No. 08-453

IN THE
Supreme Court of the United States

ANDREW M. CUOMO, IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL FOR THE STATE OF NEW YORK,
Petitioner,

v.

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

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

BRIEF FOR RESPONDENT THE CLEARING HOUSE ASSOCIATION L.L.C.

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QUESTION PRESENTED

Was the New York State Attorney General properly enjoined from demanding records of national banks relating to their mortgage lending, and from commencing proceedings to enforce state laws against national banks based on their mortgage lending, because such demands and enforcement proceedings would constitute an exercise of "visitorial powers" prohibited by 12 U.S.C. § 484 and 12 C.F.R. § 7.4000, a regulation promulgated by the Office of the Comptroller of the Currency?

CORPORATE DISCLOSURE STATEMENT

Respondent The Clearing House Association L.L.C. is an association of leading commercial banks, some of which are national banks. The Clearing House has no parent corporation and no publicly held company owns 10% or more of its stock.

In this action the Clearing House asserted associational standing on behalf of its members, and the decree entered by the District Court specifically applies to national banks that were members of the Clearing House when the decree was entered: Bank of America, National Association; Citibank, N.A.; HSBC Bank USA, National Association; JPMorgan Chase Bank, National Association; LaSalle Bank National Association; U.S. Bank National Association; Wachovia Bank, National Association; and Wells Fargo Bank, National Association. All these banks are still members of the Clearing House except LaSalle Bank National Association and Wachovia Bank, National Association.

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STATEMENT

"To prevent inconsistent or intrusive state regulation from impairing the national [banking] system," *Watters* v. *Wachovia Bank, N.A.*, 550 U.S. 1, 11 (2007), the National Bank Act provides that "[n]o national bank shall be subject to any visitorial powers except as authorized by Federal law, [or] vested in the courts of justice," 12 U.S.C. § 484(a). A regulation adopted by the Comptroller of the Currency, 12 C.F.R. § 7.4000, confirms that this provision prohibits state officials from conducting regulatory investigations of banks chartered under the National Bank Act or otherwise seeking to enforce national banks' compliance with state laws that relate to the exercise of their federally-authorized banking powers.

This case arises from an effort by petitioner, the Attorney General of New York, to commence a "preliminary inquiry" (JA173a) into how certain banks priced mortgage loans secured by New York properties in 2004. That inquiry involved extensive information requests, and the threat of subpoenas and judicial enforcement actions, against a number of national banks, including members of respondent The Clearing House Association L.L.C. JA31a-33a. The courts below agreed with the Clearing House and respondent the Office of the Comptroller of the Currency (OCC) that petitioner should be enjoined from pursuing these state enforcement proceedings.

A. The Attorney General's Authority Under New York Law

New York gives its Attorney General broad authority to investigate potential violations of state or federal law, including the power to subpoena documents and witnesses. N.Y. Exec. Law § 63(12) (reprinted at Pet. Br. App. 1a-2a). Administrative subpoenas allow him to "take proof and make a determination of the relevant facts" before commencing litigation or taking any other formal enforcement action. *Id.* To defeat an action to quash a subpoena, the Attorney General need only show that the information demanded bears a "reasonable relation to the subject-matter under investigation and to the public purpose to be achieved." *La Belle Creole Int'l, S.A.* v. *Attorney-General*, 176 N.E.2d 705, 707 (N.Y. 1961) (internal quotation marks omitted). The Attorney General "routinely subpoenas individuals and/or companies, requiring them to produce information that is relevant to [his] investigations, and to testify under oath at subpoena hearings." JA153a.

These efforts, which may lead—often without any judicial involvement—to financial penalties, fundamental changes in the way covered entities do business, and continuing submission to oversight by the Attorney General, are part of the Attorney General's "long history of aggressive enforcement of state and federal consumer protection laws." JA153a. When directed at entities that are properly subject to regulation, supervision, and enforcement by state officials, they are perfectly permissible. The question here is whether federal law permits the Attorney General to employ the same methods to investigate the nature and propriety of lending decisions made by national banks.

B. The Mortgage-Lending Investigation

The investigation at issue here was begun in 2005 by former Attorney General Eliot Spitzer, after banks made disclosures under the federal Home Mortgage Disclosure Act, 12 U.S.C. §§ 2801-2810 (HMDA). The disclosures reported price data based on annual percentage rates for mortgage loans made in 2004 and certain demographic information about borrowers. *See* 12 C.F.R. §§ 203.4, 203.5. The Federal Reserve Board, which administers HMDA, and other federal agencies have cautioned that because HMDA data do not include critical factors such as credit scores, loan-to-value ratios, or consumer debt-to-income ratios, they do not by themselves establish whether any apparent disparities in loan pricing reflect legitimate differences among individual borrowers, or might instead suggest unlawful discrimination. *See, e.g.*, Federal Reserve Board, *et al.*, Joint Press Release, *Agencies Announce Updated An-*

swers To Frequently Asked Questions About HMDA Price Data (Apr. 3, 2006), *available at* http://www.federalreserve.gov/newsevents/press/bcreg/20060403a.htm (follow "Attachment" link); *see also* JA93a-94a.

In "'letters of inquiry'" (Pet. Br. 12) sent to various lenders less than three weeks after the HMDA data became available, petitioner's representatives suggested that the data were "troubling on their face." *E.g.*, JA173a. They observed that racial or ethnic disparities in loan pricing might violate state and federal antidiscrimination laws "unless legally justified" (*id.*)—as they would be if, for example, they were explained by credit history or other nondiscriminatory factors not revealed by the HMDA data. The letters indicated that petitioner had commenced a "preliminary inquiry" into the matter. *Id.*; *see also* JA168a-183a.

As an example of a law that might be implicated, the inquiry letters cited New York Executive Law § 296-a. *See, e.g.*, JA173a. That law, reprinted at Pet. Br. App. 2a-9a, prohibits discrimination in lending, but recognizes that it is not discriminatory to make decisions based on "factually supportable, objective differences in applicants' overall credit worthiness, which may include reference to such factors as current income, assets and prior credit history." *Id.* at 4a (§ 296-a(3)). On its face, the law commits enforcement principally to the state Superintendent of Banks, who may issue regulations, receive complaints, determine whether they are supported by "probable cause," conduct hearings, and find violations. *Id.* at 5a-9a (§ 296-a(6)-(11)); *see also* N.Y. Banking Law § 9-d. The Attorney General asserts parallel authority to investigate and remedy violations of § 296-a under the general authority conferred by Executive Law § 63(12).

Petitioner's inquiry letters, written "[i]n lieu of issuing a formal subpoena," asked recipient banks to produce two categories of information. *E.g.*, JA173a. First, the letters sought HMDA data for loans or applications involving New York properties. Second, they sought substantial amounts of non-public data and materials addressing the "business considerations" underlying the pricing of all the reported loans. *E.g.*, JA173a-175a. The requests included:

- "A list and explanation of all variables that determined the APRs for 2004 HMDA reportable loans (*e.g.*, credit score, loan-to-value ratio), and any formulas or algorithms that were used to calculate such rates";
- "An extract of every computer database containing basic loan conditions (*e.g.*, term of loan, fixed or floating rate, etc.), information used to determine APRs, or any other variables for 2004 HMDA reportable loans";
- A list and explanation of every HMDA-reportable loan product; and
- "All policies and procedures concerning the circumstances under which the APR offered to a loan applicant may depart (upward or downward) from the rate determined by application of any formulas or algorithms referenced above, and all policies and procedures concerning approval and monitoring of the origination of such loans."

E.g., JA174a-175a. In later conversations, petitioner's office advised that these requests represented "only the first stage" of the inquiry, and that petitioner "anticipated requesting substantial additional documents and information as [the] inquiry continued." JA46a.

All banks are required to disclose HMDA data to the public on request, 12 C.F.R. § 203.5(c), and the national banks that received inquiry letters produced that data as requested. JA36a, JA127a. The banks declined, however, to produce other information concerning their loan practices and specific credit decisions, on the ground that petitioner's request for such information amounted to an exercise of supervisory or "visitorial" power that the National Bank Act reserves to the Comptroller. JA36a, JA55a. One bank explained that petitioner's request for detailed lending information was typical of requests it would expect to receive in connection with examination by OCC. JA55a. Another informed OCC of petitioner's request, pursuant to OCC Advisory Letter 2002-9 (JA77a-86a), and offered to respond to any additional requests for information *from OCC* in connection with OCC's own ongoing review and analysis of the bank's HMDA data. *See* JA45a, JA77a, JA85a-86a.

In May 2005, petitioner's office told one bank that it was in "ongoing discussions" with OCC regarding "jurisdictional issues," but that petitioner would "'probably'" subpoena information the bank had not provided. JA45a-46a. In June, the office advised that petitioner had reached no agreement with the Comptroller; that the office "was committed to continuing its inquiry"; and that unless the bank provided the information, petitioner would either issue an administrative subpoena or file a state lawsuit "'within the next few days.'" JA46a.

This litigation followed.

SUMMARY OF ARGUMENT

Since 1864, the National Bank Act has prohibited state officials from exercising "visitorial powers" over national banks unless authorized to do so by federal law. 12 U.S.C. § 484. That statutory prohibition by itself bars the investigation petitioner sought to undertake into pricing decisions made by national banks in making real estate loans—a banking activity expressly authorized by federal law. *Id.* § 371(a). In addition, OCC has promulgated a regulation implementing § 484 in a way that, if valid, bars petitioner's state enforcement proceedings. That regulation was issued after full notice and comment, rests on a reasonable (indeed, correct) interpretation of the statute, falls well within Congress's delegation of authority to the Comptroller, and is entitled to deference.

I. This Court considered § 484's "visitorial powers" language just two years ago, concluding that it prohibited state officials from exercising "examination and enforcement authority over mortgage lending, or any other banking business done by national banks." *Watters* v. *Wachovia Bank, N.A.*, 550 U.S. 1, 14-15 (2007). That conclusion is consistent with the text and purposes of the National Bank Act, including historical understandings of the terms that Congress used in making clear its intention to bar any "[d]iverse and duplicative superintendence of national banks' engagement in the business of banking." *Id.* at 13-14.

