

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 ANDREW M. CUOMO, :

4 ATTORNEY GENERAL OF NEW :

5 YORK, :

6 Petitioner :

7 v. : No. 08-453

8 THE CLEARING HOUSE :

9 ASSOCIATION, L.L.C., ET AL. :

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11 Washington, D.C.

12 Tuesday, April 28, 2009

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14 The above-entitled matter came on for oral
15 argument before the Supreme Court of the United States
16 at 11:17 a.m.

17 APPEARANCES:

18 BARBARA D. UNDERWOOD, ESQ., Solicitor General, New York,
19 N.Y.; on behalf of the Petitioner.

20 MALCOLM L. STEWART, ESQ., Deputy Solicitor General,
21 Department of Justice, Washington, D.C.; on behalf of
22 the Respondent Office of the Comptroller of the
23 Currency.

24 SETH P. WAXMAN, ESQ., Washington, D.C.; on behalf of
25 the Respondent The Clearing House Association, L.L.C.

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P R O C E E D I N G S

(11:17 a.m.)

CHIEF JUDGE ROBERTS: We will hear argument next in Case 08-453, Cuomo v. The Clearing House Association.

Ms. Underwood.

ORAL ARGUMENT OF BARBARA D. UNDERWOOD

ON BEHALF OF THE RESPONDENT

MS. UNDERWOOD: Thank you, Mr. Chief Justice, and may it please the Court:

Under the OCC regulation at issue here, State antidiscrimination and consumer protection laws can be enforced against national banks by the Federal OCC and by private parties, but not by State attorneys general. This unusual enforcement pre-emption, which detaches the State's power to make laws from its power to enforce them, was not written into the National Bank Act by Congress in 1864, and it's implausible that Congress implicitly delegated to OCC the power to read it in now.

We know the NBA did not in 1864 enact enforcement pre-emption against the States for three reasons: First, the words of the statute; second, a long line of cases from this Court, especially St. Louis, upholding the power of the State to enforce laws

1 against a national bank or rejecting it on the ground
2 that the law was substantively pre-empted, but not
3 questioning the power of the State to enforce a valid
4 law; and, finally, the wholly anomalous character,
5 foreign really to our structure of government, of
6 separating the power to make law from the power to
7 enforce it.

8 JUSTICE GINSBURG: But to some extent, would
9 you concede that interpretation; that is, not only the
10 attorney general under New York's law, but the
11 superintendent of banks as well, has authority over
12 mortgage lending? Would -- would you agree that the
13 part about the bank superintendent's enforcement could
14 not be enforced against national banks?

15 MS. UNDERWOOD: Well, first of all, the bank
16 superintendent in New York doesn't have authority over
17 national banks. It has authority only over State banks,
18 as we pointed out in our reply brief. So we don't
19 assert that authority.

20 I would say that the -- and the injunction
21 doesn't run -- that's at issue in this case, doesn't run
22 against the superintendent. It runs against the
23 attorney general. But I would say --

24 JUSTICE GINSBURG: But there is -- the
25 provision that you are talking about, 296(a), concerns

1 the authority of the bank superintendent as well as the
2 authority of the attorney general; isn't that so?

3 MS. UNDERWOOD: I believe that the banking
4 superintendent does not assert authority to enforce in a
5 regulatory fashion against national banks. If they did,
6 if -- if -- if the bank superintendent asserted a
7 chartering or licensing supervisory regime, that would
8 be a different issue from the question --

9 JUSTICE GINSBURG: Just with respect to the
10 same issue on mortgage lending where there's a concern
11 about racial discrimination?

12 MS. UNDERWOOD: Well, the -- the bank -- the
13 banking superintendent of New York does not enforce
14 against national banks.

15 JUSTICE GINSBURG: Anything? And you agree
16 to that?

17 MS. UNDERWOOD: Yes, that is right.

18 JUSTICE GINSBURG: Even if the New York
19 statute --

20 MS. UNDERWOOD: Read differently or
21 interpreted or applied differently.

22 What's at issue here is a distinction
23 between a supervisory regime -- "visitation" is a regime
24 characterized by routine examinations, no cause needed,
25 by a chartering or a licensing authority for the purpose

1 of enforcing limitations on --

2 JUSTICE BREYER: How is it supposed to work?

3 This is what is bothering me at the heart of this case.

4 I imagine that banks, particularly right in these last

5 few months, are in situations where there are three

6 categories of -- of borrowers. One might be a category

7 of people whom you are reasonably confident in, and the

8 second is a category of people who are borderline or

9 less so, and there are also minorities.

10 Now, where you make the decision as a bank

11 to deny them the loan, it sometimes is difficult to say

12 whether that decision was made for a discriminatory

13 reason, namely race, or for a legitimate reason, namely

14 because this was a person unlikely to pay the money

15 back.

16 Now, how is a bank to function if 50

17 different attorneys general plus the Federal agencies

18 all look at the books of the bank to look at the

19 individual loan and to make that kind of determination

20 about which quite honestly reasonable people will often

21 differ?

22 And how -- how is that really a problem, or

23 am I just creating that? And if it's really a problem,

24 how in your opinion does the Federal law deal with that

25 problem, if not in the way that your opponent suggests?

1 MS. UNDERWOOD: Well, an -- there is a
2 single standard of discrimination. It is the case that
3 the -- that the Federal standards applied by the OCC and
4 the State law all look to Title VII law about a prima
5 facie case being --

6 JUSTICE BREYER: If I may say so, that
7 response overlooks the question. I don't doubt the
8 single standard. What I do doubt is in the -- in the
9 category of uncertain cases, that 51 different
10 individuals, 50 State attorneys general plus one Federal
11 individual, will reach the same result.

12 MS. UNDERWOOD: Well --

13 JUSTICE BREYER: These are hard and,
14 therefore, they will reach a lot of different results
15 under the same standard.

16 MS. UNDERWOOD: There has been no such
17 multiplicity of -- of enforcement. In fact, there is so
18 much antidiscrimination work to go around that having
19 multiple enforcers is a device for --

20 JUSTICE BREYER: Okay. So you deny the
21 hypothetical. You are saying that my analysis of the
22 problem is wrong; there simply is no such problem, and
23 since there is no such problem, it doesn't matter if
24 everyone enforces it.

25 MS. UNDERWOOD: It is already the case that

1 under the Fair Housing Act, HUD is required to refer --

2 JUSTICE BREYER: Is your answer yes or no to
3 what I just said, that you deny that the statement of
4 the problem is realistic and therefore there is no
5 problem in your view about having 51 different people
6 enforce the same standard.

7 MS. UNDERWOOD: There is no record of any
8 such problem. And should such a -- yes.

9 JUSTICE BREYER: And should such a problem
10 arise, what?

11 MS. UNDERWOOD: Should such a problem arise,
12 that would be an occasion for considering a kind of
13 burden pre-emption that would be similar -- on evidence
14 of such a problem, that might be a basis for OCC to make
15 a record and enact a regulation to deal with that --

16 JUSTICE KENNEDY: But if OCC thought there
17 might be such a problem, couldn't it act in advance to
18 avoid the risk that Justice Breyer's question explains?

19 MS. UNDERWOOD: Well, its regulation doesn't
20 say that. The injunction that was issued in this case
21 doesn't say that. What the regulation, the rulemaking,
22 and the injunction all rest on is a legal analysis, not
23 an empirical one.

