No. 05-1342

# In the Supreme Court of the United States

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

*v.*

WACHOVIA BANK, N.A., ET AL.

*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT*

**BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENTS**


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## QUESTIONS PRESENTED

1. Whether regulations issued by the Comptroller of the Currency under the National Bank Act, 12 U.S.C. 1 *et seq.*, preempt the application of state banking laws to an operating subsidiary of a national bank.

2. Whether the Tenth Amendment prohibits the Federal Government from preempting the application of state banking laws to an operating subsidiary of a national bank.

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## INTEREST OF THE UNITED STATES

The Comptroller of the Currency is the primary regulator of banks chartered under the National Bank Act, 12 U.S.C. 1 *et seq.* See *Nationsbank of N.C., N.A.* v. *Variable Annuity Life Ins. Co.*, 513 U.S. 251, 256-257 (1995). The Comptroller accordingly has an interest in assuring that national banks are able to exercise, subject to his supervision, the powers granted to them by the National Bank Act. In that capacity, the Comptroller has promulgated regulations prescribing the circumstances in which state laws regulating the conduct of banking activities by national banks and their operating subsidiaries are preempted by federal law. The United States has participated in cases involving the preemptive scope of the National Bank Act, see *Barnett Bank of Marion County, N.A.* v. *Nelson*, 517 U.S. 25 (1995), and the Court invited the

views of the United States concerning the preemption question at issue here in *Wachovia Bank, N.A.* v. *Burke*, petition for cert. pending, No. 05-431 (filed Sept. 30, 2005). Because the questions presented by this case concern the validity of the Comptroller's preemptive regulations, the United States has an interest in the outcome of this case.

## STATUTORY AND REGULATORY PROVISIONS INVOLVED

The pertinent statutory and regulatory provisions are set forth in an appendix to this brief. App., *infra*, 1a-16a.

## STATEMENT

1. The Office of the Comptroller of the Currency (OCC), a bureau within the Department of the Treasury, is responsible for administering the National Bank Act (the Act). 12 U.S.C. 1 *et seq*. The OCC's chief officer, the Comptroller of the Currency, is "charged by Congress with superintendence of national banks." *Nationsbank of N.C., N.A.* v. *Variable Annuity Life Ins. Co.*, 513 U.S. 251, 254 (1995).

a. The National Bank Act provides that national banks "shall have power" to engage in certain enumerated functions, 12 U.S.C. 24, and also grants national banks "all such incidental powers as shall be necessary to carry on the business of banking," 12 U.S.C. 24 Seventh. The "Comptroller bears primary responsibility for surveillance of 'the business of banking' authorized by § 24 Seventh," *Nationsbank*, 513 U.S. at 256, including the authority to define those "incidental powers" that are "necessary" for a national bank "to carry on the business of banking," 12 U.S.C. 24 Seventh; see *Nationsbank*, 513 U.S. at 258-260, 264. With respect to the "grants of both enumerated and incidental 'powers' to national banks" under 12 U.S.C. 24 Seventh, the "grants of authority [are] not normally limited by, but rather ordinarily pre-empt[], contrary state law." *Barnett Bank of Marion County, N.A.* v. *Nelson*, 517 U.S. 25, 32 (1995); see *id*. at 34.

The Comptroller has long recognized as one "incidental power[]" of a national bank the authority to perform banking functions through an "operating subsidiary." See 12 C.F.R. 5.34. An operating subsidiary is a subsidiary in which a national bank has a controlling interest, and that engages solely in activities "that are permissible for a national bank to engage in directly." 12 C.F.R. 5.34(e). An operating subsidiary conducts its functions "pursuant to the same authorization, terms and conditions that apply to the conduct of such activities by its parent national bank." 12 C.F.R. 5.34(e)(3); see 12 U.S.C. 24a(g)(3)(A). Operating subsidiaries are treated as consolidated with the parent bank for purposes of many statutory and regulatory provisions, including certain accounting and reporting requirements. See 12 C.F.R. 5.34(e)(4). The Comptroller supervises and examines operating subsidiaries to ensure that their conduct of national bank functions is consistent with applicable law and with safe and sound practices. See 12 C.F.R. 5.34(e)(3). Before establishing an operating subsidiary, a national bank generally must obtain approval from the Comptroller through a licensing process set forth in the regulations. See 12 C.F.R. 5.34(b) and (e)(5).

The rule that an operating subsidiary performs its functions "pursuant to the same * * * terms and conditions that apply to the conduct of such activities by its parent national bank," 12 C.F.R. 5.34(e)(3); see 12 U.S.C. 24a(g)(3)(A), addresses the extent to which the "terms and conditions" of state law apply to an operating subsidiary, *i.e.*, the "same" extent as they may be applied to the parent bank. Another regulation makes that even more explicit, stating: "Unless otherwise provided by Federal law or OCC regulation, State laws apply to national bank operating subsidiaries to the same extent that those laws apply to the parent national bank." 12 C.F.R. 7.4006.

b. The National Bank Act specifically authorizes national banks to engage in real estate lending activity. 12 U.S.C. 371

(national banks may "arrange, purchase or sell loans * * * secured by * * * real estate, subject to * * * such restrictions and requirements as the Comptroller * * * may prescribe"). The Comptroller, in exercising his rulemaking authority under that provision, has promulgated regulations "to set forth standards for real estate-related lending and associated activities by national banks." 12 C.F.R. 34.1(a). The regulations governing real estate lending activities explicitly apply both "to national banks and their operating subsidiaries." 12 C.F.R. 34.1(b). Those regulations provide that "a national bank may make real estate loans * * * without regard to state limitations concerning" a number of specifically enumerated subjects, including, of particular relevance, state laws concerning "[l]icensing" and "registration (except for purposes of service of process)." 12 C.F.R. 34.4(a)(1).

c. The National Bank Act preempts state law limitations on a national bank's exercise of "both enumerated and incidental 'powers,'" *Barnett Bank*, 517 U.S. at 32, and also generally prohibits state authorities from exercising "visitorial powers" over a national bank. 12 U.S.C. 484(a) ("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."). "Visitorial powers" encompass "[e]xamination of a [national] bank," "[i]nspection of a bank's books and records," "[r]egulation and supervision of activities authorized or permitted pursuant to federal banking law," and "[e]nforcing compliance with any applicable federal or state laws concerning those activities." 12 C.F.R. 7.4000(a)(2)(i)-(iv).

The Comptroller's regulations implementing Section 484(a) provide that, subject to specified exceptions, only the OCC or an OCC-authorized representative may exercise visitorial powers over national banks. 12 C.F.R. 7.4000(a). Accordingly, "[s]tate officials may not exercise visitorial powers with respect to national banks." *Ibid.* Because a national

bank's conduct of banking activities through an operating subsidiary is subject to the same terms and conditions of state law that would apply if the parent bank itself conducted the activity, 12 C.F.R. 5.34(e)(3), 7.4006, the limitations on state visitorial power over national banks established by Section 484(a) apply equally to the conduct of bank functions through an operating subsidiary. See 69 Fed. Reg. 1900-1901 (2004).

2. Respondent Wachovia Bank, N.A., is a national bank chartered by the OCC. Respondent Wachovia Mortgage Corporation, a North Carolina corporation, engages in the business of mortgage lending. Pet. 5; Pet. App. 4a.

From 1997 until 2003, Wachovia Mortgage was registered to conduct mortgage lending in Michigan. See Pet. 5. The pertinent Michigan laws require a mortgage lender, *inter alia*, to register with the State before conducting business there, to pay annual fees, to submit financial statements, and to retain documents for examination. See Pet. App. 2a n.1. Petitioner, the Commissioner of the Michigan Office of Insurance and Financial Services, administers Michigan's mortgage lending laws. Registered lenders are subject to petitioner's "general supervision and control," and she possesses authority to conduct examinations and investigations of registrants and to enforce applicable requirements against them. See Mich. Comp. Laws Ann. §§ 445.1661, 445.1665-445.1666 (West 2002); *id.* §§ 493.56b, 493.58-493.59, 493.62a (West 2005). State law also grants petitioner authority to investigate consumer complaints and take enforcement action if she believes that a complaint is not "being adequately pursued by the appropriate federal regulatory authority." *Id.* § 445.1663(2) (West 2002).

On January 1, 2003, Wachovia Mortgage became a wholly-owned subsidiary of Wachovia Bank. Wachovia Mortgage advised the State of Michigan that it was surrendering its mortgage lending registration in Michigan, in reliance on the principle that state-law limitations on its mortgage lending

activities are preempted by virtue of its status as an operating subsidiary of Wachovia Bank. Petitioner responded by advising that Wachovia Mortgage would no longer be authorized to conduct its mortgage lending business in Michigan. Pet. 7; Pet. App. 4a; J.A. 25a-27a, 47a-48a.

