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 AMERICAN BANKERS ASSOCIATION AND CONSUMER BANKERS ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

[Additional *amici* listed on inside cover]

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QUESTION PRESENTED

Whether a state attorney general can examine and regulate a national bank's exercise of its federally authorized banking power to engage in real-estate lending.

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INTEREST OF *AMICI CURIAE*[1]

Amici curiae are the principal trade associations for the banking industry in the United States. *Amici* and their members share respondents' interest in a nationwide regulatory environment that provides effective protection for the public without "[d]iverse and duplicative superintendence" of national banks by state officials. *Watters* v. *Wachovia Bank, N.A.*, 550 U.S. 1, 13-14 (2007).

The American Bankers Association is the principal national trade association of the financial services industry in the United States. Its members, located in each of the fifty States and the District of Columbia, include financial institutions of all sizes and types. ABA members hold a majority of the domestic assets of the banking industry in the United States.

The Consumer Bankers Association is a nonprofit national trade association founded in 1919 to provide a collective voice for the retail banking industry. Its members comprise more than 750 federally insured financial institutions that collectively hold more than 70 percent of all consumer credit

[1] Pursuant to this Court's Rule 37.3(a), letters of consent from all parties to the filing of this brief have been submitted to the Clerk. Pursuant to this Court's Rule 37.6, *amici* state that this brief was not authored in whole or in part by counsel for any party, and that no person or entity other than *amici* or their counsel made a monetary contribution intended to fund the preparation or submission of this brief.

held by federally insured depository institutions in the United States.

Also appearing as *amici* are 51 bankers associations. These associations represent the interests of their members at the state and local level. They provide a voice for the industry in state legislatures across the Nation, as well as providing support to their members with research and information, public relations, continuing professional education and educational materials, and business development.

SUMMARY OF ARGUMENT

The court of appeals correctly held that the New York Attorney General's attempt to examine and regulate national banks' lending practices is preempted by the NBA.

I. Petitioner and his *amici* all but ignore the historical context from which this case arises. But that history is central to the issue petitioner has asked this Court to decide and demonstrates that the federalism balance has long been struck in favor of exclusive federal regulation of national banks.

A. As the Court has repeatedly recognized, Congress's intent in enacting the NBA was to displace all state laws that would interfere with the exercise of national banks' federally authorized banking powers.

1. The Court confirmed the supremacy of federal banking laws in *McCulloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316 (1819). Against that backdrop, the Civil War Congress established a national banking system that was designed to be wholly independent of state authority. National Bank Act of 1864 (NBA), ch. 106, 13 Stat. 99. In so doing, the federal government prohibited States from interfering with national banks' exercise of their federally authorized banking

powers. In lieu of state regulation, the NBA created the Office of the Comptroller of the Currency (OCC), which Congress vested with exclusive authority to regulate the "business of banking" by national banks.

2. This Court has consistently reaffirmed the broad preemptive reach of the NBA. The statute is designed to protect national banks, in the exercise of their federally authorized banking powers, from the hazard of state legislation. *Tiffany* v. *Nat'l Bank of Mo.*, 85 U.S. (18 Wall.) 409, 413 (1874).

As the Court has explained, the "history" of the NBA "is one of interpreting 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." *Barnett Bank of Marion County, N.A.* v. *Nelson*, 517 U.S. 25, 32 (1996). When Congress confers a power on a national bank by providing that it "may" engage in certain business, the States are powerless to prevent or place limitations on the exercise of that power by regulating the national bank's business. *Franklin Nat'l Bank* v. *New York*, 347 U.S. 373 (1954). Under the Court's settled approach to NBA preemption, all state laws that "impair [the] efficiency" of national banks' exercise of their federally authorized banking powers—*i.e.*, state laws that "interfere with," "encroach[] upon," or "hamper[]" the exercise of such powers—are preempted. *Barnett Bank*, 517 U.S. at 33-34.

The Court recently reaffirmed the NBA's broad preemptive reach in *Watters* v. *Wachovia Bank, N.A.*, 550 U.S. 1 (2007), where it held that a national bank's power to engage in real-estate lending is "immune from state visitorial control." *Id.* at 13. As in *Barnett Bank* and *Franklin*, the Court emphasized

that the NBA shelters "a national bank's engagement in the 'business of banking'" from state interference. *Id.* at 21. The NBA therefore preempted the Michigan consumer-protection statute at issue because the statute hindered the efficient exercise of national banks' real-estate lending power. *Ibid*.

B. Adhering to the traditional exclusivity of federal regulation by preempting petitioner's attempt to investigate and regulate national banks' exercise of their federally authorized lending power under state law is entirely consistent with well-established principles of federalism.

Petitioner erroneously contends that this case implicates the "clear statement" rule of *Gregory* v. *Ashcroft*, 501 U.S. 452 (1991), which requires Congress to speak clearly when it intends to "alter the usual constitutional balance between the States and the Federal Government." *Id.* at 460 (internal quotation marks omitted). As the Court explained in *Barnett Bank*, however, federal preemption is the rule rather than the exception in the area of national banking; preemption of petitioner's attempt to examine and regulate national banks' real-estate lending powers therefore would not upset the ordinary constitutional balance. Indeed, it is petitioner who proposes to disturb the balance of authority between the States and the federal government by using *state* law to regulate *federally chartered* banks. Similarly, there is no "assumption" against preemption where, as here, Congress has legislated in an area since the dawn of the Republic. *United States* v. *Locke*, 529 U.S. 89 (2000).

