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., and
WACHOVIA MORTGAGE CORPORATION
*Respondents.*

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

**BRIEF FOR AMERICAN BANKERS ASSOCIATION, AMERICA'S COMMUNITY BANKERS, CONSUMER BANKERS ASSOCIATION, CONSUMER MORTGAGE COALITION, FINANCIAL SERVICES ROUNDTABLE, AND MORTGAGE BANKERS ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS**

**[Additional *amici* listed on inside cover]**

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## INTEREST OF AMICI CURIAE[1]

*Amici curiae* are the principal trade associations for the banking industry in the United States. Their members originate the vast majority of the home mortgage loans made in the United States today. Some are national banks with mortgage banking subsidiaries; others are operating subsidiaries of national banks; and still others utilize alternative corporate structures to engage in the mortgage banking business. *Amici* and their members share respondents' interest in a nationwide regulatory environment that provides effective protection for the public without obstruction by state-by-state limitations on the banking operations of national banks, including as conducted through operating subsidiaries.

The American Bankers Association is the principal national trade association of the financial services industry in the United States. Its members, located in each of the fifty States and the District of Columbia, include financial institutions of all sizes and types, both federally and state-chartered. ABA members hold a majority of the domestic assets of the banking industry in the United States.

America's Community Bankers is the national trade association committed to shaping the future of banking by being the innovative industry leader strengthening the competitive position of community banks. ACB members, whose aggregate assets are more than $1.5 trillion, pursue progressive, entrepreneurial and service-oriented strategies in providing financial services to benefit their customers and communities.

The Consumer Bankers Association is a nonprofit national trade association founded in 1919 to provide a collective voice for the retail banking industry. Its members com-

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[1] This brief was not authored, in whole or in part, by counsel for either party, and no person or entity other than *amici*, their members, and their counsel contributed monetarily to the preparation or submission of the brief. The parties have consented to the filing of the brief and copies of their letters of consent have been lodged with the Clerk of the Court.

prise more than 750 federally insured financial institutions that collectively hold over 70 percent of all consumer credit held by federally insured depository institutions in the United States.

The Consumer Mortgage Coalition is a trade association of national mortgage lenders, mortgage servicers, and mortgage origination-service providers committed to the nationwide rationalization of consumer mortgage laws and regulations.

The Financial Services Roundtable is a national association whose membership represents 100 of the largest integrated financial services companies providing banking, insurance, and investment products and services to the American consumer. Its members account for approximately $40.7 trillion in managed assets and $960 billion in revenue, and provide approximately 2.3 million jobs.

The Mortgage Bankers Association is the national association representing the real estate finance industry. The association works to ensure the continued strength of the Nation's residential and commercial real estate markets; to expand homeownership; and to extend access to affordable housing to all Americans. Its membership of over 3,000 companies includes all elements of real estate finance: mortgage companies, mortgage brokers, commercial banks, thrifts, Wall Street conduits, life insurance companies and others in the mortgage lending field.

Also appearing as *amici* are 58 bankers associations from each of the fifty States and Puerto Rico. These associations represent the interests of their members (which include state and federally chartered banks, as well as savings and loan associations) at the state and local level. They provide a voice for the industry in state legislatures across the nation, as well as providing support to their members with research and information, public relations, continuing professional education and educational materials, and business development.

## SUMMARY OF ARGUMENT

The court of appeals correctly held that the Michigan laws in issue are preempted by the National Bank Act (NBA) and its implementing regulations.

**I.** Petitioner and her *amici* all but ignore the historical context from which this case arises. But that history is central to the issue petitioner has asked this Court to decide. As the Court has repeatedly recognized, Congress's intent in enacting the NBA was to displace all state laws that would interfere with the exercise of national banks' banking powers.

**A.** The Court confirmed the supremacy of federal banking laws in *McCulloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316 (1819). Near the end of the Civil War, Congress established a national banking system that was designed to be wholly independent of state authority. National Bank Act of 1864, ch. 106, 13 Stat. 99. The federal government thereby prohibited the interference of state governments with the exercise of federally authorized banking powers by national banks. In lieu of state regulation, the NBA created the Office of the Comptroller of Currency (OCC), which was vested with exclusive authority to regulate the "business of banking" by national banks.

**B.** This Court has consistently reaffirmed the broad preemptive reach of the NBA. The statute is designed to protect national banks, in the exercise of their federally authorized banking powers, from the hazard of unfriendly state legislation. *Tiffany* v. *Nat'l Bank of Mo.*, 85 U.S. (18 Wall.) 409 (1874). Accordingly, the States are precluded from regulating the banking operations of national banks. *E.g.*, *Easton* v. *Iowa*, 188 U.S. 220 (1903); *Davis* v. *Elmira Sav. Bank*, 161 U.S. 275 (1896).

As the Court has explained, the "history" of the NBA "is one of interpreting grants of both enumerated and incidental 'powers' to national banks as grants of authority not normally limited by, but rather ordinarily pre-empting, contrary state law." *Barnett Bank of Marion County, N.A.* v. *Nelson*, 517 U.S. 25, 32 (1996). When Congress confers a power on a na-

tional bank by providing that it "may" engage in certain business, the States are powerless to prevent or put limitations on the exercise of that power by regulating the national bank's business. *Franklin Nat'l Bank* v. *New York*, 347 U.S. 373 (1954). Under the Court's consistent approach to NBA preemption, as summarized in *Barnett Bank*, all state laws that "impair the efficiency" of national banks' exercise of their federally authorized banking powers—*i.e.*, state laws that "interfere with," "encroach upon," or "hamper" the exercise of such powers—are preempted.

**II.** National banks have the express power to engage in real estate lending, 12 U.S.C. § 371(a), and the incidental power to do so through an operating subsidiary, *id.* § 24(Seventh). The Michigan laws in issue would impair the efficient exercise of both powers, and therefore are preempted.

**A.** Congress has expressly provided that national banks "may make, arrange, purchase or sell loans" secured by real estate, "subject to . . . such restrictions and requirements as the [OCC] may prescribe by regulation or order." 12 U.S.C. § 371(a). Under *Barnett Bank* and *Franklin*, a congressional declaration that a national bank "may" engage in a line of business precludes state interference with the national bank's exercise of that power.