24 JUSTICE GINSBURG: May we clarify one thing
25 about the 50 jurisdictions? The attorney general from

1 New York is not asserting authority over bank lending in
2 Hawaii. So for each institution, I assume it's going to
3 be two sovereigns, the OCC and the State attorney
4 general, not 50 descending on the single -- single bank
5 with respect to particular loans?

6 MS. UNDERWOOD: That's correct. And the
7 OCC --

8 CHIEF JUSTICE ROBERTS: Well, that's correct
9 with respect to a particular loan. It's not respect --
10 with respect to Federal policy about national banks
11 around the country. It's conceivable and I suppose
12 likely that the Federal regulator would want the same
13 rule to apply to banks in Michigan as to banks in
14 Hawaii.

15 MS. UNDERWOOD: It is. But if the question
16 was would the -- would the actual act of responding to a
17 complaint or to discovery burden particular people
18 because there would be 50 people asking for the same
19 information, that's not the case, because the loans made
20 in New York would be analyzed by a New York enforcer.

21 JUSTICE BREYER: I want to --

22 JUSTICE SCALIA: Excuse me. The same rule
23 would not apply in Michigan and Hawaii, anyway, even
24 under the Federal Government. The Federal Government
25 acknowledges that Michigan can have its own law --

1 MS. UNDERWOOD: The Federal Government --

2 JUSTICE SCALIA: -- and Hawaii can have a
3 different law. All the Federal Government is arguing
4 is: We want to be the ones to enforce the separate
5 Michigan law and the separate Hawaii law, right?

6 MS. UNDERWOOD: That appears to be the case.
7 In fact, they have acknowledged that the State law
8 actually applies. It's undisputed. OCC said so in its
9 complaint. Congress has several times said so, which is
10 presumably why the OCC says so -- said so in the Fair
11 Housing Act savings clause, in the -- in the Equal
12 Credit Opportunity Act savings clause, and in
13 Riegle-Neal, which specifically applies only to national
14 bank branches, but expressly preserves the application
15 of State fair lending and consumer protection laws.

16 JUSTICE BREYER: You are just at the point
17 of getting to what I -- the blank in my mind. And the
18 blank in my mind is when you said, but if there were
19 such a problem, as I had described, but if there were,
20 then they could -- and now that's the blank. Then they
21 could what?

22 MS. UNDERWOOD: Well, there are many things
23 that they might do.

24 JUSTICE BREYER: For example, just give me
25 two, a couple.

1 MS. UNDERWOOD: For example, make some
2 provision for -- in fact, I believe there are some
3 regulations that call for conferencing and collaboration
4 and consultation among the State enforcers and between
5 the State and Federal regulators to avoid duplicative
6 regulation. There is already the potential with respect
7 to State banks that are supervised both by State
8 regulators and by the FDIC. There are alternate audits
9 in alternate years. I mean, there -- there is plenty of
10 precedent in bank regulation for mechanisms for
11 consultation and collaboration so that people don't step
12 on each other's toes.

13 And in Federal criminal enforcement, for
14 example, there are -- there are many -- many occasions
15 where there is both Federal and State authority to
16 enforce. And the result of that tends to be to get more
17 extensive, fuller enforcement. People don't tend to
18 both bring the same case. If somebody is enforcing
19 something, somebody -- a different enforcer will attack
20 a different problem.

21 JUSTICE SOUTER: But the -- in the -- in the
22 general -- in the field of criminal enforcement
23 generally there isn't any provision comparable to what
24 is now 36(f)(1)(B), at least to my knowledge, and it's
25 set out on pages 46 and 47, the text is in the

1 government's brief: "The provisions of any State law to
2 which a branch of a national bank is subject under this
3 paragraph shall be enforced with respect to such branch
4 by the OCC."

5 And that mandate, it "shall be enforced with
6 respect to such branch" sounds pretty exclusive to me.

7 MS. UNDERWOOD: Well --

8 JUSTICE SOUTER: You can't tell for sure.
9 But why would -- why would Congress, number one, if
10 it -- if Congress simply assumed that there would be
11 a -- a dual system of enforcement, that OCC could --
12 could say to the bank, you follow State law, and if you
13 don't, we are going to go after you administratively,
14 and leaving it to the State to go after, in any other
15 fashion, what State law provided. If that was
16 Congress's assumption, why would it have -- have passed
17 this seeming mandate, "shall be enforced with respect to
18 such branch" by the -- by the OCC?

19 MS. UNDERWOOD: There are two reasons for
20 that provision. The purpose of that provision was to
21 confirm that OCC didn't lose its pre-existing
22 enforcement power when Riegle-Neal stated -- that's (1)
23 (B) -- in (1)(A) that national branches would be treated
24 more or less like State branches for purposes of
25 consumer protection and fair lending.

1 JUSTICE SOUTER: But that -- that's, in
2 effect, saving clause kind of function could have been
3 performed simply by a statute that says OCC may. And
4 this says it shall be enforced by OCC.

5 MS. UNDERWOOD: There is another reason in
6 the legislative history, which makes it clear that it
7 was a directive to OCC to mount an enforcement program
8 which Congress thought it had not been doing. We know
9 that because in the conference report and other
10 legislative history Congress says it's trying to expand,
11 not contract, the enforcement of fair lending and
12 consumer protection laws, and that the law isn't taking
13 any authority away from the States and that they are
14 distressed at the inadequate failure of OCC to exercise
15 its enforcement authority.

16 JUSTICE SCALIA: You don't deny, do you,
17 that the Federal Government can, if it wishes, enforce
18 the State laws?

19 MS. UNDERWOOD: Absolutely.

20 JUSTICE SCALIA: So this provision isn't
21 really contrary to what you are saying. You are just
22 saying the State can do it as well?

23 MS. UNDERWOOD: That's correct. It isn't
24 talking -- it doesn't say anything about exclusive
25 authority, and it isn't talking about judicial

1 enforcement, which OCC doesn't do. It is talking about
2 it's -- it has a savings clause kind of function and
3 it -- it's hortatory, it's directing OCC to exercise the
4 authority that it has.

5 It seems to be common ground that it didn't
6 give OCC any new power, because it would be odd to give
7 OCC different power over the branches -- this only
8 applies to the branches -- different power to the
9 branches than over the branches than over the banks,
10 different, more extensive power over consumer protection
11 and fair lending than other kinds of bank enforcement.
12 This was a provision dealing with branches and consumer
13 protection and fair lending that said to OCC: You still
14 have that authority and you should exercise it.

15 JUSTICE GINSBURG: But we come to the New
16 York Attorney General. I see your argument that there's
17 a certain incongruity between saying private attorneys
18 general okay, but no public attorney general. But on
19 the other hand, the attorney general starts out by
20 asking for bank books and records. And high on the list
21 of visitorial powers is the authority to demand the
22 bank's books and records.

23 So why isn't that -- his preliminary
24 investigation at least, why doesn't that fit within the
25 visitorial power bundle?

