

# Financial Institutions

## E-ALERT

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### THE SUPREME COURT'S *CUOMO* DECISION

Earlier today, the Supreme Court's long string of decisions upholding National Bank Act preemption<sup>1</sup> came to an end when the Court announced its opinion in *Cuomo v. The Clearing House Association*. In a closely divided 5-4 decision with Justice Scalia writing for the majority and Justice Thomas writing for the minority, the Court overturned a lower-court decision<sup>2</sup> that had prohibited the New York Attorney General from enforcing state fair lending laws against national banks through judicial proceedings. In so ruling, the Supreme Court rejected the argument that such action by the New York Attorney General was preempted by the OCC's visitorial powers regulation set forth in 12 C.F.R. § 7.400. The Court held in substance that such regulation was not a reasonable application and interpretation of Section 484(a) of the National Bank Act,<sup>3</sup> the statutory visitorial powers provision upon which the regulation was based.

Recognizing that under Section 484(a) the OCC has exclusive powers over national banks subject only to very limited exceptions, the Court's decision focused heavily on the proper interpretation of the phrase "visitorial powers" as used in Section 484(a). In this connection, the Court acknowledged that, "under the familiar *Chevron* framework,"<sup>4</sup> it "defer[s] to an agency's reasonable interpretation of a statute it is charged with administering." The Court also acknowledged that "[t]here is necessarily some ambiguity as to the meaning of the statutory term 'visitorial powers' . . ." and that the OCC can "give authoritative meaning to the statute within the bounds of that uncertainty." But here the Court concluded that it could "discern the outer limits of the term 'visitorial power' even through the clouded lens of history" and that those limits "do not include, as the Comptroller's expansive regulation would provide, ordinary enforcement of the law."

Specifically, the Court adopted the view that its "cases have always understood 'visitation' as the right to oversee corporate affairs, quite separate from the power to enforce the law." Thus, the Court ultimately concluded that "visitorial powers" as used in Section 484 "refers to a sovereign's supervisory powers over corporations." And the Court explained that the exercise of such sovereign supervisory powers includes "any form of [state] administrative oversight that allows a sovereign to inspect books and records on demand even if the process is mediated by a court through prerogative writ or similar means." By the same token, however, so long as a state is engaged only in enforcing its laws in court, the Court concluded that the State "is not exercising its power of visitation . . . ."

On this basis, the Court held that the court below had erred in holding that the New York Attorney General was barred by the OCC's visitorial powers

<sup>1</sup> Compare, e.g., *Watters v. Wachovia Bank, N.A.*, 550 U.S. 1 (2007); *Barnett Bank of Marion County, N.A. v. Nelson*, 517 U.S. 25 (1996); *Nations Bank of N.C., N.A. v. Variable Annuity Life Ins. Co.*, 513 U.S. 251 (1995).

<sup>2</sup> 510 F.3d 105 (2007).

<sup>3</sup> 12 U.S.C. § 484(a).

<sup>4</sup> See *Chevron U.S.A. Inc. v. Natural Resource Defense Council, Inc.*, 467 U.S. 837 (1984).

regulation, issued under Section 484, from enforcing New York's fair lending laws against national banks through judicial enforcement actions. (Consistent with the line it drew between court enforcement actions and administrative supervisory actions, however, the Court did uphold the lower court's ruling that the New York Attorney General was barred from issuing administrative subpoenas for such purposes.)

There are a few points worth particularly noting with regard to the Court's decision —

- *First*, and perhaps foremost, while rejecting the OCC's expansive reading of its exclusive "visitorial powers" under Section 484(a), the Court did not purport to overturn or narrow any of the Court's prior statements regarding substantive preemption of State law. Indeed, in a number of places, the Court's opinion effectively recognized that it was addressing only how "nonpreempted state laws" are to be enforced, not whether substantive state law or rules are to be preempted.
- *Second*, the Court made clear that, in rejecting the broad interpretation of Section 484 reflected in the OCC's visitorial powers regulation, it was not invoking the general presumption against preemption because it was simply "giving force to the plain terms of the National Bank Act" — and the Court in doing so could likewise be read to be signaling that it also was not tampering, at least for substantive preemption purposes, with the long-recognized principle that federal legislation concerning national banks is "not normally limited by, but rather ordinarily pre-empt[s], contrary state law."<sup>5</sup>
- *Third*, as indicated, the Court continued to acknowledge that the OCC is entitled to *Chevron* deference in regard to its interpretation of the National Bank Act. The Court concluded only that the OCC's interpretation of the Act was not a reasonable one in this instance.
- *Fourth*, while the Court's decision purports to draw a distinction between State law enforcement and State supervisory actions directed at national banks, it seems likely that the decision will generate new disputes as to when a state is acting in a law enforcement versus a supervisory capacity — especially insofar as State authorities now seek to shift to the courts actions that they have traditionally pursued through State supervisory and administrative regimes.

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<sup>5</sup> *Barnett Bank of Marion County, N.A. v. Nelson*, 517 U.S. at 32.