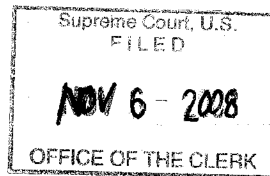

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IN THE

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

BRIEF OF NATIONAL ASSOCIATION OF REALTORS® AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*[1]

Amicus the National Association of REALTORS® ("NAR")[2] is a nationwide, nonprofit professional association, incorporated in Illinois, that represents persons engaged in all phases of the real-estate business, including, but not limited to, brokerage, appraising, management, and counseling. Founded in 1908, NAR was created to promote and encourage the highest and best use of the land, to protect and promote private ownership of real property, and to promote professional competence. Its members are bound by a strict Code of Ethics to ensure professionalism and competence. The membership of NAR includes 54 state and territorial Associations of REALTORS®, approximately 1,500 local Associations of REALTORS®, and approximately 1.3 million REALTOR® and REALTOR-ASSOCIATE® members.

NAR represents the interests of real-estate professionals and real-property owners in important matters before the legislatures, courts, and executives of the federal and state governments. The issues presented in those matters include fair-lending

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amicus* represents that it authored this brief in its entirety and that none of the parties or their counsel, nor any other person or entity other than *amicus*, its members, or its counsel, made a monetary contribution intended to fund the preparation or submission of this brief. Counsel for *amicus* also represents that counsel of record for all parties received notice of *amicus*'s intention to file this brief at least 10 days prior to the due date and that all parties have consented to the filing of this brief. Letters reflecting the parties' consent have been filed with the Clerk.

[2] REALTOR® is a federal registered collective membership mark used by members of NAR to indicate their membership status.

practices, equal opportunity in housing, real-estate licensing, neighborhood revitalization, housing affordability, and cultural diversity. NAR has previously participated as *amicus curiae* in numerous cases before this Court, including, *e.g.*, *Glenmont Hills Assocs. Privacy World at Glenmont Metro Centre v. Montgomery County*, 128 S. Ct. 2914 (2008); *FEC v. Wisconsin Right to Life, Inc.*, 127 S. Ct. 2652 (2007); *Watters v. Wachovia Bank, N.A.*, 127 S. Ct. 1559 (2007); *Rapanos v. United States*, 547 U.S. 715 (2006); *Lincoln Prop. Co. v. Roche*, 546 U.S. 81 (2005); *Kelo v. City of New London*, 545 U.S. 469 (2005); *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999); *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687 (1995); *Dolan v. City of Tigard*, 512 U.S. 374 (1994); *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992); and *Yee v. City of Escondido*, 503 U.S. 519 (1992).

NAR is interested in fighting discriminatory practices in mortgage lending in order to ensure the ample availability of funds for mortgage lending. The livelihood of NAR's members depends on lending practices that are fair, transparent, and non-discriminatory. Such lending practices ensure that mortgages will be available to the maximum number of consumers who wish to purchase homes. Home ownership is in the best interest of the country as a whole as well as to NAR, and it continues to be recognized as a favored public policy goal at both the federal and state levels. In contrast, when national banks discriminate in their mortgage lending, fewer funds are available for home purchases. State anti-discrimination laws play an important role in fighting discriminatory lending practices. These laws are

most effectively enforced by the States themselves. Therefore, enforcement of state anti-discrimination laws by the States is crucial to ensuring that national banks have fair, transparent, and non-discriminatory lending practices, and that they do not obtain a competitive advantage over similarly situated entities that must comply with generally applicable state laws.

NAR's interests in this case also arise from its status as a leading advocate for housing issues and its substantial and longstanding commitment to affordable housing, equal opportunity in housing, and fair housing compliance. These concerns are also acutely affected by and related to the mortgage lending issues at the core of this case, and to the extent this decision denies States the authority to enforce their fair lending statutes the housing interests of NAR and its members may be similarly compromised. In addition, as explained below, the broad scope of the authority seized by the Office of the Comptroller of the Currency ("OCC") in this case has widespread implications for state enforcement of other state statutory and regulatory schemes that may be applicable to NAR's members.

