No. 02-1620

In the Supreme Court of the United States

INDEPENDENT INSURANCE AGENTS AND BROKERS OF AMERICA, INC. AND NATIONAL ASSOCIATION OF PROFESSIONAL INSURANCE AGENTS, INC., PETITIONERS

v.

JOHN D. HAWKE, COMPTROLLER OF THE CURRENCY, ET AL.

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

BRIEF FOR THE RESPONDENTS IN OPPOSITION

THEODORE B. OLSON
Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
(202) 514–2217

JULIE L. WILLIAMS
First Senior Deputy Comptroller and Chief Counsel

DANIEL P. STIPANO
Deputy Chief Counsel

L. ROBERT GRIFFIN
Director of Litigation

DOUGLAS B. JORDAN
Senior Counsel
Office of the Comptroller of the Currency
Washington, D.C. 20219

QUESTIONS PRESENTED

1. Whether petitioners are proper parties to invoke this Court's certiorari jurisdiction to seek review of the merits of the decision of the court of appeals.

2. Whether federal law preempts certain West Virginia statutes to the extent that they prohibit national bank employees with lending responsibilities from soliciting the sale of insurance, prohibit national bank employees from making an insurance-related referral or solicitation of a loan applicant until after the bank has approved the loan, and require national banks to sell insurance products in an area that is separate and distinct from the bank's lending and deposit-taking activities.

PARTIES TO THE PROCEEDINGS BELOW

The petition does not provide a complete list of all parties to the proceedings in the court whose judgment is sought to be reviewed as required by Rule 14.1(b) of the Rules of this Court. The petition for review below was filed by Jane L. Cline, in her capacity as the Insurance Commissioner of the State of West Virginia, and by the State of West Virginia. Neither the Commissioner nor West Virginia has petitioned for this Court's review of the judgment below or given notice that they join in this petition for certiorari.

Petitioners Independent Insurance Agents and Brokers of America, Inc., and National Association of Professional Insurance Agents, Inc., are trade associations of insurance agents that appeared below as intervenors, over respondents' objection.

Respondents below were John D. Hawke, Jr., in his capacity as Comptroller of the Currency of the United States, and the Office of the Comptroller of the Currency (OCC), a bureau within the Treasury Department charged with the administration of the National Bank Act, 12 U.S.C. 21 *et seq.*, and other banking laws, including 12 U.S.C. 92. The OCC has broad authority over the chartering, supervision, and regulation of virtually every aspect of banks organized under the National Bank Act, including the authority to determine the nature and scope of statutorily authorized banking powers.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-19a) is not published in the *Federal Reporter* but is reprinted in 51 Fed. Appx. 392. The opinion letter of the Office of the Comptroller of the Currency (Pet. App. 30a-79a) is published at 66 Fed. Reg. 51,502.

JURISDICTION

The judgment of the court of appeals was entered on November 19, 2002. A petition for rehearing was denied on February 21, 2003 (Pet. App. 20a-21a). The petition for a writ of certiorari was filed on May 6, 2003. The jurisdiction of this Court is invoked under 28

U.S.C. 1254(1). In respondents' view, however, which is set forth more fully below, the Court lacks jurisdiction, because the court of appeals erred in permitting petitioners to intervene, and thus petitioners are not "part[ies]" within the meaning of Section 1254(1).

STATEMENT

1. Since 1916, national banks located in and doing business in towns with 5000 or fewer inhabitants have been authorized to act as insurance agents. 12 U.S.C. 92. Until 1999, national banks were otherwise authorized to engage in insurance sales only to the extent that such sales are part of or incidental to the business of banking. See 12 U.S.C. 24 (Seventh). In 1999, however, Congress enacted the Gramm-Leach-Bliley Act (GLBA), legislation that removed the historical barriers between the banking, insurance, and securities industries, and expanded the authority of national banks and their subsidiaries to sell insurance. See Pub. L. No. 106-102, 113 Stat. 1338.

Section 104(d)(2)(A) of the GLBA sets forth a general rule that limits state restrictions on insurance sales by depository institutions, including national banks. That provision states that, "[i]n accordance with the legal standards for preemption set forth in the decision of the Supreme Court of the United States in Barnett Bank of Marion County, N.A. v. Nelson, 517 U.S. 25 (1996), no State may * * * prevent or significantly interfere with the ability of a depository institution * * * to engage * * * in any insurance sales, solicitation, or crossmarketing activity." 15 U.S.C. 6701(d)(2)(A).

