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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 Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF CONFERENCE OF STATE BANK SUPERVISORS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

STEFAN L. JOURET
Counsel of Record
JOHN FOSKETT
DEUTSCH WILLIAMS BROOKS
DERENSIS & HOLLAND, P.C.
ONE DESIGN CENTER PLACE
SUITE 600
BOSTON, MA 02210
(617) 951-2300

Counsel for Amicus Curiae

ARTHUR E. WILMARTH, JR.
PROFESSOR OF LAW
GEORGE WASHINGTON
UNIVERSITY LAW SCHOOL
2000 H STREET, N.W.
WASHINGTON, D.C. 20052
(202) 994-6386

Counsel for Amicus Curiae

(*additional counsel listed on inside cover*)

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

JOHN ("BUZ") GORMAN
CONFERENCE OF STATE BANK SUPERVISORS
1155 CONNECTICUT AVE., N.W.
5TH FLOOR
WASHINGTON, D.C. 20036
(202) 728-5726

Counsel for Amicus Curiae

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INTEREST OF *AMICUS CURIAE*

The Conference of State Bank Supervisors (the "CSBS") is a national association of state banking officials. Member officials regulate state-chartered banks and state-licensed financial services providers.[1]

Throughout this nation's history, the States have enacted and enforced laws designed to protect consumers against abusive, unfair and discriminatory lending practices. The competitive balance between the state and federal components of the country's dual banking system has also promoted innovative and responsive regulation.

This case involves an OCC (Office of the Comptroller of the Currency) regulation prohibiting the States from enforcing valid, non-preempted laws against national banks and their operating subsidiaries. By upholding that regulation, the decision below undermines federalism principles that are cornerstones of our nation's political system and financial regulatory structure. It also serves to weaken the competitive equality of state-chartered financial institutions within the dual banking system. The decision below is of great concern to the CSBS,

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[1] The parties have consented to the filing of this brief. Counsel of record for all parties received notice at least 10 days prior to the due date of the *Amicus Curiae*'s intention to file this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *Amicus Curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

which has a compelling interest in supporting the petition for a writ of certiorari.

REASONS FOR GRANTING THE PETITION

This Court should grant the petition for two principal reasons. First, the Court should resolve the present split among the courts of appeal as to whether *Chevron* applies to federal agency preemption determinations. Second, the Court should address whether federal agencies may, in the absence of a clear congressional statement, adopt regulations that prohibit the States from enforcing valid, non-preempted state laws.

I. The Courts Of Appeal Are Divided As To Whether *Chevron* Applies In Determining The Validity Of Agency Regulations Purporting To Preempt State Laws.

The central issue in this case is whether the OCC exceeded its statutory authority when it issued a regulation (12 C.F.R. § 7.4000) barring States from enforcing against national banks and their operating subsidiaries valid, non-preempted laws. The court below upheld the regulation after determining that the OCC's interpretation of the National Bank Act, 12 U.S.C. §§ 1 *et seq.* ("NBA"), was entitled to judicial deference under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.,* 467 U.S. 837 (1984). *See* Pet. App. 15a-32a.

This Court has never ruled definitively on the question of whether *Chevron* applies to federal agency preemptive rules. It has, however, commented on the

issue. In *Smiley v. Citibank (South Dakota), N.A.,* 517 U.S. 735 (1996), the petitioner contended that a reviewing court must "make its own interpretation of [the federal statute] that will avoid (to the extent possible) pre-emption of state law." *Id.* at 743-44. After noting the petitioner's argument, the Court assumed without deciding that the question of a statute's preemptive effect "must always be decided *de novo* by the courts." *Id.* at 744.

In *Watters v. Wachovia Bank, N.A.,* 550 U.S. 1, 127 S. Ct. 1559 (2007), the petitioner similarly argued that "because preemption is a legal question for determination by the courts, [a preemptive agency regulation] should attract no deference." *Id.* at 1572. The Court again did not directly address this argument. Instead, the majority opinion held that "the level of deference owed to the regulation is an academic question," *id.*, because "the NBA itself – independent of OCC's regulation – preempts the application of the pertinent Michigan laws to national bank operating subsidiaries." *Id.* at 1572 n.13.

The three dissenting Justices in *Watters* took a different view. They maintained that "when an agency purports to decide the scope of federal preemption, a healthy respect for state sovereignty calls for something *less* than *Chevron* deference." *Id.* at 1584 (Stevens, J., dissenting, joined by Roberts, C.J., and Scalia, J.) (emphasis added).

