No. 08-453

In the Supreme Court of the United States

ANDREW M. CUOMO,
ATTORNEY GENERAL OF NEW YORK, PETITIONER

v.

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

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

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly held that measures taken by the New York State Attorney General to enforce state fair lending law against national banks would subject the banks to "visitorial powers" in contravention of 12 U.S.C. 484.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-62a) is reported at 510 F.3d 105. The opinions of the district court (Pet. App. 63a-117a, 118a-142a) are reported at 386 F. Supp. 2d 383 and 393 F. Supp. 2d 620.

JURISDICTION

The judgment of the court of appeals was entered on December 4, 2007. A petition for rehearing was denied on June 5, 2008 (Pet. App. 143a-144a). On August 26, 2008, Justice Ginsburg extended the time within which to file a petition for a writ of certiorari to and including October 3, 2008, and the petition was filed on that date.

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Office of the Comptroller of the Currency (OCC), a bureau within the Department of the Treasury, is responsible for administering the National Bank Act (NBA or Act), 12 U.S.C. 21 *et seq*. "As the agency charged by Congress with supervision of the NBA, OCC oversees the operations of national banks and their interactions with customers." *Watters* v. *Wachovia Bank, N.A.*, 127 S. Ct. 1559, 1564 (2007). The OCC's chief officer, the Comptroller of the Currency, is authorized "to prescribe rules and regulations to carry out the responsibilities of the office." 12 U.S.C. 93a. The OCC has authority to enforce national bank compliance with any applicable state or federal law regulating the business of banking. 12 U.S.C. 1818; see *National State Bank* v. *Long*, 630 F.2d 981, 988 (3d Cir. 1980).

Under the NBA, the OCC's supervision of national banks in their banking operations is "largely to the exclusion of other governmental entities, state or federal." *Watters*, 127 S. Ct. at 1564. Specifically, the NBA provides that "[n]o national bank shall be subject to any visitorial powers except as authorized by Federal law, vested in the courts of justice or such as shall be, or have been exercised or directed by Congress of by either House thereof or by any committee of Congress or of either House duly authorized." 12 U.S.C. 484(a).[1] As this Court has explained, visitation has been tradition-

[1] Section 484(b) provides a limited exception for "lawfully authorized State auditors and examiners" to "review [a bank's] records solely to ensure compliance with applicable State unclaimed property or escheat laws." 12 U.S.C. 484(b). That exception is not at issue in this case.

ally understood as "the act of a superior or superintending officer, who visits a corporation to examine into its manner of conducting business, and enforce an observance of its law and regulations." *Guthrie* v. *Harkness*, 199 U.S. 148, 158 (1905). "[V]isitation of civil corporations is by the government itself" and was traditionally conducted "through the medium of the courts of justice." *Id*. at 157.

Through notice and comment rulemaking, the OCC has promulgated regulations defining the term "visitorial powers" as it appears in the NBA. 69 Fed. Reg. 1895 (2004). The regulations define "visitorial powers" to include "(i) [e]xamination of a bank; (ii) [i]nspection of a banks's books and records; (iii) [r]egulation and supervision of activities authorized or permitted pursuant to federal banking law; and (iv) [e]nforcing compliance with any applicable federal or state laws concerning those activities." 12 C.F.R. 7.4000(a)(2). The OCC's regulations also clarify the meaning of the statutory exception permitting the exercise of visitorial powers "vested in the courts of justice." 12 U.S.C. 484(a). The regulations state that the "courts of justice" exception "pertains to the powers inherent in the judiciary," such as the power to issue discovery orders and subpoenas, "and does not grant state or other governmental authorities any right to inspect, superintend, direct, regulate or compel compliance by a national bank with respect to any law, regarding the content or conduct of activities authorized for national banks under Federal law." 12 C.F.R. 7.4000(b)(2).

2. Various federal laws prohibit discrimination in lending on the basis of race, color, religion, sex, national origin, marital status, age, and other protected grounds. See, *e.g.*, Equal Credit Opportunity Act (ECOA), 15

U.S.C. 1691 *et seq.*; Fair Housing Act (FH Act), 42 U.S.C. 3601 *et seq*. Many States, including New York, have enacted laws that parallel those federal anti-discrimination provisions. New York State Executive Law § 296-a is that State's counterpart to the ECOA. See Pet. App. 3a & n.3; N.Y. Exec. Law. § 296-a(1)(a) (McKinney 2005).

The Home Mortgage Disclosure Act of 1975 (HMDA), 12 U.S.C. 2801 *et seq*., requires lenders making home improvement loans or loans secured by residential real property to compile and make available to the public specified information about their mortgage lending activities. 12 U.S.C. 2803. Those disclosures include the applicants' race, ethnicity, gender, and income, and, for certain loans, the interest rate charged. *Ibid.* Because HMDA data do not capture all information necessary for prudent underwriting and pricing, HMDA data alone cannot form the basis for a determination about the existence of unlawful lending discrimination. 59 Fed. Reg. 18,270 (1994) (Interagency Policy Statement on Discrimination in Lending); OCC, *Frequently Asked Questions About the New HMDA Data* 5-6 (Apr. 3, 2006) <http://www.occ.treas.gov/ftp/release/2006-44a.pdf>.