3. Respondents filed an action in the United States District Court for the Western District of Michigan, seeking declaratory and injunctive relief on the ground that the National Bank Act and the Comptroller's regulations preempt the application of the relevant Michigan mortgage lending regulations to an operating subsidiary. Pet. App. 14a; J.A. 14a-24a.

a. The district court granted summary judgment to respondents in relevant part. Pet. App. 14a-25a. Applying the two-step framework of *Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837 (1984), the court sustained the Comptroller's determination that an operating subsidiary's conduct of banking functions is subject to state law only to the extent that the parent bank would be if it performed the same functions. Pet. App. 18a-22a. The court also rejected petitioner's Tenth Amendment claim. *Id.* at 23a-24a.

b. The court of appeals affirmed. Pet. App. 1a-12a. Observing that a "pre-emptive regulation's force does not depend on express congressional authorization to displace state law," the court explained that the relevant question instead is "whether the Comptroller 'has exceeded [his] statutory authority or acted arbitrarily.'" *Id.* at 7a (quoting *Fidelity Fed. Sav. & Loan Ass'n* v. *De la Cuesta*, 458 U.S. 141, 154 (1982)). Applying the *Chevron* framework in conducting that inquiry, the court first concluded that "Congress has not spoken precisely on the issue" of the extent to which state laws may be applied to a national bank operating subsidiary. *Id.* at 8a. Turning to the second step of the *Chevron* framework, the court explained that the Comptroller's regulations "reflect the eminently reasonable conclusion that when a bank chooses to utilize the authority it is granted under federal law" to con-

duct its functions through an operating subsidiary, "it ought not be hindered by conflicting state regulations." *Id.* at 11a. Finally, the court rejected petitioner's argument under the Tenth Amendment. *Id.* at 12a.

## SUMMARY OF ARGUMENT

The Comptroller's regulations establish that state banking laws apply to the conduct of national bank functions through an operating subsidiary only to the extent that the laws would apply to the conduct of functions directly by the parent bank. 12 C.F.R. 5.34(e)(3), 7.4006. The regulations also establish that national banks may conduct real estate lending functions through an operating subsidiary without regard to state laws concerning licensing and registration. 12 C.F.R. 34.4(a)(1). Those regulations are valid and entitled to be given effect.

This Court has settled that the validity of a preemptive federal regulation does not rest on specific congressional authorization to displace state law. Rather, a preemptive regulation is valid as long as it is within the scope of the agency's delegated authority. See *Federal Fed. Sav. & Loan Ass'n* v. *De la Cuesta*, 458 U.S. 141 (1982). Here, the Comptroller undisputedly has authority under the National Bank Act to promulgate regulations carrying the force of law, and the relevant preemptive regulations were adopted in an exercise of that authority. Indeed, Congress has specifically recognized the Comptroller's authority to make preemption determinations under the Act. See 12 U.S.C. 43.

Contrary to petitioner's argument, Congress has not foreclosed the approach taken by the Comptroller's regulations. The Comptroller's exclusive visitorial authority over "national bank[s]," 12 U.S.C. 484(a), does not demonstrate a specific intention by Congress to foreclose the Comptroller from exercising exclusive visitorial authority over operating subsidiaries pursuant to separate statutory authority. The Comptroller's preemptive regulations do not rest on an interpretation of Section 484(a), but rather implement the Comptroller's

authority to define the scope of a national bank's "incidental powers," 12 U.S.C. 24 Seventh, and to adopt rules governing real estate lending activity, 12 U.S.C. 371(a).

The Comptroller's regulations represent a reasonable accommodation of policies committed to the agency by the Act. See *De la Cuesta*, 458 U.S. at 153-154. It is undisputed that the Comptroller acted reasonably in determining that national banks' incidental powers include the performance of banking functions through operating subsidiaries. The Comptroller also acted reasonably in the closely related determination that, insofar as a national bank elects to conduct its functions through an operating subsidiary, state law limitations will apply only to the extent that they would apply to the parent bank. Congress implicitly ratified that result in recognizing that the performance of functions through an operating subsidiary is subject to the "same terms and conditions" that would govern the conduct of the same functions directly by the parent bank. 12 U.S.C. 24a(g)(3)(A). The Comptroller's rules also reflect the settled principle that the grants of both enumerated and incidental powers to national banks ordinarily preempt any state law limitations. *Barnett Bank of Marion County, N.A.*, v. *Nelson*, 517 U.S. 25, 32 (1996).

Petitioner errs in arguing that a presumption against preemption weighs against giving effect to the Comptroller's regulations. That presumption has no application in an area in which there has been a significant federal presence from the outset, as is plainly the case with respect to regulation of national banks. Nor is there any merit to petitioner's contention that agency preemption determinations are categorically ineligible for judicial deference. That argument directly contradicts this Court's precedents, and overlooks agencies' unique expertise to assess whether displacement of state law is warranted in furtherance of a federal regulatory scheme.

Even aside from the preemptive effect of the Comptroller's regulations, the state laws at issue would be preempted

by the National Bank Act because they impair the exercise of a national bank's undisputed power to conduct its functions through an operating subsidiary. The Court has held that, where national banks are granted an express or incidental power by the National Bank Act, state law limitations on that power do not apply in the absence of congressional specification to that effect. *Barnett Bank*, 517 U.S. at 32-34.

## ARGUMENT

### I. THE COMPTROLLER'S REGULATIONS VALIDLY PREEMPT THE APPLICATION OF STATE BANKING LAWS TO AN OPERATING SUBSIDIARY

From its enactment, the National Bank Act has embodied the principle that "the States can exercise no control over" national banks, "nor in any wise affect their operation, except in so far as Congress may see proper to permit." *Farmers' & Mechanics Nat'l Bank* v. *Dearing*, 91 U.S. 29, 34 (1875). It is undisputed that the National Bank Act would preempt the application to a national bank of state laws of the type at issue here. It is also undisputed that a national bank's powers under the Act include the power to conduct its functions through an operating subsidiary.

Against that backdrop, the Comptroller reasonably determined that, when a national bank exercises its authority to conduct banking functions through an operating subsidiary, state banking laws apply only to the extent they would apply if the same functions were performed directly by the bank. The Comptroller also acted reasonably in determining that national banks may exercise through an operating subsidiary their express authority to engage in real estate lending without regard to state laws concerning licensing and registration. Those determinations by the Comptroller have been sustained, without dissent, by every court of appeals to address the issue. See Pet. App. 1a-12a; *National City Bank* v. *Turnbaugh*, 463 F.3d 325 (4th Cir. 2006); *Wachovia Bank*,

*N.A.* v. *Burke*, 414 F.3d 305 (2d Cir. 2005), petition for cert. pending, No. 05-431 (filed Sept. 30, 2005); *Wells Fargo Bank N.A.* v. *Boutris*, 419 F.3d 949 (9th Cir. 2005). This Court should reach the same conclusion.

### A. The Comptroller's Regulations Are A Reasonable Exercise Of His Authority Under The National Bank Act

It is long settled that "[f]ederal regulations have no less pre-emptive effect than federal statutes." *Fidelity Fed. Sav. & Loan Ass'n* v. *De la Cuesta*, 458 U.S. 141, 153 (1982); accord *United States* v. *Locke*, 529 U.S. 89, 109-110 (2000); *City of New York* v. *FCC*, 486 U.S. 57, 63-64 (1988); *Louisiana Pub. Serv. Comm'n* v. *FCC*, 476 U.S. 355, 369 (1986). As this Court has unanimously recognized, moreover, a "pre-emptive regulation's force does not depend on express congressional authorization to displace state law," and "a narrow focus on Congress' intent to supersede state law" is thus "misdirected." *City of New York*, 486 U.S. at 64 (quoting *De la Cuesta*, 458 U.S. at 154). "Instead, the correct focus is on the federal agency that seeks to displace state law and on the proper bounds of its lawful authority to take such action." *Ibid.* Consequently, "even in the area of pre-emption, if the agency's choice to pre-empt represents a reasonable accommodation of conflicting policies that were committed to the agency's care by statute," the Court will "not disturb it unless it appears from the statute or its legislative history that the accommodation is not one that Congress would have sanctioned." *Ibid.* (internal quotation marks and citation omitted); see *Capital Cities Cable, Inc.* v. *Crisp*, 467 U.S. 691, 700 (1984).