The circuits are divided on the question. The Tenth Circuit has held that a federal agency's preemption determinations are not entitled to *Chevron* deference, while the Second, Fourth, Sixth, and Ninth Circuits

have granted *Chevron* deference to such agency rulings. *See* Pet. Cert. 19-20 (citing decisions from the Second, Sixth and Tenth Circuits); *see also Nat'l City Bank of Indiana v. Turnbaugh*, 463 F.3d 325 (CA4 2006), *cert. denied*, 127 S. Ct. 2096 (2007); *Wells Fargo, N.A. v. Boutris*, 419 F.3d 949 (CA9 2005).

A. *Chevron* Should Not Apply to Preemptive Rules Issued by Federal Agencies.

This Court should grant the petition and hold that *Chevron* deference is not available when a federal agency issues an order or rule expressing an opinion on the preemptive scope of a federal statute. The judicial branch should instead undertake a *de novo* review of federal agency preemption determinations. This will ensure that agencies resolve preemption issues in accordance with the Constitution's allocation of federal and state power.

As this Court emphasized in *Gregory v. Ashcroft,* 501 U.S. 452 (1991), the power of Congress to adopt legislation preempting "areas traditionally regulated by the States . . . is an extraordinary power in a federalist system. It is a power that we must assume Congress does not exercise lightly." *Id.* at 460. Accordingly, this Court has required Congress to "make its intention clear and manifest if it intends to pre-empt the historic powers of the States." *Id.* at 461 (citations and internal quotation marks omitted). Indeed, "the whole jurisprudence of preemption" is one of the important ways in which "this Court has participated in maintaining the federal balance."

United States v. Lopez, 514 U.S. 549, 578 (1995) (Kennedy, J., concurring).

Although the issue of *Chevron* deference was not addressed in *Gregory*, the Court emphasized that "we must be absolutely certain that Congress intended" to adopt legislation that alters the "state-federal balance." *Gregory,* 501 U.S. at 464. As the Court stated, to "give the state-displacing weight of federal law to mere congressional *ambiguity* would evade the very procedure for lawmaking on which *Garcia* relied to protect states' interests." *Id.* (emphasis in original) (quoting L. Tribe, *American Constitutional Law* § 6.25, p. 480 (2d ed. 1988) (referencing *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985) (declining to review federalism limitations on congressional Commerce Cause powers)).

In another case that raised important issues concerning the limits of federal power, this Court refused to defer under *Chevron* to an agency regulation. The Court concluded that the agency rule broadly interpreted a federal statute in a manner that "alter[ed] the federal-state framework by permitting federal encroachment upon a traditional state power." *Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng'rs,* 531 U.S. 159, 160 (2001). "[T]o avoid [the] significant constitutional and federalism questions" created by the agency's interpretation, this Court "reject[ed] the request for administrative deference." *Id.* at 161. The Court ultimately invalidated the regulation in the absence of "a clear statement from Congress that it intended . . . to readjust the federal-state balance." *Id.* at 174 (emphasis added). For the same reasons, the court

below should have held that *Chevron* was inapplicable in this case.

The judiciary's essential role in determining the preemptive scope of federal statutes should not be abdicated to federal agencies. The Second Circuit's decision demonstrates that the granting of *Chevron* deference to preemptive regulations will give federal agencies virtually unlimited discretion to override state law as long as the relevant federal statutes do not unambiguously prohibit such regulations. *See* Pet. App. 21a (holding that "[a]lthough the precise scope of 'visitorial' powers is not entirely clear from the text of [12 U.S.C.] § 484(a), . . . we cannot agree with the Attorney General that the statute clearly precludes the interpretation the OCC has adopted").

Thus, the practical effect of the Second Circuit's decision is to create a presumption favoring the agency's power to issue a preemptive ruling. Such a result is contrary to this Court's admonition that "[t]he critical question in any pre-emption analysis is always whether Congress intended that federal regulation supersede state law." *Louisiana Pub. Serv. Comm'n v. FCC,* 476 U.S. 355, 369 (1986). The Court has similarly explained that the success of a preemption claim depends on whether "language in the federal statute . . . reveals an explicit congressional intent to pre-empt state law" or, if not, whether "the federal statute's 'structure and purpose,' or nonspecific statutory language, nevertheless reveal a clear, but implicit, pre-emptive intent." *Barnett Bank of Marion County, N.A. v. Nelson,* 517 U.S. 25, 31 (1996) (quoting *Jones v. Rath Packing Co.,* 430 U.S. 519, 525 (1977)).

