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**

# REPLY BRIEF


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Respondents make the remarkable claim that national banks are generally immune from state law enforcement, even where they are subject to state laws. But as we explained in our opening brief, when Congress reserved to the Comptroller the visitorial power over national banks in what is now 12 U.S.C. § 484, Congress did not prohibit all state law enforcement activity against national banks. Instead, Congress created a federal supervisory regime for the national banks, and prohibited the States only from asserting a rival supervisory authority. OCC's regulation purporting to preempt state law enforcement is not entitled to deference because Congress did not delegate to OCC the power to make that decision.

### A. Section 484 Does Not Prohibit States From Enforcing Valid State Laws Against National Banks

1. This Court has repeatedly upheld States' authority to enforce their valid and nonpreempted laws against national banks. Indeed, the Court has noted more than once that if a State's substantive law governs a national bank's activities, it follows inexorably that the State is entitled to enforce it. Respondents' efforts to distinguish those cases are unpersuasive.

For example, in *National Bank v. Kentucky*, 76 U.S. 353 (1869), and *Waite v. Dowley*, 94 U.S. 527 (1877), this Court upheld the States' authority to tax shares of bank stock and to require national banks to take specific actions to assist in that process. Respondents suggest that these cases are inapposite because the States' authority to impose the taxes in question was clear, and the States' authority to collect the taxes followed from their authority to impose them. Brief for Respondent Office of the Comptroller of the Currency ("OCC") 51; Brief for Respondent The Clearing House Ass'n L.L.C. ("CH") 35. Similarly, OCC (at 51-52) argues that *First National Bank of Bay City v. Fellows*, 244 U.S. 416 (1917), which upheld a state attorney general's authority to sue a national bank in state court to enforce a state-law restriction on provision of trust services, is limited to situations where federal law expressly conditions a national bank's power on compliance with state law. But in all three cases, the Court held that a State's power to impose obligations implies the power to enforce them, which is precisely what respondents deny here.

As we have explained (Pet. Br. 28-30), this Court was especially emphatic about the connection between the power to make laws and the power to enforce them in *First National Bank in St. Louis v. Missouri*, 263 U.S. 640 (1924). Respondents seek to distinguish *St. Louis* on the ground that it concerned "an activity (branch banking) that was not authorized for national banks at that time" (OCC 51; *see* CH 34), but that distinction cannot withstand analysis. The relevant "activity" is providing banking services. Rules on branching – including questions such as whether an armored car, *First Nat'l Bank in Plant City v. Dickinson*, 396 U.S. 122 (1969), or an automated teller machine, 12 U.S.C. § 36(j), is a branch – simply regulate the place and manner of banks' conduct, just as the law regulates many other aspects of banks' operations.

The notion that *St. Louis* should be understood as a case only about the forbidden "activity of branching" is stretched to the breaking point by respondents' effort to extend it to *Dickinson*. In *Dickinson*, this Court upheld the authority of a state comptroller to prohibit a national bank from using an armored messenger service and a remote depository location, on the ground that these arrangements were branches prohibited by state law. Respondents suggest that, as in *St. Louis*, the State's enforcement authority in *Dickinson* was upheld because it dealt with the unauthorized activity of branching. *See* OCC 52; CH 36 n.7. But by 1969, national banks were no longer forbidden to branch; they were permitted to branch within their home States to the extent permitted by state law. *Dickinson*, 396 U.S. at 130-32. Thus, when *Dickinson* upheld the authority of the State to enforce state law, the ruling could not have rested on the ground that the state law concerned an activity categorically prohibited by federal law. Instead, the Court concluded, notwithstanding OCC's contrary view, that because federal law treated the armored car as a "branch," state enforcement of state law could not conflict or interfere with federal law. *Id.* at 138.

Whether and where banks may establish branches, and the proper definition of a branch, has been one of the most hotly contested issues in American banking regulation.[1] In this area as in others, a State cannot

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1. The history of bank regulation in American reflects a slow expansion of authority to establish branch banks. For an overview, see R. Carnell, J. Macey, & G. Miller, *The Law of Banking & Financial Institutions* 10-27 (4th ed. 2009). In 1864, the Comptroller construed federal law as banning branching; state laws on the subject varied. *Id.* at 10. In 1927 and 1933 enactments, Congress permitted limited intrastate branching

(Cont'd)

impose a requirement on a national bank that conflicts with federal law. For that reason, the Court in *St. Louis* considered whether any federal law conflicted with the state law that Missouri sought to enforce. The absence of such a law was relevant not because it carved out an "activity" outside the scope of federal regulation and therefore subject to state law enforcement but because it established that state law was not preempted, given that federal and state law were consistent on the subject of branching.

So too here, state and federal law are consistent: both contain the same prohibition on lending discrimination. Therefore, state law is not preempted and may be enforced by the State. Discriminatory lending is no more permissible for national banks today than branch banking was in the 1920s. *See, e.g.*, 15 U.S.C. § 1691 *et seq.* (Equal Credit Opportunities Act [ECOA]).

