

OFFICIAL TRANSCRIPT PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 85-971 & 85-972

TITLE ROBERT L. CLARKE, COMPTROLLER OF THE CURRENCY, Petitioner V.
SECURITIES INDUSTRY ASSOCIATION; and SECURITY PACIFIC NATIONAL
BANK, Petitioner V. SECURITIES INDUSTRY ASSOCIATION

PLACE Washington, D. C.

DATE November 3, 1986

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IN THE SUPREME COURT OF THE UNITED STATES

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ROBERT L. CLARKE, COMPTROLLER :
OF THE CURRENCY, :
Petitioner, :

V. : No. 85-971

SECURITIES INDUSTRY ASSOCIATION; :
and :
SECURITY PACIFIC NATIONAL BANK, :
Petitioner, :

V. : No. 85-972

SECURITIES INDUSTRY ASSOCIATION :

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Washington, D.C.

Monday, November 3, 1986

The above-entitled matter came on for oral
argument before the Supreme Court of the United States
at 1:55 o'clock p.m.

1 APPEARANCES:

2 CHARLES A. ROTHFELD, ESQ., Assistant to the Solicitor
3 General, Department of Justice, Washington, D.C.; on
4 behalf of the petitioner in No. 85-971.

5 WILLIAM T. COLEMAN, JR., ESQ., Washington, D.C.; on
6 behalf of petitioner in No. 972.

7 JAMES B. WEIDNER, ESQ., New York, New York; on behalf
8 of the respondents.
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C O N T E N T S

ORAL ARGUMENT OF:

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CHARLES A. ROTHFELD, ESQ.,

on behalf of the petitioner

in No. 85-971

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WILLIAM T. COLEMAN, JR., ESQ.,

on behalf of the petitioner

in No. 85-972

16

JAMES B. WEIDNER, ESQ.,

on behalf of the respondents

22

CHARLES A. ROTHFELD, ESQ.,

on behalf of the petitioner

in No. 85-971 - rebuttal

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P R O C E E D I N G S

CHIEF JUSTICE REHNQUIST: We will hear arguments next in No. 85-971, Robert L. Clarke, Comptroller of the Currency, versus Securities Industry Association, and Security Pacific National Bank versus Securities Industry Association.

You may proceed whenever you are ready, Mr. Rothfeld.

ORAL ARGUMENT OF CHARLES A. ROTHFELD, ESQ.,

ON BEHALF OF THE PETITIONER IN NO. 85-971

MR. ROTHFELD: Thank you, Mr. Chief Justice, and may it please the Court, the basic issues in this case involve fairly narrow questions of statutory construction. They have considerable significance for the banking industry. The question on the merits is whether discount brokerage offices that are operated by national banks must be treated as regular bank branches that are subject to the geographical restrictions on branching imposed by the McFadden Act.

The other closely related issue here is whether respondent has standing to try to enforce those geographical limitations. The background that gives rise to these issues is, simply stated, in 1982 two national banks applied to the Comptroller of the Currency for permission to operate discount brokerage

1 offices interstate. The Comptroller granted the
2 applications after concluding in a comprehensive written
3 opinion that bank offices offering only discount
4 brokerage services are not branches within the meaning
5 of the McFadden Act, and therefore naturally are not
6 affected by that Act's prohibition on interstate
7 branching by national banks.

8 The case is here because first the District
9 Court and then a divided panel of the Court of Appeals
10 disagreed with the Comptroller's reading of the
11 statute. In a suit brought by the respondent, a trade
12 association representing underwriters and securities
13 brokers, those courts correctly found that the McFadden
14 Act in 12 USC Section 36C permits a national bank to
15 operate a branch only in its home state, and even there
16 only to the extent that state banks are permitted to
17 branch by state law.

18 But the courts went on to hold incorrectly, in
19 our view, that essentially all bank offices must be
20 treated as branches within the meaning of the Act. As a
21 result the Courts held that banks may offer discount
22 brokerage services only at licensed in-state branches.
23 And in the course of reaching this conclusion those
24 courts obviously held that respondent has standing to
25 challenge the location of bank discount brokerage

1 offices.

2 In our view, both of these holdings on
3 standing and on the merits turned on a fundamental
4 misapplication of the McFadden Act and its meaning. On
5 the substantive branch in question the lower courts
6 disregarded both the plain language of the McFadden Act
7 and the Comptroller's comprehensive analysis of what the
8 statute means, and the courts granted standing to a
9 party that Congress plainly did not intend to be one of
10 the beneficiaries of the McFadden Act's restrictions.

11 Because these issues are related, because some
12 background on the operation of the McFadden Act may shed
13 light on standing issue, I would like to reverse the
14 usual order and talk about the merits of the case first
15 before reaching, discussing the standing question.

16 QUESTION: May I just ask, if you are talking
17 in reverse order, if you persuade us with your second
18 argument, will it be necessary for us to discuss your
19 first?

20 MR. ROTHFELD: Much as we would like you to
21 resolve the banking question, I think if the parties
22 were found not to have standing, that should be the end
23 of the case. On the substantive banking question, we
24 think that the resolution is straightforward, and that,
25 I think, lends itself to a discussion of the Act. That

1 is why I am talking about it first.

2 The District Court here recognized that the
3 geographical restrictions imposed on bank branches by
4 Section 36C apply only to bank offices that are in fact
5 branches within the meaning of the McFadden Act. Other
6 bank offices may be operated anywhere not subject to
7 locational restraints. That means that this case can be
8 resolved simply by deciding whether bank-owned
9 securities brokerage offices are branches within the
10 meaning of the McFadden Act.

11 As might be expected, the Act itself contains
12 a precise definitional provision that answers this
13 question. 12 USC Section 36F defines the term "branch"
14 to include any branch bank, branch office, branch
15 agency, additional office, or branch place of business
16 at which deposits received, checks paid, or money lent.

