

05-5996-cv(L)

05-6001-cv(CON)

IN THE
United States Court of Appeals
FOR THE SECOND CIRCUIT

◆ ◆ ◆

THE CLEARING HOUSE ASSOCIATION, L.L.C.,
Plaintiff-Appellee,
OFFICE OF THE COMPTROLLER OF THE CURRENCY,
Plaintiff-Counter-Defendant-Appellee,
—against—

ELIOT SPITZER, in his official capacity as
ATTORNEY GENERAL FOR THE STATE OF NEW YORK,
Defendant-Counter-Claimant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR APPELLEE
THE CLEARING HOUSE ASSOCIATION, L.L.C.

H. RODGIN COHEN
ROBINSON B. LACY
ADAM R. BREBNER
KEITH LEVENBERG
SULLIVAN & CROMWELL LLP
125 Broad Street
New York, New York 10004
(212) 558-4000

*Attorneys for Appellee The Clearing
House Association, L.L.C.*

May 26, 2006

DISCLOSURE OF CORPORATE AFFILIATES

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, The Clearing House Association, L.L.C. states that it does not have a parent corporation and no publicly held corporation owns 10% or more of its stock.

TABLE OF CONTENTS

DISCLOSURE OF CORPORATE AFFILIATES	i
TABLE OF AUTHORITIES	iv
STATEMENT OF THE ISSUES.....	1
STATEMENT OF THE FACTS	1
A. The Home Mortgage Disclosure Act	1
B. The Defendant’s Investigation	3
SUMMARY OF ARGUMENT	6
ARGUMENT	8
I. SECTION 484 PROHIBITS THE DEFENDANT FROM INVESTIGATING OR INITIATING ENFORCEMENT ACTIONS CONCERNING NATIONAL BANKS’ RESIDENTIAL LENDING PRACTICES	8
A. Section 484 Manifests Congress’s Intent that National Banks “Must Not Be Subjected to Any Local Government, State or Municipal.”	8
B. “Visitorial Powers” Include All Forms of Government Supervision and Enforcement.	12
C. The Structure of the National Bank Act, Subsequent Amendments, and Recent Legislation Confirm the Scope of Section 484.	18
1. The Evolution of Section 484	18
2. The Riegle-Neal Act of 1994 Demonstrates Congress’s Continuing Intent to Preclude State Enforcement.	21
D. The Defendant Does Not Exercise the “Visitorial Powers . . . Vested in the Courts of Justice.”	23
E. National Banks’ Residential Lending Practices Are Within the Scope of the OCC’s Exclusive Visitorial Authority.	24

F.	<i>First National Bank in St. Louis v. Missouri</i> Is Not Controlling.	27
II.	THE DISTRICT COURT CORRECTLY HELD THAT SECTION 7.4000 IS ENTITLED TO DEFERENCE.....	29
A.	The OCC’s Interpretation of Section 484 Satisfies the Test for <i>Chevron</i> Deference.....	29
B.	Section 7.4000 Is Within the Scope of the OCC’s Rulemaking Authority.	32
C.	The Defendant Identifies No Legal Framework that “Trumps” <i>Chevron</i>	34
	1. No Applicable “Clear Statement” Principle Limits the Application of <i>Chevron</i>	34
	2. <i>Chevron</i> Deference Cannot Be Denied on the Ground that Section 7.4000 Incorporates the OCC’s Legal Analysis of Section 484.....	39
D.	The Supreme Court Has Held that Agency Rulemaking Entitled to <i>Chevron</i> Deference Outweighs Prior Inconsistent Court Decisions.	47
E.	Defendant’s Public Policy Arguments Provide No Basis for Setting Aside the OCC’s Regulation.....	48
	1. National Banks Are Entitled to Operate Within a Consistent and Predictable Regulatory Framework.....	48
	2. The OCC Is the Agency Best Suited to Enforce Fair-Lending Laws Against National Banks.	51
III.	THE DISTRICT COURT CORRECTLY HELD THAT SECTION 484 BARS THE DEFENDANT FROM INSTITUTING A PARENS PATRIAE SUIT UNDER THE FAIR HOUSING ACT.....	53
A.	A Parens Patriae Suit Is a Form of Visitation	54
B.	The District Court Correctly Held That a Parens Patriae Suit Under the FHA Is Not Permitted Under Section 484 Because It Is Not Expressly Authorized By Federal Law.	55
C.	The Defendant’s Parens Patriae Authority Is Based on State Law, and Therefore Is Not “Authorized by Federal Law.”	61

CONCLUSION.....62

CERTIFICATE OF COMPLIANCE.....63

TABLE OF AUTHORITIES

FEDERAL CASES

ABA v. FTC,
430 F.3d 457 (D.C. Cir. 2005)38

Adams Fruit Co. v. Barrett,
494 U.S. 638 (1990).....46

Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez,
458 U.S. 592 (1982).....54

Allen v. McKean,
1 F.Cas. 489 (Cir. D. Maine 1833)13

America Hospital Ass’n v. NLRB,
499 U.S. 606 (1991).....33

Anderson Nat’l Bank v. Lockett,
321 U.S. 233 (1944).....25

Artichoke Joe’s Cal. Grand Casino v. Norton,
353 F.3d 712 (9th Cir. 2003)38

Bank of America Nat’l Trust & Sav. Assoc. v. Douglas,
105 F.2d 100 (D.C. Cir. 1939).....25

Bank One Delaware N.A. v. Wilens,
No. 03-0274, 2003 WL 21703629 (C.D. Cal. July 7, 2003).....23

Barnhart v. Thomas,
540 U.S. 20 (2003)..... 43-44

Barnhart v. Walton,
535 U.S. 212 (2002).....44

Bulova Watch Co. v. United States,
365 U.S. 753 (1961).....60

Cal. Public Employees Retirement System v. Worldcom, Inc.,
368 F.3d 86 (2d Cir. 2004).....60

Cherokee Nation of Oklahoma v. Leavitt,
125 S. Ct. 1172 (2005).....33

<i>Chevron USA, Inc. v. Natural Resources Defense Council</i> , 467 U.S. 837 (1984).....	<i>passim</i>
<i>Christensen v. Harris County</i> , 529 U.S. 576 (2000).....	42
<i>Davis v. Elmira Sav. Bank</i> , 161 U.S. 275 (1896).....	12
<i>Drozd v. INS</i> , 155 F.3d 81 (2d Cir. 1998).....	21
<i>Environmental Defense v. EPA</i> , 369 F.3d 193 (2d Cir. 2004).....	30
<i>FDA v. Brown & Williamson Tobacco Corp.</i> , 529 U.S. 120 (2000).....	29
<i>Fidelity Fed. S&L Ass’n v. De La Cuesta</i> , 458 U.S. 141 (1982).....	35-36
<i>First Nat’l Bank of Youngstown v. Hughes</i> , 6 F. 737 (6th Cir. 1881)	16-17, 25
<i>First Nat’l Bank in St. Louis v. Missouri</i> , 263 U.S. 640 (1924).....	27-28, 47
<i>First Union Nat’l Bank v. Burke</i> , 48 F.Supp.2d 132 (D. Conn. 1999).....	17
<i>Franklin Nat’l Bank of Franklin Square v. New York</i> , 347 U.S. 373 (1954).....	12
<i>Geier v. America Honda Motor Co.</i> , 529 U.S. 861 (2000).....	36
<i>Gonzales v. Oregon</i> , 126 S. Ct. 904 (2005).....	30, 32, 46
<i>Gregory v. Ashcroft</i> , 501 U.S. 452 (1991).....	38
<i>Guthrie v. Harkness</i> , 199 U.S. 148 (1905).....	12, 15-16, 23-25, 55

<i>H.W. Wilson Co. v. USPS</i> , 580 F.2d 33 (2d Cir. 1978).....	45
<i>Hawaii v. Standard Oil Co.</i> , 405 U.S. 251 (1972).....	54, 61
<i>J.E.M. Ag Supply, Inc. v. Pioneer Hi-Bred Int’l, Inc.</i> , 534 U.S. 124 (2001).....	60
<i>Lynn v. Village of Pomona</i> , 373 F. Supp. 2d 418 (S.D.N.Y. 2005).....	51
<i>McCulloch v. Maryland</i> , 17 U.S. (4 Wheat.) 316 (1819).....	11
<i>Minnesota v. Fleet Mortgage Corp.</i> , 158 F. Supp. 2d 962 (E.D. Minn. 2001)	27
<i>Morton v. Mancari</i> , 417 U.S. 535 (1974).....	60
<i>NLRB v. Bell Aerospace Co.</i> , 416 U.S. 267 (1974).....	31
<i>Nat’l Cable & Telecomm. Ass’n v. Brand X Internet Servs.</i> , 125 S. Ct. 2688 (2005).....	43, 47
<i>National State Bank v. Long</i> , 630 F.2d 981 (3d Cir. 1980).....	6, 26, 28, 52
<i>NationsBank of N.C., N.A. v. Variable Annuity Life Ins. Co.</i> , 513 U.S. 251 (1995).....	54
<i>In re New Times Sec. Servcs., Inc.</i> , 371 F.3d 68 (2d Cir. 2004).....	44
<i>New York New York, LLC v. NLRB</i> , 313 F.3d 585 (D.C. Cir. 2002).....	44-45
<i>New York v. Shalala</i> , 119 F.3d 175 (2d Cir. 1997).....	44
<i>New York v. United States</i> , 505 U.S. 144 (1992).....	37

<i>Pension Benefit Guaranty Corp. v. LTV Corp.</i> , 496 U.S. 633 (1990).....	44
<i>Peoples Bank of Danville v. Williams</i> , 449 F. Supp. 254 (D. Va. 1978).....	25
<i>Printz v. United States</i> , 521 U.S. 898 (1997).....	37
<i>RIAA v. Verizon Internet Servs., Inc.</i> , 351 F.3d 1229 (D.C. Cir. 2003).....	19
<i>Schwegmann Brothers v. Calvert Distillers Corp.</i> , 341 U.S. 384 (1951).....	10
<i>Smiley v. Citibank (South Dakota), N.A.</i> , 517 U.S. 745 (1996).....	38-39, 48
<i>United States v. Lopez</i> , 514 U.S. 549 (1995).....	37
<i>University of Great Falls v. NLRB</i> , 278 F.3d 1335 (D.C. Cir. 2002).....	38, 44
<i>Wachovia Bank, N.A. v. Burke</i> , 414 F.3d 305 (2d Cir. 2005).....	<i>passim</i>
<i>Solid Waste Agency v. U.S. Army Corps of Engineers</i> , 531 U.S. 159 (2001).....	38
<i>Wells Fargo Bank N.A. v. Boutris</i> , 419 F.3d 949 (9th Cir. 2005).....	17, 26, 34, 55
<i>Wells Fargo Bank of Texas N.A. v. James</i> , 321 F.3d 488 (5th Cir. 2003).....	36
<i>Young v. Community Nutrition Institute</i> , 476 U.S. 974 (1986).....	43

STATE CASES

<i>Alaska v. First Nat'l Bank of Anchorage</i> , 660 P.2d 406 (Alas. 1982).....	27
<i>Attorney General v. Michigan Nat'l Bank</i> , 312 N.W.2d 405 (Mich. Ct. App. 1981).....	28

