No. 08-

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

12 U.S.C. § 484(a), a provision of the National Bank Act, prohibits the exercise of "visitorial powers" as to national banks, except where those powers are authorized by federal law, vested in the courts of justice, or exercised by Congress or a House or committee thereof. The Office of the Comptroller of the Currency has issued a regulation (12 C.F.R. § 7.4000) interpreting § 484(a) to preempt state enforcement of state laws against national banks, even when the state laws are not substantively preempted. The questions presented are:

1. Whether 12 C.F.R. § 7.4000 is entitled to judicial deference under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

2. Whether 12 C.F.R. § 7.4000 is invalid because it is inconsistent with the authoritative construction of the National Bank Act by this Court in *First National Bank in St. Louis v. Missouri*, 263 U.S. 640 (1924).

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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-142a) are reported at 396 F. Supp. 2d 383 and 394 F. Supp. 2d 620.

JURISDICTION

The court of appeals' judgment was entered on December 4, 2007. A timely petition for rehearing en banc was denied on June 5, 2008. Pet. App. 143a-144a. On August 26, 2008, Justice Ruth Bader Ginsburg granted petitioner an extension of time until October 3, 2008, to file a petition for certiorari. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

The following constitutional, statutory, and regulatory provisions are reproduced in the appendix to this petition: U.S. Const., art. VI, cl. 2; 12 U.S.C. § 484; and 12 C.F.R. § 7.4000.

STATEMENT

This case presents the question of whether deference is owed under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), to a regulation of the Office of the Comptroller of the Currency ("OCC") interpreting a federal statute to deprive the States of authority to enforce their own nonpreempted state laws against national banks.

A provision of the National Bank Act ("NBA"), 12 U.S.C. § 484, enacted in 1864, generally operates to restrict the exercise of "visitorial powers" over national banks to the banks' primary regulator, the OCC. In 2004, the OCC, by regulation, for the first time interpreted that statute to deprive States of their authority to enforce state laws against national banks. The regulation, 12 C.F.R. § 7.4000, did so by expansively interpreting the statutory term "visitorial powers" well beyond its historical meaning to cover virtually all state enforcement, even of generally applicable state laws that are not substantively preempted. The regulation thus prohibits States from bringing even the same kinds of judicial actions against national banks that can be brought by a private party.

Until OCC promulgated its amended "visitorial powers" regulation in 2004, there was no doubt that States could judicially enforce their nonpreempted laws against national banks. This Court so held in *First National Bank in St. Louis v. Missouri*, 263 U.S. 640 (1924) ("*St. Louis*"), as have numerous other federal and state courts. After the issuance of the regulation, OCC took affirmative steps to prevent States from enforcing their nonpreempted laws against national banks, including instructing national banks not to speak to state attorney general offices and initiating the present lawsuit to terminate the New York Attorney General's investigation into evidence that some national banks are engaged in discriminatory mortgage lending within the State.

Pursuant to the 2004 regulation, a federal district court enjoined the New York Attorney General from taking any actions to enforce state fair-lending laws against national banks. The Second Circuit affirmed, giving deference to the regulation under *Chevron*. That holding warrants this Court's review, both because it conflicts with the Court's decision in *St. Louis*, and because it allows the OCC by regulatory fiat to alter drastically the historic balance of federal and state authority as to national banks.

A. The National Bank Act

Congress first authorized the chartering of national banks in 1863, when it enacted the "National Currency Act," which was amended and reenacted in 1864, and subsequently renamed the "National Bank Act" ("NBA"). The Act's primary purpose was to address pressing wartime federal revenue needs by replacing notes issued by individual state-chartered banks with a new national currency that would be tied to the purchase of federal bonds. Cong. Globe, 37th Cong., 3d Sess. 843 (1863). To maximize both the purchase of United States bonds and the reach of United States bank notes, Congress empowered the Treasury Department to charter private banks to issue the new currency, and thus the national banking system was born. *See* Act of Feb. 25, 1863, National Currency Act, ch. 58, §§ 4-6, 18, 21, 12 Stat. 665, 666-67, 669-70.

To promote public trust in the new currency, the NBA created in the Treasury Department the new office of the Comptroller of the Currency, with supervisory authority over national banks to ensure the safety and

soundness of their financial condition. Act of June 3, 1864, ch. 106, §§ 1, 17, 54, 13 Stat. 99, 104, 116. The Comptroller's responsibilities required him to examine, with respect to each prospective national bank:

> the amount of money paid in on account of its capital, the name and place of residence of each of the directors . . . and the amount of the capital stock of which each is the bona fide owner, and generally whether such association has complied with all the requirements of this act to entitle it to engage in the business of banking.

Id. § 17, 13 Stat. at 104.

To promote bank soundness, Congress authorized the Comptroller to scrutinize bank affairs on an ongoing basis by means of appointed examiners. *Id.* § 54, 13 Stat. at 116. The term "visitorial powers" appeared in that same section, to clarify that only the Comptroller, and not the States, would have the right to conduct examinations of the newly created national banks in order to monitor their financial condition. The section provided 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." *Id.* § 54, 13 Stat. at 116.

Historically, visitorial powers have been understood as "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 [the corporation's] laws and regulations." *Guthrie v.*

Harkness, 199 U.S. 148, 158 (1905) (quotation marks omitted), *quoted in Watters v. Wachovia Bank, N.A.*, 550 U.S. 1, 127 S. Ct. 1559, 1568 (2007). Visitorial powers subject a corporation to supervision by the jurisdiction that granted its corporate charter; they are the powers used to supervise the corporation's use of, and compliance with, its corporate charter.

Today the OCC's examination authority is set forth in 12 U.S.C. § 481, in a subchapter of Title 12 entitled "Bank Examinations." The limitation on States' exercise of visitorial powers is found in 12 U.S.C. § 484(a), as part of the same subchapter. Section 484(a) provides:

> [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.

B. State Authority as to National Banks

From the first establishment of a national banking system, composed of corporations organized under federal law but doing business in particular States, the general rule has been that both federal and state laws apply to national banks. Just five years after the enactment of the NBA, the Supreme Court observed that national banks "are subject to the laws of the State, and are governed in their daily course of business far more by the laws of the State than of the nation." *Nat'l Bank v. Kentucky*, 76 U.S. (9 Wall.) 353, 362 (1869);

accord St. Louis, 263 U.S. at 656. Federal law preempts the application of state law to national banks only where state law conflicts with federal law or substantially interferes with national banks' exercise of their powers. *See Barnett Bank of Marion County, N.A. v. Nelson*, 517 U.S. 25, 33 (1996). This Court has consistently recognized the right of state officials to sue national banks to enforce generally applicable state laws that are not substantively preempted. *See St. Louis*, 263 U.S. at 659-60; *First Nat'l Bank of Bay City v. Fellows*, 244 U.S. 416, 427-28 (1917); *Waite v. Dowley*, 94 U.S. 527, 534 (1876); *see also* Pet. App. 50a-51a (Cardamone, J., concurring in part and dissenting in part) (collecting additional cases).

Congress reaffirmed the important role of state law as to national banks in the Riegle-Neal Interstate Banking and Branching Efficiency Act of 1994 ("Riegle-Neal"), Pub. L. No. 103-328, 108 Stat. 2338, and the Riegle-Neal Amendments Act of 1997, Pub. L. No. 105-24, 111 Stat. 238. Riegle-Neal was intended to eliminate barriers to interstate branching, and simplify the complex rules for determining which state laws apply to branches of national banks. Congress eliminated many state laws that interfered with interstate branching, but expressly maintained the application of key host-state laws, specifically those pertaining to consumer protection, fair lending, community reinvestment, and establishment of intrastate branches. In Riegle-Neal, Congress made clear that a state law in any of those four categories applies to branches of national banks located in a State to the same extent that it does to branches of banks chartered by that State, unless the state law is preempted by federal law or would have a

discriminatory effect on the national bank. *See* 12 U.S.C. § 36(f)(1)(A). In light of OCC's previously expressed doubts about whether it could enforce state law,[1] Riegle-Neal specifically obligated OCC to enforce national bank branches' compliance with those four categories of state laws. *See id.* § 36(f)(1)(A)-(B).

Congress did not provide, however, that OCC was to have exclusive authority to enforce state laws, and the legislative history points in exactly the opposite direction. The Conference Report accompanying enactment of Riegle-Neal stressed that "States have a strong interest in the activities and operations of depository institutions doing business within their jurisdictions, regardless of the type of charter the institution holds," identifying in particular States' "legitimate interest in protecting the rights of their consumers, businesses, and communities." It further explained that Congress did not intend Riegle-Neal to alter the federal-state balance "and thereby weaken States' authority to protect the interests of their consumers, businesses, or communities." H.R. Rep. No. 103-651, at 53 (1994) (Conf. Rep.), *reprinted in* 1994 U.S.C.C.A.N. 2068, 2074.

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1. At one time, OCC questioned whether it could enforce state laws at all. *See* Nat'l Comm'n on Consumer Fin., *Consumer Credit in the United States* 54 (1972). As of 1977, OCC apparently acknowledged its authority to enforce state laws, but its commitment to exercising that authority remained unclear. *See* Ralph J. Rohner, *Problems of Federalism in the Regulation of Consumer Financial Services Offered by Commercial Banks: Part I*, 29 Cath. Univ. L. Rev. 1, 18 (1979).

The Conference Report acknowledged OCC's role in issuing "opinion letters and interpretive rules on preemption issues," but criticized OCC's "inappropriately aggressive" conclusions regarding federal law preemption of state consumer protection and fair-lending laws. *Id.*[2] It confirmed that Riegle-Neal did not change the judicially established principle that "national banks are subject to State law in many significant respects," or disturb the settled "rule of construction that avoids finding a conflict between the Federal and State law where possible." *Id.*

C. OCC's Visitorial Powers Rule

Beginning in 1999, the Comptroller attempted to alter this landscape dramatically. That year, OCC issued a regulation expanding the definition of visitorial powers far beyond the historical understanding of the term to include, among other things, "[e]nforcing compliance with any applicable . . . state laws concerning" activities authorized or permitted by federal banking law. 12 C.F.R. § 7.4000(a)(2)(iv) (1999). This regulation purported, for the first time, to prevent a State from exercising its police power to enforce its own valid and nonpreempted laws as they apply to the activities of national banks.

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2. In light of Congress's concern over OCC's overly aggressive preemption opinions, Riegle-Neal requires OCC to provide an opportunity for notice and comment before issuing opinion letters or interpretive rules concluding that federal law preempts the application to a national bank of state laws in any of the four listed categories. *See* 12 U.S.C. § 43(a).

OCC initially took the position that while the 1999 regulation barred state administrative actions against national banks, the rule continued to permit state officials to bring lawsuits to enforce nonpreempted state laws under the exception in § 484(a) for visitorial powers "vested in the courts of justice." *See* Brief of Plaintiff-Counter-Defendant-Appellee Office of the Comptroller of Currency at 39 n.20, *OCC v. Spitzer*, No. 05-6001 (2d Cir. May 30, 2006). In 2004, however, OCC reversed this view, issuing an amended regulation to clarify the "extent of national bank activities subject to the OCC's exclusive vistorial authority" and "the OCC's interpretation of the 'vested in the courts of justice' exception." *See* Rules, Policies, & Procedures for Corporate Activities, 68 Fed. Reg. 6363, 6367 (Feb. 7, 2003) (notice of proposed rulemaking); *see also* Bank Activities & Operations, 69 Fed. Reg. 1895 (Jan. 13, 2004) (final rule, codified at 12 C.F.R. § 7.4000).

As amended in 2004, 12 C.F.R. § 7.4000(a)(1) defines OCC's purportedly exclusive visitorial powers to include "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." The rule gives examples of what it considers the limited circumstances authorized by federal law. *Id.* § 7.4000(b)(1). It also opines that § 484's "courts of justice" exception "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." *Id*. § 7.4000(b)(2).

The visitorial powers rule therefore purports to prohibit, *inter alia*, a state attorney general from suing a national bank to obtain injunctive and monetary relief for violations of the State's nonpreempted consumer protection and antidiscrimination laws.

The 2004 rule, and the manner in which OCC adopted it, "generated considerable controversy and debate." *See* U.S. GAO, *OCC Preemption Rulemaking: Opportunities Existed to Enhance the Consultative Efforts and Better Document the Rulemaking Process* 5 (2005), *available at* http://www.gao.gov/new.items/d068.pdf (last visited Oct. 2, 2008). Forty-five state attorneys general objected to OCC's "efforts to divest the States of their historic role in protecting their residents from consumer fraud by all merchants, regardless of type." Comments and Recommendation of the Att'ys Gen. of Forty-Five States, Puerto Rico, the U.S. Virgin Islands, & the Corp. Counsel of D.C. 2 (April 8, 2003).

D. The New York Attorney General's 2005 Investigation and the Suit To Enjoin It

In April 2005, the Office of the New York Attorney General began investigating a number of state and national banks for racial and ethnic discrimination in their residential real-estate lending based on data showing a significantly higher percentage of high-interest home mortgage loans issued by those banks to African-American and Hispanic borrowers than to white borrowers. Racial and ethnic discrimination in the extension of credit violates the New York Human Rights Law (N.Y. Executive Law § 296-a), as well as other state and federal laws.

On the basis of these disparities, the Attorney General sent "letters of inquiry" to the lenders, including several national banks and their operating subsidiaries, requesting that the lenders voluntarily produce more information. Shortly after this, OCC and the Clearing House Association (a consortium of national banks) filed separate actions in the United States District Court for the Southern District of New York, invoking that court's jurisdiction under 28 U.S.C. §§ 1331 (general federal question jurisdiction) and 1345 (suits where federal agency is plaintiff). Relying on 12 C.F.R. § 7.4000, the federal suits sought to enjoin the Attorney General's investigative and enforcement efforts with respect to the national banks. OCC and the Clearing House took the position that "any efforts" by the Attorney General to investigate or enforce provisions of state or federal fair-lending law against national banks or their operating subsidiaries were an unlawful exercise of visitorial powers. *See* Pet. App. 4a. The Attorney General counterclaimed, seeking to have the regulation set aside under the Administrative Procedure Act as arbitrary, capricious, and contrary to law. *See* Pet. App. 5a.

Following a joint bench trial, the District Court for the Southern District of New York (Stein, J.) held that the Attorney General's enforcement activities were prohibited by 12 C.F.R. § 7.4000. *See* Pet. App. 63a-117a, Pet. App. 118a-142a. The district court held that the term "visitorial powers" in § 484 is ambiguous, and concluded that OCC's regulation defining the term broadly to bar nearly all state enforcement of nonpreempted state laws was entitled to deference under *Chevron*. Pet. App. 81a-84a, 96a-106a.

The district court declared that the Attorney General could not enforce state fair-lending laws against national banks or their operating subsidiaries, and permanently 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 instituting any enforcement actions to compel compliance with the Attorney General's already existing informational demands; and from instituting actions in the courts of justice against national banks to enforce state fair lending laws.

Pet. App. 116a-117a.[3]

E. The Court of Appeals' Decision

A divided panel of the Second Circuit affirmed the grant of injunctive relief. *See* Pet. App. 42a. The majority concluded that the OCC's interpretation of § 484(a), as embodied in 12 C.F.R. § 7.4000, was a valid exercise of the OCC's statutory powers and was entitled to *Chevron* deference.

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3. Because the Attorney General was broadly enjoined from taking any action to enforce the state fair-lending laws, no particular state enforcement action is at issue in this petition.

In the action filed by the Clearing House, the district court also enjoined the Attorney General from investigating or suing the banks under the federal Fair Housing Act. Pet. App. 141a. That ruling, however, is not at issue in this petition because the court of appeals unanimously vacated that portion of the injunction for lack of ripeness. Pet. App. 32a-41a, 43a (Cardamone, J., concurring in part and dissenting in part).

The court of appeals first rejected application of the presumption against preemption, concluding that no clear statement of congressional intent was required to justify OCC's interpretation because of the long history of federal regulation of national banks, which already substantially qualifies the exercise of state power. Pet. App. 11a-12a.

Proceeding to step one of the *Chevron* analysis, the court concluded that "the precise scope of 'visitorial' powers is not entirely clear from the text of § 484(a), or the common law background of the term," and therefore the court could not conclude that "the statute clearly precludes the interpretation the OCC has adopted." Pet. App. 21a. The court found no such preclusion in the statutory exception for visitorial powers "vested in the courts of justice" because it found that exception likewise ambiguous. *Id.* at 22a-23a.

The court of appeals dismissed in a footnote this Court's decision in *St. Louis*, which upheld the Missouri Attorney General's enforcement of a state anti-branching statute against a national bank over arguments by the bank, and the United States as amicus curiae, that the visitorial-powers statute precluded such enforcement. Pet. App. 21a n.8. The court observed that the decision in *St. Louis* did not expressly discuss the visitorial-powers statute and noted that, at the time of the decision, national banks were not authorized under federal law to establish branches. *Id.*

After concluding that the regulation was authorized under Congress's delegation of broad rulemaking

authority to OCC, the court further held that OCC's interpretation of the statute was not unreasonable under step two of the *Chevron* analysis. It did so despite noting that "[t]he OCC's analysis [was] at or near the outer limits of what *Chevron* contemplates," since the agency had "accrete[d] a great deal of regulatory authority to itself at the expense of the state through rulemaking lacking any real intellectual rigor or depth." Pet. App. 25a-26a. The court nonetheless 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.

Judge Cardamone dissented from the affirmance of the injunction. Pet. App. 42a-62a. In his view, *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159, 172 (2001), and *Gregory v. Ashcroft*, 501 U.S. 452, 460-61 (1991), required a clear statement of congressional intent to sustain the OCC's regulation because the regulation "ha[d] altered the compact between the state and national governments." Pet. App. 42a. He noted that "[b]y leaving state substantive law in place, while at the same time denying the state any role in enforcing that law, § 7.4000 erodes a key aspect of state sovereignty, confuses the paths of political accountability, and allows a federal regulatory agency to have a substantial role in shaping state public policy." Pet. App. 54a. He considered the "likely result" of this "a plain transgression of our republican form of government and a violation of the Tenth Amendment." *Id.*

Judge Cardamone noted not only the absence of a clear statement of congressional intent to reach this far, but also the "clear" fact that "virtually from the inception of the National Bank Act the term [visitorial powers] was *not* understood to preclude state enforcement of nonpreempted state laws." Pet. App. 50a. He noted that Congress has emphasized both the general importance of the dual banking system, and more specifically, the States' strong interest in protecting the rights of their consumers, businesses, and communities. Pet. App. 52a (quoting H.R. Rep. No. 103-651, at 53 (1994), *reprinted in* 1994 U.S.C.C.A.N. 2068, 2074).

REASONS FOR GRANTING THE PETITION

I. The Decision Below Squarely Conflicts With *First National Bank in St. Louis v. Missouri*, 263 U.S. 640 (1924), Which Held That The National Bank Act Does Not Prevent States From Enforcing Their Own Nonpreempted Laws

This Court has long recognized that the National Bank Act does not bar a state attorney general from exercising the core sovereign function of enforcing a nonpreempted state law against a national bank. In *St. Louis*, this Court upheld the authority of the Missouri Attorney General to enforce against a national bank a Missouri statute outlawing branch banking. 263 U.S. at 660. In doing so, the Court necessarily rejected the arguments of the national bank and the United States as amicus curiae that the state suit was barred as a prohibited attempt to exercise "visitatorial powers"

reserved solely to the Comptroller. *Id.* at 643, 645.[4] The Court explained that while "the United States alone" was empowered to bring an action to restrain a national bank from "acting in excess of its charter powers," the State was permitted "to vindicate and enforce its own law." *Id.* at 660.

Moreover, this principle has been applied on numerous other occasions before and after *St. Louis*. In *First National Bank of Bay City*, 244 U.S. at 427-28, the Court had earlier held that the Michigan Attorney General could sue a national bank in state court for violations of a state law prohibiting national banks from engaging in trust services. Likewise in *Waite*, 94 U.S. at 534, the Court affirmed a judgment obtained by a town treasurer against a national bank for failing to comply with state law. More recently, in *First National Bank in Plant City v. Dickinson*, 396 U.S. 122, 131-33 (1969), this Court held that a national bank was not entitled to declaratory and injunctive relief against a state comptroller's letter ordering the bank to cease and desist certain activities prohibited by state law.[5] Thus, the decision of the court of appeals here flies in the face of settled contrary precedent.

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4. The reference is to the portion of the official syllabus setting forth the arguments of the parties.

5. Many other federal and state courts have similarly entertained suits brought by state officials against national banks alleging violations of nonpreempted state laws. *See* Pet. App. 50a-51a (Cardamone, J., concurring in part and dissenting in part) (collecting cases).

St. Louis not only concerned precisely the issue presented by this case, but also expressly confronted the incongruity of separating the power of a sovereign State to enact a law and the power of that State to enforce it. In rejecting the claim that the NBA barred a State from enforcing its laws against a national bank, the Court asked only "whether the state law [was] free to act" or whether the state law was preempted. 263 U.S. at 660. Once the Court determined that the state law at issue was not preempted by federal law, the Court found the State could necessarily enforce its own law, reasoning that "since the sanction behind [the state law] is that of the State and not that of the National Government, the power of enforcement must rest with the former and not with the latter." *Id.* The Court explained that "[t]o demonstrate the binding quality of a statute but deny the power of enforcement involves a fallacy made apparent by the mere statement of the proposition, for such power is essentially inherent in the very conception of law." *Id.*[6]

The Second Circuit's opinion, which permits OCC to decouple the State's power to legislate from its power to enforce state law, flatly rejects the principle of *St. Louis*. Indeed, the court of appeals essentially acknowledged as much, dismissing *St. Louis* in a footnote on two grounds, neither one persuasive. First, the court asserted that the *St. Louis* opinion "did not directly address the NBA's restriction of state visitorial

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6. For discussions of why federal banking regulators cannot reasonably be entrusted as the sole enforcers of state laws, see *Nuesse v. Camp*, 385 F.2d 694, 703 (D.C. Cir. 1967), and *Jackson v. First National Bank of Valdosta*, 349 F.2d 71, 75 & n.1 (5th Cir. 1965).

powers." Pet. App. 21a n.8. In fact, however, because the United States and the bank directly argued to the *St. Louis* Court that state law enforcement was barred by the grant of exclusive visitorial powers to the Comptroller, this Court necessarily rejected that view by upholding the authority of the Missouri Attorney General to enforce the nonpreempted state law.

Second, the court of appeals further attempted to distinguish *St. Louis* on the ground that the state law at issue in that case merely prohibited the bank from engaging in activities it was not authorized to conduct under federal law, whereas New York is here trying to prohibit the banks from engaging in activities that national banks are authorized to undertake. *Id.* In fact, however, the two prohibitions are parallel. In *St. Louis*, Missouri was seeking to enforce a state law that prohibited branch banking, and federal law did not then authorize national banks to operate through branches. 263 U.S. at 655-56, 657-58. Similarly, here, New York is seeking to enforce a state law that, as relevant to this case, prohibits race and ethnic discrimination in lending, and federal law does not authorize or permit national banks to engage in such discrimination. *See* 15 U.S.C. § 1691 *et seq.* (Equal Credit Opportunity Act); 42 U.S.C. § 3601 *et seq.* (Fair Housing Act). The issue presented by this petition arises precisely because the State has been enjoined from enforcing laws which are not substantively preempted, and thus by definition do not substantially interfere with a national bank's exercise of its lawful powers. *See Barnett Bank*, 517 U.S. at 33.

II. The Decision Below Presents The Important And Unresolved Question When, If At All, *Chevron* Deference Is Due To A Regulation Declaring The Preemptive Scope Of A Federal Statute

The linchpin of the Second Circuit's decision was its deference to an OCC regulation interpreting the scope of the NBA's express preemption clause. The statute reserves to the OCC the exclusive right to exercise "visitorial powers" with respect to national banks, with specified exceptions. By deferring to the OCC's broad 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.[7]

The circuits are divided as to whether *Chevron* deference is due to an agency opinion as to the preemptive scope of a federal statute. The Second Circuit in this case, like the Sixth Circuit in *Watters*, extended *Chevron* deference to an OCC regulation declaring the NBA's preemptive scope. Pet. App. 23a-31a; *Wachovia Bank, N.A. v. Watters*, 431 F.3d 556, 560 (6th Cir. 2005), *aff'd on other grounds*, 550 U.S. 1, 127 S. Ct. 1559; *see also Wachovia Bank, N.A. v. Burke*, 414 F.3d 305, 314-21 (2d Cir. 2005) (affording *Chevron* deference to 12 C.F.R. § 7.4006), *cert. denied*, 127 S. Ct. 2093 (2007). The Tenth

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7. Where *Chevron* deference applies, a reasonable administrative construction of an ambiguous statute can trump a prior judicial construction. *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967 (2005). *But see id.* at 1003 (Stevens, J., concurring) (questioning whether an administrative construction can trump a prior construction by this Court).

Circuit, by contrast, has held that *Chevron* deference does not apply to administrative preemption determinations. *See Colo. Pub. Utils. Comm'n v. Harmon*, 951 F.2d 1571, 1579 (10th Cir. 1991) (deferring to a federal agency's determination that federal regulations overlapped with state regulations, but independently reviewing the legal issue of whether the state regulations were preempted).

Moreover, this Court has repeatedly recognized the importance and unresolved status of the question of whether and when *Chevron* deference is due to an administrative determination of the scope of a statutory preemption clause. In *Watters*, 550 U.S. 1, 127 S. Ct. 1559, the petition presented the question whether an OCC regulation purporting to clarify a different aspect of the NBA's preemptive scope was properly afforded *Chevron* deference. This Court ultimately found it unnecessary to resolve that question, *id.* at 1572, although three dissenting justices would have held that an agency determination regarding the preemptive effect of a federal statute is not entitled to *Chevron* deference, and that the OCC in particular had not been delegated the authority to preempt the laws of a sovereign State. *Id.* at 1582-83, 1584 (dissenting opinion of Stevens, J., joined by Roberts, C.J., and Scalia, J.).

This Court has repeatedly alluded to this issue in prior opinions without resolving it. In *Smiley v. Citibank (South Dakota), N.A.*, 517 U.S. 735, 744 (1996), the Court assumed without deciding that the question of a statute's preemptive effect "must always be decided

de novo by the courts." In *Medtronic Inc. v. Lohr*, 518 U.S. 470, 495-96 (1996), this Court afforded "substantial weight," but not *Chevron* deference, to a Food & Drug Administration ("FDA") regulation construing an express preemption clause in the Medical Device Amendments ("MDA") to the Food, Drug, and Cosmetics Act. Justice O'Connor, concurring in part and dissenting in part, pointedly noted that the majority had "[a]pparently recognize[d] that *Chevron* deference is unwarranted," and noted that "[i]t is not certain that an agency regulation determining the pre-emptive effect of *any* federal statute is entitled to deference." *Id.* at 512.

In *Riegel v. Medtronic, Inc.*, 552 U.S. __, 128 S. Ct. 999 (2008), involving the same express preemption clause at issue in *Lohr*, the Court again deflected the question of deference to the FDA's views as to the preemptive effect of the MDA on the ground that the statute spoke clearly to the point at issue. However, the Court surmised that, had the statute been ambiguous, it would have applied at most the reduced degree of deference described in *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944), presumably because the agency's current views were expressed not in a regulation, but in its amicus brief. *Riegel*, 128 S. Ct. at 1009.

Indeed, the importance of the issue is demonstrated by the fact that another case involving related but significantly different issues of deference to agency views about preemption is already on the Court's docket: *Wyeth v. Levine*, No. 06-1249 (cert. granted, Jan. 18, 2008; argument scheduled, Nov. 3, 2008). The instant case concerns possible *Chevron* deference to a regulation interpreting an express preemption clause. *Wyeth*, in

contrast, concerns the possible application of other, lesser forms of deference to agency views about implied conflict preemption that are not embodied in any regulation. Brief for Petitioner at 50 & n.22, *Wyeth*, No. 06-1249 (U.S. May 27, 2008). Because the issues are different, the presence of *Wyeth* on the docket counsels for, and not against, granting the petition here.