1 MS. UNDERWOOD: Well, because you can look
2 at books and records under various authorities. Books
3 and -- you can look at books and records under your
4 visitorial authority, if you are the supervisor and have
5 the relationship to the bank that a licensing or
6 chartering authority has and you are looking at them for
7 no particular cause. Or you can look at books and
8 records if you have a civil suit against the bank and
9 you are engaging in discovery that is -- or for that
10 matter a criminal prosecution against the bank, and
11 ancillary to that discovery is required; or in Guthrie,
12 the inquiry -- the looking at books and records was
13 pursuant to a statutory authority for shareholders to
14 look at books and records.

15 So the simple fact of a physical act of
16 looking -- or a legal act of looking at books and
17 records doesn't tell you whether visitorial authority is
18 being exercised. Visitorial authority has long been
19 understood as a whole regime of oversight. Watters
20 involved a visitorial regime that was ancillary to
21 licensing. The earlier visitorial regimes that were
22 referenced in the old treatise tended to involve
23 visitorial regimes that were established ancillary to
24 chartering, back when corporate charters had limited
25 purposes, the way banks do still, but most corporate

1 charters, most corporate certificates of incorporation
2 don't anymore.

3 So the fact that books and records are being
4 examined is neither here nor there on the question
5 whether the visitorial power that is referenced in 484
6 is -- is being exercised.

7 CHIEF JUSTICE ROBERTS: There is an historic
8 reason for thinking that Congress would be more
9 concerned about States exercising visitorial powers than
10 they would be about private attorneys general or private
11 lawyers. This goes back to *McCulloch v. Maryland*.
12 National banks were always targeted by the States. They
13 weren't typically targeted by private attorneys. So
14 that incongruity doesn't strike me as terribly
15 significant.

16 MS. UNDERWOOD: Well, the suggestion is made
17 that 484, and there is some historical basis for it, was
18 -- was meant to protect national banks against --
19 against, hostile States, which I guess is what you are
20 suggesting, rather than hostile private people. But
21 actually what it was meant to do was assign
22 responsibility for the supervision of these new
23 entities -- there hadn't been banks like this, private
24 banks which were nevertheless federally chartered.
25 Before that there was the National Bank that was at

1 issue in *McCulloch v Maryland*, and to exclude the States
2 from asserting the authority to do audits, to do regular
3 banking examinations, which actually one senator had
4 proposed the States be permitted to do and that was
5 rejected.

6 I would say the concern about State
7 hostility was apparently much reduced by 1869, not much
8 after this statute was passed, when this Court in
9 *National Bank v. Kentucky* upheld the power of the States
10 not just to tax shareholders on their shares, but to
11 require the national banks to help, to require the
12 national banks to pay the tax that was due from those
13 shareholders in order to assist in collection. And the
14 Court -- *McCulloch* was cited to the Court and the Court
15 said it saw no possibility here, unlike in *McCulloch*,
16 that the State would somehow use its authority in this
17 way to incapacitate the banks or impair them by
18 eliciting their help to collect a valid tax.

19 There actually had been some thought when
20 the national banks were first created that they would,
21 in the marketplace, drive State banks out of existence,
22 but they didn't. And the story has been one
23 legislatively of maintaining competitive equality
24 between them, not of hostility. So --

25 CHIEF JUSTICE ROBERTS: Do you want to talk

1 a little bit about Chevron?

2 MS. UNDERWOOD: Yes.

3 CHIEF JUSTICE ROBERTS: Whatever the
4 arguments may be on the merits, it's not clear to me
5 that visitorial powers has an unambiguous meaning that
6 would pre-empt the authority of the OCC to explain it to
7 us.

8 MS. UNDERWOOD: Well, I'd say two thing
9 about that. 484 may have some ambiguity about it. I
10 think it is not ambiguous as to the matters covered by
11 this regulation. Visitorials have -- visitorial powers
12 have never been understood to include discrete acts of
13 law enforcement by a jurisdiction that neither has nor
14 asserts supervisory relationship, the kind of
15 supervisory relationship that the chartering or
16 licensing sovereign has. So I think --

17 JUSTICE SOUTER: What do you say about the
18 quotations in the -- the brief that Mr. Waxman filed, as
19 I recall; it may have been the government's brief --

20 MS. UNDERWOOD: Yes.

21 JUSTICE SOUTER: -- which -- which do have
22 references to visitorial powers as including general
23 conformance to the law. Those are not universal
24 provisions, but they -- they were certainly understood
25 in some cases.

1 MS. UNDERWOOD: Well, the strongest
2 quotations that his brief mentioned several times come
3 from Blackstone. He talks about inquiring into all
4 misbehaviors of the supervised visited corporation.
5 Those comments are made in a time and place when there
6 was only one sovereign, not the distinctive federalism
7 we have today, and so there was no need to distinguish
8 between the visitorial, the distinctly visitorial powers
9 of the sovereign, and the coexisting police powers of
10 another sovereign. There was no --

11 JUSTICE SOUTER: No, but there was -- there
12 was a point in -- in distinguishing the visitorial
13 powers that Blackstone, in the cases Blackstone was
14 referring to, and those for example that would apply
15 solely to -- to religious or originally religious
16 foundations like Oxford and Cambridge colleges and so
17 on. So there -- there seems to have been a reason to
18 understand the distinction.

19 MS. UNDERWOOD: Well, I think that the point
20 about Blackstone's comment to distinguish -- the point
21 about the distinction between the charitable
22 corporations and the public non-charitable corporations
23 is that it may well be that the sovereign was enforcing
24 not just the charter, but the laws of the sovereign with
25 respect to that State. It simply --

1 JUSTICE SOUTER: But he didn't need
2 visitorial powers to do that. I mean, the sovereign had
3 that by virtue of the general law.

4 MS. UNDERWOOD: Yes, but the sovereign might
5 do it in many different -- a supervisor might do it in
6 many different ways, just as OCC here claims to enforce
7 law not by going into court --

8 JUSTICE SCALIA: I thought that was your
9 position, that the -- that the visitation authority
10 includes the power to enforce general laws.

11 MS. UNDERWOOD: The general laws of the
12 visitor, of the sovereign.

13 JUSTICE SCALIA: Of the sovereign. But that
14 a separate action to enforce the laws of the sovereign
15 does not necessarily mean that visitorial powers are
16 being exercised.

17 MS. UNDERWOOD: That is correct. That is
18 correct. That is --

19 JUSTICE SCALIA: So there would be no
20 inconsistency, if you believe that.

21 JUSTICE STEVENS: One thing --

22 MS. UNDERWOOD: That's --

23 JUSTICE STEVENS: One thing puzzled me about
24 this. They are not pre-empting any New York laws; is
25 that correct?

1 MS. UNDERWOOD: They're pre-empting --
2 that's correct. They are preempting our ability to
3 enforce any laws.

4 JUSTICE STEVENS: Did we ever -- do we have
5 any precedents dealing with the question whether
6 preemption of the right to enforce a valid law is
7 appropriate?

8 MS. UNDERWOOD: Well, this Court in, for
9 example, St. Louis said that when the Federal and the
10 State prohibition were the same, that is, a bank
11 couldn't branch at that time or couldn't interstate
12 branch, the -- and the -- and State tried to enforce
13 both provisions -- they were the same, but the State
14 tried to enforce both the Federal charter limitation and
15 the State law, this Court said the State could not
16 enforce the Federal charter, because that was the
17 prerogative of the chartering visitor, but that it could
18 enforce the State prohibition. And it said that
19 separating -- if the law is valid and can be validly
20 applied, then it's virtually unthinkable to separate the
21 authority to enforce it from the application of the law.

