No. 05-1342

IN THE
Supreme Court of the United States

LINDA A. WATTERS, IN HER OFFICIAL CAPACITY AS COMMISSIONER OF THE MICHIGAN OFFICE OF INSURANCE AND FINANCIAL SERVICES,
Petitioner,

v.

WACHOVIA BANK, N.A. AND WACHOVIA MORTGAGE CORPORATION,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF FOR THE NATIONAL ASSOCIATION OF REALTORS® AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*[1]

The National Association of REALTORS® ("NAR")[2] is a nationwide, nonprofit professional association, incorporated in Illinois, that represents persons engaged in all phases of the real estate business, including, but not limited to, brokerage, appraising, management, and counseling. As such, NAR defends the interests of real estate professionals and real property owners throughout the United States.

Founded in 1908, NAR was created to promote and encourage the highest and best use of the land, to protect and promote private ownership of real property, and to promote professional competence. In pursuit of these objectives, NAR is concerned with a wide range of activities, including fair lending practices, consumer protection in the area of real estate loans, promotion of equal opportunity in housing, real estate licensing, neighborhood revitalization, housing affordability, and cultural diversity. Its members are bound by a strict Code of Ethics to ensure professionalism and competence. The membership of NAR includes 54 state and territorial Associations of REALTORS®, approximately 1,500 local Associations of REALTORS®, and approximately 1.3 million REALTOR® and REALTOR-ASSOCIATE® members.

This case is important to NAR and its members. The decisions of the panel and of three other courts of appeals[3]

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amicus* represents that it authored this brief and that no person or entity other than *amicus* or its counsel made a monetary contribution to the preparation or submission of the brief. Counsel for *amicus* represents that counsel for all parties have consented to the filing of this brief. Petitioner has filed a letter with the Clerk granting blanket consent to any party filing an *amicus* brief in support of either petitioner or respondents, and a letter reflecting respondents' consent to the filing of this brief has been filed with the Clerk.

[2] REALTOR® is a federal registered collective membership mark used by members of NAR to indicate their membership status.

[3] *See National City Bank v. Turnbaugh*, No. 05-1647, 2006 WL 2294843 (4th Cir. Aug. 10, 2006) (to be reported at — F.3d —); *Wells*

affirming the Comptroller of the Currency's ("Comptroller") interpretation of 12 U.S.C. § 484 provide a significant competitive advantage — preemption of generally applicable state licensing and reporting requirements, as well as of related investigation and enforcement efforts by state authorities — to those state-chartered corporations owned by a national bank. The Comptroller's interpretation is not limited to the specific context of mortgage lending. It can be expected that national banks will assert that a decision affirming the Sixth Circuit will apply to every activity in which the Comptroller has found — or, in the future, finds — that a national bank can engage. Reversal of the decision below is essential to ensure the maintenance of a level playing field among state-chartered corporations with respect to all of the activities, including real estate brokerage, in which national banks can, or are actively seeking authority to, engage.

SUMMARY OF ARGUMENT

In the National Bank Act, Congress gave the Comptroller direct authority to examine national banks and, to ensure a complete examination of such banks, also authorized the Comptroller to examine the banks' affiliates. But Congress expressly limited the Comptroller's exclusive examination authority — known as its "visitorial powers" — to national banks and did not extend such exclusive authority with respect to the affiliates of national banks.

This case involves one type of national bank affiliate, known as an operating subsidiary. Although an operating subsidiary can engage only in activities that the national bank could engage in itself, an operating subsidiary is by definition a separate corporation that a national bank owns or controls. As a result, it is an affiliate, as that term is defined in the National Bank Act, and is not a national bank itself.

Fargo Bank N.A. v. Boutris, 419 F.3d 949 (9th Cir. 2005); *Wachovia Bank, N.A. v. Burke*, 414 F.3d 305 (2d Cir. 2005), *petition for cert. pending*, No. 05-431 (U.S. filed Sept. 30, 2005).

Nor can an operating subsidiary be treated as if it were a division or department of a national bank. Congress enacted and has amended the National Bank Act against the background of the settled corporate law principle that a parent corporation and its subsidiary are legally separate entities. Nothing in the National Bank Act suggests that Congress authorized the Comptroller to disregard such a basic tenet of corporate form.

For these reasons, the Comptroller has unlawfully concluded that the section of the National Bank Act that provides it with exclusive visitorial powers over national banks also preempts state authorities from exercising state-law visitorial powers over operating subsidiaries. The Comptroller's interpretation cannot be squared with the text of the National Bank Act and should be rejected at *Chevron*[4] step one.

The Comptroller's assertion of exclusive authority is also inconsistent with Congress's policy of competitive equality, as reflected in the text of the National Bank Act. The effect of the Comptroller's position is that a state-chartered corporation that becomes an operating subsidiary of a national bank obtains a significant competitive advantage over other state-chartered corporations — which remain subject to state "visitorial powers" laws of the type at issue here — even while maintaining the benefits of limited liability that flow from the separate corporate form. Indeed, the respondent here, Wachovia Mortgage Corporation, complied for six years with the same Michigan laws that it now claims are preempted as a result of a change in the identity of its parent corporation, from a bank holding company to a national bank.