OCC virtually concedes (at 53) that its theory is inconsistent with the holding of *Anderson National Bank v. Luckett*, 321 U.S. 233 (1944), which upheld the State's power to enforce a state escheat law with respect to accounts held in national banks. Kentucky enforced the law in question by taking over abandoned bank accounts and requiring banks to file periodic reports of

(Cont'd)
by national banks, to the extent permitted by state law. McFadden Act of 1927, Pub. L. No. 69-639, § 7(c), 44 Stat. 1224, 1228; Glass-Steagall Act of 1933, Pub. L. No. 73-66, § 23, 48 Stat. 162, 189-190. In 1994, Congress allowed interstate branching. Riegle-Neal Interstate Banking and Branching Efficiency Act of 1994, Pub. L. No. 103-328, § 101, 108 Stat. 2338, 2339.

inactive accounts. *Id.* at 252-53. That Congress subsequently enacted 12 U.S.C. § 484(b) to expressly authorize States to examine national banks for compliance with escheat laws does not, as OCC suggests, remove the significance of *Anderson*. Instead, it demonstrates that Congress approved the ruling, clarifying that those targeted state inspections of national bank records are compatible with the national banking system. In *Anderson*, as in *St. Louis*, *Dickinson*, and the other cases just discussed, the Court concluded that the state laws were not substantively preempted because they did not significantly burden the banks' activities. *See Anderson*, 321 U.S. at 250 (contrasting Kentucky's law with other state escheat laws determined to be unenforceable against national banks, as in *First National Bank of San Jose v. California*, 262 U.S. 366, 369 (1923)). Once the law was found not to be preempted, it followed inevitably that the State was entitled to enforce it.

By contrast, when a State has been barred from enforcing its law against a national bank, it has always been because the substantive law itself was preempted, and not because the State was barred from enforcing a valid state law. For example in *Easton v. Iowa*, 188 U.S. 220 (1903), this Court found preempted a state law making it a crime for a bank officer to receive a deposit knowing that the bank was insolvent. The Court did not find that the state law prohibition was valid but state criminal enforcement was barred; rather, it noted that "the validity of the mandatory and of the penal parts of the statute must stand or fall together," *id.* at 228, and found the statute preempted in its entirety.[2]

OCC suggests that it is irrelevant that the States have never before been barred from applying nonpreempted state law because in previous cases the banks have not raised § 484 as an objection to state enforcement of valid state law. OCC 51-52. But national banks are not bashful litigants. Their failure to invoke § 484, at a time when the term "visitorial powers" was far more familiar to courts and attorneys than it is today, confirms that OCC's recent interpretation of the term is off the mark. Indeed, in *St. Louis*, the bank expressly conceded that if the state branching law were not preempted, the State would have power to enforce it: "We doubt not that, if the state has the power to enact such a statute, it has plenary power to enforce it. A condition of sovereignty which will admit of the enactment, but not the enforcement, of legislation is anomalous to the degree of impossibility." *First Nat'l Bank in St. Louis v. Missouri*, No. 23-252, Substituted Brief and Argument for Plaintiff in Error, at 49.

2. So too this Court rested on substantive preemption, without considering enforcement preemption, in *First National Bank of San Jose*, 262 U.S. 366 (state escheat law); *Franklin National Bank of Franklin Square v. New York*, 347 U.S. 373 (1954) (state restriction on naming of banks); *Marquette National Bank of Minneapolis v. First of Omaha Service Corp.*, 439 U.S. 299 (1978) (state effort to apply its interest rate limitation to out-of-state bank's credit card solicitation program); and *Barnett Bank of Marion County v. Nelson*, 517 U.S. 25 (1996) (state restriction on bank's sale of insurance).

Thus, the idea that § 484 precludes state enforcement of valid state laws seems not to have occurred to litigants or courts from 1864, when § 484 was originally enacted, until well more than a century later, when OCC began advancing its expansive theory of enforcement preemption. The absence of that theory from the briefs and opinions of the time is powerful evidence that it was not incorporated in the statute by the term "visitorial powers."

2. This Court has only twice before discussed the visitorial powers provision of the National Bank Act (NBA), in *Guthrie v. Harkness*, 199 U.S. 148 (1905), and *Watters v. Wachovia Bank*, *N.A.*, 550 U.S. 1 (2007). In each case, its discussion has been consistent with the understanding that ordinary law enforcement does not require the exercise of visitorial power.

Respondents contend that (1) in *Watters*, this Court held that the entire Michigan statutory scheme regulating mortgage lenders was an exercise of prohibited visitorial powers, (2) because the scheme included lawsuits to enforce state laws, the Court held that such suits are inherently visitorial, and (3) the Michigan statutory scheme was sufficiently similar to New York's lending discrimination statutes to establish that the New York statutes too are visitorial. OCC 46; CH 27. Each step of that analysis is incorrect.

First, *Watters* did not adjudicate a contested issue about the visitorial character of the Michigan scheme. The regime was indisputably visitorial, defined by a complex of state laws authorizing active and general supervision of financial activities by a state commissioner. Michigan expressly vested the commissioner with "general supervision and control" over licensed entities, including the power to audit the entity's books and records and to deny or revoke its ability to operate in Michigan. 550 U.S. at 8-9.

