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P R O C E E D I N G S

(11:04 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument next in 05-1342, Watters v. Wachovia Bank.

Mr. Blanchard.

ORAL ARGUMENT OF E. JOHN BLANCHARD

ON BEHALF OF THE PETITIONER

MR. BLANCHARD: Mr. Chief Justice, and may it please the Court:

The dual banking system of State and Federal regulation in our nation which we've enjoyed for over 140 years is one of the finest examples of cooperative federalism in our history. For 35 years, the States, not the OCC, have prudently exercised their authority over nonblank State-chartered operating local subsidiaries of national banks. Indeed, Respondent Wachovia Mortgage complied with Michigan law for six years until in 2003 there was a corporate reshuffling and now it claims it's exempt from the same Michigan laws it complied with.

The OCC through its regulation 7.4006 has disrupted the careful balance and seeks to deprive the States of the regulatory authority that they have historically exercised.

JUSTICE KENNEDY: At some point --

1 JUSTICE GINSBURG: But they could do it if
2 the national bank set up this mortgage operations as a
3 division or as a department, then the sole regulator
4 would be OCC, right?

5 MR. BLANCHARD: That's correct, Your Honor.
6 But Wachovia Bank and Wachovia Mortgage made a choice.
7 They made a business judgment to create a
8 State-chartered operating subsidiary.

9 CHIEF JUSTICE ROBERTS: Why did they do
10 that? What's the advantage to them having that
11 subsidiary rather than doing this directly?

12 MR. BLANCHARD: Your Honor, the advantage is
13 that Wachovia Bank insulates itself from liability,
14 because it's a bedrock principle of State corporate law
15 that the parent corporation is not liable for the acts
16 of the subsidiary corporation.

17 CHIEF JUSTICE ROBERTS: So the mortgage
18 subsidiary could possibly get into some trouble that the
19 bank wants to protect itself from and not have -- they
20 have a certain number of assets that are subject to
21 liability in the subsidiary, that they would -- otherwise
22 they'd expose the whole bank to those liabilities?

23 MR. BLANCHARD: Absolutely, Your Honor.
24 From -- the conception behind operating subsidiaries was
25 to separate a certain part of the business and the

1 attendant risks of that business also to separate.

2 JUSTICE SCALIA: Well, I assume that the
3 Federal regulating authorities require a certain ratio
4 of loans -- to real estate value, things of that sort.
5 And I assume that the States may have different rules
6 with regard to that; right? In other words, the oversight
7 may be different. The States may be more permissive
8 as to certain loans or as to, you know, what the balance
9 sheet of the bank has to look like than the Federal
10 Government is. And if you have a State subsidiary that
11 is overseen by State authorities, you might have a
12 different result.

13 MR. BLANCHARD: Possibly, but --

14 JUSTICE SCALIA: Well, if not I don't see
15 any advantage in this great Federal banking system
16 you're talking about, if it's Tweedledum and Tweedledee.

17 MR. BLANCHARD: Well, the States do not --
18 exclusive visitorial powers over national banks rest
19 with the OCC. But Wachovia Bank and Wachovia Mortgage
20 are separate and distinct.

21 CHIEF JUSTICE ROBERTS: You're not seeking
22 visit -- "visitorial," is that the word?

23 MR. BLANCHARD: Correct.

24 CHIEF JUSTICE ROBERTS: You're not seeking
25 visitorial rights with respect to the parent bank?

1 MR. BLANCHARD: Absolutely not.

2 CHIEF JUSTICE ROBERTS: You're not arguing
3 that because you need to see more about the mortgage
4 subsidiary you need to see what the parent is up to?

5 MR. BLANCHARD: No.

6 CHIEF JUSTICE ROBERTS: Okay.

7 MR. BLANCHARD: No, we're not. Michigan and
8 the States want to be able to help their citizens with
9 abusive and predatory lending complaints.

10 JUSTICE BREYER: Suppose that it was a
11 national bank. Forget the subsidiary. And your State
12 says: Well, we want to have a law here that says we
13 want to send our own bank examiners in. And moreover,
14 we don't want them to make any loans in excess of 12
15 percent interest. Fine. Would that be constitutional?
16 I mean, wouldn't it be preempted?

17 MR. BLANCHARD: As to the national bank?

18 JUSTICE BREYER: Yes.

19 MR. BLANCHARD: Yes.

20 JUSTICE BREYER: Yes, of course, because it
21 conflicts and they don't want it.

22 MR. BLANCHARD: Yes.

23 JUSTICE BREYER: All right. Do they have
24 the authority to say a subsidiary is a national bank?

25 MR. BLANCHARD: No.

1 JUSTICE BREYER: No, they can't? Where is
2 it in the law that says they don't have the authority to
3 say that a subsidiary of a national bank owned by a
4 national bank is a national bank? Is there something
5 specifically that stops them from saying that?

6 MR. BLANCHARD: Yes.

7 JUSTICE BREYER: What?

8 MR. BLANCHARD: The Dole Foods case, the --

9 JUSTICE BREYER: What is it? What is it --
10 I mean, what statute or what is it that prevents them
11 from saying it? I don't know the Dole Foods case.

12 MR. BLANCHARD: Well, the point is that the
13 corporate law recognizes the two as separate and
14 distinct corporate entities.

15 JUSTICE SCALIA: Well, the statute says -- I
16 thought your point was that the statute defines national
17 bank, but also defines affiliates, and refers to them as
18 two separate entities.

19 MR. BLANCHARD: Yes, Your Honor.

20 JUSTICE SCALIA: And I thought your point
21 was that the effect of this regulation is to simply
22 eliminate that distinction?

