No. 08-453

IN THE

Supreme Court of the United States

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

Petitioner,

v.

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

Respondents.

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

REPLY BRIEF FOR THE PETITIONER

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December 22, 2008

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The court of appeals took the unprecedented step of holding that a State may not enforce its own laws against a national bank, even when those laws are not substantively preempted and do not conflict or interfere with any federal law. The court reached that anomalous result by deferring to an agency's interpretation of a statutory express preemption clause, even though this Court has never afforded *Chevron* deference to an agency's views as to the preemptive effect of a federal statute.

1. Both OCC and Clearing House labor to depict 12 C.F.R. § 7.4000 as "a straightforward application of the Supremacy Clause." OCC Br. 20; *see* CH Br. 30. But the regulation is hardly that. Neither respondent has identified any other area in which States are prohibited from enforcing their own nonpreempted state laws and a federal agency is given exclusive authority over the enforcement of those laws. Clearing House offers four examples to support the claim that this practice is routine (CH Br. 29-30), but none is apposite. Clearing House has identified examples of state laws which are unenforceable altogether (against international diplomats, or Indians, or where substantively preempted), not examples of state laws made enforceable exclusively by federal agents.

Nor is this anomaly resolved by OCC's observation that the State could amend its law to make the substantive prescriptions inapplicable to national banks. OCC Br. 21 n.8. That observation is a tacit acknowledgment of the unusual character of this preemption regime, and an indication that OCC would welcome the opportunity to transform enforcement

preemption into full-fledged substantive preemption, which all parties agree does not apply to New York's anti-discrimination law. The flaw in the regime embodied in §7.4000 is that it requires the State to rely on OCC for enforcement of state anti-discrimination laws against national banks, and denies the State the ability to make that enforcement a priority. It is no cure to say that the State may abandon entirely its interest in prohibiting discrimination by national banks.

2. Respondents are mistaken in suggesting that the court of appeals' decision merely "endors[ed] a 140-year-old limitation on the States' authority over national banks." CH Br. 26; *see* OCC Br. 20-21. The regulation at issue here, interpreting 12 U.S.C. § 484(a) to preempt state enforcement of valid nonpreempted state law, breaks with a long line of congressional enactments, judicial precedents, and OCC's own prior statutory interpretations.

Before 1966 OCC possessed no authority to enforce state laws, as Clearing House acknowledges (CH Br. 5, 14 n.10). Such laws, where not substantively preempted, must have been enforceable by the States. Only in 1966 did Congress vest OCC, along with the other federal financial institutions regulators, with authority to bring administrative proceedings for violations of state law. *See* Financial Institutions Supervisory Act of 1966, Pub L. No. 89-695, tit. 2, 80 Stat. 1028, 1046-55 .

Section § 484 was not substantively amended, in any relevant respect, in 1966 or at any other time (*see* CH Br. 3). It would fly in the face of both the text and the purpose of the 1966 legislation to find that it

implicitly amended § 484 to preempt state authority to enforce state law, given that Congress in 1966 did not "wish to take any action which would do violence to the balance between State and Federal functions and responsibilities which underlies the dual banking system." S. Rep. No. 89-1482, at 3538 (1966). Indeed, until 2004 OCC maintained that state officials could bring lawsuits to enforce nonpreempted state laws against national banks, confirming that the 1966 amendment did not expand § 484 to preempt that enforcement authority. *See* Brief of OCC at 39 n.20, *OCC v. Spitzer*, No. 05-6001(cv) (2d Cir. May 30, 2006).

Furthermore, States historically have enforced state laws against national banks, as evidenced by this Court's decision in *First National Bank in St. Louis v. Missouri*, 263 U.S. 640 (1924) ("*St. Louis*") and other decisions of the federal and state courts, cited at Pet. 15-18 . In *St. Louis*, this Court held that the Missouri Attorney General could sue a national bank in state court to restrain a violation of a Missouri anti-branching law, rejecting the arguments of the bank and the United States that such a suit was a prohibited exercise of visitorial powers.[1]

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1. While *St. Louis* does not expressly discuss the predecessor statute to § 484 (Revised Statutes § 5241), the national bank and the United States both argued in that case that the statute barred Missouri's suit. The Court cannot have been unaware of the relevance of that statute; as the dissenting judge below observed (App. 58a), "[i]t is no coincidence" that the Court's analysis in *St. Louis* tracks the definition of "visitorial powers" provided by *Guthrie v. Harkness*, 199 U.S. 148, 158 (1905).