The extent, if any, of agency power to make binding preemption determinations is of great and growing importance nationwide, as "federal administrative agencies increasingly seem to claim for themselves the authority to distribute power between the federal government and the states" through their own preemption determinations. Nina A. Mendelson, *Symposium: Ordering State-Federal Relations Through Federal Preemption Doctrine: A Presumption Against Agency Preemption*, 102 Nw. U. L. Rev. 695, 697 (2008).

Moreover, the issue is particularly important because *Chevron* deference to a regulation declaring the preemptive scope of a federal statute raises serious issues of institutional competence and threatens the traditional role of the courts in maintaining the proper federal-state balance. *See*, *e.g.*, Nina A. Mendelson, *Chevron and Preemption*, 102 Mich. L. Rev. 737 (2004); Nicholas Bagley, Note, *The Unwarranted Regulatory Preemption of Predatory Lending Laws*, 79 N.Y.U. L. Rev. 2274, 2293-97 (2004).

Considerations of institutional competence point to courts, rather than agencies, as the appropriate decision-makers when the scope of statutory preemption is at issue, because preemption issues in general, and

this one in particular, raise sensitive questions of federalism, which agencies are not institutionally equipped to resolve. Depriving States of their power to enforce their own valid laws removes a core attribute of their sovereignty, since "'the power to create and enforce a legal code, both civil and criminal' is one of the quintessential functions of a State." *Diamond v. Charles*, 476 U.S. 54, 65 (1986)(quoting *Alfred L. Snapp & Son v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 601 (1982)). Indeed, as the dissenting opinion below observed, "[i]t is difficult to imagine a more core aspect of state sovereignty than the authority to pass and enforce valid nonpreempted state laws." Pet. App. 55a.

Accordingly, courts, rather than agencies, are best equipped to police the proper boundaries of state and federal authority and maintain the appropriate balance between them. As the *Watters* dissenters observed, "when an agency purports to decide the scope of federal preemption, a healthy respect for state sovereignty calls for something less than *Chevron* deference." 127 S. Ct. at 1584 (Stevens, J. dissenting, joined by Roberts, C.J., and Scalia, J.).

Furthermore, the framework for addressing these federalism concerns is defined by the complex legal doctrines governing preemption analysis, which the courts, not administrative agencies, have developed and are most expert in applying. *See Colo. Pub. Utils. Comm'n*, 951 F.2d at 1579. Indeed, in promulgating the regulation at issue here, OCC did not invoke the kind of agency expertise that might support deference of any variety, but rather advanced legal arguments based primarily on judicial decisions, law review articles, and

legislative history, as to which OCC possesses no special competence. As the Second Circuit acknowledged and found "troublesome":

> The administrative record here consists almost entirely of the agency's interpretation of case law, legislative history, and statutory text. These are not subjects on which the OCC holds any special expertise, nor has the OCC identified any particularly technical aspect of the regulatory subject matter that the agency is "uniquely qualified to comprehend."

Pet. App. 25a (quoting *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 883 (2000) (quotation marks and internal citations omitted)). The court of appeals also noted that OCC "did not appear to find any facts at all in promulgating its visitorial powers regulation." Pet. App. 25a. This further underscores that *Chevron* deference is not warranted.

Even if there were a case for extending *Chevron* deference to agency decisions of this sort, an appropriate congressional delegation of rulemaking authority would be required, as it is in all cases of *Chevron* deference. *See Gonzalez v. Oregon*, 526 U.S. 243, 257-58 (2006) (refusing to extend *Chevron* deference to an agency interpretation because it fell outside the scope if its rulemaking authority). It is an open question whether a general delegation of rulemaking authority to an agency to execute its own business is sufficient to authorize the agency to grant immunity from state regulation, or whether a more specific delegation addressing preemption of state law is required.

See, *e.g.*, *Watters*, 127 S. Ct. at 1582-83 & n.23 (Stevens, J., dissenting, joined by Roberts, C.J., and Scalia, J.) (rejecting OCC's assertion that its general rulemaking authority under 12 U.S.C. §§ 93a and 371 also provides it with preemptive authority).

III. The Decision Below Warrants This Court's Review Because It Profoundly Shifts The Federal-State Balance And Deprives States Of Their Core Sovereign Power To Enforce Their Nonpreempted Laws Against National Banks

The statutory interpretation announced in the OCC regulation and endorsed by the Second Circuit works a major alteration of the balance of power between the federal and state governments. The resulting regime deprives States of the power to enforce against national banks state antidiscrimination laws and other laws of general applicability that have not been preempted as applied to those banks.

As Justice Kennedy has memorably observed, "The Framers split the atom of sovereignty. It was the genius of their idea that our citizens would have two political capacities, one state and one federal, each protected from incursion by the other." *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring). In a nation of dual sovereigns, each sovereign has a unique interest in vindicating its own laws. Preventing a State from enforcing its own valid laws is in many ways a more serious incursion on state sovereignty than preempting the operation of a state law altogether, because it assigns to one sovereign the enforcement of another sovereign's laws, violating the cardinal principle, quoted above, that "each [must be] protected from incursion by the other."

Under that principle Congress cannot compel state law enforcement officers to administer a federal regulatory program without violating state sovereignty. *Printz v. United States*, 521 U.S. 898, 933 (1997). And a similar affront to federalism occurs when the Comptroller prohibits state law-enforcement officers from enforcing state laws that are valid and not preempted. As this Court has observed in a different context, "'the power of a State to pass laws means little if the State cannot enforce them.'" *Calderon v. Thompson*, 523 U.S. 538, 556 (1998) (quoting *McClesky v. Zant*, 499 U.S. 467, 491 (1991)). Indeed, this Court made a similar point in *St. Louis*, in rejecting the claim that the NBA prevented States from enforcing their own valid laws: "[t]o demonstrate the binding quality of a statute but deny the power of enforcement involves a fallacy made apparent by the mere statement of the proposition, for such power is essentially inherent in the very conception of law." 263 U.S. at 660.

Under settled principles of statutory construction, "if Congress intends [a statute] to alter the usual constitutional balance between the States and the Federal Government, it must make its intention to do so unmistakably clear in the language of the statute." *Gregory*, 501 U.S. at 460 (quotation marks omitted). Moreover, a presumption against preemption applies to laws, such as consumer protection and antidiscrimination statutes, that are enacted under the States' historic police powers. *See Lohr*, 518 U.S. at 485.[8] OCC's

8. Furthermore, in Riegle-Neal, Congress made clear its intention that state consumer protection and fair-lending laws (Cont'd)

regulation may not supply the clear statement required to satisfy the *Gregory* canon or the presumption against preemption; rather, that must come from Congress itself. This Court has reached a similar conclusion in the analogous context of the constitutional-avoidance doctrine, ruling that when a statute is ambiguous, and a court is therefore required to construe it to avoid constitutional questions, an agency's interpretation cannot remove the ambiguity and escape the requirement. *See Solid Waste Agency of N. Cook County*, 531 U.S. at 172; *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575-78 (1988). Accordingly, a clear statement from Congress, not OCC, is necessary if 12 U.S.C. § 484 is to be construed in a manner that disturbs the federal-state balance.

Here, as the court of appeals acknowledged (Pet. App. 21a), the visitorial-powers limitation in § 484 does not evidence any clear congressional intention to strip States entirely of their power to enforce nonpreempted state laws against national banks. The Second Circuit specifically noted uncertainty as to "whether or not [States' powers to enforce state antidiscrimination laws] unambiguously fall within the scope of § 484(a)." *Id.* And in fact, the historical meaning of the key statutory phrase "visitorial powers" is to the contrary.

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generally should apply to national banks. *See* Riegle-Neal, Pub. L. No. 103-328, § 102(b), 108 Stat. at 2349 (codified as amended at 12 U.S.C. § 36(f)(1)(A)); *see also* H.R. Rep. No. 103-651, *supra*, at 53, *reprinted in* 1994 U.S.C.C.A.N. at 2074 (endorsing the judicially established "rule of construction that avoids finding a conflict between the Federal and State law where possible").

Traditionally, "visitorial powers" subject a corporation to special supervision by the jurisdiction that granted its corporate charter; they are the powers used to supervise the corporation's use of, and compliance with, its corporate charter. As *St. Louis* itself demonstrates, *see supra* at 15-18, the concept does not grant a corporation immunity from all law enforcement by jurisdictions that did not grant the corporation its charter.[9]

In this case, the New York Attorney General is not attempting to exercise supervisory control over national banks, and has not asserted any authority to audit the books and records of national banks or to police their compliance with their federal charter. *See* Pet. App. 49a (Cardamone, J., concurring in part and dissenting in part). Nor has the Attorney General sought to examine their safety and soundness as financial institutions. These have always been the proper concerns of the entity with visitorial powers. *See Guthrie*, 199 U.S. at 158 ("visitorial powers" denotes a supervisory authority "to examine into [a corporation's] manner of conducting business, and enforce an observance of its [the corporation's] laws and regulations" — *i.e.*, its charter and by-laws (quotation marks omitted)); *St. Louis*, 263

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9. Several early corporations treatises reflect this distinction between the visitor's exclusive authority to enforce the corporate charter and the undiminished power of other institutions to enforce general provisions of law. *See*, *e.g.*, James Grant, *A Practical Treatise on the Law of Corporations in General, as Well Aggregate as Sole* 517 (1850); Stewart Kyd, *A Treatise on the Law of Corporations* 276 (1794); Joseph K. Angell & Samuel Ames, *Treatise of the Law of Private Corporations Aggregate* 659 (8th ed. 1866).

U.S. at 660 (noting that the Comptroller alone may enforce a national bank's compliance with "the charter or law of its creation").[10]

The concern of the New York Attorney General in this case, by contrast, is to investigate racial discrimination in the terms of mortgages issued in New York, in contemplation of a possible judicial action to enforce a state antidiscrimination law that applies equally to all actors within the State.[11] Such enforcement of generally applicable laws has never been encompassed by the term "visitorial powers."[12] Accordingly, § 484(a) certainly contains no clear statement of congressional intent to prohibit the Attorney General from enforcing nonpreempted New York antidiscrimination laws against national banks.

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10. The congressional debates about the NBA treat the phrase "right of visitation" as synonymous with the right to examine the bank in order to monitor its financial condition and organization. *See* Cong. Globe, 37th Cong., 3d Sess. 824 (1863).

11. This Court's decision in *Watters*, 127 S. Ct. 1559, held that the Comptroller's exclusive visitorial authority applies not only to national banks, but also to their operating subsidiaries. In that case, the Court ruled that the NBA preempted a state administrative enforcement regime based on registration and licensing requirements. *Watters*, in contrast to this case, did not involve judicial enforcement of generally applicable laws.

12. Moreover, if such judicial enforcement were thought to be an exercise of visitorial powers, which it is not, there would nevertheless be the further hurdle of overcoming the exception in § 484(a) for such powers "vested in the courts of justice."

IV. The OCC's Interpretation Of § 484 Effectively Immunizes National Banks From Enforcement Of State Consumer Protection And Fair-Lending Laws

The practical effect of accepting OCC's construction of § 484 is to eradicate all government enforcement of state laws as to national banks.[13] It is no answer that the Comptroller is able to enforce such laws, because OCC is not designed or equipped to enforce States' consumer protection laws against national banks, has no record of doing so, and has shown no intention of changing its traditional indifference.

To be sure, Congress has provided the Comptroller with certain limited remedial powers to redress violations of law, including state law, by national banks, *see* 12 U.S.C. § 1818, but those powers exist primarily to ensure the safety and soundness of those financial institutions, and only secondarily to redress harm to consumers. Moreover, given OCC's structure and resources, it cannot reasonably supplant the enforcement role traditionally played by state attorneys general. According to publicly available reports, OCC was responsible in 2005 for monitoring about 2,400 national banks, branches of foreign banks, and operating subsidiaries of national banks that do business directly with consumers.[14] OCC has informed the GAO

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13. While private enforcement remains theoretically available, it is unrealistic to suppose that private parties can fully vindicate the interests protected by these state laws.

14. Comptroller of the Currency, U.S. Dep't of the Treasury, *Annual Report: Fiscal Year 2005*, at 7, *available at* http://

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that it does not even have procedures for examining compliance with state law. *See* U.S. GAO, *OCC Preemption Rules: OCC Should Further Clarify the Applicability of State Consumer Protection Laws to National Banks* 22-23 (2006).

States, by contrast, have considerable expertise in enforcing their laws and have enforced state laws prohibiting abusive financial practices more than has OCC.[15] States are more familiar with local conditions and practices than is the federal government and can more quickly recognize and respond to new predatory practices as they arise. And as OCC increasingly permits national banks and their subsidiaries to expand into nonfinancial areas, States' greater expertise and experience in identifying abuses in those areas will become even more essential to protecting consumers' interest.

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www.occ.treas.gov/annrpt/2005AnnualReport.pdf; Comptroller of the Currency, U.S. Dep't of the Treasury, *Annual Report of National Bank Operating Subsidiaries That Do Business Directly With Consumers*, *available at* http://www.occ.treas.gov/customer. htm (follow Excel hyperlink) (last visited Oct. 2, 2008).

15. For examples of enforcement efforts against operating subsidiaries under state laws, see *Minnesota ex rel. Hatch v. Fleet Mortgage Corp.*, 158 F. Supp. 2d 962 (D. Minn. 2001) (state enforcement action under state consumer fraud and deceptive practices law); Compl., *State v. First Horizon Home Loan Corp.*, No. 272/2004 (N.Y. Sup. Ct. filed Jan. 16, 2004), *available at* http://www.oag.state.ny.us/press/2004/jan/Horizon5.pdf (last visited Oct. 2, 2008) (state enforcement action under state unlawful debt collection and deceptive practices law).

Congress recently made clear its intent that state consumer protection and fair lending laws be vigorously enforced. *See*, *e.g.*, Riegle-Neal, Pub. L. No. 103-328, § 102(b), 108 Stat. at 2349-50 (codified as amended at 12 U.S.C. § 36(f)(1)-(2)); H.R. Rep. No. 103-651, *supra*, at 53, *reprinted in* 1994 U.S.C.C.A.N. at 2074. To the limited extent OCC can and actually does take steps to aid individuals harmed by national banks' illegal practices, those efforts serve Congress's stated goals. But it is unreasonable and dangerous, not to mention contrary to congressional design, to deprive consumers of the additional enforcement resources that state attorneys general have long brought to bear on these concerns, particularly when recent events show that active law enforcement against banks is badly needed.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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October 3, 2008

APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, DECIDED DECEMBER 4, 2007

UNITED STATES COURT OF APPEALS
For the Second Circuit

August Term, 2006

(Argued: December 4, 2006 Decided: December 4, 2007)

Docket Nos. 05-5996-cv (L), 05-6001-cv (CON)

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

Plaintiff-Appellee,

OFFICE OF THE COMPTROLLER
OF THE CURRENCY,

Plaintiff-Counter-Defendant-Appellee,

—v.—

ANDREW M. CUOMO,* in his Official Capacity as Attorney General for the State of New York,

Defendant-Counter-Claimant-Appellant.

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* Pursuant to Fed. R.App. P. 43(c)(2), Andrew M. Cuomo is automatically substituted for former Attorney General Eliot Spitzer in this action.

Appendix A

Before:

CARDAMONE and B.D. PARKER, *Circuit Judges*,
and KOELTL, *District Judge*.**

Judge Cardamone concurs in part and dissents in part in a separate opinion.

BARRINGTON D. PARKER, *Circuit Judge*:

The National Bank Act ("NBA" or "Act") authorizes national banks to engage in a broad range of business activities, and also limits the exercise of "visitorial powers" over such banks.[1] The Office of the Comptroller of the Currency ("OCC") is the agency Congress has entrusted to implement the NBA and to oversee the national banks' exercise of their powers. This appeal concerns the residual authority of state officials in regards to laws pertaining to real estate lending, one of the banking activities governed by the NBA and OCC regulations.

** The Honorable John G. Koeltl, United States District Judge for the Southern District of New York, sitting by designation.

1. 12 U.S.C. § 484(a) provides:

> 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.

Appendix A

I

In 2005, the New York State Attorney General began investigating evidence of possible racial discrimination in the residential real estate lending practices of several national banks and their operating subsidiaries. The Attorney General's investigation was prompted by data that the federal Home Mortgage Disclosure Act ("HMDA") requires lenders to make public. *See* 12 U.S.C. §§ 2801-10. The Attorney General observed that recent HMDA data appeared to indicate that a significantly higher percentage of high-interest home mortgage loans are issued to African-American and Hispanic borrowers than to white borrowers.

On the basis of these apparent racial disparities, the Attorney General sent "letters of inquiry" to mortgage lenders implicated by the data, including several national banks and their operating subsidiaries.[2] The letters stated that such disparities "are troubling on their face, and unless legally justified may violate federal and state anti-discrimination laws such as the Equal Credit Opportunity Act and its state counterpart, New York State Executive Law § 296-a."[3] "In lieu of issuing a

2. The banks included Wells Fargo, HSBC, J.P. Morgan Chase, and Citigroup.

3. Section 296—a broadly prohibits creditors from discriminating on the basis of race, sex, national origin, or other protected grounds. Though not restricted to real estate lending, the statute specifically prohibits discrimination regarding "applications for credit with respect to the purchase, acquisition,

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formal subpoena," the letters requested that lenders voluntarily produce certain non-public information regarding their mortgage policies and practices, as well as data concerning loans related to real property in New York State.

Soon afterwards, the OCC sued to enjoin the Attorney General's investigative and enforcement efforts. A recently promulgated OCC regulation expansively interpreted the NBA's visitorial powers provision, 12 U.S.C. § 484, to preclude state officials from enforcing national banks' compliance with state or federal laws that concern activities authorized or permitted under the NBA. *See* 12 C.F.R. § 7.4000(a)(2)(iv). On the strength of this regulation, the agency took the position that any efforts by the Attorney General to investigate or to enforce provisions of the Equal Credit Opportunity Act and New York State Executive Law § 296-a against national banks or their operating subsidiaries were an unlawful exercise of visitorial powers.

The Clearing House Association ("Clearing House")—a consortium of national banks, including several that received letters of inquiry from the

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construction, rehabilitation, repair or maintenance of any housing accommodation, land or commercial space." N.Y. Exec. Law § 296-a(1)(a). It further bars discrimination "in the granting, withholding, extending or renewing, or in the fixing of the rates, terms or conditions of, any form of credit." *Id.* § 296-a(1)(b).

Attorney General—filed a similar complaint, seeking to enjoin the Attorney General from "investigating, requesting or issuing subpoenas for information concerning, or taking any other action to enforce federal and state discrimination-in-lending laws" against its national bank members and their operating subsidiaries.

The Attorney General counterclaimed, arguing that the OCC's regulation was unlawful and should be set aside under the Administrative Procedure Act ("APA"), 5 U.S.C. § 706.[4] In his Answer, the Attorney General asserted that racial disparities reflected in the HMDA data "established a *prima facie* case, under the federal Fair Housing Act," 42 U.S.C. § 3605(a), as well as under New York State Executive Law § 296-a. The Attorney General contended that his investigation was not a prohibited exercise of visitorial powers, and that the OCC was not acting aggressively in this area. Alternatively, the Attorney General contended that he was empowered, as *parens patriae*, to sue under the Fair Housing Act ("FHA"), and that even if such a suit were considered a "visitation" it would come within § 484(a)'s exception for "visitorial powers . . . authorized by Federal law."

Following a trial on the merits, the United States District Court for the Southern District of New York (Stein, *J.*) deferred to the OCC's interpretation of the

4. The APA provides, in part, that a "reviewing court shall . . . hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706.

statute, under *Chevron U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984), and concluded that the Attorney General's investigation was prohibited. *Office of the Comptroller of the Currency v. Spitzer*, 396 F.Supp.2d 383 (S.D.N.Y.2005) ("*OCC v. Spitzer*"). In a separate opinion, the court agreed with Clearing House that the FHA does not create an exception authorizing the exercise of visitorial powers otherwise prohibited under § 484(a). *Clearing House Ass'n, L.L. C. v. Spitzer*, 394 F.Supp.2d 620 (S.D.N.Y.2005) ("*Clearing House v. Spitzer*"). Accordingly, in both cases the court issued the declaratory and injunctive relief sought by the OCC and Clearing House.

We affirm the district court's judgment in *OCC v. Spitzer*. We affirm in part and vacate in part the district court's separate judgment in *Clearing House v. Spitzer*. We affirm that part of the *Clearing House* judgment granting Clearing House the injunctive relief provided in *OCC v. Spitzer*. We vacate, however, that part of the *Clearing House* judgment granting permanent injunctive relief against the Attorney General's enforcement of the FHA. We hold that the district court lacked jurisdiction to decide the FHA claim, and we remand the case to the district court with instructions to dismiss that claim.

Appendix A

II

The NBA provides for the creation of national banks, and authorizes them to exercise certain enumerated powers, as well as "all such incidental powers as shall be necessary to carry on the business of banking." 12 U.S.C. § 24 Seventh. The OCC is the federal agency primarily responsible for overseeing "the business of banking" under the statute. *NationsBank of N.C., N.A. v. Variable Annuity Life Ins. Co.*, 513 U.S. 251, 256, 115 S.Ct. 810, 130 L.Ed.2d 740 (1995). To that end, the OCC has been granted broad authority by Congress "to prescribe rules and regulations to carry out the responsibilities of the office." 12 U.S.C. § 93a. This includes the authority "to define the 'incidental powers' of national banks beyond those specifically enumerated in the statute." *Wachovia Bank, N.A. v. Burke*, 414 F.3d 305, 312 (2d Cir.2005); *see also NationsBank*, 513 U.S. at 257-59, 115 S.Ct. 810.

Section 484 provides, in part, that "[n]o national bank shall be subject to any visitorial powers except as authorized by Federal law [or] vested in the courts of justice." 12 U.S.C. § 484(a). The Supreme Court has defined visitation as "the act of a superior or superintending officer, who visits a corporation to examine into its manner to 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). We recently observed that the purpose of the visitorial powers restriction is to "prevent inconsistent or

intrusive state regulation from impairing the national system." *Burke*, 414 F.3d at 311; *see also Watters v. Wachovia Bank, N.A.*, __ U.S. __, 127 S.Ct. 1559, 1568, 167 L.Ed.2d 389 (2007).

In 1996, the OCC adopted a regulation clarifying that, under § 484(a), "the exercise of visitorial powers over national banks is vested solely in the OCC." 12 C.F.R. § 7.4000 (1997); 61 Fed.Reg. 4862, 4869 (Feb. 9, 1996) (final rule). The OCC revised this regulation in 1999 "to clarify the extent of the OCC's visitorial powers" and to "codif[y] the definition of visitorial powers and illustrate[ ] what vistitorial powers include by providing a non-exclusive list of these powers." 64 Fed.Reg. 60092, 60094 (Nov. 4, 1999) (final rule). The previous version of the rule had indicated that "[s]tate officials have no authority to conduct examinations or to inspect or require the production of books or records of national banks, except for the limited purpose[s]" specified in § 484(b).[5] 12 C.F.R. § 7.4000 (1997). The revised rule added "prosecuting enforcement actions" against such banks as an example of prohibited state visitorial powers. *See* 64 Fed.Reg. at 60100.

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5. 12 U.S.C. § 484(b) provides that, notwithstanding the restriction on visitorial powers in subsection (a):

> [L]awfully 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.

Appendix A

In its present form, Section 7.4000 lists several examples of prohibited visitations, including "(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.*" 12 C.F.R. § 7.4000(a)(2) (emphasis added).

The regulation also addresses the exceptions included in § 484(a) for visitorial powers "authorized by Federal law" and "vested in the courts of justice." The OCC construes the courts-of-justice exception as "pertain[ing] to the powers inherent in the judiciary" and "not grant[ing] 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); 69 Fed Reg. 1895, 1904 (Jan. 13, 2004) (final rule). OCC regulations do not directly interpret the "authorized by Federal law" exception, but rather provide a non-exclusive list of federal "laws vesting visitorial power in other governmental entities," including state officials, to engage in particular visitorial acts. 12 C.F.R. § 7.4000(b)(1). These include, for example, "[v]erify[ing] payroll records for unemployment compensation purposes," pursuant to the Internal Revenue Code, 26 U.S.C. § 3305(c); "[a]scertain[ing] the correctness of Federal tax returns," under 26 U.S.C. § 7602; and "[e]nforc[ing] the Fair Labor Standards Act," under 29 U.S.C. § 211. *Id.* §§ 7.4000(b)(1)(iii), (iv), (v).

III

We review a district court's grant of a permanent injunction for abuse of discretion. *Shain v. Ellison*, 356 F.3d 211, 214 (2d Cir.2004). A district court abuses its discretion when it bases its decision on an error of law or a clearly erroneous finding of fact. *Id.*; *S.C. Johnson & Son, Inc. v. Clorox Co.*, 241 F.3d 232, 237 (2d Cir.2001). Although the parties disagree about the facts underlying the Attorney General's investigation—especially the significance of the HMDA data as evidence of possible racial bias in mortgage lending—those facts are not at issue here. The only questions before us are legal ones.

A

Central to the parties' dispute is the meaning of the term "visitorial powers" in § 484(a). The OCC argues that its interpretation of "visitorial powers" should be afforded *Chevron* deference while the Attorney General denies that the OCC's interpretation is entitled to such deference. Under *Chevron*, we first ask whether Congress has spoken directly to the precise question at issue. *Chevron*, 467 U.S. at 842, 104 S.Ct. 2778. If Congress's intent is clear, both the court and the agency "must give effect to the unambiguously expressed intent of Congress." *Id.* at 843, 104 S.Ct. 2778. If, however, "the statute is silent or ambiguous with respect to the specific issue," we proceed to the second step of the *Chevron* analysis, in which "the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Id.*

The Attorney General raises an initial argument that the *Chevron* framework does not apply to the OCC's interpretation of the statute at issue here. The Attorney General argues that by limiting the visitorial powers that apply to national banks, Congress clearly did not intend to divest states of the authority to enforce their own otherwise non-preempted laws against such banks. Such authority, the Attorney General contends, is an intrinsic aspect of state sovereignty and its exercise cannot be curtailed in the absence of a clear statement of Congressional intent. *See*, *e.g.*, *Gregory v. Ashcroft*, 501 U.S. 452, 460, 111 S.Ct. 2395, 115 L.Ed.2d 410 (1991) ("If Congress intends to alter the usual constitutional balance between the States and the Federal Government, it must make its intention to do so unmistakably clear in the language of the statute." (internal quotation marks omitted)); *see also Diamond v. Charles*, 476 U.S. 54, 65, 106 S.Ct. 1697, 90 L.Ed.2d 48 (1986) ("[T]he power to create and enforce a legal code, both civil and criminal is one of the quintessential functions of a State." (internal quotation marks omitted)). Accordingly, the Attorney General urges us not to afford *Chevron* deference to the OCC's interpretation of the statute, as the district court did.

The first question is whether a presumption against preemption applies to the OCC's regulation interpreting § 484(a). Federal preemption can be express or implied, but in either case is primarily a question of Congressional intent. *See Barnett Bank of Marion County., N.A. v. Nelson*, 517 U.S. 25, 31, 116 S.Ct. 1103, 134 L.Ed.2d 237 (1996). "Preemption can generally occur in three ways:

where Congress has expressly preempted state law, where Congress has legislated so comprehensively that federal law occupies an entire field of regulation and leaves no room for state law, or where federal law conflicts with state law." *Burke*, 414 F.3d at 313; *see also Fid. Fed. Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 153, 102 S.Ct. 3014, 73 L.Ed.2d 664 (1982). "Federal regulations have no less pre-emptive effect than federal statutes." *de la Cuesta*, 458 U.S. at 153, 102 S.Ct. 3014.

