No. 05-1342

IN THE
SUPREME COURT OF THE UNITED STATES

LINDA WATTERS, COMMISSIONER, MICHIGAN
OFFICE OF INSURANCE AND FINANCIAL SERVICES,
Petitioner,

v.

WACHOVIA BANK, N.A., *et al.*,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the Sixth Circuit

AMICI CURIAE BRIEF OF ECONOMISTS AND SCHOLARS MARCUS COLE, CHRISTOPHER DEMUTH, RICHARD EPSTEIN, ROBERT LITAN, MICHAEL STATEN, PETER WALLISON AND TODD ZYWICKI IN SUPPORT OF RESPONDENTS

SAM KAZMAN
HANS BADER*
COMPETITIVE ENTERPRISE INSTITUTE
1001 Connecticut Ave., NW, Suite 1250
Washington, D.C. 20036
(202) 331-2278
**Counsel of Record*

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INTEREST OF THE AMICI CURIAE ECONOMISTS AND SCHOLARS

G. Marcus Cole is Professor of Law, the Helen L. Crocker Faculty Scholar, and Associate Dean at Stanford Law School.[1] He has published articles on numerous financial and commercial law subjects, ranging from consumer and corporate bankruptcies to the law and economics of venture capital investment. He has also been a national fellow at the Hoover Institution and served as editor-in-chief of the Northwestern Journal of International Law and Business.

Christopher DeMuth studies government regulation at the American Enterprise Institute, where he has served as president since 1986. He has also served as Director of the Harvard Faculty Project on Regulation from 1977-1981, Executive Director of the Presidential Task Force on Regulatory Relief from 1981-1983, and as Administrator of the Office of Management and Budget's Office of Information and Regulatory Affairs from 1981-1984.

Richard Epstein is the James Parker Hall Distinguished Service Professor of Law at the University of Chicago, and the Peter and Kirsten Bedford Senior Fellow at the Hoover Institution. He was the editor of the Journal of Law and Economics from 1991-2001, and is a director of the John M. Olin Program in Law and Economics. He is a leading constitutional law scholar and the author of numerous

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[1] The parties have consented to this brief through a blanket consent letter filed by petitioner and a letter of consent by respondents to this brief, which has been filed with the Clerk of the Court. No counsel for a party authored this brief in whole or in part. No person or entity other than *amici*'s counsel, Competitive Enterprise Institute, made a monetary contribution to the preparation or submission of this brief.

books and articles on topics ranging from antitrust law to health care and property rights.

Robert E. Litan is Vice President for Research and Policy at the Kauffman Foundation and Senior Fellow in the Economic Studies Program of the Brookings Institution. He has spent much of his professional career researching financial institutions and markets, and has authored or co-authored numerous books and over 100 articles on the subject. He also has been a consultant to the U.S. Treasury Department, the House of Representatives Banking Committee, and the Federal Home Loan Board on financial issues.

Michael E. Staten is Research Professor and Director of the Financial Services Research Program at the George Washington University School of Business. Prior to moving there in August 2006, he was director of the Credit Research Center at both Georgetown University and Purdue University from 1990-2006. Over the past 16 years he has conducted research projects on a wide range of consumer credit issues, and has frequently testified on credit and insurance matters before congressional and state legislative committees. He has published numerous articles on retail financial services in various professional journals and edited volumes.

Peter J. Wallison is a Resident Fellow of the American Enterprise Institute, where he serves as co-director of its program on Financial Market Deregulation and is a member of the Shadow Financial Regulatory Committee. From 1981 to 1985, he was General Counsel of the Treasury Department, where he was involved in developing the Reagan Administration's proposals for financial services deregulation and served as General Counsel to the Depository Institutions Deregulation Committee. During 1986 and 1987, Mr. Wallison was White House counsel to

President Reagan. Mr. Wallison is the author of numerous books and articles on financial services regulation.

Todd Zywicki is Professor of Law at George Mason University, where he teaches in areas such as Bankruptcy, Contracts, Commercial Law, and Law and Economics. From 2003-2004, he served as the Director of the Office of Policy Planning at the Federal Trade Commission. He is a Senior Fellow at the university's James Buchanan Center, and a Fellow of the International Centre for Economic Research in Turin, Italy. He is the author of more than 50 articles in leading law reviews and peer-reviewed economics journals. He has testified before Congress on consumer credit issues and was recently named to the Department of Justice Study Group on "Identifying Fraud, Abuse and Errors in the United States Bankruptcy System."

The positions taken in this brief by these individuals are their own and not those of the organizations with which they are affiliated.