Section 304(a) of the GLBA provides for judicial resolution of controversies about the preemption of state insurance laws that arise between federal regulators, charged with supervising depository institu-

tions, and state regulators, who have traditionally overseen insurance sales activities. That provision states that:

> 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.

15 U.S.C. 6714(a).

2. In May 2000, the West Virginia Bankers Association asked the OCC for guidance on whether, in the OCC's opinion, certain provisions of the West Virginia Insurance Sales Consumer Protection Act, W. Va. Code §§ 33-11A-1 *et seq.* (2000), are preempted by federal law to the extent that they purport to apply to national banks. In response, the OCC published a notice in the Federal Register seeking public comment on whether federal law preempts the provisions. See 65 Fed. Reg. 35,420 (2000). Among the comments that the OCC received was a letter from the West Virginia Insurance Commissioner. The Commissioner expressed the view that federal law does not preempt four of the state provisions. The Commissioner also acknowledged that federal law does preempt the other three provisions at issue by noting his support for pending state legislation that would have repealed those provisions because of their preempted status. See Pet. App. 3a; C.A. App. 17-

28. Another comment letter, submitted on behalf of three insurance agent trade associations, including petitioners, argued that none of the provisions is preempted. Pet. App. 108a-178a.

On September 24, 2001, after reviewing the comments it had received, the OCC issued an opinion letter, which the OCC published in the Federal Register. 66 Fed. Reg. 51,502 (*reprinted in* Pet. App. 30a-79a). In determining the existence and degree of conflict between federal law authorizing insurance sales by national banks and state restrictions upon such activities, the OCC relied upon its long experience in overseeing national bank insurance sales activities. The OCC expressed the opinion that, of the seven state statutory provisions that it had analyzed, federal law did not preempt two provisions, preempted one provision only in part, and preempted four provisions in full. See Pet. App. 31a-32a. Three of the four provisions that the OCC found preempted were provisions that the West Virginia Commissioner had agreed were preempted. See C.A. App. 17, 25-28. It is those three provisions that are the subject of the petition before this Court. See Pet. 11-12.

3. a. Almost a year later, West Virginia Insurance Commissioner Cline (a successor to the Commissioner who had filed the comments with the OCC) filed a petition for review of the OCC's preemption opinion in the United States Court of Appeals for the Fourth Circuit. The Commissioner invoked the court of appeals' jurisdiction under Section 304(a) of the GLBA, which, as described above, authorizes the filing of a petition for review by a "Federal or State regulator" in cases of "regulatory conflict" between a state insurance regulator and a federal regulator regarding, among other things, whether federal law preempts state statutes

restricting insurance sales and solicitation activity. 15 U.S.C. 6714(a). After the petition was filed, petitioners, two trade associations of insurance agents, moved to intervene in the case. The OCC opposed the intervention because the only parties permitted by the text of the jurisdictional statute are federal regulators, such as the OCC, and state regulators, such as the Commissioner. The court of appeals granted petitioners' motion to intervene.

b. In an unpublished decision, the court of appeals dismissed the petition for review. Pet. App. 1a-19a. Although each member of the panel issued a separate opinion, two of the three judges agreed that federal law preempts the provisions of West Virginia law that the OCC had identified as preempted. *Id.* at 1a-9a (opinion of Gregory, J.); *id.* at 10a (Luttig, J., concurring in the judgment).

In his opinion, Judge Gregory first addressed whether the court had jurisdiction to resolve the preemption question. Pet. App. 3a-4a. He concluded that, under the circumstances of this case, the court had jurisdiction under Article III of the Constitution to review the dispute between the OCC and the West Virginia Insurance Commissioner. *Id.* at 4a. Judge Gregory reasoned that the OCC's opinion letter causes West Virginia an injury in fact because it is likely to encourage national banks to engage in activities that conflict with West Virginia's laws and thereby to undermine West Virginia's efforts to ensure compliance with those laws. *Ibid.*