17 This provision states on its face that a bank
18 office is a branch within the meaning of the Act only if
19 it does one of those three things, if it takes deposits,
20 pays checks, or makes loans. Bank discount brokerage
21 offices, whether or not owned by national banks, do none
22 of those things, and that necessarily means that they
23 are not branches within the meaning of the Act, are not
24 subject to the Act's geographical restrictions, and that
25 should be the end of this case. That is all that is

1 necessary to resolve the merits.

2 If there is any doubt about this, the
3 legislative history makes it quite clear Congress meant
4 what it said in Section 36F, in defining where the
5 geographical limits apply. During debate on the
6 McFadden Act, Congress made clear and stated repeatedly
7 that the Act and its geographical restrictions were
8 designed to provide for competitive equality between
9 state and national banks in the provision of the basic
10 banking services listed in Section 36(f).

11 As a result, it is not surprising that all of
12 the discussion in Congress about the appropriate scope
13 of branching restrictions mentioned only bank offices
14 that did one of those three things, that took deposits,
15 paid checks, or made loans. In contrast, during the
16 entire three years that the McFadden Act was under
17 consideration, there was no suggestion made by anyone
18 that geographical restraints had been or would be
19 imposed on any other bank officers performing any other
20 activities.

21 And this was a significant omission by the
22 drafters of the McFadden Act. From the time of the
23 enactment of the National Bank Act in 1864, national
24 banks performed incidental services away from their main
25 offices. As long ago as 1870 this Court upheld their

1 authority to do that in the Merchants Bank decision, and
2 in the years following Merchants Bank national banks
3 developed a substantial volume of that business,
4 including particularly, as we demonstrate in our brief,
5 a very substantial interstate securities business.

6 Now, in 1927, when Congress passed the
7 McFadden Act, it was well aware of all this interstate
8 bank activity. It made reference to it and specifically
9 authorized banks to continue the securities business.
10 Had Congress wanted to confine those bank operations to
11 in-state branches in the process overruling Merchants
12 Bank and substantially curtailing the existing business
13 of national banks it presumably would have said
14 something about that, but there is nothing in the
15 language or legislative history of the McFadden Act
16 suggesting that Congress had any such intention when it
17 passed the statute.

18 QUESTION: I take it the argument is, or at
19 least one of the arguments is that this kind of business
20 is part of the banking business and the statute says you
21 are only supposed to conduct banking business at your
22 main -- at your home location or in branches.

23 MR. ROTHFELD: You are referring, Justice
24 White, to Section 36's companion provision, 12 USC
25 Section 81 --

1 QUESTION: Yes.

2 MR. ROTHFELD: -- which respondent has pointed
3 to for that. And I think there are a number of
4 difficulties with respondent's reading of that
5 provision.

6 QUESTION: Was that presented below?

7 MR. ROTHFELD: Yes, it was, Your Honor.

8 QUESTION: And rejected?

9 MR. ROTHFELD: Well, the District Court, we
10 think, engaged in the proper form of analysis.

11 QUESTION: Or accepted? It wasn't accepted?

12 MR. ROTHFELD: That's correct. The District
13 Court looked, as we suggest this Court should look, to
14 Section 36(f) in determining whether or not the bank
15 office involved was defined as a branch within those
16 terms, although respondent's argument was presented to
17 the lower court.

18 Well, didn't our Plant City opinion say that a
19 branch office might be a branch even though it doesn't
20 perform one of the three functions that you have
21 described?

22 MR. ROTHFELD: Plant City expressly declined
23 to decide whether a bank office that does not perform
24 one of those functions every could be treated as a
25 branch. Most of the Plant City opinion then went on to

1 decide whether the bank facilities at issue in Plant
2 City did one of those three things, and the Court
3 ultimately concluded they took deposits and for that
4 reason were branches.

5 That is exactly the analysis we are asking the
6 Court --

7 QUESTION: Yes, but isn't there language in
8 Plant City suggesting that you could have a branch even
9 though it doesn't do one of those three things?

10 MR. ROTHFELD: I think as far as it went was
11 to state that a bank's branch includes offices that
12 perform those three functions and may include more. The
13 Court found it unnecessary to decide whether it did
14 include more, because the facilities there took
15 deposits. But this Court has never suggested that
16 beyond that that ambiguous statement leaving the
17 question open that a bank office should be treated as a
18 branch if it doesn't do one of those three things.

19 QUESTION: I suppose a bank could conduct in
20 non-branches trust business.

21 MR. ROTHFELD: Well, that is our position.
22 That issue has been litigated, and the Eighth Circuit
23 has held that trust businesses are within the definition
24 of branch. So far as we are aware, that is the only
25 decision by any Court that has ever suggested that a

1 bank office does not perform one of those three
2 functions should be treated as a branch within the
3 meaning of the statute. We think that that decision is
4 incorrect.

5 In fact, there are literally hundreds of bank
6 offices that have been authorized by the Comptroller
7 operating nationwide now that so long as they do not
8 perform under those three functions are not treated by
9 the Comptroller as branches. One of the difficulties
10 with both respondent's broad reading of Section 81 and
11 the District Court's parallel analysis here which
12 essentially reads the McFadden Act to mean that anything
13 that a bank can do at its main office it must do only at
14 the main office or at a licensed branch, which
15 essentially realistically means that all bank operations
16 must be performed at one of those two locations.

17 It really is entirely without support either
18 in decisions of the courts or the interpretation of the
19 Comptroller, who is entrusted with administering the
20 statute. In all the time that the McFadden Act has been
21 on the books, in 60 years no court has given it as broad
22 a reading as the lower courts gave it here. Even that
23 Eighth Circuit case concerned a banking type function,
24 and aside from that case every decision to confront a
25 McFadden Act challenge as well as every ruling of the

1 Comptroller to address the issue has ultimately looked
2 to whether the bank office performed one of the three
3 functions enumerated in Section 36(f).