SUMMARY OF ARGUMENT

The wisdom of state consumer credit regulations is not a factor in resolving federal banking preemption disputes. Nonetheless, the State of Michigan and its supporting *amici* have injected that issue into this case. But as both case law and economic research demonstrate, such measures can often backfire, hurting the very consumers that they are intended to protect by making credit more expensive and less available.

The Office of the Comptroller of the Currency (OCC) has the dual function of overseeing both national banks and the treatment that customers receive from those banks. Given the inherent relationship between these two functions, the OCC's oversight is far more likely to produce a regulatory optimum than the approach advocated by the petitioner.

ARGUMENT

I.

THIS COURT SHOULD REJECT PETITIONER'S ATTEMPT TO CLAIM THE MANTLE OF CONSUMER PROTECTION

The question on which certiorari was granted in this case is the narrow issue of whether the OCC properly determined the preemptive effect of one of its regulations on Michigan's mortgage lending laws. But Michigan and its supporting *amici* have cast this as a much broader issue of consumer protection. Whatever the merits of their approach, their substantive claims deserve a response.

Michigan states that a major purpose of its mortgage lending statutes and regulations is "to protect consumers from unfair, unsound, and abusive lending practices." Pet. Brief at 5. *See also id.* at 11 ("States have a substantial interest in protecting their citizens from abusive mortgage lending practices …"). Similarly, the Center for State Enforcement of Antitrust and Consumer Protection Laws argues in its amicus that "preemption of state banking laws by the Office of the Comptroller of the Currency will result in inadequate protection of consumers against predatory lending practices and other abuses …." Center Amicus Brief at 1.

Consumer protection receives even more attention in the joint amicus brief filed by AARP, eleven other consumer groups, and seventeen law professors. According to AARP, consumer protection is *the* issue before this Court: "At issue in this case is whether the states will be able to protect their citizens from abuses by national bank operating subsidiaries established under the states' own charters." AARP Brief at 3. AARP contends that states and localities "are much more likely than the federal government to appreciate the impact of abusive lending practices" (*id.* at 8) and that "empirical studies have demonstrated" that state mortgage lending laws "are effective in reducing predatory lending without reducing consumers' access to legitimate credit." *Id.* at 10 (footnote omitted). According to AARP, "the OCC sides with banks rather than consumers." *Id.* at 13. Preempting state consumer protection laws, AARP claims, "is unfair and unwise." *Id.* at 10.

In one sense, AARP's appeals to wisdom and fairness run counter to this Court's characterization of these factors as irrelevant to resolving state-Federal conflicts: "We cannot resolve conflicts of authority by our judgment as to the wisdom or need of either conflicting policy." *Franklin National Bank v. New York*, 347 U.S. 373, 378 (1954); *accord Ass'n of Banks in Ins. v. Duryea*, 270 F.3d 397, 408 (6th Cir. 2001) ("The fact that the state legislature enacted [the state law to protect] consumers does not, for that reason alone, preclude federal preemption"). Nonetheless, this Court should not be left with the impression that consumer protection concerns, relevant or not, are predominantly on the side of the petitioner.

The importance of credit in enabling people to better their lives cannot be overestimated. In the words of economist Muhammad Yunus, the 2006 winner of Nobel Peace Prize, "credit is the key that unlocks their humanity."[2]

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[2] Professor Yunus was honored for his pioneering efforts to establish microcredit systems for the poor in developing countries. Molly Moore, *Micro-Credit Pioneer Wins Peace Prize*, Washington Post, Oct. 14, 2006, at A1. His full quote on this point is as follows: "Poverty covers people

Yet, as both this and lower courts have recognized, in the context of mortgages and, more generally, of credit, measures aimed at protecting the public may very often do exactly the opposite. They restrict credit and raise its cost, harming the very consumers supposedly protected by them. Moreover, despite AARP's claim of support from empirical studies, there is a growing body of economic literature that demonstrates the anti-consumer nature of such consumer protection measures. This is yet another reason for concluding that the OCC's preemption of state regulation in this case properly furthers the National Bank Act's purposes of enabling national banks to provide the public with adequate access to credit. *See, e.g.,* 12 U.S.C. § 24; *Franklin National Bank*, 347 U.S. at 375.

II.