When reviewing preemptive regulations like those at issue here, the Court examines two questions: (i) whether the regulations are intended to preempt the state laws in question; and (ii) if so, whether the regulations are "within the scope of the [agency's] delegated authority." *De la Cuesta*, 458 U.S. at 154; see *City of New York*, 486 U.S. at 64; *Crisp*, 467 U.S. at

700. Here, the Comptroller's regulations plainly preempt the Michigan restrictions at issue, and are well within the Comptroller's statutory authority.

### *1. The Comptroller's regulations preempt application of the Michigan laws to an operating subsidiary*

Three separate regulations preempt application of the pertinent Michigan laws to a national bank's operating subsidiary. First, 12 C.F.R. 5.34(e)(3) provides that an "operating subsidiary conducts activities * * * pursuant to the same authorization, terms and conditions that apply to the conduct of such activities by its parent national bank." Accord 12 U.S.C. 24a(g)(3)(A). An integral aspect of the "terms and conditions" under which a national bank conducts its functions is the extent to which its operations are subject to state law. See 12 C.F.R. 7.4009(b). An operating subsidiary subject to a host of state regulations inapplicable to the parent bank could hardly be said to operate under the same terms and conditions. Therefore, the Comptroller reasonably construes Section 5.34(e)(3) to establish that an operating subsidiary conducts its activities subject only to the "same * * * terms and conditions" of state law as the parent national bank. See 66 Fed. Reg. 34,784, 34,788 (2001).

Second, the Comptroller expressly addressed the preemption issue in 12 C.F.R. 7.4006, which prescribes that, except as "otherwise provided by Federal law or OCC regulation, state laws apply to national bank operating subsidiaries to the same extent that those laws apply to the parent national bank." Because it is undisputed that Michigan's registration requirements and associated laws could not be applied to a national bank, Section 7.4006 prohibits application of those restrictions to an operating subsidiary.[1]

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[1] Petitioner suggests (Br. 32, 36) that the Comptroller did not intend Section 7.4006 to have preemptive force, but that the provision instead merely predicts how courts would rule on whether the National Bank Act preempts state law.

Finally, the Comptroller's regulations governing real estate lending separately establish that state laws like the registration requirements in issue cannot be applied to a national bank's conduct of mortgage lending functions through an operating subsidiary. The regulations provide that "a national bank may make real estate loans * * * without regard to state law limitations concerning" a number of specified subjects, including "[l]icensing and registration." 12 C.F.R. 34.4(a)(1). And the Comptroller expressly determined that the regulation's preemptive effect "applies to national banks and their operating subsidiaries." 12 C.F.R. 34.1(b).

***2. The Comptroller's regulations are a reasonable exercise of his delegated authority***

The Comptroller's preemptive regulations are well "within the scope of [his] delegated authority" under the Act. *De la Cuesta*, 458 U.S. at 154; see *City of New York*, 486 U.S. at 64, 66. In unanimously reaching that conclusion, the courts of appeals have found the applicable regulations to be valid under the two-step framework set forth in *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-

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The plain terms of the provision refute that reading. Petitioner's argument relies on the Comptroller's observations concerning whether Section 7.4006 would have federalism implications for purposes of Executive Order No. 13,132, 3 C.F.R. 206 (2000). The Comptroller stated that Section 7.4006 "*itself* does not effect preemption" for purposes of that Executive Order. 66 Fed. Reg. at 34,790 (emphasis added). That observation merely reflected the Comptroller's view that pre-existing law—in particular, 12 C.F.R. 5.34(e)(3)—*already* preempted state regulation of operating subsidiaries; Section 7.4006 was intended to "clarif[y]" that preemptive effect. 66 Fed. Reg. at 34,788. Any doubt concerning Section 7.4006's preemptive force is erased by the Comptroller's explanation that, even if Section 7.4006 *did* add to the scope of preemption under pre-existing law, the agency had complied with Executive Order No. 13,132. 66 Fed. Reg. 34,790. And any ambiguity on the matter would be beside the point in view of the Comptroller's present reaffirmation of Section 7.4006's preemptive effect. See *Auer* v. *Robbins*, 519 U.S. 452, 461-463 (1997).

845 (1984). See Pet. App. 7a; *Turnbaugh*, 463 F.3d at 331; *Burke*, 414 F.3d at 314-315; *Boutris*, 419 F.3d at 958-959.[2]

***a. The Comptroller promulgated the regulations pursuant to his authority to adopt binding rules***

i. This Court has held that an agency's regulations are binding under *Chevron* when, *inter alia*, "Congress delegated authority to the agency generally to make rules carrying the force of law" and "the agency interpretation * * * was promulgated in the exercise of that authority." *United States* v. *Mead Corp.*, 533 U.S. 218, 226-227 (2001). The Comptroller unquestionably possesses authority under the Act to promulgate binding regulations. See *Smiley* v. *Citibank (S.D.), N.A.*, 517 U.S. 735, 739 (1996); *Nationsbank of N.C., N.A.* v. *Variable Life Ins. Co.*, 513 U.S. 251, 256-257, 258-259 n.2 (1995). The Comptroller has general authority "to prescribe rules and regulations to carry out [his] responsibilities." 12 U.S.C. 93a. See also 12 U.S.C. 1, 26-27, 1818(b).

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[2] Where, as here, an agency acts under an explicit grant of authority to promulgate legislative rules having the force of law, "[s]uch legislative regulations" are generally "given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute." *Chevron*, 467 U.S. at 844. *Chevron* also explains that, when an agency exercises implicitly delegated authority to construe "a statutory scheme it is entrusted to administer," the agency's interpretation is binding as long as it is "a reasonable interpretation." *Ibid.* The latter inquiry parallels the approach taken by this Court in assessing whether an agency's preemptive regulations fall within the scope of its delegated statutory authority. Compare *Chevron*, 467 U.S. at 844-845 (quoting *United States* v. *Shimer*, 367 U.S. 374, 382-383 (1961)), with *Crisp*, 467 U.S. at 699-700 (same); *De la Cuesta*, 458 U.S. at 154 (same). Under both *Chevron*'s reasonableness framework and *De la Cuesta*, the question ultimately is whether the agency's rule reflects "a reasonable accommodation of conflicting polices * * * committed to the agency's care by the statute" or instead is "not one that Congress would have sanctioned." *Chevron*, 467 U.S. at 845; accord *Crisp*, 467 U.S. at 700; *De la Cuesta*, 458 U.S. at 154. The Comptroller's preemptive regulations clearly satisfy that reasonableness test, and *a fortiori* would satisfy the arbitrary-and-capricious test generally applied to legislative regulations.

Of particular significance, the Comptroller possesses authority to define the scope of a national bank's "incidental powers" under 12 U.S.C. 24 Seventh, see *Nationsbank*, 513 U.S. at 256-257, 258-259 n.2, including the power to conduct banking functions through an operating subsidiary. The Comptroller relied on that authority in promulgating 12 C.F.R. 5.34(e)(3) and 7.4006. See 12 C.F.R. 5.34(a); 66 Fed. Reg. at 8181. The Comptroller also has express authority to adopt regulations governing the conduct of real estate lending activity. 12 U.S.C. 371(a). The Comptroller invoked that authority in prescribing that national banks and operating subsidiaries may engage in real estate lending without regard to state laws concerning, *inter alia*, licensing and registration. 12 C.F.R. 34.4(a)(1); see 69 Fed. Reg. at 1905.

The relevant preemptive regulations thus were promulgated in an exercise of the Comptroller's authority to establish rules carrying the force of law. See *Mead*, 533 U.S. at 227. Each of the regulations was adopted pursuant to notice-and-comment rulemaking procedures, see 65 Fed. Reg. 12,911 (2000) (12 C.F.R. 5.34(e)(3)); 66 Fed. Reg. at 34,792 (12 C.F.R. 7.4006); 69 Fed. Reg. at 1917 (12 C.F.R. 34.4), which is "significant * * * in pointing to *Chevron* authority," *Mead*, 533 U.S. at 231. The plain terms of the preemptive regulations further confirm that they are intended to establish binding rules. See 12 C.F.R. 5.34(e)(3), 7.4006, 34.4(a)(1).[3]

ii. Petitioner does not deny the Comptroller's settled authority to adopt rules carrying the force of law. He contends (Br. 33-34), however, that the Comptroller lacks power to promulgate preemptive rules like those at issue here because the general conferral of rulemaking authority in 12 U.S.C. 93a

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[3] While the formality of the regulations at issue here strengthens the case for deference, the Court has recognized that the Comptroller's administration of the National Bank Act merits *Chevron* deference even in the absence of "administrative formality" such as notice-and-comment rulemaking. *Mead*, 533 U.S. at 231 & n.13; see *Nationsbank*, 513 U.S. at 256-260.

does not include a "specific authorization" to preempt state law. That argument is irreconcilable with this Court's precedents, which conclusively establish that a "pre-emptive regulation's force does not depend on express congressional authorization to displace state law." *City of New York*, 486 U.S. at 64 (quoting *De la Cuesta*, 458 U.S. at 154).[4]

Even leaving aside the settled principle that no specific authorization to displace state law is required, any suggestion that the Comptroller's authority fails to encompass matters of preemption is refuted by 12 U.S.C. 43. That provision states that, "[b]efore issuing any opinion letter or interpretive rule * * * that concludes that Federal law preempts the application to a national bank of any State law regarding community investment, consumer protection, fair lending, or the establishment of intrastate branches," the Comptroller must adhere to certain notice-and-comment procedures, 12 U.S.C. 43(a), and must publish in the Federal Register any "opinion letter or interpretive rule concluding that Federal law preempts the application of [such] State law," 12 U.S.C. 43(b)(1). While the regulations at issue here are more than "interpretive rules" or "opinion letters" under Section 43—they instead are full-dress regulations issued under notice-and-comment rulemaking procedures—Section 43 reflects Congress's recognition of the Comptroller's ample authority to preempt state law.

