No. 05-431

In the Supreme Court of the United States

JOHN P. BURKE, BANKING COMMISSIONER,
CONNECTICUT DEPARTMENT OF BANKING,
PETITIONER

v.

WACHOVIA BANK, N.A., ET AL.

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

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Whether regulations issued by the Comptroller of the Currency to implement the National Bank Act, 12 U.S.C. 21 *et seq.*, validly preempt the enforcement of state laws regulating mortgage lending activity by an operating subsidiary of a national bank.

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This brief is submitted in response to the order of this Court inviting the Solicitor General to express the views of the United States. In the view of the United States, the petition for a writ of certiorari should be denied.

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. 21 *et seq.*, and overseeing the national banking system. The OCC's chief officer, the Comptroller of the Currency, is authorized "to prescribe rules and regulations to carry out the responsibilities of the office." 12 U.S.C. 93a.

a. The National Bank Act generally preempts state regulation of national banks, *i.e.*, banks chartered under the Act. Specifically, the Act provides that "[n]o national bank shall be subject to any visitorial powers except as authorized by Fed-

eral law, vested in the courts of justice or such as shall be, or have been exercised or directed by Congress." 12 U.S.C. 484(a). The term "visitorial powers" in Section 484(a) encompasses "[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 certain exceptions, only the OCC or an OCC-authorized representative may exercise visitorial powers over national banks. 12 C.F.R. 7.4000(a). In particular, "[s]tate officials may not exercise visitorial powers with respect to national banks." *Ibid.*

b. The National Bank Act provides that national banks "shall have power" to exercise 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. "[T]he Comptroller bears primary responsibility for surveillance of 'the business of banking' authorized by § 24 Seventh," *Nationsbank of N.C., N.A.* v. *Variable Annuity Life Ins. Co.*, 513 U.S. 251, 256 (1995), including the authority to define "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.

The Comptroller has long recognized as one such "incidental power" the authority of a national bank to carry out its 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); *Wells Fargo Bank N.A.* v. *Boutris*, 419 F.3d 949, 957 (9th Cir. 2005). An operating

subsidiary exercises 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). Operating subsidiaries are treated as consolidated with the parent bank for purposes of applying many statutory and regulatory provisions, including various accounting and reporting requirements. See 12 C.F.R. 5.34(e)(4).

The rule that an operating subsidiary carries out 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), necessarily determines the extent to which the "terms and conditions" of state laws may be applied to an operating subsidiary. Reflecting that principle, the Comptroller has promulgated a regulation stating that, "[u]nless otherwise provided by Federal law or OCC regulation, State laws apply to national bank operating subsidiaries to the same extent that those laws apply to the parent national bank." 12 C.F.R. 7.4006.

c. The National Bank Act specifically authorizes national banks to engage in real estate lending activity. 12 U.S.C. 371(a) (national banks may "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"). The Comptroller, in exercising his 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 establish that, "[e]xcept 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 lend-

ing powers do not apply to national banks." 12 C.F.R. 34.4(a). The regulations specify that state "licensing" requirements are among the state laws that are inapplicable to national banks and operating subsidiaries. 12 C.F.R. 34.4(a)(1).

2. Respondent Wachovia Bank, N.A. (Wachovia Bank or the Bank), is a national bank chartered by the OCC. Respondent Wachovia Mortgage Company (Wachovia Mortgage), a North Carolina corporation, engages in the business of mortgage lending. In 1987, Wachovia Mortgage became licensed to conduct its business in Connecticut. Pet. App. A5. Connecticut statutes prohibit the conduct of first and secondary mortgage business without a state-issued license; require that licensees make their records available to the Connecticut Banking Commissioner on demand; and authorize the Commissioner to enforce those requirements, including through issuance of cease and desist orders. *Id.* at A5, A38.