22 This Court said that in -- in St. Louis; it
23 -- actually it said it in -- in Easton, which went the
24 other way. That is to say, Easton was a criminal
25 prosecution of a bank officer for taking deposits

1 knowing the bank was insolvent. Prosecution under State
2 law. And this Court said that the law itself had to be
3 preempted. Wasn't clear exactly what Federal law on the
4 subject was. The Court said there must be some Federal
5 law in this area, but we can't afford to have
6 conflicting laws, so it's substantively pre-empted. But
7 the Court also said, if it were valid, it would be
8 unthinkable to bar the State from enforcing it. And
9 that is the correct way, we think, to approach this
10 problem.

11 JUSTICE BREYER: Is it -- could they --
12 could the Federal authorities pre-empt the State law, in
13 your opinion?

14 MS. UNDERWOOD: Well, no, because Congress
15 has said to the contrary. Congress has said, that's why
16 they didn't -- presumably why they didn't do it that
17 way. Congress has said State law shall apply. So I
18 think this is an area where Congress clearly had in mind
19 that there would be, not broad pre-emption of this kind,
20 but the laws would apply. But that it --

21 CHIEF JUSTICE ROBERTS: Well, but -- I'm
22 sorry, but it certainly is pre-empted with respect to
23 visitorial powers.

24 MS. UNDERWOOD: Yes. That is correct.

25 CHIEF JUSTICE ROBERTS: This kind of gets us

1 back to where we started.

2 MS. UNDERWOOD: It does. But think that --
3 I would like to -- I'd like to reserve some time for
4 rebuttal, if I may.

5 CHIEF JUSTICE ROBERTS: Thank you, counsel.

6 MS. UNDERWOOD: Thank you.

7 CHIEF JUSTICE ROBERTS: Mr. Stewart.

8 ORAL ARGUMENT OF MALCOLM L. STEWART

9 FOR THE RESPONDENT OFFICE OF
10 THE COMPTROLLER OF THE CURRENCY

11 MR. STEWART: Mr. Chief Justice, and may it
12 please the Court:

13 To explain the threat that the OCC believes
14 the State's enforcement regime poses to the national
15 banking system and OCC's administration of that system,
16 I would like to begin by going back to a colloquy
17 between Ms. Underwood and Justice Breyer near the
18 beginning of the argument.

19 And Justice Breyer raised the possibility
20 that a myriad of State attorneys general would file --
21 would pursue similar antidiscrimination claims, and Ms.
22 Underwood's response was there really would be no
23 problem because they are all applying the same
24 substantive standard. And I think at a very high level
25 of generality that is so; that is, the Federal statute

1 and the State statute both say no discrimination on the
2 basis of race in extensions of credit. But I think when
3 you get to the way in which the statutes are
4 administered, there is at least the potential for
5 significant differences, because --

6 JUSTICE SCALIA: Well, wait a minute. I --
7 this is state law. And if the State supreme court has
8 said that the statute means a certain thing and that
9 certain thing is a little bit different from what the
10 Federal antidiscrimination law is, I assume that the
11 Federal Government in applying State law has to -- has
12 to take that difference into account, doesn't it?

13 MR. STEWART: We would --

14 JUSTICE SCALIA: The Federal Government
15 doesn't -- doesn't have the right to alter State law.

16 MR. STEWART: The Federal Government
17 wouldn't have the right to alter State law. The Federal
18 Government would have the authority to make its own
19 assessment of whether the State law was pre-empted based
20 upon those distinctions.

21 JUSTICE GINSBURG: But I thought it is a
22 given in this case -- and tell me if I am wrong on this
23 -- that the State substantive law is not pre-empted.
24 You refer, I think, to enforcement pre-emption; that is,
25 the State law is governing law. But the only enforcer

1 is Federal authority; and if that's so, is there any
2 other -- in all of Federal-State relations, any other
3 law where the State as sovereign can prescribe but
4 cannot enforce?

5 MR. STEWART: I give two examples from the
6 national banking system, itself. The first is the
7 Riegle-Neal amendments, which Justice Souter was
8 alluding to. And the amendments don't simply say that
9 OCC shall enforce non-pre-empted State laws. It says
10 that those laws shall be enforced by the Comptroller of
11 the Currency.

12 JUSTICE SOUTER: But do you -- do you agree
13 that -- that it is possible to read the "shall" both as
14 -- as an unequivocal grant of power to OCC, but not
15 necessarily as an exclusive ground?

16 MR. STEWART: I don't think so with the
17 "shall" in combination with the passive voice. That is,
18 if you had a statute that said a certain category of
19 suits shall be adjudicated by the Court of Federal
20 Claims, I think that would mean not simply that the
21 Court of Federal Claims would be required to adjudicate
22 them if a case was brought before it, but I think that
23 would unmistakably identify the Court of Federal Claims
24 as the exclusive tribunal --

25 JUSTICE STEVENS: Yes, but if you have a

1 situation in which the OCC, say, has very limited
2 personnel -- they only have ten people in their
3 enforcement division, for example -- and Congress
4 thought they have to get more, wouldn't it be
5 appropriate in that background to say, you shall start
6 enforcing? And that wouldn't necessarily mean you are
7 excluding States from also enforcing.

8 MR. STEWART: I agree that if the statute
9 simply -- if the statute used the active voice and said
10 the OCC shall enforce these laws, there would be a
11 better argument that the OCC's authority was not
12 exclusive. But when the statute said -- says these laws
13 shall be enforced by the Comptroller of the Currency, I
14 think the clear implication is this is the exclusive
15 mechanism by which the laws --

16 JUSTICE SCALIA: I don't see any difference
17 whatever in that regard between using the active and
18 passive.

19 MR. STEWART: Well, let me give you another
20 example from the national banking system, and that is 12
21 U.S.C. 85.

22 JUSTICE SOUTER: I want you to come back. I
23 -- I won't stop -- I don't want to stop you from doing
24 that, but I want to come back to this. Do you -- do you
25 want to go on to your second example, or do you want to

1 --

2 MR. STEWART: Let me just give you a second
3 example very quickly. 12 U.S.C. section 85, which was
4 an issue in Smiley, deals with the maximum rate of
5 interest that national banks may charge, and it says
6 that they may charge as much as the law of the State in
7 which they are located allows and no more. And that is
8 a similar system in that to determine the maximum rate
9 of interest that the bank may charge, you look to State
10 law. You defer to the choice of the State legislature,
11 but the enforcement regime with respect to
12 administrative enforcement is exclusively Federal. It's
13 only the Federal authorities that can go after --

14 JUSTICE GINSBURG: But that's because --
15 because it's picking a rate. It's not saying there is
16 the Federal law and it has this rate, and the State law
17 that has that rate. Here, the Equal Credit Opportunity
18 Act, a Federal Act, undoubtedly applies. And that is
19 proper Federal -- Federal law enforced by the Federal
20 authorities.

21 The State law, as this picture is drawn for
22 us, is applicable. It's substantive law applicable to
23 these banks, but only the Federal authority can enforce
24 it. That seems passing strange. And do you have an
25 example outside the -- the two you gave us in the

1 National Bank Act where the State prescribes but the
2 Federal authorities enforce?

3 MR. STEWART: Well, another example would be
4 the Similar Crimes Act, which provides for the
5 incorporation of State law with respect to --

6 JUSTICE SCALIA: Well, that's not State law
7 applying of its own force, just as your second example
8 was not State law applying of its own force. It was
9 State law that had been converted into Federal law by
10 the Federal Government's adoption of it.