Accordingly, NAR's interests will be directly affected by the outcome of this case.

SUMMARY OF ARGUMENT

This case concerns who will enforce valid, generally applicable, and non-preempted state laws against national banks and their non-bank operating subsidiaries. The OCC concedes that national banks and their operating subsidiaries must comply with these state laws, such as New York's anti-discrimination laws at issue in this case. However, the OCC asserts that its "visitorial powers" under the National Bank Act broadly vest in the OCC "exclusive visitorial authority" to enforce these state laws against national banks and their operating subsidiaries. The OCC has set forth at 12 C.F.R. § 7.4000 that claim of authority to displace the ability of state attorneys general to enforce laws enacted by state legislatures. The OCC's regulation is invalid.

A State's right to enforce its own laws is a core aspect of its sovereignty. Although federal law can preempt state law, where state law is not preempted and entities are required to abide by state law, a State retains the authority to enforce such laws. As this Court explained many years ago: "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." *First Nat'l Bank v. Missouri*, 263 U.S. 640, 660 (1924) (superseded by statute on other grounds). Indeed, neither the OCC nor the court below identified any other situation in which States are precluded from enforcing their valid laws and enforcement authority of those laws rests exclusively in a federal agency. Even assuming basic principles of federalism and this Court's jurisprudence would

afford Congress authority to deny States the right to enforce their own laws, only Congress — through an express statutory enactment — could so deprive States of that authority. A federal agency has no implicitly delegated authority to decide whether to displace state enforcement of valid state laws; therefore, this is not an issue on which a federal agency's statutory interpretation is entitled to *Chevron*[3] deference.

Here, Congress has not expressly stripped States of their authority to enforce state laws that apply to national banks and their operating subsidiaries, nor has it expressly granted to OCC the power to strip States of that authority. And neither the OCC nor the court below claimed otherwise. In fact, the statutory provisions on which the OCC and the court below relied do not divest States of their inherent enforcement authority or speak with sufficient clarity to authorize the OCC to deprive States of such authority. Where Congress did address the OCC's authority to ensure that national banks and their operating subsidiaries abide by state law, it gave the OCC — at most — concurrent authority with States to enforce that law. *See* 12 U.S.C. § 1818(b).

Even aside from the fact that reading statutes to grant implicitly federal agencies the discretion to strip States of their authority to enforce non-preempted state law conflicts with basic principles of federalism, there is a second reason why the Court should not presume such implicit authority in this case. The OCC's budget comes almost exclusively from assessments that national banks pay. In fiscal year 2007, the OCC collected $666 million — or 95.8

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[3] *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

percent of its total operating budget — through such assessments. Moreover, state banks always have the option of obtaining a national charter and, thereby, becoming national banks. The OCC, therefore, has a strong budgetary incentive to entice state banks to make that switch by increasing the attractiveness of a national charter as compared to a state charter. Through § 7.4000, the OCC purports to leave national banks' and their operating subsidiaries' compliance with state law subject only to OCC oversight, while their state bank competitors remain subject to the enforcement authority of the state attorneys general. Being subject to oversight by the OCC alone provides a significant incentive for more state banks to obtain national charters, which in turn increases the OCC's budget and the breadth of its authority over the banking system.

Finally, the scope of the OCC's claim of authority is incredibly broad. The OCC has already authorized national banks to engage in activities that are only tangentially related to the "business of banking," including the provision of Medicare and Medicaid counseling to customers, the collection and disbursement of insurance benefit payments, and the real estate development of a mixed-use building with several floors of condominiums. Accordingly, when national banks or their operating subsidiaries engage in those activities, or others the OCC may subsequently empower them to undertake, States will be unable to enforce against those companies their valid, generally applicable, and non-preempted laws, such as their consumer protection and fair housing laws. Other players in those industries will remain subject to state enforcement, creating an unlevel playing field and giving rise to large gaps in the

enforcement of otherwise uniformly applicable state laws in those industries. And achievement of the public policy objectives of state legislatures in adopting such laws will inevitably be subject to the OCC's discretion and whatever resources and abilities it may have available to apply to such enforcement.