<i>Attorney General v. Railroad Cos.</i> , 35 Wis. 425 (1874)	14
<i>Babcock v. Farwell</i> , 245 Ill. 14, 91 N.E. 683 (1910).....	15
<i>Bank Commissioners v. Bank of Buffalo</i> , 6 Paige Ch. 47 (N.Y. Ch. 1837).....	16
<i>Guilford v. Western Union Telegraph Co.</i> , 59 Minn. 332 (1894)	15
<i>North State Copper & Gold Mining Co. v. Field</i> , 64 Md. 151 (1885)	15-16
<i>Oregon v. First Nat'l Bank of Portland</i> , 61 Or. 551, 123 P. 712 (1912)	20
<i>People v. Bristol & Rensselaerville Turnpike Rd.</i> , 23 Wend. 222 (N.Y. Sup. Ct. 1840)	16
<i>People v. North River Sugar Refining Co.</i> , 121 N.Y. 583 (1890).....	16
<i>Peoples Sav. Bank v. Stoddard</i> , 102 N.W.2d 777 (Mich. 1960).....	27
<i>Relief Ass'n of Union Works v. Equitable Life Assurance Society</i> , 140 Ohio St. 68 (Ohio 1942)	15
<i>State ex rel. Lord v. First Nat'l Bank of St. Paul</i> , 313 N.W.2d 390 (Minn. 1981).....	25
<i>State v. Milwaukee, Lake Shore & Westerly Ry. Co.</i> , 45 Wis. 579 (1878)	16
<i>State v. Pasumpsic Turnpike Co.</i> , 3 Vt. 178 (1831).....	16
<i>West Virginia v. Scott Runyan Pontiac-Buick, Inc.</i> , 461 S.E.2d 516 (W. Va. 1995).....	28
<i>Winter v. Baldwin</i> , 39 Ala. 483 (1890).....	20

STATUTES, RULES, REGULATIONS, AND LEGISLATIVE HISTORY

12 C.F.R. § 7.4000 *passim*

12 C.F.R. § 7.602531

12 C.F.R. § 2034

12 U.S.C. § 36(f).....22, 50

12 U.S.C. § 6259

12 U.S.C. § 85 38-39

12 U.S.C. § 93a..... 6, 8, 32-34

12 U.S.C. § 484..... *passim*

12 U.S.C. § 1818.....17, 28, 52

12 U.S.C. § 2801.....1

15 U.S.C. § 15c(a).....58

26 U.S.C. § 3305..... 58-59

26 U.S.C. § 7602..... 58-59

29 U.S.C. § 211..... 58-59

42 U.S.C. § 3601.....4

42 U.S.C. § 3602.....56

42 U.S.C. § 3610..... 50, 56-57

42 U.S.C. § 3613.....56

42 U.S.C. § 3614.....56

36 Fed. Reg. 1700031

64 Fed. Reg. 6009231

69 Fed. Reg. 1895 *passim*

Act of Dec. 23, 1913, 38 Stat. 251	20
Act of June 3, 1864, 13 Stat. 99	6, 19
CONG. GLOBE, 37th Cong., 3d Sess.	9
CONG. GLOBE, 38th Cong., 1st Sess.	9, 11, 49
Garn-St Germain Depository Institutions Act of 1982, Pub.L. No. 97-320, 96 Stat. 1469	20
H.R. Rep. No. 96-842 (1980), <i>reprinted in</i> 1980 U.S.C.C.A.N. 298	33
H.R. Rep. 100-711 (June 17, 1988), <i>reprinted in</i> 1988 U.S.C.C.A.N. 2173	51
Rev. Stat. § 5239.....	19
Rev. Stat. § 5240.....	20
Rev. Stat. § 5241	20, 27
Riegle-Neal Interstate Branch Banking and Efficiency Act of 1994, Pub. L. No. 103-328, 108 Stat. 2338	21
S. Rep. No. 96-640 (1980), <i>reprinted in</i> 1980 U.S.C.C.A.N. 298	33

BOOKS AND ARTICLES

JAMES M. MCPHERSON, <i>BATTLE CRY OF FREEDOM</i> (1988)	9
David M. Gische, <i>The New York City Banks and the Development of the National Banking System, 1860–1870</i> , 23 AM. J. LEGAL HIST. 21 (1979).....	9
Roscoe Pound, <i>Visitorial Jurisdiction Over Corporations in Equity</i> , 49 HARV. L. REV. 369 (1936)	13-14

STATEMENT OF THE ISSUES

1. Whether the District Court was correct in holding that the New York Attorney General's investigation of national banks' residential lending practices, and threatened enforcement proceedings against them, constituted an exercise of "visitorial power" that is prohibited by the National Bank Act.

2. Whether the District Court was correct in holding that the regulations adopted by the Office of the Comptroller of the Currency ("OCC") concerning visitorial powers are entitled to deference under the *Chevron* doctrine.

3. Whether the District Court was correct in holding that the Attorney General's threatened *parens patriae* action against national banks under the Federal Fair Housing Act ("FHA") would constitute an impermissible exercise of visitorial powers.

STATEMENT OF THE FACTS

A. The Home Mortgage Disclosure Act

The Home Mortgage Disclosure Act of 1975, 12 U.S.C. §§ 2801-2810 ("HMDA"), and the regulations promulgated thereunder, require banks and other mortgage lenders to disclose certain data concerning their mortgage lending practices. The data includes the race, sex, and

income level of each loan applicant, along with whether the application was approved or denied. (JA70.) In 2002, the Federal Reserve Board amended the HMDA regulations to require disclosure of information concerning the pricing, i.e., interest rates, for mortgage loans. The new data was first reported beginning in 2005, for loans originated in 2004. (JA71.) Although the edited and aggregated HMDA data for 2004 was not released until September 2005, lenders were required to make their individual data available upon request commencing on March 31, 2005. (JA71.)

The Federal Reserve Board (“FRB”) has made clear that the HMDA data alone cannot prove unlawful discrimination. In *Wells Fargo & Co.* 15-16 (Fed. Reserve Bd. June 23, 2005),¹ the FRB stated, “HMDA data, therefore, have limitations that make them an inadequate basis, absent other information, for concluding that an institution . . . has engaged in illegal lending discrimination.” FRB Governor Edward M. Gramlich has explained:

Although the addition of the price data significantly increases the robustness of HMDA data, the data alone do not prove discrimination. . . . The new HMDA data are clearly limited: they do not include credit scores, loan-to-value ratio, or consumer debt-to-income ratio—all factors relevant to the cost of credit. Because these important determinants of price are

¹ Available at <http://www.federalreserve.gov/boarddocs/press/orders/2005/20050623/default.htm>

missing, one cannot draw definitive conclusions about whether particular lenders discriminate unlawfully or take unfair advantage of consumers based solely on a review of the HMDA data.

(JA72.)

Since the District Court's decision, the FRB staff has continued to emphasize:

[Federal Reserve] analysis strongly indicates that the raw [HMDA] data alone can lead to inaccurate conclusions, which in turn may be unfair to particular institutions and may lead to unnecessary restrictions on the availability of loans to less-creditworthy applicants. Risk based pricing has greatly expanded the availability of home loans to borrowers who, because of weaknesses in their credit profiles, had previously been unable to qualify. It would be unfortunate if unwarranted accusations of illegal bias, stemming from improperly analyzed pricing differences, discouraged lenders from participating in this segment of the market.

New Information Reported under HMDA and Its Application to Fair Lending Enforcement, 2005 Federal Reserve Bulletin 346, 393.²

B. The Defendant's Investigation

Without waiting for the federal bank regulators to edit, aggregate, or analyze the new HMDA data, the Defendant commenced an investigation based on the data that became available on March 31, 2005. In April 2005, the Defendant informed Clearing House members or their parent

² Available at <http://www.federalreserve.gov/pubs/bulletin/2005/05-index.htm>.

companies that, based on the HMDA data, he had commenced an inquiry regarding potential violations of “federal and state anti-discrimination laws such as the Equal Credit Opportunity Act and its state counterpart, New York Executive Law § 296-a.” (JA88-89, 95-96.) Although the Defendant’s correspondence with the Clearing House members never asserted that his investigation or potential claims were authorized by the FHA, 42 U.S.C. §§ 3601-31, the papers he filed in the District Court nearly four months later cited the FHA as an alternate basis. (*See* Defendant’s Mem. 23-24; *compare* JA88-89, 95-96.)

The Defendant requested that the Clearing House members “voluntarily” provide information regarding their loans and lending practices in lieu of a formal subpoena. (JA80, 82-83, 88, 91, 95.) The Defendant requested two categories of documents: (1) All data contained in their HMDA Loan/Application Register (“LAR”) for loans and applications during 2004 relating to property in New York, and (2) various non-public information concerning the Clearing House members’ residential real-estate lending. (*See* JA88-89, 95-96.)

Federal law obligates banks to make HMDA LAR data available to the public upon request. 12 C.F.R. § 203.5(c). Accordingly, the Clearing House members produced the first category of information. The

second category of information sought by the Defendant is, however, nonpublic lending information that the Clearing House members are not required to disclose to state officials. Accordingly, the Clearing House members did not produce this information. (JA83, 92.)

The Defendant threatened to subpoena the information if it were not produced and to institute state-court proceedings. (JA84-85.) He also told the Clearing House members that the documents and lending information requested in his initial letters represented only the first stage of his inquiry and that additional documents and information would be requested as the inquiry continued. (JA85.)

The Defendant's assertion that the HMDA data establishes a prima facie case of lending discrimination (J199) is exactly the improper use of HMDA data that federal bank regulators have consistently cautioned against. The federal agencies have emphasized that accusations based on HMDA data alone could be harmful to consumers including, in particular, minorities, who have benefited from the increased access to credit, and concomitant increased access to home ownership, permitted by risk-based pricing of mortgage loans. *See* pages 2-3 *supra*.

SUMMARY OF ARGUMENT

Section 484, originally enacted as part of the Act of June 3, 1864, ch. 106, 13 Stat. 99 (the “National Bank Act”), provides:

No national bank shall be subject to any visitorial powers except as authorized by Federal Law, vested in the courts of justice or such as shall be, or have been exercised or directed by Congress or by either House thereof or by any committee of Congress or of either House duly authorized.

In a decision directly on point, the Third Circuit held that section 484 prohibited New Jersey officials from enforcing anti-redlining legislation against national banks, even though the legislation was not substantively preempted. *National State Bank v. Long*, 630 F.2d 981 (3d Cir. 1980).

Pursuant to section 484 and the Comptroller’s rule-making authority under 12 U.S.C. § 93a, the OCC has promulgated 12 C.F.R. § 7.4000 (“section 7.4000”), which states:

(a) General Rule. (1) Only the OCC or an authorized representative of the OCC may exercise visitorial powers with respect to national banks, except as provided in paragraph (b) of this section. State officials may not exercise visitorial powers with respect to national banks, such as conducting examinations, inspecting or requiring the production of books or records of national banks, or prosecuting enforcement actions, except in limited circumstances authorized by federal law.

Section 7.400(b)(2) makes clear that the exception for the “courts of justice” simply preserves the powers of the courts to conduct proceedings that are

otherwise permissible under section 484, and does not authorize government officials to commence or maintain any proceedings.

There is no doubt that the Defendant's demands for national banks' books and records, and his threatened enforcement proceedings, violated the explicit terms of section 7.4000, and were properly enjoined, unless either (1) there is some reason why section 7.4000 should be denied effect or (2) the Defendant's activities are "authorized by federal law." The Defendant effectively acknowledged this by seeking to have section 7.4000 set aside under the Administrative Procedure Act in the OCC action.

As discussed below, the Defendant's efforts to escape the prohibitions of section 484 and section 7.4000 are without merit because they are based on (1) a misreading of the background and legislative history of section 484 and the cases that have construed it and (2) several profound misapprehensions concerning the principles governing the effect of agency regulations established in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), and the cases that have applied *Chevron*. Even if there were some doubt concerning the meaning of section 484 in the absence of section 7.4000—and there is not—the fact that section 7.4000 is entitled to controlling weight under *Chevron* is not subject to serious

question, especially in light of this Court’s recent decision in *Wachovia Bank, N.A. v. Burke*, 414 F.3d 305 (2d Cir. 2005).