Accordingly, more extensive analysis of an institution's lending activities is necessary to determine whether a bank has engaged in unlawful discrimination in lending. The OCC conducts that analysis through a comprehensive system of fair lending risk assessment, fair lending risk screening using sophisticated modeling techniques, and on-site examinations. If the OCC determines that a bank has violated fair lending laws or that the bank's practices are potentially discriminatory, the OCC will order the bank to cease the discriminatory

practices, take such other remedial action as necessary to address harm to individual borrowers, and make referrals to the United States Department of Justice and notifications to the Department of Housing and Urban Development, as appropriate. 15 U.S.C. 1691e(g) and, (k); 59 Fed. Reg. at 18,272-18,274; OCC, *Fair Lending Examination Procedures* 9 (Apr. 2006).

3. In March 2005, four national banks that are members of the Clearing House Association, a financial institution trade association, disclosed HMDA demographic lending data for calendar year 2004. Shortly thereafter, the New York State Attorney General's office sent "letters of inquiry" to the banks or their holding companies. Pet. App. 3a. The letters asserted that the banks' HMDA data indicated racial disparities in the pricing of loans between white borrowers and African-American and Hispanic borrowers. *Ibid.* The letters further stated that the disparities, "unless legally justified[,] may violate federal and state anti-discrimination laws such as the Equal Credit Opportunity Act and its state counterpart, New York State Executive Law § 296-a." *Ibid.* "In lieu of issuing a formal subpoena," the letters requested certain non-public information concerning the lending activities of the banks and their operating subsidiaries, including data on real estate loans made in New York State. *Id.* at 3a-4a.

4 On June 16, 2005, respondents (the OCC and the Clearing House Association) each filed a complaint in the United States District Court for the Southern District of New York seeking declaratory and injunctive relief against petitioner, the New York State Attorney General. Pet. App. 4a-5a, 66a-67a. Petitioner filed a counterclaim in the OCC action seeking to have the OCC's visitorial powers regulation, 12 C.F.R. 7.4000,

set aside as arbitrary and capricious under the Administrative Procedure Act, 5 U.S.C. 706. See Pet. App. 5a.

On October 12, 2005, the district court entered summary judgment for respondents. The court granted declaratory and injunctive relief barring petitioner from infringing the OCC's exclusive visitorial powers over national banks and their operating subsidiaries. Pet. App. 63a-117a, 118a-142a. The court also denied petitioner's counterclaim challenging the validity of the OCC's regulation. *Id.* at 114a-115a. The court permanently enjoined petitioner from "issuing subpoenas or demanding inspection of the books and records of any national banks in connection with his investigation into residential lending practices; from instituting any enforcement actions to compel compliance with [his] already existing informational demands; and from instituting actions in the courts of justice against national banks to enforce state fair lending laws." *Id.* at 116a-117a.[2]

5. As relevant here, the court of appeals affirmed the district court's judgment. Pet. App. 1a-62a. The court of appeals observed that the parties' dispute centered on "the meaning of the term 'visitorial powers' in § 484(a)," and, in particular, on whether the OCC's interpretation of that term is entitled to deference under the

[2] In its decision in the suit filed by the Clearing House Association, the district court also enjoined petitioner from instituting any judicial action premised on New York's *parens patriae* authority to enforce the FH Act's fair lending provisions against the Clearing House Association's national bank members or their operating subsidiaries. Pet. App. 141a. The court of appeals subsequently vacated that injunction on ripeness grounds because petitioner had not threatened any action to enforce the FH Act until after the Clearing House Association had commenced its suit. *Id.* at 32a-39a. Petitioner has not sought review of that portion of the court of appeals' decision. Pet. 12 n.3.

principles set forth in *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council*, 467 U.S. 837 (1984). Pet. App. 10a. In that regard, the court noted petitioner's concession that, if the OCC's definition of "visitorial powers" and its construction of the "courts of justice" exception were upheld, Section 484(a) would bar petitioner's investigation and threatened enforcement action. See Pet. App. 15a & n.6.