4 The sort of analysis proposed by the
5 respondent and used by the District Court here would
6 sweep away all of that administrative and judicial
7 construction of the statute, and it would sweep away as
8 well all of the interstate business conducted by
9 national banks at offices that don't perform one of
10 those three functions. All that would be inconsistent
11 with the reading proposed by the courts below.

12 In fact, I think what the Court -- what
13 Congress meant in Section 81, the statute that
14 respondent is pointing to and that Justice White has
15 asked about, was a general banking business, a business
16 that performs essential banking functions and offers
17 essential banking services.

18 In the McFadden Act itself Congress pointed
19 out what those services are, taking deposits, making
20 loans, and cashing checks. If a bank office is not
21 doing at least one of those things it is not offering a
22 general banking business. I think that is all really
23 that is needed to decide the merits in this case.

24 I think before sitting down I should say a
25 word about the standing issue here also, which requires

1 a look at a different portion of the legislative history
2 of the McFadden Act. That history and this Court's
3 consistent interpretations of it put it beyond dispute
4 that when Congress enacted the Act it had one goal in
5 mind and only one goal. It wanted to equalize
6 competition between state and national banks in the
7 provision of the basic banking services that are listed
8 in Section 36(f) to prevent either group of banks from
9 getting an advantage over the other.

10 Respondent, which competes with both national
11 and state banks, obviously doesn't fall into either
12 group, and by definition that means that respondent
13 cannot satisfy what the Court has called the zone of
14 interest prerequisite standard.

15 As the Court explained last term in its Pierce
16 County decision, and as the lower courts have uniformly
17 held, plaintiff satisfies that prerequisite only if it
18 is able to show that Congress intended it to benefit
19 from the statute that is at issue in the litigation. As
20 Professor Jaffe asked rhetorically in describing the
21 values that are served by the zone of interest
22 requirement, if the people that the law chooses to
23 protect are satisfied with the status quo, although it
24 may involve an alleged violation of the law, why should
25 a stranger have a right to insist on enforcement?

1 Respondent is just such a stranger or
2 incidental beneficiary of the restrictions that are
3 imposed by the McFadden Act. This is not a situation
4 where there is any doubt about whom Congress intended to
5 benefit from the Act or the statute was silent about the
6 beneficiaries. Here it is quite clear Congress intended
7 to provide for competitive equality between state and
8 national banks so that neither bank, neither group would
9 get an advantage over the other.

10 Given this, we think that then Judge Scalia
11 had it absolutely right in his dissent in the Court of
12 Appeals in this case where he noted that the brokerage
13 houses suing here are no more within the zone of
14 interest of the McFadden Act than would be a business
15 competing for parking spaces with an unlawfully licensed
16 branch.

17 We think that such an incidental, unintended
18 beneficiary of the McFadden Act's restrictions,
19 particularly one who is trying to sue under a statute
20 that was designed to preserve competition should not be
21 able to go into court to win itself windfall relief from
22 competition.

23 If there are no further questions, I will
24 reserve the remainder of my time.

25 CHIEF JUSTICE REHNQUIST: Thank you, Mr.

1 Rothfeld.

2 We will hear from you now, Mr. Coleman.

3 ORAL ARGUMENT OF WILLIAM T. COLEMAN, JR., ESQ.,

4 ON BEHALF OF THE PETITIONER IN NO. 85-972

5 MR. COLEMAN: Good afternoon, Mr. Chief
6 Justice, and may it please the Court, respondent
7 stockbrokers seek to exclude national banks from their
8 national, nationwide market, not through fair
9 competition beneficial to consumers but through
10 selective, novel, and unfair reading of statutory
11 language.

12 Three points strongly support the Solicitor
13 General's position that neither Section 36 nor Section
14 81 can rationally be interpreted to render unreasonable
15 the Comptroller's ruling that a national bank may
16 provide discount brokerage security services on a
17 nationwide basis.

18 First, the legislative history of the McFadden
19 Act Section 2(b) regarding national bank authority to
20 conduct a safe deposit business. Second, the
21 consistency of the Comptroller's ruling over 70 years of
22 practice and Congressional approval of such practice.
23 And third, the inconsistency of respondent's position
24 with this Court's efforts to analyze Section 36 in the
25 Plant City National Bank case.

1 I would first like to turn to Section 2(b) of
2 the McFadden Act. In the same section which affirmed
3 the national bank authority to engage in the security
4 brokerage business also affirmed the authority to
5 conduct a safe deposit business. The provisions in
6 Section 2(b) of the bill dealing with the safe deposit
7 business originally provided that such business could
8 only be conducted at the principal office of its
9 branches or in a building adjacent thereto.

10 The location restrictions, however, were
11 deleted during floor debate. Representative Seller
12 asked, "Does this mean that a safe deposit business can
13 be conducted a block away or a mile away from the
14 National Bank Association?" Representative McFadden
15 responded that the amendment removes limitations on
16 locations.

17 This fact completely destroys respondent's
18 argument that anything which is authorized by Section 24
19 7th must be done only at the principal office or at a
20 branch, because clearly here there is Congressional
21 intent to show that something which is authorized by 24
22 7th nevertheless could be done other than at the branch
23 or at the home office.

24 With respect to the discount brokerage
25 business Congress never at the time when it inserted the

1 authority to do the security discount brokerage
2 business, never at any time talked about a limitation,
3 and as you know, a distinguished member of this Court
4 once said that "A page of history is worth a book of
5 logic," and we have detailed throughout our briefs on
6 Page 22 to 27 of the reply brief, all the instances
7 where since the first Bank Act was established in 1864
8 where banks have done things other than the core
9 business, which is defined in Section 36, at places
10 throughout the United States.

11 Third, with respect to the Plant City National
12 Bank case, Mr. Chief Justice, the issue there was
13 whether the activity being done was one of the three
14 things defined in that Section 36. If the Court had
15 felt that Section 81, which says the general business of
16 the bank can't be done any place other than the
17 principal office or branches, then there was no need to
18 spend about 15 pages trying to determine whether what
19 was being done was the receipt of deposits. And there
20 is nothing in that case which in any way indicates that
21 when Chief Justice Burger is talking about it may be
22 more, that he is not talking about additional places
23 rather than additional activities.