The arguments advanced by petitioner's *amici* contending that preemption would offend the Tenth Amendment are equally baseless, if not frivolous.

Where States attempt to regulate in the constitutional domain of the federal government, they are subject to federal law. *E.g.*, U.S. Const. art. IV, § 2; *Osborn* v. *Bank of the United States*, 22 U.S. (9 Wheat.) 738, 868 (1824). Because Congress has the authority under the Commerce Clause to regulate national banking, it can displace state law without transgressing (or even implicating) any constitutional boundary.

II. Petitioner's attempt to examine national banks' real-estate lending records in aid of a potential state fair-lending suit—as well as that suit itself—is preempted under 12 U.S.C. § 484 because Congress has given the OCC exclusive visitorial authority over national banks.

Section 484 of the NBA explicitly 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). Congress has afforded the OCC broad visitorial authority over "all the affairs of the bank," *id.* § 481, but has not granted States "examination and enforcement authority over mortgage lending, or any other banking business done by national banks," *Watters*, 550 U.S. at 14-15. Petitioner's attempt to inspect records and data regarding national banks' real-estate loans, and to bring subsequent enforcement actions based on that investigation, falls squarely within the OCC's exclusive visitorial powers, and is therefore preempted by the NBA.

ARGUMENT

The question presented in this case is whether a state attorney general can examine and regulate a national bank's exercise of its federally authorized banking powers.

As this Court has consistently recognized, the history and structure of the National Bank Act (NBA), 12 U.S.C. §§ 21 *et seq.*, establish that state laws are preempted if they interfere with the efficient exercise of a national bank's federally authorized powers. *Barnett Bank of Marion County, N.A.* v. *Nelson*, 517 U.S. 25, 33-34 (1996) (citing cases). Petitioner and his *amici* nevertheless put forth a handful of federalism-based arguments against the continued recognition of federal supremacy in the area of national banking. *See* Pet. Br. 43-48. These arguments are difficult to take seriously: It is simply not possible to invade or offend state prerogatives by subjecting *federally chartered entities* to federal—and only federal—examination and enforcement, as more than a century of practice and precedent teaches. *See*, *e.g.*, *Osborn* v. *Bank of the United States*, 22 U.S. (9 Wheat.) 738, 868 (1824).

The NBA explicitly authorizes national banks to engage in real-estate lending, 12 U.S.C. § 371, and grants the OCC exclusive visitorial authority over national banks' exercise of that power, *id.* § 484. Petitioner's attempt to examine national banks in order to determine compliance with state fair-lending laws and to enforce those state laws against national banks is therefore preempted by § 484 of the NBA because petitioner's investigatory and regulatory actions would constitute a prohibited exercise of visitorial authority over those banks.

I. THE FEDERALISM BALANCE WAS LONG SINCE STRUCK IN FAVOR OF EXCLUSIVE FEDERAL REGULATION OF NATIONAL BANKS

Whether the NBA preempts the New York Attorney General's attempt to examine and regulate national banks' real-estate lending activities cannot be determined, as petitioner suggests, solely by consulting the OCC's visitorial powers regulations. Rather, this inquiry is substantially informed by the more than 100 years of congressional enactments and judicial decisions affirming (and reaffirming) the broad preemptive reach of the NBA. That historical context answers all of the federalism concerns raised by petitioner and his *amici*. Indeed, preclusion of state efforts to examine and regulate national banks promotes—rather than interferes with—well-established principles of federalism.

A. From The Founding, Federal Law Has Reigned Supreme In The Area Of National Banking

Congress intended the NBA to displace all state laws that would interfere with the exercise of national banks' federally authorized banking powers. For that reason, States have never had a role in regulating the banking powers of these federally chartered institutions.

1. Congress Intended To Preclude State Interference With National Banks

Following ratification of the Constitution, Congress established a central bank to facilitate government borrowing by approving the charter of the First Bank of the United States (drawn up by Alexander Hamilton) in 1791. Bray Hammond, *Banks & Politics in America: From the Revolution to the Civil*

War 114-18, 197-202 (1957) (Hammond I). But both the First Bank, whose charter Congress failed to renew in 1811, and the subsequently created Second Bank of the United States, chartered in 1816, were short-lived. Alfred M. Pollard & Joseph P. Daly, *Banking Law in the United States* § 2.03, at 2-5 (2005). The States, backed by agricultural and certain mercantile interests, strongly opposed the Second Bank's power and, to counter it, imposed taxes on the Bank's operations within their jurisdictions. *Id*. at 2-6 to 2-7. It was these taxes, as levied by the State of Maryland, that led to the Court's landmark decision in *McCulloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316 (1819).

