No. 05-1342

In the Supreme Court of the United States

LINDA A. WATTERS, in her official capacity as Commissioner of the Michigan Office of Financial and Insurance Services,

Petitioner,

v.

WACHOVIA BANK, N.A. and WACHOVIA MORTGAGE CORPORATION,

Respondents.

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

REPLY BRIEF FOR THE PETITIONER

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For six years, Wachovia Mortgage complied in full with the Michigan laws that it now claims are preempted as a result of a corporate reshuffling in 2003 that resulted in Wachovia Bank, N.A.—long a sister company—becoming its parent corporation. Thus, for six years, Wachovia Mortgage registered in Michigan to engage in the business of making mortgage loans, paid an annual fee to renew that registration, submitted financial statements and annual reports to the Commissioner of the Michigan Office of Financial and Insurance Services (OFIS), retained documents related to those statements and reports for possible examination by the Commissioner, and was subject to investigation by OFIS for consumer complaints that federal regulators were not adequately pursuing. *See* Pet. Br. 7-8; JA 19a. Tellingly, despite this significant experience with State regulation, Wachovia Mortgage has nothing specific to say about the interference it alleges would result from the requirement that it comply with such registration and reporting requirements in multiple States.

Even aside from this failure to substantiate its claim that complying with those State-law requirements "prevent[s] or significantly interfere[s] with" either Wachovia Bank's or Wachovia Mortgage's exercise of a power granted to national banks, *Barnett Bank of Marion County, N.A. v. Nelson*, 517 U.S. 25, 33 (1996), Respondents ignore that Congress spoke directly to the issue of the Office of the Comptroller of the Currency's (OCC) authority to regulate national bank affiliates, such as operating subsidiaries. In 12 U.S.C. § 481, Congress gave the OCC visitorial authority over national bank affiliates—and there is no dispute that an operating subsidiary is one kind of affiliate—that is limited and derivative of the more extensive visitorial powers Congress gave the OCC with respect to national banks. In 12 U.S.C. § 484, Congress made the OCC's visitorial powers exclusive as to national banks only. This clear statutory language—which must be interpreted in light of background corporate-law principles and the presumption against preemption—precludes the claims of Respondents and their *amici* that Congress granted the OCC full and exclusive

visitorial powers over one class of State-chartered affiliates of federally chartered national banks. Nor is there any merit to their claims that the implied definition of operating subsidiaries in the Gramm-Leach-Bliley Act (GLBA) altered Congress's long-standing allocation of visitorial powers in § 481.

Because Congress unambiguously has not given the OCC either full or exclusive visitorial powers over any national bank affiliates, the Court should find that the OCC's regulations asserting both full and exclusive visitorial powers over operating subsidiaries are unlawful. The Court need not reach the question of the deference due to the OCC's regulations. But, even if there were any ambiguity in the statute, no deference is due those regulations. First, Congress did not grant the OCC the authority to adopt preemptive regulations of the type challenged here. Second, the OCC itself did not, in promulgating the regulations at issue here, make a policy decision in favor of preemption; instead, it made a guess about what courts would likely do. Third, agency rules purporting to preempt State laws are not entitled to deference.

Finally, the Tenth Amendment prevents the OCC from preempting the State laws at issue here. The practical effect of the OCC's regulations is to transform State-chartered companies into "creatures of the federal government" without the State's consent. *Hopkins Fed. Sav. & Loan Ass'n v. Cleary*, 296 U.S. 315, 335 (1935). This transformation is especially offensive under the Tenth Amendment, because the OCC claims that its regulations preclude the States, including the State Attorneys General and State Banking Commissioners, from vindicating important policy objectives associated with the States' historic police powers, including the protection of citizens from predatory and abusive mortgage-lending practices.

I. In the National Bank Act, Congress withheld from the OCC both full and exclusive visitorial powers over national bank affiliates.

A. Sections 481 and 484 preclude the OCC regulations purporting to preempt State authority over operating subsidiaries.

There is no dispute that an operating subsidiary is an "affiliate" within the meaning of 12 U.S.C. § 221a(b) and is not itself a "national bank." *See* Resp. Br. 29; U.S. Br. 18; Pet. Br. 13-14; NCSL Br. 22-23; NAR Br. 6-8. In § 481, Congress expressly addressed the OCC's authority to examine both national banks and their affiliates. As to national banks, Congress gave the OCC the power to "examine every national bank as often as the [OCC] shall deem necessary" and the "power to make a thorough examination of all the affairs of the bank." 12 U.S.C. § 481. In stark contrast to its expansive authority to examine national banks, the OCC has only limited authority to examine the affiliates of a national bank. Congress provided that, "in making the examination of any national bank," the OCC may "examin[e] . . . the affairs of all its affiliates," but only "as shall be necessary to disclose fully the relations between [the] bank and [its] affiliates and the effect of such relations upon the affairs of [the] bank." *Id.* In other words, the OCC has no authority to investigate affiliates in their own right, but may do so only as an aid in making its "full and detailed report of the condition of [the national] bank." *Id.*

