

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

13

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 JUSTICE 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 PETITIONER

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 the bank superintendent asserted a chartering  
7 or licensing supervisory regime, there would be a  
8 different issue from the --

9 JUSTICE GINSBURG: Well, just with respect  
10 to the same issue on mortgage lending where there's a  
11 concern 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.

18 JUSTICE GINSBURG: That's right even if the  
19 New York statute --

20 MS. UNDERWOOD: Read differently or were  
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 chartering or licensing authority for the purpose of

1 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 -- a  
5 prima 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: Well, if -- if OCC thought  
17 there might be such a problem, couldn't it act in  
18 advance to avoid the risk that Justice Breyer's question  
19 explained?

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

25 JUSTICE GINSBURG: May we clarify one thing

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

7 MS. UNDERWOOD: That's correct. And 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 SCALIA: Well --

22 JUSTICE BREYER: I want to --

23 JUSTICE SCALIA: Excuse me. The same rule  
24 would not apply in Michigan and Hawaii, anyway, even  
25 under the Federal Government. The Federal Government

1 acknowledges that Michigan can have its own law --

2 MS. UNDERWOOD: The Federal Government --

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

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

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

23 MS. UNDERWOOD: Well -- there are many  
24 things that they might do.

25 JUSTICE BREYER: For example, just give me

1 two, a couple.

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

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

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

1 set out on pages 46 and 47, the text is, of the  
2 government's brief: "The provisions of any State law to  
3 which a branch of a national bank is subject under this  
4 paragraph shall be enforced with respect to such branch  
5 by the [OCC]."

6 That -- that mandate, that it "shall be  
7 enforced with respect to such branch" sounds pretty  
8 exclusive to me.

9 MS. UNDERWOOD: Well --

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

21 MS. UNDERWOOD: There are two reasons for  
22 that provision. The purpose of that provision was to  
23 confirm that OCC didn't lose its pre-existing  
24 enforcement power when Riegle-Neal stated -- that's (1)  
25 (B) --

1 JUSTICE SOUTER: Yes.

2 MS. UNDERWOOD: -- and (1)(A) -- that  
3 national branches would be treated more or less like  
4 State branches for purposes of consumer protection and  
5 fair lending.

6 JUSTICE SOUTER: But that -- that's -- in  
7 effect, Saving Clause kind of function could have been  
8 performed simply by a statute that says "OCC may." And  
9 this says it "shall" be enforced by OCC.

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

21 JUSTICE SCALIA: You -- you don't deny, do  
22 you, that -- that the Federal Government can, if it  
23 wishes, enforce the State laws?

24 MS. UNDERWOOD: Absolutely. That --

25 JUSTICE SCALIA: So this provision isn't

1 really contrary to what you're saying.

2 MS. UNDERWOOD: Not --

3 JUSTICE SCALIA: You are just saying the  
4 State can do it as well.

5 MS. UNDERWOOD: Not -- that's correct. It  
6 isn't talking -- it doesn't say anything about exclusive  
7 authority, and it isn't talking about judicial  
8 enforcement, which OCC doesn't do. It's talking about  
9 it's -- has a Savings Clause kind of function, and  
10 it's -- it's hortatory; it's directing OCC to exercise  
11 the authority that it has.

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

22 JUSTICE GINSBURG: But we come to the New  
23 York attorney general. I see your argument that there's  
24 a certain incongruity between saying private attorneys  
25 general okay, but no public attorney general. But on

1 the other hand, the attorney general starts out by  
2 asking for bank books and records. And high on the list  
3 of visitorial powers is the authority to demand the  
4 bank's books and records.

5 So why isn't that -- his preliminary  
6 investigation at least, why doesn't that fit within the  
7 visitorial power bundle?

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

22 So the simple fact of a physical act of  
23 looking -- or a legal act of looking at books and  
24 records doesn't tell you whether visitorial authority is  
25 being exercised. Visitorial authority has long been

1 understood as a whole regime of oversight. Watters  
2 involved a visitorial regime that was ancillary to  
3 licensing. The earlier visitorial regimes that were  
4 referenced in the old treatise tended to involve  
5 visitorial regimes that were established ancillary to  
6 chartering, back when corporate charters had limited  
7 purposes, the way banks do still, but most corporate  
8 charters, most corporate certificates of incorporation  
9 don't anymore.

10 So the fact that books and records are being  
11 examined is neither here nor there on the question  
12 whether the visitorial power that is referenced in 484  
13 is -- is being exercised.

14 CHIEF JUSTICE ROBERTS: There is an historic  
15 reason for thinking Congress would be more concerned  
16 about States exercising visitorial powers than they  
17 would be about private attorneys general or private  
18 lawyers. This goes back to *McCulloch v. Maryland*.  
19 That's -- national banks were always targeted by the  
20 States. They weren't typically targeted by private  
21 attorneys. So that incongruity doesn't strike me as  
22 terribly significant.

23 MS. UNDERWOOD: Well, the suggestion is made  
24 that -- that 484 -- and there's some historical basis  
25 for it -- was -- was meant to protect national banks

1 against -- against hostile States, which I guess is what  
2 you are suggesting, rather than hostile private people.  
3 But actually what it was meant to do was assign  
4 responsibility for the supervision of these new  
5 entities. There hadn't been banks like this, private  
6 banks which were nevertheless federally chartered.  
7 Before that there was the National Bank that was at  
8 issue in *McCulloch v. Maryland*. And to exclude the  
9 States from asserting the authority to do audits, to do  
10 regular banking examinations, which actually one senator  
11 had proposed the States be permitted to do, and that was  
12 rejected.

