No. 08-453

IN THE

Supreme Court of the United States

ANDREW M. CUOMO, in his official capacity as Attorney General for the State of New York,

Petitioner,

—v.—

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

Respondents.

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

BRIEF IN OPPOSITION OF THE CLEARING HOUSE ASSOCIATION L.L.C.

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December 8, 2008

QUESTION PRESENTED

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

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, respondent The Clearing House Association L.L.C. (the "Clearing House") states that it has no parent corporation and no publicly held company owns 10% or more of its stock.

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

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The Court of Appeals held that the Office of the Comptroller of the Currency ("OCC") has the exclusive authority to investigate and enforce national banks' compliance with state fair-lending laws. The Second Circuit based its decision on a regulation promulgated by the OCC, 12 C.F.R. § 7.4000, concerning the preclusive effect of a provision of the National Bank Act ("NBA") now codified as 12 U.S.C. § 484 ("§ 484"). That decision is consistent with each Court of Appeals that has applied section § 7.4000. *See National City Bank v. Turnbaugh*, 463 F.3d 325 (4th Cir. 2006), *cert. denied*, 127 S. Ct. 2096 (2007); *Wachovia Bank, N.A. v. Watters*, 431 F.3d 556 (6th Cir. 2005), *aff'd*, 127 S. Ct. 1559 (2007); *Wells Fargo Bank, N.A. v. Boutris*, 419 F.3d 949 (9th Cir. 2005); *Wachovia Bank, N.A. v. Burke*, 414 F.3d 305 (2d Cir. 2005), *cert. denied*, 127 S. Ct. 2093 (2007). Twenty-eight years ago, long before the OCC adopted the relevant provisions of § 7.4000, the Third Circuit reached the same conclusion based on § 484 itself. *Nat'l State Bank, Elizabeth, N.J. v. Long*, 630 F.2d 981, 988-89 (3d Cir. 1980).

Indeed, Petitioner is asking this Court to re-examine its decision of less than two years ago in *Watters v. Wachovia Bank, N.A.*, 127 S. Ct. 1559 (2007), where this Court applied § 484 and quoted

§ 7.4000 with approval in holding that a state could not confer on its officer "enforcement authority over mortgage lending, or any other banking business done by national banks." 127 S. Ct. at 1569. Guided by *Watters*, the Second Circuit affirmed the District Court's decree barring New York's Attorney General from investigating or exercising enforcement authority over the mortgage lending activities of national banks. Because the Second Circuit's decision follows both the recent precedent of this Court in *Watters* and settled authority excluding states from the regulation of national banks' exercise of their authorized banking powers, there is no reason to grant certiorari.

A. The National Bank Act's Prohibition Against State Investigation and Enforcement With Respect to National Banks' Exercise of Their Powers Under the Act

Section 484 plainly prohibits the exercise of "visitorial powers" over national banks "except as authorized by Federal law." 12 U.S.C. § 484(a). Pursuant to § 484 and rule-making authority under 12 U.S.C. § 93a, the OCC promulgated 12 C.F.R. § 7.4000 to make clear, *inter alia*, that § 484 precludes state officials from "inspecting or requiring the production of books or records of national banks, or prosecuting enforcement actions" against national banks with respect to activities authorized by the NBA.

In *Watters*, the Court explained that "[n]early two hundred years ago, in *McCulloch v. Maryland*, 17 U.S. [(4 Wheat.)] 316 (1819), this Court held federal law supreme over state law with respect to

national banking." 127 S. Ct. at 1566. In accordance with this federal supremacy over national banking, when Congress created a new national banking system in 1864, it expressly and clearly prohibited state exercise of visitorial powers over national banks by enacting the provision now codified as § 484(a) "[t]o prevent inconsistent or intrusive state regulation from impairing the national system." *Id.*; *see* Act of June 3, 1864, ch. 106, 13 Stat. 99.

Although § 484 has been amended since its enactment (largely to add exceptions to the general exclusion, none of which is applicable here), its essential prohibition on state exercise of visitorial powers has remained unchanged. The goal of that prohibition is evident from the legislative history of the Act of 1864. In the midst of a rebellion by state governments, the sponsors of the Act recognized that a national bank "must not be subjected to any local government, state or municipal; [but] must be kept absolutely and exclusively under that government from which it derives its functions." CONG. GLOBE, 38TH Cong., 1ST Sess. 1893 (1864) (remarks of Sen. Sumner). Senator Sumner read from *McCulloch v. Maryland* to stress that states could not be permitted to have power over national banks. "[A] power to create implies a power to preserve. . . . [A] power to destroy, if wielded by a different hand, is hostile to, and incompatible with, the powers to create and preserve." *Id.*[1]

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[1] Between the termination of the charter of the Second Bank of the United States in 1836 and enactment of the NBA in 1864, the nation's banking system was a "decentralized, unstable structure of state banks" with frequent failures and no uniform federal currency. James M. McPherson, *Battle Cry of Freedom*

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In keeping with Congress' clear intent, as confirmed by this legislative history, "[i]n the years since the NBA's enactment, [this Court has] repeatedly made clear that federal control shields national banking from unduly burdensome and duplicative state regulation." *Watters*, 127 S. Ct. at 1566-67. The Court reemphasized in *Watters* that

> 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. Any thing beyond this is an abuse, because it is the usurpation of power which a single State cannot give.

Id. at 1567 (quoting *Farmers' & Mechs.' Nat'l Bank v. Dearing*, 91 U.S. 29, 34 (1875)) (alteration in original).

The NBA established the OCC as the primary regulator of national banks. As the modes of

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government regulation of banking have changed, the OCC's role has evolved. Thus, in 1966, Congress explicitly granted the OCC authority to review and compel national banks' compliance with any applicable law regulating the business of banking, state or federal. 12 U.S.C. § 1818(b), (e), (i)(2); *see Long*, 630 F.2d at 988 (recognizing OCC's broad enforcement authority).