REASONS FOR GRANTING THE PETITION

I. CONGRESS DID NOT STRIP STATES OF THEIR SOVEREIGN RIGHT TO ENFORCE NON-PREEMPTED STATE LAWS AGAINST NATIONAL BANKS AND THEIR OPERATING SUBSIDIARIES, NOR DID IT GRANT TO OCC THE AUTHORITY TO DO SO

A. Absent An Express Authorization From Congress, Administrative Agencies Cannot Strip States Of Their Sovereign Rights

This Court's cases make clear that, when Congress seeks to alter the federal-state balance of power, Congress must "make its intention . . . unmistakably clear in the language of the statute." *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991) (internal quotation marks omitted); *see United States v. Bass*, 404 U.S. 336, 349 (1971) ("[U]nless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance.").

This clear-statement requirement is especially pronounced when it is a federal agency — and not Congress — that is altering the basic allocation of authority between the federal and state governments. As this Court has explained, "where [an] administrative interpretation alters the federal-state framework by permitting federal encroachment upon a traditional state power," the Court's "concern" for a clear statement from Congress "is heightened." *Solid*

Waste Agency v. United States Army Corps of Eng'rs, 531 U.S. 159, 173 (2001).

Here, the OCC has promulgated a regulation that purports to divest States of their sovereign authority to enforce generally applicable state laws against national banks and their subsidiaries. The OCC concedes that national banks and their operating subsidiaries must comply with those state laws[4] — the laws are not expressly preempted, subject to field preemption, or in conflict with any federal law or policy.[5] Instead, the OCC claims that state attorneys general cannot enforce against national banks and their operating subsidiaries generally applicable laws that state legislatures retain authority to enact.[6]

As this Court held long ago: "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

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[4] *See* OCC C.A. Br. 37 (May 30, 2006).

[5] Accordingly, this case is very different from *Watters v. Wachovia Bank, N.A.*, 127 S. Ct. 1559 (2007), where the question presented involved the preemption of state law. There, the Court applied conflict-preemption principles to hold that, "when state prescriptions significantly impair the exercise of [a national bank's] authority . . . under the [National Bank Act], the State's regulations must give way." *Id.* at 1567. Therefore, the national bank operating subsidiaries had no obligation to comply with those state laws.

[6] The dissent below aptly put it this way: "In the case at hand, . . . 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." Pet. App. 46a (quoting U.S. Const. amend. X).

is essentially inherent in the very conception of law." *First Nat'l Bank v. Missouri*, 263 U.S. 640, 660 (1924) (superseded by statute on other grounds). Thus, a State's authority to enforce its own laws is an inherent sovereign power and a quintessential function of the State.

Indeed, "[e]ach [State] 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); *see Diamond v. Charles*, 476 U.S. 54, 65 (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). These two powers — the power to create law and the power to enforce that law — are interdependent, for "the power of a State to pass laws means little if the State cannot enforce them." *McCleskey v. Zant*, 499 U.S. 467, 491 (1991).

Even assuming Congress has authority to preempt state enforcement of state laws, rather than state laws themselves — and neither the OCC nor the court below identified any other instance in which Congress has allowed States to pass laws that they may not enforce — Congress must speak expressly to so alter the federal-state balance of power. Congress cannot do so through implication, and federal agencies should not be assumed to have received such delegations of power to strip States of their enforcement authority. Accordingly, there is no basis in these circumstances for granting *Chevron* deference to the OCC's claim that the statute grants it such power. A fundamental prerequisite for the application of *Chevron* deference — the implicit delegation of authority to agencies to fill in statutory gaps — is

absent in this context. *See, e.g.*, *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159 (2000) ("Deference under *Chevron* . . . is premised on the theory that a statute's ambiguity constitutes an implicit delegation from Congress to the agency to fill in the statutory gaps."); *id.* at 133 (recognizing that the Court "must be guided to a degree by common sense as to the manner in which Congress is likely to delegate a policy decision of such . . . political magnitude to an administrative agency"); *cf. Adams Fruit Co. v. Barrett*, 494 U.S. 638, 649 (1990) ("A precondition to deference under *Chevron* is a congressional delegation of administrative authority.").[7]