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

1                   There actually -- there had been some  
2 thought when the national banks were first created that  
3 they would, in the marketplace, drive State banks out of  
4 existence, but they didn't. And the story has been one  
5 legislatively of maintaining competitive equality  
6 between them, not of hostility. So --

7                   CHIEF JUSTICE ROBERTS: Do you want to talk  
8 a little bit about Chevron?

9                   MS. UNDERWOOD: Yes.

10                  CHIEF JUSTICE ROBERTS: Whatever the  
11 arguments may be on the merits, it's not clear to me  
12 that "visitorial powers" has an unambiguous meaning that  
13 would pre-empt the authority of the OCC to explain it to  
14 us.

15                  MS. UNDERWOOD: Well, I'd say two things  
16 about that. 484 may have some ambiguity about it. I  
17 think it's not ambiguous as to the matters covered by  
18 this regulation. Visitorials have -- visitorial powers  
19 have never been understood to include discrete acts of  
20 law enforcement by a jurisdiction that neither has nor  
21 asserts a supervisory relationship, the kind of  
22 supervisory relationship that the chartering or  
23 licensing sovereign has. So --

24                  JUSTICE SOUTER: What do you --

25                  MS. UNDERWOOD: -- I think --

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

4 MS. UNDERWOOD: Yes.

5 JUSTICE SOUTER: -- which -- which do have  
6 references to visitorial powers as including general  
7 conformance to the law. Those are not universal  
8 provisions, but they -- they were certainly understood  
9 in some cases.

10 MS. UNDERWOOD: Well, the strongest  
11 quotations that his brief mentioned several times come  
12 from Blackstone. He talks about inquiring into all  
13 misbehaviors of the supervised visited corporation.  
14 Those comments are made in a time and place when there  
15 was only one sovereign, not the distinctive federalism  
16 we have today, and so there was no need to distinguish  
17 between the visitorial, the distinctively visitorial  
18 powers of the sovereign, and the co-existing police  
19 powers of another sovereign. There was no --

20 JUSTICE SOUTER: No, but there was -- there  
21 was a point in -- in distinguishing the visitorial  
22 powers that Blackstone -- in the cases Blackstone was  
23 referring to, and those for example that would apply  
24 solely to -- to religious or originally religious  
25 foundations like Oxford and Cambridge colleges and so

1 on. So there -- there seems to have been a reason to  
2 understand the distinction.

3 MS. UNDERWOOD: Well, I think that the point  
4 about Blackstone's comment to distinguish -- the point  
5 about the distinction between the charitable  
6 corporations and the public non-charitable corporations  
7 is that it may well be that the sovereign was enforcing  
8 not just the charter, but the laws of the sovereign with  
9 respect to that State. It simply --

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

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

17 JUSTICE SCALIA: I thought that was your  
18 position, that the -- that the visitation authority  
19 includes the power to enforce general laws, but --

20 MS. UNDERWOOD: The general laws of the  
21 visitor, of the sovereign.

22 JUSTICE SCALIA: Of the sovereign. But that  
23 a separate action to enforce the laws of the sovereign  
24 does not necessarily mean that visitorial powers are  
25 being exercised.

1 MS. UNDERWOOD: That's correct. That is  
2 correct. That is our position.

3 JUSTICE SCALIA: So there -- there would be  
4 no inconsistency, if you believe that.

5 JUSTICE STEVENS: One thing that --

6 MS. UNDERWOOD: That's --

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

10 MS. UNDERWOOD: They're pre-empting --  
11 that's correct. They're pre-empting our ability to  
12 enforce any laws --

13 JUSTICE STEVENS: Did we ever -- do we have  
14 any precedents dealing with the question whether  
15 pre-emption of a right to enforce a valid law is -- is  
16 appropriate?

17 MS. UNDERWOOD: Well, this Court in, for  
18 example, St. Louis said that when the Federal and the  
19 State prohibition were the same, that is, a bank  
20 couldn't branch at that time or couldn't interstate  
21 branch, the -- and the -- and the State tried to enforce  
22 both provisions -- they were the same -- but the State  
23 tried to enforce both the Federal charter limitation and  
24 the State law, this Court said the State could not  
25 enforce the Federal charter, because that was the

1 prerogative of the chartering visitor, but that it could  
2 enforce the State prohibition. And it said that  
3 separating -- if the law is valid and can be validly  
4 applied, then it's virtually unthinkable to separate the  
5 authority to enforce it from the application of the law.

6           This Court said that in -- in St. Louis. It  
7 -- actually it said it in -- in Easton, which went the  
8 other way. That is to say, Easton was a criminal  
9 prosecution of a bank officer for taking deposits  
10 knowing the bank was insolvent. Prosecution under State  
11 law. And this Court said that the law itself had to be  
12 pre-empted. It wasn't clear exactly what Federal law on  
13 the subject was. The Court said there must be some  
14 Federal law in this area, but we can't afford to have  
15 conflicting laws, so it's substantively pre-empted. But  
16 the Court also said, if it were valid, it would be  
17 unthinkable to bar the State from enforcing it. And  
18 that is the correct way, we think, to approach this  
19 problem.

20           JUSTICE BREYER: Is it -- could -- could the  
21 -- could the Federal authorities pre-empt the State law,  
22 in your opinion?

23           MS. UNDERWOOD: Well, no, because Congress  
24 has said to the contrary. Congress has said -- that's  
25 why they didn't -- presumably why they didn't do it that

1 way. Congress has said State law shall apply. So I  
2 think this is an area where Congress clearly had in mind  
3 that there would be, not broad pre-emption of this kind,  
4 that the laws would apply. But that it --

5 CHIEF JUSTICE ROBERTS: Well, but -- I'm  
6 sorry. But it certainly is pre-empted with respect to  
7 visitorial powers.

8 MS. UNDERWOOD: Yes. That's correct.

9 CHIEF JUSTICE ROBERTS: This kind of gets us  
10 back to where we started.

11 MS. UNDERWOOD: It does. But I think that  
12 -- I'd like to -- I'd like to reserve some time for  
13 rebuttal, if I may.