Congress further confirmed the OCC's exclusive enforcement authority in the Riegle-Neal Interstate Banking and Branching Efficiency Act of 1994, Pub. L. No. 103-328, 108 Stat. 2338 ("Riegle-Neal"), which amended federal banking laws to permit interstate branching by national banks. Congress provided that those branches would be subject to "[t]he laws of the host State regarding community reinvestment, consumer protection, fair lending, and establishment of intrastate branches," except where preempted by federal law or where state law discriminates against national banks' branches. 12 U.S.C. § 36(f)(1)(A). At the same time, however, Congress made clear that "[t]he provisions of any State law to which a branch of a national bank is subject under this paragraph *shall be enforced*, with respect to such branch, *by the Comptroller of the Currency*." 12 U.S.C. § 36(f)(1)(B) (emphasis added).[2]

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[2] Petitioner attempts to nullify this clear language by arguing that the provision is somehow limited because, after prescribing that enforcement "shall" be by the Comptroller, the statute does not add the word "exclusively." Such additional language would have been superfluous because the legislation does not provide for any state enforcement at all. Petitioner then argues that the provision was inserted into the Act "[i]n light of OCC's previously expressed doubts about whether it could enforce

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Consistent with the OCC's plenary licensing, regulatory, supervisory, examination, and enforcement authority over national banks, and pursuant to its rule-making authority under 12 U.S.C. § 93a, the OCC amended its regulation interpreting § 484 in 1999, pursuant to a comprehensive notice and comment procedure, to make clear that state officials could not investigate the activities of national banks or bring state law enforcement actions against national banks. *See* 64 Fed. Reg. 31,749, 31,751 (June 14, 1999); 64 Fed. Reg. 60,092, 60,094 (Nov. 4, 1999).[3] In 2004, the OCC further amended the regulation to provide additional examples of prohibited visitation and to clarify the meaning of the statutory "courts of justice" exception to the generally applicable rule. *See* 68 Fed. Reg. 6363, 6467 (Feb. 7, 2003); 69 Fed. Reg. 1895, 1895-96 (Jan 13, 2004).

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[3] Although at various times Petitioner characterizes the OCC as having created a recent break with "historical" precedent (Pet. 8-10), the OCC first codified its interpretive rulings with respect to the exercise of visitorial powers by state officials in 1971 in 12 C.F.R. 7.6025(b). 36 Fed. Reg. 17,000, 17,013 (Aug. 26, 1971).

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Disclosure Act, 12 U.S.C. §§ 2801-2810 ("HMDA"), to require disclosure of information concerning the interest rates for mortgage loans, in addition to the data already required about the race, sex, and income of loan applicants. The new pricing data were first reported beginning on March 31, 2005, for loans originated in 2004.

The Federal Reserve Board and its staff have repeatedly emphasized that the additional HMDA data alone cannot prove unlawful discrimination, and cautioned that "unwarranted accusations of illegal bias" based on the HMDA data "may lead to unnecessary restrictions on the availability of loans to less-creditworthy applicants."[4] As Federal Reserve Board Governor Edward M. Gramlich explained in 2005:

> Although the addition of the price data significantly increases the robustness of HMDA data, the data alone do not prove discrimination. . . . The new HMDA data are clearly limited: they do not include credit scores, loan-to-value ratio, or consumer debt-to-income ratio — all factors relevant to the cost of credit. Because these important determinants of price are missing, one cannot draw definitive conclusions about whether particular lenders discriminate unlawfully or

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[4] Robert B. Avery *et al.*, *New Information Reported under HMDA and Its Application in Fair Lending Enforcement*, 2005 Fed. Reserve Bull. 344, 393 (2005), *available at* http://www.federalreserve.gov/pubs/bulletin/2005/summer05_hmda.pdf.

take unfair advantage of consumers based solely on a review of the HMDA data.[5]

Nonetheless, in April 2005, immediately after the HMDA interest rate data first became available — and well before the Federal Reserve staff had completed their analysis of the data — then-Attorney General Eliot Spitzer commenced an investigation, based on the HMDA data alone, concerning alleged potential violations of state fair lending laws by certain national banks.[6] In particular, Spitzer requested that the national banks provide information regarding their loans and real-estate lending practices and threatened to issue subpoenas and bring enforcement proceedings against national banks with respect to their mortgage lending activities. (*See* Pet. App. 3a-4a.)

C. The Proceedings Below

The Clearing House brought this action seeking an injunction against Spitzer's violation of § 484 and the OCC's regulations, and the case was consolidated with a similar proceeding brought by the OCC. Following trial, the District Court held that Spitzer's investigation and threatened

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[5] Edward M. Gramlich, Governor, Bd. of Governors of the Fed. Reserve Sys., Remarks to the National Association of Real Estate Editors (June 3, 2005), *available at* http://www.federalreserve.gov/boarddocs/speeches/2005/20050603/default.htm.

[6] Spitzer also invoked the Federal Equal Credit Opportunity Act ("ECOA"), but he did not rely on ECOA during the proceedings below, presumably because ECOA expressly provides that the OCC shall enforce that statute as it applies to national banks, 15 U.S.C. § 1691c(a)(1)(A).

enforcement were barred by the NBA as interpreted by § 7.4000. Accordingly, the District Court enjoined the Attorney General from "issuing subpoenas or demanding inspection of the books and records of any national banks in connection with his investigation into residential lending practices," from compelling compliance with his existing information demands, and from instituting actions against national banks to enforce state fair lending laws. (*See* Pet. App. 116a-117a.)

The Court of Appeals affirmed the District Court insofar as it enjoined Petitioner's investigation and enforcement proceeding pursuant to state law.[7] Noting that in *Watters* this Court had "implied 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 Second Circuit concluded that "[i]t seems clear . . . after *Watters*, that investigation and enforcement powers of the type the Attorney General has sought to exercise here are at least in some sense 'visitorial,' whether or not they unambiguously fall within the scope of § 484(a)." (Pet. App. 21a.) Accordingly, the Court of Appeals upheld and applied the OCC's regulation, § 7.4000:

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[7] In the Clearing House action, the District Court further held that the Attorney General could not bring a *parens patriae* action under the Fair Housing Act. (Pet. App. 141a.) The Court of Appeals vacated that ruling on ripeness grounds. (Pet. App. 32a-41a.) Petitioner does not seek review of that portion of the Court of Appeals decision. (*See* Pet. 12 n.3.)