If permitted to stand, the Comptroller's decision would vastly expand the preemption of state law, as that decision is not limited to the mortgage industry, but instead extends to every activity in which a national bank — now

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[4] *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

or in the future — is permitted to engage directly. That result would have a deleterious effect on the real estate business, by tilting the competitive balance steeply in favor of such operating subsidiaries engaged in real estate activities free from state regulations applicable to others engaged in the business. The Court should find that the plain language of the National Bank Act precludes the Comptroller from creating a class of entity that is neither national bank nor national bank affiliate, but that has the dual advantages for its parent corporation of limited liability and the preemption of state laws that apply to its competitors.

ARGUMENT

I. THE COMPTROLLER'S ASSERTION OF EXCLUSIVE VISITORIAL POWERS OVER OPERATING SUBISIDIARIES CONFLICTS WITH THE PLAIN LANGUAGE AND PRO-COMPETITIVE POLICY OF THE NATIONAL BANK ACT

In its January 2004 final rule, the Comptroller asserted that "the standards of section 484 apply to national bank operating subsidiaries" and, therefore, that state laws providing for "visitorial powers" over state-chartered corporations are "inapplicable to [a national] bank's operating subsidiary."[5] But, by its express terms, § 484 applies only to "national bank[s]," 12 U.S.C. § 484(a), and operating subsidiaries are not national banks. The Comptroller's attempt to expand the definition of "national bank," and thereby to extend § 484 to entities that are not

[5] Bank Activities and Operations, 69 Fed. Reg. 1895, 1900-01 (Jan. 13, 2004) (codified at 12 C.F.R. § 7.4000). In reaching this conclusion, the Comptroller relied on its interpretive rule, released in 2001, which stated the Comptroller's view that "state laws apply to operating subsidiaries to the same extent as they apply to the parent national bank" because such subsidiaries are "the equivalent of departments or divisions of their parent [national] banks." Investment Securities; Bank Activities and Operations; Leasing, 66 Fed. Reg. 34,784, 34,788 (July 2, 2001) (codified at 12 C.F.R. Pts. 1, 7, and 23).

national banks, is precluded by the clear language of the statute. The Court therefore should reject the Comptroller's interpretation at *Chevron* step one,[6] just as the Court has done when other agencies have similarly sought to expand the reach of banking statutes beyond their plain terms.[7] The Court should also reject the Comptroller's interpretation because it conflicts with the policy of competitive equality in the National Bank Act by providing a significant competitive advantage to those state-chartered corporations that happen to be owned by a national bank.

A. Section 484 Authorizes The Comptroller To Exercise Visitorial Authority Over National Banks Only And Not National Bank Affiliates

In the National Bank Act, Congress assigned to the Comptroller the duty to "examine every national bank" and provided that "[n]o national bank shall be subject to any visitorial powers except as authorized by Federal law." 12 U.S.C. §§ 481, 484(a).[8] As a "[g]eneral rule," therefore, "[s]tate officials may not exercise visitorial powers with respect to national banks." 12 C.F.R. § 7.4000(a)(1).[9]

Congress also gave the Comptroller limited additional authority to conduct examinations of a national bank's

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[6] *See*, *e.g.*, *Household Credit Servs., Inc. v. Pfennig*, 541 U.S. 232, 239 (2004) (explaining that, in assessing an agency's interpretation of a statute it administers, the Court "first ask[s] whether Congress has directly spoken to the precise question at issue"; "[i]f so, courts, as well as the agency, must give effect to the unambiguously expressed intent of Congress") (internal quotation marks omitted).

[7] *See National Credit Union Admin. v. First Nat'l Bank & Trust Co.*, 522 U.S. 479 (1998) ("*NCUA*"); *Board of Governors of Fed. Reserve Sys. v. Dimension Fin. Corp.*, 474 U.S. 361 (1986).

[8] *See*, *e.g.*, *Guthrie v. Harkness*, 199 U.S. 148, 157-59 (1905) (describing the common-law concept of visitorial powers, incorporated into the National Bank Act, which refers to the "public right, existing in the state[,] for the purpose of examining into the conduct of the corporation with a view to keeping it within its legal powers").

[9] *See*, *e.g.*, 12 C.F.R. § 7.4000(b) (listing exceptions to the general rule).

affiliates, which Congress defined broadly to "include *any* corporation, business trust, association, or similar organization" that a national bank, "directly or indirectly, owns or controls." 12 U.S.C. § 221a(b) (emphasis added). Thus, "in making the examination of any national bank," the Comptroller may "examin[e] . . . the affairs of all its affiliates," but only "as shall be necessary to disclose fully the relations between [the] bank and [its] affiliates and the effect of such relations upon the affairs of [the] bank." *Id.* § 481. This additional authority, therefore, is derivative of the Comptroller's authority to examine national banks. Congress did not give the Comptroller free-standing authority to examine *all* the affairs of national bank affiliates, let alone exclusive authority to examine those affiliates, as § 484 makes no mention of affiliates and references only national banks.