14 CHIEF JUSTICE ROBERTS: Thank you, counsel.

15 MS. UNDERWOOD: Thank you.

16 CHIEF JUSTICE ROBERTS: Mr. Stewart.

17 ORAL ARGUMENT OF MALCOLM L. STEWART

18 ON BEHALF OF THE RESPONDENT

19 OFFICE OF THE COMPTROLLER OF THE CURRENCY

20 MR. STEWART: Mr. Chief Justice, and may it  
21 please the Court:

22 To explain the threat that the OCC believes  
23 the State's enforcement regime poses to the national  
24 banking system and OCC's administration of that system,  
25 I'd like to begin by going back to a colloquy between

1 Ms. Underwood and Justice Breyer near the beginning of  
2 the argument.

3 And Justice Breyer raised the possibility  
4 that a myriad of State attorneys general would file --  
5 would pursue similar antidiscrimination claims, and Ms.  
6 Underwood's response was there'd really be no problem  
7 because they are all applying the same substantive  
8 standard.

9 And I think at a very high level of  
10 generality that's so; that is, the Federal statute and  
11 the State statute both say no discrimination on the  
12 basis of race in extensions of credit. But I think when  
13 you get to the way in which the statutes are  
14 administered, there's at least a potential for  
15 significant differences, because --

16 JUSTICE SCALIA: Well, wait a minute. I --  
17 this is State law, and if the State supreme court has  
18 said that the statute means a certain thing and that  
19 certain thing is a little bit different from what the  
20 Federal antidiscrimination law is, I assume that the  
21 Federal Government in applying State law has to -- has  
22 to take that difference into account, doesn't it?

23 MR. STEWART: We would --

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

1           MR. STEWART: The Federal Government  
2 wouldn't have the right to alter State law. The Federal  
3 Government would have the authority to make its own  
4 assessment of whether the State law was pre-empted based  
5 upon those distinctions. Before --

6           JUSTICE GINSBURG: But I thought it's a  
7 given in this case -- and tell me if I am wrong in this  
8 -- that the State substantive law is not pre-empted.  
9 You refer, I think, to enforcement pre-emption; that is,  
10 the State law is governing law. But the only enforcer  
11 is Federal authority; and if that's so, is there any  
12 other -- in all of Federal-State relations, any other  
13 law where the State as sovereign can prescribe but  
14 cannot enforce?

15           MR. STEWART: I give two examples from the  
16 national banking system, itself. The first is the  
17 Riegle-Neal amendments, which Justice Souter was  
18 alluding to. And the amendments don't simply say that  
19 OCC shall enforce non-pre-empted State laws. It says  
20 that those laws shall be enforced by the Comptroller of  
21 the Currency.

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

1           MR. STEWART: I don't think so with the  
2 "shall" in combination with the passive voice; that is,  
3 if you had a statute that said a certain category of  
4 suits shall be adjudicated by the Court of Federal  
5 Claims, I think that would mean not simply that the  
6 Court of Federal Claims would be required to adjudicate  
7 them if a case was brought before it, but I think that  
8 would unmistakably identify the Court of Federal Claims  
9 as the exclusive tribunal --

10           JUSTICE STEVENS: Yes, but if you have a  
11 situation in which the OCC, say, has very limited  
12 personnel -- they only have 10 people in their  
13 enforcement division, for example -- and Congress  
14 thought they have to get more, wouldn't it be  
15 appropriate in that background to say, you shall start  
16 enforcing? And that wouldn't necessarily mean you are  
17 excluding States from also enforcing.

18           MR. STEWART: I agree that if the statute  
19 simply -- if the statute used the active voice and said  
20 the OCC shall enforce these laws, there would be a  
21 better argument that the OCC's authority was not  
22 exclusive. But when the statute said -- says these laws  
23 shall be enforced by the Comptroller of the Currency, I  
24 think the clear implication is this is the exclusive  
25 mechanism by which the laws --

1 JUSTICE SCALIA: I don't see any difference  
2 whatever in that regard between using the active and the  
3 passive. What --

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

7 JUSTICE SOUTER: I want you to come back --  
8 I -- I won't stop -- I don't want to stop you from doing  
9 that, but I want to come back to this. Do you -- do you  
10 want to go on to your second example, or do you want to  
11 --

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

24 JUSTICE GINSBURG: But that's because --  
25 because it's picking a rate. It's not saying there's

1 the Federal law and it has this rate, and the State law  
2 that has that rate. Here, the Equal Credit Opportunity  
3 Act, a Federal Act, undoubtedly applies. And that is  
4 proper Federal -- Federal law enforced by the Federal  
5 authorities.

6 The State law, as this picture is drawn for  
7 us, is applicable. It's substantive law applicable to  
8 these banks, but only the Federal authority can enforce  
9 it. That seems passing strange. And do you have an  
10 example outside the -- the two you gave us in the  
11 National Bank Act where the State prescribes but the  
12 Federal authorities enforce?

13 MR. STEWART: Well, another example would be  
14 the Assimilative Crimes Act, which provides for the  
15 incorporation of State law with respect to --

16 JUSTICE SCALIA: Well, that's not State law  
17 applying of its own force, just as your second example  
18 was not State law applying of its own force. It was  
19 State law that had been converted into Federal law by  
20 the Federal Government's adoption of it.