Ordinarily, a presumption against preemption applies in areas of regulation traditionally allocated to the states. *See Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230, 67 S.Ct. 1146, 91 L.Ed. 1447 (1947) ("[W]e start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress."). In *Wachovia v. Burke*, we observed that this presumption "disappears" in the context of national bank regulation, which has been "substantially occupied by federal authority for an extended period of time." *Burke*, 414 F.3d at 314 (internal quotation marks omitted); *see also Flagg v. Yonkers Sav. & Loan Ass'n*, 396 F.3d 178, 183 (2d Cir.2005). Historically, the Supreme Court has "interpret[ed] grants of both enumerated and incidental 'powers' to national banks as grants of authority not normally limited by, but rather ordinarily pre-empting, contrary state law." *Barnett Bank*, 517 U.S. at 32, 116 S.Ct. 1103. The district court, therefore, did not err in determining that no presumption against preemption applies to the regulation at issue here.

For essentially the same reason, we also reject the Attorney General's reliance on the somewhat broader principle that—whether or not a presumption against preemption applies—"[w]here an administrative interpretation of a statute invokes the outer limits of Congress' power, we expect a clear indication that Congress intended that result." *Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 172, 121 S.Ct. 675, 148 L.Ed.2d 576 (2001) (" *SWANCC* "). That broader principle is rooted in the doctrine of constitutional avoidance, which the Supreme Court has recognized may, in some instances, trump the deference typically afforded to an agency's interpretation of the statute it administers. *See id.*; *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575, 108 S.Ct. 1392, 99 L.Ed.2d 645 (1988) ("[W]here an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress."). The concern about reaching constitutional issues unnecessarily, and the corresponding demand for a clear statement from Congress, is "heightened where the administrative interpretation alters the federal-state framework by permitting federal encroachment upon a traditional state power." *SWANCC*, 531 U.S. at 173, 121 S.Ct. 675.

The Attorney General has not demonstrated that acceptance of the OCC's interpretation of § 484 would cast doubt on the constitutionality of the underlying statute. *Cf. id.; DeBartolo*, 485 U.S. at 575-76, 108 S.Ct. 1392. Nor do we see any reason to believe that such interpretation invokes the outer limit of *Congress's* power so as to trigger a clear statement requirement. National banks, as creatures of federal statute, are subject first and foremost to federal law. As a result, the exercise of "traditional" state power in the context of national banking regulation is already substantially qualified. While national banks do not operate entirely free of state law obligations, "[s]tates can exercise no control over them, nor in any wise affect their operation, except in so far as Congress may see proper to permit." *Farmers' & Mechs.' Nat'l Bank v. Dearing*, 91 U.S. 29, 34, 23 L.Ed. 196 (1875); *see Watters*, 127 S.Ct. at 1567. Where, as here, Congress has already expressed its intent to limit the role of the states in regulating national banks—especially when such conduct involves the exercise of powers granted to the banks by federal statute and regulation—we do not perceive the need for any further statement of intent to achieve the limitation at issue here. On this basis, we conclude that the district court did not err in finding that a clear statement was not required to justify the OCC's interpretation of § 484(a).

Appendix A

B

We turn next to the Attorney General's contention that § 484(a) is clear, and that the statute precludes the interpretation the OCC has adopted.[6] As we have already noted, the first question we ask in reviewing an agency's construction of the statute it administers is "whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron*, 467 U.S. at 842-43, 104 S.Ct. 2778. The two questions at issue here both concern the scope of visitorial powers encompassed by § 484(a). They are: (1) whether Congress intended to preclude state officials from enforcing non-preempted state laws that, like New York's discrimination-in-lending law, concern the federally authorized activities of national banks; and (2) whether Congress intended to permit state officials to exercise otherwise prohibited visitorial powers by bringing actions in the "courts of justice."

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6. The Attorney General concedes on appeal, as he did below, that if the OCC's regulation is upheld, it would bar his investigation and threatened enforcement action, except insofar as he asserts a right to proceed under the FHA. *See OCC v. Spitzer*, 396 F.Supp.2d at 390.

In construing § 484(a), we do not write on a blank slate. The Supreme Court interpreted "visitorial powers" in the context of the NBA for the first time in *Guthrie v. Harkness*, 199 U.S. 148, 26 S.Ct. 4, 50 L.Ed. 130 (1905). At issue in *Guthrie* was whether the NBA precludes an individual shareholder from inspecting the books and records of a national bank. The Court examined various dictionary definitions of the term "visitorial," and summarized its common law history. Based on these various sources, the Court concluded that the visitorial powers restricted by Congress in the NBA do not include "the common-law right of the shareholder to inspect the books of the corporation." *Id.* at 157, 26 S.Ct. 4. This conclusion followed from the Court's acknowledgment that "[t]he right of visitation [is] a *public* right, existing in the state for the purpose of examining into the conduct of the corporation with a view to keeping it within its legal powers." *Id.* at 158-59, 26 S.Ct. 4 (emphasis added).

The Attorney General suggests that although *Guthrie* involved a lawsuit brought by a private plaintiff, the Court's opinion is consistent with the understanding that "visitation" refers primarily to examination of a corporation's books and records for the limited purposes of managerial oversight and monitoring compliance with a bank's charter, and that the term does not encompass enforcement of state laws of general applicability. This understanding, the Attorney General maintains, is reinforced by the text and structure of the NBA.

In its current form, the NBA details the OCC's specific examination powers over national banks in a different section from the visitorial powers restriction. *See* 12 U.S.C. § 481. Originally, these two provisions were set forth in the same section of the Act, which provided that national banks "shall not be subject to any *other* visitorial powers than such as are authorized by this act." Act of June 3, 1864, ch. 106, § 54, 13 Stat. 99, 116 (emphasis added). Notwithstanding the NBA's subsequent reorganization, the Attorney General argues that the visitorial powers language currently found in § 484(a) simply forbids the states from usurping those regulatory powers that the statute grants explicitly to the OCC. In this interpretation, § 484(a) would act mainly as a constraint on the administrative powers exercised by state banking officials.

As the court below pointed out, the Attorney General's proposed reading ignores the fact that the NBA, both as originally enacted and in its present version, authorizes the OCC to sue in its own name to redress certain violations—a power that might itself be considered visitorial. *See OCC v. Spitzer*, 396 F.Supp.2d at 394; Act of June 3, 1864, ch. 106, § 53, 13 Stat. 99, 116 (codified at 12 U.S.C. § 93(a)); *see also Guthrie*, 199 U.S. at 157, 26 S.Ct. 4 ("The visitation of civil corporations is by the government itself, through the medium of the courts of justice."); Roscoe Pound, *Visitatorial Jurisdiction Over Corporations In Equity*, 49 Harv. L.Rev. 369, 372 (1936) (noting that at common law, visitorial powers were executed primarily by "the King act[ing] through his courts").

The Supreme Court's decision in *Watters v. Wachovia* casts further doubt on the Attorney General's interpretation. *Watters* involved the State of Michigan's effort to enforce two statutes concerning mortgage lending against a national bank's operating subsidiary, Wachovia Mortgage. The statutes imposed registration and disclosure requirements on mortgage lenders, including national bank operating subsidiaries and other state-chartered institutions. *Watters*, 127 S.Ct. at 1565-66. They also granted to the commissioner of Michigan's Office of Insurance and Financial Services "inspection and enforcement authority over registrants," and "authorize[d] the commissioner to take regulatory or enforcement actions against covered lenders." *Id.* at 1566. The State argued—contrary to another recent OCC regulation, 12 C.F.R. § 7.4006—that operating subsidiaries are not themselves national banks, and that state laws regulating such subsidiaries are therefore applicable and enforceable. *Id.*

The powers granted to the commissioner under the Michigan statutes, the Court observed, were undeniably "visitorial" and thus, as the parties conceded, could not be applied to national banks themselves. "State laws that conditioned national banks' real estate lending on registration with the State," the Court explained, " *and subjected such lending to the State's investigative and enforcement machinery* would surely interfere with the banks' federally authorized business." *Id.* at 1568 (emphasis added). Citing § 484(a), as well as the OCC's definition of visitorial powers in 12 C.F.R. § 7.4000(a)(2), the Court concluded that Michigan "cannot confer on

its commissioner examination and enforcement authority over mortgage lending, or any other banking business done by national banks." *Id.* at 1569. Because the banks' "authority to engage in the business of mortgage lending comes from the NBA . . . as does the authority to conduct business through an operating subsidiary," the OCC's exclusive visitorial powers under § 484(a) extend to operating subsidiaries engaged in mortgage lending just as to their parent national banks.[7] *Id.* at 1572.

In this regard, the Court in *Watters* concluded that the level of deference owed to the OCC's regulation, § 7.4006, "is an academic question," since that regulation "merely clarifies and confirms what the NBA already conveys: A national bank has the power to engage in real estate lending through an operating subsidiary, subject to the same terms and conditions that govern

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7. In *Watters*, the Court emphasized the unique characteristics of national bank operating subsidiaries, which are "licensed by OCC" and whose authority to carry on the business of banking—according to statute—coincides completely with that of the parent bank. 127 S.Ct. at 1571. The Court pointed out that Congress has distinguished operating subsidiaries from other "affiliates" of national banks. *Id.* Accordingly, while we hold below that, in accordance with OCC regulations, the Attorney General is precluded from investigating either parent national banks or their operating subsidiaries for alleged violations of state fair lending laws, our reasons for this conclusion would not apply to the quite different question of whether a state investigation or enforcement action directed at any other type of national bank affiliate would necessarily violate § 484(a). Nor do we understand the OCC to have taken any position on this issue.

the national bank itself; that power cannot be significantly impaired or impeded by state law." *Id.* at 1572; *cf. Burke*, 414 F.3d at 321 (upholding § 7.4006 on the basis of a *Chevron* analysis).

Watters does not directly address the questions at issue here. Nevertheless, the Court implied that investigation and enforcement by state officials are just as much aspects of visitorial authority as registration and other forms of administrative supervision, and that the OCC was not clearly wrong to include in its definition of visitorial powers "[e]nforcing compliance with any applicable federal or state laws concerning" a national bank's authorized banking activities. 12 C.F.R. § 7.400(a)(2)(iv); *see Watters*, 127 S.Ct. at 1568-69. Even more significantly, *Watters* emphasized that "in analyzing whether state law hampers the federally permitted activities of a national bank, [the Court] ha[s] focused on the exercise of a national bank's *powers*." *Id.* at 1570.

The *Watters* dissent maintained, as the Attorney General does here, "that nondiscriminatory laws of general application that do not 'forbid' or 'impair significantly' national bank activities should not be preempted." *Id.* at 1574 (Stevens, J., dissenting). The premise of the majority opinion, however, is that enforcement of a state law purporting to regulate a national bank's exercise of the powers it has been granted under the NBA may constitute a prohibited

visitation under § 484(a), whether or not the law itself directly conflicts with a federal statute or regulation.[8]

Although the precise scope of "visitorial" powers is not entirely clear from the text of § 484(a), or the common law background of the term, we cannot agree with the Attorney General that the statute clearly precludes the interpretation the OCC has adopted. It seems clear to us, after *Watters*, that investigative 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). *Cf. Nat'l State Bank, Elizabeth, N.J. v. Long*, 630 F.2d 981, 989 (3d Cir.1980) (concluding that while "[i]t is not clear just what 'visitorial' powers include . . . they do encompass examination of the bank's books and records," and thus

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8. The Attorney General also argues that the OCC's interpretation of § 484(a) is foreclosed by *First Nat'l Bank in St. Louis v. Missouri*, 263 U.S. 640, 44 S.Ct. 213, 68 L.Ed. 486 (1924). In that case the Court upheld Missouri's enforcement of a state statute prohibiting national banks from establishing branches, reasoning that because the statute itself was valid and not preempted, "the corollary that it is obligatory and enforceable necessarily results . . . and, since the sanction behind it is that of the state and not that of the national government, the power of enforcement must rest with the former and not with the latter." *Id.* at 659-60, 44 S.Ct. 213. The Court's opinion did not directly address the NBA's restriction of state visitorial powers. Moreover, at the time, national banks had not been authorized by federal law to establish branches. Thus, unlike this case, *St. Louis* did not involve a state law that affected a national bank's *powers* under the NBA.

enforcement of an otherwise non-preempted state "antiredlining" statute was barred by § 484(a), since such enforcement "no doubt would require examination of bank records"). Moreover, we are not prepared to conclude, as the Attorney General urges us to, that simply because a state statute is not substantively preempted by a contrary federal law, enforcement of that statute by state officials against national banks is necessarily permitted under § 484(a).

(ii)

The Attorney General maintains that even if his investigation may be construed as a visitation, it is nonetheless permitted under § 484's express exception for visitorial powers "vested in the courts of justice." To support this argument, the Attorney General relies primarily on what might be read as an alternative holding in *Guthrie.* Having concluded that the NBA's visitorial powers restriction did not foreclose a shareholder from seeking to enforce his common law right of inspection against a national bank, the Court in *Guthrie* observed that such inspection, "even if included in visitorial powers as the terms are used in the statute," would nevertheless "belong to that class 'vested in the courts of justice' which are expressly excepted from the inhibition of the statute." *Guthrie*, 199 U.S. at 159, 26 S.Ct. 4.

The Attorney General's proposed interpretation of the "courts of justice" exception cuts too broadly. If a state official could sidestep the Act's restriction on the

exercise of visitorial powers simply by filing a lawsuit, the exception would swallow the rule. Moreover, as we note above, the sovereign's bringing of an action in court was a primary means of exercising visitorial powers at common law. Because *Guthrie* involved a suit initiated by a private plaintiff, the *only* possible exercise of visitorial powers would have been by the court itself. *See Guthrie*, 199 U.S. at 158-59, 26 S.Ct. 4 ("The right of visitation [is] a *public* right. . . ." (emphasis added)). Whatever the scope of the courts of justice exception, it cannot be as broad as the Attorney General suggests, since that interpretation would provide no effective restriction on the exercise of a state's visitorial powers over national banks.

C

Since "Congress has not directly addressed the precise question[s] at issue," we proceed to step two of the *Chevron* framework, under which we ask "whether the agency's answer is based on a permissible construction of the statute." *Chevron*, 467 U.S. at 843, 104 S.Ct. 2778. We will defer to an agency's statutory interpretation, so long as it is reasonable and does not conflict with Congress's expressed intent. *See id.* at 845, 104 S.Ct. 2778; *Skubel v. Fuoroli*, 113 F.3d 330, 336 (2d Cir.1997). An agency's interpretation may be reasonable, and thus worthy of deference, "even if the agency's reading differs from what the court believes is the best statutory interpretation." *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 980, 125 S.Ct. 2688, 162 L.Ed.2d 820 (2005); *see also G & T*

Terminal Packaging Co., Inc. v. U.S. Dep't of Agriculture, 468 F.3d 86, 95 (2d Cir.2006) ("[U]nless we find the [agency's] construction of the statute to be arbitrary, capricious, or manifestly contrary to the statute, we must yield to that construction of the statute even if we would reach a different conclusion of our own accord." (internal quotation marks and citation omitted)).

The Attorney General makes two preliminary arguments for why we should not defer to the OCC's interpretation of § 484(a). Both were properly rejected by the district court. First, the Attorney General argues that the OCC's regulation, 12 C.F.R. § 7.4000, falls outside the scope of its delegated rulemaking authority. This argument fails because, as the district court pointed out, Congress conferred broad authority on the OCC to implement the NBA. *See* 12 U.S.C. § 93a. Accordingly, the Supreme Court has routinely deferred to the OCC's interpretations of that statute where Congress's intent is ambiguous:

> It is settled that courts should give great weight to any reasonable construction of a regulatory statute adopted by the agency charged with the enforcement of that statute. The Comptroller of the Currency is charged with the enforcement of banking laws to an extent that warrants the invocation of this principle with respect to his deliberative conclusions as to the meaning of these laws.

NationsBank, 513 U.S. at 256-57, 115 S.Ct. 810 (internal quotation marks omitted). We see no reason to depart from this settled principle here.

Second, the Attorney General contends that no deference is owed to the regulation because it interprets purely legal concepts, as opposed to technical matters within the OCC's expertise. This contention is significantly more troublesome. We have previously observed that "an [administrative] agency has no special competence or role in interpreting a judicial decision." *New York v. Shalala*, 119 F.3d 175, 180 (2d Cir.1997) (internal quotation marks and citation omitted).

The administrative record here consists almost entirely of the agency's interpretation of case law, legislative history, and statutory text. *See*, *e.g.*, 69 Fed.Reg. 1895, 1897-1900 (Jan. 13, 2004) (final rule); 64 Fed.Reg. 31749, 31751 (June 14, 1999) (NPRM). These are not subjects on which the OCC holds any special expertise, nor has the OCC identified any particularly technical aspect of the regulatory subject matter that the agency is " 'uniquely qualified' to comprehend." *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 883, 120 S.Ct. 1913, 146 L.Ed.2d 914 (2000) (quoting *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 496, 116 S.Ct. 2240, 135 L.Ed.2d 700 (1996)); *see also Watters*, 127 S.Ct. at 1584 (Stevens, J., dissenting). To warrant *Chevron* deference, we ordinarily require administrative agencies to "articulate a logical basis for their decisions, including a rational connection between the facts found and the choices made." *Skubel*, 113 F.3d at 336 (internal quotation marks omitted). Yet the OCC does not appear to have found any facts at all in promulgating its visitorial powers regulation. It accretes a great deal of regulatory authority to itself at the expense of the states

through rulemaking lacking any real intellectual rigor or depth. Indeed, there is very little about the OCC's rather cursory analysis that, in a different context, could justify this Court's deference under *Chevron.* The OCC's analysis is at or near the outer limits of what *Chevron* contemplates.

Nevertheless, it does not follow that an agency's attempts to harmonize its rulemaking with judicial precedent—as the OCC has done here, *see*, *e.g.*, 69 Fed.Reg. 1895, 1897-1900—necessarily invalidate that rulemaking. *Cf. Long Island Care at Home, Ltd. v. Coke*, __ U.S. __, 127 S.Ct. 2339, 2350-51, 168 L.Ed.2d 54 (2007). We remain bound to uphold the agency's rule so long as it is not "arbitrary, capricious, or manifestly contrary to the statute." *Chevron*, 467 U.S. at 844, 104 S.Ct. 2778. Because we conclude that the rule the OCC adopted is not inconsistent with judicial precedent, the Attorney General's argument is unavailing.

Rather than analyzing the OCC's regulation in the abstract, we begin by emphasizing that the investigation and threatened enforcement action it would preclude in this instance concern real estate lending—precisely the same banking activity that was at issue in *Watters.* The authority of national banks to engage in that activity is a power that Congress has expressly granted under the NBA, subject to rules prescribed by the OCC. 12 U.S.C. § 371. It is thus "[b]eyond genuine dispute" that "state law may not significantly burden a national bank's own exercise of its real estate lending power, just as it may not curtail or hinder a national bank's efficient exercise of any other power, incidental or enumerated under the NBA." *Watters*, 127 S.Ct. at 1567.

Appendix A

In 2004, the OCC adopted a separate regulation detailing certain categories of preempted state law limitations on a national bank's real estate lending powers, including laws that concern licensing and registration, loan-to-value ratios, disclosure and advertising, and interest rates. 12 C.F.R. § 34.4(a). That same regulation also sets forth categories of state laws that "are not inconsistent with the real estate lending powers of national banks and apply to national banks to the extent that they only incidentally affect the exercise of national banks' real estate lending powers." *Id.* § 34.4(b). These include contracts, torts, criminal law, zoning, and other broad subject areas that do not relate specifically to the business of banking. *Id.*

In addition to being unencumbered by state laws that are preempted, either by the NBA itself or by OCC regulations, "real estate lending, when conducted by a national bank, is immune from state visitorial control" as a result of § 484(a). *Watters*, 127 S.Ct. at 1567. Such immunity attaches not because of any specific conflict between state and federal law, but because "[t]he NBA specifically vests exclusive authority to examine and inspect in [the] OCC." *Id.* In this regard, the NBA's restriction on visitorial powers reflects Congress's overall judgment that, in the context of national bank regulation, "confusion would necessarily result from control possessed and exercised by two independent authorities." *Easton v. Iowa*, 188 U.S. 220, 232, 23 S.Ct. 288, 47 L.Ed. 452 (1903); *see Watters*, 127 S.Ct. at 1568.

Likewise, the OCC's regulation is "consistent with the intent of creating a national banking system that is subject to cohesive, uniform supervision by the primary regulator of national banks." 64 Fed.Reg. at 60095. In our reading, § 7.4000 does not, as the Attorney General suggests, claim for the OCC unfettered authority to preempt the states from enforcing their own laws or otherwise alter the role that states have traditionally occupied in our "dual banking system." *Cf. Atherton v. FDIC*, 519 U.S. 213, 221, 117 S.Ct. 666, 136 L.Ed.2d 656 (1997); *Watters*, 127 S.Ct. at 1573 (Stevens, J., dissenting). Nor does the regulation change the extent to which national banks remain "subject to state laws of general application in their daily business." *Watters*, 127 S.Ct. at 1567; *see also Barnett Bank*, 517 U.S. at 33, 116 S.Ct. 1103 (recognizing the power of states to regulate national banks "where . . . doing so does not prevent or significantly interfere with the national bank's exercise of its powers"). Rather, the OCC's regulation simply confirms that where, as here, a state law specifically concerns "activities authorized or permitted pursuant to federal banking law," 12 C.F.R. § 7.4000(a)(2), its enforcement by state officials may constitute a prohibited visitation.

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. As we have described above, the 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, as well as by not preempting state laws—including New York State Executive Law § 296-a—that do not directly conflict with such powers. Such laws, we note, remain enforceable by private parties, as well as by the OCC itself.[9]

Furthermore, as the district court pointed out, the OCC's interpretation of § 484(a) as restricting the authority of states to enforce certain otherwise non-preempted laws finds support in another recent Congressional enactment, the Riegle-Neal Interstate Branch Banking and Efficiency Act of 1994. The Riegle-Neal Act permits national banks to establish interstate branches, and provides that such branches remain subject to "[t]he laws of the host State regarding community reinvestment, consumer protection, [and]

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9. Executive Law § 296-a authorizes a cause of action for private plaintiffs who are injured on the basis of a protected ground. *See*, *e.g.*, *Dunn v. Fishbein*, 123 A.D.2d 659, 507 N.Y.S.2d 29 (N.Y.App.Div.1986). Although the issue is not before us, the parties do not dispute that private parties would remain free under the OCC's regulation to bring individual or, where appropriate, class actions against national banks to enforce compliance with non-preempted state laws, regardless of the subject matter such laws concern. This understanding, moreover, is consistent with *Guthrie*'s construal of the right of visitation as an essentially *public* right. *See Guthrie*, 199 U.S. at 158-59, 26 S.Ct. 4.

fair lending," except when such laws are federally preempted or determined by the OCC to have a discriminatory effect on national banks. 12 U.S.C. § 36(f)(1)(A). However, the Act specifies that insofar as such state laws remain applicable, they "shall be enforced . . . by the Comptroller of the Currency." *Id.* § 36(f)(1)(B). We need not determine today whether, by this provision, Congress intended to make the OCC's enforcement authority exclusive with regard to interstate branches—a matter about which the OCC and the Attorney General, predictably, hold opposite views. It is sufficient to note that the Riegle-Neal Act, when read in conjunction with § 484(a), highlights the reasonableness of the OCC's interpretation concerning the scope of its exclusive visitorial powers.

Finally, we agree with the district court that the OCC permissibly interpreted the "courts of justice" exception under § 484(a) as pertaining only "to the powers inherent in the judiciary" and as not "grant[ing] 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); *see OCC v. Spitzer*, 396 F.Supp.2d at 404-06. As we have indicated, the Attorney General's proposed interpretation of this exception would swallow the rule. 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, 26 S.Ct. 4 ("The visitation of civil corporations is by the government itself, through the medium of the courts of justice."); *see also OCC v. Spitzer*, 396 F.Supp.2d at 405.

By contrast, the OCC has put forth a more reasonable interpretation that comports with the text of the statute, as well as Congress's overall intent. The exception, as the OCC interprets it, confirms that § 484(a) does not strip the courts of any inherent authority they possess to issue subpoenas, for example, against a national bank, or to exercise jurisdiction over such a bank where it is otherwise proper to do so, simply because such acts in and of themselves might be considered "visitorial." *See*, *e.g.*, *NLRB v. N. Trust Co.*, 148 F.2d 24, 29 (7th Cir.1945); *Overfield v. Pennroad Corp.*, 113 F.2d 6, 12 (3d Cir.1940). At the same time, the OCC properly determined that this exception does not positively grant authority to state officials to accomplish what § 484(a) otherwise forbids "by invoking the power of the courts." *OCC v. Spitzer*, 396 F.Supp.2d at 406.

We conclude that the district court did not err in deferring to the OCC's interpretation of § 484(a), as set forth in 12 C.F.R. § 7.4000. Because we are not prepared to conclude that the OCC's interpretation was arbitrary or otherwise not in accordance with law, the Attorney General's Administrative Procedure Act counterclaim fails. 5 U.S.C. § 706(2)(A); *see Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42-43, 103 S.Ct. 2856, 77 L.Ed.2d 443 (1983).

We therefore affirm the declaratory and injunctive relief ordered by the district court in *OCC v. Spitzer*, 396 F.Supp.2d at 407-08.

IV

The Attorney General argues that even if he is precluded from enforcing New York State law against the national banks, under § 484(a) and § 7.4000, he nevertheless is permitted to bring an action against such banks to enforce the federal Fair Housing Act, in a *parens patriae* capacity.[10] The Attorney General first mentioned the FHA in his Answer to the OCC's complaint, and only later clarified that the basis for a potential suit under that statute might be his *parens patriae* authority. The district court concluded that whether or not a state attorney general has standing to sue under the FHA as *parens patriae*, such an action would constitute a visitation and would not fall within the exception in § 484(a) for visitorial powers "authorized by Federal law." *Clearing House v. Spitzer*, 394 F.Supp.2d at 620.

We note at the outset that the OCC did not address the issue of whether the FHA creates a federally authorized exception under § 484(a), and declined to

10. The FHA prohibits "any person or other entity whose business includes engaging in residential real estate-related transactions to discriminate against any person in making available such a transaction, or in the terms or conditions of such a transaction, because of race, color, religion, sex, handicap, familial status, or national origin." 42 U.S.C. § 3605(a).

take a position on this issue in the court below on the ground that it was not ripe for adjudication. In its brief to this Court, the OCC purports to have changed its mind regarding ripeness, and now aligns itself with Clearing House on the merits of the claim. We also note that while no party contested our jurisdiction over Clearing House's claim, the Attorney General did argue below that the court lacked subject matter jurisdiction. Moreover, we have an independent obligation to ensure that subject matter jurisdiction exists, and we therefore raise the issue *nostra sponte*. *Joseph v. Leavitt*, 465 F.3d 87, 89 (2d Cir.2006); *Palmieri v. Allstate Ins. Co.*, 445 F.3d 179, 184 (2d Cir.2006).

We perceive two aspects to this question of jurisdiction. The first is whether Clearing House has properly grounded its complaint in a federal question, consistent with the "well-pleaded complaint" rule. *See Fleet Bank, Nat'l Ass'n v. Burke*, 160 F.3d 883, 886 (2d Cir.1998) (noting that the rule "requires a complaint invoking federal question jurisdiction to assert the federal question as part of the plaintiff's claim, and precludes invoking federal question jurisdiction merely to anticipate a federal defense" (internal citations omitted)). The second is whether the FHA issue is ripe for adjudication. *See United States v. Quinones*, 313 F.3d 49, 58 (2d Cir.2002) (observing that "[r]ipeness is a constitutional prerequisite to the exercise of jurisdiction by the federal courts" (internal quotation marks omitted)).