Although the court below appears to acknowledge the clear-statement rule that applies when Congress seeks to alter "an intrinsic aspect of state sovereignty," Pet. App. 11a, the court made no attempt to reconcile that rule with the fact that *Chevron* is invoked only when "'the statute is silent or ambiguous with respect to the specific issue,'" *id.* at 10a (quoting *Chevron*, 467 U.S. at 843). Instead, the court limited itself to analyzing the applicability of the presumption against preemption and the canon of constitutional avoidance. *See id.* at 11a-14a. Finding those doctrines inapplicable, the court concluded with essentially no explanation or justification that Congress's "expressed . . . intent" to preempt certain state laws meant that there was no "need for any further statement of intent" to preempt States from enforcing laws that are not preempted. *Id.* at

[7] "[I]t is well established," the dissent below stated, "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*." Pet. App. 54a (citing *Solid Waste Agency*, 531 U.S. at 172).

14a. That conclusion is directly contrary to this Court's federalism decisions, which require a much clearer statement to divest States of their inherent authority to enforce their own laws. Moreover, allowing a federal agency to do so without express authorization from Congress blurs lines of political accountability to an even greater degree, which is in contravention of this Court's other federalism precedents. *See, e.g., United States v. Lopez*, 514 U.S. 549, 576-77 (1995) ("[C]itizens must have some means of knowing which of the two governments to hold accountable for the failure to perform a given function.") (Kennedy, J., concurring); *New York v. United States*, 505 U.S. 144, 169 (1992) ("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 pre-empted by federal regulation.").[8] Put simply, the need for a clear statement from Congress in this context means that *Chevron* deference to the OCC's interpretation of 12 U.S.C. § 484(a) and promulgation of 12 C.F.R. § 7.4000 is, by definition, improper.

B. Congress Did Not Expressly Divest States Of Authority To Enforce Non-Preempted State Law, Nor Did It Expressly Delegate To The OCC The Power To Do So

The OCC has pointed to two statutory provisions as the source for its supposed power to strip States of authority to enforce the laws that they retain the

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[8] As the dissent below concluded, "[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.

authority to enact.[9] Neither contains the type of express statement that would be necessary to withdraw from States the "power of enforcement" that is "essentially inherent" in their authority to enact laws that apply to national banks and their operating subsidiaries. *First Nat'l Bank*, 263 U.S. at 660.

First, the OCC has looked to the provisions of the National Bank Act that grant the Comptroller "visitorial powers" over national banks. 12 U.S.C. §§ 481, 484(a). The court below also relied on § 484(a). *See* Pet. App. 10a-32a. But there is nothing in this statutory provision that states — expressly or implicitly — that Congress intended for States to be able to pass laws with which national banks and their operating subsidiaries must comply, but that States would be powerless to enforce those laws when they are violated.

In particular, the term "visitorial powers" cannot be stretched to provide the necessary express statement of congressional intent. "Few ideas were more familiar in the formative era of the common law than that of visitation." Roscoe Pound, *Visitatorial Jurisdiction Over Corporations in Equity*, 49 Harv. L. Rev.

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[9] The OCC also makes reference to its general rulemaking authority as the source of its power to restrict States from enforcing non-preempted state law. *See* 12 U.S.C. § 93a ("the Comptroller of the Currency is authorized to prescribe rules and regulations to carry out the responsibilities of the office"). General rulemaking authority may mean that an agency receives *Chevron* deference for regulations that fall within its rulemaking authority, but it does not mean that Congress implicitly delegated to the agency the authority to pass any rule on any subject it wishes. Congress has not expressly authorized the OCC to strip States of enforcement authority over valid state laws, and therefore the fact that the OCC has rulemaking authority does not mean it had authority to promulgate a rule doing so.

