No. 08-453

In the Supreme Court of the United States

ANDREW M. CUOMO, ATTORNEY GENERAL OF NEW YORK, PETITIONER

v.

THE CLEARING HOUSE ASSOCIATION, L.L.C., ET AL.

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

BRIEF FOR THE FEDERAL RESPONDENT

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QUESTION PRESENTED

Whether the Office of the Comptroller of the Currency (OCC) reasonably interpreted 12 U.S.C. 484(a), which generally precludes governmental actors other than OCC from exercising "any visitorial powers" over national banks, to prohibit the New York Attorney General from demanding national bank records and from filing suit to enforce compliance by national banks with the State's fair lending laws.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-62a) is reported at 510 F.3d 105. The opinions of the district court (Pet. App. 63a-117a, 118a-142) are reported at 396 F. Supp. 2d 383 and 394 F. Supp. 2d 620.

JURISDICTION

The judgment of the court of appeals was entered on December 4, 2007. A petition for rehearing was denied on June 5, 2008 (Pet. App. 143a-144a). On August 26, 2008, Justice Ginsburg extended the time within which to file a petition for a writ of certiorari to and including October 3, 2008. The petition was filed on that date and was granted on January 16, 2009. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATEMENT

1. The Office of the Comptroller of the Currency (OCC) is responsible for administering the National Bank Act (NBA or Act), 12 U.S.C. 21 *et seq.* OCC's chief officer, the Comptroller of the Currency, is authorized "to prescribe rules and regulations to carry out the responsibilities of the office." 12 U.S.C. 93a. OCC is authorized to initiate enforcement proceedings if it concludes that a national bank is not in compliance with any applicable state or federal law regulating the business of banking. 12 U.S.C. 1818(b).

The NBA was enacted in 1864 to create a national banking system and to protect it from potentially hostile action by the States. *Tiffany* v. *National Bank*, 85 U.S. (18 Wall.) 409, 412-413 (1874). "To prevent inconsistent or intrusive state regulation from impairing the national system," *Watters* v. *Wachovia Bank, N.A.*, 550 U.S. 1, 11 (2007), the NBA provides that "[n]o national bank shall be subject to any visitorial powers except as authorized by Federal law, vested in the courts of justice or such as shall be, or have been exercised or directed by Congress or by either House thereof or by any committee of Congress or of either House duly authorized." 12 U.S.C. 484(a). An additional exception permits "lawfully authorized State auditors and examiners" to "review [a bank's] records solely to ensure compliance with applicable State unclaimed property or escheat laws." 12 U.S.C. 484(b).[1]

[1] The NBA's original visitorial exclusivity provision stated that national banks "shall not be subject to any other visitorial powers than such as are authorized by this act, except such as are vested in the several courts of law and chancery." NBA, ch. 106, § 54, 13 Stat. 116. The current version of Section 484 largely tracks that provision but includes additional exceptions to the rule of visitorial exclusivity.

Through notice and comment rulemaking, OCC has promulgated 12 C.F.R. 7.4000, which interprets Section 484. 69 Fed. Reg. 1895 (2004); 68 Fed. Reg. 6363 (2003); 64 Fed. Reg. 60,092 (1999); 64 Fed. Reg. 31,479 (1999). The regulation defines the term "visitorial powers" to include "(i) [e]xamination of a bank; (ii) [i]nspection of a bank's books and records; (iii) [r]egulation and supervision of activities authorized or permitted pursuant to federal banking law; and (iv) [e]nforcing compliance with any applicable federal or state laws concerning those activities." 12 C.F.R. 7.4000(a)(2). The regulation also clarifies the meaning of the statutory exception that permits the exercise of visitorial powers "vested in the courts of justice." 12 U.S.C. 484(a). The regulation states that the exception "pertains to the powers inherent in the judiciary," such as the authority to issue discovery orders and subpoenas, "and does not grant state or other governmental authorities any right to inspect, superintend, direct, regulate or compel compliance by a national bank with respect to any law, regarding the content or conduct of activities authorized for national banks under Federal law." 12 C.F.R. 7.4000(b)(2).

2. Various federal laws prohibit discrimination in lending on the basis of race and other protected grounds. See, *e.g.*, Equal Credit Opportunity Act (ECOA), 15 U.S.C. 1691 *et seq.*; Fair Housing Act (FH Act), 42 U.S.C. 3601 *et seq*. Many States, including New York, have enacted laws that substantially parallel those federal anti-discrimination provisions. New York Executive Law § 296-a is that State's counterpart to ECOA. Pet. App. 3a & n.3; N.Y. Exec. Law. § 296-a(1) (McKinney 2005).

The Home Mortgage Disclosure Act of 1975 (HMDA), 12 U.S.C. 2801 *et seq*., requires lenders mak-

ing loans secured by residential real property to compile and make publically available information about their mortgage lending activities. 12 U.S.C. 2803. Required disclosures include applicants' race, ethnicity, gender, and income, and, for certain loans, the interest rate charged. *Ibid.* Because HMDA data do not capture all information necessary for prudent underwriting and pricing, HMDA data alone cannot establish unlawful lending discrimination. 59 Fed. Reg. 18,270 (1994); OCC, *Frequently Asked Questions About the New HMDA Data* 5-6 (Apr. 3, 2006) (*HMDA Data Questions*) <http://www.occ.treas.gov/ftp/release/2006-44a.pdf>. Consideration of additional information—such as credit history scores, borrower debt-to-income ratios, and loan-to-property-value ratios—may indicate that differential pricing or other differential treatment reflects prudent lending practices rather than unlawful conduct. *Ibid.*

In order to determine whether a bank has engaged in unlawful discrimination in its lending activities, OCC employs a program involving fair lending risk assessment, risk screening using sophisticated modeling techniques, and on-site examinations. If OCC determines that a bank has violated fair lending laws or that its practices are potentially discriminatory, OCC will order the bank to cease the discriminatory practices, take necessary remedial action to redress harm to borrowers, and make referrals to the United States Department of Justice and notifications to the Department of Housing and Urban Development, as appropriate. 15 U.S.C. 1691e(g) and (k); 59 Fed. Reg. at 18,272-18,274; OCC, *Fair Lending Examination Procedures* 9 (Apr. 2006).

3. In March 2005, four national banks that are members of the Clearing House Association, a trade association of financial institutions, disclosed HMDA data for 2004. Shortly thereafter, the New York State Attorney General's office sent "letters of inquiry" to the banks. Pet. App. 3a. The letters asserted that the HMDA data indicated racial disparities in loan pricing between white borrowers and African-American and Hispanic borrowers. *Ibid.* The letters further stated that the disparities, "unless legally justified[,] may violate federal and state anti-discrimination laws such as [ECOA] and its state counterpart, New York State Executive Law § 296-a." *Ibid.* "In lieu of issuing a formal subpoena," the letters requested certain non-public information concerning the banks' lending activities, including data on real estate loans made in the State. *Id.* at 3a-4a. The Attorney General's office claimed authority to demand the requested bank records under New York Executive Law § 63(12), which empowers the Attorney General to issue civil subpoenas. Pet. App. 69a.

In June 2005, respondents (OCC and the Clearing House Association) each filed a complaint in federal district court seeking declaratory and injunctive relief against petitioner, the New York State Attorney General. Respondents contended that petitioner's demand for bank records and his threatened enforcement actions constituted a prohibited exercise of visitorial powers over national banks. Pet. App. 4a-5a, 66a-67a. Petitioner filed a counterclaim in the OCC action seeking to have OCC's visitorial powers regulation declared arbitrary and capricious under the Administrative Procedure Act, 5 U.S.C. 706. Pet. App. 5a.

The district court entered summary judgment for respondents. The court granted declaratory and injunctive relief that barred petitioner from demanding to inspect the national banks' books and records in connection with his investigation and from initiating any judicial action against national banks to enforce the State's fair lending laws. Pet. App. 63a-117a, 118a-142a. The court also denied petitioner's counterclaim challenging the validity of OCC's regulation. *Id.* at 114a-115a.

4. As relevant here, the court of appeals affirmed the district court's judgment. Pet. App. 1a-62a. The court of appeals observed that the parties' dispute centered on "the meaning of the term 'visitorial powers' in § 484(a)," and, in particular, on whether OCC's regulatory interpretation of that term is entitled to deference under *Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837 (1984). Pet. App. 10a. In that regard, the court noted petitioner's concession that, if OCC's definition of the term "visitorial powers" and its construction of the "courts of justice" exception were upheld, Section 484(a) would bar petitioner's investigation and threatened enforcement actions. *Id.* at 15a & n.6.

The court of appeals then considered and rejected petitioner's various arguments that *Chevron* deference should not apply. The court first rejected the contention that *Chevron* deference would be inconsistent with the presumption against preemption that governs in areas of regulation traditionally allocated to the States. The court explained that the presumption does not apply in the context of national bank regulation, which has been "substantially occupied by federal authority for an extended period of time." Pet. App. 12a (citation omitted).

The court of appeals also dismissed petitioner's contention that *Chevron* deference is inappropriate because OCC's interpretation of the term "visitorial powers" invokes the outer limits of Congress's power and therefore triggers the doctrine of constitutional avoidance. Pet. App. 13a-14a. The court concluded that OCC's construction of the disputed statutory language raises no constitutional concerns even though it prevents the States from enforcing certain state laws against national banks. The court observed that national banks are "creatures of federal statute" and that 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." *Id.* at 14a (quoting *Farmers' & Mechs'. Nat'l Bank* v. *Dearing*, 91 U.S. 29, 34 (1875)). The court also rejected petitioner's argument that OCC had exceeded its rulemaking authority, explaining that 12 U.S.C. 93a gives OCC "broad authority" to promulgate regulations implementing the NBA. Pet. App. 24a.

Applying *Chevron* deference, the court of appeals held that OCC's regulation reflects a reasonable understanding of the term "visitorial powers" and the "courts of justice" exception. The court concluded that OCC's interpretation of "visitorial powers" is consistent with the definition this Court gave that term in *Guthrie* v. *Harkness*, 199 U.S. 148 (1905), and is supported by *Watters*, which made clear that "investigation and enforcement by state officials are just as much aspects of visitorial authority as registration and other forms of administrative supervision." Pet. App. 20a.

The court of appeals also concluded that OCC had reasonably construed the "courts of justice" exception as involving only "the powers inherent in the judiciary" and not as granting authority to States to "compel com-

pliance by a national bank" with any law concerning "the content or conduct of activities authorized for national banks under Federal law." Pet. App. 30a (quoting 12 C.F.R. 7.4000(b)(2)). The court noted that petitioner's proposed interpretation of the exception, under which States could use lawsuits to enforce regulations that could not be enforced administratively, "would swallow the rule" against the unauthorized exercise of "visitorial powers." *Ibid.*

The court of appeals concluded that, "[i]n drawing the lines that it did in § 7.4000(a), the OCC reached a permissible accommodation of conflicting policies that were committed to it by the statute." Pet. App. 28a. The court explained that OCC's approach "furthers Congress's intent * * * to shield national banks 'from unduly burdensome and duplicative state regulation' in the exercise of their federally authorized powers, such as real estate lending." *Id.* at 28a-29a (quoting *Watters*, 550 U.S. at 11). "At the same time," the court observed, the challenged OCC regulation "preserves state sovereignty by leaving state officials free to enforce a wide range of laws that do not purport to regulate a national bank's exercise of its authorized banking powers." *Id.* at 29a.

