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UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

THE CLEARING HOUSE ASSOCIATION, L.L.C., Plaintiff, v. ELIOT SPITZER, ATTORNEY GENERAL OF THE STATE OF NEW YORK Defendant.	)	No. 05 Civ. 5629 (SHS)
OFFICE OF THE COMPTROLLER OF THE CURRENCY, Plaintiff, v. ELIOT SPITZER, ATTORNEY GENERAL OF THE STATE OF NEW YORK Defendant.	)	No. 05 Civ. 5636 (SHS)

BRIEF *AMICI CURIAE* OF NATIONAL COMMUNITY REINVESTMENT COALITION, CENTER FOR RESPONSIBLE LENDING, NATIONAL FAIR HOUSING ALLIANCE, AARP, NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC., NATIONAL ASSOCIATION OF CONSUMER ADVOCATES, FAIR HOUSING JUSTICE CENTER OF HELP USA, FORECLOSURE PREVENTION PROJECT OF SOUTH BROOKLYN LEGAL SERVICES, NEIGHBORHOOD ECONOMIC DEVELOPMENT ADVOCACY PROJECT, LONG ISLAND HOUSING SERVICES, EMPIRE JUSTICE CENTER, LEGAL SERVICES FOR THE ELDERLY IN QUEENS, STATEN ISLAND CENTER FOR INDEPENDENT LIVING, GREATER ROCHESTER COMMUNITY REINVESTMENT COALITION, UTICA CITIZENS IN ACTION, AND CHAUTAUQUA HOME REHABILITATION AND IMPROVEMENT CORPORATION IN OPPOSITION TO PLAINTIFFS' MOTIONS FOR PRELIMINARY AND PERMANENT INJUNCTIONS

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INTRODUCTION

As described in the attached Motion for Leave to File, *amici curiae* ("*amici*") are organizations that focus on a range of fair lending issues through litigation, policy research, and advocacy. This work includes a commitment to stop discriminatory lending practices. As organizations that directly confront the growing problems of lending discrimination, *amici* represent a broad range of groups and communities that have an abiding interest in ensuring broad enforcement of federal, state, and local fair lending laws. Accordingly, this brief is submitted in support of Attorney General Spitzer's efforts to enforce fair lending laws.

Plaintiffs seek to enjoin such enforcement by the Attorney General and to place exclusive enforcement authority of state fair lending laws – with respect to national banks and their subsidiaries – in the Office of the Comptroller of the Currency ("OCC"). Such a bold assertion of exclusive enforcement authority misconstrues all enforcement activity as "visitorial" in nature, contrary to Congressional intent and well-established case law. Plaintiffs further assert that the OCC has exclusive jurisdiction over enforcement of fair lending law against national banks. This runs directly counter to the Fair Housing Act ("FHA"), 42 U.S.C. § 3601 *et seq*., which contemplates and authorizes *greater* state enforcement of anti-discrimination law, not less.

As discussed in this brief, the OCC's aggressive effort to overturn decades of state and local fair lending enforcement and to unilaterally control virtually all fair lending enforcement as to national banks is not supported by the "visitorial powers" provision of the National Bank Act ("NBA"), 12 U.S.C. § 484 ("Section 484"), and is in direct conflict with the FHA. Accordingly, the Court should reject Plaintiffs' claims. Part I discusses the need for broad fair lending enforcement, as lending discrimination persists nationwide and in New York – and is growing

because of redlining of traditional prime credit and the explosion in subprime lending. Part II argues that it is inappropriate to defer to the OCC's interpretation of its "visitorial powers" because the issue is one of statutory construction relating to the scope of the agency's own powers. Part III argues that Section 484 does not preclude the Attorney General's fair lending investigation, since the investigation does not constitute visitation within the traditional meaning of Section 484. Part IV argues that even if this fair lending investigation constitutes visitation, it falls squarely within the "authorized by federal law" exception of Section 484, specifically through the federal FHA. It then goes on to argue that the investigation is also permissible pursuant to the "vested in the courts of justice" exception of Section 484. Finally in Part V, the brief addresses the flaws in Plaintiffs' primary arguments concerning *National State Bank v. Long*, 630 F.2d 981 (3d Cir. 1980), and the Riegle-Neal Interstate Banking and Branching Efficiency Act of 1994 ("Riegle-Neal"), Pub. L. 103-328, 108 Stat. 2338 (Sept. 29, 1994).

ARGUMENT

I. FAIR LENDING ENFORCEMENT IS INADEQUATE, ESPECIALLY IN LIGHT OF THE EXPLOSION OF SUBPRIME LENDING.

The OCC's effort to foreclose any state government enforcement of fair lending laws against national banks and their subsidiaries is inconsistent with, and interferes with, the serious and growing need for more vigorous enforcement of such laws, nationally and in New York.[1]

A. Nationwide, lending discrimination remains a problem, particularly with the recent growth in subprime lending.

Nearly forty years after the passage of the FHA, racial discrimination in housing and mortgage lending continues.[2] Of particular concern is considerable evidence indicating

[1] *Amici* do not attempt, in this brief, to compare the respective enforcement efforts of the OCC and the States. Rather, *amici* wish to present evidence of the ongoing and significant need for fair lending enforcement, and to show Congress's intent to promote fair lending enforcement at *both* the federal and state levels.

mortgage discrimination, both with the lack of prime credit availability in many minority communities and with recent increases in subprime lending.[3] Opportunities for subprime lending are created because low-income and minority communities "are comparatively underserved by traditional prime lenders," creating a vacuum filled by high-cost loans.[4] In a watershed 2000 report, the U.S. Department of Housing and Urban Development ("HUD") found a "veritable explosion" in the number of subprime refinancing loans, which increased tenfold between 1993 and 1998.[5] HUD's report summarizes the connection between subprime and predatory lending:

> The recent acceleration in predatory lending activity has accompanied growth in subprime lending over the past decade. And the predatory lending can have disastrous consequences . . . . At the very least, equity is stripped from the home. In more egregious cases, homeowners may lose their home altogether.[6]

HUD and the Department of the Treasury have also concluded that:

> The explosive growth of subprime mortgage lending has thus created a corresponding increased potential for abuse of consumers. The existence of these practices is especially troubling to the extent that, as findings from a recent HUD report indicate, subprime lending is most heavily concentrated in lower-income and predominantly minority neighborhoods.[7]

HUD testing also reveals more direct evidence of discrimination against minority mortgage applicants. Another HUD study, issued in 2002, *All Other Things Being Equal*, found that African-American and Hispanic homebuyers faced a significant risk of less favorable

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[2] In 1988, Congress documented the continuing problem of housing discrimination when it amended the FHA. *See* H.R. Rep. No. 100-711, at 15 (1988) (HUD "estimates that 2 million instances of housing discrimination occur each year").