11 MR. STEWART: Those provisions --

12 JUSTICE SCALIA: That's a different
13 situation.

14 MR. STEWART: Those provisions do accomplish
15 incorporation of State law as Federal law. But this
16 Court has repeatedly said, most recently in Watters,
17 that State law applies to national banks only insofar as
18 Congress shall see fit to permit it. So --

19 CHIEF JUSTICE ROBERTS: Is your concern that
20 -- not with the substantive State law, but that leaving
21 enforcement to the States would cause particular
22 problems? I mean there may be a State law provision
23 that says you shall do this, and the way the attorney
24 general elects to enforce it is by shutting the bank
25 down, jailing the bank officers, doing all sorts of

1 things that -- that the -- the Federal Government may
2 not consider appropriate.

3 MR. STEWART: That is certainly true, that
4 the -- the State's exercise of remedial discretion may
5 be different from the Federal Government's. But even
6 before that stage, if you look at the letters in the
7 Joint Appendix that the New York Attorney General's
8 Office sent to the national banks in question, basically
9 the thrust of the letters was: We have identified what
10 we believe to be troubling statistical disparities in
11 terms of the terms on which the credit was offered to
12 applicants of different races. If those disparities are
13 not satisfactorily explained, that it -- you may be in
14 violation of State fair lending laws. Therefore, give
15 us a wide variety of information that would allow us to
16 determine whether you have a satisfactory explanation.

17 And I think it's clear that had this process
18 been allowed to run its course, what the New York
19 Attorney General's Office was going to do was assess the
20 bank's own criteria for making lending decisions to
21 decide whether those criteria were suitable and decide,
22 therefore, whether they provided a satisfactory
23 explanation for the statistical disparities that had
24 been observed.

25 And once the New York A.G. is in the

1 business of passing upon the adequacy of the bank's
2 lending criteria, he is right on the -- the OCC's --

3 JUSTICE SCALIA: You are arguing for
4 conflict pre-emption. I mean that's a -- that's a
5 different issue than, say, that the -- the State law
6 shouldn't apply. But don't tell me the State law
7 applies, but only the Federal Government is -- what
8 incentive does the Federal Government have to enforce
9 State law?

10 MR. STEWART: Well --

11 JUSTICE SCALIA: It -- it has so much spare
12 time after enforcing Federal law that it's -- it's going
13 to be worrying about State law?

14 MR. STEWART: Well, the point that has been
15 made at various times in the argument that the State law
16 basically tracks Federal law, I think, is an answer to
17 that question; that is, whatever incentive the Federal
18 Government might have to enforce idiosyncratic features
19 of State law that didn't have a Federal analogue. Here
20 the State law in question prohibits discriminatory
21 practices that are already prohibited by Federal law.
22 So whether OCC and HUD set out to enforce State law, if
23 they are vigorously enforcing Federal law, they will in
24 the course of doing that vindicate the State's
25 prerogatives.

1 JUSTICE SOUTER: Is there any -- is there
2 any legislative history whatever to the effect that at
3 the time 36(f)(1)(B) was adopted -- to the effect that
4 its effect was to pre-empt State enforcement for --

5 MR. STEWART: They -- they don't say it in
6 -- with quite that degree of clarity, but there is a
7 colloquy quoted in the -- the brief for the Clearing
8 House between -- I believe it's Senator D'Amato and --

9 JUSTICE SOUTER: Senator D'Amato and --

10 MR. STEWART: And it is -- it is to the
11 effect that Senator D'Amato expresses the concern that
12 this may subject the -- the national banks in their
13 branch activities to State supervision. And the
14 response is that's not the case. That will happen with
15 branches of State banks, but with respect to branches of
16 national banks the supervision will be by the OCC.

17 JUSTICE SOUTER: Yes, but the -- the problem
18 I have with that is, as a -- as a kind of clear
19 statement of -- of something which is -- is -- would be
20 extraordinary -- is that it talks in terms of
21 supervision. It doesn't use the -- my recollection is
22 it doesn't use the magic word "enforcement."

23 And I would have thought that if in the
24 course of that colloquy the -- the statement had been
25 made: The States will not have the authority to enforce

1 this, that there would have been rather a dust-up. And
2 there wasn't. It's kind of a "dog that didn't bark"
3 argument. And, therefore, if -- if there is uncertainty
4 as to how to construe 36(f)(1)(B), I'm not sure that I
5 -- I don't think the legislative history supports your
6 exclusivity view.

7 MR. STEWART: Well, section 36(f)(1)(A)
8 refers to a very limited category of State laws that
9 include State fair lending laws and said these laws will
10 not be pre-empted unless they would be pre-empted with
11 respect to national banks generally. And then
12 36(f)(1)(B) says the laws in that preceding paragraph
13 shall be enforced by the comptroller of the Currency.
14 And so even if the colloquy used the term "supervision,"
15 the focus of the statutory language was -- was on a
16 pretty narrow category of laws.

17 I would like also to refer the Court to 12
18 U.S.C. 484(b), which I think is relevant here, and it is
19 on page 1a of the appendix to the government's brief.
20 And it is an express exception to the general rule
21 against the exercise of visitorial powers.

22 And it says, "Notwithstanding subsection (a)
23 of this section, lawfully authorized State auditors and
24 examiners may at reasonable times and upon reasonable
25 notice to a bank review its records solely to ensure

1 compliance with applicable State unclaimed property or
2 escheat laws."

3 Now, the basic thrust of --

4 JUSTICE SOUTER: Does that mean -- when they
5 say "review records," does that mean that the State
6 auditors in effect can walk into the bank, as
7 distinguished from what we have here, in which the bank
8 is being requested to produce excerpts from records?

9 MR. STEWART: I think that would be the
10 implication of the provision, but the significant point
11 for our purposes is that it refers solely to ensure
12 compliance with applicable State unclaimed property
13 ordinances and laws.

14 JUSTICE STEVENS: May I ask you this
15 question? Naturally, if it's State laws, clearly they
16 can look at, but what if New York was trying to enforce
17 its discrimination laws in an employment context or in
18 context where they said you are charging minority
19 depositors -- giving them lower rates of interest than
20 you give Caucasian depositors? Would they have -- would
21 the discrimination and the rates of interests paid on
22 deposits -- assume that was the question. Would you
23 make the same argument, if that was what New York had
24 alleged?

25 MR. STEWART: Yes, we would because that

1 would be going to the banks' federally authorized
2 banking --

3 JUSTICE STEVENS: All you would have to just
4 look at the records. You can tell from the records
5 whether people of different classes are paying different
6 -- are getting different rates on their deposits.

7 MR. STEWART: I mean, it might be that in
8 that instance the discrimination would be unlikely to
9 persist, but the basic --

10 JUSTICE STEVENS: It would be unlikely to
11 persist. Maybe it's an unlikely example. But you are
12 suggesting that that would also interfere with the
13 Comptroller's ability to regulate the banks?

14 MR. STEWART: Yes, the way the regulation is
15 written, it speaks to State efforts to enforce laws that
16 are directed at the bank's federally authorized banking
17 activities.

