No. 05-1342

IN THE

# Supreme Court of the United States

LINDA A. WATTERS, COMMISSIONER, MICHIGAN OFFICE OF INSURANCE AND FINANCIAL SERVICES,

*Petitioner*,

v.

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

*Respondents.*

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

**BRIEF OF NATIONAL CITY BANK AS
*AMICUS CURIAE*
IN SUPPORT OF RESPONDENTS**

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*Amicus curiae* respectfully submits this brief in support of Respondents pursuant to Supreme Court Rule 37.3.[1] We urge the Court to affirm the judgment of the United States Court of Appeals for the Sixth Circuit.

**STATEMENT OF INTEREST**

*Amicus* National City Bank ("NCB"), federally chartered since 1865, engages in the business of banking nationwide, subject to the exclusive regulation and oversight of the federal government. NCB's wholly owned operating subsidiaries, First Franklin Financial Corporation ("First Franklin") and National City Mortgage Company ("NCMC"), now service and fund mortgages originated by NCB, also on a nationwide basis. In recent years, state and local governments have imposed their own regulatory and oversight requirements on First Franklin and NCMC, despite the fact that, as operating subsidiaries of a national bank, they are supervised and overseen by federal authorities.

National City Bank has an interest in avoiding duplicative, burdensome and often conflicting regulation which imposes significant compliance costs, limits the financial products that it and its operating subsidiaries are able to offer, interferes with consumer welfare, and undermines the long-standing congressional commitment to a uniform nationwide system of banking. To that end, National City Bank and its operating subsidiaries have challenged state-imposed requirements in California, Maryland, and New Jersey. *See Wells Fargo Bank, N.A. v. Boutris*, 419 F.3d 949 (9th Cir. 2005); *Nat'l City Bank of Ind. v. Turnbaugh*, 463 F.3d 325 (4th Cir. 2006); *Nat'l City Bank of Ind. v. Bakke*, No. Civ. A. 3-04-3914 (SRC), 2005 WL 3544960 (D.N.J. Dec. 22, 2005).

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[1] Pursuant to Supreme Court Rule 37.6, *amicus* states that no counsel for a party authored this brief in whole or in part, and no person or entity other than *amicus* has made a monetary contribution to the preparation or submission of this brief. All parties have consented to the filing of this brief *amicus curiae*, and their consent letters are on file with the Clerk's Office.

## SUMMARY OF ARGUMENT

National City Bank, like other national banks and their operating subsidiaries, is subject to comprehensive and exclusive federal supervision and oversight, consistent with the congressional commitment to a uniform national banking system. Increasingly, state and local governments, are attempting to intrude upon this federal prerogative. Precluded by statute from exercising authority over national banks, state and local authorities have turned their sights to the operating subsidiaries of national banks, in an effort to accomplish indirectly what they cannot do directly—subject the business of banking to their own parochial rules.

For the national banks and their operating subsidiaries, compliance with the varied and often conflicting state and local requirements comes at a significant cost, over and above the costs incurred in complying with federal obligations. State and local assertions of authority prove costly to consumers who ultimately bear costs arising from additional compliance obligations. These efforts further harm consumers by eventually limiting the banking products that national banks and their operating subsidiaries can offer. Faced with the burdens of added supervision, national banks can and do take back functions from their operating subsidiaries. This effectively eliminates state oversight, but it also eliminates the substantial efficiencies gained through the use of operating subsidiaries.

At the same time, state and local efforts to assert authority over national banks and their operating subsidiaries provide no real benefit to consumers. Federal examiners, located on site in national banks and their operating subsidiaries, oversee and examine banking operations not only for safety and soundness but also to ensure compliance with the many federal consumer protection statutes, as required by Congress. This robust system, with day-to-day oversight and both informal and formal enforcement mechanisms, provides floor to ceiling protection for consumers. The substantial costs of state and local oversight, the lack of any benefits, and the interference with the congressionally mandated uniform operation of the national banking system, render state and local authority over national banks and their operating subsidiaries not simply unnecessary but also ill-advised.

## ARGUMENT

National City Bank ("NCB"), subject to exclusive federal authority, is one of many national banks that utilize operating subsidiaries in the performance of its functions. Treated on a consolidated basis with its operating subsidiaries for federal regulatory and reporting purposes, NCB has experienced first-hand the substantial interference and difficulty that arise when states and even local governments attempt to impose their own authority. *Amicus* NCB therefore can provide valuable insight into the costs imposed by state and local regulation over its operating subsidiaries, costs that are borne not only by the national banks and their operating subsidiaries but also—and significantly—by consumers.