B. An Operating Subsidiary Is A National Bank Affiliate, Not A National Bank

In 1966, the Comptroller announced that a national bank may, as part of its "incidental powers . . . necessary to carry on the business of banking," 12 U.S.C. § 24 (Seventh), conduct such business through a separate corporation that the national bank controls.[10] Such corporations are known as "operating subsidiaries." Under the Comptroller's current regulations, an operating subsidiary is a state-chartered "corporation, limited liability company, or similar entity" that engages in only those "activities that are permissible for a national bank to engage in directly" and that is "controll[ed]" by a national bank. 12 C.F.R. § 5.34(e)(1)-(2).[11] Under the definitions in the National

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[10] *See* Acquisition of Controlling Stock Interest in Subsidiary Operations Corporation, 31 Fed. Reg. 11,459, 11,460 (Aug. 31, 1966) (codified at 12 C.F.R. § 7.10).

[11] A national bank's operating subsidiaries are distinguished from its financial subsidiaries, which are "any compan[ies] that [are] controlled by" the national bank "other than a subsidiary that . . . engages solely in activities that national banks are permitted to engage in directly and are conducted subject to the same terms and conditions that

Bank Act, an operating subsidiary is a national bank affiliate and is not, itself, a national bank.

National banks and their affiliates are, in fact, distinct entities, formed in different ways and correspondingly subject to different regulatory requirements and regimes. A national bank is a "corporate entit[y] chartered not by any State, but by the Comptroller of the Currency." *Wachovia Bank v. Schmidt*, 126 S. Ct. 941, 944 (2006).[12] To obtain such a charter, "any number of natural persons, not less in any case than five," must form an "[a]ssociation[] for carrying on the business of banking" by "enter[ing] into articles of association" and "forward[ing] [those] to the Comptroller of the Currency." 12 U.S.C. § 21. The association also must "transmit[] to the Comptroller" an "organization certificate," which "shall specifically state," among other things, the "name assumed by such association," which "shall include the word 'national.'" *Id.* §§ 22, 23. The Comptroller is charged with "determin[ing] whether the association is lawfully entitled to commence the business of banking." *Id.* § 26. If the Comptroller, "upon a careful examination," finds that the association is so entitled, "the Comptroller shall give to [the] association a certificate . . . that [the] association is authorized to commence" the "business of banking." *Id.*

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govern the conduct of such activities by national banks." 12 U.S.C. § 24a(g)(3)(A). The enactment of this section led the Comptroller to narrow its definition of "operating subsidiary," which from 1996 through 2000 had included subsidiaries that engaged in activities "different from [those] permissible for the parent national bank." Rules, Policies, and Procedures for Corporate Activities, 61 Fed. Reg. 60,342, 60,351 (Nov. 27, 1996) (codified at 12 C.F.R. Pts. 3, 5, 7, 16, and 28); *see* Financial Subsidiaries and Operating Subsidiaries, 65 Fed. Reg. 12,905, 12,909 (Mar. 10, 2000) (codified at 12 C.F.R. Pt. 5).

[12] "National bank" is defined indirectly in the National Bank Act, which provides that "[t]he terms 'national bank' and 'national banking association' . . . [are] synonymous and interchangeable," 12 U.S.C. § 221, and separately sets forth the manner in which an entity becomes a national banking association, *see id.*, *e.g.*, §§ 21-24, 26-27.

§ 27(a).[13] "Every national bank[]" must then "subscribe to the capital stock of [a] Federal reserve bank." *Id.* § 282.

In contrast, operating subsidiaries do not enter into articles of association or organization certificates; there is no requirement that the name of an operating subsidiary include the word "national"[14]; and operating subsidiaries do not receive a certificate from the Comptroller, but instead are incorporated (or otherwise organized) under state law. In addition, an operating subsidiary is neither required nor eligible to subscribe to the capital stock of a Federal reserve bank. *See* 12 U.S.C. § 282. In sum, as the Ninth Circuit recognized, the fact that operating subsidiaries "are incorporated under a state's law" and "not directly chartered by the federal government" is an "irreducible difference between national banks and their operating subsidiaries." *Boutris*, 419 F.3d at 965.

For these reasons, an operating subsidiary is not a national bank; it is instead an "affiliate" of a national bank — a "corporation, business trust, association, or other similar organization" that a national bank, "directly or indirectly, owns or controls." 12 U.S.C. § 221a(b).

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[13] Alternatively, a state bank, "with the approval of the Comptroller of the Currency," may be "converted into a national banking association, with a name that contains the word 'national'"; upon receiving a "certificate" from the Comptroller, the converted bank "shall have the same powers and privileges, and shall be subject to the same duties, liabilities, and regulations, in all respects, as . . . associations originally organized as national banking associations." 12 U.S.C. § 35.

[14] Indeed, of the nearly 500 operating subsidiaries in existence as of December 31, 2005, only a handful have the word "national" in their name. *See* Comptroller of the Currency, *Annual Report of National Bank Operating Subsidiaries that Do Business Directly with Consumers, by Operating Subsidiary Name* (Dec. 31, 2005), *available at* http://www.occ.treas.gov/consumer/Report - 2006 for Op Sub pdf.pdf.