[3] Subprime loans are loans with rates higher than prevailing prime rates, ostensibly to compensate lenders for the added risks of borrowers with poor credit histories. Such loans can be problematic, for instance, when extended to individuals who should qualify for prime loans or when the rates and fees charged go beyond the added credit risk.

[4] *HUD/Treasury Report on Recommendations to Curb Predatory Home Mortgage Lending* (April 20, 2000), at 18.

[5] HUD, *Unequal Burden: Income and Racial Disparities in Subprime Lending in America* (2000), at 1.

[6] *Id.*; *see also* Center for Community Change, *Risk or Race? Racial Disparities in the Subprime Refinance Market* (May 2002).

treatment than comparable whites when they visited prime and subprime mortgage lending institutions.[8] In addition, statistical summaries of Home Mortgage Disclosure Act ("HMDA") data have documented significant racial disparities that warrant further investigation for possible lending discrimination.[9]

B. Lending discrimination is a documented problem in New York.

There is also evidence that discriminatory lending practices are a major problem in all regions of New York state, and that fair housing and fair lending enforcement to protect against discriminatory lending practices, including at national banks and their operating subsidiaries, is needed. Given their large share of mortgage lending in New York, including over 12% (and growing) of subprime lending, national banks and their subsidiaries are implicated both in underserving predominantly minority communities with prime credit as well as in the subprime market which fills that gap.[10]

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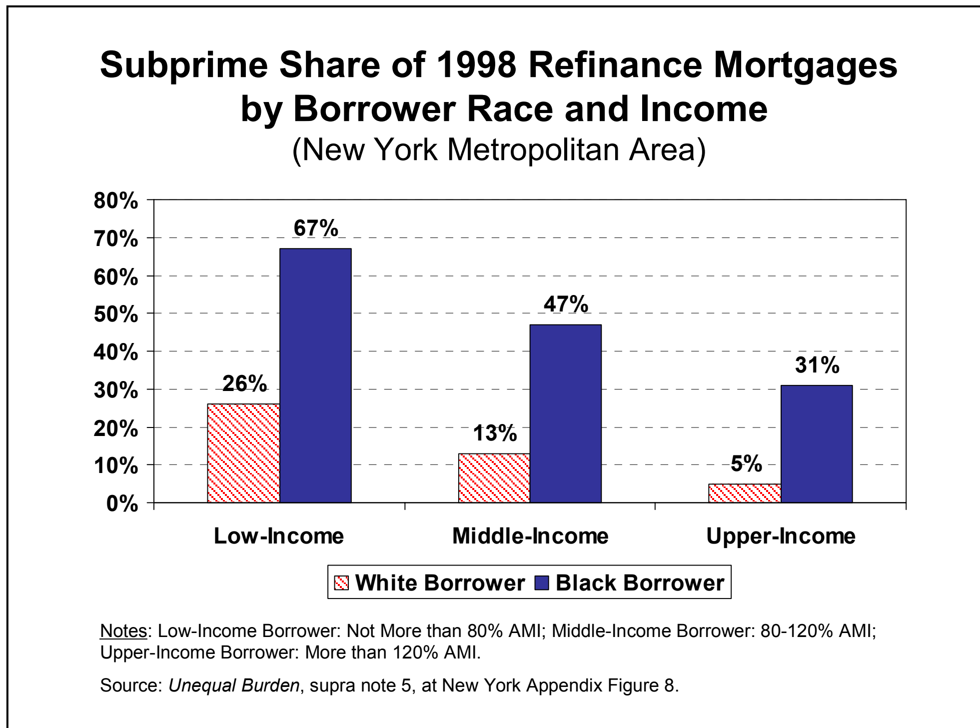
[7] *HUD/Treasury Report on Recommendations to Curb Predatory Home Mortgage Lending* (April 20, 2000), at 13.

[8] HUD, *All Other Things Being Equal: A Paired Testing Study of Mortgage Lending Institutions* (2002), at 39; *see also id*. at 9 (paired testing of mortgage lenders receiving at least 90 applications a year revealed statistically significant patterns of unequal treatment that systematically favored whites).

[9] A National Community Reinvestment Coalition ("NCRC") survey of 2004 HMDA data from 17 large lending institutions found significant racial disparities in subprime lending and loan approval rates. *See* NCRC, *Preapprovals and Pricing Disparities in the Mortgage Marketplace: A NCRC Follow-Up Report for National Homeownership Month* (April 2005). The report noted that minorities received a significantly disproportionate share of high cost subprime home loans: 33% of loans to African-Americans and 17% to Hispanics were subprime in contrast to 11% for whites. *See id*. at 11. Minorities were also denied home mortgage loans at a much higher rate than whites; for loans not involving pre-approvals, African-Americans were denied 23% of the time; Hispanics, 19%; and whites only 9%. *See id*. at 14. Similar disparities were found for loans with pre-approvals (African-Americans denied 36%, whites, 21%). *See id*. at 15.

