No. 05-1342

In The
Supreme Court of the United States

LINDA A. WATTERS, COMMISSIONER,
MICHIGAN OFFICE OF INSURANCE
AND FINANCIAL SERVICES,

Petitioner,

v.

WACHOVIA BANK, N.A., et al.,

Respondents.

**On Writ Of Certiorari To The
United States Court Of Appeals
For The Sixth Circuit**

BRIEF *AMICI CURIAE* OF AARP, CENTER FOR RESPONSIBLE LENDING, CONSUMER FEDERATION OF AMERICA, CONSUMERS UNION, FAIR HOUSING JUSTICE CENTER, NATIONAL ASSOCIATION OF CONSUMER ADVOCATES, NATIONAL ASSOCIATION OF CONSUMER AGENCY ADMINISTRATORS, NATIONAL COMMUNITY REINVESTMENT COALITION, NATIONAL CONSUMER LAW CENTER, PUBLIC CITIZEN, TRIAL LAWYERS FOR PUBLIC JUSTICE, U.S. PUBLIC INTEREST RESEARCH GROUP, AND PROFESSORS OF LAW* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*[1]

Amici curiae are twelve non-profit, public interest organizations and seventeen law professors concerned about protecting consumers from abuses in the marketplace. In their work on behalf of consumers and their scholarship, *amici curiae* have witnessed the primary role that states have played in enacting and enforcing laws to protect consumers from financial institutions' abusive practices. Over the past few years, the Office of the Comptroller of the Currency ("OCC") has sought to immunize state-chartered operating subsidiaries of national banks from the reach of numerous state laws and state law enforcement. The interest of *amici curiae* in this case stems from their desire to ensure that customers of state-chartered operating subsidiaries benefit from the critical protections afforded by state law and state officials' enforcement efforts.

STATEMENT OF THE CASE

In this case, respondents seek to prohibit petitioner, the Commissioner of the Michigan Office of Insurance and Financial Services, from enforcing Michigan's mortgage laws against respondent Wachovia Mortgage, a state-chartered national bank operating subsidiary. The bases for respondents' action are sweeping, interconnected rules promulgated by the OCC in the past six years that have

[1] A letter of consent from each of the parties has been filed with the Clerk of the Court. No counsel for a party authored this brief in whole or in part, and no person or entity other than *amici curiae* made a monetary contribution to the preparation or submission of this brief.

dramatically undermined the states' ability to protect their consumers from abuses by national bank operating subsidiaries.

The OCC's 2001 operating subsidiary preemption rule at the heart of this case provides that, "[u]nless otherwise provided by Federal law or OCC regulation, State laws apply to national bank operating subsidiaries to the same extent that those laws apply to the parent national bank." 12 C.F.R. § 7.4006. In turn, this implicates the current "visitorial powers" rule, 12 C.F.R. § 7.4000, in which the OCC redefined its own exclusive jurisdictional reach under 12 U.S.C. § 484 in 2004. The recently amended visitation rule prevents state regulators and attorneys general from examining national banks, inspecting their records, or prosecuting enforcement actions against them except pursuant to limited exceptions.[2] In 2004, the OCC also expanded the universe of preempted state laws by promulgating the broad preemption rules now found in 12 C.F.R. § 7.4007 (deposit-taking), § 7.4008 (non-real estate lending), § 7.4009 (incidental powers), and § 34.4 (real estate lending) (collectively the "2004 preemption rules").

According to the OCC, 12 U.S.C. § 484 and the 2004 preemption and visitation rules apply to national bank operating subsidiaries to the same extent as to their parent national banks under 12 C.F.R. § 7.4006. 69 Fed.

[2] 12 C.F.R. § 7.4000. The Second Circuit is currently considering whether the 2004 visitation rule impermissibly expands the definition of "visitorial powers" and unduly restricts Section 484's "courts of justice" exception, issues that have not been briefed before this Court. *See OCC v. Spitzer*, 396 F. Supp. 2d 383, 407 (S.D.N.Y. 2005) (enjoining the New York State Attorney General from enforcing state fair lending laws against national banks or their operating subsidiaries), *appeal docketed*, No. 05-5996cv (2d Cir. 2005).

Reg. 1904, 1913 (Jan. 13, 2004); 69 Fed. Reg. 1895, 1900-01 (Jan. 13, 2004). In reliance on this interpretation, Wachovia Mortgage asserts that Michigan has no right to exercise any oversight under Michigan's mortgage laws because supervision is vested exclusively in the hands of the OCC as to both national banks and the state-chartered companies they control. The court below ruled in favor of respondents, incorrectly giving deference to the OCC's position under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). *Wachovia Bank v. Watters*, 431 F.3d 556 (6th Cir. 2005).

SUMMARY OF ARGUMENT

At issue in this case is whether the states will be able to protect their citizens from abuses by national bank operating subsidiaries established under the states' own charters. The states are uniquely positioned to implement innovative and rapid responses to abuses. Yet Section 7.4006, together with the 2004 preemption rules, would immunize operating subsidiaries from important state laws, such as mortgage lending laws, depriving consumers of rights and remedies that have no adequate parallel in federal law. Combined with the OCC's 2004 visitation rule, Section 7.4006 would also prevent the fifty states from utilizing their extensive experience and resources to enforce those laws that do apply – leaving all enforcement in the hands of a single federal agency that has shown little interest in ensuring fairness to consumers. No deference is due to an interpretation by a self-interested agency that would undermine consumers' interests and state sovereignty in such a significant way.

Deference to the OCC in this case is also inappropriate because the preemption determination involves pure issues of law properly resolved by the judiciary. The OCC's rules are premised on a number of legal errors, including its failure to follow decisions of this Court that it purported to distill.