Judge Cardamone dissented in relevant part. Pet. App. 42a-62a. He would have held that OCC's regulatory definition of the term "visitorial powers" is not entitled to *Chevron* deference and that OCC's regulation is invalid because it impermissibly alters the balance between federal and state authority. *Ibid.*

SUMMARY OF ARGUMENT

The NBA prohibits governmental officials other than OCC from exercising "any visitorial powers" over national banks, except in limited circumstances authorized by federal law. 12 U.S.C. 484(a). The court of appeals correctly upheld OCC's regulation defining the term "visitorial powers" to include state efforts to obtain national bank records and to enforce state fair lending laws against national banks.

A. OCC's regulation is entitled to *Chevron* deference. This Court has repeatedly deferred to OCC interpretations of ambiguous terms in the NBA. See, *e.g.*, *Smiley* v. *Citibank (South Dakota), N.A.* 517 U.S. 735 (1996). The regulation at issue here was adopted, after full notice-and-comment procedures, under OCC's broad authority to promulgate regulations administering the NBA, 12 U.S.C. 93a.

B. Petitioner identifies no sound basis for withholding *Chevron* deference in this case. OCC's regulation does not alter the federal-state balance but simply precludes state enforcement of laws that regulate the performance by federal instrumentalities of their federally authorized powers. For similar reasons, no presumption against preemption applies to the regulation of national banks, as to which federal authority has always been predominant.

OCC's regulation does not declare the preemptive scope of the NBA, but identifies the circumstances under which state officials may act to enforce non-preempted state-law provisions. The Court in *Smiley* deferred to OCC's interpretation of ambiguous language in the NBA even though the practical effect of that interpretation was to preclude the application of state laws that would have been valid under a different con-

struction of the NBA. 517 U.S. at 743-744. And, even if OCC's regulation were read as determining the scope of federal preemption, it would be entitled to deference. See, *e.g.*, *City of N.Y.* v. *FCC*, 486 U.S. 57, 63-64 (1988); *Fidelity Fed. Sav. & Loan Ass'n* v. *de la Cuesta*, 458 U.S. 141, 153-154 (1982).

OCC clearly had authority to issue regulations interpreting Section 484. Section 484 is contained within a statute that OCC administers, and it addresses the circumstances under which national banks can be subject to supervisory and enforcement activities. OCC has consistently understood "visitorial powers" to encompass state efforts to examine national banks, review their books and records, and enforce all applicable laws that regulate the business of banking.

C. OCC's interpretation of the term "visitorial powers" better reflects the NBA's text, structure, and purposes than petitioner's alternative view that the term is limited to supervisory oversight of a bank's internal management, safety and soundness, and charter compliance. When the NBA was enacted, the visitorial powers of the States over civil corporations included broad supervisory authority to protect the public and to police corporate compliance with public laws. States frequently exercised that authority through judicial actions brought by their attorneys general, and visitorial powers over banks were particularly broad.

OCC's interpretation is also supported by the exceptions to Section 484's general prohibition. Those exceptions confirm that "visitorial powers" are not limited to supervision of internal bank affairs and charter compliance, but include state review of bank records to ensure the bank's compliance with more general laws, such as unclaimed property and escheat laws and state tax laws.

OCC's interpretation also furthers the purposes of the NBA, which created the national banking system during the Civil War to further important goals of the federal government, and which carefully protected national banks from potentially hostile action by the States. Even when the application to national banks of state law is not substantively preempted, differences in interpretation, enforcement priorities, or choice of remedies can interfere with uniform bank supervision and with the exercise by national banks of their federally authorized powers.

OCC's interpretation is also supported by this Court's decisions in *Guthrie* v. *Harkness*, 199 U.S. 148 (1905), and *Watters* v. *Wachovia Bank, N.A.*, 550 U.S. 1 (2007), which reflect the Court's own understanding of the NBA term "visitorial powers." Indeed, in *Watters*, this Court concluded that Michigan laws authorizing virtually the same enforcement actions that petitioner sought to take here involved the exercise of "visitorial powers." *Id.* at 13-15. OCC's interpretation is further supported by other provisions of federal banking law that explicitly address the appropriate entity for enforcing state fair lending laws against national banks. 12 U.S.C. 36(f)(1)(B).

D. Petitioner's alternative construction—that the term "visitorial powers" is unambiguously limited to supervisory oversight of a bank's safety and soundness, internal organization, and charter compliance—cannot be squared with the NBA's text, structure, and purposes, or with this Court's precedent. Petitioner's argument rests on a false dichotomy between "supervisory oversight" of a national bank's safety and soundness and charter compliance, on the one hand, and enforcement of "generally applicable" laws on the other. Although

New York's fair lending law is not designed specifically to ensure the safety and soundness of regulated banks, it is directed at core banking activities, and enforcement of the law necessarily entails judgments about safe and sound lending practices. OCC's interpretation of Section 484, under which state officials are barred from enforcing laws of that character, does not disable the States from enforcing laws of true general applicability, such as employment-discrimination and other labor laws.

Petitioner's interpretation is not supported by *First National Bank in St. Louis* v. *Missouri*, 263 U.S. 640 (1924), or by any of the other decisions of this Court on which petitioner relies. None of those decisions mentions, much less construes, Section 484, its predecessor provisions, or the term "visitorial powers," and none of them suggests that petitioner has the power to take the investigative and enforcement actions that he threatened in this case.

Petitioner is also mistaken in contending that OCC's interpretation would have left a significant gap in enforcement authority between 1864, when the NBA was enacted, and 1966, when Congress gave OCC authority to issue cease-and-desist orders to enforce state law. Since the NBA's enactment, OCC has been authorized to investigate whether national banks are complying with applicable state laws and to use its informal supervisory authority to ensure their compliance. In addition, private parties injured by a national bank's violation of applicable state law have always been able to seek redress in the courts. OCC currently has formal authority to enforce compliance with both state and federal fair lending laws. And OCC vigorously examines for, and enforces compliance with, fair lending requirements.

ARGUMENT

OCC'S INTERPRETATION OF THE TERM "VISITORIAL POWERS" IS SUPPORTED BY THE TEXT, STRUCTURE, AND PURPOSES OF THE NATIONAL BANK ACT AND IS ENTITLED TO *CHEVRON* DEFERENCE

The NBA was enacted during the Civil War to create a nationwide banking system, independent of the States and shielded from potentially hostile state actions, in order to establish a national currency and promote a strong national economy. *Talbott* v. *Silver Bow County*, 139 U.S. 438, 442-443 (1891); *Tiffany* v. *National Bank*, 85 U.S. (18 Wall.) 409, 412-413 (1874). As instrumentalities of the federal government, federally chartered and created for a public purpose, national banks have always been subject to the paramount authority of the United States. *Davis* v. *Elmira Sav. Bank*, 161 U.S. 275, 283 (1896). Thus, from its enactment, the NBA has reflected the principle that "the States can exercise no control over" national banks "except insofar as Congress may see proper to permit." *Farmers' & Mechs'. Nat'l Bank* v. *Dearing*, 91 U.S. 29, 34 (1875).

The central question in this case is whether state officials may investigate and enforce compliance by national banks with state laws that regulate their federally authorized banking activities. The NBA addresses that question in its "visitorial powers" provision, which is designed "[t]o prevent inconsistent or intrusive state regulation from impairing the national [banking] system." *Watters* v. *Wachovia Bank, N.A.*, 550 U.S. 1, 11 (2007). That provision states that "[n]o national bank shall be subject to any visitorial powers except as authorized by Federal law, vested in the courts of justice or such as shall be, or have been exercised or directed by

Congress or by either House thereof or by any committee of Congress or of either House duly authorized." 12 U.S.C. 484(a). The provision contains an additional exception that allows "lawfully authorized State auditors and examiners" to "review [a bank's] records solely to ensure compliance with applicable State unclaimed property or escheat laws." 12 U.S.C. 484(b).

OCC has promulgated a regulation that construes the term "visitorial powers" to include state efforts to inspect national bank records and to enforce compliance by national banks with applicable laws concerning federally authorized banking activities. 12 C.F.R. 7.4000(a)(2). Relying on that interpretation, the district court enjoined petitioner from demanding national bank lending records or instituting judicial actions to enforce state fair lending laws against national banks. J.A. 206a-207a, 209a. The court of appeals correctly upheld that injunction and OCC's regulation. OCC's interpretation of the term "visitorial powers" is entitled to judicial deference and is amply supported by the text, structure, and purposes of the NBA.

A. Under *Chevron*, OCC's Regulatory Definition Of The Term "Visitorial Powers" Is Controlling If It Is Reasonable

OCC's regulation defines "visitorial powers" to include "(i) [e]xamination of a bank; (ii) [i]nspection of a bank's books and records; (iii) [r]egulation and supervision of activities authorized or permitted pursuant to federal banking law; and (iv) [e]nforcing compliance with any applicable federal or state laws concerning those activities." 12 C.F.R. 7.4000(a)(2). Under OCC's interpretation, unless an exception applies, Section 484 prohibits state officials from demanding national bank

records or enforcing compliance by national banks with state laws regulating their federally authorized banking activities, such as real estate lending.

