

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

-----X
THE CLEARING HOUSE :
ASSOCIATION L.L.C., :
 :
Plaintiff, : No. 05 Civ. 5629 (SHS)
 :
v. : **ELECTRONICALLY FILED**
 :
ELIOT SPITZER, ATTORNEY GENERAL :
OF THE STATE OF NEW YORK, :
 :
Defendant. :
-----X

**REPLY MEMORANDUM IN FURTHER SUPPORT OF
MOTION FOR PRELIMINARY AND FINAL INJUNCTION**

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The language of Section 484, its legislative history, and Supreme Court and Second Circuit precedent all make clear that action by state officials—whatever their titles—to inspect the records of a national bank or enforce laws relating to the activities authorized by the National Bank Act constitutes an impermissible exercise of “visitorial powers.” Defendant’s effort to avoid that result by asserting that Section 484 applies only to state administrative officials and not to state attorneys general is without support in the statutory language, the case law, or common sense. Defendant’s variation of this argument, seeking to carve out a special exemption for a state attorney general based on Section 484’s “vested in the courts of justice” provision, is equally misplaced. The courts of justice exception—as the case law demonstrates—simply permits the courts to exercise the visitorial powers vested *in them* in proceedings that do not otherwise violate Section 484. It does not create an exception to Section 484 for enforcement actions by the executive branch of a state government and, *a fortiori*, does not apply to the non-judicial subpoenas and investigation contemplated by defendant.

Defendant’s memorandum implicitly concedes that his threatened conduct would violate the OCC’s regulation implementing Section 484. Accordingly, the Clearing House is entitled to an injunction because of the deference that the courts are required to give to the OCC, as emphasized by controlling decisions rendered by the Supreme Court and the Second Circuit within the past two months.

Defendant now seeks refuge in the Fair Housing Act (“FHA”), a statute he did not rely on in his letters demanding the production of documents by Clearing House members. Here, too, defendant’s argument does not withstand scrutiny. The FHA did not amend Section 484, and does not conflict with Section 484’s clear terms. Moreover, although the FHA does provide

for multiple levels of enforcement, the FHA only authorizes enforcement by federal agencies, by certified state agencies to which a complaint was referred by a federal agency, or by an aggrieved person in private litigation. Defendant's actual and threatened conduct does not constitute any of these forms of enforcement.

Defendant has abandoned any contention that his threats to issue subpoenas and commence litigation would not satisfy the equitable requirements for an injunction if the threatened conduct would violate Section 484.¹ His challenge to the Court's subject matter jurisdiction, now limited to a passing reference to an earlier letter to the Court (Def. Mem. 3 n.1), is completely without merit.² Accordingly, the Clearing House is entitled to a permanent injunction on the terms requested in its motion.

¹ See also Letter from Robinson Lacy to the Court dated June 23, 2005. (Reply Declaration of Adam R. Brebner, executed August 19, 2005 ("Brebner Reply Decl."), Exh. A.)

² The Supreme Court has recognized since *Ex parte Young* that the federal courts have jurisdiction to enjoin threatened state court enforcement proceedings that would violate federal law. *Ex parte Young*, 209 U.S. 123, 144-45 (1908). "It is beyond dispute that federal courts have jurisdiction over suits to enjoin state officials from interfering with federal rights. A plaintiff who seeks injunctive relief from state regulation, on the ground that such regulation is pre-empted by a federal statute which, by virtue of the Supremacy Clause of the Constitution, must prevail, thus presents a federal question which the federal courts have jurisdiction under 28 U.S.C. § 1331 to resolve." *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 96 n.14 (1983) (internal citation omitted).

ARGUMENT

I. SECTION 484 PROHIBITS THE DEFENDANT FROM ENFORCING NATIONAL BANKS' COMPLIANCE WITH DISCRIMINATION-IN-LENDING LAWS.

A. The Statute, Case Law, and Legislative History Demonstrate that Section 484 Precludes State Actions Against National Banks Relating to Activities Authorized by the National Bank Act.

Section 484(a) provides:

No 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) (emphasis added).³ When the Supreme Court discussed the “visitation” subject to what is now Section 484 a century ago, it made clear that the term applies to both examination and enforcement by a governmental authority, including enforcement through judicial proceedings. It quoted two earlier decisions defining the term as follows:

Visitation, in law, is the act of a superior or superintending officer, who visits a corporation to examine into its manner of conducting business, and *enforce an observance* of its laws and regulations. . . .

In the United States, the legislature is the visitor of all corporations created by it, where there is no individual founder or donor, and *may direct judicial proceedings against such corporations* for such abuses or neglects as would at common law cause forfeiture of their charters.

Guthrie v. Harkness, 199 U.S. 148, 158-159 (1905) (internal quotation marks and citations omitted) (emphasis added). Just within the past month, the Ninth Circuit reaffirmed that:

visitorial power[] . . . generally refers to the power of the OCC to “visit” a national bank to examine its activities and its observance of applicable laws, and encompasses any examination of a national bank’s records relative to the conduct

³ 12 U.S.C. § 484(b) creates an exception relating to state unclaimed property or escheat laws that has no relevance to this proceeding.

of its banking business as well as *any enforcement action* that may be undertaken for violations of law.

Wells Fargo Bank N.A. v. Boutris, Nos. 03-16194, 03-16461, 03-16197, 2005 WL 1924713, at *2 n.7 (9th Cir. Aug. 12, 2005) (internal citation omitted) (emphasis added).