Second, because the scheme as a whole was indisputably visitorial, and the contested issue was whether certain state-incorporated bank subsidiaries were entitled to the same protection from state visitorial powers as the banks themselves, the Court had no occasion to consider whether any particular elements of the scheme taken alone would constitute the exercise of visitorial power. Nothing in *Watters* suggests that a state attorney general's lawsuit to enforce a nonpreempted state law would be a prohibited exercise of visitorial power,[3] and the unbroken line of cases discussed above upholding the power to bring such lawsuits shows that it would not.

Third, the powers authorized by the Michigan scheme are far broader than, and different from, the powers asserted by the New York Attorney General here. The Michigan scheme subjected regulated corporations, in that case bank subsidiaries, to "audits and surveillance under rival oversight regimes," with judicial enforcement being merely one small aspect of a regime characterized by ongoing oversight, supervision,

3. OCC is mistaken in suggesting (at 45-46) that *Watters* also found preempted certain provisions in Michigan's statutes authorizing the state attorney general to sue for injunctive relief. This Court's decision addressed only the powers of the state commissioner, and did not mention or discuss the state attorney general or his enforcement powers.

and administrative enforcement. 550 U.S. at 21. In this case, by contrast, the Attorney General's proposed law enforcement is not part of any "oversight regime[]," but rather a targeted law enforcement action, more like a criminal prosecution or a private civil damages action than like the ongoing supervision that characterizes visitation.

Nor does *Guthrie* support respondents. They rely heavily on *Guthrie*, notwithstanding that the case held that the shareholder's demand for inspection at issue was *not* visitation, because this Court reasoned that "visitation" did not include actions by a private shareholder. *See* OCC 43-44; CH 16-19. But this Court never implied that all government enforcement is visitorial, or that the private or public nature of an act is the fault line that separates visitation from other forms of enforcement. Quite to the contrary, as OCC acknowledges (at 43), *Guthrie*'s survey of definitions of "visitation" emphasized supervision of corporate governance and general oversight of the charter or law of a corporation's creation.

3. Respondents miss the point in arguing that at common law, having visitorial authority over a corporation permitted a wide range of government action that in some respects resembles modern state law enforcement. OCC 34; CH 14-15. The question is not whether visitorial power might authorize (among many other powers) an enforcement action such as this one. Rather, the question is whether state enforcement against a national bank of state law of general applicability *necessarily* constitutes a forbidden exercise of visitorial powers. The antidiscrimination action at

issue here is not, fundamentally, an exercise of visitorial power, whether or not visitorial power could also be marshaled to similar effect; rather, it is fundamentally an exercise of the police power.

This point is demonstrated by the fact that the absence of visitorial powers has never been thought to restrict a State's enforcement of generally applicable laws against a foreign corporation, *i.e.*, a corporation chartered in another State. While a State possesses no visitorial powers over a foreign corporation doing business within its borders, the host State may nonetheless enforce its laws against such foreign corporations in the exercise of its police powers. Roscoe Pound, *Visitatorial Jurisdiction Over Corporations in Equity*, 59 Harv. L. Rev. 369, 389 (1936). Like a foreign corporation, a national bank is subject to general law enforcement but not the exercise of visitorial powers by a State, which of course did not charter the bank.[4]

Merely because a visitor is empowered to take a certain action – such as looking at a bank record or filing a complaint against a bank in court – does not mean

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4. Respondents exaggerate the differences between visitation of eleemosynary corporations and visitation of civil corporations. OCC 29-30, CH 15-16. Eleemosynary corporations historically had a private visitor, while civil corporations were visited by the chartering sovereign. *See*, *e.g.*, 1 Seymour D. Thompson, *Commentaries on the Law of Private Corporations* 581, § 476 (2d ed. 1908). But in both cases the visitorial power derived from the act of founding the corporation, and was not equivalent to the general police power. Pound, *supra*, 59 Harv. L. Rev. at 375; Thompson, *supra*, at 580-81, §§ 475-476.

that any attempt by another official to perform a similar act is necessarily visitorial. For instance, reviewing bank records as part of routine surveillance through bank examinations may be visitorial. *See*, *e.g.*, *United States v. Phila. Nat'l Bank*, 374 U.S. 321, 329-30 (1963) (describing "the broad visitatorial power of federal bank examiners" as the authority to make "frequent and intensive" examinations into all of banks' affairs, and to require that "banks . . . furnish detailed periodic reports of their operations to the supervisory agencies," so as to "maintain virtually a day-to-day surveillance" of the banking system). But reviewing bank records produced in ordinary civil discovery is not. *See* 12 C.F.R. § 7.4000(a) (acknowledging that production of records may be required "under normal judicial procedures"); *accord* OCC Interpretive Ltr. No. 122, 1979 OCC Ltr. LEXIS 11 (Aug. 1, 1979); OCC Interpretive Ltr. No. 93, 1979 OCC Ltr. LEXIS 47 (Apr. 2, 1979). Similarly, although filing a lawsuit to hold a national bank to the charter or law of its creation may require the exercise of visitorial power, filing a lawsuit to remedy violations of generally applicable state law does not. *See St. Louis*, 263 U.S. at 660.