18 JUSTICE GINSBURG: So do you think the same
19 answer whether -- Justice Stevens mentioned employment
20 discrimination. The State has reason to believe the
21 bank is discriminating in its employment policies, and
22 it wants to examine certain employment records in that
23 connection. Would you say also that, although New York
24 can prescribe its antidiscrimination in employment law,
25 it can't enforce it?

1 MR. STEWART: No, the regulation does sweep
2 more categorically with respect to inspection of bank
3 records. New York would not be forbidden to file
4 lawsuits to enforce its employment discrimination laws.

5 JUSTICE KENNEDY: Does any of this bring us
6 back to the colloquy you began -- began with -- between
7 Justice Breyer and Ms. Underwood with reference to many
8 States?

9 MR. STEWART: Yes, a certain --

10 JUSTICE KENNEDY: You -- you began on that,
11 and I never did hear --

12 MR. STEWART: The part of the point I was
13 trying to make was, even if the substantive State law on
14 its face is not pre-empted because it is identical to
15 the Federal law, once we get to the enforcement stage
16 where the relevant enforcement agency is saying your
17 statistical disparity constitutes a violation because it
18 is not justified by sound banking practices, inevitably
19 that judgment is going to put the State regulator in the
20 business of doing what OCC does. And if 50 different
21 State attorneys general have slightly different ideas of
22 what constitutes an adequate banking justification for
23 lending criteria that produces statistical disparity,
24 then the problem is multiplied. Then --

25 JUSTICE SCALIA: That's conflict

1 pre-emption, and that goes to the -- to the law. You
2 shouldn't have a separate State law that -- that
3 provides a separate standard that conflicts with the
4 Federal standard. So you pre-empt the law. You don't
5 say the law is in effect, but the State can't enforce
6 it. That's a weird way to solve that problem.

7 MR. STEWART: Well, the other point I would
8 make about this is that it is accurate to say that under
9 the Federal regime the State is entirely disabled from
10 enforcing its own fair lending law. As Ms. Underwood
11 alluded to in the opening part of the argument and as
12 the Petitioner's reply brief explains at pages 25 and
13 26, the Fair Housing Act does contain a mechanism by
14 which a State agency -- in the case of New York, it's
15 the Division of Human Resources --- can be certified by
16 HUD to enforce the State fair lending laws.

17 But that certification entails two different
18 steps: First, HUD has to determine that the substantive
19 State law is -- I believe it's substantially equivalent
20 to the comparable Federal law. And, second, HUD
21 monitors the performance of the enforcing agency, the
22 particular agency under State law that carries out that
23 responsibility, and HUD can thereby make sure that
24 enforcement as well as the substance of the law are
25 consistent with Federal law.

1 CHIEF JUSTICE ROBERTS: Thank you, counsel.
2 Mr. Waxman.

3 ORAL ARGUMENT OF SETH P. WAXMAN
4 ON BEHALF OF THE RESPONDENT

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

6 MR. WAXMAN: Mr. Chief Justice, and may it
7 please the Court:

8 Section 484 plainly has pre-emptive effect,
9 and what it pre-empts, quoting this Court's decision in
10 Watters, is, quote, "the State's investigative and
11 enforcement machinery," close quote.

12 JUSTICE GINSBURG: Mr. Waxman, your mention
13 of Watters, which has been mentioned in the briefs, I
14 think is an inaccurate description of what that opinion
15 held. Watters dealt with a regime that was indisputably
16 visitorial. It was a registration regime, where annual
17 fees were paid, annual reports were filed with the State
18 financial agency, and the State monitor could go into a
19 lending organization any time for any reason without any
20 suspicion of wrongdoing. The only -- so everyone agreed
21 that was a visitorial regime.

22 The sole question was whether the banks --
23 the national bank's operating subsidiary was to be
24 equated with a division of the national bank. That was
25 the only question provided the Court.

1 MR. WAXMAN: Oh, I -- I quite agree, and I
2 did not mean to suggest that this Court's decision in
3 Watters, you know, the holding in Watters concludes the
4 outcome of this case. But this Court, in section II A
5 of Watters -- and we did have a State statutory regime
6 that dealt, yes, with licensure but also with
7 examination, supervision, and enforcement, including
8 judicial enforcement -- this Court repeatedly described
9 that what was pre-empted is -- and this goes to, I
10 think, a point that Justice Scalia was making -- was not
11 substantive pre-emption. There are substantive
12 pre-emption provisions that are addressed in other
13 sections of the Act, including the one that was at issue
14 in Smiley. What is exempted, this Court said again and
15 again, is the State's enforcement and investment and --
16 investigative and enforcement machinery, or its
17 examination and enforcement authority, and that those --

18 JUSTICE GINSBURG: And that was in the
19 context of a State law that says, mortgage lending
20 institution, you may not lend unless you register and do
21 all the rest. That was the context of Watters. And I
22 do not think that excerpts from that opinion should be
23 taken out of that context, which was: You can't be in
24 this business unless you register with us.

25 MR. WAXMAN: The question in the case is

1 whether or not what the Attorney General here sought to
2 do is the exercise of a visitorial power.

3 JUSTICE BREYER: Can I -- can I take what
4 Justice Ginsburg just said, and give you a thought that
5 I am interested in your response to?

6 I haven't seen the letter from the Attorney
7 General. Is the whole thing in the record?

8 MR. WAXMAN: There -- the letters are in the
9 record in the Joint Appendix.

10 JUSTICE BREYER: Okay. Now, reading Judge
11 Parker's description of it, it seemed to me that what he
12 had said was that there are statistical disparities
13 between interest rates and race. Well, as long as, most
14 unfortunately, income is correlated with race, with
15 minorities being towards the bottom, of course such
16 statistical disparities will exist, some legitimate,
17 some not. So if the only basis for getting this
18 information is that allegation, it's hard to see how
19 this differs from the case that Justice Ginsburg put.

20 MR. WAXMAN: Yes, that --

21 JUSTICE BREYER: But it might be quite a
22 different case, if they had gone into court and found
23 individuals who were really getting different interest
24 rates and who really seemed very, very similar, but for
25 race. But at that point, they'd have to go get this

1 same information, because that's where they would find
2 whether that prima facie case was right or wrong.

3 MR. WAXMAN: Yes.

4 JUSTICE BREYER: Do you see what I'm doing?

5 MR. WAXMAN: Right.

6 JUSTICE BREYER: I'm dividing the matter
7 vertically, instead of, say, horizontally --

8 MR. WAXMAN: I'd like to --

9 JUSTICE BREYER: -- and I want to know if
10 that's possible.

11 MR. WAXMAN: I'd like to address both the
12 vertical and horizontal axes of what I perceive to be
13 your question. One is the distinction that this Court
14 drew in Guthrie, where it said there is a -- there's a
15 huge distinction in determining what's a visitorial
16 power between a private individual seeking to vindicate
17 a deprivation of his or her traditional property right,
18 which is what was at issue there, and what the Court --
19 what this Court said was the public right of visitation,
20 which it also explained was the State's, quote,
21 "enforcing observance of its laws and regulations."
22 There is a public and private distinction, and
23 visitation deals with the former.