Section 43 also confirms that the Comptroller's exercise of authority to preempt state law is subject to congressional oversight and is a matter that Congress has addressed. In

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[4] Petitioner's cramped reading of Section 93a is groundless in any event. Section 93a grants the Comptroller broad authority "to prescribe rules and regulations to carry out [his] responsibilities." 12 U.S.C. 93a. That grant of authority encompasses any statute administered by the Comptroller, and the breadth of the Comptroller's rulemaking authority is made clear when it is juxtaposed against the specific exclusions set forth in the provision, *i.e.*, for branching and "securities activities of National Banks." *Ibid.*; see *Conference of State Bank Supervisors* v. *Conover*, 710 F.2d 878, 885 (D.C. Cir. 1983).

this context, accordingly, there is all the more reason to apply the settled principle that a grant of rulemaking authority to an agency contains no carve-out for matters of preemption. See, *e.g.*, *City of New York*, 486 U.S. at 64; *De la Cuesta*, 458 U.S. at 153-154. Indeed, in addition to Section 43, Congress also enacted 15 U.S.C. 6714, which provides that, in a conflict between state authorities and the Comptroller on whether "any insurance sales or solicitation activity is properly treated as preempted under Federal law," a reviewing court should decide the issue "without unequal deference" to the Comptroller's views. 15 U.S.C. 6714(a) and (e). Congress specified that Section 6714's prohibition against giving the Comptroller "unequal deference" does not apply—and that the Comptroller thus should continue to receive deference—with respect to whether certain state insurance laws enacted before September 3, 1998, are preempted by federal law. 15 U.S.C. 6701(d)(2)(C)(i) (entitled "OCC deference"). Those provisions not only evidence Congress's authorization and active oversight of the Comptroller's preemption determinations, but they also show that, when Congress intends a departure from normal principles of judicial deference to those determinations, Congress says so explicitly.

***b. Congress has not directly addressed the preemption rules that apply to operating subsidiaries***

The threshold question under *Chevron* and *De la Cuesta* is whether Congress has spoken directly to the issue addressed by the agency—here, the extent to which state banking regulations apply to the conduct of banking functions through an operating subsidiary. The answer to that question is clear: Congress has not specifically addressed the issue.

Petitioner contends (Br. 12-16) that Congress specifically addressed the issue in 12 U.S.C. 484(a), which addresses visitorial powers over national banks. Petitioner notes that Section 484(a) by terms establishes the Comptroller's exclu-

sive visitorial authority only with respect to a "national bank," and infers that the Comptroller therefore lacks authority to preempt state regulation of operating subsidiaries. Visitorial powers, however, principally concern the supervision and enforcement—through investigations and the like—of applicable state and federal restrictions, see 12 C.F.R. 7.4000(a)(2)(i)-(iv), not the question whether such restrictions apply in the first place. In adopting the preemptive regulations at issue, the Comptroller did not purport to construe or apply the term "national bank" in 12 U.S.C. 484(a). The Comptroller instead grounded the regulations on his authority over national banks' incidental powers, 12 U.S.C. 24 Seventh, and over their conduct of real estate lending functions, 12 U.S.C. 371(a). The regulations thus bar application of the Michigan registration requirements to an operating subsidiary entirely apart from any questions concerning the scope of Section 484(a). See, *e.g.*, 12 C.F.R. 34.4(a)(1).

With respect to visitorial powers, moreover, the Comptroller validly concluded that, by operation of 12 C.F.R. 7.4006, Section 484(a)'s limitations on state visitorial authority apply to an operating subsidiary. See 69 Fed. Reg. at 1900-1901. That conclusion is not at odds with Section 484(a)'s reference to a "national bank." That reference does not dictate that state authorities—who otherwise lack visitorial powers over national bank operations—must be given visitorial authority over national bank functions whenever a bank exercises its federal right to perform those functions through an operating subsidiary. Section 484(a) was enacted in 1864 in the original National Bank Act, and has remained materially unchanged. See Act of June 3, 1864, ch. 106, § 54, 13 Stat. 116. It was not until one century later that the Comptroller first promulgated regulations recognizing national banks' power to perform their functions through an operating subsidiary. See 31 Fed. Reg. 11,459 (1966). The reference to a "national bank" in Section 484(a) thus could not have been intended to foreclose the

Comptroller from applying the provision's protections to the conduct of national bank functions through an "operating subsidiary," a concept that did not exist when Section 484(a) was enacted. Congress simply did not speak to the question whether, or to what extent, state registration requirements may be applied to an operating subsidiary.

Petitioner also errs in relying (Br. 13-14) on the term "affiliate" in 12 U.S.C. 481. Section 481 does not address the exercise of state visitorial authority over a national bank "affiliate." And whatever may be the implications of Section 481 for state visitorial authority over an "affiliate," Congress's use of the general term "affiliate" in no way signals a specific intention concerning treatment of an operating subsidiary. An "affiliate" includes "any corporation" controlled by a national bank, including a subsidiary. 12 U.S.C. 221a(b). An operating subsidiary thus qualifies as an "affiliate." But an operating subsidiary may engage only in the business of banking as authorized by the National Bank Act, whereas other "affiliates" may engage in functions not authorized by the Act. Provisions generally addressing "affiliates" thus shed little light on the specific treatment of operating subsidiaries.[5]

***c. The Comptroller reasonably determined that the Michigan laws at issue should not apply to an operating subsidiary***

The final question under *De la Cuesta* and *Chevron* is whether the challenged regulations represent a reasonable accommodation of policies committed to the agency. See *De*

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[5] Contrary to petitioner's argument (Br. 16-17), nothing in the Alternative Mortgage Transaction Parity Act of 1982 (Parity Act), 12 U.S.C. 3801 *et seq.*, suggests that Congress has directly addressed the preemption rules that apply to operating subsidiaries. The Parity Act addresses issuance of adjustable-rate mortgage loans (ARM loans) by state-chartered housing creditors, but does not apply to national banks or their operating subsidiaries, which conduct all of their functions (including, as may be relevant, issuance of ARM loans) under the National Bank Act, not the Parity Act.

*la Cuesta*, 458 U.S. at 153-154; *Chevron*, 467 U.S. at 844-845. The Comptroller's regulations readily satisfy that standard.

i. Initially, petitioner does not dispute (Br. 21) that the Comptroller acted reasonably in determining that national banks' "incidental powers" under 12 U.S.C. 24 Seventh should include the performance of functions through an operating subsidiary The Comptroller has made clear since 1966 that national banks have that power. 12 C.F.R. 5.34; 31 Fed. Reg. at 11,459. The operating subsidiary principle not only is long-standing, but also is an integral feature of banking practice that is not unique to national banks—it also applies to state member banks and federal savings associations under regulations adopted by the Federal Reserve Board and the Office of Thrift Supervision (OTS). See 12 C.F.R. 223.3(w), 225.2(e)(2), 250.141(c), 559.3(n). Indeed, some of this Court's decisions addressing national bank functions have involved operating subsidiaries. See *Nationsbank*, 513 U.S. at 254; *Clarke* v. *Securities Indus. Ass'n*, 479 U.S. 388, 390-391 (1987).

The Comptroller explained the basis for enabling the use of operating subsidiaries when first recognizing that power:

> The use of [operating subsidiaries] provides national banks with additional options in structuring their businesses. National banks may desire to exercise such option for many reasons, including controlling operations costs, improving effectiveness of supervision, more accurate determination of profits, decentralizing management decisions or separating particular operations of the bank from other operations.