Contrary to petitioner's contention (Br. 19-20), however, OCC's regulation does not equate "visitorial powers" with "general law enforcement." Under OCC's interpretation, "visitorial powers" include two principal state activities. First, the term encompasses all state efforts to examine a national bank or inspect its records. 12 C.F.R. 7.4000(a)(2)(i) and (ii). Second, the term includes state regulatory or enforcement activities of a particular kind—those directed at an institution's banking activities. 12 C.F.R. 7.4000(a)(2)(iii) and (iv). The term does not encompass every state effort to enforce *any* state law against a national bank, but rather is limited to enforcement of laws "concerning" "activities authorized or permitted pursuant to federal banking law." *Ibid.* Thus, States remain free to enforce applicable laws that do not regulate the content or conduct of federally authorized banking activities, 12 C.F.R. 7.4000(a)(3), including, for example, criminal, tax, zoning, and labor and employment laws. See 69 Fed. Reg. 1896 (2004).[2]

Under *Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837 (1984), OCC's regulation interpreting "visitorial powers" is entitled to controlling weight if it is reasonable. As

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[2] Although OCC's regulation defines "visitorial powers" to encompass a state officer's demand to examine a national bank or inspect its records even if the purpose of that demand is unrelated to the business of banking, this case does not present any question concerning the application of Section 484 and the regulation to a demand of that character. The avowed purpose of petitioner's "letters of inquiry" was to obtain information concerning national banks' federally authorized lending activities. Pet. App. 3a-4a.

this Court recognized in *Chevron*, "[t]he power of an administrative agency to administer a congressionally created . . . program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress." *Id.* at 843 (citation omitted). Accordingly, when a statute authorizes an agency to engage in rulemaking, courts assume that "Congress would expect the agency to be able to speak with the force of law when it addresses ambiguity in the statute" through the rulemaking process. *United States* v. *Mead Corp.*, 533 U.S. 218, 229 (2001). In that circumstance, a reviewing court "is obliged to accept the agency's position if Congress has not previously spoken to the point at issue and the agency's interpretation is reasonable." *Ibid.*

Because OCC is "the administrator charged with supervision of the [NBA]," this Court has repeatedly applied *Chevron* deference to OCC's interpretations of ambiguous provisions in the Act. *NationsBank* v. *Variable Annuity Life Ins. Co.*, 513 U.S. 251, 256-257 (1995) (citing *Clarke* v. *Securities Indus. Ass'n*, 479 U.S. 388, 403-404 (1987), and *Investment Co. Inst.* v. *Camp*, 401 U.S. 617, 626-627 (1971)). Indeed, the Court has stated that the Comptroller's special authority to administer the NBA warrants deference to his interpretations even when they are not adopted through notice-and-comment rulemaking or formal adjudication. *Mead Corp.*, 533 U.S. at 230-231 & n.13 (citing *NationsBank*, *supra*). In this case, OCC's interpretation of the relevant NBA provision is set forth in a published regulation that was promulgated after full notice-and-comment procedures. 69 Fed. Reg. 1895 (2004); 68 Fed. Reg. 6363 (2003); 64 Fed. Reg. 60,092 (1999); 64 Fed. Reg. 31,749 (1999). The regulation was issued pursuant to the Comptroller's broad

authority to prescribe rules and regulations to "carry out the responsibilities of the office," 12 U.S.C. 93a, which include administration of the NBA and other federal banking laws. *NationsBank*, 513 U.S. at 256. Accordingly, OCC's interpretation of the term "visitorial powers" is controlling if it is reasonable.

B. Petitioner's Arguments Against Applying *Chevron* Deference Are Not Persuasive

1. OCC's regulation does not alter the federal-state balance

Petitioner (Br. 43-45) contends that OCC's regulation is not entitled to *Chevron* deference because it produces a "major alteration in the federal-state balance of authority." Pet. Br. 43. Far from altering the traditional allocation of responsibilities between the federal and state governments, the regulation is consistent with this Court's repeated statements that national banks are created by the government to serve federal purposes and that oversight of the banks is therefore principally entrusted to the United States.

"Nearly two hundred years ago, in *McCulloch* v. *Maryland*, [17 U.S. 316,] 4 Wheat. 316 (1819), this Court held federal law supreme over state law with respect to national banking." *Watters*, 550 U.S. at 10. "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." *Davis*, 161 U.S. at 283. As this Court has repeatedly recognized, "the 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." *Watters*, 550 U.S. at 11 (quoting *Farmers' & Mechs'. Nat'l Bank*, 91 U.S. at 34). Interpreting Section

484 to preclude state enforcement of laws concerning "activities authorized or permitted pursuant to federal banking law" (12 C.F.R. 7.4000(a)(2)(iii)) therefore simply reserves to the federal government its traditional responsibility for the enforcement of laws that regulate the performance by federal instrumentalities of their federally authorized activities.

Petitioner's reliance (Br. 43-45) on *Printz* v. *United States*, 521 U.S. 898 (1997), and *New York* v. *United States*, 505 U.S. 144 (1992), is misplaced. Those decisions held that the Tenth Amendment precludes the federal government from "compel[ling] the States to enact or administer a federal regulatory program." *Printz*, 521 U.S. at 933 (quoting *New York*, 505 U.S. at 188). Precluding States from enforcing their fair lending laws against national banks does not "compel[] state officers to execute federal laws," *id.* at 905, but reserves enforcement of laws affecting federally authorized activities of federally created entities to the federal officials responsible for their supervision.

As this Court reaffirmed in *Watters*, federal displacement of state law over national banks poses no Tenth Amendment concerns. "Regulation of national bank operations is a prerogative of Congress under the Commerce and Necessary and Proper Clauses." 550 U.S. at 22 (citing *Citizens Bank* v. *Alafabco, Inc.*, 539 U.S. 52, 58 (2003)). "The Tenth Amendment, therefore, is not implicated." *Ibid.*

2. Chevron *deference applies even though Section 484 limits the enforcement authority of state officials rather than addressing the conduct of regulated national banks*

Petitioner (Br. 46-53) makes several related arguments that *Chevron* deference does not apply here because Section 484 preempts state law. Those arguments lack merit.

a. Petitioner argues (Br. 46-47) that OCC's regulation is not entitled to *Chevron* deference because there is a presumption against preemption of state law. That presumption, however, applies only in "field[s] which the States have traditionally occupied." *United States* v. *Locke*, 529 U.S. 89, 108 (2000) (citation omitted). The presumption does not apply to the regulation of national banks and other federal instrumentalities, where federal authority has historically been predominant and the States have not played a significant role. See *ibid.*; *Buckman Co.* v. *Plaintiffs' Legal Comm.*, 531 U.S. 341, 347-348 (2001).[3] Indeed, this Court has recognized that the "grants of both enumerated and incidental 'powers' to national banks" involve a presumption in *favor* of preemption, in that those grants are "not normally limited by, but rather ordinarily pre-empt[], contrary state

[3] This Court's decisions in *Altria Group, Inc.* v. *Good*, 129 S. Ct. 538 (2008), and *Wyeth* v. *Levine*, No. 06-1249 (Mar. 4, 2009), slip op. 9 n.3, did not alter that established principle. They simply make clear that a history of federal regulation does not render the presumption against preemption inapplicable in fields where state regulation has also historically played a substantial role. Unlike the regulated entities in *Altria* and *Wyeth*, national banks are not simply the subject of longstanding federal regulation. Rather, they are *created* by Congress to serve distinctly federal purposes, and their banking powers have never been the subject of extensive state regulation.

law." *Barnett Bank, N.A.* v. *Nelson*, 517 U.S. 25, 32 (1996).

b. In a related vein, petitioner argues (Br. 48-53) that OCC's regulation is not entitled to *Chevron* deference because it "declares the preemptive scope of a federal statute." Br. 48. That argument reflects a misunderstanding of Section 484's purpose and effect. Quite apart from Section 484, if particular state laws impose materially greater limitations on the federally authorized banking activities of national banks than federal law, the NBA preempts those laws under ordinary conflict-preemption principles. As this Court explained in *Watters*, "when state prescriptions significantly impair the exercise of authority, enumerated or incidental under the NBA, the State's regulations must give way." 550 U.S. at 12 (citing cases). Section 484 does not speak to the circumstances under which substantive state laws will be preempted, but instead addresses whether and how *non-preempted* state laws applicable to national banks may be *enforced* by state officials.

OCC's regulation interpreting the term "visitorial powers" is thus different from the regulation at issue in *Watters*, the "sole purpose" of which "was to pre-empt state law rather than to implement a statutory command." 550 U.S. at 44 (Stevens, J., dissenting). In *Watters*, the dissenting Justices expressed the view that regulations like the one at issue there, which "purport[] to decide the scope of federal pre-emption," *id.* at 41, are not entitled to *Chevron* deference because they improperly attempt "to transform the preemption question from a judicial inquiry into an administrative *fait accompli*," *id.* at 40 n.24 (citation omitted). That concern is not presented by the regulation at issue here, which does not address the preemption question itself, but

instead construes the meaning of an ambiguous term in an "express command" in the statute that Congress has charged OCC to administer. *Id.* at 14.

In *Smiley* v. *Citibank (South Dakota), N.A.*, 517 U.S. 735 (1996), the Court deferred to OCC's interpretation of the term "interest" in 12 U.S.C. 85, which "authorizes a national bank to charge out-of-state credit-card customers an interest rate allowed by the bank's home State, even when that rate is higher than what is permitted by the States in which the cardholders reside." 517 U.S. at 737. The Court rejected the plaintiff's argument that "the 'presumption against . . . preemption' * * * trumps *Chevron*, and requires a court to make its own interpretation of § 85 that will avoid (to the extent possible) pre-emption of state law." *Id.* at 743-744. The Court held that deference was warranted even though the practical effect of OCC's interpretation was to preclude the application of state laws that would have been applicable if Section 85 had been given a different construction.

To be sure, whereas the statutory provision at issue in *Smiley* defined the conduct in which regulated entities (the national banks) could lawfully engage, Section 484 is directed not at the banks themselves but at state and federal officials acting in their governmental capacities. In that sense Section 484, and OCC's regulation construing "visitorial powers," may bear a family resemblance to a preemption provision. But neither Section 484 nor the challenged regulation purports to "immunize" national banks from any state laws that would escape preemption under usual conflict-preemption principles. *Watters*, 550 U.S. at 39 (Stevens, J., dissenting). Thus, even if principles of *Chevron* deference were uniquely inapplicable to federal regulations that define

the preemptive scope of a federal statute, the regulation at issue here does not fall within that category.

c. Even if OCC's "visitorial powers" regulation defined the scope of federal preemption in the way petitioner claims, the regulation would be entitled to judicial deference. "Federal regulations have no less pre-emptive effect than federal statutes." *Fidelity Fed. Sav. & Loan Ass'n* v. *de la Cuesta*, 458 U.S. 141, 153 (1982). And courts review preemptive regulations under the same deferential standards applicable to other regulations, *i.e.*, "only to determine whether [the agency] has exceeded [its] statutory authority or acted arbitrarily." *Id.* at 154; see *City of N.Y.* v. *FCC,* 486 U.S. 57, 64 (1988). "[I]f the agency's choice to pre-empt represents a reasonable accommodation of conflicting policies that were committed to the agency's care by the statute," the Court will "not disturb it unless it appears from the statute or its legislative history that the accommodation is not one that Congress would have sanctioned." *Ibid.* (internal quotation marks and citation omitted); see *Capital Cities Cable, Inc.* v. *Crisp*, 467 U.S. 691, 699-700 (1984); *de la Cuesta*, 458 U.S. at 154.

Petitioner argues (Br. 49-50) that *Chevron* deference should not apply to preemptive regulations because preemption questions do not implicate an agency's expertise. That is incorrect. Federal agencies "have a unique understanding of the statutes they administer and an attendant ability to make informed determinations about how state requirements may pose 'an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" *Wyeth* v. *Levine*, No. 06-1249 (Mar. 4, 2009), slip op. 20 (quoting *Hines* v. *Davidowitz*, 312 U.S. 52, 67 (1941)); accord *Medtronic, Inc.* v. *Lohr*, 518 U.S. 470, 496 (1996); *id.* at 505-506

(Breyer, J., concurring). As administrator of the NBA and supervisor of national banks, OCC is well positioned to determine whether the exercise of concurrent enforcement authority by state officials will assist OCC in its supervision or instead interfere with its responsibilities and with the exercise by national banks of their federally authorized powers.