> In 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 . . . . [T]he OCC's regulation furthers Congress's intent, through § 484(a) and other provisions of the NBA, to shield national banks 'from unduly burdensome and duplicative state regulation' in the exercise of their federally authorized powers, such as real estate lending. *Watters*, 127 S. Ct. at 1567. At the same time, it 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 . . . .

(Pet. App. 28a-29a.)[8] Petitioner's request for rehearing en banc was denied.

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[8] Thus, there is a role for the states, contrary to Petitioner's assertion that 12 C.F.R. § 7.4000 covers "virtually all state enforcement" (Pet. 2). The distinction is between enforcement of state laws that affect a national bank's exercise of its authorized banking powers and enforcement that does not affect the exercise of those powers. Petitioner's attempt to limit § 484 based on whether the substantive state law is preempted (*e.g.*, Pet. 6) is inherently nonsensical because if the state law is preempted, there is no enforcement power to be exercised by anyone.

REASONS FOR DENYING THE PETITION

I. THE DECISION OF THE COURT OF APPEALS DOES NOT CONFLICT WITH ANY DECISION OF THIS COURT

Petitioner's first ground for seeking certiorari is an asserted conflict between the Second Circuit's decision and *First National Bank in St. Louis v. Missouri*, 263 U.S. 640 (1924) (hereinafter "*St. Louis*"), a decision that nowhere cites § 484. For several independent reasons, no such conflict exists.

First, Petitioner argues that in deferring to the OCC's "construction of 'visitorial powers,' the Court of Appeals *avoided* this Court's prior *interpretation* of the NBA in *St. Louis*, with its more measured and traditional *construction* of the term." (Pet. 19 (emphasis added).) Contrary to Petitioner's argument, there was nothing for the Second Circuit to "avoid" because this Court did not provide any "interpretation" or "construction" of "visitorial powers" or § 484 in *St. Louis*. To the contrary, neither the opinion nor the dissent in *St. Louis* even once mentions "visitorial powers" or the predecessor to § 484 then in force (Rev. Stat. § 5241).[9]

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[9] Petitioner's entire argument is premised on the citation of Rev. Stat. § 5241 in the summary of the parties' submissions in the syllabus of the official report (*see* Pet. 16 & n.4) and the suggestion that the Court must have "necessarily rejected" one of those submissions (Pet. 15-16). The Court may have dismissed or disregarded the parties' arguments concerning the statute without comment for a variety of reasons, including those set forth herein. *St. Louis* cannot reasonably be read as

(footnote continued)

Second, Petitioner has conceded that his investigation and threatened enforcement action under state law are barred if the OCC's regulation is upheld. (Pet. App. 15a n.6.) The Second Circuit affirmed the District Court's injunction because it concluded that the OCC's regulation should be sustained under the principles announced by this Court in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). Thus, the Second Circuit's decision could not possibly conflict with *St. Louis* because that case was decided decades before the OCC issued 12 C.F.R. § 7.4000. Even if the OCC's regulation were inconsistent with an interpretation of § 484 adopted *sub silentio* in *St. Louis*, this Court made clear less than three years ago that "[a] court's prior judicial construction of a statute trumps an agency construction otherwise entitled to *Chevron* deference only if the prior court decision holds that its construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion." *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 982 (2005). Because *St. Louis* did not address or even mention § 484, it certainly did not hold that any construction of § 484 "follows from the unambiguous terms of the statute."

Third, even if it is assumed that the Court in *St. Louis* considered and construed § 484 without ever referring to it, *St. Louis* involved enforcement of a state law prohibiting national banks from establishing branches, at a time that the NBA did

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(continued)
providing a construction, much less a definitive construction, of a statute it never mentions.

not authorize national banks to establish branches. *See St. Louis*, 263 U.S. at 659-60. For that reason, the state action in *St. Louis* did not involve a prohibited interference with a bank's exercise of its authorized powers, which is the touchstone of the *Watters* analysis. It is indisputable that the mortgage lending in question here involves a national bank's lawful powers. Although Petitioner suggests that enforcement of state fair lending laws against the exercise of that authority likewise "by definition do[es] not substantially interfere with a national bank's exercise of its lawful powers" (Pet. 18), that argument misses the point explicitly made by this Court in *Watters* that subjecting national banks' mortgage lending "to the State's investigative and enforcement machinery *would surely interfere* with the banks' federally authorized business." 127 S. Ct. at 1568 (emphasis added).

That interference arises because "[d]iverse and duplicative superintendence of national banks' engagement in the business of banking . . . is precisely what the NBA was designed to prevent." 127 S. Ct. at 1568. For that reason, "[s]ecurity against significant interference by state regulators is a characteristic condition of the 'business of banking' conducted by national banks." *Id.* at 1571. Unlike branch banking at the time of *St. Louis* (*see St. Louis*, 263 U.S. at 659 (premising ruling on fact that branching was not an "incidental power" conferred on national banks by the NBA)), real estate lending, the "banking business" Petitioner sought to investigate, is specifically authorized by the NBA, 12 U.S.C. § 371(a). It is, therefore, "[b]eyond genuine dispute [that] state law may not significantly burden" this power through duplicative enforcement. *Watters*, 127 S. Ct. at 1567. What Petitioner fails to

recognize is the crucial distinction between state enforcement of alleged violations of state law based on how an authorized banking power is exercised — which *Watters* prohibits — and state enforcement of state law that does not affect the exercise of powers authorized by the NBA, which *St. Louis* and *Watters* permit.[10]

None of the other three decisions Petitioner invokes as "settled contrary precedent" to the Second Circuit's opinion (Pet. 2, 16) is remotely close to that. Both *First National Bank in Plant City v. Dickinson*, 396 U.S. 122 (1969) and *First National Bank of Bay City v. Fellows*, 244 U.S. 416 (1917) concerned statutes in which Congress had expressly conditioned grants of powers to national banks upon state authorization. In *Watters*, this Court noted with specific reference to *Plant City* that the holdings in such decisions cannot be "ripped from their context" to suggest that States have authority to regulate national banks as they do state banks. 127 S. Ct. at 1569 n.7. In the case of national banks' mortgage lending powers — unlike the branching authorized by the McFadden Act at issue in *Plant City* or the trustee and brokerage powers at issue in *Bay City* — the NBA does not condition the power

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[10] The holding in *St. Louis* is also inapplicable here because, when *St. Louis* was decided, Missouri's law would have been unenforceable if the state could not enforce it. *See* 263 U.S. at 660. State enforcement was thus necessary, as the District Court held, "to fill a gap in the law." (Pet. App. 86a.) Those circumstances no longer exist because since 1966 the OCC has had the authority to enforce all laws, state and federal, regulating the business of banking. 12 U.S.C. § 1818; *see Long*, 630 F.2d at 988.