24 QUESTION: But of course there is nothing to
25 indicate to the contrary, either. The language could

1 well mean that it includes these three things but it
2 might include something else.

3 MR. COLEMAN: Yes, and then that takes you
4 back to the statute, and here the judge below said,
5 based upon the literal reading of the statute, that the
6 Comptroller was correct. It is also in the Plant City
7 case they talk about this indefiniteness.

8 Now, under those circumstances it seems to me
9 that it is clear that this Court should say that since
10 the Comptroller is the one responsible for administering
11 the statute, and if you have this clear -- if you have
12 indefiniteness, a vagueness, then that is the type of
13 case where you have always said that you will affirm the
14 Comptroller and he does give reason.

15 Now, with respect to the statute, the sole
16 reason why the judge below said that the statute which
17 in my judgment reads so clearly nevertheless doesn't
18 give the result we say is because as a statement by Mr.
19 McFadden made ten days after Congress has passed the
20 statute and also after presumably the President has
21 signed the law, and that statute in which he says not
22 only is it the three things in 86(f) but in addition it
23 is anything you could do at your principal place of
24 business.

25 There is not a word about that in the

1 statute. There is not a word in any of the legislative
2 history of that. The one thing, and you know, whenever
3 you talk about statutory interpretation, Congressional
4 intent, you know, some time it works, sometimes it
5 doesn't, but the one thing which I think this Court has
6 finally established and has to establish is that
7 statements made by a Senator or Congressman after the
8 bill was passed and after it was voted upon has no
9 significance whatsoever in determining the
10 interpretation of the statute, and once you get away
11 from that, then I assure you there is not a word in the
12 legislative history, there is not a word in the statute
13 which justifies saying that anything other than the
14 activity set forth in Section 36(f) are those activities
15 that are restricted to the principal office and the
16 branches.

17 QUESTION: Does the Comptroller have to
18 authorize the setting up of a bank office that deals in
19 securities?

20 MR. COLEMAN: The answer is, Your Honor, no.
21 I will explain to you, because I asked the same thing.

22 QUESTION: Well, he has been doing -- he has
23 been doing it --

24 MR. COLEMAN: It took me a long time -- I will
25 tell you what the answer is. The Comptroller has to

1 authorize the setting up of any subsidiary corporation
2 of a national bank regardless of what that subsidiary is
3 going to do, and on that basis he authorized this
4 transaction.

5 But there is nothing in the statute which says
6 that he specifically has to authorize the setting up as
7 it was in the case that Mr. Justice Powell had when you
8 were dealing with the holding company acquiring a
9 discount security brokerage business, and there, because
10 the Holding Company Act says you can only do banking and
11 things which are closely related and you there
12 interpreted Section 4(c)(8) as saying the business is
13 closely related and therefore that got the approval.

14 QUESTION: So his approval power doesn't
15 suggest that what he is approving is banking business?

16 MR. COLEMAN: That's true.

17 QUESTION: This is just that he has general --
18 this is just some financial concern.

19 MR. COLEMAN: Yes, sir. Yes, sir, that's
20 correct. I have no other remarks, unless there are
21 other questions.

22 CHIEF JUSTICE REHNQUIST: Thank you, Mr.
23 Coleman.

24 We will hear now from you, Mr. Weidner.

25 ORAL ARGUMENT OF JAMES B. WEIDNER, ESQ.,

ON BEHALF OF THE RESPONDENTS

MR. WEIDNER: Mr. Chief Justice, and may it please the Court, this case, of course, concerns the locational restrictions of the National Bank Act. The Act's basic restriction in that respect is Section 81. That statute enacted over 100 years ago provided that a national bank was limited in transacting its business to one office.

QUESTION: What business, the banking business?

MR. WEIDNER: It is, as enacted, and I will return to this, it was its usual business. As amended in 1927 and now it is general business. It did not say its banking business. In fact, that is a significant factor to which --

QUESTION: And you say that it certainly isn't limited to that.

MR. WEIDNER: Correct, Justice White. Indeed, the only exception that Congress has made to that one office restriction was in the McFadden Act in 1927. That Act as amended permits national banks to establish branches within the state where their main office is located to the extent permitted by state law. In effect, the Comptroller's ruling focused solely on the branching exception and ignored completely the basic

1 locational rule. Furthermore, it seemed to assume that
2 national banks were permitted to establish multiple
3 locations to carry on their business unless they were
4 expressly prohibited from doing so. In fact, banking
5 law is just the reverse. That logical lapse, we
6 suggest, pervades the Comptroller's argument here both
7 as to substance --

8 QUESTION: What happened to your argument
9 below?

10 MR. WEIDNER: In our argument below, Justice
11 White, there was some suggestion in the briefs in
12 response to ours that the Section 81 argument hadn't
13 been made. In fact, it was made. The District Court's
14 opinion starts with a quotation to Section 81, and
15 indeed, and if I may, reading from the appendix which is
16 part of the petition, 25A, the District Court rejected
17 the Comptroller's argument as to interstate locations
18 because "it ignores completely the fact that the
19 McFadden Act was a limited extension of the National
20 Banking Act provisions for the location of bank offices
21 which previously had allowed national banks only one
22 central office. Never have national banks been
23 authorized under the National Bank Act to" --

24 QUESTION: What happened in the Court of
25 Appeals?

1 MR. WEIDNER: They affirmed basically for the
2 reasons -- the decision below, Justice White. There was
3 no separate opinion.

4 QUESTION: So your argument here wasn't
5 sustainable. It was just --

6 MR. WEIDNER: It was, to the extent -- In this
7 sense. The Comptroller's argument is essentially that
8 Section 36 does not restrict these activities.