Respondents attempt to distinguish *St. Louis* on the ground that petitioner here seeks to enforce a state law against national banks operating within the scope of their federally authorized banking powers, while *St. Louis* involved state enforcement against a national bank operating outside the scope of those powers, stating that national banks did not have the power to engage in branch banking at the time. OCC Br. 15-16; CH Br. 12-13.[2]

But nothing in *St. Louis* suggests that this proposed distinction is relevant to a State's power to enforce its own nonpreempted law against a national bank. The Court in *St. Louis* first asked whether the Missouri anti-branching statute was preempted by federal law, under principles of conflict preemption. 263 U.S. at 656-59. It considered whether the state law would frustrate the purpose for which the bank was created, interfere with its operations, or impair its efficiency. *Id.* at 659. Finding that Missouri's anti-branching law was not preempted, the Court held that the state attorney general's ability to enforce the law through judicial proceedings necessarily followed. *Id.* at 660.[3]

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2. As a matter of fact, certain national banks did have limited power to operate branches at the time of *St. Louis*, as the opinion itself makes clear. *See* 263 U.S. at 657-58.

3. Nor is this case different from the cases Clearing House seeks to distinguish on the ground that they involved "generally applicable laws that 'do not directly concern a banking practice' and as to which OCC therefore 'has no direct responsibility for

(Cont'd)

The fact that federal law generally did not authorize branch banking was relevant in *St. Louis* only as evidence that the state law could not possibly interfere with federal law and therefore was not preempted. But as New York's anti-discrimination law is also indisputably not preempted, there is no meaningful distinction between the cases. Under the reasoning of *St. Louis*, the Attorney General is not prohibited from suing national banks to enforce New York's nonpreempted anti-discrimination laws.

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enforcing.'" CH Br. 21 n.15 (quoting *Minnesota v. Fleet Mortgage Corp.*, 158 F. Supp. 2d 962, 966 (D. Minn. 2001)). Like the anti-telemarketing and consumer fraud laws applied to banking practices in *Fleet Mortgage*, New York's anti-discrimination laws state generally applicable prohibitions that apply to the extension of credit, as well as employment, public accommodations, public housing, education, and other activities. *See* N.Y. Exec. Law §§ 296, 296-a. Moreover, 12 C.F.R. § 7.4000's effect is not limited to laws that "directly concern a banking practice," but instead broadly excludes States from any enforcement of state laws "with respect to the . . . conduct of activities authorized for national banks under Federal law." 12 C.F.R. § 7.4000(a)(3). The authorized activities of national banks are extremely far-ranging and include, for example, providing Medicaid counseling and operating roadside assistance programs. *See* Comptroller of the Currency: Activities Permissible for a National Bank (2007), at 5, 16, *available at* http://www.occ. treas.gov/corpapps/BankAct.pdf (last visited Dec. 18, 2008). Indeed, in the court of appeals OCC asserted a very broad enforcement preemption, conceding only that under its regulation States could still engage in "environmental and building code enforcement." Brief of OCC at 24, *OCC v. Spitzer*, No. 05-6001 (2d Cir. May 30, 2006).

For the same reason, there is no merit to respondents' efforts to distinguish *First National Bank of Bay City v. Fellows*, 244 U.S. 416 (1917), *First National Bank of Plant City v. Dickinson*, 396 U.S. 122 (1969), and other federal decisions permitting suits against national banks by state officials on the ground that in those cases, "federal law expressly applied conditions incorporated by reference to state law." OCC Br. at 17; CH Br. at 14-15. When federal law incorporates state law, there can be no claim that state law is substantively preempted. But incorporation is not otherwise relevant to the question whether the State may enforce its own nonpreempted law. As New York's law also is not preempted, the above cases squarely apply here.

3. Clearing House is mistaken in asserting that petitioner is asking this Court to "re-examine" its recent holding in *Watters v. Wachovia Bank, N.A.*, 127 S. Ct. 1559, 1582-84 (2007). CH Br. at 1. *Watters* has no relevance to this case. *Watters* held that state officials are prohibited from exercising visitorial powers over operating subsidiaries of national banks to the same extent that they are prohibited from exercising such powers as to the parent national bank. The parties did not present, and the Court did not decide, any question regarding the scope of those "visitorial powers" or of the statutory exception for such powers "vested in the courts of justice."