Congress went on to provide that, with respect to national banks, the visitorial powers assigned to the OCC are exclusive: "No national bank shall be subject to any visitorial powers except as authorized by Federal law." *Id.* § 484(a).[1] But that

[1] Section 371(a), on which Respondents and the United States rely, similarly applies only to "national banking association[s]," 12 U.S.C. § 371(a), a term that is defined to be "synonymous and interchangeable" with the term "national bank," *id.* § 221. That section, therefore, also does not grant the OCC any authority, let alone exclusive authority, over national banks' affiliates. *See* Pet. Br. 15-16; NCSL Br. 21-22.

section does not make exclusive even the OCC's limited authority to "visit" national bank affiliates—it contains no mention of affiliates. Those provisions of the National Bank Act (NBA) must be interpreted consistent with the "basic tenet of American corporate law" that a "corporate parent" and its "subsidiaries" are "distinct entities." *Dole Food Co. v. Patrickson*, 538 U.S. 468, 474-75 (2003). Thus, if Congress had meant for the exclusive authority it granted to the OCC to apply to both national banks and some of their affiliates (such as operating subsidiaries), it would have said so expressly; but Congress instead made clear that the limited and non-exclusive authority conferred in § 481 applies to "*all* [of a national bank's] affiliates." 12 U.S.C. § 481 (emphasis added).[2] Moreover, where Congress has intended to draw distinctions between and among national bank affiliates, it has done so expressly and for limited purposes. *See, e.g.*, *id.* §§ 371c(b)(1)-(2)(A) (exempting certain national bank affiliates from restrictions on inter-company transactions), 371c-1(d)(1) (same).

Respondents and their *amici* have little to say in response to the clear language of § 481. Respondents' primary contention is that, because §§ 481 and 484, as well as the definition of affiliate in § 221a(b), were enacted before the OCC authorized operating subsidiaries, those Congresses cannot have had any intention with respect to that class of affiliates. Resp. Br. 29; U.S. Br. 18. But that ignores that Congress purposefully chose extremely broad language in those sections—referring to "all" affiliates in § 481 and defining "affiliate" in § 221a(b) as "any" entity that a national bank, "directly or indirectly, owns or controls." As this Court has said before, "the fact that a statute can be applied in situations not expressly anticipated by Congress does not demonstrate ambiguity. It demonstrates

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[2] *See Dole Food*, 538 U.S. at 476 (requiring Congress to "indicat[e] that [it] intended . . . to depart from the general rules regarding corporate formalities"); *United States v. Bestfoods*, 524 U.S. 51, 62 (1998) (holding that, "against this venerable common-law backdrop, . . . congressional silence is audible").

breadth." *Pennsylvania Dep't of Corrections v. Yeskey*, 524 U.S. 206, 212 (1998) (internal quotation marks omitted). In addition, after the OCC authorized the use of operating subsidiaries, Congress enacted provisions, such as §§ 371c and 371c-1, that distinguish between and among types of affiliates expressly. Yet, despite the fact that Congress has amended §§ 481 and 484 on numerous occasions since 1980, Congress has not seen fit to add language to those sections that would extend the OCC's full and exclusive visitorial powers over national banks to their operating subsidiaries. For these reasons, Congress's chosen language in §§ 481 and 484 can no more be read to grant the OCC full and exclusive visitorial powers over operating subsidiaries than the Bank Holding Company Act could be read to include "nonbank banks." *See Board of Governors of Fed. Reserve Sys. v. Dimension Fin. Corp.*, 474 U.S. 361 (1986); Pet. Br. 14-15.

Respondents and the United States do not dispute this, but assert that the OCC "has not redefined the term 'national bank' in Section 484" and instead is interpreting the scope of "a national bank's incidental powers under Section 24 Seventh." Resp. Br. 31; *see* U.S. Br. 17. But, as the Ninth Circuit correctly found, the OCC itself had "conclu[ded] that § 484(a) . . . foreclose[d] the exercise of [visitorial powers over operating subsidiaries] by the states." *Wells Fargo Bank N.A. v. Boutris*, 419 F.3d 949, 964 (9th Cir. 2005); *see* 69 Fed. Reg. 1895, 1900 (2004). In addition, § 24 (Seventh) describes the powers of national banks, not the OCC, and cannot be used to confer on the OCC full and exclusive visitorial powers beyond those set forth expressly in §§ 481 and 484(a). *See* Pet. Br. 21-22; NAR Br. 17-19; NCSL Br. 23-24.