### I. CONGRESS VESTED THE OCC WITH EXTENSIVE AND EXCLUSIVE VISITORIAL AUTHORITY OVER NATIONAL BANKS TO ENSURE THE STABILITY AND SECURITY OF THE BANKING SYSTEM

Federal visitorial authority over national banks is far-reaching and exclusive. Governance by a single, uniform set of rules long has enabled national banks to safely and soundly exercise their central role in the national economy, whether directly or through their wholly-owned operating subsidiaries. State oversight is prohibited with respect to the national banks themselves. When imposed on their operating subsidiaries, state authority not only negatively affects the operating subsidiaries, it also seriously interferes with and threatens the ability of national banks to perform their essential task.

### A. The Federal Government's Visitorial Authority Is The Broad Power To Supervise And Oversee The Business Of Banking

Congress long ago vested the federal government with extensive authority over national banks, conferring on it broad "visitorial powers." National Bank Act of June 3, 1864, c. 106, § 54, 13 Stat. 116, *codified at* 12 U.S.C. §§ 481-84 ("1864 Act"). At common law, "visitation" was a significant power, with corporations "subject to visitation in order to maintain their good government and secure their adherence to the purposes of their institution." Roscoe Pound, *Visitorial Jurisdiction Over Corporations in Equity*, 49 HARV. L. REV. 369, 371 (1936). Visitation was intended to help detect and correct improper corporate conduct, because "corporations being composed of individuals, subject to human infirmities, are liable, as well as private persons, to deviate from the end of their institution. The law, therefore, has provided, that there shall somewhere exist a power to visit, inquire into, and correct all irregularities and abuses in such corporations, and to compel the original purposes . . . to be faithfully fulfilled." *Trs. of Dartmouth Coll. v. Woodward*, 17 U.S. 518, 673 (1819) (citing William Blackstone, COMMENTARIES 480 (1769)).

When Congress enacted the National Bank Act in 1864, it conferred on the federal government similarly broad "visitation" authority to oversee the national banking system, adapting the concept to the realm of national banks. Congress thus mandated "an examination of the affairs of the association," by examiners empowered to "examine [bank] officers and agents [under] oath" and required "to make a full and detailed report of the condition of the association to the comptroller." 1864 Act § 54. Congress "made full and complete provision for investigation by the Comptroller of the Currency and examiners appointed by him . . . for the purpose of examining into the conduct of the corporation with a view to keeping it within its legal powers," and "to correct all abuses of authority, and to nullify all irregular proceedings." *Guthrie v. Harkness*, 199 U.S. 148, 158-59 (1905) (internal quotation marks omitted).

The National Bank Act today continues to vest sweeping visitorial authority in the federal government, through the Office of the Comptroller of the Currency ("OCC"). 12 U.S.C. §§ 24 (Seventh), 481, 484(a). Modern visitorial authority includes the right and duty to "examine every national bank," as well as "the affairs of all of its affiliates . . . as shall be necessary to disclose fully the relations between such bank and such affiliates and the effect of such relations upon the affairs of such bank." *Id.* § 481; 12 C.F.R. § 5.34(e)(3). Indeed, the "chief duty" of OCC examiners is to "ascertain that the statutory requirements and restrictions enacted by Congress, and administrative regulations adopted thereunder, are being complied with, and that the lending and investment policies of the bank, and its operating procedures, are such as to minimize the dangers to the banking system." S. Doc. No. 82-123, Pt. 2, Ch. VI, at 901 (1952). Bank examiners accomplish this statutory purpose by subjecting the national banking system—including national bank operating subsidiaries—to virtually "day-to-day surveillance," rendering examination authority "perhaps the most effective weapon of federal regulation of banking." *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 329 (1963).

### B. The Federal Government's Visitorial Authority Over National Banks Is Exclusive

Congress did not stop with according the federal government these far-ranging and specific elements of visitation. Rather, Congress went on to declare that this authority exclusively is the province of the federal government.