Thus, the visitorial powers prohibited by Section 484 are (1) any examination of a national banks' records or enforcement proceedings against a national bank, (2) by a governmental authority, (3) with respect to activities within the scope of the bank's authority under the National Bank Act, *other than* visitorial powers (x) authorized by Federal law (most importantly, those assigned to the OCC), (y) vested in the courts, or (z) exercised or directed by Congress.

Section 484(a) is hardly a "breathtaking anomaly" (Def. Mem. 27) in view of its background and Congress's clearly expressed intent. It was enacted during a national crisis occasioned by overreaching assertions of state power. "[Congress] was compelled to resort to some scheme by which to nationalize and arrange upon a secure and firm basis a national currency." CONG. GLOBE, 37th Cong., 3d Sess. 844 (1863) (remarks of Sen. Sherman). To fulfill this purpose, it was recognized that the newly-created national banking system "must not be subjected to *any* local government, State or municipal; it must be kept *absolutely* and *exclusively* under that Government from which it derives its functions." CONG. GLOBE, 38th Cong., 1st Sess. 1893 (1864) (remarks of Sen. Sumner) (emphasis added).⁴

Defendant and *amici* do not cite a single case that explicitly considered Section

⁴ For a more comprehensive discussion of the legislative history of Section 484, as well as a thorough treatment of the cases construing it and a response to the article by Arthur Wilmarth cited by defendant and the amici attorneys general see 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. BANK. & FIN. L. 365 (2004) (copy annexed to Brebner Reply Decl. as Exh. B).

484 and allowed a state authority to enforce laws with respect to national banks' authorized activities.⁵ Instead, defendant relies entirely on cases that do not involve a superior authority, *see, e.g., Guthrie*, 199 U.S. at 154-155 (suit by private stockholder to enforce common law right to inspect corporation's records) (Def. Mem. 18-20),⁶ cases that do not implicate the authorized activities of national banks, *Bank of Am. Nat'l Trust & Sav. Ass'n v. Douglas*, 105 F.2d 100. (D.C. Cir. 1939) (SEC investigation of possible securities violation by third party) (*Amicus* Brief of National Community Reinvestment Coalition *et al.* ("NCRC Am. Br.") 11),⁷ and cases that do

⁵ The Clearing House members' mortgage lending activities are expressly authorized by the National Bank Act. *See* 12 U.S.C. § 371(a); *see also Wells Fargo*, 2005 WL 1924713, at *4 n.14 ("Congress, not the OCC, has explicitly authorized national banks to engage in real estate lending. The Commissioner's argument . . . that the regulation of real estate lending falls outside the substantive scope of the OCC's delegated authority is therefore unavailing.").

⁶ *See also Jacobs v. ABN-Amro Bank N.V.*, No. 03-CV-4125 (NGG), 2004 WL 869557, at *5 (E.D.N.Y. Apr. 21, 2004) (remanding private fraud action to state court) (Def. Mem. 13); *Best v. United States Nat'l Bank of Or.*, 739 P.2d 554 (Or. 1987) (suit brought by individual plaintiffs against a national bank) (*Amicus* Brief of State Attorneys General ("SAG Am. Br.") 13). Defendant similarly cites out of context cases that stand for the uncontroversial proposition that national banks in their daily operations and private transactions may be governed by state laws of general application, for example, laws relating to contracts, property and debt collection. *See Nat'l Bank v. Kentucky*, 76 U.S. (9 Wall.) 353, 362 (1869) (Def. Mem. 8); *Barnett Bank of Marion Cty., N.A. v. Nelson*, 517 U.S. 25, 33-34 (1996) (Def. Mem. 8).

⁷ *See also First Nat'l Bank v. Hughes*, 6 F. 737 (C.C.N.D. Ohio 1881) (inspection of a national bank's records for the limited purpose of determining whether depositors had made deposits that were subject to county taxation) (NCRC Am. Br. 11); *Bowles v. Shawano Nat'l Bank*, 151 F.2d 749 (7th Cir. 1945) (Office of Price Administration's investigation of cheese company with deposits in national banks) (NCRC Am. Br. 18); *NLRB v. N. Trust Co.*, 148 F.2d 24 (7th Cir. 1945) (allowing NLRB to subpoena bank in investigation of unfair labor practices) (*Amicus* Brief of the National Association of Realtors *et al.* 8); *Minnesota v. Fleet Mortg. Corp.*, 158 F. Supp. 2d 962, 966 (Minn. 2001) (suit relating to information sharing practices between bank subsidiary and telemarketers that did "not directly concern a banking practice") (SAG Am. Br. 15); *Peoples Bank of Danville v. Williams*, 449 F. Supp. 254 (W.D. Va. 1978) (SEC subpoena relating to anti-fraud provisions of federal securities law) (Def. Mem. 20).

