No. 08-453

IN THE

Supreme Court of the United States

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

Petitioner,

v.

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

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR PETITIONER

ANDREW M. CUOMO
Attorney General of the State of New York
BARBARA D. UNDERWOOD*
Solicitor General
MICHELLE ARONOWITZ
Deputy Solicitor General
RICHARD DEARING
Assistant Solicitor General
120 Broadway, 25th Floor
New York, NY 10271
(212) 416-8020

* *Counsel of Record*

Attorneys for Petitioner

221312

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTIONS PRESENTED

12 U.S.C. § 484(a), a provision of the National Bank Act, prohibits the exercise of "visitorial powers" over national banks except where those powers are authorized by federal law, vested in the courts of justice, or exercised or directed by Congress or a House or committee thereof. The Office of the Comptroller of the Currency has issued a regulation (12 C.F.R. § 7.4000) interpreting § 484(a) to preempt state enforcement of state laws against national banks, even when the state laws are not substantively preempted. The questions presented are:

1. Whether 12 C.F.R. § 7.4000 is invalid because it is inconsistent with the authoritative construction of the National Bank Act by this Court in *First National Bank in St. Louis v. Missouri*, 263 U.S. 640 (1924).

2. Whether 12 C.F.R. § 7.4000 is entitled to judicial deference under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

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JURISDICTION

The court of appeals entered judgment on December 4, 2007. A timely petition for rehearing en banc was denied on June 5, 2008. Pet. App. 143a-144a. On August 26, 2008, Justice Ginsburg granted petitioner an extension of time until October 3, 2008, to file a petition for certiorari. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

The following constitutional, statutory, and regulatory provisions are reproduced in the petition appendix: U.S. Const., Art. VI, cl. 2; 12 U.S.C. § 484; and 12 C.F.R. § 7.4000. See Pet. App. 145a-150a. New York Executive Law § 63(12) and New York Executive Law § 296-a are reproduced in an addendum to this brief.

STATEMENT

A. The National Bank Act

1. Congress first authorized the chartering of national banks in 1863 when it enacted the National Currency Act, which was amended and reenacted in 1864,

and subsequently renamed the National Bank Act.[1] The Act's primary purpose was to address pressing wartime federal revenue needs by replacing notes issued by individual state-chartered banks with a new national currency that would be tied to the purchase of federal bonds. Cong. Globe, 37th Cong., 3d Sess. 843 (1863). Congress authorized the Treasury Department to charter private banking associations to issue the new currency. Act of Feb. 25, 1863, National Currency Act, ch. 58, §§ 4-6, 18, 21, 12 Stat. 665-67, 669-70.

The 1863 act prescribed detailed requirements for the organization of these national banks, governing such matters as required capital and reserves, *id.* §§ 6, 7, 13, 38, 41, 42, 12 Stat. at 666-69, 676-77; the number, residency, and election of directors, *id.* §§ 39-40, 12 Stat. at 676; shareholder rights and obligations, *id.* §§ 8, 12, 35, 36, 38, 12 Stat. at 667-68, 675-76; and the authorized powers of national banks, including the power to make contracts, sue and be sued, select directors and officers, discount and negotiate promissory notes and other instruments, receive deposits, and loan money on personal security, *id.* § 11, 12 Stat. at 668.

To promote public trust in the new currency, the act created within the Treasury Department the new Office of the Comptroller of the Currency (OCC), and vested the Comptroller with supervisory authority over

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1. National Currency Act, ch. 58, 12 Stat. 665 (1863); Act of June 3, 1864, ch. 106, 13 Stat. 99; Act of June 20, 1874, ch. 343, § 1, 18 Stat. 123 (renaming the 1864 act "the national-bank act"). Both the 1863 and 1864 acts are referred to herein as the National Bank Act ("NBA").

national banks to ensure their proper organization and their financial safety and soundness. *Id.* §§ 1, 9, 29, 50, 51, 12 Stat. at 665-68, 673-74, 679-80.

The statute authorized the Comptroller to certify banks to begin operating under federal charters, after examining

> the amount of money paid in on account of its capital stock; the name and place of residence of each of the directors . . . and the amount of the capital stock of which each is the bona fide owner, and generally whether such association has complied with all the requirements of this act to entitle it to engage in the business of banking.

Id. § 9, 12 Stat. at 667-68; *see also id.* § 10, 12 Stat. at 668. The Comptroller was authorized to appoint a receiver to take possession of a bank and administer its assets if the bank refused to redeem its circulating notes, *id.* § 29, 12 Stat. at 673-74, and to sue for forfeiture of a bank's charter if its directors knowingly violated, or knowingly permitted any of the bank's officers, employees, or agents to violate, any of the NBA's provisions, *id.* § 50, 12 Stat. at 679.

Congress authorized the Comptroller to monitor bank affairs on an ongoing basis by means of appointed examiners. *Id.* § 51, 12 Stat. at 679-80. The Comptroller was directed to appoint persons "to make a thorough examination into all the affairs" of national banks and to "make a full and detailed report of the [banks'] condition . . . to the comptroller." *Id.* The same provision stated that the banks "shall not be subject to any other visitorial powers than such as are authorized by this act, except such as are vested in the several courts of law and chancery." *Id.*

In 1875, Congress divided that text into two separate sections, which became §§ 5240 and 5241 of the Revised Statutes. The provision describing OCC's own visitorial examination powers was placed in § 5240. Rev. Stat. § 5240, at 1013 (2d ed. 1878). The bar on other exercises of visitorial powers was included in § 5241, rephrased slightly to read: "No association shall be subject to any visitorial powers other than such as are authorized by this Title, or are vested in the courts of justice." *Id.* § 5241, at 1013.

2. With the passage of the Federal Reserve Act of 1913, ch. 6, 38 Stat. 251, Congress transferred control over the nation's currency from the Comptroller to the newly created Federal Reserve Board (later renamed the Board of Governors of the Federal Reserve System). The Comptroller has retained his role as primary administrator of the national banks, although the Board of Governors and the FDIC also possess certain supervisory authority over national banks.[2]

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2. *See* 12 U.S.C. § 222 (national banks must join the Federal Reserve System) § 483 (special examinations by Federal Reserve Banks), § 485 (examinations by Board of the Federal Reserve), § 501a (Comptroller's authority to sue for charter forfeiture of national bank, under direction of Board of Governors, when banks fail to comply with Federal Reserve Act); § 1820(b)(3) (special examinations by the FDIC).

Today the Comptroller retains supervisory authority to charter a national bank, 12 U.S.C. §§ 21, 26-27; to examine the bank, *id.* § 481; to appoint a receiver to liquidate the bank's assets, *id.* §§ 55, 192-193; to appoint a conservator, *id.* § 203; and to seek forfeiture of the bank's charter, *id.* §§ 93, 501a. The Comptroller's examination authority over national banks is now set forth in a subchapter of the United States Code entitled "Bank Examinations." *See* 12 U.S.C. §§ 481-486. Section 481 directs the Comptroller to appoint examiners "to make a thorough examination of all the affairs of the bank and . . . make a full and detailed report of the condition of said bank to the Comptroller of the Currency."

The limitation on other exercises of visitorial powers against national banks is now found in 12 U.S.C. § 484, as part of the same subchapter. Section 484 provides:

> (A) No national bank shall be subject to any visitorial powers except as authorized by Federal law, vested in the courts of justice or such as shall be, or have been exercised or directed by Congress or by either House thereof or by any committee of Congress or of either House duly authorized.
>
> (B) Notwithstanding subparagraph (A), lawfully authorized State auditors and examiners may, at reasonable times and upon reasonable notice to a bank, review its records solely to ensure compliance with applicable State unclaimed property or escheat laws upon reasonable cause to believe that the bank has failed to comply with such laws.

B. State Authority as to National Banks

From the first establishment of a national banking system, consisting of private corporations organized under federal law and doing business in the several States, the general rule has been that both federal and state laws apply to national banks. *See generally Atherton v. FDIC*, 519 U.S. 213, 222-23 (1997) (surveying the relevant history). Just five years after the enactment of the NBA, this 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); *accord St. Louis*, 263 U.S. at 656.

States generally cannot limit or condition national banks' corporate powers, *see Barnett Bank of Marion County, N.A. v. Nelson*, 517 U.S. 25, 33 (1996), and cannot legislate "to promote the welfare and stability" of national banks themselves, *Easton v. Iowa*, 180 U.S. 220, 231 (1899). Otherwise, however, federal law preempts the application of state law to national banks only where state law conflicts with federal law or substantially interferes with national banks' exercise of their powers. *See Barnett Bank*, 517 U.S. at 33.

This Court has consistently recognized the right of state officials to sue national banks to enforce generally applicable state laws when those laws are not substantively preempted. *See, e.g.*, *Anderson Nat'l Bank v. Luckett*, 321 U.S. 233 (1944); *First Nat'l Bank in St. Louis v. Missouri*, 263 U.S. 640, 659-60 (1924) ("*St. Louis*"); *Waite v. Dowley*, 94 U.S. 527, 534 (1876);

Pet. App. 50a-51a (Cardamone, J., concurring in part and dissenting in part) (collecting additional cases).[3]

In 1966 for the first time Congress gave the federal financial institution regulatory agencies, including OCC,[4] the power to enforce state law, albeit through administrative and not judicial proceedings. The Financial Institutions Supervisory Act of 1966 ("FISA"), Pub L. No. 89-695, tit. 2, 80 Stat. 1028, 1046-55, authorized these federal regulators to bring administrative proceedings where a depository institution that they regulate engages "in an unsafe or unsound practice" or violates "a law, rule or regulation," or any written condition imposed by the agency. 12 U.S.C. § 1818(b)(1). No suggestion was made at that time that this new authority to enforce state law administratively was intended to displace the authority of state officials to enforce state law against national banks.

In the 1990s, Congress reaffirmed the important role of state authority over national banks in the Riegle-

3. The record contains evidence that over the past several decades, the New York Attorney General has investigated and settled against national banks claims of deceptive marketing, improper billing or debt collection practices, failure to disclose service fees, disclosure of personal data, and illegal collection of attorneys fees. J.A. 152a-157a. Until this case, national banks cooperated with the Attorney General's investigations. J.A. 154a-157a.

4. The federal financial institution regulatory agencies also include the Board of Governors of the Federal Reserve System, the FDIC, and the Office of Thrift Supervision. *See* 12 U.S.C. § 1813(q).

Neal Interstate Banking and Branching Efficiency Act of 1994 ("Riegle-Neal"), Pub. L. No. 103-328, 108 Stat. 2338, and the Riegle-Neal Amendments Act of 1997, Pub. L. No. 105-24, 111 Stat. 238. Riegle-Neal eliminated barriers to interstate branching and simplified the complex rules for determining which state laws apply to branches of national banks. Congress expressly preserved the application of host state laws pertaining to consumer protection, fair lending, community reinvestment, and establishment of intrastate branches. In Riegle-Neal, Congress made clear that those four categories of state law apply to branches of national banks located in a State to the same extent that they do to branches of banks chartered by that State, unless the state law is preempted by federal law or would have a discriminatory effect on the national bank. 12 U.S.C. § 36(f)(1)(A). Riegle-Neal also specifically obligated OCC to enforce national bank branches' compliance with those four categories of state laws. *Id.* § 36(f)(1)(A)-(B).