The point is confirmed by Congress's later consideration and amendment of what is now § 484 and related provisions. In the statute, Congress added specific exceptions allowing "visitorial" access to banks by Congress itself and by States in limited circumstances relating to state unclaimed-property or escheat laws.

12 U.S.C. § 484(a), (b). It considered proposals to create further exceptions for the specific purpose of allowing state enforcement of state consumer-protection or fair-lending laws, but it enacted no such measure. To the contrary, when Congress authorized interstate branch banking in 1994, it expressly addressed the enforcement of such state laws, but in doing so carefully preserved the historical division of enforcement authority between state officials (as to branches of state banks) and the federal Comptroller (as to branches of national banks).

This understanding of the statute makes sense, because subjecting national banks to discretionary investigation and enforcement decisions by multiple concurrent regulators would be "unduly burdensome and duplicative," *Watters*, 550 U.S. at 11, and "confusion would necessarily result," *Easton* v. *Iowa*, 188 U.S. 220, 232 (1903). Moreover, the public-prosecutor model of enforcement typified by petitioner's investigation here is incompatible with (and less effective than) the continuous and penetrating, but typically private, supervision process used by OCC.

Nothing in *First National Bank in St. Louis* v. *Missouri*, 263 U.S. 640 (1924), or any other decision of this Court supports petitioner's contrary reading of § 484.

II. OCC's regulation implementing the Act's "visitorial powers" restrictions, 12 C.F.R. § 7.4000, also bars petitioner's proposed enforcement actions. The regulation was promulgated (and then amended) after public notice and comment, pursuant to the Comptroller's broad authority to prescribe rules to carry out the responsibilities of his office. It fulfills a paradigmatic agency function, reasonably resolving any ambiguity as to the definition and scope of statutory terms. *See, e.g.*, *Smiley* v. *Citibank (S.D.), N.A.*, 517 U.S. 735, 740-741 (1996). Like the regulation that defined "interest" in the National Bank Act provision at issue in *Smiley*, which displaced any otherwise applicable state regulation of the "interest" charged by national banks, OCC's regulation construes the substantive terms of § 484 and clarifies its limitations on state enforcement. As in *Smiley*, the regulation is entitled to deference so long as its implementation of the statute is reasonable, as it plainly is.

None of petitioner's arguments warrants any departure from ordinary principles of deference. There is no presumption against preemption in a case involving state efforts to regulate national banks, which have been under federal dominion since Congress first created them in 1864. For the same reason, OCC's reasonable implementation of the Act does not shift the federal-state balance, or approach the constitutional limits of Congress's authority. There is no basis for requiring Congress to speak any more plainly than it already has, in § 484 and in its broad grant of general rulemaking authority, in order to authorize the adoption of § 7.4000.

Finally, there is no force to petitioner's various arguments for denying deference because § 7.4000, like § 484, has preemptive effect. The regulation falls well within OCC's delegated rulemaking authority. It both resolves any arguable ambiguity in the statute's own terms and reflects the agency's unique expertise in the supervision of national banks. Whatever might be true of a regulation that "declares the preemptive scope of a federal statute" (Pet. Br. 48) in the sense of merely asserting the legal conclusion of preemption, *this* regulation interprets and implements the express terms of a statute that all agree has preemptive effect. Here, just as in *Smiley*, 517 U.S. at 744, there should be no doubt that such a regulation is entitled to deference.

ARGUMENT

I. THE NATIONAL BANK ACT BROADLY PRECLUDES STATE INVESTIGATIONS OR ENFORCEMENT ACTIONS THAT RELATE TO A NATIONAL BANK'S EXERCISE OF ITS AUTHORIZED BANKING POWERS

Two years ago, in *Watters* v. *Wachovia Bank, N.A.*, 550 U.S. 1 (2007), this Court explained how and why the National Bank Act's visitorial powers provision, 12 U.S.C. § 484, precludes States from subjecting national banks' mortgage lending to compliance investigations or other regulatory law enforcement:

> State laws that conditioned national banks' real estate lending on registration with the State, and subjected such lending to the State's investigative and enforcement machinery would surely interfere with the banks' federally authorized business: National banks would be subject to registration, inspection, and enforcement regimes imposed not just by Michigan, but by all States in which the banks operate. Diverse and duplicative superintendence of national banks' engagement in the business of banking, we observed over a century ago, is precisely what the NBA was designed to prevent ….
>
> Recognizing the burdens and undue duplication state controls could produce, Congress included in the NBA an express command: "No national bank shall be subject to any visitorial powers except as authorized by Federal law …." "Visitation," we have explained "is the act

> of a superior or superintending officer, who visits a corporation to examine into its manner of conducting business, and enforce an observance of its laws and regulations." [Citing in part 12 C.F.R. § 7.4000, the OCC regulation at issue in this case.] Michigan, therefore, cannot confer on its commissioner examination and enforcement authority over mortgage lending, or any other banking business done by national banks.

550 U.S. at 13-15 (citations and footnote omitted).

Yet, this is precisely what petitioner seeks to do. The text and history of the National Bank Act, the contemporary understanding of "visitorial powers," the obvious conflict between comprehensive federal bank regulation and the sort of state proceeding at issue here, and this Court's cases all confirm that petitioner's attempt to assert investigative and enforcement authority over national banks falls squarely within the prohibition enacted by Congress in § 484.

A. The Text And History Of § 484

1. The National Bank Act

Congress enacted the National Bank Act to establish a stable, uniform national currency and to fund the national government during the Civil War. *See*, *e.g.*, *Tiffany* v. *National Bank of Mo.*, 85 U.S. (18 Wall.) 409, 413 (1873); *see generally* Bray Hammond, *Banks and Politics in America* 718-734 (1957). The Act provided for a system of national banks that would purchase United States bonds, thus funding the treasury, and issue notes to the public, creating a national currency. *See* Act of June 3, 1864, ch. 106, §§ 5, 16, 21-23, 13 Stat. 99, 100-101, 104-106. The banks were conceived of as "instrumentalities of the federal government," *Davis* v. *Elmira Sav. Bank*, 161 U.S. 275, 283 (1896), "designed to be used to aid the government in the administration of an important branch of the public service," *Farmers' & Mechanics' Nat'l Bank* v. *Dearing*, 91 U.S. 29, 33 (1875). National banks' operations would not be confined to individual States, but would be interstate in scope. *Marquette Nat'l Bank of Minneapolis* v. *First of Omaha Serv. Corp.*, 439 U.S. 299, 314-316 (1978).

Congress placed the new national banks firmly under the "paramount authority" of the national government. *Davis*, 161 U.S. at 283. The Act established a new office of the Comptroller of the Currency within the Treasury Department, and granted the Comptroller broad authority to supervise the national banks. Act of June 3, 1864, § 1, 13 Stat. 99-100. He was directed, for example, to appoint suitable persons, "as often as shall be deemed necessary or proper, … to make a thorough examination into all the affairs of" every national bank, including "examin[ing] any of the officers and agents thereof on oath." *Id.* § 54, 13 Stat. 116. The Act authorized the Comptroller to sue in federal court to dissolve a national banking association for certain violations of the Act. *Id.* § 53, 13 Stat. 116; *see also id.* § 55, 13 Stat. 116 (providing for penalties for certain conduct of bank officers or employees, including certain acts intended "to injure or defraud the association or any other company, body politic or corporate, or any individual person").

Concerned about possible state hostility to the new national banks, Congress included several provisions designed to protect the new system from state interference.[1] Most important for present purposes, immediately after directing the Comptroller to have his examiners inquire into "all the affairs" of each national bank, the Act specified that the banks would "not be subject to any other visitorial powers than such as are authorized by this act, except such as are vested in the several courts of law and chancery." Act of June 3, 1864, § 54, 13 Stat. 116 (this portion now codified, as amended, at 12 U.S.C. § 484). As this Court explained in *Watters*, Congress included this provision because it "[r]ecogniz[ed] the burdens and undue duplication state controls could produce," 550 U.S. at 14, and intended "[t]o prevent inconsistent or intrusive state regulation from impairing the national system," *id.* at 11.

2. The historical understanding of "visitorial powers"

The original National Bank Act thus gave the Comptroller broad power to supervise and regulate national banks—including, but not limited to, the "thorough examination" power conferred by § 54—and then provided that the banks would not be subject to any "visitorial powers" other than those authorized by the Act itself. The sole exception was for any such powers

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[1] Section 30 of the Act, 13 Stat. 108, for example, shielded national banks from any state attempt to interfere with their ability to charge interest at the same rates allowed to state banks. Congress considered that shield "indispensable to protect [national banks] against possible unfriendly State legislation," which might otherwise "make [the banks'] existence in the State impossible." *Tiffany*, 85 U.S. (18 Wall.) at 412-413. The same provision is now codified at 12 U.S.C. § 85, and this Court upheld the Comptroller's regulatory construction of it in *Smiley* v. *Citibank (South Dakota), N.A.*, 517 U.S. 735 (1996).

"vested in the several courts of law and chancery." Act of June 3, 1864, § 54, 13 Stat. 116. Because the Act conferred no powers on state regulators or enforcement officials, they were definitively excluded from the "visitorial" role. Historical sources do not offer pellucid guidance on the contours of "visitation" in 1864, but they do confirm that the Act's exclusion of States from any visitorial role not specifically authorized by federal law precludes the sort of state-law compliance investigation and enforcement that petitioner sought to undertake in this case. Indeed, in light of the National Bank Act's broader objectives, no other reading of the "visitorial powers" provision would make sense.

Historically, "visitorial" powers over civil corporations were understood to involve more than simply private examinations into a corporation's compliance with its charter. *Cf.* Pet. Br. 24-26. The powers included investigations into, and court proceedings to correct, any abuse, irregularity, or misbehavior of the corporation, including violations of the common law. In England, the king—the government—was the "visitor" of civil corporations:

> [B]eing thus constituted by law the visitor of all civil corporations, the law has also appointed the place, wherein he shall exercise this jurisdiction: which is the court of king's bench; where, and where only, *all misbehaviors* of this kind of corporations are inquired into and redressed, and all their controversies decided. … [T]he law having by immemorial usage appointed them to be visited and inspected by the king their founder, in his majesty's court of king's bench, according to the rules of the common law, they ought not to be visited elsewhere, or by any other authority.