While Clearing House correctly observes (CH Br. 25-26) that *Watters* refers to 12 C.F.R. § 7.4000 in discussing the phrase "visitorial powers," the mere reference to § 7.4000 is not equivalent to a finding that the regulation is entitled to *Chevron* deference, which is the core issue here. Indeed, *Watters* specifically

disclaimed any reliance on *Chevron* deference. 127 S. Ct. at 1572 n.13. Here, by contrast, OCC asserts that the key statutory terms are ambiguous, and that *Chevron* deference to 12 C.F.R. § 7.4000 is essential to sustaining its position. OCC Br. 10.

Even if *Watters* had decided a question concerning the meaning of "visitorial powers," which it did not, that case concerned powers very different from those at issue here. At issue in *Watters* was the State's assertion of administrative authority over the bank, including the authority to license and conduct examinations of the regulated entity, which are classic visitorial powers. *See, e.g., Guthrie*, 199 U.S. at 158 ("visitorial powers" denote a supervisory authority "to examine into [a corporation's] manner [of] conducting business, and enforce an observance of [the corporation's] laws and regulations").[4] Thus, to the extent that statements in *Watters* describe "enforcement" as an exercise of visitorial powers, those statements refer to *administrative* enforcement proceedings. *Watters* says nothing about the ability of state attorneys general to bring judicial proceedings against national banks to

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4. Contrary to OCC's contention (OCC Br. 13 n.4), 12 U.S.C. § 484(b) fully supports petitioner's position. Section 484(b) authorizes "State auditors and examiners" to "review [bank] records" to ensure compliance with unclaimed property or escheat laws notwithstanding § 484(a). Petitioner has consistently identified the supervisory bank examination as the paradigm of a visitorial power. Section 484(b) merely makes clear that certain on-site inspections by state administrators, which otherwise might be thought to be prohibited banking examinations, are permissible where state administrators are enforcing unclaimed property or escheat laws.

enforce nonpreempted state laws. The decision does not mention *St. Louis* or *Fellows*, let alone overrule those cases.

For similar reasons, respondents ' reliance on *National State Bank, Elizabeth, N.J. v. Long*, 630 F.2d 981 (3d Cir. 1980) (OCC Br. 14; CH Br. 1, 20-21) is misplaced. *Long* held that § 484 prohibited administrative enforcement of state anti-redlining laws by a state banking commissioner; the decision did not address judicial enforcement. Likely for this reason, *Long*, like *Watters*, did not acknowledge or discuss *St. Louis*, *Fellows*, or the many other federal and state decisions permitting state officials to sue national banks to enforce nonpreempted state laws.

4. Respondents argue (OCC Br. 16; CH Br. 12) that OCC's promulgation of § 7.4000 supersedes *St. Louis*, citing this Court's decision in *National Cable & Telecommunications Association v. Brand X Internet Services*, 545 U.S. 967 (2005) ("*Brand X*"). But this argument simply demonstrates why the decision below warrants this Court's review. Pet. 19-25. *Brand X* depends on the application of *Chevron* deference, which here raises the important and unresolved questions whether, and in what circumstances, such deference applies to a regulation like 12 C.F.R. § 7.4000 that purports to declares the preemptive scope of a federal statute. As we have explained (Pet. 19-25), these legal issues warrant this Court's review.

OCC asserts (OCC Br. 20) that this case is a poor vehicle for resolving these questions because § 484 is not an "ordinary express preemption provision," given

that it restricts both federal and state actors. OCC provides no reason why this distinction is relevant, and it is not. Even if § 484 has incidental effects on the relationship among federal regulatory agencies, the statute is principally directed at the preemption of state law, as Clearing House acknowledges (CH Br. 2-3). And OCC's regulation is expressly aimed at the States, declaring that "[s]tate 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." 12 C.F.R. § 7.4000(a). The regulation therefore squarely implicates the concerns about federalism and institutional competence that have led members of this Court and other federal courts to question whether and when *Chevron* deference should be afforded to an administrative declaration of a statute's preemptive scope.