[10] Neighborhood Economic Development Advocacy Project, another of the *amici* in this case, is preparing a document entitled *Analysis of Home Mortgage Lending By National Banks in New York State* (forthcoming 2005). Data from this study reveal that in 2003, national banks and their subsidiaries accounted for 25% of all home purchase and 30% of all refinancing loans made in the state. Of New York's top ten lenders, national banks and their operating subsidiaries accounted for 36% of home purchase loans, and 49% of all refinancing loans, statewide. Further, according to 2003 HMDA data, national banks and their subsidiaries are responsible for approximately 12.2% of all subprime refinancing loans originated in the New York City MSA. *See id*. If anything, these 2003 figures *understate* national bank involvement, since they do not include loans made by two of the state's largest institutions, JP Morgan Chase and HSBC, which converted from state to national charters soon after the issuance of the 2004 OCC regulations.

For example, HUD has found that in New York, "black neighborhoods alone carry almost 50% of all the subprime lending in New York City," and "accounted for 23% of all refinances in the New York metropolitan area but 49% of all subprime refinances."[11] HUD's *Unequal Burden* study documents that disproportionate subprime lending to blacks and predominantly black communities persists even when accounting for borrower and neighborhood income. For example, the following chart shows that 31% of refinance mortgages for upper-income black borrowers were subprime – far higher than the 5% for upper-income white borrowers and, strikingly, still higher than the 26% for low-income white borrowers:



Notes: Low-Income Borrower: Not More than 80% AMI; Middle-Income Borrower: 80-120% AMI; Upper-Income Borrower: More than 120% AMI.

Source: *Unequal Burden*, supra note 5, at New York Appendix Figure 8.

[11] *Unequal Burden*, *supra* note 5, New York Appendix. Analysis of New York City lending data shows that subprime mortgage lenders occupy a disproportionately high market share in neighborhoods that are more than 50% black or Latino, and where homeownership rates are relatively high. *See* Neighborhood Economic Development Advocacy Project, *Analysis of Home Mortgage Lending By National Banks in New York State* (forthcoming 2005).

Likewise, in its study, *Home Mortgage Lending and Foreclosures in Three New York City Neighborhoods*, Neighborhood Economic Development Advocacy Project ("NEDAP"), one of the *amici* on this brief, reported that in 2000, subprime lenders made more than 65% of all refinancing loans in the predominantly African-American and Caribbean-American community of Bedford-Stuyvesant, Brooklyn. NEDAP also has reported a disproportionate lack of prime home purchase loans made in predominantly non-white census tracts in New York City, including by national banks.[12]

Evidence also suggests that national banks and their operating subsidiaries have engaged in reverse redlining[13] in New York. Serving in part as the basis for the Attorney General's investigation, 2004 HMDA data show a significant racial disparity in mortgage loan pricing by some of the largest OCC-regulated institutions in New York. Black New Yorkers who get a mortgage from JP Morgan Chase, for example, are twice as likely as their white counterparts to receive a high-cost loan. State-wide, approximately 5% of home purchase, refinancing and home improvement loans to white borrowers were high-cost, compared to 10% for blacks. *See* NEDAP, *Analysis of Home Mortgage Lending By National Banks in New York State* (forthcoming 2005).

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[12] NEDAP, *Home Mortgage Lending and Foreclosures in Three New York City Neighborhoods* (Oct. 2002) at 2. In its review of 2003 HMDA data, NEDAP found that although nine national banks and national bank subsidiaries ranked among the top 25 conventional home purchase lenders in the New York City Metropolitan Statistical Area ("MSA"), these national banks and subsidiaries made a significantly lower percentage of loans in predominantly non-white neighborhoods than the 25 overall. Furthermore, some of the largest national banks in New York City had no, or only minimal, lending presence in dozens of residential neighborhoods with populations more than 50% black and Latino, in contrast to their strong presence in predominantly white areas. *See* NEDAP, *Analysis of Home Mortgage Lending By National Banks in New York State* (forthcoming 2005).

[13] Redlining is often defined as the denial of banking services and products to communities (based on, for example, their racial composition), while reverse redlining involves targeting such communities for inferior and high-cost products and services.

South Brooklyn Legal Services ("SBLS"), another *amici*, runs a hotline, funded by a HUD fair housing enforcement grant, for New York City homeowners targeted by predatory or discriminatory lending practices. Its data show that of the more than 1,700 complaints logged since 2001, 17% involved national banks or their operating subsidiaries. Since 2000, SBLS has filed 84 housing discrimination complaints alleging reverse redlining. Of the 240 defendants named, nearly 10% are national banks or their operating subsidiaries.

New York communities have a growing need for fair housing and fair lending enforcement to protect against discriminatory lending practices. Indeed, the citizens of New York are entitled to expect their Attorney General to enforce such protections on their behalf. Nothing in the NBA prevents the Attorney General from doing so.

II. NO DEFERENCE IS OWED TO THE OCC'S SELF-AGGRANDIZING INTERPRETATION OF THE SCOPE OF ITS "VISITORIAL POWERS."

The OCC's effort to preclude a state attorney general from enforcing fair lending laws exceeds the limits of the agency's recognized authority.[14] When evaluating the OCC's claims, the Court should not defer to the OCC's position on the scope of its exclusive jurisdiction under the NBA, which is quintessentially a question of statutory construction for the Court. That courts have deferred to the OCC's interpretation of other aspects of the NBA – such as whether the definition of national bank includes operating subsidiaries – does not establish that the Court

[14] This is not a dispute about whether the OCC, rather than state bank regulatory agencies, has *administrative* regulatory authority over national banks and their operating subsidiaries. *Compare Wachovia Bank v. Burke*, No. 04-3770-cv, 2005 WL 1607740, at *2 (2d Cir. Jul. 11, 2005) (discussing Connecticut banking regulations requiring licensing and maintenance of certain records). The Attorney General is the state's chief law enforcement officer, not a regulator, and his law enforcement activity is not an administrative proceeding. Thus his actions do not present a challenge or threat to the dual banking system or to the established dual regulatory structure.

should defer to the OCC's interpretation of the scope of its "visitorial powers."[15] Given the OCC's self-aggrandizing position and the fact that the agency has no more relevant expertise than the Court on the issue at hand, the rationales for deference under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), are not present here.