It is undisputed that the Michigan laws at issue in this case run afoul of the *Barnett Bank* preemption standard with respect to real estate lending conducted by a national bank itself. This is confirmed by an OCC regulation finding that laws like Michigan's would impermissibly "obstruct, impair, or condition" a national bank's exercise of the lending power. 12 C.F.R. § 34.4(a). Petitioner does not challenge that regulation, which is based on the OCC's experience with the impact of state laws on national bank operations and is clearly within the OCC's delegated rulemaking authority. *See Clarke v. Sec. Indus. Ass'n*, 479 U.S. 388 (1987). Thus, the Michigan laws are indisputably preempted from application to a national bank.

**B.** The NBA authorizes national banks to exercise "incidental" powers, 12 U.S.C. § 24(Seventh), and the OCC has the authority to determine the scope of such powers. *NationsBank of N.C., N.A.* v. *Variable Annuity Life Ins. Co.*, 513 U.S. 251 (1995) (*VALIC*). The OCC has long construed the statute to allow national banks to use state-chartered operating subsidiaries to conduct federally authorized banking operations, including real-estate lending. 12 C.F.R. § 5.34. Petitioner does not challenge this regulation, nor does she dispute that a national bank's use of operating subsidiaries is an exercise of the bank's "incidental" powers under the NBA.

Petitioner asserts that the preemptive reach of the NBA extends only to the national bank, and not to its state-chartered operating subsidiaries. This formalistic proposition finds no support in this Court's NBA jurisprudence, which has always focused on whether state law interferes with the *exercise* of federally authorized *powers*, not on the corporate structure of the entity exercising those powers. Thus, in *VALIC*, it was of no moment to the preemption inquiry that the entity selling annuities—an activity that the OCC had determined to be within the "incidental" powers conferred by the NBA—was an operating subsidiary rather than the national bank itself.

Congress has provided that national bank operating subsidiaries may engage "solely in activities that national banks are permitted to engage in directly" and that, as conducted by operating subsidiaries, those activities are "subject to the same terms and conditions that govern the conduct of such activities by national banks." 12 U.S.C. § 24a(g)(3)(A). One of the terms and conditions of real-estate lending by national banks is that it must be unobstructed by state law. 12 C.F.R. § 34.4(a)(1). Because real estate lending through a national bank operating subsidiary is conducted "subject to the same terms and conditions," it necessarily follows that state laws that obstruct such lending cannot be applied to a national bank operating subsidiary, just as they could not apply to the bank itself. Accordingly, the Michigan laws at issue are preempted in this case.

**III.** Petitioner advances three principal objections to a finding of preemption. Each is meritless.

**A.** Petitioner first objects to an OCC regulation that states: "Unless 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. Although petitioner and her *amici* expend much ink on the question of whether this regulation is to be afforded "deference," the Court need not address that issue in this case, because preemption of the Michigan laws follows directly from the federal statute itself. The *statute* provides that national bank operating subsidiaries conduct banking activities subject to the same "terms and conditions" as national banks. 12 U.S.C. § 24a(g)(3)(A). Because displacement of obstructive state law is one of the "terms and conditions" of real-estate lending by national banks, the identical displacement occurs when such lending is conducted, as is indisputably authorized, through an operating subsidiary. That is true regardless of the "deference" to be afforded 12 C.F.R. § 7.4006; indeed, the outcome in this case would not change even if the regulation had never been promulgated.

**B.** Petitioner next contends that 12 U.S.C. § 484, which confers on the OCC exclusive visitorial power over national banks, does not extend to operating subsidiaries. But Section 484 insulates the exercise of national bank banking powers from state visitation, without regard to the corporate form through which such powers are exercised. Moreover, the Court's preemption decisions in other areas make clear that the mere existence of a state charter is no barrier to a finding of federal preemption. *E.g.*, *Texas* v. *United States*, 292 U.S. 522 (1934); *Colorado* v. *United States*, 271 U.S. 153 (1926).

**C.** Finally, petitioner complains that preemption of the Michigan laws would contravene federalism principles. She is wrong. Contrary to petitioner's contention, there is no "presumption" against preemption where, as here, Congress has legislated in an area since the dawn of the Republic.

*United States* v. *Locke*, 529 U.S. 89 (2000). Nor does the "clear statement" rule of *Gregory* v. *Ashcroft*, 501 U.S. 452 (1991), apply here. As the Court explained in *Barnett Bank*, federal preemption is the rule rather than the exception in the area of national banking; preemption of the Michigan laws thus would not upset the ordinary constitutional balance. For much the same reason, petitioner's assertion that preemption here would offend the Tenth Amendment is baseless. Because Congress has the Commerce Clause authority to regulate national banking, it may displace state laws without transcending any constitutional boundary.

## ARGUMENT

The central question in this case is whether a national bank's exercise of federally authorized powers, which would indisputably be immune from state control if conducted in the bank itself, can be subjected to state control simply because the bank elects to exercise those powers through a state-chartered subsidiary corporation. As this Court has repeatedly recognized, the history and structure of the National Bank Act (NBA), 12 U.S.C. § 21 *et seq.*, establish that state laws are preempted if they interfere with the efficient exercise of federally authorized powers. *Barnett Bank of Marion County, N.A.* v. *Nelson*, 517 U.S. 25, 32-34 (1996) (citing cases). The power to engage in real estate lending, *and* to do so through an operating subsidiary, is authorized by federal law. It necessarily follows that state interference with the efficient exercise of that power is preempted, as other provisions of the NBA and applicable regulations confirm. Because the Michigan laws in issue (*see* Resp. Br. 7-8 (summarizing laws)) indisputably would interfere with the efficient exercise of the lending power, those laws are preempted as applied to national banks and their operating subsidiaries.

## I. The National Bank Act Preempts State Laws That Interfere With The Exercise Of Federally Authorized Powers By National Banks

Petitioner and her *amici* focus almost exclusively on a regulation issued by the Office of the Comptroller of the Currency (OCC) regarding the applicability of state laws to national bank operating subsidiaries. 12 C.F.R. § 7.4006; *see* Part III.A., *infra*. But that regulation does not exist, and cannot be evaluated, in the abstract; rather, it reflects more than a century of legislative and judicial decisions concerning the broad preemptive reach of the NBA. That historical context, which petitioner all but ignores, is essential to answering the question presented by petitioner.

### A. Congress Intended To Preclude State Interference With The Exercise Of Banking Powers By National Banks

Following ratification of the Constitution, Congress established a central bank to facilitate government borrowing by approving the charter of the First Bank of the United States (drawn up by Alexander Hamilton) in 1791. Bray Hammond, *Banks & Politics in America: From the Revolution to the Civil War*, 114-18 (1957) (Hammond I). But both the First Bank, whose charter Congress failed to renew in 1811, and the subsequently created Second Bank of the United States, chartered in 1816, were short-lived. Alfred M. Pollard & Joseph P. Daly, *Banking Law in the United States* § 2.03 (2005). The States, backed by agricultural and certain mercantile interests, strongly opposed the Second Bank's power and, to counter it, imposed taxes on the Bank's operations within their jurisdictions. *Id*. at 2-6 to 2-7. It was these taxes, as levied by the State of Maryland, that led to the Court's landmark decision in *McCulloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316 (1819).