21 MR. STEWART: Those provisions --

22 JUSTICE SCALIA: That's a different  
23 situation.

24 MR. STEWART: Those provisions do accomplish  
25 an incorporation of State law as Federal law. But this

1 Court has repeatedly said, most recently in Watters,  
2 that State law applies to national banks only insofar as  
3 Congress shall see fit to permit it. So --

4 CHIEF JUSTICE ROBERTS: Is your concern that  
5 -- not with the substantive State law, but that leaving  
6 enforcement to the States would cause particular  
7 problems? I mean, there may be a State law provision  
8 that says you shall do this, and the way the attorney  
9 general elects to enforce it is by shutting the bank  
10 down, jailing the bank officers, doing all sorts of  
11 things that the -- the Federal Government may not  
12 consider appropriate.

13 MR. STEWART: That's certainly true, that  
14 the -- the State's exercise of remedial discretion may  
15 be different from the Federal Government's, but even  
16 before that stage, if you look at the letters in the  
17 Joint Appendix that the New York Attorney General's  
18 Office sent to the national banks in question, basically  
19 the thrust of the letters was: We have identified what  
20 we believe to be troubling statistical disparities in  
21 terms of the terms on which the credit was offered to  
22 applicants of different races. If those disparities are  
23 not satisfactorily explained, that you may be in  
24 violation of State fair lending laws. Therefore, give  
25 us a wide variety of information that would allow us to

1 determine whether you have a satisfactory explanation.

2           And I think it's clear that had this process  
3 been allowed to run its course, what the New York  
4 Attorney General's Office was going to do was assess the  
5 bank's own criteria for making lending decisions; decide  
6 whether those criteria were suitable; and decide,  
7 therefore, whether they provided a satisfactory  
8 explanation for the statistical disparities that had  
9 been observed.

10           And once the New York A.G. is in the  
11 business of passing upon the adequacy of the bank's  
12 lending criteria, he is right on the -- the OCC's --

13           JUSTICE SCALIA: Well, you're arguing for  
14 conflict pre-emption. I mean that's a -- that's a  
15 different issue than, say, that the -- the State law  
16 shouldn't apply. But don't tell me the State law  
17 applies, but only the Federal Government is -- what  
18 incentive does the Federal Government have to enforce  
19 State law?

20           MR. STEWART: Well --

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

24           MR. STEWART: Well, the point that has been  
25 made at various times in the argument, that the State

1 law basically tracks Federal law, I think, is an answer  
2 to that question; that is, whatever incentive the  
3 Federal Government might have to enforce idiosyncratic  
4 features of State law that didn't have a Federal  
5 analogue. Here the State law in question prohibits  
6 discriminatory practices that are already prohibited by  
7 Federal law. So whether OCC and HUD set out to enforce  
8 State law, if they are vigorously enforcing Federal law,  
9 they will, in the course of doing that, vindicate the  
10 State's prerogatives.

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

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

19 JUSTICE SOUTER: Senator D'Amato and Senator  
20 -- yes.

21 MR. STEWART: And it is -- it is to the  
22 effect that Senator D'Amato expresses the concern that  
23 this may subject the -- the national banks in their  
24 branching activities to State supervision. And the  
25 response is that's not the case. That will happen with

1 branches of State banks, but with respect to branches of  
2 national banks the supervision will be by the OCC.

3 JUSTICE SOUTER: Yes, but the -- the problem  
4 I have with that is, as a -- as a kind of clear  
5 statement of -- of something which is -- is -- would be  
6 extraordinary -- is that it talks in terms of  
7 supervision. It doesn't use the -- my recollection is  
8 it doesn't use the magic word "enforcement."

9 And I would have thought that if in the  
10 course of that colloquy the -- the statement had been  
11 made, the States will not have the authority to enforce  
12 this, that there would have been rather a dust-up. And  
13 there wasn't. It's kind of a "dog that didn't bark"  
14 argument. And, therefore, if -- if there is uncertainty  
15 as to how to construe 36(f)(1)(B), I'm not sure that I  
16 -- I don't think the legislative history supports your  
17 exclusivity view.

18 MR. STEWART: Well, section 36(f)(1)(A)  
19 refers to a very limited category of State laws that  
20 include State fair lending laws and said these laws will  
21 not be pre-empted unless they would be pre-empted with  
22 respect to national banks generally. And then  
23 36(f)(1)(B) says the laws in that preceding paragraph  
24 shall be enforced by the comptroller of the Currency.  
25 And so, even if the colloquy used the term

1 "supervision," the focus of the statutory language was  
2 -- was on a pretty narrow category of laws.

3 I'd like also to refer the Court to 12  
4 U.S.C. 484(b), which I think is relevant here, and it's  
5 on page 1a of the appendix to the government's brief.  
6 And it is an express exception to the general rule  
7 against the exercise of visitorial powers.

8 And it says, "Notwithstanding subsection (a)  
9 of this section, lawfully authorized State auditors and  
10 examiners may, at reasonable times and upon reasonable  
11 notice to a bank, review its records solely to ensure  
12 compliance with applicable State unclaimed property or  
13 escheat laws."

14 Now, the basic thrust of --

15 JUSTICE SOUTER: Does that mean -- when they  
16 say "review records," does that mean that the State  
17 auditors in effect can walk into the bank, as  
18 distinguished from what we have here, in which the bank  
19 is being requested to produce excerpts from records?

20 MR. STEWART: I think that would be the  
21 implication of the provision, but the significant point  
22 for our purposes is that it refers solely to ensure  
23 compliance with applicable State unclaimed property  
24 ordinances and laws.

25 JUSTICE STEVENS: May I ask you this

1 question? Yes, the escheat laws -- clearly they can  
2 look at, but what if New York was trying to enforce its  
3 discrimination laws in an employment context or in a  
4 context where they said you are charging minority  
5 depositors -- giving them lower rates of interest than  
6 you give Caucasian depositors? Would they have -- would  
7 the discrimination and the rates of interests paid on  
8 deposits -- assume that was the question. Would you  
9 make the same argument, if that was what New York had  
10 alleged?