C. The National Bank Act Must Be Interpreted Consistent With Basic Principles Of Corporate Law, Under Which An Operating Subsidiary Cannot Be Treated As If It Were A Division Or Department Of A National Bank

Despite the fact that an operating subsidiary does not meet the statutory requirements for being a national bank, the regulations challenged here "treat[] each operating subsidiary . . . as if it were a national bank itself." *Boutris*, 419 F.3d at 961. The Comptroller — implicitly acknowledging that operating subsidiaries are not, in fact, national banks — asserts instead that operating subsidiaries are the "equivalent of departments or divisions of their parent banks." 66 Fed. Reg. at 34,788.[15] Either way, the Comptroller's treatment of operating subsidiaries as legally indistinguishable from their parent national banks cannot be squared with the basic principles of corporate law against which Congress enacted and has amended the National Bank Act.

The National Bank Act, like all statutes, must be interpreted consistent with the "basic tenet of American corporate law" that a "corporate parent" and its "subsidiaries" are "distinct entities." *Dole Food Co. v. Patrickson*, 538 U.S. 468, 474-75 (2003). The Court has required Congress to "indicat[e] that [it] intended . . . to depart from the general rules regarding corporate formalities," *id.* at 476, and has recognized that, "against this venerable common-law backdrop, . . . congressional silence is audible," *United States v. Bestfoods*, 524 U.S. 51, 62 (1998).

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[15] *Accord* 69 Fed. Reg. at 1900 (asserting that operating subsidiaries are, "in essence, no more than incorporated departments of the bank itself"). The Comptroller has also asserted that "[c]ourts have consistently treated operating subsidiaries as equivalent to national banks in determining their powers and status under Federal law," but in none of the cases cited was the court called upon to address the distinction between the national bank and its operating subsidiaries. *See id.* at 1900 & n.45.

Applying these "elementary principles of corporate law" in other contexts, the Court has held that a corporation cannot obtain the benefits of the Foreign Sovereign Immunities Act of 1976 merely because it is a subsidiary of a corporation owned by a foreign state. *Dole Food*, 538 U.S. at 477. Similarly, the Court has refused to read into the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 an implicit "reject[ion] [of] th[e] bedrock principle" that a corporate parent is not liable "simply because its subsidiary is subject to liability." *Bestfoods*, 524 U.S. at 62.

The Court has also relied on the "existence of . . . a distinct corporate entity" — even where the corporate form "was doubtless adopted solely to secure . . . some advantage under the . . . law[]" — to hold that jurisdiction over a parent corporation was not obtained by service on a subsidiary corporation. *Cannon Mfg. Co. v. Cudahy Packing Co.*, 267 U.S. 333, 335 (1925). In *Cannon*, it was undisputed that the "defendant wanted to have business transactions with persons resident in North Carolina, but for reasons satisfactory to itself did not choose to enter the state in its corporate capacity" and, instead, "employ[ed] a subsidiary corporation." *Id.* at 336. Finding that this "corporate separation, though perhaps merely formal, was real," the Court held that the parent corporation did not subject itself to suit in North Carolina merely because it used "a subsidiary corporation as the instrumentality for doing business therein." *Id.* at 336-37. Applying the same principles, this Court held that Whitney Central National Bank was not subject to suit in New York, despite the bank's "large," "varied, important and extensive" "New York business," because the bank itself "was not in New York" but had its New York business "transacted for it by its correspondent[]" banks. *Bank of America v. Whitney Cent. Nat'l Bank*, 261 U.S. 171, 172-73 (1923).

The text of the National Bank Act makes it "evident . . . that Congress was aware of settled principles of corporate law and legislated within that context," with no indication

that Congress intended to override those settled principles. *Dole Food*, 538 U.S. at 474.[16] Indeed, the Comptroller has previously — and correctly — recognized that, "as a legal matter," the "use of a separate subsidiary structure . . . distinguish[es] the subsidiary's activities from those of the parent bank." 61 Fed. Reg. at 60,354. One of the reasons why a national bank may prefer to conduct business through an operating subsidiary rather than through an actual division or department of the national bank itself is to "separat[e] particular operations of the bank from other operations" and thereby limit the liability of the parent national bank for actions of the operating subsidiary. 31 Fed. Reg. at 11,460. Having done so, the national bank must accept the consequences that, under the text of the National Bank Act, follow from use of the separate corporate form.[17]

D. The Comptroller's Assertion Of Exclusive Visitorial Authority Over Operating Subsidiaries Violates The Plain Language Of The National Bank Act

As demonstrated above, an operating subsidiary is not a national bank itself or a part of a national bank. It is, instead, a separate corporate entity that falls within the statutory definition of a national bank affiliate. In the National Bank Act, Congress clearly distinguished between national banks, on the one hand, and their

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[16] *Compare*, *e.g.*, 12 U.S.C. § 221a(b)(1)-(3) (defining an "affiliate" of a national bank based on the ownership or control of "voting shares," "stock ownership," or the composition of the board of directors of "any corporation, business trust, association, or other similar organization") *with Dole Food*, 538 U.S. at 474 (finding that Congress "legislated within th[e] context" of "settled principles of corporate law" where the statute "refer[red] to the ownership of 'shares'" and "to a 'separate legal person, corporate or otherwise'").

[17] A national bank that prefers to have particular business operations subject to the exclusive visitorial powers of the Comptroller under § 484 may do so by engaging in that activity through a department or division of the bank, rather than through a separately organized subsidiary.

affiliates, on the other hand, giving the Comptroller largely exclusive visitorial powers over the former, but only partial, derivative, and concurrent visitorial authority over the latter. The text of the statute does not establish, or permit the Comptroller to create, a third class of entities — part state-chartered corporation, part national bank — and thereby to provide national banks with the best of both worlds: limited liability and preemption of state law. The Court, therefore, should strike down the Comptroller's interpretation of § 484 at *Chevron* step one, as it has in other cases where federal regulators sought to expand the statutory definition of the financial institutions they regulate.