B. Applicable interpretive principles all support Petitioner's interpretation of §§ 481 and 484.

At least three well-established rules of statutory interpretation—the presumption against preemption, the clear-statement rule of *Gregory v. Ashcroft*, 501 U.S. 452 (1991), and the canon of constitutional avoidance—all lead to the same

result as the plain language of §§ 481 and 484(a): Congress withheld from the OCC both full and exclusive visitorial powers over all national bank affiliates. The first two principles require a clear statement from Congress before the Court will find that a statute supersedes "the historic police powers of the States," *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)—including the registration and monitoring of foreign corporations operating within their borders and the protection of their consumers from the actions of such corporations—or "upset[s] the usual constitutional balance of federal and state powers," *Gregory*, 501 U.S. at 460. It is undisputed that the National Bank Act contains no clear statement granting to the OCC the authority it has claimed in its regulations. The third principle counsels in favor of the construction of a statute that avoids "grave and doubtful constitutional questions," *United States ex rel. Attorney Gen. v. Delaware & Hudson Co.*, 213 U.S. 366, 408 (1909), such as those presented by Respondents' and the OCC's interpretation, which violates the Tenth Amendment. *See* Pet. Br. 22-28.

Respondents and the United States claim that the presumption against preemption does not apply because of a history of "'significant federal presence'" in the regulation of national banks. Resp. Br. 23 (quoting *United States v. Locke*, 529 U.S. 89, 108 (2000)); *accord* U.S. Br. 22. But such claims ignore that "in 1870 and thereafter this Court held that federally chartered banks are subject to state law" and "found numerous state laws applicable to federally chartered banks." *Atherton v. FDIC*, 519 U.S. 213, 222-23 (1997). This extensive history of State regulation of national banks is set out at length in *Atherton*, *id.* at 219-26, but ignored entirely by Respondents and the United States.[3] Congress, moreover, ratified the States'

[3] *See also National Bank v. Commonwealth*, 76 U.S. (9 Wall.) 353, 362 (1870) (declaring that national banks "are subject to the laws of the State"). In *Commonwealth*, moreover, the Court rejected the claim—echoed by Respondents (Br. 23)—that *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819), immunized national banks from State legislation. *See* 76 U.S. (9 Wall.) at 361-62; *see also Osborn v. Bank of United States*, 22 U.S.

authority in 1994, when it enacted the Riegle-Neal Act. *See* Pet. Br. 2-3; NCSL Br. 11-12. State regulation of operating subsidiaries, therefore, is fundamentally different from the types of State vessel equipment and operating standards at issue in *Locke*, where the Court found that "Congress has legislated in the field from the earliest days of the Republic, creating an extensive federal statutory and regulatory scheme," and there is no history that supports an "assumption that concurrent regulation by the State is a valid exercise of its police powers." 529 U.S. at 108. Instead, the applicable rule is stated by *CTS Corp. v. Dynamics Corp. of America*, 481 U.S. 69, 86 (1987), where the Court held that the "longstanding prevalence of state regulation in this area suggests that, if Congress had intended to pre-empt all state laws . . . , it would have said so explicitly."

Equally misplaced are claims that *Barnett Bank* rejects the applicability of the presumption against preemption in the interpretation of the National Bank Act. *See* Resp. Br. 23; U.S. Br. 23. Indeed, *Barnett Bank* contains no mention of the presumption against preemption. The question in *Barnett Bank*, moreover, was "whether a federal statute that permits national banks to sell insurance in small towns pre-empts a state statute that forbids them to do so." 517 U.S. at 27. In answering that question—which is not the question presented here[4]—the Court

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(9 Wheat.) 738, 859-60 (1824) (Marshall, C.J.) (explaining that *McCulloch* was based on the fact that the Second Bank of the United States was "a public corporation" and that, if it had been a "mere private corporation" (which Wachovia Bank is), it "would certainly be subject to the taxing power of the State").

[4] Nothing in the challenged Michigan laws forbids a national bank from owning or conducting business through an operating subsidiary. For the same reason, Respondents and the United States err in relying on this Court's statement in *Barnett Bank* that, "where Congress has not expressly conditioned the grant of 'power' upon a grant of state permission, the Court has ordinarily found that no such condition applies." 517 U.S. at 34; *see* Resp. Br. 21-22; U.S. Br. 27. Petitioner does not claim—as the State of Florida did in *Barnett Bank*—that the State of Michigan can exercise a State-law prohibition on a national bank undertaking activities through an operating subsidiary.

explained that it "must ask whether or not the Federal and State Statutes are in 'irreconcilable conflict' " or whether, as the State claimed, the federal statute merely grants "permission to sell insurance to the extent that state law also grants permission to do so." *Id.* at 31 (emphasis omitted). In the context of rejecting the State's claim about the meaning of that federal statute, this Court noted that "grants of both enumerated and incidental 'powers' to national banks" are "not normally limited by, but rather ordinarily pre-empt[], contrary state law." *Id.* at 32. Restating that same point later in the opinion, the Court explained that "the pre-emptive scope of statutes . . . granting a power to national banks" is such that a State cannot "forbid, or . . . impair significantly, the exercise of a power that Congress explicitly granted." *Id.* at 33.