1 William Blackstone, *Commentaries on the Laws of England* 469 (1765) (Univ. of Chi. Press 1979) (emphasis added).

Petitioner relies (Br. 25) on treatises that address the private visitation of colleges to argue that visitorial powers extend only to the enforcement of the "private laws" of such colleges. It is hardly clear that visitation was so limited even in that context. *See, e.g.*, *Trustees of Dartmouth College* v. *Woodward*, 17 U.S. (4 Wheat.) 518, 673 (1819) (opinion of Story, J.) (citing Blackstone's discussion favorably in describing visitation of eleemosynary corporations as including the power to "inquire into, and correct *all irregularities and abuses* in such corporations" (emphasis added)). But even if it was, other authorities distinguished between private visitation of an eleemosynary corporation, such as a college, and government visitation of a civil corporation. *See, e.g.*, Joseph K. Angell & Samuel Ames, *Treatise on the Law of Private Corporations* 659-660 (8th ed. 1866); 1 John B. Minor, *Institutes of Common and Statute Law* 573-575 (2d ed. 1876). To the extent visitation over eleemosynary corporations may have been cabined in the manner petitioner suggests, that narrow conception of the visitorial role did not apply to government visitation of civil corporations.

Thus, Blackstone explained that, while eleemosynary corporations were "bound to observe" the "rules, laws, statutes, and ordinances" given to them by their founder, civil corporations were subject to "the common law, *and* to their own by-laws, not contrary to the laws of the realm." 1 Blackstone, at 465 (emphasis added); *see also* 2 James Kent, *Commentaries on American Law* 304 (12th ed. 1873) ("[Civil corporations] are subject to the general law of the land, and amenable to the judicial tribunals for the exercise and abuse of their powers."). While private visitors of colleges might have been thought by some commentators to enforce only the "statutes of the college," 1 Blackstone, at 471, the government as visitor of civil corporations enforced the corporation's compliance not only with its "own by-laws" but also with "the common law," *id.* at 465, 469.

In any event, in the National Bank Act Congress created national banks, framed an entire new federal law to govern them, and prescribed in detail how and by whom they should be supervised. When it then specified, in the negative, that these federal creations "shall not be subject to any other visitorial powers than such as are authorized by this act," Act of June 3, 1864, § 54, 13 Stat. 116, it could only have intended to use the term "visitorial" in a broad sense, applying at least to any governmental enforcement of laws concerning the exercise of the banking powers conferred by the new Act. Particularly given Congress's demonstrated sensitivity to the potential for state interference, it could hardly have meant, as petitioner suggests (Br. 21-23, 26), to bar state officers from investigating national banks' compliance with their charters (whatever exactly petitioner means by that), while allowing them free access to the banks to conduct examinations or enforcement proceedings relating to, for example, the banks' lending decisions. *Cf. Tiffany*, 85 U.S. (18 Wall.) at 413 ("It could not have been intended … to expose [national banks] to the hazard of unfriendly legislation by the States[.]").

3. This Court's construction of "visitorial powers" in *Guthrie* v. *Harkness*

This Court has addressed the "visitorial powers" provision in the National Bank Act twice: recently in

Watters, and much earlier in *Guthrie* v. *Harkness*, 199 U.S. 148 (1905). In *Guthrie*, the Court quoted a broad definition:

> "Visitation, in law, is the act of a superior or superintending officer, who visits a corporation to examine into its manner of conducting business, and enforce an observance of its laws and regulations. Burrill defines the word to mean 'inspection; superintendence; direction; regulation.'"

199 U.S. at 158. Visitors of civil corporations, the Court observed, have a power not only "to keep them within the legitimate sphere of their operations," but also "to correct all abuses of authority" and "nullify all irregular proceedings." *Id.* (internal quotation marks omitted).

In *Guthrie*, a shareholder of a national bank sought to enforce a common-law right to inspect the books of the bank in order to protect his personal interests. 199 U.S. at 149, 155. In holding that the Bank Act's exclusion of "visitorial powers" other than those conferred by the Act on the Comptroller (or vested in the courts) did not preempt the shareholder's right, the Court contrasted "the private right of the shareholder to have an examination of the business in which he is interested" with the "public right" of visitation, which rests with the government "for the purpose of examining into the conduct of the corporation with a view to keeping it within its legal powers." *Id.* at 158-159. These rights having long existed in parallel to one another, the private right of inspecting how one's property was being managed was not one that the Act's provision "withholding visitorial powers" was intended to displace. *Id.* at 159; *see id.* at 153-155, 157-158.

In contrast, the *public* right of "examining into the conduct of the corporation" was a visitorial power, and the Act "made full and complete provision for [such] investigation by the Comptroller of the Currency and examiners appointed by him." 199 U.S. at 159. "It was the intention that this statute should contain a full code of provisions upon the subject, and that no state law or enactment should undertake to exercise the right of visitation over a national corporation." *Id.*

Guthrie holds that the private "right" and "remedy" of a shareholder "to compel the inspection of books" of a national bank does not involve visitation over the bank. 199 U.S. at 159. The Court also said, in the alternative, that "even if" the shareholder's right were deemed "visitorial," the statutory exception for powers "'vested in [the] courts of justice'" would allow a court to grant the remedy. *Id.* Because in this Court petitioner apparently contends (*e.g.*, Br. 20) that state enforcement lawsuits are categorically non-visitorial—not that they fall within the "courts of justice" exception—he argues from *Guthrie* that the exception serves only "a clarifying role" (Br. 37), ensuring that § 484 will not mistakenly be read to interfere with lawsuits that should not be viewed as visitorial in the first place.

The drafters' precise understanding of the "courts of justice" exception is not entirely clear. When Congress enacted the National Bank Act, it was understood that the government, as "visitor" of all civil corporations, frequently exercised its visitorial powers "'through the medium of the courts of justice.'" *Guthrie*, 199 U.S. at 157 (citing *Dartmouth College*, 17 U.S. (4 Wheat.) 518); *see also* 2 Kent, at 304. One role for the "courts of justice" exception may have been to preserve this recognized ability of a *proper visitor* to seek whatever aid he might need from the courts.[2] Another role may have been to preserve whatever power courts needed in non-visitorial suits, such as the shareholder action in *Guthrie*, because the exercise of inherent coercive powers by a court against a corporate entity might have been deemed "visitorial" in itself.

One thing, however, is entirely clear: The "visitorial powers" provision sweeps broadly, excluding States from any visitorial role over national banks. *See, e.g.*, *Guthrie*, 199 U.S. at 159. It follows that petitioner's apparent decision to abandon any reliance on the "courts of justice" language is well advised. Whatever else it may mean, the exception surely does not allow a State to take up the prohibited visitorial mantle simply by pursuing it through lawsuits. Any such reading would swallow § 484's plain rule of generally exclusive federal visitorial power.

4. Later congressional consideration and amendment of § 484 and related provisions

The original understanding that States may not exercise public examination or enforcement authority over national banks is confirmed by Congress's subsequent treatment of § 484 and related provisions.

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[2] Because the Act first limited the exercise of "visitorial powers" over national banks to only those "authorized by this act" (now "by Federal law"), Congress may have thought it necessary to make clear that it did not intend to displace inherent judicial powers (such as the power to compel access to premises or records) that the Comptroller might need to call upon in discharging the visitorial duties that the new Act otherwise vested exclusively in him.

a. Congress amended § 484 in 1913. Among other changes, it added a new exception:

> No bank shall be subject to any visitatorial powers other than such as are authorized by law, or vested in the courts of justice *or such as shall be or shall have been exercised or directed by Congress, or by either House thereof or by any committee of Congress or of either House duly authorized.*

Act of Dec. 23, 1913, ch. 6, § 21, 38 Stat. 251, 271-272 (emphasis added). Thus, Congress recognized that the Act's exclusion of any investigative or supervisory powers other than those it vested in the Comptroller, or otherwise specifically authorized by law, was so comprehensive that it required a statutory amendment for *Congress itself* to reclaim the power to require the production of information by a national bank.

b. Congress next amended what is now § 484 in 1982. Before that amendment, however, congressional committees twice considered modifying OCC's exclusive examination and enforcement powers to allow States to enforce certain state laws against national banks. Each time, Congress ultimately took no action.

In 1976, the Senate Banking Committee considered allegations that OCC was not adequately enforcing a new generation of state consumer-protection laws. The Committee recognized that OCC had a "unique responsibility … to see to effective enforcement of state consumer protection laws":

> In the case of the Comptroller who traditionally has had exclusive visitorial powers with respect to national banks, considerable additional effort is needed to assure that those

> banks are in compliance with state laws applicable to them....
>
> Should evidence of inadequate enforcement of state law continue, the Congress should consider legislation to reassign the authority to enforce state laws against national banks to appropriate state officials.

Committee on Banking, Housing, and Urban Affairs, *Report on Consumer Protection and Enforcement Activities by the Three Commercial Bank Regulatory Agencies*, S. Rep. No. 94-1388, at 9 (1976). No such legislation was ever enacted.