The court of appeals then considered and rejected petitioner's various arguments that *Chevron* deference should not apply. The court first rejected the contention that *Chevron* deference would be inconsistent with the presumption against preemption that governs in areas of regulation traditionally allocated to the States. The court explained that the presumption against preemption does not apply in the context of national bank regulation, which has been "substantially occupied by federal authority for an extended period of time." Pet. App. 12a (quoting *Wachovia Bank, N.A.* v. *Burke*, 414 F.3d 305, 314 (2d Cir. 2005), cert. denied, 127 S. Ct. 2093 (2007)). The court also rejected petitioner's contention that *Chevron* deference is inappropriate because the OCC's interpretation invokes the outer limits of Congress's power and therefore triggers the doctrine of constitutional avoidance. *Id.* at 13a-14a. The court concluded that the OCC's interpretation of the term "visitorial powers" casts no doubt on the constitutionality of Section 484 even though it prevents the States from enforcing certain state laws against national banks. The court observed that, because national banks are "creatures of federal statute," the "exercise of 'traditional' state power in the context of national banking regulation is already substantially qualified." *Id.* at 14a. The court also explained that, under this Court's precedents, States

"can exercise no control over [national banks], nor in any wise affect their operation, except in so far as Congress may see proper to permit." *Ibid.* (quoting *Farmers' & Mechs.' Nat'l Bank* v. *Dearing*, 91 U.S. 29, 34 (1875)).

The court of appeals also rejected petitioner's contention that the OCC had exceeded its rulemaking authority, noting that 12 U.S.C. 93a gives the Comptroller "broad authority" to promulgate regulations implementing the NBA. Pet. App. 24a. And the court rejected petitioner's argument that *Chevron* deference is inappropriate because the regulation at issue here "interprets purely legal concepts, as opposed to technical matters within the OCC's expertise." *Id.* at 25a. The court explained that the OCC is not deprived of *Chevron* deference for its interpretation of terms in the NBA merely because it "attempts to harmonize its rulemaking with judicial precedent." *Id.* at 26a. The court also noted that the OCC's regulation reflects an effort to "accommodat[e] conflicting policies that [a]re committed to it by the [NBA]." *Id.* at 28a.

Applying *Chevron* deference, the court of appeals held that the challenged OCC regulations reflect a reasonable understanding of the statutory term "visitorial powers" and of the "courts of justice" exception. The court concluded that the OCC's interpretation of the term "visitorial powers" is consistent with the definition this Court gave to that term in *Guthrie* v. *Harkness*, 199 U.S. 148 (1905), and is supported by the Court's recent decision in *Watters*, which made clear that "investigation and enforcement by state officials are just as much aspects of visitorial authority as registration and other forms of administrative supervision." Pet. App. 20a. The court of appeals also concluded that the OCC has

reasonably interpreted the "courts of justice" exception as involving only "the powers inherent in the judiciary" and as not granting States any authority to "compel compliance by a national bank" with any law concerning "the content or conduct of activities authorized for national banks under Federal law." *Id.* at 30a (quoting 12 C.F.R. 7.4000(b)(2)). The court noted that petitioner's proposed interpretation of the exception, under which States could use lawsuits to accomplish regulation that could not be accomplished administratively, "would swallow the rule" against the States' unauthorized exercise of "visitorial powers." *Ibid.*; see *id.* at 22a-23a.

The court of appeals also observed that the OCC's interpretation of Section 484 "furthers Congress's intent * * * to shield national banks 'from unduly burdensome and duplicative state regulation' in the exercise of their federal authorized powers, such as real estate lending." Pet. App. 28a-29a (quoting *Watters*, 127 S. Ct. at 1567). "At the same time," the court noted, the OCC's interpretation "preserves state sovereignty by leaving state officials free to enforce a wide range of laws that do not purport to regulate a national bank's exercise of its authorized banking powers." *Id.* at 29a. The court of appeals therefore upheld the OCC's interpretation of Section 484 and affirmed the declaratory and injunctive relief sought by the OCC and ordered by the district court. *Id.* at 32a.

Judge Cardamone dissented in relevant part. Pet. App. 42a-62a. He would have held that the OCC's regulatory definition of the term "visitorial powers" is not entitled to *Chevron* deference, and that the challenged regulation is invalid because it impermissibly alters the balance between federal and state authority. *Ibid.*

ARGUMENT

The decision of the court of appeals is correct, and it does not conflict with any decision of this Court or another court of appeals. This Court's review is therefore not warranted.

1. The court of appeals correctly upheld the OCC's interpretations of the term "visitorial powers" and the "courts of justice" exception in 12 U.S.C. 484. As the court of appeals concluded (Pet. 10a-32a), the OCC's reasonable interpretations of those ambiguous NBA provisions are entitled to deference under the principles set forth in *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council*, 467 U.S. 837 (1984).