In *McCulloch*, the Court emphatically confirmed the supremacy of federal over state law with respect to national banking. Starting with the fundamental principle that the powers in the Constitution are derived from the people, the Court held that the Commerce Clause (in conjunction with the Necessary and Proper Clause) of Article I authorized Congress to create a bank. 17 U.S. (4 Wheat.) at 331-33. And, laying the foundation for future federal preemption jurisprudence, the Court held that state law conflicting with federal law is superseded. *See id*. at 405 ("If any one proposition could command the universal assent of mankind, we might expect it would be this—that the government of the Union, though limited in its powers, is supreme within its sphere of action"); *see also Osborn*, 22 U.S. (9 Wheat.) at 868 (federal statute incorporating the Bank of the United States preempted a state law attempting to tax the bank's operations).

Although *McCulloch* and *Osborn* clearly affirmed Congress's right to establish national banks, President Andrew Jackson vetoed the re-chartering of the

Second Bank in 1832. Hammond I at 405. That marked the beginning of a period of "free banking," in which the States liberally granted bank charters and allowed state-chartered banks to issue paper currency for use within state lines. *Id*. at 572-73. But state bank note values were uncertain and varied unpredictably, and in the late 1850s, a series of banks defaulted, setting into motion a nationwide crisis both for the currency and for commerce. *Id*. at 707-12.

The outbreak of the Civil War was the catalyst for radical change in the Nation's banking system. As the war escalated, the "country [became] involved in the expenditures of a contest for national existence." *Letter from the Sec. of the Treas. to Congress* (Apr. 11, 1862) (*reprinted in* Cong. Globe, 37th Cong., 2d Sess., Misc. Doc. No. 81, at 3 (1862)). As one Senator expressed it, "surrounded by difficulties, surrounded by war, and in the midst of great troubles, [Congress was] compelled to resort to some scheme by which to nationalize and arrange upon a secure and firm basis a national currency." Cong. Globe, 37th Cong., 3d Sess., at 844 (1863) (statement of Sen. Sherman).

The National Currency Act of 1863, ch. 58, 12 Stat. 665, revised one year later as the National Bank Act of 1864, 13 Stat. 99, was the general act that President Lincoln envisioned as necessary to shore up the Union's faltering currency. According to President Lincoln, there was "no other mode by which 'the great advantages of a safe and uniform currency' could be achieved so promisingly and unobjectionably as by the organization of banking associations under a general act of Congress." Bray Hammond, *Sovereignty and an Empty Purse: Banks and Politics in the Civil War* 290 (1970); *see also id.*

at 314 (discussing the NBA's key objective "to rationalize the decentralized, unstable structure of state banks and to create a uniform banknote currency" under federal control).

In debating the legislation, both proponents and opponents of the NBA recognized that it granted the federal government the *exclusive* power to control the national banking system. The NBA would establish a banking system "made to operate directly upon the people independent[] of State boundaries or State sovereignty," and "wholly independent of State authority." Cong. Globe, 37th Cong., 3d Sess. 1115 (1863) (statement of Rep. Spaulding). As one opponent stated, "the whole purpose and object and scope and tendency of the bill is to prostrate State power and put it at the control of the great centralized power to be established here." Cong. Globe, 38th Cong., 1st Sess. 1413 (1864) (statement of Rep. Mallory). In defense of that purpose, a supporter of the NBA stated:

> The proposition, as I understand it, is to make this a great national system, to make it responsible to the national Government, to make it subject to any burdens and restrictions the national Government may see fit to place upon it; and to carry out that object it will not do to place it in the power of the States, otherwise you place it in the power of any State which may be opposed to the system to cripple and destroy it.

Id. at 1393 (statement of Rep. Washburn).

Congress was keenly aware of *McCulloch* v. *Maryland* when it drafted the NBA to preclude States from overseeing national banks' exercise of their federally authorized banking powers. As one

Senator reminded his colleagues, the Court had explained that "'it is of the very essence of supremacy to remove all obstacles to its action within its own sphere,'" and, accordingly, a bank created by the federal government "must not be subjected to any local government, State or municipal; it must be kept absolutely and exclusively under that Government from which it derives its functions." Cong. Globe, 38th Cong., 1st Sess. 1893 (1864) (statement of Sen. Sumner) (quoting *McCulloch*, 17 U.S. (4 Wheat.) at 427). Thus, he continued, "I shall vote to keep [the new national banking system] free from all State hostility or even State rivalry, that it may become in reality as in name, national in all respects." *Id*. at 2130.

Ultimately, Congress embraced the NBA's objectives, and voted "to take from the States . . . all authority whatsoever over . . . [national] banks, and to vest that authority here in Washington, in the . . . Secretary of the Treasury." Cong. Globe, 38th Cong., 1st Sess. 1267 (1864) (statement of Rep. Brooks). The NBA codified federal control over the money supply, taxation, and interest rate regulation, and prohibited the States from exerting their interests in those areas. National Bank Act, ch. 106, §§ 19-23, 30 (interest rates), 31 (currency), 41 (taxation), 13 Stat. at 105-06, 108-09, 111-12; *see also* Cong. Globe, 38th Cong., 1st Sess. 1376 (interest rate regulation), 1377 (control of national currency) (1864). The federal government thereby "assumed entire control of the currency of the country, and, to a very considerable extent, of its banking interests, prohibiting the interference of State governments." *Letter from the Sec. of the Treas. to the Senate* (Apr. 12, 1866) (*reprinted in* Cong. Globe, 39th Cong., 1st Sess., Misc. Doc. No. 100, at 2 (1866)).