The *Chevron* framework is inappropriate for judging the validity of agency preemption determinations.[2] In view of our nation's commitment to federalism, a reviewing court may not properly decide that Congress intended to preempt state law simply by deferring to an agency's interpretation of an "ambiguous" statute.

B. The OCC's Preemptive Rules, in Particular, Should Not Be Reviewed Under *Chevron.*

The OCC's self-interest in issuing preemptive rules provides a special and compelling reason for rejecting its request for *Chevron* deference. Section 7.4000 is but one of a series of preemptive rules and opinions that the OCC has issued in recent years. *See Watters, supra* (upholding the validity of 12 C.F.R. § 7.4006, adopted in 2001, preempting the application of state laws to operating subsidiaries of national banks); 69 Fed. Reg. 1904 (Jan. 13, 2004) (adopting regulations preempting the application of a wide range of state laws to national banks). In defending the OCC's preemption initiatives, one former OCC head declared that preemption of state law is "a significant benefit of

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[2] *See* Nina A. Mendelson, *A Presumption Against Agency Preemption,* 102 Nw. L. Rev. 695, 698-99, 705-06 (2008) (arguing that *Chevron* deference should not apply to federal agency preemption determinations because agencies lack the requisite "expertise on important issues of state autonomy and federalism," *id.* at 698); *accord,* Nicholas Bagley, *Note: The Unwarranted Regulatory Preemption of Predatory Lending Laws*, 79 N.Y.U. L. Rev. 2274, 2293-97 (2004).

the national [bank] charter – a benefit that the OCC has fought hard over the years to preserve."[3]

The OCC has a substantial interest in persuading the largest banks to operate under national charters. The OCC's budget is almost entirely funded by national bank assessments, and the biggest banks pay the highest assessments.[4] In response to the OCC's aggressive preemption efforts, several large, multistate banks have converted from state to national charters, thereby producing a significant increase in the OCC's assessment revenues.[5]

Further, the OCC's record of enforcing consumer protection laws has been described as "a long history of inaction."[6] Publicly available information indicates that, during the entire period of 1995-2007, the OCC issued only 13 public enforcement orders against national banks for violations of consumer protection

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[3] Speech by Comptroller of the Currency John D. Hawke, Jr., on Feb. 12, 2002, quoted in Arthur E. Wilmarth, Jr., *The OCC's Preemption Rules Exceed the Agency's Authority and Present a Serious Threat to the Dual Banking System and Consumer Protection,* 23 Ann. Rev. Banking & Fin. L. 225, 236, 274 (2004).

[4] *See* Wilmarth, *supra* note 3, at 276.

[5] *See* Oren Bar-Gill & Elizabeth Warren, *Making Credit Safer*, 157 U. Pa. L. Rev. (2008) (forthcoming), *available at* http://www.ssrn.com/abstract=1137981, at 56-58, 64-66; Wilmarth, *supra* note 3, at 233-36, 274-79, 289-93.

[6] Bar-Gill & Warren, *supra* note 5, at 56-58, 64-66 (quote at 66); *see also* Wilmarth, *supra* note 3, at 232, 274-77, 289-93, 310-16, 351-56 (contending that the OCC's record of enforcing consumer protection laws is "unimpressive," *id.* at 232).

laws.[7] Only one of those orders included a charge that the bank violated state laws.[8] In that case, the OCC only took action after the public became aware that a California prosecutor was investigating the offending bank.[9] This feeble enforcement record is consistent with the OCC's budgetary incentives to follow policies that encourage large banks to operate under national charters.

The States' record presents a dramatic contrast. The New York State Attorney General and other state officials have used their enforcement powers to prosecute financial service providers for a wide range of unlawful practices over the past decade. Frequently, they have done so with greater vigor than their federal counterparts.[10] In 2003 alone, "state bank supervisory agencies performed more than 20,000 investigations in response to consumer complaints about abusive lending practices, and those

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[7] *See* Bar-Gill & Warren, *supra* note 5, at 65; Wilmarth, *supra* note 3, at 353, 355-56; Stephanie Mencimer, "No Account," *New Republic*, Aug. 27, 2007, at 14.

[8] *See In re Providian Nat'l Bank,* June 28, 2000, 2000 OCC Enf. Dec. LEXIS 55, at *1 (alleging violations of California statutes prohibiting unfair business practices).

[9] *See* Wilmarth, *supra* note 3, at 316 & n.357; "Correspondence," *New Republic*, Oct. 8, 2007, at 7 (response by Stephanie Mencimer to letter from Comptroller of the Currency John C. Dugan).