The unambiguous language of 12 U.S.C. § 484 – which grants the OCC exclusive visitorial powers only as to "national bank[s]" – precludes deference to the OCC's assertion of exclusive visitorial powers over operating subsidiaries. The OCC's effort to circumvent this statutory language by claiming that state-chartered operating subsidiaries are the equivalent of departments or divisions of their parent banks contradicts basic principles long-settled in the common law. The asserted equivalence is, in any event, irrelevant under this Court's decision in *Board of Governors of the Federal Reserve System v. Dimension Financial Corp.*, 474 U.S. 361 (1986). This Court's precedents also preclude the OCC's attempt to rewrite the specific terms of Section 484 through its interpretation of the "incidental powers" provision, 12 U.S.C. § 24 (Seventh).

Even if the Court were to find an ambiguity in the National Bank Act ("NBA"), the OCC would not be entitled to deference because its position is neither reasonable nor permissible, particularly in light of repeated warnings by Congress that the OCC has exceeded its authority in recent years. Notwithstanding the OCC's contrary suggestion, the Riegle-Neal Interstate Banking and Branching Efficiency Act of 1994 ("Riegle-Neal"), Pub. L. No. 103-328, 108 Stat. 2338 (1994), and the Gramm-Leach-Bliley Financial Modernization Act ("GLBA"), Pub. L. No. 106-102, 113 Stat. 1338 (1999), do not support respondents' argument in this case. In fact, those Acts' legislative histories reflect Congressional disapproval of overreaching by the OCC.

ARGUMENT

I. THE OCC HAS NO AUTHORITY TO INTERFERE SO SUBSTANTIALLY WITH THE STATES' ABILITY TO PROTECT THEIR CITIZENS.

The combined effect of the OCC's rules is to severely curtail the states' ability to protect their citizens in their dealings with hundreds of state-chartered companies, despite a strong state interest in ensuring fairness in the marketplace. If upheld, the rules would render numerous substantive state laws inapplicable to operating subsidiaries and prevent state officials in many cases from enforcing even those laws that do apply. It is thus unsurprising that Congress did not explicitly delegate to the OCC authority to promulgate these rules. This Court should not find that Congress implicitly did what it did not do explicitly, because powers with such sweeping ramifications for consumers and state sovereignty are not delegated by mere implication. *See FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133, 159-60 (2000) ("[W]e 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 economic and political magnitude to an administrative agency.").[3]

[3] Although this brief does not discuss the Tenth Amendment implications of the OCC's rules, *amici curiae* note that this Court has granted certiorari on the question of whether the rules violate the Tenth Amendment by effectively converting a state-chartered corporation into a federal instrumentality in violation of the laws of the state of

(Continued on following page)

A. The States Have a Strong Interest in Protecting Their Citizens in Their Dealings with State-Chartered Operating Subsidiaries.

States have a longstanding, well-recognized interest in protecting their consumers and are often in the best position to respond quickly and appropriately to abusive practices in the marketplace. In comparison to the federal government, states are more familiar, accessible, and accountable to their constituencies and are better positioned to act as laboratories of experimentation in resolving problems in areas as fundamental as home lending.[4]

The extension of the rights of national banks to state-chartered non-banks would impair the states' ability to pursue this important state interest as to a significant number of state corporations with substantial consumer contact. The OCC has identified approximately 500 national bank operating subsidiaries that deal directly with

its creation. That the OCC's interpretation may raise serious constitutional questions is reason alone to deny deference to the OCC. *See Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 172-74 (2001); *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council,* 485 U.S. 568, 575-78 (1988); *AFL-CIO v. Fed. Election Comm'n*, 333 F.3d 168, 175, 179 (D.C. Cir. 2003).

[4] *See Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991) (stating that federalism "assures a decentralized government that will be more sensitive to the diverse needs of a heterogenous society" and "allows for more innovation and experimentation in government"); Baher Azmy, *Squaring the Predatory Lending Circle: A Case for States as Laboratories of Experimentation*, 57 Fla. L. Rev. 295, 390-400 (2005); Christopher L. Peterson, *Federalism and Predatory Lending: Unmasking the Deregulatory Agenda*, 78 Temple L. Rev. 1, 61-68 (2005).

consumers.[5] Wells Fargo Bank alone has nearly 160 such operating subsidiaries, with a substantial majority apparently involved in mortgage lending. *See supra* note 5. Just one subsidiary of National City Bank of Indiana, First Franklin Financial, originated over $29 billion mortgages in 2005, composing 4.4% of the subprime (higher-cost) market share that year. 1 Inside Mortgage Finance, *The 2006 Mortgage Market Statistical Annual* 187 (2006).

Like national banks, operating subsidiaries are permitted to engage in a wide range of activities beyond mortgage lending – such as acting as a finder for used car sales.[6] Many of these activities lie well outside the OCC's expertise, rendering the states' role in regulating these non-bank entities all the more critical.

B. Upholding Section 7.4006 Would Immunize State-Chartered Operating Subsidiaries from Important Substantive Consumer Protection Laws.

The interplay of Section 7.4006 with other OCC rules threatens to displace vitally important state consumer

[5] *See* OCC, National Bank Operating Subsidiaries Doing Business with Consumers (Dec. 31, 2005), http://www.occ.treas.gov/consumer/Report%20%202006%20for%20Bank%20pdf.pdf.