Here, the Attorney General is not attempting to exercise supervisory power over national banks, but rather to investigate and prosecute specific suspected violations of generally applicable state law. New York's Human Rights Law (HRL), N.Y. Executive Law §§ 290-301, prohibits discrimination in a wide range of activities, including employment, housing, public accommodations, education, and, relevant here, the extension of credit.[5] The Attorney General seeks to exercise his power under New York Executive Law § 63(12) to sue for damages, penalties, and injunctive relief based on alleged violations of New York's fair-lending law in the making of loans related to New York properties during 2004, and also seeks to obtain relevant information about those loans in contemplation of such a suit. Clearing House itself contrasts the Attorney General's "prosecutorial" approach under § 63(12) and the Comptroller's "supervisory model," observing that the Attorney General's enforcement is "episodic, narrowly-focused," and targeted at responding to "previous misconduct," whereas the Comptroller conducts "comprehensive and continuous examinations" focused on "heading off or remediating possible problems as they might develop." CH 30-31. This well describes an essential difference between visitation and ordinary law enforcement.

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5. Respondents incorrectly suggest that enforcement of New York's fair-lending law lies principally with the New York State Banking Department. OCC 48; CH 4. The fair-lending law, like the other antidiscrimination laws in New York's HRL, may be enforced by the Attorney General or administratively by the New York State Division of Human Rights (DHR). N.Y. Executive Law § 297(1). Alternatively, an individual or the Attorney General may sue in state court. *Id.* §§ 63(12), 297(9). As to state-licensed or -supervised creditors only, the individual also has the option of filing a complaint with the Banking Department, *id.* § 296-a(6), but that is not the principal mode of enforcement. Moreover, the DHR has issued a substantive regulation construing the fair-lending law, 9 N.Y.C.R.R. § 466.8, while the Banking Department has not done so.

4. Respondents contend that the statutory exceptions to § 484(a) support their interpretation of the statute. OCC 35-39; CH 20, 22-23. But we have shown (Pet. Br. 36-39 & n.17), and respondents do not rebut, that these provisions were enacted to resolve disputes about the meaning of § 484(a). The existence of the exceptions says more about national banks' historic obstructionism than it does about the scope of § 484(a).

Nor is respondents' position supported by two congressional committee reports from the 1970s, cited by Clearing House (at 20-21). *See* Comm. on Banking, Housing, & Urban Affairs, *Report on Consumer Protection Enforcement Activities by the Three Commercial Bank Regulatory Agencies*, S. Rep. No. 94-1388, (1976); Comm. on Government Operations, *The Truth in Lending Act: Federal Banking Agency Enforcement and the Need for Statutory Reform*, H.R. Rep. No. 95-280, at 48 (1977). Not only are committee reports that are unconnected to any enacted legislation notoriously unreliable as a guide to the meaning of any law, but these reports, even if reliable, would not support the claim that States lack, and always have lacked, any authority to enforce any state consumer protection law.

The 1976 report does not, as Clearing House contends (at 20-21), indicate that a statutory amendment would be required to give States a role in enforcing state consumer protection laws against national banks. To the contrary, the report recognized that States already had an enforcement role, and criticized the Comptroller for obstructing that role by "refus[ing] to allow state officials access to information needed to determine compliance" with state consumer protection laws. *Report on*

*Consumer Protection*, at 9. In the event of continued poor enforcement of consumer protection laws by OCC, the report recommended that OCC's assigned supervisory role should be reassigned to state banking authorities. *Id.* The report did not address ordinary law enforcement at all.

The 1977 report expressly addressed only examination authority and not enforcement actions. It noted first that § 484 limits state examinations of national banks, and then recommended that federal law be amended to specifically authorize States "to conduct examinations of the affairs of national banks . . . for the purpose" of enforcing state truth-in-lending laws. *The Truth in Lending Act*, at 48.

5. As we have shown (Pet. Br. 32-33), respondents' interpretation of § 484 implies that Congress intended that no government would have the power to enforce valid state laws against national banks for the first century after the NBA's enactment, until OCC was given such enforcement authority in 1966.

Clearing House counters (at 24) that Congress had little reason to expect that much state law would apply to national banks. But just a few years after the NBA's passage, this Court made clear that state law generally applies to national banks, and that preemption of state law is the exception, not the rule. *See, e.g.*, *Kentucky*, 76 U.S. at 362; *McClellan v. Chipman*, 164 U.S. 347, 358 (1896); *St. Louis*, 263 U.S. at 656; *see also Atherton v. FDIC*, 519 U.S. 213, 222-23 (1997) (collecting cases).

Respondents now suggest that OCC has always had power to enforce state law (OCC 53, CH 23), even though they previously acknowledged that OCC lacked such power until 1966 (CH Brief in Opp. 14 n.10; *see Bank Activities & Operations*, 69 Fed. Reg. 1895, 1899-1900 & n.40 (2004)). OCC argues that while it initially lacked any "formal" authority to enforce state law, it nevertheless could have brought about compliance with state law through "informal" means. OCC 53. But as this Court has recognized, the effectiveness of such informal persuasion depends on the existence of formal sanctions to back it up. *See Philadelphia Nat'l Bank*, 374 U.S. at 330.

