05-5996cv(L)
05-6001-cv(CON)

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

The Clearing House Association, L.L.C.,

Plaintiff-Appellee,

Office of the Comptroller of the Currency,

Plaintiff-Counter-Defendant-Appellee,

v.

Eliot Spitzer, in his official capacity as Attorney General for the State of New York,

Defendant-Counter-Claimant-Appellant.

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

BRIEF FOR *AMICI CURIAE* CENTER FOR RESPONSIBLE LENDING, AARP, CONSUMER FEDERATION OF AMERICA, NATIONAL ASSOCIATION OF CONSUMER ADVOCATES, NATIONAL CONSUMER LAW CENTER, PUBLIC CITIZEN, INC., U.S. PIRG, AND NATIONAL ASSOCIATION OF STATE PUBLIC INTEREST RESEARCH GROUPS IN SUPPORT OF DEFENDANT-APPELLANT AND ARGUING FOR REVERSAL

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RULE 26.1 DISCLOSURE STATEMENT

The Center for Responsible Lending ("CRL") is a non-profit supported organization under the Internal Revenue Code. CRL's supporting, or parent, organization is the Center for Community Self-Help, which is tax-exempt under section 501(c)(3) of the Internal Revenue Code. The Center for Community Self-Help's mission is to create ownership and economic opportunities for minorities, women, rural residents, and low-wealth families. Neither CRL nor the Center for Community Self-Help has issued shares or securities.

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Consumer Federation of America ("CFA") is a non-profit membership association of some 300 pro-consumer non-profit organizations established in 1967 to advance the interests of consumers through research, education, and advocacy. It is organized under the laws of New York and is tax-exempt under section

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The National Association of Consumer Advocates is a non-profit membership organization of law professors, public sector lawyers, private lawyers, legal services lawyers, and other consumer advocates. It is organized under the laws of the State of Massachusetts and is tax-exempt under section 501(c)(6) of the Internal Revenue Code. It has no parent corporation, nor has it issued shares or securities.

The National Association of State Public Interest Research Groups and its federal advocacy office, U.S. PIRG, represent the interests of state PIRGs and their 500,000 individual members around the country. PIRGs are non-profit, non-partisan consumer advocacy organizations that have long been concerned with financial industry compliance with all consumer and fair lending laws, and with the

ability of states to protect their residents from unfair financial practices. The association does not issue stock nor do any of its affiliates.

The National Consumer Law Center ("NCLC") is a national research and advocacy organization focusing specifically on the legal needs of low income, financially distressed, and elderly consumers. NCLC is a non-profit, tax exempt Massachusetts corporation qualified under section 501(c)(3) of the Internal Revenue Code. NCLC is recognized nationally as an expert in consumer credit issues, and has drawn on this expertise to provide information, legal research, policy analyses, and market insights to federal and state legislatures, administrative agencies, and the courts for over 36 years. NCLC also is author of a sixteen-volume Consumer Credit and Sales Legal Practice Series that includes, *inter alia*, treatises on Consumer Banking and Payments Law and Credit Discrimination. NCLC frequently is asked to appear as *amicus curiae* in consumer law cases before trial and appellate courts throughout the country and does so in appropriate circumstances. NCLC has never issued shares or securities.

Public Citizen, Inc. is a non-profit, non-stock corporation. It has no parent corporation and no publicly held company owns ten percent or more of its stock. Public Citizen, Inc. is a consumer advocacy, lobbying, and litigating organization with approximately 100,000 members nationwide. It has a longstanding interest in limiting the reach of federal preemption to only those situations in which Congress

has made clear its intent to oust state law in order to serve important federal objectives.

DATED: April 3, 2006

Respectfully submitted,

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I. INTEREST OF AMICI CURIAE

Amici curiae Center for Responsible Lending, AARP, Consumer Federation of America, National Association of Consumer Advocates, National Consumer Law Center, Public Citizen, Inc., U.S. PIRG, and the National Association of State Public Interest Research Groups are nonprofit organizations that work on behalf of consumers. *Amici* and their members have extensive experience on a wide range of consumer protection matters, including efforts to fight predatory lending and discrimination in the marketplace. *Amici* are interested in this appeal because they believe that enforcement by the state attorneys general is essential to ensuring adequate and effective compliance with fair lending and consumer protection laws by national banks and their operating subsidiaries.

II. SUMMARY OF ARGUMENT

The statute at the core of this appeal has 142 years of interpretation and experience behind it. That experience and interpretation has allowed our nation's banking system to grow to a vibrant maturity under a system of shared federal and state governance and enforcement. The visitorial powers provision of the National Bank Act ("NBA"), now codified at 12 U.S.C. § 484, is the fulcrum upon which the balance of that shared enforcement authority rests. The provision by its terms limits only the exercise of "visitorial powers" – a term that has a well-established,

narrow meaning – and expressly does *not* preclude the exercise of powers "vested in the courts of justice" or "authorized by Federal law."[1]

Though Congress has not changed this provision in any relevant respect since its enactment, the Office of the Comptroller of the Currency ("OCC") seeks to alter the balance of enforcement authority. In its 2004 amendments to 12 C.F.R. § 7.4000, the agency seeks to expand dramatically the range of its exclusive enforcement authority and eviscerate the statute's courts of justice exception.