The following year, the House Committee on Government Operations considered a similar change concerning lending disclosures. *See* Committee on Government Operations, *The Truth in Lending Act: Federal Banking Agency Enforcement and the Need for Reform*, H.R. Rep. No. 95-280 (1977). Because § 484 "appear[ed] to prohibit State regulators from entering a national bank to conduct a truth-in-lending examination," the Committee recommended an amendment to the federal Truth in Lending Act to allow States "to conduct examinations of the affairs of national banks located in such State for the purpose of enforcing the law of such State which imposes requirements substantially similar to those imposed under this chapter." *Id.* at 48. The amendment was not adopted.[3]

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[3] Recent amendments to the Truth in Lending Act could be read to permit state enforcement against national banks. *See* Omnibus Spending Act of 2009, Pub. L. No. 111-8, § 626, 123 Stat. 524, 678-680. Legislative history, however, makes clear that this provision was not intended "to change the regulatory authority and the jurisdictional structures we now have for our Federal regulators

c. In 1982 Congress did amend § 484, clarifying that any visitorial power must be authorized by "Federal" law and adding a new subsection (b), which gives States authority to examine banks under limited circumstances and for a specific purpose:

> (b) Notwithstanding subsection (a), lawfully authorized State auditors and examiners may, at reasonable times and upon reasonable notice to a bank, review its records solely to ensure compliance with applicable State unclaimed property or escheat laws upon reasonable cause to believe that the bank has failed to comply with such laws.

Garn-St Germain Depository Institutions Act of 1982, Pub. L. No. 97-320, § 412, 96 Stat. 1469, 1521 (codified at 12 U.S.C. § 484(b)).

Everything about the 1982 amendment refutes petitioner's assertion of broad authority to investigate national banks' compliance with state fair-lending laws.

First, by enacting § 484(b) as an express exception to § 484(a), Congress necessarily recognized that state examination of a national bank's records to ensure com-

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over our depository institutions." 155 Cong. Rec. S2816 (daily ed. Mar. 5, 2009) (statement of Sen. Crapo). Rather, the "intention was to permit state attorneys general to bring civil actions only against mortgage industry participants that are not supervised by the Federal banking agencies or are not Federal credit unions." *Id.* at S2816-2817 (statement of provision's author, Sen. Dorgan). In any event, while Congress is always free to permit state enforcement of laws against national banks where it chooses to do so, such limited changes do not alter § 484's general exclusion of visitorial powers not specifically "authorized by Federal law." 12 U.S.C. § 484.

pliance with state law is the exercise of a "visitorial power[]" that § 484(a) would otherwise preclude.

Moreover, while the committee proceedings discussed above show that general concerns about displacing state enforcement authority had been brought to Congress's attention with considerable force, the 1982 amendment did not grant States broad authority to inspect banks to "ensure compliance" with all state laws. Rather, it provided for state examination "*solely* to ensure compliance with applicable State unclaimed property or escheat laws." 12 U.S.C. § 484(b) (emphasis added).

Finally, even in that narrow area, Congress limited state inspection authority to situations in which the State can first demonstrate "reasonable cause to believe that the bank has failed to comply" with state law. 12 U.S.C. § 484(b).

d. Petitioner challenges this natural reading of § 484 in part on the ground that for many years it would have left "no governmental authority [with] the power to enforce valid state laws against national banks." Pet. Br. 32. That assertion is belied, however, by related statutory provisions and their development over time.

Even at the outset, the Comptroller's broad power to examine "all the affairs" of national banks was sufficiently broad to allow him to ensure compliance with rules of conduct grounded in either federal or state law. Act of June 3, 1864, § 54, 13 Stat. 116. As a practical matter, the federal Act's "apt provisions, sanctioned by severe penalties," have always given the Comptroller ample authority to ensure the integrity of the national banking system. *Easton* v. *Iowa*, 188 U.S. 220, 230 (1903).

Of course, in 1864 Congress likely did not foresee much application of state law to the authorized banking activities of its new national banks. The National Bank Act "ha[d] in view the erection of a system extending throughout the country, and independent, so far as powers conferred are concerned, of state legislation which, if permitted to be applicable, might impose limitations and restrictions as various and as numerous as the states." *Easton*, 188 U.S. at 229. State laws that concern banking activities but are arguably not substantively preempted are a relatively recent phenomenon, and there is an anachronistic air to petitioner's concern about an enforcement gap. If, however, there was ever such a gap, over time Congress moved to meet it. The Banking Act of 1933 expressly authorized OCC to initiate removal proceedings against directors and officers of national banks for violations of "any law relating to such bank." Pub. L. No. 73-66, ch. 89, § 30, 48 Stat. 162, 193 (authority now provided at 12 U.S.C. § 1818(e)(1)). And in 1966, the Financial Institutions Supervisory Act further authorized OCC to issue cease-and-desist orders to correct violations of any "law, rule, or regulation, or any condition imposed … by the agency." Pub. L. No. 89-695, § 202, 80 Stat. 1028, 1046 (codified at 12 U.S.C. § 1818(b)(1)). Petitioner acknowledges (Br. 7) that OCC's formal power to enforce state laws has been clear at least since that time.

e. In 1994, these two legislative strands—excluding state officials from any "visitorial" enforcement, while granting the Comptroller power to enforce any substantively applicable state law—came together. In the Riegle-Neal Interstate Banking and Branching Efficiency Act of 1994, Pub. L. No. 103-328, 108 Stat. 2338, Congress authorized interstate bank branching by both national and state-chartered banks. Sections

102 and 105 of that Act provided that interstate branches of both national and state banks would under some circumstances be subject to host-state laws regarding community reinvestment, consumer protection, and fair lending. *Id.* §§ 102(b)(1)(B) (national bank branches), 105 (state bank branches), 108 Stat. 2349-2350, 2357.[4] As to enforcement, however, the Act maintained the traditional division of visitorial responsibility between federal and state sovereigns. Section 102 provided that for branches of *national banks*, the specified state laws "shall be enforced, with respect to such branch, by the Comptroller of the Currency." *Id.* § 102(b)(1)(B), 108 Stat. 2350 (codified at 12 U.S.C. § 36(f)(1)(B)). Section 105, in contrast, placed the enforcement power as to branches of *state* banks in state bank supervisors or law-enforcement officials. *Id.* § 105, 108 Stat. 2357 (codified as amended at 12 U.S.C. § 1820(h)).

The text and structure of the 1994 Act leave no reasonable doubt that Congress granted exclusive enforcement power to OCC. *Cf.* Pet. Br. 7-9, 34-36 (suggesting power is concurrent). If there were any doubt, however, a floor exchange between Senator Riegle, the chairman of the Senate Banking Committee and sponsor of the legislation, and New York's own Senator D'Amato, the Committee's ranking minority member, would put it to rest:

> Mr. D'AMATO. I understand there is a concern that [Section 105] could be construed as

[4] These laws do not apply to national bank branches if federal law substantively preempts them or if they discriminate against national banks. § 102(b)(1)(B) (codified at 12 U.S.C. § 36(f)(1)(A)).

> conferring on States supervisory authority over interstate branches of national banks.
>
> Mr. RIEGLE. This simply is not the case. Section 105 speaks to the supervisory authority of State banking supervisors over interstate State-chartered banks only ….
>
> …
>
> A different section of the bill addresses supervision of interstate branches of national banks. Section 102 of the bill clarifies that under interstate banking, State-chartered banks will continue to be subject to supervision by State authorities, while national banks will remain subject to supervision by the OCC. Where a national bank is subject to State law, section 102(f) of our bill clearly spells out that those State laws "shall be enforced, with respect to such branch, by the Comptroller of the Currency."
>
> Mr. D'AMATO. I appreciate the chairman's clarification of this matter. I am in total agreement with Senator Riegle on this point.

140 Cong. Rec. 24,484 (1994). Thus, the 1994 amendments simply clarified that enforcement of state consumer-protection laws with respect to interstate branches would be subject to the same division of state and federal authority that had always applied to the banks themselves.

5. This Court's decision in *Watters*

The text, history, and precedent outlined above lead naturally to the understanding of § 484 set out by this Court in *Watters* and quoted above. Although petitioner argues that *Watters* "did not address[] any question about the scope of the term 'visitorial powers' in § 484(a)" (Br. 31), that is demonstrably incorrect.

The question in *Watters* was whether the National Bank Act preempted the application of certain Michigan laws to mortgage-lending activities conducted by an operating subsidiary of a national bank. 550 U.S. at 7. The statutes at issue granted the Commissioner of the Michigan Office of Insurance and Financial Services "inspection and enforcement authority over registrants" and "authorize[d] the commissioner to take regulatory or enforcement actions against covered lenders," including filing actions in court for injunctive relief. 550 U.S. at 9-10 (citing, *inter alia*, Mich. Comp. Laws Ann. §§ 445.1661, 493.56b). In this respect, Michigan law was closely akin to the New York statutes invoked by petitioner in this case.

Relying on § 484, this Court held that the federal Act did preempt Michigan's assertion of authority under the statutes at issue. 550 U.S. at 21. The necessary first step in the Court's analysis was its recognition that the Act would "surely" preempt Michigan's application of its laws to a national bank itself. *Id.* at 10-15. "Diverse and duplicative superintendence of national banks' engagement in the business of banking," the Court explained, "is precisely what the NBA was designed to prevent." *Id.* at 13-14. In light of the visitorial powers provision, Michigan could not assert "examination and enforcement authority over mortgage lending, or any other banking business done by national banks." *Id.* at 14-15. Finally, the Court held that the same preemption principles applied to an operating subsidiary of a national bank. *Id.* at 15-21. While the dissent rejected this final step, it expressly agreed that the Michigan inspection and enforcement statutes provided for "state visitorial oversight," and that through § 484 "Congress has … preempted … those laws purporting to lodge with state authorities visitorial power over national banks" themselves. *Id.* at 34, 35 (Stevens, J., dissenting).

Watters thus stands clearly—and, in effect, unanimously—for the proposition that, absent some specific authorization in federal law, § 484 denies States any ability to assert inspection and enforcement authority over a national bank's banking business, and specifically over mortgage-lending activities such as those at issue here.

B. Concurrent State Enforcement Is Incompatible With The Federal Regulatory System

The Court's conclusion in *Watters* makes perfect sense. The National Bank Act directs the Comptroller to examine and supervise "all the affairs" of national banks (12 U.S.C. § 481) and gives him ample power to do so, including the power to enforce any applicable state laws touching on their banking activities. Allowing officials from 50 States to exercise separate investigation and enforcement power with respect to their own laws would both burden the banks and interfere with OCC's chosen methods of regulatory supervision.