Barnett Bank, therefore, does not hold that the presumption against preemption does not apply in a case, such as this one, where there is no irreconcilable conflict between federal and State law. Instead, *Barnett Bank* does nothing more than restate basic principles of conflict preemption, making clear that the National Bank Act preempts State law that is contrary to—that is, irreconcilably conflicts with—federal law because it forbids or significantly impairs the exercise of a power Congress granted. This Court stressed that point by expressly stating that the National Bank Act does "not . . . deprive States of the power to regulate national banks, where (*unlike here*) doing so does not prevent or significantly interfere with the national bank's exercise of its powers." *Id.* (emphasis added). In this case, the evidence of Wachovia Mortgage's six years of compliance with the Michigan laws at issue—and its inability to identify any specific, significant impairment or irreconcilable conflict—demonstrates that these laws can readily coexist with federal law.[5]

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[5] Respondents and their *amici* largely dispute the applicability of the *Gregory* clear-statement rule and the canon of constitutional avoidance solely on the basis of their claims regarding the Tenth Amendment. *See* Resp. Br. 49-50;

C. The implicit definition of operating subsidiaries in the Gramm-Leach-Bliley Act did not expand the OCC's authority over operating subsidiaries or preempt the State laws at issue here.

Respondents argue at length that Congress's 1999 enactment of the GLBA, which added a definition of "financial subsidiary" to the National Bank Act, had the effect of extending the OCC's exclusive visitorial powers over national banks, as set forth in §§ 481 and 484(a), to cover operating subsidiaries. *See* Resp. Br. 18-20, 25, 30-31, 39, 40.[6] Such an interpretation contravenes the many clear-statement and similar interpretive rules applicable here, including those set forth in *Dole Food*, *Gregory*, and *Rice*. Their claim also conflicts with the basic principle that Congress "does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes." *Whitman v. American Trucking Ass'ns, Inc.*, 531 U.S. 457, 468 (2001). It strains credulity to suggest that Congress, in adding a definition that only inferentially acknowledges the existence of operating subsidiaries, radically altered the OCC's and the States' respective authority, in place for more than 130 years, over national bank affiliates.

In any event, the text of that definition cannot bear the weight Respondents place on it. In the GLBA, Congress provided that, for purposes of the new § 24a, the term "financial subsidiary" excludes affiliates that "engage[ ] solely in activities that national banks are permitted to engage in directly and are conducted subject to the same terms and conditions that govern the conduct of such activities by national banks." 12 U.S.C.

U.S. Br. 30; ABA Br. 27-28. As shown below, those claims are without merit. *See infra* Part III.

[6] The United States does not follow Respondents in placing such weight on that definition, claiming only that it "fortifie[s]" the (erroneous) "conclusion that the Act preempts [the] state[ ]" laws at issue here. U.S. Br. 28.

§ 24a(g)(3)(A).[7] Thus, the excluded affiliates are those that solely conduct activities that a national bank can "engage in directly" and that "conduct[ ]" those activities pursuant to the same rules that "govern the *conduct* of . . . national banks." *Id.* (emphasis added). These affiliates, therefore, are defined by what they do, not who regulates them.

The OCC's contemporaneous response to this new definition, moreover, conflicts with Respondents' current claims. At the time Congress enacted the GLBA, OCC regulations promulgated in 1996 permitted a national bank's operating subsidiaries to engage in activities that the national bank could not lawfully conduct itself. *See* 12 C.F.R. § 5.34(f) (1999). Immediately following the enactment of the GLBA, the OCC amended its regulations to rescind its 1996 rule and narrow its definition of operating subsidiary. In doing so, the OCC did not suggest that the GLBA had extended its authority over national banks to reach operating subsidiaries. Instead, it simply noted that, contrary to its 1996 rule, "the GLBA makes clear that an operating subsidiary may engage only in activities that are permissible for the parent bank to engage in directly."[8] In rescinding the 1996 regulation, moreover, the OCC was following Congress's intent, as set forth in the conference

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[7] Section 24a imposes a host of substantive duties on financial subsidiaries and the national banks that own them, including requirements pertaining to capital levels, managerial ratings, and community reinvestment standards. *See* 12 U.S.C. § 24a(a)-(f). Affiliates that meet the definition in § 24a(g)(3)(A) are exempted from those duties.

[8] *See* 65 Fed. Reg. 12,905, 12,909 (2000). The OCC, however, adopted a rule that deviates from Congress's definition, by asserting that an operating subsidiary "conducts activities . . . pursuant to the same *authorization*, terms and conditions that apply to the conduct of such activities by its parent national bank." 12 C.F.R. § 5.34(e)(3) (emphasis added). The OCC offered no explanation for its addition of the word "authorization," which does not appear in § 24a(g)(3)(A). The OCC's reference to the national bank's "authorization" from the OCC ignores an "irreducible difference between national banks and their operating subsidiaries": the former are "directly chartered by the federal government," while the latter "are incorporated under a state's law." *Boutris*, 419 F.3d at 965.

committee report, that it alter its regulations. *See* H.R. Conf. Rep. No. 106-434, at 160 (1999).