Justice Stein correctly rejected Defendant’s afterthought assertion that he is “authorized by federal law” to maintain *parens patriae* proceedings against national banks under the FHA because the FHA cannot reasonably be construed to authorize visitation inconsistent with section 484, and because a *parens patriae* proceeding is based on a state’s inherent authority as a sovereign rather than “Federal law.”

ARGUMENT

I. SECTION 484 PROHIBITS THE DEFENDANT FROM INVESTIGATING OR INITIATING ENFORCEMENT ACTIONS CONCERNING NATIONAL BANKS’ RESIDENTIAL LENDING PRACTICES

A. Section 484 Manifests Congress’s Intent that National Banks “Must Not Be Subjected to Any Local Government, State or Municipal.”

The OCC is charged with the chartering and oversight of national banks. (JA27.) The Comptroller of the Currency is authorized “to prescribe rules and regulations to carry out the responsibilities of [his] office.” 12 U.S.C. § 93a. Under the National Bank Act and other federal banking laws, the OCC has plenary licensing, regulatory, supervisory, examination, and enforcement authority over national banks. (JA27.) The

OCC is thus the primary regulator of the national bank members of the Clearing House. (JA19.)

Congress's decision to grant the OCC exclusive visitorial authority over national banks in section 484 was clearly designed to prevent state authorities from interfering with the operations of national banks. In the midst of a rebellion in the name of states' rights, "[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. 844 (1863) (remarks of Sen. Sherman).³ To fulfill this purpose, it was recognized that the newly-created national banking system "must not be subjected to any local government, State or municipal; it must be kept absolutely and exclusively under the Government from which it derives its functions." CONG. GLOBE, 38th Cong., 1st Sess. 1893 (1864) (remarks of Sen. Sumner).

³ Prior to 1864, the nation's banking system was a "decentralized, unstable structure of state banks" with frequent failures and no uniform federal currency. JAMES M. MCPHERSON, *BATTLE CRY OF FREEDOM* 594 (1988). In the absence of federal involvement, banking was governed by disparate state regulation. *See generally* David M. Gische, *The New York City Banks and the Development of the National Banking System, 1860-1870*, 23 AM. J. LEGAL HIST. 21, 24-25 (1979).

The goal was “uniformity,” a banking system “substantially the same in Washington, in New York, in Boston, and in Chicago,” rather than one subject to “complications and differences” under the laws of different states. *Id.* at 1873 (remarks of Sen. Sumner). As the District Court noted:

Essential to the effort of creating a uniform national currency, was creating a system of national banks that would operate according to federal law and supervision, and without the intrusion of potentially unfriendly state regulation.

(SPA48 (citing *Easton v. Iowa*, 188 U.S. 220, 229-230 (1903)).)

The Defendant attempts to counter the overwhelming weight of the legislative history by citing the remarks of Senator Clark, but he opposed the legislation and urged the Senate to allow state visitation. (Appellant’s Br. 14, 54-55.) The Congress disagreed on both counts. The Supreme Court has made clear that comments of opponents of a bill are not reliable indications of Congress’s intent. *See Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384, 394-95 (1951).

The Defendant’s argument also ignores the obvious historical context—the Civil War—that intensified Congress’s concern that the states might interfere in any way with the newly created banking system:

The country at this moment is engaged in a deadly struggle to establish itself as a nation [A]t every stage we have been encountered by objections in the name of State rights. . . . And now, Sir, while considering the financial stability of the

Republic, we are doomed again to encounter this oft-repeated objection.

* * *

What is worth doing is worth well doing, and if it be worth while to organize the finances of this Republic by the proposed banking system, it is worth while to do it well; and can you do it well if at the very moment of its organization you leave its most delicate nerves exposed to hostile influences?

CONG. GLOBE, 38th Cong., 1st Sess. 1893 (1864) (remarks of Sen. Sumner).

During the Senate debate, Senator Sumner, a leading proponent of the bill, quoted from Justice Marshall's opinion in *McCulloch v.*

Maryland to stress that the states could not be permitted to have any power over national banks:

“[A] power to create implies a power to preserve . . . [A] power to destroy, if wielded by a different hand, is hostile to, and incompatible with, the powers to create and preserve.”

Id. at 1893 (quoting *McCulloch v. Maryland* (17 U.S. (4 Wheat.) 316, 426 (1819)). While it is certainly true that federal and state banking regulation have evolved since 1864, Congress has never repealed or materially altered the limitation on the exercise of visitorial powers that formed a central part of its original scheme for national banks.

In accordance with this legislative history, the courts have consistently acknowledged the unique status of national banks and the limits which the National Bank Act places on states' authority. “National banks

are instrumentalities of the federal government, created for a public purpose, and as such necessarily subject to the paramount authority of the United States.” *Davis v. Elmira Sav. Bank*, 161 U.S. 275, 283 (1896); *see also Franklin National Bank of Franklin Square v. New York*, 347 U.S. 373, 375 (1954). With particular reference to what is now section 484, the Supreme Court emphasized:

Congress had in mind . . . that in other sections of the law it had made full and complete provision for investigation by the Comptroller of the Currency and examiners appointed by him. . . . It was the intention that this statute should contain a full code of provisions upon the subject, and that no state law or enactment should undertake to exercise the right of visitation over a national corporation. Except in so far as such corporation was liable to control in the courts of justice, this act was to be the full measure of visitorial power.

Guthrie v. Harkness, 199 U.S. 148, 159 (1905).

B. “Visitorial Powers” Include All Forms of Government Supervision and Enforcement.

There is no basis for the Defendant’s argument that the “visitorial powers” governed by section 484 encompass only “routine monitoring and examination responsibilities” and not investigations by “law-enforcement agencies.” (Appellant’s Br. 47.) In *Guthrie*, 199 U.S. at 158, the Supreme Court relied on Justice Story’s explanation of visitorial powers in the *Dartmouth College* case, but Justice Story summarized the matter more succinctly in a later proceeding:

But, what is the nature and extent of . . . visitorial power? . . . It is a . . . power to control and arrest abuses, and to enforce a due observance of the statutes.

Allen v. McKean, 1 F. Cas. 489, 498 (Cir. D. Maine 1833). Indeed, at common law the King—that is, the state—was viewed as the visitor of all civil corporations:

The king being thus constituted by law visitor of all civil corporations, the law has also appointed the place, wherein he shall exercise this jurisdiction: which is the court of king's bench; where, and where only, all misbehaviours of this kind of corporations are enquired into and redressed, and all their controversies decided.

1 William Blackstone, Commentaries *481.⁴

The Defendant cites, but disregards the substance of, the scholarly survey of visitorial authority by Roscoe Pound in *Visitorial Jurisdiction Over Corporations In Equity*, 49 HARV. L. REV. 369 (1936). (See Appellant's Br. 44.) Pound defined "visitorial power" at common law to encompass a broad authority to "compel domestic corporations . . . to perform specific duties incumbent on them by reason of their charters, or under statutes or ordinances or imposed by the common law," and, in certain

⁴ The Oxford English Dictionary includes a citation to an even earlier authority making clear that visitorial power included both inquiry into violations of the law and enforcement: "It is a visitatory, or a reforming Power which is executed by inquiry of offences against Lawes established, and by executing such Lawes." N. BACON, DISC.

cases, to obtain equitable relief against “abuse of corporate powers or corporate activities injurious to the public.” *Id.* at 375-76.

Pound cites cases illustrating that visitorial authority was exercised by judicial proceedings to correct public wrongs. For example, *Attorney General v. Railroad Cos.*, 35 Wis. 425 (1874), was a proceeding against a railroad for excessive tolls. The opinion itself does not use the term “visitorial,” but it was described in contemporary cases as reflecting the exercise of visitorial power. *See Republican Mountain Silver Mines v. Brown*, 58 F. 644, 648 (8th Cir. 1893); *Attorney General v. Albion Academy*, 9 N.W. 391, 395 (Wis. 1881). In *Arbour v. Pittsburgh Produce Trade Ass’n*, 44 Pa. Super. 240, 250 (1910), the court stated that visitorial authority encompassed the power to ensure that corporate by-laws “in every instance be consistent with and not repugnant to the constitution and laws of the state and the United States.” In *Venner v. Chicago City Ry*, 246 Ill. 170, 176 (1910), the court upheld a statute as an exercise of the state’s “right to exercise a visitorial power over” corporations “in order to protect the public from monopolies, unlawful combinations, and unreasonable exactions.”

GOVT. ENG. II. xxviii 208 (1651) (as quoted in OXFORD ENGLISH DICTIONARY 695 (2d. Ed. 1989)).

Thus, when the Supreme Court discussed the “visitation” subject to what is now section 484 over a century ago, it made clear that the term applies to both examination and enforcement by a governmental authority, including enforcement through judicial proceedings. It said:

In the United States, the legislature is the visitor of all corporations created by it, where there is no individual founder or donor, and *may direct judicial proceedings against such corporations* for such abuses or neglects as would at common law cause forfeiture of their charters.

Guthrie v. Harkness, 199 U.S. 148, 158-159 (1905).

Visitorial powers are not limited to proceedings to “control the corporation *qua* corporation.” (Appellant’s Br. 45.) The fact that some of the opinions use that term for proceedings to enforce compliance with a state’s corporation law or provisions of the corporation’s own charter⁵ does not imply that it is limited to such proceedings. The authorities discussed above make clear that the term extended to correction of “all misbehaviours of” civil corporations, 1 William Blackstone, Commentaries *481.

The range of misconduct subject to visitorial proceedings was not limited by the fact that a typical remedy was revocation of the

⁵ The Attorney General cites *Relief Ass’n of Union Works v. Equitable Life Assurance Soc’y*, 140 Ohio St. 68, 70, 76 (1942); *Babcock v. Farwell*, 245 Ill. 14, 33-34, 91 N.E. 683 (1910); *Guilford v. Western Union Tel. Co.*, 59 Minn. 332, 334-40 (1894); *North State Copper &*

corporation's charter. *See Guthrie*, 199 U.S. at 159. In the nineteenth century, a corporation could be dissolved based on its violation of laws regulating its business that had nothing to do with obligations “*qua* corporation.” *See People v. North River Sugar Refining Co.*, 121 N.Y. 583 (1890) (combination in restraint of trade); *People v. Bristol & Rensselaerville Turnpike Rd.*, 23 Wend. 222 (N.Y. Sup. Ct. 1840) (failure to maintain roads amounting to nuisance); *Bank Commissioners v. Bank of Buffalo*, 6 Paige Ch. 47 (N.Y. Ch. 1837) (violation of prohibition against loans by moneyed corporations to their directors); *State v. Pasumpsic Turnpike Co.*, 3 Vt. 178 (1831) (failure to maintain toll roads); *State v. Milwaukee, Lake Shore & Westerly Ry. Co.*, 45 Wis. 579 (1878) (common law and statutory obligations to make itself available for judicial process).

Defendant misreads the language in *First National Bank of Youngstown*, quoted in *Guthrie*, which describes visitorial authority as enforcement of a corporation's compliance with “its laws and regulations.” (Appellant's Br. 45.) The distinction drawn in *Youngstown* was between an investigation of the bank's compliance with the laws applicable to its business and an investigation concerning the bank's customers. *First*

Gold Mining Co. v. Field, 64 Md. 151, 153 (1885)). None of these cases purports to define the full extent of “visitorial powers.”

National Bank of Youngstown v. Hughes, 6 F. 737, 740-41 (6th Cir. 1881).