On January 1, 2003, Wachovia Mortgage became a wholly owned operating subsidiary of Wachovia Bank. Pet. App. A5. Wachovia Mortgage then surrendered its Connecticut license, in reliance on the principle that state-law limitations on its mortgage lending activities were preempted by virtue of its status as an operating subsidiary of Wachovia Bank. *Id.* at A5-A6.[1] On February 24, 2003, petitioner, the Banking Commissioner of the State of Connecticut, issued a Notice of Intent to Issue a Cease and Desist Order against Wachovia Mortgage for engaging in the business of mortgage lending without a license. On March 31, 2003, Wachovia Mortgage entered into a stipulation with petitioner, pursuant to which

[1] Subject to certain exceptions, a national bank must obtain approval from the OCC before acquiring or establishing an operating subsidiary. See 12 C.F.R. 5.34(e)(5). In this case, Wachovia Bank had previously received OCC authorization to conduct real estate lending activities through an operating subsidiary, and that existing authorization applied to Wachovia Mortgage. See 12 C.F.R. 5.34(e)(5)(vi).

it agreed to apply for re-licensing while reserving its right to pursue legal action. *Id.* at A5-A6.

3. On April 25, 2003, respondents filed an action in the United States District Court for the District of Connecticut, seeking declaratory relief on the ground that the National Bank Act and the Comptroller's regulations preempt the enforcement of the relevant Connecticut banking laws against Wachovia Mortgage.[2]

a. The district court granted summary judgment in favor of respondents. Pet. App. A36-A58, A63. The court noted that petitioner had conceded that the Act and regulations would preempt application of the relevant Connecticut banking laws to Wachovia Bank. *Id.* at A44. Petitioner argued, however, that those laws could be enforced against the Bank's operating subsidiary, Wachovia Mortgage.

In rejecting that claim, the district court explained that any enforcement of the state banking laws against Wachovia Mortgage "seemingly creates a direct conflict with" 12 C.F.R. 7.4006, under which "State laws apply to national bank operating subsidiaries to the same extent that those laws apply to the parent national bank." Pet. App. A44. Applying the two-step framework of *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), the court sustained the Comptroller's regulatory determination that an operating subsidiary should be subject to state law only to the same extent as its parent national bank.

With respect to the first step of the *Chevron* analysis, the court explained that Congress had not specifically addressed the extent to which state laws may be applied to an operating

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[2] Respondents also filed a claim for injunctive relief under 42 U.S.C. 1983, asserting that they possessed federal rights under the National Bank Act and that petitioner's actions infringed those rights. The Section 1983 claims were ultimately resolved against respondents, see Pet. App. A28-A34, A61-A63, and those claims are not before this Court.

subsidiary. Pet. App. A47-A52. With respect to the second step, the court concluded that state regulation of activities conducted by national banks through their operating subsidiaries "could reasonably be conceived to have the same obstructive effect on national bank operations as * * * [if] directed at the bank itself." *Id.* at A55.

b. The court of appeals affirmed in pertinent part. Pet. App. A1-A28, A34. Observing that "[f]ederal regulations have no less pre-emptive effect than federal statutes," *id.* at A13 (quoting *Fidelity Fed. Sav. & Loan Ass'n* v. *de la Cuesta*, 458 U.S. 141, 153 (1982)), the court explained that petitioner had erroneously "attempt[ed] to frame the issue as whether Congress has expressly and clearly manifested an intent to preempt state visitorial power over operating subsidiaries." *Id.* at A15; see *id.* at A13. The "proper focus" instead, the court observed, "is on whether the agency * * * 'has exceeded [its] statutory authority or acted arbitrarily.'" *Ibid.* (quoting *de la Cuesta*, 458 U.S. at 154). Applying the *Chevron* framework, the court of appeals upheld the relevant regulations.

The court first explained that Congress had not addressed the extent to which state laws may be applied to a national bank's operating subsidiaries. Congress had thus "left open a gap concerning the treatment of * * * operating subsidiaries," and the "OCC has the authority to fill that gap by defining a national bank's incidental powers to include conducting the business of banking * * * through an operating subsidiary." Pet. App. A22.