Courts are rightly skeptical when agencies argue that deference is due to interpretations that enlarge their own powers in politically significant ways: "we 'must be guided to a degree by common sense as to the manner in which Congress is likely to delegate a policy decision of . . . political magnitude to an administrative agency.'" *Natural Resources Defense Council v. Abraham*, 355 F.3d 179, 199 (2d Cir. 2004), quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000). As the Second Circuit and other courts have recognized, "it seems highly unlikely that a responsible Congress would implicitly delegate to an agency the power to define the scope of its own power." *ACLU v. FCC*, 823 F.2d 1554, 1567 n.32 (D.C. Cir. 1987) (per curiam), *quoted in Natural Res. Def. Council*, 355 F.3d at 199. "When an agency's assertion of power into new arenas is under attack, . . . courts should perform a close and searching analysis of congressional intent, remaining skeptical of the proposition that Congress did not speak to such a fundamental issue." *ACLU*, 823 F.2d at 1567 n.32.[16]

Deference is also inappropriate where, as here, the issue is one of pure statutory construction as to which the agency has no special expertise.[17] As explained below, the Court

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[15] *See Kruse v. Wells Fargo Home Mortgage, Inc.*, 383 F.3d 49, 61 (2d Cir. 2004) (noting that "deference to an agency with respect to its interpretation of one portion of a statute [does not] necessarily require[] our deference with respect to its analysis of another portion").

[16] *See* Parts IV-B and V, *infra*, regarding the OCC's newly restrictive and unsupported interpretation of the "vested in the courts of justice" exception and the OCC's assertion that Congress did speak in Riegle-Neal to grant the OCC exclusive fair lending enforcement authority over branches of national banks.

[17] *See National Mining Ass'n v. Secretary of Labor*, 153 F.3d 1264, 1267 (11th Cir. 1998) ("[W]hen applying *Chevron*'s first step, we do not need to defer when the issue is a 'pure question of statutory construction.' Likewise, we need not defer to issues beyond the agency's expertise.") (citation omitted); *see also Iavorski v. INS*, 232 F.3d

here must interpret, using established case law, what the statutory terms "visitorial powers," "authorized by federal law," and "vested in the courts of justice" mean. The OCC cannot claim any such expertise, since interpreting the statutory terms does not implicate safety and soundness considerations or any other technical banking matters.[18]

Even if the agency had more relevant expertise than the Court and were not trying to augment its own powers, no deference would be due unless the agency's interpretation were a reasonable and permissible construction of the statute. *See Coke v. Long Island Care At Home, Ltd.*, 376 F.3d 118, 126 (2d Cir. 2004) (citing *Chevron*, 467 U.S. at 843-44). As explained below, the OCC's position is neither reasonable nor permissible.

III. THE ATTORNEY GENERAL'S FAIR LENDING INVESTIGATION IS NOT AN EXERCISE OF "VISITORIAL POWERS" PRECLUDED BY THE NATIONAL BANK ACT.

The concept of visitation under Section 484 is not co-extensive with general law enforcement.[19] The mere fact that an official requests the records of a national bank, inquires into its operations, or brings an enforcement action does not necessarily constitute an exercise of "visitorial powers."

124, 133 (2d Cir. 2000) (distinguishing "an exercise of statutory interpretation" from "venturing into areas of special agency expertise, concerning which courts owe special deference under the *Chevron* doctrine"); *State of New York v. Shalala*, 119 F.3d 175, 180 (2d Cir. 1997) ("[A]n agency has no special competence or role in interpreting a judicial decision.").

[18] By contrast, the Second Circuit found that an OCC regulation relating to operating subsidiaries, 12 C.F.R. § 7.4006, reflected "a policy determination based on 'safety and soundness' considerations rather than any pure interpretation of law" and accorded deference to that regulation. *Wachovia Bank v. Burke*, 2005 WL 1607740, at *11.

[19] *See, e.g., State of Minnesota v. Fleet Mortgage Corp.*, 158 F. Supp. 2d 962, 966 (D. Minn. 2001) (stating that federal law does not require the OCC to have exclusive enforcement over laws of general applicability, where the agency does not have specific expertise). Indeed, one highly respected banking scholar has observed that "[t]he notions of national banks as protected 'federal instrumentalities' subject to the 'exclusive visitorial powers' of OCC are historical relics exaggerated by constant repetition." Ralph J. Rohner, *Problems of Federalism in the Regulation of Consumer Financial Services Offered by Commercial Banks: Part II*, 29 Cath. U. L. Rev. 313, 378-379 (1980).

"Visitation, in law, 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." *Guthrie v. Harkness*, 199 U.S. 148, 158 (1905) (internal quotation omitted).[20] The Supreme Court has recognized that some state enforcement of applicable state laws falls outside the scope of visitation. In *First Nat'l Bank in St. Louis v. State of Missouri*, 263 U.S. 640 (1924), the Supreme Court upheld a state's right to enforce applicable state law as outside the scope of visitation.[21] There, the United States and a national bank argued that the NBA's visitorial provision prohibited state officials from suing to enforce state law against national banks. *See id.* at 642-43, 645-48. Although the Court's opinion did not mention "visitorial powers" by name, it decisively rejected this argument, stating:

> To demonstrate the binding quality of a 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 law

[20] The concept of visitation derives from canon law and in the 18th century was applied to the authority of charitable founders to ensure that charities continued to observe their founding statutes. *State v. First Nat'l Bank of St. Paul*, 313 N.W.2d 390, 393 (Minn. 1981). "[Visitation] is a mere power to control and arrest abuses, and to enforce a due observance of the statutes of the charity." *State v. First Nat'l Bank of Portland*, 123 P. 712, 715 (Or. 1912). Compliance with internal corporate law is distinct from general law, which was recognized as a matter for public courts. *See St. Paul*, 313 N.W.2d at 393.