Respondents also cite a 1933 statute that authorized the Comptroller to refer matters to the Federal Reserve Board for removal of officers or directors for violations of "any law relating to such bank." OCC 54 (citing Glass-Steagall, § 30, 48 Stat. at 193); CH 24 (same). Even assuming that this provision encompassed violations of state law, at best it would only slightly reduce the length of the enforcement gap entailed by respondents' position.

6. Respondents contend that 12 U.S.C. § 36(f)(1)(B), enacted in 1994 as part of the Riegle-Neal amendments, shows that States cannot enforce state laws against national banks. They argue that § 36(f)(1)(B) demonstrates that States lacked enforcement power under preexisting law. CH 24-26; OCC 46-48.

As we has shown, however, § 36(f)(1)(B) does not support respondents. Pet. Br. 34-35. The provision states that applicable state consumer protection and fair-lending laws, among other laws, "shall be enforced, with respect to [an out-of-state branch of a national bank], by the Comptroller of the Currency." The provision does not purport to exclude all state enforcement authority.[6] The effect of § 36(f)(1)(B) is to clarify that *supervision* of out-of-state branches of national banks remains with OCC, notwithstanding the fact that, under § 36(f)(1)(A), such branches are generally subject to state consumer protection, fair-lending, and certain other laws as if they were branches of host state banks. The provision does not address ordinary law enforcement outside the supervisory process.

Prior to enactment of Riegle-Neal, bank branching was governed by the McFadden Act, which incorporated state-law branching standards, enforceable by the States. *See Dickinson*, 396 U.S. at 129-34; *Watters*, 550 U.S. at 15 n.7. As respondents acknowledge, Riegle-Neal was not intended to alter the federal-state balance of authority as to national banks. OCC 47; CH 25. But such unintended alteration would occur if States were forbidden to enforce intrastate branching standards, which are among the laws subject to § 36(f)(1)(A) and (B).

Clearing House (at 25) attempts to contrast § 36(f)(1)(B) with another provision added by Riegle-Neal, 12 U.S.C. § 1820(h), which vests state banking officials with broad supervisory authority, including examination authority, over interstate branches of banks chartered by other States. But the contrast shows only that Congress did not afford state banking officials

6. Indeed, in other statutes using the phrase "shall be enforced," Congress has expressly provided for exclusivity when it so intended. *See* 15 U.S.C. § 1681s-2(d); *id.* § 1681m(h)(8)(B); 31 U.S.C. § 5364(e).

supervisory authority over interstate branches of national banks. The floor colloquy cited by Clearing House confirms that those two provisions of Riegle-Neal concern only the allocation of "supervisory authority" over banks' branches. 140 Cong. Rec. 24,484 (1994).

### B. Section 7.4000 Is Not Entitled To *Chevron* Deference

As we have shown, 12 U.S.C. § 484 is not ambiguous on the question whether a suit by state officials against national banks to enforce valid state laws is a prohibited exercise of visitorial powers. But even if the statute were ambiguous, 12 C.F.R. § 7.4000 would not be entitled to *Chevron* deference, because it is utterly implausible that Congress delegated to OCC the authority to determine whether States may enforce their own valid laws against national banks.

1. We have explained that *Chevron* deference is inappropriate for an agency declaration of the scope of federal preemption, at least in the absence of an explicit delegation of authority to make binding preemption determinations. Pet. Br. 48-57. Both respondents claim that § 7.4000 does not declare the scope of federal preemption, but they are mistaken.[7] The unusual feature of § 7.4000 – the fact that it preempts only state enforcement power and not state substantive law – does

7. Presumably respondents strain to avoid the "preemption" label because this Court recently made clear that a specific delegation of rulemaking authority is required for an agency to possess authority to make binding preemption determinations. *Wyeth v. Levine*, 555 U.S. ____, 129 S. Ct. 1187, 1200-01 & n.9 (2009).

not remove it from the category of agency declarations of preemption. Instead, it makes § 7.4000 especially offensive to state sovereignty, and thus especially implausible as an exercise of power delegated to the OCC by Congress.

Clearing House argues (at 46-47) that § 7.4000 does not declare the scope of federal preemption because it merely interprets an express statutory provision in the NBA. But this presents a false dichotomy. An agency interpretation of an express preemption clause both interprets statutory language and declares the preemptive scope of the statute. Interpreting the meaning of an express preemption clause requires the same sensitivity to federalism interests that implied-preemption analysis demands. Indeed, in *Medtronic, Inc. v. Lohr*, 518 U.S. 470 (1996), even where Congress had specifically given the agency a role in determining the scope of an express preemption clause, this Court did not defer under *Chevron* to the agency's regulation interpreting the terms of the clause, but merely allowed its own construction to be "substantially informed" by the agency's analysis. *Id.* at 495-96.