31 Fed. Reg. at 11,460. The use of an operating subsidiary can "enhance the safety and soundness of conducting new activities by distinguishing the subsidiary's activities from those of the parent bank (as a legal matter) and allowing more focused management and monitoring." 61 Fed. Reg. at 60,354. For instance, an operating subsidiary can enable

maintenance of distinct compensation schemes or specialized business standards; promote branding under separate corporate names; facilitate the sale or purchase of a business unit as a distinct subsidiary; permit regulators in a particular industry (*i.e.*, securities or insurance) to examine the regulated functions in a subsidiary without exposing other bank operations; and allow control of risks and liabilities associated with distinct functions.

ii. The Comptroller's reasonable determination to afford national banks the power to perform banking functions through an operating subsidiary bears a "close and logical" connection to the determination that state laws are preempted with respect to an operating subsidiary to the same extent as with respect to the parent bank. *Boutris*, 419 F.3d at 962. Indeed, Congress implicitly ratified that result when it enacted 12 U.S.C. 24a(g)(3)(A) as part of the Gramm-Leach-Bliley Act (GLBA), Pub. L. No. 106-102, § 121(a)(2), 113 Stat. 1378. That provision confirms Congress's understanding that, when a national bank controls a subsidiary that "engages solely in activities that national banks are permitted to engage in directly"—*i.e.*, an operating subsidiary—the activities will be "conducted subject to the same terms and conditions that govern the conduct of such activities by national banks." 12 U.S.C. 24a(g)(3)(A); see also 12 U.S.C. 24a(a)(2)(A)(ii) (authorizing national bank to control a "financial subsidiary," which may engage, in part, in "activities that are permitted for national banks to engage in directly (subject to the same terms and conditions that govern the conduct of the activities by a national bank)"). Congress's understanding that the exercise of national bank functions through an operating subsidiary would be subject to the "same terms and conditions that govern the conduct of such activities" by the parent bank, 12 U.S.C. 24a(g)(3)(A), fortifies the reasonableness of the Comptroller's determination that an operating subsidiary should be subject only to the same terms and conditions of

state law as the parent bank. See 12 C.F.R. 5.34(e)(3), 7.4006.[6]

The reasonableness of the Comptroller's determination is further confirmed by the history and context of the National Bank Act. With particular respect to "grants of both enumerated and incidental 'powers' to national banks," there is a settled "history * * * of interpreting" the "grants of authority [as] not normally limited by, but rather ordinarily preempting, contrary state law." *Barnett Bank of Marion County, N.A.*, v. *Nelson*, 517 U.S. 25, 32 (1996). Against that background, it was entirely reasonable for the Comptroller to conclude that, when a national bank exercises its power to conduct banking functions through an operating subsidiary, the performance of those functions should no more be constrained by state law than if conducted by the parent bank. See *id.* at 34; see also 12 C.F.R. 559.3(n)(3) (OTS regulation reaching same conclusion for operating subsidiaries of federal savings associations).

By contrast, subjecting an operating subsidiary to state regulations that could not be applied to the parent bank would impair a national bank's exercise of its longstanding authority to conduct its functions through an operating subsidiary, potentially deterring the bank from realizing the efficiencies that could be afforded thereby. As the Comptroller explained:

> The application of multiple, often unpredictable, different state or local restrictions and requirements prevent [national banks] from operating in the manner authorized under Federal law, is costly and burdensome, interferes with their ability to plan their business and manage their risks, and subjects them to uncertain liabilities and poten-

[6] The Senate Report on GLBA explained that, "[f]or at least 30 years, national banks have been authorized to invest in operating subsidiaries that are engaged only in activities that national banks may engage in directly," and "[n]othing in [GLBA] is intended to affect [that] authority." S. Rep. No. 44, 106th Cong., 1st Sess. 8 (1999).

> tial exposure. In some cases, this deters them from making certain products available in certain jurisdictions.

69 Fed. Reg. at 1908. The Comptroller thus issued the regulations "in furtherance of [his] 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." *Ibid.*

For those reasons, the Comptroller's preemptive regulations "represent[] a reasonable accommodation of conflicting policies that were committed to the agency's care by statute." *Chevron*, 467 U.S. at 845 (citation omitted); *De la Cuesta*, 458 U.S. at 154. They therefore should be given effect.[7]

#### *3. Petitioner's arguments for declining to give effect to the Comptroller's regulations are without merit*

##### *a. Any presumption of non-preemption is inapplicable in the context of this case*

Petitioner errs in arguing (Br. 25-26) that giving effect to the Comptroller's regulations would conflict with a "presumption against preemption." First, an " 'assumption' of nonpreemption is not triggered when the State regulates in an area in which there has been a history of a significant federal presence." *Locke*, 529 U.S. at 108. Regulation of national banks is quintessentially such an area. Soon after the National Bank Act was enacted, the Court explained that the "spirit of all the legislation" is that "National banks have been National favor-

[7] Contrary to petitioner's argument (Br. 17-20), the Comptroller's regulations do not impermissibly disregard principles of corporate separateness. Rather, the Comptroller has reasonably concluded that an operating subsidiary affords "a convenient and useful form for conducting activities that the parent bank could conduct directly," 66 Fed. Reg. at 34,788, and that the federal entitlement to conduct federally authorized functions through an operating subsidiary should not be unduly impaired by state law.

ites," and it "could not have been intended * * * to expose them to the hazard of unfriendly legislation by the States." *Tiffany* v. *National Bank*, 85 U.S. (18 Wall.) 409, 413 (1874). Indeed, this Court has recognized that the "grants of both enumerated and incidental 'powers' to national banks" involve a presumption in *favor* of preemption, in that those grants are "not normally limited by, but rather ordinarily pre-empt[], contrary state law." *Barnett Bank*, 517 U.S. at 32.

More generally, the Court has explained that the presumption against preemption may apply "when a controversy concerns *not* the scope of the Federal Government's authority to displace state action, but rather *whether* a given state authority conflicts with, and thus has been displaced by," federal law. *New York* v. *FERC*, 535 U.S. 1, 17-18 (2002) (emphasis added). Accordingly, in a case like this one involving a clearly preemptive federal regulation and a clearly preempted state law, the relevant legal question concerns only "the rule that a federal agency may pre-empt state law only when and if it is acting within the scope of its congressionally delegated authority," and the "case does not involve a presumption against pre-emption." *Id.* at 18 (internal quotation marks and citation omitted). The Court instead "must interpret the statute to determine whether Congress has given [the agency] the power to act as it has," and must "do so without any presumption one way or the other." *Ibid.*; see *Conover*, 710 F.2d at 882. As detailed above, the Comptroller has clearly acted within his delegated authority here.

***b. There is no basis for categorically excepting preemptive regulations from deference under* Chevron**

Petitioner asserts (Br. 31-35) that agency rules preempting state laws are categorically ineligible for analysis under principles of deference recognized in *Chevron*. Petitioner's argument is squarely at odds with the *De la Cuesta* line of cases, but she suggests (Br. 34) that this Court has departed

from *De la Cuesta* in its post-*Chevron* decisions. To the contrary, however, the Court unanimously reaffirmed *De la Cuesta* in its post-*Chevron* decision in *City of New York* v. *FCC*, *supra*; see also *New York* v. *FERC*, 535 U.S. at 18-21. None of the post-*Chevron* decisions cited by petitioner calls into question the applicability of the *De la Cuesta* framework when examining an expressly preemptive regulation adopted in the exercise of an agency's delegated authority.[8]

Petitioner argues (Br. 32-33) that *Chevron* should not apply to preemptive regulations because the question whether state laws conflict with a federal regulatory scheme so as to warrant preemption is better suited to resolution by a court than an agency. The *De la Cuesta* line of cases is rooted in precisely the opposite conclusion, however, and with good reason. When an agency concludes, in an exercise of delegated *policymaking* authority, that displacement of state law is warranted in furtherance of a federal statute that it is entrusted to administer, the agency is acting within the core of its expertise. *E.g.*, *Medtronic*, *Inc.* v. *Lohr*, 518 U.S. 470, 496

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[8] Petitioner relies (Br. 34) on *Geier* v. *American Honda Motor Co.*, 529 U.S. 861 (2000), *Medtronic, Inc.* v. *Lohr*, 518 U.S. 470 (1996), and *Louisiana Public Service Comm'n*, *supra*. *Geier*, however, raised a question of implied conflict preemption and thus involved no expressly preemptive regulation, a distinction emphasized by the dissent in *Geier* as a reason to decline to find preemption in that case. 529 U.S. at 906 (Stevens, J., dissenting). *Medtronic* raised a question of statutory rather than regulatory preemption, and the agency construed the statute as *not* giving rise to preemption, a view to which the Court attached "substantial weight." 518 U.S. at 496 (citing *Chevron*). In *Louisiana Public Service Comm'n*, the Court reaffirmed the *De la Cuesta* framework, but concluded that the FCC's preemptive order exceeded the scope of its authority. 476 U.S. at 368-376. Petitioner also relies (Br. 31) on the Court's statement in *Smiley* that it would "assume (*without deciding*)" that "the question of *whether* a statute is pre-emptive * * * must always be decided *de novo* by the courts." 517 U.S. at 744 (first emphasis added). That statement is obviously not a holding, and in any event is addressed to an agency's assessment of whether a *statute* gives rise to preemption, not to a preemptive *regulation* adopted in an exercise of delegated authority.