[21] While the OCC strikingly ignores *St. Louis* here, in promulgating the current expansive visitorial regulation, 12 C.F.R. § 7.4000, the OCC attempted to airbrush this adverse high court precedent entirely out of visitation jurisprudence. The OCC characterized the decision as "outdated" and otherwise argued it should be limited to the narrow procedural posture in which it was presented to the Supreme Court. *See* 69 Fed. Reg. 1895, 1899-1900 (Jan. 13, 2004). Its arguments do not withstand scrutiny. There is nothing in the Supreme Court's language that suggests anything other than a broad principle that visitation is a narrow concept that does not bar the enforcement of applicable state laws by the state. Similarly, the OCC's strained effort to limit *St. Louis* to a specific procedural posture is belied by the Court's own language. Having determined the application of the statute, and the state's power to enforce it, "the nature of the remedy to be employed is a question for state determination," and only if there is a denial of due process will it concern itself with whether the remedy is appropriate. *St. Louis*, 263 U.S. at 661.

The OCC further argued that the Financial Institutions Supervisory Act of 1966 ("FISA"), Pub. L. 89-695, § 202, 80 Stat. 1028, 1046-1053 (1966), codified at 12 U.S.C. § 1818, gave it enforcement authority that it did not have when *St. Louis* was decided. 69 Fed. Reg. at 1900. However, there is no evidence that Congress intended FISA to overrule *St. Louis*. Rather, the grant of cease and desist authority to enforce "the law" (§ 1818(b), with no specific mention of state law) was merely to add an additional weapon to the administrative agency's enforcement arsenal, because the previously authorized remedies were too drastic and cumbersome to be useful. *See* S. Rep. No. 1482 (1966), *reprinted in* 1966 U.S.C.C.A.N. 3532, 3537. Thus FISA simply added an additional *remedy* to use in carrying out existing visitorial authority; it was not an expansion of the scope of visitorial jurisdiction.

> . . . . What the state is seeking to do is to vindicate and enforce its own law, and the ultimate inquiry which it propounds is whether the bank is violating that law, not whether it is complying with the charter or law of its creation.

Id. at 660; *see also Jackson v. First Nat'l Bank of Valdosta*, 349 F.2d 71, 74 (5th Cir. 1965) ("Since the substantive law which will be determinative of the merits of the controversy in this case is that of the State of Georgia, in the absence of any contraindicative federal policy, the remedial provisions of Georgia law should also be applicable.");[22] *State of Missouri v. First Nat'l Bank in St. Louis*, 405 F. Supp. 733, 735 (E.D. Mo. 1975) (per curiam) (holding that the plaintiff Commissioner of Finance had standing to enforce the banking laws of the State of Missouri and to prohibit national banks from violating the state laws), *aff'd* 538 F.2d 219 (8th Cir. 1976).

Courts have repeatedly declined to find prohibited visitation absent evidence of an effort to manage, control, or supervise the bank. "It is neither the fact of examination nor the extent of examination that determines whether a visitorial power is being exercised; rather, it is the purpose for which the examination is made that is determinative." *State v. First Nat'l Bank of St. Paul*, 313 N.W.2d 390, 393 (Minn. 1981) (citations omitted). Absent a purpose of regulation or control, investigation "is not, by itself, a prohibited power." *Peoples Bank of Danville v. Williams*, 449 F. Supp. 254, 259-60 (W.D. Va. 1978); *see also Bank of Am. Nat'l Trust & Sav. Ass'n v. Douglas*, 105 F.2d 100, 105-06 (D.C. Cir. 1939) (stating that a subpoena commanding production of a bank's books did not "manage or control the Bank's affairs or policy" and was not "visitorial"); *St. Paul*, 313 N.W.2d at 393 (stating that the purpose of visitation is "to supervise, direct, and control the management of the corporation") (internal quotation marks

omitted). Here, the Attorney General seeks to investigate and enforce applicable anti-discrimination laws. He does not seek to manage, supervise, or control the banks. As such, his inquiry falls outside the scope of visitation.

IV. EVEN IF THE ATTORNEY GENERAL'S ACTIONS ARE VISITORIAL, THEY ARE PERMITTED BY THE NATIONAL BANK ACT.

A. The Attorney General's actions are contemplated and authorized by federal fair housing and lending law.

The National Bank Act states: "No national bank shall be subject to any visitorial powers *except as authorized by Federal law* . . ." 12 U.S.C. § 484 (emphasis added), creating an express exception to the OCC's assertion of exclusive visitorial authority. Even if the Court were to deem the Attorney General's actions "visitorial," this case falls within the ambit of the "authorized by federal law" exception because the FHA plainly contemplates and, in certain circumstances, authorizes state enforcement of fair housing and fair lending laws. Cognizant of the ongoing need for increased fair lending enforcement, Congress clearly intended that state enforcement of anti-discrimination laws be bolstered, not restricted, when it passed the FHA in 1968 and amended it in 1988.

The FHA is at the core of our nation's deep commitment to civil rights and fair housing. It prohibits discrimination based on race, color, religion, national origin, handicap, and family status in a wide variety of housing transactions – including mortgage lending.[23] Furthermore, the

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[22] The Fifth Circuit goes on to note that the state banking regulator is "particularly well suited to the task of representing interests adverse to those of a national bank which, even with the approval of the Comptroller," would be inclined to push the limits of the applicable law at issue. *Id*. at 75.

[23] Section 3605 prohibits discrimination "in making available a [residential real-estate] transaction, or in the terms and conditions of such a transaction." 42 U.S.C. § 3605(a). Residential real-estate transactions include "[t]he making . . . of loans or providing other financial assistance: for purchasing, constructing, improving, repairing or maintaining a dwelling; or secured by residential real estate." 42 U.S.C. § 3605(b)(1). Such prohibitions plainly apply to national banks and their subsidiaries. *See* 42 U.S.C. § 3605(a) (covering "any person or other entity whose business includes engaging in residential real estate-related transactions").