Section 7.4000 is unlike the regulation in *Smiley v. Citibank, N.A. (S.D.)*, 517 U.S. 735 (1996), relied on by both respondents (OCC 21, CH 47), because that regulation addressed the "substantive" meaning of a statute as it governed the primary conduct of the banks, whereas this regulation addresses only the "preemptive" meaning of an express preemption provision. *Fidelity Federal Savings & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 153 (1982), is similarly inapposite because the regulation there governed the primary conduct of regulated entities.[8]

OCC suggests (at 20) that § 484, and thus the regulation interpreting it, does not address preemption of state law because § 484 does not purport to limit the application of any substantive state rule. It is no less preemptive, however, for federal law to forbid the operation of state enforcement provisions than to forbid the operation of state substantive rules. Respondents are incorrect in asserting that enforcement preemption is no more offensive to state sovereignty than other forms of preemption. CH 45; *see also* OCC Brief in Opp. 21 n.8. As this Court noted in *St. Louis*, and has reiterated on numerous occasions, "[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." 263 U.S. at 660.

OCC's novel assertion of enforcement preemption rests on the startling claim that, while the state fair-lending law at issue in this case is properly applied to the national banks, and while it may properly be enforced both by OCC and by private parties, including in class actions, the state attorney general is forbidden

8. As this Court explained in *Wyeth*, regulations governing primary conduct "can pre-empt conflicting state requirements." 129 S. Ct. at 1200-01. In such a case, however, the Court does not defer to an agency's views on the existence of a conflict, but "perform[s] its own conflict determination, relying on the substance of state and federal law and not on agency proclamations of preemption." *Id.*

to enforce it. Congress never made such a judgment, and it is implausible that Congress delegated to OCC the authority to make it. As this Court observed in *Adams Fruit Co. v. Barrett*, 494 U.S. 638 (1990), when Congress authorizes an agency to prescribe the behavior of participants in a regulated industry, it does not follow that the agency is also authorized to determine the availability of judicially enforceable remedies. *Id.* at 650.

Section 7.4000 does not address an interstitial question of statutory implementation, but rather decides a fundamental question about the division of federal and state authority in enforcing valid state laws against national banks. Clearing House describes the issue as involving "the sensitive area of inter-governmental relations," and draws upon doctrines of tribal immunity and state sovereign immunity as supposed analogues to OCC's regime of enforcement preemption. CH 45-46 n.12. It is implausible that Congress intended to delegate to OCC a judgment of this character. *See, e.g.*, *Gonzales v. Oregon*, 546 U.S. 243, 258 (2006); *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159 (2000); *see also Carcieri v. Salazar*, 555 U.S. __, 129 S. Ct. 1058, 1069 (2009) (Breyer, J., concurring) (agency interpretation not entitled to *Chevron* deference "despite linguistic ambiguity" where "circumstances indicate that Congress did not intend to delegate interpretive authority to the [agency]").

2. Indeed, the NBA as amended by Riegle-Neal in 1994 contains powerful evidence that Congress did not broadly delegate to OCC the power to make binding determinations on preemption questions. In 12 U.S.C. § 36(f)(1)(A), Congress provided that state fair-lending

laws (and certain other state laws) shall apply to interstate branches of national banks as the laws apply to branches of host state banks, with two exceptions: (1) where the state law would be preempted by federal law as to a national bank, § 36(f)(1)(A)(i); and (2) where the application of state law would have a discriminatory effect on the national bank branch as compared with a branch of a host state bank, § 36(f)(1)(A)(ii). Congress expressly authorized OCC to make binding determinations on the second exception, which requires an empirical determination of discriminatory effect, but conspicuously did not give that authority to OCC for the first exception, which requires a general determination of federal preemption. Thus, Congress clearly made conscious choices about when to authorize OCC to declare the scope of preemption. The absence of any such delegation with respect to § 484 demonstrates that Congress did not intend to give OCC authority to make binding determinations about its preemptive scope. *See also Watters*, 550 U.S. at 38-40 & nn.21-24 (Stevens, J., dissenting) (finding that OCC lacks authority to issue rules determining the scope of federal preemption).

Nor does 12 U.S.C. § 43 support OCC's claim of authority to make binding preemption determinations. *See* OCC 25; *see also* CH 52. That statute placed procedural requirements on OCC's existing practice of issuing guidance to banks or others on preemption questions through opinion letters and interpretive rulings. Section 43 does not confer any preemption authority on OCC at all, as OCC acknowledges (at 25), and the statute recognizes only a practice of giving nonbinding opinions on preemption questions, not a practice of making binding determinations eligible for

*Chevron* deference. *See Watters*, 550 U.S. at 39 n.22 (Stevens, J., dissenting).

As OCC has previously stated, its opinion practice "us[es] well recognized standards developed by the courts" to analyze "whether or not a federal law does, or does not, preempt a state law." *See* U.S. GAO, *Role of the Office of Thrift Supervision and Office of the Comptroller of the Currency in the Preemption of State Law* 38 (Feb. 7, 2000) (letter from Comptroller John D. Hawke, Jr., Jan. 31, 2000). Agencies are not entitled to deference in interpreting judicial precedents. *Ledbetter v. Goodyear Tire & Rubber Co., Inc.*, 550 U.S. 618, 642 n.11 (2007). Moreover, when enacting § 43, Congress made clear that it viewed OCC's past preemption analyses to be "inappropriately aggressive," and reaffirmed that such analysis should follow "well-established judicial principles." H.R. Conf. Rep. No. 103-651, at 53, *reprinted in* 1994 U.S.C.C.A.N. 2068, 2074. Thus § 43 does not evidence any congressional intention that OCC should possess authority to make binding preemption determinations, but shows that Congress meant for preemption questions to be decided by this Court.