In *McCulloch*, the Court emphatically confirmed the supremacy of federal over state law with respect to national

banking. Starting with the fundamental principle that the powers in the Constitution are derived from the people, the Court held that the Commerce Clause (in conjunction with the Necessary and Proper Clause) of Article I authorized Congress to create a bank. 17 U.S. (4 Wheat.) at 331-33. And, laying the foundation for future federal preemption jurisprudence, the Court held that state law conflicting with federal law is superseded. *Id*. at 405 ("If any one proposition could command the universal assent of mankind, we might expect it would be this—that the government of the Union, though limited in its powers, is supreme within its sphere of action.").

Although *McCulloch* clearly affirmed Congress's right to establish national banks, President Andrew Jackson vetoed the re-chartering of the Second Bank in 1832. Hammond I at 405. That marked the beginning of a period of "free banking," in which the States liberally granted bank charters and allowed state-chartered banks to issue paper currency for use within state lines. *Id*. at 572-73. But state bank note values were uncertain and varied unpredictably, and in the late 1850s, a series of banks defaulted, setting into motion a nationwide crisis both for the currency and for commerce. *Id*. at 707-12.

The outbreak of the Civil War was the catalyst for radical change. As one Senator expressed it: "[S]urrounded by difficulties, surrounded by war, and in the midst of great troubles, [Congress] was compelled to resort to some scheme by which to nationalize and arrange upon a secure and firm basis a national currency." Cong. Globe, 37th Cong., 3d Sess., at 844 (1863) (statement of Sen. Sherman). It became clear, as President Lincoln observed, that there was "no other mode by which 'the great advantages of a safe and uniform currency' could be achieved so promisingly and unobjectionably as by the organization of banking associations under a general act of Congress." Bray Hammond, *Sovereignty and an Empty Purse: Banks and Politics in the Civil War* 290 (1970)

The National Currency Act of 1863, ch. 58, 12 Stat. 665, revised one year later as the National Bank Act of 1864, ch.

106, 13 Stat. 99, was that general act. In debating the legislation, both proponents and opponents of the NBA recognized that it granted the federal government the *exclusive* power to control the national banking system. The NBA would establish a banking system "made to operate directly upon the people independently of State boundaries or State sovereignty," and "wholly independent of State authority." Cong. Globe, 37th Cong., 3d Sess. 1115 (1863) (statement of Rep. Spaulding). As one opponent stated, "the whole purpose and object and scope and tendency of the bill is to prostrate State power and put it at the control of the great centralized power to be established here." Cong. Globe, 38th Cong., 1st Sess. 1413 (1864) (statement of Rep. Mallory). In defense of that purpose, a supporter stated:

> The proposition, as I understand it, is to make this a great national system, to make it responsible to the national Government, to make it subject to any burdens and restrictions the national Government may see fit to place upon it; and to carry out that object it will not do to place it in the power of the States, otherwise you place it in the power of any State which may be opposed to the system to cripple and destroy it.

*Id.* at 1393 (statement of Rep. Washburn).

Congress was keenly aware of *McCulloch* v. *Maryland* in declaring the preemptive effect of the NBA. As one Senator reminded his colleagues, the Court had explained that " 'it is of the very essence of supremacy to remove all obstacles to its action within its own sphere,' " and accordingly, a bank created by the federal government "must not be subjected to any local government, State or municipal; it must be kept absolutely and exclusively under that Government from which it derives its functions." Cong. Globe, 38th Cong., 1st Sess. 1893 (1864) (statement of Sen. Sumner) (quoting *McCulloch*, 17 U.S. (4. Wheat) at 427). Thus, "I shall vote to keep [the new national banking system] free from all State hostility or even State rivalry, that it may become in reality as in name, national in all respects." *Id*. at 2130.

Ultimately, Congress embraced the NBA's objectives, and voted "to take from the States . . . all authority whatsoever over . . . [national] banks, and to vest that authority here in Washington, in the . . . Secretary of the Treasury." Cong. Globe, 38th Cong., 1st Sess. 1267 (1864) (statement of Rep. Brooks). The NBA codified federal control over the money supply, taxation, and interest rate regulation, prohibiting the States to exert their interests in those areas. National Bank Act, ch. 106 of 1864, §§ 19-23, 31 (currency), 30 (interest rates), 41 (taxation), 13 Stat. at 105-106, 108-109, 111-112. *See* Cong. Globe, 38th Cong., 1st Sess. 1376 (interest rate regulation), 1377 (control of national currency) (1864). The federal government thereby "assumed entire control of the currency of the country, and, to a very considerable extent, of its banking interests, prohibiting the interference of State governments." S. Misc. Doc. 100, 39th Cong., 1st Sess. (1866).

Within the Department of the Treasury, the NBA established the Comptroller of the Currency, in whom Congress vested plenary authority to charter, examine, supervise, regulate and bring enforcement actions against national banks. That authority was exclusive of any State "visitorial" power over national banks. § 54, 13 Stat. at 116 (codified as amended at 12 U.S.C. § 484).[2] Congress confirmed the exclusive nature of the OCC's visitorial authority over national banks in 1982. Responding to a state court decision concerning the enforcement of state escheat laws, *see Minnesota* v. *First Nat'l Bank of St. Paul*, 313 N.W.2d 390 (Minn. 1981), Congress amended the NBA both to correct that court's erro-

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[2] In its original version, the "visitorial powers" provision of the NBA stated: "[A national bank] shall not be subject to any other visitorial powers than such as are authorized by this act, except such as are vested in the several courts of law and chancery." § 54, 13 Stat. at 116. The reference to "this act" was subsequently codified as "this Title," 1878 R.S. 5421, and later was changed to "law." *See* Federal Reserve Act, ch. 6, § 21, 38 Stat. 251, 272 (1913) (also substituting the reference to "courts of law and chancery" with "courts of justice").

neous conclusion that state law could serve as authority for state examinations of national banks, *see* Pub. L. No. 97-320, § 412, 96 Stat. 1469, 1521 (1982) (replacing 12 U.S.C. § 484's reference to permissible non-OCC visitations "authorized by law" to "authorized by Federal law"), and to carve out an extremely narrow exception to the OCC's exclusive visitorial authority for certain state examinations of national banks based on evidence of noncompliance with state escheat law. *See* 12 U.S.C. § 484(b); § 412, 96 Stat. at 1521. Such an exception would not have been necessary had the statute not otherwise so completely prohibited the states from exerting "visitorial" authority over of national banks. *See* Br. for National City Bank at Part I.