Defendant's citation to cases allowing inspection of national bank records to ensure compliance with state unclaimed property and escheat laws (Def. Mem. 12 n.5 (citing *Minnesota v. First Nat'l Bank of St. Paul*, 313 N.W.2d 390 (Minn. 1981) and *Oregon v. First Nat'l Bank of*

not address Section 484 at all.⁸

The case that defendant describes as “dispositive” (Def. Mem. 10), *First National Bank in St. Louis v. Missouri*, 263 U.S. 640 (1924), is irrelevant for *three* reasons. *First*, neither the opinion nor the dissent even mentions the predecessor to Section 484 then in force, much less provides any rationale for limiting the application of the statute. *Second*, the case did not involve

Portland, 61 Ore. 551 (Or. 1912)) is similarly misguided. Congress in 1982 clarified the law in this regard by (i) adding subsection (b) to Section 484 to authorize expressly state officials to review a bank’s records regarding compliance with the state’s unclaimed property or escheat laws and (ii) by amending the “authorized by law” exception to read “as authorized by Federal law.” See Garn-St Germain Depository Institutions Act of 1982, Pub. L. No. 97-320, § 412, 96 Stat. 1469, 1521 (codified as amended at 12 U.S.C. § 484). This amendment makes absolutely clear that the only state enforcement allowed is as described in Section 484(b) or as otherwise allowed by Federal law.

⁸ In *Franklin Nat’l Bank of Franklin Square v. New York*, 347 U.S. 373 (1954) (Def. Mem. 12), the Supreme Court invalidated a state statute that conflicted with federal law and was not required to and did not address the question of when a state can sue a national bank. In *Jackson v. First Nat’l Bank of Valdosta*, 349 F.2d 71, 74 (5th Cir. 1965) (Def. Mem. 12), the Fifth Circuit allowed the Georgia Superintendent of Banks to enforce the state’s branching law relying on “the absence of any contraindicative federal policy” without consideration of Section 484. See also *Brown v. Clarke*, 878 F.2d 627 (2d Cir. 1989) (Def. Mem. 12 n.5); *Utah v. Zions First Nat’l Bank of Ogden, UT*, 615 F.2d 903 (10th Cir. 1980) (Def. Mem. 12 n.5); *Missouri ex rel. Kostman v. First Nat’l Bank in St. Louis*, 405 F. Supp. 733 (E.D. Mo. 1975) (Def. Mem. 12). Since the branching cases were decided, the Riegle-Neal Interstate Banking and Branching Efficiency Act of 1994 amended 12 U.S.C. § 36 to permit interstate branching and clarified that the OCC has exclusive enforcement authority over interstate branches’ compliance with state laws. Riegle-Neal Act, Pub. L. No. 103-328, § 102 (codified at 12 U.S.C. § 36(f)(1)(b)). Other cases cited by defendant and amici not only fail to consider the application of 12 U.S.C. § 484, but are procedurally and factually unconnected to anything at issue here. See *New York v. Citibank, N.A.*, 537 F. Supp. 1192, 1197 (S.D.N.Y. 1982) (Def. Mem. 12) (remand decision in suit seeking bank reimbursement for victims of criminal scheme); *Alaska v. First Nat’l Bank of Anchorage*, 660 P.2d 406 (Alaska 1982) (Def. Mem. 12) (suit seeking declaration that bank was not holder in due course of promissory notes); *Wisconsin v. Ameritech Corp.*, 185 Wis. 2d 686 (Wis. Ct. App. 1994) (Def. Mem. 12) (holding that no state right to jury trial in deceptive advertising suit); *W. Va. v. Scott Runyan Pontiac-Buick, Inc.*, 461 S.E.2d 516 (W. Va. 1995) (SAG Br. 14 n.8) (suit against a bank concerning sale of extended warranties by an automobile dealership); *Attorney General v. Michigan Nat’l Bank*, 312 N.W.2d 405 (Mich. Ct. App. 1981) (SAG Br. 14 n.8) (suit alleging improper changes to contractual terms).

activities within the scope of a national bank's powers under the National Bank Act. *See id.* at 660. Rather, the Court was concerned with activities that the Court held not to be authorized under the National Bank Act. In contrast, mortgage lending is clearly authorized by the National Bank Act. *See* 12 U.S.C. § 371(a).

Third, in *St. Louis* the Court was concerned about a gap in the law (a “fallacy”): if Missouri could not enforce its state statute prohibiting branch banking against national banks, there would have been *no* mechanism to enforce the state law. *See* 63 U.S. at 660. That “fallacy” has no application here. The OCC now has broad enforcement authority with respect to all the laws at issue here. *See* 12 U.S.C. § 1818(b), -(e), and -(i)(2); *see also Nat'l State Bank, Elizabeth, N.J. v. Long*, 630 F.2d 981, 988 (3d Cir. 1981). Thus, unlike in *St. Louis*, defendant's threatened enforcement actions would conflict with the enforcement authority of the OCC.

In sharp contrast to the inapposite “authority” cited by defendant, in two cases discussed in the Clearing House's opening memorandum, the courts have squarely held that Section 484 prohibits state authorities (or a private party acting in the capacity of a state authority) from enforcing non-preempted state laws in respect of a bank's authorized activities. *See Long*, 630 F.2d at 987-89; *Bank One Delaware, N.A. v. Wilens*, No. 9ACV 03-274-JUS, 2003 WL 21703629 (C.D. Cal. July 7, 2003). In *Long*, the court *specifically* recognized that discrimination-in-lending laws directly implicate the core activities of national banks—assessing credit and making loans—that are the subject of the Comptroller's exclusive authority. 630 F.2d at 988-89. Defendant avoids addressing the merits of these precedents, resorting to conclusory assertions that the cases are “unpersuasive” or “of no moment.” (Def. Mem. 15 n.6, 26 n.14.)⁹