This Court recently reaffirmed that, "[w]here an agency rule sets forth important individual rights and duties, where the agency focuses fully and directly upon the issue, where the agency uses full notice-and-comment procedures to promulgate a rule, where the resulting rule falls within the statutory grant of authority, and where the rule itself is reasonable, then a court ordinarily assumes that Congress intended it to defer to the agency's determination." *Long Island Care at Home, LTD* v. *Coke*, 127 S. Ct. 2339, 2350-2351 (2007) (citing *United States* v. *Mead Corp.*, 533 U.S. 218, 229-233 (2001)).[3] The OCC's interpretations of "visitorial powers" and the "courts of justice" exception, as embodied in 12 C.F.R. 7.4000, satisfy each of those criteria. The regulation sets forth the rights of national banks and the

[3] This Court has indicated that notice-and-comment rulemaking is not indispensable to the extension of *Chevron* deference to OCC statutory interpretations. *Mead*, 533 U.S. at 231 & n.13 (citing *NationsBank* v. *Variable Annuity Life Ins. Co.*, 513 U.S. 251, 256-257, 263 (1995)). In any event, as discussed below, the OCC followed full notice-and-comment procedures in promulgating the regulation at issue here.

respective authority of federal and state actors. See 12 C.F.R. 7.4000. In adopting its interpretations, the OCC carefully focused on the issues involved and followed full notice-and-comment procedures, responding to concerns raised by commenters and fully explaining its reasoning. See 69 Fed. Reg. 1895 (2004) (final rule); 68 Fed. Reg. 6363 (2003) (proposed rule). And, as the court of appeals explained (Pet. App. 24a), OCC acted within its broad statutory authority to issue rules and regulations to "carry out the responsibilities of the office." 12 U.S.C. 93a.

The application of *Chevron* deference is further supported by this Court's cases interpreting the NBA, which have repeatedly affirmed that the OCC's "reasonable interpretation" of that Act is entitled to "controlling weight" unless it is contrary to Congress's clearly expressed intent. *NationsBank* v. *Variable Annuity Life Ins. Co.*, 513 U.S. 251, 256-257 (1995) (citing *Clarke* v. *Securities Indus. Ass'n*, 479 U.S. 388, 403-404 (1987), and *Investment Co. Inst.* v. *Camp*, 401 U.S. 617, 626-627 (1971)). The Court has made clear that the OCC's interpretation of ambiguous NBA language is entitled to *Chevron* deference even if, as in this case, that interpretation results in preemption of state law. See *Smiley* v. *Citibank*, 517 U.S. 735, 744 (1996) (deferring to the OCC's interpretation of the term "interest" in 12 U.S.C. 85 even though Section 85 preempts state law).

The application of *Chevron* deference in this case is also consistent with the decisions of other courts of appeals, which have deferred to OCC interpretations of NBA provisions even when those interpretations resulted in the preemption of state law. See, *e.g.*, *SPGGC, LLC* v. *Ayotte*, 488 F.3d 525, 531-532 (1st Cir. 2007) (de-

ferring to OCC interpretation that issuance and sale of stored value cards is an "incidental power[] * * * necessary to carry on the business of banking" under 12 U.S.C. 24(Seventh)), cert. denied, 128 S. Ct. 1258 (2008); *Wachovia Bank, N.A.* v. *Burke*, 414 F.3d 305, 318 (2d Cir. 2005) (deferring to OCC interpretation that use of an operating subsidiary is an "incidental power"), cert. denied, 127 S. Ct. 2093 (2007); *National City Bank* v. *Turnbaugh*, 463 F.3d 325, 332 (4th Cir. 2006) (same), cert. denied, 127 S. Ct. 2096 (2007); *Wells Fargo Bank* v. *James*, 321 F. 3d 488, 493 (5th Cir. 2003) (deferring to OCC determination that NBA authorizes national banks to charge non-account-holders for cashing checks); *Wachovia Bank, N.A.* v. *Watters*, 431 F.3d 556, 561 (6th Cir. 2005) (deferring to OCC interpretation that use of an operating subsidiary is an "incidental power[]"), aff'd, 127 S. Ct. 1559 (2007); *Wells Fargo Bank, N.A.* v. *Boutris*, 419 F.3d 949, 960 (9th Cir. 2005) (same). Petitioner cites no court of appeals decision holding that deference to the OCC's construction of ambiguous NBA terms is inappropriate, either in general or where acceptance of the OCC's interpretation results in the preemption of state law.

The court of appeals in this case also correctly held that the OCC's interpretations of "visitorial powers" and the "courts of justice" exception are reasonable. Pet. App. 16a-23a, 26a-32a. The OCC has construed the term "visitorial powers" to include a State's demands to review a national bank's "records," as well as state efforts to "[e]nforc[e] compliance with" state laws concerning "activities authorized or permitted pursuant to federal banking law." 12 C.F.R. 7.4000(a)(2). As the court of appeals concluded (Pet. App. 16a-17a), the OCC's interpretation is consistent with this Court's observation in

Guthrie v. *Harkness*, 199 U.S. 148, 158 (1905), that visitation has traditionally been understood as "the act of a superior or superintending officer, who visits a corporation to examine into its manner of conducting business, and enforce an observance of its laws and regulations."[4]

