UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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THE CLEARING HOUSE ASSOCIATION, L.L.C, :

Plaintiff, :

05 Civ. 5629 (SHS)

- against - :

ELIOT SPITZER, ATTORNEY GENERAL OF THE STATE OF NEW YORK, :

Defendant. :

-- x

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OFFICE OF THE COMPTROLLER OF THE CURRENCY, :

Plaintiff, :

05 Civ. 5636 (SHS)

- against - :

ELIOT SPITZER, ATTORNEY GENERAL OF THE STATE OF NEW YORK, :

Defendant. :

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DEFENDANT'S MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFFS' REQUEST FOR INJUNCTIVE AND DECLARATORY RELIEF AND IN SUPPORT OF COUNTERCLAIM

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August 5, 2005

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Defendant Eliot Spitzer, the Attorney General of the State of New York, submits this memorandum of law in opposition to the requests of plaintiffs The Clearing House Association, LLC ("Clearing House") and the Office of the Comptroller of the Currency ("OCC") for a permanent injunction, and in support of his counterclaim to set aside, under the Administrative Procedure Act, the OCC's rulemaking codified at 12 C.F.R. § 7.4000.

PRELIMINARY STATEMENT

In this case, plaintiffs seek to have this Court enjoin the Attorney General from exercising his authority to enforce <u>non-preempted</u> state fair lending laws against national banks. Although plaintiffs would have the Court believe otherwise, any such ruling would be unprecedented. Indeed, no court has ever held that the National Bank Act precludes the state's highest law enforcement officer from investigating and prosecuting violations of the state's anti-discrimination statutes. Not surprisingly, plaintiffs fail to identify any other federal scheme that strips states of authority to exercise their core sovereign right to enforce their own non-preempted laws. Plaintiffs attempt to manufacture their novel claim of "enforcement preemption" from Section 484 of the National Bank Act, which provides, in relevant part, that "[n]o national bank shall be subject to any visitorial powers except as authorized by Federal law, [or] vested in the courts of justice," 12 U.S.C. § 484(a), and from the OCC's own recent interpretation of that provision, 12 C.F.R. § 7.4000. This claim should be rejected for several reasons.

<u>First</u>, plaintiffs' interpretation defies the plain language of the National Bank Act and more than a century of judicial precedent. An enforcement action by the Attorney General does not violate Section 484 because it falls squarely within its "courts of justice" exception. Nor does such a lawsuit entail any exercise of "visitorial powers" by a state agency. As history and case law reveal, "visitorial powers" refers to the agency activity of administratively <u>supervising</u> the affairs of a

national bank to ensure safety and soundness, plus compliance with relevant laws. To the extent a suit by the Attorney General involves the exercise of "visitorial powers," it is the court that performs the "visitation" by ordering disclosures and remedies.

These basic principles explain more than 100 years of precedent affirming the right of states to proceed against national banks for violations of non-preempted state laws. Indeed, the Supreme Court, in First National Bank in St. Louis v. Missouri, 263 U.S. 640 (1924), flatly rejected the very claim urged here: that the National Bank Act precludes state judicial enforcement of non-preempted state laws. None of the cases on which plaintiffs rely disturb this well-settled authority. To the contrary, every one of those cases involved an agency's pursuit of administrative enforcement, a proceeding fundamentally different from a civil enforcement action brought in state court. In an administrative proceeding, the agency acts as both judge and jury, the sole arbiter of whether a violation has occurred and which remedy should be imposed. By contrast, in a civil enforcement action, the court – not the agency – ultimately makes these decisions. In bringing suit, the Attorney General, like a private plaintiff, does not "visit" but instead asks the court to exercise its powers, including its inherent equitable powers, to grant relief.

Second, plaintiffs' claim that the Attorney General is powerless to enforce fair lending laws against national banks contradicts federal fair lending law and policy, and raises serious federalism concerns. The Fair Housing Act ("FHA") allows the Attorney General to bring federal fair lending claims against national banks – which, even under plaintiffs' tortured reading of the National Bank Act, would fall within the statute's exception for visitations "authorized by federal law." The FHA also creates a multi-pronged enforcement apparatus that relies extensively on state and local agencies to investigate and adjudicate federal fair lending complaints against national banks under state law and procedures. The FHA expresses Congress' determination that enforcement by multiple actors, including states, is necessary to advance national fair lending policy. This specific policy determination trumps any contrary policy arguably expressed in the National Bank Act – a general statute that never contemplated anti-discrimination laws.

Further, plaintiffs wholly ignore the threat their unprecedented scheme would pose to established principles of federalism. While they would have the Court embrace a regime utterly destructive of traditional state interests, plaintiffs fail to demonstrate, as they must, that Congress' intention to sweep aside these interests is "unmistakably clear." In fact, the opposite is true: Congress has made plain the central role of state enforcement of fair lending laws in advancing its fair lending policy.

Third, the OCC's rulemaking is not entitled to Chevron deference and must be set aside to the extent it purports to divest states of their well-established authority to sue national banks for violations of non-preempted laws. The rulemaking fills no statutory gap and applies no special agency expertise on a technical matter – the classic agency action warranting Chevron deference. It is nothing more than a naked attempt to expand the OCC's power and usurp traditional state authority. While the OCC's rulemaking authority extends solely to promulgating rules designed to ensure the safety and soundness of national banks, the rulemaking at issue here offers no explanation as to how preventing state enforcement of fair lending laws against national banks – and thereby limiting overall enforcement in this area – would further these safety and soundness goals.

Consequently, plaintiffs' request for injunctive and declaratory relief must be denied. For the same reasons, the OCC's regulation should be set aside to the extent it purports to prohibit states from suing national banks under federal laws and non-preempted state laws of general application.[1]

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[1] While the Court concededly has jurisdiction over the OCC's claims, it lacks jurisdiction over Clearing House's claims, for the reasons set forth in the Letter from Dietrich L. Snell,

STATEMENT OF FACTS

As head of the New York State Department of Law, Attorney General Eliot Spitzer is both New York State's chief legal officer and the guardian of the legal rights of the citizens of the State. Among its many mandates, the Office of the Attorney General ("OAG") is authorized to investigate and prosecute repeated fraudulent or illegal acts in the carrying on of a business and to investigate complaints of unlawful discrimination. N.Y. Exec. L. §§ 63(12). The OAG also has parens patriae authority to commence legal actions for violations of law where such actions would redress injuries to a substantial segment of New York State's population.

Pursuant to these authorities, the OAG has developed an extensive history of comprehensive enforcement of laws of general applicability on behalf of the citizens of New York. For example, the OAG prosecutes businesses and individuals engaged in fraudulent, misleading, deceptive, or illegal trade practices, and enforces anti-discrimination laws prohibiting unlawful discrimination in employment, housing, credit, education and places of public accommodation. See N.Y. Exec. L. §§ 63(12), 296, 296-a; N.Y. Gen. Bus. L. § 349.

The OAG Has Enforced Laws Against National Banks

In recent years, the OAG's investigative and enforcement activities increasingly have focused on lending practices, including those of nationally chartered banks. In recent years, the OAG has observed a significant number of complaints against national banks and other lending institutions. See Declaration of Thomas G. Conway, Chief of the Attorney General's Bureau of Consumer Frauds and Protection, dated August 4, 2005 ("Conway Decl."), ¶ 3. The OAG has filed legal actions and

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Deputy Attorney General, to The Honorable Sidney H. Stein, dated June 20, 2005, annexed as Ex. 8 to the Declaration of Dennis D. Parker, Chief of the Attorney General's Civil Rights Bureau, dated August 5, 2005 ("Parker Decl."). The Clearing House's action, therefore, should be dismissed.

obtained consent orders and assurances of discontinuance, pursuant to Section 63(15) of the New York Executive Law, to enjoin national banks from engaging in a wide range of prohibited practices, including: failing to clearly disclose fees; engaging in improper debt collection practices; collecting attorney's fees in violation of state law; violating the federal Electronic Funds Transfer Act; failing to properly acknowledge or investigate complaints of billing errors in connection with credit card accounts; deceptively advertising the terms of credit; permitting bank credit cards to be used for illegal online gambling; and releasing personal customer data to third parties. Id. ¶ 6 (describing OAG settlements with national banks, including Chase Manhattan Bank and Citibank). Each of these settlements was reached after the OAG completed a full investigation into the underlying complaints, including a review of documentary evidence provided by the complainant, the banks, and third parties. Id. ¶ 4.

The Attorney General's Current Inquiries into Racial Disparities in Lending

Pursuant to Regulation C promulgated under the Home Mortgage Disclosure Act ("HMDA"), lenders are required to publicly disclose information about, among other things, the cost of their loans and about applicant or borrower race, ethnicity, sex and income. See 12 C.F.R. pt. 203, app. A. The purpose of requiring disclosures about loan pricing is to "help[] the public and regulators to better understand mortgage lending patterns, particularly in the subprime market, and in enforcing the fair lending laws." 65 Fed. Reg. 78656, 78661 (2000) (codified at 12 C.F.R. pt. 203).

In April 2005, the OAG analyzed the HMDA data disclosures and found substantial racial disparities in interest rates charged by various banks on their New York State loans. For example, HMDA data revealed that at Wells Fargo, African-American borrowers were 3 times more likely to receive high-cost loans than white borrowers; at JP Morgan Chase and Citigroup, African-American borrowers were nearly 2 times more likely to receive high-cost loans; and at HSBC, African-

American borrowers were about 1.5 times as likely to receive such loans. See HMDA Data Analysis Chart, annexed as Ex. 1 to Parker Decl.