⁹ Defendant incorrectly suggests that the *Bank One* decision conflicts with the OCC's conclusion that private parties have the right to sue national banks. (Def. Mem. 15 n.6.) In *Bank*

Defendant is mistaken in asserting that “[n]o distinction exists between an individual’s right to sue a national bank in a court of justice and a State Attorney General’s right to sue in the same court.” (Def. Mem. 10.) The Supreme Court’s decision in *Guthrie* makes this distinction explicitly. The Court allowed a shareholder to examine a bank’s records because the shareholder was exercising a “private right” as distinguished from the “public right, existing in the State.” *Guthrie*, 199 U.S. at 158-159; *see also Bank One*, 2003 WL 21703629, at *2.¹⁰

Although defendant acknowledges that “state banking commissioners charged with traditional administrative oversight” are prohibited by Section 484 from supervising national banks (Def. Mem. 20), defendant fails to explain how the oversight of national bank lending activity he is attempting here is substantively different. Defendant attempts to create a distinction between his authority and that of other state officials by asserting that unlike “government officials directly charged with the duty to examine” banks he is not “a

One, the plaintiff asserted a claim not based on an individual injury but “as a private attorney general ... on behalf of the general public.” *See Bank One*, 2003 WL 21703629, at *2. On this basis, the *Bank One* court correctly held that cases cited by plaintiff referring to individual or class actions against national banks were not controlling. *Id.* at *2 n.1.

¹⁰ Defendant’s reliance on *First Union Nat’l Bank v. Burke*, 48 F. Supp. 2d 132 (D. Conn. 1999) for the proposition that state enforcement is permitted under Section 484 (*see* Def. Mem. 13, 32) is misplaced. First, the court there held that the very conduct at issue here—“to investigate violations”—“necessarily implicates use of visitorial powers” and is prohibited by Section 484. *Id.* at 149 n.10 (emphasis added). Second, the District Court’s holding on the “narrow issue presented . . . whether the Commissioner’s pending cease and desist order violates the OCC’s claimed right of exclusive regulatory authority,” did not reach the question of judicial enforcement of state laws. *Id.* at 140. Unlike in *Bank One*, *see* 2003 WL 21703629, at *2, the issue of whether Section 484 “leaves available judicial remedies” for public officials was not before the *First Union* court. *See First Union*, 48 F. Supp. 2d at 149; *see also Guthrie*, 199 U.S. at 157-58 (“the legislature is the visitor . . . and may direct judicial proceedings”). Notably, the recent decisions of the Second and Ninth Circuits do not draw a distinction between “administrative” and “judicial” enforcement and do not cite *First Union* for the proposition relied on by defendant. *See Wachovia Bank, N.A. v. Burke*, 414 F.3d 305 (2d Cir. 2005); *Wells Fargo*, 2005 WL 1924713.

superintending officer.” (Def. Mem. 16, 19.) However, the cases interpreting visitorial powers make clear that enforcement by any governmental authority is visitorial. *See Guthrie*, 199 U.S. at 158-159 (referring to “superior” or “superintending” officers); *Wells Fargo*, 2005 WL 1924713, at *2 n.7; *Bank One*, 2003 WL 21703629.¹¹

The “vested in the courts of justice” exception does not provide defendant with an end-run around the visitorial powers provision. This exception applies to the visitorial powers of the courts themselves in proceedings that do not otherwise involve prohibited visitation. It does not provide a screen allowing state governments to act as visitors. *See Bank One*, 2003 WL 21703629, at *2 (the “vested in the court of justice” exception is a reservation of the rights of courts to enforce their rules in connection with an authorized action against a bank). To hold otherwise would be to completely eviscerate Section 484. Moreover, if defendant were allowed to bring judicial enforcement proceedings, he would then use the threat of judicial enforcement to seek administrative remedies, which is exactly what was attempted here. Defendant’s claim that his role is “fundamentally different” from that of state agencies seeking to exercise supervisory authority (*see* Def. Mem. 2) is untenable. Defendant does in fact act as a “sole

¹¹ The illogic of defendant’s position is further exposed by a consideration of its practical consequences: if defendant were correct, the courts, rather than the federal agency charged with the task, would become the locus of enforcement of state fair lending regulation, and the 50 state attorneys general rather than federal or state authorities with expertise in these areas would become the primary enforcers. The importance of the uniform enforcement scheme mandated by Congress is illustrated by the OAG’s conclusory (and irresponsible) assertion that the HMDA data “establish a *prima facie* case” of lending discrimination (Def. Mem. 6), an assertion that has been flatly rejected by the Board of Governors of the Federal Reserve System, which administers the Home Mortgage Disclosure Act. *See, e.g., Wells Fargo & Co.*, 15-16 (Fed. Reserve Bd. June 23, 2005), available at <http://www.federalreserve.gov/boarddocs/press/orders/2005/20050623/default.htm> (“HMDA data, therefore, have limitations that make them an inadequate basis, absent other information, for concluding that an institution . . . has engaged in illegal lending discrimination”).

arbiter” concerning whether to issue non-judicial subpoenas, the scope of his non-judicial investigations, and whether to enter into assurances of discontinuance. Likewise, contrary to defendant’s suggestion, administrative action by other parts of the executive branch is not unchecked by the courts: administrative enforcement is ultimately supported by judicial enforcement and is always subject to appeal to the courts.