The OCC's construction is also supported by *Watters*, in which the Court relied on Section 484 and the OCC's visitorial powers regulation in concluding that a State may not confer on a state officer "examination and *enforcement* authority over mortgage lending, or any other banking business done by national banks." *Watters*, 127 S. Ct. at 1569 (emphasis added); see Pet. App. 18a-21a. In addition, the OCC's interpretation furthers Congress's intent in enacting the NBA "[t]o prevent inconsistent or intrusive state regulation from impairing the national [banking] system." *Watters*, 127 S. Ct. at 1566; see Pet. App. 28a-29a. State laws subjecting national banks' lending and other banking activities "to the State's investigative and enforcement machinery would surely interfere with the banks' federally authorized business." *Id.* at 18a (quoting *Watters*, 127 S. Ct. at 1568).

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[4] Petitioner contends (Pet. 28) that "[t]raditionally, 'visitorial powers' subject a corporation to special supervision by the jurisdiction that granted its corporate charter; they are the powers used to supervise the corporation's use of, and compliance with, its corporate charter." As noted above (note 1, *supra*), however, 12 U.S.C. 484(b) establishes a limited exception to Section 484(a)'s general ban on the unauthorized exercise of "visitorial powers." Section 484(b) provides that "lawfully authorized State auditors and examiners may * * * review [a national bank's] records solely to ensure compliance with applicable State unclaimed property or escheat laws." 12 U.S.C. 484(b). That specific statutory exception, covering a narrow category of state enforcement activities, would be superfluous if petitioner's construction of the term "visitorial powers" were correct.

The OCC has also reasonably interpreted the "courts of justice" exception to encompass only "the powers inherent in the judiciary" and not to grant States any authority to "compel compliance by a national bank" with laws concerning "the content or conduct of activities authorized for national banks under Federal law." 12 C.F.R. 7.4000(b)(2). As the court of appeals explained, the contrary interpretation proposed by petitioner, under which the exception would permit lawsuits by States to enforce substantive requirements and prohibitions that the States could not enforce administratively, "would swallow the rule" against unauthorized state exercise of "visitorial powers." Pet. App. 30a; see *id.* at 22a-23a. At the time the NBA was enacted, lawsuits were the primary means by which state officials exercised visitorial powers. *Guthrie*, 199 U.S. at 157. Section 484's prohibition on the exercise of visitorial powers would therefore have been virtually meaningless if the "courts of justice" exception permitted all visitations accomplished through lawsuits. It was therefore entirely reasonable for the OCC to reject that interpretation of the exception.

The OCC regulations at issue here also accord with longstanding precedent interpreting Section 484. Nearly thirty years ago, the Third Circuit held that "visitorial powers" under Section 484 included enforcement of a New Jersey law prohibiting redlining (*i.e.*, geographic discrimination in mortgage lending), and that Section 484 therefore precluded the State from enforcing the law. See *Long*, 630 F.3d at 981. Consistent with that decision, the court below correctly held that current 12 C.F.R. 7.4000 reflects a permissible interpretation of Section 484.

2. Contrary to petitioner's contention (Pet. 15-18), the decision of the court of appeals does not conflict with *First National Bank in St. Louis* v. *Missouri*, 263 U.S. 640 (1924) (*St. Louis*), or with any other decision of this Court.

St. Louis involved a State's suit against a national bank to enforce a state statute prohibiting banks from operating branches. After concluding that federal law at that time did not authorize national banks to engage in branch banking, *St. Louis*, 263 U.S. at 656-659, this Court held that the State could enforce the state law against the bank, *id.* at 659-660. The decision in *St. Louis* does not conflict with the holding of the court below that Section 7.4000 reasonably interprets Section 484's prohibition on a State's exercise of "visitorial powers" to include state efforts to "[e]nforc[e] compliance" with laws concerning "activities authorized or permitted pursuant to federal banking law." 12 C.F.R. 7.4000(a)(2).

The Court in *St. Louis* did not mention, much less construe, either the term "visitorial powers" or the predecessor to Section 484 in effect at the time, Rev. Stat. 5241.[5] And the Court of course had no opportunity to consider Section 7.4000, which was not promulgated until decades later. Moreover, the holding in *St. Louis* is fully consistent with Section 7.4000's interpretation of the term "visitorial powers" because the state law at issue in *St. Louis* concerned branch banking, an activity that was not authorized for national banks at that time. Under those circumstances, the State's suit did not seek

[5] As petitioner notes (Pet. 16 & n.4), the parties in *St. Louis* had called the Court's attention to Rev. Stat. 5241. For whatever reason, however, the Court chose not to address the provision. The Court's opinion therefore cannot reasonably be viewed as adopting any particular construction of Rev. Stat. 5241.

to "[e]nforc[e] compliance" with a law concerning "activities authorized or permitted pursuant to federal banking law." 12 C.F.R. 7.4000(a)(2). Here, in contrast, the state law at issue, insofar as it prohibits discrimination in real estate and other lending, unquestionably concerns an activity authorized by federal banking law—real estate lending, the same activity at issue in *Watters*. See 12 U.S.C. 371; Pet. App. 26; *Watters*, 127 S. Ct. at 1267. Petitioner's argument (Pet. 18) that the banking activity at issue here was unauthorized incorrectly conflates the underlying banking power with the discriminatory manner in which the power was allegedly exercised.