### B. This Court Has Consistently Interpreted The NBA To Preempt State Laws That Interfere With The Exercise Of Banking Powers By National Banks

Since the NBA's enactment, the Court has repeatedly confirmed the statute's broad preemptive effect. In one of its earliest interpretations of the NBA, the Court described the statute as specifically designed to protect national banks' exercise of federally authorized powers from "the hazard of unfriendly legislation by the States." *Tiffany* v. *Nat'l Bank of Mo.*, 85 U.S. (18 Wall.) 409, 413 (1874). Thus, insofar as the banking powers of national banks are concerned, "the States can exercise no control over them, nor in any wise affect their operation, except in so far as Congress may see proper to permit." *Farmers' & Mechs.' Nat'l Bank* v. *Dearing*, 91 U.S. 29, 34 (1875). Consistent with its opinion in *McCulloch* v. *Maryland*, the Court subsequently explained:

> 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. It follows that *an attempt by a state to define their duties or control the conduct of their affairs is absolutely void*, wherever such attempted exer-

> cise of authority expressly conflicts with the laws of the United States, and either *frustrates the purpose of the national legislation or impairs the efficiency of these agencies of the federal government to discharge the duties for the performance of which they were created*.

*Davis* v. *Elmira Sav. Bank*, 161 U.S. 275, 283 (1896) (emphases added); *see also Talbott* v. *Bd. of County Comm'rs*, 139 U.S. 438, 443 (1891) ("The[ ] various provisions, scattered through the entire body of the statute respecting national banks, emphasize . . . an intent to create a national banking system co-extensive with the territorial limits of the United States, and with uniform operation within those limits"); *Easton* v. *Iowa*, 188 U.S. 220, 231 (1903) (the NBA "provide[s] a symmetrical and complete scheme for the banks to be organized under the provisions of the statute").

Echoing Congress's own statements regarding the uniform nature of the system established by the NBA, the Court has emphasized that national banks must be held "independent, so far as powers conferred are concerned, of state legislation which, if permitted to be applicable, might impose limitations and restrictions as various and as numerous as the states." *Easton*, 188 U.S. at 229. And, because "the State has no power to enact legislation contravening the Federal laws for the control of national banks," *Guthrie* v. *Harkness*, 199 U.S. 148, 152 (1905), "[h]owever wise or needful [a state's] policy, . . . it must give way to [any] contrary federal policy" underlying the NBA. *Franklin Nat'l Bank* v. *New York*, 347 U.S. 373, 378-79 (1954); *see also Marquette Nat'l Bank* v. *First of Omaha Serv. Corp.*, 439 U.S. 299, 308, 314-15 (1978) ("Close examination of the National Bank Act of 1864, its legislative history, and its historical context makes clear that . . . Congress intended to facilitate . . . a 'national banking system' ") (citation omitted).

Central to the Court's NBA preemption jurisprudence is the understanding that the States may not interfere with the

efficient exercise of the banking *powers* of national banks. As the Court has explained:

> In using the word "powers," the [NBA] chooses a legal concept that, in the context of national bank legislation, has a history. That history is one of interpreting grants of both enumerated and incidental "*powers*" to national banks as grants of authority not normally limited by, but rather *ordinarily pre-empting*, contrary state law.

*Barnett Bank*, 517 U.S. at 32 (emphasis added); *see also id.* at 33 ("In defining the pre-emptive scope of statutes and regulations granting a power to national banks," the Court in prior cases had recognized that "normally Congress would not want States to forbid, or impair significantly, the exercise of a power that Congress explicitly granted").[3]

In *Barnett Bank*, the Court relied particularly on its 1954 decision in *Franklin*, which emphatically underscores the breadth of a national bank's authority to exercise its banking powers free from *any* state limitation or condition. The question in *Franklin* was whether the NBA preempted a New York State statute that forbade banks to use the words "saving" and "savings" in advertising. 347 U.S. at 374. The New York statute did not prohibit banks from taking deposits—*i.e.*, exercising savings-related banking powers—but rather *conditioned the exercise of those powers* on a limitation on the right to advertise regarding bank deposit accounts. The Court, while recognizing that the New York statute prevented only the *specific* power to use the word "savings" in advertising, emphasized that preemption derived from the effect of the

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[3] As explained in Part II.B. *infra*, the exercise of express powers through an operating subsidiary is one of the "incidental powers" of a national bank under the NBA. Because *Barnett Bank* and the long line of precedent on which it was based make clear that state laws interfering with all such "powers" are preempted, petitioner's contention that exclusive federal regulation of the banking activities of national bank operating subsidiaries would constitute "a sharp break from the past" (Pet. Br. 26) is historically inaccurate.

state restriction upon the *underlying* national bank power to offer savings accounts. Observing that "[m]odern competition for business finds advertising one of the most usual and useful of weapons," the Court found that "[i]t would require some affirmative indication to justify an interpretation that would permit a national bank to engage in a business but gave no right to let the public know about it." *Id.* at 377-78. As there was "no indication that Congress intended to make this phase of national banking subject to local restrictions, as it has done by express language in several other instances," the advertising restriction was preempted—not because it "prevented" a certain form of marketing activity, but rather because it *burdened the exercise of the power* to offer savings accounts. *Id*. at 378-79.

The history and structure of the NBA thus teach that the federal statute displaces all state laws that "impair [the] efficiency" of national banks' *exercise of their federally authorized powers*, both express and incidental. *Barnett Bank*, 517 U.S. at 34. Accordingly, if a state law would "interfere with," "encroac[h]" upon, or "hampe[r]" the exercise of a power authorized under the NBA, it is preempted. *Id.* at 33-34. In contrast, the NBA does not preempt state laws that do not unduly burden a national bank's "exercise of its powers." *Ibid.* (offering examples of non-preempted laws).[4] The question before the Court is into which category the Michigan laws at issue fall. As explained next, the Michigan laws, just like the New York law in *Franklin*, clearly interfere with the efficient exercise of a national bank's banking powers. Just as New York's restrictions on advertising interfered with national banks' use of "one of the[ir] most usual and useful of weapons" to conduct banking, *Franklin*, 347 U.S. at 377, so too do

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[4] *See also* 12 C.F.R. § 34.4(b) ("State laws on [certain enumerated] subjects are not inconsistent with the real estate lending powers of national banks and apply to national banks [and thus their operating subsidiaries] to the extent that they only incidentally affect the exercise of national banks' real estate lending powers.").