[6] *See* OCC, Activities Permissible for a National Bank 2005, at 3, 10-12 (Feb. 2006), http://www.occ.treas.gov/corpapps/BankAct.pdf (listing permissible activities for national banks and their operating subsidiaries, including "Medicare and Medicaid counseling" and finder activities); OCC Corporate Decision 97-60, 1997 WL 402653, *2 (July 1, 1997) (approving an application to expand an operating subsidiary's activities to include acting as a "finder" for used car sales and taking a fee for referring customers to "national auto service companies, such as Firestone, Jiffy Lube and other appropriate parties"); Patricia A. McCoy, *Banking Law Manual* § 5.02 (2d ed. 2003).

protection laws as to entities that are themselves creatures of the states. This preemption sweeps more broadly than the specific supervisory laws at issue in this case, as the OCC has arrogated to itself the right to preempt state consumer protection laws that merely place a "condition" or have more than an incidental effect on any national bank powers recognized by the OCC. *See* 69 Fed. Reg. 1904, 1911-12, 1916-17 (2004); *infra* Section II. While this case frames the respective rights of state and federal officials to oversee these state-chartered entities, it also implicates the rights of aggrieved consumers to petition the courts directly for relief.

A critical example of rights and remedies at stake are those arising under laws enacted by a number of states to curb abusive mortgage lending practices. In response to abuses in the high-cost mortgage market, Congress enacted the Home Ownership and Equity Protection Act of 1994 ("HOEPA"), Pub. L. No. 103-325, Title I, Subt. B, 108 Stat. 2160 (1994) (codified primarily at 15 U.S.C. § 1639). The legislative history of HOEPA makes it clear that the "Conferees intend[ed] to allow states to enact more protective provisions than those in [HOEPA]." H.R. Rep. No. 103-652 (1994) (Conf. Rep.), *reprinted in* 1994 U.S.C.C.A.N. 1977, 1992; *see also* 15 U.S.C. § 1610(b). States and localities are much more likely than the federal government to appreciate the impact of abusive lending practices that are linked to increased mortgage foreclosures,[7] because foreclosures may lead to neighborhood

[7] *See, e.g.,* Azmy, *supra* note 4, at 343-45; Roberto G. Quercia et al., *The Impact of Predatory Loan Terms on Subprime Foreclosures: The Special Case of Prepayment Penalties and Balloon Payments* (2005), http://www.kenan-flagler.unc.edu/assets/documents/foreclosurepaper.pdf; The Reinvestment Fund, *Mortgage Foreclosure Filings in Pennsylvania*

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decline, lowered property values, higher rates of abandonment, higher rates of violent crime, and other costs.[8]

Although HOEPA accomplished many of its objectives, market abuses exploited its weaknesses. To bolster the federal law, states including North Carolina, Georgia, New York, Illinois, and Massachusetts enacted "state HOEPAs" providing greater protections with private rights of action.[9]

At the request of two national banks and their operating subsidiaries, the OCC pronounced the Georgia law preempted in its entirety with respect to national banks and their operating subsidiaries, and on the same day announced its proposed expansive new preemption rules.[10] The OCC has cited its preemption of the Georgia law as an

75-84 (2005), http://www.trfund.com/resource/downloads/policypubs/Mortgage-Forclosure-Filings.pdf.

[8] Dan Immergluck & Geoff Smith, *The External Costs of Foreclosure: The Impact of Single-Family Mortgage Foreclosures on Property Values*, 17 Housing Policy Debate 57 (2006); William Apgar et al., *The Municipal Cost of Foreclosures: A Chicago Case Study* 8-12 (2005), http://www.hpfonline.org/PDF/Apgar-Duda_Study_Full_Version.pdf.

[9] *See, e.g.,* N.C. Gen. Stat. §§ 24-1.1A, -1.1E, -2.5, -8, -9, -10.2; Ga. Code Ann. §§ 7-6A-1 to -13; N.Y. Banking Law § 6-*l*; N.Y. Gen. Bus. § 771-a; N.Y. Real Prop. Acts. § 1302; 815 Ill. Comp. Stat. 137/1 to 137/175; Mass. Gen. Laws ch. 183C §§ 1-19.

[10] 68 Fed. Reg. 46,264 (Aug. 5, 2003); 68 Fed. Reg. 46,119 (Aug. 5, 2003). For thoughtful academic criticisms of the OCC's preemption of state anti-predatory lending laws and other consumer protection laws, see generally Azmy, *supra* note 4, at 382-83, 385-88; Nicholas Bagley, *The Unwarranted Regulatory Preemption of Predatory Lending Laws*, 79 N.Y.U. L. Rev. 2274 (2004); Peterson, *supra* note 4; Arthur E. Wilmarth, Jr., *The OCC's Preemption Rules Exceed the Agency's Authority and Present a Serious Threat to the Dual Banking System and Consumer Protection*, 23 Ann. Rev. of Banking & Fin. Law 225 (2004); Vincent Di Lorenzo, *Federalism, Consumer Protection and Preemption: A Case for Heightened Judicial Review* (St. John's Legal Studies Research Paper #09-0026 2005), http://ssrn.com/abstract=796147.

example of how it will apply the 2004 preemption rule standards, *see* 69 Fed. Reg. 1904, 1911-12 nn.57, 59 (2004), suggesting that it will take the position that other "state HOEPAs" are preempted as well.[11] Preemption of these laws is unfair and unwise, as empirical studies have demonstrated that they are effective in reducing predatory lending without reducing consumers' access to legitimate credit.[12] In the predatory lending arena, as in a host of other contexts, Section 7.4006's extension of preemption to state-chartered operating subsidiaries strips borrowers of important rights and remedies under state law that were expressly designed to cure inadequacies in federal law.[13]

[11] An OCC official testified to Congress that, despite a Congressional request for delay, the OCC proceeded with the final preemption rules due to continuing initiatives from states on anti-predatory lending laws. *Cong. Review of OCC Preemption: Hearing Before the Subcomm. on Oversight & Investigations of the House Fin. Servs. Comm.*, 108th Cong. 30-31 (Jan. 28, 2004) (testimony of Julie Williams, OCC First Senior Deputy Comptroller and Chief Counsel), *available at* http://commdocs.house.gov/committees/bank/hba93717.000/hba93717_0f.htm; *cf.* Bagley, *supra* note 10, at 2284 (noting that rules would preempt all state predatory lending laws).