Section 296-a of the New York State Human Rights Law, which the OCC concedes is not preempted, see OCC Compl. ¶ 15, proscribes lending discrimination. The racial disparities described above would establish a prima facie case under that statute as well as federal anti-discrimination law. Thus, pursuant to its statutory and common-law authority to investigate potential violations of law, the OAG sent letters to Clearing House member banks Wells Fargo, JP Morgan Chase, Citibank, and HSBC advising them of the potential violations and asking them voluntarily to provide information concerning the factors and policies involved in the pricing of their loans.[2]

The Instant Actions

While discussions regarding the OAG's requests were ongoing, Clearing House filed its complaint on June 16, 2005, asking that the Court enjoin the Attorney General from taking any action to enforce federal and non-preempted state anti-discrimination laws against any Clearing House member national banks. See Clearing House Compl. at 9. The requested relief would preclude the OAG from bringing lawsuits, issuing investigatory subpoenas, and even writing letters requesting information. That same day, the OCC filed a complaint similarly requesting that the Attorney General be enjoined from "instituting any enforcement activities against national banks" and seeking a declaration that the Attorney General has no authority to enforce fair lending or any other laws against, or investigate potential violations of such statutes by, national banks. See OCC Compl. at 12. The Court determined that the two actions were related and would be heard together.

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[2] See Letter from Dennis D. Parker to Citigroup, dated April 6, 2005; Letter from Dennis D. Parker to JP Morgan Chase & Co., dated April 20, 2005; Letter from Dennis D. Parker to Wells Fargo & Co., dated April 19, 2005; and Letter from Dennis D. Parker to HSBC Bank USA, N.A., dated April 19, 2005; annexed collectively as Ex. 2 to Parker Decl.

At a hearing held on June 20, 2005, the Court denied Clearing House's request for a temporary restraining order. The Court later entered an Order, dated July 5, 2005, consolidating the trial on the merits in the instant actions with the hearing on plaintiffs' motions for preliminary injunctions, pursuant to Rule 65(a)(2) of the Federal Rules of Civil Procedure. In anticipation of the trial on the merits, the OAG requested leave to conduct limited factual discovery to assess whether plaintiffs had met the requirements for injunctive relief. See Letter from Dietrich L. Snell, Deputy Attorney General, to The Honorable Sidney H. Stein, dated June 21, 2005, attached as Ex. 9 to Parker Decl. Specifically, the OAG sought to conduct expedited discovery concerning the extent and nature of the OCC's enforcement actions, and the degree to which Clearing House member banks had been subject to state and/or federal investigations or enforcement proceedings. Id. at 3. By Order dated July 29, 2005, the Court denied the OAG's request for discovery.

Along with its answer, filed today in accordance with the Court's scheduling order, the OAG has filed a counterclaim for declaratory relief and for an order setting aside the OCC's rulemaking to the extent it purports to prohibit states from exercising their statutory and common-law authority to enforce non-preempted state laws against national banks.

ARGUMENT

I. THE NATIONAL BANK ACT DOES NOT DIVEST THE ATTORNEY GENERAL OF HIS AUTHORITY TO CONDUCT INVESTIGATIONS AND INITIATE JUDICIAL ACTIONS TO ENFORCE STATE ANTI-DISCRIMINATION LAWS.

Plaintiffs concede – as they must – that Executive Law § 296-a is not preempted and that national banks are subject to New York's anti-discrimination laws. See OCC Compl. ¶ 15 ("The OCC does not argue that the substantive provisions of New York State Executive Law § 296-a are preempted by federal law . . . ."). Instead, plaintiffs assert that the National Bank Act, specifically Section 484 of the Act, 12 U.S.C. § 484, prohibits the Attorney General from enforcing New York's anti-discrimination laws against national banks. Plaintiffs argue that Section 484 vests the OCC with exclusive "visitorial powers" over national banks and that any action by a state to enforce its non-preempted laws against a national bank, even in a court of justice such as the New York State Supreme Court, is prohibited by Section 484.

Plaintiffs' argument finds no support in the history or language of the National Bank Act and clashes with clear and controlling Supreme Court precedent affirming the rights of states to sue national banks for violations of non-preempted state laws. Judicial enforcement by the New York Attorney General of New York's anti-discrimination laws falls within the National Bank Act's express exception for "courts of justice," and is not, in any event, an exercise of "visitorial powers."

A. The Attorney General's Authority to Judicially Enforce the State's Anti-Discrimination Law Falls Within the National Bank Act's Express Exception for "Courts of Justice."

The National Bank Act was never intended to displace application of state law to national banks. In fact, from their creation, national banks have been subject to state law, except where such law substantially impairs or interferes with the operation of the bank or otherwise conflicts with federal law. National Bank v. Kentucky, 76 U.S. (9 Wall.) 353, 362 (1869) (national banks "are subject to the laws of the State, and are governed in their daily course of business far more by the laws of the State than of the nation"); see also Barnett Bank of Marion Co. v. Nelson, 517 U.S. 25, 33 (1996).

The primary means by which states have enforced their laws with respect to national banks is through the courts, and Section 484 expressly leaves this avenue of state enforcement intact. Section 484 states in pertinent part:

> 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) (emphasis added).

As discussed below, see infra Pt. I.B, the Attorney General's right to sue in court to enforce compliance with New York's anti-discrimination laws, including conducting investigations preliminary to such enforcement, is not an exercise of "visitorial powers" as that term is used in Section 484. However, even if such judicial enforcement action were deemed "visitorial," it nevertheless falls within the Section's "courts of justice" exception. The Attorney General is clearly authorized to proceed against violations of state anti-discrimination laws. Having carved out an explicit exception for visitorial powers "in the courts of justice," Congress has limited any exclusive regulatory authority of the OCC to the administrative arena only. Thus, while Section 484 precludes states from exercising direct administrative authority over national banks, it does not limit the states' authority to pursue judicial enforcement of non-preempted state laws, including requesting information and otherwise investigating the existence of violations of law.

The Supreme Court first addressed the "courts of justice" exception in Guthrie v. Harkness, 199 U.S. 148 (1905). In Guthrie, the Court confirmed that the visitorial powers provision of the National Bank Act was not intended to deprive parties of longstanding judicial remedies. The Court held that the "courts of justice" exception permitted parties to sue a national bank to obtain judicial remedies for violations of their common law rights – there, an individual shareholder's suit to enforce his common law right to inspect bank records: "If the right to compel the inspection of books was a well-recognized common law remedy, as we have no doubt it was, even if included in visitorial powers as the terms are used in the statute, it would belong to that class 'vested in courts of justice' which are expressly excepted from the inhibition of the statute." Id.

No distinction exists between an individual's right to sue a national bank in a court of justice and a State Attorney General's right to sue in the same court. Indeed, following Guthrie, the Supreme Court rejected the very premise advanced by plaintiffs here, i.e., that Section 484 precludes a State Attorney General from enforcing state laws even where those laws have not been preempted. In First National Bank in St. Louis v. Missouri, 263 U.S. 640 (1924), the Court expressly denied a national bank's claim that Section 5241 of the Revised Statutes, the predecessor to 12 U.S.C. § 484, prohibited the Missouri Attorney General from suing in state court to enforce Missouri law against a national bank. Because the state statute was not preempted, the State necessarily had the authority to enforce it:

> The state statute as applied to national banks is, therefore, valid, and the corollary that it is obligatory and enforceable necessarily results, unless some controlling reason forbids; and, since the sanction behind it is that of the state and not that of the national government, the power of enforcement must rest with the former and not with the latter. To demonstrate the binding quality of a statute, but deny the power of enforcement involves a fallacy made apparent by the mere statement of the proposition, for such power is essentially inherent in the very conception of the law.

Id. at 659-60. In dismissing the bank's argument that "the United States alone may inquire by quo warranto whether a national bank is acting in excess of its charter powers," the Court noted further:

> The state is neither seeking to enforce a law of the United States nor endeavoring to call the bank to account for an act in excess of its charter powers. What the State is seeking to do is to vindicate and enforce its own law, and the ultimate inquiry which it propounds is whether the bank is violating that law, not whether it is complying with the charter or law of its creation. . . . Having determined that the power sought to be exercised by the bank finds no justification in any law or authority of the United States, the way is open for the enforcement of the state statute.

Id. at 660. This holding is obviously dispositive.

In their briefs, plaintiffs ignore the Supreme Court's decision in St. Louis, which conclusively established that states could sue national banks to enforce non-preempted state laws. In prior statements, however, the OCC has struggled unsuccessfully to distinguish the case, arguing, based on the Missouri Attorney General's application for a quo warranto remedy, that St. Louis indicates only that states can bring declaratory judgment actions to see whether a state law, as applied to a national bank, has been preempted by federal law. See 69 Fed. Reg. 1895, 1899-1900 (2004) (codified at 12 C.F.R. § 7.4000). Quo warranto actions, however – which historically were brought to remove an officer acting outside his or her legal authority – resemble actions for equitable relief far more than they do garden-variety declaratory judgment actions.[3] In any event, the St. Louis Court affirmed a state court judgment, State v. First National Bank of St. Louis, 249 S.W. 619 (Mo. 1923), that had granted the state prohibitory relief. Indeed, the Supreme Court explicitly said that the nature of the remedy sought had no bearing on its ruling. See St. Louis, 263 U.S. at 661 ("[T]he nature of the remedy to be employed is a question for state determination . . . . We are not concerned with the question whether an information in the nature of quo warranto, according to the general principles of the law, is in fact appropriate. It is enough that the Supreme Court of the State has so held.") (citations omitted).[4]

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[3] See, e.g., 2 Am. Jur. 2d Administrative Law § 405 (2004) ("In the absence of a statutory provision for appellate review of an administrative decision, relief from illegal, fraudulent, or oppressive acts of public officials and boards can be obtained by using such equitable remedies as quo warranto, mandamus, or injunction."). Bringing an action quo warranto does not preclude a court from granting other equitable relief. Once the equitable powers of the court are invoked, it "has the power to decide all relevant matters in dispute and to award complete relief." Porter v. Warner Holding Co., 328 U.S. 395, 399 (1946); see also 42 Am. Jur. 2d Injunctions § 11 (2004) ("An injunction may issue ancillary to . . . quo warranto").