The district court erred in ruling that § 484 and this newly-minted visitorial rule prohibit the Attorney General of New York from investigating and enforcing non-preempted fair lending laws against national banks. As explained in Section III below, the Court's determination of whether states may continue to exercise their enforcement authority against national banks will have a profound impact on America's households: the practical implications for consumer protection and fair lending enforcement are very real, indeed. The ever-expanding universe of activities as to which the OCC now asserts exclusive enforcement authority ranges far a-field from the traditional banking activities with which the OCC has either experience or specialized expertise. The OCC also seeks to prevent states –

[1] Although this brief does not address the "authorized by Federal law" exception, the undersigned *amici curiae* concur in the arguments raised by the Attorney General of New York and various civil rights groups as *amici curiae* that the Attorney General's actions are "authorized by Federal [discrimination] law."

including the fifty chief law enforcement officers of the states – from bringing their knowledge, expertise, experience and resources to bear in enforcing their own applicable state laws. This is particularly troubling because the OCC has brought very few actions of its own to protect consumers and in fact has an interest in siding with banks.

The district court erred in deferring to the OCC's self-aggrandizing interpretation of § 484 in this context. *See* Section IV.A. *infra*. There is no ambiguity in the NBA's visitorial powers provisions other than what the agency itself has tried to create in the last few years. It is also implausible to suggest that Congress would have implicitly delegated to a self-interested agency the power to define the scope of its own authority and prevent state attorneys general from enforcing the laws of their own states. Determining the scope of "visitorial powers" and the powers "vested in the courts of justice" is a purely legal inquiry, which this Court is far better equipped to handle than the OCC.

As explained in Sections IV.B. and IV.C. below, the interpretation of visitorial powers and the courts of justice exception that the OCC has advanced is also wholly unreasonable. The Supreme Court firmly rejected the idea that the visitorial powers provision would prevent a state official from enforcing state law over eighty years ago. Consistent with this precedent, state attorneys general have a long tradition of enforcing their non-preempted state laws against national banks,

even when "banking" activities are at issue. The Supreme Court has also recognized that Congress did not intend the visitorial powers provision to take away the right to proceed in the courts of justice to enforce recognized rights, such as the right to be free from discrimination. The district court's decision should be reversed.

III. BACKGROUND

A. The Universe of Activities As to Which the OCC Asserts Exclusive Visitorial Powers Extends Well Beyond the Established Definition of "Visitation" and Traditional Banking Functions.

As the Attorney General explains in Point III.A. of his brief, it is well established that "[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 laws and regulations." *Guthrie v. Harkness*, 199 U.S. 148, 158 (1905) (quoting *First Nat'l Bank of Youngstown v. Hughes*, 6 F. 737 (C.C.N.D. Ohio 1881)). Fundamental to this case is a full understanding of how far the OCC has sought to expand the outer limits of its exclusive enforcement authority in § 7.4000 beyond the clear and narrow boundaries of "visitation." The OCC's regulation provides, in relevant part as follows:

> (a) General Rule
> ….
> (2) For purposes of this section, visitorial powers include:
> ….
> ….

(iii) Regulation and supervision of activities authorized or permitted pursuant to federal banking law; and
(iv) Enforcing compliance with any applicable federal or state laws concerning those activities.
(3) Unless otherwise provided by Federal law, the OCC has exclusive visitorial authority with respect to the content and conduct of activities authorized for national banks under Federal law.
(b) Exceptions to the general rule….
….
(2) Exception for courts of justice.... This exception…does not grant state…authorities any right to…compel compliance by a national bank with respect to any law, regarding the content or conduct of activities authorized for national banks under Federal law.

(emphasis added).[2]

Under the OCC's expanded rule implementing § 484, the reach of its exclusive enforcement authority is bounded by what national banks are authorized or permitted to do under federal banking laws. In turn, the universe of what is "authorized or permitted" activity for national banks has been expanding – in part through aggressive interpretation by the OCC itself. The end result is that the OCC has described the outer boundaries of its exclusive enforcement authority by reference to measurements over which it has considerable control.

The OCC's 2005 cumulative list of "permissible" activities for national banks and their operating subsidiaries includes many areas where banking regulators have no specialized expertise. Comptroller of the Currency: Activities

[2] The 2004 amendment added paragraph (a)(3), and completely rewrote (b), adding the restrictive reading to the courts of justice exception. *See* 69 Fed. Reg. 1895, 1904 (Jan. 13, 2004).

Permissible For a National Bank (2005), *available at* http://www.occ.treas.gov/corpapps/BankAct.pdf (last visited March 17, 2006). Among the permissible activities for banks and/or operating subsidiaries are: providing "Medicare and Medicaid counseling to customers and collect[ing] and disburs[ing] insurance benefit payments," *id.* at 3; providing "add-ons" to credit cards and having a referral service to third parties who offer extended warranty programs for various products and reimbursement for locksmith services, *id.*; selling long-term care and disability insurance, *id.* at 4; acquiring a company providing "welfare-to-work" counseling, *id.* at 5; acting as finder for auto sales and operating roadside assistance programs, *id.* at 11;[3] acting as finder for health insurance, *id.*; and acting as a third-party debt collector for other lenders and providing billing services for medical or other service providers, *id.* at 17. These few examples demonstrate the range of activities in which banks and/or their operating subsidiaries are permitted to engage, and show that the OCC's newly-minted expansion of its exclusive enforcement powers would bar many activities to which attorneys general have traditionally applied their own non-preempted state consumer protection laws. *See* Sec. IV.B.2., *infra.* If affirmed, the district court's ruling would prohibit the states from bringing their experience, expertise, and

[3] In practice, national banks use such "finder" authority to engage in "pre-acquired account marketing" activities with marketing partners, which have led to allegations of account "cramming" and consequently have been the subject of state attorney general enforcement activities. *See* Sec. IV.B.2., *infra.*

combined resources to these and other kinds of cases, such as predatory mortgage lending cases, which extend well beyond the significant fair lending issues raised in the instant action.