Congress did not provide, however, that OCC had exclusive authority to enforce state laws against national banks, and the legislative history points in exactly the opposite direction. The Conference Report accompanying enactment of the original Riegle-Neal Act stressed that "States have a strong interest in the activities and operations of depository institutions doing business within their jurisdictions, regardless of the type of charter the institution holds," identifying in particular States' "legitimate interest in protecting the rights of their consumers, businesses, and communities." It further explained that Congress did not intend Riegle-Neal to alter the federal-state balance "and thereby weaken States' authority to protect the interests of their consumers, businesses, or communities." H.R. Conf. Rep. No. 103-651, at 53 (1994), *reprinted in* 1994 U.S.C.C.A.N. 2068, 2074.

The Conference Report criticized OCC's practices in issuing "opinion letters and interpretive rules on preemption issues," finding that OCC had reached "inappropriately aggressive" conclusions regarding federal law preemption of state consumer protection and fair lending laws. *Id.* As a result, Congress required OCC to provide notice and an opportunity for comment before issuing opinion letters or interpretive rules concluding that federal law preempts the application to a national bank of state laws in any of the four listed categories. *See* 12 U.S.C. § 43. The Conference Report also confirmed that Riegle-Neal did not change the judicially established principle that "national banks are subject to State law in many significant respects," or disturb the settled "rule of construction that avoids finding a conflict between the Federal and State law where possible." H.R. Conf. Rep. No. 103-651, at 53, *reprinted in* 1994 U.S.C.C.A.N. at 2074.

C. OCC's Visitorial Powers Rule

In 1971, OCC published an interpretive rule construing 12 U.S.C. § 484, titled "Books and Records of National Banks." *See* 36 Fed. Reg. 17,000, 17,013 (Aug. 26, 1971) (originally codified at 12 C.F.R. § 7.6025). That rule provided that "[t]he exercise of visitorial powers over national banks is vested in the Comptroller of the Currency," and that "[o]ther officials, including State banking officials, have no authority to conduct examinations or to inspect or to require the production of books or records of national banks, except as authorized by law." *Id.* The 1971 rule expressly acknowledged that "[p]roduction of records may . . . be required [of national banks] under normal judicial procedures." *Id.* In 1996, OCC rephrased the rule and recodified it as 12 C.F.R. 7.4000, *see* 61 Fed. Reg. 4849, 4869 (Feb. 9, 1996), noting that the rule addressed "the exclusive examination authority of the OCC," *id.* at 4857.

In 1999, the Comptroller broadened the regulation dramatically. That year, OCC issued a new regulation, titled "Visitorial Powers," which expanded the definition of visitorial powers to include, among other things, "[e]nforcing compliance with any applicable . . . state laws concerning" activities authorized or permitted by federal banking law. 12 C.F.R. § 7.4000(a)(2)(iv) (1999). OCC interpreted this regulation to limit, for the first time, a State's ability to enforce its own valid and nonpreempted laws as they apply to the activities of national banks. *See* Pet. App. 109a. OCC took the position that the 1999 regulation barred state administrative actions against national banks, but permitted state officials to bring lawsuits to enforce nonpreempted state laws under the exception in § 484(a) for visitorial powers "vested in the courts of justice." *See* Pet. App. 109a.

In 2004, however, OCC issued an amended regulation to clarify the "extent of national bank activities subject to the OCC's exclusive visitorial authority," and also to limit the "authorized by Federal law" and "vested in the courts of justice" exceptions. *See* Rules, Policies, & Procedures for Corporate

Activities; Bank Activities & Operations; Real Estate Lending and Appraisals, 68 Fed. Reg. 6363, 6367 (Feb. 7, 2003) (notice of proposed rulemaking); *see also* Bank Activities & Operations, 69 Fed. Reg. 1895 (Jan. 13, 2004) (final rule, codified at 12 C.F.R. § 7.4000). The 2004 rule gives examples of what OCC considers the limited circumstances in which exercises of visitorial powers by other governmental officials or agencies are authorized by federal law. *Id.* § 7.4000(b)(1). It also opines that § 484's "courts of justice" exemption "does not grant state or other governmental authorities any right to inspect, superintend, direct, regulate or compel compliance by a national bank with respect to any law, regarding the content or conduct of activities authorized for national banks under Federal law." *Id.* § 7.4000(b)(2). OCC interprets the visitorial powers rule to prohibit, among other things, a state attorney general from suing a national bank to obtain injunctive and monetary relief for violations of the State's nonpreempted consumer protection and antidiscrimination laws.

The 2004 rule, and the manner in which OCC adopted it, "generated considerable controversy and debate." U.S. GAO, OCC Preemption Rulemaking: Opportunities Existed to Enhance the Consultative Efforts and Better Document the Rulemaking Process 5 (2005), *available at* http://www.gao.gov/new.items/d068.pdf. Forty-five state attorneys general objected to OCC's "efforts to divest the States of their historic role in protecting their residents from consumer fraud by all merchants, regardless of type." Comments and Recommendation of the Att'ys Gen. of Forty Five States, Puerto Rico, the U.S. Virgin Islands, & the Corp. Counsel of D.C. 2 (April 8, 2003).

D. Respondents' Suits to Enjoin the New York Attorney General From Enforcing New York's Antidiscrimination Laws Against National Banks

New York Executive Law § 296-a, like other state and federal laws, prohibits any person from discriminating on the basis of race, ethnicity, sex, or other specified characteristics in extending credit. New York Executive Law § 63(12) authorizes the New York Attorney General to apply to New York State Supreme Court for injunctive and monetary relief to redress repeated or persistent fraud or illegality. Section 63(12) also authorizes the Attorney General to issue subpoenas and take proof "[i]n connection with any such application" to the state court.

In April 2005, the Attorney General analyzed publicly available 2004 data disclosed by lenders pursuant to the Home Mortgage Disclosure Act ("HMDA"), 12 U.S.C. §§ 2801-2810, regarding high-interest residential mortgage loans in New York State. The Attorney General found significant racial and ethnic disparities in the interest rates charged by a number of state and national banks. The data showed that the banks issued a far greater percentage of high-interest loans to African-American and Hispanic borrowers than to white borrowers. J.A. 159a-160a, 167a.

On the basis of these disparities, the Attorney General sent "letters of inquiry" to the lenders, including several national banks and their operating subsidiaries, requesting that the lenders voluntarily produce more information. Shortly after this, OCC and the Clearing House Association (a consortium of national banks) filed separate actions in the United States District Court for the Southern District of New York, invoking that court's jurisdiction under 28 U.S.C. §§ 1331 (general federal question jurisdiction) and 1345 (suits where federal agency is plaintiff). Relying on 12 C.F.R. § 7.4000, the federal suits sought to enjoin the Attorney General's enforcement efforts with respect to the national banks. OCC and the Clearing House took the position that "any efforts" by the Attorney General to investigate or enforce provisions of state or federal fair-lending law against national banks or their operating subsidiaries were an unlawful exercise of visitorial powers. Pet. App. 4a-5a. The Attorney General counterclaimed, seeking to have the regulation set aside under the Administrative Procedure Act as arbitrary, capricious, and contrary to law.

E. The District Court's Ruling

The suits for injunctive relief were consolidated. After a bench trial, the United States District Court for the Southern District of New York (Stein, J.) held that the Attorney General's enforcement activities were prohibited by 12 C.F.R. § 7.4000. Pet. App. 63a-117a, 118a-142a. The district court held that the term "visitorial powers" in § 484 is ambiguous, and concluded that OCC's regulation defining the term broadly to bar nearly all state enforcement of nonpreempted state laws against national banks was entitled to deference under *Chevron*. *Id*. at 81a-84a, 96a-106a.

The district court permanently enjoined the Attorney General from

> issuing subpoenas or demanding inspection of the books and records of any national banks in connection with his investigation into residential lending practices; from instituting any enforcement actions to compel compliance with the Attorney General's already existing informational demands; and from instituting actions in the courts of justice against national banks to enforce state fair lending laws.

Id. at 116a-117a.

F. The Court of Appeals' Decision

A divided panel of the Second Circuit affirmed the grant of injunctive relief. *Id.* at 42a. The majority concluded that OCC's interpretation of § 484(a), as embodied in 12 C.F.R. § 7.4000, was a valid exercise of OCC's statutory powers and was entitled to *Chevron* deference.

The court of appeals first rejected application of the presumption against preemption, concluding that no clear statement of congressional intent was required to justify OCC's interpretation because of the long history of federal regulation of national banks. *Id.* at 11a-12a.

Proceeding to step one of the *Chevron* analysis, the court concluded that "the precise scope of 'visitorial' powers is not entirely clear from the text of § 484(a), or the common law background of the term," and that the court could not conclude that "the statute clearly precludes the interpretation OCC has adopted." *Id.* at 21a. The court found no such preclusion in the statutory exception for visitorial powers "vested in the courts of justice" because it found that exception likewise ambiguous. *Id.* at 22a-23a.

The court of appeals dismissed in a footnote this Court's decision in *St. Louis*, which upheld the Missouri Attorney General's enforcement of a state anti-branching statute against a national bank, despite arguments by the bank, and by the United States as amicus curiae, that the visitorial-powers statute precluded such enforcement. *Id.* at 21a n.8. The court observed that *St. Louis* did not expressly discuss the visitorial-powers statute and noted that at the time of the decision national banks were not authorized by federal law to establish branches. *Id.*

After concluding that the regulation was authorized under Congress's delegation of rulemaking authority to OCC, the court further held that OCC's interpretation of the statute was not unreasonable under step two of the *Chevron* analysis. It did so despite noting that "OCC's analysis [was] at or near the outer limits of what *Chevron* contemplates," since the agency had "accrete[d] a great deal of regulatory authority to itself at the expense of the state through rulemaking lacking any real intellectual rigor or depth." *Id.* at 25a-26a. The court further observed that OCC did "not appear to find any facts at all in promulgating its visitorial powers regulation." *Id.* at 25a. The court of appeals nonetheless concluded that "[i]n drawing the lines that it did in § 7.4000(a), OCC reached a permissible accommodation of conflicting policies that were committed to it by the statute." *Id.* at 28a.