[4] See generally Arthur E. Wilmarth, Jr., "The OCC's Preemption Rules Exceed the Agency's Authority and Present a Serious Threat to the Dual Banking System and Consumer Protection," 23 Ann. Rev. Banking & Fin. L. 225, 332 & n.434 (2004) (discussing reasons the "OCC's interpretation of St. Louis is clearly wrong").

Following the Supreme Court's decision in St. Louis, states have continued to enforce their laws against national banks, and courts have recognized, both expressly and implicitly, their right to do so. See, e.g., Jackson v. First Nat'l Bank of Valdosta, 349 F.2d 71, 75 n.1 (5th Cir. 1965) (upholding state's authority to sue national bank under state law for violating branch banking laws because "fact that the Comptroller is charged under 12 U.S.C. § 93 with the duty of enforcing the National Bank Act certainly does not have the effect of prohibiting actions to enforce that law by any other party who might have a legitimate interest"); Missouri ex rel. Kostman v. First Nat'l Bank in St. Louis, 405 F. Supp. 733, 735 (E.D. Mo. 1975) (relying on St. Louis to hold that state could commence legal action "to enforce the banking laws of the State of Missouri and to prohibit national banks from violating the state laws" and was "entitled to injunctive relief"), aff'd, 538 F.2d 219 (8th Cir. 1976). Indeed, so basic is the right of states to seek judicial recourse that the authority of the states to sue a national bank in court has often been presumed. See, e.g., New York v. Citibank, 537 F. Supp. 1192 (S.D.N.Y. 1982) (section 63(12) action by Attorney General against Citibank for violating Electronic Funds Transfer Act, 15 U.S.C. § 1693 et seq., and engaging in unfair and deceptive business practices in violation of state law); State v. First National Bank of Anchorage, 660 P.2d 406 (Alaska 1982) (suit against land developer and bank based on misrepresentations in the sale of residential lots); State v. Ameritech Corp., 517 N.W.2d 705 (Wis. 1994) (state suit against national bank among others for deceptive credit card promotion); cf. Franklin Nat'l Bank of Franklin Square v. New York, 347 U.S. 373 (1954) (finding preemption of specific state law as applied to national bank but never questioning state's authority to sue national bank).[5] In fact, the New York

[5] See also Brown v. Clarke, 878 F.2d 627 (2d Cir. 1989) (action against national bank operating messenger service in violation of state law); Utah v. Zion's First Nat'l Bank of Ogden, 615 F.2d 903 (10th Cir. 1980) (action to enjoin branch operating in violation of state law); State v. First Nat'l Bank of Saint Paul, 313 N.W.2d 390 (Minn. 1981) (action to compel compliance

Attorney General has a long history of using his judicial enforcement powers to enforce state consumer protection laws against national banks. See Conway Decl. ¶ 6 (describing consumer protection enforcement actions taken against national banks). Until recently, neither the banks nor the OCC ever challenged the Attorney General's right to enforce state laws.

In contrast to the Attorney General's long history of judicial enforcement, the OCC asserts that it did not even gain the authority to enforce state law until 1966 when it obtained cease and desist remedies in addition to its other available remedies. See 69 Fed. Reg. at 1900. The OCC's asserted lack of authority to enforce state laws for the more than 100 years that followed the adoption of the National Bank Act makes wholly untenable the notion that Congress ever intended the Act to grant the OCC sole discretion to enforce non-preempted state laws, or to deprive states of their traditional ability to seek judicial enforcement of such laws.

More recently, in First Union National Bank v. Burke, 48 F. Supp. 2d 132 (D. Conn. 1999), the court stated that although Section 484 precluded a state banking commissioner from issuing a cease and desist order against a national bank, the state could bring legal action to enforce non-preempted state law: Although Section 484 "carved out from state control supervisory authority over these federal instrumentalities," this "relegation of regulatory and supervisory authority over federal instrumentalities to a single federal regulator . . . expressly leaves available judicial remedies to compel national bank compliance with state law." Id. at 148-49 (emphasis added); see also Jacobs v. ABN-Amro Bank N.V., No. 03-CV-4125 (NGG), 2004 U.S. Dist. LEXIS 6888, at *14 (E.D.N.Y. Apr. 21, 2004) (rejecting claim that suing national bank for deceptive practices or fraud falls within the OCC's exclusive visitorial powers; "it does not necessarily follow from the fact that a state

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with state's abandoned property law); Oregon v. First Nat'l Bank of Portland, 123 P. 712 (Or. 1912) (same).

regulator may not examine a national bank's balance sheet that the same bank may not be sued for fraud in state court"); Wells Fargo Bank v. Boutris, 265 F. Supp. 2d 1162, 1170-71 (E.D. Cal. 2003) (quoting First Union); National City Bank of Indiana v. Boutris, No. S-03-0655, 2003 U.S. Dist. LEXIS 25852, at *13 (E.D. Cal. July 2, 2003) (same).

The preceding cases confirm that enforcement action by the Attorney General under state law against a national bank, at minimum, falls within the "courts of justice" exception in Section 484, because when the Attorney General files suit in court against a national bank, he, just like a private plaintiff, is asking the court to exercise its powers. While the OCC has argued that the "phrase visitorial powers 'vested in' the courts speaks to the courts' inherent powers: e.g., the powers to issue writs, to issue subpoenas, and to punish contempt," OCC Br. at 26, this assertion is wrong. First, a writ includes orders for injunctive relief. See, e.g., 43A C.J.S. Injunctions § 2 (defining injunction as "a remedial writ which a court issues for the purpose of enforcing its equity jurisdiction"). Moreover, courts of justice also possess a whole range of powers, both explicit and inherent, including "inherent equitable powers." Missouri v. Jenkins, 515 U.S. 70, 131 (1995). Judicial enforcement actions pursuant to New York Executive Law §§ 63(12) and 296-a, which primarily seek injunctive relief, are equitable in nature, and as such invoke "all the inherent equitable powers of the court." See, e.g., Porter, 328 U.S. at 397-98; see also Mitchell v. Robert DeMario Jewelry, Inc., 361 U.S. 288, 291 (1960) (quoting Porter). Such judicial enforcement is thus distinguishable from the facts of National State Bank, Elizabeth, N.J. v. Long, 630 F.2d 981 (3d Cir. 1980), on which plaintiffs rely, because Long involved only an administrative enforcement proceeding by a state banking commissioner, not an enforcement action brought by a state attorney general in the "courts of justice."

Because the OAG's current investigations into the lending practices of national banks are based on the Attorney General's independent legal authority to sue in New York state court for violations of state law, they fall within the "courts of justice" exception.[6]

B. Judicial Enforcement by the Attorney General of the State's Non-Preempted State Laws, Such as Executive Law § 296-a, Does Not Constitute an Exercise of Visitorial Powers.

Even if Section 484 did not contain an express exception for judicial enforcement in the "courts of justice," the Attorney General's judicial enforcement of New York's anti-discrimination laws, including investigations preliminary to such enforcement, is not an exercise of "visitorial powers" as that term is used in Section 484. Neither the text nor the legislative history of the National Bank Act supports plaintiffs' construction of the term "visitorial powers," and the relevant judicial precedent confirms that legal actions by states for violations of state laws and investigations conducted by states in advance of such litigation are not visitorial.

As plaintiffs acknowledge, see OCC Compl ¶ 7, Section 484 "remains substantially unchanged since its enactment in 1864," when Congress adopted the National Bank Act. The legislation followed a "57-year hiatus in which there was no federal involvement in banking." Clarke v. Securities Indus. Ass'n, 479 U.S. 388, 411 (1987). Originally entitled "An Act to Provide a National Currency," the Act was intended "largely to bolster the Union's financial status, shaky because of the Civil War," First Agr. Nat'l Bank of Berkshire County v. State Tax Comm'n, 392 U.S. 339, 410-11 (1968), primarily by establishing, for the first time, a single, national currency to

[6] Bank One Delaware v. Wilens, No. SACV 03-274-JVS ANX, 2003 WL 21703629 (C.D. Cal. July 7, 2003), cited in Clearing House Br. at 10, 15, is singularly unpersuasive. There, the court held that a private plaintiff could not sue a national bank under California's "private attorney general" law to enforce compliance with the state's retail installment sales act. Thus, the decision conflicts with the OCC's own position that private parties do have the right to sue national banks. In any event, the case cites no case law support and fails to address the numerous cases that reached the opposite conclusion.

help the country maintain a more stable supply of currency. Act of June 3, 1864, ch.106, 13 Stat. 99; see generally Arnold Tours, Inc. v. Camp, 472 F.2d 427, 433-34 (1st Cir. 1972); see also Andrew McFarland Davis, The Origin of the National Banking System, S. Doc. No. 61-582 (2d Sess. 1910). To advance the goal of establishing a single, stable currency, Congress created the OCC to regulate the national currency by preventing unsafe and unsound banking practices. See Act of June 3, 1864, ch. 106, § 1, 13 Stat. at 99-100.