THERE IS GROWING JUDICIAL RECOGNITION OF THE FACT THAT CREDIT REGULATIONS AIMED AT PROTECTING CONSUMERS MAY ACTUALLY HURT THEM

Courts have frequently recognized that protecting a consumer from loan provisions designed to protect the interests of a creditor may actually hurt rather than help consumers over the long run. In *Fidelity Federal Savings & Loan Ass'n v. De la Cuesta*, 458 U.S. 141 (1982), this Court upheld a Federal Home Loan Bank Board (FHLBB)

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in a thick crust and makes the poor appear stupid and without initiative. Yet if you give them credit they will slowly come back to life. Even those who seemingly have no conceptual thought, no ability to think of yesterday or tomorrow, are in fact quite intelligent at the art of survival. Credit is the key that unlocks their humanity." Quoted in Diane Coyle, *The Weightless World: Strategies for Managing the Digital Economy* 79 (1997).

regulation preempting state laws restricting the enforcement of "due-on-sale" clauses, which allow a lender to seek immediate repayment of a mortgage loan upon the sale of the property by the borrower.

In doing so, this Court noted that the FHLBB had reasonably concluded, after economic analysis, that state laws restricting enforcement of due-on-sale clauses "'will reduce the amount of home-financing funds available to potential home buyers, and generally cause a rise in home loan interest rates'" at borrowers' expense. *Id.* at 168 (quoting the FHLBB's *Schott* Advisory Opinion); *accord id.* at 169 (citing risk that "flow of home loan funds … will be reduced" and savings and loans' very solvency will be endangered).[3]

While this Court did not make its own independent judgment about whether permitting the enforcement of due-on-sale clauses was good for consumers, deferring to the FHLBB, it did observe that there was nothing "arbitrary or capricious" about the FHLBB's conclusion, which was supported by both analysis and rulings from a number of courts. *Id.* at 169.

Indeed, many other courts agreed with the FHLBB that imposing restrictions on the enforcement of due-on-sale clauses would harm the very consumers such restrictions purport to help, mortgage borrowers.

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[3] Similarly, analysts have found that this Court's decision in *Marquette National Bank v. First Omaha Serv. Corp.*, 439 U.S. 299 (1978), which held that the National Bank Act preempted state credit card interest rate ceilings except for those imposed by a national bank's home state, had clearly positive results for consumers and resulted in the democratization of credit markets in the United States. *See infra* at 15; Todd Zywicki, *The Economics of Credit Cards*, 3 Chapman L. Rev. 79, 147 (2000).

Williams v. First Federal Savings & Loan Ass'n of Arlington, 651 F.2d 910, 930 n. 47 (4th Cir. 1981), rejected challenges to the enforceability of a mortgage's due-on-sale clause without proof of impairment of security under Virginia's antitrust and common law. The court noted that such challenges might immediately benefit "a relative few" homeowners, but that they would cause far more harm in the future. In its words, they would "inexorably lead to an increase in interest rates" and "all future purchasers of homes in the end would suffer." The court pointed out that the purported "'beneficence'" of protecting borrowers from the clause is "'shortsighted," since this would "necessarily restrict, if not dry up, mortgage funds available to the next generation of borrowers.'" *Id., quoting Wellenkamp v. Bank of America*, 21 Cal.3d 943, 954, 148 Cal.Rptr. 379, 386 (Cal. 1978) (Clark, J., dissenting).

Similarly, the Massachusetts Supreme Judicial Court observed that enforcing due-on-sale clauses was good for consumers, since it "lowers the interest rate at which the bank is willing to loan money" by reducing its risks when interest rates fluctuate. *Dunware v. Ware Savings Bank*, 423 N.E.2d 998, 1001-02 (Mass. 1981). As a result, "Elimination of the [due-on-sale] clause 'will cause widespread hardship to the general home-buying public.'" *Id.* at 1004*, quoting FHLBB Advisory Opinion No.* 75-647, at 37 (July 30, 1975).

Many other state courts reached similar conclusions. *United Savings Bank Mut. v. Barnette*, 695 P.2d 73, 76 (Or. App. 1981) (noting "the substantial benefits that due-on-sale clauses have on interest rates and loan availability"); *Income Realty & Mortgage Inc. v. Columbia Savings & Loan Ass'n,* 661 P.2d 257, 261-63 (Colo. 1983) (restricting enforcement of due-on-sale clauses will "necessitate an increase in the interest rate of new loans"; "The due-on-sale clause was of benefit to both" lender and borrower, since "the borrowers received a lower interest rate than they would have, if there had been no such clause"); *Martin v. Peoples Mutual Savings & Loan Ass'n*, 319 N.W.2d 220, 226-28 (Iowa 1982) ("economic and social consequences of nullifying the due-on-sale provisions" include "charging new borrowers a higher rate of interest than they would otherwise be required to pay"; *Occidental Savings & Loan Ass'n v. Venco Partnership*, 293 N.W.2d 843, 847, 849 (Neb. 1980) (if such clauses are not enforced, "ultimately, no one will be able secure satisfactory financing"; thus, "a 'due on sale' clause is not repugnant to public policy but, to the contrary . . . the clauses may favor the public interest"); *Lake v. Equitable Sav. & Loan Ass'n*, 674 P.2d 419, 422 (Idaho 1983) ("less money available to potential borrowers" if borrowers shielded from enforcement of such clauses); *Weiman v. McHaffie*, 470 So.2d 682, 684 (Fla. 1985) (restricting enforcement of the clause causes "shortage of mortgage money" for buyers); *Malouff v. Midland Federal Savings & Loan Ass'n*, 509 P.2d 1240, 1244-45 (Colo. 1973) (barring such clauses would "increase monthly payments and make the obtaining of such [mortgage] loans prohibitive to many people" (citation omitted)). Thus, it is no surprise that the courts in the "majority of jurisdictions" liberally enforce due-on-sale clauses while only a minority bars their enforcement under state common law. *Lake,* 674 P.2d at 423.