"upon a grant of state permission," rendering the holdings in those decisions inapposite. *Id.*[11]

The final decision of this Court cited by Petitioner as supposedly in conflict with the Second Circuit's opinion, *Waite v. Dowley*, 94 U.S. 527 (1876), is even further afield. In *Waite*, the Court addressed the question of whether a state official could require a national bank to disclose a list of its shareholders and dividends paid to them for state taxation purposes. *Id.* at 532. The disclosure sought had nothing at all to do with state regulation of the bank's federally authorized business and did not involve any exercise of visitorial authority.[12]

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[11] For similar reasons, appellate decisions involving branching issues cited by Petitioner and his *amici* (including, *Jackson v. First National Bank of Valdosta*, 349 F.2d 71, 74 (5th Cir. 1965) (which relied on "the absence of any contraindicative federal policy") and *Nuesse v. Camp*, 385 F.2d 694 (D.C. Cir. 1967)) do not support review.

[12] Additional cases cited by Petitioner's *amici* as supposedly contrary to the Second Circuit's decision similarly do not address the exercise of visitorial powers. For example, *National Bank v. Kentucky*, 76 U.S. (9 Wall.) 353 (1870), concerned state taxation of bank shares, not state regulation of the business of banking, *see id.* at 362-63. *Anderson National Bank v. Luckett*, 321 U.S. 233, 248 (1944), concerned the transfer of abandoned bank deposits to the state, and the Court specifically noted that the state's power was limited to demanding payment of accounts "in the same way and to the same extent that the depositors could" and compared the state law to "tax laws, the attachment laws, or the laws for the administration of estates of decedents or of missing or unknown persons," *id.* at 249, 252. *Atherton v. FDIC*, 519 U.S. 213, 222-223 (1997), was an action in which the FDIC as receiver asserted claims on behalf of a failed savings association and had nothing to do with state visitation of national banks.

The fact that *none* of these decisions cited by Petitioner and his *amici* addresses the scope or meaning of § 484 at all demonstrates conclusively the absence of a conflict.

II. THE DECISION OF THE COURT OF APPEALS DOES NOT PRESENT AN "IMPORTANT" OR "UNRESOLVED" QUESTION CONCERNING THE APPLICATION OF *CHEVRON* DEFERENCE

The decision below does not present any "important and unresolved" question concerning the application of *Chevron* deference. (Pet. 19.) In particular, there is no merit to Petitioner's principal assertion that the Second Circuit's decision deferring to the OCC's regulation (which Petitioner acknowledges to be consistent with a recent decision of the Sixth Circuit) (Pet. 19) conflicts with the Tenth Circuit's decision in *Colorado Public Utilities Commission v. Harmon*, 951 F.2d 1571 (10th Cir. 1991), (Pet. 19-20), in which state law was found to be preempted.

In *Harmon*, the Tenth Circuit addressed whether certain regulations regarding the transportation of hazardous materials promulgated by the Colorado Public Utilities Commission were preempted by regulations issued by the United States Department of Transportation ("DOT") under the Federal Hazardous Materials Transportation Uniform Safety Act of 1990 ("HMTUSA"). 951 F.2d at 1574. In that case, the United States Department of Energy had obtained "advisory, nonbinding opinions" from DOT that the Colorado regulations were preempted by the DOT regulations. *Id.* at

1575, 1578. In considering the weight to accord those advisory determinations, the Tenth Circuit noted that "DOT's expertise, in part, lies in determining the scope and coverage of its regulations and whether Colorado's regulations cover the same subject matter." *Id.* at 1579. Accordingly, the Tenth Circuit concluded that it *would* defer to DOT's advisory determinations "that its regulations overlap with Colorado's regulations," while independently reviewing the legal issue of preemption under HMTUSA's express preemption standards. *Id.* Based on DOT's determinations that Colorado's regulations overlapped with federal law, the Tenth Circuit concluded that they created an obstacle to the accomplishment and execution of the full purposes and objectives of Congress, and were thus preempted. *Id.* at 1579-83.

There is no inconsistency between *Harmon* and the Court of Appeals' decision in this case for two reasons. First, there is an obvious difference between an informal advisory opinion of the type at issue in *Harmon* and a formal regulation such as § 7.4000 that is subject to notice and comment. In *Harmon* the Tenth Circuit declined to defer to "advisory, nonbinding opinions" (951 F.2d at 1578) of the DOT concerning certain preemption issues. The Tenth Circuit was not asked to address the preemptive effect of a regulation having the force of law adopted pursuant to an agency's substantive rule-making authority, such as the OCC's authority under 12 U.S.C. § 93a. As noted below, this Court has made clear that a regulation adopted pursuant to statutory authority has the same preemptive force as a statute itself. *Fid. Fed. Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 153 (1982).

Second, the question here, unlike in *Harmon*, is not whether a particular state statute is preempted by applicable federal law, but the substantive meaning of a federal statute that preempts state authority. Spitzer conceded that the regulation, as written, prohibited what he sought to do. (Pet. App. 15a n.6.) This Court rejected a similar argument in *Smiley v. Citibank (S.D.), N.A.*, 517 U.S. 735 (1996), in words that are directly applicable to Petitioner's argument here:

> This argument confuses the question of the substantive (as opposed to pre-emptive) *meaning* of a statute with the question of *whether* a statute is pre-emptive. We may assume (without deciding) that the latter question must always be decided *de novo* by the courts. That is *not* the question at issue here; there is no doubt that [the statute at issue] pre-empts state law.