[12] *See* Roberto G. Quercia et al., *Assessing the Impact of North Carolina's Predatory Lending Law*, 15 Housing Policy Debate 573 (2003); Wei Li & Keith S. Ernst, Center for Responsible Lending, *The Best Value in the Subprime Market: State Predatory Lending Reforms* (2006), http://www.responsiblelending.org/pdfs/rr010-State_Effects-0206.pdf; *cf.* Peterson, *supra* note 4, at 74-76 (discussing spillover effects of preemption rules).

[13] Operating subsidiaries assert that state laws limiting prepayment penalties are preempted pursuant to Section 7.4006. *See, e.g., Nat'l City Bank of Ind. v. Turnbaugh*, 2006 WL 2294843, at *1 (4th Cir. Aug. 10, 2006). The states' interest in curbing abuses regarding prepayment penalties is significant, because prepayment penalties have been linked to an increase in the risk of foreclosure in subprime loans. *See, e.g.,* Quercia et al., *The Impact of Predatory Loan Terms on Subprime Foreclosures*, *supra* note 7; *cf.* H.R. Rep. No. 103-652,

(Continued on following page)

C. Upholding Section 7.4006 Would Prevent State Officials from Enforcing Even Many Non-Preempted State Laws, Despite the Agency's Own Weak Enforcement Record and Self-Interest.

In addition to preempting substantive state law, Section 7.4006 forecloses any meaningful role for states in overseeing national bank operating subsidiaries. The rule would prevent state officials – including attorneys general – from bringing their resources, experience, and expertise to bear to investigate and enforce a broad swath of consumer law as to these state-chartered entities. *See supra* note 2. It is difficult to overstate the significance of this result, as state officials have been the leaders in enforcing consumer protection laws. According to one 2004 congressional report, state banking agencies and state attorney generals' offices employ nearly 700 full time examiners and attorneys to monitor compliance with consumer laws, more than seventeen times the number of OCC personnel allocated to investigate consumer complaints. Comm. on Fin. Servs., 108th Cong., *Views and Estimates on Matters to Be Set Forth in the Concurrent Res. on the Budget for Fiscal Year 2005*, at 16 (Comm. Print 2004), *available at* http://financialservices.house.gov/media/pdf/FY2005%20Views_Final.pdf, *cited in* Wilmarth, *supra* note 10, at 316 & n.359. "In the area of abusive mortgage lending practices alone, State bank supervisory agencies initiated 20,332 investigations in 2003 in response to consumer complaints, which resulted in 4,035 enforcement actions." *Id.*

reprinted in 1994 U.S.C.C.A.N. at 1991-92 (indicating that the HOEPA conferees intended that more restrictive state laws relating to prepayment penalties would remain in effect following HOEPA's enactment).

By contrast, the OCC's record of consumer protection enforcement is extremely weak. The agency lists only eight actions in a section on its website captioned "[a]ctions the OCC has taken against banks engaged in abusive practices." OCC, Consumer Protection News: Unfair and Deceptive Practices, http://www.occ.treas.gov/Consumer/Unfair.htm (last visited Aug. 28, 2006). The OCC stayed its hand for *more than a quarter century* before bringing its first action in 2000 to address unfair and deceptive practices under Section 5 of the Federal Trade Commission Act.[14] Even then, the action came only after a decade in which the target bank "had been well known in the . . . industry as the poster child of abusive consumer practices" and after "[a] California state prosecutor . . . embarrassed the OCC into taking action."[15]

Rather than vigilantly and publicly enforcing consumer protection laws, the OCC has in recent years frequently intervened on the side of national banks or their operating subsidiaries against the consumer. *See*

[14] *See* Julie L. Williams & Michael S. Bylsma, *On the Same Page: Federal Banking Agency Enforcement of the FTC Act to Address Unfair and Deceptive Practices by Banks*, 58 Bus. Law. 1243, 1244, 1246 & n.25, 1253 (2003) (noting that the OCC brought its first such action in 2000, citing authority from the early 1970s indicating that the OCC had the authority to bring such an action under Section 8 of the Federal Deposit Insurance Act, and conceding that "[a]n obvious question is why it took the federal banking agencies more than twenty-five years to reach consensus on their authority to enforce the FTC Act"); *see also* Peterson, *supra* note 4, at 72-73; Wilmarth, *supra* note 10, at 352-56.

[15] Duncan A. MacDonald (former General Counsel, Citigroup Inc.'s Europe and North American card business), Letter to the Editor, *Comptroller Has Duty to Clean Up Card Pricing Mess*, Am. Banker, Nov. 21, 2003, at 17; *see also Frontline: Secret History of the Credit Card* (PBS television broadcast Nov. 23, 2004) (transcript available at http://www.pbs.org/wgbh/pages/frontline/shows/credit/etc/script.html).