Under the common law, both in England and in the United States, the term "visitation" carried the connotation of exclusivity, contemplating only a single source of visitation for an institution. *See, e.g., Dartmouth Coll.*, 17 U.S. at 673-

74; *Guthrie*, 199 U.S. at 156. Congress continued this concept in the National Bank Act, conferring on the federal government exclusive visitorial authority over national banks. Congress did this not only by using the term "visitorial" and specifying its various elements in describing the federal government's authority over national banks, but also by expressly prohibiting any other authority from visiting national banks. Thus, the National Bank Act explicitly provided that national banks "shall not be subject to any other visitorial powers than such as are authorized by this act, except such as are vested in the courts of law and chancery." 1864 Act § 54.[2]

Construing the Act, this Court has recognized that "[i]t was [Congress's] intention that this statute should contain a full code of provisions upon the subject, and that no state law or enactment should undertake to exercise the right of visitation over a national corporation." *Guthrie*, 199 U.S. at 159. As the Court further has stated, "[we] are unable to perceive that Congress intended to leave the field open for the states to attempt to promote the welfare and stability of national banks by direct legislation." *Easton v. Iowa*, 188 U.S. 220, 232 (1903). Rather, because "[t]he National Bank Act . . . constitutes by itself a complete system for the establishment and government of National Banks," *Deitrick v. Greaney*, 309 U.S. 190, 194 (1940) (internal quotation marks omitted), national banks are "necessarily subject to the paramount authority of the United States." *Davis v. Elmira Sav. Bank*, 161 U.S. 275, 283 (1896).

[2] Powers "vested in the courts of justice" referred to "inherent judicial powers, [without which] § 484 could have been construed as depriving the courts of the power to, for example, compel a national bank to produce books and records in connection with statutorily authorized litigation against the bank." Howard N. Cayne & Nancy L. Perkins, *National Bank Preemption: The OCC's New Rules Do Not Pose A Threat To Consumer Protection Or The Dual Banking System*, 23 ANN. REV. BANKING & FIN. L. 365, 381-82 (2004); *see* 12 C.F.R. § 7.4000(b)(2).

Exclusive federal authority over national banks is an essential component of a national banking system. It provides "uniformity," so that the banking system is "substantially the same in Washington, in New York, in Boston, and in Chicago," rather than one subject to "complications and differences" under the laws of different states. Cong. Globe, 38th Cong., 1st Sess. 1873 (1864) (remarks of Sen. Sumner). Without exclusive federal authority, states "might impose limitations and restrictions as various and as numerous as the States [themselves]." *Easton*, 188 U.S. at 229. Exclusive federal authority also is crucial given the "key role" of banks in "the national economy," that "banks do not merely deal in, but are actually a source of, money and credit," and that banks are "the intermediaries in most financial transactions." *Philadelphia Nat'l Bank*, 374 U.S. at 326. Without exclusivity, confusion would necessarily result from control possessed and exercised by two independent authorities, *id.*, and "national banks [would be] expose[d] . . . to the hazard of unfriendly legislation by the States . . . ." *Tiffany v. Nat'l Bank of Mo.*, 85 U.S. 409, 413 (1874). Thus, the "entire body of the [National Bank Act], emphasize[s] that which the character of the system implies—an intent to create a national banking system co-extensive with the territorial limits of the United States, and with uniform operation within those limits." *Talbott v. Bd. of Comm'rs of Silver Bow County*, 139 U.S. 438, 443 (1891).

While the language of the National Bank Act has changed slightly since its enactment, it continues to mandate exclusivity. Today, the Act provides that "[n]o national bank shall be subject to any visitorial powers except as authorized by Federal law, vested in the courts of justice or such as shall be, or have been exercised or directed by Congress or by either House thereof or by any committee of Congress or of either House duly authorized." 12 U.S.C. § 484(a). Exclusive federal control of national banks, and the uniformity and other protections that it confers, remain the rule.

### C. The Federal Government's Exclusive Visitorial Authority Over National Banks Necessarily Reaches National Bank Operating Subsidiaries

The essential principles undergirding Congress' unwavering commitment to exclusive federal authority over national banks apply with equal force to the operating subsidiaries of national banks. It long has been established that national banks can create and utilize operating subsidiaries in carrying out "the business of banking," 12 U.S.C. § 24 (Seventh), a power expressly endorsed by Congress in the Gramm-Leach-Bliley Act ("GLB Act"). Pub. L. No. 106-102, Title I § 121(a)(2), 113 Stat. 1338, 1373-74 (1999), *codified at* 12 U.S.C. § 24a(g)(3). Speaking directly to the activities engaged in by operating subsidiaries, the Senate Report accompanying the GLB Act acknowledged that "national banks are authorized directly to make mortgage loans and engage in related mortgage banking activities. Many banks choose to conduct these activities through subsidiary corporations. Nothing in this legislation is intended to affect the authority of national banks to engage in bank permissible activities through subsidiary corporations, or to invest in joint ventures to engage in bank permissible activities with other banks or nonbank companies." S. Rep. No. 106-44 (1999), *available at* 1999 WL 266803, at *8.