The court next determined that the Comptroller had acted reasonably in concluding that state laws may be applied to an operating subsidiary only to the extent that those laws would apply to the parent national bank if it engaged in the same activities directly. The court reviewed the Comptroller's longstanding "policy judgment that national banks' use of operating subsidiaries as separately structured corporate

entities is desirable and * * * should not be hindered by state regulations," and concluded that the "OCC's well-explained policy judgment is reasonable and entitled to deference." Pet. App. A23, A24. The court explained that 12 C.F.R. 7.4006 "reflects [the OCC's] policy judgment about national banks' use of operating subsidiaries" by clarifying "that state laws apply to operating subsidiaries to the same extent that they apply to the parent national bank." Pet. App. A25. Wholly apart from 12 C.F.R. 7.4006, moreover, the court concluded that the Comptroller's regulations concerning real estate lending, 12 C.F.R. 34.1(b), 34.4, "independently support a finding of preemption in this case." Pet. App. A27.

ARGUMENT

The decision of the court of appeals is correct, and it does not conflict with the decisions of any other courts. Indeed, every lower court to consider the question presented has upheld the validity of the Comptroller's regulations governing the applicability of state laws to operating subsidiaries of national banks. Accordingly, the petition should be denied.

A. Every Court To Consider The Question Presented Has Correctly Sustained The Validity Of The Regulations

1. In addition to the court of appeals below, two other courts of appeals have rejected challenges to the Comptroller's regulations establishing that state laws may be enforced against an operating subsidiary only to the extent that those laws may be enforced against the parent national bank. See *Wachovia Bank, N.A.* v. *Watters*, 431 F.3d 556 (6th Cir. 2005), petition for cert. pending, No. 05-1342; *Wells Fargo Bank N.A.* v. *Boutris*, 419 F.3d 949 (9th Cir. 2005). No court has reached a contrary result. In view of the uniformity of the

decisions among the lower courts, there is no reason for this Court to grant certiorari.[3]

2. The courts of appeals that have addressed the issue have correctly upheld the Comptroller's regulations. It is settled that "[f]ederal regulations have no less preemptive effect than federal statutes." *de la Cuesta*, 458 U.S. at 153. Moreover, "[a] pre-emptive regulation's force does not depend on express congressional authorization to displace state law." *Id.* at 154. Rather, a federal regulation has preemptive force whenever (i) the agency intended to preempt the state laws at issue, and (ii) the regulations achieving that result are "within the scope of the [agency's] delegated authority." *Ibid.*; see *City of New York* v. *FCC*, 486 U.S. 57, 64 (1988).

a. With respect to the threshold question, the OCC's pertinent regulations plainly are intended to preempt the enforcement of state laws against an operating subsidiary. The Comptroller expressly addressed that issue in 12 C.F.R. 7.4006, which establishes 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." Petitioner suggests (Pet. 13-14) that the OCC did not intend for Section 7.4006 to have preemptive effect, but the plain terms of the provision refute that contention. And the courts below, as well as the other courts of appeals that have addressed Section 7.4006, have construed the provision as preemptive, in accordance with its express and unambiguous language. See

[3] The Fourth Circuit is currently considering the validity of the OCC's relevant regulations in an appeal from a district court decision that upheld those regulations. See *National City Bank* v. *Turnbaugh*, 367 F. Supp. 2d 805 (D. Md. 2005), appeal pending, No. 05-1647. The Second Circuit is currently considering an appeal from a district court decision ruling in favor of the OCC on related issues. *OCC* v. *Spitzer*, 396 F. Supp. 2d 383 (S.D.N.Y. 2005), appeal pending, No. 05-6001.

Pet. App. A25-A26, A44-A46; *Watters*, 431 F.3d at 559-560, 561, 562; *Boutris*, 419 F.3d at 957, 962-963.[4]

Aside from Section 7.4006, other OCC regulations independently establish that the relevant Connecticut laws may be applied to an operating subsidiary only insofar as those laws may be applied to the parent national bank. For instance, the regulations provide that an operating subsidiary conducts its activities "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). An integral aspect of the "terms and conditions" under which a national bank conducts its activities is the extent to which its operations are subject to state laws. See 12 C.F.R. 7.4009(b) ("state laws that obstruct, impair, or condition a national bank's ability to fully exercise its powers to conduct activities authorized under Federal law do not apply to national banks"). Under Sec-