With regard to the first aspect, the district court correctly noted that "[i]t is beyond dispute that federal courts have jurisdiction over suits to enjoin state officials from interfering with federal rights." *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 96 n. 14, 103 S.Ct. 2890, 77 L.Ed.2d 490 (1983); *see also Fleet Bank*, 160 F.3d at 888. Thus, the fact that the claim Clearing House is asserting might *also* serve as the basis for a defense to a potential state court action has no bearing on whether it has satisfied the well-pleaded complaint rule. *See Clearing House v. Spitzer*, 394 F.Supp.2d at 624-25. Moreover, since Clearing House seeks to prevent the Attorney General from enforcing one federal statute (the FHA) because such enforcement would conflict with another federal statute (the NBA), the issue of whether a federal question has been presented is even more straightforward than in cases such as *Fleet Bank* and *Shaw*, which involved actions brought to challenge the threatened enforcement of state laws by state officials.[11] *See id.* at 624; *see also Verizon Md. Inc. v. Pub. Serv. Comm'n of Md.*, 535 U.S. 635, 650-51, 122 S.Ct. 1753, 152 L.Ed.2d 871 (2002) (Souter, J., concurring).

Somewhat more difficult is the issue of ripeness, which the district court did not address, but which we find necessary to consider given that the Attorney General has not yet filed a lawsuit against any national

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11. For the same reason, were the Attorney General to bring an action to enforce the FHA against a national bank in state court, the bank could unquestionably remove that action to federal court. *See* 28 U.S.C. § 1441; *cf. Franchise Tax Bd. of Cal. v. Constr. Laborers Vacation Trust for S. Cal.*, 463 U.S. 1, 103 S.Ct. 2841, 77 L.Ed.2d 420 (1983).

banks on the basis of the FHA. Under Article III, our jurisdiction "extend[s] to all Cases . . . [or] Controversies." U.S. Const. art. III § 2. We have observed that the purpose of the ripeness requirement is to ensure that a dispute has generated injury sufficient to satisfy the case or controversy requirement of Article III. *See Quinones*, 313 F.3d at 58 n. 5. This requirement "prevents a federal court from entangling itself in abstract disagreements over matters that are premature for review because the injury is merely speculative and may never occur." *Dougherty v. Town of N. Hempstead Bd. of Zoning Appeals*, 282 F.3d at 90.

The Supreme Court has advised that ripeness questions are "best seen in a twofold aspect, requiring us to evaluate both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." *Abbott Labs. v. Gardner*, 387 U.S. 136, 149, 87 S.Ct. 1507, 18 L.Ed.2d 681 (1967). Whether the Attorney General may sue to enforce the FHA against national banks depends on our interpretation of that statute's grant of standing, along with our understanding of § 484(a). Those questions might be viewed as purely legal ones which would not be significantly clarified by further factual development. *See Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 581, 105 S.Ct. 3325, 87 L.Ed.2d 409 (1985); *Abbott Labs.*, 387 U.S. at 149, 87 S.Ct. 1507.

As to the second factor, however, we have serious doubts regarding any hardship that Clearing House might suffer were we to defer consideration of this issue.

If this were only a prudential matter, we might be inclined to afford greater weight to the first aspect of the ripeness inquiry. *Cf. Nat'l Park Hospitality Ass'n v. Dep't of Interior*, 538 U.S. 803, 814-15, 123 S.Ct. 2026, 155 L.Ed.2d 1017 (2003) (Stevens, J., concurring). In this case, however, the question of hardship for ripeness purposes coincides with the question of whether an "imminent injury in fact" has been established for purposes of standing. *See*, *e.g.*, *MedImmune*, *Inc. v. Genentech*, *Inc.*, __ U.S. __ n. 8, 127 S.Ct. 764, 772 n. 8, 166 L.Ed.2d 604 (2007). The latter is an independent constitutional requirement. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992).

The district court held that Clearing House and its members had suffered injury because "[t]he threat of litigation in this case is not merely conjectural or hypothetical." *Clearing House v. Spitzer*, 394 F.Supp.2d at 626 (citing *O'Shea v. Littleton*, 414 U.S. 488, 496-97, 94 S.Ct. 669, 38 L.Ed.2d 674 (1974)). Although no enforcement action has yet been filed, the district court noted the Attorney General's stated intention to file such an action in the absence of an injunction, as well as his belief that the HMDA data are sufficient to establish a *prima facie* case of racial discrimination under both federal and state fair lending laws. *See id.*

The Supreme Court has recognized that "where threatened action by *government* is concerned, we do not require a plaintiff to expose himself to liability before bringing suit to challenge the basis for the threat—for

example, the constitutionality of a law threatened to be enforced." *MedImmune*, 127 S.Ct. at 772; *see also Steffel v. Thompson*, 415 U.S. 452, 459, 94 S.Ct. 1209, 39 L.Ed.2d 505 (1974) (holding that where a threat of prosecution is concrete and not merely speculative, "it is not necessary that petitioner first expose himself to actual arrest or prosecution to be entitled to challenge a statute that he claims deters the exercise of his constitutional rights"). However, the various factors giving rise to that principle are mostly absent here. Because Clearing House challenges the Attorney General's right to enforce the FHA against its members, but does not contest the validity of the federal statute itself or its applicability to national banks, there is no risk that the threat of enforcement would chill conduct in which the banks could otherwise legally engage. *Cf. Marchi v. Bd. of Coop. Educ. Servs. of Albany*, 173 F.3d 469, 478-79 (2d Cir.1999); *St. Martin's Press*, *Inc. v. Carey*, 605 F.2d 41, 44 (2d Cir.1979).

Nor are Clearing House's members faced with the dilemma confronted in *Ex Parte Young*, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908), where to test the validity of an allegedly unconstitutional state regulation, the company would have been required to find an agent or employee to disobey the regulation at the risk of a fine or imprisonment. *Id.* at 145-46, 28 S.Ct. 441; *see also Yakus v. United States*, 321 U.S. 414, 437-38, 64 S.Ct. 660, 88 L.Ed. 834 (1944). Nor is this a situation in which compliance with a challenged law, prior to its enforcement, would force Clearing House's members to incur immediate expenses, make changes in their daily

activity, or otherwise would affect their "primary conduct." *Cf. Nat'l Park Hospitality Ass'n*, 538 U.S. at 810, 123 S.Ct. 2026; *Abbott Labs.*, 387 U.S. at 152-53, 87 S.Ct. 1507. As we have already emphasized, Clearing House and its members are required to abide by the fair lending provisions of the FHA regardless of whether the New York Attorney General has the authority to enforce those provisions.

Finally, we see no risk that, in the absence of an injunction, the Attorney General will continue to investigate Clearing House's members prior to filing an enforcement action. Under state law, the Attorney General has broad authority to investigate illegality as well as the power to issue subpoenas. McKinney's Exec. Law § 63(12); *see OCC v. Spitzer*, 396 F.Supp.2d at 388. No analogous pre-enforcement mechanism exists under the FHA, however, and the Attorney General does not contend otherwise. Should the Attorney General ultimately decide to pursue an action to enforce the federal statute, Clearing House could assert its objection immediately before a court, without subjecting itself to any punitive consequences.

For similar reasons, we see no contradiction between our decision to affirm the relief granted by the district court in *OCC v. Spitzer* and our determination that the FHA claim at issue is not ripe for adjudication. Although the Attorney General had not filed a lawsuit to enforce Executive Law § 296-a, the threat that he might do so became imminent when he issued letters of inquiry to the banks and their subsidiaries. Those letters—in which

the Attorney General threatened to invoke his subpoena power—required the banks to take affirmative steps in response or else risk finding themselves in violation of state law, despite their belief that the Attorney General's authority to enforce such law was federally preempted. Here, by contrast, the Attorney General never mentioned the FHA until after Clearing House filed this action. The Attorney General's mere assertion, made during trial, that he had the authority to bring a *parens patriae* action under the FHA did not result in any direct or immediate consequences and did not require Clearing House's members to alter their "primary conduct" in any way that would affect our ripeness analysis.

Because it was unripe, the district court lacked jurisdiction over Clearing House's claim regarding enforcement of the FHA. We therefore vacate the injunction against the Attorney General's enforcement of the FHA and remand the case to the district court to dismiss that claim. Prudential considerations also weigh in favor of this result. Despite the Attorney General's stated intentions at the outset of the litigation, it is not certain that he will file an enforcement action under the FHA against national banks now or in the foreseeable future. Since it is unclear what the precise contours of such an action would be, we are neither sure of the exact harm that might be alleged nor of the relief that might be sought.

Moreover, this Court has never had occasion to address the underlying question of whether a state attorney general has standing to sue as *parens patriae* under the FHA. *Cf. Support Ministries for Pers. With Aids, Inc. v. Vill. of Waterford*, 799 F.Supp. 272, 279 (N.D.N.Y.1992) (concluding that New York State had *parens patriae* standing to maintain a suit under the FHA); *Hous. Auth. of the Kaw Tribe of Indians of Okla. v. City of Ponca*, 952 F.2d 1183, 1195 (10th Cir.1991) (holding that a state housing authority could be considered a "person" for purposes of standing under the FHA). Though we do not believe it would be appropriate to do so in the first instance on the basis of the hypothetical action posited in this case, we note that both Congress and the Supreme Court have made clear that standing to sue under the FHA is extraordinarily permissive. *See infra.* As a result, the question of whether the NBA precludes state attorneys general from seeking to enforce the FHA against national banks is significantly more complicated than the district court's analysis suggests.

The FHA includes a broad remedial provision that allows any "aggrieved person" to bring an action in district court on the basis of a discriminatory housing practice. 42 U.S.C. § 3613(a)(1)(A). The Supreme Court has interpreted the language of this provision as evincing "a congressional intention to define standing as broadly as is permitted by Article III of the Constitution." *Trafficante v. Metro. Life Ins. Co.*, 409 U.S. 205, 209, 93 S.Ct. 364, 34 L.Ed.2d 415 (1972) (internal quotation marks omitted); *see also Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379, 102 S.Ct. 1114, 71 L.Ed.2d 214 (1982) (holding that a non-

profit organization had standing to sue under the FHA); *Gladstone Realtors v. Vill. of Bellwood*, 441 U.S. 91, 109-11, 99 S.Ct. 1601, 60 L.Ed.2d 66 (1979) (holding that a municipality had standing to sue as an aggrieved person under the FHA, and reiterating *Trafficante*'s broad interpretation of standing under the statute).[12] Congress itself "reaffirm[ed] the broad holdings of these cases" when it adopted amendments to the FHA in 1988. H.R.Rep. No. 100-711, at 23 (1988), *as reprinted in* 1988 U.S.C.C.A.N. 2173, 2184 (citing *Havens Realty* and *Gladstone*). As the district court recognized, we have generally interpreted such broad grants of standing as reflecting "Congressional intent to permit states to enforce the rights protected by federal statutes through *parens patriae* actions." *Clearing House v. Spitzer*, 394 F.Supp.2d at 628 (citing *Connecticut v. Physicians Health Servs. of Conn., Inc.*, 287 F.3d 110, 121 (2d Cir.2002)). In light of these powerful indicators that Congress intended expansive standing to enforce the FHA, we are reluctant to consider arguments for restricting that standing on the basis of what is at best an incomplete record.

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12. At trial, the Attorney General maintained that he would have standing to sue under the FHA as an aggrieved person, based on the State's proprietary interests, as well as in a *parens patriae* capacity. Both Clearing House and the OCC agreed below that such a proprietary claim was not ripe, and the district court declined to consider it because it was "conjectural." *Clearing House v. Spitzer*, 394 F.Supp.2d at 627 n. 1. The Attorney General has not sought to revive this claim on appeal, and so we likewise decline to address it here.

For the foregoing reasons, we Affirm the district court's judgment in *OCC v. Spitzer*. We Affirm in part and Vacate in part the district court's separate judgment in *Clearing House v. Spitzer*, and we Remand with instructions for the district court to dismiss the Fair Housing Act claim for lack of subject matter jurisdiction.

CARDAMONE, *Circuit Judge*, *Concurring in part*, *and dissenting in part*:

By proscribing the enforcement of nonpreempted state law against national banks the Office of the Comptroller of the Currency, a bureau within the U.S. Treasury Department, has altered the compact between the state and national governments. That compact crafted by the framers of our Constitution envisioning two independent co-existing sovereigns will be dangerously weakened should this action by the Executive branch stand. A co-equal relationship between the two sovereigns was built into the frame of our republican form of government. Changing that status to one more akin to parent-child or employer-employee tips the federalism scales and strips the states of a portion of the residual sovereignty granted them under the Tenth Amendment by casting the states into a permanent junior or inferior position vis-à-vis the national government. Thus, if the power to alter the relationship between the state and federal government is established, it portends the power to destroy the constitutional concept of federalism, an indispensable component of our free society.

Appendix A

This case arose when the Attorney General of New York discovered significant disparities based on race in interest rates charged by some national banks and their state chartered subsidiaries operating in New York. He found, for example, minority borrowers at Wells Fargo Bank, J.P. Morgan Chase, Citigroup and HSBC paid higher rates of interest for mortgage loans than did white borrowers. If discrimination is proved, such conduct violates New York and federal law. Accordingly, the Attorney General launched an investigation into these banks' predatory practices. Plaintiffs the Clearing House Association, L.L.C. (Clearing House) and the Office of the Comptroller of the Currency (Comptroller or OCC) moved to enjoin the state Attorney General and obtained a trial on the merits in the United States District Court for the Southern District of New York (Stein, J.), at the conclusion of which Judge Stein ruled the Attorney General could not enforce New York's nonpreempted laws against a national bank. This ruling and the permanent injunction the district court later issued prompted the present appeal.

With respect to the majority's view of this appeal, I agree with my colleagues that we lack subject matter jurisdiction to review the Fair Housing Act issue in *Clearing House Ass'n, L.L.C. v. Spitzer* (*Clearing House v. Spitzer*), 394 F.Supp.2d 620 (S.D.N.Y.2005), and I concur in a remand. But, I respectfully dissent from that portion of the majority opinion affirming in part the district court's judgment in *Clearing House v. Spitzer* and affirming the court's separate judgment in *Office of the Comptroller of the Currency v. Spitzer* (*OCC v. Spitzer*), 396 F.Supp.2d 383 (S.D.N.Y.2005). I do not believe *Chevron* deference is

due to the promulgation by the OCC of 12 C.F.R. § 7.4000 barring New York State from enforcing its civil rights laws in this case.

DISCUSSION

I Federalism

A principal issue on this appeal is federalism, which is focused on the tension that exists, as here, when a state law and a federal regulation conflict. Federalism is built into the structure of our Constitution that establishes a system of dual sovereigns, that is, the state and the federal government. In the felicitous words of Chief Justice Salmon Chase, "The Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible States." *Texas v. White*, 74 U.S. (7 Wall.) 700, 725, 19 L.Ed. 227 (1868). As James Madison, the father of the Constitution, wrote in an essay in support of the Constitution's adoption

> The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite. . . . The powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs; concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State.

The Federalist No. 45, at 303 (James Madison) (Sesquicentennial ed., 1937).

Appendix A

At the adoption of the Bill of Rights, the Tenth Amendment enshrined the concept of federalism: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. Const. amend. X. The Supreme Court believes that one of the great benefits of the federalist system is that it serves as a built in check on abuses of governmental power by a state or by the federal government, so long as there is a "healthy balance of power" between them. *Gregory v. Ashcroft*, 501 U.S. 452, 458, 111 S.Ct. 2395, 115 L.Ed.2d 410 (1991). The framers recognized that whatever state powers were surrendered to the new federal government, they were limited so as to be with respect to "certain enumerated objects only"; the states retained "a residuary and inviolable sovereignty over all other objects." The Federalist No. 39, at 249 (James Madison). Federalism assumes the state and federal governments have concurrent authority over the people, *Printz v. United States*, 521 U.S. 898, 919-20, 117 S.Ct. 2365, 138 L.Ed.2d 914 (1997). Hence, in *Printz* the Supreme Court ruled it unconstitutional for Congress to commandeer the chief law enforcement officer of each local jurisdiction to conduct background checks of prospective handgun purchasers under the Brady Act. Such a command under the Act, the High Court ruled, violates states' residual sovereignty by compelling them to administer a federal regulatory program. *Id.* at 932-33, 117 S.Ct. 2365.

In the case at hand, we do not have the federal government compelling the states to take some action. Instead, we have a federal executive official—the Comptroller of the Currency—usurping "residual power reserved to the states." Here, the power usurped is the police power to investigate certain national banks and their operating subsidiaries doing business in New York allegedly guilty of discriminatory lending practices in the state.

In discussing federalism in *United States v. Lopez*, 514 U.S. 549, 115 S.Ct. 1624, 131 L.Ed.2d 626 (1995), the Supreme Court observed the healthy balance between state and federal sovereignties is an obligation of all government officials. *Id.* at 578, 115 S.Ct. 1624. It is so vital in preserving our freedom that a court should not refuse to intervene when the federal or state government has "tipped the scales too far." *Id.* The record on this appeal reveals that an administrative official in the Executive branch—not Congress—has tipped the scales too far, which should in my view prompt us to intervene.

Appendix A

II Visitorial Power Under the National Bank Act

A. *National Bank Act*

I turn now to the statutory backdrop for this litigation. The National Bank Act, 12 U.S.C. § 21 *et seq.* (2001), first enacted in 1863 and reenacted in 1864, provides for the formation and regulation of national banks. *See U.S. Nat'l Bank of Or. v. Indep. Ins. Agents of Am., Inc.*, 508 U.S. 439, 449, 113 S.Ct. 2173, 124 L.Ed.2d 402 (1993). Rather than displacing the state banking system, the National Bank Act established what has come to be known as the dual banking system, in which federal and state chartered banks coexist in relative "competitive equality." *See generally First Nat'l Bank in Plant City v. Dickinson*, 396 U.S. 122, 131-33, 90 S.Ct. 337, 24 L.Ed.2d 312 (1969). National banks are federal instrumentalities, in that they are organized and exist under the laws of the United States, but they are also privately owned businesses headquartered in a particular state and, in general, subject to the laws of that state. *See Nat'l Bank v. Commonwealth*, 76 U.S. (9 Wall.) 353, 361-62, 19 L.Ed. 701 (1869); *Guthrie v. Harkness*, 199 U.S. 148, 157, 26 S.Ct. 4, 50 L.Ed. 130 (1905); Keith R. Fisher, *Toward a Basal Tenth Amendment: A Riposte to National Bank Preemption of State Consumer Protection Laws*, 29 Harv. J.L. & Pub. Pol'y 981, 1002-03 (2006).

Appendix A

B. *Visitorial Power*

Section 484 of the National Bank Act 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) (2001). Whether New York State is attempting to exercise "visitorial powers" over national banks is a matter of controversy in this case. The American legal scholar Roscoe Pound traced the history of visitorial jurisdiction, beginning with canon law, from which the concept originated, when visitations by bishops to parishes took place to remedy abuses and to make sure church matters were handled decently and in order. In the common law America inherited from England all corporations are subject to visitation to ensure their abiding by the purposes of the charter that created them. Roscoe Pound, *Visitatorial Jurisdiction over Corporations in Equity*, 49 Harv. L.Rev. 369 (1936).

Early interpretations of the term emphasized the supervisory nature of visitorial authority. *See*, *e.g.*, *First Nat'l Bank of Youngstown v. Hughes*, 6 F. 737, 740 (1881), appeal dismissed, 106 U.S. 523, 1 S.Ct. 489, 27 L.Ed. 268 (1883). In *Guthrie*, the Supreme Court explained that visitation is the "act of a superior or superintending

officer, who visits a corporation to examine into its manner to conducting business, and enforce an observance of its laws and regulations." 199 U.S. at 158, 26 S.Ct. 4; *see also Watters v. Wachovia Bank, N.A.*, __ U.S. __, 127 S.Ct. 1559, 1568, 167 L.Ed.2d 389 (2007) (same).

The state Attorney General has not expressed an interest in analyzing national banks' activities under their national banking charter, but instead is exercising his authority under the state's police power to investigate civil rights violations being committed by New York entities in New York. In response to troubling indicia of discrimination in the terms of mortgages issued in New York, *see generally* Manny Fernandez, *Racial Disparity Found Among New Yorkers with High-Rate Mortgages*, N.Y. Times, Oct. 15, 2007, at B1, the Attorney General asserts his right to conduct reasonable investigations of national banks—just as he does of other citizens located in New York—as part of his duty to enforce a state law of general application. Under § 296-a of New York's Human Rights Law it is an unlawful discriminatory practice for a bank to discriminate against an applicant for credit because of the applicant's "race, creed, color, national origin, . . ." N.Y. Exec. Law § 296-a (McKinney 2005). The statute expressly states the Human Rights Law "shall be deemed an exercise of the police power of the state" to protect "the public welfare, health and peace of the people of this state." *Id.* § 290(2).

C. *Authority of States to Enforce Nonpreempted State Laws Against National Banks*

While the precise contours of the term "visitorial powers" in the national banking context have not been fully delineated, it is clear that virtually from the inception of the National Bank Act the term was *not* understood to preclude state enforcement of nonpreempted state laws. *See Waite v. Dowley*, 94 U.S. 527, 528, 534, 24 L.Ed. 181 (1876) (affirming, in suit brought by town treasurer, state court judgment imposing penalty on national bank cashier for failing to comply with state law).

Considerable authority supports the proposition that states have the authority to enforce such laws against national banks. For example, the Supreme Court held in 1924 that the National Bank Act did not impede the ability of a state attorney general to bring an action against a national bank to enforce a valid state law prohibiting the establishment of branch banks. *First Nat'l Bank in St. Louis v. Missouri*, 263 U.S. 640, 659-60, 44 S.Ct. 213, 68 L.Ed. 486 (1924); *see also First Nat'l Bank of Bay City v. Fellows*, 244 U.S. 416, 421-22, 37 S.Ct. 734, 61 L.Ed. 1233 (1917) (considering and denying on merits state attorney general's *quo warranto* action testing authority of national bank to engage in trust services under state and federal law); *Minn. v. Fleet Mortgage Corp.*, 158 F.Supp.2d 962, 966 (D.Minn.2001) (holding that state could bring action to enforce state fraud and deceptive trade practice laws against national bank); *Alaska v. First Nat'l Bank of Anchorage*, 660 P.2d

406, 425-26 (Alaska 1982) (holding that state could sue national bank to enforce state consumer protection laws); *Peoples Savs. Bank v. Stoddard*, 359 Mich. 297, 102 N.W.2d 777, 782, 796-97 (1960) (applying, in suit brought by state attorney general, state antitrust law to national bank); *cf. Dickinson*, 396 U.S. at 129, 130, 138, 90 S.Ct. 337 (denying declaratory and injunctive relief to national banking association following state comptroller's letter requesting national bank to cease and desist activities prohibited by state law and incorporated into federal law under 12 U.S.C. § 36(c)); *Brown v. Clarke*, 878 F.2d 627, 629, 632 (2d Cir. 1989) (affirming, in suit brought by state banking commissioner, judgment barring national bank from engaging in branching activity prohibited by state law and incorporated into federal law under 12 U.S.C. § 36(c)); *Utah ex rel. Dep't of Fin. Insts. v. Zions First Nat'l Bank of Ogden*, 615 F.2d 903, 904, 906 (10th Cir.1980) (same); *Nuesse v. Camp*, 385 F.2d 694, 700 (D.C.Cir.1967) (finding state banking commissioner could intervene in suit to enjoin Comptroller of Currency from authorizing national bank to open branch in contravention of state law as incorporated into federal law under 12 U.S.C. § 36(c)); *Jackson v. First Nat'l Bank of Valdosta*, 349 F.2d 71, 75 (5th Cir.1965) ("[W]here there is authority to proceed against national banking associations, even if in terms it is only authority to proceed against violations of state law, the subsumption of state substantive law as the regulating principle for national banking associations concerning branching carries with it the right of the State Superintendent of Banks to see to it that that substantive law is enforced.").

Not only have federal and state courts repeatedly affirmed the authority of states to enforce nonpreempted state law against national banks, Congress has also emphasized the importance of the dual banking system generally and, more specifically, the importance of the ordinary application of state laws to national banks. When Congress enacted the Riegle-Neal Interstate Banking and Branching Efficiency Act in 1994, it specifically subjected interstate branches of national banks to the laws of their host states in the areas of community reinvestment, consumer protection, fair lending, and intrastate branching. *See* 12 U.S.C. § 36(f) (2001). The House Conference Report stated that

> States have a strong interest in the activities and operations of depository institutions doing business within their jurisdictions, regardless of the type of charter an institution holds. In particular, States have a legitimate interest in protecting the rights of their consumers, businesses, and communities.... Congress does not intend that the Interstate Banking and Branching Efficiency Act of 1994 alter this balance and thereby weaken States' authority to protect the interests of their consumers, businesses, or communities.

H.R.Rep. No. 103-651, at 53 (1994), as *reprinted in* 1994 U.S.C.C.A.N. 2068, 2074.

III Section 7.4000 is Not Entitled to *Chevron* Deference

A. *Action of the OCC*

It is against this statutory and case law background that, in 1999, the Comptroller issued a revised regulation interpreting § 484's prohibition on the exercise of visitorial powers over national banks to preclude states from enforcing in court nonpreempted state laws. 12 C.F.R. § 7.4000. Rather than preempting state law, § 7.4000 preempts the ability of a state government to enforce concededly nonpreempted state law. By limiting the power of the state to enforce applicable state law and vesting that authority in a federal agency under § 7.4000, the usual constitutional balance of power between the states and the federal government is heavily tilted towards the federal government, and the Tenth Amendment is put in peril. Because there is no evidence that Congress planned for such a shift to occur, § 7.4000 must be set aside.

B. *Regulation Not Authorized Under the Supremacy Clause*

To avoid facing the conflict this regulation poses to the balance crafted by the Tenth Amendment, the majority applies to § 7.4000 the deferential review laid out in *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984). The majority's apparent assumption is that a federal regulation preempting a state's ability

to *enforce* state law is no more troubling or problematic than a regulation substantively preempting state law. I strongly disagree. By leaving state substantive law in place, while at the same time denying the state any role in enforcing that law, § 7.4000 erodes a key aspect of state sovereignty, confuses the paths of political accountability, and allows a federal regulatory agency to have a substantial role in shaping state public policy. The likely result of which is a plain transgression on our republican form of government and a violation of the Tenth Amendment.

Further and significantly, the Supremacy Clause in article VI, clause 2 grants the power to preempt state law to the Congress, not to appointed officials in the Executive branch. Even when there is preemption by a federal agency, it may only occur within the scope of authority unmistakably delegated to it by Congress. Such authority does not exist here. In such cases, it is well established that an agency's construction of a statute that upsets the usual constitutional balance between federal and state powers is never entitled to deferential review under *Chevron. See Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 172, 121 S.Ct. 675, 148 L.Ed.2d 576 (2001). Instead, the courts require a clear indication that Congress intended that result. *Id.* The requirement for a clear expression of congressional intent

> . . . stems from our prudential desire not to needlessly reach constitutional issues and our assumption that Congress does not casually

> authorize administrative agencies to interpret a statute to push the limit of congressional authority. This concern is heightened where the administrative interpretation alters the federal-state framework by permitting federal encroachment upon a traditional state power.

Id. at 172-73, 121 S.Ct. 675; *see also Gregory*, 501 U.S. at 460-61, 111 S.Ct. 2395 ("If Congress intends to alter the usual constitutional balance between the States and the Federal Government, it must make its intention to do so unmistakably clear in the language of the statute.").