9 QUESTION: Yes.

10 MR. WEIDNER: Therefore they are permissible
11 countrywide. In our view that is not so. In our view
12 if they are not permitted by Section 36, they remain
13 subject to 81 and therefore are restricted to the home
14 office.

15 QUESTION: That wasn't the rationale of the
16 District Court or the Court of Appeals.

17 MR. WEIDNER: I think it was the implicit
18 rationale, Justice White. In any event I believe it is
19 the correct rationale, and, I believe, quite consistent
20 with the District Court's opinion. Section 81 is the
21 basic provision here and has been in the case since the
22 beginning, and we believe this is a plain language case
23 except that the governing plain language, we believe, is
24 that of Section 81. That provision, and I will quote,
25 states that the general business of each National

1 Banking Association shall be transacted at the place
2 specified in its organization certificate and in the
3 branch or branches, if any, established or maintained by
4 it in accordance with the provisions of Section 36 of
5 its title.

6 The statute does not further define the terms
7 used in Section 81 thereby leading to the conclusion
8 that Congress intended the ordinary meaning. The
9 ordinary meaning of the term "general" is all
10 encompassing or including the whole rather than a part
11 of a particular thing. Here, then, under the plain
12 language reading of this provision the conclusion
13 follows that Congress intended to cover the whole of the
14 general business of a national bank.

15 But in this case it is not necessary to try to
16 define the outer parameters of that since at a minimum
17 it certainly must encompass all those activities that
18 are expressly permitted for national banks by the
19 National Bank Act.

20 QUESTION: Do you think general business then
21 doesn't mean anything more than just business, in your
22 view?

23 MR. WEIDNER: It means business in all of its
24 respects, yes. And in that sense it would encompass the
25 express powers of banks, including, it has been held,

1 the discount brokerage here undertaken. Under that
2 interpretation therefore the Comptroller's ruling which
3 permits discount brokerage operations at any location
4 and not simply at the main office or at branches is
5 contrary to law.

6 The legislative history, however, underscores
7 what the plain language to Section 81 indicates. As I
8 noted, the section was initially passed as part of the
9 National Bank Act of 1864. As passed, the statute
10 limited the usual business of a national bank to one
11 location, its headquarters. In 1927 Congress amended
12 the statute to read as it does now, the general business
13 of a national bank shall be conducted, and so on.

14 Now, the linguistic change itself, I suggest,
15 has significance. Usual in its ordinary meaning
16 connotes customary or traditional. General, I suggest,
17 connotes an all-encompassing intent, a broader term.

18 QUESTION: Any indication in the legislative
19 history as to why that change was made?

20 MR. WEIDNER: Mr. Chief Justice, there is no
21 indication in the legislative history one way or the
22 other, although I think the circumstances make it fairly
23 plain, and they are these.

24 In 1927, also as part of the McFadden Act,
25 Congress recognized for the first time in the country's

1 history the authority of banks, national banks, to deal
2 in securities. It had not theretofore been among the
3 enumerated powers. So at the same time that Congress
4 was changing the term in 81 from usual, customary,
5 traditional, to general, all-encompassing, it was adding
6 to the powers of banks the power to engage in the
7 business of dealing in securities.

8 There was nothing to suggest that Congress did
9 not intend to include that newly added power among the
10 general business regulated by Section 81. Indeed, the
11 Congressional debates are full of statements by both
12 Senators and representatives that the securities
13 business was indeed a proper part of the business of a
14 bank. In fact, even in this case the Comptroller and
15 Security Pacific Bank argued for two years that discount
16 brokerage was indeed a proper part of the business of
17 banking.

18 If I may, I am quoting now from the Joint
19 Appendix before the Court of Appeals in this case at
20 . A163. Security Pacific Bank in its application to the
21 Comptroller to conduct discount brokerage and to conduct
22 it on a nationwide basis said "We believe that these
23 facts," the facts in the application, "show conclusively
24 that the purchase and sale of securities are part of the
25 'business of banking,'" so we had the bank, when it was

1 trying to get authorization to do this business, arguing
2 that conclusively it is properly part of the business of
3 banking. Now having gained permission to do it we have
4 the bank stating that absolutely the discount brokerage
5 business is not part of the business of banking.

6 Now, I suggest they can't have it both ways.
7 If it is a properly authorized bank activity, then it is
8 subject to the locational restrictions on those
9 activities. I suggest also that had Congress meant to
10 limit Section 81 solely to the traditional business of
11 banking, essentially what the argument is here before
12 the Court by the Comptroller, it could easily have done
13 so.

14 The power to engage in investment securities,
15 deal in securities that Congress added in 1927 was added
16 to Section 24 7th which sets forth the powers of
17 national banks.

18 That provision, since it was enacted over 100
19 years ago, had given banks all such incidental powers as
20 shall be necessary to carry on "the business of
21 banking," so it is quite clear that Congress in amending
22 the statute did not intend to use the same language.
23 Having used different language in different sections of
24 the same statute, it is to be assumed they meant
25 different things. "General" is clearly broad enough to

1 cover and encompass the traditional business of banking
2 and the business of buying and selling in securities
3 then permitted.

4 Let me then turn, if I may, to Section 36 of
5 the statute. We think it is unnecessary to reach
6 Section 36 and the definitional question because we
7 believe the case is covered by Section 81. Even,
8 however, if Section 36 is examined, the conclusion is
9 the same. That section, as counsel said, defines the
10 term "branch" as including certain geography -- to
11 include certain geography and at which deposits are
12 received or checks paid or money lent, and indeed in the
13 Plant City case this Court said that Congress intended a
14 calculated indefiniteness about the term.

15 The argument under 36 here really is whether
16 the term "include" is exclusive or illustrative. That
17 is, do the functions listed thereafter simply serve as
18 illustrations, or are they in fact set in stone as the
19 only functions permitted? Here again, the legislative
20 history tells us exactly what Congress meant. The
21 McFadden bill originated in the House. As the House
22 passed the bill, Section 8 of the McFadden bill provided
23 that the general business of a bank shall be carried on
24 at its headquarters.