FHA promotes enforcement of fair housing and lending laws not only by the federal government, but also by private parties and state and local agencies. In particular, the FHA authorizes state enforcement of such laws through its "substantial equivalence" provisions. The OCC's attempt to block state fair lending investigation of national banks undermines both substantive and procedural objectives of the FHA. As such, the OCC's interpretation of the NBA impermissibly conflicts with Congressional intent to authorize and support state enforcement of fair housing laws through the FHA.

1. The federal Fair Housing Act envisions an important state role in investigation and enforcement of housing-related anti-discrimination laws.

When passing the Fair Housing Amendments Act of 1988 ("FHAA"), Pub. L. No. 100-430, 102 Stat. 1619 (1988), Congress emphasized that the effectiveness of the FHA had been undermined by inadequate enforcement:

> Although [the FHA] provides a clear national policy against discrimination in housing, it provides only limited means for enforcing the law. The Committee . . . views this shortcoming as the primary weakness in existing law. . . . Twenty years after the passage of the [FHA], discrimination and segregation in housing continue to be pervasive. . . . Existing law has been ineffective because it lacks an effective enforcement mechanism.

H.R. Rep. No. 100-711, at 15-16. To supplement the enforcement efforts of private parties, which Congress saw as "restricted by the limited financial resources of litigants and the bar, and by disincentives in the law itself," *id*. at 16, the FHAA specifically strengthened the enforcement powers of private persons and federal enforcement agencies – HUD and the Department of Justice.[24] Importantly, it also maintained the enforcement role for state and local agencies

[24] The FHAA set forth an administrative enforcement scheme for HUD, 42 U.S.C. §§ 3610-3612, which allows the HUD Secretary to self-initiate complaints, 42 U.S.C. § 3610 (a)(1)(A)(i), allows HUD to issue subpoenas and order

established by the 1968 FHA. Indeed, Congress specifically "recognize[d] the valuable role state and local agencies play in the [FHA] enforcement process." H.R. Rep. No. 100-711, at 35. Reading state fair lending enforcement as prohibited by the NBA cuts directly against one of the express purposes of the FHA and the 1988 amendments – to *strengthen* enforcement of fair housing and fair lending laws.

The FHA not only encourages broad enforcement by state agencies, but also states that HUD "may reimburse such agencies and their employees," 42 U.S.C. § 3616, for these services. Pursuant to this provision, HUD developed the Fair Housing Assistance Program ("FHAP") to promote greater enforcement of fair housing law by providing financial assistance to state and local agencies. *See* 24 C.F.R. § 115.300 ("The intent of this funding program is to build a coordinated intergovernmental enforcement effort to further fair housing and to encourage the [state and local] agencies to assume a greater share of responsibility for the administration and enforcement of their fair housing laws and ordinances.").[25]

2. The Fair Housing Act authorizes state enforcement of fair housing and fair lending laws.

In addition to recognizing the need for broad enforcement of its fair housing and fair lending provisions, providing authority for HUD to fund such enforcement by states, and strengthening the enforcement provisions for private parties and the federal government, the

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discovery to aid fair housing investigations, 42 U.S.C. § 3611(a), allows parties and complainants to elect judicial, rather than administrative, action, 42 U.S.C. § 3612, and allows the HUD Secretary to authorize prompt judicial action by the Attorney General, 42 U.S.C. § 3610(e). The FHAA also strengthened the provision of the Act authorizing private enforcement by extending its statute of limitations, 42 U.S.C. § 3613(a)(1), removing a limitation on punitive damages, 42 U.S.C. § 3613(c)(1), and allowing attorney's fees and costs to be awarded, 42 U.S.C. § 3613(c)(2). The FHAA also considerably strengthened the Department of Justice's enforcement authority, allowing the Attorney General to seek monetary damages for any person aggrieved by the discrimination, 42 U.S.C. § 3614(d)(1)(B), and to seek substantial civil monetary penalties against violators, 42 U.S.C. § 3614(d)(1)(C).

[25] In 42 U.S.C. § 3615, the FHA also recognizes the importance of state enforcement of fair housing and fair lending, noting that nothing in the FHA shall be construed to "invalidate or limit any law of a State or political subdivision of a State. . . . that grants, guarantees or protects the same rights as are granted by [the FHA]. . . ."

FHA authorizes state enforcement of state fair housing law. Specifically, the FHA requires HUD to refer complaints to state and local agencies whose fair housing laws have been certified by HUD as "substantially equivalent" to the federal statute. Through such provisions, the FHA makes clear that state enforcement agencies should be the primary enforcers of state fair housing law:

> Whenever a complaint alleges a discriminatory housing practice within the jurisdiction of a State or local public agency and . . . such agency has been certified by the [HUD] Secretary under this subsection, the Secretary shall refer such complaint to that certified agency before taking any action with respect to such complaint.

42 U.S.C. § 3610(f)(1). The FHA explains the certification requirement as follows:

> The Secretary may certify an agency under this subsection only if the Secretary determines that the substantive rights protected by such agency in the jurisdiction with respect to which certification is to be made, the procedures followed by such agency, the remedies available to such agency, and the availability of judicial review of such agency's action are substantially equivalent to those created by and under this title.

42 U.S.C. § 3610(f)(3).[26] In particular, to be certified, agencies must "[e]ngage in timely, comprehensive and thorough fair housing complaint investigation, conciliation and enforcement activities." 24 C.F.R. § 115.203(a). A leading commentator has noted that as a whole, these provisions "encourage states and localities to enact and enforce broad and effective fair housing laws." Robert G. Schwemm, *Housing Discrimination Law and Litigation*, 24-13 (2004).

In New York, HUD has certified the state fair housing and lending law.[27] The federal enforcement scheme created by the FHA requires enforcement of laws certified by HUD as

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[26] HUD has certified state laws and agencies in 36 states and the District of Columbia. HUD has also certified 64 local agencies. *See* http://www.hud.gov/offices/fheo/partners/FHAP/agencies.cfm.