For example, in *Dimension Financial*, the Court rejected the Federal Reserve Board's effort to expand the statutory definition of "bank" in the Bank Holding Company Act of 1956 to include "nonbank banks." As the Comptroller has attempted to do here, the Board there "promulgated rules providing that nonbank banks offering the functional equivalent of traditional banking services would . . . be regulated as banks," based on the Board's view that such equivalent treatment furthered the "purpose" of the Bank Holding Company Act. 474 U.S. at 364, 373. The Court rejected the Board's effort at *Chevron* step one, finding that "no amount of agency expertise" could cause these nonbank banks to fall within the statutory definition of "bank." *Id.* at 368, 373. The Court also held that the "purpose" of the Act was to be determined "with reference to the plain language of the statute" and that the Board, therefore, "has no power to correct flaws that it perceives in the statute" but instead "is limited to adopting regulations to carry into effect the will of Congress as expressed in the statute." *Id.* at 373-74. That is because the "breadth of [the Board's] regulatory power rests on the Act's definition of the word 'bank.'" *Id.* at 365.

Similarly, in *NCUA*, the Court rejected the agency's attempt to expand the scope of the membership permitted in a single federal credit union. Where Congress had

provided that membership in a credit union "shall be limited to groups having a common bond of occupation or association," 12 U.S.C. § 1759 (1994), the NCUA interpreted that section to permit a single credit union to be "composed of wholly unrelated employer groups, each having its own distinct common bond." 522 U.S. at 484. As a result of this revised interpretation, credit unions were able to "expand[] [their] operations considerably by adding unrelated employer groups to [their] membership." *Id.* The Court, however, rejected the NCUA's interpretation, finding that "Congress has made it clear that the *same* common bond of occupation must unite each member of an occupationally defined federal credit union" and that "the NCUA's contrary interpretation is impermissible under the first step of *Chevron*." *Id.* at 500.

The Court should reach the same determination here. The Comptroller's position that operating subsidiaries are the functional equivalents of departments or divisions of national banks does not change the facts that Congress limited § 484 to "national bank[s]" and that operating subsidiaries are separate corporate entities that are affiliates, not divisions or departments, of national banks. The Comptroller's interpretation of § 484, therefore, must be rejected because "no amount of agency expertise — however sound may be the result — can make the words" "national bank" mean "operating subsidiary." *Dimension Fin.*, 474 U.S. at 368.

E. The Comptroller's Assertion Of Exclusive Visitorial Authority Over Operating Subsidiaries Violates The Policy Of Competitive Equality In The National Bank Act

The Comptroller's claim that the "standards of section 484 apply to national bank operating subsidiaries," 69 Fed. Reg. at 1900, also conflicts with Congress's "deliberate[]" decision, in the National Bank Act, to "settle[] upon a policy intended to foster competitive equality," *First Nat'l Bank v. Dickinson*, 396 U.S. 122, 131 (1969) (internal quotation marks omitted). Under the Comptroller's

regulations, Wachovia Mortgage is freed from a number of generally applicable requirements, including state registration, payment of registration fees, and submission of annual financial statements to the state commissioner. Nor, on the Comptroller's view, would it be subject to the investigatory and enforcement powers of the state commissioner with respect to those obligations. *See* Pet. App. 2a n.1 (listing preempted state laws).[18] The thousands of other mortgage brokers licensed and registered in Michigan, however, continue to be bound by those rules and, therefore, are placed at a competitive disadvantage, contrary to the federal policy of competitive equality.

The competitive disadvantage is especially pronounced on the facts here. For six years, Wachovia Mortgage operated under the same state-law requirements applicable to all other mortgage brokers in Michigan.[19] During that time, Wachovia Mortgage was owned by a bank holding

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[18] Notwithstanding the common-law definition of visitorial powers, set forth in *Guthrie*, 199 U.S. at 157-59, and other decisions, the Comptroller has claimed "exclusive . . . authority" to "[e]nforc[e] compliance with any applicable federal or *state laws* concerning" a national bank's or its operating subsidiaries' "activities authorized or permitted pursuant to federal banking law." 12 C.F.R. § 7.4000(a)(2)-(3) (emphasis added); *see id.* § 7.4006. That is, the Comptroller has asserted that its visitorial powers, as interpreted in these regulations, preclude States from enforcing against national banks and their operating subsidiaries even those state laws — such as state anti-discrimination laws — that are not preempted by federal law, and that only the Comptroller may act to enforce those state laws. *See*, *e.g.*, *Office of Comptroller of Currency v. Spitzer*, 396 F. Supp. 2d 383 (S.D.N.Y. 2005), *appeal pending*, No. 05-5996 (2d Cir.). The question whether the Comptroller has overstepped its authority in this regard as well is not presented here.