On the merits, Judge Gregory rejected petitioners' and intervenors' arguments that the OCC lacked authority to issue the preemption opinion, and determined that the OCC has express authority to interpret the banking laws that empower national banks to

engage in insurance sales, solicitation and cross-marketing activity, and implicit authority to interpret provisions of the GLBA that relate to national banks. Pet. App. 5a-6a. Judge Gregory next concluded that, because the OCC does not have regulation writing authority under the GLBA, the OCC's preemption opinion letter is not entitled to deference of the kind described in *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), but rather is entitled to deference under *Skidmore* v. *Swift & Co.*, 323 U.S. 134 (1944), "to the extent that" it has the "power to persuade." Pet. App. 7a (quoting *Christensen* v. *Harris County*, 529 U.S. 576, 587 (2000)). Analyzing the substance of the OCC's preemption opinion, Judge Gregory concluded that the OCC had given the preemption issues "thorough" consideration, that the OCC's reasoning that certain of the West Virginia laws would "prevent or significantly interfere" with national bank insurance sales activity was "valid," and that the OCC's interpretation is therefore entitled to *Skidmore* deference because of its "persuasiveness." *Id.* at 8a-9a.

Judge Luttig concurred in the judgment. He agreed that federal law preempted the West Virginia provisions at issue, for the reasons stated in the OCC opinion letter and articulated by counsel for the OCC during oral argument. Pet. App. 10a.

Judge King dissented. Pet. App. 10a-19a. In his view, the court lacked jurisdiction to determine whether the West Virginia statutes are preempted. *Ibid.* Judge King reasoned that, because the OCC's preemption opinion is not entitled to *Chevron* deference and thus "has no legal effect," the regulatory conflict between the OCC and West Virginia does not present a

"case or controversy," as required by Article III of the Constitution. *Id.* at 12a-14a.

Petitioners filed a petition for rehearing or rehearing en banc. In response to the court's direction that the other parties respond to the petition, the Commissioner stated that she neither joined nor opposed the rehearing petition and would "remain silent." See Answer of Pet'rs in Resp. to Intervenors' Pet. for Rehearing or Rehearing En Banc 2.

ARGUMENT

Petitioners are not proper parties to invoke this Court's certiorari jurisdiction to seek review of the merits of the decision below. Moreover, the unpublished decision of the court of appeals is correct, and it does not conflict with any decision of this Court or of another court of appeals. This Court's review is therefore not warranted.

1. a. Because petitioners' intervention in this case was impermissible under Section 304(a) of the GLBA, 15 U.S.C. 6714(a), they are not proper parties to the underlying case, and this Court lacks jurisdiction to review the merits of the decision below at their behest. Only a person who is properly a "party" to the case in the court of appeals may invoke this Court's certiorari jurisdiction to review the merits of the court of appeals' decision. See 28 U.S.C. 1254(1). The decision of the court of appeals granting or denying a motion to intervene does not conclusively establish whether the person who sought intervention is a "party" authorized to seek review of the merits of the court of appeals' decision. See *Izumi Seimitsu Kogyo Kabushiki Kaisha* v. *U.S. Philips Corp.*, 510 U.S. 27, 30, 34 (1993) (per curiam) (unless Court reviews and reverses order denying intervention, the party denied intervention

cannot obtain review under 28 U.S.C. 1254(1) of the issues presented in the underlying case); *International Union, United Automobile Workers* v. *Scofield*, 382 U.S. 205, 209 (1965) (Court has certiorari jurisdiction if it determines that petitioner was improperly denied intervention by court of appeals). Just as a person who was denied intervention is properly a "party" entitled to seek this Court's review of the merits of the underlying case if the denial of intervention was erroneous, a person who was granted intervention is not properly a "party" entitled to seek this Court's review of the underlying merits if the grant of intervention was erroneous. Cf. *Diamond* v. *Charles*, 476 U.S. 54, 71 (1986) (O'Connor, J., joined by Burger, C.J., and Rehnquist, J., concurring in part and concurring in the judgment) (party who was not a proper intervenor in the court of appeals is not a "party" authorized to appeal under 28 U.S.C. 1254(2)).

That is the situation here. Section 304(a) of the GLBA specifies that the only entity that may seek judicial review under the expedited mechanism that it creates is a "Federal or State regulator." 15 U.S.C. 6714(a). Intervention by individually regulated entities or trade associations is not consistent with that narrowly limited procedure. The court of appeals' decision permitting petitioners to intervene as parties in the case, which the OCC opposed, was therefore incorrect. Because petitioners were not proper parties in the court of appeals, they are not authorized by 28 U.S.C. 1254(1) to invoke this Court's certiorari jurisdiction to review the merits of the case.

b. Even if petitioners could establish that they are "part[ies]" within the meaning of 28 U.S.C. 1254(1), their petition would not be an appropriate vehicle to resolve either the preemption question that they seek

to raise or the justiciability question that divided the court below. Section 304(a) of the GLBA creates a narrowly tailored judicial review mechanism to resolve "a regulatory conflict between a State insurance regulator and a Federal regulator." 15 U.S.C. 6714(a). If this Court is going to review either that judicial review mechanism or a substantive determination yielded by that mechanism, the Court should do so in a case that actually presents a regulatory dispute between the statutorily specified parties. Because the West Virginia Insurance Commissioner has not sought review of the judgment below, this is not such a case.