In short, it is well-recognized that credit regulations aimed at protecting consumers may actually hurt them, and it is entirely reasonable for federal bank regulators to take this risk into account in carrying out their mission of ensuring that federal financial institutions are able to provide an adequate flow of credit to consumers. It is thus not surprising that Congress has given the OCC the dual function of overseeing both national banks and the treatment that those banks give to their customers.[4] AARP characterizes this as a conflict of interest for the OCC, and claims that the agency supposedly "sides with banks rather than with consumers." In fact, as indicated above, the protection of banks and consumers is inextricably intertwined, and the OCC's dual function is far likelier to produce a regulatory optimum than is Michigan's approach.

In this case, Michigan, consumer groups, and realtors ask the Court to reject preemption because it would supposedly harm consumers. Their position is not based on new findings. Rather, it is a replay of arguments unsuccessfully raised over two decades ago in *De la Cuesta*. *See Amicus Curiae Brief of the Consumers' Committee to Protect Mortgage Rights*, 1982 WL 60848 (March 26, 1982); *Amicus Curiae Brief of the National Association of Realtors in Support of Appellees*, 1982 WL 608495 (March 27, 1982); *Amici Curiae Brief of Michigan, et al.*, 1982 WL 608494 (March 29, 1982). Their arguments are as unpersuasive now as they were then.[5]

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[4] In the words of one GAO report, "OCC's mission focuses on the chartering and oversight of national banks to assure their safety and soundness and on fair access to financial services and fair treatment of bank customers." General Accounting Office, *OCC Preemption Rules* (Report GAO-06-387) at pg. 5 (April 2006) (available at www.gao.gov/new.items/d06387.pdf). As the report explains, "In addition to exercising its supervisory responsibilities under the National Bank Act, which include consumer protection, OCC enforces other consumer protection laws. They include the Federal Trade Commission Act or FTC Act, which prohibits unfair and deceptive practices, and the Federal Home Ownership and Equity Protection Act, which addresses predatory practices in residential mortgage lending. With respect to real estate lending, other consumer protection laws that national banks and their operating subsidiaries are subject to include, but are not limited to, the Truth in Lending Act, the Home Mortgage Disclosure Act, the Fair Housing Act, and the Equal Credit Opportunity Act." *Id.* at 6.

[5] AARP argues that, in "comparison to the federal government, states are more familiar, accessible, and accountable to their constituencies and are

III.

ECONOMIC STUDIES INCREASINGLY DEMONSTRATE THE HARMFUL EFFECTS OF CONSUMER CREDIT REGULATION

Economic studies demonstrate that consumers suffer as a result of consumer credit regulations. In the words of one study, in "the longer run, the costs of [consumer credit] regulation are passed on to consumers in one way or another." Richard L. Peterson, *The Costs of Consumer Credit Regulation* at 3 (Credit Research Center Reprint #13, 1979) (www.business.gwu.edu/research/centers/fsrp/pdf/Reprint13.pdf). *See, e.g.,* Mark Meador, *The Effects of Mortgagee Laws on Home Mortgage Rates*, 34 J. Econ. & Bus. 143 (1981) (concluding that borrower protection laws place upward pressure on the interest rates charged by lenders).