Finally, immediately prior to the enactment of the GLBA, the OCC rejected a request that it "clarify that its exclusive visitorial powers extend to operating subsidiaries of national banks." 64 Fed. Reg. 60,092, 60,095 (1999). In other words, the OCC was asked in 1999 to make the same determination of its authority that is at issue here. The OCC noted that its regulations at the time provided that "each operating subsidiary is subject to examination and supervision by the OCC." *Id.* (citing 12 C.F.R. § 5.34(d)(3) (1999)).[9] The OCC then rejected the requested clarification, explaining that its regulation "does not mean . . . that [its] jurisdiction necessarily is exclusive over a given subsidiary" and listing, as an example of other regulators that might have authority over a given subsidiary, "a *state* insurance department." *Id.* (emphasis added). Because Congress is presumed to be cognizant of relevant administrative rulings when it adopts legislation, *see*, *e.g.*, *Lindahl v. Office of Personnel Mgmt.*, 470 U.S. 768, 782-83 (1985), its subsequent enactment of § 24a(g)(3)(A)—if it has any substantive import at all—can only be read as ratifying the OCC's view that it does *not* have exclusive visitorial powers over operating subsidiaries.

* * *

For all these reasons, the National Bank Act unambiguously does not preempt the Michigan laws at issue here. For the same reasons, the OCC's regulations—including 12 C.F.R. §§ 7.4006, 34.1(b), and 34.4(a)(1)—that purport to preempt those Michigan laws exceed the limited and non-exclusive visitorial powers over national bank affiliates that Congress granted to the OCC. The court below erred in finding otherwise, and its decision should be reversed.

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[9] The regulation did not state either that the OCC's authority over operating subsidiaries was exclusive or that it was greater than its authority over all affiliates, as set forth in § 481.

II. Even if the National Bank Act were ambiguous, the OCC's assertion of authority to preempt State regulation of operating subsidiaries is not entitled to deference and should be rejected as unpersuasive.

As this Court has recently reaffirmed, "*Chevron* deference . . . is not accorded merely because the statute is ambiguous and an administrative official is involved." *Gonzales v. Oregon*, 126 S. Ct. 904, 916 (2006). Instead, a further precondition to the application of such deference is that Congress delegated authority to that administrative official or agency. *See id.*; *United States v. Mead Corp.*, 533 U.S. 218, 226-27 (2001). Congress uses a standard formulation when it intends to "give[ ] an agency broad power to enforce all provisions of [a] statute," *Gonzales*, 126 S. Ct. at 916—it gives the agency the authority to "prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of" a statute or set of statutory provisions.[10] While Congress used that language in granting the OCC rulemaking authority with respect to specific statutory provisions, *see* 12 U.S.C. §§ 92a(j), 211(a), the delegation of authority on which the OCC relied here—12 U.S.C. § 93a—does not employ that formulation. Instead, in that section, Congress gave the OCC only "authori[ty] to prescribe rules and regulations to carry out the responsibilities of the office." *Id.*

This delegation is tied to the OCC's "responsibilities" in the same way that the delegation to the Attorney General in 21 U.S.C. § 871(b) is tied to his statutory "functions." In *Gonzales*, the Court found that such a delegation allows the administrative official "to best determine how to execute" those

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[10] *E.g.*, 47 U.S.C. § 201(b), *cited in Gonzales*, 126 S. Ct. at 916; *see* 15 U.S.C. § 1604(a) (similar); *see also, e.g.*, 7 U.S.C. § 12a(5) (authorizing promulgation of regulations "to effectuate any of the provisions or to accomplish any of the purposes of this chapter"); *id.* § 87e(a) (authorizing promulgation of rules that "the Secretary deems necessary to effectuate the purposes or provisions of this chapter"); 15 U.S.C. § 717*o* (authorizing promulgation of regulations found "necessary or appropriate to carry out the provisions of this chapter").

functions or responsibilities, but does not include the authority to "define the substantive standards" under the statute. 126 S. Ct. at 919. As the Court went on to explain, when Congress chooses to delegate broad rulemaking authority to an agency, "it does so not by referring back to the administrator's functions but by giving authority over the provisions of the statute he is to interpret." *Id.* at 920.[11] The contentions of Respondents and the United States that § 93a is "unusually broad" and "encompasses any statute administered by the Comptroller," Resp. Br. 37-38; U.S. Br. 15 n.4, cannot be squared with the Court's holding in *Gonzales*. Therefore, the OCC's claim to deference stumbles at the first hurdle—and this is true regardless of whether the deference at issue is called *Chevron*,[12] *de la Cuesta*,[13] or *Shimer*,[14] as all of those doctrines require that Congress has delegated sufficient authority to the agency. *See* Pet. Br. 33-34; States Br. 7-10; Center Br. 4; NCSL Br. 15-18.[15]

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[11] Contrary to the claims of Respondents and the United States, 12 U.S.C. § 43 confirms—and does not call into question—the limited authority Congress conferred in § 93a. *See* Resp. Br. 12, 22 n.11, 36; U.S. Br. 15. In § 43, Congress imposed special procedures that the OCC must follow "[b]efore issuing any opinion letter or interpretive rule" that sets forth the agency's view that federal law preempts State law. 12 U.S.C. § 43(a). Notably absent from § 43 is any reference to *legislative* rules, confirming that Congress has not delegated broad, substantive rulemaking authority on the OCC, but instead has expressly limited that agency's inherent authority to express its views through non-binding statements. *See* Center for State Enforcement of Antitrust and Consumer Protection Laws (Center) Br. 18-19.