Judge Cardamone dissented from the affirmance of the injunction. Pet. App. 42a-62a (Cardamone J., concurring in part and dissenting in part). In his view, *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159, 172 (2001), and *Gregory v. Ashcroft*, 501 U.S. 452, 460-61 (1991), required a clear statement of congressional intent to sustain OCC's regulation because the regulation "ha[d] altered the compact between the state and national governments." Pet. App. 42a; *see also id.* at 54a-55a. He noted that "[b]y leaving state substantive law in place, while at the same time denying the state any role in enforcing that law, § 7.4000 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." *Id.* at 54a. He considered the "likely result" of this "a plain transgression on our republican form of government and a violation of the Tenth Amendment." *Id.* Judge Cardamone noted not only the absence of a clear statement of congressional intent to reach this far, but also the "clear" fact that "virtually from the inception of the National Bank Act the term [visitorial powers] was not understood to preclude state enforcement of nonpreempted state laws." *Id.* at 50a. He noted that Congress has emphasized both the general importance of the dual banking system, and more specifically, States' strong interest in protecting the rights of their consumers, businesses, and communities. *Id.* at 52a (quoting H.R. Conf. Rep. No. 103-651, at 53 (1994), *reprinted in* 1994 U.S.C.C.A.N. 2068, 2074).[5]

SUMMARY OF ARGUMENT

OCC has invoked 12 C.F.R. § 7.4000 (the "Regulation") to bar the Attorney General from enforcing New York's fair-lending law against national banks, even though it is undisputed that New York's law is not preempted in its application to those banks. This regime of "enforcement preemption" is inconsistent with the text of § 484, which OCC's regulation purports to construe.

Section 484 prohibits States from exercising "visitorial powers" over national banks. The term "visitorial powers" in the NBA cannot reasonably be construed to encompass state enforcement of state consumer protection and antidiscrimination laws that are validly applied to national banks. The term derives from the common law, and it refers to supervisory authority that a chartering government exercises over corporations that it charters. Visitation has never been synonymous with enforcement of generally applicable laws. This fact is confirmed by eighteenth and nineteenth century treatises, and by numerous decisions of this Court that permit States to enforce their valid laws against national banks. Perhaps most significant

5. The court of appeals unanimously vacated that portion of the district court's order enjoining the Attorney General from investigating or suing the banks under the federal Fair Housing Act because it considered the claim unripe. *See* Pet. App. 32a-41a; *id* at 43a (Cardamone, J., concurring in part and dissenting in part).

is *St. Louis*, in which this Court rejected arguments by the United States and a national bank that a state attorney general's suit to enforce the national bank's compliance with state antibranching laws was barred by the visitorial-powers statute. *See* 263 U.S. at 659-60.

More recent federal legislation confirms the implausibility of OCC's position that the statute deprives the States of the authority to enforce their consumer protection and fair lending laws against the banks. In 1966, Congress gave OCC the power to enforce state law administratively, but did not indicate any intent to preclude state enforcement and did not provide OCC with the full scope of remedies available to the States. *See* FISA, Pub. L. 89-695, tit. 2, 80 Stat. at 1046-55. In 1994, Congress directed OCC to administratively enforce, inter alia, state consumer protection and fair-lending laws against interstate branches of national banks, but did not withdraw the authority of the States to enforce those laws, and made clear its intent that the laws be vigorously enforced. *See* 12 U.S.C. § 36(f)(1)(A)-(B); H.R. Conf. Rep. No. 103-651, at 53, *reprinted in* 1994 U.S.C.C.A.N. at 2074.

OCC has not identified any legitimate purpose served by its interpretation, and it is difficult to imagine any special burden imposed on the banks by ordinary state law enforcement, particularly given that States' consumer protection and antidiscrimination laws remain enforceable against national banks by private plaintiffs, including in large class actions.

The court of appeals upheld OCC's odd regime of enforcement preemption by deferring to the Regulation under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). But *Chevron* deference has no application here for several reasons. First, the Regulation is inconsistent with the plain meaning of the statute it purports to interpret. Second, OCC's interpretation would work a major alteration in the federal-state balance of authority, and therefore triggers the clear-statement rule of *Gregory v. Ashcroft*; because Congress itself could not accomplish such a result without a clear statement, an agency cannot do the same thing without clear authorization from Congress. Third, *Chevron* deference does not extend to a regulation that declares the preemptive scope of a federal statute, because the agency has no distinctive institutional competence to determine the preemptive scope of a federal statute, and it is implausible that Congress would intend to delegate such a determination to an agency, rather than relying on the courts to interpret a statutory preemption clause.

ARGUMENT

I. OCC's Expansive Interpretation of the Term "Visitorial Powers" Is Inconsistent with the Established Meaning of the Term as Used in 12 U.S.C. § 484(a)

Section 484(a) prohibits state officials (and others) from exercising visitorial powers over national banks, with limited exceptions. The term "visitorial powers" thus defines the scope of preemption effected by § 484(a). That term is not synonymous with general law enforcement, as the Regulation declares. Instead, consistent with the term's longstanding historical meaning as confirmed by decisions of this Court, the term "visitorial powers" refers to supervisory authority over corporations, including the authority to grant charters, appoint receivers, sue to forfeit charters, and conduct routine on-site examinations to monitor the safety and soundness of national banks and compliance with their federal charters.

This supervisory authority is entirely distinct from the authority to bring lawsuits to enforce generally applicable law. The term "visitorial powers" has long been used to describe a class of special powers exercisable over a corporation by the chartering sovereign; earlier it was used to describe a class of special powers exercisable over a charity by a private "visitor" who was usually the donative founder of the organization. *See, e.g.*, Joseph K. Angell & Samuel Ames, *Treatise on the Law of Private Corporations Aggregate* 659-60 (1866).

Contrary to the ruling below, § 484(a) cannot reasonably be interpreted to prohibit state officials from undertaking ordinary enforcement of nonpreempted state laws against national banks. This point is demonstrated by the text, structure, and purpose of § 484(a), and by treatises, decisions of this Court, and other sources showing the longstanding meaning of "visitorial powers." Therefore, the statute clearly precludes OCC's interpretation, as embodied in the Regulation. *See Gen. Dynamics Land Sys., Inc. v. Cline*, 540 U.S. 581, 596-600 (2004) (no deference afforded to agency construction that is "clearly wrong"); *FDA v.*

Brown & Williamson Tobacco Corp., 529 U.S. 120, 132-33 (2000) (no deference where "Congress has directly spoken to the issue" and precluded the agency's jurisdiction); *City of Chicago v. Environmental Defense Fund*, 511 U.S. 328, 339 (1994) (no deference to agency interpretation that "goes beyond the scope of [any statutory] ambiguity").

A. Congress Used The Term "Visitorial Powers" in Section 484(a) to Refer to Supervisory Oversight and Examination of Banks, and Not Enforcement of Generally Applicable Law

1. Section 484(a) was enacted to resolve whether the power to supervise the new national banks through banking examinations would be shared between the national government and the States, or whether it would rest exclusively with the national government. Before enactment of the NBA, the chartering of private banks, and corporations more generally, had been exclusively a state function. *See* H. Rep. No. 103-448, at 19 (1994), *reprinted in* 1994 U.S.C.C.A.N. 2039, 2043. Congress modeled the national banking system on the regulatory regime New York had developed to oversee its own banks, John Jay Knox, *A History of Banking in the United States* 404, 405, 422 (1903), but gave a federal official – the Comptroller – enumerated supervisory powers over the banks. The Comptroller was authorized to charter and examine the national banks, appoint receivers to take possession of failing banks, and sue to have forfeit the charters of banks that willfully violated the NBA. Congress invoked a then-familiar common law term of corporate governance – visitation – to clarify that the States, traditionally the supervisors of private

corporations doing business within their jurisdictions, had no authority to examine the condition of a national bank, respond to any perceived financial risk, or hold the bank to its charter or the laws of its creation.

In the legislative debates, one senator proposed that the States should have "the right of visitation" over national banks, such that national banks would "be examined by the States." Cong. Globe, 37th Cong., 3d Sess. 824 (1863) (Sen. Clark). The senator argued that "it [would] give confidence to the institutions within the States if the State had the right of visitation, and could know how [the banks] stood." *Id.* Otherwise, the senator suggested, there "would be a want of information in the State[s]." *Id.* The Act's sponsor responded that a right of visitation in the States was unnecessary because "[t]he bill itself [was] very full and very stringent on the subject of examination," and argued that it would be "unwise to allow state authorities to interfere with [a national bank's] organization." *Id.* (Sen. Sherman). The sponsor's view ultimately prevailed, and Section 51 of the 1863 act made clear that national banks "shall not be subject to any other visitorial powers than such as are authorized by this act, except such as are vested in the several courts of law and chancery." Act of Feb. 25, 1863, National Currency Act, ch. 58, § 51, 12 Stat. at 679-80.

Thus, in prohibiting States from exercising visitorial powers, Congress was largely concerned to prevent States from conducting banking examinations, which are the foundation of banking supervision. A banking examination is a periodic on-site review of a bank, aimed at early detection of unsafe and unsound practices, that typically focuses on matters like the quality of bank assets, adequacy of capital structure, concentration of credit, loans to insiders, quality of management, and internal bank controls. *See* U.S. GAO, *Consumer Protection: Federal and State Agencies Face Challenges in Combating Predatory Lending* 42 (2004); 5 Senate Gov't Affairs Comm., 95th Cong., *Study on Federal Regulation* xiv-xv, xviii (Comm. Print 1977). The power to engage in this routine monitoring is largely what distinguishes a supervisory agency, like OCC or a state banking commission, from a law enforcement agency, like the Attorney General. *See* GAO, *Consumer Protection*, *supra* at 53 (contrasting "supervisory agency" with "routine monitoring and examination responsibilities" with a "law enforcement [agency] focused on conducting investigations in response to consumer complaints and other information"); Nat'l Comm'n on Consumer Fin., *Consumer Credit in the United States* 53 (1972) ("[U]nlike the financial regulatory agencies, attorneys general have no general supervisory or examination powers.").

The original location of the visitorial-powers clause amid provisions addressing the Comptroller's own examination authority confirms that Congress's principal aim was to prohibit States from conducting examinations of national banks. In the 1863 Act, the visitorial-powers prohibition was preceded by a provision directing the Comptroller to appoint persons "to make a thorough examination into all the affairs of [every banking] association" and to "make a full and detailed report of the condition of the association to the comptroller," and was followed by a sentence concerning the compensation due to examiners. Act of June 3, 1864, ch. 106, § 54, 13 Stat. 99, 116.[6]

2. A review of early corporations treatises confirms that enforcement of general laws that apply equally to all actors within a State, like the ban on discrimination found in New York Executive Law § 296-a,[7] has never been considered an exercise of visitorial powers. A classic treatise from the late eighteenth century, for example, explains, in regards to visitation, that "[i]n order to maintain the peace and good government of corporations, and to secure their adherence to the purposes of their institution, the law has appointed a tribunal to inspect the conduct of their internal affairs."[8]

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6. Further confirmation is provided by an early District of Columbia statute, also enacted by Congress, stating that the Comptroller "shall have and exercise the same visitorial powers over the affairs of [trust companies] as [are] conferred upon him by [Section 5240] of the Revised Statutes . . . of the United States in the case of national banks." Act of March 3, 1901, ch. 854, § 720, 31 Stat. 1303, 1304. At the time, the cross-referenced section set forth the Comptroller's examination authority.