[19] *See* JA 19a (Compl. ¶¶ 20-21) (alleging that the predecessor of Wachovia Mortgage, First Union Mortgage Corporation, "registered" in Michigan under state law to "mak[e] first mortgage loans" "on March 27, 1997," and "remained continuously registered" thereafter, but that it "became a wholly-owned operating subsidiary of [Wachovia] national bank effective January 1, 2003," and on "April 3, 2003, notified the [Michigan] Commissioner[]" of its view that it was "no longer subject to the requirements of the Michigan Licensing Act").

company[20] and had a national bank as a sister subsidiary. It was not until January 2003 that it switched its parent from the bank holding company (Wachovia Corporation) to the national bank (Wachovia Bank, N.A.), thereby becoming a "direct operating subsidiary" of the national bank. JA 19a (Compl. ¶ 21). Undoubtedly, this change in corporate structure was designed primarily — if not solely — to enable Wachovia Mortgage to obtain a competitive advantage over competitors that would remain subject to state requirements and state enforcement, while maintaining for Wachovia Bank, N.A. and Wachovia Corporation the benefits of operating through a legally separate entity, chartered under state law.[21]

In addition, the inconsistency of the Comptroller's position with Congress's policy of competitive equality enshrined in the National Bank Act is not limited to the mortgage industry. The Comptroller's view extends to *every* activity that a national bank can take pursuant to its "incidental powers." 12 U.S.C. § 24 (Seventh). This Court has held that the Comptroller "has discretion to authorize [national banks to undertake] activities beyond those specifically enumerated" in § 24 (Seventh), though the "exercise of the Comptroller's discretion . . . must be kept within reasonable bounds."[22] Therefore, whenever the Comptroller exercises that discretion to add to the list of activities permitted for a national bank, it expands the

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[20] A "bank holding company" is defined as, among other things, "any company which has control over any bank." 12 U.S.C. § 1841(a)(1).

[21] Under the Comptroller's regulations, the national bank need not even own a majority of the "voting (or similar type of controlling) interest" in a state-chartered corporation for that company to qualify as an operating subsidiary. 12 C.F.R. § 5.34(e)(2). The Comptroller has interpreted this regulation to find that national bank ownership of only 10 percent of the voting shares in a corporation is sufficient to render that company an operating subsidiary. *See* Comptroller of the Currency, Conditional Approval No. 646, 2004 WL 1656647, at *1 (June 28, 2004).

[22] *NationsBank of North Carolina, N.A. v. Variable Annuity Life Ins. Co.*, 513 U.S. 251, 258 n.2 (1995).

industries in which national banks, by the simple expedient of rechristening their subsidiary, state-chartered corporations as "operating subsidiaries," can obtain a competitive advantage over other corporations engaged in such activities — namely, exemption from state registration and reporting requirements, and related state investigation and enforcement. Therefore, if the Comptroller's equation of national banks with their operating subsidiaries were upheld, the only limitation on the preemption of state laws would likely be the outer boundary of the Comptroller's authority to interpret the "incidental powers" clause in § 24 (Seventh).[23]

This possibility is of particular concern to NAR because of recent efforts by the banking industry and its federal regulators to permit national banks, bank holding companies, and their subsidiaries to engage in real estate brokerage.[24] Although NAR maintains that such extensions of authority would be unlawful because real estate brokerage is neither an "incidental power[] . . . necessary to carry on the business of banking," 12 U.S.C. § 24 (Seventh), nor "financial in nature or incidental to such financial activity," *id.* § 1843(k)(1), those questions are not presented here.[25] NAR, however, has a substantial interest

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[23] *See id.* (stating that a conclusion that "operating a general travel agency" is an incidental power necessary to carry on the business of banking "*may* exceed th[e] bounds" of the Comptroller's discretion) (emphasis added).

[24] *See*, *e.g.*, Bank Holding Companies and Change in Bank Control, 66 Fed. Reg. 307 (proposed Jan. 3, 2001) (joint proposed rule by the Board of Governors of the Federal Reserve System and the Department of the Treasury that would permit bank holding companies and financial subsidiaries of national banks to engage in real estate brokerage); Comptroller of the Currency, Interpretive Letter #1044 (Dec. 5, 2005) (authorizing national bank to develop mixed-use building containing, among other things, four floors of residential condominiums, without expressly conditioning approval on the bank utilizing an unaffiliated real estate broker to sell condominium units), *available at* http://www.occ.treas.gov/interp/dec05/int1044.pdf.

[25] Congress has passed appropriations riders that preclude the use of funds "to finalize, implement, administer, or enforce . . . the pro-

in ensuring that all of its members, and all industry participants, compete on a level playing field.[26]

II. THE COMPTROLLER'S PREEMPTION OF STATE REGULATION CANNOT BE JUSTIFIED AS AN INTERPRETATION OF NATIONAL BANKS' "INCIDENTAL POWERS"

Apparently recognizing that § 484, which applies only to "national bank[s]," cannot be interpreted to apply to operating subsidiaries, the court below asserted that the Comptroller did "not expand the definition of 'national bank' as Congress used it in section 484," but instead "interpret[ed] [the scope of] a national bank's 'incidental powers.'" Pet. App. 8a. The Second Circuit similarly asserted that the Comptroller "does not purport to define the term 'national bank,' as used in § 484, to include an 'operating subsidiary,'" but instead "interpreted a