Michigan's restrictions on the use of operating subsidiaries interfere with national banks' use of the most usual and useful means through which to conduct real estate lending. *See* Br. for Clearing House Association at Part II. The Michigan laws at issue are, therefore, preempted.

## II. The National Bank Act Preempts State Laws That Interfere With A National Bank's Exercise Of The Power To Engage In Real Estate Lending Through An Operating Subsidiary

The history of the NBA, and this Court's consistent recognition of its broad preemptive scope, establish that state laws are preempted if they interfere with the efficient exercise of a federally authorized power—express or incidental—by a national bank. *Barnett Bank*, 517 U.S. at 32-33. The Michigan laws at issue here would interfere with a national bank's express power to engage in real-estate lending, 12 U.S.C. § 371(a), as well as the bank's incidental power to exercise the lending power through an operating subsidiary, id. § 24(Seventh); 12 C.F.R. § 5.34. Accordingly, the Michigan laws are preempted by the NBA.

### A. The Power To Engage In Real Estate Lending Is Expressly Conferred By The NBA

Congress has provided that "[a]ny national banking association may make, arrange, purchase or sell loans . . . secured by liens on interests in real estate, subject to section 1828(*o*) of this title and such restrictions and requirements as the Comptroller of the Currency may prescribe by regulation or order." 12 U.S.C. § 371(a).[5] A statutory provision that a national bank "may" engage in specified activity is "declaratory of the right of a national bank to enter into or remain in that

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[5] 12 U.S.C. § 1828(*o*) requires the federal banking regulators to adopt uniform regulations governing real-estate lending.

type of business," *Franklin*, 347 U.S. at 377, and preempts contrary state law. Where (as here) a federal statute "contains no 'indication' that Congress intended to subject [a federally granted] power to local restriction," this Court applies "a broad interpretation of the word 'may' that does not condition federal permission upon that of the State." *Barnett Bank*, 517 U.S. at 34-35. Thus, state laws, such as the Michigan statutes at issue here, that place "restrictions" or "conditions" on the exercise of national bank real estate lending powers are preempted. *See id.* at 32-33 (provision that national banks "may . . . act as the agent" for insurance sales preempts contrary state law); *Franklin*, 347 U.S. at 375-79 (provision that national banks "may . . . receive . . . savings deposits" preempts contrary state law).

That laws like Michigan's run afoul of the *Barnett Bank* standard has been confirmed by the federal agency charged with regulating national banks. In 2003, the OCC proposed a regulation to "clarify[] the applicability of state law to national banks" by "identify[ing] types of state laws that are preempted, as well as types of state laws that generally are not preempted, in the context of national bank lending . . . activities." Bank Activities & Operations, Real Estate Lending and Appraisals, 68 Fed. Reg. 46,119, 46,119 (Aug. 5, 2003). After surveying the history of legislation and judicial decisions involving national banks, the Comptroller listed several categories of state laws that had been found preempted, including "[s]tate statutes that require national banks to obtain a license or to register with the state." *Id.* at 46,123 & n.41 (citing cases and administrative interpretations).

The OCC explained that 12 U.S.C. § 371 "provides a broad grant of authority to national banks to engage in real estate lending," and "does not condition [that] grant upon engaging in that activity only to the extent that a state permits it." 68 Fed. Reg. at 46,124. Rather, "section 371 refers expressly and exclusively to the OCC as the entity possessing authority to set *restrictions* and *requirements* that apply to national banks' real estate lending activities," which have "been extensively regulated at the *Federal* level since the

[lending] power first was codified." *Ibid*. (emphases added). The Comptroller concluded that "[u]nder 12 U.S.C. 371, the OCC has the . . . specific authority to provide that the specified types of laws relating to national banks' real estate lending activities are preempted." Bank Activities & Operations, Real Estate Lending and Appraisals, 69 Fed. Reg. 1,904, 1,909 (Jan. 13, 2004).

The OCC's clarifying regulation, as codified in 2004, provides that "state laws that obstruct, impair, or condition a national bank's ability to fully exercise its Federally authorized real estate lending powers do not apply to national banks." 12 C.F.R. § 34.4(a). The "obstruct, impair, or condition" standard is "the distillation of the various preemption constructs articulated by the Supreme Court" in *Barnett Bank* and other cases and is not intended "as a replacement construct that is in any way inconsistent with those standards." 69 Fed. Reg. at 1,910. Under that standard, several categories of state laws are clearly preempted, including state "[l]icensing" and "registration" requirements for mortgage lenders. 12 C.F.R. § 34.4(a)(1).[6]

Petitioner does not challenge this OCC regulation, and for good reason. The OCC clearly has the authority to determine the types of state laws that interfere with the exercise of banking powers. *See Clarke* v. *Sec. Indus. Ass'n*, 479 U.S. 388, 403-04 (1987) ("The Comptroller of the Currency is charged with the enforcement of banking laws to an extent that warrants the invocation of this principle [of giving 'great

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[6] *See* 12 C.F.R. § 34.4(a)(1)-(14) (listing categories of preempted state laws). "This list . . . reflects [the OCC's] experience with types of state laws that can materially affect and confine—and thus are inconsistent with—the exercise of national banks' real estate lending powers." 69 Fed. Reg. at 1,911. The regulation also lists several categories of state laws that "do not attempt to regulate the manner or content of national banks' real estate lending, but that instead form the legal infrastructure that makes it practicable to exercise a permissible Federal power." 69 Fed. Reg. at 1,912; *see* 12 C.F.R. § 34.4(b)(1)-(9).

weight' to agency determinations] with respect to his deliberative conclusions as to the meaning of these laws."); *cf. Geier* v. *Am. Honda Motor Co.*, 529 U.S. 861, 883 (2000) ("The agency is likely to have a thorough understanding of its own regulation and its objectives and is 'uniquely qualified' to comprehend the likely impact of state requirements"). Thus, as applied to real-estate lending activities by a national bank itself, it is undisputed that the Michigan laws at issue are preempted.