11 MR. STEWART: Yes, we would because that  
12 would be going to the banks' federally authorized  
13 banking activities.

14 JUSTICE STEVENS: All you would have to just  
15 look at the records. You can tell from the records  
16 whether people of different -- are paying different --  
17 are getting different rates on their deposits.

18 MR. STEWART: I mean, it might be that in  
19 that instance the discrimination would be unlikely to  
20 persist, but the basic --

21 JUSTICE STEVENS: Would it be unlikely to  
22 persist? Maybe it's an unlikely example. But you are  
23 suggesting that that would also interfere with the  
24 Comptroller's ability to regulate the banks?

25 MR. STEWART: Yes, the way the regulation is

1 written, it speaks to State efforts to enforce laws that  
2 are directed at the banks' federally authorized banking  
3 --

4 JUSTICE GINSBURG: So do you make the same  
5 answer whether -- Justice Stevens mentioned employment  
6 discrimination. The State has reason to believe the  
7 bank is discriminating in its employment policies, and  
8 it wants to examine certain employment records in that  
9 connection. Would you say also that, although New York  
10 can prescribe its antidiscrimination in employment law,  
11 it can't enforce it?

12 MR. STEWART: No, the regulation does sweep  
13 more categorically with respect to inspection of bank  
14 records. New York would not be forbidden to file  
15 lawsuits to enforce its employment discrimination law.

16 JUSTICE KENNEDY: Does any of this bring us  
17 back to the colloquy we began -- began with -- between  
18 Justice Breyer and Ms. Underwood with reference to many  
19 States?

20 MR. STEWART: Yes, a certain --

21 JUSTICE KENNEDY: You -- you began on that,  
22 and I never did hear --

23 MR. STEWART: The part of the point I was  
24 trying to make was, even if the substantive State law on  
25 its face is not pre-empted because it is identical to

1 the Federal law, once we get to the enforcement stage  
2 where the relevant enforcement agency is saying your  
3 statistical disparity constitutes a violation because it  
4 is not justified by sound banking practices, inevitably  
5 that judgment is going to put the State regulator in the  
6 business of doing what OCC does. And if 50 different  
7 State attorneys general have slightly different ideas of  
8 what constitutes an adequate banking justification for  
9 lending criteria that produces statistical disparity,  
10 then the problem is multiplied. Then --

11 JUSTICE SCALIA: That's conflict  
12 pre-emption, and that goes to the -- to the law. You  
13 shouldn't have a separate State law that -- that  
14 provides a separate standard that conflicts with a  
15 Federal standard. So you pre-empt the law. You don't  
16 say the law is in effect, but the State can't enforce  
17 it. That's a weird way to solve that problem.

18 MR. STEWART: Well, the other point I would  
19 make about this is that it isn't accurate to say that  
20 under the Federal regime the State is entirely disabled  
21 from enforcing its own fair lending law. As Ms.  
22 Underwood alluded to in the opening part of the argument  
23 and as the Petitioner's reply brief explains at pages 25  
24 and 26, the Fair Housing Act does contain a mechanism by  
25 which a State agency -- in the case of New York, it's

1 the Division of Human Resources --- can be certified by  
2 HUD to enforce the State fair lending laws.

3 But that certification entails two different  
4 steps: First, HUD has to determine that the substantive  
5 State law is -- I believe it's substantially equivalent  
6 to the comparable Federal law. And, second, HUD  
7 monitors the performance of the enforcing agency, the  
8 particular agency under State law that carries out that  
9 responsibility, and HUD can thereby make sure that  
10 enforcement as well as the substance of the law are  
11 consistent with Federal law.

12 CHIEF JUSTICE ROBERTS: Thank you, counsel.  
13 Mr. Waxman.

14 ORAL ARGUMENT OF SETH P. WAXMAN  
15 ON BEHALF OF THE RESPONDENT

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

17 MR. WAXMAN: Mr. Chief Justice, and may it  
18 please the Court:

19 Section 484 plainly has pre-emptive effect,  
20 and what it pre-empts, quoting this Court's decision in  
21 Watters, is, quote, "the State's investigative and  
22 enforcement machinery," close quote.

23 JUSTICE GINSBURG: Mr. Waxman, your mention  
24 of Watters, which has been mentioned in the briefs, I  
25 think is an inaccurate description of what that opinion

1 held. Watters dealt with a regime that was indisputably  
2 visitorial. It was a registration regime, where annual  
3 fees were paid, annual reports were filed with the State  
4 financial agency, and the State monitor could go into a  
5 lending organization any time for any reason without any  
6 suspicion of wrongdoing. The only -- so everyone agreed  
7 that was a visitorial regime.

8 The sole question was whether the banks --  
9 the national bank's operating subsidiary was to be  
10 equated with a division of the national bank. That was  
11 the only question provided the Court.

12 MR. WAXMAN: Oh, I -- I quite agree, and I  
13 did not mean to suggest that this Court's decision in  
14 Watters, you know, the holding in Watters, concludes the  
15 outcome of this case. But this Court, in section II A  
16 of Watters -- and we did have a State statutory regime  
17 that dealt, yes, with licensure but also with  
18 examination, supervision, and enforcement, including  
19 judicial enforcement -- this Court repeatedly described  
20 that what was pre-empted is -- and this goes to, I  
21 think, a point that Justice Scalia was making -- was not  
22 substantive pre-emption. There are substantive  
23 pre-emption provisions that are addressed in other  
24 sections of the Act, including the one that was at issue  
25 in Smiley. What is exempted, this Court said again and

1 again, is the State's enforcement and investment and --  
2 investigative and enforcement machinery, or its  
3 examination and enforcement authority, and that those --

4 JUSTICE GINSBURG: And that was in the  
5 context of a State law that says, mortgage lending  
6 institution, you may not lend unless you register and do  
7 all the rest. That was the context of Watters. And I  
8 do not think that excerpts from that opinion should be  
9 taken out of that context, which was: You can't be in  
10 this business unless you register with us.