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posed rule relating to the determination that real estate brokerage is an activity that is financial in nature or incidental to a financial activity." Consolidated Appropriations Resolution, 2003, Pub. L. No. 108-7, Div. J, § 646, 117 Stat. 11, 428, 474 (2003); *see* Consolidated Appropriations Act, 2004, Pub. L. No. 108-199, Div. F, § 538, 118 Stat. 3, 279, 346 (2004); Consolidated Appropriations Act, 2005, Pub. L. No. 108-447, Div. H, § 519, 118 Stat. 2809, 3199, 3267 (2004); Transportation, Treasury, Housing and Urban Development, the Judiciary, and Independent Agencies Appropriations Act, 2006, Pub. L. No. 109-115, Div. A, § 718, 119 Stat. 2396, 2493 (2005); *see also* H.R. 5576, 109th Cong. § 818 (June 14, 2006). Congress is also considering legislation that would amend the statutory definitions to preclude such a ruling. *See* H.R. 111, 109th Cong. (Jan. 4, 2005); S. 98, 109th Cong. (Jan. 24, 2005).

[26] *Cf. NCUA*, 522 U.S. at 493-94 (finding that "competitors of federal credit unions" are within the zone of interests protected by the Federal Credit Union Act based on their "interest in limiting the markets that federal credit unions can serve" and the fact that "the NCUA's interpretation has affected that interest by allowing federal credit unions to increase their customer base").

national bank's 'incidental powers.'" *Burke*, 414 F.3d at 316.[27] That position is untenable.

First, the Comptroller expressly based its conclusion that state regulation of operating subsidiaries is preempted based on its view that "the standards of section 484 apply to national bank operating subsidiaries to the same extent as their parent national bank." 69 Fed. Reg. at 1900. Similarly, a January 2003 Interpretive Letter took the position that, "pursuant to 12 U.S.C. § 484, State regulatory authorities do not have the right to exercise visitorial powers" over "national bank operating subsidiaries conducting mortgage lending and servicing activities."[28] The Ninth Circuit likewise recognized that the Comptroller "conclu[ded] that § 484(a) . . . foreclose[d] the exercise of [visitorial powers] by the states," and erroneously found that interpretation to be "eminently permissible." *Boutris*, 419 F.3d at 964 (internal quotation marks omitted). Thus, contrary to the conclusion of the court below, the Comptroller itself explicitly identified § 484(a) as the basis for it's action. The Court "may not enforce [an agency's] order by applying a legal standard the [agency] did not adopt," and the Comptroller's "error in interpreting" the term "national bank" in § 484 "precludes [the Court] from enforcing its" decision. *NLRB v. Kentucky River Community Care, Inc.*, 532 U.S. 706, 721 (2001).

Second, and in any event, the "incidental powers" clause does not give the Comptroller additional authority to preempt state exercise of visitorial powers, beyond that set forth in § 484, which is limited to national banks. NAR does not dispute the Comptroller's conclusion that a national bank's incidental powers include the use of a

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[27] *See also Turnbaugh*, 2006 WL 2294843, at *4-*5 (finding the Comptroller's claim of preemption to be a permissible interpretation of the incidental powers clause).

[28] Comptroller of the Currency, Interpretive Letter #958, at 6 (Jan. 27, 2003), *available at* http://www.occ.treas.gov/interp/mar03/int958.pdf.

separate, state-chartered corporate subsidiary to undertake activities that the national bank could carry out on its own behalf. Nor does NAR dispute that a state law purporting to prohibit national bank ownership of an operating subsidiary would be preempted by the Comptroller's interpretation of a national bank's incidental powers, though there is no plausible claim that the Michigan laws at issue here — with which Wachovia Mortgage complied for six years before switching its corporate parent — rises to the level of an effective prohibition on ownership of an operating subsidiary.[29]

But the fact that "'using an operating subsidiary is a legitimate power granted to national banks'" does not mean, as the court below concluded, that "'§ 484 provides the [Comptroller] with ample authority to preempt states from exercising visitorial powers over the subsidiary.'" Pet. App. 8a-9a (quoting *Burke*, 414 F.3d at 316). The plain text of § 484 — which is expressly limited to "national bank[s]" — precludes that conclusion, as does the fact that § 24 (Seventh) "concerns the incidental powers of national banks, not the extent of the [Comptroller's] regulatory authority." *Boutris*, 419 F.3d at 961.

Third, the Comptroller's assertion of exclusive visitorial authority over operating subsidiaries also cannot be defended as a regulation of national banks' exercise of their incidental powers that was promulgated pursuant to the Comptroller's "authori[ty] to prescribe rules and regulations to carry out the responsibilities of the office." 12 U.S.C. § 93a; *see Boutris*, 419 F.3d at 961. As an initial matter, this is not the language Congress uses to confer general rulemaking authority on an agency. Instead, when Congress intends to "give[] an agency broad power to enforce all provisions of [a] statute," *Gonzales v.*

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[29] *See Barnett Bank of Marion County, N.A. v. Nelson*, 517 U.S. 25, 32 (1996) ("Th[e] history [of national bank legislation] is one of interpreting grants of both enumerated and incidental 'powers' to national banks as grants of authority not normally limited by, but rather ordinarily pre-empting, contrary state law.").