25 It also provided that for branching and

1 defined a branch to include a place where the three
2 functions are carried on. It did not, however, also
3 provide that a bank might carry on general business at
4 branches. The bill then went to the Senate, which
5 marked it up, and in the markup the Senate changed the
6 language of Section 8 to read "the general business of a
7 national bank shall be conducted at headquarters or at
8 such branches as may be established."

9 The bill then went to conference committee.
10 The conference accepted the Senate version. The
11 conference report, the statement of the House managers,
12 is highly significant in that respect. One of those was
13 Representative McFadden. It said in this respect the
14 Senate amendment provides that national banks might
15 transact general business not only at the place
16 specified in the organization certificate but also at
17 such branches at the bank might lawfully maintain under
18 the provisions of this bill.

19 The House bill contained no similar provision,
20 and the House recedes. Now, Representative McFadden,
21 who is one of the authors of that statement, further
22 underscored the importance of the change in the
23 statement that he put in the Congressional Record. He
24 said about Section 36(f) it "defines the term 'branch'
25 any place outside or away from the main office where the

1 bank carries on its business of receiving deposits,
2 paying checks, lending money, or transacting any
3 business carried on at the main office."

4 QUESTION: Of course, that isn't what Section
5 36 said. He added those words on the end.

6 MR. WEIDNER: Section 36 does not specifically
7 state that, Justice White. That is correct. On the
8 other hand, his statement is directly consistent with
9 what the conference committee had said it intended to do
10 in accepting the Senate amendment and is consistent with
11 the reading of the word "include" as being
12 illustrative.

13 The fact is, if we accept the Comptroller's
14 interpretation of Section 36 we have a logical Catch 22
15 at least. The Comptroller's argument is that the three
16 functions listed in 36(f) are the exclusive -- 36(f) is
17 limited to those functions. If that is so, remember,
18 36(f), 36 is a permissive provision allowing branches,
19 those three functions are the only functions that could
20 be conducted in branches. Thus absent a branch all
21 remaining functions, including discount brokerage, would
22 remain subject to the overall limitation of Section 81.

23 QUESTION: Of course, you read 81 as a
24 limitation. You read it as if it said the general
25 business of each national banking association shall be

1 transacted only in the place specified in its
2 organization certificate and the branch or branches. It
3 doesn't say that. A statute that said a bank shall be
4 open for business every day from 9:00 a.m. to 3:00 p.m.
5 Monday through Friday would not necessarily be read to
6 prohibit a bank from being open on Saturday.

7 MR. WEIDNER: Mr. Chief Justice, however, this
8 Court has twice held that indeed the meaning of Section
9 81 is to limit the transaction of the general business
10 of a national bank to one office. That is absent
11 Section 36. Indeed, in 1924, the Court addressed the
12 question of whether a bank had power to multiply the
13 places at which it exercises its powers as one of the
14 incidental powers of banking.

15 The Court concluded it did not have such
16 incidental power. Rather, the bank was limited to one
17 location and supported that conclusion, citing to
18 Section 81. The Court reiterated what it had held in
19 the Citizens and Southern case, cited in our brief. In
20 fact, it was this Court's holding in January, 1924, in
21 the St. Louis case that led in part to the McFadden
22 Act. McFadden proposed his bill in February, 1924, to
23 remedy the problem, in his view, that had resulted from
24 this Court's decision in the St. Louis case.

25 So as construed by this Court there is little

1 question, I suggest, that the one office location is
2 just that, is a one office location. Furthermore, not
3 only do we think that there is a logical Catch-22 if the
4 Comptroller's interpretation is accepted. There is a
5 further problem. Banks have only such powers as are
6 expressly granted and as are necessary incidentally to
7 carry on their business. It is a fundamental tenet of
8 banking law so held by this Court repeatedly.

9 Now, in the St. Louis case, to reiterate, this
10 Court specifically said that national banks do not have
11 the incidental power to multiply the places at which
12 their powers will be conducted. Therefore, if the bank
13 has authority, the power to multiply the places at which
14 it conducts its business, it has to be expressly
15 granted, and where Congress expressly granted that power
16 was in the McFadden Act, Section 36. The problem is,
17 the Comptroller has said that brokerage does not fall
18 within provisions of Section 36. Therefore it is not
19 permitted for branches. Therefore, because it does not
20 have the incidental power to multiply where it will
21 carry on its business, the places, it has no power
22 whatsoever.

23 So, in short, we believe the Comptroller's
24 finding was contrary to the direct language of Section
25 81 and its legislative history, is contrary to Section

1 36, as demonstrated by the legislative history of that
2 section, and furthermore is logically inconsistent or
3 leads to a completely illogical conclusion, that is to
4 say that either the business is limited to the home
5 office or banks have no power whatsoever to do what he
6 has authorized.

7 If I may, let me turn briefly to the standing
8 question. There is no issue here as to constitutional
9 standing. We are all agreed that there is sufficient
10 adverseness of interest under Article 3 to create a case
11 or controversy. The only question is whether the
12 prudential zone of interest rationale should slam the
13 door of this Court on the SIA.

14 As to that I don't think -- as to that, that
15 is, the zone of interest test, I don't really think
16 there is an essential dispute between the SIA's position
17 and that of the government. I read from Pages 10 and 11
18 of the government's reply brief. They agree that the
19 test provides that in the face of Congressional silence
20 about who is to benefit from a given legislative action
21 the zone test is satisfied when "Congress has arguably
22 legislated against the competition that the plaintiff
23 seeks to challenge."

24 That quote is from this Court's decision in
25 Investment Company Institute v. Camp, a circumstance

1 virtually identical to that here. In Camp the Court
2 considered the Comptroller's ruling permitting national
3 banks to sell shares enclosed in investment trust,
4 essentially mutual funds. There was a challenge to the
5 Comptroller's standing in that case.