517 U.S. at 744 (emphasis in original). Here, there is similarly "no doubt" that § 484 preempts state exercise of "visitorial powers." Accordingly, because the regulation does not determine *whether* the statute is preemptive, but interprets the substantive meaning of the phrase "visitorial powers," as used in the statute, this case does not present the question Petitioner asserts *Smiley* left open. (Pet. 20-21.) In fact, *Smiley* forecloses Petitioner's argument that the OCC's "full-dress regulation" interpreting a provision

of the NBA (517 U.S. at 741), is not entitled to *Chevron* deference.[13]

Indeed, in large part, the *Harmon* decision corresponds with the Second Circuit's deference to the OCC's regulation in that the Tenth Circuit determined to defer to DOT's determination of the scope of federal law in the agency's area of expertise. In particular, the Tenth Circuit deferred to DOT's interpretation of its regulations and determination that federal law "overlap[ped] with" Colorado law (951 F.2d at 1579), and here the Second Circuit deferred to the OCC's interpretation of the term "visitorial powers" as used in the NBA.

The OCC's adoption of § 7.4000 involved the interpretation of the NBA and determinations concerning how responsibility for investigations and enforcement proceedings involving national banks should be allocated in order best to achieve the objectives of the Act. These are the sort of questions within the expertise of the OCC on which this Court has repeatedly held that the OCC is entitled to deference. The Court has "settled" that the OCC's "reasonable" interpretation of the NBA is entitled to

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[13] Similarly, *Riegel v. Medtronic, Inc.*, 128 S. Ct. 999 (2008), did not "deflect[]" (Pet. 21) any question of deference presented here. In *Riegel*, the Court held that the medical device statute at issue was unambiguous, but suggested that, had it found ambiguity, it would have applied the appropriate standard of deference to an agency position set forth in an amicus brief (*i.e.*, "*Skidmore*" rather than *Chevron* deference). 128 S. Ct. at 1009. As Petitioner acknowledges, however, that lesser standard of deference would have been a function of the fact that the agency's views were not expressed in a regulation, in contrast to the present case. (Pet. 21.)

"controlling weight" under *Chevron* unless Congress' intent is unambiguously to the contrary. *NationsBank of N.C., N.A. v. Variable Annuity Life Ins. Co.*, 513 U.S. 251, 256-257 (1995) (internal quotations omitted). Thus, there is no conflict between the Court of Appeals' decision in this case and the Tenth Circuit's decision in *Harmon*.[14]

Contrary to Petitioner's assertion of a circuit conflict, the Courts of Appeals that have considered the issue have uniformly reached the same conclusion: The OCC's regulations interpreting the NBA's prohibition of state exercise of visitorial powers are entitled to deference under *Chevron*. *See Nat'l City Bank v. Turnbaugh*, 463 F.3d at 331-33; *Wachovia Bank, N.A. v. Watters*, 431 F.3d at 560-63; *Wells Fargo Bank, N.A. v. Boutris*, 419 F.3d at 958-62; *Wachovia Bank, N.A. v. Burke*, 414 F.3d at 315-21.

The Second Circuit's decision is also consistent with a closely analogous ruling of the Third Circuit that has not been questioned by this Court or any Court of Appeals since it was decided nearly three decades ago. In *Long*, the Third Circuit held that § 484 prohibited New Jersey officials from enforcing state anti-redlining legislation against national banks, even though the legislation was not substantively preempted. In that decision, the Third Circuit observed that "when state law prohibits the practice of redlining, its enforcement so directly

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[14] In *Watters*, the petitioner also invoked *Harmon* in her petition for certiorari, but then failed to cite *Harmon* even once in her brief on the merits. *Compare* Pet. for Writ of Certiorari, Case No. 05-1342 *with* Brief for the Petitioner, Case No. 05-1342.

implicates concerns in the banking field that the appropriate federal regulatory agency has jurisdiction." 630 F.2d at 988.[15]

Petitioner also argues that the OCC's rule-making should be disregarded because the OCC lacks "institutional competence" (Pet. 22-23) to promulgate preemptive regulations interpreting the NBA. But this Court has repeatedly upheld the OCC's rule-making interpreting the scope of the Act, *see, e.g.*, *Smiley*, 517 U.S. at 739-44 (deferring to OCC's interpretation of the term "interest"); *NationsBank*, 513 U.S. at 256-64 (deferring to OCC's determination that brokering annuities is an incidental power of national banks), and the OCC's interpretation of § 484 is entitled to no less deference. As the Court of Appeals noted, the OCC's regulation "reached a permissible accommodation of conflicting policies that were committed to it by the

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[15] Various decisions cited by Petitioner and his *amici* do not contradict the Third Circuit's holding in *Long* either because they involved state enforcement of generally applicable laws that "do not directly concern a banking practice" and as to which the OCC therefore "has no direct responsibility for enforcing," *Minnesota v. Fleet Mortgage Corp.*, 158 F. Supp. 2d 962, 966 (D. Minn. 2001) (anti-telemarketing and consumer-fraud laws); *see also Alaska v. First National Bank of Anchorage*, 660 P.2d 406, 425 (Alaska 1982) (contract and property law); *Peoples Savings Bank v. Stoddard*, 102 N.W.2d 777, 796-97 (Mich. 1960) (antitrust laws), or because they make no mention of § 484 or the OCC's enforcement role, *e.g.*, *Brown v. Clarke*, 878 F.2d 627 (2d Cir. 1989); *West Virginia v. Scott Runyan Pontiac-Buick, Inc.*, 461 S.E.2d 516 (W.Va. 1995); *Attorney General v. Michigan National Bank*, 312 N.W.2d 405 (Mich. Ct. App. 1981). The District Court distinguished *Fleet* and other such cases on precisely these grounds. (*See* Pet. App. 91a-92a.)

statute," furthering "Congress's intent . . . to shield national banks 'from unduly burdensome and duplicative state regulation' in the exercise of their federally authorized powers." (Pet. App. 28a-29a (quoting *Watters*, 127 S. Ct. at 1567).)