This very case illustrates the dangers of permitting multiple jurisdictions to undertake their own evaluations of a national bank's lending practices, even when applicable legal standards may suggest no conflict on their face. Already, one fundamental disagreement has emerged: The Federal Reserve Board, which is responsible for developing HMDA requirements, has said that the data by themselves cannot make out a *prima facie* case of discrimination, while petitioner has asserted that they can and do. *See supra* pp. 3-4; JA148a. Similarly, the Comptroller may conclude that loan-to-value ratios can provide a legitimate explanation for lending decisions; one State may argue that they cannot; and another State may accept them as relevant but accord them little weight. It is no exaggeration to say that, if petitioner's position were to prevail, a national bank could be subject to five, ten, or even more different legal analyses of when a particular loan decision passes from permissible credit evaluation to unlawful discrimination. This is exactly why, "[i]n the years since the NBA's enactment," this Court has "repeatedly made clear that federal control shields national banking from unduly burdensome and duplicative state regulation." *Watters*, 550 U.S. at 11.

Concurrent state enforcement is problematic even if a state law is not substantively preempted.[5] In *Easton*, this Court considered a state law that prohibited bank directors from accepting deposits when they knew the bank was insolvent. While federal law did not condone fraud, this Court clearly recognized the practi-

[5] Petitioner repeatedly characterizes New York's fair-lending law as "nonpreempted" (*e.g.*, Pet. Br. 20), and that conclusion has been assumed for purposes of this litigation (*see, e.g.*, Pet. i). If that is correct, however, it must be because state law imposes no requirement materially more onerous than federal law addressing the same banking matters. *See, e.g.*, *Barnett Bank of Marion County, N.A.* v. *Nelson*, 517 U.S. 25, 33 (1996) (state law may not "prevent or significantly interfere with the national bank's exercise of its powers"). New York law is substantively preempted to the extent that either its substance or its enforcement "significantly burden[s] a national bank's own exercise of its real estate lending power" or "curtail[s] or hinder[s] a national bank's efficient exercise of any other power, incidental or enumerated under the NBA." *Watters*, 550 U.S. at 13.

cal importance of entrusting complex or discretionary enforcement questions to a single regulator. The Court explained that "[w]hether a bank is or is not actually insolvent may be, often, a question hard to answer," and that the Comptroller, in his discretion, might take a different view from the State about how that or related questions should be approached. 188 U.S. at 232. Federal law precluded state enforcement because "confusion would necessarily result from [supervisory or enforcement] control possessed and exercised by two independent authorities," which "would have to be exercised and limited by their own discretion." *Id.*

The same reasoning explains why § 484 excludes state officials from investigating or enforcing a national bank's compliance with state law even where its substantive provisions are similar or identical to those of federal law. Congress has given OCC exclusive responsibility for determining what methods of supervision and enforcement will best serve national goals.

In making those determinations, OCC has a unique vantage point. Its principal supervisory model involves intimate, ongoing examination of banks' affairs. *See* 12 C.F.R. § 4.6. Large national banks, for example, have dedicated on-site examination teams conducting continuous examinations of all aspects of the bank's operations. *See* Statement of John D. Hawke, Jr., Comptroller of the Currency, before the S. Comm. on Banking, Hous. and Urban Affairs, On Federal Preemption of State Laws, Washington, D.C., April 7, 2004, 23 O.C.C. Q.J. 69, 2004 WL 3418806, at *7. Indeed, the size of OCC's examination staff far surpasses, on a per-supervised-entity basis, the number of state examiners dedicated to supervising state financial institutions. *See id.* at *9. While OCC has a variety of formal enforcement mechanisms and punitive measures at its disposal, it encourages examiners to identify problems early, to discuss significant issues with a bank's management and board, and to provide guidance on how the bank may bring itself into compliance where it may be falling short. *See* Comptroller of the Currency, *An Examiner's Guide to Problem Bank Identification, Rehabilitation, and Resolution* 23-24 (2001), *available at* http://www.occ.treas.gov/prbbnkgd.pdf.

By means of its comprehensive and continuous examinations, OCC gains an unparalleled understanding of banks' affairs—and an unparalleled capacity to shape their behavior. Congress has long recognized the merits of this supervisory model, and facilitated it by authorizing OCC to conduct its visitorial activities largely in private, promoting the free flow of information and a focus on prompt remediation rather than defensiveness or confrontation. *See* 5 U.S.C. § 552(b)(8). This Court, too, has recognized the effectiveness of OCC's approach. *See United States* v. *Philadelphia Nat'l Bank*, 374 U.S. 321, 330 (1963) ("recommendations by the agencies concerning banking practices tend to be followed by bankers without the necessity of formal compliance proceedings").

That approach contrasts sharply with the episodic, narrowly-focused, prosecutorial model reflected in petitioner's effort to investigate banks' mortgage-lending decisions in New York in 2004. Petitioner has nothing like OCC's comprehensive, ongoing familiarity with banks' operations, or its banking expertise. His methods look not to identifying and heading off or remediating possible problems as they might develop in the course of ongoing operations, but to reviewing records of past practice in search of evidence of previous misconduct. His methods are inherently adversarial, and his actions are typically very public, if not political.

And, as petitioner himself emphasizes (Pet. 31), his perspective is purely local. For all of these reasons, petitioner's effort to launch an investigation or other enforcement efforts here—an avowed part of his "long history of aggressive enforcement of state and federal consumer protection laws" (JA153a)—conflicts fundamentally with the approach adopted by OCC. Through § 484, Congress purposefully ensured that, in the case of national banks, it is the designated federal regulator who gets to make that choice. *See, e.g.*, *Watters*, 550 U.S. at 13-14 ("Diverse and duplicative superintendence of national banks' engagement in the business of banking … is precisely what the NBA was designed to prevent." (citing *Easton*, 188 U.S. at 229)).[6]

[6] Some of petitioner's *amici* focus on recent problems associated with predatory lending practices. There can be, however, no plausible suggestion that those problems stem from a lack of state enforcement authority over national banks. Federal and state officials agree that the vast majority of predatory lending originated with state-supervised non-bank mortgage firms, not banks or bank subsidiaries. *See* State Attorneys General Amicus Br. 10-11, *National Home Equity Mortgage Ass'n* v. *OTS*, No. 02-2506 (D.D.C. Mar. 21, 2003) ("[P]redatory lending abuses are largely confined to the subprime mortgage lending market and to non-depository institutions. Almost all of the leading subprime lenders are mortgage companies and finance companies, not banks or direct bank subsidiaries."); Comments of the National Association of Attorneys General on Responsible Alternative Mortgage Lending—Notice of Proposed Rulemaking, OTS Docket No. 2000-34, at 2 (July 7, 2000), *available at* http://files.ots.treas.gov/comments/762b5a78-fd8e-41e6-a869-2b61ba4714f0.pdf ("In the experience of state Attorneys General, predatory lending is perpetrated primarily by non-depository lenders and mortgage brokers."); Testimony of John C. Dugan, Comptroller of the Currency, before the S. Comm. on Banking, Hous., and Urban Affairs 12-13 (Mar. 19, 2009), *available at* http://www.occ.treas.gov/ftp/release/2009-24b.pdf (discussing recent study reaching similar conclusions regarding

C. This Court's Cases Do Not Recognize State Power To Enforce State Laws Affecting National Banks' Exercise Of Their Authorized Banking Powers

In the face of this textual, historical, and structural evidence of the meaning of § 484, petitioner argues (Br. 27-31) that this Court's cases demonstrate States' ability to bring enforcement actions challenging national banks' exercise of their authorized banking powers. Petitioner's cases, however, lend no support to his interpretation of § 484. To begin with, none of them even mentions the provision. In any event, none of them involved any state action remotely similar to petitioner's effort to examine national banks' lending decisions, in contemplation of action to enforce state law regulating the core banking activity of real-estate lending. As this Court viewed and resolved those cases, none of them threatened any interference either with a national bank's exercise of its federally-authorized banking powers or with the Comptroller's supervision and control of national banks.

1. Petitioner sought certiorari in part based on an alleged conflict with *First National Bank in St. Louis* v. *Missouri*, 263 U.S. 640 (1924). He argues (Br. 29) that *St. Louis* recognized a State's right to enforce any state law whose application to national banks is not substantively preempted. In *St. Louis*, however, this Court addressed two issues in a deliberate order. First, the Court held that federal law did not authorize national banks to engage in branch banking. 263 U.S.

2005-2007 period). Banks' comparatively favorable record in this regard has been attributed to the close, ongoing supervision applied to them. *See* Dugan Testimony, at 15-17.

at 656-659. Only then, "[h]aving determined that the power sought to be exercised by the bank finds no justification in any law or authority of the United States," did the Court conclude that "the way [was] open for the enforcement of the state statute." *Id.* at 660. The decision's limited holding is that a State may enforce a prohibition against a national bank activity, *if* federal law grants the bank no power to engage in that sort of activity in the first place.

That holding has no application here. Federal law expressly authorizes national banks to make mortgage loans. 12 U.S.C. § 371(a). Rather than seeking to enforce a state law prohibiting a whole category of activity (branch banking) that benefited from no federal authorization, petitioner seeks to conduct a detailed regulatory inquiry into the precise way in which national banks have been carrying on their federally-authorized banking business—deciding to approve or reject particular loan applications and to loan money to specific individuals on particular terms. And quite unlike the state *quo warranto* action in *St. Louis*, which involved a controlling legal question and no issue of fact, petitioner's inquiry here would necessarily have required a searching examination of national banks' books and records. Thus, unlike in *St. Louis*, petitioner's plan to subject national banks' real-estate lending "to the State's investigative and enforcement machinery would surely interfere with the banks' federally authorized business," *Watters*, 550 U.S. at 13.

Petitioner relies especially (Br. 30) on *St. Louis*'s statement that it would be a "fallacy" to recognize a State's power to legislate on a matter but then deny it the power to enforce its law. *See* 263 U.S. at 660. Even that statement, however, he takes out of context. In the Court's opinion, that observation follows another:

Enforceability of a law follows from its substantive validity, "*unless* some controlling reason forbids" it. *Id.* (emphasis added). Here, § 484—which the *St. Louis* decision does not discuss, or even cite—limits "visitorial powers" over national banks to those granted by federal law, and petitioner's plan of examination and enforcement could not be more clearly visitorial. Those circumstances provide a "controlling reason" forbidding state enforcement.