Thus, as the modern cases confirm, investigatory and enforcement activities directed at the banks' conduct of its banking business are visitorial activities prohibited by section 484. *See Wells Fargo*, 419 F.3d at 956 n.7; *Long*, 630 F.2d at 988; *First Union National Bank v. Burke*, 48 F. Supp. 2d 132, 148-49 (D. Conn. 1999).⁶

The Defendant also argues that his actions are not visitorial in nature because there is “a firm line” between a “law enforcement agency” that “must rely on complaints as catalysts for [its] investigative and enforcement activities” and a “supervisory agency” like the OCC. (Appellant's Br. 47.) But the Defendant himself has demonstrated that this is not so: He commenced his investigation based on the very same HMDA data employed by the Federal agencies in the course of their regulatory,

⁶ The modern understanding of the nature of the bank's “laws” is also reflected in amendments to the visitorial powers provision and the OCC's enforcement powers: as noted above, as originally enacted, the visitorial powers provisions limited visitorial powers to those authorized by “this act,” whereas the modern provision limits them to those authorized by “Federal law.” Correspondingly, when the National Bank Act was promulgated the OCC could seek forfeiture of a bank's charter for “violations of the provisions of this act,” (1864 Act, § 53), whereas the modern enforcement provision authorizes the OCC to take remedial action and to bring proceedings for violations of “a law, rule or regulation”. 12 U.S.C. § 1818(b); *see also* §§ 1818(e).

supervisory, and enforcement activities, not in response to an individual complaint. (*See* Appellant’s Br. 6-7.) Moreover, the OCC *does* respond to and investigate tens of thousands of consumer complaints a year, more than any other federal financial regulator, through its Customer Assistance Group and its Enforcement and Compliance Division. *See* United States Government Accountability Office, *OCC Consumer Assistance* 30 n.32 (Feb. 2006). Thus, the “firm” distinction the Defendant attempts to draw is both baseless and utterly unrelated to the scope of the OCC’s visitorial authority.

C. The Structure of the National Bank Act, Subsequent Amendments, and Recent Legislation Confirm the Scope of Section 484.

1. The Evolution of Section 484

The Defendant argues that the meaning of section 484 should be circumscribed because, as originally enacted in 1864, it was part of Section 54 of the National Bank Act, which also provided for examinations of banks. As the District Court found (SPA33-34), this argument has no merit. First, had Congress intended to limit the provision to “examinations,” it would have employed the word “examination” that it used elsewhere in

the section.⁷ Second, the 1864 statute read: “And the association 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.” Act of June 3, 1864, ch. 106, § 54, 13 Stat. 99, 116 (reproduced at SPA93) (emphasis added). Because the provision refers to “this act,” it must be read in light of the enforcement provisions in the entire act which, as the District Court observed, provided the “OCC with the authority to exercise visitorial powers by bringing judicial proceedings in the courts.” (SPA34 (citing National Bank Act, ch. 106, § 53, 13 Stat. 110).)

Similarly, when the predecessor to section 484 was codified as part of the revised statutes, its scope was not limited to the preceding section. The new section stated that national banks would not be subject to visitorial powers except as authorized by “this Title,” referring to the entirety of the National Bank Act as then codified as Title 62. Title 62 granted the OCC the visitorial authority to bring proceedings in the courts against national banks. *See* Rev. Stat. § 5239.⁸

⁷ “Where different terms are used in a single piece of legislation, the court must presume that Congress intended the terms have different meanings.” *RIAA v. Verizon Internet Servs., Inc.*, 351 F.3d 1229, 1234 (D.C. Cir. 2003) (citation and internal brackets omitted).

⁸ The only authority cited by the Attorney General for his argument that “visitorial powers” are limited to bank examinations (Appellant’s Br.

In 1913, Congress amended the provision to state that national banks would not be subject to visitorial powers “except as authorized by law.” *See* Act of Dec. 23, 1913, ch. 6, § 21, 38 Stat. 251, 271 (reproduced at SPA72). Likewise, Congress made clear that the visitorial powers allowed were those authorized by “Federal law.” *See* Garn-St Germain Depository Institutions Act of 1982, Pub. L. No. 97-320, § 412, 96 Stat. 1469, 1521. Congress would have had no reason to use the broad language of “by law” or “by Federal law” if the “visitorial powers” contemplated were limited to examinations.

The Defendant also fails to read the statute in light of its other exceptions. As originally enacted, the visitorial powers provision made an exception for “such [visitorial powers] as are vested in the several courts of law and chancery.” Act of 1864 § 54. The “several courts of law and chancery” did not then and do not now have routine monitoring and

46-47) is inapposite. *Winter v. Baldwin*, 89 Ala. 483, 486 (1890) addressed a stockholder’s right to inspect the records of a national bank, and says nothing about the visitorial powers described in Rev. Stat. § 5241 being limited to the examination authority described in Rev. Stat. § 5240. *Oregon v. First National Bank of Portland*, *Oregon v. First National Bank of Portland*, 61 Or. 551, 123 P. 712, 715 (1912), addressed the application of state escheat laws. 123 P. at 716. Congress made clear that enforcement of state escheat laws is in fact an exercise of visitorial authority when it amended section 484 expressly to exclude such enforcement from its prohibition. *See* 12 U.S.C. § 484(b).

examination responsibilities over national banks. In 1913 Congress added an exception for powers exercised or directed by Congress. (SPA72-73.) This exception, too, makes little sense if those powers are limited to those of “routine monitoring” and “administrative oversight” (Appellant’s Br. 43.)

Because Congress has included these specific exceptions, an additional exception allowing state attorneys general to enforce fair lending laws against national banks cannot be implied. *See, e.g., Drozd v. I.N.S.*, 155 F.3d 81, 86 (2d Cir. 1998) (“The canon of construction that says ‘*expressio unius est exclusio alterius*’ cautions against creating additional exceptions to complex statutory enactments.”) (citation omitted).

2. The Riegle-Neal Act of 1994 Demonstrates Congress’s Continuing Intent to Preclude State Enforcement.

As the District Court correctly found, the Riegle-Neal Interstate Branch Banking and Efficiency Act of 1994, Pub. L. No. 103-328, 108 Stat. 2338 (“Riegle-Neal Act”), provides further indication of the scope of the OCC’s visitorial powers. The Riegle-Neal Act amended federal banking laws to permit interstate branching by national banks. Congress provided that those branches would be subject to “[t]he laws of the host State regarding community reinvestment, consumer protection, fair lending, and establishment of intrastate branches,” except where preempted by federal law or where state laws discriminate against national banks’ branches.

12 U.S.C. §§ 36(f)(1)(A)(i)-(ii). At the same time, however, Congress made clear that “[t]he provisions of any State law to which a branch of a national bank is subject under this paragraph *shall be enforced*, with respect to such branch, *by the Comptroller of the Currency.*” 12 U.S.C. § 36(f)(1)(B) (emphasis added).

The Defendant’s argument that Riegle-Neal’s mandatory language leaves open the possibility of enforcement of state law by the states fails to comport with the statutory language. If Congress had intended the OCC to exercise joint enforcement responsibilities with state authorities, it would have so stated. The legislative history cited by the Defendant (Appellant’s Br. 57) is fully in accord with this: The states do not lose any preexisting authority to legislate with respect to national banks, nor did they gain any visitorial power over national banks. As the District Court held:

broadly worded concerns about the balance of federal and state power do not defeat the clear import of 12 U.S.C. § 36(f)(1)(B), which vests in the OCC—not the host states—the power to enforce the applicable state laws. By dealing separately with the applicability of state law and the authority to enforce that law, Congress did not alter the balance of state authority over national banks, but rather applied to national banks’ interstate branches the same limitations on state visitorial powers as are applicable to national banks themselves.

(SPA50.)

D. The Defendant Does Not Exercise the “Visitorial Powers . . . Vested in the Courts of Justice.”

There is no merit to the Defendant’s argument that “lawsuits by a state official fall under the ‘courts of justice’ exception.” (Appellant’s Br. 51.) The exception applies to the visitorial powers of *the courts themselves* in proceedings that do not otherwise involve prohibited visitation. The “‘vested in the courts of justice’ exception was a reservation of the right to enforce the court’s procedural rules through contempt proceedings in connection with an *authorized* action against a bank.” *Bank One Delaware N.A. v. Wilens*, No. 03-0274, 2003 WL 21703629 at *2 (C.D. Cal. July 7, 2003). It does not provide a back door for state governments to act as visitors.

The District Court correctly held that “[n]othing in the text of section 484 or the surrounding provisions indicates that Congress intended the courts of justice exception to preserve the ability of states to enforce laws regulating national banks’ activities by instituting judicial proceedings.” (SPA35.) The Defendant’s broad reading of the “vested in the courts of justice” exception makes little sense given the way visitorial powers were exercised in 1864. Visitorial powers were exercised “through the medium of the courts of justice,” *Guthrie*, 199 U.S. at 197; thus, to construe this exception as allowing state visitation through the courts would be to make

the exception “nearly coterminous with the prohibitory rule.” *See* 69 Fed. Reg. at 1899-1900.

The Defendant’s argument that his investigation does not seek to “exercise supervisory control” over the banks (Appellant’s Br. 14 n.48) is similarly without merit. The Defendant’s investigation is directed at banks’ compliance with the fair lending laws that govern banks’ mortgage lending activities. This directly overlaps with the supervisory and regulatory mandate of the OCC, which examines bank compliances with fair lending laws. *See generally* Comptroller of the Currency, Fair Lending Examination Procedures (Apr. 2006).⁹

E. National Banks’ Residential Lending Practices Are Within the Scope of the OCC’s Exclusive Visitorial Authority.

Contrary to the straw man that Defendant falsely attributes to the Clearing House throughout his brief, no one in this proceeding asserts that section 484 negates the application of all state laws to national banks, or prohibits all enforcement activity by states against national banks. As the District Court observed, the *Guthrie* case highlighted an “important distinction[] in understanding the nature of visitorial powers.” (SPA46.) In that case, the Supreme Court held that a private shareholder’s action demanding access to a national bank’s records was not barred. In so doing,

the Court noted that, consistent with the common law, visitation was “a public right, existing in the state.” (SPA46.)

The District Court also noted that a second early decision, *First National Bank of Youngstown*, 6 F. at 740, provides additional guidance as to the nature of visitorial powers. In the *Youngstown* case, the court concluded that a county auditor’s investigation did not constitute visitation, where the auditor did not seek “to investigate or supervise *the bank*, but rather sought information from the bank in furtherance of his investigation of individuals’ tax liabilities,” implying, as the District Court found, that the converse also holds: when a government authority is seeking to investigate or supervise the bank itself, it is exercising visitorial authority. (SPA46.)¹⁰

Thus, *Guthrie* and *Youngstown* delimit the visitorial powers that Congress made the exclusive province of the OCC: visitation is (1) an exercise of public authority (2) with respect to the authorized activities of

⁹ Available at <http://www.occ.treas.gov/handbook/fairlep.pdf>.

¹⁰ For the same reason, courts have held that a state’s authority to compel production of information from national banks is not precluded in instances where the production is unrelated to the regulation of the banks themselves. See *Anderson Nat’l Bank v. Lueckett*, 321 U.S. 233, 252-253 (1944); *Bank of Am. Nat’l Trust & Savings Assoc. v. Douglas*, 105 F.2d 100, 105-106 (D.C. Cir. 1939); *Peoples Bank of Danville v. Williams*, 449 F. Supp. 254, 259-60 (D. Va. 1978); *State ex rel. Lord v. First Nat’l Bank of St. Paul*, 313 N.W. 2d 390, 393 (Minn. 1981).

national banks. This very same interpretation has more recently been reaffirmed by the Ninth Circuit:

visitorial power[] . . . generally refers to the power of the OCC to “visit” a national bank to examine its activities and its observance of applicable laws, and encompasses any examination of a national bank’s records relative to the conduct of its banking business as well as any enforcement action that may be undertaken for violations of law.