Petitioner's appeal to *Gonzalez v. Oregon*, 546 U.S. 243 (2006) is misplaced. In *Gonzalez*, the Court held that the United States Attorney General did not have delegated authority to issue a rule regarding a medical standard for care and treatment of patients because the rule did not fall within his "limited powers, to be exercised in specific ways." 546 U.S. at 259. In contrast, Congress delegated to the Comptroller of the Currency "authoriz[ation] to prescribe rules and regulations to carry out the responsibilities of the office." 12 U.S.C. § 93a. In accord with this broad grant of authority, this Court has repeatedly held that "'[t]he Comptroller of the Currency is charged with the enforcement of banking laws to an extent that warrants the invocation of [*Chevron* deference] with respect to his deliberative conclusions as to the meaning of these laws.'" *NationsBank*, 513 U.S. at 256-57 (quoting *Clarke v. Securities Industry Ass'n*, 479 U.S. 388, 403-04 (1987)).[16]

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[16] The argument of *amicus* the Conference of State Bank Supervisors ("CSBS") that the OCC does not have authority to issue regulations interpreting § 484 (Br. of CSBS 20-22) is squarely inconsistent with *NationsBank*. The Comptroller's rule-making authority "is as broad as the OCC's statutory responsibilities." *Wells Fargo Bank*, 419 F.3d at 958; *see also Conference of State Bank Supervisors v. Conover*, 710 F.2d 878, 883 (D.C. Cir. 1983) (per curiam).

Indeed, if there were ever any doubt about the OCC's authority and "institutional competence" to promulgate preemptive regulations, it was put to rest by the Riegle-Neal Act in which Congress specifically directed the OCC to follow notice and comment procedures "[b]efore issuing any opinion letter or interpretive rule . . . that concludes that Federal law preempts the application to any national bank of any State law regarding community reinvestment, consumer protection [or] fair lending." 12 U.S.C. § 43(a). This Congressional requirement necessarily presupposes that the OCC is authorized to promulgate preemptive regulations, and the OCC is uniquely competent to determine the scope of a statute designed to ensure uniform and fair treatment of the institutions that it is responsible for regulating.[17]

Likewise, there is no merit to the position of *amici* North Carolina, *et al.* that agency "legal analysis" of a statute's meaning is not entitled to deference. (Br. for N.C., *et al.* 10-11). "An agency

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[17] The argument of Petitioner's *amici* that no deference is warranted because of supposed OCC "self-interest" in promulgating preemptive regulations (see Br. for N.C., *et al.* 14-17; Br. of CSBS 8-10; Br. of Nat'l Ass'n of Realtors 16-20) is entirely without merit. The OCC is a governmental agency, not a profit making organization. Its assessment revenues fund its regulatory expenditures, and the increase in assessment revenues resulting from an increase in the number of national banks corresponds to an increase in the regulatory burden on it. That the OCC has publicly announced the benefits of a federal charter — including the long-standing benefit of a single national regulator — is no different from any other government agency pointing out the benefits of the programs it administers and is irrelevant to the *Chevron* analysis.

action qualifies for *Chevron* deference when Congress has explicitly or implicitly delegated to the agency the authority to 'fill' a statutory 'gap,' *including an interpretive gap* created through an ambiguity in the language of a statute's provisions." *Nat'l Cable & Telecomms. Ass'n*, 545 U.S. at 1004 (Breyer, J., concurring) (emphasis added) (citing *Chevron*, 467 U.S. at 843-44; *United States v. Mead Corp.*, 533 U.S. 218, 226-27 (2001)). "Of course, the framework of deference set forth in *Chevron* does apply to an agency interpretation [of an ambiguous statute] contained in a regulation." *Christensen v. Harris County*, 529 U.S. 576, 587 (2000). Thus, as this Court recently and unanimously reaffirmed, where an agency is charged by Congress with authority to promulgate regulations under a statute and does so pursuant to a full notice-and-comment procedure, the agency's view of what the statute means is entitled to deference. *Long Island Care at Home, Ltd. v. Coke*, 127 S. Ct. 2339, 2349-51 (2007).

III. THE DECISION OF THE COURT OF APPEALS DOES NOT "PROFOUNDLY SHIFT[] THE FEDERAL-STATE BALANCE" OR DEPRIVE THE STATES OF ANY "CORE SOVEREIGN POWER"

Petitioner also seeks review based upon an unsupportable assertion that the Court of Appeals' decision "works a major alteration of the balance of power between the federal and state governments." (Pet. 25.) Contrary to Petitioner's argument, the Court of Appeals' decision conforms to the long-established principle adopted by Congress and emphasized by this Court that the regulation of

national banks' exercise of their powers under the NBA is a matter of federal law, from which Congress deliberately and emphatically excluded any role for the states, subject to certain specified exceptions. Any "major alteration" was the work of the Civil War Congress, not the decision below.

This Court has "repeatedly made clear that federal control shields national banking from unduly burdensome and duplicative state regulation." *Watters*, 127 S. Ct. at 1566-67. Thus, "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." *Id.* 1567 (quoting *Farmers' & Mechs.' Nat'l Bank v. Dearing*, 91 U.S. at 34) (emphasis added); *see also Guthrie v. Harkness*, 199 U.S. 148, 159 (1905) ("Except in so far as such corporation was liable to control in the courts of justice, this act was to be the full measure of visitorial power."); *Davis v. Elmira Sav. Bank*, 161 U.S. 275, 283 (1896) ("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.").

In *Watters*, the Court rejected the exact contention now reiterated by Petitioner that visitorial powers are limited to "supervision by the jurisdiction that granted [a] corporate charter" and relate to nothing more than "the corporation's use of, and compliance with, its corporate charter" (Pet. 28.). In rejecting that cramped reading, the Court quoted favorably the very regulation at issue here:

> "Visitation," we have explained "is the act of a superior or superintending officer, who visits a corporation to examine into its

> manner of conducting business, and enforce an observance of its laws and regulations." *Guthrie v. Harkness*, 199 U.S. 148, 158, 26 S. Ct. 4, 50 L. Ed. 130 (1905) (internal quotation marks omitted). *See also* 12 CFR § 7.4000(a)(2) (2006) (defining "visitorial" power as "(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").