National banks establish operating subsidiaries for varied reasons, including convenience, efficiency, and flexibility. "The operating subsidiary stems from the commonsense notion that national banks can carry out all incidental banking powers as specified by Congress, and sanctioned by the courts, either directly or, if more convenient to the bank, through a separately incorporated entity." William B. Glidden, *The Regulation of National Banks' Subsidiaries*, 40 BUS. LAW. 1299, 1303 (1985). Operating subsidiaries aid banks in "controlling operations costs, improving effectiveness of supervision, [providing for] more accurate determination of profits, decentralizing management decisions[, and] separating particular operations of the bank from other operations." Acquisition of Controlling Stock Interest in Subsidiary Operations Corporation, 31 Fed. Reg. 11,459-01, 11,460 (Aug. 25, 1966).

The operating subsidiary structure is advantageous because, among other reasons, it allows a national bank to focus the subsidiary, with its separate sale force, processing system, and business model, on a particular product line such as residential mortgage lending. Operating subsidiaries are "convenient," *see* Glidden, *supra*, 40 BUS. LAW. at 1303, providing substantial flexibility in organizing a corporate structure that both protects the safety and soundness of the national bank and permits the bank to respond to customer demand for products and services. For NCB and other banks, "whether to conduct business through operating subsidiaries or, instead, through subdivisions of the bank itself is thus essentially one of internal organization." *Wells Fargo Bank*, 419 F.3d at 960.

Operating subsidiaries essentially function as extensions of national banks. By statute, these subsidiaries can engage only in activities that national banks may engage in directly, "subject to the same terms and conditions that govern the conduct of such activities by national banks." 12 U.S.C. § 24a(g)(3)(A). Consistent with that requirement, this Court and other federal courts routinely have subjected operating subsidiaries to the same treatment under the federal banking laws as their parent national banks. *See, e.g.*, *NationsBank of N.C., N.A. v. Variable Annuity Life Ins. Co.*, 513 U.S. 251, 256 (1995) (NBA authorized operating subsidiary to sell annuities); *Clarke v. Sec. Indus. Ass'n*, 479 U.S. 388, 409 (1987) (operating subsidiary subject to federal branching restrictions); *Am. Ins. Ass'n v. Clarke*, 865 F.2d 278, 281 (D.C. Cir. 1988) (NBA authorized operating subsidiary to sell bond insurance).

Indeed, with respect to visitorial authority over national banks, Congress requires the OCC to examine "the affairs of all of [the national bank's] affiliates . . . as shall be necessary to disclose fully the relations between such bank and such affiliates and the effect of such relations upon the affairs of such bank." 12 U.S.C. § 481; *see* 12 C.F.R. § 5.34(e)(3). For that reason, operating subsidiaries are treated as if they are the bank for regulatory purposes, with operating subsidiaries "normally supervised on a consolidated basis along with the parent bank. For supervisory purposes, the bank and its operating subsidiaries are viewed as a single economic entity." United States Office of the Comptroller of the Currency, Related Organizations, Comptroller's Handbook at 64 (OCC Aug. 2004) (footnote omitted). Thus, the OCC oversees banks by reference to "business line[s]," applying the same law whether banking "activities are conducted directly or through an operating subsidiary." *Id.*

Examples of "business line" examination abound. Statutory dividend and lending limits are applied to a parent national bank and its operating subsidiaries on a consolidated basis. *See, e.g.*, 12 U.S.C. §§ 56, 60, 84, 371d, 12 C.F.R. § 5.34(e)(4)(i). Likewise, the assets and liabilities of operating subsidiaries are consolidated with those of the parent bank for accounting and regulatory reporting purposes. *See* 12 C.F.R. §§ 5.34(e)(4)(i), 223.3(w). Given the reasons for the creation of operating subsidiaries, their limited range of activities, and their treatment for legal and regulatory purposes, the need for exclusive federal visitorial authority with respect to national banks is equally applicable to the operating subsidiaries of national banks.

## II. NATIONAL BANKS AND THEIR OPERATING SUBSIDIARIES ARE SUBJECT TO COMPREHENSIVE AND RIGOROUS VISITATION BY THE OCC

Consistent with the statutory provisions governing the scope and extent of exclusive visitorial authority, NCB and its operating subsidiaries experience first-hand the "day-to-day surveillance of the American banking system."

*Philadelphia Nat'l Bank*, 374 U.S. at 329. For NCB and its operating subsidiaries, First Franklin and NCMC, the OCC exercises its visitorial authority not simply through periodic examinations but through embedded OCC examiners, physically present on a daily basis at the Bank. Working out of a suite of offices at NCB's headquarters in Cleveland, Ohio, a staff of at least eighteen federal examiners is on-site and dedicated to reviewing NCB's operations. OCC on-site staff at NCB usually swells to twenty-four or more for certain examinations.