In Section 54 of the National Banking Act, as originally enacted, Congress authorized the OCC to appoint suitable people to whom it granted the following powers: (1) "to make a thorough examination into all the affairs of [every banking] association"; (2) "in doing so, to examine any of the officers and agents thereof on oath"; and (3) to "make a full and detailed report of the condition of the association to the Comptroller." Id. § 54, 13 Stat. at 116. Congress then added, in the very next sentence, the following proviso: "And the association shall not be subject to any other visitorial powers than such as are authorized by this act, except such as are vested in the several courts of law and chancery." Id. (emphasis added).

The phrase "visitorial powers" in Section 54 should be construed in accordance with its ordinary use in law, i.e., as identifying the powers of government officials directly charged with the duty to examine the affairs of a public or non-profit corporations to determine compliance with the terms and conditions of their corporate charters and supervise corporate officers to ensure proper execution of their duties.[7] Accord 19 C.J.S. Corporations § 986 (1990) (defining "visitation of

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[7] See, e.g., Ind. Code Ann. § 28-11-3-2 (2004) (providing, in chapter entitled "Supervision of Financial Institutions," that Indiana Department of Financial Institutions has "visitorial powers with respect to any financial institution for the purpose of maintaining the safety and soundness of the financial institution"); Mich. Comp. Laws § 600.3605(4) (2005) (referring to powers of circuit courts over corporations, such as power to call for corporate officers to account for corporate funds managed by them, and power to remove corporate trustee

corporations" as "the act of examining into corporate affairs . . . and the purpose of visitation is to supervise, direct, and control the management of the corporation.").

The original text and placement of the "visitorial powers" provision in Section 54 indicates that Congress intended it to be read in conjunction with ordinary usage and with the explicit inspection, examination and reporting responsibilities imposed on the OCC by the sentence preceding the "visitorial powers" provision. Congress would naturally have expected readers of Section 54 to read the last sentence of that section – the "visitorial powers" provision – in this way, because both then and now, Congress expects that when a general statutory term follows more specific terms, the readers of the general term should understand its meaning by reference to the meaning of any more specific words or phrases associated with it. See Circuit City Stores, Inc. v. Adams, 532 U.S. 105, 114-15 (2001); Jarecki v. G.D. Searle & Co., 367 U.S. 303, 307 (1961). To make this way of reading the term "visitorial powers" in Section 54 unavoidable, Congress used the adjective "other" – a word that is meaningless in the provision unless it refers back to the powers of examination and inspection and reporting conferred upon the OCC.

Although subsequent Congresses moved the specific visitorial powers contained in Section 54 into different sections of the federal code, nothing suggests any intention to depart from the originally-intended purpose of the term "visitorial powers": to preclude state or local government officials charged with the primary duty to examine bank practices for compliance with state banking law from applying their powers to national banks. In 1875, Congress moved the Section 54 provisions that conferred the "visitorial powers" onto OCC appointees to Section 5240 of the Revised Statutes, added other powers for OCC appointees, and moved the "visitorial powers"

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or officer for gross misconduct, as "visitorial powers").

provision of Section 54 into Section 5241 of the Revised Statutes, which provided: "No association shall be subject to any visitorial powers other than such as are authorized by this Title, or are vested in the courts of justice." Rev. Stat. § 5241. No more or less than before, the term "visitorial power" in Section 5241 still referred back to the nature of the powers Congress provided OCC appointees – now set forth in the immediately adjacent Section 5240 – to examine the affairs of national banks. See Oregon v. First Nat'l Bank of Portland, 123 P. at 715 (describing powers of OCC appointees in Section 5240 and concluding that "[t]hese, we take, are the visitorial powers referred to" in Section 5241); see also Guthrie, 199 U.S. at 159 ("It was the intention that this statute should contain a full code of provisions upon the subject, and that no state law or enactment should undertake to exercise the right of visitation over a national corporation. Except in so far as such corporation was liable to control in the courts of justice, this act was to be the full measure of visitorial power.").

Furthermore, the nature of the powers that the thirty-eighth Congress originally conferred upon OCC appointees confirms that Congress intended to imbue the term "visitorial powers" with its ordinary meaning in law. As the court in First National Bank of Youngstown v. Hughes, 6 F. 737 (C.C.N.D. Ohio 1881), defined the term, "[v]isitation, in law, is the act of a superior or superintending officer, who visits a corporation to examine into its manner of conducting business, and enforce an observance of its [the corporation's] laws and regulations." Id. at 740 (emphasis added). See Guthrie, 199 U.S. at 158 (quoting Hughes discussion of "visitorial power" with approval); State v. First Nat'l Bank of St. Paul, 313 N.W.2d at 393 (same).

Section 484, the immediate successor to Section 5241 of the Revised Statutes, is currently contained in subchapter 15 of the National Bank Act, entitled "Bank Examinations," which addresses the kind of examination and reporting matters previously covered by Section 5240 of the Revised Statutes. See 12 U.S.C. §§ 481-483 & 485-486. It is thus clear that the meaning of "visitorial powers" in Section 484, like that of its predecessor provisions, is connected to the OCC's express statutory responsibilities of inspecting and examining national banks for safety, soundness and compliance with the banking laws and, consistent with both its ordinary usage and the text of the Act, involves direct supervisory and regulatory oversight.

Section 484 thus prevents state banking commissioners from directly regulating or examining national banks. It does not, however, prohibit a state Attorney General from exercising his traditional judicial enforcement prerogatives against national banks. In contrast to a state banking commissioner, the Attorney General is not a superintending officer, and does not act in that capacity when he enforces non-preempted state laws. Because the Attorney General is not seeking to supervise or exercise regulatory authority over any national bank or operating subsidiary when he brings a legal action against a national bank or investigates activities that might warrant judicial enforcement, he is not exercising visitorial powers within the meaning of Section 484. In administrative enforcement actions and audits, the agency is both judge and jury, making the fact determinations and deciding on its own if violations have occurred. If the Attorney General brings an enforcement action, the judge, as an independent and impartial arbiter, makes the determinations and exercises whatever "visitorial" powers may be necessary to remediate a violation. Cf. Guthrie, 199 U.S. at 156 ("It does not follow that the courts will compel the inspection of the bank's books under all circumstances. . . . [T]he court will exercise a sound discretion and grant the right under proper safeguards to protect the interests of all concerned.").

The right to inspect records prior to litigation, either through subpoena or through voluntary requests, is not visitorial because it is a necessary incident to responsible litigation. Executive Law § 63(12) gives the Attorney General pre-litigation subpoena power as part of his judicial enforcement authority in order to enable him to substantiate and document evidence of wrongdoing before commencing legal action. See Peoples Bank of Danville v. Williams, 449 F. Supp. 254, 260 (W.D. Va. 1978) (Securities and Exchange Commission subpoena of national bank was not "a prohibited visitorial power" because agency sought to investigate possible securities fraud violations, not "to control Peoples in any fashion"). The Supreme Court in Guthrie also noted the importance of examining records in advancing a claim: "To say that [shareholders] have the right [to advance a claim against a national bank], but that it can be enforced only when they have ascertained, in some way without the books, that their affairs have been mismanaged, or that their interests are in danger, is practically to deny the right in the majority of cases." 199 U.S. at 155.

The cases upon which plaintiffs rely, see OCC Br. at 2, 16, 19; Clearing House Br. at 13-16, are inapposite. All of those cases involved state banking commissioners charged with traditional administrative oversight and thus exercising the kind of supervisory control prohibited under Section 484. And in the majority of those cases, the issue was whether a state banking commissioner could exercise regulatory authority over the operating subsidiaries of national banks in areas that were indisputably visitorial with respect to national banks.[8]

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[8] See, e.g., Long, 630 F.2d at 981 (state Banking Commissioner could not bring administrative proceedings against national bank to enforce state's redlining laws); First Union Nat'l Bank v. Burke, 48 F. Supp. 2d at 132 (while state banking commissioner's administrative enforcement authority was visitorial and could not be asserted against national bank, Section 484 did not bar judicial action to enforce non-preempted state law); see also National City Bank v. Turnbaugh, 367 F. Supp. 2d 805 (D. Md. 2005) (banking department investigation of operating subsidiary's violations of state's prepayment penalty law); Wachovia Bank v. Watters, 334 F. Supp. 2d 957 (W.D. Mich. 2004) (imposing registration requirements on operating subsidiary), appeal pending; Wachovia Bank v. Burke, 319 F. Supp. 2d 275 (D. Conn. 2004), aff'd in part & rev'd in part, No. 04-3770-cv, 2005 U.S. App. LEXIS 13904 (2d Cir. July 11, 2005) (imposing licensing requirements on operating subsidiary); Wells Fargo Bank, 265 F. Supp. 2d at 1162 (banking department audit of operating subsidiary to identify loans violating state's per diem law); National City Bank, 2003 U.S. Dist. LEXIS 25852 (same). The operating subsidiary cases are also not germane because they involved claims that the underlying state laws were preempted, which is not the case here.

C. The Riegle-Neal Amendments Do Not Oust States of Their Judicial Enforcement Authority Over National Banks.

The Riegle-Neal Interstate Banking and Branching Efficiency Act of 1994 ("Riegle-Neal") does not alter the above analysis or conclusions in any way. Riegle-Neal provides, in relevant part, that state laws, including those regarding consumer protection and fair lending, "shall apply to any branch in the host State of an out-of-State national bank to the same extent as such State laws apply to a branch of a bank chartered by that State, except . . . when Federal law preempts the application of such State laws to a national bank." 12 U.S.C. § 36(f)(1)(A).[9] The statute further directs the OCC to enforce those laws in the course of reviewing the activities of interstate branches of national banks, by providing that state fair lending and consumer protection laws "shall be enforced, with respect to such branch[es], by the Comptroller of the Currency." 12 U.S.C. § 36(f)(1)(B).