Within the Department of the Treasury, the NBA created the Office of the Comptroller of the Currency (OCC), in which Congress vested plenary authority to charter, examine, supervise, regulate, and bring enforcement actions against national banks. That authority was exclusive of any state "visitorial" power over national banks. 13 Stat. at 116 (codified as amended at 12 U.S.C. § 484).[2]

Congress confirmed the exclusive nature of the OCC's visitorial authority over national banks in 1982. Responding to a state court decision concerning the enforcement of state escheat laws, *see Minnesota* v. *First Nat'l Bank of St. Paul*, 313 N.W.2d 390 (Minn. 1981), Congress amended the NBA both to correct that court's erroneous conclusion that state law could serve as authority for state examinations of national banks, *see* Act of Jan. 12, 1983, Pub. L. No. 97-457, § 23(a), 96 Stat. 2507, 2510 (replacing 12 U.S.C. § 484's reference to permissible non-OCC visitations "authorized by law" with "authorized by Federal law"), and carved out an extremely narrow exception to the OCC's exclusive visitorial authority for certain state examinations of national banks based on evidence of noncompliance with state escheat laws. *See* 12 U.S.C. § 484(b); Pub. L. No. 97-457, § 23(a), 96 Stat. at 2510. Such an exception would have been unnecessary had the statute not otherwise

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[2] In its original version, the "visitorial powers" provision of the NBA stated: "[A national bank] shall not be subject to any other visitorial powers than such as are authorized by this act, except such as are vested in the general courts of law and chancery." The reference to "this act" was subsequently codified as "this Title," 1875 Rev. Stat. 5421, and later was changed to "law." *See* Federal Reserve Act of 1913, Pub. L. No. 63-43, 38 Stat. 251, 272 (Dec. 23, 1913) (also replacing the reference to "courts of law and chancery" with "courts of justice").

so completely prohibited the States from exerting visitorial authority over national banks.

Although the original enactment of the NBA vested national banks with a number of broad banking powers, real-estate lending was not one of them. *See Nat'l Bank* v. *Matthews*, 98 U.S. 621, 626 (1878). Once Congress determined to give national banks that power, however, it did so in a manner that ensured that national banks' real-estate lending would be subject exclusively to *federal* control and regulation. Beginning in 1913, Congress expressly authorized national banks to make loans secured by farmland under restricted conditions. Federal Reserve Act of 1913, Pub. L. No. 63-43, § 24, 38 Stat. 251, 273. Three years later, Congress expanded that power by authorizing loans on farmland within specified geographic areas, and by authorizing loans on other types of property subject to other restrictions. Act of Sept. 7, 1916, ch. 461, § 24, 39 Stat. 752, 754-55 (codified as amended at 12 U.S.C. § 371).

In the years that followed, Congress continued to amend § 371 of the NBA to progressively remove the statutory limitations on national banks' power to engage in real-estate lending. In 1982, it removed those statutory restrictions altogether, replacing them with a broad provision that authorized national banks to "make, arrange, purchase or sell loans or extensions of credit secured by liens on interests in real estate, subject to such terms, conditions, and limitations as may be prescribed by the Comptroller of the Currency by order, rule, or regulation." Garn-St. Germain Depository Institutions Act of 1982, Pub. L. No. 97-320, § 403, 96 Stat. 1469, 1510-11. Most recently, in 1991, Congress again amended § 371, adding an additional requirement that national banks comply with the uniform real-estate

lending standards adopted by federal banking regulators, including the OCC, pursuant to 12 U.S.C. § 1828(*o*). *See* 12 U.S.C. § 371(a).

Thus, "the history of national banks' real estate lending activities under section 371 is one of extensive Congressional involvement gradually giving way to a streamlined approach in which Congress has delegated broad rulemaking authority to the Comptroller." Bank Activities and Operations; Real Estate Lending and Appraisals, 68 Fed. Reg. 46,119, 46,124 (Aug. 5, 2003). But, whether that regulatory authority is exercised by Congress or the OCC, "national bank real estate lending authority," since its inception, "has been extensively regulated at the *Federal* level" and immune from state oversight. *Ibid.* (emphasis in original).

2. This Court Has Interpreted The NBA To Preempt State Laws That Interfere With National Banks

Since its enactment, the NBA's broad displacement of state efforts to examine and regulate national banks has been firmly established and frequently reaffirmed by this Court.

In one of its earliest interpretations of the NBA, the Court described the statute as specifically designed to protect national banks' exercise of federally authorized powers from "the hazard of unfriendly legislation by the States." *Tiffany* v. *Nat'l Bank of Mo.*, 85 U.S. (18 Wall.) 409, 413 (1874). Thus, insofar as the banking powers of national banks are concerned, "the States can exercise no control over them, nor in any wise affect their operation, except in so far as Congress may see proper to permit." *Farmers' & Mechs.' Nat'l Bank* v. *Dearing*, 91 U.S. 29, 34 (1875).