[4] In arguing that Section 7.4006, despite its plain terms, is not preemptive, petitioner relies (Pet. 13-14) on the Comptroller's statements concerning whether the regulation would have federalism implications for purposes of Executive Order No. 13,132, 3 C.F.R. 206 (2000). See 66 Fed. Reg. 34,790 (2001). The Comptroller expressed the view that Section 7.4006 did not implicate Executive Order No. 13,132 because existing regulations already established that state laws could be applied against an operating subsidiary only to the extent they applied to the parent national bank. The Comptroller accordingly observed that Section 7.4006 "*itself* does not effect preemption" for purposes of Executive Order No. 13,132. *Ibid.* (emphasis added). That observation was limited to addressing the marginal effect of Section 7.4006 relative to pre-existing law for purposes of the applicability of Executive Order No. 13,132, and does not suggest that the Comptroller understood the import of Section 7.4006 to be something other than the clear preemptive effect set forth in its text. Rather, Section 7.4006 was designed to "clarif[y]" the preemptive effect that was provided, albeit less explicitly, by the existing regulations. 66 Fed. Reg. at 34,788; see *id.* at 34,788-34,789. Lest there be any doubt on that score, the Comptroller went on to explain that, even if Section 7.4006 *did* add to the preemptive scope of the existing regulations, the agency had complied with Executive Order No. 13,132. See *id.* at 34,790.

tion 5.34(e)(3), an operating subsidiary conducts its activities subject to the "same * * * terms and conditions" of state law as the parent national bank. 12 C.F.R. 5.34(e)(3); see *Boutris*, 419 F.3d at 962 (explaining that Section 7.4006 "simply explicate[s] further [the] specification, in" Section 5.34(e)(3), that "operating subsidiaries are to have the *same* authority as, and be subject to the *same* governmental regulation as, their national bank parents").

Finally, as the court of appeals correctly concluded (Pet. App. A26-A27), the OCC's regulations governing real estate lending also establish that state banking laws like those at issue here cannot be enforced against operating subsidiaries that (like Wachovia Mortgage) engage solely in real estate lending activities. Those regulations provide that "state laws that obstruct, impair, or condition a national bank's ability to fully exercise its Federally authorized real estate lending powers do not apply to national banks." 12 C.F.R. 34.4(a). In particular, "a national bank may make real estate loans * * * without regard to state law limitations concerning," *inter alia*, "[l]icensing" and "registration," 12 C.F.R. 34.4(a)(1), such as the Connecticut licensing requirements that petitioner seeks to enforce in this case. And those regulatory constraints on the application of state laws to a national bank's real estate lending activities explicitly apply to operating subsidiaries as well. See 12 C.F.R. 34.1(b) ("This part applies to national banks *and their operating subsidiaries* as provided in 12 CFR 5.34.") (emphasis added).[5]

[5] Even if the various OCC regulations did not by their terms preempt the application of state laws to an operating subsidiary to the same extent as with respect to the parent bank, the state laws would be impliedly preempted by virtue of basic principles of conflict preemption. Under those principles, state laws are preempted to the extent they impair the exercise of a national bank's authorized powers, see *Barnett Bank* v. *Nelson*, 517 U.S. 25, 31-34 (1996), including the power to conduct activities through an operating subsidiary.

b. In promulgating the relevant regulations, the Comptroller acted well "within the scope of [his] delegated authority" under the National Bank Act. *de la Cuesta*, 458 U.S. at 154. As the court of appeals recognized, this Court's decision in *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-845 (1984), sets forth the proper framework for examining whether the regulations are valid exercises of the Comptroller's delegated authority. See Pet. App. A15-A16; *Watters*, 431 F.3d at 560; *Boutris*, 419 F.3d at 958.[6]

i. This Court has held that the *Chevron* framework is applicable, *inter alia*, when "Congress delegated authority to the agency generally to make rules carrying the force of law" and "the agency interpretation claiming deference was promulgated in the exercise of that authority." *United States* v. *Mead Corp.*, 533 U.S. 218, 226-227 (2001); see *National Cable & Telecomms. Ass'n* v. *Brand X Internet Servs.*, 125 S. Ct. 2688, 2699 (2005). It is undisputed that Congress has delegated authority to the Comptroller to promulgate regulations carrying the force of law, see 12 U.S.C. 93a (granting the Comptroller general authority "to prescribe rules and regulations to carry out the responsibilities of the office"), including