(1996) ("agency is uniquely qualified to determine whether a particular form of state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress'") (quoting *Hines* v. *Davidowitz*, 312 U.S. 52, 67 (1941)); *id.* at 506 (Breyer, J., concurring) (agency has "special understanding of * * * whether (or the extent to which) state requirements may interfere with federal objectives"); *City of New York*, 486 U.S. at 69; *Hillsborough County* v. *Automated Med. Labs., Inc.*, 471 U.S. 707, 721 (1985). Here, for instance, the Comptroller relied on the agency's "experience with the types of state laws that can materially affect and confine—and thus are inconsistent with—the exercise of national banks' real estate lending powers." 69 Fed. Reg. at 1911. There is thus no basis for categorically declining to apply normal principles of deference to an agency's determination that preemption is warranted as a matter of federal policy. See *City of New York*, 486 U.S. at 64. That is especially true with respect to preemption determinations by the Comptroller, as to which Congress has demonstrated full awareness and active oversight. See pp. 15-16, *supra*.

Of course, courts retain ultimate authority to ensure that an agency has acted within its delegated authority and that its preemption rules are reasonable in light of the statutory scheme. See *Louisiana Pub. Serv. Comm'n*, 476 U.S. at 368-376 (invalidating preemptive order as exceeding the scope of the agency's delegated authority). There is no basis in this case, however, for declining to give effect to the Comptroller's regulations on that ground. That is particularly so in light of the narrow scope of the preemption determinations at issue. This case comes to the Court on the understanding that the relevant state laws could not be applied to a national bank; and the Comptroller has determined that those state laws also do not apply to an operating subsidiary. The Court therefore need not address any questions concerning the threshold

question of preemption vis-a-vis the national bank, or the degree of deference owed to the Comptroller on that issue. As to the ensuing question of preemption vis-a-vis an operating subsidiary, a natural and necessary incident of the Comptroller's conceded authority to give national banks the power to perform functions through an operating subsidiary is the authority to define the contours of that power, including the applicability of any state law limitations.

***c. Petitioner's policy reasons for applying state law do not cast doubt on the Comptroller's regulations***

Petitioner argues that States should be permitted to apply their banking laws to operating subsidiaries because States have a substantial interest in protecting their citizens from abusive lending practices. Pet. Br. 5-6, 23-26. But petitioner does not dispute that the state laws at issue would not apply to real estate lending by a national bank itself, and the Comptroller has rejected any suggestion that the "likelihood of unsafe and unsound practices * * * are significantly greater when banks operate through subsidiary corporations." 31 Fed. Reg. at 11,460. Moreover, the Comptroller has found "no reason to believe that [abusive] practices are occurring in the national banking system to any significant degree." 69 Fed. Reg. at 1914. Insofar as abuses do occur in the national banking system, the OCC "has ample legal authority and resources to ensure that consumers are adequately protected." *Id.* at 1915. In any event, petitioner's policy concerns are beside the point. When a federal agency acting within its authority has concluded that preemption is warranted as a matter of federal policy, "it is neither [a court's] function, nor within [its] expertise, to evaluate the * * * soundness of the [agency's] approach." *De la Cuesta*, 458 U.S. at 169-170.

### B. The Michigan Laws Are Also Preempted By The National Bank Act

Even leaving aside the effect of the Comptroller's preemptive regulations, the Michigan laws are preempted by the National Bank Act itself because they frustrate achievement of the Act's purposes. See *Barnett Bank*, 517 U.S. at 31-37. The Michigan laws impair the ability of a national bank to exercise its federal powers by conditioning the bank's ability to perform real estate lending through an operating subsidiary on obtaining registration with the State, and by subjecting the bank's conduct of real estate lending through an operating subsidiary to the State's investigative and enforcement machinery. The impairment is especially pronounced because what is ultimately at stake is the applicability of varying registration and enforcement regimes imposed by the 50 States. See *Easton* v. *Iowa*, 188 U.S. 220, 229 (1903) (federal legislation on national banks "has in view the erection of a system throughout the country, and independent, so far as powers conferred are concerned, of state legislation which, if permitted to be applicable, might impose limitations and restrictions as various and as numerous as the States").

Those restrictions are preempted by the National Bank Act under the rationale of this Court's decisions. In *Barnett Bank*, the Court held that a Florida law prohibiting national banks from selling insurance was preempted by a provision of the National Bank Act permitting national banks to sell insurance in small towns, 12 U.S.C. 92. Reviewing the history of the Act and the Court's decisions, the Court explained that, "where Congress has not expressly conditioned the grant of 'power'" to a national bank "upon a grant of state permission, the Court has ordinarily found that no such condition applies." 517 U.S. at 34. In this case, likewise, by virtue of the Act's grant of incidental powers to national banks, banks have the the power to conduct real estate lending through an operating

subsidiary, and there is no indication that exercise of that power is subject to state permission or state-imposed conditions. The conclusion that the Act preempts state-imposed conditions on exercise of that power is fortified by Congress's express understanding that operating subsidiaries conduct banking functions "subject to the same terms and conditions that govern the conduct of such activities by national banks." 12 U.S.C. 24a(g)(3)(A).

The Court has made clear that the Act preempts state conditions on the exercise of national bank powers even when the conditions fall short of an outright prohibition. In *Franklin National Bank* v. *New York*, 347 U.S. 373 (1954), the Court held that a New York law barring national banks from using the word "savings" in advertisements was preempted by the National Bank Act's authorization for banks to receive savings deposits. Although the New York law did not bar national banks from receiving savings deposits, the Court found a "clear conflict" with the National Bank Act on the ground that the law impaired a national bank's ability to advertise its savings products. *Id.* at 377-378. In this case, the Michigan laws similarly impose substantial conditions on the exercise of the power to conduct real estate lending through an operating subsidiary, including potentially preventing exercise of that power altogether by denying registration.

Finally, even aside from the question of *Chevron* deference, the agency's views on whether the statute effects preemption would be entitled to substantial weight. See *Geier* v. *American Honda Motor Co.*, 529 U.S. 861, 883 (2000); *Medtronic*, 518 U.S. at 496. The agency is uniquely positioned to assess whether state law limitations interfere with operation of the federal scheme, and the Comptroller relied on that expertise in concluding that state laws like the ones at issue here impair the exercise of authorized national bank powers. See p. 25, *supra*. The conclusion that the National Bank Act preempts application of the Michigan laws is confirmed by the

Comptroller's considered judgment that preemption is warranted to enable national banks to make full and efficient use of their statutory powers. See, *e.g.*, *First Nat'l Bank* v. *California*, 262 U.S. 366, 369 (1923) ("[A]ny attempt by a state to define [national banks'] duties or control the conduct of their affairs is void whenever," *inter alia*, it "impairs the efficiency of the bank to discharge the duties for which it was created.").

## II. THE TENTH AMENDMENT DOES NOT BAR THE FEDERAL GOVERNMENT FROM PREEMPTING APPLICATION OF STATE LAW TO AN OPERATING SUBSIDIARY

There is no merit to petitioner's novel argument (Br. 39-44) that the Federal Government is barred by the Tenth Amendment from preempting the application of state banking laws to an operating subsidiary. This Court has explained that, "[i]f a power is delegated to Congress in the Constitution, the Tenth Amendment expressly disclaims any reservation of that power to the States." *New York* v. *United States*, 505 U.S. 144, 156 (1992). Congress's commerce power plainly encompasses supervision of national banks, including their conduct of real estate lending activity. See *Citizens Bank* v. *Alafabco, Inc.*, 539 U.S. 52, 58 (2003) (per curiam). Contrary to petitioner's suggestion (Br. 39-40), this case does not implicate the anti-commandeering principle of *New York* v. *United States*, *supra*, and *Printz* v. *United States*, 521 U.S. 898 (1997). Barring Michigan from applying its mortgage lending laws to operating subsidiaries does not "compel[] state officers to execute federal laws," *id.* at 905, but instead has the reverse effect of reserving the banking regulation of operating subsidiaries primarily to federal officials and federal law.