[10] *See, e.g.,* Wilmarth, *supra* note 3, at 316, 348-52, 354-55; Amir Efrati & Aaron Lucchetti, "U.S. News: Cuomo Blazes Own Trail as Wall Street Cop," *Wall St. J.,* Aug. 11, 2008, at A3; Brooke Masters, "In Spitzer's footsteps: Cuomo trains his sights on financial services," *Fin. Times*, June 5, 2007, at 1.

investigations produced more than 4,000 enforcement actions."[11]

Given the OCC's obvious financial motives for issuing preemptive rules and its anemic enforcement record, its regulation barring State enforcement actions should be denied any deference under *Chevron*.[12]

C. The Court Should Address the Tenth Amendment Issues Raised by the OCC's Regulation.

The OCC agrees that the NBA does not preempt state antidiscrimination laws, including New York State Executive Law § 296-a, and that those laws therefore apply to national banks.[13] Nevertheless, the OCC's regulation, 12 C.F.R. § 7.4000 (a)(2)(iv) & (b)(2), purports to bar New York from enforcing § 296-a against national banks or their operating subsidiaries. The regulation thereby impermissibly infringes upon New York's sovereign authority.

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[11] Wilmarth, *supra* note 3, at 316 (emphasis added).

[12] *See* Wilmarth, *supra* note 3, at 232-33, 293-98; *see also* Timothy K. Armstrong, Chevron *Deference and Agency Self-Interest*, 13 Cornell J. L. & Pub. Pol'y 203, 206-07, 286 (2004).

[13] *See* Pet. App. 15a, 29a (recognizing that Executive Law § 296-a is not preempted by the NBA or the OCC's regulation); *see also* OCC Interpretive Letter No. 998, Mar. 9, 2004, from OCC Chief Counsel Julie L. Williams to Rep. Barney Frank, *available at* http://www.occ.treas.gov/interp/aug04/int998.pdf.

In *Heath v. Alabama,* 474 U.S. 82 (1985), this Court explained that the authority of States to enforce their criminal laws "derive[s] from separate and independent sources of power and authority originally belonging to them before admission to the Union and preserved to them by the Tenth Amendment." *Id.* at 89. Each State also "has the power, inherent in any sovereign, independently to determine what shall be an offense against its authority and to punish such offenses." *United States v. Wheeler,* 435 U.S. 313, 320 (1978), *superseded by statute on other grounds*, Pub. L. No. 102-137, 105 Stat. 646 (1991) (codified at 25 U.S.C. § 1301(2)), *as recognized in United States v. Lara,* 541 U.S. 193, 197-98 (2004).

As Judge Cardamone observed in his dissenting opinion below, "[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 (Cardamone, J., dissenting). In *Calderon v. Thompson,* 523 U.S. 538 (1998), this Court observed that "'[o]ur 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.'" *Id.* at 556 (quoting *McClesky v. Zant,* 499 U.S. 467, 491 (1991)).

The majority opinion below concluded that the OCC's regulation "preserves state sovereignty" because non-preempted state laws "remain enforceable by private parties, as well as by the OCC itself." Pet. App. 29a. That conclusion is plainly at odds with this Court's decisions and with practical reality.

The Court has repeatedly upheld the sovereign authority of each State to enforce its own criminal laws. It has done so notwithstanding the fact that other entities may have power to enforce similar laws against the same persons. In *Heath*, the Court stated that "[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." 474 U.S. at 93 (emphasis in original). Similarly, in *Bartkus v. Illinois*, 359 U.S. 121 (1959), the Court determined that "[i]t would be in derogation of our federal system to displace the reserved power of States over state offenses by reason of prosecution of minor federal offenses by federal authorities beyond the control of the States." *Id.* at 137 (footnote omitted).

Ultimately, the OCC's regulation "confuses which governmental entity citizens should hold accountable for the enforcement of state laws against national banks." Pet. App. 59a (Cardamone, J., dissenting). Further, the OCC 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." *Id.* This problem has implications that have recently come to the forefront. Some analysts believe that the OCC's preemption of state consumer protection laws and state enforcement actions contributed to the severity of the current credit crisis by "stifling . . . prescient

state enforcers and legislators" who tried to prevent irresponsible lending.[14]

This Court invalidated a similar federal invasion of state sovereignty in *New York v. United States*, 505 U.S. 144 (1992). There, the Court struck down a federal law that used coercive measures to interfere with the States' regulatory and enforcement authority. The challenged statute in *New York* would have forced state governments to carry out a congressionally-mandated nuclear waste disposal program. The provision was unconstitutional because it "commandeer[ed] the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program." *Id.* at 176 (internal quotation marks and citation omitted). The Court's anti-commandeering principle reflected its concern that political accountability is "diminished when, due to federal coercion, elected state officials cannot regulate in accordance with the views of the local electorate in matters not pre-empted by federal regulation." *Id.* at 169.