127 S. Ct. at 1568-69 (alterations in original).

There is likewise no merit to Petitioner's suggestion that the Second Circuit's decision, endorsing a 140-year old limitation on the states' authority over national banks, is an "affront to federalism" "similar" (Pet. 26) to compelling chief law enforcement officers ("CLEOs") to administer a federal regulatory program, which this Court held to be unconstitutional in *Printz v. United States*, 521 U.S. 898 (1997). In *Printz*, Congress attempted to require local law enforcement officials affirmatively to enforce federal handgun legislation. As Justice Scalia explained, "it will be the CLEO and not some federal official who stands between the gun purchaser and immediate possession of his gun." 521 U.S. at 930. In contrast, the Second Circuit decision does not require a state official to enforce any law, but instead prohibits a state official from enforcing state law in a specific context, just like countless other preemption decisions. *See Cellular Phone Taskforce v. FCC*, 205 F.3d 82, 96 (2d Cir. 2000) (noting irrelevance of *Printz* where federal law "does

not commandeer local authorities to administer a federal program").[18]

There is no merit to Petitioner's invocation of a "presumption against preemption" and "constitutional-avoidance doctrine," relying on *Gregory v. Ashcroft*, 501 U.S. 452 (1991), *Solid Waste Agency of North Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001) and *Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Construction Trades Council*, 485 U.S. 568, 575 (1988) (Pet. 26-29). Congress made its intent to preempt state exercise of visitorial powers over national banks abundantly clear in § 484. Moreover, this Court has repeatedly emphasized that a "pre-emptive regulation's force does not depend on express congressional authorization to displace state law" and a "narrow focus on Congress's intent to supersede state law [is] misdirected." *de La Cuesta*, 458 U.S. at 154; *see City of N.Y. v. FCC*, 486 U.S. 57, 63-64 (1988).

Moreover, Petitioner's reliance on *Gregory* is completely misplaced. That case concerned "a state constitutional provision" establishing the qualifications of state judges, as to which Congressional interference would have "upset the usual constitutional balance" (*id.* at 460), not a field of regulation historically occupied by federal

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[18] The similar holding in *New York v. United States*, 505 U.S. 144 (1992) (cited by Petitioner's *amici*) is inapplicable for the same reason. There the Court invalidated a federal law concerning radioactive waste that would have "'comandeer[ed]' state governments into the service of federal regulatory purposes." *Id.* at 175-76.

authority. In *Barnett Bank of Marion County, N.A. v. Nelson*, 517 U.S. 25 (1996), this Court unanimously held that "grants of both enumerated and incidental 'powers' to national banks" are "not normally limited by, but rather ordinarily pre-empt[], contrary state law." *Id.* at 32. "[A]n 'assumption' of nonpre-emption is not triggered when the State regulates in an area where there has been a history of significant federal presence." *United States v. Locke*, 529 U.S. 89, 108 (2000) (citation omitted).

Petitioner's references to the clear-statement and constitutional-avoidance doctrines (Pet. 27) are equally beside the point. Those principles are only applicable to regulations that raise "significant constitutional questions," *Solid Waste*, 531 U.S. at 173-174, or "serious constitutional problems" with respect to the underlying statute, *Edward J. DeBartolo*, 485 U.S. at 575. As the Court of Appeals explained, nothing about the OCC's interpretation "would cast doubt on the constitutionality of the underlying statute" or "invoke[] the outer limit of *Congress's* power so as to trigger a clear statement requirement." (Pet. App. 14a (emphasis in original).)

The attempt by certain *amici* once again to invoke the Tenth Amendment is baseless for the reasons explained in *Watters*:

> As we have previously explained, "[i]f a power is delegated to Congress in the Constitution, the Tenth Amendment expressly disclaims any reservation of that power to the States." *New York v. United States*, 505 U.S. 144, 156 (1992). Regulation of national bank operations is a prerogative

> of Congress under the Commerce and Necessary and Proper Clauses. *See Citizens Bank v. Alafabco, Inc.*, 539 U.S. 52, 58 (2003) (per curiam). The Tenth Amendment, therefore, is not implicated here.

127 S. Ct. at 1573.[19]

There is also nothing unusual about federal law limiting a state's enforcement of its laws against specific classes of persons entitled to federal protection or under specific circumstances. For example, a state judge may not issue, and a state officer may not execute, a writ of habeas corpus for a person in federal custody. *Tarble's Case*, 80 U.S. (13 Wall.) 397, 411-12 (1872). Federal law precludes a state from enforcing its criminal laws against persons with diplomatic immunity. 22 U.S.C. § 254d. The states may not enforce their generally applicable taxes against Indians within federally recognized Indian reservations. *See Moe v. Confederated Salish & Kootenai Tribes*, 425 U.S. 463, 475-81 (1976). Federal law generally prohibits state courts from enjoining peaceful organizational labor

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[19] The reliance of Petitioner and his *amici* on language from various cases concerning the importance of state power to enforce state criminal laws — which Petitioner acknowledges are "in a different context" (Pet. 26) — is also unavailing. None of these cases, all of which concern federal habeas review or double jeopardy, stands for the proposition that state enforcement of otherwise valid state laws may not be limited by the Supremacy Clause in areas of substantial federal concern. *See Calderon v. Thompson*, 523 U.S. 538 (1998); *McCleskey v. Zant*, 499 U.S. 467 (1991); *see also Heath v. Alabama*, 474 U.S. 82 (1985); *United States v. Wheeler*, 435 U.S. 313 (1978); *Bartkus v. Illinois*, 359 U.S. 121 (1959).

picketing. *See Hotel Employees Union, Local No. 255 v. Sax Enters., Inc.*, 358 U.S. 270, 271 (1959). Thus, prohibiting a state from enforcing its laws against subjects of federal concern, such as national banks, is a conventional application of the supremacy of federal law.

Finally, the argument of the CSBS that the exception to § 484 for visitorial powers "vested in the courts of justice" permits the states to "file suits to enforce their laws" (CSBS Br. 14-17) flies in the face of *Watters*' holding prohibiting the exercise of state "enforcement authority," 127 S. Ct. at 1569. Petitioner implicitly concedes that this argument does not support certiorari by relegating it to a single-sentence footnote (Pet. 29 n.12). As the Second Circuit explained,

> The notion that the exception was intended to permit lawsuits, as opposed to administrative actions, appears particularly misguided since at the time the NBA was enacted, visitorial powers were primarily exercised through the bringing of actions in court. *See, e.g., Guthrie*, 199 U.S. at 157 ("The visitation of civil corporations is by the government itself, through the medium of the courts of justice.")