3. To avoid application of the presumption against preemption, OCC insists that national banks are federal "instrumentalities." *See* OCC 17 (citing *Davis v. Elmira Sav. Bank*, 161 U.S. 275, 283 (1896)). But even if that may have been true when national banks served the public function of issuing the national currency, they have not served that role since 1913. There is no basis today to consider national banks federal instrumentalities. Congress removed their immunity

from state taxation in 1969, *see* Act of Dec. 24, 1969, Public Law No. 91-156, §§ 1(a), 2(a), 83 Stat. 434 (codified at 12 U.S.C. § 548), noting that there was "no longer any justification" for it, S. Rep. No. 91-530, at 2 (1969), *reprinted in* 1969 U.S.C.C.A.N. 1594, 1595. This vindicated the observation of three Justices in dissent a year before, with no objection from the majority, that a national bank was no longer a federal instrumentality, but was merely a "privately owned corporation existing for the private profits of its shareholders" that "perform[ed] no significant governmental function that is not performed equally by state-chartered banks." *First Agric. Nat'l Bank of Berkshire County v. State Tax Comm'n*, 392 U.S. 339, 354 (1968) (Marshall, J., dissenting).

Nor is a contrary presumption in favor of preemption for national banks established by *Barnett Bank of Marion County v. Nelson*, 517 U.S. 25 (1996), as respondents suggest. OCC 19-20; CH 42. In *Barnett Bank*, federal law empowered the national bank to sell insurance, while state law purported to deny the bank that power. 517 U.S. at 28-29. This Court observed that federal grants of power to national banks are "not normally limited by, but rather ordinarily pre-empt[] contrary state laws" withholding such powers. *Id.* at 32. This states the unsurprising principle that in the case of state laws that are *contrary* to federal grants of power to national banks, federal law ordinarily preempts. But that statement has no application here, where state law is not contrary to federal law and for that reason is not substantively preempted.

4. Respondents claim that the Attorney General's enforcement of New York's fair-lending laws against national banks would interfere with OCC's supervision of the federal banking system. OCC 39-42; CH 28-32. But this is not an implied preemption case, which would be governed by such analysis; respondents claim express preemption of state enforcement under § 484(a), as construed in 12 C.F.R. § 7.4000. No lower court has considered the question whether state enforcement here would interfere with federal objectives. Respondents' current arguments about interference with the federal scheme were not developed in OCC's rulemaking; indeed, neither respondent cites the rulemaking on this point.

In any event, respondents' claim of interference is unpersuasive. Respondents are in effect arguing that state enforcement would intrude upon OCC's discretion to excuse or overlook national banks' violations of New York's fair-lending laws, laws that proscribe lending discrimination just as federal law does. But because no bank is entitled to receive a pass when it violates a fair-lending law, OCC's claim (at 41) that state enforcement would interfere with its ability to implement "different enforcement priorities" from state authorities is misplaced. Congress intends that lending discrimination be eradicated, and OCC retains no prerogative to make fair-lending enforcement against national banks a low federal priority.

At bottom, respondents' arguments are just another way of saying that the substantive state law should be preempted and that federal law alone should apply to national banks. Indeed, *Easton v. Iowa*, 188 U.S. 220, on which respondents rely (OCC 41; CH 29-30), found state substantive law preempted. The problem, for respondents, is that New York's fair-lending laws are not preempted, particularly given that the Fair Housing Act (FHA) and ECOA both contain saving clauses preserving state law. *See* 42 U.S.C. § 3615; 15 U.S.C. § 1691d(f); *see also* Brief of *Amici Curiae* Lawyers' Committee for Civil Rights Under Law, et al., at 4-9.

Respondents' argument that state enforcement would interfere with OCC's discretion rests on the false premise that federal law vests OCC with exclusive authority to determine liability and remedy issues in fair-housing complaints involving national banks. Even under respondents' conception, fair-housing proceedings against national banks will be initiated by diverse private and governmental actors and adjudicated in diverse administrative and judicial fora, state and federal. For example, the FHA authorizes the U.S. Department of Housing and Urban Development (HUD) to investigate discrimination complaints and conduct administrative proceedings, 42 U.S.C. §§ 3610-3612; the U.S. Department of Justice to sue in federal court for a "pattern or practice" of discrimination or upon a referral by HUD, *id.* § 3614(a)-(b); and private plaintiffs to sue in federal court, *id.* § 3613.[9] And OCC concedes that § 484 does not bar private plaintiffs from suing national banks in state court under state fair-

9. OCC has no authority to issue substantive regulations under either the FHA or ECOA. *See* 42 U.S.C. § 3614a (authorizing the Secretary of HUD to promulgate rules to implement the FHA); 15 U.S.C. § 1691b(a) (authorizing the Federal Reserve Board to promulgate regulations to effectuate ECOA).

lending laws (OCC 42 n.7), or bar certified state agencies like the New York State DHR from conducting administrative proceedings against national banks under state laws (OCC 36-37 n.5 (citing 42 U.S.C. § 3610(f))). Indeed, under 42 U.S.C. § 3610(f), HUD must afford the DHR, as a certified state agency, the first opportunity to resolve all New York fair housing complaints. *See* U.S. Dep't of Hous. & Urban Dev., Fair Housing Assistance Program (FHAP) Agencies, *available at* http://www.hud/gov/offices/fheo/partners/FHAP/agencies.cfm#NY (last visited April 19, 2009).