B. The OCC Has a Very Short and Poor Track Record in Fair Lending and Consumer Protection Enforcement.

The OCC's "primary mission and long-standing cultural focus," like that of other federal depository regulators, "has been monitoring the safety and soundness of their institutions." Christopher L. Peterson, *Federalism and Predatory Lending: Unmasking the Deregulatory Agenda*, 78 Temple L. Rev. 1, 73 (2005). It has only been since 2000, as the OCC's efforts to expand its exclusive jurisdictional sphere have heated up, that the OCC has even looked for authority to replace the authority of the attorneys general. Dusting off authority that is more than 25 years old, the OCC took its first enforcement action under Section 5 of the Federal Trade Commission Act against a national bank's unfair and deceptive practices in 2000.[4] Even then, the action came only after a decade in which the target bank "had been well known in the…industry as the poster child of abusive consumer practices"

[4] *See* Julie L. Williams & Michael L. Bylsma, *On the Same Page: Federal Banking Agency Enforcement of the FTC Act to Address Unfair and Deceptive Practices by Banks*, 58 Bus. Law. 1243, 1244, 1246 & n.25, 1253 (May 2003) (citing authority from the early 1970s indicating that the OCC had the authority to bring such an action under Section 8 of the Federal Deposit Insurance Act, noting that the OCC brought its first such case in 2000, and conceding that "[a]n obvious question is why it took the federal banking agencies more than twenty-five years to reach consensus on their authority to enforce the FTC Act").

and after the OCC was "embarrassed …into taking action" by a California prosecutor.[5] The OCC currently lists only eight actions in a section on its website captioned "[a]ctions the OCC has taken against banks engaged in abusive practices." http://www.occtreas.gov/Consumer/Unfair.htm (last visited March 17, 2006). By contrast, during the quarter century since the widespread enactment of general consumer protection laws, state attorneys general have vigilantly brought actions to curb improper practices by national banks, *see* Sec. IV.B.2., *infra*.

Even under specific federal consumer protection and fair lending laws,[6] the OCC's record of enforcement is thin. During the eighteen-year period from 1987 to 2004, the OCC brought only four formal enforcement actions under the Equal Credit Opportunity Act and/or its implementing regulation, and from 1999 to 2005, the OCC made only six fair lending referrals to the U.S. Department of Justice, only one of which involved discrimination on the basis of race or national origin.[7]

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[5] Duncan A. MacDonald (former General Counsel, Citigroup Inc.'s Europe and North American card business), Letter to the Editor, *Comptroller Has Duty to Clean Up Card Pricing Mess*, Am. Banker, Nov. 21, 2003, at 17; *see also* Frontline, *Secret History of the Credit Card*, Transcript at 16-17, http://www.pbs.org/wgbh/pages/frontline/shows/credit/etc/script.html.

[6] Federal consumer protection and some fair lending laws give the OCC enforcement authority over national banks independent of the NBA. *See, e.g.*, 15 U.S.C. § 1691c(a)(1)(A) (ECOA); 15 U.S.C. § 1607(a)(1)(A) (Truth in Lending).

[7] This information is contained in annual reports that the Federal Reserve Board and U.S. Attorney General provide to Congress. *See* 15 U.S.C. §§ 1613, 1691f. The relevant pages for the FRB Annual Reports by year are as follows: for 2004, 69-73; 2003, 67-71; 2002, 75-79; 2001, 134-37; 2000,

From 1997 to 2004, the Federal Reserve Board reported just seven formal enforcement actions against banks by the OCC under the Truth in Lending Act's Regulation Z. *See* note 7, *supra*.

While Plaintiffs may try to explain the unfavorable comparison to the states' enforcement activity against predatory mortgage lending by claiming that national banks and their operating subsidiaries do not engage in predatory lending, there is ample evidence to the contrary. National banks or their operating subsidiaries have been defendants in a host of cases involving allegations of predatory lending.[8] Further, a recent study that analyzed who receives higher-cost loans using the enhanced data reported under the Home Mortgage Disclosure Act, 12 U.S.C. § 2801 *et seq.* ("HMDA") found that national banks regulated by the OCC displayed the *greatest* disparities based on race, ethnicity, and income of all of the institutions studied. California Reinvestment Coalition, Who Really Gets Higher-Cost Home Loans?, at 3, 18, *available at* http://calreinvest.org/pdf/CRC_highcostloans1205.pdf (Dec. 2005). For example,

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104-08; 1999, 106-11; 1998, 220-24; 1997, 192-95; 1996, 199-203; 1995, 211-15; 1994, 224-28; 1993, 210-15; 1992, 196-201; 1991, 180-84; 1990, 166-69; 1989, 146-49; 1988, 149-51; 1987, 157-60. The U.S. Attorney General's Reports to Congress for 1999 to 2005 are available at http://www.usdoj.gov/crt/housing/housing_special.htm (last visited March 31, 2006).