C. *Law Enforcement Core Aspect of State Sovereignty*

It is difficult to imagine a more core aspect of state sovereignty than the authority to pass and enforce valid nonpreempted state laws. "[T]he power to create and enforce a legal code, both civil and criminal is one of the quintessential functions of a State." *Diamond v. Charles*, 476 U.S. 54, 65, 106 S.Ct. 1697, 90 L.Ed.2d 48 (1986). The Supreme Court has repeatedly emphasized that states' ability to pass *and enforce* their own laws is an essential attribute of state sovereignty. *See*, *e.g.*, *United States v. Wheeler*, 435 U.S. 313, 320, 98 S.Ct. 1079, 55 L.Ed.2d 303 (1978) ("Each [state] has the power, inherent in any sovereign, independently to determine what shall be an offense against its authority and to punish such offenses."); *cf. Calderon v. Thompson*, 523 U.S. 538, 556, 118 S.Ct. 1489, 140 L.Ed.2d 728 (1998)

("Our federal system recognizes the independent power of a State to articulate societal norms through criminal law; but the power of a State to pass laws means little if the State cannot enforce them.").

In criminal law, the doctrine of dual sovereignty has evolved to protect the substantial state interest in the enforcement of its criminal code. The Supreme Court has explained that separate federal and state prosecutions for the same unlawful act do not offend the Double Jeopardy Clause because "[f]oremost among the prerogatives of sovereignty is the power to create and enforce a criminal code" and "[a] State's interest in vindicating its sovereign authority through enforcement of its laws by definition can never be satisfied by another State's enforcement of *its* own laws." *Heath v. Alabama*, 474 U.S. 82, 93, 106 S.Ct. 433, 88 L.Ed.2d 387 (1985); *see also Bartkus v. Illinois*, 359 U.S. 121, 137, 79 S.Ct. 676, 3 L.Ed.2d 684 (1959) (holding that a federal prosecution cannot "displace the reserved power of States over state offenses" and that the opposite result "would be in derogation of our federal system").

D. *St. Louis v. Missouri*

But it is not necessary to turn to the constitutional principles underlying the dual sovereignty doctrine to demonstrate that nonpreempted state laws may be enforced by a state against national banks. The Supreme Court has addressed this precise issue in a precedent that is now over eighty years old. In *St. Louis*, the attorney general of Missouri brought a *quo warranto*

proceeding in Missouri state court against a national bank alleging that the bank had violated a state law prohibiting the establishment of branch banks. 263 U.S. at 655, 44 S.Ct. 213. The national bank responded by asserting, *inter alia*, that, even if the state statute could be validly applied to a national bank, the state could not maintain a proceeding in court to enforce it. *Id.* at 655, 660, 44 S.Ct. 213. The Supreme Court soundly rejected this argument, stating

> . . . since the sanction behind [the state statute] is that of the State and not that of the National Government, the power of enforcement must rest with the former and not with the latter. To demonstrate the binding quality of a statute but deny the power of enforcement involves a fallacy made apparent by the mere statement of the proposition, for such power is essentially inherent in the very conception of law.

Id. at 660, 44 S.Ct. 213.

The majority's attempts to distinguish *St. Louis* are unavailing. Although *St. Louis* did not discuss the term "visitorial powers" by name, the result in that case would have been logically impossible were the OCC's interpretation of the term correct. In affirming Missouri's authority to enforce valid state laws against a national bank, the Supreme Court in *St. Louis* drew a distinction between permissible state action "to vindicate and enforce its own law," on the one hand, and

impermissible state action to "enforce a law of the United States" or "call the bank to account for an act in excess of its charter powers," on the other. *Id.* It is no coincidence that the state actions that the *St. Louis* Court indicated would be impermissible under the National Bank Act—actions to ensure that a national bank is complying with its charter or the law of its creation—line up precisely with the definition of "visitorial power" provided by the Court in *Guthrie. See Guthrie*, 199 U.S. at 158, 26 S.Ct. 4 (explaining visitation).

E. *Traditional Federal-State Balance Upset*

Not only does § 7.4000 upset the traditional federal-state balance by intruding upon a core state function, but it does so in a way that potentially blurs the distinct lines of political accountability between citizens and the federal and state governments.

> The theory that two governments accord more liberty than one requires for its realization two distinct and discernable lines of political accountability: one between the citizens and the Federal Government; the second between the citizens and the States. If . . . the Federal and State Governments are to control each other, and hold each other in check by competing for the affections of the people, those citizens must have some means of knowing which of the two governments to hold

> accountable for the failure to perform a given function.

Lopez, 514 U.S. at 576-77, 115 S.Ct. 1624 (Kennedy, J., concurring). By keeping state law in effect, but removing from state executives the power to enforce that law in court, § 7.4000 confuses which governmental entity citizens should hold accountable for the enforcement of state laws against national banks. If the OCC fails adequately to enforce state law against national banks, state officials could bear the brunt of public disapproval while federal officials remain insulated from the electoral ramifications of their enforcement policies. *Cf. New York v. United States*, 505 U.S. 144, 169, 112 S.Ct. 2408, 120 L.Ed.2d 120 (1992) (raising parallel concern in context of federal legislation compelling states to regulate disposal of radioactive waste). "Accountability is thus diminished when, due to federal coercion, elected state officials cannot regulate in accordance with the views of the local electorate in matters not preempted by federal regulation." *Id.*

Similarly, the federal government is unlikely to be as motivated or as effective as the states in responding to the complaints of a particular state's citizenry regarding the enforcement of that state's laws. Here, *amici* for appellant echo numerous state officials, consumer groups and academic authors in expressing concern that the OCC may lack the capability and commitment to protect consumers with the vigor applied by state attorneys in the past. *See*, *e.g.*, U.S. Gen. Accounting Office, OCC Consumer Assistance: Process

is Similar to That of Other Regulators but Could be Improved by Enhanced Outreach 23-24 (2006) (noting concerns of local officials and consumer group representatives); Fisher, *supra*, at 1006 (commenting on state officials' proactive enforcement of consumer protection statutes in cases that federal agencies were "unable or unwilling" to pursue).

Perhaps of most concern is the role § 7.4000 gives to a federal agency in shaping state policy. While the regulation does not mandate that a state legislature institute a particular regulatory regime, there is no doubt that the ultimate contours of state policies will be shaped by the decisions the OCC makes regarding how to—and how not to—enforce state laws against national banks. As the Supreme Court has observed, "[e]xecutive action that has utterly no policymaking component is rare." *Printz*, 521 U.S. at 927, 117 S.Ct. 2365.

In light of the implications that § 7.4000 has for state sovereignty and the core state function of the enforcement of valid state law, a clear statement of congressional purpose to do so is necessary to support the OCC's interpretation of the term visitorial powers. Because Congress has provided no such indication, the regulation should be set aside and the district court's judgments in *OCC v. Spitzer*, *supra*, and *Clearing House v. Spitzer*, *supra*, vacated.

IV *Watters* Decision

Finally, the Supreme Court's recent decision in *Watters* does not lead to a contrary result. In *Watters*, the Supreme Court confronted the question of whether a state can exercise visitorial powers over national bank operating subsidiaries. 127 S.Ct. at 1564. There was no question that the state statute at issue in that case constituted an exercise of visitorial power over such subsidiaries. *Id.* The statute attempted to empower the state banking commissioner with general supervision and control over the operating subsidiaries and subjected them to various licensing, registration, and inspection requirements. *Id.* at 1565-66. In finding that the National Bank Act's prohibition on the exercise of visitorial powers applied to national bank subsidiaries to the same extent that it applied to national banks, *Watters* reaffirmed the basic principle that "when state prescriptions significantly impair the exercise of [the national bank's] authority, enumerated or incidental under the NBA, the State's regulations must give way." *Id.* at 1567.

Watters thus concerned the relatively familiar case in which a state statute was substantively preempted by federal law. The questions raised by the regulation at issue in this case are very different. Here, there is no dispute that Congress could—but has chosen not to—preempt the state law that the New York Attorney General is attempting to enforce. The crucial question is rather whether the OCC can interpret the National Bank Act to limit state regulation of national banks *in*

this way. This case calls on this Court to determine whether Congress aimed to vest the enforcement of valid state law against national banks entirely in the hands of a federal agency. As the majority concedes, *Watters* had no occasion to address directly this unique and complex question.

CONCLUSION

Accordingly, for the reasons stated above, § 7.4000 should be set aside and *OCC v. Spitzer*, *supra*, and *Clearing House v. Spitzer*, *supra*, vacated. Thus, while I concur in the majority's determination that the Fair Housing Act claim in *Clearing House v. Spitzer*, should be dismissed, I respectfully dissent from that part of the majority's decision that affirms the district court judgments.

APPENDIX B — OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK, DATED OCTOBER 12, 2005

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

05 Civ. 5636 (SHS)

OFFICE OF THE COMPTROLLER
OF THE CURRENCY,

Plaintiff,

-against-

ELIOT SPITZER, in his official capacity as
Attorney General for the State of New York,

Defendant.

OPINION AND ORDER

SIDNEY H. STEIN, U.S.District Judge.

This is an action by the Office of the Comptroller of the Currency (the "OCC") seeking declaratory and injunctive relief barring the Attorney General of the State of New York from infringing on the OCC's exclusive visitorial authority over national banks and

their operating subsidiaries.[1] The OCC is the federal agency with primary responsibility for supervising national banks. This litigation was prompted by the Attorney General's investigation into whether the residential mortgage lending practices of several national banks doing business in New York was racially discriminatory. The OCC does not challenge the applicability of the state's anti-discrimination law to national banks' lending practices, nor does it question whether national banks must comply with state fair lending laws. Rather, this action addresses only the question of whether the Attorney General of the State of New York may enforce those laws against national banks.

The OCC contends that the Attorney General's assertion of authority pursuant to state law to conduct his investigation and enforce relevant laws is in conflict with, and thus preempted by, section 484 of the National Bank Act, 12 U.S.C. § 484(a), and the OCC's implementing regulation codified at 12 C.F.R. § 7.4000, which gives the OCC exclusive authority to investigate national banks and prosecute enforcement actions to

1. The U.S. Court of Appeals for the Second Circuit recently affirmed the validity of OCC regulations permitting national banks to conduct banking activities through operating subsidiaries and providing that those operating subsidiaries are subject to state laws to the same extent as are national banks. *See Wachovia Bank, N.A. v. Burke,* 414 F.3d 305, 321 (2d Cir.2005), *petition for cert. filed,* No. 05-431 (Sept. 30, 2005); *see also* 12 C.F.R. § 7.4006. Thus, for simplicity's sake, unless otherwise specified, the Court refers to national banks and their operating subsidiaries collectively as "national banks."

compel their compliance with state and federal laws regulating the content or conduct of federally authorized banking activities. The Attorney General challenges the validity of the OCC's interpretation of section 484, and claims that even if the OCC's regulation is valid, he is authorized to enforce fair lending laws against national banks pursuant to the federal Fair Housing Act, 42 U.S.C. §§ 3601 *et seq.* The Attorney General also asserts a counterclaim pursuant to the Administrative Procedure Act, 5 U.S.C. §§ 706(2)(A) and (C), that seeks an order setting aside 12 C.F.R. § 7.4000 insofar as it prohibits states from enforcing non-preempted state laws against national banks and their operating subsidiaries.

As explained more fully below, this Court finds that the OCC acted within its statutory authority in promulgating 12 C.F.R § 7.4000; the regulation, as recently amended, reflects a permissible construction of section 484 of the National Bank Act; and the regulation is therefore entitled to deference and, pursuant to the U.S. Supreme Court's decision in *Chevron U.S.A., Inc. v. Natural Resources Defense Council,* 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984), is to be given "controlling weight." *Id.* at 844, 104 S.Ct. 2778. The Court also finds that the Attorney General's assertion of visitorial authority impermissibly interferes with the OCC's supervisory role. Accordingly, the OCC's application for declaratory and injunctive relief pursuant to Rule 65 of the Federal Rules of Civil Procedure is granted and the Attorney General is permanently enjoined 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 instituting any enforcement actions to compel compliance with the Attorney General's already existing informational demands; and from instituting actions in the courts of justice against national banks to enforce state fair lending laws.

This opinion says nothing about whether it is better public policy to vest visitorial powers over national banks in state attorneys general as well as in the OCC. That is a matter for the legislative and executive branches of government to determine. What this opinion does conclude is that the federal statutes, regulations and decisional authority as they now exist compel the conclusion that the New York State Attorney General may not exercise visitorial powers over national banks in connection with an investigation into the banks' residential lending practices.

* * *

I. Background

A. Procedural Background

On June 16, 2005, the OCC commenced this action by filing a complaint and motion for a preliminary injunction. On the same day, The Clearing House Association, L.L.C. filed a separate complaint and motion for a temporary restraining order and

preliminary injunction seeking a similar order enjoining the Attorney General's investigation and asserting the same grounds for relief. *See The Clearing House Association, L.L.C. v. Spitzer,* No. 05 Civ. 5629(SHS). Following oral argument four days later, this Court denied the plaintiff's request for a temporary restraining order in *The Clearing House Association, L.L.C. v. Spitzer,* No. 05 Civ. 5629(SHS). The two actions were accepted as related, and the Court subsequently set a coordinated briefing schedule and consolidated the trials on the merits with the hearings on the preliminary injunction applications pursuant to Rule 65(a)(2) of the Federal Rules of Civil Procedure. (Order, dated July 5, 2005). The trial on the merits was held in both actions on September 7, 2005, at which time argument was heard and affidavits and other exhibits were admitted into evidence. (Transcript, dated Sept. 7, 2005, at 36-37).[2]

B. Factual Background

This action arises in response to the Attorney General's investigation into the residential mortgage

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2. Various associations and institutions have submitted briefs *amici curiae* in connection with this and the related action. The National Community Reinvestment Coalition, together with fifteen other interested organizations; the National Association of Realtors and New York State Association of Realtors, Inc.; the Greenlining Institute; and Thirty State Attorneys General all submitted memoranda opposing the OCC's requested relief. The American Bankers Association, Consumer Bankers Association, and the Financial Services Roundtable jointly submitted a memorandum in support of the OCC.

lending practices of a number of banks doing business in New York State, including several national banks and their operating subsidiaries. The Attorney General's inquiry began with a review of data made available pursuant to the federal Home Mortgage Disclosure Act, 12 U.S.C. §§ 2801-2810, which requires residential real estate lenders to compile certain information regarding their mortgage lending activities and to make that information available to the public. *See* 12 U.S.C. § 2803.

Upon a preliminary analysis of 2004 data from several national banks and their mortgage lending operating subsidiaries, Attorney General Spitzer found evidence that he believes shows that differences in the prices of home loans may have been based on the race of the borrower, and concluded that the data was sufficient to establish a *prima facie* case of race discrimination in violation of federal and state fair lending laws. (*See* Declaration of Dennis D. Parker in Supp. of Def.'s Opp to Pls.' Request for Injunctive and Declaratory Relief and in Supp. of Counterclaim, dated August 5, 2005, ("Parker Decl."), at ¶ 5).

In April 2005, the Attorney General sent letters of inquiry to several national banks, including Citibank, N.A., JP Morgan Chase Bank, N.A., HSBC Bank USA, N.A., and Wells Fargo Bank, N.A., informing the banks that he had commenced a preliminary inquiry into each bank's lending practices, advising them that racial disparities in their loan rates "might indicate a violation of state and federal laws prohibiting discrimination in lending," and requesting certain non-public lending

information. (*See* Parker Decl. at ¶ 6, 7, and Ex. 2; *see also* Decl. of Grace E. Dailey, dated June 16, 2005, at ¶ 5). In the letters to Wells Fargo, HSBC, and JP Morgan Chase, the Attorney General cited New York Executive Law § 296-a and the federal Equal Credit Opportunity Act as potentially applicable anti-discrimination laws. (*See* Ex. 2 to Parker Decl.). The letters requested that "[i]n lieu of issuing a formal subpoena . . . ," the banks "voluntarily provide" certain non-public lending information. (*Id.*).

The Attorney General asserts the authority to conduct such investigations and bring appropriate enforcement actions pursuant to New York statutory and common law. Specifically, section 63(12) of the New York Executive Law gives the Attorney General the authority to investigate and prosecute instances of "persistent fraud or illegality in the carrying on, conducting or transaction of business. . . ." *See* McKinney's Exec. Law § 63(12). In furtherance of an inquiry into "persistent fraud or illegality," the Attorney General has the power to issue subpoenas. *See id.*

In response to the letters from the Attorney General, the OCC instituted this action on the grounds that the Attorney General's investigation impermissibly intrudes on the OCC's exclusive visitorial authority over national banks. The Attorney General has reaffirmed his intention to go forward with his investigation and enforcement actions in the event he is not enjoined from doing so. (*See* Transcript, dated Sept. 7, 2005, at 38).

In his opposition to the OCC's motion, the Attorney General raised, for the first time, a claim that he may bring enforcement actions against national banks pursuant to the federal Fair Housing Act, (the "FHA"), which he asserts creates a federally authorized exception to section 484's general limitation on states' visitorial powers. *See* 12 U.S.C. § 484(a) (limiting the exercise of visitorial powers, "except as authorized by Federal law . . ."). The Attorney General also contends that the FHA reveals an intent by Congress to permit multiple levels of enforcement of fair lending laws, rendering the OCC's interpretation of section 484 unreasonable insofar as it prohibits states from enforcing fair lending laws. The OCC disagrees with the Attorney General's argument regarding Congressional intent, insisting that its interpretation of section 484 is not in conflict with any policy expressed by the FHA. It also notes that none of the enforcement provisions of the FHA on their face apply to the Attorney General, but the OCC does not seek a determination as to the Attorney General's authority to bring any particular type of action pursuant to the FHA.[3] Accordingly, here,

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3. The OCC acknowledges that the FHA authorizes the federal Secretary of Housing and Urban Development and the *United States* Attorney General to visit and take enforcement actions against national banks. (*See* OCC's Reply Mem at 10, n.9). It asserts, however, that section 3613 of the FHA, 42 U.S.C. § 3613, which provides a private right of action for aggrieved persons, "by its terms contains no authorization" for the Attorney General's actions. (*See id.*, at 10, n. 8). The OCC also notes that the Attorney General is not certified to receive referrals pursuant to section 3610(f) of the FHA, 42 U.S.C. § 3610(f). (*Id.*).

the Court considers only the Attorney General's contention that the national policy expressed in the FHA mandates a reading of the National Bank Act that would permit him to enforce fair lending laws against national banks.[4]

II. Subject Matter Jurisdiction

This Court has jurisdiction over this dispute pursuant to 28 U.S.C. § 1331 because this action arises under the Supremacy Clause of the U.S. Constitution and the National Bank Act. *See Fleet Bank Nat'l Ass'n v. Burke,* 160 F.3d 883, 892-93 (2d Cir.1998); *see also First Union Nat'l Bank v. Burke,* 48 F.Supp.2d 132, 140 (D.Conn.1999). Because the OCC is part of the United States Department of Treasury, this Court also has jurisdiction pursuant to 28 U.S.C. § 1345, which provides federal jurisdiction over all actions commenced by an agency of the United States. 28 U.S.C. § 1345; *see also* 12 U.S.C. § 93(d); *Fed. Sav. & Loan Ins. Corp. v. Ticktin,* 490 U.S. 82, 85, 109 S.Ct. 1626, 104 L.Ed.2d 73 (1989).

III. The National Banking Statutory and Regulatory Scheme

National banks are created and governed by the National Bank Act, 12 U.S.C. §§ 21 *et seq.,* originally

4. The plaintiff in the related action seeks an injunction barring the Attorney General from proceeding with an action in his *parens patriae* capacity pursuant to the FHA, and accordingly, the issue is addressed there.

enacted in 1864. *See* Act of June 3, 1864, 38th Cong. ch. 106, 13 Stat. 99. The National Bank Act authorizes national banks to engage in various banking activities and "to exercise . . . all such incidental powers as shall be necessary to carry on the business of banking . . ." 12 U.S.C. § 24(Seventh). Additionally, Congress has expressly authorized national banks to engage in residential lending subject to restrictions and requirements prescribed by the OCC. 12 U.S.C. § 371(a).[5]

"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 v. Elmira Sav. Bank*, 161 U.S. 275, 283, 16 S.Ct. 502, 40 L.Ed. 700 (1896). They remain subject to state laws, but only insofar as those laws do not "prevent or significantly interfere with the national bank's exercise of its powers." *Barnett Bank of Marion County v. Nelson*, 517 U.S. 25, 33, 116 S.Ct. 1103, 134 L.Ed.2d 237 (1996). Moreover, in order to "prevent

5. Section 371(a) provides that "[a]ny national banking association may make, arrange, purchase or sell loans or extensions of credit secured by liens on interests on real estate, subject to section 1828(*o*) of this title and such restrictions and requirements as the Comptroller of the Currency may prescribe by regulation or order." 12 U.S.C. § 371(a). Section 1828(*o*) in turn directs federal banking regulators, including the OCC, to promulgate safety and soundness standards applicable to real estate lending. *See* 12 U.S.C. § 1828(*o*). The regulatory standards promulgated by the OCC governing national banks' real estate lending practices are set forth in 12 C.F.R. 34, Subpart D, Appendix A.

inconsistent or intrusive state regulation from impairing the national system," the National Bank Act specifically limits states' ability to exercise supervisory authority over national banks. *See Wachovia Bank, N.A. v. Burke,* 414 F.3d 305, 311-12 (2d Cir.2005) (citing 12 U.S.C. § 484(a)), *petition for cert. filed,* No. 05-431 (Sept. 30, 2005). In the provision at the center of this litigation-12 U.S.C. § 484(a)-the National Bank Act provides:

> 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 . . .

12 U.S.C. § 484(a) (referred to as "section 484"). Section 484 as currently codified remains substantially the same as it was when originally enacted 141 years ago. *See* Act of June 3, 1864, ch. 106, § 54, 13 Stat. 99, 116.[6]

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6. The Act of June 3, 1864 was designated the "National Bank Act" by Act of June 20, 1874, ch. 343, § 1, 18 Stat. 123, 123 (codified at 12 U.S.C. § 38). The visitorial powers provision was codified together with examination provisions at Section 5240 of the Revised Statutes of the United States in 1875. It has subsequently been recodified and amended, in 1913 and again most recently in 1982, when section 484(b) was added to provide a narrow exception allowing appropriate state officials to review a bank's records "solely to ensure compliance with applicable State unclaimed property or escheat laws." *See* 12 U.S.C. § 484(b); *see also* Garn-St. Germain Depository Institutions Act of 1982, 97 Pub.L. 320, § 412, 96 Stat. 1469, 1521 (1982).

Appendix B

The OCC is the federal agency entrusted with the "primary responsibility for surveillance of 'the business of banking' authorized by § 24 Seventh." *NationsBank of N.C., N.A. v. Variable Annuity Life Ins. Co.,* 513 U.S. 251, 256, 115 S.Ct. 810, 130 L.Ed.2d 740 (1995). The OCC has recently amended its regulation clarifying the scope of section 484's limitation on the exercise of visitorial powers over national banks and the meaning of the exception for those powers vested in the courts of justice. That OCC regulation is codified in the Code of Federal Regulations at 12 C.F.R. § 7.4000. In that regulation, the OCC defines "visitation" 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)(i)-(iv). The regulation construes section 484 of the National Bank Act as vesting the OCC with "exclusive visitorial authority with respect to the content and conduct of activities authorized for national banks under Federal law," unless federal law provides otherwise. 12 C.F.R. § 7.4000(a)(3). Finally, section 7.4000(b)(2) clarifies the "courts of justice" exception to section 484's general limitation on visitorial powers, explaining that:

> 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.

12 C.F.R. § 7.4000(b)(2).

As is evident by the plain terms of this regulation, the Attorney General's assertion of authority pursuant to state law to investigate and enforce national banks' compliance with federal or state laws regulating their conduct of residential mortgage lending-in the absence of any exception provided by federal law—is in direct conflict with section 484 as clarified by 12 C.F.R. § 7.4000(a). Section 7.4000(b)(2) prevents the Attorney General from invoking the courts of justice exception to enforce fair lending laws through judicial proceedings. Except insofar as he claims a right to proceed pursuant to the federal Fair Housing Act, the Attorney General does not dispute that 12 C.F.R. § 7.4000 would bar his investigation and threatened enforcement actions. The Attorney General does, however, assert that 12 C.F.R. § 7.4000 represents an impermissible construction of section 484, which, he claims, is to be accorded no deference by this Court.

IV. Discussion

Because the Attorney General challenges the OCC's interpretation of section 484 of the National Bank Act as reflected in 12 C.F.R. § 7.4000, a threshold question for the Court is whether the OCC's interpretation should be given deference—indeed, controlling weight—under

the familiar framework set forth by the U.S. Supreme Court some two decades ago in *Chevron U.S.A., Inc. v. Natural Resources Defense Council,* 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984), and known as the *Chevron* framework.

A. The *Chevron* Framework

Pursuant to the *Chevron* doctrine, if an implementing agency's regulations are challenged, a court must first inquire whether "the intent of Congress is clear" as to "the precise question at issue." *Chevron,* 467 U.S. at 842, 104 S.Ct. 2778. If Congress has spoken clearly, "that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Id.* at 842-43, 104 S.Ct. 2778. However, "if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Id.* at 843, 104 S.Ct. 2778. "If the administrator's reading fills a gap or defines a term in a way that is reasonable in light of the legislature's revealed design, we give the administrator's judgment 'controlling weight.' " *NationsBank,* 513 U.S. at 257, 115 S.Ct. 810 (quoting *Chevron,* 467 U.S. at 844, 104 S.Ct. 2778). As the Supreme Court has observed,

> It is settled that courts should give great weight to any reasonable construction of a regulatory statute adopted by the agency charged with the enforcement of that statute.

> The Comptroller of the Currency is charged with the enforcement of banking laws to an extent that warrants the invocation of this principle with respect to his deliberative conclusions as to the meaning of these laws.

Clarke v. Secs. Indus. Ass'n, 479 U.S. 388, 403-04, 107 S.Ct. 750, 93 L.Ed.2d 757 (1987) (quotations and citation omitted). When the OCC implements a provision of the National Bank Act "in accord with the legislature's intent," that interpretation is entitled to deference. *See NationsBank,* 513 U.S. at 259, 115 S.Ct. 810; *see also Wachovia,* 414 F.3d at 321. Accordingly, if there is ambiguity in section 484's reference to visitorial powers, or its courts of justice exception, this Court must "give great weight to any reasonable construction" of those terms by the OCC. *Clarke,* 479 U.S. at 403, 107 S.Ct. 750; *see also Wachovia,* 414 F.3d at 315.

B. No Clear Statement Is Required

As a preliminary matter, the Court addresses the Attorney General's contention that a clear statement of Congressional intent to preempt state visitorial power in the manner effected by 12 C.F.R. § 7.4000 is necessary in order to affirm the validity of that regulation. The Attorney General posits that this clear statement is necessary because the OCC's interpretation of section 484 interferes with the traditional state interest in enforcing its own laws, and in protecting its citizens from discriminatory conduct. A similar argument was raised in *Wachovia Bank, N.A. v. Burke,* 414 F.3d 305 (2d

Cir.2005), and rejected there by the U.S. Court of Appeals for the Second Circuit. For the reasons articulated in *Wachovia,* the argument is equally unavailing here.