If it were true, as Clearing House contends (at 28-29), that conflicts between state and federal law might arise on issues such as the evidentiary value of Home Mortgage Disclosure Act (HMDA) data or whether loan-to-value ratios can explain statistical disparities in loan terms, these conflicts would not be eradicated by OCC's novel enforcement preemption. This is because private parties, including those assisted by advocacy groups and class action attorneys, would remain free to take advantage of the same potential conflicts between state and federal law. And if there were a substantial conflict, that would at most be a basis for a narrow claim of implied preemption as to that conflict, in either a private or public suit. It would not be a basis for preempting all state enforcement.

The suggestion of conflict here, however, is meritless. Contrary to Clearing House's claims (at 28-29), petitioner and the Federal Reserve do not have different views of the significance of HMDA data. Both take statistical disparities in HMDA data as the starting point for inquiry, and take the position, as they must under both federal and state law, that statistical disparities may establish a prima facie case of discrimination.[10] And both would seek additional information to determine whether there is a legitimate nondiscriminatory explanation for the disparities. Indeed, in this case the Attorney General specifically requested additional information about pricing factors from the banks, but they refused to provide it. *See* JA 35a-36a.

In any event, whether the evidence makes out a case of discrimination under state law will ultimately be decided not by state law enforcement officers but by state courts. As we have shown (Pet. Br. 41-42), and respondents have not contested, the NBA displays no concern about the fairness of state courts in deciding allegations against national banks.

OCC argues that it is reasonable to prohibit suits by state attorneys general while permitting private suits because "[p]rivate suits do not pose a danger comparable to the purposeful state efforts to undermine the national banking system that motivated Section

10. A Federal Reserve regulation states that ECOA includes the disparate-impact standard developed under Title VII. 12 C.F.R. § 202.6(a) n.2. Under that standard, statistical disparities may establish a prima facie case of discrimination, requiring lenders to come forward with evidence showing a legitimate nondiscriminatory basis for their decisions. *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975); *see also Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 339-40 (1977) (intentional discrimination). Clearing House claims (at 28-29) that the Federal Reserve will not find a prima facie case based on HMDA data alone, but they point only to a statement that such data "will not alone prove unlawful discrimination," which is not the same thing.

484's enactment." OCC 42 n.7.[11] But there is no evidence that Congress was concerned about States undermining national banks by bringing lawsuits to enforce generally applicable and nondiscriminatory state laws, especially fair-lending laws that further a joint federal and state interest in eliminating discrimination in lending.

Clearing House's argument (at 30-32) that OCC is better positioned than state attorneys general to enforce fair-lending laws because of its close supervisory relationship with national banks would be better made to Congress than to this Court, because Congress has simply not afforded the Comptroller exclusive authority to enforce fair-lending laws with respect to national banks.[12]

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11. OCC also asserts (at 42 n.7) that private suits ensure compensation for victims of discrimination, but suits by state attorneys general serve the very same interest. *See*, *e.g.*, N.Y. Executive Law § 63(12) (authorizing the Attorney General to obtain "restitution and damages").

12. Even as to OCC's core mission of overseeing banks' safety and soundness, its informal and confidential supervisory approach has increasingly come under fire. *See*, *e.g.*, Office of the Inspector Gen., U.S. Dep't of Treasury, *Safety and Soundness: Material Loss Review of ANB Financial*, *National Association*, at 13 (2008), *available at* http://www.treas.gov/inspector-general/audit-reports/2009/oig09013.pdf (last visited April 12, 2009); *Consumer Protections in Financial Services: Past Problems*, *Future Solutions: Hearing Before the S. Comm. on Banking*, *Hous.*, *& Urban Affairs*, 111th Cong. 18-19 (2009) (statement of Patricia J. McCoy, George J. & Helen M. England Professor of Law, University of Connecticut School of Law), *available at* http://banking.senate.gov/public/index.cfm?FuseAction=Hearings.Hearing&Hearing_ID=11be680d-04db-42cc-89bf-7fe4ffe4d9cd (follow links) (last visited April 19, 2009).

Moreover, enforcement by state attorneys general carries its own considerable benefits toward the goal of ending lending discrimination. Because attorneys general are more familiar with local conditions than OCC, they often learn of the practices that are harming residents and communities before federal regulators do. And the accountability of elected attorneys general to local residents creates strong incentives to enforce fair-lending laws vigorously. By contrast, OCC's close relationship with banks and dependence on bank assessments for funding may dampen its fair-lending enforcement. The possibility of state enforcement action may provide a useful check against such complacency by OCC, and in particular cases, enforcement by state or local officials may actually spur OCC to action. See Brief of *Amici Curiae* Center for Responsible Lending, et al., at 24 (discussing the Providian National Bank case).

## CONCLUSION

For the foregoing reasons, and those stated in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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