Consistent with its opinion in *McCulloch* v. *Maryland*, the Court subsequently explained:

> National banks are instrumentalities of the Federal government, created for a public purpose, and as such necessarily subject to the paramount authority of the United States. It follows that *an attempt, by a State, to define their duties or control the conduct of their affairs is absolutely void*, wherever such attempted exercise of authority expressly conflicts with the laws of the United States, and either *frustrates the purpose of the national legislation or impairs the efficiency of these agencies of the Federal government to discharge the duties, for the performance of which they were created*.

Davis v. *Elmira Sav. Bank*, 161 U.S. 275, 283 (1896) (emphases added); *see also Talbott* v. *Bd. of County Comm'rs*, 139 U.S. 438, 443 (1891) ("The[] various provisions, scattered through the entire body of the statute respecting national banks, emphasize . . . an intent to create a national banking system coextensive with the territorial limits of the United States, and with uniform operation within those limits"); *Easton* v. *Iowa*, 188 U.S. 220, 231 (1903) (the NBA "provide[s] a symmetrical and complete scheme for the banks to be organized under the provisions of the statute").

Echoing Congress's own statements regarding the uniform nature of the system prescribed by the NBA, the Court has emphasized that national banks must remain "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. And, because a "State has no power to enact legislation contravening the Federal laws for the control of national banks," *Guthrie* v. *Harkness,* 199 U.S. 148, 152 (1905), "[h]owever wise or needful [a State's] policy, . . . it must give way to [any] contrary federal policy" underlying the NBA. *Franklin Nat'l Bank of Franklin Square* v. *New York*, 347 U.S. 373, 378-79 (1954); *see also Marquette Nat'l Bank* v. *First of Omaha Serv. Corp.*, 439 U.S. 299, 308, 314-15 (1978) ("Close examination of the National Bank Act of 1864, its legislative history, and its historical context makes clear that . . . Congress intended to facilitate . . . a 'national banking system'") (citation omitted).

Central to the Court's NBA preemption jurisprudence is the settled principle that the States may not interfere with the efficient exercise of the banking *powers* of national banks. As the Court has explained:

> In using the word "powers," the [NBA] chooses a legal concept that, in the context of national bank legislation, has a history. That history is one of interpreting 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.

Barnett Bank, 517 U.S. at 32 (emphases added); *see also id.* at 33 ("In defining the pre-emptive scope of statutes and regulations granting a power to national banks," the Court in prior cases had recognized that "normally Congress would not want States to forbid, or impair significantly, the exercise of a power that Congress explicitly granted").

In *Barnett Bank*, the Court held that the NBA preempted a Florida statute that prohibited banks from selling insurance because the state law "impair[ed]" national banks' statutory power under the NBA to sell insurance in towns with populations of less than 5,000. 517 U.S. at 33. In reaching that conclusion, the Court relied particularly on its 1954 decision in *Franklin*, which emphatically underscores the breadth of a national bank's authority to exercise its banking powers free from *any* state limitation or condition.

Franklin held that the NBA preempted a New York State statute that forbade banks to use the words "saving" and "savings" in advertising. 347 U.S. at 374. The New York statute did not prohibit banks from taking deposits—*i.e.*, exercising savings-related banking powers—but rather *conditioned the exercise of those powers* on a limitation on the right to advertise regarding bank deposit accounts. The Court recognized that the New York statute prevented only the *specific* power to use the word "savings" in advertising, but nevertheless held that preemption derived from the effect of the state restriction upon the *underlying* national bank power to offer savings accounts. Observing that "[m]odern competition for business finds advertising one of the most usual and useful of weapons," the Court found that "[i]t would require some affirmative indication to justify an interpretation that would permit a national bank to engage in a business but gave no right to let the public know about it." *Id.* at 377-78. As there was "no indication that Congress intended to make this phase of national banking subject to local restrictions, as it has done by express language in several other instances," the advertising restriction was preempted—not because it "prevented" a certain

form of marketing activity, but rather because it *burdened the exercise of the power* to offer savings accounts. *Id*. at 378.

The history and structure of the NBA thus teach that the federal statute displaces all state laws that "impair [the] efficiency" of national banks' *exercise of their federally authorized powers*, both express and incidental. *Barnett Bank*, 517 U.S. at 34 (internal quotation marks omitted). Accordingly, if a state law would "interfere with," "encroach[]" upon, or "hamper[]" the exercise of a power authorized under the NBA, it is preempted. *Id.* at 33-34. In contrast, the NBA does not preempt state laws that do not unduly burden a national bank's "exercise of its powers." *Ibid.* (offering examples of non-preempted laws).[3]

The NBA's broad prohibition on state efforts to examine and regulate national banks was explicitly reaffirmed in *Watters* v. *Wachovia Bank, N.A.*, 550 U.S. 1 (2007). There, the Court held that a national bank's real-estate lending business—whether conducted by the bank itself or one of its operating subsidiaries—is "immune from state visitorial control" and that the NBA therefore preempted a Michigan consumer-protection statute that purported to subject the lending activities of a national bank operating subsidiary to state oversight. *Id.* at 13 (citing 12 U.S.C. § 484(a)). As in *Barnett* and *Franklin*, the Court reiterated that "the NBA . . . protect[s] from state hindrance a national bank's engagement in the 'business of banking.'" *Id.* at 21. "[W]hen state pre-