6 The standing was upheld, this Court's finding.
7 Because Congress arguably legislated against the
8 competitive activity at issue, sale of mutual shares,
9 and because the members of that association, much like
10 the members of the SIA, were adversely affected by the
11 Comptroller's ruling, and because there was no
12 preclusion to review the Comptroller's ruling under the
13 National Bank Act, the ICI, the plaintiff in that case,
14 had standing.

15 The Court has made clear equally in that case
16 as well as the Data Processing and the Arnold Tours
17 cases, which preceded it on the standing question that
18 no, it is not necessary to show specific legislative
19 history, that specific competitors are protected by
20 Congress, nor is it necessary to show that the
21 competition which is challenged, in that case mutual
22 shares, was actually prevented, the latter simply being
23 the legal interest test, which was rejected in those
24 three cases, in essence which said you have got to prove
25 you could win your case before you could get into court

1 to prove your case.

2 We are in the same circumstance here. The SIA
3 has argued and we believe that it is at least arguable
4 that Section 81 and/or Section 36, but certainly Section
5 81 limits the competition, multiplication of offices
6 here involved. Second, admittedly members of the SIA
7 are adversely affected by reducing those restrictions.
8 And third, the Court has already held that there is no
9 preclusion to review of the Comptroller's opinions under
10 the National Bank Act. That is the statute which is
11 involved here.

12 Therefore, under the zone rationale as
13 articulated by this Court in Camp and other cases, we
14 believe the SIA has standing. The real issue here is
15 again what is the relevant statute? The Comptroller in
16 his standing analysis as essentially in his substantive
17 analysis, says only Section 36 is the statute that is
18 involved, essentially ignoring Section 81.

19 Well, first, in our view that is to focus on
20 the exception and ignore the rule. The fact is, 81 was
21 put in the statute 120 years ago. Section 36 was a
22 relaxation of the one office restriction permitting
23 additional offices. We are not basing our case on the
24 relaxation. We are basing our case on the basic
25 restriction. The two statutory provisions are

1 integrally related. We suggest they both should be
2 interpreted in determining standing.

3 Section 81, the fundamental locational
4 restriction, is but one example of a policy reflected
5 throughout the National Bank Act that in light of the
6 importance to our economic society and the economic
7 wallop of national banks, they are limited both in where
8 they can conduct their business and what business they
9 can conduct. Interpretations reducing those boundaries
10 adversely affect competitors, be they travel agents, be
11 they mutual funds, be they data processors, or be they,
12 as here, securities brokerage.

13 Finally, as to the Comptroller's argument
14 under Section 36, here, too there is an anomaly. The
15 argument is that Section 36 was intended solely to
16 benefit -- I believe I have that correct; yes, from Page
17 11 of the reply brief -- state banks, and because state
18 banks aren't the plaintiffs, although they are 7,000
19 strong in amicus on behalf of the SIA in this Court,
20 because they are not technically plaintiffs, therefore
21 the SIA has no standing, it is not a state bank, but the
22 fact is that Section 36 was not enacted to protect state
23 banks. Recall at that point branching was prohibited
24 for national banks. What Congress intended to do was to
25 permit national banks to branch, thereby adversely

1 affecting state banks' competitive interests, not
2 benefitting or protecting them.

3 Therefore if state banks have standing to sue
4 and everyone agrees that they do, and we certainly on
5 behalf of the SIA agree that they do, they have standing
6 because they are significantly involved in activities
7 that are affected by those that are regulated, here the
8 national banks. That is essentially simply another way
9 of stating this Court's holding in ICI v. Camp. SIA is
10 in the identical position. We believe the SIA therefore
11 clearly has standing.

12 QUESTION: Just competitors?

13 MR. WEIDNER: As competitors. Accordingly, we
14 ask the Court to affirm the decision below both as to
15 substance and as to standing.

16 CHIEF JUSTICE REHNQUIST: Thank you, Mr.
17 Weidner.

18 Mr. Rothfeld, do you have something more? You
19 have six minutes.

20 ORAL ARGUMENT OF CHARLES A. ROTHFELD, ESQ.,

21 ON BEHALF OF THE PETITIONER

22 IN NO. 85-971 - REBUTTAL

23 MR. ROTHFELD: Two basic points on the merits
24 and one on standing, Your Honor. If Section 81 is the
25 fundamental restriction on the activities of national

1 banks that has been presented to you, it is remarkable
2 that in the 60 years the McFadden Act has been on the
3 books neither the courts nor the Comptroller have
4 noticed that.

5 As I suggested before, all --

6 QUESTION: (Inaudible) this case.

7 MR. ROTHFELD: Well, I think the discussion of
8 Section 81 in this case was largely in response to the
9 Comptroller's argument, which was not repeated here,
10 that the McFadden Act only reaches intrastate and not
11 extra-state activities of national banks. I think a
12 fair reading of what the District Court -- District
13 Court's analysis which looked to Representative
14 McFadden's statement in Plant City is that it turned
15 largely on the meaning of Section 36, aside from the
16 references in this, which --

17 QUESTION: Well, the District Court
18 specifically said that the brokerage business is part of
19 the general business of the bank.

20 MR. ROTHFELD: It did say that in response, as
21 I said, to the argument of the Comptroller.

22 QUESTION: Well, isn't that the whole
23 argument?

24 MR. ROTHFELD: Well, leaving aside the
25 District Court's opinion here, which I think the

1 preceding discussion in the District Court's opinion --

2 QUESTION: How can you leave aside that
3 opinion?

4 MR. ROTHFELD: Well, I think in looking at
5 it --

6 QUESTION: You say that no court has ever held
7 it.

8 MR. ROTHFELD: Well, our reading of --

9 QUESTION: In this Court and the Court of
10 Appeals, too. They just took what the District Court
11 said.

12 MR. ROTHFELD: Well, again, our reading of the
13 District Court's opinion is that it focused on a
14 different analysis. But aside from this case, in any
15 event, no court and the Comptroller have never pointed
16 to Section 81 in deciding whether bank offices are
17 subject to geographical restrictions. And I think there
18 is a simple explanation for that. I think that the
19 account that has been presented here simply turns the
20 history of the McFadden Act on its head. From the --
21 Section 81 was part of the original National Bank Act of
22 1864, and at the time it referred to the usual business
23 of the national bank.