Petitioner contends (Br. 50-52) that OCC's regulation should not receive *Chevron* deference because OCC has a "self-interest" in expanding its regulatory power, particularly since it is funded by assessments on national banks. As petitioner himself recognizes (Br. 50-51), that argument is difficult to square with this Court's practice of deferring to agency interpretations of the scope of their own jurisdiction. See *Mississippi Power & Light Co.* v. *Mississippi ex rel. Moore*, 487 U.S. 354, 381-382 (1988) (opinion of Scalia, J.). Petitioner does not and could not plausibly contend that OCC's regulation *directly* expands its regulatory authority. OCC has undisputed power to enforce New York's fair lending law against national banks; the question in this case is whether state officials may exercise such power as well. The apparent thrust of petitioner's argument (Br. 51) is that, by "mak[ing] a federal charter more attractive to banks," OCC's interpretation of "visitorial powers" will eventually increase the number of national banks, thus potentially increasing the revenues available to OCC and indirectly expanding the de facto reach of its regulatory influence.

Petitioner cites no decision suggesting that such speculation justifies withholding *Chevron* deference. Moreover, the vast majority of state banking departments also obtain their revenues primarily from the institutions they supervise and have just as much incen-

tive to encourage banks to maintain state charters. Conference of State Bank Supervisors, *A Profile of State Chartered Banking* I40-I48 (20th ed. 2004/2005). Thus, to the extent such financial considerations may influence regulatory actions, that prospect only underscores the danger inherent in allowing state officials to exercise enforcement authority over national banks.

3. OCC had statutory authority to promulgate its regulation

Petitioner argues (Br. 53-57) that OCC lacked authority to promulgate its regulation because there is no "specific evidence" that Congress gave OCC "rulemaking authority to declare the scope of statutory preemption." Br. 53. That argument is mistaken for several reasons.

First, as discussed above, the regulation does not declare the scope of statutory preemption. Second, courts do not presume that an agency lacks authority to issue regulations determining the scope of preemption in the absence of "specific evidence" that Congress gave the agency that authority. See *City of N.Y.*, 486 U.S. at 64 (A "pre-emptive regulation's force does not depend on express congressional authorization to displace state law.") (citation omitted). In *New York* v. *FERC*, 535 U.S. 1 (2002), this Court explained that the "presumption against pre-emption" does not apply to the question whether an agency "is acting within the scope of its congressionally delegated authority" in issuing a preemptive regulation. *Id.* at 18. Instead, the Court "must interpret the statute to determine whether Congress has given [the agency] the power to act as it has, and [the Court] do[es] so without any presumption one way or the other." *Ibid.*

Analyzed under that standard, 12 U.S.C. 93a clearly gives OCC authority to promulgate regulations interpreting Section 484. Section 93a grants the Comptroller broad authority "to prescribe rules and regulations to carry out the responsibilities of the office." As this Court has recognized, the Comptroller's responsibilities include supervising national banks, administering the NBA, and enforcing the federal banking laws. *Watters*, 550 U.S. at 6; *NationsBank*, 513 U.S. at 256. Those responsibilities encompass interpretation of Section 484, a provision of the NBA that specifically addresses the circumstances under which national banks can be subject to supervisory and enforcement activities.

Even if "specific evidence" of OCC's authority to make preemption determinations were required, federal banking laws contain ample evidence of that authority. For example, 12 U.S.C. 43 provides that, "[b]efore issuing any opinion letter or interpretive rule * * * that concludes that Federal law preempts the application to a national bank of" certain state laws (including fair lending laws), OCC must follow notice and comment procedures, including publication of its preemption determination in the *Federal Register*. 12 U.S.C. 43(a). See also 15 U.S.C. 6714 (addressing the appropriate level of deference for certain OCC determinations regarding the preemption of state laws regulating insurance sales or solicitation). Although Section 43 does not grant preemption authority to OCC (Pet. Br. 55-56), it is an express congressional acknowledgment that preemption determinations are among OCC's delegated "responsibilities." 12 U.S.C. 93a. And Congress's directive that OCC preemption determinations be preceded by notice-and-comment rulemaking strengthens the inference that such determinations should be accorded

Chevron deference. See *Mead Corp.*, 533 U.S. at 230 (explaining that "the overwhelming number of [the Court's] cases applying *Chevron* deference have reviewed the fruits of notice-and-comment rulemaking or formal adjudication").

4. OCC has not changed its position in any way that precludes deference

Petitioner asserts (Br. 36, 57) that OCC's interpretation of "visitorial powers" has been inconsistent. Even if petitioner were correct, that would not be a basis for declining to apply *Chevron* deference. See *National Cable & Telecommunications Ass'n* v. *Brand X Internet Servs.*, 545 U.S. 967, 981 (2005) (*Brand X*). But, in any event, OCC regulations have long provided that, unless an exception applies, state officials have no authority to conduct examinations or to inspect or require the production of national bank books or records. 12 C.F.R. 7.4000(a)(1) (2005); *ibid.* (2000); 12 C.F.R. 7.4000(b) (1997); 12 C.F.R. 7.6025(b) (1984); *ibid.* (1972). OCC opinion letters and interpretive rulings likewise have consistently stated that Section 484 precludes States from demanding national bank records or taking administrative enforcement actions against national banks. See, *e.g.*, 1993 OCC Ltr. LEXIS 35 (July 19, 1993); 1993 OCC Ltr. LEXIS 10 (Feb. 26, 1993); 1993 OCC Ltr. LEXIS 8 (Jan. 15, 1993); 1992 OCC Ltr. LEXIS 1 (Jan. 15, 1992); 1989 OCC Ltr. LEXIS 24 (Mar. 22, 1989); 1983 OCC Ltr. LEXIS 22 (Dec. 21, 1983); 1981 OCC Ltr. LEXIS 55 (Mar. 26, 1981); 1979 OCC Ltr. LEXIS 11 (Aug. 1, 1979); 1979 OCC Ltr. LEXIS 47 (Apr. 2, 1979); Interpretive Ruling No. 6025 (1967); *ibid.* (1964); *ibid.* (1963). Although OCC did not take a definitive position on the scope of the "courts of justice" exception until

2004, OCC has never interpreted that exception to permit States to use the courts to regulate the federally authorized banking activities of national banks. And, in its 2004 rulemaking, OCC clarified that the exception does not give States that authority. 69 Fed. Reg. at 1904.

Petitioner is likewise wrong in asserting (Br. 36) that, until 2004, OCC had interpreted Section 484 to permit state officials to bring lawsuits to enforce state laws against national banks. That assertion is apparently based on statements OCC made in its pleadings in *First Union Nat'l Bank* v. *Burke*, 48 F. Supp. 2d 132 (D. Conn. 1999). See Pet. App. 109a. *Burke* involved a state administrative enforcement action against a national bank. The district court ruled that Section 484 precludes States from taking administrative enforcement actions against national banks but stated, in dictum, that the "courts of justice" exception allows judicial enforcement actions. *Burke*, 48 F. Supp. at 145-149. OCC, which was the prevailing party, did not appeal.

In its pleadings in *Burke*, OCC stated that Section 484 permits States to "obtain a judicial declaration as to the meaning of the applicable law." Reply Br. of Pl. in Intervention OCC in Support of Mot. for Prelim. Inj. at 11, *Burke*, *supra* (No. 32). In its district court pleadings in this case, OCC described its statements in *Burke* as an "acquiescence" in the dictum regarding judicial enforcement, but noted that, in its 2004 rulemaking, it had "comprehensively reevaluated" its interpretation of the "courts of justice" exception and disagreed with the *Burke* dictum. Mem. of Pl. OCC in Support of Mot. for Prelim. Inj. 25 n.20. In fact, OCC's statements in its *Burke* pleadings are fully consistent with its current regulation, which interprets "visitorial powers" not to

encompass declaratory judgment actions (because they seek only to ascertain the meaning of the law, not to enforce it). 69 Fed. Reg. at 1900. In any event, to the extent that OCC's statements in *Burke* created any uncertainty about the scope of the "courts of justice" exception, that simply indicates "that there was good reason for the Comptroller to promulgate the new regulation." *Smiley*, 517 U.S. at 743.

C. OCC's Interpretation Of The Term "Visitorial Powers" Is More Consistent With The Text, Structure, and Purposes of the NBA Than The Alternative Construction Advanced By Petitioner

1. OCC's interpretation of "visitorial powers" is consistent with the understanding of that term that prevailed when the NBA was enacted

In 1864, when Congress enacted the NBA, legal dictionaries defined the term "visitation" broadly to include "[i]nspection; superintendence; direction"; and "regulation." 2 Alexander M. Burrill, *Law Dictionary and Glossary* 598 (1860); accord Henry C. Black, *A Dictionary of Law* 1225 (1891). The term was further defined as "[t]he act of examining into the affairs of a corporation," without limitation to any particular affairs, such as internal management or charter compliance. 2 John Bouvier, *A Law Dictionary* 633 (1852). Those definitions reflect the fact that, when the NBA was enacted, the state's visitorial powers over civil corporations were understood to include a broad supervisory authority, exercised to protect the public and enforce compliance with public laws. Moreover, state officials ordinarily exercised that supervision by initiating judicial enforcement actions. *Id.* at 634 ("visitation of civil corporations

is by the government itself, through the medium of the courts of justice").

The concept of "visitation" originated in Roman law and canon law, where the term described the exclusive authority exercised by the Church hierarchy over Church institutions. It gradually evolved to include the authority of founders over the charitable organizations they endowed and, later, the King over the civil corporations he chartered. Roscoe Pound, *Visitatorial Jurisdiction Over Corporations in Equity*, 49 Harv. L. Rev. 369, 369-370 (1936). Thus, in the 1760s, Blackstone described parallel but distinct systems of visitation for ecclesiastical, eleemosynary, and civil corporations. 1 William Blackstone, *Commentaries* *467-*472.

Ecclesiastical institutions were visited by the ordinary, who ensured their proper behavior in accordance with canon law. Blackstone *468. Eleemosynary institutions were generally subject to the supervision of a "private visitor," ordinarily either the founder or someone he had appointed. Pound 370; Blackstone *469; *Trustees of Dartmouth Coll.* v. *Woodward*, 17 U.S. (4 Wheat.) 518, 673-677 (1819) (Story, J., concurring). The private visitor's authority derived from the founder's right "to see that [his] property [was] rightly employed." Blackstone *469; see Horace L. Wilgus, *Private Corporations* § 159, at 225-226 (1911); Joseph K. Angell & Samuel Ames, *Treatise on the Law of Private Corporations Aggregate* § 687, at 637 (7th ed. 1861). The source of the private visitor's authority, and the nature and object of eleemosynary organizations, dictated a narrow scope for the private visitor's duties: his task was to ensure that the organization adhered to the rules and pursued the purposes set out in its founding documents. See *id.* § 684, at 636; Charles B. Elliott, *A*

Treatise on the Law of Private Corporations § 90, at 94 (Howard S. Abbott ed., Bobbs-Merrill 4th rev. ed.) (1893); James Grant, *A Practical Treatise of the Law of Corporations in General, As Well Aggregate as Sole* 512 (1854); 2 Stuart Kyd, *A Treatise on the Law of Corporations* 276 (1794).