[3] *See also* 12 C.F.R. § 34.4(b) ("State laws on [certain enumerated] subjects are not inconsistent with the real estate lending powers of national banks and apply to national banks to the extent that they only incidentally affect the exercise of national banks' real estate lending powers").

scriptions significantly impair the exercise of [a national bank's] authority," the Court explained, "the State's regulations must give way." *Id.* at 12. Because 12 U.S.C. § 371 explicitly authorizes national banks to engage in real-estate lending, state law may not "significantly burden[,] . . . curtail or hinder a national bank's efficient exercise" of that power. *Id.* at 13. To hold otherwise, the Court recognized, would subject national banks to "[d]iverse and duplicative superintendence of . . . the business of banking," which is precisely what Congress intended the NBA to prevent. *Id.* at 13-14. Thus, States cannot exercise "examination and enforcement authority over mortgage lending, or any other banking business done by national banks." *Id.* at 14-15.[4]

B. Adherence To The Tradition Of Exclusive Federal Oversight Of National Banks Raises No Federalism Concerns

In a series of interrelated arguments, petitioner and his *amici* contend that principles of federalism should lead the Court to conclude that the NBA does not preempt state examination and enforcement under state fair-lending laws, even if such state oversight would interfere with the efficient exercise of national banks' lending operations. The Court re-

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[4] Significantly, the Court reached this conclusion without finding it necessary to consult an OCC regulation precluding state oversight of national bank operating subsidiaries because it found the NBA to be clear on its face: It precludes state "hindrance" or "impair[ment]" of a national bank's "business of banking"—including the business of real-estate lending—whether conducted by the national bank itself or by its operating subsidiary. *Watters*, 550 U.S. at 12, 21; *see also* 12 U.S.C. §§ 24(Seventh), 24a(g)(3)(A), 371, 484.

jected a variant of this argument almost 200 years ago in *McCulloch* v. *Maryland*; as reformulated here, it fares no better today.

Petitioner first argues that Congress can only preempt his oversight of national banks' federally authorized lending power if Congress satisfies the "clear statement" rule of *Gregory* v. *Ashcroft*, 501 U.S. 452 (1991). Pet. Br. 43-45. That rule requires Congress to speak clearly when it intends to "alter the usual constitutional balance between the States and the Federal Government." *Gregory*, 501 U.S. at 460 (quoting *Atascadero State Hosp.* v. *Scanlon,* 473 U.S. 234, 242 (1985) (internal quotation marks omitted)). But congressional displacement of petitioner's attempt to examine and regulate national banks' real-estate lending would not upset the usual balance between state and federal power; to the contrary, it would be consistent with the exclusive federal regulation of national bank powers since the Civil War. *See*, *e.g.*, *Easton*, 188 U.S. at 230 ("Such being the nature of [national banks], it must be obvious that their operations cannot be limited or controlled by state legislation").

Indeed, the national banking system is an area of traditional federal authority that would, if anything, require a clear statement to permit *state* action because it is petitioner who seeks to alter the traditional federal-state balance. Petitioner's invocation of the "clear statement" rule is therefore manifestly inapposite. In any event, the Court has held for more than a century that the federal banking laws clearly preclude state efforts to examine and regulate the exercise of banking powers by national banks. *Watters*, 550 U.S. at 15-16; *Davis*, 161 U.S. at 290. No more is required.

Petitioner similarly argues that the preemption analysis should "begin[] with the assumption that the historic police powers of the States [are] not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." Pet. Br. 46 (quoting *Altria Group, Inc.* v. *Good*, 555 U.S. __, 127 S. Ct. 538, 543 (2008) (internal quotation marks omitted)). But as the Court has made clear, "an 'assumption' of nonpre-emption is *not* triggered when the State regulates in an area where there has been a history of significant federal presence." *United States* v. *Locke*, 529 U.S. 89, 108 (2000) (emphasis added). The regulation of national banks is indisputably such an area.

Indeed, state police powers have *never* extended to the regulation of the banking powers that Congress explicitly conferred on national banks, and this Court has consistently rejected States' attempts to extend those powers. *See*, *e.g.*, *McCulloch*, 17 U.S. (4 Wheat.) at 436 (state taxing authority); *Barnett Bank*, 517 U.S. at 33 (state authority to regulate insurance). Where "Congress has legislated in the field from the earliest days of the Republic, creating an extensive federal statutory and regulatory scheme," "there is no beginning assumption that concurrent regulation by the State is a valid exercise of its police powers." *Locke*, 529 U.S. at 108. As discussed above, Congress chartered the First Bank of the United States just three years after ratification of the Constitution, and an extensive federal statutory and regulatory framework has governed the national bank system since the Civil War. Neither petitioner nor any of his *amici* has been able to cite even a single decision in which this Court has applied the "assumption of nonpre-emption" to a preemption inquiry under the NBA. Preemption is the rule, not

the exception, in such cases. *Barnett Bank*, 517 U.S. at 32.