7. Executive Law § 296-a is a generally applicable provision prohibiting discrimination in any extension of credit within New York State. It applies not only to banks, but also to brokers, finance companies, payday lenders, retailers, tax preparers (refund anticipation loans), and all others who extend credit. Moreover, the preceding section of New York's Executive Law, § 296, prohibits discrimination in employment, public accommodations, public housing, education, and other activities.

8. Except in emergency situations, courts still today decline jurisdiction in suits requiring "true visitation" over (Cont'd)

Stewart Kyd, *A Treatise on the Law of Corporations* 174 (1794). In discussing visitation of a college, Kyd observes: "The power of the visitor is confined to offences against the *private* laws of the college; he has no cognizance of acts of disobedience to the general laws of the land." *Id.* at 276.

Later treatises continue to distinguish enforcement of general laws from visitation, which is concerned with the rules and laws specific to the institution. A treatise from 1850, for example, explains as to visitors of universities:

> [The visitor's] province and duty [is] to see that the institution conforms to the rules and regulations that the founder has laid down, called in this case statutes, and to maintain order generally, but not to take cognizance of offences which are such by act of parliament, or the common law, independently of the statutes of the institution.

James Grant, *A Practical Treatise on the Law of Corporations in General, as Well Aggregate as Sole* 517 (1850). Another also draws a clear line between the State's general power over all corporations and persons,

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foreign corporations – e.g., suits seeking annulment of the election of a corporate director. *See* 17 Fletcher's Cyclopedia of Corporations § 8427 (2006). Courts sometimes exercise jurisdiction over suits that merely involve some consideration of a foreign corporation's internal affairs, but typically apply the law of the chartering jurisdiction. *Id.*; *see id.* § 4223.50.

and its special visitorial power over corporations in certain circumstances: "The state, by permitting actions at law and suits in equity, exercises general control over corporations as over other persons. But the state also exercises, by visitation through the courts or commissions, special control over corporations under certain circumstances." 8 Horace Lafayette Wilgus, *American Law and Procedure: Private Corporations* 220 (1911).

Here, the New York Attorney General does not propose to conduct a bank examination or to supervise any bank's safety and soundness, internal organization, or charter compliance. Nor does it seek to appoint a receiver or revoke a bank's charter. Rather, the Attorney General seeks the ability to bring lawsuits in state court to enforce New York's fair lending laws, and to conduct targeted investigations in contemplation of such lawsuits. Section 484(a) was not intended to immunize national banks from such ordinary law enforcement.

3. This Court's decisions have consistently recognized the distinction between supervisory oversight of a bank and enforcement of other valid legal obligations of the bank. *Guthrie v. Harkness*, 199 U.S. 148 (1905), is the only decision of this Court expressly discussing the NBA's visitorial powers provision. *Guthrie* held that a private shareholder's right to inspect bank records is not a right of visitation, and that a court order compelling bank officers to permit such an inspection, even if arguably an exercise of visitorial powers, is protected under the exception for such powers "vested in courts of justice." *Id.* at 159. The

Court concluded that the shareholder's right of inspection was not visitorial in nature, because it was not part of the general oversight of a corporation to ensure that it complies with its charter and by-laws, but rather derived from the separate common law right of a shareholder to examine the methods and means by which the corporation conducts its affairs, in order to ascertain the value and legal status of his investment. *Id.* at 157-59.

The fact that the record-seeker in *Guthrie* was a private individual tended to corroborate that he was not seeking to exercise visitorial powers, but it was not critical to the decision, contrary to view of the court below. Pet. App. 23a. Instead, the decision rests on the fact that the record-seeker was enforcing his own rights, which were separate in nature from, and not preempted by, the Comptroller's right to examine the bank's records. *Guthrie*, 199 U.S. at 156-59. In short, the statute did not preclude the shareholder's right of inspection in *Guthrie* because that right was not part of any supervisory oversight regime. Likewise, § 484(a) does not prohibit the Attorney General's enforcement of New York's valid fair-lending law, including but not limited to review of bank records, because such enforcement is not part of any supervisory oversight regime.

Indeed, from the beginning, this Court has recognized that States can enforce their generally applicable laws against national banks where those laws are not preempted. In *National Bank v. Commonwealth*, 76 U.S. 353, 363-64 (1869), decided just five years after enactment of the NBA, this Court affirmed a state court judgment obtained by Kentucky to compel a national bank to remit to the State a tax levied on stockholders' shares in the bank. Shortly thereafter, in *Waite v. Dowley*, 94 U.S. 527, 534 (1876), the Court affirmed a judgment obtained by a town treasurer against the cashier of a national bank for failing to comply with a state law requiring the bank to provide information about its shareholders for tax purposes. Likewise, in *First National Bank of Bay City v. Fellows*, 244 U.S. 416, 427-28 (1917), the Court held that the Michigan Attorney General could sue a national bank in state court to test whether the bank could provide trust services, where the bank's authority was dependent on whether state law provided the same right to analogous state entities.

In *St. Louis*, the bank and the United States as amicus curiae argued, among other things, that Missouri's quo warranto action seeking to prohibit the bank from violating the state antibranching laws was barred as a prohibited attempt to exercise "visitorial powers" reserved solely to the Comptroller. 263 U.S. at 643, 645.[9] The Court rejected that argument without discussion, in effect applying the settled distinction between supervision of the corporate charter and enforcement of other valid laws. The Court observed that state officials may not "inquire by quo warranto whether a national bank is acting in excess of its charter powers," *id.* at 660, or sue to inquire whether a national bank "is complying with the charter or law of its creation," *id.* However, the Court held that Missouri was not attempting to do either of these things, but was

9. The reference is to the portion of the official syllabus setting forth the arguments of the parties.

merely seeking "to vindicate and enforce its own law." *Id.* The decision thus defines the same boundary set forth above to separate visitorial enforcement from ordinary enforcement: charter supervision is visitorial, enforcement of valid general laws is not.[10]

The idea that the NBA might prevent a State from enforcing its own valid and unpreempted law was flatly rejected by the *St. Louis* Court, and for reasons that cannot be overturned by agency fiat. *St. Louis* noted that it would be incongruous to separate the power of a sovereign State to enact a law and the power of that State to enforce it. In rejecting the claim that the NBA barred a State from enforcing its laws against a national bank, the Court asked only "whether the state law [was] free to act" or whether the state law was preempted under principles of conflict preemption. *Id.* at 660. It considered whether the state law would frustrate the purpose for which the bank was created, interfere with its operations, or impair its efficiency. *Id.* at 659. The Court concluded that Missouri's prohibition on branching could not conflict with the National Bank Act

10. The three dissenters in *St. Louis* did not dispute this rule, but merely disagreed with the majority's characterization of Missouri's lawsuit. In the dissent's view, the lawsuit pertained to "questions of corporate power," not enforcement of "general laws," and therefore was the Comptroller's alone to bring under federal law. 263 U.S. at 665-66 (Van Devanter J., dissenting). The dissent would have found Missouri's antibranching law substantively preempted, on the ground that questions of national banks' powers "must turn on the laws of the United States under which the bank is created," and that state law "simply has no bearing on the solution of [such questions]." *Id.*

because, at the time, federal law generally did not permit national banks to operate branches.[11]

Once the Court determined that the state law at issue was not preempted by federal law, it held that the state attorney general's power to enforce the law through judicial proceedings necessarily followed. *Id.* at 659-60. The Court reasoned that "since the sanction behind [the state law] is that of the state and not that of the national government, the power of enforcement must rest with the former and not with the latter." *Id.* at 660. The Court explained that "[t]o 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." *Id.*

After *St. Louis*, this Court permitted enforcement of state laws against national banks that arguably struck closer to visitation. In *Anderson National Bank v. Luckett*, 321 U.S. 233, 252-53 (1944), this Court held that a State could enforce its abandoned property laws against national banks, and, "as an appropriate incident to this exercise of authority," could require national banks to submit periodic reports of inactive accounts.[12]

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11. Certain national banks, but not that petitioner, did have limited power to operate branches at the time of *St. Louis*. *See* 263 U.S. at 657-58.

12. The Comptroller, as amicus curiae for the bank, argued primarily that the whole state statute was substantively preempted. Brief of the Comptroller of the Currency as Amicus

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And in *First National Bank in Plant City v. Dickinson*, 396 U.S. 122, 129-30 (1969), this Court held that a national bank was not entitled to declaratory and injunctive relief against a state comptroller's letter ordering the bank to cease and desist branching activities prohibited by state law.

Contrary to the decision below, Pet. App.18a-21a, no light is shed on the scope of the term "visitorial powers" by *Watters v. Wachovia Bank, N.A.*, 550 U.S. 1 (2007). *Watters* held that the Michigan Office of Insurance and Financial Services (OIFS) was preempted from exercising "general supervision and control" over a state-chartered operating subsidiary of a national bank. *Id.* at 8. The Court was not asked to address, and did not address, any question about the scope of the term "visitorial powers" in § 484(a), because Michigan had conceded that its "licensing, registration, and inspection requirements" would be precluded as applied to the national bank. *Id.* at 1569. The only issue was whether the bank's operating subsidiary should benefit from the same preemption standard. In concluding that Michigan's administrative regime does not apply to the subsidiary, the Court commented that subjecting the subsidiary to "multiple audits and surveillance under rival oversight regimes" would interfere with the business of banking. *Id.* at 21. But, consistent with the

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Curiae, *Anderson Nat'l Bank v. Luckett*, No. 43-154, at 2-17. Its alternative argument of procedural preemption under § 484 was aimed not at all state enforcement of the law, but only at a section authorizing examinations, which the Comptroller called the "visitorial provisions" of the statute. *Id.* at 17-18.

above analysis of visitation, the Court's comment plainly refers to "oversight regimes,"[13] not to enforcement of generally applicable state laws.[14]

B. No Doubt is Cast on this Settled Understanding by Subsequent Legislation or the Exceptions Contained in or Added to the Statute

1. OCC has suggested that the Regulation finds support in the fact that the agency now has the power to enforce valid state laws through administrative proceedings. But that analysis is entirely anachronistic. Congress conferred that power on OCC in 1966, while the visitorial-powers prohibition has existed, essentially unchanged, since 1863. Thus, if the 1863 statute prohibited the States from enforcing their valid state laws against national banks, or even permitted that interpretation, then it would follow that for over a century no governmental authority had the power to enforce valid state laws against national banks. That simply cannot be the law. As this Court observed in *St. Louis*, the notion that state law could apply to

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13. The OIFS conditions a mortgage company's ability to do business in the State on registration and payment of fees, compliance with record keeping and reporting requirements, and submission to periodic inspections, among other things. *Id.* at 13-15.