Defendant’s attempt to draw support from the fact that state discrimination-in-lending laws are not preempted is not merely unavailing, but illogical. The purpose of Section 484 is to confine the supervision of national banks and the enforcement of laws governing national banks’ authorized activities to the OCC; the statute in that sense is “procedural, not substantive.” *Wells Fargo*, 2005 WL 1924713, at *8. The Ninth Circuit explicitly rejected the position advanced by defendant, holding that “federal ‘visitorial’ authority—but not necessarily federal substantive law—[is] exclusive with regard to national banks.” *Id.* “One area of authority over national banks that *has* historically been the exclusive province of the federal government, however, is the ‘visitorial’ power.” *Id.* Similarly, the Third Circuit has recognized, “Questions about the applicability of state legislation to national banks must be distinguished from the related inquiry of who is responsible for enforcing national bank compliance.” *Long*, 630 F.2d at 987-88.

Finally, there is no merit to defendant’s contention that by codifying the statute as Section 5241 of the Revised Statutes in 1875 Congress limited the scope of visitorial powers to the immediately preceding section of the statute, which described the OCC’s examination powers. (Def. Mem. 18.) Contrary to defendant’s assertion, Section 5241 clearly stated that national banks would not be subject to visitorial powers except as authorized by “this Title,”

referring to the National Bank Act as then codified as Title 62.¹² Title 62 authorized the OCC to commence judicial proceedings to revoke the charter of a national bank for violations of law.

Rev. Stat. § 5239 (1873-75).

B. The OCC’s Regulations Clearly Preclude Defendant’s Actions and Are Entitled to Deference.

The OCC’s regulations state that the “visitorial powers” subject to Section 484 specifically include “(i) Examination of a [national] bank; (ii) Inspection of a [national] bank’s books and records; (iii) Regulation and supervision of [a national bank’s] activities authorized or permitted pursuant to federal banking law; and (iv) Enforcing compliance with any applicable federal or state laws concerning those activities.” 12 C.F.R. § 7.4000(a)(2). The same regulation also makes clear that Section 484’s exception for visitorial powers “vested in the courts of justice”:

does not grant state or other governmental authorities any right to inspect, superintend, direct, regulate or compel compliance by a national bank with respect to any law, regarding the content or conduct of activities authorized for national banks under Federal law.

12 C.F.R. § 7.4000(b)(2). Defendant and the *amici* attorneys general participated in the OCC’s notice and comment procedure leading to the adoption of these regulations, (*see* SAG Am. Br. 2-3), but they did not seek judicial review of the decision to adopt them, and defendant instead made this litigation necessary by ignoring them. Accordingly, under basic principles of deference to the agency responsible for administering a statute, the Clearing House is entitled to an injunction unless the OCC’s regulation is invalid as arbitrary or unreasonable. *See* 5 U.S.C. § 706(2)(a), -(c); *Wachovia Bank, N.A. v. Burke*, 414 F.3d 305, 314-315 & n.6 (2d Cir. 2005).

¹² Rev. Stat. §§ 5133-5243 (1873-75) (copy annexed to Brebner Reply Decl. as Exh C).

The OCC is entitled to deference under *Chevron* because it was granted broad rulemaking authority under 12 U.S.C. § 93a to promulgate rules for the interpretation of the National Bank Act and because the regulations at issue were issued, not arbitrarily, but according to a notice and comment rulemaking procedure. The regulation is entitled to deference as long as the OCC acted within its statutory authority when promulgating it. *See Wachovia*, 414 F.3d at 319-321 (rejecting contention that another OCC regulation simply reflected OCC’s view of the case law); *see also Lincoln Sav. & Loan Ass’n v. Fed. Home Loan Bank Bd.*, 856 F.2d 1558, 1560 (D.C. Cir. 1988).

The Supreme Court has consistently held that the OCC’s interpretation of the National Bank Act is entitled to *Chevron* deference. *See NationsBank of N.C., N.A. v. Variable Annuity Life Ins. Co.*, 513 U.S. 251, 256-257 (1995) (“The Comptroller of the Currency is charged with the enforcement of banking laws to an extent that warrants the invocation of [the rule of deference] with respect to his deliberative conclusions as to the meaning of these laws.”) (quoting *Clarke v. Sec. Indus. Ass’n*, 479 U.S. 388, 403-404 (1987)); *see also United States v. Mead*, 533 U.S. 218, 231 n.13 (2001) (same); *Smiley v. Citibank (SD), N.A.*, 517 U.S. 735, 740 (1996) (same).

Each of defendant’s arguments against applying *Chevron*’s fundamental principle of deference has been authoritatively discredited. First, defendant is mistaken in asserting that there is a presumption against preemption in this case absent an “unmistakably clear” intent in the statute. (Def. Mem. 29.) This presumption is inapplicable in the context of the OCC’s regulation of national banks. As the Second Circuit recently explained in *Wachovia*:

The presumption against federal preemption disappears, however, in fields of regulation that have been substantially occupied by federal authority for an extended period of time. Regulation of federally chartered banks is one such area.

Wachovia, 414 F.3d at 314 (internal quotations and citation omitted); *see also Barnett Bank*, 517 U.S. at 32-33.