Plaintiffs argue that Riegle-Neal makes the OCC the exclusive government enforcer of state fair lending and consumer protection laws as against national bank branches. See Clearing House Br. at 12; OCC Br. at 14. This interpretation is flawed for several reasons. First, it is inconsistent with congressional intent. In passing Riegle-Neal, Congress specifically stressed the importance of "maintaining the balance of Federal and State law under the dual banking system" and of preserving state authority within this system:

> States have a strong interest in the activities and operations of depository institutions doing business within their jurisdictions, regardless of the type of charter an institution holds. In particular, States have a legitimate interest in protecting the rights of their consumers, businesses, and communities . . . Congress does not

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[9] Due to its concern that the OCC had previously been "inappropriately aggressive" in preempting state law "in situations where the federal interest did not warrant that result," Congress directed that preemption should occur "only when the agency has determined that the Federal policy interest in preemption is clear." H.R. Rep. No. 103-651, at 53-54 (Conf. Rep.) (1994), reprinted in 1994 U.S.C.C.A.N. 2068, 2074.

intend that [this Act] alter this balance and thereby weaken States['] authority to protect the interests of their consumers, businesses, or communities.

H.R. Rep. No. 103-651, at 53, reprinted in 1994 U.S.C.C.A.N. at 2074 (emphasis added). Plaintiffs' construction, by contrast, would radically shift the balance of state and federal authority by stripping states of their ability to judicially enforce non-preempted state laws against national banks. Second, plaintiffs' view contradicts the OCC's own assertion that private lawsuits against national banks remain permissible. See 69 Fed. Reg. at 1899 n.30. If the phrase "shall be enforced . . . by the Comptroller of the Currency" suffices to divest states of their authority to bring lawsuits, it surely would bar similar lawsuits by private parties. Third, under plaintiffs' reading, the OCC would be the only governmental body in the nation to which consumers could turn for assistance with claims that national banks, or any of their hundreds of branches, had violated state consumer protection or fair lending laws. If Congress had truly intended Section 36(f) to transform the OCC from an insurer of safety and soundness into a national consumer complaints processing agency, it would not have been so coy in stating that intent.

II. PLAINTIFFS' CONSTRUCTION OF THE NATIONAL BANK ACT WOULD CONTRADICT CONGRESSIONAL FAIR LENDING LAW AND POLICY AND WOULD RAISE SERIOUS FEDERALISM CONCERNS.

Plaintiffs argue that the OAG cannot enforce fair lending laws against national banks because Section 484 generally precludes states from enforcing "federal and state discrimination-in-lending laws with respect to national banks" and grants the OCC exclusive enforcement authority. Clearing House Br. at 16. This construction cannot stand, not only because it rests on a mistaken interpretation of the National Bank Act, see supra Pt. I, but also because it ignores the provisions of and policies underlying the Fair Housing Act, Pub. L. 90-284, as amended, 42 U.S.C. §§ 3601 et seq. ("FHA"), and because it raises serious federalism concerns.

A. Plaintiffs' Interpretation of the National Bank Act Is Contrary to the Fair Housing Act and the Policies Underlying That Statute.

The FHA plainly authorizes state actors, including the OAG, to enforce the FHA's prohibition against discriminatory lending by national banks. Moreover, Section 484 must be construed in para materia with the FHA so as not to undermine Congress' modern judgment that the best way to advance the purposes of the FHA is to have multiple layers of enforcement at federal, state, and local levels. Plaintiffs' construction of Section 484 would directly contravene Congress' determination that state enforcement of fair lending law is necessary to advance the policies underlying the FHA.

1. States Are Authorized to Bring Lawsuits Against National Banks under the Fair Housing Act.

Even under plaintiffs' tortured reading of the National Bank Act, an OAG suit against a national bank for violating the FHA clearly qualifies as an act "authorized by Federal law" under Section 484. The FHA authorizes any "aggrieved person" to commence a civil action if injured by a "discriminatory housing practice," which is defined to include discriminatory residential mortgage lending. See 42 U.S.C. §§ 3602(f), 3605, 3613.[10] The statutory term "aggrieved persons," which reflects Congress' intent to extend standing under the FHA "to the broadest class of plaintiffs permitted by Art[icle] III," Gladstone Realtors v. Village of Bellwood, 441 U.S. 91, 97 (1979), includes state and local governments. See id. (municipality); Housing Auth. of the Kaw Tribe of Indians v. City of Ponca City, 952 F.2d 1183, 1195 (10th Cir. 1991) (tribal agency established pursuant to state law). Indeed, this Court has affirmed the OAG's parens patriae standing to enforce

[10] This ban on discriminatory lending extends fully to national banks. See 59 Fed. Reg. 18266, 18267 (1994) (joint policy statement by OCC and other federal banking agencies, HUD, and DOJ advising that discriminatory residential lending by all lenders, including national banks, would violate FHA).

the FHA. See Support Ministries for Persons with AIDS, Inc. v. Village of Waterford, 799 F. Supp. 272, 279 (S.D.N.Y. 1992). This presupposes that Congress intended the FHA to authorize state actors such as the OAG to bring such suits. See Connecticut v. Physician's Health Servs., 287 F.3d 110, 121 (2d Cir. 2002) (congressional intent to allow lawsuits by states may be demonstrated by broad enforcement provisions permitting suit by "aggrieved persons"). Simply put, the FHA authorizes the OAG to enforce the federal ban on discrimination in residential mortgage lending.

2. Plaintiffs' Interpretation of the National Bank Act Conflicts with Congress' Clear Preference for Multiple Layers of Fair Lending Enforcement.

Plaintiffs' construction of the National Bank Act would seriously undermine Congress' fair lending policy, as reflected in the FHA, that national fair lending goals require multiple government enforcers, including states. Even though the National Bank Act pre-dates the FHA by over a century, "[t]he meaning of one statute may be affected by other Acts, particularly where Congress has spoken subsequently and more specifically to the topic at hand." FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 133 (2000). The reasons for this are basic:

> The classic judicial task of reconciling many laws enacted over time, and getting them to make sense in combination, necessarily assumes that the implications of a statute may be altered by a later statute. This is particularly so where the scope of the earlier statute is broad but the subsequent statutes more specifically address the topic at hand. . . . [A] specific policy embodied in a later federal statute should control our construction of the earlier statute, even though it has not been expressly amended.

Id. at 140 (citations and internal quotation marks omitted). Here, the FHA "more specifically address[es] the topic at hand" – discrimination in lending – than does the National Bank Act.

In enacting and amending the FHA, Congress has created a system of FHA enforcement by multiple actors in multiple fora in which "state and local agencies play" a "valuable role." H. Rep.

No. 100-711, at 35 (1988), reprinted in 1988 U.S.C.C.A.N. 2173, 2196; see also Ponca City, 952 F.2d at 1195 ("It is clear that Congress intended to summon all available forces to vindicate a policy that Congress considered to be of the highest priority.") (internal quotation marks omitted). The FHA provides for Department of Housing and Urban Development ("HUD") enforcement in administrative proceedings, Department of Justice enforcement in federal court, and civil actions by "aggrieved persons" (including states). 42 U.S.C. §§ 3610-3614. It also authorizes HUD to certify state or local agencies to process FHA complaints pursuant to state or local law if HUD determines that such law is substantially equivalent, both substantively and procedurally, to the FHA. See 42 U.S.C. § 3610(f); 24 C.F.R. § 115.201. Once such agencies are certified, HUD must refer complaints alleging discrimination within their geographic jurisdiction to those agencies for processing pursuant to state or local law and procedures. See 42 U.S.C. § 3610(f).

HUD's referral practices confirm that state and local agencies play a central role in prosecuting fair lending complaints, even against national banks. According to the OAG's informal canvassing of a handful of states, HUD routinely refers discriminatory lending complaints against national banks to state enforcement agencies. See Parker Decl. ¶¶ 9-20 & Exs. 3-7; see also Boykin v. Key Corp., No. 03-CV-944S (WMS), 2005 U.S. Dist. LEXIS 5546, at *4 (W.D.N.Y. Mar. 28, 2005) (HUD referral of fair lending complaint against national bank to New York State Division of Human Rights).[11]

Moreover, nothing in the text of the FHA suggests that Congress intended to grant the OCC exclusive authority to pursue complaints against national banks under either federal or state fair lending laws. Rather, the FHA directs federal agencies "having regulatory or supervisory authority

[11] The OAG believes that these are not random or isolated occurrences, and that discovery would reveal that this has been HUD's regular practice since the enactment of the FHA.

over financial institutions" – including the OCC – to "cooperate with" HUD to advance the purposes of the FHA. 42 U.S.C. § 3608(d). This suggests that Congress believed, contrary to plaintiffs' view,[12] that a federal banking regulator's experience with the business practice of national banks, though useful, is not necessary to investigate a fair lending complaint and take enforcement action, and that, in any event, multiple agencies possess useful experience in this regard.[13]

Congress has made a policy choice that the advantages of having "more cops on the beat" to enforce fair lending laws outweigh any duplication of effort or redundancy that a multi-pronged enforcement apparatus would entail. This specific congressional policy choice on the precise issue at hand trumps any contrary policy in the National Bank Act, which never contemplated anti-discrimination laws. Congress plainly believes that any exclusivity principles expressed in the National Bank Act have no place in, and indeed would hamper, the battle to eliminate lending discrimination. For this reason, plaintiffs' distorted construction of the National Bank Act would frustrate congressional intent.[14]

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[12] Tr. of July 5, 2005 Hearing, at 27 (Statement of Clearing House's Counsel) ("[Y]ou cannot evaluate whether there has been discrimination in lending without understanding how banks decide, in the ordinary course, to make a mortgage loan. And that is something the OCC knows something about. And not something the Attorney General knows anything about.").