Even if *St. Louis* could somehow be construed as adopting, *sub silentio*, an interpretation of Section 484 that is inconsistent with the OCC's interpretation in Section 7.4000, the current OCC regulations would still be entitled to deference. In *National Cable & Telecommunications Ass'n* v. *Brand X Internet Services*, 545 U.S. 967 (2005), this Court held that, under *Chevron,* an agency may adopt a statutory interpretation that differs from the interpretation previously reached by a federal court so long as the judicial construction does not follow "from the unambiguous terms of the statute." *Id.* at 982. "Only a judicial precedent holding that the statute unambiguously forecloses the agency's interpretation, and therefore contains no gap for the agency to fill, displaces a conflicting agency construction." *Id.* at 982-983. Because the Court's opinion in *St. Louis* did not even mention the then-current version of Section 484, *St. Louis* cannot reasonably be read to hold that any particular construction of Section 484 follows "from the unambiguous terms of the statute." *Id.* at 982.

For many of the same reasons, the decision below also does not conflict with the other decisions of this Court on which petitioner relies. See Pet. 16 (citing *First Nat'l Bank in Plant City* v. *Dickinson*, 396 U.S. 122 (1969) (*Plant City*); *First Nat'l Bank of Bay City* v. *Fellows*, 244 U.S. 416 (1917) (*Bay City*); *Waite* v. *Dowley*, 94 U.S. 527 (1877)). Like *St. Louis*, those decisions do not mention, much less construe, Section 484, its predecessor statutes, or the term "visitorial powers." Nor did the Court, in issuing those decisions, have the opportunity to address Section 7.4000, which did not yet exist. Those cases, moreover, involved circumstances quite different from those presented here. *Waite* involved enforcement of a state law concerning the taxation of bank shareholders, not a law concerning the bank's exercise of its federally authorized banking powers. See *id.* at 532. *Plant City* and *Bay City* involved the enforcement of limits to national banking powers imposed where federal law expressly applied conditions incorporated by reference to state law. See *Plant City*, 396 U.S. at 130; *Bay City*, 244 U.S. at 428. As this Court explained in *Watters*, rulings in cases involving that very different context do not shed light on state authority to regulate the exercise by national banks of powers that are not conditioned upon state permission, such as the real estate lending power at issue here. See 127 S. Ct. at 1569 n.7.

3. Petitioner contends (Pet. 19-25) that this Court's review is warranted because the decision of the court of appeals conflicts with the Tenth Circuit's decision in *Colorado Public Utilities Commission* v. *Harmon*, 951 F.2d 1571 (1991). There is no conflict.

The question presented in *Harmon* was whether regulations issued by the United States Department of

Transportation (DOT) under the Hazardous Material Transportation Uniform Safety Act of 1990 (HMTUSA), 49 U.S.C. App. §§ 1801 *et seq.*, at 146 (Supp. II 1990), preempted certain regulations promulgated by the Colorado Public Utilities Commission. The DOT had issued "advisory, nonbinding opinions" concluding that the Colorado regulations were preempted under 49 U.S.C. App. § 1811(a), at 158 (Supp. II 1990), which provides that a state regulation is preempted if it "creates an obstacle to the accomplishment and execution" of the HMTUSA or federal regulations promulgated thereunder. *Harmon*, 951 F.2d at 1576, 1578. The Tenth Circuit deferred to the "DOT's determinations" in the opinions "that its regulations overlap with Colorado's regulations," but the court "independently review[ed] the legal issue of preemption." *Id.* at 1579.

The decision below is not inconsistent with *Harmon*. The court below deferred to the OCC's interpretation of ambiguous NBA language—the term "visitorial powers" and the phrase "vested in the courts of justice." 12 U.S.C. 484(a); see Pet. App. 16a-21a (discussing the meaning of "visitorial powers"); *id.* at 22a-23a (discussing the meaning of "vested in the courts of justice"). The court did not defer to the OCC's position that its construction of that language would result in the preemption of petitioner's investigation and threatened enforcement action. Indeed, the court had no occasion to defer to the OCC's position on that question because petitioner conceded that his investigation and enforcement efforts would be barred if the court upheld the OCC's interpretation. See *id.* at 15a n.6. In contrast, the Tenth Circuit in *Harmon* did not address whether it should defer to the DOT's interpretation of the substantive meaning of ambiguous statutory terms. Rather, it

addressed whether it should defer to the DOT's legal determination that particular state regulations were preempted. See *Harmon*, 951 F.2d at 1579.