2. The other decisions petitioner cites (Br. 27-28, 30-31) are also inapposite. The two earliest—*First National Bank* v. *Commonwealth*, 76 U.S. (9 Wall.) 353 (1869), and *Waite* v. *Dowley*, 94 U.S. 527 (1876)—concerned state taxation of national bank shares held by private shareholders. Congress expressly authorized such taxation in the 1864 Act and required national banks to make lists of shareholders available for inspection by "officers authorized to assess taxes under state authority." Act of June 3, 1864, §§ 40-41, 13 Stat. 111-112. In *First National Bank* and *Waite*, the Court held that States could obtain the lists, and collect the taxes that were due them, from national banks. Both exercises of state authority followed naturally from the scheme of the federal Act, and neither threatened interference with banks' exercise of authorized banking activities. *First Nat'l Bank*, 76 U.S. (9 Wall.) at 362; *Waite*, 94 U.S. at 534.

Anderson National Bank v. *Luckett*, 321 U.S. 233 (1944), concerned state enforcement of an abandoned property statute. The Court allowed enforcement, but only on the theory that the State had effectively taken over private depositors' abandoned claims against the bank and sought to enforce those private property rights. *Id.* at 248. So long as the State "demand[ed] payment of the accounts in the same way and to the same extent that the depositors could," the Court "perceive[d] no danger of unlimited control by the state over the operations of national banking institutions." *Id.* at 249. The decision provides no authority for state compliance investigations or enforcement of state regulatory laws affecting national banks' conduct of their core banking activities. That is especially true today after Congress's 1982 enactment of § 484(b), which makes clear that state examination of a national bank to enforce compliance with unclaimed property and escheat laws is an exercise of visitorial power, albeit one that is now expressly authorized by federal law on a limited basis.[7]

3. Thus, petitioner fails to cite any decision of this Court that actually supports the sort of intrusive state enforcement, directed at core banking activities, that he sought to undertake in this case. Indeed, the only federal appellate decision to address the question be-

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[7] Petitioner also cites (Br. 28, 31) *First National Bank of Bay City* v. *Fellows ex rel. Union Trust Co.*, 244 U.S. 416 (1917), and *First National Bank in Plant City* v. *Dickinson*, 396 U.S. 122 (1969), but neither of those decisions is relevant here. In *Bay City*, the Michigan Attorney General brought a *quo warranto* action to determine whether Congress had exceeded its constitutional authority in allowing national banks to provide trust services. 244 U.S. at 421-422. The case did not involve any examination of the bank's financial decisions, inspection of its books and records, or enforcement of state law against the national bank. In *Plant City*, the Court affirmed the denial of an injunction against the Florida comptroller's request that a national bank stop certain branch banking operations. 396 U.S. at 129-130. The decision does not discuss, much less reject, any visitorial-powers objection to the state comptroller's action. As in *St. Louis*, the Court rejected injunctive relief on the ground that the bank was engaging in branch banking without authority under federal law. *Id.* at 134-138; *see also Watters*, 550 U.S. at 15 n.7.

fore this case is one that petitioner acknowledges only in a footnote (Br. 32 n.14). In *National State Bank, Elizabeth, New Jersey* v. *Long*, 630 F.2d 981 (3d Cir. 1980), the Third Circuit correctly held that, although federal law did not preempt substantive application of New Jersey's anti-redlining statute to national banks, § 484 reserved any enforcement of the statute to OCC. *Id.* at 987-989. Accordingly, the one directly relevant federal precedent, issued almost 30 years ago, directly refutes petitioner's theory in this case.

II. OCC'S REGULATION IS ENTITLED TO DEFERENCE

Thus, since 1864, the National Bank Act's visitorial powers provision has expressly commanded that, subject to narrow exceptions, national banks are not subject to any state exercise of visitorial powers. 12 U.S.C. § 484. Even standing alone, that command preempts petitioner's assertion of a state-law power to investigate the books, records, and lending decisions of national banks and to bring related enforcement actions. But the statute does not stand alone.

The Comptroller has adopted a substantive regulation implementing § 484 in a way that, if valid, concededly resolves the controversy here. 12 C.F.R. § 7.4000. Petitioner asks this Court to invalidate the regulation, characterizing it as a self-delegation by federal administrators that displaces a long tradition of state enforcement and alters the constitutional balance between federal and state governments. As the court of appeals recognized, however, OCC's regulation involves nothing more—and nothing less—than a reasonable administrative construction of the terms of a federal statute that clearly has preemptive effect. There should be no doubt that such a regulation is entitled to deference. *E.g.*, *Smiley* v. *Citibank (S.D.), N.A.*, 517

U.S. 735, 743-744 (1996); *Chevron U.S.A. Inc.* v. *Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

A. OCC's Regulation Reasonably Implements The Terms Of A Statute That Congress Has Entrusted To The Agency's Administration

"Recognizing the burdens and undue duplication state controls could produce, Congress included in the NBA an express command: 'No national bank shall be subject to any visitorial powers except as authorized by Federal law[.]'" *Watters*, 550 U.S. at 14 (quoting 12 U.S.C. § 484(a)); *see also id.* at 31-32, 35 (Stevens, J., dissenting). Understandably, over the years some questions have arisen—as in this case—about exactly what "visitorial powers" means, and how the general reservation of such powers to the Comptroller interacts with the exception provided for powers "vested in the courts of justice." *See, e.g.*, 69 Fed. Reg. 1895 (Jan. 13, 2004); 68 Fed. Reg. 6363, 6363-6364, 6367 (Feb. 7, 2003). Observing Congress's further direction "to prescribe rules and regulations to carry out the responsibilities of the office" (12 U.S.C. § 93a), since 1971 OCC has issued, and when necessary amended, a regulation addressing such questions. 12 C.F.R. § 7.4000.[8]

[8] *See* 69 Fed. Reg. 1895 (Jan. 13, 2004) (final rule); 68 Fed. Reg. 6363 (Feb. 7, 2003) (proposed rule); 64 Fed. Reg. 60,092 (Nov. 4, 1999) (final rule); 64 Fed. Reg. 31,751 (June 14, 1999) (proposed rule); 36 Fed. Reg. 17,000 (Aug. 26, 1971); *see also* 61 Fed. Reg. 4849, 4850, 5858 (Feb. 9, 1996) (clarifying application of statutory exception relating to state escheat laws, 12 U.S.C. § 484(b)); 60 Fed. Reg. 11,924 (Mar. 3, 1995) (proposed rule); 48 Fed. Reg. 3936 (Jan. 28, 1983) (addressing enactment of § 484(b)). Contrary to petitioner's repeated suggestions, no step in this regulatory history "breaks sharply from [OCC's] own prior interpretations" (Br. 57) of § 484. Petitioner's best citation (Br. 10, 36) is to a portion of

Procedurally, § 7.4000 is "a full-dress regulation, issued by the Comptroller himself and adopted pursuant to the notice-and-comment procedures of the Administrative Procedure Act designed to assure due deliberation." *Smiley*, 517 U.S. at 741. Substantively, the regulation carries out a paradigmatic agency function by reasonably filling "gaps … as to the scope and definition of statutory terms." *Long Island Care at Home, Ltd.* v. *Coke*, 127 S. Ct. 2339, 2346 (2007); *see also, e.g.*, *Smiley*, 517 U.S. at 740-741 (ambiguities are to be "resolved, first and foremost, by the agency" implementing a statute); *NationsBank of N.C., N.A.* v. *Variable Annuity Life Ins. Co.* 513 U.S. 251, 256-257 (1995) (deferring to statutory construction by Comptroller, as "the administrator charged with supervision of the National Bank Act"); *Clarke* v. *Securities Indus. Ass'n*, 479 U.S. 388, 403-404 (1987) (same).

Indeed, § 7.4000 is like the definitional OCC regulation to which this Court deferred in *Smiley*. There, another provision of the National Bank Act, 12 U.S.C. § 85, allowed a national bank to charge its loan customers "interest" at whatever rate was allowed by the bank's home State, even if that rate was higher than

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the district court's opinion in this case, reporting OCC's "acknowledg[ment]" that it previously "acquiesced" in a 1999 district court decision that barred state administrative proceedings but purported to leave room for enforcement through the state courts. Pet. App. 109a (citing *First Union Nat'l Bank* v. *Burke*, 48 F. Supp. 2d 132, 135 (D. Conn. 1999)). That observation ultimately rests on nothing more than OCC's decision not to take any further action after the decision in *Burke*, in which OCC had substantially prevailed. There was never any formal OCC "acquiesce[nce]" of the sort petitioner means to suggest. Of course, even if OCC *had* changed its position (which it has not), its current regulation would still be entitled to deference. *E.g.*, *Smiley*, 517 U.S. at 742.

would otherwise have been permitted by the laws of customers' States. 517 U.S. at 737. In the face of litigation over whether the statutory term "interest" included late fees, OCC adopted a regulation spelling out what sorts of fees it did and did not include. *Id.* at 739-741. Rejecting a series of anti-deference arguments strikingly similar to those made here, *id.* at 740-744, the Court adhered to the *Chevron* "presumption that Congress, when it left ambiguity in a statute meant for implementation by an agency, understood that the ambiguity would be resolved, first and foremost, by the agency, and desired the agency (rather than the courts) to possess whatever degree of discretion the ambiguity allows," *id.* at 740-741. OCC's regulatory definition of "interest" was therefore entitled to judicial enforcement so long as it embodied any reasonable interpretation of the statute—as it plainly did. *Id.* at 744-745.