The Second Circuit made clear in *Wachovia* that the “‘pre-emptive regulation’s force does not depend on express congressional authorization to displace state law’ and that a ‘narrow focus’ on Congress’s intent to supersede state law is ‘misdirected.’” *Wachovia*, 414 F.3d at 314 (quoting *Fidelity Federal Sav. & Loan Ass’n v. de la Cuesta*, 458 U.S. 141, 154 (1982)). When a regulation is expressly preemptive, the only issue is “whether the agency effecting preemption ‘has exceeded [its] statutory authority or acted arbitrarily.’” *Wachovia*, 414 F.3d at 314 & 315 n.6 (quoting *de la Cuesta*, 458 U.S. at 154).¹³ Federal regulations have no less preemptive effect than federal statutes. *de la Cuesta*, 458 U.S. at 153.

Here, there can be no doubt that the OCC acted within its authority. The Second Circuit held less than a month ago that “12 U.S.C. § 484 provides the OCC with ample authority to preempt states from exercising visitorial power . . . because such state regulation could interfere with the national bank’s exercise of its federal powers.” *Wachovia*, 414 F.3d at 316; *see also Conference of State Bank Supervisors v. Conover*, 710 F.2d 878, 885 (D.C. Cir. 1983) (OCC has broad rulemaking authority under 12 U.S.C. § 93a, including the power to issue regulations that preempt state laws). Similarly, defendant cannot claim that the OCC acted “arbitrarily”—it followed a detailed notice and comment procedure in promulgating the regulations and provided a full explanation of its reasoning. *See* 64 Fed. Reg. 31749 (June 14,

¹³ Although defendant asserts that the OCC’s regulation violates principles of federalism, the federalism notice accompanying the 2004 promulgation of 12 C.F.R. § 7.4000 provided a detailed federalism impact statement and noted that in formulating the proposal and the final rule, the OCC adhered to the principles of Executive Order 13132 for the promulgation of regulations with federalism implications. *Compare* 69 Fed. Reg. 1895, 1903 (Jan. 13, 2004) *with Wachovia*, 414 F.3d at 319-321.

1999); 64 Fed. Reg. 60092 (Nov. 4, 1999); 68 Fed. Reg. 6363 (Feb. 7, 2003); 69 Fed. Reg. 1895 (Jan. 13, 2004).¹⁴

Defendant’s argument that the visitorial powers rulemaking does not implicate “safety and soundness” (Def. Mem. 38) is without merit. As shown above, the OCC’s rulemaking authority under sections 93a and 484 is not limited to “safety and soundness.”¹⁵ Moreover, even if it were, the regulation does effect safety and soundness. In addition to the detailed rationale articulated in the releases accompanying its proposed and final amendments to

¹⁴ Defendant’s citation to cases in which the language of the statute was unambiguous and contrary to the agency’s interpretation are inapposite. 12 C.F.R. § 7.4000 is consistent with, not contrary to, Section 484. *Compare INS v. Cardoza-Fonseca*, 480 U.S. 421, 444-49 (rejecting INS’s interpretation contrary to the “plain language of the Act”); *Am. Civil Liberties Union v. FCC*, 823 F.2d 1554, 1567-1568 (D.C. Cir. 1987) (per curiam) (rejecting FCC’s attempt “to adopt . . . a definition of a particular term that is at odds with a definition of that very term contained in the Act itself”). Moreover, contrary to defendant’s assertion, the preemptive effect of Section 484 is not an assertion by the OCC of powers in a new area. *See, e.g.*, 36 Fed. Reg. 17000 (Aug. 26, 1971) (promulgating predecessor to 12 C.F.R. § 7.4000 based on prior interpretive rulings); OCC Interpretive Letter No. 614 (Jan. 15, 1993) (state enforcement of state laws against national banks is prohibited exercise of visitorial power). Other cases cited by defendant are equally inapposite. *See Bankwest, Inc. v. Baker*, 411 F.3d 1289, 1300-301 & n.22 (11th Cir. 2005) (declining to defer to alleged FDIC non-regulatory preemption determination, but noting that under the National Bank Act, “national banks are free from state interference”); *Colorado Public Utils. Comm’n v. Harmon*, 951 F.2d 1571, 1578-79 (10th Cir. 1991) (not discussing *Chevron* and declining to defer to Secretary of Transportation’s “advisory, nonbinding” interpretation of regulation).

¹⁵ Defendant disputes the D.C. Circuit’s holding concerning section § 93a based on a sentence in a Senate Committee Report. (Def. Mem. 38.) The 1979 Senate Report defendant cites was directed to a more limited provision that was never enacted. *Compare S. REP. NO. 96-368*, at 38 (1979), *reprinted in* 1980 U.S.C.C.A.N. 236, 249 (1980) (limiting rulemaking authority to responsibilities “under the Financial Institutions Supervisory Act” of 1966) *with* 12 U.S.C. § 93a. The 1980 Senate and House Conference Reports accompanying the final bill—in accordance with its plain language—contain no indication that the OCC’s rulemaking was to be limited other than as expressly provided in the legislation. *See S. REP. NO. 96-640*, at 83 (1980) (Conf. Rep.); *H.R. REP. NO. 96-842*, at 83 (1980) (Conf. Rep.), *reprinted in* 1980 U.S.C.C.A.N. 298, 313 (1980). In any event, the Supreme Court has made clear that “restrictive language contained in Committee Reports is not legally binding,” *Cherokee Nation of Okla. v. Leavitt*, 125 S. Ct. 1172, 1182 (2005), and does not restrict an agency’s exercise of statutory rulemaking power, *see Am. Hosp. Ass’n v. NLRB*, 499 U.S. 606, 616-17 (1991).