11 MR. WAXMAN: The question in the case is  
12 whether or not what the attorney general here sought to  
13 do is the exercise of a visitorial power.

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

17 I haven't seen the letter from the attorney  
18 general. Is the whole thing in the record?

19 MR. WAXMAN: There -- the letters are in the  
20 record in the Joint Appendix.

21 JUSTICE BREYER: Okay. Now, reading Judge  
22 Parker's description of it, it seemed to me that what  
23 he'd said was that there are statistical disparities  
24 between interest rates and race. Well, as long as, most  
25 unfortunately, income is correlated with race, with

1 minorities being towards the bottom, of course such  
2 statistical disparities will exist, some legitimate,  
3 some not. So if the only basis for getting this  
4 information is that allegation, it's hard to see how  
5 this differs from the case that Justice Ginsburg put.

6 MR. WAXMAN: Yes --

7 JUSTICE BREYER: But it might be quite a  
8 different case, if they had gone into court and found  
9 individuals who were really getting different interest  
10 rates and who really seemed very, very similar, but for  
11 race. But at that point, they'd have to go get this  
12 same information, because that's where they would find  
13 whether that prima facie case was right or wrong.

14 MR. WAXMAN: Yes.

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

16 MR. WAXMAN: Right.

17 JUSTICE BREYER: I'm dividing the matter  
18 vertically, instead of, say, horizontally, and --

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

20 JUSTICE BREYER: -- and I want to know if  
21 that's possible.

22 MR. WAXMAN: I'd like to address both the  
23 vertical and horizontal axes of what I perceive to be  
24 your question. One is the distinction that this Court  
25 drew in Guthrie, where it said there is a -- there's a

1 huge distinction in determining what's a visitorial  
2 power between a private individual seeking to vindicate  
3 a deprivation of his or her traditional property right,  
4 which is what was at issue there, and what the Court --  
5 what this Court said was the public right of visitation,  
6 which it also explained was the State's, quote,  
7 "enforcing observance of its laws and regulations."  
8 There is a public and private distinction, and  
9 visitation deals with the former.

10 JUSTICE SCALIA: Sure, there is.

11 MR. WAXMAN: It deals with the sovereign.

12 JUSTICE SCALIA: Would -- would you  
13 acknowledge, counsel, that there is a difference between  
14 enforcing State laws through visitation and enforcing  
15 State laws apart from visitation? And what Waters  
16 involved was enforcing State laws through visitation.  
17 Of course, you can do that through -- through visitation  
18 powers, but you can also do it apart from that by  
19 bringing a lawsuit or whatever.

20 MR. WAXMAN: Justice Breyer, I'll get to the  
21 horizontal axis in a moment. I'm afraid I'm going to  
22 forget --

23 JUSTICE SCALIA: I -- did I -- did I skip  
24 over an axis here? I didn't --

25 (Laughter.)

1 JUSTICE SCALIA: I didn't mean to.

2 MR. WAXMAN: Let me go -- let me go to your  
3 axis first, which is to say that anything that is a  
4 visitorial power can also be interpreted as a police or  
5 enforcement power, and what Congress had in mind -- this  
6 is legislation that was born in the crucible of the  
7 Civil War, and what Congress sought to pre-empt was  
8 State executive action, State examination and  
9 enforcement action with respect to these newly created,  
10 very important Federal instrumentalities. That was  
11 historically done, this Court explained in Guthrie --  
12 and Chancellor Kent and Blackstone and many other  
13 authorities agree -- was historically done through  
14 access to the courts; and, in fact, what Dean Pound, in  
15 his oft-cited article about visitorial powers, said  
16 was -- he said, and this is -- this is discussed at  
17 pages 16 through 18 of the amicus brief of the Financial  
18 Services Roundtable -- what he called, quote, "the  
19 leading case for visitorial powers in equity" was a case  
20 called the Attorney General v. Chicago and Northwest  
21 Railroad, decided in 1874, in which the attorney general  
22 of Wisconsin was seeking to require this railroad to  
23 comply with the State's mandated rate schedule. That  
24 was a visitorial power, even though you could also call  
25 it a law enforcement power.

1           Now, Justice Breyer, on the horizontality of  
2 your question: This is not a suit in which the New York  
3 attorney general is trying to enforce its employment  
4 discrimination laws or its health laws or its zoning  
5 laws. The attorney general wants the loan records of  
6 national banks, and he wants them so that he can  
7 evaluate for himself whether the banks are making proper  
8 judgments about how to market and how to price their  
9 loans.

10           JUSTICE STEVENS: Mr. Waxman, assume --  
11 assume for a minute, this -- what if before writing the  
12 letter, the attorney general of New York said: We have  
13 conducted 500 interviews with people who have borrowed  
14 money from you, and on the basis of all those interviews  
15 we have drawn these tentative conclusions, that there's  
16 discrimination. We would like to give you an  
17 opportunity to explain all of this by showing us your  
18 records. And they say no, we won't do it.

19           Would they then be pre-empted from bringing  
20 their lawsuit?

21           MR. WAXMAN: Yes, they would. And in fact  
22 --

23           JUSTICE STEVENS: Even though they didn't  
24 have to look at any bank record to make their prima  
25 facie case?

1           MR. WAXMAN: Well, their -- the -- the OCC,  
2 in the preamble to its regulations, does draw a  
3 distinction between State enforcement actions and a pure  
4 State declaratory judgment, quote, "as to the meaning of  
5 the applicable law." This is a case that -- in which --

6           JUSTICE STEVENS: No, I am asking about a  
7 hypothetical. I understand your argument here. But I  
8 just don't understand how your argument would apply to  
9 my hypothetical. But I think the regulation would apply  
10 to the hypothetical.