The West Virginia Commissioner's failure to seek this Court's review makes this case an inappropriate vehicle to address the issues raised by petitioners for still another reason: The Court would have to resolve a difficult standing question before it could reach the merits of the case. "[A]n intervenor's right to continue a suit in the absence of the party on whose side intervention was permitted is contingent upon a showing by the intervenor that he fulfills the requirements of Art. III." *Diamond*, 476 U.S. at 68. It is unclear whether petitioners could establish standing because West Virginia has apparently acquiesced in the decision below.

To establish Article III standing, petitioners would have to demonstrate not only that they are suffering injury in fact, but also that the injury is fairly traceable to respondents' actions and is likely to be redressed by a decision in petitioners' favor. See *Valley Forge Christian College* v. *Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 472 (1982). Petitioners, trade associations representing independent insurance agents, contend that they are suffering injury because the OCC's preemption opinion encourages

national banks to engage in insurance sales activities in which they are prohibited from engaging by the West Virginia laws that the court of appeals found to be preempted. See Supp. Br. of Intervenors 2-3. But in light of the West Virginia Insurance Commissioner's apparent acquiescence in the view that the relevant state law provisions are preempted (*i.e.*, unconstitutional by virtue of the Supremacy Clause), petitioners might have difficulty establishing that a favorable decision would result in enforcement of the statute to their benefit, and therefore that their injury is redressable. As this Court noted in *Diamond*, in holding that the intervenor in that case lacked standing to appeal, a State's failure to seek this Court's review of a lower court's decision "indicate[s] its acceptance of that decision, and its lack of interest in defending its own statute[s]." *Diamond*, 476 U.S. at 63. Accordingly, this Court should deny the petition for a writ of certiorari.[1]

2. The Court should also deny the petition because the decision below is correct and does not conflict with any decision of this Court or of another court of appeals.

a. The court of appeals correctly held that the three West Virginia statutes at issue in the petition are preempted to the extent that they purport to apply to national banks. One of the statutes prohibits financial institutions from using employees with lending responsibilities to solicit the sale of insurance. W. Va. Code

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[1] The Commissioner's failure to seek this Court's review is not the only indication that West Virginia is unlikely to enforce the statutes at issue against national banks. As noted above, the former Commissioner supported legislation to repeal the statutes. See p. 3, *supra*. In addition, the current Commissioner not only declined to seek this Court's review but also declined to endorse the petition for rehearing or rehearing en banc that petitioners filed in the court of appeals. See p. 7, *supra*.

§ 33-11A-6 (2000). Another prohibits bank employees from making an insurance-related referral or solicitation of a loan applicant until after the bank has approved the loan. *Id.* § 33-11A-10. The third requires financial institutions to sell insurance products in an area that is separate and distinct from lending and deposit-taking activities. *Id.* § 33-11A-14. As both the OCC and the court of appeals reasoned, those provisions are very disruptive to bank operations, increase bank operating costs and reduce bank efficiency, and significantly impair a bank's ability to solicit and sell insurance products. See Pet. App. 8a, 10a, 62a-66a, 76a-79a. The court of appeals therefore correctly concluded that the provisions would "prevent or significantly interfere with a bank's ability to engage in insurance sales" and solicitation as permitted by federal law and are thus preempted by federal law. Pet. App. 8a; see *id.* at 10a. See also 12 U.S.C. 92; 15 U.S.C. 6701(d)(2)(A); *Barnett Bank of Marion County, N.A.* v. *Nelson*, 517 U.S. 25 (1996).

b. Petitioners incorrectly contend (Pet. 14-17) that this Court's review is warranted to resolve a conflict between the unpublished decision of the court below and the First Circuit's decision in *Bowler* v. *Hawke*, 320 F.3d 59 (2003). Contrary to petitioners' contention, there is no conflict between the two decisions.