the visitorial powers rule, the OCC has issued other rules in which its reasons for preempting state regulation are “extensively developed,” including that “‘national banks’ ability to conduct operations to the full extent authorized by Federal law has been curtailed as a result’ of increasing state efforts to regulate bank activities.” *Wachovia*, 414 F.3d at 320 (quoting 69 Fed. Reg. 1904, 1908 (Jan. 13, 2004)). “When national banks are unable to operate under uniform, consistent, and predictable standards, their business suffers, which negatively affects their safety and soundness.” *Wachovia*, 414 F.3d at 320-21 (quoting 69 Fed. Reg. at 1908 n.25).

There is also no merit to defendant’s argument that *Chevron* deference does not apply because the regulation expands the agency’s authority. (Def. Mem. 37-38.) The regulation does not expand the OCC’s authority. It simply articulates and clarifies the restrictions on other regulators pursuant to a statute that was unquestionably intended to impose such restrictions. In any event, even if the agency interpretation might be said to expand the agency’s power, deference is appropriate. *See Wachovia*, 414 F.3d at 314-15 (granting *Chevron* deference and upholding extension of OCC regulation to operating subsidiaries of national banks); *Wells Fargo*, 2005 WL 1924713 (same); *see also Commodity Futures Trading Comm’n v. Schor*, 478 U.S. 833, 844-47 (1986) (applying *Chevron* to the CFTC’s extension of its jurisdiction to common-law counterclaims); *EEOC v. Seafarers Int’l Union*, 394 F.3d 197, 201-202 (4th Cir. 2005) (rejecting premise that *Chevron* deference “should not apply to interpretations of statutory provisions that delimit agencies’ jurisdiction”); *In re Lyon Cty. Landfill, Lynd, Minn.*, 406 F.3d 981, 983-84 (8th Cir. 2005) (granting *Chevron* deference to EPA’s statutory interpretation on a question of its own jurisdiction); *Okla. Natural Gas Co. v. FERC*, 28 F.3d 1281, 1283-84 (D.C. Cir. 1994) (holding *Chevron* deference applicable even to questions of agency jurisdiction and preemption of state power).

Finally, even if there were judicial decisions that conflicted with the OCC’s interpretation of Section 484—and there are not—the OCC’s interpretation would prevail under a decision issued by the Supreme Court while this motion was pending. As the Supreme Court recently explained, because the “the whole point of *Chevron* is to leave the discretion provided by the ambiguities of a statute with the implementing agency,’ . . . [a] court’s prior judicial construction of a statute trumps an agency construction otherwise entitled to *Chevron* deference only if the prior court decision holds that its construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion.” *Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 125 S. Ct. 2688, 2699-2700 (2005) (quoting *Smiley*, 517 U.S. at 742). Neither *St. Louis* nor any of the lower court decisions cited by defendant or the *amici* involved a holding that Section 484 was unambiguously inconsistent with the standards set forth in the OCC’s regulation.

C. The FHA Does Not Override Section 484.

Defendant’s belated attempt to rely on the FHA fails because it ignores the express requirements of the FHA. The provision of the FHA providing for state enforcement is Section 810(f). That provision authorizes the Department of Housing and Urban Development (“HUD”) to refer proceedings to the State agency “that has been certified . . . with respect to such complaint.” *See* FHA § 810(f) (codified at 42 U.S.C. § 3610(f)). Here, however, the Attorney General does not contend that his office is certified as a state agency authorized to enforce the FHA—and it is not. The only New York State agency so certified is the New York State Division of Human Rights.¹⁶ Moreover, the Attorney General does not contend that the subject of his ongoing inquiry was ever referred by HUD to *any* state agency. Accordingly, this

¹⁶ *See* <http://www.hud.gov/offices/fheo/partners/FHAP/agencies.cfm>.

case does not present any issue concerning the effect of Section 484 on a proceeding pursuant to a referral under 42 U.S.C. § 3610(f).

Section 813 of the FHA (codified at 42 U.S.C. § 3613) also authorizes an action by any “aggrieved person,” but this general provision authorizes a remedy for actual victims of housing discrimination, *see* 42 U.S.C. § 3602(f), typically individuals, and cannot be understood to authorize general state visitation for purposes of Section 484. Section 813 of the FHA does not “authorize” the exercise of “visitorial powers”—it authorizes suits by “aggrieved persons”—and accordingly it does not create any exception to Section 484.¹⁷

Defendant does not contend that the State of New York has incurred a “proprietary” injury—*i.e.*, an injury akin to that of a private litigant to its own proprietary or business interests, *see Alfred L. Snapp & Son, Inc. v. Puerto Rico*, 458 U.S. 592, 607 (1982)—for which it might seek redress as an aggrieved person under the FHA. Rather, defendant’s investigation is based solely on general HMDA statistical data. (*See* Def. Mem. 5-6.) Defendant acknowledges the lack of any claim based on the state’s proprietary interests by arguing that he has *parens patriae* standing, which requires injury to a “quasi-sovereign interest.” *See Snapp*, 458 U.S. at 601, 607; *see also Support Ministries for Persons With Aids, Inc. v. Vill. of Waterford*, 799 F. Supp. 272, 277 (N.D.N.Y. 1992).¹⁸ The doctrine of *parens*

¹⁷ In contrast, Sections 811-12 and 814 expressly provide for the exercise of visitorial powers by the United States Attorney General and Secretary of Housing and Urban Development. 42 U.S.C. §§ 3611-12, 3614.