As this Court explained in *Smiley*, those are two very different questions. See 517 U.S. at 744 (distinguishing "the question of the substantive (as opposed to pre-emptive) *meaning* of a statute with the question of *whether* a statute is pre-emptive"). The Court in *Smiley* reserved the question whether courts should defer to an agency's determination that a statute preempts state law, while making clear that courts must defer to an agency's reasonable interpretation of ambiguous statutory terms, even if that deference results in preemption. See *ibid.* The decision below accords with *Smiley* and does not conflict with *Harmon*.[6]

The decision below also does not conflict with *Harmon* for another, independent reason. The court below deferred to an interpretation embodied in a "full-dress regulation, issued by the Comptroller himself and adopted pursuant to the notice-and-comment procedures of the Administrative Procedure Act." *Smiley*, 517 U.S. at 741. In contrast, the Tenth Circuit in *Harmon* declined to defer to DOT views expressed in "advisory, nonbinding opinions." *Harmon*, 951 F.2d at 1578. This Court has indicated that such informal opinions, unlike regulations issued pursuant to notice and comment, generally

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[6] To the extent that *Harmon* provides any indication of how the Tenth Circuit would resolve the deference issue addressed by the court below, that decision suggests that the Tenth Circuit would likewise defer to an agency's interpretation of the substantive meaning of ambiguous statutory provisions. The Tenth Circuit stated that "this Court shows great deference to the interpretation given the statute by the officers or agency charged with its administration." *Harmon*, 951 F.2d at 1578-1579.

are not entitled to *Chevron* deference. See *Mead*, 533 U.S. at 227-231.[7]

In any event, this case would be a poor vehicle to address the extent to which agency opinions on preemption are entitled to deference. Such questions generally arise when courts resolve issues of implied conflict preemption, *e.g.*, *Geier* v. *American Honda Motor Co.*, 529 U.S. 861, 883 (2000), or when they interpret a provision that expressly preempts state law, *e.g.*, *Medtronic* v. *Lohr*, 518 U.S. 470, 496 (1996). This case involves neither of those contexts. It does not involve implied preemption because Section 484 is an "express command." *Watters*, 127 S. Ct. at 1568. At the same time, Section 484 is not an ordinary express preemption provision. Instead, it is an express prohibition (subject to exceptions) of action by *any* government entity, including *federal* entities. This case therefore does not cleanly present the question whether deference is due an agency's interpretation of a provision expressly preempting state law.

4. Petitioner's remaining arguments are also unpersuasive.

a. Contrary to petitioner's contention (Pet. 25-29), the decision below does not produce a "major alteration of the balance of power between the federal and state governments." *Id.* at 25. Instead, it represents a straightforward application of the Supremacy Clause in the context of federally chartered financial institutions.

"Nearly two hundred years ago, in *McCulloch* v. *Maryland*, [17 U.S. 316,] 4 Wheat. 316, 4 L. Ed. 579

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[7] As noted above, the Court has indicated that OCC interpretations of the NBA warrant deference even when they are expressed in opinion letters rather than rulemaking or formal adjudication. See *Mead*, 533 U.S. at 231 n.13. But *Harmon* involved opinions issued by the DOT rather than by the OCC.

(1819), this Court held federal law supreme over state law with respect to national banking." *Watters*, 127 S. Ct. at 1566. "National banks are instrumentalities of the Federal government, created for a public purpose, and as such necessarily subject to the paramount authority of the United States." *Davis* v. *Elmira Sav. Bank*, 161 U.S. 275, 283 (1896). The Court has repeatedly recognized that "the States can exercise no control over [national banks], nor in any wise affect their operation, except in so far as Congress may see proper to permit." *Watters*, 127 S. Ct. 1567 (quoting *Farmers' & Mechs.' Nat'l Bank* v. *Dearing*, 91 U.S. 29, 34 (1875)). Interpreting Section 484 to preclude state enforcement of laws concerning "activities authorized or permitted pursuant to federal banking law" (12 C.F.R. 7.4000(a)(2)(iii)) therefore does not remotely alter the constitutional balance or otherwise implicate the doctrine of constitutional avoidance.[8]

This case bears no resemblance to the cases on which petitioner relies (Pet. 26-27). Those cases involved federal laws that constrained the States in their performance of core state functions and/or extended federal power into areas that Congress has not traditionally

[8] Although petitioner contends that the OCC regulation and the court of appeals' decision sustaining that rule effect "a major alteration of the balance of power between the federal and state governments" (Pet. 25), he appears to acknowledge that Congress could constitutionally have preempted the application to national banks of the New York laws that petitioner sought to enforce. Petitioner argues (*ibid.*) that "[p]reventing a State from enforcing its own valid laws is in many ways a more serious incursion on state sovereignty than preempting the operation of a state law altogether." But if New York officials regard OCC enforcement of New York anti-discrimination provisions as uniquely offensive, the State is free to amend its own laws to render them inapplicable to national banks.