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better positioned to act as laboratories of experimentation in areas as fundamental as home lending." AARP brief at 6. But AARP itself is actively promoting its own model law for state mortgage regulation across the country. AARP, *Home Loan Protection Act: A Model State Statute*, www.aarp.org/research/legis-polit/legislation/ aresearch-import-174-D17346.html. Apparently, AARP's espousal of state experimentation is secondary to its own agenda for regulation

As for Consumers Union and the other consumer groups on the AARP brief, one legal commentator has noted such "groups have not joined the preemption debate" out of principle, but rather because they believe that state laws are a tool for goading Congress into action; "These groups do not actually want 50 different state laws that protect consumers in various lending situations to varying degrees. They would prefer a federal standard" that is the same for "all consumers" throughout the nation, but they believe that "state laws provide Congress with the necessary impetus to act." Mark Furletti, *The Debate Over the National Bank Act and the Preemption of State Efforts to Regulate Credit Cards*, 77 Temple L. Rev. 425, 449 (2004) (citing a Consumers Union lobbyist).

As one scholar noted, the due-on-sale clauses upheld against state regulation by this Court in *De la Cuesta* "contribute economic benefit to borrower and lender alike" by keeping interest rates down, fostering the "flow of funds" into state mortgage markets, and helping "to ensure the continued availability of the fixed-rate mortgage, a popular instrument from the borrower's perspective"; accordingly, federal preemption of state "restrictions on the enforcement of due-on-sale clauses benefits both lenders and borrowers." Eric J. Murdock, *The Due-on-Sale Controversy: Beneficial Effects of the Garn-St. Germain Depository Institution Act of 1982*, 1984 Duke L. J. 121, 137, 140 (1984); *see also* Richard T. Pratt & Tim S. Campbell, *An Economic Analysis of the "Due on Sale" Clause in California Mortgage Markets* 5 (Credit Research Center (CRC) Working Paper #14, Jan. 1979) (www.business.gwu.edu/research/centers/fsrp/pdf/Mono14.pdf) ("economic analysis of the 'due on sale' clause . . . demonstrates why unrestricted use of the clause is in the interest of both borrowers and lenders").[6]

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[6] See also Grant S. Nelson & Dale A. Whitman, *Congressional Preemption of Mortgage Due-on-Sale Law: An Analysis of the Garn-St. Germain Act*, 35 Hastings L.J. 241, 310 (1983) (arguments for restricting due-on-sale clauses are "not logical"); Thomas Kinzler, *Due on Sale Clauses: The Economic and Legal Issues*, 43 U. Pitt. L. Rev. 441, 460 (1982) ("mortgagors as a whole will benefit through enforcement of [the due on sale clause] because lenders will continue to offer a fixed rate mortgage" and "will be able to charge lower interest rates," and because enforcing them "insures a supply of mortgage funds for tomorrow's mortgages"); Alan J. Blocher, *Due-on-Sale in the Secondary Mortgage Market*, 31 Cath. U. L. Rev. 49, 95, 99 (1981) (barring enforcement of due-on-sale clause will drive up interest rates for future borrowers; "the costs will be borne most heavily by those on relatively fixed incomes, such as the elderly or low-income groups"; and the patchwork of state laws in this area restricting such clauses reduces "the supply of conventional mortgage funding"); Bartke & Tagaropulos, *Michigan's Looking Glass World of Due-on-Sale Clauses*, 24 Wayne L. Rev. 971, 1002 (1978) ("A question legitimately may be asked whether a consumer, who is protected to the point that he or she can no longer get home

This is especially true for the interest-rate ceilings contained in state usury laws. As a senior economist at the Federal Reserve noted, "The unanimous or near unanimous view of the profession" of economists is that "ceilings or controls of interest rates have been a bad idea for a long time and will continue to be a bad idea in the future."[7] "Nobel Laureate Milton Friedman spoke well for the entire profession in 1970 when he reported, 'I know of no economist of any standing . . . who has favored a legal limit on the rate of interest that borrowers could pay or lenders receive.'"[8]

Although interest rate ceilings are intended to help borrowers, they actually harm them, since "controls create credit shortages, they impede competition, they waste resources, and probably most tellingly, they do not work anyway."[9] They dry up the flow of credit to the low-income and high-risk borrowers they seek to help, forcing borrowers to turn to loan-sharks and disguised loans, such as installment purchases at inflated prices. *See, e.g.,* Christopher DeMuth*, The Case Against Credit Card Interest*

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financing because the sources of funds have dried out, is that much better off than before").

[7] Thomas Durkin, *An Economic Perspective on Interest Rate Regulation*, 9 Ga. St. U. L. Rev. 821, 837 (1993) (www.business.gwu.edu/research/centers/fsrp/pdf/Reprint22.pdf).

[8] *Id.* at 821 (quoting Milton Friedman, *Defense of Usury*, Newsweek, Apr. 6, 1970, at 79).