14. The court of appeals' reliance on *First National Bank, Elizabeth, N.J. v. Long*, 630 F.2d 981 (3d Cir. 1980), Pet. App. 21a, is similarly misplaced. *Long* held that § 484 prohibited administrative enforcement of state anti-redlining laws by a state banking commissioner, but did not address judicial enforcement.

national banks, but be enforceable by no government, is a "fallacy made apparent by the mere statement of the proposition." 263 U.S. at 660. Enforcement power, the Court held, is "inherent in the very conception of law." *Id.*

Neither is it plausible that Congress intended to broaden the preemptive effect of § 484(a) when it gave OCC administrative power to enforce state law in FISA in 1966. *See* 12 U.S.C. § 1818(b)(1). FISA did not amend § 484(a). Nor did FISA overrule *St. Louis* or any of the other cases cited above. Instead, FISA was designed to give the federal financial institution regulatory agencies some intermediate administrative remedies less drastic than those that the agencies already possessed, such as revocation of federal insurance or membership in the Federal Reserve. *See* S. Rep. No. 89-1482, at 5-6 (1966), *reprinted in* 1966 U.S.C.C.A.N. 3532, 3537-38. The statute does not single out OCC, does not expressly mention state law, and does not provide that the federal agencies' new administrative powers are meant to be exclusive of concurrent state authority.[15] Moreover, FISA did not give OCC the same powers that state attorneys general have to order compensation to injured consumers. *See* 12 U.S.C. § 1818(b)(6)(A)(OCC may order restitution and similar remedies only where the financial institution was unjustly enriched or

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15. As to the federal agencies that regulate state-chartered entities, like the FDIC or the Board of Governors of the Federal Reserve, it is clear that those administrative powers are *not* exclusive. *See* 12 U.S.C. § 1818(m) (requiring federal agencies to notify the appropriate state supervisory authority and give the state supervisory agency an opportunity to take corrective action before commencing federal administrative proceedings).

manifested reckless disregard for the law). Finally, the Senate committee report on FISA expressly disclaimed any intent "to take any action which would do violence to the balance between State and Federal functions and responsibilities which underlies the dual banking system." S. Rep. No. 89-1482, at 7, *reprinted in* 1966 U.S.C.C.A.N. at 3538.

2. Nor do the 1994 Riegle-Neal amendments preempt state enforcement of valid state laws. Riegle-Neal expressly directs that host state laws in four areas of traditional state regulation and concern — consumer protection, fair lending, community reinvestment, and intrastate banking — generally should apply to out-of-state branches of national banks, except where the laws would be preempted as to the parent national bank. 12 U.S.C. § 36(f)(1)(A), (f)(2); *see also* H.R. Conf. Rep. No. 103-651, at 53, *reprinted in* 1994 U.S.C.C.A.N. at 2074. While the statute provides that "any State law to which a branch of a national bank is subject under this paragraph shall be enforced . . . by the Comptroller of the Currency," 12 U.S.C. § 36(f)(1)(B), the provision cannot fairly be read to give the agency exclusive enforcement authority, because the clause does not use the word "exclusive" or otherwise indicate any intent to deprive States of concurrent enforcement power, and the legislative history forecloses this radical reading of the provision.

Senator Riegle explained that "the States [would] not lose any authority that they already ha[d] over national banks," and that the bill was intended "to maintain the status quo regarding a State's ability to regulate the activities of national banks operating in that

State." 140 Cong. Rec. 8642 (1994). Likewise, the Conference Report acknowledged that "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," and stated that "Congress [did] not intend . . . [to] weaken States' authority to protect the interests of their consumers, businesses, or communities." H.R. Conf. Rep. No. 103-651, at 53, 1994 U.S.C.C.A.N. at 2074.

Moreover, Congress made clear its intent that state consumer protection and fair-lending laws be vigorously enforced. *See, e.g.*, Riegle-Neal, Pub. L. No. 103-328, § 102(b), 108 Stat. at 2349-50 (codified as amended at 12 U.S.C. § 36(f)(1)-(2)); H.R. Conf. Rep. No. 103-651, *supra*, at 53, 1994 U.S.C.C.A.N. at 2074. To the limited extent OCC can and actually does take steps to aid individuals harmed by national banks' illegal practices, those efforts serve Congress's stated goals. But it is not likely that Congress intended to deprive consumers of the additional enforcement resources and broader remedial powers that state attorneys general have long brought to bear on those concerns. It is especially unlikely given OCC's structure and resources that Congress intended OCC's administrative enforcement capacity to supplant the enforcement role traditionally played by state attorneys general. *See* Nicholas Bagley, Note, *The Unwarranted Regulatory Preemption of Predatory Lending Laws*, 79 N.Y.U. L. Rev. 2274, 2309 (2004) (observing that "OCC [i]s [n]ot a [c]onsumer [p]rotection [a]gency"); Christopher L. Peterson, *Federalism and Predatory Lending; Unmasking the Deregulatory Agenda*, 78 Temp. L. Rev. 1, 73 (2005)

(OCC's focus has always been "monitoring the safety and soundness of their institutions, rather than consumer protection"). Indeed, OCC has informed the GAO that it does not even have procedures for examining compliance with state law. *See* U.S. GAO, *OCC Preemption Rules: OCC Should Further Clarify the Applicability of State Consumer Protection Laws to National Banks* 22-23 (2006). States, by contrast, have expertise and experience in enforcing their own laws. States are more familiar with local conditions and practices than is the federal government and can more quickly recognize and respond to new predatory practices as they arise, especially as national banks and their subsidiaries expand into nonfinancial areas. *See, e.g.*, Peterson, *supra*, at 61-68.

In light of these unequivocal indications of Congress's intent, both in 1966 and in 1994, to maintain the existing balance between federal and state authority, it is implausible that Congress intended on either occasion to divest States of the authority to enforce valid state laws against national banks. OCC did not consider either act a watershed at the time of its passage. OCC itself initially took the position that its power under FISA to initiate cease-and-desist proceedings for violations of "a law, rule, or regulation" did not encompass violations of state law. *See* Nat'l Comm'n of Consumer Fin., *Consumer Credit in the United States* at 54. And until 2004, the agency acknowledged that state officials could bring lawsuits to enforce state laws against national banks. *See* Pet. App. 109a.

3. OCC has suggested that the statutory exceptions contained in § 484 provide support for its overbroad

interpretation of "visitorial powers," but they do not. Each of these exceptions was written to resolve a dispute about whether certain actions might be seen as a prohibited exercise of visitorial powers. The exceptions serve a clarifying role; they do not imply that actions within their scope are necessarily visitorial, but merely foreclose any argument that the covered actions are prohibited by the statute.

The exception for visitorial powers "vested in the courts of justice" was characterized in just that way by this Court in *Guthrie v. Harkness*, 199 U.S. 148. In that case, the Court held that it was "evident" from that exception that the statute did not prevent a court from compelling a national bank to afford a shareholder access to the bank's books and records for inspection. *Id.* at 159. The Court did not hold that such a court order was an exercise of visitorial powers, but rather concluded that "even if [such an order were] included in visitorial powers as the terms are used in the statute, it would belong to that class 'vested in courts of justice' which are expressly excepted from the inhibition of the statute." *Id.*[16]

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16. The court of appeals found *Guthrie* inapplicable to this case on the ground that reading the exception for "courts of justice" so broadly "would swallow the rule." Pet. App. 114a. The court was mistaken. Neither *Guthrie* nor this case requires the conclusion that every resort to the courts is embraced by the exception for "courts of justice." To the contrary, both *Guthrie* and this case involve a request for records that arises from a nonpreempted substantive claim. If the underlying claim were preempted, resort to the courts would not overcome that obstacle.

So too the statutory exception for visitorial powers "exercised or directed by Congress" or by a House or committee thereof serves a similar clarifying role. That provision was enacted as part of the Federal Reserve Act of 1913, in a provision captioned "Limit of other examinations." Federal Reserve Act, ch. 6, § 21, 38 Stat. 251, 272 (1913). In 1912 the U.S. Attorney General had opined that the House Committee on Banking and Currency lacked the power to direct the Comptroller to use its examination authority to procure information from national banks for the committee to use in considering amendments to the banking and currency laws. *See* 29 Op. Att'y Gen. 555 (1912). Earlier the House Committee on Banking and Currency had expressed a similar concern. *See* H.R. Rep. No. 62-665, at 1 (1912). Members of the committee proposed a statutory amendment "to remove the doubt and to prevent the investigation from becoming abortive by being tied up in litigation." *Id.* Although the proposed amendment did not pass in 1912, a similar provision was added to § 484 the following year as part of the Federal Reserve Act.

Likewise, the enactment of § 484(b) in 1982, affirmatively permitting state examiners and auditors to inspect national banks' records for compliance with state abandoned property and escheat laws, was intended to resolve a dispute about the meaning of the visitorial-powers statute. Decades before, in *Anderson National Bank*, 321 U.S. 233, this Court had made clear that States generally could enforce such laws against national banks and, incident to such enforcement, could require national banks to submit annual reports to the State. *Id.* at 252-53. However, in the 1970s OCC advised that, in its view, § 484 "probably" prohibited the States from examining banks for compliance with abandoned property laws. *See Bank Treatment of Inactive Checking and Savings Accounts: Hearings before a Subcomm. of the House Comm. on Government Operations*, 96th Cong. 23 (1980) (statement of Jim Lord, Treasurer, State of Minnesota). The contrary view was suggested by the Congressional Research Service, *id.* at 408, and endorsed by the Minnesota Supreme Court, *Minnesota ex rel. Lord v. First Nat'l Bank*, 313 N.W.2d 390 (Minn. 1981). *See Clovis Nat'l Bank v. Callaway*, 69 N.M. 119, 130-31, 364 P.2d 748, 755-56 (1961). Congress conclusively resolved the dispute by adding subsection (b) to § 484, providing that "[n]otwithstanding subparagraph (A), lawfully authorized State auditors and examiners may, at reasonable times and upon reasonable notice to a bank, review its records solely to ensure compliance with applicable State unclaimed property or escheat laws upon reasonable cause to believe that the bank has failed to comply with such laws."[17]

C. OCC's Novel Theory of "Enforcement Preemption" Does Not Serve Any Legitimate Goals of the National Banking System

OCC has not demonstrated how its novel theory of "enforcement preemption" is needed to serve the legitimate goals of the national banking system.

17. A similar clarifying purpose is served by 26 U.S.C. § 3305(c), which provides that "nothing contained in . . . [12 U.S.C. § 484]" shall prevent States from requiring national banks to submit reports to state unemployment compensation systems. Absent § 3305(c), some might question whether States could compel such periodic administrative reporting by national banks. The statute makes clear that States may do so.

Enforcement preemption does not serve to protect national banks from conflicting or unduly burdensome standards of conduct; if state law created such conflicts or burdens, the state law would be substantively preempted. When state substantive law is not preempted, national banks must conform their conduct to that law.