The federal law invalidated in *New York* presented the mirror image of the OCC regulation at issue here. In *New York*, Congress sought to compel the States to implement a federal mandate. In this case, the OCC's regulation seeks to *prevent* the States from enforcing a State mandate. In each case, the federal provision is

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[14] *See, e.g.*, Robert Berner & Brian Grow, "They Warned Us: The Watchdogs Who Saw the Subprime Disaster Coming – and How They Were Thwarted by the Banks and Washington," *Bus. Week*, Oct. 20, 2008, at 36, 38; *see also* Nicholas Bagley, "Subprime Safeguards We Needed," *Wash. Post*, Jan. 25, 2008, at A19.

unlawful because it treats the States as "'mere political subdivisions of the United States'" and fails to recognize the "'residuary and inviolable sovereignty,'... reserved explicitly to the States by the Tenth Amendment." *Id.* at 188 (quoting *The Federalist* No. 39, p. 245 (James Madison) (C. Rossiter ed. 1961)).

II. Even If *Chevron* Applies, The Court Below Erred In Holding That The OCC's Regulation Was Entitled To Deference.

A. Congress Has Not Authorized the OCC to Prohibit States From Enforcing Valid, Non-preempted State Laws.

It is clear that "*Chevron* deference . . . is not accorded merely because the statute is ambiguous and an administrative [agency] is involved." *Gonzales v. Oregon*, 546 U.S. 243, 258 (2006). Rather, such deference is appropriate only if the regulation is "promulgated pursuant to authority Congress has delegated to the [agency]." *Id.*[15] In this case, however, Congress has not authorized the OCC to bar the States from enforcing valid, non-preempted state laws.

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[15] *Accord, Adams Fruit Co. v. Barrett,* 494 U.S. 638, 649 (1990) ("A precondition to deference under *Chevron* is a congressional delegation of administrative authority"); *see also* Thomas W. Merrill, *Preemption and Institutional Choice,* 102 Nw. L. Rev. 727, 771 (2008) ("the *Chevron* standard should apply to agency opinions about preemption in only one circumstance: where Congress has expressly delegated authority to the agency to preempt").

The OCC and the court below relied primarily on 12 U.S.C. § 484(a). Section 484(a) 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 [exercised by Congress or a committee thereof]." The OCC and the court focused mostly on the first clause of § 484(a). However, they applied an inappropriately restrictive reading to the "vested in the courts of justice" clause, which is key to this case.

The original NBA, enacted in 1864 (the "1864 Act"), included the prohibition on "visitorial" powers in the same section that authorized the OCC to make periodic examinations of national banks. *See* Act of June 3, 1864, c. 106, § 54, 13 Stat. 116. The 1864 Act also empowered the OCC to make special examinations of national banks in formation to determine whether those embryonic banks should be given certificates of authority to "commence the business of banking." Act of June 3, 1864, *supra*, §§ 17, 18, 13 Stat. 104, 105.

The current NBA provides the OCC with the same examination and chartering powers. *See* 12 U.S.C. §§ 481, 26, 27. In view of the OCC's authority to charter and examine national banks, *Watters* held that 12 U.S.C. § 484(a) would preclude the States from imposing a "registration" or "inspection" regime on national banks. 127 S. Ct. at 1568-69.

The 1864 Act and the current NBA also have authorized the OCC to appoint receivers for insolvent national banks or banks that fail to redeem their circulating notes. *See* Act of June 3, 1864, *supra*,

§§ 31, 32, 50, 13 Stat. 108-09, 114-15 (codified as amended in 12 U.S.C. §§ 191, 192). The power to appoint receivers is a significant source of administrative enforcement authority for the OCC. *See Cooper v. O'Connor*, 99 F.2d 135, 139 (CADC), *cert. denied,* 305 U.S. 643 (1938) (noting that the Comptroller is empowered to place a receiver "in complete charge" of a national bank).[16] In view of the administrative enforcement powers the OCC possesses, *Watters* concluded that a State "cannot confer on its [banking] commissioner examination and enforcement authority over mortgage lending, or any other banking business done by national banks." 127 S. Ct. at 1569 (footnote omitted).