¹⁸ “In fact, if nothing more than [representation of private interests] is involved . . . then [a state] will not have standing under the *parens patriae* doctrine.” *Snapp*, 458 U.S. at 600. *Parens patriae* standing also requires a finding that individuals could not obtain complete relief through a private suit. *Abrams v. 11 Cornwall Co.*, 695 F.2d 34, 40 (2d Cir. 1982), *vacated on other grounds*, 718 F.2d 22 (2d Cir. 1983). Defendant ignores this requirement and fails to allege that individuals aggrieved under the FHA could not obtain complete relief.

patriae standing does not derive from the FHA and a *parens patriae* suit based on supposed violation of the FHA is not “authorized by Federal law.” Rather, enforcement of laws in a “quasi-sovereign” capacity for the purported benefit of the public, as opposed to redress of an injury to the plaintiff itself, constitutes prohibited visitation. *See Guthrie*, 199 U.S. at 158-159 (visitation is public right to enforce observance of laws governing corporation’s authorized powers).

Nothing in the FHA’s original enactment in 1968 or subsequent amendments by Congress purports to limit the application of Congress’ historical grant of exclusive visitorial powers to the OCC. “Repeals by implication are not favored” and absent either legislative history affirmatively demonstrating intent to repeal or irreconcilability there is no justification for repeal by implication. *Morton v. Mancari*, 417 U.S. 535, 549-50 (1974) (internal quotations and citations omitted); *see also J.E.M. AG Supply, Inc. v. Pioneer Hi-Bred Int’l, Inc.*, 534 U.S. 124, 141 (2001) (same). Moreover, “when two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective.” *Morton*, 417 U.S. at 551. The National Bank Act specifically entrusts the supervision of national banks and enforcement of federal and state laws representing national banks to the OCC. In contrast, the FHA is a broad remedial statute that governs all players in the housing industry—including landlords and realtors—of which lenders, let alone lenders who are national banks—constitute a small part.¹⁹

¹⁹ A more specific statute will be given precedence over a more general one, regardless of their temporal sequence. *See Bulova Watch Co. v. United States*, 365 U.S. 753, 758 (1961); *Cal. Pub. Employees Ret. Sys. v. Worldcom, Inc.*, 368 F.3d 86, 100 (2d Cir. 2004).

II. DEFENDANT’S PAPERS CONFIRM THAT THE CLEARING HOUSE IS ENTITLED TO AN INJUNCTION AGAINST THE ISSUANCE OF NON-JUDICIAL SUBPOENAS.

The immediate occasion for this suit was defendant’s threat to issue subpoenas to obtain national banks’ records concerning their mortgage lending activities. Those subpoenas would violate Section 484 even under defendant’s very narrow reading of the statute. Defendant’s Memorandum seeks to distinguish between state administrative proceedings, which he concedes are prohibited by Section 484, and his commencement of judicial proceedings, which he asserts are exempted by the “courts of justice” clause or are not visitation. These arguments are misplaced for the reasons discussed above, but in any event they have no application to the subpoenas that defendant threatens to issue pursuant to Section 63 of the Executive Law, which he acknowledges are “non-judicial” (Conway Decl. ¶ 4), or to the administrative assurances of discontinuances that appear to be defendant’s normal enforcement procedure (Conway Decl. ¶¶ 5-6). As stated in a Supreme Court case on which defendant incorrectly relies, public “examin[ation] into the conduct of the corporation with a view to keeping it within its legal powers” falls within the definition of visitation and is barred by Section 484. *Guthrie*, 199 U.S. at 158; *see also Wells Fargo*, 2005 WL 1924713, at *2 n.7 (“visitorial power ... encompasses any examination of a national bank’s records relative to the conduct of its banking business”); *Long*, 630 F.2d at 989 (finding explicitly that visitorial powers “encompass examination of the bank’s books and records”).

There is no merit to the Attorney General’s bootstrap argument that “the right to inspect records prior to litigation . . . through subpoena . . . is not visitorial because it is a necessary incident to responsible litigation.” (Def. Mem. 19.) Litigants generally have no right to conduct discovery before commencing an action. *See, e.g.,* FED. R. CIV. P. 26-37; N.Y.

C.P.L.R. § 2302(a). Defendant cannot argue on one hand that he is “just like a private plaintiff” (Def. Mem. 14) authorized to commence an action under the “vested in the courts of justice” exception or pursuant to the FHA to avoid the application of Section 484, only to turn around and argue that he is entitled to exercise his authority as the state’s chief law enforcement officer to conduct pre-enforcement investigations that no private litigant could conduct and that are not authorized by the FHA.

Accordingly, the Clearing House is entitled, at a minimum, to an injunction prohibiting defendant’s threatened issuance of subpoenas.

CONCLUSION

For the reasons set forth above and in its opening memorandum, the Clearing House requests that the Court grant its application for injunctive relief.

Dated: New York, New York
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