Preemption, which finds its roots in the Supremacy Clause of the U.S. Constitution, generally occurs in one of three ways: where Congress expressly preempts state law; where Congress legislates so comprehensively as to occupy an entire field, leaving no room for state law; or where federal law conflicts with state law. *See Fid. Fed. Sav. & Loan Ass'n v. de da Cuesta,* 458 U.S. 141, 152-53, 102 S.Ct. 3014, 73 L.Ed.2d 664 (1982); *see also* U.S. Const. art. VI. cl. 2. "Federal regulations have no less pre-emptive effect than federal statutes," *de la Cuesta,* 458 U.S. at 153, 102 S.Ct. 3014, and "federal courts have recognized that the OCC may issue regulations with preemptive effect." *Wachovia,* 414 F.3d at 314. This case, just as *Wachovia,* involves an instance of "conflict preemption" that arises where " 'state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.' " *Wachovia,* 414 F.3d at 313-14 (quoting *de la Cuesta,* 458 U.S. at 153, 102 S.Ct. 3014). As the Supreme Court observed, " '[t]he 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, 102 S.Ct. 3014 (quoting *Free v. Bland,* 369 U.S. 663, 666, 82 S.Ct. 1089, 8 L.Ed.2d 180 (1962)).

Appendix B

In *Wachovia,* the Second Circuit expressly rejected a claim that a "clear statement" was necessary where OCC regulations purportedly infringed on an area of traditional state authority. The Second Circuit acknowledged that courts will typically apply a presumption against preemption in areas of traditional state authority, but explained that " '[t]he presumption against federal preemption disappears . . . in fields of regulation that have been substantially occupied by federal authority for an extended period of time. Regulation of federally chartered banks is one such area.' " *Wachovia,* 414 F.3d at 314 (quoting *Flagg v. Yonkers Sav. & Loan Ass'n,* 396 F.3d 178, 183 (2d Cir.2005), *cert. denied,* __ U.S. __, 126 S.Ct. 343, 163 L.Ed2d 55 (2005)); *see also Wells Fargo Bank N.A. v. Boutris,* 419 F.3d 949, 956-57 (9th Cir.2005). There is no distinguishing circumstance present here that warrants a departure from the approach the Second Circuit followed in *Wachovia* just a few months ago. Accordingly, here, as in *Wachovia,* the proper focus is "on the reasonableness of the OCC's exercise of its regulatory authority." 414 F.3d at 315.

The Attorney General contends that rather than giving deference to the OCC's own interpretation of section 484, a heightened degree of judicial skepticism should be applied because 12 C.F.R. § 7.4000 represents a jurisdictional "power-grab." (Def's Mem. of Law in Opp. to Pls.' Request for Declaratory and Injunctive Relief and in Support of Counterclaim, at 34). *Compare Natural Resources Defense Council v. Abraham,* 355 F.3d 179, 199 (2d Cir.2004) (critically viewing agency's

attempt to circumvent limitations placed on the exercise of its discretion) with *Oklahoma Natural Gas Co. v. FERC,* 28 F.3d 1281, 1283-84 (D.C.Cir.1994) (affording *Chevron* deference to regulation over objections that it improperly expanded the agency's jurisdiction). That argument fails as well. Here, the OCC has interpreted undefined terms in its organic statute in order to clarify existing ambiguity and provide certainty to affected parties. This Court can find no valid basis for distinguishing between the effect on the OCC's jurisdictional reach resulting from the amendments to 12 C.F.R. § 7.4000 and that arising from the related operating subsidiary regulations recently affirmed by the Second Circuit in *Wachovia. Wachovia,* 414 F.3d at 321.[7] Because there is no basis for departing from the traditional *Chevron* framework, the Court now proceeds with that analysis.

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7. In response to proposed amendments preceding the OCC's adoption of the operating subsidiary regulations at issue in *Wachovia,* the OCC received comments opposing its assertion of exclusive authority over those banks, similar to comments received in opposition to the 2004 amendments to 12 C.F.R. § 7.4000. *See e.g.,* Bank Activities and Operations, 69 Fed.Reg. 1895, 1896, 1903 (Jan 13, 2004) (announcing final rule amending visitorial powers provision); Investment Securities; Bank Activities and Operations; Leasing, 66 Fed.Reg. 34,791, 34,788 (July 2, 2001) (announcing final rule providing that operating subsidiaries are subject to state laws to the same extent as national banks).

C. Congress Has Not Unambiguously Addressed the Precise Questions at Issue

The Court now turns to step one of the *Chevron* framework: determining whether Congress has addressed the "precise question[s] at issue." *Chevron,* 467 U.S. at 842, 104 S.Ct. 2778. In making this determination, a court employs the "traditional tools of statutory construction." *Chevron,* 467 U.S. at 842-43, n. 9, 104 S.Ct. 2778. In this analysis, "a reviewing court should not confine itself to examining a particular statutory provision in isolation. The meaning-or ambiguity—of certain words or phrases may only become evident when placed in context." *Food and Drug Admin. v. Brown & Williamson Tobacco Corp.,* 529 U.S. 120, 132-133, 120 S.Ct. 1291, 146 L.Ed.2d 121 (2000).

The precise questions at issue here are (1) whether through section 484's limitation on visitorial powers, Congress intended to preclude state officials from enforcing non-preempted state laws that regulate the conduct of a national bank's federally authorized banking activities; and (2) whether the courts of justice exception was intended to permit state officials to utilize the courts to exercise otherwise prohibited visitorial power over national banks. Although section 484 plainly confines the exercise of visitorial authority over national banks to that authorized by federal law, and other provisions in the National Bank Act vest the OCC with the primary supervisory authority over national banks, nowhere does the Act precisely define the scope of the OCC's exclusive visitorial powers or the reach of the

courts of justice exception. *See e.g.,* 12 U.S.C. §§ 93a, 481, 484 and 1818.

The Attorney General raises two central arguments as to why the statute unambiguously contravenes the OCC's interpretation as reflected in 12 C.F.R. § 7.4000; the first is based on the text of the original visitorial powers provision, and the second on his reading of the Supreme Court's decision in *First National Bank in St. Louis v. Missouri,* 263 U.S. 640, 44 S.Ct. 213, 68 L.Ed. 486 (1924). The Court addresses each in turn.

1. The Statutory Text Does Not Unambiguously Contravene the OCC's Construction of Section 484

The Attorney General asserts that when section 484 is read in context, it is evident that Congress intended that the limitation on visitorial powers would encompass only direct supervisory authority aimed at ensuring the safety and soundness of national banks, and that Congress did not intend to preclude state law enforcement officials from enforcing general state laws that were applicable to national banks.

The Attorney General begins with the word "other" as used in the original visitorial powers provision, which provided that the 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." Act of June 3, 1864, ch. 106, § 54, 13 Stat. at 116 (emphasis added). He contends that

the reference to "other" visitorial powers refers only to those powers granted to the OCC in the immediately preceding sentences of the original Act, including the powers to examine the affairs of banking associations; to examine their officers and agents; and to make full and detailed reports of the associations' condition. The Attorney General notes that consistent with the original statute, the language of section 484 has been altered only slightly and remains in a subchapter of the National Bank Act entitled, "Bank Examinations." *See* Subchapter XV, Title 12 of the U.S.Code. The surrounding sections of the subchapter cover specific bank examination matters, including appointment and payment of examiners, special examinations and waivers of examination requirements. 12 U.S.C. §§ 481-483, 485-486. Thus, the Attorney General insists that the limitation on visitorial powers is intended to limit state *administrative* officials from directly supervising national banks, and is not intended to preclude state officials from enforcing generally applicable state laws, particularly through actions in the courts.

The visitorial powers provision as originally enacted, however, refers not simply to visitorial powers "other" than the ones in the same section, but to visitorial powers "other" than those authorized by "this act." *See* Act of June 3, 1864, ch. 106, at § 54. The Attorney General's statutory reading ignores a provision in the original Act vesting the OCC with the authority to exercise visitorial powers by bringing judicial proceedings in the courts. *See* Act of June 3, 1864, ch. 106, § 53, 13 Stat. 110; *see also* 12 U.S.C. § 93(a). Moreover, section 484 in its

current form contains no reference to nearby provisions or to any other specific provisions in the National Bank Act, but states rather simply that "[n]o national bank shall be subject to any visitorial powers except as authorized by Federal law, [or] vested in the courts of justice," or those exercised or directed by Congress. 12 U.S.C. § 484(a). Thus, the Court does not find any clear intent of Congress reflected in either the original visitorial powers provision, or in its current form, to refer only to direct supervision and regulation by administrative officials of laws directly touching on concerns about the safety and soundness of the banks.

The Attorney General also posits that the exception for those powers "vested in the courts of justice" speaks for itself, unambiguously permitting state officials to bring enforcement actions in the courts to enforce applicable state or federal laws. Here again, the Court disagrees. Nothing in the text of section 484 or the surrounding provisions indicates that Congress intended the courts of justice exception to preserve the ability of states to enforce laws regulating national banks' activities by instituting judicial proceedings. The statute therefore neither unambiguously requires that the general law enforcement officials of states be permitted to enforce state laws regulating the business of banking, nor unambiguously permits states to bring judicial actions to enforce such laws pursuant to the courts of justice exception.

2. *First National Bank in St. Louis v. Missouri* Does Not Preclude the OCC's Assertion of Exclusive Authority to Enforce State Laws Regulating National Banks' Authorized Banking Activities

The Attorney General asserts that in *First National Bank in St. Louis v. Missouri,* 263 U.S. 640, 44 S.Ct. 213, 68 L.Ed. 486 (1924), the U.S. Supreme Court conclusively established that states could sue national banks to enforce non-preempted state laws. However, the Attorney General overstates the holding of *St. Louis* as applied in the current context of national banking regulation.

The first question addressed in *St. Louis* was whether the National Bank Act permitted national banks to create intrastate branches, and the Court held that it did not. 263 U.S. at 658-59, 44 S.Ct. 213. Because federal law did not permit branches, the Court concluded that a Missouri law prohibiting branches was not preempted and could be enforced against national banks. *Id.* at 659, 44 S.Ct. 213. The Court also reasoned that because the Missouri law applied, to deny the state the ability to enforce it would involve "a fallacy made apparent by the mere statement of the proposition, for such power is essentially inherent in the very conception of law." *Id.* at 660, 44 S.Ct. 213. It further observed that ". . . since the sanction behind [the anti-branching law] is that of the State and not that of the National Government, the power of enforcement must rest with the former and not with the latter." *Id.* In concluding

that the state could enforce its own law, the Court did not limit its holding to the type of enforcement action in that case—a *quo warranto* action to determine the applicability of the state law and to prohibit the bank from violating it—but stated that "the power of the State to enforce [the state law] being established, the nature of the remedy to be employed is a question for state determination." *Id.* at 660-61, 44 S.Ct. 213. Seizing on the *St. Louis* Court's recognition that the state was the only proper party with the authority to enforce the applicable state law, the Attorney General insists that *St. Louis* conclusively held that section 5241 of the Revised Statutes, the predecessor to section 484, could not limit states' ability to enforce their own non-preempted laws against national banks.

In *St. Louis,* the national bank was acting entirely outside the powers granted by federal law and engaging in an activity prohibited by a state law. *See id.* at 659-60, 44 S.Ct. 213. At that time, the OCC had no clear authority to enforce national banks' compliance with applicable state banking laws. The Court recognized that although states generally were precluded from exercising authority over national banks, to fill a gap in the law, the state must be permitted to enforce its own law against national banks. *Id.* at 660-61, 44 S.Ct. 213. Those circumstances do not exist here.

First, residential mortgage lending is an activity expressly authorized by the federal banking laws, and a national bank's lending activity is regulated and supervised by the OCC. *See* 12 U.S.C. § 371(a). Unlike

Missouri's anti-branching law, New York's anti-discrimination law does not purport to prohibit national banks from engaging in residential mortgage lending, but rather regulates the conduct of that federally authorized banking activity. Second, in *St. Louis,* there was no federal enforcement mechanism in place; only the state possessed the authority to enforce the state's anti-branching law. In contrast, here, not only does the state's anti-discrimination law contemplate enforcement by private individuals in private enforcement actions, *see* McKinney's Exec. Law §§ 296-a, 297, but it is also enforceable by the OCC, which since 1966 has had the authority to compel national banks' compliance with any applicable law regulating the business of banking, state or federal. *See* 12 U.S.C. §§ 1818(b), (e) and (i)(2), Pub.L. 89-695, section 202, 80 Stat. 1028 (Oct. 16, 1966); *see also National State Bank, Elizabeth, N.J. v. Long,* 630 F.2d 981, 988 (3d Cir.1980).

The Attorney General asserts that references to section 5241 in the summaries of arguments provided in the syllabus in front of the actual published decision of the Supreme Court in *St. Louis* warrant the conclusion that the Supreme Court, *sub silentio,* conclusively decided that section 484's limitation on visitorial powers unambiguously excludes from its reach a state's authority to enforce its own non-preempted laws that regulate the conduct of a national bank's federally authorized banking activity. But the actual opinion of *St. Louis* did not mention nor cite section

5241 of the Revised Statutes, making the Attorney General's sweeping assertion about its importance untenable.[8]

More recent cases from the U.S. Courts of Appeals from the Third and Ninth Circuits support this Court's conclusion that *St. Louis* does not foreclose the OCC from interpreting section 484's limitation on visitorial powers to encompass state efforts to enforce non-preempted state laws that regulate the business of banking. In 1980, the U.S. Court of Appeals for the Third Circuit considered the OCC's current construction of section 484 as limiting states' ability to enforce state

8. The OCC insists that even if *St. Louis* reached a conclusion regarding the scope of states' proper exercise of visitorial powers that differs from the OCC's current construction, it would not foreclose the OCC's new interpretation because *St. Louis* did not rest on the "unambiguous terms of the statute." *See National Cable & Telecommunications Ass'n v. Brand X Internet Services*, __ U.S. __, 125 S.Ct. 2688, 2700, 162 L.Ed.2d 820 (2005) ("Only a judicial precedent holding that the statute unambiguously forecloses the agency's interpretation, and therefore contains no gap for the agency to fill, displaces a conflicting agency construction."). Because *St. Louis* is best understood in light of the statutory framework in place at the time and involved a gap in the law that no longer exists, it does not necessarily stand in conflict with the OCC's interpretation of section 484. To the extent *St. Louis* is inconsistent with the OCC's modern interpretation of section 484, pursuant to the principle recognized in *Brand X,* the OCC is not foreclosed from reinterpreting the provision in light of changed circumstances or from clarifying its application in the different situation present here. *See Brand X,* 125 S.Ct. at 2700.

laws, even when those laws are not substantively preempted by the federal banking laws. *See National State Bank, Elizabeth, N.J. v. Long,* 630 F.2d 981, 987-88 (3d Cir.1980).

Long held that while substantive provisions of a New Jersey anti-redlining statute were not preempted by federal banking laws, provisions of the statute requiring banks to compile and disclose statistical information and authorizing the state banking commissioner to investigate, issue subpoenas and cease and desist orders and impose penalties were preempted by section 484. *Id.* The court recognized that "when state law prohibits the practice of redlining, its enforcement so directly implicates concerns in the banking field that the appropriate federal regulatory agency has jurisdiction." *Id.* at 988. The Third Circuit also observed that permitting state enforcement of the statute "would result in unnecessary and wasteful duplication of effort on the part of the bank and the state agency. From that standpoint enforcement exclusivity in the federal agency is reasonable and practical." *Id.* Accordingly, the court explained that "[q]uestions about the applicability of state legislation to national banks must be distinguished from the related inquiry of who is responsible for enforcing national bank compliance." *Id.* at 987-88.

Although the Third Circuit suggested that the question of "just what 'visitorial' powers include" remained unclear, it concluded that the OCC's interpretation that it had the exclusive power to

examine national banks' compliance with state law was "a reasonable interpretation of the National Bank Act." *Long,* 630 F.2d at 989. After *Long,* another court in this district captured this principle, noting that in the context of the dual banking system of national and state banks, "when the states seek to enact laws affecting national banks, they do so subject to the enforcement limitation imposed by Congress for the purpose of protecting against a state's use of its legislative authority to restrict, limit or otherwise penalize national banks." *First Union Nat'l Bank v. Burke,* 48 F.Supp.2d 132, 148-49 (D.Conn.1999).[9]

In August of this year, the U.S. Court of Appeals for the Ninth Circuit similarly found the distinction between "procedural" and "substantive" preemption to be a reasonable one. *See Wells Fargo Bank N.A. v. Boutris,* 419 F.3d 949, 963-64 (9th Cir.2005) (characterizing the preemptive effect of section 484 as "entirely procedural, not substantive"). In *Wells Fargo,* the Ninth Circuit agreed with the OCC that California's banking commissioner could not exercise authority

9. As discussed in section IV(G), *infra, First Union,* in *dicta,* drew a distinction between administrative and judicial enforcement concluding that states could bring judicial enforcement actions pursuant to section 484's courts of justice exception. The OCC has since reconsidered the proper application of the courts of justice exception, concluding that the distinction drawn in *First Union* contravenes the purposes of the visitorial powers provision. *See* 48 F.Supp.2d at 151; *see also* Bank Activities and Operations, 69 Fed.Reg. 1895, 1900 (Jan. 13, 2004).

granted by state law to conduct or require audits of national bank operating subsidiaries because that assertion of authority is a form of prohibited visitorial power. *Wells Fargo,* 419 F.3d at 963-64. The Ninth Circuit observed that although national banks are not governed exclusively by federal laws in their banking business, "[o]ne area of authority over national banks that has historically been the exclusive province of the federal government . . . is the 'visitorial' power." *Id.* The court explained that "[t]he exclusively federal power to 'visit' national banks is not the power to oust all state regulation of those entities. Instead, the exclusivity of visitorial authority preempts only *enforcement* of state visitation laws by *state officials,* subject to the exceptions stated in § 484(a) itself." *Id.* (emphasis in original) (citing, *inter alia, Nat'l State Bank, Elizabeth, N.J. v. Long,* 630 F.2d 981, 989 (3d Cir.1980)).

To counter the weight of *Long,* the Attorney General cites several cases that he contends either explicitly or implicitly recognize the right of states to enforce their non-preempted laws against national banks. Each of these cases are inapposite, however as some involve private plaintiffs who do not themselves possess any visitorial authority, *see e.g., Guthrie v. Harkness,* 199 U.S. 148, 154-55, 26 S.Ct. 4, 50 L.Ed. 130 (1905); others do not implicate the authorized banking activities of national banks, either because information is sought from national banks in furtherance of investigations into other parties, *see e.g., Bank of Am. Nat'l Trust & Sav. Ass'n v. Douglas,* 105 F.2d 100, 106 (D.C.Cir.1939), or because the state laws enforced were not ones

regulating the content or conduct of federally authorized banking activities. *See e.g., State of Minnesota v. Fleet Mortgage Corp.,* 158 F.Supp.2d 962, 966 (D.Minn.2001). Cases that did involve state enforcement of banking related laws did not directly address the visitorial powers provision. *See e.g., Brown v. Clarke,* 878 F.2d 627 (2d Cir.1989); *New York v. Citibank,* 537 F.Supp. 1192 (S.D.N.Y.1982).

In sum, because Congress has not specifically addressed the precise questions at issue, and because judicial precedent does not foreclose the OCC's construction of section 484, the Court must give deference to the OCC's reasonable construction of those terms. *Chevron,* 467 U.S. at 843, 104 S.Ct. 2778. As explained below, the Court finds that 12 C.F.R. § 7.4000 reflects such a reasonable interpretation.

The Attorney General raises two additional bases for declining to give deference to the OCC's construction of section 484 that the Court now addresses: first, the OCC purportedly acted outside its statutory authority in promulgating 12 C.F.R. § 7.4000 and thus is entitled to no deference; and second, because the OCC merely attempted to distill the meaning of statutory terms and judicial precedent rather than applying agency expertise, there is no basis for applying the traditional *Chevron* deference. Neither assertion provides a basis for denying the deference the OCC is due, but the Court turns now to each.

D. The OCC Acted Within Its Authority In Promulgating 12 C.F.R. § 7.4000

The Attorney General contends that the OCC acted outside its statutory authority when it promulgated 12 C.F.R. § 7.4000 because that regulation is not expressly and directly addressed to safety and soundness concerns. This cabined reading of the OCC's regulatory authority does not comport with the terms of 12 U.S.C. § 93a, which provides in relevant part, "[e]xcept 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 . . ." The Ninth Circuit recently characterized this provision as a "conferral of regulatory authority [that] is as broad as the OCC's statutory responsibilities, defined piecemeal throughout the Bank Act." *Wells Fargo,* 419 F.3d at 958 (citing provisions of the National Bank Act); *Wachovia,* 414 F.3d at 318 (sustaining OCC authority to promulgate regulations applying 12 C.F.R. § 7.4000 to national bank operating subsidiaries). As is apparent from its terms, section 93a clearly encompasses the authority to clarify ambiguous terms in section 484. 12 U.S.C. § 93a; *see also Wells Fargo,* 419 F.3d at 958.

E. Section 7.4000 Does Not Represent Merely the OCC's Attempt to Distill Statutory Terms and Judicial Precedent.

The Attorney General next contends that deference should not be afforded the OCC's regulation interpreting section 484 of the National Bank Act because the regulation represents merely the OCC's attempt at distilling statutory terms and judicial precedent. A similar argument was made in *Wachovia,* challenging the application of *Chevron* deference to 12 C.F.R. § 7.4006, the OCC's regulation clarifying that national banks' operating subsidiaries are subject to state laws to the same extent as national banks. *See Wachovia,* 414 F.3d at 319-20. The OCC had characterized section 7.4006 as clarifying that preemption of state laws as applied to operating subsidiaries "already existed based on the combination of federal statutes and preexisting regulations." *Id.* at 320 (internal citation omitted). Upon a review of the OCC's discussion of its reasons for promulgating the regulation, however, the Second Circuit was satisfied that the regulation, "at its core, reflects a policy judgment about national banks' use of operating subsidiaries," and therefore accorded it the deference it was due. *Id.* A similar analysis of the rulemaking record behind the 1999 and 2004 amendments to section 7.4000 reveals that here too, the OCC's construction of the statutory text was informed by its experience as the national banks' primary regulator.

Appendix B

The OCC's discussion in the Federal Register of its reasons behind the 1999 and 2004 amendments to 12 C.F.R. § 7.4000 does include a comprehensive review of the history of the visitorial powers provision, the context in which the national banking system originated, and relevant judicial precedent. At the same time, however, the discussion indicates that the OCC's response to questions regarding the proper application of section 484 was informed by its experience acting as the sole supervisor of the banking activities of national banks in a dual banking system. *See e.g.,* Banking Activities and Operations 69 Fed.Reg. 1895, 1896 (Jan. 13, 2004) (explaining need to clarify terms in section 484 "in order to provide greater certainty to affected parties . . ." and in a manner reflecting Congressional intent to create a uniform system of regulation over national banks subject to exclusive visitorial authority except where otherwise authorized by federal law). The terms of the statute engendered sufficient ambiguity that the OCC felt the need to clarify their application, and particularly in the context of states' use of the courts of justice exception as a means of exercising otherwise prohibited visitorial powers. *See* Rules, Policies, and Procedures for Corporate Activities; Bank Activities and Operations; Real Estate Lending and Appraisals, 68 Fed.Reg. 6363, 6367 (Feb. 7, 2003). In setting forth its proposed amendments, the OCC described the history and purpose of the National Bank Act as well as relevant judicial precedent in order to "present the [ ] proposed changes in context." *Id.* The OCC's "interpretation and extrapolation" of the scope of the visitorial powers provision and its exceptions "is precisely the type of

interpretation with which an administrative agency is charged." *Wachovia Bank, N.A. v. Burke,* 319 F.Supp.2d 275, 282 (D.Conn.2004) *aff'd in part and vacated on other grounds,* 414 F.3d 305 (2d Cir.2005). Under *Chevron,* its reasonable application of that expertise and experience is entitled to deference.

F. Section 7.4000 Reflects a Permissible Construction of the Statute

Where, as here, Congress has not addressed the precise questions at issue, and has delegated authority to the OCC to fill in gaps in the National Bank Act, the Court must determine, pursuant to step two of *Chevron,* whether the OCC's regulation "harmonizes with the language, origins, and purpose of the statute." *Coke v. Long Island Care at Home, Ltd.,* 376 F.3d 118, 128 (2d Cir.2004). If the regulation reflects a permissible construction of the statute that is not contravened by its text or Congressional intent, it must be given " 'controlling weight.' " *NationsBank,* 513 U.S. at 257, 115 S.Ct. 810; *see also Wachovia,* 414 F.3d at 321.

The OCC's regulation implementing section 484 was first codified as 12 C.F.R. § 7.6025 in 1971, and has been revised a number of times and renumbered to its current codification at 12 C.F.R. § 7.4000. *See* 36 Fed.Reg. 17000, 17013 (Aug. 26, 1971) (adopting 12 C.F.R. § 7.6025(b)).[10]

10. *See also* 60 Fed.Reg. 11924 (Mar. 3, 1995) (notice of proposed rule); 61 Fed.Reg. 4849, 4869 (Feb. 9, 1996) (final rule); 64 Fed.Reg. 31749 (June 14, 1999) (notice of proposed rule); 64 (Cont'd)

Appendix B

In recent amendments promulgated in 1999 and 2004, the OCC has extrapolated on the proper understanding of "visitorial powers" and the courts of justice exception.

In 1999, the OCC proposed amendments to section 7.4000 in order "to clarify the extent of the OCC's visitorial powers under 12 U.S.C. § 484 . . ." *See* Investment Securities; Rules, Policies, and Procedures for Corporate Activities; and Interpretive Rulings, 64 Fed.Reg. 31749, 31751 (June 14, 1999). The 1999 amendments codified the definition of "visitorial powers" and illustrated the meaning of the term by including a "non-exclusive list" of the OCC's visitorial powers, including: "(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." *See* 12 C.F.R. § 7.4000(a)(2)(i)-(iv) (as amended in 1999); Investment Securities; Rules, Policies, and Procedures for Corporate Activities; Bank Activities and Operations, 64 Fed.Reg. 60092, 60099, 60100 (Nov. 4, 1999) (announcing final rule).

In its February 7, 2003 Notice of Proposed Rulemaking, the OCC acknowledged that questions had

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Fed.Reg. 60092, 60099 (Nov. 4, 1999) (final rule); 68 Fed.Reg. 6363 (Feb. 7, 2003) (notice of proposed rule); 69 Fed.Reg. 1895, 1904 (Jan. 13, 2004) (final rule).

arisen regarding the scope of the OCC's visitorial authority over national banks, specifically questions regarding "what activities conducted by a national bank are subject to the OCC's exclusive visitorial powers" and the meaning of the "vested in the courts of justice exception." *See* Rules, Policies, and Procedures for Corporate Activities; Bank Activities and Operations; Real Estate Lending and Appraisals, 68 Fed.Reg. 6363, 6367 (Feb. 7, 2003). The OCC again proposed revisions to clarify the scope of its exclusive visitorial powers and in its final rule issued in 2004 clarified that, "[u]nless 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." 12 C.F.R. § 7.4000(a)(3) (as amended in 2004); *see also* Bank Activities and Operations, 69 Fed.Reg. 1895, 1904 (Jan. 13, 2004) (announcing final rule). The 2004 amendments also clarified that the courts of justice exception does not permit state officials to exercise otherwise prohibited visitorial powers through the courts. 12 C.F.R. § 7.4000(b)(2) (as amended in 2004); *see also* 69 Fed.Reg. at 1904.

The Court first turns to the OCC's construction of the scope of the visitorial powers limitation: whether the OCC reasonably concluded that section 484 bars states from enforcing non-preempted state laws that regulate the content and conduct of federally authorized banking activities. Second, the Court addresses whether the OCC's construction of the courts of justice exception is permissible.