This case thus concerns an ordinary exercise of the Federal Government's basic authority to preempt state law. Petitioner erroneously contends (Br. 43) that preempting application of the Michigan laws to an operating subsidiary would "transform State-chartered operating subsidiaries into 'crea-

tures of the federal government.'" Federal law routinely preempts the application of state laws to state-chartered corporations without raising any conceivable issue under the Tenth Amendment. *E.g.*, *Geier*, *supra* (state-chartered automobile manufacturer). Moreover, the Comptroller's regulations do not preempt application of *all* state laws, but only those laws that regulate the conduct of banking functions. See, *e.g.*, 12 C.F.R. 34.4(b)(1)-(9); 69 Fed. Reg. at 1912.

Insofar as petitioner's Tenth Amendment argument rests on the sovereign interests of an operating subsidiary's "chartering State[]" (Pet. Br. 43), it suffices to note that Wachovia Mortgage is a North Carolina corporation, not a Michigan corporation. See Pet. 5. With respect to an operating subsidiary's chartering state, moreover, nothing in the Act or the Comptroller's regulations displaces that state's laws governing the incorporation, governance, or dissolution of an operating subsidiary. For those reasons, petitioner's reliance on the Tenth Amendment—either directly or via the canon of constitutional doubt (Br. 27-28, 37-38)—is groundless.

## CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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## APPENDIX

## STATUTORY AND REGULATORY PROVISIONS INVOLVED

1. 12 U.S.C. 24 provides, in pertinent part:

**§ 24. Corporate powers of associations**

Upon duly making and filing articles of association and an organization certificate a national banking association shall become, as from the date of the execution of its organization certificate, a body corporate, and as such, and in the name designated in the organization certificate, it shall have power—

* * * * *

Seventh. To exercise by its board of directors or duly authorized officers or agents, subject to law, all such incidental powers as shall be necessary to carry on the business of banking; * * * .

2. 12 U.S.C. 24a provides, in pertinent part:

**§ 24a. Financial subsidiaries of national banks**

**(a) Authorization to conduct in subsidiaries certain activities that are financial in nature**

**(1) In general**

Subject to paragraph (2), a national bank may control a financial subsidiary, or hold an interest in a financial subsidiary.

**(2) Conditions and requirements**

A national bank may control a financial subsidiary, or hold an interest in a financial subsidiary, only if—

(A) the financial subsidiary engages only in—

(i) activities that are financial in nature or incidental to a financial activity pursuant to subsection (b) of this section; and

(ii) activities that are permitted for national banks to engage in directly (subject to the same terms and conditions that govern the conduct of the activities by a national bank);

* * * * *

**(g) Definitions**

For purposes of this section, the following definitions shall apply:

* * * * *

**(3) Financial subsidiary**

The term "financial subsidiary" means any company that is controlled by 1 or more insured depository institutions other than a subsidiary that—

(A) engages solely in activities that national banks are permitted to engage in directly and are conducted subject to the same terms and conditions that govern the conduct of such activities by national banks; or

* * * * *

3. 12 U.S.C. 43 provides, in pertinent part:

**§ 43. Interpretations concerning preemption of certain State laws**

**(a) Notice and opportunity for comment required**

Before issuing any opinion letter or interpretive rule, in response to a request or upon the agency's own motion, that concludes that Federal law preempts the application to a national bank of any State law regarding community reinvestment, consumer protection, fair lending, or the establishment of intrastate branches, or before making a determination under section 36(f)(1)(A)(ii) of this title, the appropriate Federal banking agency (as defined in section 1813 of this title) shall—

(1) publish in the Federal Register notice of the preemption or discrimination issue that the agency is considering (including a description of each State law at issue);

(2) give interested parties not less than 30 days to submit written comments; and

(3) in developing the final opinion letter or interpretive rule issued by the agency, or making any determination under section 36(f)(1)(A)(ii) of this title, consider any comments received.

**(b) Publication required**

The appropriate federal banking agency shall publish in the Federal Register—

(1) any final opinion letter or interpretive rule concluding that Federal law preempts the application of any State law regarding community reinvestment, consumer protection, fair lending, or establishment of intrastate branches to a national bank; and

(2) any determination under section 36(f)(1)(A)(ii) of this title.

**(c) Exceptions**

**(1) No new issue or significant basis**

This section shall not apply with respect to any opinion letter or interpretive rule that—

(A) raises issues of Federal preemption of State law that are essentially identical to those previously resolved by the courts or on which the agency has previously issued an opinion letter or interpretive rule; or

(B) responds to a request that contains no significant legal basis on which to make a preemption determination.

**(2) Judicial, legislative, or intragovernmental materials**

This section shall not apply with respect to materials prepared for use in judicial proceedings or submission to Congress or a Member of Congress, or for intragovernmental use.

**(3) Emergency**

The appropriate Federal banking agency may make exceptions to subsection (a) of this section if—

(A) the agency determines in writing that the exception is necessary to avoid a serious and imminent threat to the safety and soundness of any national bank; or

(B) the opinion letter or interpretive rule is issued in connection with—

(i) an acquisition of 1 or more banks in default or in danger of default (as such terms are defined in section 1813 of this title); or

(ii) an acquisition with respect to which the Federal Deposit Insurance Corporation provides assistance under section 1823(c) of this title.

4. 12 U.S.C. 93a provides, in pertinent part:

**§ 93a. Authority to prescribe rules and regulations**

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, except that the authority conferred by this section does not apply to section 36 of this title or to securities activities of National Banks under the Act commonly known as the "Glass-Steagall Act".

5. 12 U.S.C. 371 provides, in pertinent part:

**§ 371. Real estate loans**

**(a) Authorization to make real estate loans; orders, rules, and regulations of Comptroller of the Currency**

Any national banking association may make, arrange, purchase or sell loans or extensions of credit secured by liens on interests in real estate, subject to section 1828(o) of this title and such restrictions and requirements as the Comptroller of the Currency may prescribe by regulation or order.

* * * * *

6. 12 U.S.C. 481 provides, in pertinent part:

**§ 481. Appointment of examiners; examination of member banks, State banks, and trust companies; reports**

The Comptroller of the Currency, with the approval of the Secretary of the Treasury, shall appoint examiners who shall examine every national bank as often as the Comptroller of the Currency shall deem necessary. The examiner making the examination of any national bank shall have power to make a thorough examination of all the affairs of the bank and in doing so he shall have power to administer oaths and to examine any of the officers and agents thereof under oath and shall make a full and detailed report of the condition of said bank to the Comptroller of the Currency: *Provided,* That in making the examination of any national bank the examiners shall include such an examination of the affairs of all its affiliates other than member banks as shall be necessary to disclose fully the relations between such bank and such affiliates and the effect of such relations upon the affairs of such bank; and in the event of the refusal to give any information required in the course of the examination of any such affiliate, or in the event of the refusal to permit such examination, all the rights, privileges, and franchises of the bank shall be subject to forfeiture in accordance with sections 141, 222 to 225, 281 to 283, 285, 286, 501a and 502 of this title. The Comptroller of the Currency shall have power, and he is authorized, to publish the report of his examination of any national banking association or affiliate which shall not within one hundred and twenty days after notification of the recommendations or suggestions of the Comptroller, based on said examination, have complied with the same to his satisfaction. Ninety days' notice prior to such publicity shall be given to the bank or affiliate.

* * * * *

7. 12 U.S.C. 484 provides, in pertinent part:

**§ 484. Limitation on visitorial powers**

(a) 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.

(b) Notwithstanding subsection (a) of this section, lawfully authorized State auditors and examiners may, at reasonable times and upon reasonable notice to a bank, review its records solely to ensure compliance with applicable State unclaimed property or escheat laws upon reasonable cause to believe that the bank has failed to comply with such laws.

8. 15 U.S.C. 6701 provides, in pertinent part:

**§ 6701. Operation of state law**

* * * * *

**(d) Activities**

* * * * *

**(2) Insurance sales**

* * * * *

**(C) Limitations**

**(i) OCC deference**

Section 6714(e) of this title does not apply with respect to any State statute, regulation, order, interpretation, or other action regarding insurance sales, solicitation, or cross marketing activities described in subparagraph (A) that was issued,

adopted, or enacted before September 3, 1998, and that is not described in subparagraph (B).

* * * * *

9. 15 U.S.C. 6714 provides, in pertinent part:

**§ 6714. Expedited and equalized dispute resolution for Federal regulators**

**(a) Filing in court of appeals**

In the case of a regulatory conflict between a State insurance regulator and a Federal regulator regarding insurance issues, including whether a State law, rule, regulation, order, or interpretation regarding any insurance sales or solicitation activity is properly treated as preempted under Federal law, the Federal or State regulator may seek expedited judicial review of such determination by the United States Court of Appeals for the circuit in which the State is located or in the United States Court of Appeals for the District of Columbia Circuit by filing a petition for review in such court.