These federal examiners provide intensive, seamless and continuous oversight of the full scope of NCB's operations, including those of its operating subsidiaries. *See* 12 U.S.C. § 481. These embedded examiners are present day in and day out at NCB, fully familiar with its operations, functions and processes, and fully proficient with its products. As a result, federal examiners are in a unique position to detect any inconsistencies, problems, or emerging patterns meriting review and correction, as well as to investigate any matters brought to their attention by state authorities or consumers. *See infra* at 12.

While smaller national banks and their operating subsidiaries do not necessarily have full-time resident OCC examiners, they too are subject to comprehensive oversight, including the same "full scope, on-site examination," 12 U.S.C. § 1820(d)(1), usually on an annual or more frequent basis, with limited statutory exceptions. *Id.* § 1820(d)(4); *see also* United States Office of the Comptroller of the Currency, Bank Supervision Process, Comptroller's Handbook at 4 (OCC April 1996) ("Bank Supervision Handbook"). These examinations are conducted by examiners housed in sixty OCC field offices spread across the country, who travel to and often remain at the banks for the duration of the examinations.

The OCC's intensive scrutiny of national banks, large and small, and their operating subsidiaries, does not depend solely on the work done by embedded examiners. Examiners working off site with full access to bank information systems and reports subject national banks and their operating subsidiaries to further oversight, and are called upon to participate in examinations, either on-site or remotely, as needed. In addition to the safety and soundness examination in which the OCC analyzes NCB's (as well as all other national banks') finances, operations, management and compliance with national banking laws, s*ee* Bank Supervision Handbook at 26, the OCC conducts a wide variety of targeted examinations, dispatching many more examiners to reside on site at NCB and other national banks during the course of these examinations. If the OCC perceives a level of potential risk posed by a bank's operations and finances, the intensity level of the examination is elevated. *Id.* at 26-27. In addition, the OCC regularly conducts examinations of bank information systems and trust departments, *id.* at 6-7, and, at its discretion, can order examinations of particular products and services. *Id.* at 4.

OCC examiners also conduct examinations of compliance with consumer protection statutes on a continuous three-year cycle for large banks like NCB and its operating subsidiaries. For smaller banks, OCC examines compliance with consumer protection laws at least once every three years. *Id.* at 3, 5. Of the 1,800 examiners employed by the OCC, more than 300 spend all or part of their time enforcing bank compliance with consumer protection laws. *See* United States Office of the Comptroller of the Currency, *Comptroller Calls Preemption a Major Advantage of National Bank Charter*, NEWS RELEASE 2002-10 (Feb. 12, 2002), *available at* http://www.occ.treas.gov/ftp/release/2002-10.doc (last visited Nov. 3, 2006). In addition, the OCC solicits from state regulators information on national bank and operating subsidiary compliance with consumer protection laws, and the OCC's Customer Assistance Group ("CAG") processes more than 70,000 complaints and inquiries from customers of national banks and their operating subsidiaries each year. The CAG maintains and analyzes a database of these complaints and inquiries, used by examiners "to identify banks, activities and products that require further review or investigation," often giving rise to guidance issued by the OCC. United States Government Accountability Office, OCC Consumer Assistance: Process Is Similar To That Of Other Regulators But Could Be Improved By Enhanced Outreach, No. GAO-06-293, at 22 (U.S. Gov't Accountability Off. Feb. 2006). In addition, the CAG provides relief to consumers; in 2004 alone it returned more than $4 million in fees, charges, and other relief to national bank and operating subsidiary customers. *See* United States Office of the Comptroller of the Currency, 2004 Report of the Ombudsman at 29 (OCC Dec. 2004).

By congressional mandate, the OCC is required to enforce federal consumer protection laws including the Federal Trade Commission Act, 15 U.S.C. § 57a(f)(2); Truth in Lending Act, 15 U.S.C. § 1607(a)(1)(A); Fair Credit Reporting Act, 15 U.S.C. § 1681s(b)(1)(A); Equal Credit Opportunity Act, 15 U.S.C. § 1691c(a)(1)(A); the Electronic Funds Transfer Act, 15 U.S.C. § 1693o(a)(1)(A); and Fair Debt Collection Practices Act, 15 U.S.C. § 1692l(b)(1)(A). While the OCC often obtains voluntary compliance, *see infra* at 14-15, where needed it has initiated enforcement proceedings. Thus, in 2000, following a year-long investigation, the OCC found Providian National Bank liable for engaging in a pattern of deceptive practices in connection with the marketing of subprime credit cards. The OCC directed Providian to cease a number of unfair and deceptive practices prohibited by, *inter alia*, the FTC Act, and ordered Providian to pay at least $300 million in restitution to consumers harmed by those practices. *See In re Providian Nat'l Bank*, OCC Consent Order No. 2000-53 (June 28, 2000), *available at* http://www.occ.treas.gov/ftp/release/2000% 2D49b.pdf (last visited Nov. 3, 2006).