11           MR. WAXMAN: Well, this is -- this case is  
12 certainly in the core, but a -- a State authority,  
13 whether it's the State banking commission or the State  
14 human rights commissioner or the State attorney general,  
15 or for that matter another Federal Government authority,  
16 that seeks to call a national bank to account for the  
17 manner in which it is conducting an expressly  
18 designated, allocated banking power is an exercise of  
19 visitorial power.

20           JUSTICE BREYER: Well, it isn't -- it isn't  
21 if -- it isn't --

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

1 MR. WAXMAN: I mean --

2 JUSTICE STEVENS: I don't understand why  
3 that would be visitorial power.

4 MR. WAXMAN: The -- the State's enforcement  
5 of any law that is directed at a national bank's  
6 authorized banking powers is a visitorial power. And  
7 the fact that it may also be characterized as a police  
8 power or a lawsuit is -- is interesting, but not what's  
9 at stake.

10 What Congress aimed at -- Congress in 1864  
11 knew -- the Supreme Court said, Blackstone and Kent had  
12 said -- that visitorial powers on civil corporations are  
13 exercised (a) by the sovereign, not by a private  
14 individual; and (b) are almost always exercised through  
15 access to the courts. Whether they're invoking the  
16 courts' authority to seek records or not, that was the  
17 historical core of what visitorial powers --

18 JUSTICE GINSBURG: So one could say, yes,  
19 the Federal authorities have visitorial powers, and they  
20 can go to court. But we have here that the State can  
21 prescribe, not a supervisory regime, but fair lending.  
22 And the State wants to go into court and say the bank is  
23 violating the State substantive law, which is  
24 applicable.

25 MR. WAXMAN: That's correct. And a

1 sovereign taking a national bank into court with respect  
2 to not any old general law, but with respect to the  
3 conduct of its specifically authorized national banking  
4 powers, is the exercise of visitorial powers.

5 JUSTICE SOUTER: Well, is it -- is it --

6 MR. WAXMAN: That was the reason for the  
7 courts of justice exception.

8 JUSTICE SOUTER: Is it the exercise of  
9 visitorial powers, or is it an action which covers the  
10 same subject that an exercise of visitorial powers would  
11 do? Let me -- let me propose a distinction, and I -- I  
12 don't know whether this is sound. You know -- I mean,  
13 you tell me.

14 I would suppose that if someone with  
15 visitorial powers dealing with discrimination in lending  
16 brought an action against the bank or tried to enforce  
17 it against the bank and couldn't do so in any other way  
18 than by going to court, you would go to court, and you  
19 would say, Court, tell this institution that I have some  
20 responsibility for to obey the law.

21 But I also assume that if the attorney  
22 general of New York, which is not a visitor, enforces  
23 the law, it would go into court and say tell them to  
24 obey the law and to pay damages or recompense of some  
25 sort to these people whom they have wronged.

1           The subject matter of each suit is the same,  
2 but the relief that is being requested and the judicial  
3 power that is being exercised is different in these two  
4 cases. Is that a fair distinction?

5           MR. WAXMAN: I don't think -- I think that  
6 if I understood your question, and I may not have -- if  
7 a suit by a private individual or a group of private  
8 individuals seeking to vindicate the deprivation of a  
9 private traditional right is not visitorial; but if the  
10 State, either directly in the enforcement of its general  
11 laws or seeking to protect the people of its State, goes  
12 into court or asks for records or anything else, it is  
13 exercising a traditional visitorial power.

14           May -- while I have your attention, may I  
15 also go back to your question about 36(f) and  
16 Riegle-Neal, because there is yet -- there are other  
17 additional indicators that when the Congress said in  
18 36(f) that these State laws shall be enforced by the  
19 OCC, it was mandatory and exclusive.

20           First of all, the colloquy that was  
21 discussed and is reported in our brief, I think at page  
22 26, does use the word "enforce" as well as "supervise,"  
23 but more to the point --

24           JUSTICE SOUTER: That's the one with Senator  
25 D'Amato?

1                   MR. WAXMAN: Yes. Riegle-Neal -- here's --  
2 here's the most important point. That provision that  
3 we've been looking at had a cognate -- had an analogue  
4 that was also enforced. Riegle-Neal basically said  
5 out-of-state banks can now branch bank. When they do  
6 so, they are subject to these four categories of State  
7 laws. The provision we have been looking at, which was  
8 section 102, said with respect to enforcement of those  
9 laws, the OCC shall enforce it.

10                   But section 105 said where the out-of-state  
11 bank is a State-chartered bank -- and this is reported,  
12 I think it's at section 1820(h) of title 12, when it's  
13 an -- when it's a State-chartered bank, the State  
14 authorities of the host State shall enforce the laws.

15                   So it enacted a dual regime that  
16 demonstrates exactly what Congress had in mind, which is  
17 that there would be one regulator making the kind of  
18 judgments about, okay, there's a disparity, but let's  
19 look at credit history, let's look at the -- the  
20 loan-to-equity value, let's look at income versus debt  
21 incurred, and all these factors that the OCC and the Fed  
22 have explained have to go into making a judgment about  
23 whether or not a particular condition of a particular  
24 loan violates Federal law, whether it's the Fair Housing  
25 Act or the Equal Credit Opportunity Act or the Fed's

1 regulation B.

2 JUSTICE GINSBURG: Mr. Waxman, you're  
3 talking about lending. And like depositing, those are  
4 core banking activities, but today national banks have a  
5 lot of incidental -- they have authority to do things  
6 incidental to banking. Does your restriction of State  
7 enforcement extend to those matters incidental to  
8 banking?