(Pet. App. 30a-31a.)

IV. THE DECISION OF THE COURT OF APPEALS DOES NOT IMMUNIZE NATIONAL BANKS FROM ENFORCEMENT OF STATE CONSUMER PROTECTION AND FAIR-LENDING LAWS

The Court of Appeals' decision leaves responsibility for enforcement of state consumer protection and fair-lending laws with respect to the exercise of authorized national bank lending powers where Congress intended it to be: with the OCC. Congress has given the OCC broad authority to issue cease and desist orders to national banks for any violation of law, state or federal, 12 U.S.C. § 1818(b), as well as to impose substantial civil money penalties, 12 U.S.C. § 1818(i)(2). When Congress authorized interstate branching by national banks, it subjected the interstate branches to the laws of the "host" state, but expressly provided that such state laws "shall be enforced, with respect to such branch[es], by the Comptroller of the Currency." 12 U.S.C. § 36(f)(1)(B). There was no suggestion that the states should share in the enforcement of these laws.

Because Congress has already made the policy determination that the OCC, not state authorities, should regulate national banks, the arguments of Petitioner and his *amici* that states have a strong interest in enforcing their laws does not support granting the petition. "The relative importance to the State of its own law is not material when there is a conflict with a valid federal law, for the Framers of our Constitution provided that the federal law must

prevail." *de la Cuesta*, 458 U.S. at 153 (quoting *Free v. Bland*, 369 U.S. 663, 666 (1962)).

The OCC has specialized expertise and resources that it brings to bear in enforcing fair lending laws, whether the laws are adopted by Congress or the states. Any consideration of whether a national bank has unlawfully discriminated in its mortgage lending requires a comparison between the bank's actual lending decision and the decision that arguably should have been made based on all the factors that must be considered under the standards established and enforced by the OCC.

Petitioner is mistaken in asserting that the OCC does not examine compliance with state law. (*See* Pet. 30-32.) As the report of the U.S. Government Accountability Office ("GAO") cited by Petitioner makes clear, when the OCC identifies state law requirements applicable to national banks, examiners are advised so that they can take the requirements into account in their examinations. GAO, GAO-06-387, *OCC Preemption Rules: OCC Should Further Clarify the Applicability of State Consumer Protection Laws to National Banks* 23 (2006), *available at* http://www.gao.gov/new.items/d06387.pdf. Notably, the conclusion of the GAO report is that the OCC ought further to clarify its position with respect to state consumer protection laws, not that the OCC should withdraw its regulations. *Id.* at 41-45. The OCC has a staff of over 2000 bank examiners who have conducted thousands of fair lending examinations.[20]

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[20] Between 1993 and 1997, for example, the OCC conducted more than 3000 fair lending examinations. Eugene A. Ludwig, (footnote continued)

Additionally, the OCC's Customer Assistance Group handles 70,000 calls a year and "returned nearly $30 million to national bank customers over the last five years."[21]

The OCC usually does not need to bring formal enforcement actions because "recommendations by the [federal bank regulators] concerning banking practices tend to be followed by bankers without the necessity of formal compliance proceedings." *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 330 (1963). However, the OCC has initiated numerous public enforcement actions against national banks, and imposed significant monetary sanctions, in connection with violations of laws prohibiting discrimination in lending and unfair and deceptive marketing practices.[22]

(continued)
Comptroller of the Currency, Remarks Before the National Urban League, 1997 WL 847864, at *2 (Aug. 5, 1997).

[21] OCC, *Report of the Ombudsman 2005-2006* 10 (2007), *available at* http://www.occ.treas.gov/Ombudsman/2006OmbudsmanReport.pdf. The OCC recently has entered into Memoranda of Understanding with various state banking departments, including the New York Banking Department, to "provide a mechanism for sharing consumer complaints information." OCC, NR 2006-128, *OCC and New York Banking Department Agree to Share Consumer Complaints* (2006).

[22] *See In re Homeowners Loan Corp.*, OCC Enf. Act. 2005-142 (Nov. 1, 2005); *In re First Nat'l Bank of Marin*, OCC Enf. Act. 2004-45 (May 24, 2004); *In re Clear Lake Nat'l Bank*, OCC Enf. Act. 2003-135 (Nov. 4, 2003); *In re First Cent. Bank, N.A.*, OCC Enf. Act. 99-13 (Feb. 12, 1999); *In re First Nat'l Bank of Vicksburg*, OCC Enf. Act. 94-220 (Jan. 21, 1994); *see also In re Providian Nat'l Bank*, 2000 OCC Enf. Dec. LEXIS 55 (June 28, 2000).

Far from suggesting any need to expand the visitorial authority of state attorneys general, the "recent events" alluded to by Petitioner (Pet. 32) indicate that the state attorneys general should concentrate their resources on the many thousands of state chartered and licensed mortgage brokers, mortgage banks, and commercial banks over which they indisputably have authority. The Chairman of the House Financial Services Committee has concluded that:

> *The more traditional commercial banks, which have been well regulated for years, contributed relatively little to the current crisis.* It is the unregulated sectors of the economy, including non-bank mortgage originators and unregulated dealers in exotic financial instruments like credit default swaps that were largely responsible for the problems.[23]

State attorneys general are, of course, responsible for enforcement of myriad state laws, including specifically enforcement of state laws against a vast number of state-licensed lenders and

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[23] Barney Frank, Chairman, House Comm. on Fin. Servs., Letter to Constituents (Oct. 11, 2008), *available at* http://www.house.gov/frank/economiccrisis101108.html (emphasis added); *see also* President's Working Group on Financial Markets, *Policy Statement on Financial Market Developments* 11 (Mar. 2008) ("limited government oversight of mortgage companies not affiliated with regulated depositories, which made about half of higher-priced mortgages in 2006, contributed to a rise in unsound underwriting practices in the subprime sector, including, in some cases, fraudulent and abusive practices.").

brokers. Any effort to extend their enforcement powers to hundreds of national banks would only dilute the enforcement capabilities of state attorneys general where they are most needed.

CONCLUSION

The petition for a writ of certiorari should be denied.

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