Nor is there any basis to think that Congress considered ordinary law enforcement, to which all persons and entities are typically subject, to be especially burdensome or harmful to national banks. OCC has not identified any such harm, nor could it, as private plaintiffs may sue national banks in state court for violations of the very same fair-lending and consumer protection laws that respondents would prevent state attorneys general from enforcing. *See* Pet. App. 87a.[18] Indeed, private litigation may proceed in the form of a class action.[19] To justify its regulation, the agency has

18. In the area of fair housing, moreover, state authorities that are certified by HUD to process complaints may sue national banks. *See* Pet. App. 133a. The FHA authorizes HUD to certify state or local agencies to process FHA complaints pursuant to state or local law if HUD determines that such law is substantially equivalent, both substantively and procedurally, to the FHA. 42 U.S.C. § 3610(f). Once HUD has certified a state or local agency, it is required to refer all complaints of discrimination within their geographic jurisdiction to those agencies for processing pursuant to state or local law and procedures. *Id.*

19. *See, e.g., Hood v. Santa Barbara Bank & Trust*, 143 Cal. App. 4th 526, 541-42 (Cal. Ct. App. 2006) (putative class action

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referred to concepts of "uniformity," *see Bank Activities and Operators*, 69 Fed. Reg. 1895, 1896 (Jan. 13, 2004), but this Court has pointedly observed, in specific reference to federally chartered depository institutions, that merely "[t]o invoke the concept of 'uniformity' . . . is not to prove its need." *Atherton*, 519 U.S. at 220; *see also id.* at 223 ("To point to a federal charter by itself shows no conflict [or] threat. . . .").

Nor can OCC invoke any congressional preference for a federal forum to resolve all allegations against national banks. Since 1864, the NBA has made national banks subject to suit in state court. Act of June 3, 1864, ch. 106, § 57, 13 Stat. 99, 116-17; *see also Fellows*, 244 U.S. at 428 (finding that § 57 "fortified" its holding that state attorney general could bring quo warranto action against national bank in state court). Furthermore, while for a brief time national banks could remove any suit against them to federal court, *see Petri v. Commercial Nat'l Bank of Chicago*, 142 U.S. 644, 648-49 (1892), for over a century federal law has limited a national bank's ability to remove a state suit to situations where a state-chartered bank would likewise have the ability to remove the suit. *See* 28 U.S.C. § 1348; *Wachovia Bank, N.A. v. Schmidt*, 546 U.S. 303, 310-11 (2006); *cf.* 28 U.S.C. § 1442(a) (giving federal agencies and officers the right

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not barred by § 484(a)); *Muhammad v. Nat'l City Mortgage, Inc. f/k/a Nat'l City Mortgage Co.*, No. 2:07-cv-0423, 2008 WL 5377783 (S.D. W. Va. Dec. 19, 2008) (approving $700,000 class-action settlement against national banks); *see also Bank of Am., N.A. (USA) v. Miller*, No. S-06-1971, 2007 WL 184804 (E.D. Cal. Jan. 17, 2007) (action against national bank by consumer group not barred by § 484(a)).

to remove to federal court suits based on acts taken under color of their office); § 1442a (same as to members of the United States armed forces).

Under OCC's interpretation of § 484, preemption turns not on the substance of state law or any perceived need for a federal forum to adjudicate claims or defenses, but on the mere fact that the plaintiff filing the suit is a state official. It is implausible that Congress authorized the adoption of a scheme so arbitrary, yet at the same time so destructive of States' dignity and traditional authority.

II. OCC 's Regulation Cannot Receive Deference Under *Chevron* Because It Profoundly Shifts the Federal-State Balance and Purports to Define the Preemptive Scope of a Statute.

Even if the Regulation contained a plausible construction of § 484 (and it does not), it would not be entitled to the *Chevron* deference accorded to it by the courts below for at least two reasons. First, OCC's interpretation shifts the federal-state balance in a way that can be sustained only on a clear statement of congressional intent, not on an agency's interpretation. Second, because the Regulation declares the preemptive scope of a federal statute, it is not eligible for *Chevron* deference.

A. OCC's Regulation Preventing a State From Enforcing Its Own Valid Law So Drastically Alters the Federal-State Balance as to Require a Clear Statement from Congress That Is Not Present Here

1. As shown below, the aberrant nature of the preemption regime that the Regulation purports to establish, under which state substantive law applies but only a federal agency and private parties may enforce that law, would work a major alteration in the federal-state balance of authority, and therefore triggers the clear-statement rule of *Gregory v. Ashcroft*, 501 U.S. 452. For that reason alone, *Chevron* deference must be denied. Even where a statute is ambiguous and therefore susceptible of multiple interpretations, if the particular interpretation chosen by the agency enters terrain protected by a clear-statement canon, the construction is necessarily beyond the range of permissible interpretations eligible for *Chevron* deference. To hold otherwise would permit an agency to circumvent clear-statement rules that are binding on Congress.

The *Gregory* clear-statement rule is triggered here because the "enforcement preemption" contemplated by OCC's regulation is destructive to our tradition of federalism and distorts the lines of political accountability that are the foundation of that tradition. As this Court has recognized, the "great innovation" of our federalist system

> was that "our citizens would have two political capacities, one state and one federal, each

> protected from incursion by the other" – "a legal system unprecedented in form and design, establishing two orders of government, each with its own direct relationship, its own privity, its own set of mutual rights and obligations to the people who sustain it and are governed by it."

Printz v. United States, 521 U.S. 898, 920 (1997) (quoting *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring)). "This separation of the two spheres is one of the Constitution's structural protections of liberty." *Id.* at 921.

This Court has held that the lines of political accountability defining these two spheres are impermissibly distorted when the federal government "commandeers" state executive officials to enforce federal regulatory programs. *Id.* at 925; *see also New York v. United States*, 505 U.S. 144, 161 (1992). Such commandeering is prohibited because it puts States "in the position of taking the blame for [a federal program's] burdensomeness and for its defects," *Printz*, 521 U.S. at 930, meaning that state officials may bear "the brunt of public disapproval," while federal officials are "insulated from the electoral ramifications of their decisions," *New York*, 505 U.S. at 169.

Respondents' construction of § 484(a) would likewise erode the lines ensuring that both federal and state governments remain accountable to citizens. As this Court has observed, state law

> can always be pre-empted under the Supremacy Clause if it is contrary to the

> national view, but in such a case it is the Federal Government that makes the decision [to preempt state law] in full view of the public, and it will be federal officials that suffer the consequences if the decision turns out to be detrimental or unpopular.

Id. at 168. Under respondents' position, however, state substantive law is *not* preempted; only state enforcement power is displaced. Because state substantive law survives, the public is entitled to expect enforcement of that law, and will naturally expect such enforcement to come from state officials, not a federal administrator. If OCC were to possess exclusive authority to enforce state laws through its often confidential processes, and if the agency were to decline to enforce that law or to do a poor job of enforcing it – whether due to lack of resources, lack of familiarity with the law, different enforcement priorities, or any other reason – the public would likely blame state officials for those failures. It is not clear that Congress could ever enact such a regime, but before accepting a statutory construction that so confuses the traditional roles of federal and state authority and diminishes political accountability within our federalist system, this Court should at least require explicit evidence that Congress intended that reading. *See New York*, 505 U.S. at 170 (applying the *Gregory* clear-statement rule to avoid statutory interpretation that would erode political accountability).

2. Moreover, a clear indication that Congress intended to preempt all state enforcement of valid state law would be required even if the Regulation were not considered especially destructive to the balance of

federal and state authority or intrusive on state sovereignty. All preemption threatens the balance of federal and state authority. This Court recently reaffirmed that every express or implied preemption analysis begins "'with the assumption that the historic police powers of the States [are] not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.'" *Altria, Inc. v. Good*, 555 U.S. __, 129 S. Ct. 538, 543 (2008) (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)). This presumption against preemption "applies with particular force when Congress has legislated in a field traditionally occupied by the States." *Id.* (quoting *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996)). Under the presumption, "when the text of a pre-emption clause is susceptible of more than one plausible reading, courts ordinarily 'accept the reading that disfavors pre-emption.'" *Id.* (quoting *Bates v. Dow Agrosciences LLC*, 544 U.S. 431, 449 (2005)). The rule ensures "that the federal-state balance will not be disturbed unintentionally by Congress or unnecessarily by the courts." *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977) (internal citation and quotation marks omitted).

The court of appeals incorrectly rejected application of the presumption against preemption on the ground that regulation of national banks has been substantially occupied by federal authority for an extended period of time. Pet. App. 12a-13a. In *Altria*, however, this Court made clear that the presumption applies in every case threatening displacement of the States' historic police powers, and merely acquires special force in areas where there has been no substantial federal presence. 129 S. Ct. at 543. In any event, this case is not about banking regulation, an area where there has been a sustained federal presence as to national banks. It is about the protection of consumers, where States historically have taken the lead. When passing Riegle-Neal, the House Banking, Finance, and Urban Affairs Committee specifically observed that "[c]onsumer protection, fair lending and community reinvestment laws have been areas of traditional State concern." H.R. Rep. No. 103-448, at 24 (1994), *reprinted in* 1994 U.S.C.C.A.N. 2039, 2047. And a later conference report endorsed application of the presumption against preemption regarding those specific areas of regulation. *See* H.R. Conf. Rep. No. 103-651, at 53 (1994), *reprinted in* 1994 U.S.C.C.A.N. at 2074 (approving the judicially established "rule of construction that avoids finding a conflict between the Federal and State law where possible").

The court of appeals misconstrued this Court's decision in *Barnett Bank* to support its conclusion that no presumption against preemption applies here. *See* Pet. App. 12a. *Barnett Bank* involved a national bank's power to sell insurance when expressly authorized by Federal law but prohibited by state law. The case did not disavow the presumption against preemption in all cases involving national banks, and did not consider whether the presumption would apply in the context of consumer protection or civil rights laws. *See* Bagley, *supra*, at 2300-02. In this context, the presumption against preemption applies, and requires § 484(a) to be construed in a manner that limits the statute's intrusion on state authority.

Because the Regulation triggers the above canons requiring a clear indication of *congressional* intent, and because no such clear statement exists in § 484, the agency's interpretation cannot be sustained under *Chevron*. This Court has squarely held that when an agency purports to adopt a statutory interpretation that raises serious constitutional questions and thus implicates the doctrine of constitutional avoidance, the interpretation will not receive *Chevron* deference. *See Solid Waste Agency of N. Cook County* ("*SWANCC*"), 531 U.S. 159, 172-73 (2001); *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575-76 (1988). That is because "Congress does not casually authorize administrative agencies to interpret a statute to push the limit of congressional authority," especially "where the administrative interpretation alters the federal-state framework by permitting federal encroachment upon a traditional state power." *SWANCC*, 531 U.S. at 172. Because it is likewise implausible that Congress intended that OCC should have the ability to disrupt the federal-state balance so dramatically as its Regulation proposes, OCC's interpretation should not receive *Chevron* deference.