Watters is consistent with this Court's decision in *Guthrie v. Harkness*, 199 U.S. 148 (1905). In *Guthrie,* the Court explained that the OCC's administrative powers of "investigation" (through bank examinations) and "appointment of a receiver" were the key "visitorial powers" referred to in 12 U.S.C. § 484(a). *Id.* at 159. However, *Guthrie* also observed that "visitorial powers . . . 'vested in the courts of justice'" are "expressly excepted from the inhibition of [§ 484(a)]." *Id.* As shown *infra* in Part II.B., § 484(a) was never interpreted to preempt judicial proceedings

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[16] Since 1966, the OCC has exercised additional administrative enforcement powers against national banks under provisions of § 8 of the Federal Deposit Insurance Act, 12 U.S.C. § 1818(b), (e), (i). This includes authority to issue cease-and-desist orders as well as orders removing officers and directors and orders imposing civil money penalties.

by state officials to enforce state laws until 2004, when the OCC adopted its challenged regulation.[17]

The "vested in the courts of justice" clause of § 484(a) and other provisions of the NBA make clear that Congress has not authorized the OCC to prevent the States from filing suits to enforce their laws. The clause is derived from § 54 of the 1864 Act, which exempted "visitorial powers . . . vested in the several courts of law and chancery." Act of June 3, 1864, *supra*, § 54, 13 Stat. 116. The current language of § 484(a), like § 54, contains no restriction on judicial proceedings instituted by state officials. The plain language of § 484(a) thus contradicts the OCC's regulation, which seeks to bar state officials from gaining access to "the courts of justice" to enforce their laws against national banks.

Other NBA provisions confirm the absence of OCC authority to bar suits by state officials. Section 93(a) of the NBA (which is derived from § 53 of the 1864 Act, 13 Stat. 116), provides that the OCC can sue in federal court to rescind the charter of a national bank if any of its directors "knowingly violate, or knowingly permit any of [its] officers, agents, or servants . . . to violate"

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[17] *Watters* dealt only with the question of whether a state official could exercise certain types of administrative enforcement powers over national banks and their operating subsidiaries. *See* 127 S. Ct. at 1565-66 (describing the administrative powers of Michigan's banking commissioner). *Watters* did not consider whether § 484(a) bars the States from enforcing valid, non-preempted state laws against national banks by using other methods, including the filing of judicial proceedings. Thus, as the court below acknowledged, "*Watters* does not directly address the questions at issue here." Pet. App. 20a.

any provision of the NBA. 12 U.S.C. § 93(a). Section 93(a) does not authorize the OCC to sue a national bank based on violations of *state* laws, nor does it prevent state officials from suing national banks to enforce state laws. Similarly, § 1 of the NBA (derived from § 1 of the 1864 Act, 13 Stat. 99-100), provides that the OCC is "charged with the execution" of the NBA. 12 U.S.C. § 1. This provision likewise does not authorize the OCC to "execute" state laws. It therefore rebuts the OCC's claim of exclusive authority to enforce state laws against national banks.

The OCC has also asserted that § 36(f)(1)(B) of the NBA supports its claim of "exclusive visitorial authority." 69 Fed. Reg. 1895, 1897 (Jan. 13, 2004). Section 36(f)(1)(B) provides that the OCC "shall . . . enforce[]" state laws applying to an interstate branch of national banks. 12 U.S.C. § 36(f)(1)(B). For two reasons, § 36(f)(1)(B) does not support the OCC's contention or the regulation at issue.

First, the provision applies only to interstate branches of national banks. Therefore, it cannot be construed to repeal by implication the "vested in the courts of justice" clause of § 484(a), which applies to national banks in their entirety. *See, e.g., Nat'l Ass'n of Home Builders v. Defenders of Wildlife,* 127 S. Ct. 2518, 2532 (2007) (holding that "repeals by implication are not favored and will not presumed unless the legislature's intention to repeal [is] clear and manifest") (internal quotation marks and citation omitted).

Second, the conference report on the 1994 legislation that enacted § 36(f)(1)(B) emphasized that

"States have a legitimate interest in protecting the rights of their consumers, businesses, and communities," and that "Congress does not intend that [the 1994 law] . . . weaken States' authority to protect the interests of their consumers, businesses, or communities."[18] The conference report further stated that "[u]nder well-established judicial principles, national banks are subject to State law in many significant respects . . . . The [1994 law] does not change these judicially established principles."[19] Thus, Congress clearly did not intend that § 36(f)(1)(B) would impair the States' existing authority to enforce their laws against national banks.