[8] *See, e.g.*, Comments of National Consumer Law Center *et al.*, Docket No. 03-16, § 2 (Oct. 6, 2003), *available at* http://www.nclc.org/initiatives/test_and_comm/10_6_occ.shtml (listing examples of cases and banks that profit from predatory mortgage lenders).

national banks were 4.15 times more likely to make higher-cost refinance loans to African-Americans than they were to make higher-cost loans to white borrowers. *Id.*

Against this backdrop of almost non-existent consumer protection and fair lending enforcement under federal law, the OCC's effort to displace attorneys general from their role in enforcing applicable state law is even more troubling. Rather than vigilantly enforcing consumer protection and discrimination laws, the OCC has frequently intervened in recent years on the side of the banks it regulates when consumer rights are at stake.[9] The OCC's complaint in the instant action – filed simultaneously with the commercial bank association's complaint – provides yet another example of the OCC acting in concert with banks. Rather than bringing an action of its own utilizing the enhanced HMDA data, the OCC has opted to use its limited resources to curtail law enforcement.

That the OCC sides with banks rather than consumers when their interests conflict is not surprising, given the OCC's funding mechanism and the system of allowing depository institutions to choose their regulator, leading to "charter competition" in banking. An institution may choose between the federal charters

[9] For example, it did so when Minnesota challenged the telemarketing practices of an operating subsidiary. *See Minnesota v. Fleet Mortgage Co.*, 181 F. Supp. 2d 995 (D. Minn. 2001); *see also* Comments of the Attorneys General of 50 States and the Virgin Islands and the D.C. Office of Corporation Counsel, Docket No. 03-16, at 7-9 (Oct. 6, 2003), *available at* http://www.naag.org/issues/pdf/20031006-multi-occ.pdf.

issued by the OCC or the Office of Thrift Supervision or choose a state charter, to be regulated at the state level. Institutions may switch charters.

Agency leaders themselves have made no secret that the OCC, in essence, markets its charter.[10] The OCC has a financial stake in the success of that marketing. According to the OCC's annual report, the agency's budget authority for fiscal year 2005 was $519.4 million. OCC, Annual Report, Fiscal Year 2005, at 61, *available at* www.occ.treas.gov/annrpt/2005AnnualReport.pdf. Its total revenue for that year was $577.7 million, of which $557.8 million (97%) came from assessments. *Id.* at 7, 62. The assessment revenue increased nearly $80 million over FY 2004, "due mostly to increased assessments …as a result of the more than 26.2 percent growth in bank assets, which includes the assets of new large banks joining the national banking system in FY 2005." *Id.* at 62. As of June 30, 2005, the OCC supervised banks holding 67 percent of the total assets of all U.S. commercial banks. *Id*. at 7.

Eighty-six percent of the bank assets under OCC jurisdiction are large banks. *Id*. at 62. Thus the agency's revenues can be heavily dependent upon a few large players. The Bank of America's $40 million annual assessment, for example,

[10] A former comptroller, John D. Hawke, Jr., described the OCC's use of its power to override state laws protecting consumers as "one of the advantages of a national charter," and asserted that he was "not the least bit ashamed to promote it." Jess Bravin & Paul Beckett, *Friendly Watchdog: Federal Regulator Often Helps Banks Fighting Consumers – Dependent on Lenders' Fees, the OCC Takes Banks' Side Against Local, State Laws*, Wall St. J., Jan. 28, 2002, at A1.

was reportedly 10% of the OCC's annual budget in one recent year. Bravin & Beckett, note 10, *supra*. The OCC's dependence on fees and banks' choice of charter create conditions conducive to regulatory capture and may well explain why there has not been "a single public prosecution of a major national bank for violating a consumer protection law." 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. of Banking & Fin. Law 225, 232 (2004).

IV. ARGUMENT

A. The Court Should Not Defer to the OCC's Self-Interested Interpretation of Its Own Authority.

The district court's initial error was to defer to the OCC's self-serving interpretation of its own exclusive enforcement authority under *Chevron v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). Deference is inappropriate under step one of the *Chevron* test because (A) there is no ambiguous gap in this 142-year old statute for the OCC to fill, (B) Congress would not have implicitly delegated such a politically and economically important decision about the scope of the agency's own powers to a self-interested agency, and (C) the OCC has no more relevant expertise than the Court on the issues at hand. Even if the Court were to reach step two of the *Chevron* test, deference would not be warranted because the OCC's interpretation is unreasonable.