[6] Although *de la Cuesta* predated the decision in *Chevron*, the *de la Cuesta* Court's discussion of the requirement that an agency's preemptive regulation fall within the scope of the agency's delegated authority mirrors the subsequent discussion in *Chevron* of the weight generally to be given an agency interpretation. Compare *de la Cuesta*, 458 U.S. at 153-154, with *Chevron*, 467 U.S. at 843-845. Indeed, the two decisions rely on the same precedents. See *de la Cuesta*, 458 U.S. at 154 (quoting *United States* v. *Shimer*, 367 U.S. 374, 383 (1961)); *Chevron*, 467 U.S. at 844-845 (also quoting *Shimer*, 367 U.S. at 382-383). And *Chevron* explicitly relied on *Capital Cities Cable, Inc.* v. *Crisp*, 467 U.S. 691 (1984), see *Chevron*, 467 U.S. at 845, which itself had expressly applied *de la Cuesta* in upholding a preemptive regulation, see *Crisp*, 467 U.S. at 699-700. A regulation that satisfies the two-step *Chevron* analysis will necessarily be within the scope of the agency's delegated authority. The *Chevron* framework thus governs the inquiry called for by *de la Cuesta* into whether an agency acted within its delegated authority in promulgating a preemptive regulation.

regulations governing the conduct of real estate lending activities, see 12 U.S.C. 371(a). Indeed, this Court has recognized that the "Comptroller of the Currency is charged with the enforcement of banking laws to an extent that warrants the invocation of this principle [of deference] with respect to his deliberative conclusions as to the meaning of these laws." *Nationsbank of N.C., N.A.* v. *Variable Annuity Life Ins. Co.*, 513 U.S. 251, 256-257 (1995) (citation and internal quotation marks omitted).

It is equally clear that the relevant OCC regulations were promulgated pursuant to the agency's delegated authority to adopt legally binding regulations. Each of the pertinent regulations was adopted pursuant to formal notice-and-comment rulemaking procedures. See 61 Fed. Reg. 60,374-60,377 (1996) (12 C.F.R. 5.34); 66 Fed. Reg. 34,792 (2001) (12 C.F.R. 7.4006); 69 Fed. Reg. 1917 (2004) (12 C.F.R. 34.4); see also *Mead*, 533 U.S. at 229 (formal rulemaking authority is "a very good indicator of delegation meriting *Chevron* treatment"); *id.* at 231 & n.13 (citing *Nationsbank* as establishing that Comptroller's interpretations of National Bank Act warrant deference even when not the product of formal notice-and-comment proceedings). In addition, the plain terms of the regulations confirm that they establish rules carrying the force of law. See 12 C.F.R. 5.34(e), 7.4006, 34.1(a), 34.4.

ii. The threshold question under the *Chevron* framework is whether Congress has spoken directly to the issue addressed by the agency interpretation—here, the extent to which state laws are applicable to an operating subsidiary's activities. Congress, as the court of appeals determined, has not spoken to that issue, and nothing in the National Bank Act casts doubt on the OCC's regulations. Pet. App. A16-A22.

As an initial matter, petitioner correctly concedes that the Comptroller acted well within his authority under the National Bank Act in establishing that national banks may carry

out their authorized activities through an operating subsidiary. See Pet. App. A17 ("[N]either [petitioner] nor the [amici] dispute that the OCC is empowered to authorize national banks to use operating subsidiaries in conducting their business of banking."). This Court has recognized the Comptroller's authority to define the "incidental powers" possessed by national banks under 12 U.S.C. 24 Seventh, see *Nationsbank*, 513 U.S. at 258-260, 264, and the OCC has made clear since 1966 that one such "incidental power" is the authority of a national bank to conduct its authorized activities through an operating subsidiary. See 12 C.F.R. 5.34; 31 Fed. Reg. 11,459 (1966); Pet. App. A10, A19, A23-A24; *Watters*, 431 F.3d at 561-562; *Boutris*, 419 F.3d at 959-960. The operating subsidiary principle is not unique to the OCC or to national banks, but is also reflected in regulations promulgated by the Federal Reserve Board and the Office of Thrift Supervision. See 12 C.F.R. 223.3(w), 250.141(c), 559.3(n)(1).