Petitioner's reliance on *Printz* v. *United States*, 521 U.S. 898 (1997), and *New York* v. *United States*, 505 U.S. 144 (1992), is similarly misplaced. Pet. Br. 43-44. Although principles of political accountability may prevent Congress from "commandeering" state officers to enforce a federal law, the lines of political accountability remain clear where States are barred from enforcing their own lending regulations against federally chartered entities that have been governed by comprehensive federal regulatory requirements throughout their entire history. Moreover, it is not unusual for the federal government to bear exclusive responsibility for enforcing state law where federal interests are at stake. *See*, *e.g.*, 18 U.S.C. § 13 (laws of the States made applicable to federal properties and jurisdictions). It is petitioner's attempt to change the *status quo* in this respect that would blur lines of political accountability and unsettle the well-established principle that the federal government is supreme within its own sphere of operations.

Petitioner seeks to avoid these conclusions by arguing that "this case is not about banking regulation, an area where there has been a sustained federal presence as to national banks." Pet. Br. 46-47. But banking regulation is *exactly* what this case is about—specifically, who has the authority to examine and regulate the terms and conditions of national banks' real-estate loans. Congress has given the power to engage in real-estate lending to federally chartered banks, 12 U.S.C. § 371, subject to the OCC's exclusive visitorial authority, *id.* § 484, and States cannot interfere with the efficient exercise of that power, *Barnett Bank*, 517 U.S. at 33. Petitioner's arguments are therefore more appropriately

directed to Congress, which alone may authorize state regulation of federal entities. *Cf.* 12 U.S.C. § 484(b) (expressly authorizing limited state regulation). But unless and until Congress does so, petitioner's request that this Court alter the federal-state balance should be declined.

Petitioner's *amici* go even further by arguing that prohibiting state oversight of national banks would exceed the powers conferred on Congress by the Constitution, and thus offend the Tenth Amendment's reservation of power to the States. Indeed, the briefs submitted by the States and the American Association of Residential Mortgage Regulators, as *amici* for petitioner, suggest that this case is a "mirror image" of *Printz* and *New York*. States Br. 6; AARMR Br. 24. But far from being "mirror images" of this case, those precedents are false parallels.

The Court's concern in *Printz* and *New York* was with state officials being "dragooned into administering federal law." *Printz*, 521 U.S. at 928 (internal quotation marks omitted). Here, Congress's prohibition against state interference with a federal entity's exercise of its federal powers in no way commandeers state officials to enforce a federal regulatory scheme. Indeed, the fact that the federal government cannot require the States to enforce federal gun laws (*Printz*) does not prevent Congress from enjoining the States from enforcing state gun laws against federal officials. In the same way, even if Congress cannot require States to enforce federal law against national banks, it certainly can prevent the States from enforcing state laws against national banks' exercise of their federally authorized banking powers. *See McCulloch*, 17 U.S. (4 Wheat.) at 436.

Moreover, in *Printz* and *New York*, the Court found that "an essential attribute of the States' retained sovereignty [is] that they remain independent and autonomous *within their proper sphere of authority*." *Printz*, 521 U.S. at 928 (emphasis added); *see also New York*, 505 U.S. at 180. But outside their proper sphere of authority—for example, where they try to intrude into the *federal* sphere—States do not remain independent and autonomous, but rather are subject to sovereign federal law. This principle is firmly established in this Court's precedent, *e.g.*, *Osborn*, 22 U.S. (9 Wheat.) at 868, and in the Supremacy Clause of the Constitution, U.S. Const. art. VI, § 2.

It is not surprising, then, that the Tenth Amendment argument urged by petitioner's *amici* was squarely rejected in *Watters* by both the majority and the dissent. 550 U.S. at 22; *id.* at 43-44 (Stevens, J., dissenting). The Court explained that "'[i]f a power is delegated to Congress in the Constitution, the Tenth Amendment expressly disclaims any reservation of that power to the States.'" *Id.* at 22 (quoting *New York*, 505 U.S. at 156). Thus, "[a]s long as it is acting within the powers granted it under the Constitution, Congress may impose its will on the States" without violating the Tenth Amendment. *Gregory*, 501 U.S. at 460. It is well-settled that Congress acts within its constitutional powers when creating national banks, *see*, *e.g.*, *Farmers & Mechs.' Nat'l Bank*, 91 U.S. at 33, and that "[r]egulation of national bank operations is a prerogative of Congress under the Commerce and Necessary and Proper Clauses," *Watters*, 550 U.S. at 22.

Because petitioner's examination and regulation of national banks' real-estate lending practices would impair the exercise of banking powers that Congress

plainly had the authority to confer on national banks, preemption transgresses no constitutional boundary.

II. THE NBA PREEMPTS PETITIONER'S ATTEMPT TO EXAMINE AND REGULATE NATIONAL BANKS' EXERCISE OF THEIR REAL-ESTATE LENDING POWER

Petitioner attempts to escape the NBA's preemptive force by focusing principally on an OCC regulation that provides, in part, that "[o]nly the OCC or an authorized representative of the OCC may exercise visitorial powers with respect to national banks." 12 C.F.R. § 7.4000. Petitioner and his *amici* argue at length that this regulation does not merit judicial "deference." Pet. Br. 42-57. But there is no need for the Court even to reach that issue because preemption of petitioner's attempt to interfere with national banks' federally authorized lending power flows from the NBA itself, and does not depend on the degree of deference due Section 7.4000.