The OCC has initiated other consumer protection enforcement actions against national banks and their operating subsidiaries. *See, e.g.*, *In re Household Bank (SB), N.A.*, OCC Formal Agreement No. 2003-17, *available at* http://www.occ.treas.gov/ftp/eas/ea2003-17.pdf; *In re ABN AMRO Mortgage Group, Inc.*, OCC Stipulation & Consent Order No. 2005-162, *available at* http://www.occ.treas.gov/ftp/eas/ea2005-162.pdf; *In re First Horizon Home Loan Corp.*, OCC Stipulation & Consent Order No. 2005-78, *available at* http://www.occ.treas.gov/ftp/eas/ea2005-78.pdf; *In re Homeowners Loan Corp.*, OCC Agreement No. 2005-142, *available at* http://www.occ.treas.gov/ftp/eas/ea2005-142.pdf (all last visited Nov. 3, 2006). Congress also requires the OCC to enforce non-preempted state consumer protection law. *See* Riegle-Neal Interstate Banking and Branching Efficiency Act, 12 U.S.C. § 36(f)(1)(B). Indeed, in addition to directing Providian National Bank to cease practices that violated the FTC Act, the OCC also ordered Providian to cease violations of California unfair business laws. *See supra*, OCC Consent Order No. 2000-53.

In examining national banks and their operating subsidiaries, OCC examiners have broad authority under the statute. They are authorized not only to review documents, books, and records, but also to "administer oaths and affirmations, to take or cause to be taken depositions." 12 U.S.C. §§ 1818(n), 481. OCC examiners also are empowered to issue, revoke, quash, or modify "subpoenas and subpoenas duces tecum." *Id.* Significantly, while OCC examiners have broad enforcement authority, it rarely is invoked, due in large part to the fact that "recommendations by the agencies concerning banking practices tend to be followed by bankers without the necessity of formal compliance proceedings." *Philadelphia Nat'l Bank*, 374 U.S. at 330.

Voluntary compliance, the prevailing practice in the industry, is in large part a unique by-product of the constant presence of examiners in the banks. If examiners identify a problematic trend at a particular bank, they are in a position to seek an agreement from the bank to take action to correct the problem. At the end of an examination, the OCC reviews with bank management its conclusions and recommendations, and asks the bank to commit to correcting "all material deficiencies noted during the examination." Bank Supervision Handbook at 39. For NCB and other large national banks, OCC examiners discuss their findings and recommended corrective actions with the board of directors at least once a year. *Id.* at 40. The OCC provides a written report on its examination, and an examination summary is provided to the board at least once during each examination cycle. *Id.* at 41. Thus, the OCC visitation system functions as an early warning system enabling national banks to take corrective action before a problem ripens.

Voluntary compliance also occurs, in part, because "[t]he agencies' potent alternative of formal enforcement proceedings usually insures such voluntary compliance." *In re Franklin Nat'l Bank Sec. Litig.*, 478 F. Supp. 210, 218 (E.D.N.Y. 1979); *see also Philadelphia Nat'l Bank*, 374 U.S. at 330 (OCC's "panoply of sanctions" encourages national banks to correct problems identified during a bank examination). A failure to take corrective action comes with real and significant consequences for national banks and their operating subsidiaries. If a bank does not comply with the "recommendations and suggestions of the Comptroller, based on [the] examination" within 120 days, the OCC is authorized to publish its examination report, 12 U.S.C. § 481, and the threat of publication alone can compel compliance, given bank need and commitment to maintaining public confidence. The OCC has recourse to substantially stronger enforcement mechanisms as well, including the authority to impose civil penalties, *id.* §§ 93(b), 1818(i)-(j), order restitutionary payment, *id*. § 1818(b)(6)(A), issue cease and desist orders, *id.* § 1818(b)-(c), and prohibit from banking any bank director, officer, or "any other person participating in the conduct of the affairs of [a national bank]" who violates a rule, regulation or the terms of a cease and desist order, or participates in unsound or unsafe business practice. *Id.* § 1818(e), (f), (g). As a last resort, the OCC can revoke a bank's charter. *Id.* § 93(a).