It is also undisputed that the relevant Connecticut laws are preempted with respect to Wachovia Bank itself (or any national bank). See Pet. App. A55 (petitioner "concedes that the state would have no authority to enforce the statutes against Wachovia Bank itself"). Preemption of state banking regulation of national banks is manifested by, *inter alia*: (i) the specification in the visitorial powers statute and regulations that visitorial powers are to be exercised by the OCC alone, to the exclusion of state officials, 12 U.S.C. 484; 12 C.F.R. 7.4000(a); (ii) the prescription in the regulations that "state laws that obstruct, impair, or condition a national bank's ability to fully exercise its Federally authorized real estate lending powers do not apply to national banks," 12 C.F.R. 34.4(a); and (iii) the specific regulation that bars application of state licensing and registration laws to national banks, 12 C.F.R. 34.4(a)(1). See also 12 C.F.R. 7.4009(d).

In light of the unchallenged preemption of state laws with respect to a parent national bank, and the undisputed authority of a national bank to conduct its banking functions through an operating subsidiary, it follows that the Comptroller has authority to preempt the application of state laws to an operating subsidiary to the same extent that those laws would be preempted with respect to the parent national bank. As the Ninth Circuit explained in *Boutris*, "once the OCC's authority to allow the creation of and to regulate operating subsidiaries as it has done is established, its authority to displace contrary state regulation where the Bank Act itself preempts contrary state regulation of national banks follows." 419 F.3d at 962; accord *Watters*, 431 F.3d at 561-562.

The court of appeals correctly rejected petitioner's argument (Pet. 23-25) that Congress, in the terms of the visitorial powers statute, 12 U.S.C. 484(a), explicitly barred the OCC from extending the preemption of state visitorial authority to an operating subsidiary. See Pet. App. A16-A17; accord *Watters*, 431 F.3d at 561. Petitioner notes that Section 484(a) by its terms bars only the application of state visitorial powers to a "national bank,"[7] and infers that OCC therefore lacks authority to preempt state regulation of operating subsidiaries. But the reference to a "national bank" in Section 484(a) hardly compels the conclusion that state regulators must be permitted to regulate the business of national banking whenever, and to the extent that, national banks choose to exercise their federal right to perform banking functions through operating subsidiaries. Nothing in the text of the statute precludes the entirely reasonable conclusion that state regulators

[7] "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." 12 U.S.C. 484(a).

should be barred from exercising visitorial powers over operating subsidiaries in order to preserve the exclusively federal regulatory regime that Congress plainly intended to achieve.

Section 484(a) was enacted in 1864 as part of the original National Bank Act, and has remained materially unchanged since that time. See Act of June 3, 1864, ch. 106, § 54, 13 Stat. 116; *Boutris*, 419 F.3d at 963 & n.18. It was not until many decades later that the OCC first recognized the authority of national banks to conduct their activities through an operating subsidiary. See Pet. App. A19. The reference to a "national bank" in Section 484(a) thus could not have been intended to foreclose the OCC from applying Section 484(a)'s protections to a national bank's "operating subsidiary," a concept that did not exist when Section 484(a) was enacted.

Moreover, in establishing that state laws—including the exercise of state visitorial powers—may be applied to an operating subsidiary only to the same extent as to the parent national bank, the OCC did not purport to interpret the term "national bank" in Section 484(a) to include an operating subsidiary. See Pet. App. A17. Rather, the OCC construed the term "incidental powers," in 12 U.S.C. 24 Seventh, to encompass the conduct of activities through an operating subsidiary. A straightforward incident of authorizing a national bank to conduct its activities through an operating subsidiary is that the subsidiary should no more be constrained by state law (including state laws concerning visitation) than the parent bank. Accordingly, Section 24 Seventh, coupled with Section 484(a), "provides the OCC with ample authority to preempt states from exercising visitorial power over the subsidiary because such state regulation could interfere with the national bank's exercise of its federal powers." Pet. App. A17.[8]

[8] Petitioner suggests (Pet. 24-25) that the OCC lacks exclusive visitorial authority over operating subsidiaries because an operating subsidiary is an "affiliate" of a national bank for purposes of 12 U.S.C. 481, and the OCC lacks

iii. The final question under *Chevron* is whether the challenged agency interpretation reflects a reasonable construction of the governing statute. See *Chevron*, 467 U.S. at 844-845; *de la Cuesta*, 458 U.S. at 153-154. The Comptroller's regulations readily satisfy that requirement.