The Administrative Procedure Act, in contrast, exempts such non-binding statements of agency views from such procedures, *see* 5 U.S.C. § 553(b), and those statements lack the force of law. *See Mead*, 533 U.S. at 234.

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

[13] *Fidelity Fed. Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141 (1982).

[14] *United States v. Shimer*, 367 U.S. 374 (1961).

[15] The *amici* Law Professors elide this issue and pretend that § 93a uses Congress's standard language for delegating rulemaking authority. *See* Law Prof. Br. 27-28 (asserting that § 93a "empowers the OCC to issue 'rules and regulations' enforcing the NBA"). Nor is there any merit to their implication that the Court has already determined that § 93a is the type of delegation that

In addition, even assuming that Congress granted the OCC sufficient authority to adopt preemptive regulations, there is no indication that the OCC, in promulgating the regulations at issue here, made a policy determination that preemption is warranted. In adopting 12 C.F.R. § 7.4006, which asserts that "State laws apply to national bank operating subsidiaries to the same extent that those laws apply to the parent national bank," the OCC expressly asserted that this section "does *not* effect preemption of any State law" and instead reflects the OCC's best guess about the decision "a Federal court would reach, *even in the absence* of the regulation." 66 Fed. Reg. 34,784, 34,790 (2001) (emphases added). Applying deference to such a rule would be pure bootstrapping, as it would turn the OCC's prediction of how courts *will* act into a determinant of how courts *must* act. Nor can the OCC's statement be explained away, as Respondents and the United States attempt to do, by pointing to the OCC's adoption of its current operating-subsidiary rule in 2000. *See* Resp. Br. 34 n.19; U.S. Br. 11 n.1. In promulgating that earlier regulation, the OCC said nothing at all about any preemptive intent, and instead made clear that it was simply rescinding the existing definition of operating subsidiaries that Congress rejected in the GLBA. *See* 65 Fed. Reg. at 12,908-09; *supra* Part I.C.

Finally, *Chevron* deference to the OCC regulations at issue is not warranted because agency preemption determinations are not entitled to such deference unless Congress specifically delegates the authority to make preemption determinations having the force of law. This is so because, among other reasons, administrative agencies are not institutionally suited to take into account the serious federalism implications of displacing State law, are prone to expand their own power by eliminating competing regulators, and have no special

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triggers *Chevron* deference. *See id.* at 28. Neither *Smiley v. Citibank (South Dakota), N.A.*, 517 U.S. 735 (1996), nor *NationsBank of North Carolina, N.A. v. Variable Annuity Life Insurance Co.*, 513 U.S. 251 (1995), so much as mentions § 93a.

competence in applying preemption doctrine. *See* Pet. Br. 31-37; Center Br. 8-15.

Respondents, the United States, and various supporting *amici* argue at length that this Court's precedents "conclusively establish" (U.S. Br. 15) or "demonstrate" (Law Prof. Br. 8) that agency preemption determinations are entitled to *Chevron* deference. In so arguing, they do precisely what this Court cautioned against in *Smiley*: "confus[ing] the question of the substantive (as opposed to pre-emptive) *meaning* of a statute with the question of *whether* a statute is pre-emptive." 517 U.S. at 744. The cases upon which Respondents and their *amici* rely deferred to agency determinations about substantive law, not agency assertions as to whether State law must be displaced.[16]

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[16] For example, in *Shimer*, the Court first concluded that Veterans' Administration (VA) regulations setting procedures for resolving certain indemnity actions against veterans conflicted with the different procedures prescribed by Pennsylvania law. Although the Court observed in this connection that the VA intended its regulations to supersede State law, 367 U.S. at 381, there is no suggestion in this part of the opinion that the Court was deferring in any way to the VA on the question of preemption. Only after independently finding a conflict between the two sets of procedures did the Court turn, in Part II of the opinion, to the question whether the VA had statutory authority to issue its regulation. Only on this question—what *Smiley* would later characterize as the question of substantive meaning—did the Court defer to the judgment of the VA, using language that anticipates the subsequent decision in *Chevron*. *See id*. at 383.

Likewise, in *de la Cuesta*, the Court independently concluded that the California rule prohibiting due-on-sale clauses conflicted with a Federal Home Loan Bank Board regulation permitting the adoption of such clauses. After finding a conflict, the Court turned, in Part IV of its opinion, to the question whether the Board had acted within the scope of its authority in promulgating the regulation, and found that the rule was permissible. As in *Shimer*, there is no suggestion that courts should defer to an agency on the question of preemption, as opposed to the meaning of federal law administered by the agency.