1. There is no gap in the "visitorial powers" provision to fill under step one of the *Chevron* test.

If the *Chevron* test applies at all,[11] the first step is to determine whether Congress has spoken to the issue. If Congress's intent is clear, no deference is due because the Court must give effect to the congressional intent. *Chevron*, 467 U.S. at 842-43. Whether there is an ambiguity is determined by looking at the overall context, and applying the full panoply of statutory construction rules. *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132-33 (2000); *Natural Res. Def. Council v. Abraham*, 355 F.3d 179, 198 (2d Cir. 2004). This step is the courts' responsibility alone, and the agency's position is not entitled to deference. *See, e.g., Bank of Am., N.A. v. FDIC*, 244 F.3d 1309, 1319 (11th Cir. 2001); *Rettig v. Pension Benefit Guar. Corp.*, 744 F.2d 133, 141 (D.C. Cir. 1984) ("We are not required to grant any particular deference to the agency's parsing of statutory language or its interpretation of legislative history."). Even where ambiguity is found, it "must be such as to make it appear that Congress either explicitly or

[11] As the Attorney General explains in his brief, the federalism concerns raised by the OCC's interpretation render the *Chevron* test inapplicable and provide yet another reason for the Court to withhold deference. *See* Appellant's Brief at 30-35; *AFL-CIO v. FEC*, 333 F.3d 168, 175, 179 (D.C. Cir. 2003) (declining to defer to avoid constitutional concerns), *cited in Edwards v. INS*, 393 F.3d 299, 308 (2d Cir. 2004). Similarly, some of the concerns discussed in the context of the *Chevron* analytical framework below could alternatively serve as a basis for denying deference without even applying the *Chevron* test. *See, e.g.*, Timothy K. Armstrong, *Chevron Deference and Agency Self-Interest*, 13 Cornell J. L. & Pub. Pol'y 203, 205-06 (2004) (noting that support exists in case law and commentary for addressing agency self-interest outside the *Chevron* analytical framework).

implicitly delegated authority to cure that ambiguity," and a failure to negate that authority does not supply it. *Am. Bar Ass'n v. FTC*, 430 F.3d 457, 468-69 (D.C. Cir. 2005). The fact that courts have deferred to the OCC's interpretation of other aspects of the NBA does not require deference to this assertion of expanded jurisdiction by the agency. *See Kruse v. Wells Fargo Home Mortgage, Inc.*, 383 F.3d 49, 61 (2d Cir. 2004).[12]

One hundred and forty-two years of experience under this provision of the NBA is relevant to a determination of whether there is an ambiguity. *Cf. Brown & Williamson*, 529 U.S. at 160 (citing history and the breadth of the authority the FDA claimed in declining to defer to the FDA's "expansive construction of the statute"). The OCC's argument that there is a "gap" to fill in § 484's visitorial powers provision at this late date is implausible. Even the OCC has recognized that "Congress has never altered the original meaning of these grants of authority to the OCC." 69 Fed. Reg. 1895, 1897 (Jan. 13, 2004). Indeed, the fact that the visitorial powers provision has generated so *little* dispute in nearly one and one-half centuries itself argues against the notion that the law is ambiguous.

[12] In *Wachovia Bank, N.A. v. Burke*, 414 F.3d 305 (2d Cir. 2005), *petition for cert. filed*, 74 U.S.L.W. 3233 (U.S. Sep. 30, 2005) (No. 05-431), the Second Circuit deferred to the OCC's interpretation of the "incidental powers" provision of NBA, 12 U.S.C. § 24 (Seventh), with regard to the OCC rules on operating subsidiaries, 12 C.F.R. § 5.34(e) and § 7.4006. The issues presented in *Burke* are very different from the question of jurisdictional boundaries presented here, as is explained on pages 33-34 and 39 of the Appellant's brief.

2. The self-aggrandizing nature of the OCC's position, the agency's lack of political accountability, and the political magnitude of this jurisdictional issue militate against finding a gap and deferring in this case.

The conclusion that no deference is due is supported by the self-aggrandizing nature of the OCC's position, the agency's lack of political accountability, and the economic and political significance of this issue. Courts are rightly skeptical when agencies argue that deference is due to interpretations that enlarge their own powers in politically and economically significant ways. "Although[] ambiguity in a statute can be considered 'an implicit delegation from Congress to the agency to fill in the statutory gaps,' we 'must be guided to a degree by common sense as to the manner in which Congress is likely to delegate a policy decision of [such economic and] political magnitude to an administrative agency.'" *NRDC*, 355 F.3d at 199, quoting *Brown & Williamson*, 529 U.S. at 159. As the Second Circuit and other courts have recognized, "it seems highly unlikely that a responsible Congress would implicitly delegate to an agency the power to define the scope of its own power." *ACLU v. FCC*, 823 F.2d 1554, 1567 n.32 (D.C. Cir. 1987) (per curiam), *quoted in NRDC*, 355 F.3d at 199.

> The more intense scrutiny that is appropriate when the agency interprets its own authority may be grounded in the unspoken premise that government agencies have a tendency to swell, not shrink, and are likely to have an expansive view of their mission. Not surprisingly, therefore, an agency ruling that broadens its own jurisdiction is examined carefully.

Hi-Craft Clothing Co. v. NLRB, 660 F.2d 910, 916 (3rd Cir. 1981).

The OCC's current interpretation expands the outside boundaries of its exclusive enforcement authority – precluding the chief law enforcement officers of the sovereign states from enforcing non-preempted state consumer protection laws and fair lending laws – under a statute that for nearly a century and a half has been recognized as authorizing shared responsibility between the states and the agency. The OCC has significant self-interest in extending the scope of its exclusive authority, due to its financial interest and the charter competition described in Section III.B. above. This regulatory structure undermines one of the pillars articulated for agency deference in *Chevron*, that of political accountability for policy choices. 467 U.S. at 865-66. The OCC's receipt of funding from its regulated entities reduces the capacity of the Congressional branch to exercise effective oversight through control of purse strings. Vicarious political accountability through the executive branch is also much weaker here than *Chevron* itself envisioned, *id.* at 865, by virtue of the staggered term for which the Comptroller of the Currency is appointed, 12 U.S.C. § 2 (5-year term unless sooner removed by the President).