As the OCC has explained, "the use of a separate subsidiary structure 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 of its operations." 61 Fed. Reg. 60,354 (1996); see Pet. App. A23-A24. Contrary to petitioner's argument (Pet. 27-29), the OCC's rationale does not impermissibly disregard principles of corporate separateness. Rather, the OCC has reasonably concluded that an operating subsidiary affords "a convenient and useful corporate form for conducting activities that the parent bank could conduct directly." 66 Fed. Reg. at 34,788; see *Boutris*, 419 F.3d at 960 ("Allowing national banks to create, control, and delegate banking functions to operating subsidiaries provides some assistance to banks in performing their authorized activities.").

The determination that it is desirable to afford national banks the authority to conduct banking activities through an operating subsidiary bears a "close and logical" connection to the determination that state laws are preempted with respect

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exclusive visitorial authority over "affiliate[s]." That argument lacks merit. As the court of appeals explained, the term "affiliate" encompasses a much broader category of affiliated entities than merely operating subsidiaries: an operating subsidiary by definition may engage only in the business of banking as authorized by the National Bank Act, whereas an affiliate may engage in non-banking functions. Pet. App. A18-A19; see *id.* at A50-A51. At any rate, even if an operating subsidiary were properly considered an "affiliate" for purposes of 12 U.S.C. 481, that provision simply does not speak to the extent to which state laws (including state visitorial powers) may be enforced with respect to an operating subsidiary. See Pet. App. A21.

to an operating subsidiary to the same extent as with respect to the parent national bank. *Boutris*, 419 F.3d at 962; see Pet. App. A23. In fact, Congress implicitly ratified that result in 1999 when it enacted 12 U.S.C. 24a(g)(3) as part of the Gramm-Leach-Bliley Act, Pub. L. No. 106-102, § 121, 113 Stat. 1378; see Pet. App. A19-A20. That provision confirms Congress's understanding of the authority of national banks to control operating subsidiaries, *i.e.*, subsidiaries that engage "solely in activities that national banks are permitted to engage in directly and are conducted *subject to the same terms and conditions that govern the conduct of such activities by national banks*." 12 U.S.C. 24a(g)(3)(A) (emphasis added); see Pet. App. A19-A20; *Boutris*, 419 F.3d at 957 & n.9; 66 Fed. Reg. at 34,788. By recognizing that an operating subsidiary conducts its activities "subject to the same terms and conditions" as the parent national bank itself, 12 U.S.C. 24a(g)(3)(A), Congress reinforced the conclusion that an operating subsidiary should be subject to the "same terms and conditions" of state law as the parent national bank.

By contrast, subjecting an operating subsidiary to state regulations that could not be applied to the parent national bank would impair a national bank's exercise of its long-settled power under the National Bank Act to conduct its banking functions through an operating subsidiary. See Pet. App. A23-A24, A55. National banks would have to choose between the benefits of maintaining an operating subsidiary and the benefits of avoiding burdensome state regulations in a manner that would skew decision-making and potentially deter national banks from realizing the efficiencies that an operating subsidiary can provide. Accordingly, as the court of appeals determined, the OCC's "well-explained policy judgment" that an operating subsidiary is subject to state laws to the same extent as its parent national bank "is reasonable and entitled to deference." *Id.* at A24.

B. Petitioner's Claim That Courts Should Not Defer To Preemptive Regulations Does Not Merit Review

The first question set forth in the petition asks whether "the interpretation of the Office of Comptroller of the Currency as to the preemption of state law under the National Bank Act [is] entitled to judicial deference." Pet. i. According to petitioner, the decision of the court of appeals, which applies *Chevron* deference in judging the validity of the Comptroller's regulations, conflicts with decisions of other circuits that reject judicial deference to agencies' preemption decisions. Insofar as petitioner objects to the application of *Chevron* principles to the preemption issue in this case, he has forfeited any such argument: as the court of appeals noted, "[n]either party has questioned that the *Chevron* framework generally applies in this case." Pet. App. A15 n.6; see also Pet. C.A. Br. 29-35. In any event, petitioner errs both in his characterization of the decision below and in his assertion of a circuit conflict. Further review is not warranted.