The NBA's provisions dealing with judicial proceedings confirm that Congress has not immunized national banks from suits in state court by state officials for violations of state law. The 1864 Act, like the current NBA, provided that each national bank would have the express authority to "sue and be sued, complain and defend, in any court of law and equity, as fully as natural persons." Act of June 3, 1864, § 8, 13 Stat. 101 (codified as amended at 12 U.S.C. § 24 (Fourth)). Section 57 of the 1864 Act gave federal and state courts concurrent jurisdiction over "suits, actions, and proceedings" against national banks. *Id.*, § 57, 13 Stat. 116-17.

The only exception to this general grant of concurrent jurisdiction to state courts was that federal

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[18] H.R. Rep. No. 103-651, at 53 (1994) (Conf. Rep.), *reprinted in* 1994 U.S.C.C.A.N. 2068, 2074 (emphasis added).

[19] *Id.* (emphasis added).

courts would have exclusive jurisdiction against "all proceedings to enjoin the [OCC]." *Id.*, 13 Stat. 117. Congress placed no limitation on suits by state officials and thus did not qualify the concurrent jurisdiction of state courts over suits involving national banks.

The provisions of § 57, as modified by several later enactments, were ultimately codified in 12 U.S.C. § 1348.[20] Section 1348 gives federal district courts exclusive original jurisdiction over (i) suits filed by federal officials against national banks, (ii) proceedings to wind up the affairs of national banks, and (iii) actions by national banks "to enjoin the Comptroller of the Currency or any receiver acting under his direction." However, § 1348 provides that national banks "shall, for the purposes of *all other actions* by or against them, be deemed citizens of the States in which they are respectively located." 12 U.S.C. § 1348 (emphasis added). Section 1348 preserves the general concurrent jurisdiction of state courts over suits involving national banks. It does not bar suits by state officials.

The OCC's regulation is plainly inconsistent with these NBA provisions. It therefore exceeds the agency's rulemaking authority under 12 U.S.C. §§ 371(a) and 93a. Under § 371(a), the OCC may issue regulations that prescribe "restrictions and requirements" for national bank real estate loans. However, § 371(a) provides that national banks must

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[20] *Mercantile Nat'l Bank at Dallas v. Langdeau,* 371 U.S. 555, 559-61, 565-67 (1963); *see also Wachovia Bank, N.A. v. Schmidt,* 546 U.S. 303, 310-12 (2006).

also comply with the uniform interagency real estate lending standards established under 12 U.S.C. § 1828(*o*). One of those standards requires national banks to adopt lending policies promoting "[c]ompliance with all real estate laws and regulations, including anti-discrimination laws." 12 C.F.R. Pt. 34, Subpt. D, App. A (OCC's version of uniform standards, under the heading "Loan Portfolio Management Considerations").

On its face, this uniform standard requires national banks to comply with applicable state laws, including New York State Executive Law 296-a. Accordingly, § 371(a) does not permit the OCC to adopt a regulation that undermines the compliance duties of national banks by blocking state officials' enforcement of controlling state law.

Under 12 U.S.C. § 93(a), the OCC may adopt rules "to carry out the responsibilities of the office." *Gonzales v. Oregon* held that a similar federal statute did not authorize the Attorney General to "make a rule declaring illegitimate a medical standard for care and treatment of patients that is specifically authorized under state law." 546 U.S. at 258. The Court concluded that the Attorney General's authority to adopt rules executing "his functions" under 12 U.S.C. § 871(b) did not empower him to issue a preemptive regulation that went "well beyond the statute's specific grants of authority." *Id.* at 264-65. Like § 871(b), 12 U.S.C. §§ 371(a) and 93a are "generic authorizations of rulemaking authority, . . . and neither says a word about preemption." *Watters,* 127 S. Ct. at 1583 n.23 (Stevens, J., dissenting). Those provisions therefore

"provide no textual foundation for the OCC's assertion of preemption authority." *Id.*

B. This Court and Other Courts Have Repeatedly Upheld the States' Authority to Institute Judicial Proceedings to Enforce Their Laws Against National Banks.

In two cases decided soon after Congress passed the 1864 Act, this Court confirmed the right of state and local officials to sue national banks. *See Nat'l Bank v. Kentucky,* 76 U.S. (9 Wall.) 353 (1870) (suit by Kentucky); *Waite v. Dowley,* 94 U.S. 527 (1876) (suit by Vermont local official). Neither decision mentioned the NBA's restriction on "visitorial powers."