Unlike ecclesiastical and eleemosynary institutions, however, civil corporations were founded by the government for public purposes. Accordingly, they were visited by the government itself, and the government's visitorial powers were broader than those of a private visitor. See Elliott § 90, at 94 (stating that the government's visitorial power over civil corporations "is founded more on grounds of public policy than on any theory of succession to the rights of a prehistoric founder. As a general rule the state has the same control, in this respect, over corporations that it has over individuals."); Angell & Ames § 684, at 636 ("Civil corporations, whether public or private, being created for public use and advantage, properly fall under the superintendency of that sovereign power whose duty it is to take care of the public interest."); 1 Seymour D. Thompson, *Commentaries on the Law of Private Corporations* § 475, at 580 (2d ed. 1908) ("In its visitorial capacity the state checks and controls corporate affairs, even for the protection of those who deal with them."). The government traditionally exercised those broad visitorial powers over civil corporations "through the medium of the courts of justice." Elliott § 90, at 94. Thus, Blackstone explained that civil corporations were "visited and inspected by the king their founder, in his majesty's court of king's bench, according to the rules of common law." Blackstone *469. There, "all misbehaviours of this kind

of corporations [were] enquired into and redressed." *Ibid.*

In the United States, state governments generally were the charterers and visitors of civil corporations. Thompson § 476, at 581. The States commonly exercised their visitorial powers through court actions by their attorneys general using prerogative writs, such as mandamus, or the equitable writ of injunction. Wilgus § 153, at 221; Pound 374-388. Those writs enabled the States to police compliance by corporations with not only their charters and internal regulations but also public laws. "The basis of mandamus to private corporations and their officers [was] the visitorial jurisdiction of the state over all corporations which it has created," and mandamus could be used "to compel domestic corporations or their officers to perform specific duties incumbent on them by reason of their charters, or under statutes or ordinances or imposed by the common law." *Id.* at 375; S.S. Merrill, *Law of Mandamus* § 158, at 194 (1892) ("[U]nder the visitorial power of the state, any breach of duty by a private corporation may be corrected by this writ."); *ibid.* (The duty "may be imposed by its charter, by the general statutes, or by the common law.") (footnotes omitted); accord Wilgus § 156, at 223. Of particular relevance here, mandamus was used to compel common carriers and certain other corporations to comply with "statutory or common law" obligations "of extending to all without discrimination the use of their services." Merrill § 162, at 200. States could also seek injunctions "whenever a corporation [wa]s abusing the power given it for a public purpose, or acting adversely to the public, or creating a nuisance." *Id.* § 157, at 224-225; accord 4 Eugene A. Gilmore & William C. Wermuth, *Modern American Law* § 81, at 101 (1921).

Beginning in the 19th century, States also exercised visitorial powers over corporations through commissions or "public" visitors. Wilgus § 160, at 226; Gilmore & Wermuth § 80, at 100-101. Those commissions "exercise[d] a general supervision" "for the protection of the public." *Ibid.*; Wilgus § 160, at 226. That was particularly true of banking regulation, where the State's "visitorial" authority "extend[ed] to the minutest details of the banking business," to "protect the public by any and all reasonable regulations necessary to that end." Thompson § 460, at 556.

Several state statutes gave banking commissioners broad authority to investigate banks' compliance with any public laws bearing on their banking business and to bring judicial actions to enforce those laws. For example, an 1838 Massachusetts statute authorized state commissioners to "visit" every bank and "examine all [its] affairs" to determine whether it had "complied with the provisions of law applicable to [its] transactions." Act of Feb. 23, 1838, ch. 14, § 2, 1838 Mass. Acts 303. If the commissioners concluded that a bank had "exceeded its powers, or ha[d] failed to comply with all of the rules, restrictions and conditions provided by law," the commissioners were authorized to apply to the state supreme court for an injunction. § 5, 1838 Mass. Acts 304. In addition, when the commissioners concluded that a bank had "violated any law of this Commonwealth," they were required to make a special report to the legislature. § 6, 1838 Mass. Acts 305.

New York's banking statutes gave its commissioners similarly broad authority. The commissioners were instructed to "visit" every banking corporation and "thoroughly to inspect [its] affairs." Safety Fund Act, ch. 94, § 15, 1829 N.Y. Laws 170. If they "ascertain[ed] from

such inspection, and examination, or in any other manner, that any of said corporations * * * ha[d] violated any of the provisions of their acts or acts of incorporation, or of any other act binding on such corporations," the commissioners were required immediately to seek an injunction against the bank. § 18, 1829 N.Y. Laws 170. See Act of May 14, 1840, ch. 363, § 12, 1840 N.Y. Laws 307-308 (authorizing the commissioners to bring a judicial action against any banking association or individual banker "found to have violated any law of this state * * * in the same manner and with the like effect as any incorporated bank may be proceeded against for a violation of its charter"). The broad visitorial powers exercised by New York's banking commissioners are particularly relevant to the interpretation of the NBA because, as petitioner notes (Br. 21), Congress modeled the NBA on New York's regulatory system. John Jay Knox, *A History of Banking in the United States* 422 (1903).

Petitioner is therefore wrong in contending (Br. 24-26) that, when the NBA was enacted, the term "visitorial powers" was understood to be limited to supervision of a corporation's internal management and charter compliance. In particular, petitioner's reliance (Pet. 25) on treatise discussions addressing the powers of private visitors over eleemosynary corporations is misplaced because, as discussed above, the authority of those private visitors was considerably narrower than the powers of the state and its public visitors over civil corporations, especially banking corporations. Indeed, the very treatises cited by petitioner indicate that the State could invoke mandamus when corporations "refuse[d] to perform a duty cast upon them by the law of the land." Grant 262; accord Kyd 293-314 (giving examples of

where mandamus lies to execute statutes and common law duties).

Far from supporting petitioner's narrow view of the term "visitorial powers," NBA-era sources suggest that the term was often used to describe state officials' enforcement of *all* state laws that applied to banks, even laws unrelated to the business of banking. In interpreting Section 484 in its current form, however, OCC did not adopt so broad a reading of the term "visitorial powers," but instead construed that term not to encompass enforcement of state laws unrelated to the business of banking. See p. 15, *supra*. OCC recognized that, in today's environment, state officials' enforcement against national banks of laws that do not concern banking powers is unlikely to undermine the national banking system or interfere with OCC supervision, and that OCC's own expertise lies in supervising banking activities rather than enforcing compliance with state laws aimed at unrelated conduct.

As the court of appeals explained, OCC thus "reached a permissible accommodation of conflicting policies that were committed to it by the statute," by "shield[ing] national banks 'from unduly burdensome and duplicative state regulation' in the exercise of their federally authorized powers," while "leaving state officials free to enforce a wide range of laws that do not purport to regulate a national bank's exercise of its authorized banking powers." Pet. App. 28a-29a (quoting *Watters*, 550 U.S. at 11). OCC's decision not to adopt the broadest possible reading of the term "visitorial powers" that NBA-era sources might support was wholly reasonable and is in any event unchallenged in this case. Those sources strongly indicate, however, that petitioner's far narrower interpretation of the stat-

utory language is not required by the NBA's text or history.

2. OCC's interpretation of the term "visitorial powers" is supported by the structure of Section 484

Section 484(a)'s general prohibition against the unauthorized exercise of "any visitorial powers" over national banks is qualified by four exceptions. Those exceptions shed light on the meaning of the term "visitorial powers" because they imply that the relevant activities would otherwise be encompassed by the general prohibition. See, *e.g.*, *First Nat'l Bank in St. Louis* v. *Missouri*, 263 U.S. 640, 658 (1924) (*St. Louis*) (provision allowing national banks that convert from state charters to retain preexisting branches confirmed that branch banking was generally prohibited). The exceptions in Section 484 support OCC's view that the term "visitorial powers" is not limited to supervision of internal bank affairs and charter compliance, but also encompasses state efforts to obtain bank records for other purposes.

For example, Section 484(b) provides that, "[n]otwithstanding" Section 484(a)'s general prohibition on the exercise of visitorial powers, "State auditors and examiners may," under specified circumstances, "review [a national bank's] records solely to ensure compliance with applicable State unclaimed property or escheat laws." 12 U.S.C. 484(b). Those laws are not components of a bank's charter and do not regulate its internal affairs; indeed, they are not even specific to banking. Accordingly, Section 484(b) demonstrates that "visitorial powers" are not limited to supervisory oversight over internal management and charter compliance, but also include reviewing bank records to ensure compliance with public laws. That conclusion is reinforced by

Section 484(b)'s use of the word "solely," which indicates that, unless some other exception applies in a particular circumstance, the "visitorial powers" prohibition bars state inspection of national bank records for purposes other than enforcement of unclaimed property and escheat laws.[4]

The other exceptions in Section 484 also confirm that the term "visitorial powers" encompasses state efforts to obtain bank records for a broad range of purposes, including monitoring compliance with public laws. Section 484(a) includes an exception for visitations "authorized by Federal law." 12 U.S.C. 484(a). One such visitation is described in 26 U.S.C. 3305(c), which provides that "[n]othing contained in [Section 484] shall prevent any State from requiring any national" bank to provide payroll records and reports for unemployment tax purposes. Similarly, 12 U.S.C. 62 permits "the officers authorized to assess taxes under State authority" to inspect national bank shareholder lists. Both provisions would be unnecessary if the concept of "visitation" were limited to supervisory oversight of internal management and charter compliance.[5]

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[4] As explained above (see p. 15 & n.2, *supra*), although OCC's regulation precludes state-initiated enforcement actions only when those actions seek to enforce laws related to the business of banking, the regulation defines the term "visitorial powers" to encompass all governmental demands for national bank records. The statutory exceptions described in the text, which authorize state officials to demand records relevant to the enforcement of escheat and tax laws that are unrelated to the business of banking support the reasonableness of OCC's approach.