[13] The activities of national banks do not differ substantively from those of state-chartered banks, against which states undisputedly may enforce state fair lending laws. Indeed, two of the nation's largest banks, Clearing House members HSBC and JP Morgan Chase, were state-chartered until last year. See Baher Azmy, "Squaring the Predatory Lending Circle: A Case for States as Laboratories of Experimentation," 57 Fla. L. Rev. 295, 388 & n.484 (2005).

[14] The Third Circuit's apparent contrary policy judgment in Long with respect to discrimination-in-lending enforcement is of no moment. See 630 F.2d at 988 (concluding that state enforcement would be duplicative). The Long court did not consider the FHA and its multi-layered enforcement regime – a regime that makes plain Congress' view that multiple and even overlapping enforcement by federal and state agencies best serves fair lending goals.

B. Serious Federalism Concerns Warrant Rejecting Plaintiffs' Construction of the National Bank Act.

Plaintiffs construe the National Bank Act to establish a regulatory scheme in which state laws of general applicability are not preempted by federal law but governmental enforcement of those statutes nonetheless resides exclusively with the OCC. This scheme would be both unprecedented and irrational; it also would impinge on core sovereign interests of the states and blur the lines of political accountability in our federal system. Since Congress has not spoken with the clarity necessary to justify such a substantial shift in the federal-state balance – and, at the same time, has articulated a very clear intent to afford states an important role in enforcing federal and state fair lending law – established principles of federalism doom plaintiffs' position.

1. Congress Did Not Intend to Preempt Enforcement of State Laws by State Officials, Which Would Be Both Unprecedented and Irrational.

Plaintiffs contend that while state anti-discrimination laws apply to national banks, those banks need not fear enforcement of those laws by state authorities. This view, if accepted, would produce a breathtaking anomaly in federal law. Plaintiffs identify no other circumstances in which Congress has made federal authorities exclusively responsible for enforcing state laws, and our research has identified only one such area: regulation of gambling on Native American reservations. See 18 U.S.C. § 1166 (making state gambling laws applicable to Indian country but providing for exclusive federal "jurisdiction over criminal prosecutions of violations" of such laws). This example, however, affords plaintiffs no support. States historically have been excluded from regulating conduct in Native American territory; state criminal laws do not even apply there without specific federal authorization. See Washington v. Confederated Bands & Tribes of Yakima Indian Nation, 439 U.S. 463, 470 (1979). By contrast, state laws typically apply to national banks unless those laws are preempted. See Barnett Bank, 517 U.S. at 33-34.

Plaintiffs' construction moves from the anomalous to the irrational when viewed in light of the usual interaction of the states and the federal government in our federal system. Typically, where the Constitution permits both state and federal regulation of a particular kind of activity, Congress must decide whether it should leave a particular domain of activity for state regulation, preempt every state law concerning that activity, or preempt only those state laws that conflict with federal law. See, e.g., Crosby v. National Foreign Trade Council, 530 U.S. 363, 372-73 (2000). This requires Congress to weigh two competing sets of benefits: (1) the benefits of leaving a particular domain to state-by-state legislation, e.g., creating fifty separate laboratories for policy experimentation and innovation, calibrating laws to local circumstances, and drawing upon the law-enforcement resources of fifty separate sovereigns; and (2) the benefits of a single set of exclusive or minimum federal rules, e.g., avoiding duplicative enforcement efforts and providing those who engage in the regulated conduct across state lines a nationally uniform set of standards.

Here, by arguing that the National Bank Act precludes state enforcement of state fair lending laws against national banks, plaintiffs want this Court to believe that Congress intended a course that secures neither the full benefits of state-by-state experimentation nor the full benefits of a national uniform standard. As the OCC concedes, the National Bank Act does not preempt state fair lending laws as applied to national banks. Assuming for argument's sake that the OCC actually does and would enforce the non-preempted laws of all fifty states, including fair lending laws, against national banks, then the efficiency benefits of a single nationally-uniform standard remain unattained. On the other hand, if the National Bank Act precludes states from enforcing their own laws against national banks, as plaintiffs argue, then states are discouraged from experimentation and innovation. Conscientious state legislators would have little incentive to make their laws applicable to national banks if state law-enforcement officials could not enforce those laws against national banks.

2. Plaintiffs Cannot Show That Congress Expressed an "Unmistakably Clear" Intent to Preclude States from Enforcing Non-Preempted State Laws Against National Banks.

a. A Clear Statement of Congressional Intent Is Required Because Plaintiffs' Interpretation Would Raise Substantial Federalism Concerns.

"Federal statutes impinging upon important state interests cannot be construed without regard to the implications of our dual system of government." BFP v. Resolution Trust Corp., 511 U.S. 531, 544 (1994) (internal quotation marks and alterations omitted). When a statute would "pre-empt the historic powers of the States" or "alter the usual constitutional balance between the States and the Federal Government," the Supreme Court requires Congress to "make its intention to do so unmistakably clear in the language of the statute." Will v. Michigan Dep't of State Police, 491 U.S. 58, 65 (1989) (internal quotation marks omitted). Requiring a clear statement of congressional intent "acknowledg[es] that the States retain substantial sovereign powers under our constitutional scheme, powers with which Congress does not readily interfere." Gregory v. Ashcroft, 501 U.S. 452, 461 (1991); see also Davies Warehouse Co. v. Bowles, 321 U.S. 144, 154 (1944).

Plaintiffs' construction of the National Bank Act triggers this clear statement requirement for at least two reasons. First, it would trample upon several important and traditional state interests. States have a strong interest in enforcing their own generally applicable laws, for this power is at the core of state sovereignty. See Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez, 458 U.S. 592, 601 (1982) ("power to create and enforce a legal code" is key sovereign interest of state).[15] This

[15] See also Diamond v. Charles, 476 U.S. 54, 65 (1986) ("Because the State alone is entitled to create a legal code, only the State has [the direct stake needed to support standing] in defending the standards embodied in that code."); Berger v. Cuyahoga County Bar Ass'n, 983 F.2d 718, 722 (6th Cir. 1993) ("Promulgation and enforcement of the rules are plainly exercises of Ohio's sovereign power.").

sovereign interest – in seeing that the individuals selected and authorized to enforce state laws are actually permitted to do so – is of a piece with other state government interests that may only suffer derogation pursuant to a clear statement of congressional intent. See Nixon v. Missouri Mun. League, 541 U.S. 125, 140 (2004) (determination of activities in which municipalities may engage); Pennsylvania Dep't of Corrections v. Yeskey, 524 U.S. 206, 209 (1998) (management of state prisons); Gregory, 501 U.S. at 460-61 (determination of qualifications of state officeholders). In addition, as Congress acknowledged when it enacted the Riegle-Neal amendments, states have an important interest in protecting the rights of their consumers, businesses, and communities, and specifically in combating discrimination in housing and lending. See H.R. Rep. No. 103-651, at 53 reprinted in 1994 U.S.C.C.A.N. at 2074. Substantial encroachments on these and other traditional state police powers typically require a clear statement of congressional intent. See Cleveland v. United States, 531 U.S. 12, 24-25 (2000) (policing of criminal conduct); BFP, 511 U.S. at 544 (regulation of title to real estate); Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230-31 (1947) (regulation of warehouses); Davies Warehouse Co., 321 U.S. at 154-55 (same).

Second, the clear statement rule applies here because plaintiffs' interpretation would effectively distort the lines of political accountability in our federal system. The Supreme Court has held that the Constitution does not allow Congress to "compel the States to implement, by legislation or executive action, federal regulatory programs." Printz v. United States, 521 U.S. 898, 925 (1997). Such "commandeering" is impermissible in large part because state officials will likely "tak[e] the blame for [the federal regulatory program's] burdensomeness and for its defects," id. at 930, and therefore "bear the brunt of public disapproval," New York v. United States, 505 U.S. 144, 168 (1992), while the federal officials who actually run the program are likely to be "insulated from the electoral ramifications of their decisions," id. at 169.

Here, while there is no federal commandeering of state officials, plaintiffs' construction of the National Bank Act raises similar accountability concerns. If Congress has authorized only the OCC to enforce state fair lending laws against national banks, as plaintiffs argue, and if the OCC does a poor job of enforcing those laws, the people of the state will lack adequate recourse against those responsible for the enforcement failure. The OCC will remain insulated from political pressure to fully enforce any particular state law because its responsibility for doing so may not be apparent to the public, which naturally would expect state officials to be responsible for enforcing state law. Moreover, it will be difficult for citizens concerned about the under-enforcement of their state's law to convince Congress or the President to compel more vigorous enforcement efforts by the OCC.

b. Plaintiffs Can Point to No "Unmistakably Clear" Statement That Congress Intended to Preclude States from Enforcing Non-preempted State Laws Against National Banks.

Plaintiffs cannot show that Congress made it "unmistakably clear" that it intended not to preempt state laws of general applicability but to preclude states from enforcing their own non-preempted laws. To suffice as a clear statement of intent, statutory language must leave no ambiguity or doubt as to Congress' purpose. See Dellmuth v. Muth, 491 U.S. 223, 230 (1989) ("[E]vidence of congressional intent must be both unequivocal and textual."); Pennsylvania Dep't of Corrections, 524 U.S. at 209-10 (intent to apply statute to state prisons demonstrated by language imposing requirements on "any department, agency, . . . or other instrumentality of a State"); Rice, 331 U.S. at 233-34 (intent to supplant state regulation of public warehouses demonstrated by language providing that federal "power, jurisdiction, and authority . . . shall be exclusive" for licensees under federal warehouse law).