In petitioner's own words, he "seeks the ability to bring lawsuits in state court to enforce New York's fair lending laws, and to conduct targeted investigations in contemplation of such lawsuits." Pet. Br. 26. Both the lawsuits threatened by petitioner and his demand for lending information in aid of those suits are preempted by the NBA because Congress has afforded the OCC exclusive visitorial authority over national banks. 12 U.S.C. § 484. The injunction against petitioner's examination and regulation of national banks' lending power should therefore be sustained in its entirety, irrespective of the meaning or validity of the regulation that is the focus of petitioner's and his *amici*'s submissions.

Section 484 of the NBA 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). Congress intended that the OCC's visitorial authority over national banks extend to "all the affairs of the bank." *Id.* § 481. Using these broad visitorial powers, the OCC can "correct all abuses of authority, and . . . nullify all irregular proceedings" by national banks. *Guthrie*, 199 U.S. at 158 (internal quotation marks omitted). Congress did not afford States similar visitorial authority over national banks, and state officials are therefore barred by § 484 from examining and regulating national banks' exercise of their federally authorized banking powers.

Real-estate lending is no exception to this rule. Like all other federally authorized banking powers, "lending, when conducted by a national bank, is immune from state visitorial control" because "[t]he NBA specifically vests exclusive authority to examine and inspect in OCC." *Watters*, 550 U.S. at 13. This assignment of exclusive visitorial authority to the OCC reflects the judgment of Congress—and this Court—that "[s]tate laws that . . . subjected [national banks'] lending to [a] State's investigative and enforcement machinery would surely interfere with the banks' federally authorized business." *Ibid*.

Petitioner's attempt to examine and regulate national banks' real-estate lending practices falls squarely within the scope of the OCC's exclusive visitorial powers. In anticipation of potential fair-lending suits, petitioner sought to inspect bank records and data regarding loans that national banks made on New York property over a one-year period. Pet. App. 49a. Petitioner requested a wide range of information regarding those loans, including all vari-

ables and formulas that the national banks used to determine the annual percentage rate on their loans, the circumstances in which the banks deviated from their standard rate formula, and extracts from every computer database containing the banks' basic loan conditions. Pet. App. 50a. Such "examination and enforcement authority over mortgage lending" by national banks rests within the sole province of the OCC. *Watters*, 550 U.S. at 14-15.

State investigations and enforcement actions regarding the exercise of national banks' lending powers could result in burdensome oversight of national banks' day-to-day lending practices. Indeed, the New York Attorney General recently settled a fair-lending investigation into the activities of a lending institution through an agreement that mandated extensive and continuous state supervision of the institution's lending practices. *See* Assurance of Discontinuance Pursuant to Executive Law 63(15) (Nov. 22, 2006), *available at* http://www.oag.state.ny.us/media_center/2006/dec/Countrywide%20Assurance%20Final%20Signed%20PDF.pdf (requiring the lender to adopt new real-estate lending policies, retain a state-approved independent consultant to review and approve certain lending procedures, and provide periodic reports to the State regarding its real-estate lending practices). If the NBA were construed to permit similar state examination and regulation of national banks' lending practices, state attorneys general could undertake equally intrusive oversight of national banks' day-to-day lending activities and "impose limitations and restrictions as various and as numerous as the States." *Easton*, 188 U.S. at 229. But such "[d]iverse and duplicative superintendence of . . . the business of banking . . . is precisely what the NBA was designed to prevent." *Watters*, 550

U.S. at 13-14; *see also* Cong. Globe, 38th Congress, 1st Sess. 1873 (1864) (statement of Sen. Sumner) (national banks should be "substantially the same in Washington, in New York, in Boston, and in Chicago," such that the "complications and differences" of the various state laws would not interfere with the exercise of their powers).

Petitioner seeks to avoid preemption by arguing that the OCC's visitorial powers are limited to inquiries into conformance with federal charter requirements and that his investigation into compliance with fair-lending laws therefore falls outside of § 484. Pet. Br. 26. But the fact that a state examination of a national bank's records serves a consumer-protection purpose does not remove that examination from the scope of the OCC's exclusive visitorial powers. Indeed, the state statute in *Watters* was "[e]nacted to protect consumers from mortgage lending abuses," 550 U.S. at 34 & n.18 (Stevens, J., dissenting); *see also id.* at 13-14 (majority opinion), but the Court nevertheless held that it was preempted by § 484 because the "authority to engage in the business of mortgage lending comes from the NBA," which "vests visitorial oversight" of national banks "in OCC, not state regulators," *id.* at 21.

States therefore cannot "interfere, whether with hostile or friendly intentions, with national banks . . . in the exercise of the powers bestowed upon them by the general government." *Easton*, 188 U.S. at 238. That well-settled principle is an insurmountable obstacle to petitioner's attempt to examine and regulate national banks' federally authorized lending power under state law.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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April 1, 2009