Wells Fargo Bank N.A. v. Boutris, 419 F.3d 949, 956 n.7 (9th Cir. 2005)

(internal citation omitted).

The Third Circuit made clear that section 484 prohibits state enforcement of discrimination-in-lending laws in *National State Bank v. Long*, 630 F.2d 981 (3d Cir. 1980). The Third Circuit held that “while the substantive law of New Jersey prohibiting redlining is not preempted, enforcement of the state statute is the responsibility of the Comptroller of the Currency rather than the State Commissioner.” *Id.* at 989. In reaching this holding, the Third Circuit observed:

[W]hen state law prohibits the practice of redlining, its enforcement so directly implicates concerns in the banking field that the appropriate federal regulatory agency has jurisdiction.

It is reasonable to assume that enforcement against redlining in a particular instance involves consideration of “a reasonable analysis of the lending risks associated with the applicant” of the “condition of the property,” . . . and, thus, does have some relationship to the banks’ financial stability.

Id. at 988.

Cases that Defendant cites to support his argument that “state officials may sue national banks to enforce non-preempted state laws” (Appellant’s Br. 23) do not contradict the Third Circuit’s holding in *Long* because they involved state enforcement of generally applicable laws that “do not directly concern a banking practice” and which the OCC therefore “has no direct responsibility for enforcing.” *Minnesota v. Fleet Mortgage Corp.*, 158 F. Supp. 2d 962, 966 (E.D. Minn. 2001) (anti-telemarketing and consumer-fraud laws) (cited in Appellant’s Br. 25); *see also Alaska v. First National Bank of Anchorage*, 660 P.2d 406, 425 (Alas. 1982) (contract and property law) (cited in Appellant’s Br. 25); *Peoples Sav. Bank v. Stoddard*, 102 N.W.2d 777, 796-97 (Mich. 1960) (antitrust laws) (cited in Appellant’s Br. 25). The District Court distinguished *Fleet* and other such cases on precisely this ground. (SPA40.)

F. *First National Bank in St. Louis v. Missouri* Is Not Controlling.

First National Bank in St. Louis v. Missouri, 263 U.S. 640 (1924) is not controlling in this case for two reasons. First, neither the opinion nor the dissent in *St. Louis* even mentions the R.S. 5241, the predecessor to section 484 then in force.¹¹ As the District Court held, the

¹¹ Appellant also relies on other cases that similarly make no mention of section 484 or the OCC’s enforcement role and therefore certainly

“conclusion that the Supreme Court, sub silentio, conclusively decided that section 484’s limitation on visitorial powers unambiguously excludes from its reach a state’s authority to enforce its own non-preempted laws that regulate the conduct of a national bank’s federally authorized banking activity” is “overstate[d]” and “untenable.” (SPA35, 37.)

The District Court also distinguished *St. Louis* on the ground that, at the time *St. Louis* was decided, “the OCC had no clear authority to enforce national banks’ compliance with applicable state laws.” (SPA36.) Missouri’s law would have been unenforceable if the state could not enforce it itself. *See* 263 U.S. at 660. The Supreme Court therefore found state enforcement permissible to “fill a gap in the law.” (SPA36.) In contrast, the OCC “since 1966 has had the authority to compel national banks’ compliance with any applicable law regulating the business of banking, state or federal.” (SPA37.) *See also* 12 U.S.C. § 1818(b), (e), (i)(2); *National State Bank, Elizabeth, N.J. v. Long*, 630 F.2d 981, 988 (3d Cir. 1981). Thus, the “gap” in the law which was dispositive in *St. Louis* no longer exists.

cannot be construed to have opined on those issues. *E.g.*, *West Virginia v. Scott Runyan Pontiac-Buick, Inc.*, 461 S.E.2d 516 (W.Va. 1995); *Attorney General v. Michigan Nat’l Bank*, 312 N.W.2d 405 (Mich. Ct. App. 1981).

II. THE DISTRICT COURT CORRECTLY HELD THAT SECTION 7.4000 IS ENTITLED TO DEFERENCE.

The express terms of section 7.4000 prohibit the Defendant from “requiring the production of books and records of national banks, or prosecuting enforcement actions, except in limited circumstances authorized by federal law.” Because section 7.4000 is “an administrative agency’s construction of a statute that it administers,” *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132 (2000), the extent to which its interpretation of the statute is binding is governed by the test set forth in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). Under that test, section 7.4000 is controlling.

A. The OCC’s Interpretation of Section 484 Satisfies the Test for *Chevron* Deference.

Chevron imposes a two-pronged test for evaluating whether deference to agency interpretation is due. If “Congress has directly spoken to the precise question at issue” and “the intent of Congress is clear,” courts “must give effect to the unambiguously expressed intent of Congress” and no deference to the regulation is warranted. *Chevron*, 467 U.S. at 842-43. But “if the statute is silent or ambiguous with respect to the specific issue,” courts must defer to any “permissible” construction of the statute by the agency, because such silence or ambiguity is construed as a “delegation of

authority to the agency to elucidate a specific provision of the statute by regulation.” *Id.* at 843-44. The District Court’s deference to section 7.4000 was clearly proper under this test.

A statutory provision is ambiguous for purposes of the first step of *Chevron* when “susceptible to more precise definition and open to varying constructions.” *Gonzales v. Oregon*, 126 S. Ct. 904, 916 (2005). This Court has held that when the precise question at issue is the meaning of a particular phrase, the statute’s failure to define the phrase in its definitions section is sufficient ground for finding that Congress has not directly spoken. *See Environmental Defense v. EPA*, 369 F.3d 193, 209 (2d Cir. 2004). As the District Court noted:

Although section 484 plainly confines the exercise of visitorial authority over national banks to that authorized by federal law, and other provisions in the National Bank Act vest the OCC with the primary supervisory authority over national banks, nowhere does the Act precisely define the scope of the OCC’s exclusive visitorial powers or the reach of the courts of justice exception.

(SPA33.) Accordingly, the first prong of *Chevron* is satisfied.

With respect to the second prong of *Chevron*, the District Court was also correct in holding that the OCC’s interpretation is permissible because it is consistent with the plain language of the statute, its legislative

history, and the historical, common-law understanding of “visitorial powers” for all the reasons set forth in its opinion and Part I of this argument.

Moreover, a “congressional failure to revise or repeal the agency’s interpretation is persuasive evidence that the interpretation is the one intended by Congress.” *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 275 (1974). The definition of “visitorial powers” in section 7.4000 was adopted in 1999. *See* 64 Fed. Reg. 60092, 60094-95 (Nov. 4, 1999).¹² Thus, contrary to the Defendant’s assertions (Appellant’s Br. 18-19), the current regulation does not represent a recent shift in the OCC’s interpretation of section 484. Indeed, the provision’s explicit statement that state officials may not prosecute enforcement proceedings against national banks has been in place for well over six years.¹³ Congress could have enacted correcting legislation if it disagreed with either the OCC’s interpretation of section 484 or its authority to interpret the section.

¹² In 2004, the OCC added interpretations of the exceptions provided in section 484, including the “vested in the courts of justice” exception. 69 Fed. Reg. 1895 (Jan. 13, 2004).

¹³ The OCC first codified its interpretive rulings with respect to the exercise of visitorial powers in 1971 as 12 C.F.R. 7.6025(b). 36 Fed. Reg. 17000, 17013 (Aug. 26, 1971).

B. Section 7.4000 Is Within the Scope of the OCC's Rulemaking Authority.

Congress delegated rulemaking authority to the OCC in 12 U.S.C. § 93a, which provides in pertinent part:

Except to the extent that authority to issue such rules and regulations has been expressly and exclusively granted to another regulatory agency, the Comptroller of the Currency is authorized to prescribe rules and regulations to carry out the responsibilities of the office.

Because section 7.4000 is directly related to the OCC's supervision, examination, and enforcement responsibilities with regard to national bank's banking activities, it is clearly authorized by section 93a.

The Defendant is mistaken in asserting that *Gonzales* supports his argument that section 7.4000 falls outside the OCC's rulemaking authority. (Appellant's Br. 40-42.) *Gonzales* was predicated on the fact that "[t]he Attorney General does not have the sole delegated authority under the [Controlled Substances Act.] He must instead share it with, and in some respects defer to, the Secretary [of Health and Human Services], whose functions are likewise delineated and confined by the statute." 126 S. Ct. at 920. The Defendant's powers were "limited," *id.* at 917, to authority over "registration and control" of substances, *id.* at 921, while the Secretary of Health and Human Services was delegated authority over "scientific and

medical matters.” *Id.* at 920. In contrast, no agency shares administrative authority under the National Bank Act with the OCC.

The Defendant also argues that the OCC may only regulate “to carry out the responsibilities of the office,” and those responsibilities are purportedly limited to “ensur[ing] the safety and soundness of national banks.” (Appellant’s Br. 41.) The Defendant identifies no basis in the statute for this claim, but instead predicates it on a piece of legislative history for a bill that was never enacted. (*See id.* (citing S. Rep. No. 96-368, at 13 (1979), *reprinted in* 1980 U.S.C.C.A.N. 236, 249).) The Senate and House Conference Reports accompanying the bill that actually became section 93a contain no indication that the OCC’s rulemaking was to be limited to the “safety and soundness” of national banks, or in any way other than as expressly provided in the statute. *See* S. Rep. No. 96-640, at 83 (1980), H.R. Rep. No. 96-842, at 83 (1980), *reprinted in* 1980 U.S.C.C.A.N. 298, 313 (1980).¹⁴

The Supreme Court has held that the OCC’s statutory responsibilities are broad enough to give it authority to interpret the Act’s

¹⁴ In any event, “restrictive language contained in Committee Reports is not legally binding,” *Cherokee Nation of Oklahoma v. Leavitt*, 543 U.S. 631, 646 (2005), and does not restrict an agency’s exercise of statutory rulemaking power. *See Am. Hosp. Ass’n v. NLRB*, 499 U.S. 606, 616-17 (1991).

terms: ““The Comptroller of the Currency is charged with the enforcement of banking laws to an extent that warrants the invocation of [*Chevron* deference] with respect to his deliberative conclusions as to the meaning of these laws.”” *NationsBank v. Variable Annuity Life Ins. Co.*, 513 U.S. 251, 256-57 (1995) (quoting *Clarke v. Security Industry Ass’n*, 479 U.S. 388, 403-04 (1987)). The Ninth Circuit has likewise held that section 93a’s “conferral of regulatory authority is as broad as the OCC’s statutory responsibilities, defined piecemeal throughout the Bank Act.” *Wells Fargo Bank N.A. v. Boutris*, 419 F.3d 949, 958 (9th Cir. 2005). The District Court’s holding that “section 93a clearly encompasses the authority to clarify ambiguous terms in section 484” was therefore proper. (SPA41.)

C. The Defendant Identifies No Legal Framework that “Trumps” *Chevron*.

The Defendant presents three arguments why section 7.4000 should not be subject to *Chevron* deference. Each of these arguments ignores or misconstrues the applicable precedents.

1. No Applicable “Clear Statement” Principle Limits the Application of *Chevron*.

There is no merit to Defendant’s contention that section 7.4000’s supposed alteration of the usual constitutional balance between the states and the federal government requires application of a clear-statement

canon which “trump[s] *Chevron*’s analytical framework.” (Appellant’s Br. 30.) The District Court properly held that this argument is foreclosed by *Wachovia Bank, N.A. v. Burke*, 414 F.3d 305 (2d Cir. 2005).