Jess Bravin & Paul Beckett, *Friendly Watchdog: Federal Regulator Often Helps Banks Fighting Consumers*, Wall St. J., Jan. 28, 2002, at A1. For example, it has filed *amicus* briefs on behalf of operating subsidiaries in cases ranging from the State of Minnesota's suit to enforce the Telemarketing Sales Rule, 16 C.F.R. §§ 310.1-.7, to lower state court challenges to state unauthorized practice of law rules that affect document preparation charges.[16]

That the OCC sides with banks rather than consumers when their interests conflict is not wholly surprising given its institutional interests. Depository institutions may choose not only between state and federal regulators, but also among federal regulators, leading to "charter competition" in banking.[17] The OCC has a financial stake in attracting financial institutions to its charter because it is funded by assessments from the banks it regulates, rather than by Congressional appropriations. OCC, Annual Report, Fiscal Year 2005, at 7, *available at* http://www.occ.treas.gov/annrpt/2005AnnualReport.pdf. In 2005, 97% of the OCC's operations were funded by revenues from assessments. *Id.*

[16] *See, e.g., Minnesota ex rel. Hatch v. Fleet Mortgage Corp.*, 181 F. Supp. 2d 995, 997, 999-1001 (D. Minn. 2001) (denying a motion to dismiss and noting that "[t]he OCC's insistence that it must have exclusive jurisdiction over subsidiaries in order to avoid having its authority 'restricted' is not persuasive"); *Charter One Mortgage Co. v. Condra*, 847 N.E.2d 207 (Ind. Ct. App. 2006) (rejecting argument of operating subsidiary and OCC *amicus* that the challenged state law was preempted).

[17] *See, e.g.*, Christine E. Blair & Rose M. Kushmeider, *Challenges to the Dual Banking System: The Funding of Bank Supervision*, 18 FDIC Banking Review 1, 14 (2006); John A. Weinberg, *Competition Among Bank Regulators*, 88 Fed. Res. Bank of Richmond/Econ. Q. 19, 19 (2002).

The OCC has not been shy about using preemption to encourage institutions to adopt its charter. A former comptroller, John D. Hawke, Jr., described the OCC's use of its power to override state laws protecting consumers as "one of the advantages of a national charter," and asserted that he was "not the least bit ashamed to promote it." Bravin & Beckett, *supra*, at A1. This charter competition and funding mechanism create conditions ripe for regulatory capture. *Cf.* Bagley, *supra* note 10, at 2295 (describing "two well-documented institutional pathologies: regulatory capture . . . [and] self-aggrandizing administrators," which "could manifest themselves in particularly pernicious ways if agencies were given an effective carte blanche to override the laws of duly elected state legislatures") (footnotes omitted). Judicial deference is unwarranted in this circumstance, where a self-interested agency has interpreted the scope of its own exclusive jurisdiction in an area of tremendous consequence for the public. *See ACLU v. FCC*, 823 F.2d 1554, 1567 n.32 (D.C. Cir. 1987) (per curiam) ("[I]t seems highly unlikely that a responsible Congress would implicitly delegate to an agency the power to define the scope of its own power."); *Hi-Craft Clothing Co. v. NLRB*, 660 F.2d 910, 916 (3rd Cir. 1981) (noting that "an agency ruling that broadens its own jurisdiction is examined carefully" because "government agencies have a tendency to swell, not shrink").

II. NO DEFERENCE IS DUE BECAUSE THE PREEMPTION DETERMINATION INVOLVES PURE ISSUES OF LAW.

Chevron deference is also inappropriate because the preemption issue before the Court involves pure issues of law as to which the agency has no special expertise.

Practical agency expertise is one of the primary justifications for *Chevron* deference. *See Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 651-52 (1990). With respect to the interpretation of preemption cases, however, banking regulators have no greater expertise than the courts. As the Tenth Circuit explained in *Colorado Public Utilities Commission v. Harmon*, 951 F.2d 1571 (10th Cir. 1991):

> [C]ourts should defer to the judgment of an administrative agency with reference to topics within the agency area of expertise. . . . However, a preemption determination involves matters of law – an area more within the expertise of the courts than within the expertise of the [administrative agency].

951 F.2d at 1579 (internal quotation marks and citations omitted); *see also Nat'l Mining Ass'n v. Sec'y of Labor*, 153 F.3d 1264, 1267 (11th Cir. 1998) (citing *Harmon*, 951 F.2d at 1579) (citation omitted).

The OCC itself acknowledged the purely legal nature of Section 7.4006 by stating, in promulgating the rule, that it "reflects the conclusion we believe a Federal court would reach, even in the absence of the regulation, pursuant to the Supremacy Clause and applicable Federal judicial precedent." 66 Fed. Reg. 34,784, 34,790 (July 2, 2001). The agency also devoted substantial portions of the 2004 preemption and visitation rules' commentaries to analyzing this Court's prior decisions, a quintessential judicial function. *See* 69 Fed. Reg. 1904, 1910-11 (Jan. 13, 2004); 69 Fed. Reg. 1895, 1899 (Jan. 13, 2004); 68 Fed. Reg. 46,119, 46,121-23 (Aug. 5, 2003); 68 Fed. Reg. 6363, 6368-69 (Feb. 7, 2003).

In promulgating the preemption rules, the agency not only addressed issues of pure law, but resolved those issues incorrectly. One example is the agency's handling of this Court's preemption jurisprudence. In *Barnett Bank of Marion County, N.A. v. Nelson*, 517 U.S. 25 (1996), the Court held:

> In defining the pre-emptive scope of statutes and regulations granting a power to national banks, [several of the Court's prior] cases take the view that normally Congress would not want States to forbid, or to impair significantly, the exercise of a power that Congress explicitly granted. To say this is not to deprive States of the power to regulate national banks, where (unlike here) doing so does not *prevent or significantly interfere* with the national bank's exercise of its powers.

Id. at 33 (1996) (emphasis added). This has been the law since the 1860's. *See Nat'l Bank v. Commonwealth*, 76 U.S. 353, 362 (1869) ("It is only when the State law *incapacitates* the banks from discharging their duties to the government that it becomes unconstitutional.") (emphasis added). Ignoring these authorities, while purporting to "distill[ ]" them, the OCC promulgated the 2004 preemption rules, which preempt not only state laws that "incapacitate" or "prevent" or "significantly interfere," but also state laws that merely "*condition*" the exercise of national bank powers. 69 Fed. Reg. at 1910 & n.53, 1916-17 (emphasis added) (citing *Barnett*, 517 U.S. at 34, although the case provides no support for the proposition that state laws that only "condition" the exercise of national bank powers are preempted).