The political and economic magnitude of this question counsels against deference. The OCC's view that Congress implicitly delegated to the agency the right to change the long-standing balance of authority and preclude important enforcement activity by the state attorneys general under their own non-preempted

consumer protection laws of general applicability and fair lending laws is simply untenable.

3. The OCC has no more expertise than the Court on the issues at hand.

Deference is also inappropriate where, as here, the issue is one of pure statutory construction as to which the agency has no special expertise.[13] Practical agency expertise is another primary justification for *Chevron* deference. *See Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 651-52 (1990), *cited in In re New Times Sec. Servs., Inc.*, 371 F.3d 68, 82 (2d Cir. 2004). As to where enforcement authority lies, or what powers are "vested in the courts of justice," however, banking regulators have no greater expertise than the courts. The meaning of "visitorial powers" and "vested in the courts of justice" is a matter of pure statutory construction as to which no deference is due.[14]

[13] *See Iavorski v. INS*, 232 F.3d 124, 133 (2d Cir. 2000) (distinguishing "an exercise of statutory interpretation" from "venturing into areas of special agency expertise, concerning which courts owe special deference under the *Chevron* doctrine"); *New York v. Shalala*, 119 F.3d 175, 180 (2d Cir. 1997) ("an agency has no special competence or role in interpreting a judicial decision").

[14] Having brought only four formal enforcement actions under the Equal Credit Opportunity Act or its implementing regulation in the last 18 years, *see supra* Section III, the OCC also cannot claim to be an "expert" on fair lending and discrimination issues and should not be given any deference as to what is "authorized" by federal discrimination laws.

4. No deference is appropriate under *Chevron* step two because the agency's interpretation is unreasonable.

Even if the Court were to disagree as to step one of the *Chevron* test, deference would be inappropriate under step two of the *Chevron* test, which examines whether the agency's interpretation is a reasonable and permissible construction of the statute. *See Chevron*, 467 U.S. at 843-44. As explained below, the OCC's position is neither reasonable nor permissible.

B. Attorney General Spitzer's Action Is Not Barred By § 484 Because It Does Not Constitute Visitation.

1. The Supreme Court recognized that states may sue to enforce non-preempted state laws in *First National Bank in St. Louis v. Missouri*.

In *First National Bank in St. Louis v. Missouri*, 263 U.S. 640 (1924), the Supreme Court clearly upheld a state's right to enforce applicable state law against the argument of the bank and the United States as *amicus* that the visitorial provisions of the NBA precluded that. 263 U.S. at 642-43, 645-48. Although the Court's opinion did not mention "visitorial powers" by name,[15] it decisively rejected this argument, stating:

[15] The district court gave this fact unwarranted significance, noting that that the *St. Louis* opinion did not name § 5241 (a predecessor of § 484) specifically. 396 F. Supp. 2d at 395-96. That is a strained distinction, given how much judicial writing styles have changed since 1924. The U.S. reporter's summary of argument indicates that both the bank and the United States argued that the state's action constituted an improper exercise of "visitatorial power" and specifically cites § 5241 in summarizing the bank's argument. 263 U.S. at 643, 645.

> 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 law . . . . 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.

Id. at 660.

Although Plaintiffs seek to limit the *St. Louis* decision to its facts, the Court in fact broadly held that visitation does not bar the enforcement of applicable state laws by the state, as captured in the sweeping language quoted above. Similarly, the OCC's strained effort to limit *St. Louis* to a specific procedural posture is contradicted by the Court's own language. Having determined that the statute applied and that the state had the power to enforce it, the Court went on to state that "the nature of the remedy to be employed is a question for state determination," and that the Court would only concern itself with the appropriateness of the remedy if there were a denial of due process. 263 U.S. at 661.

There is also no merit to Plaintiffs' effort to distinguish *St. Louis* based on the fact that intrastate branching was not an authorized activity for national banks at the time the case was decided: subsequent decisions after intrastate branching became an authorized activity amply demonstrate that this was *not* the

determinative factor.[16] Three years after *St. Louis*, Congress gave national banks authority to engage in branch banking to the same extent as the state law allowed state banks to branch. 44 Stat. 1228 (1927). The question then arose whether the OCC alone could enforce the limitations on that branching activity, which were federal limitations that incorporated state law by reference. Resolving the question in a manner consistent with the *St. Louis* decision, the Fifth Circuit recognized the authority of the state Superintendent of Banking to enforce the state law limits which the federal authority subsumed, finding the state Superintendent "particularly well situated to represent interests adverse to those of a national bank which, even with the approval of the Comptroller of the Currency, would naturally be inclined to push the restrictions of [the authorized branching activity] to, or if possible, beyond their proper limits." *Jackson v. First Nat'l Bank of Valdosta*, 349 F.2d 71, 75 (5th Cir. 1965) ("[T]he subsumption of state substantive law as the regulating principle for national banking associations concerning branching carries with it the right of the State Superintendent of Banks to see to it that that substantive law is enforced.").

Since *Jackson*, a number of other courts have also upheld state bank regulatory agencies' efforts to enforce state laws against national banks when banks have sought to push the limits of authorized branching requirements

[16] The third proferred ground for distinguishing *St. Louis*, relating to FISA, also is meritless, as Point IV.A.2. of the Appellant's brief makes clear.