The two courts did not address the same legal issues. In *Bowler*, the First Circuit held that the court lacked statutory jurisdiction to review the OCC's opinion letter because there was no "regulatory conflict" within the meaning of Section 304(a) of the GLBA, 15 U.S.C. 6714(a). See 320 F.3d at 61 (*reprinted in* Pet. App. 23a-24a). In the instant case, no party raised with the court of appeals whether the dispute between the OCC and the West Virginia Insurance Commissioner was a

"regulatory conflict" within the meaning of 15 U.S.C. 6714(a), and none of the three opinions below addressed that question. See Pet. App. 22a-29a. There is therefore no conflict between the decision below and the decision of the First Circuit on that question.

The court of appeals here apparently concluded that the case presented a justiciable case or controversy under Article III, although only Judge Gregory and Judge King (in dissent) addressed that issue. See Pet. App. 3a-4a (opinion of Gregory, J.); *id.* at 10a (Luttig, J., concurring in the judgment); *id.* at 10a-19a (King, J., dissenting). The First Circuit in *Bowler*, however, did not address that constitutional question, because it concluded that there was no grant of *statutory* jurisdiction under the GLBA. See 320 F.3d at 61 (*reprinted in* Pet. App. 23a-24a). Although *Bowler*'s statutory holding was informed by the First Circuit's doubt whether a finding of statutory jurisdiction would be constitutional, the *Bowler* court avoided rather than resolved the constitutional question. See *id.* at 63-64 (*reprinted in* Pet. App. 29a). Thus, the decision in *Bowler* does not conflict with the resolution of that constitutional question by the court of appeals here. And, even if it did, petitioners argued in the court of appeals that there was a justiciable case or controversy, Supp. Br. of Intervenors 1-3, and they have not raised any jurisdictional issue in their petition for a writ of certiorari. See Pet. i.[2]

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[2] It is not completely clear that a majority of the court of appeals in this case in fact concluded that there was a case or controversy under Article III. Judge Luttig did not address that question, and the judgment of the court, in which he expressly concurred, was dismissal, rather than denial, of the petition for review. Pet. App. 10a. On the other hand, Judge King's opinion, which expressed the view that there was no case or controversy

The court below also held that the West Virginia statutes at issue were preempted by federal law, presumably because, as Judge Gregory explained, they would "prevent or significantly interfere" with national banks' solicitation and sale of insurance. See Pet. App. 7a-9a (opinion of Gregory, J.); *id.* at 10a (Luttig, J., concurring). But the court of appeals in *Bowler* did not pass on either the appropriate standard for preemption or whether the particular state laws at issue were in fact preempted. See 320 F.3d at 60-64 (*reprinted in* Pet. App. 22a-29a). Thus, there is also no conflict between the two decisions on the preemption question.

Petitioners argue that the two courts of appeals made conflicting statements about "whether the OCC has any interpretive authority under GLBA Section 104(d)(2) and thus whether an OCC letter opining that a state insurance law is preempted under that provision has any force or effect." Pet. 14. Any such conflicting statements would not warrant this Court's review, because this Court "reviews judgments, not statements in opinions." *Black* v. *Cutter Labs.*, 351 U.S. 292, 297 (1956). Moreover, there was no opinion for the court in this case, and Judge Gregory's statements about the extent of the OCC's interpretive authority under the GLBA and the legal effect of its opinion letter were not endorsed by Judge Luttig. Thus, the court below made no definitive statements on those issues. The statements of individuals judges in unpublished opinions do

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under Article III, was styled a dissent and was clearly premised on the belief that a majority of the court had concluded that there was a justiciable case or controversy. See *ibid.*; *id.* at 19a. The ambiguity of the holding of the court of appeals on this point is yet another reason why the court's unpublished disposition does not warrant this Court's review.

not provide a sufficient basis to justify this Court's plenary review.

In any event, Judge Gregory's statements that the OCC had authority to issue an opinion letter interpreting the GLBA (Pet. App. 5a) and that the letter was entitled deference under *Skidmore* v. *Swift & Co.*, 323 U.S. 134 (1944) (Pet. App. 7a), do not conflict with any statements by the First Circuit in *Bowler*. The First Circuit expressly refrained from "resolv[ing] whether the OCC's issuance of the opinion letter was *ultra vires*." 320 F.3d at 62 n.1 (*reprinted in* Pet. App. 27a). And, although the *Bowler* court stated that the OCC opinion letter "constitutes no more than informal agency guidance" and does not "carry[] the force of law" (320 F.3d at 62) (*reprinted in* Pet. App. 27a), that conclusion is fully consistent with Judge Gregory's conclusion that the opinion letter is entitled to *Skidmore* deference. See *Christensen* v. *Harris County*, 529 U.S. 576, 587 (2000) (holding that an "interpretation contained in an opinion letter, * * * which lack[s] the force of law," is "'entitled to respect' under [the Court's] decision in *Skidmore*"). Finally, it bears emphasis that the court of appeals' decision is unpublished and therefore could not, under any circumstance, create a split of binding authority with the First Circuit's *Bowler* decision.