[5] Other provisions of federal law, such the FH Act, also expressly authorize certain types of visitation by federal and state agencies other

Section 484(a) also contains an exception permitting Congress and its committees to exercise visitorial powers over national banks. That exception likewise reflects the broad scope of the term "visitorial powers." Congress and its committees do not ordinarily examine banks to ensure charter compliance or supervise corporate governance, but congressional committees frequently request or subpoena business records to aid in the drafting and consideration of new legislative proposals. Indeed, the congressional exception was added precisely because Section 484's predecessor would otherwise have precluded Congress from demanding bank records for legislative purposes. In the early 1900s, several national banks, relying on the NBA's "visitorial powers" provision, refused to provide records requested by a congressional committee. In response, the committee's counsel recommended adoption of the exception. He explained that the exception was necessary because, under the NBA, "[t]he visitorial power over the banks is vested solely in the Comptroller of the Currency, and Congress can not investigate the banks and find out what they are doing as a basis for remedial legislation." *Hearings Before the Senate Committee on Banking and Currency*, 63d Cong., 1st Sess. 1322 (1913) (statement of Samuel Untermyer).

The final exception, for visitorial powers "vested in the courts of justice," also supports OCC's interpretation. Like Congress, the courts do not themselves supervise banks' internal management or charter compliance. In cases that are otherwise properly before them, however, courts regularly issue subpoenas or other or-

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than OCC. See 42 U.S.C. 3614 (Department of Justice); 42 U.S.C. 3610 (Department of Housing and Urban Development (HUD)); 42 U.S.C. 3610(f) (state and local agencies certified and monitored by HUD).

ders requiring the production of bank records. The "courts of justice" exception permits those normal judicial processes in actions that are not otherwise "visitorial" or are "visitorial" but authorized by federal law. 12 C.F.R. 7.4000(b)(2); 68 Fed. Reg. at 6369-6370.

As this Court held in *Guthrie* v. *Harkness.*, 199 U.S. 148, 159 (1905), because visitation over banks and other civil corporations is a "public right," efforts by private individuals to inspect bank records or to sue banks for redress of injury do not involve the exercise of "visitorial powers." The "courts of justice" exception ensures that private individuals may utilize the judicial process for those purposes, even though, because courts are state actors, judicial orders compelling bank documents might otherwise fall under the "visitorial powers" prohibition. See *ibid.*; 68 Fed. Reg. at 6369. By contrast, the bringing of a lawsuit by the New York Attorney General is itself the exercise of "visitorial powers," separate and distinct from any exercise of judicial power that the suit is intended to prompt.[6]

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[6] In the courts below, petitioner argued that his own initiation of a judicial enforcement action would be authorized by the "courts of justice" exception even if state administrative enforcement would constitute a prohibited exercise of "visitorial powers." See Pet. App. 22a, 108a. Petitioner has apparently abandoned that argument in this Court (but see Br. 37 n.16), although some amici (*e.g.*, States Br. 21-22) continue to press it. As both courts below correctly concluded, OCC reasonably refused to interpret the "courts of justice" exception as authorizing state officials to initiate lawsuits to enforce laws that they could not enforce administratively. Such an interpretation is not supported by the exception's text, which refers to powers "vested in," not "exercised through," the courts of justice. Nor would it be consistent with the overall thrust of Section 484, because it "would swallow the rule" against unauthorized exercises of visitorial authority. Pet. App. 30a. When the NBA was enacted, lawsuits were the primary

Petitioner contends (Br. 36-39) that the exceptions described above were enacted to resolve disputes about whether the relevant activities were in fact "visitorial." It is far from clear that every exception was the product of such a dispute. But in any event, Congress did not amend the general prohibition to clarify that the term "visitorial powers" has the limited construction petitioner espouses. Instead, in each case, Congress created an *exception* to the general prohibition. And even if the exceptions do not conclusively refute petitioner's understanding of the term "visitorial powers," they demonstrate that petitioner's proposed definition is hardly *unambiguously* correct. Because OCC's interpretation of ambiguous NBA provisions is entitled to deference, that is a sufficient basis for rejecting petitioner's challenge to OCC's regulation.

3. OCC's interpretation advances the purposes of the NBA, including Section 484

Enacted during the Civil War, the NBA created a national banking 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." *Watters*, 550 U.S. at 14 (quoting *Easton* v. *Iowa*, 188 U.S. 220, 229 (1903)). Congress viewed the national banking system as critical to the Nation's survival—essential to financing the war, establishing a national currency, and promoting a strong national economy. See, *e.g.*, Cong.

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means by which state officials exercised visitorial powers. *Guthrie*, 199 U.S. at 157; pp. 28-29, *supra*. Section 484's general prohibition would therefore have been virtually meaningless if the "courts of justice" exception permitted all visitations accomplished through lawsuits.

Globe, 38th Cong., 1st Sess. 1376 (1864) (Rep. Kasson); *id.* at 1451 (Rep. Hooper); *id.* at 1893-1894 (Sen. Sumner); *id.* at 1897 (Sen. Sherman); *id.* at 2128-2130 (Sen. Sumner); *id.* at 2130 (Sen. Chandler).

The legislative debates that culminated in the NBA's enactment reflected Congress's concern that the States would seek to undermine the new national banks, which were designed to replace existing state-chartered banks. *Tiffany,* 85 U.S. (18 Wall.) at 412-413; *e.g.*, Cong. Globe 1375 (Rep. Pike); *id.* at 1376 (Rep. Miller); *id.* at 1256, 1451 (Rep. Hooper); *id.* at 1893-1894, 2128-2130 (Sen. Sumner). Accordingly, Congress included in the NBA protections against potential state interference. For example, wary that state usury laws could impair the survival and prosperity of national banks, Congress provided a federal formula that constrained state regulation of national bank interest rates and an exclusive federal remedy for usury claims against national banks. See *Beneficial Nat'l Bank* v. *Anderson*, 539 U.S. 1, 10-11 (2003); 12 U.S.C. 85-86. Similarly, instead of relying on state contract law, Congress provided a federal remedy, administered by the Comptroller, for failures by national banks to redeem their circulating notes. NBA §§ 46-48, 13 Stat. 113-114.

The NBA's "visitorial powers" provision was an integral part of Congress's effort "[t]o prevent inconsistent or intrusive state regulation from impairing the national system." *Watters*, 550 U.S. at 11. OCC's interpretation of that provision as encompassing all state efforts to investigate or enforce national bank compliance with laws concerning federally authorized banking powers furthers that purpose. Subjecting a national bank's exercise of those powers "to the State's investigative and enforcement machinery would surely interfere with the

banks' federally authorized business." *Id.* at 13. State investigation and enforcement would also interfere with OCC's efforts to provide uniform and coherent supervision since "[c]onfusion would necessarily result from control possessed and exercised by two independent authorities." *Id.* at 14 (quoting *Easton*, 188 U.S. at 232). Such "[d]iverse and duplicative superintendence of national banks' engagement in the business of banking, [this Court] observed over a century ago, is precisely what the NBA was designed to prevent." *Id.* at 13-14.

As explained above, one means by which the NBA protects the national banking system against interference from state officials is by preempting the application to national banks of substantive state laws that "significantly impair the exercise" by national banks of powers that are "enumerated or incidental under the NBA." *Watters*, 550 U.S. at 12. Even when state law is not preempted, however, because its substantive requirements essentially track those imposed by analogous federal statutes, enforcement of that law by state officials could undermine OCC's supervision of the national banking system if those officials adopted different enforcement priorities or preferred different remedies than their OCC counterparts. See J.A. 120a (Decl. of Grace E. Dailey, Deputy Comptroller for Large Bank Supervision); *Easton*, 188 U.S. at 232 (explaining that state control would necessarily result in confusion because "it would have to be exercised and limited by [the State's] own discretion"). For example, state officials might bring enforcement actions for diverse kinds of injunctive relief that take little account of the root causes of the problem or the effect of the required future conduct on the overall operations of the bank. The OCC, by contrast, can invoke a broad range of remedial actions tai-

lored to assure compensation of injured parties, while maintaining the integrity of the national banking system, not only within the State where the particular complaint initially arose, but nationwide if warranted.

The potential for inconsistent direction regarding the exercise of core banking powers is particularly acute in the context of fair lending laws. Determining whether a bank has violated such laws requires careful review of the bank's underwriting and pricing decisions and judgments about whether those decisions were justified or required by safe and sound lending practices. See 59 Fed. Reg. 18,270 (1994); *HMDA Data Questions* 5-6; p. 4, *supra*. Thus, even when a state fair lending statute is not preempted because its substantive requirements are not meaningfully different from those imposed by federal law, enforcement of the law by state officials poses a significant threat to national banks' performance of their federal responsibilities and to OCC's exercise of its supervisory duties.[7]

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[7] Petitioner also argues (Br. 40) that state enforcement of applicable state laws poses no greater risk of interfering with bank powers or OCC supervision than private suits to enforce the same laws, which Section 484 does not preclude. That is incorrect. Private suits do not pose a danger comparable to the purposeful state efforts to undermine the national banking system that motivated Section 484's enactment. In addition, allowing private suits under non-preempted state laws furthers the strong countervailing interest in permitting individuals to obtain redress for injuries they have suffered. And, to the extent that private enforcement actions actually prevent or significantly interfere with a bank's exercise of its federal powers or with OCC's supervision, those suits would be barred under conflict-preemption principles. See *Watters*, 550 U.S. at 12.

4. This Court's decisions in Guthrie *and* Watters *support OCC's interpretation*

a. In *Guthrie*, this Court held that an action by a private shareholder of a national bank seeking access to the bank's books and records was not prohibited by Revised Statutes § 5241 (1875), the predecessor to Section 484 then in effect. The Court concluded that the "visitorial powers" prohibition did not encompass the "private right" of the shareholder to inspect the bank's records because "[t]he right of visitation" is a "public right." *Guthrie*, 199 U.S. at 158-159.

In reaching that conclusion, the Court reviewed various definitions of the term "visitation," some of which primarily discussed supervision of corporate governance, but several of which made clear that the term also encompasses other exercises of supervisory and regulatory power. For example, the Court cited approvingly Bouvier's definition of "visitation" as "[t]he act of examining into the affairs of a corporation." *Guthrie*, 199 U.S. at 157. The Court also cited a circuit court case stating that "[v]isitation, 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" and noting Burrill's broad definition of "visitation" as "inspection; superintendence; direction; regulation." *Id.* at 158 (quoting *First Nat'l Bank* v. *Hughe*s, 6 F. 737, 740 (C.C.N.D. Ohio 1881)). And the Court quoted Merrill's statement that "[v]isitors of corporations have power to keep them within the legitimate sphere of their operations, and to correct all abuses of authority, and to nullify all irregular proceedings." *Ibid.* (quoting Merrill § 175, at 213).