24 The terms "usual business" and "general
25 business" were used interchangeably before 1927 when the

1 current language was placed in the statute, used
2 interchangeably in court opinions and in the opinion of
3 the Attorney General that this Court has called
4 authoritative. I can't see that there was any
5 distinction between the two. And from the beginning it
6 has been recognized that national banks can perform
7 business, certain types of business, away from their
8 main offices.

9 This Court recognized that immediately after
10 the passage of the National Bank Act in 1870 in the
11 Merchants Bank case. And in fact the language of the
12 statute refers not to the business of a bank or all the
13 business but to the general business.

14 QUESTION: Is it your point that the general
15 business just doesn't include brokerage?

16 MR. ROTHFELD: That's right, Justice White, we
17 think the general business -- well, our analysis is
18 broader than that, although we think that is all the
19 Court need say here.

20 QUESTION: And the general business of the
21 bank is the business that they perform in branches or --
22 you think the general business is those three
23 functions?

24 MR. ROTHFELD: Essentially that's right.
25 Before the passage of the McFadden Act the only

1 restriction that Section 81 was seen to place on
2 national banks essentially was the ability to -- it
3 restricted their ability to branch. The Attorney
4 General analyzed the statute in 1911 in an opinion this
5 Court termed authoritative, and he saw the distinction
6 as being between a branch bank which performed the full
7 range of essential banking functions and particular bank
8 officers that performed individual bank functions but
9 did not offer a general banking business.

10 That was the interpretation placed on Section
11 81. When Congress passed the McFadden Act of 1927, it
12 liberalized that by essentially removing a portion of
13 the one restriction that was placed on locational
14 activities of national banks, by permitting banks to
15 branch, although subject to Section 36 of those
16 geographical restrictions.

17 When it did that it specifically reenacted
18 Section 81 as a part of the McFadden Act and amended
19 Section 81 to refer to the branching restrictions
20 imposed by Section 36.

21 QUESTION: May banks just willy-nilly engage
22 in any kind of business they want to as long as it isn't
23 specifically prohibited?

24 MR. ROTHFELD: No, not at all, Justice White.

25 QUESTION: What about, could they just set up

1 a -- could they just say, well, we know a good place to
2 set up a restaurant, and we are going to get in the
3 restaurant business?

4 MR. ROTHFELD: No, they could not do that.

5 QUESTION: Why couldn't they do that?

6 MR. ROTHFELD: The powers granted national
7 banks are specifically set out in 12 USC Section 24 7th,
8 and --

9 QUESTION: The brokerage business is one of
10 those, then?

11 MR. ROTHFELD: Well, Congress has set out
12 essentially two types of businesses that banks engage
13 in, the business of banking, and it lists a series of
14 things that banks can engage in as part of the business
15 of banking. It separately authorizes banks to engage in
16 the business of buying and selling securities, which is
17 what obviously the national banks are trying to do in
18 this case. And Congress has also authorized banks to
19 engage in --

20 QUESTION: But even though the banks are
21 specifically authorized to buy and sell securities, it
22 is not part of their general business?

23 MR. ROTHFELD: It is not part of their general
24 banking business as that term --

25 QUESTION: That isn't what it says. It says

1 general business.

2 MR. ROTHFELD: Well, the statute refers to the
3 general business of a national bank, and that statutory
4 language was interpreted by this Court, by the
5 Comptroller, and by the Attorney General, and again in
6 an opinion that was endorsed by this Court prior to 1927
7 as meaning a general banking business. The terms were
8 used interchangeably. That was the interpretation
9 placed on the statute from its enactment, and Congress --

10 QUESTION: But the statute permits,
11 specifically permits the banks to do this as part of
12 their business, to buy and sell securities as part of
13 their business.

14 MR. ROTHFELD: As part of their business, but
15 again, Section 81 --

16 QUESTION: But that is not part of their
17 general business?

18 MR. ROTHFELD: Section 81 doesn't refer to all
19 business or the business. It refers to the general
20 business, and as I say, since 1870 the Court has taken
21 the position that the general business is a subset of
22 all the business the bank is authorized to engage in,
23 the subset being the general banking business, the
24 essential functions related to the banking activities of
25 the bank, and when Congress reenacted Section 81 as part

1 of the McFadden Act it included an express reference to
2 Section 36, suggesting, I think, irrefutably that what
3 Congress has in mind is the essential banking functions.
4 Those that could only be performed at the main office or
5 a branch are the functions listed in Section 36(f).

6 It may be that the respondent's reluctance to
7 talk about Section 36 stems from the fact that his
8 reading of Section 81 -- would read Section 36 out of
9 the statute entirely, because if all the bank's business
10 must be performed only at its branches or at its main
11 office, there is no point in separately defining the
12 term "branch" in terms of a limited number of
13 specifically enumerated functions.

14 Thank you, Your Honors.

15 CHIEF JUSTICE REHNQUIST: Thank you, Mr.
16 Rothfeld.

17 The case is submitted.

18 (Whereupon, at 2:46 o'clock p.m., the case in
19 the above-entitled matter was submitted.)
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CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:

#85-971 - ROBERT L. CLARKE, COMPTROLLER OF THE CURRENCY, Petitioner V. SECURITIES INDUSTRY ASSOCIATION; and

#85-972 - SECURITY PACIFIC NATIONAL BANK, Petitioner V. SECURITIES INDUSTRY ASSOCIATION

and that these attached pages constitutes the original transcript of the proceedings for the records of the court.

BY Paul A. Richardson

(REPORTER)