[9] *Id.* at 837. *See also Crafton, An Empirical Test of the Effect of Usury Laws*, 23 J.L. & ECON. 135, 140 (1980) (Usury laws lead to a decrease in mortgage loan origination); Nathan*, Economic Analysis of Usury Laws*, 10 J. BANK RES. 200, 204 (1980) ("[R]esearch indicates that usury restrictions have limited the flow of credit to mortgage markets."); Ostas, *Effects of Usury Ceilings in the Mortgage Market*, 21 J. FIN. 821, 831 (1976) (usury laws reduced mortgage loan volume).

Rate Regulation, 3 Yale Journal of Regulation 201, 221 (1986) ("By effectively segmenting the supply of credit and reducing the competition faced by the firms who are superior repricers, usury controls raise net costs of credit. This was the conclusion of one recent study which found that usury controls significantly reduced price competition between finance companies and banks," *citing A. Sullivan, Effects of Consumer Loan Rate Ceilings on Competition Between Banks and Finance Companies* 20-22 (1981) (CRC Working Paper No. 38); *see also* Michael E. Staten & Robert W. Johnson, *The Case for Deregulating Interest Rates in Consumer Credit* 7, 38, 48, 50 (CRC Monograph #31, 1995) (www.business.gwu.edu/research/centers/fsrp/pdf/Mono31.pdf).

As one economic study observed,

- "rate ceilings that are thought to 'protect' consumers do not protect consumers and do clear harm to those at the bottom of the economic ladder," since they "'reduce the number of loans made" and "are most harmful to citizens they were apparently designed to protect -- relatively poor credit risks.'"[10]

- "rate ceilings on loans" indirectly "heap distress on consumers" by cutting off credit and driving them to alternatives like pawnshops and loan sharks;[11] and

- "Restrictive rate ceilings on cash credit force lenders to deny credit to consumers who pose a high risk or desire only small amounts of credit. Those excluded consumers are typically young, have short-time on the

[10] Staten & Johnson, *The Case for Deregulating Interest Rates in Consumer Credit* 7, 50 (quoting former Labor Secretary Robert B. Reich)

[11] *Id.* at 38.

> job, are renters, and are unskilled workers with relatively low incomes. Not only do ceilings ration customers out of the legal market, but they also drive smaller lenders from the market and thereby diminish competition."[12]

Thus, it was consumers who ultimately benefited from this Court's decision in *Marquette National Bank v. First Omaha Serv. Corp.*, 439 U.S. 299 (1978), which held that the National Bank Act preempted state credit card interest rate ceilings except for those imposed by the national bank's home state. *See, e.g.,* Todd Zywicki, *The Economics of Credit Cards*, 3 Chapman L. Rev. 79, 147 (2000) ("by eliminating archaic and largely ineffective usury restrictions, *Marquette* increased efficiency and competition in the credit card industry, made the market more responsive to consumer demand, and provided large benefits to consumers").

Similarly, state laws that limit creditor remedies against debtors, such as garnishment, increase interest rates, drive up the cost of credit, and reduce its availability to needy consumers. *See, e.g.,* Richard L. Peterson & James R. Frew, *Creditor Remedy Restrictions and Interstate Differences in Personal Loan Rates and Availability: A Supplementary Analysis* 1, 8 (CRC Working Paper #14, 1977) (www.business.gwu.edu/research/centers/fsrp/pdf/WP14.pdf) ("many restrictions on creditors' remedies are likely to reduce personal loan availability (per capita) and, to a lesser extent, increase personal loan finance rates"; for example, "restrictions on garnishment significantly affected the price and availability of consumer credit," leading to "significantly elevated finance company personal loan rates," while "prohibitions against confession of judgment clauses" were linked to "significant increases in loan rates" and "significant reductions in bank personal loan credit availability");

[12] *Id.* at 48.

Richard L. Peterson, *The Impact of Creditors' Remedies on Consumer Loan Charges* 4, 7 (CRC Working Paper #15, 1977) (www.business.gwu.edu/ research/centers/fsrp/pdf/ WP15.pdf) ("bank auto loan rates [were] significantly higher in states with the most restrictive creditor remedies," and "in every case a lack of restriction on (or prohibition against) a particular creditors' remedy was associated with lower loan rates"; for example, "State restrictions on attorney fee clauses are associated with 90 basis point increased in bank consumer loan rates," and restrictions on garnishment increase "consumer finance charges"; moreover, "restrictions on creditors' remedies also induce lenders to reduce their supplies of consumer credit -- both in the aggregate . . . and to the most risky borrower groups").[13]