Here, the language of Section 484 falls far short of unambiguously showing an intent to permit only federal enforcement of non-preempted state laws. Indeed, the provision contains exceptions – permitting the exercise of visitorial powers "authorized by Federal law" or "vested in the courts of justice" – suggesting that Congress envisioned an enforcement role for states. See supra Pts. I.A & II.A.1. Riegle-Neal, which provides that certain state laws "shall be enforced" by the OCC as against interstate branches of national banks, likewise fails to establish unequivocally that Congress intended to make the OCC's enforcement authority exclusive. See supra Pt. I.C. Congress knows how to confer exclusive authority unambiguously: by using the term "exclusive." See, e.g., 18 U.S.C. § 1166(d) (providing United States with "exclusive jurisdiction over criminal prosecutions of violations of State gambling laws" applicable in Native American territory); Rice, 331 U.S. at 233 (finding exclusive federal authority where statute provided that Secretary of Agriculture's "power, jurisdiction, and authority . . . shall be exclusive"). Its failure to do so in Riegle-Neal renders its statement insufficiently clear to wrest from the states their traditional powers to enforce non-preempted state laws.

The cases upon which plaintiffs rely do not suggest, much less support, a contrary result. Although they found no constitutional problem with the OCC's exclusive visitorial authority, each of them involved a state banking commissioner engaged in traditional administrative oversight, not a state attorney general contemplating a judicial action to enforce non-preempted state law. See supra Pt. I.B. Indeed, some of the courts drew comfort from the belief that – contrary to plaintiffs' construction of the National Bank Act – states could pursue "judicial remedies to compel national bank compliance with state law." First Union, 48 F. Supp. 2d at 149; see also Wells Fargo Bank, 265 F. Supp. 2d at 1171 (quoting First Union); National City Bank, 2003 U.S. Dist. LEXIS 25852, at *13 (same). Having assumed that Congress left this crucial element of state sovereignty intact, it is hardly surprising that these courts found no substantial federalism difficulty.[16]

Precluding the OAG from judicial enforcement of non-preempted state laws against national banks would trample upon important state interests and erode political accountability. Because plaintiffs cannot identify an unmistakably clear statement that Congress intended to establish so drastic and irrational a result, their interpretation of the National Bank Act should be rejected.

III. OCC'S RULEMAKING SHOULD NOT BE AFFORDED JUDICIAL DEFERENCE.

In 1999 and 2004, the OCC amended its regulations purportedly to clarify the meanings of "visitorial powers" and "vested in the courts of justice" as used in Section 484. See 64 Fed. Reg. 60092, 60094-95 (1999) (codified at 12 C.F.R. § 7.4000); 69 Fed. Reg. 1895 (2004) (codified at 12 C.F.R. § 7.4000). The OCC claimed that the amended regulations did not represent a change in law but rather were designed to "interpret and implement" Section 484. 69 Fed. Reg. at 1895. However, to the extent that the rulemaking precludes states from bringing enforcement lawsuits and taking any ancillary actions necessary to bring such suits, it reflects an incorrect reading of the statute and contradicts a long line of judicial precedent. The OCC's attempt to expand its powers by administrative fiat is not entitled to the deference that often is afforded to administrative regulations.

A. The Court Should Interpret Section 484 De Novo Rather Than Apply The Deferential Chevron Analysis.

While an agency's construction of a statute is often afforded deference under Chevron v. Natural Resources Defense Council, 467 U.S. 837 (1984), such deference is not appropriate here. "Employing traditional tools of statutory construction," INS v. Cardoza-Fonseca, 480 U.S. 421, 446 (1987), it is clear that Congress intended to permit states to bring lawsuits against national banks,

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[16] The Long decision, which held that a non-preempted state anti-redlining law could be enforced against a national bank only by the OCC, contains no discussion of federalism concerns, nor any indication that the parties raised any such issues in their briefs. 630 F.2d at 988-89.

and the OCC's contrary interpretation is inconsistent with the plain language of the statute. See supra Pts. I & II; see also Chevron, 467 U.S. at 843-45 (court must initially look at congressional intent on question and plain statutory language); cf. Independent Ins. Agent of America, Inc. v. Hawke, 211 F.3d 638 (D.C. Cir. 2000) (rejecting OCC's interpretation of National Banking Act); Consolidated Bank v. United States Dep't of Treasury, 118 F.3d 1461 (11^{th} Cir. 1997) (same).

Moreover, even if Section 484 were in any way ambiguous, the Court should interpret the provision de novo without giving the OCC rulemaking any deference. The Chevron framework should not govern because the principles underlying the framework do not apply here, and the OCC has acted outside the scope of its delegated rulemaking authority.

1. The Rationales for the Deferential Chevron Framework Do Not Apply.

The deferential Chevron framework is not appropriate to assess the OCC's interpretation of Section 484 because the rationales underlying this approach do not apply here: (1) the regulatory amendments do not reflect the application of agency expertise to a complex issue, but instead reflect the usurpation of traditional judicial functions; and (2) the regulatory amendments do not reconcile conflicting banking policies, but instead constitute a mere power-grab.

First, Chevron applies where "a full understanding of the force of the statutory policy in the given situation has depended upon more than ordinary knowledge respecting the matters subjected to agency regulation," Chevron, 467 U.S. at 844 (emphasis added), and where "the regulatory scheme is technical and complex." Id. at 865. Chevron deference relies critically on the "superior expertise of the agency in question." In re New York Times Secs. Servs., Inc., 371 F.3d 68, 82 (2d Cir. 2004).

Here, the OCC's expertise is limited to banking and affords the agency absolutely no advantage in construing judicial precedent to interpret pure statutory language, such as the phrase "vested in the courts of justice." The OCC is no better equipped than courts to resolve what is best characterized as a jurisdictional dispute, and there is no reason to believe that Congress has implicitly delegated to the OCC the authority to resolve this issue. See Chevron, 467 U.S. at 844 (deference is based on implicit "legislative delegation" to agency). The OCC's determination to preempt state enforcement of laws resembles the pure legal decision as to whether a federal law preempts state law, to which no judicial deference is warranted because its resolution is within the expertise of courts. See Smiley v. Citibank, 517 U.S. 735, 744 (1996) (OCC decision as to whether federal statute preempted state law would not be entitled to deference); Bankwest, Inc. v. Baker, No. 04-12420, 2005 U.S. App. LEXIS 10832, at *29 (11th Cir. June 10, 2005) ("Because a preemption determination involves matters . . . more within the expertise of the courts than within the expertise of an administrative agency, we need not defer to an agency's opinion regarding preemption.") (internal citations and quotation marks omitted); Colorado Pub. Utils. Comm'n v. Harmon, 951 F.2d 1571, 1579 (10th Cir. 1991) (declining to apply Chevron to agency's preemption decision because it "involves matters of law – an area more within the expertise of the courts").

Far from applying its expertise to make a policy determination related to the complex and technical business of banking, the OCC simply has undertaken the traditional judicial role of interpreting plain statutory language and judicial precedent. This is best illustrated by the OCC's justifications for the 2004 regulatory amendments set forth in its Notice of Proposed Rulemaking, see 68 Fed. Reg. 6363, 6366-70 (2003), and the commentary that accompanied the final rule, see 69 Fed. Reg. 1895. In these documents, the OCC analyzes judicial precedents, legislative history, and plain statutory language, much as a lawyer would in a legal brief, and quite unlike a policymaker's approach to the business of banking. See, e.g., 68 Fed. Reg. at 6367 ("we first discuss the background and purpose of section 484, and then summarize case law"); 69 Fed. Reg. at 1899 (wrongly distinguishing long line of judicial precedent recognizing state's right to judicially enforce state laws against national banks). Courts need not defer to agency positions based merely on statutory interpretation and the agency's own reading of court opinions, since the judiciary is the expert in performing these functions. Compare Cardoza-Fonseca, 480 U.S. at 446 (declining to apply Chevron deference because issue was "a pure question of statutory construction for the courts to decide") with National Cable Telecomms. Ass'n v. Brand X Internet Servs., 125 S. Ct. 2688, 2699-2700 (2005) (applying Chevron deference to agency's technical interpretation of "telecommunications services"); see also Chevron, 467 U.S. at 843 n.9 ("judiciary is the final authority on issues of statutory construction"); Iavorski v. INS, 232 F.3d 124, 133 (2d Cir. 2000) (not deferring to agency on question of statutory construction because it does not implicate "areas of special agency expertise"); cf. Wachovia Bank, 2005 U.S. App. LEXIS 13904, at *37-39 (rejecting claim that another OCC regulation merely reflected agency's "view of what courts would hold," because discussion accompanying final rulemaking was "replete with language indicating a policy determination based on 'safety and soundness' considerations rather than any pure interpretation of law") (emphasis added).[17]

Second, the OCC's construction of Section 484 does not involve "reconciling conflicting policies" – the typical scenario requiring judicial deference. Chevron, 467 U.S. at 844. Instead, the rulemaking reflects an attempt to bolster the OCC's power over the national banking industry at the

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[17] In Wachovia Bank, the Second Circuit found that 12 C.F.R. § 7.4006 – which makes state laws applicable to national bank operating subsidiaries to the same extent as the laws apply to the parents – was entitled to deference because it reflected "a policy judgment" grounded in "safety and soundness" considerations. 2005 U.S. App. LEXIS 13904, at *38. By contrast, the final rulemaking for the 2004 amendments to 12 C.F.R. 7.4000 never even mentions "safety and soundness," but instead seeks to interpret over 40 different judicial decisions. Compare 66 Fed. Reg. 34788 (2001) (commentary accompanying 12 C.F.R. § 7.4006) with 69 Fed. Reg. 1895 (commentary accompanying amendments to 12 C.F.R. § 7.000).

expense of state enforcement authority. Courts decline to defer to agency interpretations seeking solely to expand the agency's limited statutory jurisdiction.[18] Scholars agree that deferential treatment should not be afforded to regulations that implicate agency self-aggrandizement.[19] The OCC, though, has gone one step beyond defining its own jurisdiction by barring the OAG from exercising its powers to enforce non-preempted New York laws. Such a turf claim, dressed up as a statutory interpretation, does not merit Chevron deference.