24 JUSTICE SCALIA: Sure, there is.

25 MR. WAXMAN: It deals with the sovereign.

1 JUSTICE SCALIA: Would -- would you
2 acknowledge, counsel, that there is a difference between
3 enforcing State laws through visitation and enforcing
4 State laws apart from visitation? And what Waters
5 involved was enforcing State laws through visitation.
6 Of course, you can do that through -- through visitation
7 powers, but you can also do apart from that by bringing
8 a lawsuit or whatever.

9 MR. WAXMAN: Justice Breyer, I'll get to the
10 horizontal axis in a moment. I'm afraid I'm going to
11 forget --

12 JUSTICE SCALIA: I'm sorry, did I skip over
13 an axis here.

14 (Laughter.)

15 JUSTICE SCALIA: I didn't mean to.

16 MR. WAXMAN: Let me go -- let me go to your
17 axis first, which is to say that anything that is a
18 visitorial power can also be interpreted as a police or
19 enforcement power, and what Congress had in mind -- this
20 is legislation that was born in the crucible of the
21 Civil War, and what Congress sought to pre-empt was
22 State executive action, State examination and
23 enforcement action with respect to these newly created,
24 very important Federal instrumentalities. That was
25 historically done, this Court explained in Guthrie, and

1 Chancellor Kent and Blackstone and many other
2 authorities agree was historically done through access
3 to the courts; and in fact what Dean Pound in his
4 oft-cited article about visitorial powers said, was --
5 he said, and this is discussed at pages 16 through 18 of
6 the amicus brief of the Financial Services Roundtable --
7 what he called, quote, "the leading case for visitorial
8 powers in equity" was a case called the Attorney General
9 v Chicago and Northwest Railroad decided in 1874, in
10 which the Attorney General of Wisconsin was seeking to
11 require this railroad to comply with the State's
12 mandated rate schedule. That was a visitorial power,
13 even though you could also call it a law enforcement
14 power.

15 Now, Justice Breyer, on the horizontality of
16 your question: This is not a suit in which the New York
17 Attorney General is trying to enforce its employment
18 discrimination laws or its health laws or its zoning
19 laws. The attorney general wants the loan records of
20 national banks, and he wants them so that he can
21 evaluate for himself whether the banks are making proper
22 judgments about how to market and how to price their
23 loans.

24 JUSTICE STEVENS: Mr. Waxman, assume --
25 assume for a minute, this -- what if before writing the

1 letter, the Attorney General of New York said, "We have
2 conducted 500 interviews with people who have borrowed
3 money from you, and on the basis of all these interviews
4 we have drawn these tentative conclusions that there is
5 discrimination. We would like to give you an
6 opportunity to explain all of this by showing us your
7 records." And they say no, we won't do it. Would they
8 then be pre-empted from bringing their lawsuit?

9 MR. WAXMAN: Yes, they would. And in fact
10 --

11 JUSTICE STEVENS: Even though they didn't
12 have to look at any bank record to make their prima
13 facie case?

14 MR. WAXMAN: Well, their -- the OCC in the
15 preamble to its regulations does draw a distinction
16 between State enforcement actions and a pure State
17 declaratory judgment, quote, "as to the meaning of the
18 applicable law." This is a case that -- in which --

19 JUSTICE STEVENS: I am asking about a
20 hypothetical. I understand your argument here. But I
21 just don't understand how your argument would apply to
22 my hypothetical. But I think the regulation would apply
23 to the hypothetical.

24 MR. WAXMAN: Well, this is -- this case is
25 certainly in the core, but a -- a State authority,

1 whether it's the State banking commission or the State
2 human rights commission or the State attorney general,
3 or for that matter another Federal Government authority,
4 that seeks to call a national bank to account for the
5 manner in which it is conducting an expressly
6 designated, allocated banking power is an exercise of
7 visitorial power.

8 JUSTICE SOUTER: Well, it isn't -- it isn't
9 if --

10 JUSTICE STEVENS: He doesn't even want to
11 look at your books; he just wants to prove it by people
12 who have been borrowing money and compare them with --
13 among them they can orally.

14 MR. WAXMAN: I don't --

15 JUSTICE STEVENS: I don't understand why
16 that would be visitorial power.

17 MR. WAXMAN: The -- the State's enforcement
18 of any law that is directed at a national bank's
19 authorized banking powers is a visitorial power. And
20 the fact that it may also be characterized as a police
21 power or a lawsuit is -- is interesting, but not what's
22 at stake.

23 What Congress aimed at -- Congress in 1864
24 knew -- the Supreme Court said, Blackstone and Kent had
25 said -- that visitorial powers on civil corporations are

1 exercised A, by the sovereign, not by a private
2 individual, and B, are almost always exercised through
3 access to the courts. Whether they are invoking the
4 courts' authority to seek records or not, that was the
5 historical core of what visitorial powers --

6 JUSTICE GINSBURG: So one could say, yes,
7 the Federal authorities have visitorial powers, and they
8 can go to court. But we have here that the State can
9 prescribe, not a supervisory regime, but -- fair
10 lending. And the State wants to go into court and say
11 the bank is violating the State substantive law, which
12 is applicable.

13 MR. WAXMAN: That's correct. And a
14 sovereign taking a national bank into court with respect
15 to not any old general law, but with respect to the
16 conduct of its specifically authorized national banking
17 powers, is the exercise of visitorial powers.

18 JUSTICE SOUTER: Well, is it --

19 MR. WAXMAN: That was the reason for the
20 courts of justice exception.

21 JUSTICE SOUTER: Is it the exercise of
22 visitorial powers, or is it an action which covers the
23 same subject that an exercise of visitorial powers would
24 do? Let me -- let me propose a distinction, and I don't
25 know whether this is sound. You know -- I mean, you

1 tell me.

2 I would suppose that if someone with
3 visitorial powers dealing with discrimination in lending
4 brought an action against the bank or tried to enforce
5 it against the bank and couldn't do so in any other way
6 then by going to court, it would go to court, and it
7 would say court, tell this institution that I have some
8 responsibility for, to obey the law.

9 But I also assume that if the Attorney
10 General of New York, which is not a visitor, enforces
11 the law, it would go into court and say tell them to
12 obey the law and to pay damages or recompense of some
13 sort to these people whom they have wronged.

14 The subject matter of each suit is the same,
15 but the relief that is being requested and the judicial
16 power that is being exercised is different in these two
17 cases. Is that a fair distinction?

18 MR. WAXMAN: I don't think -- I think that
19 if I understood your question, and I may not have -- if
20 a suit by a private individual or a group of private
21 individuals seeking to indicate the deprivation of a
22 private traditional right is not visitorial; but if the
23 State, either directly in the enforcement of its general
24 laws or seeking to protect the people of its State, goes
25 into court or asks for records or anything else, it is

1 exercising a traditional visitorial power.

2 May -- while I have your attention, may I
3 also go back to your question about 36(f) and
4 Riegle-Neal, because there is yet -- there are other
5 additional indicators that when the Congress said in
6 36(f) that these State laws shall be enforced by the
7 OCC, it was mandatory and exclusive.