All of this federal oversight comes at a considerable cost to NCB and its operating subsidiaries. Changes in law require significant expenditures of time and money to retool specialized systems to track compliance. In addition, NCB and other national banks must provide special reports to the OCC, including detailed "condition reports" that analyze the financial condition and performance of national banks and their operating subsidiaries in key areas reviewed by the OCC (such as capitalization and liquidity), 12 U.S.C. § 161, and "call reports" on more specialized topics. *Id*. NCB and its operating subsidiaries employ a centralized, dedicated, full-time compliance staff of 102 people whose sole function is to design, implement and oversee policies or procedures that ensure bank and operating subsidiary compliance, and provide the OCC with compliance, financial risk and other information. In addition to this compliance staff, NCB has more than 300 full-time employees assigned to various business units ensuring day-to-day compliance with applicable banking laws and regulations.

## III. IMPOSITION OF STATE AUTHORITY OVER NATIONAL BANKS AND THEIR OPERATING SUBSIDIARIES UNNECESSARILY BURDENS THE BUSINESS OF BANKING AND INJURES COMPETITION

In recent years, state regulators have attempted, with greater frequency, to assert their own visitorial authority over certain activities conducted by national banks and their operating subsidiaries.

Despite the long-standing recognition of the pre-emptive force of the National Bank Act, some states have attempted to exercise authority over the national banks themselves. In other instances, states assert visitorial authority over the operating subsidiaries of national banks, thereby attempting to do indirectly what they cannot do directly. Licensing laws recently enacted in California, for example, subject operating subsidiaries to state examinations on par with those mandated by federal law. *See* Cal. Fin. Code §§ 50302(a), 50315, 50318, 50320 to 50325 (authorizing Commissioner of Corporations to examine any licensed entity; impose significant penalties; issue cease and desist orders; seek injunctions or restraining orders; criminally prosecute entities in violation of the law; and censure or suspend officers).

At the same time, even local authorities have issued their own laws concerning the practices of national banks and their operating subsidiaries. Banks in California, for example, recently found themselves subject to *municipal* ordinances prohibiting the assessment of ATM fees to non-depositors. *See Bank of Am. v. City & County of San Francisco*, 309 F.3d 551, 564 (9th Cir. 2002). Washington, D.C. imposed its own anti-predatory lending laws on lenders, *see* D.C. Code Ann. §§ 26-1114, 26-1151.01 *et seq.*, and the Ohio Bureau of Motor Vehicles expressly prohibited banks and their operating subsidiaries from using one particular method of selling reclaimed leased vehicles. *See* Preemption Opinion, 66 Fed. Reg. 23,977-01, 23,978 (May 10, 2001).

State and local efforts to exercise extensive visitorial powers subject national banks and their operating subsidiaries to requirements that vary from state to state and even city to city. *See, e.g.,* Bank Activities & Operations; Real Estate Lending & Appraisals, 69 Fed. Reg. 1,904-01, 1,908 (Jan. 13, 2004). The differing and often conflicting laws impose significant harm on consumers, by raising compliance costs of national banks and their operating subsidiaries as well as by limiting the types of products and services available to consumers.

### A. Subjecting National Banks And Operating Subsidiaries To State And Local Authority Creates Unnecessary Regulatory Burdens And Significant Compliance Costs, Ultimately Injuring Consumers

When banks and their operating subsidiaries are required to comply with varying state and local laws and visitorial authority, the cost of engaging in the business of banking rises significantly. In recent years, California, Maryland, and Georgia passed laws concerning residential mortgage lending which, if enforced, would impose dramatically increased compliance costs on NCB and its operating subsidiaries, First Franklin and NCMC.

The California Residential Mortgage Lending Act ("CRMLA"), Cal. Fin. Code §§ 50000 *et seq.*, for example, prohibited lenders from charging interest on residential first mortgages for more than one day prior to the recording of a mortgage deed. *See Wells Fargo Bank*, 419 F.3d at 955 (citing Cal. Fin. Code § 50204(o)). Under that law, in August 2002 the California Commissioner ordered NCMC to review every mortgage loan that it had made going back to August 2, 2000, the effective date of the CRMLA. The costs of complying with the Commissioner's order would have been extraordinary—between 150,000 and 180,000 mortgage loans were initiated during the relevant period. Retrieval and review of the associated files could only be done manually, at an estimated cost in excess of $4 million. When NCMC objected, the Commissioner instituted an administrative proceeding to revoke NCMC's license to operate in California. *Id.* at 956.