1. Petitioner contends that the court of appeals should have "decid[ed] for itself whether Congress had intended to oust state regulation," Pet. 11, but instead impermissibly deferred to the OCC's views on whether the application of the pertinent Connecticut banking laws to an operating subsidiary is preempted by federal law. Pet. 9-15. Petitioner is mistaken. As this Court has explained, when an agency, as here, "promulgates regulations intended to pre-empt state law," a "narrow focus on Congress' intent to supersede state law [is] misdirected." *de la Cuesta*, 458 U.S. at 154. The validity of an agency's preemptive regulation therefore does not depend on "congressional authorization to displace state law," but instead turns on whether the preemptive intent of the agency is clear and whether the regulation "is within the scope of the [agency's] delegated authority." *Ibid.* The court

of appeals, adhering to *de la Cuesta*, correctly rejected petitioner's argument that the analysis should focus on whether Congress had manifested an intention to preempt state regulation of operating subsidiaries. Pet. App. A14-A15.

Nor did the court of appeals defer to the OCC's views concerning the question of "*whether* a statute is pre-emptive." *Smiley* v. *Citibank (S.D.), N.A.*, 517 U.S. 735, 744 (1996); cf. Pet. 12. There is no dispute that the National Bank Act has preemptive effect. See 12 U.S.C. 484(a). The question rather is the substantive scope of the "business of banking" conducted by national banks, 12 U.S.C. 24 Seventh, over which the OCC exercises exclusive visitorial authority. The court of appeals properly gave *Chevron* deference to the Comptroller's reasonable "policy judgment" that "national banks should be able to 'use the operating subsidiary as a convenient and useful corporate form for conducting activities' without substantial restrictions imposed by states." Pet. App. A25; see *de la Cuesta*, 458 U.S. at 154, 159-170.[9]

2. There is no merit to petitioner's assertion (Pet. 11) that the decision below conflicts with *BankWest, Inc.* v. *Baker*, 411 F.3d 1289 (11th Cir.), vacated and rehearing en banc granted, 433 F.3d 1344 (2005). That decision has been vacated and therefore lacks precedential effect. *County of Los Angeles* v.

[9] The court did not expressly defer to the Comptroller in concluding that the regulations were generally within the scope of the Comptroller's delegated authority. See Pet. App. A21-A22. Instead, the court independently concluded "that the OCC generally has the authority to promulgate the regulations at issue." *Id.* at A22. Having reached that conclusion, the court next explained that it would "defer to the regulations if they reflect a reasonable construction of the statutory scheme." *Ibid.* In any event, the scope-of-authority question need not be addressed independently of the *Chevron* analysis because a regulation that is valid under *Chevron* will necessarily be within the scope of the agency's regulatory authority, and a regulation that is invalid under *Chevron* will lack the force of law regardless of whether the regulation could be said, in some sense, to fall within the scope of the agency's delegated authority.

Davis, 440 U.S. 625, 634 n.6 (1979). In any event, *BankWest* involved the question whether deference is owed to an agency's informal view that state law is preempted by a federal *statute*. See 411 F.3d at 1300-1301. In this case, the court of appeals had no occasion to address that question, but instead held that the Connecticut laws at issue were preempted by the OCC's implementing regulations.

Nor does the decision below conflict (Pet. 11) with *Colorado Public Utilities Commission* v. *Harmon*, 951 F.2d 1571 (10th Cir. 1991). In that case, the court "defer[red] to [the agency's] determinations that its regulations overlap with [the state's] regulations," but "independently review[ed] the legal issue" of whether the "overlap" was sufficient to trigger a finding of implied conflict preemption. See *id.* at 1579. Whatever the merit of the *Harmon* court's approach with respect to the application of deference principles in the context of implied conflict preemption, the approach has no relevance here. There is no dispute that application of the relevant Connecticut banking laws to Wachovia Mortgage would conflict directly with the Comptroller's regulations, and the court of appeals did not rely on deference principles in reaching that conclusion.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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