As described in Section III below, the OCC's rules are based on other legal errors, including its erroneous assumptions that operating subsidiaries are the equivalent of departments or divisions of their parent banks and that the OCC's authority to preempt state authority over operating subsidiaries follows necessarily from the national banks' authority to own them. The Court owes no deference to rules that are premised on analysis of these purely legal issues, which are best resolved by the courts.

III. THE COURT SHOULD NOT DEFER TO THE OCC'S CLAIM OF EXCLUSIVE VISITORIAL POWERS OVER OPERATING SUBSIDIARIES BECAUSE THE STATUTORY LANGUAGE IS CLEAR.

When Congress's intent is clear, no deference is due because the Court must give effect to congressional intent. *Chevron*, 467 U.S. at 842-43. Whether there is an ambiguity is determined by looking at the overall context. *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132-33 (2000).

> The judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent. If a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect.

Chevron, 467 U.S. at 843 n.9 (citations omitted). Even when ambiguity is found, it "must be such as to make it appear that Congress either explicitly or implicitly delegated authority to cure that ambiguity," and a failure to negate that authority does not supply it. *Am. Bar Ass'n v. FTC*, 430 F.3d 457, 468-69 (D.C. Cir. 2005).

In the clearest terms possible, 12 U.S.C. § 484 exempts national banks from state visitorial powers. Seeking to extend this exemption to state-chartered operating subsidiaries, the OCC asserts that operating subsidiaries are "the equivalent of departments or divisions of their parent banks." 66 Fed. Reg. 34,784, 34,788 (July 2, 2001) (discussing proposed new Section 7.4006). This erroneous claim is contradicted by long-settled law, as well as statements by the OCC itself. Even if this claim were true, it would not provide a basis for extending the exemption to non-bank operating subsidiaries, because the plain language of the statute provides the exemption only to "national banks." This conclusion is supported by this Court's decision in *Board of Governors of the Federal Reserve System v. Dimension Financial Corp.*, 474 U.S. 361 (1986), which rejected a similar claim by the Federal Reserve. Because the language of Section 484 is unambiguous, no deference is due to the OCC's assertion of exclusive visitorial powers over operating subsidiaries.

A. Well-Established Common Law Principles Negate the OCC's Claim that Operating Subsidiaries Are the Equivalent of Departments or Divisions of Their Parents.

The OCC's claim that subsidiaries are the equivalent of departments or divisions of their parent banks contradicts basic principles long-settled in the common law. It is fundamental that parent corporations, like all shareholders, are distinct from the corporations they own. *See United States v. Bestfoods*, 524 U.S. 51, 61-62 (1998). This is true even where the parent and the subsidiary have the same officers and directors, have the same name, and are "extremely interrelated." *See, e.g.*, 1 William Meade

Fletcher et al., *Fletcher Cyclopedia of the Law of Private Corporations* § 25 (perm. ed., rev. vol. 2005). "The corporation is an entity, distinct from its stockholders even if the subsidiary's stock is wholly owned by one person or corporation." *Buechner v. Farbenfabriken Bayer Aktiengesellschaft*, 154 A.2d 684, 686-87 (Del. 1959). This Court has described "this respect for corporate distinctions" as a "bedrock principle" of the common law. *Bestfoods*, 524 U.S. at 62. Because they are distinct entities, a parent company is not liable for the debts of its subsidiaries. This is "a general principle of corporate law deeply 'ingrained in our economic and legal systems.'" *Id.* at 61 (quoting William O. Douglas & Carrol M. Shanks, *Insulation from Liability Through Subsidiary Corporation*, 39 Yale L.J. 193 (1929)).

The OCC invokes the concept of equivalence to permit banks and their subsidiaries to have the best of both worlds: preemption and limited liability. Yet, ironically, characterizing operating subsidiaries as a department or division may, in the right circumstances, help deprive them of the latter. *See, e.g., Yoder v. Honeywell, Inc.*, 104 F.3d 1215, 1220-21 (10th Cir. 1997).

This Court has noted that "the failure of [a federal statute] to speak to a matter as fundamental as the liability implications of corporate ownership demands application of the rule that '[i]n order to abrogate a common-law principle, the statute must speak directly to the question addressed by the common law.'" *Bestfoods*, 524 U.S. at 63 (quoting *United States v. Texas*, 507 U.S. 529, 534 (1993)). Section 484 vests the OCC with exclusive visitorial authority over "national bank[s]," which cannot be read to encompass banks' non-bank operating subsidiaries.

While the judiciary is the arbiter of the unambiguous meaning of "national bank," *Chevron*, 467 U.S. at 843 n.9, it is telling that even the OCC has at times acknowledged the distinction between operating subsidiaries and their parent banks. In interpretive letters permitting shared state oversight of insurance activities in 1983 and 1988, the OCC stated:

> Unlike a national bank, . . . an operating subsidiary is a creature of state corporate laws. It is not in the strict sense a federal instrumentality. Therefore, the Comptroller's Office does not derogate Section 484 by according other authorities the right to examine a national bank's subsidiary if the Office determines that such examinations would be helpful in regulating the activities of the subsidiary.[18]

The OCC's current operating subsidiary preemption rule deserves no deference because its premise contradicts the well-established common law difference between a parent bank and a subsidiary, a distinction recognized in some of the OCC's own letters.