369, 369 (1936). When Congress enacted the National Bank Act in 1864 and included the clause on "visitorial powers," *see* Act of June 3, 1864, ch. 106, § 54, 13 Stat. 99, 116, it incorporated the common-law meaning of that term.[10]

As this Court has held, under the common law, "[v]isitation, *in law*, is the act of a superior or superintending officer, who visits a corporation to . . . enforce an observance of [the corporation's] laws and regulations." *Guthrie v. Harkness*, 199 U.S. 148, 158 (1905) (emphasis added). In other words, the term refers to the supervisory authority to examine the corporation's books and records, to oversee its management and internal affairs, and to monitor its compliance with its charter. *See id.* at 157-59. The Court reiterated the meaning of "visitorial powers" 19 years later, explaining that "the United States alone may inquire . . . whether a national bank is acting in excess of its charter powers, and . . . the state is wholly without authority to do so." *First Nat'l Bank*, 263 U.S. at 660; *see also Watters*, 127 S. Ct. at 1568-69. For nearly 150 years, Congress has not seen a need to amend the National Bank Act to alter the well-settled meaning of "visitorial powers." Numerous federal courts have confirmed the authority of state officials to enforce non-preempted state laws against national banks.[11]

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[10] *See Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 322 (1992) ("[W]here Congress uses terms that have accumulated settled meaning under the common law, a court must infer, unless the statute otherwise dictates, that Congress means to incorporate the established meaning of these terms.") (internal quotation marks and ellipses omitted).

[11] *E.g., Jackson v. First Nat'l Bank*, 349 F.2d 71, 74-75 (5th Cir. 1965) (upholding a state banking superintendent's author-

Accordingly, when a State brings an enforcement action against a national bank for violations of valid, generally applicable, and non-preempted state anti-discrimination or consumer protection laws, it is not exercising "visitorial powers" over that bank, for it is not "endeavoring to call the bank to account for an act in excess of its charter powers"; instead, it is seeking "to vindicate and enforce its own law, and the ultimate inquiry which it propounds is whether the bank is violating that law, not whether it is complying with the charter or law of its creation." *First Nat'l Bank*, 263 U.S. at 660.[12] The dissent below understood that distinction. *See* Pet. App. 49a ("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."). The OCC's interpretation of "visitorial powers" to preclude state enforcement of all generally applicable state laws is flatly contrary to the settled meaning of that term.

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ity to bring suit for injunctive relief); *Nuesse v. Camp*, 385 F.2d 694, 699-705 (D.C. Cir. 1967) (same); *Minnesota v. Fleet Mortgage Corp.*, 158 F. Supp. 2d 962, 966 (D. Minn. 2001) ("[f]ederal law does not require that the OCC have exclusive enforcement" of state laws prohibiting fraud and deceptive trade practices against "national banks and their branches").

[12] The General Accounting Office (now the Government Accountability Office) ("GAO") similarly recognized the distinction between a "law enforcement" agency "focused on conducting investigations in response to consumer complaints and other information" and a "supervisory" officer like the Comptroller performing "routine monitoring and examination responsibilities." GAO, *Consumer Protection: Federal and State Agencies Face Challenges in Combating Predatory Lending* 53 (2004), *available at* http://www.gao.gov/new.items/d04280.pdf.

At a minimum, Congress's use of "visitorial powers" cannot be understood to reflect an intent to divest States of their inherent, sovereign authority to enforce the laws they have the power to enact against those parties that are subject to — and violate — those laws.