Other state laws would require operating subsidiaries, including those of NCB, to create compliance systems tailored to each state, in addition to the nationwide systems required for compliance under the National Bank Act. Maryland's Mortgage Lender Law ("MMLL"), Md. Code Ann., Com. Law § 12-105(b)(4), limiting prepayment penalties, *see Nat'l City Bank*, 463 F.3d at 328 n.1, and Georgia's Fair Lending Act ("GFLA"), Ga. Code Ann. §§ 7-6A-1 *et seq.* (2002), setting interest rates, fees, and credit terms would impose significant compliance costs. *See* Preemption Determination and Order, 68 Fed. Reg. 46,264-02 (Aug. 5, 2003).

Until recently, NCB dedicated a staff of approximately sixty-two full-time employees solely to ensuring that its operating subsidiaries were in compliance with all the different state and local lending laws. And NCB is not alone. When California enacted a law mandating a minimum payment warning for credit cards, six other national banks estimated that together they would have to spend $44 million to come into and maintain compliance in the first year alone. *See* 69 Fed. Reg. at 1,908 n.24. And when anti-predatory lending laws were enacted in the District of Columbia, Georgia, Pennsylvania, and New York, one national bank estimated that it would need 250 programming days to bring just one of several computer systems into compliance with these laws. *See id*.

Each time another state enters the regulatory fray, national banks and their operating subsidiaries incur a new set of compliance costs. On top of these ongoing costs are those associated with responding to the specific requests of regulators in various states for varying information. Ultimately all these costs affect the price at which mortgages and other financial products can be provided to consumers.

### B. Subjecting National Banks And Operating Subsidiaries To State And Local Authority Limits The Products Available To Consumers

State attempts to assert visitorial authority impose additional harm by limiting the products that operating subsidiaries can offer consumers. The MMLL, for example, limited prepayment penalties that NCB, First Franklin, and NCMC could charge on adjustable rate mortgage loans. *See Nat'l City Bank*, 463 F.3d at 328 & n.1. Prohibited from including prepayment penalties, NCB's operating subsidiaries could not continue to offer these loans without threatening their own and NCB's safety and soundness, thus withdrawing from consumers this highly popular form of mortgage which made home ownership more widely available.

Similarly, the GFLA's array of requirements, including its imposition of liability on the assignees of loans, severely limited the secondary market for residential mortgage loans made by NCB and its operating subsidiaries, making it highly difficult for the bank and its operating subsidiaries to continue providing these products to consumers. *See, e.g.*, 68 Fed. Reg. at 46,279 n.92. Rating services like Standard & Poors and Moody's Investor Services refused to rate securities that included these loans, and refused to include these loans in rated structured financial transactions. Other investors simply stopped buying the loans. *See, e.g.*, Preemption Letter, 68 Fed. Reg. 8,959-02, 8,963 (Feb. 26, 2003). These acts seriously limited the ability of NCB and its operating subsidiaries to assign loans, thereby limiting their ability to respond to consumer need with appropriate banking products. If national banks cannot assign loans, "banks will be required hold [them] to maturity . . . [and] hold capital against the full amount of the [] loans," making fewer other products available. 68 Fed. Reg. at 46,278 n.90.

The costs of state and local regulation and visitation of national banks and their operating subsidiaries are, in sum, considerable. With respect to the substantive limitations that states seek to impose on operating subsidiaries, *see* Brief of AARP as *Amicus Curiae* In Support of Petitioner, at 5 ("AARP Brief"), the decision of states to enact and enforce such laws are made without consideration of the possible effect on bank safety and soundness nor on the costs of eliminating nationwide uniformity of law, both overriding concerns of the National Bank Act. And the cost of state action brings with it marginal if any benefit for consumers.

Significantly, far from showing "little interest in ensuring fairness to consumers," as is claimed, AARP Brief at 3, the OCC subjects NCB as well as other national banks and their operating subsidiaries, to exacting and continuous oversight and enforcement of the law, including—consistent with the congressional mandate—consumer protection laws. *See supra* at 12-13. The OCC's intensive supervision of national banks and their operating subsidiaries also provides the unique ability to detect and root out any potential problems before they take root, and so provides another assurance of bank safety and soundness. Federal law and enforcement leaves no vacuum of enforcement, protection, or oversight, whether as to the national banks or their operating subsidiaries. As a result, permitting states to exercise their own visitorial authority over operating subsidiaries would provide no added benefit, consumer or otherwise, nor would it otherwise enhance the substantial protections already in place.

## CONCLUSION

For the foregoing reasons, the decision below should be affirmed.

Respectfully submitted,

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