[18] OCC Interp. Ltr. 277, 1983 WL 54162 (Dec. 21, 1983), *quoted in* OCC Interp. Ltr., 1988 WL 282227 (June 7, 1988) (concluding that "a national bank, absent a compulsory court order, may legally refuse to comply with requests by state officials to inspect the books and records of a national bank's division, but *may not refuse such a request for records of an operating subsidiary*") (emphasis added); *cf.* OCC Interp. Ltr., 1990 WL 362185 n.3 (Oct. 26, 1990) (opining that Ohio laws requiring licensing, examination, and visitation by state authorities for national banks to engage in securities activities are preempted, but expressly taking no position "regarding the authority of the state to enforce any state laws against an operating subsidiary of a national bank").

B. Even If Operating Subsidiaries Were Equivalent to National Banks, *Board of Governors v. Dimension Financial* Precludes the OCC's Extension of Section 484 to Operating Subsidiaries.

The Court's decision in *Board of Governors of the Federal Reserve System v. Dimension Financial Corp.*, 474 U.S. 361 (1986), addressed a situation closely analogous to the OCC's purported application of Section 484 to operating subsidiaries. There, the Federal Reserve Board argued that its authority over "banks" pursuant to the Bank Holding Company Act included the authority to make banking regulations applicable to bank equivalents. While the Court agreed that "there is much to be said for regulating financial institutions that are the functional equivalent of banks," it held that the agency had "no power to correct flaws that it perceives in the statute it is empowered to administer." 474 U.S. at 374.

In *Dimension Financial*, the agency did not directly revise the Act's definition of "bank," but rather interpreted expansively two phrases contained in the statutory definition. *See id.* at 364, 368-69; 49 Fed. Reg. 794, 796-97 (Jan. 5, 1984). The agency argued that in the years subsequent to the enactment of the relevant statutory provisions, the powers of previously unregulated lending institutions had substantially expanded, "making them for all intents and purposes banks" under the statute. 474 U.S. at 367 n.3 (internal quotation marks omitted). According to the agency, the recent proliferation of these institutions threatened the structure established by Congress and necessitated the new regulation. *Id.* at 367. The Court rejected the argument, holding that the statute's plain language controlled. *Id.* at 374. Here, as in *Dimension Financial*, extending coverage to bank equivalents would be a job for Congress, not the agency.

The OCC's reliance on the "incidental powers" provision in 12 U.S.C. § 24 (Seventh) does not change this result. The court below erred in holding that the general authority of the OCC could be used to broaden the specific grant of exclusive visitorial powers under Section 484. The court concluded that, "'[t]o the extent that using an operating subsidiary is a legitimate power granted to national banks, [Section 484] provides the OCC with ample authority to preempt states from exercising visitorial powers over the subsidiary.'" *Watters*, 431 F.3d at 561 (quoting *Wachovia Bank v. Burke*, 414 F.3d 305, 316 (2d Cir. 2005), *petition for cert. filed*, 74 U.S.L.W. 3233 (U.S. Sep. 30, 2005) (No. 05-431)). This reasoning should be rejected. When the exercise of a particular agency power is governed by a specific statutory provision, it is that provision, not the agency's general authority, that controls. *See Dimension Fin.*, 474 U.S. at 372 n.6 (holding that a provision authorizing the Board to issue regulations to administer and carry out the Act's purposes did not permit the Board to expand its jurisdiction beyond the boundaries of the specific provisions at issue); *First Nat'l Bank in St. Louis v. Missouri*, 263 U.S. 640, 659 (1924) ("it is wholly illogical to say that a power which by fair construction of the statutes is found to be denied, nevertheless exists as an incidental power"); *cf. Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001) (noting that Congress "does not . . . hide elephants in mouseholes").

IV. DEFERENCE IS INAPPROPRIATE BECAUSE THE OCC'S READING CANNOT BE SQUARED WITH CONGRESSIONAL DISAPPROVAL OF RECENT OCC OVERREACHING.

Even if the Court were to find that the relevant language of the NBA is ambiguous, deference would be inappropriate under step two of the *Chevron* test, which examines whether the agency's interpretation is a reasonable and permissible construction of the statute. *See Chevron*, 467 U.S. at 843-44. The OCC's position is neither reasonable nor permissible due to all of the flaws described in Sections I through III above. It also cannot be squared with legislative history showing Congressional concern in recent years about OCC overreaching, particularly with respect to preemption and the agency's interpretation of the NBA's "incidental powers" provision.

Although the OCC has relied on Riegle-Neal and GLBA to support its claim of authority, the legislative histories of the two acts and the 1997 amendments to Riegle-Neal demonstrate how unreasonable the agency's current position is. In Riegle-Neal, Congress explicitly stated that, in the interstate branch context, the "host state's" consumer protection, fair lending, and community reinvestment laws apply to any branch in the host state of an out-of-state national bank to the same extent as such laws apply to a branch of a bank chartered by that state, except "when Federal law preempts the application of such State laws to a national bank." Pub. L. No. 103-328, § 102, 108 Stat. 2338, 2350 (1994) (codified at 12 U.S.C. § 36(f)(1)(A)). The conference report makes it clear that Riegle-Neal was *not* intended to undermine the states' role in ensuring consumer protection:

> States have a strong interest in the activities and operations of depository institutions doing business within their jurisdictions, regardless of the type of charter an institution holds. In particular, States have a legitimate interest in protecting the rights of their consumers, businesses, and communities. Federal banking agencies . . . play an important role in maintaining the balance of Federal and State law under the dual banking system. *Congress does not intend that [Riegle-Neal] alter this balance and thereby weaken States' authority to protect the interests of their consumers, businesses, or communities*.