### B. NBA Preemption Extends To The Exercise Of Incidental Powers, Including the Power To Lend Through An Operating Subsidiary

Petitioner concedes that, as an exercise of the "incidental" powers conferred by 12 U.S.C. § 24(Seventh), national banks may use operating subsidiaries to conduct federally authorized banking activities, including real estate lending. Pet. Br. 21 ("no one disputes that 12 USC § 24 (Seventh) authorizes national banks to use nonbank operating subsidiaries"). That concession is necessary because the OCC has long construed the NBA to authorize national banks to use operating subsidiaries (*see* Acquisition of Controlling Stock Interest in Subsidiary Operations Corporation, 31 Fed. Reg. 11,459 (Aug. 31, 1966)), and this Court has recognized the broad discretion enjoyed by the OCC in defining incidental powers. *NationsBank of N.C., N.A.* v. *Variable Annuity Life Ins. Co.*, 513 U.S. 251, 256-58 & n.2 (1995) (*VALIC*). But while agreeing that a national bank may use operating subsidiaries to engage in real estate lending, and not disputing that the NBA preempts state laws obstructing or conditioning such lending (including the Michigan laws at issue here) as applied to national banks, petitioner argues that such state laws nevertheless survive preemption with respect to national bank operating subsidiaries, as those subsidiaries are separate corporate entities chartered under state law. Pet. Br. 17-20.

This formalistic proposition is flatly at odds with this Court's NBA preemption jurisprudence, which has always

focused on the exercise of national banks' banking *powers*, not the *corporate structure* of a national bank. Because, as the Court has properly recognized, the NBA was intended to preclude state interference with the *exercise of those powers*, it would thwart Congress' objectives to allow states to exert their regulatory influence whenever a national bank chooses to make use of an operating subsidiary for purposes of exercising its powers. In *VALIC*, for example, this Court addressed the question whether the OCC reasonably had concluded, in granting the application for a national bank's operating subsidiary to act as an agent in the sale of annuities, that annuity sales were "the business of banking" within the meaning of Section 24(Seventh). *See* 513 U.S. at 255-56. Although the Court recognized that the approval provided by the OCC was for annuity sales by the operating subsidiary rather than the bank itself, it analyzed the question presented by direct reference to *national bank* powers—there was no need to distinguish between the exercise of those powers through the operating subsidiary as opposed to by the bank itself. *See id.* at 256-61.

Nonetheless, petitioner argues that, because operating subsidiaries are "affiliates" of national banks, and because Congress has treated national banks and their "affiliates" differently in certain contexts, preemption of state law applies only to national banks and not their "affiliates"—including an operating subsidiary. Pet. Br. 21-22. This argument ignores, however, the fact that courts have consistently treated operating subsidiaries as equivalent to national banks with respect to *powers* exercised under federal law (except where federal law provides otherwise). The use of an operating subsidiary is itself an exercise of a national bank's incidental powers, and state laws that interfere with the exercise of national banks' incidental powers are preempted no less than laws that interfere with national banks' expressly enumerated powers. *Barnett Bank*, 517 U.S. at 32 ("*both* enumerated *and* incidental 'powers' . . . ordinarily pre-empt[] contrary state law") (emphases added). Thus, as this Court understood in *VALIC*, a distinction between a national bank and its operating subsidi-

ary is not relevant to federal preemption of state laws that interfere with the exercise of national bank powers. *See VALIC*, 513 at 255-56; *see also Clarke*, 479 U.S. 388 (securities brokerage subsidiary); *Am. Ins. Ass'n* v. *Clarke*, 865 F.2d 278 (D.C. Cir. 1988) (bond insurance subsidiary); *M & M Leasing Corp.* v. *Seattle First Nat'l Bank*, 563 F.2d 1377 (9th Cir. 1977) (auto leasing subsidiary).

Petitioner's argument about "affiliates" also ignores Congress's express distinction between national bank operating subsidiaries and other subsidiary "affiliates" of national banks. In the Gramm-Leach-Bliley Financial Modernization Act, Pub. L. No. 106-102, § 121(a)(2), 113 Stat. 1338, 1373-80 (1999) (GLBA), Congress distinguished national bank operating subsidiaries from "financial subsidiaries" of national banks, identifying an operating subsidiary of a national bank as a subsidiary that "engages *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." 12 U.S.C. § 24a(g)(3)(A) (emphases added).[7] In response to GLBA, the OCC revised its regulations to mirror the statute, specifying that "[a] national bank may conduct in an operating subsidiary activities that are permissible for a national bank to engage in directly," and that "[a]n operating subsidiary conducts activities authorized under this section pursuant to the same authorization, terms and conditions that apply to the conduct of such activities by its parent national bank." 12 C.F.R. § 5.34(e)(1), (3); Financial Subsidiaries & Operating Subsidi-

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[7] A Senate committee specifically noted in this context that, "[f]or at least 30 years, national banks have been authorized to invest in operating subsidiaries that are engaged only in activities that national banks may engage in directly. For example, national banks are authorized directly to make mortgage loans and engage in related mortgage banking activities. Many banks choose to conduct these activities through subsidiary corporations. Nothing in this legislation is intended to affect the authority of national banks to engage in bank permissible activities through subsidiary corporations. . . ." S. Rep. No. 44, 106th Cong., 1st Sess. 8 (1999).

aries, 65 Fed. Reg. 12,905, 12,911 (Mar. 10, 2000). The "same terms and conditions" proviso of GLBA and its implementing regulation, which petitioner does not challenge, is fatal to her case.

One of the specific "terms and conditions" that governs real-estate lending by a national bank is that the bank is not subject to state registration laws. 12 C.F.R. § 34.4(a)(1). Because real-estate lending through an operating subsidiary is governed by those "same terms and conditions," a national bank operating subsidiary also cannot be subjected to state registration laws. It follows inexorably from the text of 12 U.S.C. § 24a(g)(3) that neither state registration requirements nor any other state laws that "interfere with," "encroach[]" upon, or "hamper[]" any aspect of real estate lending may be applied to national bank operating subsidiaries, as such application would directly obstruct the exercise by a national bank of its real estate lending powers through an operating subsidiary. *Barnett Bank*, 517 U.S. at 33-34. Pursuant to 12 U.S.C. § 24a(g)(3), operating subsidiaries of national banks are treated just like the banks themselves with respect to the terms and conditions of their real estate lending, including with respect to preemption of state laws purporting to govern any aspect of such lending. Thus, the Michigan laws at issue in this case can no more be applied to operating subsidiaries of national banks than they could be to the banks themselves. They are preempted by the NBA.