Appendix B

1. The OCC's Interpretation of "Visitation" is Consistent with the Historical Understanding of that Term

The Supreme Court provided an early explication of the term "visitation" in *Guthrie v. Harkness,* 199 U.S. 148, 156-57, 26 S.Ct. 4, 50 L.Ed. 130 (1905), in which the Court found a private shareholder's action demanding access to a national banks' books and records was not barred by the National Bank Act's visitorial powers provision, then codified at section 5241 of the Revised Statutes. The Court reviewed definitions of the term "visitation," noting that visitation refers to "the act of examining into the affairs of a corporation," and 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." *Id.* at 157-58, 26 S.Ct. 4 (internal quotations and citations omitted). At common law, visitation was understood as a right "exercised by the King as to civil corporations, and as to eleemosynary ones, by the founder or donor." *Id.* at 158, 26 S.Ct. 4. Correspondingly, "[i]n the United States, the legislature is the visitor of all corporations founded by it for public purposes" *Id.; see also Trustees of Dartmouth College v. Woodward,* 17 U.S. (4 Wheat.) 518, 673-76, 4 L.Ed. 629 (1819) (Story, J., concurring) (explaining visitation at common law).

"Visitation, in law," was defined in *First National Bank of Youngstown v. Hughes,* 6 F. 737, 740 (1881), *appeal dismissed,* 106 U.S. 523, 1 S.Ct. 489, 27 L.Ed.

268 (1883), as "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 . . . . [meaning] 'inspection; superintendence; direction; regulation.' " *See* 6 F. at 740-41 (cited in *Guthrie,* 199 U.S. at 158, 26 S.Ct. 4); *see also Peoples Bank v. Williams,* 449 F.Supp. 254, 259 (W.D.Va.1978).

Guthrie and *Hughes* highlight two important distinctions in understanding the nature of visitorial power. In *Guthrie,* the Supreme Court explained that visitation did not include the private right of one of the bank's shareholders to examine the business affairs of the bank as a shareholder; but rather is "a *public right, existing in the state* for the purpose of examining into the conduct of the corporation with a view to keeping it within its legal powers." *Guthrie,* 199 U.S. at 158-59, 26 S.Ct. 4. In *Hughes,* a county auditor sought information from a national bank regarding its depositors in the course of his investigation into the depositors' personal tax liabilities. *See Hughes,* 6 F. at 738-39. The court concluded that the auditor's investigation did not constitute visitation for purposes of section 5241 because the auditor did not seek to investigate or supervise *the bank,* but rather sought information from the bank in furtherance of his investigation of individuals' tax liabilities. *See id.* at 740-41.

Each of these distinctions is reflected in the OCC's construction of section 484's limitation on states' visitorial powers. The OCC's regulation bars states, not

private parties, from enforcing laws against national banks, and it bars states from enforcing only those laws regulating the content and conduct of federally authorized banking activities against national banks. *See* 12 C.F.R. § 7.4000.

Guthrie also recognized that in providing in section 5241 that national banks would be free from the exercise of visitorial powers except as specifically provided otherwise,

> Congress had in mind . . . that in other sections of the law it had made full and complete provision for investigation by the Comptroller of the Currency and examiners appointed by him . . . It was the intention that this statute should contain a full code of provisions upon the subject, and that no state law or enactment should undertake to exercise the right of visitation over a national corporation. 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.

Id. at 159, 26 S.Ct. 4. Consistent with this historical understanding of the nature of visitation, the OCC reasonably defines section 484's limitation on visitorial powers in a manner that encompasses any attempt by states to supervise national banks' compliance with laws governing the conduct of federally authorized banking activities, whether directly or through the courts.

2. Section 7.4000 Interprets Visitorial Powers in a Manner Consistent With the Purposes Animating the Enactment of the National Bank Act

The Act of June 3, 1864 provided for the organization of a system of national banking associations, subject to the supervisory authority of the Comptroller of the Currency, and established a uniform and secure national currency that could help stabilize and support the post-Civil War national economy. *See* Act of June 3, 1864, ch. 106 §§ 1, 54, 13 Stat. 99, 99, 116; *see also Tiffany v. Nat'l Bank of the State of Missouri,* 85 U.S. (18 Wall.) 409, 413, 21 L.Ed. 862 (1873).

The creation of this national banking system had followed a period during which state chartered banks proliferated, each issuing its own currency and operating in the absence of any federal regulation; in the wake of the Civil War, Congress recognized the urgent need for a uniform currency, and it was in this context that Congress enacted the National Currency Act of 1863, which designated the Comptroller of the Currency as the single authority responsible for approving federal charters and regulating all matters relating to the new national currency. *See* Act of Feb. 25, 1863, ch. 58, § 1, 12 Stat. 665, 665; *see also* Cong. Globe, 37th Cong., 3rd Sess. 844 (Feb. 10, 1863) (remarks of Sen. Sherman). The following year, Congress passed the Act of June 3, 1864-the National Bank Act-repealing and replacing the National Currency Act. *See* Act of June 3, 1864, ch. 106, § 62, 13 Stat. 99. The Act of 1864 included provisions

comprehensively regulating the new national banking associations, providing for reserve requirements; placing limitations on interest rates; and providing for regular examinations by the OCC. *See e.g.,* Act of June 3, 1864, ch. 106, §§ 30, 31, 44, 54, 13 Stat. at 108, 112-13, 116.

Essential to the effort of creating a uniform national currency, was creating a system of national banks that would operate according to federal law and supervision, and without the intrusion of potentially unfriendly state regulation. *See Easton v. Iowa,* 188 U.S. 220, 229-230, 23 S.Ct. 288, 47 L.Ed. 452 (1903); *see also* Cong. Globe, 38th Cong., 1st Sess. 1893 (1864) (remarks of Sen. Sumner) (recounting the constitutional principles announced in *M'Culloch v. Maryland,* 17 U.S. (4 Wheat.) 316, 4 L.Ed. 579 (1819), and insisting that the new national banking system "must not be subjected to any local government, State or municipal; it must be kept absolutely and exclusively under that Government from which it derives its function"). Although Congress did not entirely preempt state regulation of banking, it limited the exercise of visitorial powers over national banks to those it vested in the OCC, and those vested in the courts. *See* Act of June 3, 1864, ch. 106, § 54, 13 Stat. at 116 (codified at 12 U.S.C. § 484).

The OCC drew on this history in its recent clarification of the scope of visitorial powers and the exceptions to its exclusive visitorial authority created by Congress. *See* 69 Fed.Reg. 1895, at 1898. The OCC has read section 484's limitation on visitorial powers in

light of the basic objectives of the National Bank Act: to create a uniform system of national banks, comprehensively and exclusively regulated by federal law. The available legislative history does not contravene the OCC's conclusion that even as states are free to enact legislation substantively governing national banks' banking activity, the enforcement of those laws is properly vested in the OCC, not in state officials. *See Coke,* 376 F.3d at 127.

This view of the scope of the OCC's exclusive visitorial authority also finds support in a more recently enacted federal banking law, the Riegle Neal Interstate Banking and Branch Efficiency Act of 1994 (the "Riegle Neal Act").

The Riegle-Neal Act, 12 U.S.C. §§ 36, *et seq.*, amended federal banking laws to permit interstate branches 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" to the same extent as such state laws apply to state branch banks, except where preempted by federal law or where state laws discriminate against national banks' branches. 12 U.S.C. §§ 36(f)(1)(A), (A)(i), and (A)(ii). 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).

The OCC views this grant of authority to itself rather than to relevant state officials as evidence that its construction of section 484 is in line with Congressional intent to retain exclusive supervisory authority in the OCC even as states are permitted to enact laws substantively regulating banking activities. The Attorney General responds by citing legislative history reflecting Congressional intent that the Riegle-Neal Act not be read as altering the balance of federal and state power over national banks' branching activity.[11] But broadly worded concerns about the balance of federal and state power do not defeat the clear import of 12 U.S.C. § 36(f)(1)(B), which vests in the OCC—not the host states—the power to enforce the applicable

11. *See* H.R. Conf. Rep. No. 103-651, at 53 (1994), *reprinted in* 1994 U.S.C.C.A.N. 2068, 2074 ("States have a strong interest in the activities and operations of depository institutions doing business within their jurisdictions, regardless of the type of charter an institution holds. In particular, States have a legitimate interest in protecting the rights of their consumers, businesses, and communities. Federal banking agencies . . . play an important role in maintaining the balance of Federal and State law under the dual banking system. Congress does not intend that the Interstate Banking and Branching Efficiency Act of 1994 alter this balance and thereby weaken States' authority to protect the interests of their consumers, businesses, or communities."). Congress addressed the substantive preemption issue in a separate provision, specifically stating that the standards for preemption of a state law were not altered by the Act. *See* 12 U.S.C. § 36(f)(3). The Act also includes a provision requiring the OCC to report to Congress annually regarding its actions taken in regard to the applicability of state laws. *See* 12 U.S.C. § 36(f)(1)(C).

state laws. By dealing separately with the applicability of state law and the authority to enforce that law, Congress did not alter the balance of state authority over national banks, but rather applied to national banks' interstate branches the same limitations on state visitorial powers as are applicable to national banks themselves. Thus, this Court agrees with the conclusion of the district court in *First Union* that "[t]he OCC's view of its exclusive administrative enforcement authority for all banking laws, state and federal is consistent with 12 U.S.C. § 36(f)." *First Union,* 48 F.Supp.2d at 146.

3. National Fair Lending Policy as Expressed in the Fair Housing Act Does Not Require a Narrower Interpretation of the OCC's Exclusive Visitorial Powers

The Attorney General contends that section 484 must be construed in *para materia* with the federal Fair Housing Act (the "FHA") so as not to undermine Congress' intent to advance the national policy of fair lending by permitting multiple layers of enforcement at federal, state and local levels. It is true that the meaning of terms in a broadly worded statute may be narrowed by subsequent acts of Congress "where the scope of the earlier statute is broad but the subsequent statutes more specifically address the topic at hand." *See Brown & Williamson,* 529 U.S. at 143, 120 S.Ct. 1291; *see also Cal. Pub. Employees Ret. Sys. v. WorldCom, Inc.,* 368 F.3d 86, 100 (2d Cir.2004), *cert. denied,* 543 U.S. 1080, 125 S.Ct. 862, 160 L.Ed.2d 824 (2005). In fact, both

parties invoke that principle here. A consideration of the several enforcement provisions in the FHA, however, supports the OCC's argument that Congress did not intend to impliedly alter the application of section 484 in the fair lending context.

While the FHA specifically prohibits discrimination in lending, the Act is not limited to lending practices; rather, it much more broadly aims at eliminating discrimination in housing. *See* 42 U.S.C. §§ 3601, 3604-3606. As elucidated in the *amicus curiae* brief of the American Bankers Association, *et al.*, there is no indication that Congress either expressly or implicitly intended the FHA's several enforcement mechanisms to override the National Bank Act's specific limitation on the exercise of visitorial powers over national banks. In fact, while the FHA specifically directs the various federal banking regulators, including the OCC, to cooperate with the Secretary of Housing and Urban Development and the United States Attorney General to enforce its provisions, *see* 42 U.S.C. § 3608(d), none of the various enforcement provisions expressly grants state Attorneys General the power to enforce the law. *See* 42 U.S.C. §§ 3610, 3613 and 3614. Because Congress explicitly addressed the applicability of the FHA to federal banking institutions but did not expressly create an exception to section 484's limitations for state Attorneys General, the Court will not presume that Congress intended to implicitly modify the longstanding limitation on the exercise of visitorial authority over national banks.

In sum, the OCC's construction of section 484 as limiting states' authority to enforce state laws regulating the content or conduct of federally authorized banking activities even where those state laws are not substantively preempted, is a reasonable and permissible construction of the statute and is therefore entitled to deference. *See Chevron,* 467 U.S. at 844, 104 S.Ct. 2778.

G. The OCC's Interpretation of the Courts of Justice Exception Is Also a Permissible Construction of the Statute

The Attorney General also contends that even if his threatened actions are deemed "visitorial," he nevertheless has authority to enforce the state's anti-discrimination law in state or federal court pursuant to the National Bank Act's express exception permitting the exercise of those visitorial powers vested in courts of justice. Such a reading of the courts of justice exception, however, is plainly at odds with the OCC's interpretation reflected in 12 C.F.R. § 7.4000(b), and an analysis of the statutory scheme demonstrates that the OCC's interpretation is reasonable and must be afforded deference.

Appendix B

1. The OCC Reasonably Reconsidered Its Earlier Position Reflected in *First Union National Bank v. Burke*

The OCC acknowledges that its current interpretation of the courts of justice exception is inconsistent with the position it acquiesced to in *First Union Nat'l Bank v. Burke,* 48 F.Supp.2d 132, 135 (D.Conn.1999). *First Union* involved the OCC's motion for preliminary injunctive relief enjoining a state banking official from administratively enforcing a state law limiting banks' collection of ATM fees. Although the banks involved in the case separately sought a determination that the state law did not bar their activities, for the purposes of the OCC's motion, the court assumed that the law applied and proceeded with the question of whether the OCC was likely to prevail on the merits of its claim that section 484 and its implementing regulation precluded the state banking commissioner from proceeding with pending enforcement actions. *See id.* at 135-36. The district court, concluding that the OCC was likely to prevail, issued a preliminary injunction enjoining the state banking commissioner from issuing cease and desist orders. *Id.* at 151. Although no judicial action had been brought or apparently threatened, the court noted that its injunction would not bar the state commissioner from enforcing the statute through the courts. *See id.*[12]

12. Other district courts have since rejected the distinction drawn by *First Union. See Bank One Delaware, N.A. v. Wilens,* No. SACV 03-274, 2003 WL 21703629, at *2 (C.D.Cal. July 7, (Cont'd)

Appendix B

The Attorney General asserts that *First Union* is not an aberration, but is consistent with a long history of states enforcing their consumer protection laws against national banks and that the OCC's current interpretation represents a sharp departure from its own long-standing interpretation of the courts of justice exception. (*See* Brief Amicus Curiae of State Attorneys General, at 14, n.8 (collecting cases)). The OCC responds that its amendment, adopted in the wake of *First Union*, was justified because "[t]he allocation of any supervisory responsibility for the new national banking system to the states would have been inconsistent with [the] need to protect national banks from state interference." *See* 69 Fed.Reg. 1895-1900.

To the extent that the OCC's most recent amendment to section 7.4000 marks a departure from its prior interpretation of the courts of justice exception, "the change is not invalidating," if the OCC sufficiently

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2003) (enjoining "private attorney general" action where private party asserted the rights of the general public in action against national bank, concluding that the "courts of justice" exception would not permit judicial enforcement where administrative action could not otherwise be taken); *see also Goleta Nat'l Bank v. O'Donnell*, 239 F.Supp.2d 745, 757 (S.D.Ohio 2002) (characterizing a national bank's attempt to distinguish between judicial proceedings and administrative action for purposes of section 484 and 12 C.F.R. § 7.4000 as an argument that "borders on being frivolous," because the statute and regulation "prohibit regulation by state officials regardless of the form of the enforcement action").

justifies the reasonableness of its current interpretation. *Nat'l Cable & Telecommunications Ass'n v. Brand X Internet Servs.*, __ U.S. __, 125 S.Ct. 2688, 2699-2700, 162 L.Ed.2d 820 (2005) ("[I]f the agency adequately explains the reasons for a reversal of policy, 'change is not invalidating, since the whole point of *Chevron* is to leave the discretion provided by the ambiguities of a statute with the implementing agency' ") (quoting *Smiley v. Citibank (South Dakota), N. A.*, 517 U.S. 735, 742, 116 S.Ct. 1730, 135 L.Ed.2d 25 (1996)). The question for this Court, therefore, is whether the OCC's current construction of the courts of justice exception as found in section 7.4000 is reasonable.

2. The OCC's Interpretation of the Courts of Justice Exception is Consistent with the Statutory Text and the Purpose Underlying the National Bank Act

The OCC reasons that the courts of justice exception is best understood as permitting courts to exercise visitation over national banks in actions-like the one at issue in *Guthrie*-that do not otherwise constitute an attempt to exercise prohibited visitorial authority. The OCC explained in the preamble to the 2004 amendments to 12 C.F.R. § 7.4000: "[b]ecause in 1864, the primary procedure for the exercise of visitorial powers was through an action in court, it would have made little sense for Congress to have created an exception that was nearly coterminous with the prohibitory rule." *See* 69 Fed.Reg. at 1899-1900. In *Guthrie,* the Supreme Court recognized that "[t]he visitation of civil

corporations is by the government itself, through the medium of the courts of justice." *See Guthrie,* 199 U.S. at 157, 26 S.Ct. 4. It also recognized that the exercise of judicial power itself is a form of visitation, and that power is what Congress excepted from the general limitation of visitation over national banks. *See id.* at 158-59, 26 S.Ct. 36.

Guthrie does not stand for the proposition that the courts of justice exception must be read to permit states to use judicial remedies to enforce applicable state laws. The *Guthrie* court noted that the predecessor to section 484 did not intend to extinguish the right of a shareholder to bring an action to compel access to a bank's books and records, explaining,

> If the right to compel the inspection of books was a well-recognized common law remedy, as we have no doubt it was, even if included in visitorial powers as the terms are used in the statute, it would belong to that class 'vested in courts of justice' which are expressly excepted from the inhibition of the statute.

Guthrie, 199 U.S. at 158-59, 26 S.Ct. 4. The Supreme Court was simply acknowledging that the exercise of judicial power to compel production of books is itself an act of visitation, properly exercised in actions by private individuals. *Guthrie* does not, however, support the very different proposition that a state—prohibited from exercising its own visitorial powers directly against a bank—may use the courts as a medium for doing so.

Guthrie noted the distinction between private actions and the assertion of a superior, sovereign authority to enforce compliance with applicable laws. *Id.* The OCC's most recent amendment to section 7.4000 draws this same distinction, and is therefore reasonable.

Moreover, as the OCC points out, the Attorney General's broad interpretation of the courts of justice exception is in contrast to the other exceptions in section 484(a) and 484(b), each of which is narrowly drawn. *See* 12 U.S.C. §§ 484(a) and (b). Section 484(a) carves out the additional exception for powers "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), while section 484(b) permits "lawfully authorized State auditors and examiners" to "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." 12 U.S.C. § 484(b). The OCC's clarification of the courts of justice exception is consistent with these other exceptions in reflecting a narrowly drawn exception to the otherwise broad preclusion of states' visitorial authority.

The OCC's interpretation of the courts of justice exception, "preserves the powers that are inherent in the courts" and gives effect to Congressional intent to preclude state authorities from exercising visitorial authority over national banks. *See* 69 Fed.Reg. at 1900.

The OCC has reasonably concluded that the exception should not be read in a manner that would swallow the rule against state visitation by permitting state officials to circumvent the limits on their visitorial powers by invoking the power of the courts. The OCC's regulation thus reflects a permissible construction of the statute, and accordingly is entitled to deference.*See NationsBank,* 513 U.S. at 262, 115 S.Ct. 810; *Chevron,* 467 U.S. at 842, 104 S.Ct. 2778. With respect to policy concerns raised by the Attorney General, "[t]he states' proper recourse at this point is to Congress. [The Court] must defer to the OCC's authorized and reasonable implementation of the NBA." *Wachovia,* 414 F.3d at 321.

V. The Attorney General's Administrative Procedure Act Counterclaim

The Attorney General's counterclaim seeking an order setting aside 12 C.F.R. § 7.4000 pursuant to the Administrative Procedure Act, 5 U.S.C. § 706(2)(A) and (C), fails for the reasons set forth above.

Pursuant to section 706 of the Administrative Procedure Act, a district court may "hold unlawful and set aside agency action," where that action is found to be, "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," or "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right." 5 U.S.C. §§ 706(2)(A) and (C). In support of his counterclaim, the Attorney General reasserts the arguments already raised to prove the OCC's interpretation to be contrary to law, outside the

OCC's statutory jurisdiction and authority, and an unreasonable construction of section 484. For the reasons detailed above, these arguments are unavailing.

The Attorney General also fails to show the OCC's regulation to be arbitrary and capricious. "[T]he scope of judicial review under this standard is narrow and deferential." *Henley v. Food and Drug Admin.,* 77 F.3d 616, 620 (2d Cir.1996). So long as the reviewing court is certain "that an agency has considered all the important aspects of the issue and articulated a satisfactory explanation for its action, including a rational connection between the facts found and the choice made," the judgment of the agency must be affirmed. *Id.* The OCC solicited comments and responded to concerns—including many of those asserted here—and reached a reasonable conclusion regarding the proper construction of section 484's limitation on visitorial powers and the courts of justice exception. *See* 69 Fed.Reg. at 1896. "Where, as here, an agency's determination cannot be characterized as arbitrary, capricious, an abuse of discretion, or contrary to law, the [Administrative Procedure Act] precludes [this Court] from substituting [its] judgment for that of the agency." *Henley,* 77 F.3d at 621. Because the OCC acted within its jurisdiction and statutory authority in promulgating 12 C.F.R. § 7.4000, and because section 7.4000 reflects a reasoned approach to preempting state enforcement of banking related laws and is not in conflict with the statute or relevant judicial precedent, the Attorney General's counterclaim fails.

VI. Conclusion

Because 12 C.F.R § 7.4000 is a reasonable interpretation of the National Bank Act, and because the Attorney General's investigation into national banks' residential mortgage lending activities is prohibited by that regulation, the OCC is entitled to a declaratory judgment that: (1) the Attorney General of the State of New York cannot enforce state fair lending laws against national banks or their operating subsidiaries; (2) the Attorney General cannot compel compliance with a state investigation into potential violations in connection with the residential mortgage lending practices of those banks except as authorized by federal law; and (3) the courts of justice exception to section 484 does not provide an exception permitting the Attorney General to enforce state or federal fair lending laws through judicial actions.

Because the Attorney General's assertion of visitorial authority impermissibly interferes with the OCC's exclusive supervisory role, the OCC's application for injunctive relief pursuant to Fed.R.Civ.P. 65 is granted. The Attorney General for the State of New York, and all those acting under his direction or in concert with him, are permanently enjoined 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 instituting any enforcement actions to compel compliance with the Attorney General's already existing informational demands; and from instituting actions in the courts of justice against national banks to enforce state fair lending laws.

Dated: New York, New York
October 12, 2005

SO ORDERED:

s/ Sidney H. Stein
Sidney H. Stein, U.S.D.J.

APPENDIX C — OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK, DATED OCTOBER 12, 2005

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

05 Civ. 5629 (SHS)

THE CLEARING HOUSE ASSOCIATION, L.L.C.

Plaintiff,

-against-

ELIOT SPITZER, in his official capacity as Attorney General for the State of New York,

Defendant.

OPINION AND ORDER

SIDNEY H. STEIN, U.S. District Judge.

The Clearing House Association, L.L.C., (the "Clearing House"), brings this action against Eliot Spitzer, the Attorney General of the State of New York to enjoin him from instituting enforcement actions or investigating the Clearing House's national bank members and their operating subsidiaries relating to their residential mortgage lending practices. The Clearing House contends that the Attorney General's investigation and threatened enforcement

actions impinge on the exclusive visitorial powers of the Office of the Comptroller of the Currency (the "OCC") in violation of section 484(a) of the National Bank Act, 12 U.S.C. § 484(a), and the OCC's regulation interpreting that provision, codified at 12 C.F.R. § 7.4000.

The bulk of the issues raised by the Clearing House's application for injunctive relief have been resolved in the opinion issued today in the related action of *The Office of the Comptroller of the Currency v. Spitzer,* No. 05 Civ. 5636, (*"OCC v. Spitzer"*). In *OCC v. Spitzer,* this Court, applying the framework set forth in *Chevron U.S.A., Inc. v. Natural Resources Defense Council,* 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984), concluded that 12 C.F.R. § 7.4000 reflects a reasonable and permissible construction of the National Bank Act. (*See* Opinion and Order in *OCC v. Spitzer,* dated October 12, 2005). Because the Attorney General's assertion of authority pursuant to state law to investigate and bring enforcement actions related to the residential lending practices of national banks impermissibly infringes on the OCC's exclusive visitorial authority as defined in 12 C.F.R. § 7.4000, this Court granted the OCC's application for declaratory and permanent injunctive relief against the Attorney General.

In this action, the Clearing House seeks an additional measure of relief based on the Attorney General's assertion that 42 U.S.C. § 3613(a), the civil enforcement provision of the federal Fair Housing Act,

(the "FHA"), authorizes the Attorney General to sue national banks in the state's *parens patriae* capacity for alleged violations of the FHA's fair lending provisions. Because an action in the state's *parens patriae* capacity to enforce the FHA's fair lending provisions against the Clearing House national bank members constitutes a form of visitorial authority prohibited by section 484(a) of the National Bank Act, and is not expressly authorized by the FHA, the Clearing House is entitled to the injunction it seeks.

I. Background

The Court assumes familiarity with its opinion issued today in *OCC v. Spitzer,* No. 05 Civ. 5636(SHS), and limits the discussion here to issues not raised directly in *OCC v. Spitzer.* Indeed, this opinion need be read in conjunction with that one. The Court writes separately to address issues regarding the Clearing House's ability to bring its claim in federal court, and to answer the question raised only by the Clearing House of whether the Attorney General should be enjoined from bringing an action in the state's *parens patriae* capacity to enforce the federal Fair Housing Act against national banks.

The Clearing House commenced this action on June 16, 2005 seeking to enjoin the Attorney General from issuing subpoenas for information concerning, or taking any other action to enforce federal and state discrimination in lending laws against the national banks that are members of the Clearing House, with respect

to their mortgage lending operations. *OCC v. Spitzer* was accepted as a related case, and pursuant to Fed.R.Civ.P. 65(a)(2), the trials on the merits in this action and *OCC v. Spitzer* were consolidated, with the hearings on the preliminary injunction applications. (Order, dated July 5, 2005). The trial in both actions was held on September 7, 2005, and at that time, argument was heard and affidavits and other exhibits were admitted into evidence. (Transcript, dated Sept. 7, 2005, at 36-37).

The Clearing House Association, L.L.C., is an association of commercial banks, including federally chartered national banks. (*See* Declaration of Norman R. Nelson, Esq., dated June 15, 2005 at ¶¶ 1-3). The Clearing House describes itself as dedicated to protecting the rights and interests of its member banks as well as advancing the broader interests of the domestic commercial banking industry. (*Id.* at ¶¶ 2, 4). The Clearing House states that it is "interested in ensuring stability and certainty in the regulatory environment in which its member banks operate." (*Id.* at ¶ 4). At least four of the Clearing House's national bank members or their operating subsidiaries—Citibank, N.A., Wells Fargo Bank, N.A., HSBC Bank U.S.A., N.A., and JPMorgan Chase Bank, N.A.—are subjects of the inquiry initiated by the Attorney General and have received requests for certain non-public lending information. (*See* Nelson Decl. at ¶¶ 7-8; Declaration of Dennis D. Parker in Supp. of Def.'s Opp to Pls.' Request for Injunctive and Declaratory Relief and in Supp. of Counterclaim, dated August 5, 2005, ("Parker Decl."), at ¶ 4-5, and Ex. 2).

Appendix C

As recounted in the related action, a preliminary analysis by the Attorney General of home loan pricing data made publicly available pursuant to the federal Home Mortgage Disclosure Act, 12 U.S.C. §§ 2801-2810, led the Attorney General to conclude that the data established a *prima facie* case of race discrimination in violation of federal and state fair lending laws. (*See* Parker Decl., at ¶¶ 4-5). In letters to HSBC, Wells Fargo and JP Morgan Chase, the Attorney General informed the banks that he had commenced a preliminary inquiry into each bank's lending practices, and requested that "[i]n lieu of issuing a formal subpoena . . ." the banks "voluntarily provide" certain non-public lending information. (*See* Letters from Dennis D. Parker, dated April 19, 2005, Ex 2 to Parker Decl.).