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

The Riegle-Neal conferees also left no ambiguity about the preemption principles that they intended to incorporate – that is, the narrow, traditional preemption principles articulated by this Court that the OCC failed to follow in promulgating its preemption rules, as explained in Section II above. The conference report states:

> Under well-established judicial principles, national banks are subject to State law in many significant respects. . . . Generally, State law applies to national banks unless the State law is in direct conflict with the Federal law, Federal law is so comprehensive as to evidence Congressional intent to occupy a given field, or the State law stands as an obstacle to the accomplishment of the full purposes and objectives of the Federal law. In this regard, the impact of a State law on the safe and sound operations of a national bank is one factor that may be taken into account in considering whether Federal law preempts State law. *Courts generally use a rule of construction*

> *that avoids finding a conflict between the Federal and State law where possible. The title does not change these judicially established principles.*

Id. (emphasis added).[19]

The conferees also explicitly criticized the OCC for being "inappropriately aggressive" in applying "traditional preemption principles," with the result that state law was being preempted in certain "situations where the federal interest did not warrant that result." *Id.* (citing examples). In light of this concern, Congress imposed exceptional procedural requirements on federal banking agencies, requiring them to publish for comment any new opinion letter or interpretive rule preempting state consumer protection and fair lending laws. 12 U.S.C. § 43. The conference report indicates that these requirements were "not intended to confer upon the agency any new authority to preempt. . . . Rather, [they were] intended . . . to help ensure that an agency only makes a preemption determination when the legal basis is compelling and the Federal policy interest is clear." H.R. Rep. No. 103-651, at 55 (Conf. Rep.), *reprinted in* 1994 U.S.C.C.A.N. at 2076.

In amendments to Riegle-Neal in 1997, Congress added a requirement that the OCC include in its annual report to Congress a review of, and explanation for, each of its preemption determinations. Riegle-Neal Amendments,

[19] Indeed, Congress gave specific instruction to the OCC as to how and when it could expand the boundaries of the existing standards for displacing state law in a separate exception to the general, default rule that host state consumer protection and fair lending laws apply: when the OCC determines that the law would have a *discriminatory effect* on national bank branches when compared to branches chartered by the host state. 12 U.S.C. § 36(f)(1)(A)(ii).

Pub. L. No. 105-24, § 2, 111 Stat. 238, 239 (1997). Again, a driving force was concern that the OCC had "undertaken preemptive actions which were unnecessarily expansive." 143 Cong. Rec. S5638 (daily ed. June 12, 1997) (statement of Sen. Sarbanes); *see also* 143 Cong. Rec. S5637 (daily ed. June 12, 1997) (statement of Sen. D'Amato). Riegle-Neal and its 1997 amendments thus reflected Congressional dissatisfaction with the OCC's overreaching as of the 1990's and certainly cannot be read as an endorsement of the far more expansive preemption agenda that the OCC revealed through its 2001 and 2004 rules.

There is also no merit to the OCC's argument that Congress, in GLBA, sanctioned the agency's extension of preemption and exclusive jurisdiction by referring to national bank operating subsidiaries as entities that "engage[ ] solely in activities that national banks are permitted to engage in directly and are conducted subject to the same terms and conditions that govern the conduct of such activities by national banks."[20] This provision was not intended as a license for the OCC to preempt state law as to operating subsidiaries. Rather, the statutory language was intended to *curb* the OCC, which had authorized operating subsidiaries to engage in activities that Congress had not chosen to permit parent banks to engage in directly. As Representative Bliley explained:

> [O]ne of the most important aspects of the Gramm-Leach-Bliley Act is that it reaffirms a long-standing principle of the Federal Banking law – that a national bank may not own any

[20] Pub. L. No. 106-102, § 121, 113 Stat. 1338, 1378 (1999) (codified at 12 U.S.C. § 24a(g)(3)(A)); *see also* Azmy, *supra* note 4, at 387 (noting that the OCC has attempted to transform a limited grant of authority into complete exemption for operating subsidiaries).

> interest in or control another company engaged in activities that national banks cannot conduct directly unless such ownership or control is expressly authorized by Federal law. . . . Recently, the Comptroller of the Currency has interpreted section 24 (Seventh) of the [NBA] to permit national banks to own and control subsidiaries engaged in activities that national banks cannot conduct directly. These decisions and the legal reasoning therein are erroneous and contrary to the law. The Act overturns these decisions and renders inoperative those portions of Part 5 of the Comptroller's regulations that purport by administrative action to authorize national banks to control subsidiaries engaged in activities that the national banks cannot conduct directly.

145 Cong. Rec. E2386-01, 1999 WL 1032747 (Nov. 4, 1999) (statement of Rep. Bliley).

The legislative histories of the Acts show that Congress believed that the OCC had *already* overstepped its bounds even prior to the agency's expanded displacement of states' supervisory and substantive laws in 2001 and 2004, making any claim that the Acts sanctioned these recent expansions unsustainable.[21]

[21] Bipartisan concerns about OCC overreaching were also voiced at Congressional hearings on the 2004 rules. *See, e.g., Cong. Review of OCC Preemption: Hearing Before the Subcomm. on Oversight & Investigations of the House Fin. Servs. Comm.*, 108th Cong., at 3 (Jan. 28, 2004) (statement of Chairwoman Sue Kelly), *available at* http://commdocs.house.gov/committees/bank/hba93717.000/hba93717_0f.htm ("[F]or a regulator to single-handedly preempt a State's ability to both determine and enforce laws without public debate or explicit direction from Congress is not only troublesome, but I believe it is careless."); Wilmarth, *supra* note 10, at 297 & n.279.

CONCLUSION

For the foregoing reasons, the decision of the court of appeals should be reversed.

Respectfully submitted,

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