The issue in *Wachovia* was “the manner in which state law should apply to a national bank operating subsidiary.” *Id.* at 315. Section 484, the same provision at issue in this case, limits states’ assertion of visitorial powers against national banks, but was silent on the extent to which visitorial powers could be asserted against their operating subsidiaries. *See id.* The OCC filled that void by regulation, interpreting a national bank’s statutory “incidental powers” “to include the power to conduct the business of banking through an operating subsidiary,” therefore prohibiting states from “imposing regulations on the subsidiary that could not be imposed on the parent bank.” *Id.* at 316 (citing 12 C.F.R. §§ 5.34, 7.4006). This Court deferred to these regulations under the standards prescribed by *Chevron*. *Id.* at 319-20.

The Court expressly rejected the argument that it should require a clear statement from Congress to defer to a regulation that preempts state law, *see id.* at 313-15, relying on *Fidelity Federal S&L Ass’n v. de la Cuesta*, 458 U.S. 141, 154 (1982), and other controlling decisions of the Supreme Court:

Preemption is always a matter of congressional intent. *De la Cuesta*, 458 U.S. at 152. But the Supreme Court has made it clear that a “pre-emptive regulation’s force does not depend on express congressional authorization to displace state law” and that a ‘narrow focus’ on Congress's intent to supercede state law is “misdirected.” *Id.* at 154. The proper focus is on whether the agency effecting preemption “has exceeded [its] statutory authority or acted arbitrarily.” *Id.*; *see also Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 884 (2000).

414 F.3d at 314.

As in *Wachovia*, the Defendant “incorrectly attempts to frame the issue as whether Congress has expressly and clearly manifested an intent to preempt state visitorial power,” but the proper focus “is on the reasonableness of the OCC’s exercise of its regulatory authority.” *Id.* at 314-15; *accord Wells Fargo Bank of Texas N.A. v. James*, 321 F.3d 488, 492-93 (5th Cir. 2003). “12 U.S.C. § 484 provides the OCC with ample authority to preempt states from exercising visitorial power” over national banks or their operating subsidiaries. *Wachovia*, 414 F.3d at 316. Contrary to the Defendant’s position (*see* Appellant’s Br. 30), this test for reasonableness does not *trump* the *Chevron* doctrine; rather, the reasonableness inquiry is *governed by Chevron*. *See id.* at 315 (“The District Court properly approached the issue [of reasonableness] through the framework of *Chevron*.”).

The Defendant attempts to distinguish *Wachovia* on the ground that neither the National Bank Act nor the OCC purport to preempt New York's Human Rights Law, and consequently frames the issue before this Court as whether the OCC has "stripp[ed] the States of their core sovereign power to enforce their own non-preempted laws." (Appellant's Br. 31.) The Defendant's attempted distinction is inapposite because section 484 *does* preempt the state law in question, i.e., not the New York Human Rights Law, but any law that would otherwise authorize the Defendant to investigate or commence enforcement proceedings against national banks.¹⁵

The "clear-statement" cases relied on by the Defendant (*see* Appellant's Br. 30-31) deal with entirely different issues and provide no precedent for departing from *Wachovia*. The clear-statement rule applied in all of these cases stemmed from the familiar canon of construction "not to

¹⁵ There is no merit to Defendant's suggestion that preemption of state enforcement raises the accountability concerns underlying the rule of *New York v. United States*, 505 U.S. 144 (1992), that the federal government may not compel states to administer a federal regulatory scheme because doing so may unfairly subject them to criticism of the scheme's defects. *See Printz v. United States*, 521 U.S. 898, 930 (1997); *United States v. Lopez*, 514 U.S. 549, 576 (1995) (Kennedy, J., concurring). Federal law restricts states and their officials in countless ways, by virtue of the Supremacy Clause, U.S. CONST. art. VI, cl. 2, and no one could suggest that imposing such restrictions unconstitutionally violates state sovereignty like the sort of legislation condemned in *New York v. United States*.

needlessly reach constitutional issues.” *Solid Waste Agency v. Army Corp Of Engineers*, 531 U.S. 159, 172 (2001). See also *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991); *Artichoke Joe’s Cal. Grand Casino v. Norton*, 353 F.3d 712, 730 (9th Cir. 2003); *Univ. of Great Falls v. NLRB*, 278 F.3d 1335, 1340-41 (D.C. Cir. 2002). Here, in contrast, the regulation does not approach any constitutional limitation of federal authority.¹⁶

The Defendant’s argument does not acknowledge the Supreme Court case most directly applicable to this issue, *Smiley v. Citibank (South Dakota), N.A.*, 517 U.S. 735 (1996), which also involved a provision of the National Bank Act and an implementing regulation of the OCC. Section 30 of the Act permitted national banks to charge “interest at the rate allowed by the laws of the State . . . where the bank is located.” 12 U.S.C. § 85. The OCC promulgated a regulation specifying what fees and charges qualified as

¹⁶ The only precedent Appellant cites for applying a clear-statement requirement to a rule that raises no constitutional problems, *ABA v. FTC*, 430 F.3d 457 (D.C. Cir. 2005), concluded that an agency interpretation is unreasonable if it infers from statutory “language that is, even charitably viewed, at most ambiguous” that Congress intended to legislate in a traditional domain of the states. *Id.* at 472. Even if this decision were consistent with *de la Cuesta* and this Court’s decision in *Wachovia*, it has no application here. Regulating national banks is clearly not the traditional domain of the states, and regardless of any ambiguities in the precise meaning of “visitorial powers,” there is nothing ambiguous about Congress’s intent in section 484 to limit them to the OCC.

“interest” under the statute. *See* 12 C.F.R. § 7.4001(a). In effect, the OCC’s regulation permitted national banks to charge late fees authorized by the laws of the bank’s home state even if they were not authorized by the laws of the borrower’s home state.

Like the Defendant, the petitioner in *Smiley* argued “that *no* [OCC] interpretation of § 85 is entitled to deference, because § 85 is a provision that pre-empts state law” and the “presumption against . . . pre-emption . . . in effect trumps *Chevron*.” *Smiley*, 517 U.S. at 743. The Supreme Court rejected this argument, holding any presumption against pre-emption inapposite because “there is no doubt that § 85 pre-empts state law.” 517 U.S. at 744. Here, similarly, section 484 clearly preempts state visitorial powers, and what is at issue is simply the meaning of the phrase “visitorial powers.”

2. *Chevron* Deference Cannot Be Denied on the Ground that Section 7.4000 Incorporates the OCC’s Legal Analysis of Section 484.

The Defendant argues that agency interpretations based on “legal reasoning” are not entitled to *Chevron* deference because “courts generally defer to agency judgments” only “in areas where an agency has ‘perceived superior expertise,’” while “legal reasoning . . . is the courts’ usual province.” (Appellant’s Br. 35-36.) This argument is faulty on two

fronts. First, the areas covered by section 7.4000 are well within the OCC's regulatory expertise, as the District Court recognized. Second, case law clearly demonstrates that once an agency is regulating in the general field of its expertise, as the OCC is here, *Chevron* deference is due to both its policymaking *and* its statutory interpretation.

a. Section 7.4000 Comes Within the OCC's Expertise.

The District Court correctly relied on this Court's decision in *Wachovia* to hold that section 7.4000 does not represent merely the OCC's attempt to distill statutory terms and judicial precedent. (SPA41.) In *Wachovia*, the OCC's release adopting 12 C.F.R. § 7.4006 stated 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.” 414 F.3d at 319. The banking commissioner “seize[d] on the last sentence in arguing that 12 C.F.R. § 7.4006 merely reflects the OCC's view of what courts would hold, and . . . contends that courts are not required to defer to an agency's interpretation of case law.” *Id.* This Court rejected that argument, holding that “the OCC's codification of section 7.4006, at its core, reflects a policy judgment about national banks' use of operating subsidiaries.” *Id.* at 320.

In this case, the District Court acknowledged that the OCC's discussion of its reasons for promulgating section 7.4000 included a study of "relevant judicial precedent" but noted that the regulation also "was informed by [the OCC's] experience acting as the sole supervisor of the banking activities of national banks in a dual banking system." (SPA42.) This was reflected in the fact that the publication of section 7.4000 was accompanied by a discussion of the importance of the "uniform system of regulation over national banks." (SPA42.) That discussion took the view that "[d]ifferences in national and state bank powers and in the supervision and regulation of national and state banks ... are the defining characteristics" and "essence" of the dual-banking system. 69 Fed. Reg. at 1896. The OCC further explained that state regulation of national banks becomes inconsistent with the dual-banking system when they "affect the content or extent of the Federally-authorized business of banking conducted by national banks." *Id.*

There is no basis for the Defendant's contention that "[t]he kind of agency 'policy judgments' that this Court identified in *Wachovia* are wholly absent in this case." (Appellant's Br. 39.) As in *Wachovia*, the discussion accompanying section 7.4000 manifests a policy determination within the scope of the OCC's expertise. *See* 414 F.3d at 320-21. The

OCC’s statement quoted in *Wachovia* that the “safety and soundness” of national banks would be compromised by “multiple, often unpredictable, different state or local restrictions and requirements prevent[ing] [national banks] from operating in the manner authorized under Federal law,” *id.* at 321 (quoting 69 Fed. Reg. at 1908), is equally, if not more, applicable to the regulation at issue in this case. Both regulations are “in furtherance of [the OCC’s] responsibility to enable national banks to operate to the full extent of their powers under Federal law, without interference from inconsistent state laws, consistent with the national character of the national banking system, and in furtherance of their safe and sound operations.” *Id.*

b. The *Chevron* Doctrine Does Not Distinguish Between “Legal” and “Technical” Rulemaking.

Even if section 7.4000 “represent[ed] merely the OCC’s attempt at distilling statutory terms and judicial precedent” (SPA41), Supreme Court precedent establishes that it would still be entitled to *Chevron* deference. “Of course, the framework of deference set forth in *Chevron* does apply to an agency interpretation [of an ambiguous statute] contained in a regulation.” *Christensen v. Harris County*, 529 U.S. 576, 587 (2000). “An agency action qualifies for *Chevron* deference when Congress has explicitly or implicitly delegated to the agency the authority to ‘fill’ a statutory ‘gap,’ including an interpretive gap created through an ambiguity

in the language of a statute’s provisions.” *National Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 125 S. Ct. 2688, 2712 (2005) (Breyer, J., concurring) (emphasis added) (citing *Chevron*, 467 U.S. at 843-44; *United States v. Mead Corp.*, 533 U.S. 218, 226-27 (2001)).

The Supreme Court’s first major case applying *Chevron*, *Young v. Community Nutrition Institute*, 476 U.S. 974 (1986), involved a statute providing that when the addition of an unsafe substance cannot be avoided by good manufacturing practice, the responsible official “shall promulgate regulations limiting the quantity therein or thereon to such extent as he finds necessary for the protection of public health.” 21 U.S.C. § 346 (1986). The respondent argued that the FDA was *always* required to issue a regulation governing *any* unavoidable addition of an unsafe substance, and that the phrase “to such extent as he finds necessary” only modified the limitation as to quantity that the regulation imposed. 476 U.S. at 980. The FDA interpreted the same phrase as limiting its obligation to issue any regulation at all. *Id.* at 979. Applying *Chevron*, the Court found that the statutory language was ambiguous because of the “dangling participle” and deferred to the FDA’s view. *Id.* at 980-81.¹⁷

¹⁷ Similarly, in *Barnhart v. Thomas*, 540 U.S. 20, 26 (2003), the Court deferred to an administrative interpretation of a similar ambiguity in the Social Security Act, namely, whether a limiting phrase applied to

Of the five cases cited by the Defendant for the proposition that “an agency interpretation based upon the type of legal reasoning that is the courts’ usual province will not be given deference,” (Appellant’s Br. 36), two were relied on by the banking commissioner in *Wachovia* and found inapplicable by this Court because they involved agency adjudicative decisions that “rely *solely* on the interpretation of federal judicial decisions.” *See* 414 F.3d at 319-20 (emphasis added) (discussing *New York New York, LLC v. NLRB*, 313 F.3d 585, 590 (D.C. Cir. 2002); *University of Great Falls v. NLRB*, 278 F.3d 1335, 1341 (D.C. Cir. 2002)). The same is true of another case cited by the Defendant, *New York v. Shalala*, 119 F.3d 175 (2d Cir. 1997), which involved an agency adjudicative decision based solely on the agency’s interpretation of a specific decision of this Court. *See id.* at 180. As the court emphasized in *New York New York*,

It is up to the Board to answer these questions, and others, not only by applying whatever principles it can derive from the

just one or both antecedents. *See also Barnhart v. Walton*, 535 U.S. 212, 217-219 (2002). Cases such as *PBGC v. LTV Corp.*, 496 U.S. 633, 651-52 (1990), and *In re New Times Sec. Servcs., Inc.*, 371 F.3d 68, 82 (2d Cir. 2004) which refer to “practical agency expertise” as “one of the principal justifications behind *Chevron* deference” refer merely to the agency’s expertise in anticipating the consequences of its statutory interpretations. *See PBGC*, 496 U.S. at 651. An agency’s cognizance of the practical consequences of its rulemaking does not depend on the extent to which its interpretations rest on pure policymaking, the meaning of ambiguous terms, or English grammar.