The same analysis applies here, and it leads to the same result.[9]

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[9] As a reasonable, properly-promulgated OCC construction of the National Bank Act, § 7.4000 is entitled to deference even if it modifies or displaces a court's previous interpretation of the Act, so long as the court did not "hold[] that its construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion." *National Cable & Telecomms. Ass'n* v. *Brand X Internet Servs.*, 545 U.S. 967, 982 (2005). Thus, even were petitioner correct that this Court's decision in *St. Louis* was premised on a view of "visitorial powers" different from that reflected in § 7.4000 (*see* Pet. Br. 28-30; *but see supra* pp. 33-35), OCC's regulatory construction should now prevail. Far from "holding that the statute unambiguously forecloses the agency's interpretation," 545 U.S. at 982-983, *St. Louis* reached its result "without discussion" (Pet. Br. 28) of the statute's visitorial powers provision.

B. No Clearer Statement Of Congressional Intent Is Required

Petitioner seeks to avoid this straightforward case for deference first by arguing (Br. 42-48) that the particular regulation at issue here cannot be sustained in the absence of clearer congressional authorization. Petitioner focuses on § 7.4000's construction of § 484 to prohibit state compliance investigations or other enforcement actions when, as has been assumed in this case, a state law is not substantively preempted. He argues that the regulation works "a major alteration in the federal-state balance of authority" (Br. 43), "distorts the lines of political accountability" between federal and state governments (*id.*), triggers a general "presumption against preemption" (Br. 46), and "implicates the doctrine of constitutional avoidance" (Br. 48). None of these arguments has any purchase here.

1. To begin with, petitioner never explains what clearer statement Congress should have made. Section 484 provides that "[n]o national bank shall be subject to any visitorial powers except as authorized by Federal law." 12 U.S.C. § 484(a). That language is broad enough to preempt the substance of state law to any necessary extent, but on its face it focuses less on substance than on "visitorial" actions—investigation, supervision, or enforcement. The parts of OCC's regulation to which petitioner objects merely define more precisely what actions by state (or other federal) officials are "visitorial," and make clear that § 484's preservation of the inherent powers of "courts of justice" cannot be construed in a way that would swallow the statute's general rule. Those are unremarkable elaborations on a basic principle set out perfectly clearly by Congress itself.

If confirmation were needed, Congress provided it in 1994 when it authorized interstate branch banking. As described above (pp. ___), in that Act Congress expressly endorsed, in the specific context of state consumer-protection and fair-lending laws, both the dichotomy between substantive validity and enforcement authority that petitioner finds so anomalous, and the clear division between OCC and state regulators of the supervision and enforcement authority over, respectively, national and state banks. *Compare* 12 U.S.C. § 36(f)(1) *with id.* § 1820(h)(3). Those provisions are perfectly consistent with § 7.4000, and not at all consistent with petitioner's theory of this case.

2. Petitioner's invocation of a "presumption against preemption" (Br. 46) is wholly out of place in a case involving state investigation and regulation of national banks. As the Court reiterated recently in *Watters*, for well over 100 years it has been clear that "'States can exercise no control over [national banks], nor in any wise affect their operation, except in so far as Congress may see proper to permit.'" 550 U.S. at 11 (quoting *Farmers & Mechanics' Nat'l Bank* v. *Dearing*, 91 U.S. 29, 34 (1875) (alterations in *Watters*)). Indeed, far from applying a presumption *against* preemption, in this area the Court has "'interpret[ed] grants of both enumerated and incidental 'powers' to national banks as grants of authority not normally limited by, but rather *ordinarily pre-empting*, contrary state law." *Id.* at 12 (quoting *Barnett Bank*, 517 U.S. at 32 (first alteration in *Watters*; emphasis added)).[10]

[10] *See also Rose* v. *Chase Bank USA, N.A.*, 513 F.3d 1032, 1036-1037 (9th Cir. 2008) ("[T]he usual presumption against federal preemption of state law is inapplicable to federal banking regula-

Petitioner seeks to shift the relevant context by arguing that this case is about consumer protection, "not about banking regulation." Br. 46-47. That is untenable. Petitioner's demand to inspect the books and records of national banks in order to investigate their compliance with state laws governing real estate lending was unquestionably an effort to supervise and regulate the banks' exercise of banking powers conferred on them by federal law. Indeed, the Michigan laws at issue in *Watters* were "[e]nacted to protect consumers from mortgage lending abuses," 550 U.S. at 34 (Stevens, J., dissenting), yet the Court had no difficulty concluding that "real estate lending, when conducted by a national bank, is immune from state visitorial control," *id.* at 13 (citing 12 U.S.C. § 484(a)); *see also id.* (subjecting lending practices to "investigative and enforcement machinery" of States "would surely interfere with the banks' federally authorized business"). Similarly, in *Easton*, the Court specifically rejected an argument very much like petitioner's, holding that a state law prohibiting insolvent banks from receiving deposits could not be enforced against national banks as an exercise of the State's police power to protect the public from fraud. 188 U.S. at 228-229.[11]

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tion." (internal quotation marks omitted)); *National City Bank of Ind.* v. *Turnbaugh*, 463 F.3d 325, 330-331 (4th Cir. 2006) (presumption against preemption "does not exist" in area of national bank regulation).

[11] Even if a presumption against preemption were relevant here, petitioner cites no case holding that it would displace the deference owed, under *Chevron*, to an agency's reasonable construction of a statute Congress has charged it with implementing. *See, e.g.*, *Smiley*, 517 U.S. at 743-744.

3. For the same reasons, nothing in OCC's regulation implementing § 484's "visitorial powers" rule either alters the federal-state balance or threatens to "distort[] the lines of political accountability" between the two sovereigns. Pet. Br. 43. This is hardly a case like *Gregory* v. *Ashcroft*, 501 U.S. 452 (1991), where the question was whether Congress meant, without having expressly said so, to interfere for the first time with the previously exclusive state prerogative to regulate the selection and retention of judges for state courts. On the contrary, "[n]early 200 years ago … this Court held federal law supreme over state law with respect to national banking." *Watters*, 550 U.S. at 10. Petitioner's protestations notwithstanding, nothing in § 7.4000's modest clarifications of § 484's assignment of "visitorial powers" over national banks to federal, not state, authorities shifts the federal-state balance materially from where Congress left it when it first framed the National Bank Act in 1864.

Nor has there been, for nearly 150 years, any "commandeering" of state officers in the service of federal bank regulation or any reason for citizens to be confused about whom they should hold accountable for the supervision and regulation of national banks. *See* Pet. Br. 43-44 (invoking *Printz* v. *United States*, 521 U.S. 898 (1997), and *New York* v. *United States*, 505 U.S. 144 (1992)). The creation of a class of federally-chartered banks was a major policy innovation of the nineteenth century. Far from being "commandeered," state officials were pointedly excluded from the supervision of these new banks. And there has never been anything obscure about the distinction between national and state banks. From the beginning, for example, Congress has required national banks to proclaim themselves as such. *See* 12 U.S.C. § 22 First (federally-chartered banks must include "national" in their names). The preclusion of state supervision or enforcement authority over national banks has always been "in full view of the public." *New York*, 505 U.S. at 168. Whether citizens are satisfied or dissatisfied with how national banks are supervised, investigated, and regulated, they know which of their governments to praise or blame.

4. Finally, nothing about § 7.4000 even remotely "implicates the doctrine of constitutional avoidance." Pet. Br. 48. Petitioner nowhere questions Congress's authority to preempt the application of state law to national banks entirely. He provides no support for his passing speculation (Br. 45) that Congress might lack power to take the more limited step—seemingly *more accommodating* of state interests—of leaving state law substantively in force to some extent but requiring that, in the case of these federal instrumentalities, any compliance investigation or similar enforcement be undertaken only by federal officials.[12] Congress's decision to

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[12] In the sensitive area of inter-governmental relations, limitations on the means otherwise available to a given sovereign to enforce its substantively valid laws are not as unusual as petitioner suggests. Diplomatic or foreign sovereign immunity, for example, may preclude States from enforcing many valid laws against particular persons or entities. *See* 22 U.S.C. § 254d; 28 U.S.C. § 1604. Federal immunity may preclude enforcement of otherwise valid state law against federal officers or instrumentalities or on federal land. *See, e.g., Johnson* v. *Maryland*, 254 U.S. 51, 55-57 (1920); *In re Neagle*, 135 U.S. 1, 6, 60-62, 72-76 (1890); *Tarble's Case*, 80 U.S. (13 Wall.) 397, 410-412 (1872). Tribal immunity may prevent resort to the most efficient means of enforcing valid state tax laws, *see Oklahoma Tax Comm'n* v. *Citizen Band Potawatomi Indian Tribe of Okla.*, 498 U.S. 505, 514 (1991) ("Oklahoma complains that, in effect, [the Court's] decisions … give them a right without any remedy."), or preclude the judicial enforce-

prohibit States from exercising "visitorial powers" against national banks is clear, 12 U.S.C. § 484, as is its constitutional authority to create and regulate national banks, *see*, *e.g.*, *Watters*, 550 U.S. at 22. Neither § 484 itself nor OCC's reasonable interpretation of it in § 7.4000 reaches anywhere near "the outer limits of Congress' power." *Solid Waste Agency of N. Cook County* v. *U.S. Army Corps of Eng'rs*, 531 U.S. 159, 172 (2001).

C. The Preemptive Reach Of § 484 And OCC's Implementing Regulation Do Not Limit *Chevron* Deference

Petitioner also argues that § 7.4000 "is not eligible for *Chevron* deference because it declares the preemptive scope of a federal statute." Br. 48; *see* Br. 48-57. That argument is both inapposite and unpersuasive.