The Court also explained the breadth of the visitorial exclusivity intended by Congress, explaining that "Congress had in mind in passing [Section 5421] that in other sections of the law it had made full and complete provision for investigation" of national banks by the Comptroller and his examiners, as well as for remedial action against the bank. *Guthrie*, 199 U.S. at 159. The Court observed that "[i]t 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." *Ibid.*

Guthrie thus supports OCC's interpretation of the term "visitorial powers," making clear that, for civil corporations, the term denotes governmental (as opposed to private) enforcement actions. Petitioner's assertion (Br. 27) that the plaintiff's status as a private individual asserting a private right "was not critical to the decision" in *Guthrie* cannot be squared with the Court's statement of the reasons for its holding. See *Guthrie*, 199 U.S. at 158-159. Contrary to petitioner's contention (Br. 26-27), the Court did not rely on a distinction between "supervisory oversight regimes" and "enforcement of other valid legal obligations of the bank." Indeed, that distinction is inconsistent with the Court's broad description of the reasons for, and the scope of, the "visitorial powers" prohibition.

b. *Watters* also supports OCC's interpretation. The Court in *Watters* held that a national bank's mortgage lending business, "whether conducted by the bank itself or through the bank's operating subsidiary, is subject to OCC's superintendence, and not to the licensing, reporting, and visitorial regimes of the several States in which the subsidiary operates." 550 U.S. at 7. Although the

decision turned primarily on implied conflict preemption, the Court's analysis indicates that the term "visitorial powers" encompasses petitioner's investigation and threatened enforcement efforts against national banks.

Watters involved Michigan laws regulating mortgage brokers, lenders, and servicers. 550 U.S. at 8. The laws imposed various registration, supervisory, and reporting requirements, and they provided for enforcement of those requirements through judicial actions by the state commissioner of insurance and financial services or the state attorney general. *Id.* at 9-10 (citing, *inter alia*, Mich. Comp. Laws Ann. § 445.1661 (West 2002); *id.* § 493.56b (West Supp. 2005)). The laws also gave the commissioner investigative authority, including administrative subpoena authority. Mich. Comp. Laws Ann. § 445.1661 (West 2002); *id.* § 493.56b (West Supp. 2005). The State conceded that those provisions could not properly be applied to national banks themselves, but it argued that its regulatory regime could be enforced "with respect to national banks' operating subsidiaries." *Watters*, 550 U.S. at 15.

This Court made clear, consistent with the State's concession, that application of the pertinent Michigan laws to national banks would constitute an exercise of "visitorial powers" prohibited by Section 484. 550 U.S. at 13-15. The Court relied on both *Guthrie* and OCC's regulation, specifically citing OCC's definition of "visitorial powers" as including both "[i]nspection of a bank's books and records" and "[e]nforcing compliance with any applicable federal or state laws concerning" federally authorized banking activities. *Id.* at 14 (citing 12 C.F.R. 7.4000(a)(2)). The Court concluded that Michigan could not "confer on its commissioner examination

and enforcement authority over mortgage lending, or any other banking business done by national banks." *Id.* at 14-15. Given the significant similarities between the powers authorized by the Michigan laws and the powers asserted by petitioner, *Watters* strongly supports OCC's regulation and the court of appeals' judgment upholding the injunction.[8]

5. OCC's interpretation is supported by other provisions of federal banking law

OCC's interpretation of "visitorial powers" is also consistent with the approach Congress has taken when explicitly addressing enforcement of state fair lending laws against national banks. In the Riegle-Neal Interstate Banking and Branching Efficiency Act of 1994 (Riegle-Neal), Pub. L. No. 103-328, 108 Stat. 2338, Congress authorized national banks to operate interstate bank branches. Riegle-Neal also explicitly addressed the application of state fair lending laws to those interstate branches. Congress provided that such state laws ordinarily apply to the interstate branches of national banks unless federal law preempts their application to national banks in general. 12 U.S.C. 36(f)(1)(A). Congress further directed, consistent with OCC's interpretation of Section 484, that "[t]he provisions of any State

[8] The dissenting Justices in *Watters* likewise described as "visitorial" the laws giving investigative, subpoena, and enforcement authority to the commissioner and authorizing judicial enforcement by the state attorney general. 550 U.S. at 34 (citing Mich. Comp. Laws Ann. § 445.1661 (West 2002); *id.* § 493.56b (West Supp. 2005)). Those Justices would have held, however, that application of the challenged state laws to national-bank operating subsidiaries was neither barred by Section 484 nor otherwise preempted because Section 484 applies only to the exercise of visitorial power over national banks themselves. See *id.* at 34-35.

law to which a branch of a national bank is subject under this paragraph shall be enforced, with respect to such branch, by the [OCC]." 12 U.S.C. 36(f)(1)(B).

Contrary to petitioner's contention (Br. 34-36), OCC's enforcement authority under Section 36(f)(1)(B) is clearly exclusive. Section 36(f)(1)(A) provides that specified state laws generally apply to interstate branches of national banks unless the laws are preempted, and Section 36(f)(1)(B) provides that such state laws "shall be enforced" by OCC. Taken together, the use of the passive voice and the word "shall" make clear that Congress intended for the non-preempted state laws to be enforced by OCC and OCC alone. Indeed, Congress has used the same phrasing in other financial services laws to confer exclusive enforcement authority. See 15 U.S.C. 6711 (providing that "insurance activities of any person," including national banks, "shall be functionally regulated by the States" subject to certain limitations).

As petitioner notes (Br. 34-36), Riegle-Neal's text, see 12 U.S.C. 36(f)(3), and legislative history indicate that Congress intended its provisions to reflect, rather than to alter, the existing balance between federal and state authority. Riegle-Neal also refutes petitioner's suggestion (Br. 43) that the purportedly "aberrant" nature of the enforcement regime that OCC's regulation contemplates, under which non-preempted state fair lending laws will be enforceable against national banks solely by OCC rather than by state officials, provides a basis for declaring the regulation invalid. Though such a regime is unusual, Riegle-Neal unambiguously mandates that enforcement scheme with respect to the interstate branches of national banks. There is no reason to suppose that Congress gave state officials greater en-

forcement authority over national banks themselves than over their interstate branches. Accordingly, Congress's decision to vest OCC with exclusive authority to enforce state fair lending laws that apply to the interstate branches of national banks strongly supports OCC's interpretation of Section 484.

D. Petitioner's Arguments That OCC's Interpretation Is Unreasonable Are Not Persuasive

1. a. In arguing that OCC's interpretation of "visitorial powers" is unreasonable, petitioner primarily contends (Br. 21-32) that the term is unambiguously limited to "supervisory oversight" of a "bank's safety and soundness, internal organization, or charter compliance," Br. 26. As explained above, that contention cannot be squared with the text, structure, and purposes of the NBA, or with this Court's decisions in *Guthrie* or *Watters*. And while petitioner posits a dichotomy between "supervisory oversight" and "[e]nforcement of [g]enerally [a]pplicable [l]aw," Br. 21, the New York fair lending law at issue here does not fall within either category. Although the law serves purposes other than ensuring the safety and soundness of regulated banks, it applies only to those "who extend credit" (Pet. Br. 24 n.7), and its enforcement provisions reflect its focus on the banking business. One of the primary enforcement mechanisms is by complaint to the New York banking superintendent, who then resolves the complaint through an administrative process. N.Y. Exec. Law § 296-a(6)-(10) (McKinney 2005). Moreover, the banking superintendent is "empowered to promulgate rules and regulations" to effectuate the law. *Id.* § 296-a(11).

Unlike (for example) a general prohibition on racial discrimination in employment, the New York law regu-

lates core banking powers granted by a national bank's charter—the powers to engage in residential and other lending. 12 U.S.C. 24(Seventh), 371(a). Enforcement will necessarily require the State to engage in "supervisory oversight" of the bank's exercise of those powers and to make decisions that affect its safety and soundness. As described above, it is impossible to determine whether a bank has engaged in unlawful lending discrimination without making judgments about whether the bank appropriately exercised its lending powers, including whether its actions were driven by safe and sound lending practices. See p. 42, *supra*.[9]

b. Petitioner asserts (Br. 21-24) that his interpretation of "visitorial powers" is supported by Congress's original placement of the visitorial exclusivity provision in Section 54 of the NBA, which primarily addressed the Comptroller's examination authority. Even if the scope of "visitorial powers" were coextensive with the scope of the Comptroller's examination authority, that would not mean that "visitorial powers" are limited to supervision of a bank's safety and soundness, internal organization and charter compliance, because Section 54 in its original form authorized the Comptroller to "make a thorough examination into *all* the affairs" of the bank. NBA § 54, 13 Stat. 116 (emphasis added). In any event, Congress's initial placement of the visitorial powers provi-

[9] Moreover, compliance with fair lending laws is an essential component of safe and sound operation. Letter from John C. Dugan, Comptroller of the Currency, to Rep. Barney Frank (Nov. 21, 2005). Failure to comply with fair lending or other consumer protection requirements exposes the bank to the risk of litigation, monetary judgments, and reputational harm, all of which would adversely affect its safety and soundness. See OCC Advisory Ltr. 2002-3 (Mar. 22, 2002).

sion in Section 54 does not suggest that "visitorial powers" and "examination" are synonymous. On the contrary, Congress's use of distinct terms suggests that they have different meanings.

2. Petitioner also contends (Pet. 27-32) that OCC's interpretation of Section 484 is foreclosed by certain decisions of this Court. Contrary to that contention, none of those decisions mentions, much less construes, Section 484, its predecessor provisions, or the term "visitorial powers." Nor did the Court have the opportunity to consider the regulation at issue in this case, which was not promulgated until long after those decisions were issued.[10]

In any event, none of the decisions indicates that petitioner has authority to enforce state fair lending laws against national banks or to demand national bank records in aid of that enforcement effort. Petitioner principally relies (Br. 28-30) on *St. Louis,* which involved Missouri's suit against a national bank to enforce a state statute prohibiting banks from operating branches. The Court first determined that federal law at the time did not authorize national banks to engage in branch banking (except in one circumstance inapplicable to the bank at issue). 263 U.S. at 655-659. The Court

[10] In *Brand X*, 545 U.S. at 982, this Court held that, under *Chevron*, an agency may adopt a statutory interpretation that differs from the interpretation previously reached by a federal court so long as the prior judicial construction was not based on the "unambiguous terms of the statute." None of the decisions cited by petitioner could have been based on the "unambiguous terms" of Section 484, because none even mentions that statute. Thus, even if any of the decisions could be construed as adopting, *sub silentio*, an interpretation of Section 484 that is inconsistent with OCC's regulation, the regulation's superseding interpretation of the term "visitorial powers" would still be controlling if it is reasonable.

then held that, because "the power sought to be exercised by the bank finds no justification in any law or authority of the United States, the way is open for the enforcement of the state statute." *Id.* at 660.

OCC's current interpretation of the term "visitorial powers" is wholly consistent with the Court's analysis in *St. Louis* because the Missouri law at issue there concerned an activity (branch banking) that was not authorized for national banks at that time. The State's suit therefore did not seek to "[e]nforc[e] compliance" with a law concerning "activities authorized or permitted pursuant to federal banking law." 12 C.F.R. 7.4000(a)(2). Here, in contrast, New York's fair lending law concerns activities—real estate and other lending—that are unquestionably among the authorized activities of national banks under federal banking law.