regulated. See *Printz* v. *United States*, 521 U.S. 898 (1997) (holding that Congress cannot compel the States to administer a federal program); *Gregory* v. *Ashcroft*, 501 U.S. 452 (1991) (requiring a clear statement that Congress intended to override a state constitutional provision setting the qualifications for state judges); *Solid Waste Agency* v. *United States Army Corps of Eng'rs*, 531 U.S. 159 (2001) (requiring a clear statement that Congress intended to authorize federal regulation of discharges into isolated intrastate waters). "Regulation of national bank operations," in contrast, clearly "is a prerogative of Congress under the Commerce and Necessary and Proper Clauses. * * * The Tenth Amendment, therefore, is not implicated here." *Watters*, 127 S. Ct. at 1573; see *Citizens Bank* v. *Alafabco, Inc.*, 539 U.S. 52, 58 (2003) ("No elaborate explanation is needed to make evident the broad impact of commercial lending on the national economy or Congress' power to regulate that activity pursuant to the Commerce Clause."). Section 484(a) simply provides for unified federal law over the regulation of federal instrumentalities. It neither extends federal regulation beyond traditional areas of federal concern nor precludes state enforcement activities in spheres where the States have historically regulated.

b. Petitioner is also incorrect in asserting (Pet. 30-32) that the decision below effectively immunizes national banks from enforcement of state consumer protection and fair lending laws. Congress has authorized the OCC to compel national banks to comply with all applicable laws, both state and federal. See 12 U.S.C. 1818(b); see *Long*, 630 F.2d at 988. Moreover, as the court of appeals noted, when Congress authorized interstate branching by national banks, it expressly provided

that state consumer protection and fair lending laws "shall be enforced, with respect to such branch[es], by the [OCC]." 12 U.S.C. 36(f)(1)(B). Congress thus had no doubts about the OCC's capacity to enforce those state laws.

The OCC employs more than 2000 bank examiners and has conducted many thousand fair lending examinations. See Eugene A. Ludwig, Comptroller of the Currency, Remarks Before the National Urban League, 1997 WL 847864, at *2 (Aug. 5, 1997). The primary purpose of such examinations is to ensure compliance with federal fair lending laws, which generally afford protections similar to those provided by state laws like the New York law at issue here. Compare 15 U.S.C. 1691 with N.Y. Exec Law 296-a. When the OCC identifies state-law requirements applicable to national banks, however, examiners are advised of those requirements and can take them into account in conducting examinations. GAO, Publ'n No. 06-387, *OCC Preemption Rules: OCC Should Further Clarify the Applicability of State Consumer Protection Laws to National Banks* 23 (2006).

Between 2002 and July 2007, OCC examiners called to the attention of bank management approximately 200 issues relating to fair lending and mortgage data reporting. *Rooting out Discrimination in Mortgage Lending: Using HMDA as a Tool for Fair Lending Enforcement: Hearing Before the Subcomm. on Oversight and Investigations of the H. Comm. on Financial Services,* 110th Cong. 1st Sess. 110 (2007) (Statement of Calvin R. Hagins, Director for Compliance Policy, OCC). In addition, the OCC has frequently referred possible fair lending violations to the Departments of Justice and of Housing and Urban Development, and several such referrals

have resulted in public enforcement actions. *Id.* at 106-108. The OCC's Customer Assistance Group, which handles consumer complaints against national banks, has also facilitated the recovery by injured customers of tens of millions of dollars. See OCC, *Report of the Ombudsman* 2005-2006, at 10 (Nov. 2007). Petitioner offers no reason to believe that the OCC does not vigorously enforce fair lending laws against national banks.[9]

In any event, petitioner's policy arguments provide no basis for questioning the correctness of the decision below or for granting the petition for a writ of certiorari. As this Court has recognized in the specific context of national-bank regulation, questions concerning the appropriate division of authority between federal and state officials cannot be resolved "by [the Court's] judgment as to the wisdom or need of either conflicting policy. The compact between the states creating the Federal Government resolves them as a matter of supremacy. However wise or needful New York's policy, * * * it must give way to the contrary federal policy." *Franklin Nat'l Bank* v. *New York*, 347 U.S. 373, 378-379 (1954).

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[9] Petitioner also implies (Pet. 32) that the OCC's interpretation of Section 484 somehow contributed to the recent problems associated with subprime lending. Petitioner provides no support for that suggestion, which is contrary to congressional findings that the vast majority of subprime lending was conducted by state-regulated nonbank lenders. H.R. Rep. No. 441, 110th Cong., 1st Sess. 36 (2007).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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DECEMBER 2008