(typically with OCC approval). *See Missouri v. First Nat'l Bank in St. Louis*, 405 F. Supp. 733, 735 (E.D. Mo. 1975) (holding that the plaintiff Commissioner of Finance "had standing to enforce the banking laws of the State of Missouri and to prohibit national banks from violating the state laws"), *aff'd*, 538 F.2d 219 (8th Cir. 1976); *cf. First Nat'l Bank in Plant City, Fla. v. Dickinson*, 396 U.S. 122 (1969) (denying national bank's action for declaratory relief and injunction against Florida state regulator regarding OCC-approved activity); *Illinois v. Cont'l Ill. Nat'l Bank*, 536 F.2d 176 (7th Cir. 1976) (per curiam) (noting challenges on same facts in six cases around the country and upholding the state banking regulator's challenge on the merits).

There is no merit to the notion that Congress was seeking to displace this recognized state enforcement authority and amend § 484 by implication when it enacted the Riegle-Neal Interstate Banking and Branching Efficiency Act of 1994 ("Riegle-Neal"), Pub. L. No. 103-328, 108 Stat. 2338 (Sep. 29, 1994) (codified at 12 U.S.C. § 36(f)(1)(B)). In Riegle-Neal, Congress authorized the OCC to enforce applicable provisions of state law against interstate branches of national banks, including states' fair lending laws, but it did not state – and certainly did not intend – that the OCC's authority to do so would be exclusive. State attorneys general had the authority to enforce their non-preempted statutes under the law that existed

at the time Riegle-Neal was enacted in 1994,[17] and there is nothing to indicate that Congress in any way intended to change this aspect of the law, of which it was presumably aware, *see Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 184-85 (1988). If anything, the legislative history reflects Congress's intent to reaffirm the balance of federal and state authority that existed at the time.[18]

2. The state attorneys general have historically enforced non-preempted laws against national banks in litigation and pre-litigation investigations, including as to activities authorized for national banks under the NBA.

Consistent with the foregoing authorities, state enforcement of laws prohibiting unfair or deceptive practices – even when related to activities

[17] The exception cited by the district court, *National State Bank v. Long*, 630 F.2d 981 (3rd Cir. 1980), is weak counter to this long and rich history of dual regulation. It dealt specifically with the question of whether a state banking regulator could enforce state law against a national bank through administrative procedures, which is not the matter at hand. 630 F.2d at 983. *Long* cited only three visitation cases against banks, none of which addressed state enforcement of state laws. *Id.* at 989. *Long* also cited "wasteful duplication of effort," without any factual basis, *id.* at 988, grounds that have been soundly rejected by other courts, *see, e.g., Peoples Bank of Danville v. Williams*, 449 F. Supp. 254, 259 (W.D. Va. 1978) ("The Bank of America case specifically rejected the claim that any duplication of efforts by agencies in supervision of a bank constituted prohibited visitation.") (citing *Bank of Am. Nat'l Trust & Sav. Ass'n v. Douglas*, 105 F.2d 100, 106 (D.C. Cir. 1939)).

[18] *See* Appellant's Brief at 16-17, 56-58; *see also* Wilmarth, *supra*, at 333-34 & n.437 (citing Congressional colloquy indicating that its purpose was to recognize the OCC's examination and administrative authority over interstate branches, *i.e.* the traditional "visitorial" activities).

authorized for national banks expressly or as "incidental" powers[19] – proceeded without question from either banks or the OCC until recently. For example, the state of Alaska sued a national bank in connection with its role as a financer of a real estate development – an authorized banking activity. *Alaska v. First Nat'l Bank of Anchorage*, 660 P.2d 406 (Alaska 1982). Similarly, Michigan sued a national bank over its mortgage escrow practices – though mortgage lending is also an expressly authorized banking activity. *Attorney Gen. v. Mich. Nat'l Bank*, 312 N.W.2d 405, 414 (Mich. App. 1981), *rev'd in part and remanded on other grounds*, 325 N.W.2d 777 (Mich. 1982); *see also Arizona v. Sgrillo*, 859 P.2d 771 (Ariz. 1993) (listing Valley National Bank as a defendant in case involving sale of information about credit cards); *Wisconsin v. Ameritech*, 517 N.W.2d 705 (Wis. Ct. App. 1994), *aff'd*, 532 N.W. 2d 449 (Wis. 1995) (naming Household Bank, N.A. as a defendant in a case involving advertising and marketing); *West Virginia v. Scott Runyan Pontiac-Buick, Inc.*, 461 S.E.2d 516 (W. Va. 1995) (allowing a state Attorney General's claims against Citizens National Bank for assignee liability as financer of dealer's car loans to go forward).

[19] The activities involved in all of the cases cited in this section are authorized for national banks expressly or as "incidental" powers. *See, e.g.*, 12 C.F.R. § 34.3 (real estate lending powers); 12 C.F.R. § 7.4008 (non-real estate lending powers, including right to purchase loans); 66 Fed. Reg. 28593, 28595-96 (May 23, 2001) (use of auto dealers as agents for solicitation and origination of auto loans); *Franklin Nat'l Bank v. New York*, 347 U.S. 373 (1954) (advertising); § III.A., *supra* (partnering with third parties for marketing non-banking services).