8 First of all, the colloquy that was
9 discussed and is reported in our brief, I think at page
10 26, does use the word "enforce" as well as "supervise,"
11 but more to the point --

12 JUSTICE SOUTER: That is the one with
13 Senator D'Amato?

14 MR. WAXMAN: Yes. Riegle-Neal -- here's the
15 most important point. That provision that we've been
16 were looking at had a cognate, had an analogue that was
17 also enforced. Riegle-Neal basically said out-of-state
18 banks can now branch bank. When they do so, they are
19 subject to these four categories of State laws. The
20 provision we have been looking, which was section 102,
21 said with respect to enforcement of those laws, the OCC
22 shall enforce it. But section 105 said where the
23 out-of-state bank is a State-chartered bank -- and this
24 is reported, I think it's at section 1820(h) of title
25 12, when it's a State-chartered bank, the State

1 authorities of the host State shall enforce the laws.

2 JUSTICE SOUTER: Uh-huh.

3 MR. WAXMAN: So it enacted a dual regime
4 that demonstrates exactly what Congress had in mind,
5 which is that there would be one regulator making the
6 kind of judgments about, okay, there is a disparity, but
7 let's look at credit history, let's look at the loan to
8 equity value, let's look at income versus debt incurred,
9 and all these factors that the OCC and the Fed have
10 explained have to go into making a judgment about
11 whether or not a particular condition of a particular
12 loan violates Federal law, whether it the Fair Housing
13 Act or the Equal Credit Opportunity Act or the Fed's
14 regulation B.

15 JUSTICE GINSBURG: Mr. Waxman, you are
16 talking about lending. And like depositing, those are
17 core banking activities, but today national banks have a
18 lot of incidental -- they have authority to do things
19 incidental to banking. Does your restriction of State
20 enforcement extend to those matters incidental to
21 banking?

22 MR. WAXMAN: May I answer? I believe that
23 it would if those incidental authorities are in fact
24 authorized, approved and regulated by the OCC, but this
25 case doesn't require you to address it, because this is

1 an express power under section 371(a).

2 CHIEF JUSTICE ROBERTS: Thank you, counsel.
3 Five minutes, Ms. Underwood.

4 REBUTTAL ARGUMENT OF BARBARA D. UNDERWOOD
5 ON BEHALF OF THE PETITIONER

6 MS. UNDERWOOD: A couple of -- four points
7 or so. To the extent the subpoena is perceived -- or
8 this discovery request -- it didn't even proceed to this
9 subpoena stage -- is perceived to be burdensome, State
10 laws allows a motion to quash a subpoena for inadequate
11 basis or for harassment. So there is control in the
12 State courts over anything that is perceived to be
13 excessive.

14 Two, States have been enforcing consumer
15 protection and fair lending laws since the mid '70s when
16 they were enacted. The Center for Responsive Lending
17 amicus brief has a discussion of that history of
18 enforcement. The Conway affidavit at the Joint Appendix
19 at 152 has a description of New York's enforcement
20 activities between 1975 and 2004. And the Lawyers'
21 Committee for Civil Rights also goes over that history.

22 And they have been enforcing other laws
23 against national banks for even longer, antitrust laws,
24 branching laws, idiosyncratic laws of various sorts with
25 no evidence that this has impaired the functions of the

1 banks.

2 JUSTICE SCALIA: Ms. Underwood, I -- I
3 forgot the response you made in your brief. I know you
4 did make some response to subsection (b) of section 484.
5 How do you -- how do you explain that?

6 MS. UNDERWOOD: In the exceptions?

7 JUSTICE SCALIA: Yes. Why -- why do they
8 list those exceptions, unless one would think that
9 everything is covered?

10 MS. UNDERWOOD: Virtually every exception
11 was enacted to resolve a controversy over whether
12 something was visitorial or not. In fact, just as in
13 Guthrie, where this Court said the shareholders' suit
14 for bank records was not visitorial, or alternatively,
15 if it is, it is covered by the courts of justice
16 exception. So too, each of those exceptions involved a
17 situation where there was a claim, an incorrect claim,
18 but a claim that the action would be banned as
19 visitorial, so Congress --

20 CHIEF JUSTICE ROBERTS: Counsel, why isn't
21 it a complete answer to what I agree is a somewhat
22 unusual situation of pre-empting enforcement but not the
23 substance of law that its enforcement that raises the
24 concerns? That the Federal Government thinks the State
25 law is fine, but when you get attorneys general

1 enforcing it in a particular way, that's what causes the
2 problem. And I mean, the problem arises in a lot of
3 areas. Even within the Federal Government, the FBI and
4 DEA have different ways of enforcing that might conflict
5 with each other. Why doesn't that make perfect sense?

6 MS. UNDERWOOD: Well, even without
7 enforcement of State law, OCC would not have exclusive
8 control of enforcement of discrimination laws against
9 national banks. So the idea that State enforcement
10 poses some special problem to interfere with that
11 exclusive control is just a mistake. That's not the way
12 Congress set it up.

13 CHIEF JUSTICE ROBERTS: So, why -- why is it
14 a mistake? Why can't Congress or the OCC think that
15 that's where the difficulties are going to arise? In
16 other words, it's kind of a less intrusive approach, and
17 saying, well, you can have your State law but we are
18 concerned about enforcement, so we are going to be the
19 ones that enforce it.

20 MS. UNDERWOOD: I didn't mean it's a mistake
21 of policy. I meant it's a mistake in description of the
22 regime Congress created.

23 HUD has administrative enforcement. DOJ has
24 litigation enforcement. This is a Federal law. Private
25 parties can enforce Federal fair housing law. States

1 can probably enforce Federal fair housing laws, too, as
2 -- patriotic for the victim. The Second Circuit set
3 aside that part of the injunction, the part that barred
4 New York from enforcing Federal law.

5 CHIEF JUSTICE ROBERTS: So your answer is
6 because they have different entities that can enforce
7 it, they are sort of in for a penny, in for a pound? If
8 you let anybody else enforce it, you have got to let
9 everybody else enforce it?

10 MS. UNDERWOOD: No, I don't say that --

11 CHIEF JUSTICE ROBERTS: Including the
12 entities that have historically have targeted national
13 banks?

14 MS. UNDERWOOD: I don't make that argument.
15 What I say is that is strong evidence that Congress
16 didn't intend to give OCC exclusive control here.

17 JUSTICE SCALIA: I suppose if -- if
18 enforcement pre-emption is the lesser step, we probably
19 ought to revise our jurisprudence so as not to tread any
20 more heavily than we have to upon the States so that
21 where there is conflict pre-emption, all we should say
22 is the State law is not invalidated, it is simply not
23 enforceable?

24 MS. UNDERWOOD: Well --

25 JUSTICE SCALIA: I mean that would --

1 CHIEF JUSTICE ROBERTS: No, I suppose the
2 question would not be what we think is a good idea but
3 what Congress has done. And here the OCC has
4 interpreted what Congress has done is to make exclusive
5 the OCC regulation only with respect to enforcement.

6 MS. UNDERWOOD: Well --

7 CHIEF JUSTICE ROBERTS: I would suppose you
8 would thank them for that rather than criticize them for
9 it.

10 MS. UNDERWOOD: I think that in many ways
11 leaving the law intact and denying the States the
12 ability to enforce it is more intrusive than simply
13 finding pre-emption. In any event, Congress made it
14 quite clear that it didn't want pre-emption.

15 I think my time is up.

16 CHIEF JUSTICE ROBERTS: Thank you,
17 Ms. Underwood. The case is submitted.

18 (Whereupon, at 12:18 p.m., the case in the
19 above-entitled matter was submitted.)

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