Supreme Court's decisions, but also by considering the policy implications. . . .

313 F.3d at 590. There is no question that the OCC considered the “policy implications” as well as the applicable judicial precedents when it adopted and amended section 7.4000.

H.W. Wilson Co. v. USPS, 580 F.2d 33, 37 (2d Cir. 1978) (cited in Appellant's Br. 36), predated *Chevron*, and this Court had no occasion to consider the applicability of *Chevron* deference. One decision cited by Defendant, *Bamidele v. INS*, 99 F.3d 557 (3d Cir. 1996), contains language indicating that *Chevron* deference should not be accorded to the agency's interpretation of a statute of limitations because “a statute of limitations is not a matter within the particular expertise of the INS.” *Id.* at 561.

However, the Third Circuit made clear that this holding was limited to a statute of limitations, because it acknowledged that it had accorded *Chevron* deference to the same agency's interpretations of other provisions of the Act it administers. *Id.* at 561-62. To the extent *Bamidele* stands for any more general proposition that *Chevron* deference does not apply to any agency's interpretation of the statute it administers, it is inconsistent with the applicable decisions of the Supreme Court. The specific holding in *Bamidele* was considered and rejected in *Asika v. Ashcroft*, 362 F.3d 264, 267 (4th Cir. 2004).

Gonzales, the sole Supreme Court case the Defendant cites in support of this argument, is even more inapposite. (Appellant’s Br. 35.) The Supreme Court’s refusal to defer to the regulation at issue in *Gonzales* was based on its determination that it was not within the scope of the rulemaking authority vested in the Attorney General. The Court did not hold that the Attorney General’s interpretation of the CSA lacked deferential force merely because it was outside his expertise. Rather, the Court held that “the Interpretive Rule was not promulgated pursuant to the Attorney General’s authority,” because authority to act in that sphere was delegated to the Secretary of Health and Human Services, *not* the Attorney General, by virtue of requiring medical expertise. 126 S. Ct. at 922. Similarly, in *Adams Fruit Co. v. Barrett*, 494 U.S. 638, 649-50 (1990) (cited at Appellant’s Br. 36), the Supreme Court did not hold that an agency lacked the authority “to regulate the scope of the judicial power vested by the statute” because interpretation of such questions is inherently reserved for the courts, as Defendant contends, but because “Congress has expressly established the Judiciary and not the [administrating agency] as the adjudicator of private rights of action arising under the statute.”

D. The Supreme Court Has Held that Agency Rulemaking Entitled to *Chevron* Deference Outweighs Prior Inconsistent Court Decisions.

The District Court correctly held that *First National Bank in St. Louis v. Missouri*, 263 U.S. 640 (1924), did not preclude the OCC from adopting section 7.4000. (SPA35-41.) As discussed above, *St. Louis* provides no guidance concerning the application of section 484 to the Defendant's investigation and threatened enforcement proceedings. Even if it did support the Defendant's position, however, the OCC has the authority to adopt, and has adopted, a different interpretation of the statute.

In *Brand X*, the Supreme Court held that it "follows from *Chevron* itself" that

[a] court's prior judicial construction of a statute trumps an agency construction otherwise entitled to *Chevron* deference only if the prior court decision holds that its construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion. . . . [A]llowing a judicial precedent to foreclose an agency from interpreting an ambiguous statute . . . would allow a court's interpretation to override an agency's. *Chevron's* premise is that it is for agencies, not courts, to fill statutory gaps.

125 S. Ct. at 2700. The Defendant does not cite any cases, nor could he, holding that section 484 "unambiguous[ly]" condones his enforcement activities. The OCC is entitled to fill any "gap" in section 484's restrictions

on who may exercise visitorial powers over national banks, rendering any judicial precedents predating section 7.4000 irrelevant.

E. Defendant’s Public Policy Arguments Provide No Basis for Setting Aside the OCC’s Regulation.

Much of Defendant’s brief, and virtually all of the briefs submitted by the *amici curiae* supporting him, are devoted to appeals to public policy concerns. Those appeals are appropriately addressed to Congress and are utterly beside the point in this proceeding. It is up to the Congress to decide who shall supervise and enforce laws against national banks. To the extent Congress has not made its intentions clear, the OCC is responsible for resolving ambiguities under *Chevron* and *Smiley*. However, even if it were appropriate to consider the appeals to public policy advanced by Defendant and his supporting amici, those appeals are misguided and without merit.

1. National Banks Are Entitled to Operate Within a Consistent and Predictable Regulatory Framework.

The Defendant and amici argue that the OCC’s role as exclusive enforcer of state law against national banks will undermine the dual banking system by subjecting national banks to “a markedly different legal regime than their state bank counterparts.” (Appellant’s Br. 58-59.) But that, of course, was the precise intent of Congress in enacting the

National Bank Act—to create a system in which national banks are subject to “uniform[]” laws “substantially the same in Washington, in New York, in Boston, and in Chicago,” rather than the “complications and differences” in the laws of every state and municipality. CONG. GLOBE, 38th Cong. 1st Sess., 1873 (1864) (remarks of Sen. Sumner); *see supra* Part I.A. This Court has specifically held that preemption of state laws that infringe on national banks’ powers is fully consistent with the “‘dual banking system’ of federal and state regulation.” *Wachovia*, 414 F.3d at 314.

In contrast, Defendant’s actions threaten the fundamental regulatory approach adopted by Congress for national banks. One of the primary functions of the National Bank Act is to "prevent inconsistent or intrusive state regulation" of national banks. *Wachovia*, 414 F.3d at 311. The OCC cited the need for uniform standards governing national banks as one of the justifications for section 7.4000.

The Federal grant of national bank powers and the uniformity of the standards that govern their exercise, coupled with the OCC’s exclusive visitorial authority, are fundamental distinctions between the national banking system and the system of state-chartered and regulated banks that comprises the other half of the dual banking system.

69 Fed. Reg. at 1896.

Defendant continues to confuse state substantive law with enforcement authority, and therefore misses the point, when he asserts that

the Riegle-Neal Act provides that “in the realm of fair lending and consumer protection, state laws should nonetheless apply” (Appellant’s Br. 65 (citing 12 U.S.C. § 36(f)(1)(A))) The same provision of the act mandates that “the provisions of any State law”—expressly including state fair-lending laws— “to which a branch of a national bank is subject under this paragraph shall be enforced, with respect to such branch, by the Comptroller of the Currency.” 12 U.S.C. § 36(f)(1)(A)-(B).

Finally, Defendant’s argument that state fair lending laws should be enforced by state officials to give effect to the idiosyncrasies of different states’ law is inconsistent with the FHA provisions designed to achieve uniformity among state and federal laws. The FHA authorizes certain state officials to provide a remedy for violations of the Act, but only after HUD certifies them to perform this function.¹⁸ 42 U.S.C. § 3610(f)(1). Certification is appropriate “only” when “the substantive rights protected by [the state] agency,” “the procedures followed by such agency,” “the remedies available to such agency,” and “the availability of judicial review of such agency’s action . . . are substantially equivalent to those created by” the FHA. *Id.* § 3610(f)(3)(A)(i)-(iv). The apparent purpose, and undoubted effect, of these provisions is to encourage states to conform their laws to the

¹⁸ The Appellant has recognized that he is not so certified. (SPA12.)

FHA. See H.R. Rep. 100-711 (June 17, 1988), *reprinted in* 1988

U.S.C.C.A.N. 2173 at 2196.

2. The OCC Is the Agency Best Suited to Enforce Fair-Lending Laws Against National Banks.

As the agency with the greatest familiarity with national banks and their lending business, and regular access to their books and records, the OCC is far better qualified than the Defendant to enforce their compliance with fair lending laws. Defendant's assertion that the OCC would achieve the desired regulatory uniformity by refusing to enforce state law is completely unjustified. The Defendant *does* not and cannot present any evidence that the OCC would shirk its responsibilities, and in any event enforcement of state fair housing laws is consistent with regulatory uniformity. As discussed above, the certification provisions of the FHA are designed to conform state fair housing laws to the standards of the FHA. In particular, New York's fair lending law is substantively identical to the FHA. See *Lynn v. Village of Pomona*, 373 F. Supp. 2d 418, 434 (S.D.N.Y. 2005).

In addition to data collected pursuant to the HMDA, which expert economists and bank examiners at the OCC review to ensure its accuracy, the OCC is the recipient of consumer complaints and other resources it uses to identify banks that merit comprehensive fair-lending

examinations. Moreover, contrary to Defendant's claims that the OCC has limited enforcement power with respect to state law (Appellant's Br. 60-62), the OCC has far-reaching enforcement powers. In addition to the OCC's broad enforcement powers under the National Bank Act, the Financial Institutions Supervisory Act authorizes the OCC to issue a cease-and-desist order against any aspect of a national bank's business upon finding that the bank has violated any law, rule, or regulation. *See* 12 U.S.C. § 1818(b). In *Long*, the Third Circuit held that Congress intended this provision to be used as a mechanism for the enforcement "not only [of] federal [law] but . . . state law as well." 630 F.2d at 988. The Third Circuit held that the OCC specifically has jurisdiction to enforce state fair-lending laws via the cease-and-desist provisions of Section 1818. *See id.*

The Defendant does not and cannot claim to have expertise concerning the evaluation of lending decisions necessary for proper enforcement of fair lending laws that remotely approaches the expertise of the OCC. The investigation and threatened enforcement proceedings that the District Court enjoined in this case were based on the Defendant's inferences of discriminatory intent based on HMDA data concerning institutions' lending decisions. As discussed at pages 2 to 3 above, however, the Federal Reserve Board has made clear that the HMDA data is not

sufficient to support such inferences, and ascertaining compliance with fair lending laws requires evaluation of an institution's lending decisions in light of factors such as the applicant's credit history and the value of the property that would secure the loan. An institution's proper evaluation of these factors is central to the safety and soundness of its banking business. Indeed, if the Defendant were permitted to use state court enforcement proceedings to impose new lending standards which he considered to be more favorable to certain segments of New York's population, those standards would directly implicate and potentially compromise the safety and soundness of the national banks which it is the OCC's responsibility to maintain.

Accordingly, there is no basis for the Defendant's assertions that he is better qualified than the OCC to secure national banks' compliance with fair lending laws.

III. THE DISTRICT COURT CORRECTLY HELD THAT SECTION 484 BARS THE DEFENDANT FROM INSTITUTING A PARENS PATRIAE SUIT UNDER THE FAIR HOUSING ACT.