## III. Petitioner's Attempts To Avoid Preemption Are Meritless

The previous discussion establishes that the Michigan laws at issue are preempted from application to either national banks or their operating subsidiaries by statutes (12 U.S.C. §§ 24(Seventh) & 371) and regulations (12 C.F.R. §§ 5.34 & 34.4) the validity and applicability of which petitioner does not even purport to challenge in this case. The judgment below could be affirmed on that basis alone. Moreover, the objections that petitioner and her *amici* do raise—*viz.*, that 12 C.F.R. § 7.4006 is not entitled to deference; that 12 U.S.C.

§ 484 does not apply to operating subsidiaries; and that a preemption finding would raise federalism concerns—do not alter the conclusion that the Michigan law is preempted by the NBA.

### A. Petitioner's Challenge To 12 C.F.R. § 7.4006 Is Misguided

Petitioner trains most of her fire on the OCC regulation that states: "Unless 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. Petitioner and her *amici* argue at length that this regulation does not merit "deference" by the courts. Pet. Br. i, 28-38. But there is no need here to address that issue, because preemption of the laws Michigan seeks to apply flows from the NBA itself, and does not depend on Section 7.4006. Thus, regardless of the deference due to Section 7.4006, federal law precludes Michigan from applying its mortgage lending registration and related requirements to a national bank or its operating subsidiary.

Section 7.4006 was designed to "clarif[y] that state laws apply to a national bank operating subsidiary to the same extent as those laws apply to the parent national bank." Investment Securities; Bank Activities & Operations; Leasing, 66 Fed. Reg. 8,178, 8,181 (Jan. 30, 2001). The OCC expressly based Section 7.4006 on the provisions of GLBA and 12 C.F.R. § 5.34(e)(3) that operating subsidiaries conduct banking activities on the "same terms and conditions" as national banks. As the OCC stated: "A fundamental component of these descriptions of the characteristics of operating subsidiaries in GLBA and the OCC's rule is that state laws apply to operating subsidiaries to the same extent as they apply to the parent national bank." Investment Securities: Bank Activities & Operations; Leasing, 66 Fed. Reg. 34,784, 34,788 (July 2, 2001). Thus, "unless otherwise provided by Federal law or OCC regulation, State laws, such as licensing requirements, are applicable to a national bank operating subsidiary only to the extent that they are applicable to national banks." *Ibid.*

Petitioner's challenge to Section 7.4006 ignores the significance of this regulatory history, and in particular the OCC's adherence to the "same terms and conditions" provision in the GLBA definition of an operating subsidiary. Although petitioner attempts to portray Section 7.4006 as a "preemptive regulation," the preemption described in Section 7.4006 flows directly from the NBA itself. Under GLBA, the same terms and conditions apply to operating subsidiary lending and national bank lending. 12 U.S.C. § 24a(g)(3). The necessary consequence of that congressional directive is that, because displacement of contrary state law is one of the "terms and conditions" of national bank lending, the identical displacement occurs when the lending power is exercised through an operating subsidiary. Because Section 7.4006 simply recites that result, the level of deference due to the regulation is not an issue this Court needs to address. Indeed, the proper outcome in this case—preemption of Michigan's registration law—would not change even if 12 C.F.R. § 7.4006 had never been promulgated.

### B. Petitioner's Reading Of 12 U.S.C. § 484 Is Incorrect

Both petitioner and her *amici* devote considerable space to arguing that, because 12 U.S.C. § 484 does not expressly refer to "operating subsidiaries," Congress must not have intended to preclude the states from exercising "visitorial" authority over such subsidiaries. *See* Pet. Br. 17-22. There is simply no basis for that contention.

Section 484 was enacted a full century before national bank operating subsidiaries existed. After the OCC authorized the use of operating subsidiaries in 1966, there was no need to amend the statute, because it already precluded any state visitation that would restrict or otherwise affect the *exercise of a national bank's banking powers*—in any form or any manner. *Cf. First Nat'l Bank of Youngstown v. Hughes*, 6 F. 737, 740-41 (C.C.N.D. Ohio 1881) (a "visitation" of a national bank does not occur when state taxation authorities seek bank records in aid of taxation of depositors, which does

"not contemplate inspection, supervision, or regulation of [the bank's] *business*") (emphasis added). Whether those powers are exercised by a national bank directly or through an operating subsidiary, the same Congressional objective for precluding state visitations applies. It is the *exercise of banking powers* of national banks that Congress sought to insulate from "visitations" by the states; accordingly, Section 484 cannot be read to permit state visitations of operating subsidiaries *with respect to their activities conducted as an exercise of national bank powers*. Congress did not need to distinguish between national banks and their operating subsidiaries to ensure the applicability of Section 484.

Contrary to petitioner's suggestion (Pet. Br. 20), it is immaterial that national bank operating subsidiaries are incorporated under state law. State incorporation laws ordinarily do not regulate the *substantive activities* of the corporations established thereunder—they merely dictate the ministerial means of establishing and maintaining the corporate form.[8] The NBA, in contrast, regulates the *banking activities* in which a national bank is authorized to engage. Because the NBA and the OCC's implementing regulations comprehensively govern those activities, whether undertaken by the bank itself or an operating subsidiary (*see* 12 C.F.R. § 5.34), there is a conflict between federal law and the application of state laws such as the Michigan statutes at issue to *either* national banks or their state-incorporated operating subsidiaries.

The decisions of this Court in other preemption cases make clear that where there is a basis for federal preemption, it is irrelevant that the conduct at issue may be performed

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[8] *See, e.g.*, Del. Code Ann. tit. 8, §§ 101-111 (providing corporate formation requirements in connection with certificate of incorporation contents, Secretary of State filings, commencement of corporate existence, incorporator powers and meetings, bylaws, and the interpretation and enforcement of the certificate of incorporation and bylaws); N.Y. Bus. Corp. Law §§ 401-409 (similar); 805 Ill. Comp. Stat. 5/2.05 to 5/2.35 (similar); N.C. Gen. Stat. §§ 55-2-01 to 55-2-07 (similar).

through a state-chartered corporation. *See, e.g.*, *Texas* v. *United States*, 292 U.S. 522, 531-32, 535 (1934) ("[W]hile railroad corporations [are] left under state charters, they [are] still instrumentalities of interstate commerce, and, as such, [are] subject[] to the paramount federal obligation to render the efficient and economical service required in the maintenance of an adequate system of interstate transportation"); *Colorado* v. *United States*, 271 U.S. 153, 161-62, 165-66 (1926) (noting that while "[t]he charter of the Colorado & Southern is a contract with the state," "[t]he obligation assumed by the corporation under its charter of providing intrastate service . . . within the state is subordinate to the performance by it of its federal duty, also assumed, efficiently to render transportation services in interstate commerce").[9] Indeed, petitioner and her *amici* have not cited a single case in which this Court's preemption analysis even mentioned, let alone was guided by, the jurisdiction in which the entity complaining of state regulation was incorporated. Petitioner's theory in this case would thus work a radical revision of the Court's Supremacy Clause jurisprudence.