[27] New York State Human Rights Law, N.Y. Exec. Law §§ 290-301 (Consol. 2005). The Human Rights Law includes N.Y. Exec. Law § 296a, which specifically prohibits discriminatory lending.

"substantially equivalent" by the state agency certified to administer the law through specified procedures.[28] This scheme also plainly encourages states to investigate and enforce "substantially equivalent" fair housing and lending laws – and clearly assumes that they are permitted to do so. Here, where New York's fair housing and lending law has been certified as "substantially equivalent" by HUD, the Attorney General's effort to enforce this law is "authorized by federal law." Although the Attorney General is not directly part of the certified agency, his efforts to enforce the state's substantially equivalent law are part of the state's fair housing enforcement regime authorized by federal law. In short, federal "authorization" is not narrowly limited to certified agencies only.[29]

Overall, the FHA provisions demonstrate that Congress intended a "coordinated intergovernmental enforcement effort to further fair housing," 24 C.F.R. § 115.300, that includes a strong state role. Through the framework of the FHA, Congress encouraged and authorized vigorous investigation and enforcement of fair housing laws by state officials. The OCC's suggestion that such enforcement must be enjoined as duplicative runs directly counter to the clear congressional intent that *underenforcement* – not overenforcement – of fair housing and lending laws must be corrected.[30]

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[28] In New York, the certified agency is the New York State Division of Human Rights. HUD is required to refer complaints to this agency, which is responsible for processing such complaints pursuant to the administrative and enforcement procedures mandated by the state fair housing and fair lending law.

[29] For example, federal law clearly contemplates strong enforcement by non-certified agencies that are attempting to obtain "substantially equivalent" certification. *See* 42 U.S.C. §3610(f)(3)(B) (before certifying an agency, the "Secretary shall take into account the current practices and past performances, if any, of such agency"); 24 C.F.R. § 115.203(a) (to obtain certification from HUD, agencies must "[e]ngage in timely, comprehensive and thorough fair housing complaint investigation, conciliation and enforcement activities").

[30] *See* Part V, *infra* (discussing how concerns about duplicative enforcement run contrary to Congressional intent).

B. An enforcement action by the Attorney General and the preceding investigation fall within the "vested in the courts of justice" exception of the National Bank Act.

Plaintiffs have offered an impossibly narrow and strained reading of Section 484's "vested in the courts of justice" exception, a reading that has no support in 140 years of judicial interpretation of the NBA's visitation provision. It is well-established that state officials may bring enforcement actions against national banks in court and that the power to investigate is a natural part of the authority to bring such actions. Plaintiffs' proffered construct of *Guthrie v. Harkness*, 199 U.S. 148 (1905), OCC Mem. pp. 25-27, cannot withstand scrutiny. The Supreme Court there upheld the common law right of a shareholder to inspect a bank's books notwithstanding the bank's effort to shield itself with the National Bank Act. The Court held that Congress "did not intend, in withholding visitorial powers, to take away the right to proceed in courts of justice to enforce such recognized rights as are here involved." 199 U.S. at 159. Though the OCC apparently tries to distinguish civil actions by private parties from actions by state officials, the *Guthrie* Court's reasoning that the "vested in the courts of justice" exception is designed to permit courts to vindicate longstanding rights naturally extends to the well-established right of state officials to enforce applicable laws.[31]

Consistent with *Guthrie*, courts have interpreted the authority "vested in the courts of justice" to include the authority to hear actions instituted by state officials to address legal violations. In *First Union Nat'l Bank v. Burke*, 48 F. Supp. 2d 132 (D. Conn. 1999), the court recognized a long line of cases, including *Brown v. Clarke*, 878 F.2d 627 (2d Cir. 1989), that "illustrate ways in which a state may seek enforcement of its state banking laws in either federal

or state court." 48 F. Supp. 2d at 145-46. Accordingly, the *First Union* order enjoining the Connecticut Banking Commissioner from pursuing administrative enforcement proceedings expressly did *not* preclude the Commissioner from "seeking enforcement through judicial means." *Id.* at 135.

Inherent in the power of the Attorney General to institute an action against a national bank is the power to investigate the bank's potential violations of applicable laws, such as fair lending law. In *Bowles v. Shawano Nat'l Bank*, 151 F.2d 749 (7th Cir. 1945), the Seventh Circuit upheld the right of the Administrator of the Office of Price Administration to require a representative of a national bank to testify at a hearing and to produce certain bank records. After analyzing Section 484 and the statutes granting the Administrator the authority to issue subpoenas and other administrative powers, the court held as follows:

> The Administrator, ex necessitate, needs investigatory powers both to promulgate rational orders and regulations, and to apprehend violations thereof. He can not intelligently make charges without knowing facts to substantiate them. The accused would vigorously and justly protest against unfounded charges. How is the Administrator to unearth such violations or to confirm information given him by aggrieved persons or alert loyal citizens? By investigation and checking, of course.

151 F.2d at 751. The OCC's contention that the "vested in the courts of justice" exception does not permit the Attorney General to investigate is untenable. The authority to issue subpoenas is a necessary corollary of the Attorney General's power to bring a subpoena enforcement action and to enforce fair lending laws through the courts.[32]

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[31] *See also* cases collected in Comments and Recommendations of the Attorneys General to OCC's Proposed Rule § 7.4000, Dkt #04-3, at 7 (April 8, 2003), *available at* http://www.naag.org/issues/pdf/20030408-comments-occ.pdf; *supra* Part III.