c. Petitioners also err in contending (Pet. 18-23) that the decision of the court of appeals conflicts with this Court's decision in *Barnett*. Because there was no opinion for the court of appeals in this case, it is difficult to ascertain with certainty the reasoning behind the court's holding that the state laws at issue are preempted. But nothing in either the opinion of Judge Gregory or the concurring opinion of Judge Luttig conflicts with *Barnett*. On the contrary, Judge Gregory

concluded that the West Virginia statutes are preempted because they "prevent or significantly interfere" with a national bank's solicitation and sale of insurance, which is among the formulations that this Court used in *Barnett* to describe the threshold for preemption. Compare Pet. App. 8a with 517 U.S. at 33. Judge Luttig did not articulate what preemption standard he was applying, but stated only that he believed that the West Virginia laws are preempted for the reasons given by the OCC. Pet. App. 10a.

Petitioners' contention (Pet. 19-23) that the OCC's preemption analysis is inconsistent with *Barnett* is incorrect. The OCC's preemption analysis is fully consistent with that case. The OCC explained that the governing preemption standards are those "set forth in [this] Court's *Barnett* decision," which entail a determination whether the state laws at issue "prevent or significantly interfere" with, or otherwise stand as an obstacle to, the ability of national banks fully to exercise their powers. Pet. App. 46a-47a.

Although petitioners object (Pet. 19) to the OCC's conclusion (Pet. App. 47a) that a state law "'prevent[s] or significantly interfere[s] with a national bank's exercise of its powers" if it "'unlawfully encroach[es]' on the rights and privileges of national banks; * * * 'destroy[s] or hamper[s]' [their] functions; or * * * 'interfere[s] with or impair[s]' national banks' efficiency in performing authorized functions," that is precisely what this Court held in *Barnett*. See 517 U.S. at 33-34. It is petitioners' contention (Pet. 20-21) that preemption is limited to situations in which the challenged state law "incapacitates" national banks from exercising their powers—not the OCC's opinion letter—that is inconsistent with the Court's analysis in *Barnett*. *Barnett* applied ordinary conflict preemption

principles under which state law is preempted when it "stan[ds] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," not a standard of incapacitation. *Barnett*, 517 U.S. at 31 (quoting *Hines* v. *Davidowitz*, 312 U.S. 52, 67 (1941)).

d. Finally, petitioners are incorrect in arguing (Pet. 23-27) that the decision of the court of appeals conflicts with *Skidmore*. That argument is based on the mistaken premise that the court of appeals "fail[ed] to conduct its own independent analysis." Pet. 24. That premise is flawed for two reasons.

First, it is based on the erroneous view that Judge Gregory's opinion is the opinion of the court. Judge Gregory wrote only for himself, and Judge Luttig's opinion neither addressed whether the OCC was entitled to *Skidmore* deference nor applied the *Skidmore* standard to the OCC's opinion letter.

Second, Judge Gregory's opinion is fully consistent with *Skidmore*. Under *Skidmore*, an agency's opinion may only persuade, not control, a reviewing court, and the agency's power to persuade depends upon such factors as the thoroughness of its consideration, the validity of its reasoning, and the consistency of the action under review with other agency actions. *Skidmore*, 323 U.S. at 140. Here, Judge Gregory explained that he was persuaded by the thoroughness of the OCC's consideration and the validity of its reasoning. Pet. App. 8a-9a. Petitioners have not identified any lack of consistency in the OCC's approach to insurance preemption issues. Thus, no further review is warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

THEODORE B. OLSON
Solicitor General

JULIE L. WILLIAMS
First Senior Deputy Comptroller and Chief Counsel

DANIEL P. STIPANO
Deputy Chief Counsel

L. ROBERT GRIFFIN
Director of Litigation

DOUGLAS B. JORDAN
Senior Counsel
Office of the Comptroller of the Currency

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