### C. The Federalism Concerns Invoked by Petitioner Are Inapplicable

In a series of interrelated arguments, petitioner and her *amici* contend that principles of federalism should lead the Court to conclude that the NBA does not preempt state laws that purport to regulate the mortgage lending operations of national bank operating subsidiaries. *See* Pet. Br. 22-28, 39-44. A variant of this contention was rejected almost 200 years

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[9] Of course, federal law preempts state laws that otherwise would apply to the activities of state-chartered corporations in any number of circumstances. *See, e.g.*, *Geier*, 529 U.S. 861 (state law cannot require state-chartered automobile manufacturer to install air bags); *Int'l Paper Co. v. Ouellette*, 479 U.S. 481 (1987) (state law cannot regulate pollution by state-chartered paper company); *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374 (1992) (enjoining Texas' enforcement of its deceptive advertising law against an airline incorporated under state law).

ago in *McCulloch* v. *Maryland*; as reformulated here, it fares no better today.

Petitioner first argues that, for purposes of the preemption inquiry here, " 'we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.' " Pet. Br. 23 (quoting *Rice* v. *Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)). But as the Court has since explained, "an 'assumption' of nonpre-emption is *not* triggered when the State regulates in an area where there has been a history of significant federal presence." *United States* v. *Locke*, 529 U.S. 89, 108 (2000) (emphasis added). In particular, where "Congress has legislated in the field from the earliest days of the Republic, creating an extensive federal statutory and regulatory scheme," "there is no beginning assumption that concurrent regulation by the State is a valid exercise of its police powers." *Ibid.* As discussed above, Congress chartered the first Bank of the United States just two years after ratification of our Constitution, and an extensive federal statutory and regulatory scheme has governed the national bank system since the Civil War. Neither petitioner nor any of her *amici* has been able to cite even a single decision in which this Court has applied the *Rice* "assumption" to a preemption inquiry under the NBA. That is because preemption is the rule, not the exception, in such cases. *Barnett Bank*, 517 U.S. at 32.

Petitioner next invokes the "clear statement" rule of *Gregory* v. *Ashcroft*, 501 U.S. 452 (1991). Pet. Br. 26-27. As the Court found in *Gregory*, the state constitutional provision at issue defined the qualifications of judges, and thus embodied "a decision of the most fundamental sort for a sovereign entity." 501 U.S. at 460. *Gregory* is inapplicable here because the authority Michigan seeks to exert is an ordinary incident of regulation, not "a decision of the most fundamental sort for a sovereign entity." *Ibid*. Congressional displacement of the Michigan statutes at issue would not upset the usual balance; to the contrary, it would be consistent with the exclusive federal regulation of national bank powers since the

Civil War. *See, e.g., Easton*, 188 U.S. at 230 ("Such being the nature of these national institutions [banks], it must be obvious that their operations cannot be limited or controlled by state legislation . . ."). In any event, the Court has held for more than a century that the banking laws clearly oust inconsistent state laws; no more is required.

Petitioner further argues that preemption of state law in these circumstances exceeds the powers conferred on Congress by the Constitution, and thus offends the Tenth Amendment's reservation of power to the States. *See* Pet. Br. 39. Although Petitioner concedes that "Congress has general power . . . to preempt State laws that affect national banks," she maintains that this concession "does not end the Tenth Amendment inquiry." *Ibid*. But petitioner is wrong. "As long as it is acting within the powers granted it under the Constitution, Congress may impose its will on the States" without violating the Tenth Amendment, including by "legislat[ing] in areas traditionally regulated by the States." *Gregory*, 501 U.S. at 460. It has long been settled that Congress acts within its powers in creating and regulating national banks, including by ensuring that national banks' banking powers are not affected by state law. *See, e.g., Farmers' & Mechs.' Nat'l Bank*, 91 U.S. at 33-34. Because the Michigan laws at issue here would impede the exercise of banking powers that Congress clearly had authority to confer, NBA preemption of those laws transcends no Constitutional boundary.

Petitioner's reliance in this context on *New York* v. *United States*, 505 U.S. 144, 188 (1992), and *Printz* v. *United States*, 521 U.S. 898 (1997), is misplaced. *See* Pet. Br. 38-40. Those cases hold that "[t]he Federal Government may not compel the States to enact or administer a federal regulatory program." *New York*, 505 U.S. at 188; *Printz*, 521 U.S. at 925. But while the government may not "compel[] States to regulate," state regulation "can always be pre-empted under the Supremacy Clause if it is contrary to the national view." *New York*, 505 U.S. at 168; *see also id.* at 167. This case is about preemption, not compulsion. The Tenth Amendment

stands as no barrier to preemption where, as here, Congress has acted pursuant to its Article I powers.

Petitioner's attempt to analogize this case to *Hopkins Federal Savings & Loan Ass'n* v. *Cleary*, 296 U.S. 315 (1935), is similarly misguided. *See* Pet. Br. 41-42. *Hopkins* stands only for the proposition that where a state charters a particular type of financial institution, federal law cannot confer on that institution powers that the state charter has expressly denied it. *See* 296 U.S. at 343. *Hopkins* also recognizes that the federal government *may* regulate the activities of state corporations "when reasonably necessary for the fair and effective exercise of some other and cognate power explicitly conferred." *Id.* at 337. Congress has the unquestioned power (under the Commerce Clause, as augmented by the Necessary and Proper Clause) to regulate the supervision of national banks. Because that power necessarily extends to regulation of national banks' exercise of their incidental powers, including engaging in lending through operating subsidiaries, *Hopkins* does not speak to the preemption issue in this case. *See id.* at 343 ("No question is here as to the scope of . . . the power to regulate transactions affecting interstate or foreign commerce"). Thus, assuming *arguendo* that *Hopkins* remains good law, it has no bearing on the issues before the Court.

Where, as here, Congress exercises its enumerated powers, the resultant displacement of conflicting state law is mandated by the Supremacy Clause, and does not even implicate, much less violate, the Tenth Amendment or general concerns of federalism and state sovereignty. *See Gonzales* v. *Raich*, 545 U.S. 1, 41-42 (2005) (Scalia, J., concurring in the judgment). There is no constitutional issue in this case.

## CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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