B. The Regulation Is Not Eligible for *Chevron* Deference Because It Declares the Preemptive Scope of a Federal Statute.

Apart from any clear-statement canon, the Regulation is not eligible for *Chevron* deference because it declares the preemptive scope of a federal statute. This Court has never deferred to a regulation of this nature, and it should not do so here.

1. *Chevron* rests on a presumption about relative institutional competence: Because administrative agencies are more expert than the courts in implementing the details of complex and technical regulatory schemes, the courts presume that Congress intended them to defer to authorized agencies' policy judgments in resolving statutory ambiguities to implement such schemes. *See, e.g.*, *Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 651-52 (1990). But agencies' very focus on the details of particular regulatory programs makes them ill-suited to resolve the broad structural questions of federalism that preemption cases present. *See, e.g.*, Nina A. Mendelson, *Chevron and Preemption*, 102 Mich. L. Rev. 737, 779-80 (2004); Bagley, *supra*, at 2293-97. When Congress has not spoken clearly on an issue of statutory preemption, leaving resolution of the issue to administrative agencies, subject only to *Chevron* review, would eviscerate the courts' traditional role in maintaining the constitutional balance of federal and state authority. *See United States v. Lopez*, 514 U.S. 549, 578 (1995) (Kennedy, J., concurring) (identifying "the whole jurisprudence of pre-emption" as an important way in which "this Court has participated in maintaining the federal balance"). Thus, as the dissenting justices in *Watters* observed, without contradiction from the majority, "when an agency purports to decide the scope of federal pre-emption, a healthy respect for state sovereignty calls for something less than *Chevron* deference." 550 U.S. at 41 (Stevens, J. dissenting, joined by Roberts, C.J., and Scalia, J.).

Moreover, the framework for addressing the above federalism concerns is defined by judicially developed doctrines governing preemption analysis, which courts – not agencies – are most expert in applying. *Cf. Ledbetter v. Goodyear Tire & Rubber Co., Inc.*, 550 U.S. 618, 642 n.11 (2007) ("Agencies have no special claim to deference in their interpretation of [the Court's] decisions."); *accord Reno v. Bossier Parish Sch. Bd.*, 528 U.S. 320, 336 n.5 (2000). The House Conference Report in Riegle-Neal illustrates this point, expressly contemplating that preemption analysis under the NBA should adhere to "well-established judicial principles." H.R. Conf. Rep. No. 103-651, at 53, *reprinted in* 1994 U.S.C.C.A.N. at 2074. And as the court of appeals found "troublesome" below, OCC's rulemaking here is dominated by traditional legal analysis, "consist[ing] almost entirely of the agency's interpretation of case law, legislative history, and statutory text." Pet. App. 25a; *see also id.* ("[T]he OCC does not appear to have any facts at all in promulgating its visitorial powers regulation."). There is no reason why this Court should defer to OCC's legal conclusions about preemption.

A further factor counseling against *Chevron* deference is the strong agency self-interest that often operates in this area. By finding state authority broadly displaced, administrative agencies may effectively increase their own regulatory power, despite the bedrock principle that "[a]n agency may not confer power upon itself." *La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986). To be sure, this Court has been unwilling to deny *Chevron* deference on the sole ground that an agency determination addresses the scope of its own authority, largely because it may be difficult in some case to distinguishing between jurisdictional and non-jurisdictional issues. *Compare Miss. Power & Light Co.*

v. Mississippi ex rel. Moore, 487 U.S. 354, 381-82 (1988) (Scalia, J., concurring in judgment), *with id.* at 386-87 (Brennan, J., dissenting). But preemption questions are easily identified, and, in any event, petitioner does not advance the point as a sufficient reason, by itself, to deny *Chevron* deference. Rather, it is an additional reason for concern that agencies will not give adequate consideration to the federalism implications of a decision to oust state authority.

That risk is particularly acute with respect to OCC, since federal and state banking regulators essentially compete to attract institutions to incorporate under their respective charters. OCC's budget is funded almost entirely from assessments levied against the banks it supervises,[20] which creates strong incentives for the agency to make a federal charter more attractive to banks. In this regard, former Comptroller John Hawke openly stated in 2000 that preemption of state law "is one of the advantages of a national charter," and acknowledged that OCC is "not the least bit ashamed to promote it."[21] It would give short shrift to federalism

20. *See* Office of the Comptroller of the Currency, U.S. Dep't of Treasury, *Annual Report: Fiscal Year 2007*, at 7, *available at* http://www.occ.treas.gov/annrpt/2007AnnualReport.pdf (last visited February 24, 2009). The private source of the agency's budget also diminishes the agency's political accountability. The Comptroller has cited the assessment system, together with the fact that he is appointed by the President for a fixed term of five years, as evidence of its "considerable operational independence." *Id.*

21. *See* Jess Bravin & Paul Beckett, *Friendly Watchdog: Federal Regulator Often Helps Banks Fighting Consumers – Dependent on Lenders' Fees, the OCC Takes Their Side Against Local, State Laws*, Wall St. J., Jan. 28, 2002, at A1.

values for courts to defer under *Chevron* to OCC's efforts to broadly displace state enforcement against national banks, rather than independently evaluating the appropriateness of such preemption under established legal principles.

In short, declarations about the preemptive scope of a federal statute differ sharply from substantive statutory interpretations, and it is unlikely that Congress would intend that administrative agencies possess primary interpretive authority in the area of preemption. Thus, while this Court has often deferred to agency interpretations of the substantive meaning of federal statutes, including OCC's substantive interpretations of the NBA, *see, e.g.*, *Smiley v. Citibank (S.D.), N.A.*, 517 U.S. 735, 737, 743-44 (1996); *NationsBank of N.C., N.A. v. Variable Annuity Life Ins. Co.*, 513 U.S. 251, 256-58 (1995), the Court has not deferred to agency actions that merely purport to declare the preemptive scope of a federal statute, and has questioned the application of such deference, *see Smiley*, 517 U.S. at 744 (assum[ing] (without deciding) that the [preemptive meaning of a statute] must always be decided *de novo* by the courts"); *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 496 (1996) (the Court's interpretation of statutory express preemption clause merely "substantially informed by" agency's regulation); *see also id.* at 512 (O'Connor, J., concurring in part and dissenting in part) ("It is not certain that an agency regulation determining the pre-emptive effect of *any* federal statute is entitled to deference."). Because OCC's regulation purports to declare the scope of preemption effected by § 484, it is not eligible for *Chevron* deference.[22]

2. At a minimum, the above considerations counsel for applying heightened scrutiny before concluding that Congress has delegated to an agency rulemaking authority to declare the scope of statutory preemption. *See Gonzales*, 546 U.S. at 258 (reiterating that, as a precondition to *Chevron* deference, a regulation "must be promulgated pursuant to authority Congress has delegated to the [agency]"). As the *Watters* dissenters recognized, "there is a vast and obvious difference between rules authorizing or regulating conduct and rules granting immunity from regulation." 550 U.S. at 39 (Stevens, J., dissenting). Accordingly, this Court should not apply *Chevron* to an agency declaration about preemption absent specific evidence that Congress intended that the agency would possess primary interpretive authority regarding the scope of statutory preemption.[23]

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22. This analysis does not "touch [the Court's] cases holding that a properly promulgated agency regulation can have a preemptive *effect* should it conflict with state law." *Watters*, 550 U.S. at 40 n.24 (Stevens, J., dissenting) (citing *Hillsborough County v. Automated Med. Labs., Inc.*, 471 U.S. 707, 713 (1985); *Fidelity Fed. Sav. & Loan Ass'n v. De la Cuesta*, 458 U.S. 141, 154- 59 (1982); *City of N.Y. v. FCC*, 486 U.S. 57, 59, 65-70 (1988)). *See also United States v. Shimer*, 367 U.S. 374, 381-85 (1961). It is a different matter when agencies merely declare the preemptive scope of a federal statute, particularly where the agency's declaration is unconnected to any substantive regulation.

23. On occasion, Congress has expressly and specifically delegated to an agency the authority to determine preemption

(Cont'd)

There is no such specific evidence here. The principal delegation of rulemaking authority to OCC, 12 U.S.C. § 93a, merely provides generally that "the Comptroller of the Currency is authorized to prescribe rules and regulations to carry out the responsibilities of the office." Congress has not specifically conferred on OCC any power to determine the preemptive scope of § 484(a).

Nor does the Regulation "carry out the responsibilities of the office" of the Comptroller, under the natural meaning of that language. OCC supervises national banks by monitoring their fiscal soundness and enforcing the NBA's banking laws. Accordingly, this Court has held that the Comptroller "is charged with the enforcement of banking laws to an extent that warrants the invocation of this principle with respect to his deliberative conclusions as to the meaning of these

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(Cont'd)

questions. *See, e.g.*, 30 U.S.C. § 1254(g) (preempting state or local statutes that conflict with "the purposes and the requirements of this Act" and providing that "[t]he Secretary [of the Interior] shall set forth any State law or regulation which is preempted and superseded by the Federal program"); 47 U.S.C. § 253(a), (d) (authorizing the Federal Communications Commission to preempt "any statute, regulation, or legal requirement" that "may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service"); 49 U.S.C. § 5125(d) (setting forth a procedure by which an affected person may apply to the Secretary of Transportation for a decision as to whether a state or local statute that conflicts with the regulation of hazardous waste transportation is preempted, or may seek relief from a court of competent jurisdiction).

laws." *Clarke v. Secs. Indus. Ass'n*, 479 U.S. 388, 403-04 (1987) . But displacement of state enforcement authority is a different matter entirely. *Cf. Adams Fruit Co. v. Barrett*, 494 U.S. 638, 649-50 (1990) (delegation of authority to promulgate motor vehicle safety "standards" did not include the authority to determine whether a statutory private right of action was barred because "[n]o such delegation regarding [the statute's] enforcement provisions is evident in the statute"). OCC's Regulation does not address any statutory provision that the agency is charged to enforce, and OCC's rulemaking does not mention safety or soundness or explain any way in which state enforcement of valid state laws purportedly impairs OCC's own supervisory functions. Thus, the regulation does not carry out OCC's statutory responsibilities.

To be sure, the 1994 Riegle-Neal amendments recognized that OCC had been issuing opinion letters and interpretive rules on preemption. *See* 12 U.S.C. § 43. But by its own terms, § 43 did not confer any authority on OCC to make binding determinations concerning statutory preemption,[24] but rather placed limitations on OCC's existing practice. *See Watters*, 550 U.S. at 39 n.22 (Stevens, J., dissenting).

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24. OCC arguably has such authority in an extremely narrow area not at issue here: determining whether "the application of [state consumer protection, fair-lending, community reinvestment, and intrastate branching laws] would have a discriminatory effect" on the national bank branch in comparison with their effect of the branches of a bank chartered by the host State. 12 U.S.C. § 36(f)(1)(A)(ii). Although OCC's expertise may be relevant to the determination at issue in § 36, it has no bearing on the interpretive question in this case.