* * * * *

**(e) Standard of review**

The court shall decide a petition filed under this section based on its review on the merits of all questions presented under State and Federal law, including the nature of the product or activity and the history and purpose of its regulation under State and Federal law, without unequal deference.

10. 12 C.F.R. 5.34 provides, in pertinent part:

**§ 5.34. Operating subsidiaries.**

(a) *Authority.* 12 U.S.C. 24 (Seventh), 24a, 93a, 3101 *et seq.*

(b) *Licensing requirements.* A national bank must file a notice or application as prescribed in this section to acquire or establish an operating subsidiary, or to commence a new activity in an existing operating subsidiary.

* * * * *

(e) *Standards and requirements—*

(1) *Authorized activities.* A national bank may conduct in an operating subsidiary activities that are permissible for a national bank to engage in directly either as part of, or incidental to, the business of banking, as determined by the OCC, or otherwise under other statutory authority, including:

* * * * *

(3) *Examination and supervision.* An operating subsidiary conducts activities authorized under this section pursuant to the same authorization, terms and conditions that apply to the conduct of such activities by its parent national bank. If, upon examination, the OCC determines that the operating subsidiary is operating in violation of law, regulation, or written condition, or in an unsafe or unsound manner or otherwise threatens the safety or soundness of the bank, the OCC will direct the bank or operating subsidiary to take appropriate remedial action, which may include requiring the bank to divest or liquidate the operating subsidiary, or discontinue specified activities. OCC authority under this paragraph is subject to the limitations and requirements of section 45 of the Federal Deposit Insurance

Act (12 U.S.C. 1831v) and section 115 of the Gramm-Leach-Bliley Act (12 U.S.C. 1820a).

(4) *Consolidation of figures*—(i) *National banks.* Pertinent book figures of the parent national bank and its operating subsidiary shall be combined for the purpose of applying statutory or regulatory limitations when combination is needed to effect the intent of the statute or regulation, e.g., for purposes of 12 U.S.C. 56, 60, 84, and 371d.

* * * * *

(5) *Procedures*— (i) *Application required.* (A) Except as provided in paragraph (e)(5)(iv) or (e)(5)(vi) of this section, a national bank that intends to acquire or establish an operating subsidiary, or to perform a new activity in an existing operating subsidiary, must first submit an application to, and receive approval from, the OCC.

* * * * *

11. 12 C.F.R. 7.4000 provides, in pertinent part:

**§ 7.4000 Visitorial powers.**

(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. However, production of a bank's records (other than non-public OCC information under 12 CFR part 4, subpart C) may be required under normal judicial procedures.

(2) For purposes of this section, visitorial powers include:

(i) Examination of a bank;

(ii) Inspection of a bank's books and records;

(iii) Regulation and supervision of activities authorized or permitted pursuant to federal banking law; and

(iv) Enforcing compliance with any applicable federal or state laws concerning those activities.

(3) Unless otherwise provided by Federal law, the OCC has exclusive visitorial authority with respect to the content and conduct of activities authorized for national banks under Federal law.

(b) *Exceptions to the general rule*. Under 12 U.S.C. 484, the OCC's exclusive visitorial powers are subject to the following exceptions:

(1) *Exceptions authorized by Federal law*. National banks are subject to such visitorial powers as are provided by Federal law. Examples of laws vesting visitorial power in other governmental entities include laws authorizing state or other Federal officials to:

(i) Inspect the list of shareholders, provided that the official is authorized to assess taxes under state authority (12 U.S.C. 62; this section also authorizes inspection of the shareholder list by shareholders and creditors of a national bank);

(ii) Review, at reasonable times and upon reasonable notice to a bank, the bank's records solely to ensure compliance with applicable state unclaimed property or escheat laws upon reasonable cause to believe that the

bank has failed to comply with those laws (12 U.S.C. 484(b));

(iii) Verify payroll records for unemployment compensation purposes (26 U.S.C. 3305(c));

(iv) Ascertain the correctness of Federal tax returns (26 U.S.C. 7602);

(v) Enforce the Fair Labor Standards Act (29 U.S.C. 211); and

(vi) Functionally regulate certain activities, as provided under the Gramm-Leach-Bliley Act, Pub. L. 106-102, 113 Stat. 1338 (Nov. 12, 1999).

(2) *Exception for courts of justice.* National banks are subject to such visitorial powers as are vested in the courts of justice. This exception pertains to the powers inherent in the judiciary and does not grant state or other governmental authorities any right to inspect, superintend, direct, regulate or compel compliance by a national bank with respect to any law, regarding the content or conduct of activities authorized for national banks under Federal law.

(3) *Exception for Congress.* National banks are subject to such visitorial powers 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.

* * * * *

12. 12 C.F.R. 7.4006 provides, in pertinent part:

**§ 7.4006 Applicability of State law to national bank operating subsidiaries.**

Unless otherwise provided by Federal law or OCC regulation, State laws apply to national bank operating subsidiaries to the same extent that those laws apply to the parent national bank.

13. 12 C.F.R. 34.1 provides, in pertinent part:

**§ 34.1 Purpose and scope.**

(a) *Purpose*. The purpose of this part is to set forth standards for real estate-related lending and associated activities by national banks.

(b) *Scope*. This part applies to national banks and their operating subsidiaries as provided in 12 CFR 5.34. * * * .

* * * * *

14. 12 C.F.R. 34.4 provides, in pertinent part:

**§ 34.4 Applicability of state law.**

(a) Except where made applicable by Federal law, state laws that obstruct, impair, or condition a national bank's ability to fully exercise its Federally authorized real estate lending powers do not apply to national banks. Specifically, a national bank may make real estate loans under 12 U.S.C. 371 and § 34.3, without regard to state law limitations concerning:

(1) Licensing, registration (except for purposes of service of process), filings, or reports by creditors;

(2) The ability of a creditor to require or obtain private mortgage insurance, insurance for other collateral, or

other credit enhancements or risk mitigants, in furtherance of safe and sound banking practices;

(3) Loan-to-value ratios;

(4) The terms of credit, including schedule for repayment of principal and interest, amortization of loans, balance, payments due, minimum payments, or term to maturity of the loan, including the circumstances under which a loan may be called due and payable upon the passage of time or a specified event external to the loan;

(5) The aggregate amount of funds that may be loaned upon the security of real estate;

(6) Escrow accounts, impound accounts, and similar accounts;

(7) Security property, including leaseholds;

(8) Access to, and use of, credit reports;

(9) Disclosure and advertising, including laws requiring specific statements, information, or other content to be included in credit application forms, credit solicitations, billing statements, credit contracts, or other credit-related documents;

(10) Processing, origination, servicing, sale or purchase of, or investment or participation in, mortgages;

(11) Disbursements and repayments;

(12) Rates of interest on loans;[1]

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[1] The limitations on charges that comprise rates of interest on loans by national banks are determined under Federal law. *See* 12 U.S.C. 85 and 1735f-7a; 12 CFR 7.4001. State laws purporting to regulate national bank fees and charges that do not constitute interest are addressed in 12 CFR 7.4002.

(13) Due-on-sale clauses except to the extent provided in 12 U.S.C. 1701j-3 and 12 CFR part 591; and

(14) Covenants and restrictions that must be contained in a lease to qualify the leasehold as acceptable security for a real estate loan.

(b) State laws on the following subjects are not inconsistent with the real estate lending powers of national banks and apply to national banks to the extent that they only incidentally affect the exercise of national banks' real estate lending powers:

(1) Contracts;

(2) Torts;

(3) Criminal law;[2]

(4) Homestead laws specified in 12 U.S.C. 1462a(f);

(5) Rights to collect debts;

(6) Acquisition and transfer of real property;

(7) Taxation;

(8) Zoning; and

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[2] *But see* the distinction drawn by the Supreme Court in *Easton* v. *Iowa*, 188 U.S. 220, 238 (1903), between "crimes defined and punishable at common law or by the general statutes of a state and crimes and offences cognizable under the authority of the United States." The Court stated that "[u]ndoubtedly a state has the legitimate power to define and punish crimes by general laws applicable to all persons within its jurisdiction * * * . But it is without lawful power to make such special laws applicable to banks organized and operating under the laws of the United States." *Id.* at 239 (holding that Federal law governing the operations of national banks preempted a state criminal law prohibiting insolvent banks from accepting deposits).

(9) Any other law the effect of which the OCC determines to be incidental to the real estate lending operations of national banks or otherwise consistent with the powers and purposes set out in § 34.3(a).