The District Court correctly rejected the Defendant's argument that he could assert a parens patriae claim against national banks pursuant to the FHA's provision authorizing a private right of action because (1) such a

claim would not constitute visitation and (2) “even if a suit to enforce the FHA against national banks could be termed a visitation, it is authorized by the FHA and thus falls within § 484’s exception for the exercise of visitorial powers ‘authorized by Federal law.’” (Appellant’s Br. 66.)¹⁹

A. A Parens Patriae Suit Is a Form of Visitation.

The doctrine of parens patriae recognizes “the right of a State to sue . . . to prevent or repair harm to its ‘quasi-sovereign’ interests.”

Hawaii v. Standard Oil Co., 405 U.S. 251, 258 (1972). The Supreme Court has made clear that if “nothing more” is involved than the state’s “stepping in to represent the interests of particular citizens . . . i.e., if the State is only a nominal party without a real interest of its own[,] then it will not have standing under the *parens patriae* doctrine.” *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 600 (1982).

The District Court correctly held that the “quasi-sovereign interest” element of a parens patriae action distinguishes it from a private suit and qualifies it as a visitation subject to section 484. (SPA10-11.)

¹⁹ In this appeal, the Attorney General no longer contends that the FHA would authorize him to conduct an investigation prior to commencing an action. Nothing in the FHA’s provisions authorizing a private right of action provide any basis for departing from the usual rule that discovery in aid of litigation may not commence until the action is filed.

Visitorial power is the assertion of sovereign authority over a corporation. (SPA11 (citing *Guthrie*, 199 U.S. at 158-59).) The state cannot proceed against a national bank as *parens patriae* without asserting sovereign authority, and cannot assert its sovereign authority against a national bank without engaging in visitation.

There is no merit to the Defendant’s objection that “the notion of visitation, as used in § 484 and as generally understood, does not encompass judicial enforcement efforts intended to protect the well-being of [the state’s] citizens, not to monitor a bank’s safety and soundness.” (Appellant’s Br. 70.) As discussed at length in Part I, above, the visitorial powers which section 484 limits to the OCC are not confined to monitoring banks’ safety and soundness, but include all sorts of enforcement proceedings relating to national banks’ banking activities. “Visitorial power[] . . . encompasses . . . any enforcement action that may be undertaken for violations of law.” *Wells Fargo*, 419 F.3d at 956 n.7.

B. The District Court Correctly Held That a *Parens Patriae* Suit Under the FHA Is Not Permitted Under Section 484 Because It Is Not Expressly Authorized By Federal Law.

There is likewise no merit to the Defendant’s argument that “the FHA’s broad civil enforcement provision” is sufficient ““authoriz[ation] [under] Federal law”” of *parens patriae* actions even if “the FHA does not

expressly provide for such actions.” (Appellant’s Br. 70.) The Act expressly provides for enforcement by various government officials. The Secretary of HUD is authorized to conduct investigations, to commence administrative proceedings for violations of the act, and to adjudicate administrative proceedings commenced by any “aggrieved person.”²⁰ 42 U.S.C. §§ 3610-12. The United States Attorney General is authorized to commence civil actions for “a pattern or practice of resistance to the full enjoyment of any of the rights” under the FHA. *Id.* § 3614. As discussed above, the Secretary of HUD may also refer administrative complaints to a state or local public agency if, but only if, it is a “certified agency” under the standards and procedures prescribed by the FHA. *Id.* § 3610(f). The Defendant is concededly not a certified state agency. (SPA12.) Finally, any aggrieved person may, as an alternative to filing an administrative complaint with HUD, commence a civil action “to obtain appropriate relief with respect to such discriminatory housing practice.” *Id.* § 3613(a)(1)(A).

“When determining whether a state has *parens patriae* standing under a federal statute, we ask if Congress intended to allow for such

²⁰ An “aggrieved person” is “any person who—(1) claims to have been injured by a discriminatory housing practice; or (2) believes that such person will be injured by a discriminatory housing practice that is about to occur.” 42 U.S.C. § 3602(i).

standing.” *Connecticut v. Physicians Health Services*, 287 F.3d 110, 120 (2d Cir. 2002). In light of the FHA’s explicit provisions for enforcement by HUD, the United States Attorney General, certified state agencies that do not include the Defendant, and private individuals, it is open to question whether a state may ever assert a *parens patriae* claim under the FHA. It makes no sense for a state to be able to circumvent the carefully drafted provisions concerning HUD referrals to certified state agencies to enforce the FHA on behalf of the state’s citizens, *see* 42 U.S.C. § 3610(f), through a *parens patriae* proceeding initiated without a referral by an official who is not certified. Moreover, a *parens patriae* claim requires a showing that individual citizens may not obtain adequate relief. *See New York v. 11 Cornwell Co.*, 695 F.2d 34, 40 (2d Cir. 1982), *vacated in part on other grounds*, 718 F.2d 22 (2d Cir. 1983) (en banc). The availability of administrative proceedings under the auspices of HUD and certified state agencies, in addition to private civil actions, precludes such a showing.

It is at least clear, however, that in the context of national banks subject to section 484’s general prohibition against state visitation, the District Court correctly held that the Defendant’s proposed *parens patriae* claim is not “authorized by Federal law.” (SPA14-17.) Where Congress has in fact created exceptions authorizing states to exercise visitorial power over

national banks, “it has done so explicitly, carefully defining the parameters of the states’ authority.” (SPA15.)

The OCC’s implementing regulation provides various “[e]xamples of laws vesting visitorial power in other governmental entities” which come within the statutory exception. 12 C.F.R. § 7.4000(b)(1). The District Court observed that each of those examples “carefully defin[ed] the parameters of the states’ authority” and “explicitly” provided for and defined the state’s enforcement role when one was intended. (SPA15.) Some of these exceptions operate by specific reference to section 484. *See, e.g.*, 26 U.S.C. § 3305(c); 12 U.S.C. § 484(b). Others expressly charge state actors with enforcement powers and define the permitted visitorial activity in detail. *See, e.g.*, 29 U.S.C. § 211(a)-(b); 26 U.S.C. § 7602(a).

The FHA’s private right of action is distinguishable from each of these statutory exceptions. *First*, it remains silent on the permissibility of *parens patriae* suits, in contrast to other statutes that authorize them explicitly. *See, e.g.*, 15 U.S.C. § 15c(a)(1) (Clayton Act provision for “[a]ny attorney general of a State [to] bring a civil action in the name of such State, as *parens patriae* on behalf of natural persons residing in such State, in any district court of the United States”). *Second*, unlike 26 U.S.C. § 3305(c) or 12 U.S.C. § 484(b), it neither makes reference to the National Bank Act nor

evinces a Congressional intent to carve out an exception to that statute.²¹

Third, unlike 12 U.S.C. § 62, 29 U.S.C. § 211, and 26 U.S.C. § 7602(a), it does not describe what visitorial powers may be deployed or identify any state actor authorized to deploy them.²² The OCC’s identification of these statutes illustrates the type of statutory language that constitutes “authoriz[ation] by Federal law” to exercise visitorial powers over national banks. 12 U.S.C. § 484(a).

Nothing in the FHA’s original enactment in 1968 or subsequent amendments by Congress purports to limit the application of Congress’

²¹ 12 U.S.C. § 484(b) permits “lawfully authorized State auditors and examiners,” notwithstanding the previous paragraph’s reservation of visitorial powers over national banks to the federal government, to review bank records “solely to ensure compliance with applicable State unclaimed property or escheat laws.” 26 U.S.C. § 3305(c) provides that nothing in section 484 “shall prevent any State from requiring any national banking association to render returns and reports relative to the associations’ employees, their remuneration and services, to the same extent that other persons are required to render like returns and reports under a State law requiring contributions to an unemployment fund.”

²² 12 U.S.C. § 62 authorizes “the officers authorized to assess taxes under State authority” to inspect logs of shareholders in national banking associations. 26 U.S.C. § 7602(a) authorizes the Secretary of the Treasury to examine books and records and compel testimony “[f]or the purpose of ascertaining the correctness of any [tax] return.” 29 U.S.C. §§ 211(a)-(b) authorizes the Secretary of Labor and “State and local agencies and employees” to inspect records, question employees, and conduct investigations pertaining to compliance with the Fair Labor Standards Act.

historical grant of exclusive visitorial powers to the OCC. “Repeals by implication are not favored,” and absent either legislative history affirmatively demonstrating intent to repeal or irreconcilability there is no justification for repeal by implication. *Morton v. Mancari*, 417 U.S. 535, 549-50 (1974); *see also J.E.M. AG Supply, Inc. v. Pioneer Hi-Bred Int’l, Inc.*, 534 U.S. 124, 141-42 (2001). Moreover, “when two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective.” *Morton*, 417 U.S. at 551.

A more specific statute will be given precedence over a more general one, regardless of their temporal sequence. *See Bulova Watch Co. v. United States*, 365 U.S. 753, 758 (1961); *Cal. Pub. Employees Ret. Sys. v. Worldcom, Inc.*, 368 F.3d 86, 101-04 (2d Cir. 2004). Section 484 specifically entrusts the enforcement of federal and state laws governing national banks’ banking activities to the OCC. In contrast, the FHA is a broad remedial statute that governs all the participants in the housing industry, including landlords and realtors. Lenders, let alone lenders who are national banks, form only a small part of the persons subject to the FHA.

C. The Defendant’s Parens Patriae Authority Is Based on State Law, and Therefore Is Not “Authorized by Federal Law.”

The Defendant’s argument is without merit for the additional reason that federal law in itself does not authorize him to bring any parens patriae suit, under the FHA or otherwise. The parens patriae power of a state official derives from the sovereign authority of the *states*. *See, e.g., Hawaii v. Standard Oil*, 405 U.S. at 258; *Connecticut v. Physician’s Health*, 287 F.3d at 119. Because these powers are “sovereign,” they are inherent to the states, having passed to the states as a “royal prerogative.” *Hawaii v. Standard Oil*, 405 U.S. at 257.

Moreover, the power of any particular state official to assert a parens patriae claim in the name of the state depends on the allocation of responsibilities among state officials pursuant to state law. Accordingly, a parens patriae action based on a state’s inherent authority is based on the state’s inherent sovereign authority and state law, and is not “authorized by Federal law” within the exception under section 484.

CONCLUSION

For the reasons stated above, the judgment of the District Court should be affirmed.

Dated: New York, New York
May 26, 2006

H. Rodgin Cohen
Robinson B. Lacy
Adam Brebner
Keith Levenberg
SULLIVAN & CROMWELL LLP
125 Broad Street
New York, New York 10004
(212) 558-4000

*Attorneys for the Clearing House
Association, L.L.C.*

CERTIFICATE OF COMPLIANCE

I, Robinson B. Lacy, certify that foregoing Brief has been prepared in Microsoft Word, 14-point, Times New Roman type; that the total word count, excluding the corporate disclosure statement, table of contents, table of citations, and any certificates of counsel as determined using the word count tool in Microsoft Word is 13,849 words; and that it complies with Rule 32(a)(7)(B) of the Federal Rules of Civil Procedure.

Robinson B. Lacy

ANTI-VIRUS CERTIFICATION

Case Name: Clearing House v. Spitzer

Docket Number: 05-5996-cv(L), 05-6001-cv(CON)

I, Natasha R. Monell, hereby certify that the Appellee's Brief submitted in PDF form as an e-mail attachment to **briefs@ca2.uscourts.gov** in the above referenced case, was scanned using Norton Antivirus Professional Edition 2003 (with updated virus definition file as of 5/26/2006) and found to be VIRUS FREE.

Natasha R. Monell, Esq.
Staff Counsel
Record Press, Inc.

Dated: May 26, 2006