The same is true of state laws aimed at so-called predatory lending. By placing added restrictions on high-interest loans, and increasing the liability risks of lenders who make them, they have many of the same unfortunate side-effects as usury laws. *See* Donald Lampe, *Wrong from*

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[13] *See also* Norman Geis, *Escape from the 15th Century: The Uniform Land Security Act*, 30 Real Prop. Prob. & Tr. J. 289, 300 (1995) ("Economists have predicted . . . that the increased cost of lending in the judicial foreclosure states will be reflected in an increased cost of mortgage borrowing"); *accord* Durham, *In Defense of Strict Foreclosure: A Legal and Economic Analysis*, 36 S.C. L. Rev. 461, 495-06, 499 (1985) (increasing obstacles to foreclosure harms rather than helps consumers); Anne Bradner, *The Secondary Mortgage Market and State Regulation of Real Estate Financing*, 36 Emory L. J. 971, 997 (1987) ("costs are largely a function of delays built into the system, and the delays [in foreclosure] harm both mortgagor and mortgagee"), *citing* Bauer, *Judicial Foreclosure and Statutory Redemption: The Soundness of Iowa's Traditional Preference for Protection Over Credit*, 71 Iowa L. Rev. 1, 9-10, 11-12 (1985); Note, *Foreclosures, Redemptions, and Homeowners*, 1975 U. Ill. L.F. 335, 358-61; Pedowitz, *Mortgage Foreclosure Under the Uniform Land Transactions Act (As Amended)*, 6 REAL EST. L.J. 179, 195 (1978*); Madway & Pearlman, Mortgage Forms and Foreclosure Practices: Time for Reform*, 9 Real Prop. Prob. & Tr. J. 560, 565 (1974).

the Start? North Carolina's "Predatory Lending" Law and the Practice vs. Product Debate, 7 Chapman L. Rev. 135, 145 (2004) (studies show that "the North Carolina [predatory lending] law's 'triggers' form usury ceilings on residential mortgage loans made after the effective date of the law").

Thus, economic analysis has found that such laws reduce the availability of credit to lower-income households while adding little to protections against consumer fraud. *See id.* at 144-45; Office of the Comptroller of the Currency, *Preemption Determination & Order*, 68 Fed. Reg. 46264, 46271 n.26 (Aug. 5, 2003) ("a growing body of evidence indicates that state anti-predatory lending laws are likely to restrict the availability of credit to subprime borrowers"); OCC Working Paper, *Economic Issues in Predatory Lending* at 2 (July 30, 2003) (www.occ.treas.gov/workingpaper.pdf) ("there is substantial empirical evidence that anti-predatory statutes can impede the flow of mortgage credit, especially to low-income and higher-risk borrowers, and that any reduction in predatory abuses resulting from these measures is probably achieved at the expense of many legitimate loans").[14]

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[14] *See also* Gregory Elliehausen & Michael Staten, *Regulation of Subprime Mortgage Products: An Analysis of North Carolina's Predatory Lending Law*, 29 J. of Real Estate Finance & Economics 411 (2004) (www.business.gwu.edu/research/centers/fsrp/pdf/RevisedWP66.pdf); Robert E. Litan, *Unintended Consequences: The Risks of Premature State Regulation of Predatory Lending* (American Bankers Association, 2002) at 15 (www.aba.com/NR/rdonlyres/D881716A-1C75-11D5-AB7B-00508B95258D/28871/PredReport200991.pdf) ("State and local laws [on predatory lending] threaten to dry up credit for the very same population about which critics of predatory lending are most concerned"; risk "discouraging the supply of credit to higher risk borrowers"; and "reduce overall lending to subprime borrowers"); OCC Working Paper, *Economic Issues in Predatory Lending* at 20 ("There is a good deal of empirical evidence to suggest that anti-predatory statutes impede the flow of mortgage credit, especially to low-income and higher-risk borrowers, and

For example, Georgia's predatory lending law "caused secondary market participants to cease purchasing certain Georgia mortgages and many mortgage lenders to stop making mortgage loans in Georgia," dramatically reducing the availability of credit. OCC, *Bank Activities and Operations: Real Estate Lending and Appraisals*, 69 Fed. Reg. 1904, 1908 (Jan. 13, 2004); OCC Working Paper, *Economic Issues in Predatory Lending*, at 3, 20 (Fannie Mae and Freddie Mac stopped buying "high cost home loans" after the Georgia Fair Lending Act passed, and the law caused "the nation's seventh largest subprime originator to stop making all subprime loans in Georgia").