1. Section 7.4000 does not "declare[] the preemptive scope of a federal statute" (Br. 48) in the way petitioner seeks to suggest. Petitioner invokes the dissent in *Watters*, which argued for "'something less than *Chevron* deference'" when "'an agency purports to decide the scope of federal pre-emption.'" Br. 49 (quoting 550 U.S. at 41 (Stevens, J., dissenting)). But both the majority opinion and the dissent in *Watters* agreed that, in the case of national banks themselves (as opposed to the operating subsidiaries at issue in that case), preclusion of regulatory visitation by state offi-

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ment of otherwise valid state-law obligations, *see Kiowa Tribe of Okla.* v. *Manufacturing Techs., Inc.*, 523 U.S. 751, 754-756 (1998). And *state* immunity, of course, has been held to limit the means available to enforce valid *federal* laws. *See, e.g.*, *Alden* v. *Maine*, 527 U.S. 706, 754-757 (1999).

cials is the "express command" of the statute itself. 550 U.S. at 14; *id.* at 31-32, 35 (Stevens, J., dissenting). When § 7.4000 elaborates on the statute's prescription that "[n]o national bank shall be subject to any visitorial powers except as authorized by Federal law, [or] vested in the courts of justice," 12 U.S.C. § 484(a), it is "implement[ing] [that] statutory command," 550 U.S. at 44 (Stevens, J., dissenting). The regulation here is not one "whose sole purpose was to pre-empt state law," *id.*—or one that simply declares "an agency's *conclusion* that state law is pre-empted," *Wyeth* v. *Levine*, No. 06-1249, 2009 WL 529172, at *11 (Mar. 4, 2009).

In this respect, too, the present case is like *Smiley*. *See supra* pp. 39-40. There, OCC's regulatory elaboration on the statutory term "interest" in effect determined the precise preemptive scope of 12 U.S.C. § 85, because that provision displaces certain state limitations on "interest." 517 U.S. at 737, 739-740. Nonetheless, the Court accorded OCC's regulation full *Chevron* deference, unanimously rejecting Smiley's argument that "*no* Comptroller interpretation of § 85 is entitled to deference, because § 85 is a provision that pre-empts state law." *Id.* at 743. That argument, the Court explained, "confuses the question of the substantive (as opposed to pre-emptive) *meaning* of a statute with the question of *whether* a statute is pre-emptive." *Id.* at 744. Whatever rule might be appropriate if the question were whether a statute has preemptive effect, ordinary deference was due to OCC's regulation construing operative terms in statute that clearly does. *Id.*

Petitioner's only answer to *Smiley* is his repeated assertion that § 7.4000 is a "declaration[] about … preemptive scope." Br. 52; *see also, e.g.*, Br. 53-54. He offers, however, no basis for distinguishing OCC's interpretation of "visitorial powers" from its interpretation of "interest." Here, as in *Smiley*, "there is no doubt that [the statute itself] pre-empts state law." 517 U.S. at 744. Here, as in *Smiley*, OCC's regulation addresses "the substantive … *meaning*" of the federal law. *Id.* And here, as in *Smiley*, that regulation is entitled to full deference. Nothing in that conventional application of *Chevron* threatens to "eviscerate the courts' traditional role in maintaining the constitutional balance of federal and state authority." Pet. Br. 49.

2. Petitioner also argues that the Court should not defer to § 7.4000 because *Chevron* rests on a presumption of agency expertise, and agencies are not experts on "broad structural questions of federalism." Br. 49. That argument is doubly misguided in this case.

First, as noted above, this Court has repeatedly explained that *Chevron* rests not only on agency expertise but on "a presumption that Congress, when it left ambiguity in a statute meant for implementation by an agency, understood that the ambiguity would be resolved, first and foremost, by the agency, and desired the agency (rather than the courts) to possess whatever degree of discretion the ambiguity allows." *Smiley*, 517 U.S. at 740-741; *see also, e.g.*, *Long Island Care at Home*, 127 S. Ct. at 2345-2346; *Chevron*, 467 U.S. at 843. That gap-filling authority is essential to any agency's ability to discharge the responsibilities delegated to it by Congress. Here, there is no basis for concluding that Congress created OCC, charged it with exercising exclusive "visitorial powers" over national banks, 12 U.S.C. § 484, and gave it authority "to prescribe rules and regulations to carry out the responsibilities of the office," *id.* § 93a, but withheld from that regulatory delegation the usual power to adopt reasonable implementations of statutory terms.

Second, although it is not clear why an agency should ever be faulted for engaging in "traditional legal analysis" when promulgating rules (Pet. Br. 50), petitioner's stated concern that agencies are ill-suited to interpret and apply judicial doctrines governing preemption is especially inapposite in this case. The legal analysis in OCC's rulemakings mostly discusses not principles of preemption, but rather the historical understanding of "visitorial powers." *See* 69 Fed. Reg. at 1896-1902; 68 Fed. Reg. at 6367-6370; 64 Fed. Reg. at 60,094-60,095; 64 Fed. Reg. at 31,751. That makes sense, because the issue is not a "broad structural question[]" (Pet. Br. 49) about whether Congress intended to preempt; clearly it did. The question is a far narrower one of how § 484's treatment of "visitorial powers" relates to OCC's ability to fulfill its statutory responsibilities. On that issue, OCC's analysis clearly does reflect relevant expertise—the agency's hands-on experience, its understanding of how the national banking system works, and its informed judgments as to how best to effectuate Congress's express policy of uniform and cohesive supervision of national banks. *See, e.g.*, Pet. App. 94a-96a ("OCC's construction of the statutory text was informed by its experience as the national banks' primary regulator."); 69 Fed. Reg. at 1895-1896, 1903, 1904; 68 Fed. Reg. at 6367-6369; 64 Fed. Reg. at 60,094-60,095; *cf*. JA120a-121a (exhibit to OCC Complaint summarizing policy rationales underlying § 7.4000).

3. Petitioner half-heartedly suggests (Br. 50-52) that OCC's regulatory implementation of § 484 might be disregarded (indeed, invalidated) because of "agency self-interest" (Br. 50). As he acknowledges (*id.*), however, this Court has never embraced any such rule. *See Mississippi Power & Light Co.* v. *Mississippi ex rel.*

Moore, 487 U.S. 354, 381-382 (1988) (Scalia, J., concurring in the judgment) (cataloguing cases in which Court has deferred to agency interpretations of statutes defining agency authority or jurisdiction). And if the advantages of having a single federal regulator exercise all visitorial powers provide an incentive to organize as a national bank, *see* Pet. Br. 51-52, that would be no more than Congress itself contemplated when it first framed the National Bank Act more than 140 years ago. *See, e.g.*, Hammond, at 728, 732-733; *Tiffany*, 85 U.S. (18 Wall.) at 413 ("much has been done to insure [national banks'] taking the place of State banks").

4. Relying again on his characterization of § 7.4000 as "an agency declaration about preemption" (Br. 53), petitioner argues (Br. 53-55) that the regulation is not within Congress's grant of regulatory authority to OCC in 12 U.S.C. § 93a (Comptroller "authorized to prescribe rules and regulations to carry out the responsibilities of the office"), or at least should be subject to some form of "heightened scrutiny" (Br. 53). He offers, however, no cogent support for these positions.

To begin with, as petitioner acknowledges (Br. 53 n.22), the Court has routinely deferred to properly promulgated agency regulations that have preemptive effect. The cases do not refuse deference, or vary the standards for according it, where agencies have acted under broad grants of rulemaking authority, rather than pursuant to special delegations or statutory language manifesting specific preemptive intent. *See City of New York* v. *FCC*, 486 U.S. 57, 64 (1988) (preemptive regulation's force "does not depend on express congressional authorization to displace state law" (internal quotation marks omitted)); *see also id.* at 63-70; *Capital Cities Cable, Inc.* v. *Crisp*, 467 U.S. 691, 699-700 (1984); *Fidelity Fed. Sav. & Loan Ass'n* v. *de la Cuesta*, 458

U.S. 141, 153-154 (1982); *United States* v. *Shimer*, 367 U.S. 374, 380-383 (1961). Even if § 7.4000 were supported only by Congress's broad delegation and the agency's own authority, there would be no basis for denying it full deference.

That point is academic here, however, given the actual nature of and basis for the regulation. Petitioner's assertions that § 7.4000 is "unconnected to any substantive regulation" (Br. 53 n.22) and "does not address any statutory provision that the agency is charged to enforce" (Br. 55) are perplexing. OCC's "visitorial powers" rule *is* a "substantive regulation," implementing § 484; and § 484 clearly commits to OCC, subject to limited express exceptions, all "visitorial powers" over national banks. Petitioner would limit those powers to "monitoring … fiscal soundness and enforcing the NBA's banking laws" (Br. 54; *see* Br. 55), but he cites no authority for that atextual proposition. *Cf.*, *e.g.*, 12 U.S.C. § 481 ("make a thorough examination of *all the affairs* of the bank") (emphasis added). In any event, arguments about the proper scope of "visitorial powers" speak to the substance of the regulation, not to whether it addresses a subject falling generally within OCC's statutory responsibilities (and thus within its delegated rulemaking power). OCC's rulemakings also explain at length how § 7.4000 serves the policy of uniform federal supervision of national banks, and thus relates directly to the OCC's implementation of its statutory responsibilities. *See* 64 Fed. Reg. at 60,094-60,095; 68 Fed. Reg. at 6366-6369; 69 Fed. Reg. at 1895-1896.

5. Finally, as petitioner all but acknowledges (Br. 55-56), Congress's 1994 statutory amendments relating to branch banking demonstrate its understanding that OCC has the authority to issue even "opinion letter[s] or interpretive rule[s]" that *do* simply "conclude[] that

Federal law preempts the application to a national bank of any State law" of the consumer-protection sort at issue here. 12 U.S.C. § 43(a). The amendments require that the agency use notice-and-comment procedures, which would normally be required only for legislative rules having the force and effect of law. *Id.*; *see* 5 U.S.C. § 553(b). The power they recognize, however, *a fortiori* confirms OCC's ability to frame and promulgate, using appropriate procedures, the "full-dress regulation" at issue here. *See Smiley*, 517 U.S. at 741.

That regulation does not simply declare conclusions about preemption, but reasonably implements the specific terms of a clearly preemptive statutory provision that the Comptroller is charged with administering. It is entitled to binding effect. And petitioner does not contest that, if the regulation is given effect, his demand to examine the books and records of national banks in order to investigate and enforce their compliance with state laws governing real-estate lending is an unlawful exercise of "visitorial powers" denied to the States by § 484.

CONCLUSION

The decision of the court of appeals should be affirmed.

Respectfully submitted.

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