Second, in promulgating § 7.4000, the OCC cited 12 U.S.C. § 1818 as a basis for its claim to exclusive authority to enforce valid, generally applicable state laws against national banks and their operating subsidiaries. That section authorizes the OCC to initiate cease-and-desist proceedings to remedy a violation of any "law, rule, or regulation." 12 U.S.C. § 1818(b). At least one court has read that section's terms to encompass violations of both state and federal laws.[13] Section 1818(b), however, simply authorizes the OCC to take enforcement actions when a national bank or an operating subsidiary violates an applicable state law. But it is one thing for Congress to authorize an agency to enforce state law and quite another to make the federal agency's authority exclusive, so as to preclude the progenitor of the law from enforcing it. Nothing in the text or legislative history of § 1818(b) suggests that Congress did anything more than authorize concurrent enforcement of state law.[14]

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[13] *See National State Bank v. Long*, 630 F.2d 981, 988 (3d Cir. 1980) ("[t]he legislative history of the Act indicates that Congress was concerned not only with federal but with state law as well").

[14] The court below did not address § 1818(b). And, in its brief below, the OCC made a passing reference to the section as the source of its authority to bring enforcement actions for violations of state law against national banks, but the OCC did not (because it cannot) make a serious argument that § 1818(b) authorizes it to preclude state enforcement of valid state laws.

If § 7.4000 were allowed to stand, it would have serious implications for the proper allocation of political accountability between the state and federal governments. By removing from state officials the power to enforce valid, generally applicable, non-preempted state laws, § 7.4000 raises the possibility that citizens will be uncertain and confused as to whom they should hold responsible for the enforcement of state laws against national banks.

II. THE OCC'S BUDGETARY INCENTIVES PROVIDE AN INDEPENDENT REASON TO VIEW ITS CLAIM OF AUTHORITY WITH SKEPTICISM RATHER THAN DEFERENCE

The OCC's budget comes primarily from assessments that it levies on those banks that have elected to operate under national charters. The OCC does not receive appropriations.[15] Instead, the Comptroller is given authority by statute to "impose and collect assessments, fees, or other charges as necessary or appropriate to carry out the responsibilities of the office of the Comptroller." 12 U.S.C. § 482. Pursuant to this authority, the Comptroller levies a semiannual assessment on all nationally chartered banks. The size of the assessments is not based on the OCC's budgetary needs. Rather, assessments are based on a fixed fee schedule,[16] so the more banks with national charters, the larger the OCC's budget.[17] For fiscal year 2007, the OCC's total

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[15] *See* OCC, *Annual Report – Fiscal Year 2007*, at 70 (Nov. 2007) ("*OCC FY2007 Report*"), *available at* http://www.occ.gov/annrpt/2007AnnualReport.pdf.

[16] *See* 12 C.F.R. § 8.2(a) (highest assessment rates are paid by national banks with assets over $250 billion).

[17] *See generally* OCC, *Semiannual Assessment* (updated Feb. 19, 2008), *at* http://www.occ.gov/assess.htm.

budget amounted to $695.4 million, $666 million of which, or 95.8 percent, came from assessments on national banks.[18]

Because its budget depends on these assessments on national banks, the OCC has a strong incentive to promulgate rules and to operate in a manner that entices banks to obtain and maintain national charters, as opposed to state charters. Indeed, the OCC views itself as engaged in a competition with the States to convince banks to opt for national charters rather than state charters. The OCC has stated that the potential of losing regulatory "market share" to the state banking system was "'a matter of concern to us.'"[19] Accordingly, "the OCC has aggressively supported the preemption of state laws in order to keep national banks . . . from converting to state charters" — thereby reducing the OCC's resources — and to persuade state banks to adopt national charters.[20] As a former Comptroller acknowledged, the preemption of state regulatory authority "provides an incentive for banks to sign up with the OCC . . . . 'It is one of the advantages of a national charter, and I'm not the least bit ashamed to promote it.'"[21]

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[18] The remainder of the OCC's budget comes from investment income and bank licensing fees. *See OCC FY2007 Report* at 70 & table 9.

[19] Jess Bravin & Paul Beckett, *Friendly Watchdog: Federal Regulator Often Helps Banks Fighting Consumers*, Wall St. J., Jan. 28, 2002, at A1 (quoting Comptroller John D. Hawke, Jr.).