Oregon, 126 S. Ct. 904, 916 (2006), it says so explicitly. Thus, Congress gave the Federal Communications Commission authority to "prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this chapter." 47 U.S.C. § 201(b).[30] Section 93a also stands in contrast to the Comptroller's general rulemaking authority — conferred in other statutory provisions using Congress's standard language — over national banks' authority to act as trustees and to implement the Emergency Banking and Bank Conservation Act.[31] Section 93a, therefore, cannot be read to provide the general rulemaking authority that would be necessary (even though not sufficient) to authorize the Comptroller to preempt States from applying their generally applicable regulations to state-chartered corporations that happen to be owned or controlled by a national bank as an operating subsidiary.[32]

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[30] *See also*, *e.g.*, 7 U.S.C. § 12a(5) (authorizing the Commodity Futures Trading Commission "to make and promulgate such rules and regulations as, in the judgment of the Commission, are reasonably necessary to effectuate any of the provisions or to accomplish any of the purposes of this chapter"); *id.* § 87e(a) ("The Secretary [of Agriculture] is authorized to . . . prescribe such rules, regulations, and instructions, as the Secretary deems necessary to effectuate the purposes or provisions of this chapter."); 15 U.S.C. § 717*o* ("The [Federal Energy Regulatory] Commission shall have power to perform any and all acts, and to prescribe, issue, make, amend, and rescind such orders, rules, and regulations as it may find necessary or appropriate to carry out the provisions of this chapter.").

[31] *See* 12 U.S.C. § 92a(j) ("The Comptroller of the Currency is authorized and empowered to promulgate such regulations as he may deem necessary to enforce compliance with the provisions of this section and the proper exercise of the powers granted therein."); *id.* § 211(a) ("The Comptroller of the Currency may prescribe such rules and regulations as the Comptroller may deem necessary to carry out the provisions of th[e] [Emergency Banking and Bank Conservation] Act.").

[32] In *Conference of State Bank Supervisors v. Conover*, 710 F.2d 878 (D.C. Cir. 1983) (per curiam), the D.C. Circuit found that § 93a permitted the Comptroller to promulgate regulations that "preempt those state laws that conflict with his responsibility to ensure the safety and

In any event, even an agency with broad rulemaking authority is limited by the specific substantive provisions of the statute. *See*, *e.g.*, *Dimension Fin.*, 474 U.S. at 374 (holding that the Federal Reserve Board's "rulemaking power is limited to adopting regulations to carry into effect the will of Congress as expressed in the statute"). Here, Congress authorized the Comptroller to "examine every national bank" and also to "examin[e] . . . the affairs of all its affiliates," but only to the extent necessary to investigate fully the national bank. 12 U.S.C. § 481. Nor did Congress give the Comptroller exclusive visitorial authority over national bank affiliates — a term Congress defined broadly and that includes, among others, operating subsidiaries, *see id.* § 221a(b) — instead limiting the Comptroller's exclusive authority to "national bank[s]." *Id.* § 484(a). Congress thus determined that a State's exercise of visitorial powers over a national bank's affiliates is consistent with, and "does not prevent or significantly interfere with the national bank's exercise of its powers" under, the National Bank Act. *Barnett Bank*, 517 U.S. at 33. The Comptroller's conclusion that any exercise of visitorial powers by a State over an operating subsidiary necessarily "prevent[s] or significantly interfere[s] with [a] national bank's" ability to utilize that subsidiary, *id.*, conflicts with that clear congressional determination. The plain language of the statute, therefore, precludes the Comptroller from using its limited rulemaking authority to assert exclusive authority over entities that are not national banks.

For the same reasons, the Comptroller's position is not aided by its regulation providing that an "operating subsidiary conducts activities . . . pursuant to the same authorization, terms and conditions that apply to . . . its

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soundness of the national banking system," *id.* at 885. The scope of preemptive authority the Comptroller has claimed here, however, goes far beyond that necessary "to ensure the safety and soundness of the national banking system."

parent national bank." 12 C.F.R. § 5.34(e)(3).[33] The Comptroller has asserted that this regulation must mean "that state laws apply to operating subsidiaries to the same extent as they apply to the parent national bank." 66 Fed. Reg. at 34,788; *see Boutris*, 419 F.3d at 962 (adopting this argument). But the Comptroller cannot, by piling regulation upon regulation, avoid the plain language of § 484, which applies only to national banks. In any event, the Comptroller places too much weight on the "same . . . terms and conditions" language in its regulation, because operating subsidiaries are not subject to all of the same terms and conditions as their parent national banks — among other things, they are not obligated to subscribe to the capital stock of a Federal reserve bank and need not include the word "national" in their name. As the Court recognized in another case involving the National Bank Act, "[i]t is a strange argument that permits [the Comptroller] to pick and choose what portion of the law binds him." *First Nat'l Bank v. Walker Bank & Trust Co.*, 385 U.S. 252, 261 (1966).

[33] As noted above, from 1996 to 2000, the Comptroller's regulations permitted operating subsidiaries to engage in activities prohibited to national banks, and the Comptroller promulgated the current regulation to conform to the narrower definition implicit in the Gramm-Leach-Bliley Act. *See supra* note 11. The current regulation, therefore, was not promulgated with any preemptive intent, but instead with the intent to conform an overbroad regulation to the dictates of the governing statute.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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