Less draconian statutes, such as North Carolina's predatory lending law, have also had negative effects on the availability of credit. "For example, studies of subprime lending activity in North Carolina before and after enactment of that state's anti-predatory lending law have shown a post-enactment decline in subprime mortgage originations of about 15%." OCC, *Preemption Determination & Order*, 68 Fed. Reg. at 46271 n.26, *citing* Keith D. Harvey & Peter J. Nigro, *Do Predatory Lending Laws Influence Mortgage Lending?*, *An Analysis of the North Carolina Predatory Lending Law*, 29 J. Real Est. Fin. & Econ. 435 (2004); Elliehausen & Staten, *Regulation of Subprime Mortgage Products: An Analysis of North Carolina's Predatory Lending Law*, 29 J. Real Est. Fin. & Econ. 411 (2004); *see also* OCC Working Paper, *Economic Issues in Predatory Lending* at 22 (Philadelphia predatory lending ordinance also found to have likely resulted in reduction in legitimate loans).

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any reductions in predatory abuses resulting from these measures if probably achieved at the expense of many legitimate loans").

AARP claims that such laws reduce predatory lending without reducing access to credit. *See* AARP Brief at 10. AARP's claims, however, are subject to serious dispute. A number of analysts have found that North Carolina's predatory lending law has in fact reduced the flow of credit to low-income borrowers. As a result of its passage, "creditors appear to have sharply restricted lending to higher-risk customers in North Carolina -- but not to customers in neighboring states or to lower risk customers in North Carolina -- after passage of the law." *Elliehausen & Staten*, 29 J. Real Est. & Fin. at 412. After the law's passage "significant declines [in mortgage loans] occurred only in North Carolina and only among the lower-income borrowers. Neither the higher-income borrowers in North Carolina nor borrowers in other states experienced significant declines." *Id.* at 429; *see also* OCC Working Paper, *Economic Issues in Predatory Lending* at 25 (declines were significant and "were found only in the higher-risk segment of the market"). Moreover, "the North Carolina statute did impede the flow of mortgage credit to higher-risk borrowers . . . at the expense of many legitimate loans." *Elliehausen & Staten*, 29 J. Real Est. & Fin. at 430; *see also* OCC Working Paper, *Economic Issues in Predatory Lending* at 2, 20 (any putative benefits of the law likely came "at the expense of many legitimate loans"); Keith D. Harvey & Peter J. Nigro, *Do Predatory Lending Laws Influence Mortgage Lending?*, *An Analysis of the North Carolina Predatory Lending Law*, 29 J. Real Est. Fin. & Econ. 435 (2004). In the words of one analyst, studies suggest "that the North Carolina 'predatory lending' law has led to a reduction in the availability of higher cost or 'subprime' mortgage loan credit in the State." Lampe, 7 Chapman L. Rev. at 144.[15]

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[15] Although a 2002 report from the Center for Responsible Lending claimed legitimate lending was unaffected, the "evidence presented [in it] d[id] not support, and often contradict[ed], the report's conclusions," since the report ignored important "borrower risk characteristics" to reach

While AARP faults the OCC for not preventing predatory lending, the agency does in fact enforce prohibitions against predatory lending, without using the counterproductive approach of many state regulators. *See* Robert E. Litan, *Unintended Consequences: The Risks of Premature State Regulation of Predatory Lending* (American Bankers Association, 2002) at 15, 34 (www.aba.com/NR/rdonlyres/D881716A-1C75-11D5-AB7B-00508B95258D/28871/PredReport200991.pdf) ("federal law already bans all or virtually all of the practices associated with predatory lending," and "recent enforcement activity indicates that the authorities are taking the problem very seriously").

The absence of large numbers of enforcement proceedings simply reflects the fact that it is not banks who are the primary sources of predatory lending. *See* OCC Working Paper at 7 ("There is little data suggesting that banks themselves are engaged in predatory lending to any significant degree"); *id.* at 4 (noting "scant evidence" of national bank involvement).

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its conclusions. *Elliehausen & Staten*, 29 J. Real Est. & Fin. at 414-15. Worse, it "excluded the largest category of subprime borrowers [that] represents the heart of the industry" from the study, eliminating most of the relevant data. OCC Working Paper at 19 (citing this and other "weaknesses in the data").

CONCLUSION

The decision below should be affirmed, because the OCC's interpretation of the statute promotes the purposes of the National Bank Act by enabling banks to meet the credit needs of their customers without being subjected to a hodgepodge of burdensome and wasteful state regulations.

Respectfully submitted,

SAM KAZMAN
HANS BADER*
COMPETITIVE ENTERPRISE INSTITUTE
1001 Connecticut Ave., NW, Ste. 1250
Washington, D.C. 20036
(202) 331-2278
**Counsel of Record*

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