9 MR. WAXMAN: May I answer? I believe that  
10 it would if those incidental authorities are in fact  
11 authorized, approved and regulated by the OCC, but this  
12 case doesn't require you to address it, because this is  
13 an express power under section 371(a).

14 CHIEF JUSTICE ROBERTS: Thank you, counsel.  
15 Five minutes, Ms. Underwood.

16 REBUTTAL ARGUMENT OF BARBARA D. UNDERWOOD

17 ON BEHALF OF THE PETITIONER

18 MS. UNDERWOOD: A couple of -- four points  
19 or so. To the extent the subpoena is perceived -- or  
20 this discovery request -- it didn't even proceed to this  
21 subpoena stage -- is perceived to be burdensome, State  
22 law allows a motion to quash a subpoena for inadequate  
23 basis or for harassment. So there's a control in the  
24 State courts over anything that's perceived to be  
25 excessive.

1           Two, States have been enforcing consumer  
2 protection and fair lending laws since the mid '70s when  
3 they were enacted. The Center for Responsive Lending  
4 amicus brief has a discussion of that history of  
5 enforcement. The Conway affidavit at the Joint Appendix  
6 at 152 has a description of New York's enforcement  
7 activities between 1975 and 2004. And the Lawyers'  
8 Committee for Civil Rights also goes over that history.

9           And they have been enforcing other laws  
10 against national banks for even longer, antitrust laws,  
11 branching laws, idiosyncratic laws of various sorts,  
12 with no evidence that this has impaired the function of  
13 the banks.

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

18           MS. UNDERWOOD: The exceptions?

19           JUSTICE SCALIA: Yes. Why -- why do they  
20 list those exceptions, unless one would think that  
21 everything is covered?

22           MS. UNDERWOOD: Virtually every exception  
23 was enacted to resolve a controversy over whether  
24 something was visitorial or not. In fact, just as in  
25 Guthrie, where this Court said the shareholders' suit

1 for bank records was not visitorial, or alternatively,  
2 if it is, it's covered by the courts of justice  
3 exception. So, too, each of those exceptions involved a  
4 situation where there was a claim, an incorrect claim,  
5 but a claim that the action would be banned as  
6 visitorial, so Congress --

7 CHIEF JUSTICE ROBERTS: Counsel, why isn't  
8 it a complete answer to what I agree is a somewhat  
9 unusual situation of pre-empting enforcement but not the  
10 substantive law that it's enforcement that raises the  
11 concerns? That the Federal Government thinks the State  
12 law is fine, but when you get attorneys general  
13 enforcing it in a particular way, that's what causes the  
14 problem. And I mean, the problem arises in a lot of  
15 areas. Even within the Federal Government, the FBI and  
16 DEA have different ways of enforcing that might conflict  
17 with each other. Why doesn't that make perfect sense?

18 MS. UNDERWOOD: Well, even without  
19 enforcement of State law, OCC would not have exclusive  
20 control of enforcement of discrimination laws against  
21 national banks. So the idea that State enforcement  
22 poses some special problem to interfere with that  
23 exclusive control is just a mistake. That's not the way  
24 Congress set it up.

25 CHIEF JUSTICE ROBERTS: So, why -- why is it

1 a mistake? Why can't Congress or the OCC think that  
2 that's where the difficulties are going to arise? In  
3 other words, it's kind of a less intrusive approach.  
4 They're saying, well, you can have your State law, but  
5 we are concerned about enforcement, so we're going to be  
6 the ones that enforce it.

7 MS. UNDERWOOD: I didn't mean it was a  
8 mistake of policy. I meant it's a mistaken description  
9 of the regime Congress created.

10 HUD has administrative enforcement. DOJ has  
11 litigation enforcement. This is a Federal law. Private  
12 parties can enforce Federal fair housing law. States  
13 can probably enforce Federal fair housing law, too, as  
14 parens patriae for the victims. The Second Circuit set  
15 aside that part of the injunction, the part that barred  
16 New York from enforcing Federal law. I --

17 CHIEF JUSTICE ROBERTS: So your answer is  
18 because they have different entities that can enforce  
19 it, they -- sort of in for a penny, in for a pound? If  
20 you let anybody else enforce it, you've got to let  
21 everybody else enforce it?

22 MS. UNDERWOOD: No, I don't say that -- I  
23 don't think that --

24 CHIEF JUSTICE ROBERTS: Including the  
25 entities that historically have targeted national banks?

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

4 JUSTICE SCALIA: I suppose if -- if  
5 enforcement pre-emption is the lesser step, we probably  
6 ought to revise our jurisprudence so as not to tread any  
7 more heavily than we have to upon the States so that  
8 where there is conflict pre-emption, all we should say  
9 is the State law is not invalidated; it is simply not  
10 enforceable.

11 MS. UNDERWOOD: Well --

12 JUSTICE SCALIA: I mean, that would be --  
13 enforcement being --

14 CHIEF JUSTICE ROBERTS: No, I suppose the  
15 question would not be what we think is a good idea but  
16 what Congress has done. And here the OCC has  
17 interpreted what Congress has done is to make exclusive  
18 the OCC regulation only with respect to enforcement.

19 MS. UNDERWOOD: Well --

20 CHIEF JUSTICE ROBERTS: I'd --

21 MS. UNDERWOOD: -- I would --

22 CHIEF JUSTICE ROBERTS: I would suppose you  
23 would thank them for that, rather than criticize them  
24 for it.

25 MS. UNDERWOOD: I think that in many ways

1 leaving the law intact and denying the State the ability  
2 to enforce it is more intrusive than simply finding  
3 pre-emption. In any event, Congress made it quite clear  
4 that it didn't want pre-emption.

5 I think my time is up.

6 CHIEF JUSTICE ROBERTS: Thank you,  
7 Ms. Underwood.

8 The case is submitted.

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

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