Respondents claim this Court has already decided that *Chevron* deference is appropriate for OCC regulations interpreting the NBA, but they incorrectly equate 12 C.F.R. § 7.4000 with other OCC actions to which this Court has extended *Chevron* deference. OCC Br. 11; CH Br. 21-22. The cases they cite involve OCC interpretations that regulate the primary conduct of national banks, not the enforcement authority of States. In *NationsBank of North Carolina, N.A. v. Variable Annuity Life Ins. Co.*, 513 U.S. 251, 256-58 (1995), for example, this Court deferred to OCC's interpretive ruling that the brokerage of annuities was an activity "incidental" to the "business of banking" under 12 U.S.C. § 24 (Seventh). Similarly, in *Smiley v. Citibank*

(South Dakota), N.A., 517 U.S. 735, 737, 743-44 (1996), the Court deferred to an OCC regulation providing that late-payment fees qualify as "interest" governed by 12 U.S.C. § 85, which authorizes national banks to change interest at a defined rate. Both cases involve OCC determinations that govern the primary conduct of national banks, unlike the regulation at issue here, which governs whether state officials may enforce state laws against such banks.

Respondents misstate the nature of the distinction drawn in *Smiley* between a statute's "substantive meaning," for which this Court has frequently deferred to agency constructions, and a statute's "preemptive meaning," for which this Court has never extended *Chevron* deference to agency views. Contrary to respondents' suggestions (OCC Br. 19; CH Br. 18-19), a regulation does not pertain to a statute's substantive meaning merely because it construes ambiguous statutory language. If that were so, it would be clear that an administrative construction of an express preemption clause is entitled to *Chevron* deference, whereas several members of this Court have specifically rejected that view, and none has expressly endorsed it. *See Watters*, 127 S. Ct. at 1582-84 (dissenting opinion of Stevens, J., joined by Roberts, C.J., and Scalia, J.); *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 512 (1996) (O'Connor, J., concurring in part and dissenting in part).

The substantive meaning of a statute, as explained in *Smiley*, is the meaning of a statute insofar as it regulates primary conduct. Preemptive meaning, by contrast, refers to a statute's preemptive effect on state

law. An express preemptive clause, like 12 U.S.C. § 484, has only preemptive meaning. Accordingly, 12 C.F.R. § 7.4000, which construes § 484, does not warrant *Chevron* deference.

5. Respondents claim there is no genuine circuit split on the question whether *Chevron* deference applies to administrative preemption determinations, OCC Br. 17-20; CH Br. 16-20, but they are mistaken. The District of Columbia Circuit recently noted the uncertainty on precisely this point. *Albany Eng'g Corp. v. FERC*, __ F.3d __, No. 07-1162, 2008 U.S. App. LEXIS 24724, *6-7 (Nov. 28, 2008). Respondents seek to minimize the significance of *Colorado Public Utilities Commission v. Harmon*, 951 F.2d 1571, 1579 (10th Cir. 1991) – which categorically refused to extend *Chevron* deference to an agency determination of preemption – by providing an alternative rationale for that decision, but their effort is both anachronistic and unpersuasive. While OCC observes that today deference might be denied on the ground that deference is generally not afforded to agency positions that are not the product of notice-and-comment rulemaking (OCC Br. 19-20; *see also* CH Br. 17), it is beyond dispute that the Tenth Circuit in fact denied deference in *Harmon* on the ground that the agency's opinion addressed preemption of state law.

Not only is there a split, but OCC overstates the number of circuits on its side of that split. OCC Br. 11-12. Most of the cases cited by OCC are from the line of circuit court decisions leading up to this Court's decision in *Watters*, and their continuing vitality is called into question by this Court's refusal in *Watters* to endorse

the courts of appeals' application of *Chevron* deference to an OCC regulation. The other two – *SPGGC, LLC v. Ayotte*, 488 F.3d 525, 531-32 (1st Cir. 2007), *cert. denied*, 128 S. Ct. 1258 (2008), and *Wells Fargo Bank of Texas, N.A. v. James*, 321 F.3d 488, 492 (5th Cir. 2003) – like *Smiley* involve regulations that do not purport to declare the preemptive scope of the NBA.

CONCLUSION

For the foregoing reasons, and for the reasons stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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