2. The Chevron Framework Does Not Apply Because the OCC Has Acted Outside its Delegated Rulemaking Authority.

The OCC has overstepped its rulemaking authority by promulgating regulations that prohibit states from bringing lawsuits pursuant to federal laws that states have standing to enforce, such as the FHA, and pursuant to non-preempted state laws, such as New York State Executive Law § 296-a. "[A]n administrative agency's power to promulgate legislative regulations is limited to the authority

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[18] As the Second Circuit has noted, "it seems highly unlikely that a responsible Congress would implicitly delegate to an agency the power to define the scope of its own power." National Res. Def. Council v. Abraham, 355 F.3d 179, 199 (2d Cir. 2004) (internal quotation marks omitted); see also FEC v. NRA Political Victory Fund, 513 U.S. 88, 97 (1994) (statutory provisions defining agency's powers are not "within the province of the agency to interpret"); Addison v. Holly Hill Fruit Prods., Inc., 322 U.S. 607, 616 (1944) ("The determination of the extent of authority given to a delegated agency by Congress is not left for the decision of him in whom authority is vested."); ACLU v. FCC, 823 F.2d 1554, 1567 n.32 (11th Cir. 1987) ("When an agency's assertion of power into new arenas is under attack . . . courts should perform a close and searching analysis of congressional intent, remaining skeptical of the proposition that Congress did not speak to such a fundamental issue."); Hi-Craft Clothing Co. v. NLRB, 660 F.2d 910, 916 (3d Cir. 1981) ("[A]n agency ruling that broadens its own jurisdiction is examined carefully.").

[19] See, e.g., Bernard Schwartz, Administrative Law § 10.36, at 707 (3d ed. 1991) ("Agencies have no special expertise in deciding their own jurisdiction. In addition, statutory provisions confining an agency's authority manifest an unwillingness to give the agency freedom to define the scope of its own power. To give effect to the confining intent, the ultimate word on jurisdiction should be with the courts, not the agencies."); Timothy K. Armstrong, "Chevron Deference and Agency Self-Interest," 13 Cornell J. L. & Pub. Pol'y 203 (2004); Thomas W. Merrill & Kristin E. Hickman, "Chevron's Domain," 89 Geo. L.J. 833, 910 (2001).

delegated by Congress." Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 208 (1988). When an agency acts outside the scope of its congressionally delegated rulemaking authority, its regulations are not entitled to deference under Chevron. See Adams Fruit Co., Inc. v. Barrett, 494 U.S. 638, 649 (1990); American Library Ass'n v. FCC, 406 F.3d 689, 698-99 (D.C. Cir. 2005).

Congress has granted the OCC the authority "to prescribe rules and regulations to carry out the responsibilities of the office." 12 U.S.C. § 93a. Those responsibilities are limited to ensuring the safety and soundness of national banks by executing and ensuring compliance with federal banking laws and conducting examinations. See 12 U.S.C. §§ 1, 481, 1818; see also S. Rep. No. 96-368, at 13 (1979), reprinted in 1980 U.S.C.C.A.N. 236, 249 ("rulemaking authority is limited to unsafe or unsound banking practices"). The OCC's rulemaking construing Section 484 to bar states from enforcing the FHA and non-preempted state laws bears no relation to ensuring the safety and soundness of national banks. See 69 Fed. Reg. 1895 (not mentioning "safety and soundness" in commentary to rulemaking).

To be sure, the OCC has rulemaking authority to preempt state laws that "significantly interfere with the national bank's exercise of its powers." Barnett Bank, 517 U.S. at 33. However, the agency cannot preempt laws, such as New York State Executive Law § 296-a, that parallel federal law but in no way encroach upon a bank's ability to exercise its federally authorized functions. See St. Louis, 263 U.S. at 656; National Bank, 76 U.S. (9 Wall.) at 362. Indeed, the OCC has acknowledged that it has not preempted state anti-discrimination laws because they do not "obstruct, impair, or condition" banks' ability to exercise federally authorized powers. See OCC Interpretive Letter No. 998 (Aug. 2004), annexed as Ex. 10 to Parker Decl. Because the OCC cannot substantively preempt New York State Executive Law § 296-a through rulemaking, it cannot promulgate regulations preempting states from seeking compliance with this law.

B. Even If the Deferential Chevron Analysis Applies, the Rulemaking Is Not Entitled to Deference Because it Is Unreasonable.

Assuming arguendo that congressional intent is not clear on this question and the Chevron deferential analysis applies, the Court still should not defer to the OCC's rulemaking because it does not reflect "a permissible construction" of Section 484, Chevron, 467 U.S. at 843, and does not reflect a "reasonable policy choice," id. at 845.

The OCC's rulemaking contravenes the overarching public policy of promoting vigorous anti-discrimination enforcement efforts at all levels of government – a societal goal of great import. See, e.g., 42 U.S.C. § 2000e-5 (permitting enforcement of Title VII by state and local agencies); Alexander v. Gardner-Denver Co., 415 U.S. 36, 47 (1974) ("legislative enactments in this area have long evinced a general intent to accord parallel or overlapping remedies against discrimination"); Trafficante v. Metropolitan Life Ins. Co., 409 U.S. 205, 211 (1972) (finding multiple enforcers of FHA critical to "vindicating a policy that Congress considered to be of the highest priority").

In addition, the OCC's statutory interpretation would result in diminished consumer protection. It is an unreasonable policy choice for the OCC to abruptly bar future state investigations and lawsuits against national banks – which historically have been commonplace[20] – and unnecessarily limit the resources available to enforce a myriad of federal and state laws against the approximately 1,934 national banks, 450 operating subsidiaries, and 52 federal foreign bank branches within the OCC's allegedly exclusive purview.[21] As the self-proclaimed sole cop on the

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[20] If allowed the opportunity to conduct the limited discovery requested, the OAG would present additional evidence to demonstrate that states routinely have conducted investigations and enforcement actions against national banks and their operating subsidiaries, and that the OCC's sudden usurpation of this authority will result in significant harm to consumers.

[21] See Comptroller of the Currency, Annual Report: Fiscal Year 2004, at 7 (Oct. 2004), annexed as Ex. 11 to Parker Decl. The policy choice to preclude state investigations and lawsuits

beat, the OCC will need to ensure that its limited staff are intimately familiar not only with all applicable federal laws, but also with the applicable non-preempted laws of the 50 states – a daunting challenge. This will surely undermine consumer protection efforts, and will detract from the OCC's primary mission of ensuring the safety and soundness of national banks.

IV. OCC'S RULEMAKING SHOULD BE SET ASIDE TO THE EXTENT IT PRECLUDES STATE JUDICIAL ENFORCEMENT OF FEDERAL LAWS AND NON-PREEMPTED STATE LAWS.

The Attorney General asserts a counterclaim seeking judicial review of the OCC's rulemaking pursuant to Section 706 of the Administrative Procedure Act. The Attorney General respectfully requests that this Court set aside 12 C.F.R. § 7.4000 to the extent it purports to prohibit states from "exercising their statutory and common law authority to enforce non-preempted state laws against national banks and their operating subsidiaries." Counterclaim, Prayer for Relief. For the reasons set forth in this memorandum of law, the OCC's interpretation of Section 484 is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," and "in excess of statutory jurisdiction, authority, or limitations." 5 U.S.C. § 706(2)(a) & (c). As such, it should be held to be unlawful and set aside. See, e.g., National Credit Union Admin. v. First Nat'l Bank & Trust Co., 522 U.S. 479 (1998) (agency statutory interpretation should be set aside under the Administrative Procedure Act because it conflicted with plain statutory language).

CONCLUSION

For the reasons stated above, the Court should deny plaintiffs' requests for injunctive and

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is particularly unreasonable in light of the OCC's unimpressive track record of enforcement of federal law against national banks. See Clearing House Br. at 12 n.8 (noting only 2 OCC enforcement actions since 1994); Parker Decl. Exs. 12-17 (United States Attorney General Annual Reports noting that OCC referred only 6 fair lending cases to DOJ from 1999-2004, including two cases challenging bank efforts to increase access to credit for senior citizens and Hispanics).

declaratory relief and grant the OAG's requested relief on its counterclaim.

Dated: New York, New York
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Certificate of Service

Anne H. Pearson, a member of the bars of the State of New York and of this District Court and an Assistant Attorney General of the Office of the Attorney General of the State of New York, certifies that on August 5, 2005, I served a true copy of Defendant's Memorandum of Law in Opposition to Plaintiffs' Request for Injunctive and Declaratory Relief and in Support of Counterclaim, the Declaration of Thomas G. Conway, dated August 4, 2005, and the Declaration of Dennis D. Parker, dated August 5, 2005, via the Court's ECF system and by e-mail on counsel for all parties at the addresses shown below:

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