[20] Remarks by John D. Hawke, Jr., Comptroller of the Currency, Before the Women in Housing and Finance at 2 (Feb. 12, 2002) ("Hawke Remarks"), *reprinted in* OCC News Release 2002-10, *available at* http://www.occ.treas.gov/ftp/release/2002-10a.doc.

[21] Bravin & Beckett, *supra* note 19, at A1 (quoting Comptroller Hawke).

Moreover, the OCC made clear from the outset that it intended for § 7.4000 and related regulations to serve as a marketing tool to attract state banks to adopt national charters, as the switch would free them from the prospect of state enforcement of applicable state laws. In a Notice of Proposed Rulemaking that delineated the several categories of preempted state laws, the OCC promoted the creation of "a 'complete' national banking system, free from state control, and subject to uniform, national standards."[22] The only way for there to be "uniform, national standards" is if the varying laws of the 50 States remain unenforced. The OCC has taken the possibility of operating under "uniform, national standards" (and the implicit promise to leave state laws unenforced) as a theme in its public pronouncements, emphasizing that one of the primary benefits of becoming a national bank is the freedom from state regulation. In the OCC's view, a "major advantage of the national charter" is the possibility "to conduct a multistate business subject to a single uniform set of federal laws, under the supervision of a single regulator, free from visitorial powers of various state authorities."[23] A former Chairman of the Federal Deposit Insurance Corporation ("FDIC") came to the same conclusion in 2005, explaining that "[t]he facts of life today with regard to preemption are fairly simple. A state-chartered bank that wants to do business across state lines is at a substantial competitive disadvantage relative to a national bank."[24]

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[22] *Bank Activities and Operations; Real Estate Lending and Appraisals*, 68 Fed. Reg. 46,119, 46,129 (Aug. 5, 2003).

[23] Hawke Remarks at 2.

[24] Remarks by Donald E. Powell, Chairman, FDIC, Before the American Bankers Association Annual Convention at 2 (Sept.

The OCC's marketing efforts have been successful. In fiscal year 2005, the OCC recorded a 15 percent increase in assessment revenues.[25] The OCC openly attributed this revenue growth to "new large banks joining the national banking system" following the promulgation of regulations like § 7.4000.[26]

Given the possibility of freedom from state enforcement of state law, it is not surprising that many of the largest banks publicly supported the OCC's adoption of § 7.4000[27] and then converted from state to national charters thereafter.[28]

In short, even if *Chevron* deference to the OCC's adoption of § 7.4000 were appropriate, which it is not, as explained above, the OCC's budgetary self-interest provides an independent basis for viewing its interpretation of the National Bank Act with skepticism rather than the deference accorded under *Chevron*. *See Indiana Michigan Power Co. v. Depart-*

26, 2005), *available at* http://www.fdic.gov/news/news/speeches/archives/2005/chairman/spsept2605.html.

[25] OCC, *Annual Report – Fiscal Year 2005*, at 62 & table 9 (Oct. 2005) (reporting that the OCC's assessment revenues rose from $482.3 million in fiscal year 2004 to $557.8 million in fiscal year 2005), *available at* http://www.occ.treas.gov/annrpt/2005AnnualReport.pdf.

[26] *Id.* at 62.

[27] *See* Todd Davenport, *Are States, OCC Near a Preemption Showdown?*, American Banker, Nov. 5, 2003, at 1 (reporting that, "[t]o nobody's surprise, large national banking companies such as Bank of America Corp., Wells Fargo & Co., Wachovia Corp., Bank One Corp., and National City Corp. wrote long comment letters" in support of the OCC's rulemaking proposal).