The other cases cited by petitioner are similarly inapposite. *National Bank* v. *Kentucky*, 76 U.S. (9 Wall.) 353 (1870), and *Waite* v. *Dowley*, 94 U.S. 527 (1877), involved state laws effectuating collection of state taxes on national bank shareholders. Because the NBA expressly authorized those taxes, the Court concluded that the States had implicit authority to take reasonable measures to collect them. See *id.* at 533-534; *National Bank*, 76 U.S. (9 Wall.) at 363. Here, by contrast, no provision of the NBA authorizes New York to enact or to enforce fair lending laws against national banks.

Petitioner's reliance on *First National Bank of Bay City* v. *Fellows*, 244 U.S. 416 (1917), and *First National Bank in Plant City* v. *Dickinson*, 396 U.S. 122 (1969), is likewise misplaced. *Fellows* involved a state lawsuit challenging as unconstitutional a federal law giving trust powers to national banks. The bank did not invoke

the "visitorial powers" prohibition but instead argued that the suit could not proceed "in a state court" because the powers of national banks are "susceptible only of being directly tested in a federal court." 244 U.S. at 427. In rejecting that contention, the Court reasoned that "the particular functions in question [trust powers] by the express terms of the act of Congress were given only 'when not in contravention of State or local law.'" *Id.* at 428; see 12 U.S.C. 92a(a). The Court therefore concluded that "the state court was, if not expressly, at least impliedly authorized by Congress to consider and pass upon the question whether the particular power was or was not in contravention of the state law." *Ibid.* That reasoning has no relevance here because a national bank's lending powers are not conditioned on state authorization. *Dickinson* is even further afield. It involved a suit by a bank, not by a State, and the only issue addressed by this Court was whether the bank's activity constituted "branch[ing]" under 12 U.S.C. 36 (1970), which at that time authorized national banks to engage in branch banking only to the extent permitted by state law.

Anderson National Bank v. *Luckett*, 321 U.S. 233 (1944) (*Anderson*), also does not support petitioner. That case concerned the validity of a Kentucky statute requiring banks to turn over to the State deposits that had remained inactive or unclaimed for specified periods. The bank did not argue, and the Court did not address, any claim that enforcement of the statute would violate the "visitorial powers" provision. Instead, the Court considered and rejected the bank's arguments that the state law was preempted by the NBA and that it "unconstitutionally interfere[d]" with the bank as an "instrumentalit[y] of the Federal Government." *Id.* at

239-240. This Court's determination that a national bank could be subjected to the substantive obligations imposed by the challenged state law, see *id.* at 247-252, is consistent with OCC's current recognition that, although Section 484 precludes state officials from undertaking the enforcement actions that are at issue in this case, it does not preempt the application to national banks of state fair lending laws.

The *Anderson* Court's further statement that Kentucky could "enforce" its statute, and, as an incident thereto, could require national "banks to file reports of inactive accounts," 321 U.S. at 252-253, appears inconsistent with the terms of the visitorial powers provision as it existed at that time. But Congress has since amended the provision to add an exception permitting enforcement of state escheat and unclaimed property laws. 12 U.S.C. 484(b); see pp. 35-36, *supra*. The result in *Anderson* is therefore consistent with OCC's interpretation of current Section 484.

3. Petitioner also argues that OCC's interpretation of "visitorial powers" cannot be correct because it would mean that "no governmental authority had the power to enforce valid state law against national banks" between 1864, when the NBA was enacted, and 1966, when Congress gave OCC authority to issue cease-and-desist orders to enforce state laws. Pet. Br. 32. That argument ignores the fact that, since the NBA was first enacted, OCC has been authorized to investigate whether national banks were complying with applicable state laws. See NBA § 54, 13 Stat. 116. Although OCC did not always have *formal* authority to compel banks to comply with those laws, OCC could use its *informal* supervisory authority to achieve compliance. Indeed, OCC frequently uses informal supervisory leverage to obtain

compliance with applicable laws and sound banking practices. See *United States* v. *Philadelphia Nat'l Bank*, 374 U.S. 321, 330 (1963). And, beginning in 1933, OCC had authority to take formal action against directors and officers of national banks for violations of "any law relating to such bank." Banking Act of 1933, ch. 89, § 30, 48 Stat. 193. Moreover, as noted above, Section 484 does not preclude private suits to enforce applicable laws. Accordingly, individuals injured by a national bank's violation of non-preempted state laws have always been able to seek redress in the courts.

4. Petitioner further contends (Br. 35-36) that OCC's regulation is unreasonable because OCC lacks the capacity or the inclination to enforce state fair lending laws against national banks. That is incorrect.

OCC has general enforcement authority to compel national banks to comply with all laws, both state and federal. 12 U.S.C. 1818(b); *National State Bank* v. *Long*, 630 F.2d 981, 988 (3d Cir. 1980). In addition, OCC has specific authority to enforce compliance by national banks with various federal consumer protection laws, including the Equal Credit Opportunity Act (ECOA), 15 U.S.C. 1691 *et seq.*, which prohibits the same misconduct that petitioner alleged as the basis for his investigation and threatened enforcement actions in this case. Compare 15 U.S.C. 1691 with N.Y. Exec. Law § 296-a(1) (McKinney 2005).

OCC employs nearly 2000 bank examiners. New examiners are trained to examine for both safety and soundness and consumer compliance, and OCC has many examiner specialists who have professional certifications and extensive expertise in compliance, including fair lending. The largest national banks are examined continuously, including for fair lending issues, by on-site

examination teams, and other banks receive regular periodic examinations. *Hearings Before the House Committee on Financial Services*, 110th Cong., 1st Sess. 12-14 (2007) (testimony of John C. Dugan, Comptroller of the Currency); *Rooting Out Discrimination in Mortgage Lending: Using HMDA as a Tool for Fair Lending Enforcement: Hearing Before the Subcomm. on Oversight and Investigations of the House Comm. on Financial Services*, 110th Cong., 1st Sess. 87 (2007) (statement of Calvin R. Hagins, Director for Compliance Policy, OCC) (Hagins Testimony). When OCC identifies state-law requirements applicable to national banks, examiners are advised of those requirements and can take them into account in conducting examinations. GAO, *Publ'n No. 06-387*, *OCC Preemption Rules: OCC Should Further Clarify the Applicability of State Consumer Protection Laws to National Banks* 23 (2006).

Between 2002 and July 2007, OCC examiners directed bank management to address approximately 200 issues relating to fair lending and mortgage data reporting. Hagins Testimony 110. In addition, OCC has frequently referred possible fair lending violations to the Departments of Justice and of Housing and Urban Development, and several such referrals have resulted in public enforcement actions. *Id.* at 106-108. OCC's Customer Assistance Group, which handles all consumer complaints against national banks in coordination with OCC's examination staff, has also facilitated the recovery by injured customers of tens of millions of dollars. OCC, *Report of the Ombudsman 2005-2006*, at 10 (Nov.

2007). OCC thus vigorously enforces fair lending laws against national banks.[11]

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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[11] Some of petitioner's amici suggest (*e.g.*, States Br. 8-14) that OCC's interpretation of Section 484 somehow contributed to the recent problems associated with subprime lending. On the contrary, the vast bulk of subprime loans were originated by state-regulated, non-bank mortgage lenders and brokers, who were subject to significantly less rigorous oversight and examination than banks. Loans by those non-depository institutions accounted for a disproportionate percentage of defaults and foreclosures, as well as the bulk of abusive and predatory lending. H.R. Rep. No. 441, 110th Cong., 1st Sess. 36 (2007); *Hearings Before the House Comm. on Financial Services*, 111th Cong., 1st Sess. (2009) (statement of John C. Dugan, Comptroller of the Currency).

APPENDIX

1. Section 484 of Title 12, United States Code, provides:

Limitation on visitorial powers

(a) No national bank shall be subject to any visitorial powers except as authorized by Federal law, vested in the courts of justice or such as shall be, or have been exercised or directed by Congress or by either House thereof or by any committee of Congress or of either House duly authorized.

(b) Notwithstanding subsection (a) of this section, 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.

2. Section 93a of Title 12, United States Code, provides:

Authority to prescribe rules and regulations

Except to the extent that authority to issue such rules and regulations has been expressly and exclusively granted to another regulatory agency, the Comptroller of the Currency is authorized to prescribe rules and regulations to carry out the responsibilities of the office, except that the authority conferred by this section does not apply to section 36 of this title or to securities activities of National Banks under the Act commonly known as the "Glass-Steagall Act".

3. Section 7.4000 of Title 12 Code, of Federal Regulations provides, in relevant part:

Visitorial powers.

(a) *General rule.* (1) Only the OCC or an authorized representative of the OCC may exercise visitorial powers with respect to national banks, except as provided in paragraph (b) of this section. State officials may not exercise visitorial powers with respect to national banks, such as conducting examinations, inspecting or requiring the production of books or records of national banks, or prosecuting enforcement actions, except in limited circumstances authorized by federal law. However, production of a bank's records (other than non-public OCC information under 12 CFR part 4, subpart C) may be required under normal judicial procedures.

(2) For purposes of this section, visitorial powers include:

(i) Examination of a bank;

(ii) Inspection of a bank's books and records;

(iii) Regulation and supervision of activities authorized or permitted pursuant to federal banking law; and

(iv) Enforcing compliance with any applicable federal or state laws concerning those activities.

(3) Unless otherwise provided by Federal law, the OCC has exclusive visitorial authority with respect to the content and conduct of activities authorized for national banks under Federal law.

(b) *Exceptions to the general rule.* Under 12 U.S.C. 484, the OCC's exclusive visitorial powers are subject to the following exceptions:

(1) *Exceptions authorized by Federal law.* National banks are subject to such visitorial powers as are provided by Federal law. Examples of laws vesting visitorial power in other governmental entities include laws authorizing state or other Federal officials to:

(i) Inspect the list of shareholders, provided that the official is authorized to assess taxes under state authority (12 U.S.C. 62; this section also authorizes inspection of the shareholder list by shareholders and creditors of a national bank);

(ii) Review, at reasonable times and upon reasonable notice to a bank, the bank's 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 those laws (12 U.S.C. 484(b));

(iii) Verify payroll records for unemployment compensation purposes (26 U.S.C. 3305(c));

(iv) Ascertain the correctness of Federal tax returns (26 U.S.C. 7602);

(v) Enforce the Fair Labor Standards Act (29 U.S.C. 211); and

(vi) Functionally regulate certain activities, as provided under the Gramm-Leach-Bliley Act, Pub.L. 106-102, 113 Stat. 1338 (Nov. 12, 1999).

(2) *Exception for courts of justice.* National banks are subject to such visitorial powers as are vested in the courts of justice. This exception pertains to the powers

inherent in the judiciary and does not grant state or other governmental authorities any right to inspect, superintend, direct, regulate or compel compliance by a national bank with respect to any law, regarding the content or conduct of activities authorized for national banks under Federal law.

(3) *Exception for Congress.* National banks are subject to such visitorial powers as shall be, or have been, exercised or directed by Congress or by either House thereof or by any committee of Congress or of either House duly authorized.

* * * * *