Finally, in *City of New York v. FCC*, 486 U.S. 57 (1988), the question was whether the Federal Communications Commission had authority to expressly preempt State and local regulations involving cable television signal quality. The Court concluded that Congress had delegated this extraordinary authority to the agency based primarily on recent legislation

It is precisely for this reason that the Court stated in *Smiley* that "[w]e may assume (without deciding) that the latter [preemption] question must always be decided *de novo* by the courts." *Id*. That statement would be incomprehensible if the Court's precedents already "conclusively establish[ed]" (U.S. Br. 15) that *Chevron* deference applies to agency determinations of preemption.

For all of these reasons, even if §§ 481 and 484, interpreted according to their plain terms and in light of applicable canons of statutory construction, do not resolve the question before the Court, the court below erred in deferring to the OCC's interpretation of those provisions. Because that interpretation is unpersuasive for the reasons set forth in Part I, the Court should reject the OCC's regulations and reverse the decision below.

III. The OCC's regulation violates the Tenth Amendment by effectively transforming State-chartered corporations into federal entities.

The Tenth Amendment precludes Congress from acting—even where the Commerce Clause grants Congress "legislative authority over the subject matter"—through statutes that "violate[ ] the principles of federalism contained in the Tenth Amendment." *Reno v. Condon*, 528 U.S. 141, 149 (2000). For this reason, Respondents and the United States wrongly assert that Congress's Commerce Clause authority over real estate lending confirms the constitutionality of the OCC's regulation purporting to preempt States from exercising visitorial powers over operating subsidiaries of national banks. *See* Resp. Br. 46-47; U.S. Br. 29-30. On the contrary, the fact that a federal law regulates "article[s] in interstate commerce does not

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that it construed as ratifying previous agency regulations preempting State regulation of cable television. *Id.* at 66-69. Notably, however, there was no suggestion that courts should defer to agency determinations of preemption where applicable statutes and regulations leave the question of preemption in doubt. Certainly, there was no suggestion that agencies are entitled to *Chevron* deference for their determinations that preemption is warranted. *Chevron* was not even cited.

conclusively resolve the constitutionality of the" law. *Reno*, 528 U.S. at 149. The Tenth Amendment inquiry goes further and requires consideration of whether federal law—here, the OCC's regulation—violates applicable principles of federalism.

In this case, the applicable principles are clearly enunciated by this Court's decision in *Hopkins Federal Savings & Loan Association v. Cleary*. Contrary to the claims of Respondents, *Hopkins* was not simply a case about whether federal law could "regulate corporate dissolution." Resp. Br. 48.[17] Instead, *Hopkins* involved Wisconsin's objection to a provision of the Home Owners' Loan Act of 1933 (HOLA) that permitted the "conversion [of] state associations into federal ones" irrespective of the "consent of the state or compliance with its laws." 296 U.S. at 332.[18] Wisconsin objected that, as a result of this conversion, it was stripped of its authority to subject building and loan organizations organized in that State to "supervision by the administrative agencies of the state . . . in the course of doing business." *Id.* at 328. This supervision included the requirement that organizations annually "submit to the commissioner a report of their condition," as well as the authority of the commissioner to "take charge of the business" of an organization if its "business has been conducted in a manner contrary to law." *Id.* at 329.

The Court found that this provision of HOLA was "an unconstitutional encroachment upon the reserved powers of the states" in violation of the Tenth Amendment because that provision stripped the States of authority over "matters of governmental policy," such as how those organizations "shall be

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[17] Equally misplaced is *amici* American Bankers Association's claim that *Hopkins* held, instead, only that "federal law cannot confer on [a State-chartered] institution powers that the state charter has expressly denied it." ABA Br. 29.

[18] The comparable provision of the National Bank Act at that time—as it does today—permitted a State bank to convert into a national bank, provided that the conversion is " 'not . . . in contravention of the State law.' " *Hopkins*, 296 U.S. at 333-34 (quoting 12 U.S.C. § 35).

. . . maintained and supervised." *Id.* at 335, 337. The Court did not dispute Congress's authority to create federal building and loan associations, but held that the "critical question" was whether that power carried with it the power to take "corporations created by the states and turn them into different corporations created by the nation." *Id.* at 336. The Court held that Congress lacked that additional power and, therefore, that this provision of HOLA was "an illegitimate encroachment . . . upon a domain of activity set apart by the Constitution as the province of the states." *Id.* at 338.