The Minnesota attorney general's right to bring an enforcement action against an operating subsidiary under state consumer fraud and deceptive trade practices provisions was upheld in *Minnesota v. Fleet Mortgage Corp.*, 158 F. Supp. 2d 962 (D. Minn. 2001), which involved a pre-acquired account marketing program. The district court below summarily distinguished *Fleet*, saying that it did not involve "a state law regulating the content or conduct of federally authorized banking activities." 396 F. Supp. 2d at 397. That casual dismissal masks a fundamental flaw in the district court's sanction of the OCC's expansive reading of its exclusive authority – one that must be kept at the forefront of review on this appeal. *Fleet*, decided three years prior to the 2004 amendments to § 7.4000, said that the practices before it did not directly concern a banking practice, were not banking specific, and the OCC has no responsibility for enforcing state laws on deceptive practices generally. 158 F. Supp. 2d at 966. But the OCC, in effect, has since acted to close the *Fleet* loophole. It now asserts enforcement authority as to unfair and deceptive practices by banks. *See* Sec. III.B., *supra*. It asserted exclusive jurisdiction under *any* state or federal law as to activities "authorized" for national banks. These kinds of "finder" activities, which the *Fleet* court and district court below labeled "non-banking," are "authorized" for national banks, *see* Sec. III.A., *supra*. Thus now, if *Chevron* deference is given to the rule as it

stands, the *Fleet* conduct would fall within the literal sweep of the OCC's exclusive authority should a bank or the OCC choose to raise it.

C. An Enforcement Action By a State Attorney General and the Preceding Investigation Fall Within the Courts of Justice Exception of the NBA, Even If Considered Visitation.

The district court accepted an impossibly narrow and strained reading of § 484's "vested in the courts of justice" exception, a reading that is inconsistent with over 140 years of judicial interpretation of the NBA's visitation provision. It is well established that state officials may bring enforcement actions against national banks in court and that the power to investigate is a natural part of the authority to bring such actions. In *Guthrie v. Harkness*, 199 U.S. 148 (1905), the Supreme Court upheld the common law right of a shareholder to inspect a bank's books notwithstanding the bank's effort to shield itself with the NBA. The Court held that Congress "did not intend, in withholding visitorial powers, to take away the right to proceed in courts of justice to enforce such recognized rights as are here involved." 199 U.S. at 159. Though the OCC tries to distinguish civil actions by private parties from actions by state officials, the *Guthrie* Court's reasoning that the courts of justice exception is designed to permit courts to vindicate longstanding rights naturally extends to the well-established right of state officials to enforce applicable laws.

Consistent with *Guthrie*, courts have interpreted the authority "vested in the courts of justice" to include the authority to hear actions instituted by state officials to address legal violations. In *First Union National Bank v. Burke*, 48 F. Supp. 2d 132 (D. Conn. 1999), the court recognized a long line of cases, including *Brown v. Clarke*, 878 F.2d 627 (2d Cir. 1989), that "illustrate ways in which a state may seek enforcement of its state banking laws in either federal or state court." 48 F. Supp. 2d at 145-46. Accordingly, the *First Union* order enjoining the Connecticut Banking Commissioner from pursuing administrative enforcement proceedings expressly did *not* bar the Commissioner from "seeking enforcement through judicial means." *Id.* at 135.

Inherent in the courts of justice exception is the authority to conduct an investigation to determine the merits of a potential case. In *Bowles v. Shawano National Bank*, 151 F.2d 749 (7th Cir. 1945), the Seventh Circuit upheld the right of another agency, the Office of Price Administration, to require a national bank representative to testify and produce certain records over the bank's objections under § 484. The court upheld the agency's right to investigate, saying:

> The Administrator . . . needs investigatory powers both to promulgate rational orders and regulations, and to apprehend violations thereof. He can not intelligently make charges without knowing facts to substantiate them. The accused would vigorously and justly protest against unfounded charges. How is the Administrator to unearth such violations or to confirm information given him by aggrieved persons or alert loyal citizens? By investigation and checking, of course.

151 F.2d at 751. The OCC's contention that the courts of justice exception does not permit the Attorney General to investigate is untenable. The authority to issue subpoenas is a necessary corollary of the Attorney General's power to bring a subpoena enforcement action and to enforce fair lending laws through the courts.

CONCLUSION

For the reasons cited herein, the district court should be reversed.

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 29(d) and 32(a)(7)(B) because this brief contains 6970 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in Times New Roman 14 point.

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PROOF OF SERVICE

I, Eric Halperin, being duly sworn, depose and say:

1. I am not a party to this action, and I am over 18 years of age.

2. On April 3, 2006, I caused to be served true and correct copies of the BRIEF FOR *AMICI CURIAE* CENTER FOR RESPONSIBLE LENDING, AARP, CONSUMER FEDERATION OF AMERICA, NATIONAL ASSOCIATION OF CONSUMER ADVOCATES, NATIONAL CONSUMER LAW CENTER, PUBLIC CITIZEN, U.S. PIRG, AND NATIONAL ASSOCIATION OF STATE PUBLIC INTEREST RESEARCH GROUPS IN SUPPORT OF DEFENDANT-APPELLANT AND ARGUING FOR REVERSAL by first class mail, postage prepaid, and one portable document format (PDF) copy by electronic mail upon the following:

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