relief for victims of fraudulent practices by retail sellers, attorneys general must pursue the banking institutions that financed the questionable transactions. As the West

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[4] For examples of reported cases involving state attorney general actions against national banks, *see, e.g., State of Alaska v. First Nat'l Bank of Anchorage*, 660 P.2d 406 (Alaska 1982); *Attorney General v. Michigan Nat'l Bank*, 312 N.W.2d 405 (Mich. Ct. App. 1981), *rev'd on other grounds*, 325 N.W.2d 777 (Mich. 1982); *State of New York v. Citibank, N.A.*, 537 F. Supp. 1192 (S.D.N.Y. 1982); *State of Arizona v. Sgrillo*, 859 P.2d 771 (Ariz. Ct. App. 1993); *State of Wisconsin v. Ameritech Corp.*, 517 N.W.2d 705 (Wis. Ct. App. 1994); *State of West Virginia v. Scott Runyan Pontiac-Buick, Inc.*, 461 S.E.2d 516 (W. Va. 1995); *State of Minnesota v. Fleet Mortgage Corp.*, 158 F. Supp. 2d 962, 966 (D. Minn. 2001).

Virginia Supreme Court noted in allowing that State's attorney general to maintain an action against a national bank that financed the allegedly unlawful sale of motor vehicle extended warranties:

> Logic and experience dictate that if the types of lawsuits which the Attorney General could bring under the CCPA [the state consumer protection act] did not include lawsuits against financial institutions such as defendants, these institutions could, if unsavory, run in effect a "laundry" for "fly-by-night" retailers that seek to excessively charge their customers. Consequently, the real meaning of consumers protection would be stripped of its efficacy.

State of West Virginia v. Scott Runyan Pontiac-Buick, Inc., 461 S.E.2d 516, 526 (W. Va. 1995).

Despite the continuing need for consumer protection oversight, the OCC has increasingly hardened its position against state enforcement in the past few years. National banks can regularly rely on OCC support for their preemption arguments against state officials. For example, in 2001, the Minnesota Attorney General brought suit in federal court against Fleet Mortgage Corporation for allegedly deceptive telemarketing practices. Fleet Mortgage, a national bank subsidiary, argued that only the OCC could

enforce state consumer protection laws against it and was supported by an OCC amicus brief. The District Court rejected Fleet's motion to dismiss, holding that "[f]ederal law does not require that the OCC have exclusive enforcement over such actions." *State of Minnesota v. Fleet Mortgage Corp.*, 158 F. Supp. 2d 962, 966 (D. Minn. 2001).

Prior to the OCC's recent assertion of exclusive enforcement authority, the OCC had minimal interest in consumer protection.[5] As subprime mortgage lending abuses became epidemic, the OCC and other banking regulators were criticized for their slow response. *See* Edmund L. Andrews, *Fed Shrugged as Subprime Crisis Spread*, N.Y. TIMES, Dec. 18, 2007, at 1; Greg Ip & Damian Paletta, *Lending Oversight: Regulators Scrutinized in Mortgage Meltdown – States, Federal Agencies Clashed on Subprimes as Market Ballooned*, WALL ST. J., Mar. 22, 2007, at A1. By contrast, States were enacting predatory lending laws and pursuing major national lenders for predatory

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[5] The OCC's record in enforcing consumer protection laws against national banks has been described as "relatively lax" and "unimpressive," particularly when compared to the more vigorous enforcement efforts of state authorities. Christopher L. Peterson, *Federalism and Predatory Lending: Unmasking the Deregulatory Agenda*, 78 TEMPLE L. REV. 1, 70-74, 77-81 (2005).

lending practices.[6] Efforts by state attorneys general to persuade the OCC to temper its preemption zeal were unavailing. *See* Robert Berner & Brian Grow, *They Warned Us: The Watchdogs Who Saw the Subprime Disaster Coming – and How They Were Thwarted by the Banks and Washington*, BUSINESS WEEK, Oct. 20, 2008, at 36.

The power to create and enforce laws, both criminal and civil, is "one of the quintessential functions of a State." *Diamond v. Charles*, 476 U.S. 54, 65 (1986); *see also United States v. Wheeler*, 435 U.S. 313, 320 (1978) (affirming that a State "has the power, inherent in any sovereign, independently to determine what shall be an offense against its authority and to punish such offenses"). The States have exercised their police powers against national banks for over a hundred years. This essential sovereign enforcement power to enforce nonpreempted state laws will be ended if the OCC's preemption fiat is upheld.

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[6] *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 ANN. REV. BANKING & FIN. L. 225, 316 (2004); Paul Beckett & Joseph T. Hallinan, *Household May Pay $500 Million Over 'Predatory' Loan Practices*, WALL ST. J., Oct. 11, 2002, at A1.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted.

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