In his opposition to the Clearing House's application for injunctive relief, the Attorney General asserted that the FHA creates a federally authorized exception to section 484's general limitation on states' visitorial powers. *See* 12 U.S.C. § 484(a) (limiting the exercise of visitorial powers, "except as authorized by Federal law . . ."). Specifically, the Attorney General contends that the FHA's private right of action provision, 42 U.S.C. § 3613(a)—which authorizes suits by an "aggrieved person"—permits the state to sue national banks both in its *parens patriae* capacity, and on its own behalf, claiming injury to its proprietary interests.

Because the injunction issued in *OCC v. Spitzer* applies by its terms to all national banks and their operating subsidiaries, it clearly encompasses the

national bank members of the Clearing House on whose behalf the Clearing House seeks injunctive relief. The single outstanding issue on the merits of the Clearing House's application is whether the Attorney General's threatened action *pursuant to the Fair Housing Act,* is also prohibited by section 484's limitation on states' visitorial authority, or whether such an action would fall within an exception "authorized by Federal law."

Because the Attorney General has challenged the Clearing House's ability to bring this claim in federal court, the Court turns first to the questions of whether federal subject matter jurisdiction exists, and whether the Clearing House has standing to bring this action, and answers each question in the affirmative.

II. Subject Matter Jurisdiction

The Clearing House contends that subject matter jurisdiction exists pursuant to 28 U.S.C. § 1331 because this action arises under the National Bank Act, 12 U.S.C. §§ 21, *et seq.,* asserting that "[i]t is beyond dispute that federal courts have jurisdiction over suits to enjoin state officials from interfering with federal rights." *Fleet Bank, Nat. Ass'n v. Burke,* 160 F.3d 883, 888 (2d Cir.1998) (citing *Ex parte Young,* 209 U.S. 123, 160-62, 28 S.Ct. 441, 52 L.Ed. 714 (1908)).

The Attorney General responds by claiming that the Clearing House's complaint is one that merely anticipates a federal defense that would be filed in answer to a potential state court action brought by the

Attorney General, and thus lacks federal jurisdiction under what is known as the "well-pleaded complaint" rule. *See Fleet Bank,* 160 F.3d at 886. However, the U.S. Supreme Court has long made it clear that actions such as this one that seek to enjoin state officials from interfering with federal rights present a federal question over which federal courts have jurisdiction. *See Shaw v. Delta Air Lines, Inc.,* 463 U.S. 85, 96, n. 14, 103 S.Ct. 2890, 77 L.Ed.2d 490 (1983) (citing *Ex parte Young,* 209 U.S. 123, 160-62, 28 S.Ct. 441, 52 L.Ed. 714 (1908)); *see also Verizon Md., Inc. v. Pub. Serv. Comm'n,* 535 U.S. 635, 642, 122 S.Ct. 1753, 152 L.Ed.2d 871 (2002). The rule was stated most plainly in *Shaw* as follows:

> It is beyond dispute that federal courts have jurisdiction over suits to enjoin state officials from interfering with federal rights. *See Ex parte Young,* 209 U.S. 123, 160-62, 28 S.Ct. 441, 52 L.Ed. 714 (1908). A plaintiff who seeks injunctive relief from state regulation, on the ground that such regulation is pre-empted by a federal statute which, by virtue of the Supremacy Clause of the Constitution, must prevail, thus presents a federal question which the federal courts have jurisdiction under 28 U.S.C. § 1331 to resolve.

Shaw, 463 U.S. at 96 n. 14, 103 S.Ct. 2890 (internal citations omitted); *see also Verizon,* 535 U.S. at 642, 122 S.Ct. 1753 (there is "no doubt that federal courts have jurisdiction under § 1331" over an action seeking declaratory and injunctive relief against state officials

on the grounds that a state regulation was preempted by federal law).

While it is true that the Clearing House's claims might be raised as defenses in a claim brought in a state court action by the state Attorney General, "a properly framed federal cause of action does not fall outside § 1331 simply because it could *also* arise as an affirmative federal defense in state court." *Aroostook Band of Micmacs v. Ryan,* 404 F.3d 48, 61 (1st Cir.2005) (emphasis in original). In any event, the sole issue that remains to be resolved in this action is the Clearing House's request for injunctive relief enjoining the Attorney General from bringing an action pursuant to the *federal* Fair Housing Act, thus even looking to the character of the anticipated claim to determine whether it would present a federal question, the well-pleaded complaint rule is satisfied. *See Public Service Comm'n v. Wycoff Co.,* 344 U.S. 237, 248, 73 S.Ct. 236, 97 L.Ed. 291 (1952) ("Where the complaint in an action for declaratory judgment seeks in essence to assert a defense to an impending or threatened state court action, it is the character of the threatened action, and not of the defense, which will determine whether there is federal-question jurisdiction in the District Court."); *see also Fleet Bank,* 160 F.3d at 886. Because the Clearing House seeks injunctive relief from the Attorney General's threatened enforcement action on the ground that such action is prohibited by federal law, it has presented a federal question over which this Court has jurisdiction pursuant to 28 U.S.C. § 1331 to resolve.

III. Standing

The Clearing House asserts that it has standing to bring this action on behalf of its members pursuant to a judicially created concept known as associational standing. The applicable test for associational standing is set forth in *Hunt v. Washington State Apple Advertising Commission,* 432 U.S. 333, 343, 97 S.Ct. 2434, 53 L.Ed.2d 383 (1977). *See N.Y. Pub. Interest Research Group v. Whitman,* 321 F.3d 316, 325 (2d Cir.2003). As explicated in *Hunt,*

> An association has standing to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.

Hunt, 432 U.S. at 343, 97 S.Ct. 2434. To meet the first prong of this test, the Clearing House must establish that its members satisfy the three elements comprising the "irreducible constitutional minimum of standing" required by Article III of the U.S. Constitution. *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992); *see also N.Y. Pub. Interest Research Group,* 321 F.3d at 325. First, the member banks "must have suffered an injury in fact—an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not

conjectural or hypothetical. Second, there must be a causal connection between the injury and the conduct complained of. . . . Third, it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Lujan,* 504 U.S. at 560-61, 112 S.Ct. 2130.

As described above, four Clearing House member banks have been threatened with the state's assertion of authority to sue to compel the national banks' compliance with laws governing their federally authorized banking activities. "When the suit is one challenging the legality of government action or inaction, the nature and extent of facts that must be . . . proved . . . in order to establish standing depends considerably upon whether the plaintiff is himself an object of the action . . . at issue. If he is, there is ordinarily little question that the action or inaction has caused him injury, and that a judgment preventing or requiring the action will redress it." *Lujan,* 504 U.S. at 561-562, 112 S.Ct. 2130. The member banks are the direct targets of the Attorney General's threatened enforcement actions, and an injunction would protect those banks from the allegedly unlawful intrusion into their federally authorized banking operations.

The threat of litigation in this case is not merely conjectural or hypothetical. *See O'Shea v. Littleton,* 414 U.S. 488, 496-97, 94 S.Ct. 669, 38 L.Ed.2d 674 (1974). The Attorney General has informed specific member banks as well as this Court that the mortgage pricing data from four Clearing House member banks was, he

believes, "sufficient to establish a *prima facie* case of discrimination on the basis of race under both federal and state fair lending laws." (Parker Decl. at ¶¶ 4-5; Letters from Dennis Parker, dated April 19, 2005, Ex. 2 to Parker Decl.). At the trial of this action, the Attorney General's attorney stated that the Attorney General intended to proceed with the investigation and enforcement actions in the absence of an injunction. (Transcript, dated Sept. 7, 2005, at 38). Accordingly, the Clearing House has established that its members would have standing to sue in their own right, thus meeting the first prong of the *Hunt* test.

The Clearing House also meets the second and third prongs of the *Hunt* test. The interests the Clearing House seeks to protect, particularly its members' interest in being free from the burden of complying with state regulatory and enforcement efforts allegedly taken in violation of section 484 of the National Bank Act, and its members' interest in certainty in their regulatory environment, are the type of interests that are "germane to the [Clearing House's] purpose." *Hunt,* 432 U.S. at 343, 97 S.Ct. 2434; (*See* Nelson Decl. at ¶¶ 3-4). Finally, the participation of the individual members is not required either to establish the fact or extent of the threatened injury; the Attorney General's assertion that the available data establishes a *prima facie* case of prohibited discrimination was asserted without distinction between the national banks that are the focus of his inquiry. (*See* Parker Decl. at ¶¶ 4-5). The Clearing House seeks only injunctive relief that " 'will inure to the benefit of those members of the association

actually injured.' " *Bano v. Union Carbide Corp.*, 361 F.3d 696, 714 (2d Cir.2004) (quoting *Warth v. Seldin*, 422 U.S. 490, 515, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975)); *see also International Union, United Automobile, Aerospace & Agricultural Implement Workers of America v. Brock*, 477 U.S. 274, 287-88, 106 S.Ct. 2523, 91 L.Ed.2d 228 (1986).

Accordingly, the Clearing House meets the test the Supreme Court set forth in *Hunt v. Washington State Apple Advertising Commission*, 432 U.S. 333, 97 S.Ct. 2434, 53 L.Ed.2d 383 (1977) for associational standing; it therefore has standing to bring this action as a representative of its member banks.

VI. Discussion

The Clearing House contends that section 484(a) of the National Bank Act, 12 U.S.C. § 484(a), as clarified by 12 C.F.R. § 7.4000, bars the Attorney General from bringing an action pursuant to the Fair Housing Act in which he would assert standing in the state's *parens patriae* capacity. Section 484(a) provides:

> 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 . . .

12 U.S.C. § 484(a). Here, the Attorney General asserts that he is "authorized by Federal law," specifically by

the civil enforcement provision of the Fair Housing Act, 42 U.S.C. § 3613(a)(1)(A), to bring an action to enforce that Act's fair lending provisions against national banks in the state's *parens patriae* capacity.[1]

The question that this Court must answer therefore, is whether a *parens patriae* action constitutes visitation for purposes of 12 U.S.C. § 484(a), and if so, whether Congress intended to create an exception to the limitation on state visitorial power by permitting states to bring *parens patriae* actions to enforce the FHA's fair lending provisions against national banks. *See Hawaii v. Standard Oil Co. of California,* 405 U.S. 251, 259, 92 S.Ct. 885, 31 L.Ed.2d 184 (1972); *see also Connecticut v. Physicians Health Servs. of Conn., Inc.,* 287 F.3d 110, 120-21 (2d Cir.2002). In answering that question, the Court first outlines briefly the nature of *parens patriae* actions and considers whether they constitute a form of visitation for purposes of the National Bank Act. The Court then considers whether the FHA, viewed in light of the National Bank Act's prohibition on state visitorial authority, evinces a Congressional intent to permit states to bring *parens*

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1. The Attorney General briefly asserts that he has the authority to bring an action claiming injury to the state's proprietary interests as well as in the state's *parens patriae* capacity. However, not only does such a claim raise constitutional standing issues, but plaintiff here seeks only an injunction addressed to a *parens patriae* suit. Rather than analyze a conjectural claim asserting potential proprietary interests, this Court will address solely the question of whether an injunction is appropriate to bar a *parens patriae* litigation.

patriae actions to enforce the FHA's fair lending provisions against national banks.

A. A *Parens patriae* Action Is a Form of Visitation

In *Alfred L. Snapp & Son, Inc. v. Puerto Rico, ex rel., Barez,* 458 U.S. 592, 600, 102 S.Ct. 3260, 73 L.Ed.2d 995 (1982), the Supreme Court explained the history of the *parens patriae* doctrine pursuant to which a state may bring suit on behalf of its citizens asserting injury to a "quasi-sovereign interest," which is a "judicial construct that does not lend itself to a simple or exact definition." *Id.* at 601, 102 S.Ct. 3260. As set forth in *Snapp,* the *parens patriae* doctrine, which has its roots in the principle that a sovereign, as "parent of the country," may step in on behalf of its citizens to prevent "injury to those who cannot protect themselves," has developed in American law into a concept that "does not involve the States stepping in to represent the interests of particular citizens who, for whatever reason, cannot represent themselves. In fact, if nothing more than this is involved—i.e., if the State is only a nominal party without a real interest of its own—then it will not have standing under the *parens patriae* doctrine." *Id.* at 600, 102 S.Ct. 3260. Although *Snapp* did not precisely define the parameters of a state's quasi-sovereign interests, it explained that they do encompass a state's interests in the "well-being of its populace." *Id.* at 602, 102 S.Ct. 3260. In line with these principles, when a state seeks to establish standing to sue in its *parens patriae* capacity, it must: (1) "allege [ ] injury to a sufficiently

substantial segment of its population;" (2) "articulate an interest apart from the interests of particular private parties, i.e., the State must be more than a nominal party;" and must (3) "express a quasi-sovereign interest." *Id.* at 607, 102 S.Ct. 3260. Additionally, the U.S. Court of Appeals for the Second Circuit has required that in order to support *parens patriae* standing, a state must demonstrate that it is acting on behalf of its citizens where individuals could not obtain complete relief through a private suit. *People of the State of New York v. 11 Cornwell Co.,* 695 F.2d 34, 40 (2d Cir.1982), *vacated in part on other grounds,* 718 F.2d 22 (2d Cir.1983) (en banc).

Because states must invoke a quasi-sovereign authority in order to establish *parens patriae* standing, a *parens patriae* action is a form of visitation, and is prohibited by section 484(a) of the National Bank Act, as interpreted by 12 C.F.R. § 7.4000, unless Congress intended to provide otherwise. *See Guthrie v. Harkness,* 199 U.S. 148, 158-59, 26 S.Ct. 4, 50 L.Ed. 130 (1905); *see also* Banking Activities and Operations, 69 Fed.Reg. 1895, 1899 (Jan. 13, 2004) ("private civil cases in pursuit of personal claims against national banks, . . . unlike attempts by state authorities to exercise authority over national banks using the courts, do not amount to visitations").

B. The Fair Housing Act Does Not Permit *Parens Patriae* Actions Otherwise Barred by Section 484 of the National Bank Act

The FHA prohibits "any person or other entity whose business includes engaging in residential real estate-related transactions to discriminate against any person in making available such a transaction, or in the terms or conditions of such a transaction, because of race, color, religion, sex, handicap, familial status, or national origin." 42 U.S.C. § 3605(a). Real estate-related transactions for the purposes of the Act include making or purchasing loans for the purchase, construction, improvement, repair, or maintenance of a dwelling, and making or purchasing loans "secured by residential real estate." 42 U.S.C. § 3605(b)(1)(A) and (B). The FHA establishes several means of enforcing these provisions and the other anti-discrimination provisions in the Act, including administrative enforcement by the U.S. Secretary of Housing and Urban Development; administrative enforcement by certified state or local agencies; private causes of action by aggrieved persons; and civil enforcement by the U.S. Attorney General where that federal official discerns a "pattern and practice" of violations. *See* 42 U.S.C. §§ 3610, 3610(f), 3613(a), 3614. The parties to this litigation agree that the New York State Attorney General is not a certified state agency for these purposes.

The Attorney General asserts the authority to regulate the mortgage lending activities of the national banks through litigation brought in the state's

parens patriae capacity pursuant to 42 U.S.C. § 3613, which is part of the Fair Housing Act, entitled, "Enforcement by private persons." That section grants an "aggrieved person" the right to bring an action for appropriate relief from an alleged discriminatory housing practice. 42 U.S.C. § 3613(a)(1)(A). The FHA defines an "aggrieved person" as "any person who—(1) claims to have been injured by a discriminatory housing practice; or (2) believes that such person will be injured by a discriminatory housing practice that is about to occur." 42 USCA § 3602(i).

This grant of standing to any "aggrieved person" is the type of statutory language cited by the Second Circuit as that which is generally interpreted to reflect Congressional intent to permit states to enforce the rights protected by federal statutes through *parens patriae* actions. *See Connecticut v. Physicians Health Services of Connecticut, Inc.*, 287 F.3d 110, 121 (2d Cir.2002) (*"Physicians Health Services"*) (" 'the federal statutes under which states have been granted *parens patriae* standing all contain broad civil enforcement provisions that permit suit by any "person" that is "injured" or "aggrieved." ' ") (quoting *Connecticut v. Physicians Health Services of Connecticut, Inc.*, 103 F.Supp.2d 495, 509-10 (D.Conn.2000)) (citing, *inter alia*, 42 U.S.C. § 3613(a)(1)(A)); *see also Support Ministries for Persons with Aids v. Village of Waterford*, 799 F.Supp. 272, 277 (N.D.N.Y.1992) (concluding that New York alleged sufficient injury to its quasi-sovereign interest in the health and well-being of its citizens to maintain a *parens patriae* action challenging an

allegedly discriminatory denial of building permits for a facility for persons living with AIDS as violative of the FHA, the Fourteenth Amendment, and state and local anti-discrimination laws).

However, just as the Supreme Court found in *Hawaii v. Standard Oil Co. of California,* 405 U.S. 251, 259, 92 S.Ct. 885, 31 L.Ed.2d 184 (1972), the question of whether the Attorney General may bring a *parens patriae* action against national banks to enforce the FHA's fair lending provisions is a question that "cannot be resolved simply by reference to any general principles governing *parens patriae* actions." *Id.* at 259, 92 S.Ct. 885.

In *Hawaii v. Standard Oil Co. of California,* the Supreme Court was faced with the question of whether a state could bring a *parens patriae* action seeking monetary damages—as opposed to injunctive relief—based on injury to its quasi-sovereign interests pursuant to federal antitrust laws. *See* 405 U.S. at 260-61, 92 S.Ct. 885. The Court considered the federal statutory scheme, its legislative history, and the practical impact of allowing *parens patriae* actions. The Court concluded that, in light of the absence of an express provision in the statutory text permitting *parens patriae* actions, Congress did not intend to permit states to recover monetary damages for alleged harm to their quasi-sovereign interests. *See id.* at 263-66, 92 S.Ct. 885. Congress responded to that decision and subsequently amended the law to *explicitly* permit *parens patriae* suits by states seeking monetary damages. *See New York ex rel Vacco v. Reebok International Limited,* 96 F.3d

44, 46 (2d Cir.1996); *see also* 15 U.S.C. § 15c(a)(1) ("Any attorney general of a State may bring a civil action in the name of such State, as *parens patriae* on behalf of natural persons residing in such State, in any district court of the United States having jurisdiction of the defendant, to secure monetary relief as provided in this section for injury sustained by such natural persons to their property by reason of any violation of sections 1 to 7 of this title.").

In *Physicians Health Services,* the Second Circuit similarly sets forth that in determining whether a state may assert *parens patriae* standing pursuant to a particular federal statutory provision, a court's task is to discern whether "Congress intended to allow for such standing." *See* 287 F.3d at 120-21. This analysis begins with a consideration of the relevant statutory scheme, including what types of enforcement mechanisms are—and are not—expressly provided for by Congress. *See id.* In *Physicians Health Services,* finding that ERISA's carefully drawn limitations on parties authorized to sue did not include an express provision for suits by states, the Second Circuit concluded that Congress did not intend to permit *parens patriae* suits by states, and thus held that Connecticut lacked statutory standing to bring an action on behalf of the state's citizens challenging an insurance company's use of a drug formulary system. *Id.* at 121.

Here, when the broad enforcement provisions of the FHA are read in conjunction with section 484 of the National Bank Act, the absence of any express provision

in the Fair Housing Act authorizing states to bring *parens patriae* actions against national banks leads to the conclusion that Congress did not intend, in granting any "aggrieved person" a private right of action, to implicitly override section 484's limitation on the powers of states to exercise visitorial powers over national banks.

Section 484 of the National Bank Act, as interpreted by the OCC, prohibits states from: "[e]nforcing compliance with any applicable federal or state laws concerning" the "activities authorized or permitted pursuant to federal banking law." *See* 12 C.F.R. §§ 7.4000(a)(2)(iii) and (iv). The OCC has read the exceptions to section 484's limitation on states' visitorial powers narrowly, reasoning that Congress intended to create a system of national banks protected from intrusive state regulation. *See* Banking Activities and Operations, 69 Fed.Reg. 1895, 1900 (Jan. 13, 2004). In considering whether 42 U.S.C. § 3613(a)(1)(A) evinces an intent by Congress to create an exception to the limitation on state visitorial powers, it is helpful to contrast the FHA provision at issue here with instances where Congress has indisputably created exceptions for state visitation over national banks.

In each of the exceptions noted in 12 C.F.R. § 7.4000(b)(1) in which Congress has created exceptions authorizing states to exercise visitorial authority over national banks, it has done so explicitly, carefully defining the parameters of the states' authority. *See* 12 U.S.C. § 484(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."); *see also* Federal Unemployment Tax Act, 26 U.S.C. § 3305(c) ("Nothing contained in [12 U.S.C. 484], shall prevent any State from requiring any national banking association to render returns and reports relative to the association's employees, their remuneration and services, to the same extent that other persons are required to render like returns and reports under a State law requiring contributions to an unemployment fund"). Each of these exceptions to the rule limiting states' visitorial authority is explicit, narrowly drawn, and carves out an exception pertaining to non-banking activities.

In contrast, the FHA neither explicitly includes states in its definition of "aggrieved persons" nor explicitly grants states the authority to bring actions in their *parens patriae* capacity. It does grant the U.S. Attorney General the authority to institute civil actions where there is a pattern and practice of violations, *see* 42 U.S.C. § 3614, but fails to extend similar authority to states. It directs the U.S. Secretary of Housing and Urban Development to refer administrative complaints to state or local agencies that have been certified as providing substantially equivalent protections, *see* 42 U.S.C. § 3610(f), but, as noted, the parties agree that that carefully crafted certification and referral

mechanism does not provide the basis for the Attorney General's threatened action. Finally, section 3608(d) reveals that Congress was cognizant of the role of federal banking regulators when it enacted the enforcement provisions of the FHA, *see* 42 U.S.C. § 3608(d), yet there is no provision expressly creating an exception to section 484 of the National Bank Act to permit states to enforce the FHA's fair lending provisions against national banks.

In light of the several carefully drawn enforcement provisions in the FHA, the explicit exceptions in other instances where Congress clearly intended to permit states to exercise visitorial authority over national banks, and the lack of any similar grant of authority for states to bring *parens patriae* actions pursuant to the FHA's private right of action provision, the Court concludes that 42 U.S.C. § 3613(a) does not reflect an intent by Congress to authorize states to bring *parens patriae* actions against national banks to enforce the FHA's fair lending provisions. *See Physicians Health Services,* 287 F.3d at 121 (citing *Great-West Life & Annuity Ins. Co. v. Knudson,* 534 U.S. 204, 122 S.Ct. 708, 151 L.Ed.2d 635 (2002) ("ERISA's carefully crafted and detailed enforcement scheme provides strong evidence that Congress did not intend to authorize other remedies that it simply forgot to incorporate expressly.") (emphasis, citations, and internal quotation marks omitted)).

C. Permanent Injunctive Relief Is Warranted

The Attorney General correctly asserts that in order to warrant the requested injunctive relief, the Clearing House must establish that it is threatened with an injury for which there is no adequate remedy at law. The Supreme Court has repeatedly explained that "[i]t is a 'basic doctrine of equity jurisprudence that courts of equity should not act . . . when the moving party has an adequate remedy at law and will not suffer irreparable injury if denied equitable relief.' " *Morales v. Trans World Airlines,* 504 U.S. 374, 381, 112 S.Ct. 2031, 119 L.Ed.2d 157 (1992) (quoting *O'Shea v. Littleton,* 414 U.S. 488, 499, 94 S.Ct. 669, 38 L.Ed.2d 674 (1974)); *see also Weinberger v. Romero-Barcelo,* 456 U.S. 305, 312, 102 S.Ct. 1798, 72 L.Ed.2d 91 (1982).

Where it is established that a state's threatened action would violate a federal statute, and an injunction is necessary in order to protect the "underlying substantive purpose" of that statute, injunctive relief may be granted. *See Amoco Production Co. v. Village of Gambell,* 480 U.S. 531, 544, 107 S.Ct. 1396, 94 L.Ed.2d 542 (1987); *see also Jennings Water, Inc. v. City of North Vernon, Ind.,* 895 F.2d 311, 318, n. 6 (7th Cir.1989).

Here, the Clearing House seeks an injunction barring the state from precisely the type of interference with national banks that section 484 of the National Bank Act is intended to prohibit. *See Wells Fargo v. Boutris,* 265 F.Supp.2d 1162, 1178-79 (E.D.Cal.2003) (granting permanent injunction barring state regulation

of national bank's operating subsidiary), *aff'd in part and reversed in part on other grounds,* 419 F.3d 949 (9th Cir.2005); *see also First Union Nat'l Bank v. Burke,* 48 F.Supp.2d 132, 150-51 (D.Conn.1999) (granting the OCC's motion for preliminary injunction on showing that threatened state regulation of national banks was likely prohibited by 12 C.F.R. § 484(a)). Accordingly, the Clearing House is entitled to the injunctive relief provided in *OCC v. Spitzer* as well as the additional measure of injunctive relief enjoining the threatened *parens patriae* actions that has not already been provided in *OCC v. Spitzer.*

V. Conclusion

For the reasons set forth above, the Clearing House's application for permanent injunctive relief is granted. Plaintiff is entitled to the injunctive relief provided in *OCC v. Spitzer* for the reasons set forth in the Opinion and Order in that action dated October 12, 2005. In addition, because an action brought in the state's *parens patriae* capacity to enforce the Fair Housing Act's fair lending provisions against the Clearing House national bank members or their operating subsidiaries constitutes a form of visitorial authority prohibited by section 484(a) of the National Bank Act, and is not authorized by federal law, the New York State Attorney General is enjoined from instituting any judicial action premised on the state's *parens patriae* authority to enforce the Fair Housing Act's fair lending provisions against the Clearing House's national bank members or their operating subsidiaries.

Appendix C

Dated: New York, New York
October 12, 2005

SO ORDERED:

s/ Sidney H. Stein
Sidney H. Stein, U.S.D.J.

APPENDIX D — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DENYING PETITION FOR REHEARING, DATED AND FILED JUNE 5, 2008

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
Thurgood Marshall U.S. Court House
40 Foley Square, New York, N.Y. 10007

Nos: 05-5996-cv (Lead)
05-6001-cv (Con)

Catherine O'Hagan Wolfe
CLERK OF THE COURT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 5th day of June two thousand and eight,

The Clearing House Association, L.L.C.,

Plaintiff-Appellee,

Office of the Comptroller of the Currency,

Plaintiff-Counter-Defendant-Appellee,

v.

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

Defendant-Counter-Claimant-Appellant.

Appendix D

ORDER

Appellant Andrew M. Cuomo, having filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*, and the panel that determined the appeal having considered the request for panel rehearing, and the active members of the Court having considered the request for rehearing *en banc*,

IT IS HEREBY ORDERED that the petition is denied.

For the Court:
Catherine O'Hagan Wolfe, Clerk

By: s/ Franklin Perez
Frank Perez, Deputy Clerk

APPENDIX E — CONSTITUTIONAL PROVISION, STATUTE, AND REGULATION INVOLVED

U.S. Const., Art. VI, Cl. 2

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

12 U.S.C. § 484

> **Sec. 484. 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 subparagraph (A), lawfully authorized State auditors and examiners may, at reasonable times and upon reasonable notice to a bank, review its records solely to ensure compliance with applicable State unclaimed property or escheat laws upon reasonable cause to believe that the bank has failed to comply with such laws.

Appendix E

12 C.F.R. § 7.4000

Sec. 7.4000 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.

(c) *Report of examination.* The report of examination made by an OCC examiner is designated solely for use in the supervision of the bank. The bank's copy of the report is the property of the OCC and is loaned to the bank and any holding company

thereof solely for its confidential use. The bank's directors, in keeping with their responsibilities both to depositors and to shareholders, should thoroughly review the report. The report may be made available to other persons only in accordance with the rules on disclosure in 12 CFR part 4.