Section 43(a) requires OCC to follow notice-and-comment procedures before issuing "any opinion letter or interpretive rule that concludes that Federal law preempts the application to a national bank of any State law regarding community reinvestment, consumer protection, fair lending, or the establishment of intrastate branches." The reference to "opinion letter[s] or interpretive rule[s]" is particularly significant, since those types of administrative actions do not have the force of law and generally are not eligible for *Chevron* deference. *See United States v. Mead Corp.*, 533 U.S. 218 (2001); *Christensen v. Harris County*, 529 U.S. 576 (2000).

Moreover, the Riegle-Neal House Conference Report confirms that § 43 was "not intended to confer upon the agency any new authority to preempt or determine preemptive Congressional intent . . . , or to change the substantive theories of preemption as set forth in existing law." H.R. Conf. Rep. No. 103-651, at 55, *reprinted in* 1994 U.S.C.C.A.N. at 2076. Rather, the section was intended "to help focus any administrative preemption analysis" by OCC, given that OCC had been "appl[ying] traditional preemption principles" in an "inappropriately aggressive" manner. *Id.* at 53, 55, *reprinted in* 1994 U.S.C.C.A.N. at 2074, 2076. Congress therefore clearly did not intend § 43 to delegate to OCC any additional rulemaking authority concerning preemption.

Of course, even if not eligible for *Chevron* deference, OCC's views may be given respect in proportion to their power to persuade under *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944). *See Mead*, 533 U.S. at 235 (stating that agency action not eligible for *Chevron* should be considered under *Skidmore*); *cf. Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 883 (2000); *Lohr*, 518 U.S. at 495. But that is of no help to OCC, since the agency's rulemaking breaks sharply from its own prior interpretations in a manner that drastically alters the federal-state balance, and does so based not on any technical analysis about the business of banking, but on legal arguments that are demonstrably incorrect. See Point I, *supra.*

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

ANDREW M. CUOMO
Attorney General of the State of New York
BARBARA D. UNDERWOOD*
Solicitor General
MICHELLE ARONOWITZ
Deputy Solicitor General
RICHARD DEARING
Assistant Solicitor General
120 Broadway, 25th Floor
New York, NY 10271
(212) 416-8020

Attorneys for Petitioner

* *Counsel of Record*

APPENDIX

APPENDIX — RELEVANT STATUTORY PROVISIONS

New York Executive Law § 63(12)

§ 63. General duties

* * *

12. Whenever any person shall engage in repeated fraudulent or illegal acts or otherwise demonstrate persistent fraud or illegality in the carrying on, conducting or transaction of business, the attorney general may apply, in the name of the people of the state of New York, to the supreme court of the state of New York, on notice of five days, for an order enjoining the continuance of such business activity or of any fraudulent or illegal acts, directing restitution and damages and, in an appropriate case, cancelling any certificate filed under and by virtue of the provisions of section four hundred forty of the former penal law or section one hundred thirty of the general business law, and the court may award the relief applied for or so much thereof as it may deem proper. The word "fraud" or "fraudulent" as used herein shall include any device, scheme or artifice to defraud and any deception, misrepresentation, concealment, suppression, false pretense, false promise or unconscionable contractual provisions. The term "persistent fraud" or "illegality" as used herein shall include continuance or carrying on of any fraudulent or illegal act or conduct. The term "repeated" as used herein shall include repetition of any

separate and distinct fraudulent or illegal act, or conduct which affects more than one person.

In connection with any such application, the attorney general is authorized to take proof and make a determination of the relevant facts and to issue subpoenas in accordance with the civil practice law and rules. Such authorization shall not abate or terminate by reason of any action or proceeding brought by the attorney general under this section.

New York Executive Law § 296-a

§ 296-a. Unlawful discriminatory practices in relation to credit

1. It shall be an unlawful discriminatory practice for any creditor or any officer, agent or employee thereof:

a. In the case of applications for credit with respect to the purchase, acquisition, construction, rehabilitation, repair or maintenance of any housing accommodation, land or commercial space to discriminate against any such applicant because of the race, creed, color, national origin, sexual orientation, military status, age, sex, marital status, disability, or familial status of such applicant or applicants or any member, stockholder, director, officer or employee of such applicant or applicants, or of the prospective occupants or tenants of such housing accommodation, land or commercial space, in the granting, withholding, extending or renewing, or in the fixing of the rates, terms or conditions of, any such credit;

b. To discriminate in the granting, withholding, extending or renewing, or in the fixing of the rates, terms or conditions of, any form of credit, on the basis of race, creed, color, national origin, sexual orientation, military status, age, sex, marital status, disability, or familial status;

c. To use any form of application for credit or use or make any record or inquiry which expresses, directly or indirectly, any limitation, specification, or discrimination as to race, creed, color, national origin, sexual orientation, military status, age, sex, marital status, disability, or familial status;

d. To make any inquiry of an applicant concerning his or her capacity to reproduce, or his or her use or advocacy of any form of birth control or family planning;

e. To refuse to consider sources of an applicant's income or to subject an applicant's income to discounting, in whole or in part, because of an applicant's race, creed, color, national origin, sexual orientation, military status, age, sex, marital status, childbearing potential, disability, or familial status;

f. To discriminate against a married person because such person neither uses nor is known by the surname of his or her spouse.

This paragraph shall not apply to any situation where the use of a surname would constitute or result in a criminal act.

2. Without limiting the generality of subdivision one of this section, it shall be considered discriminatory if, because of an applicant's or class of applicants' race, creed, color, national origin, sexual orientation, military status, age, sex, marital status or disability, or familial status, (i) an applicant or class of applicants is denied credit in circumstances where other applicants of like overall credit worthiness are granted credit, or (ii) special requirements or conditions, such as requiring co-obligors or reapplication upon marriage, are imposed upon an applicant or class of applicants in circumstances where similar requirements or conditions are not imposed upon other applicants of like overall credit worthiness.

3. It shall not be considered discriminatory if credit differentiations or decisions are based upon factually supportable, objective differences in applicants' overall credit worthiness, which may include reference to such factors as current income, assets and prior credit history of such applicants, as well as reference to any other relevant factually supportable data; provided, however, that no creditor shall consider, in evaluating the credit worthiness of an applicant, aggregate statistics or assumptions relating to race, creed, color, national origin, sexual orientation, military status, sex, marital status or disability, or to the likelihood of any group of persons bearing or rearing children, or for that reason receiving diminished or interrupted income in the future.

3-a. It shall not be an unlawful discriminatory practice to consider age in determining credit worthiness when age has a demonstrable and statistically sound relationship to a determination of credit worthiness.

4. a. If so requested by an applicant for credit, a creditor shall furnish such applicant with a statement of the specific reasons for rejection of the applicant's application for credit.

b. If so requested in writing by an individual who is or was married, a creditor or credit reporting bureau shall maintain in its records a separate credit history for any such individual. Such separate history shall include all obligations as to which such bureau has notice with respect to which any such person is or was individually or jointly liable.

5. No provision of this section providing spouses the right to separately apply for credit, borrow money, or have separate credit histories maintained shall limit or foreclose the right of creditors, under any other provision of law, to hold one spouse legally liable for debts incurred by the other.

6. Any person claiming to be aggrieved by an unlawful discriminatory practice engaged in by a regulated creditor, in lieu of the procedure set forth in section two hundred ninety-seven of this [fig 1] article, may file a verified complaint with the superintendent, as provided hereinafter; provided, however, that the filing of a complaint with either the superintendent or the division

shall bar subsequent recourse to the other agency, as well as to any local commission on human rights, with respect to the grievance complained of.

7. In the case of a verified complaint filed with the superintendent the following procedures shall be followed:

a. After receipt of the complaint, the superintendent shall make a determination within thirty days of whether there is probable cause to believe that the person named in the complaint has engaged in or is engaging in an unlawful discriminatory practice. If the superintendent determines there is no such probable cause, the complaint shall be dismissed. If the superintendent determines that there is such probable cause, he or she shall attempt to resolve such complaint by conference and conciliation. If conciliation is achieved, the terms shall be recorded in a written agreement signed by the creditor and complainant, a copy of which shall be forwarded to the commissioner.

b. If conciliation is not achieved, the superintendent or his or her designated representative shall conduct a hearing with respect to the alleged violation of this section. All interested parties shall be entitled to adequate and timely notice of the hearing. Such parties shall have the right to be represented by counsel or by other representatives of their own choosing; to offer evidence and witnesses in their own behalf and to cross-examine other parties and witnesses; to have the power of subpoena exercised in their behalf; and to have access to a written record of such hearing. The superintendent or his or her representative shall not be bound by the strict rules of evidence prevailing in courts of law or equity. The testimony taken shall be under oath and a record shall be made of the proceedings. A written decision shall be made by the superintendent or his or her designated representative separately setting forth findings of fact and conclusions of law. A copy of such decision shall be forwarded to the commissioner.

c. If the superintendent finds that a violation of this section has occurred, the superintendent shall issue an order which shall do one or more of the following:

(1) impose a fine in an amount not to exceed ten thousand dollars for each violation, to be paid to the people of the state of New York;

(2) award compensatory damages to the person aggrieved by such violation;

(3) require the regulated creditor to cease and desist from such unlawful discriminatory practices;

(4) require the regulated creditor to take such further affirmative action as will effectuate the purposes of this section, including, but not limited to, granting the credit which was the subject of the complaint.

d. Any complainant, respondent or other person aggrieved by any order or final determination of the superintendent may obtain judicial review thereof.

8. Where the superintendent makes a determination that a regulated creditor has engaged in or is engaging in discriminatory practices, the superintendent is empowered to issue appropriate orders to such creditor pursuant to the banking law. Such orders may be issued without the necessity of a complaint being filed by an aggrieved person.

9. Whenever any creditor makes application to the superintendent or the banking board to take any action requiring consideration by the superintendent or such board of the public interest and the needs and convenience thereof, or requiring a finding that the financial responsibility, experience, charter, and general fitness of the applicant, and of the members thereof if the applicant be a co-partnership or association, and of the officers and directors thereof if the applicant be a corporation, are such as to command the confidence of the community and to warrant belief that the business will be operated honestly, fairly, and efficiently, such creditor shall certify to the superintendent compliance with the provisions of this section. In the event that the records of the banking department show that such creditor has been found to be in violation of this section, such creditor shall describe what action has been taken with respect to its credit policies and procedures to remedy such violation or violations. The superintendent shall, in approving the foregoing applications and making the foregoing findings, give appropriate weight to compliance with this section.

10. Any complaint filed with the superintendent pursuant to this section shall be so filed within one year after the occurrence of the alleged unlawful discriminatory practice.

11. The superintendent is hereby empowered to promulgate rules and regulations hereunder to effectuate the purposes of this section.

12. The provisions of this section, as they relate to age, shall not apply to persons under the age of eighteen years.