In *Kentucky*, the Court stated that Kentucky's lawsuit to collect taxes from a national bank was "no greater interference with the functions of the bank than any other legal proceeding to which its business operations may subject it." 76 U.S. (9 Wall.) at 362-63. In *Waite,* the Court held that a Vermont statute, which authorized judicial proceedings to enforce a national bank's duty to furnish shareholders' names and addresses, was a "proper exercise of the rightful powers of the State." 94 U.S. at 534.

In two subsequent decisions, the Court upheld the authority of state attorneys general to file *quo warranto* actions to enforce state laws against national banks. *See First Nat'l Bank in St. Louis v. Missouri,* 263 U.S. 640, 659-61 (1924); *First Nat'l Bank of Bay City v. Fellows,* 244 U.S. 416, 427-28 (1917). In *St. Louis*, the national bank and the United States argued

that Rev. Stat. § 5241 – the predecessor of 12 U.S.C. § 484(a) – barred Missouri's attorney general from suing the bank. *See* 263 U.S. at 643 (summary of bank counsel's argument); *id.* at 645 (summary of Solicitor General's argument). This Court, however, upheld the Missouri attorney general's power to institute judicial enforcement proceedings. It declared that "the power of enforcement . . . is essentially inherent in the very conception of law." *Id.* at 660.

The Court determined in *St. Louis* that Missouri was seeking "to vindicate and enforce its own law" and was "neither seeking to enforce a law of the United States nor endeavoring to call the bank to account for an act in excess of its charter powers." *Id.* As the dissent below observed, the latter two functions – which Missouri was **not** trying to exercise – "line up precisely with the definition of 'visitorial power' provided . . . in *Guthrie* [199 U.S. at 158]." Pet. App. 57a-58a (Cardamone, J., dissenting).

This case presents the same situation as *St. Louis*. The Petitioner here is seeking to enforce a State law prohibiting discrimination in lending. The OCC, in turn, has conceded the absence of any conflict between that State law and applicable federal law. Therefore, as in *St. Louis*, the State is not seeking to enforce a federal law or to interfere with the authorized activities of a national bank.

Judge Cardamone's dissent also cited several federal and state court decisions that have affirmed the right of state officials to sue national banks since *St. Louis*. *Id.* at 50a-51a. Another federal court decision shows that the OCC acknowledged the States'

authority to file judicial enforcement proceedings in 1999. In *First Union National Bank v. Burke*, 48 F. Supp. 2d 132 (D. Conn. 1999), the OCC obtained an injunction to prevent Connecticut's banking commissioner from issuing administrative cease-and-desist orders against three national banks.

In *Burke*, "the OCC claim[ed] that . . . Congress intended the OCC to have exclusive administrative enforcement authority over national banks for all laws, including state banking laws." *Id.* at 135 (quote), 140. The *Burke* court agreed with the OCC, but it also concluded that "a state may seek enforcement of its state banking laws in either federal or state court" by reason of the "vested in the courts of justice" clause in 12 U.S.C. § 484(a). *Id.* at 146.

Further, in rejecting the state banking commissioner's Tenth Amendment argument, the court emphasized that its injunction would not "preclude the Commissioner from seeking enforcement of this state banking statute against the plaintiff national banks through the courts." *Id.* at 148-49, 151. For a time, the OCC "acquiesced to" the court's conclusion in *Burke*, and it did not seek to bar state officials from enforcing their laws through judicial proceedings. *See* Pet. App. 109a-110a (district court decision). Then, in 2004, the OCC adopted the challenged regulation.

The 2004 regulation unmistakably exceeds the OCC's statutory authority. It also creates the identical Tenth Amendment problems that the *Burke* court carefully avoided. This Court should therefore review the decision below and invalidate the regulation.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

STEFAN L. JOURET
Counsel of Record
JOHN FOSKETT
DEUTSCH WILLIAMS BROOKS DERENSIS & HOLLAND, P.C.
One Design Center Place
Suite 600
Boston, Massachusetts 02210
(617) 951-2300

ARTHUR E. WILMARTH, JR.
Professor of Law
GEORGE WASHINGTON UNIVERSITY LAW SCHOOL
2000 H Street, N.W.
Washington, D.C. 20052
(202) 994-6386

JOHN ("BUZ") GORMAN
Conference of State Bank Supervisors
1155 Connecticut Ave., NW, 5th floor
Washington, DC 20036
(202) 728-5726

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