[32] *See Bowles*, 151 F.2d at 751 (finding that an order enforcing the Administrator's subpoena fell within three exceptions to Section 484, including the "vested in the courts of justice" exception, and noting that "Appellee's right to issue this subpoena duces tecum and his right to compliance with its terms, are clear"). Thus far, the Attorney General has asked the banks to provide the information voluntarily, which is of course also permitted. The OCC

V. NEITHER *NATIONAL STATE BANK V. LONG* NOR RIEGLE-NEAL MANDATES THE RESULT SOUGHT BY PLAINTIFFS.

Neither the Third Circuit's decision in *National State Bank v. Long*, 630 F.2d 981 (3d Cir. 1980), nor 12 U.S.C. § 36(f)(1)(B), relied upon by Plaintiffs, mandates an injunction against the Attorney General's actions. The flawed *Long* decision cannot bear the tremendous weight Plaintiffs attempt to place on it. First, its review of the long history of visitation jurisprudence was superficial, referring to only three visitation cases, none of which addressed state enforcement of state law or state enforcement authorized by federal law.[33] *See Long*, 630 F.2d at 989.

Second, *Long* dealt specifically with the question of whether a state banking regulator could enforce state law against a national bank through administrative procedures, which is not the matter at hand. *See id*. at 983. There is nothing in *Long* that gives the OCC exclusive authority to enforce fair lending laws in the courts, as opposed to administratively. Moreover, as noted above, the FHA has explicitly authorized state enforcement of fair housing laws – even administratively – through "substantially equivalent" procedures.

Third, the *Long* court cited, without any factual basis, "unnecessary and wasteful duplication of effort." *Id*. at 988. Other courts have roundly rejected this thin argument for

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itself has issued interpretive letters that state that national banks voluntarily may comply with requests by state officials. *See, e.g.*, OCC Interpretive Letter 628, 12 NO. 4 O.C.C. Q.J. 50 (Jul. 19, 1993) ("National banks may . . . permit state authorities to inspect the national banks' books and records."); OCC Interpretive Letter 616, 12 NO. 2 O.C.C. Q.J. 51 (Feb. 26, 1993) ("[N]o statute, regulation, or policy of the OCC would prohibit a bank from providing the information voluntarily if the bank's board of directors decides that it is in the bank's best interest to do so."). *Cf.* OCC Interpretive Letter 998, 23 NO. 4 O.C.C. Q.J. 39 (Aug. 2004) (assuring Congress that states may enforce "many" anti-discrimination laws).

[33] For further discussion, see Part III above. *See generally* 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. of Banking & Fin. Law 225, 329-34 (2004).

exclusivity.[34] As to fair lending laws specifically, *Long*'s reasoning has been deeply undermined by subsequent legislative and agency action. The FHAA, enacted eight years after *Long* was decided, identifies *inadequate* enforcement as the principal flaw in the original FHA, while the FHAP was designed to help "build a coordinated intergovernmental enforcement effort to further fair housing." 24 C.F.R. § 115.300. These developments undercut the Third Circuit's claim that exclusive federal enforcement of anti-redlining statutes was needed to avoid over-enforcement.

The OCC's reliance on 12 U.S.C. § 36(f)(1)(B) is also misplaced. In Riegle-Neal, Congress directed the OCC to enforce applicable provisions of state law against interstate branches of national banks, including fair lending laws. It did not, however, state – and certainly Congress did not intend – that the OCC's authority to do so would be exclusive, at the expense of existing state authority. Indeed, the legislative history of Riegle-Neal is replete with the opposite concern, making the OCC's reading improper. The conference report clearly reflects Congress's intent *not* to change the balance of federal and state power, and its concerns over the OCC's overreaching efforts to displace state law.[35]

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[34] *See Peoples Bank of Danville v. Williams*, 449 F. Supp. 254, 259 (W.D. Va. 1978) ("The Bank of America case specifically rejected the claim that any duplication of efforts by agencies in supervision of a bank constituted prohibited visitation.") (citing *Bank of Am. Nat'l Trust & Sav. Ass'n v. Douglas*, 105 F.2d 100, 106 (1939)); *State v. First Nat'l Bank of St. Paul,* 313 N.W.2d 390, 395 (Minn. 1981) ("The bank raises a related objection that examination by a state official constitutes a 'duplication of effort.' This, without more, is not an adequate ground for preemption."). *Cf. State of Minnesota v. Fleet Mortgage Corp.*, 181 F. Supp. 2d 995, 1001 (D. Minn. 2001) ("The OCC's insistence that it must have exclusive jurisdiction over subsidiaries in order to avoid having its authority 'restricted' is not persuasive.").

[35] *See, e.g.,* H.R. Conf. Rep. No. 103-651 (1994), *reprinted in* 1994 U.S.C.C.A.N. 2068, 2074 ("States have a strong interest in the activities and operations of depository institutions doing business within their jurisdictions, regardless of the type of charter an institution holds. In particular, States have a legitimate interest in protecting the rights of their consumers, businesses, and communities. Federal banking agencies . . . play an important role in maintaining the balance of Federal and State law under the dual banking system. *Congress does not intend that the Interstate Banking and Branching Efficiency Act of 1994 alter this balance and thereby weaken States' authority to protect the interests of their consumers, businesses, or communities*.") (emphasis added). *Cf.* Wilmarth*, supra* note 33, at 333-34 & n.437 (quoting Congressional colloquy indicating that its purpose was to recognize the OCC's examination and administrative authority over interstate branches).

If Congress had wanted the OCC's enforcement authority to be exclusive, it would have said so. *Compare, e.g.,* 15 U.S.C. § 1681m(h)(8)(B) ("This section shall be enforced *exclusively* under section 1681s of this title by the Federal agencies and officials identified in that section.") (emphasis added) *with* 12 U.S.C. § 36(f)(1)(B) ("The provisions of any State law to which a branch of a national bank is subject under this paragraph shall be enforced, with respect to such branch, by the Comptroller of the Currency."). Given the demonstrated Congressional concern with the OCC's overreaching, Congress's failure to specify exclusivity is a particularly compelling reason to reject Plaintiffs' interpretation that would deprive the chief law enforcement officer of a state of the right it has long had to enforce applicable state laws.

CONCLUSION

For the reasons stated herein, *amici* respectfully urge the Court to deny Plaintiffs' efforts to enjoin the Attorney General's fair lending enforcement activities.

Dated: August 5, 2005 s/Matthew B. Colangelo

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