The OCC regulation challenged here effectuates the same kind of conversion as the statute struck down in *Hopkins*. Indeed, the OCC itself has concluded that State-chartered operating subsidiaries are the "equivalent" of—or, "in essence," the same as—internal divisions or departments of a federally chartered national bank. 66 Fed. Reg. at 34,788; 69 Fed. Reg. at 1900. The OCC's regulation thus transforms operating subsidiaries into national banks in all but name.[19] As in *Hopkins*, that transformation occurs over the objection of the chartering State; indeed, 49 States and the District of Columbia support Michigan's position here.[20] Finally, no different from *Hopkins*, that transformation is alleged to strip the State

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[19] *See* 12 U.S.C. § 22 (First) ("The name assumed by [a national bank] . . . shall include the word 'national.' ").

[20] *See* States Br. 1. This uniformity among the States is a sufficient basis for rejecting suggestions that no Tenth Amendment concerns are raised here because Wachovia Mortgage is chartered in North Carolina, not Michigan. *See* Resp. Br. 47; U.S. Br. 30. Such claims, moreover, ignore that the OCC's regulations do not distinguish between native and foreign corporations that are operating subsidiaries, but instead purport to convert all of them into national bank equivalents. In any event, it is well-settled that each State is "legitimately concerned with safeguarding the interests of its own people in business dealings with corporations not of its own chartering but who do business within its borders" and is entitled to "assur[e] responsibility and fair dealing on the part of foreign corporations coming into a State." *Union Brokerage Co. v. Jensen*, 322 U.S. 202, 208, 210 (1944). The OCC's regulation as applied to Wachovia Mortgage encroaches on that interest in the same manner as the HOLA provision struck down in *Hopkins*.

of authority to "supervis[e]" the entity "in the course of doing business" and to take action against that entity if its "business has been conducted in a manner contrary to law." *Hopkins*, 296 U.S. at 328-29. The OCC regulation, therefore, unconstitutionally encroaches "upon the reserved powers of the states" over "matters of governmental policy," such as how foreign corporations doing business in a State "shall be . . . supervised." *Id.* at 335, 337.

The violation of principles of federalism is particularly acute here, because the OCC's regulations purport to preempt not only the ministerial registration and reporting requirements applicable to companies such as Wachovia Mortgage, but also the right of OFIS to investigate consumer complaints and to enforce consumer-protection laws.[21] Among the laws that the court below held are preempted is MCL 445.1663(2). *See* Pet. App. 2a. That section provides that, when the Commissioner of OFIS receives a complaint against "a subsidiary of a federally chartered depository financial institution"—which includes an operating subsidiary such as Wachovia Mortgage—it must "immediately" send that complaint "to the appropriate federal regulatory authority." MCL 445.1663(2). The Commissioner of OFIS "shall make no investigation of the complaint" on her own "if the complaint is being adequately pursued by [that] federal regulatory authority," but may take action on the complaint if that is not the case. *Id.* This provision, therefore, is fully cooperative with any federal regulatory authority over such subsidiaries of federally chartered financial institutions, while at the same time recognizing that—as *amici* have shown

[21] The OCC has adopted an unlawfully broad definition of "visitorial powers," through which it has asserted the "exclusive . . . authority" to "[e]nforc[e] compliance with *any* applicable federal or *state* laws concerning" the federal banking activities conducted by an operating subsidiary. 12 C.F.R. § 7.4000(a)(2)-(3) (emphases added). The issue of the lawfulness of that regulation, however, is not presented here, but is presented in a case pending before the Second Circuit. *See* Pet. Br. 24; NAR Br. 14 n.18; *Clearing House Ass'n, LLC, et al. v. Spitzer*, Nos. 05-5996 & 05-6001 (2d Cir., to be argued Dec. 4, 2006).

here—federal regulators, and the OCC in particular, are not equipped to be the sole enforcers of all complaints against such subsidiaries. *See* AARP Br. 12-13; NCSL Br. 17.

Indeed, State consumer-protection efforts have proved critical in combating predatory lending. In December 2002, State officials secured a nationwide settlement of approximately $484 million with Household International, in one of the largest (if not the largest) settlements of a consumer-protection investigation involving mortgage-lending practices.[22] The Household settlement resulted from consumer complaints and investigations by the States into allegations of misrepresentations and failure to provide timely and adequate disclosures and descriptions of loan terms. Ameriquest entered into a similar settlement this year with 49 States and the District of Columbia. That settlement generated approximately $295 million in relief for consumers nationwide.[23] If either Household or Ameriquest had structured their lending operations in operating subsidiaries of a national bank, the OCC regulations challenged here would have precluded the States from obtaining redress for their citizens for the abusive practices that gave rise to these settlements.

CONCLUSION

The judgment of the Court of Appeals should be reversed.

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[22] The Household settlement directly impacted approximately 19,000 Michigan consumers alone, who received approximately $15.7 million in relief. *See, e.g.*, News Release, *OFIS Announces Distribution of $15.7 Million in Settlement Payments to Michigan Household/Beneficial Borrowers* (Aug. 5, 2003), *available at* http://www.michigan.gov/documents/cis_hhf_annmt_71225_7.pdf.

[23] *See generally* http://www.ameriquestmultistatesettlement.com/.

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