[28] Laura Thompson Osuri, *Trustmark of Miss. Sticking with OCC*, American Banker, Sept. 20, 2004, at 5 (reporting that J.P. Morgan Chase, HSBC, and Harris Bank had converted from state to national charters in 2004).

ment of Energy, 88 F.3d 1272 (D.C. Cir. 1996) (refusing to apply *Chevron* deference to a financially self-interested agency's interpretation of a statute). In comparable situations where there is a risk of agency self-interest — such as when an agency interprets a contract to which it is a party — courts routinely refuse to apply *Chevron*. *See Mesa Air Group, Inc. v. Department of Transp.*, 87 F.3d 498, 503 (D.C. Cir. 1996) (holding that an agency's self-interested contractual interpretation did not deserve *Chevron* deference); *see also National Fuel Gas Supply Corp. v. FERC*, 811 F.2d 1563, 1571 (D.C. Cir. 1987) ("[I]f the agency itself were an interested party to the agreement, deference might lead a court to endorse self-serving views that an agency might offer in a post hoc reinterpretation of its contract."). For this reason as well, the court below erred in deferring under *Chevron* to the OCC's interpretation of the National Bank Act reflected in § 7.4000.

III. THE OCC'S DISPLACEMENT OF STATE ENFORCEMENT AUTHORITY REACHES WELL BEYOND THE BANKING INDUSTRY

As this Court has held, the OCC "has discretion to authorize [national banks to undertake] activities beyond those specifically enumerated" in the National Bank Act,[29] so long as they are among the "incidental powers . . . necessary to carry on the business of banking." 12 U.S.C. § 24 (Seventh).

In recent years, the OCC has read the "incidental powers" language extremely broadly, concluding that national banks and their operating subsidiaries can provide counseling to Medicare and Medicaid recipi-

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[29] *NationsBank of North Carolina, N.A. v. Variable Annuity Life Ins. Co.*, 513 U.S. 251, 258 n.2 (1995).

ents,[30] sell long-term care and disability insurance,[31] operate roadside assistance programs,[32] act as finder of customers for automobile sales,[33] develop commercial buildings and manage residential condominiums in those buildings,[34] dispense prepaid alternate products (i.e., public transportation tickets, event and attraction tickets, gift certificates, prepaid phone cards, promotional and advertising materials) from ATM machines,[35] operate a "virtual mall" where bank customers "can shop for a range of financial and non-financial products and services,"[36] and provide "Web design and development services."[37]

Under the OCC's view of its authority, States are precluded from enforcing valid, generally applicable laws against national banks and their operating subsidiaries engaged in all of those activities, and any others that the OCC may subsequently determine are "incidental" to the business of banking.[38]

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[30] OCC, *Activities Permissible for a National Bank, 2007*, at 5 (June 2008), *available at* http:www.occ.treas.gov/corpapps/BankAct.pdf.

[31] *Id.* at 6.

[32] *Id.* at 16.

[33] *Id.*

[34] *Id.* at 67-68.

[35] *Id.* at 52.

[36] *Id.* at 56.

[37] *Id.*

[38] Of keen concern to NAR, of course, is, as Justice Stevens suggested in *Watters*, that "[t]he Comptroller may well have the authority to decide whether the activities of a mortgage broker, *a real estate broker*, or a travel agent should be characterized as 'incidental' to banking, and to approve a bank's entry into those businesses." 127 S. Ct. at 1583 (Stevens, J., dissenting) (emphasis added).

Thus, although all other companies that offer roadside assistance programs, for example, are subject to state enforcement should they discriminate against stranded motorists, the national bank operating subsidiary is not. And the reality is that freedom from state enforcement may mean, as a practical matter, that national banks and their subsidiaries may be largely free from *any* effective enforcement, given significant competing demands on the OCC's attention, resources, and, indeed, enforcement skills with respect to such a wide range of activities governed by state law. Therefore, the practical effect of the OCC's expansive view of what constitutes "incidental powers" necessary to the "business of banking" is that the reach of § 7.4000 — and the divestiture of States' authority to enforce their own laws — is vast and goes well beyond traditional banking activities. The result threatens not only to preclude the uniform state enforcement of state laws across a wide range of industries, but, correspondingly, to prejudice seriously the interests of those consumers and other parties such state laws are designed to protect.

CONCLUSION

The Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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