23 MR. BLANCHARD: You're right.

24 CHIEF JUSTICE ROBERTS: Their argument, they
25 haven't argued -- I realize this was a hypothetical, but

1 they haven't argued that the subsidiary should be
2 treated as a national bank. They're arguing that
3 they're entitled to say that the same preemption that
4 applies to the national bank applies to the
5 subsidiary.

6 MR. BLANCHARD: Exactly. That's what they
7 --

8 CHIEF JUSTICE ROBERTS: Presumably, if they
9 said it's treated as a national bank they would lose the
10 benefit of the separate corporate existence when it came
11 to issues of liability. If they said this subsidiary is
12 a national bank, then presumably that the separate
13 corporate existence that they're seeking to take advantage
14 of would be obliterated.

15 MR. BLANCHARD: Well, but that's the -- they
16 are trying to contend that they are one and the same.
17 But they can't have their cake and eat it, too.

18 JUSTICE KENNEDY: Well, I guess we can ask
19 the Respondents. But is it your understanding that
20 respondents take the position that the State has no
21 control at all over whether or not the shares have been
22 properly issued, whether or not certain accounting
23 requirements applicable to all corporations have been
24 complied with?

25 MR. BLANCHARD: Yes, that is my

1 understanding of their position.

2 JUSTICE KENNEDY: They say that there's no
3 area of State law that is applicable to the subsidiary
4 corporation?

5 MR. BLANCHARD: They are saying that
6 visitorial powers over the State-chartered operating
7 subs is exclusively --

8 JUSTICE KENNEDY: I could understand that
9 with reference to just the amount of consumer loans, as
10 Justice Scalia was talking about. But if it's just to
11 see that the corporation has a -- had -- had a meeting
12 that year, has duly elected its officers under State law,
13 do the Respondents take the position you have no authority
14 to visit the corporation to determine that?

15 MR. BLANCHARD: They take the authority --
16 the position that Michigan has no authority to impose on
17 the State-chartered operating sub the two Michigan
18 laws --

19 JUSTICE GINSBURG: But let's straighten out
20 two different kinds of regulations. I think
21 Justice Kennedy was talking about regulations of the
22 chartering State. This subsidiary was set up under the
23 law of a State. It wasn't Michigan. Is there -- is
24 anyone contesting that -- was it North Carolina?

25 MR. BLANCHARD: Yes, you're correct.

1 JUSTICE GINSBURG: -- that they have to meet
2 all the requirements for setting up a corporation and
3 having meetings and all that that North Carolina
4 requires for corporations that are incorporated in that
5 State?

6 MR. BLANCHARD: No, I've not heard them say
7 that as to North Carolina law. But what they're saying
8 is that the Michigan Mortgage Brokers, Lenders and
9 Servicers Licensing Act and the Michigan Secondary
10 Mortgage Act do not apply to them.

11 JUSTICE KENNEDY: Well, that seems to me
12 just a standard preemption case. It's not as broad as
13 this visitorial powers generally. Maybe I'm wrong. Do
14 some subsidiaries of the -- of a national bank do things
15 other than banking, say title insurance or something
16 like that? I don't see anything in the record where the
17 OCC wants to displace the State as to that. This is
18 just a standard preemption case. When the OCC has
19 regulations that control, then the State has no
20 authority to add to those regulations or to have, or to
21 have contrary regulations. But if it's something that
22 doesn't have to do with banking at all, then I suppose
23 they would say -- I can ask them -- I suppose they would
24 say the State has authority to regulate.

25 MR. BLANCHARD: The important point, though,

1 Your Honor, is that the OCC has no independent power to
2 preempt the validly enacted legislation of a sovereign
3 State.

4 JUSTICE BREYER: Doesn't it have exactly the
5 same power that any other agency or Congress has? That
6 it has the power, if its regulation is authorized, it
7 has the power to what they say, preempt a State law that
8 obstructs, impairs, or conditions a bank's ability fully
9 to exercise its federally authorized real estate lending
10 powers? That's what they say, and then they list some
11 examples.

12 Suppose they said nothing. Wouldn't we be
13 in the same boat? After all, a State cannot, under the
14 Federal Constitution, normally, enact a law that
15 interferes or stands as an obstacle to the achievement
16 of the objective of the Federal law.

17 So if that's right, or if it's wrong,
18 explain why it's wrong, but if it's right, why don't you
19 tell me whether your two laws that you are worried about
20 do or do not stand as an obstacle to the full
21 achievement of the purposes of the statute as
22 implemented by their regulation?

23 MR. BLANCHARD: They do not.

24 First of all, if the OCC -- if Congress
25 intends to alter the balance that I spoke of earlier, it

1 must do so with clear and manifest language. There must
2 be unmistakably clear language that Congress intended to
3 authorize the OCC to preempt the State law.

4 JUSTICE BREYER: Let's assume I don't agree
5 with you about that, that I think conflict preemption
6 does not require clear language. Assume that, even
7 though you disagree with it. Now on my assumption that
8 you can have the law if it doesn't conflict, but you
9 can't have the law if it does conflict, so now you
10 explain to me why the two laws at issue here don't
11 conflict.

12 MR. BLANCHARD: Your Honor, in the Barnett
13 case and in the Atherton case, in order to have the kind
14 of problem you're talking about, there must be a
15 significant interference with the business of banking or
16 an incapacitation of the business of banking. Our
17 Michigan law doesn't incapacitate what --

18 JUSTICE GINSBURG: Mr. Blanchard, may I ask
19 you a question, perhaps preliminary to what you are
20 launching into? My understanding was that you did not
21 question the OCC's regulatory authority over a unit that
22 it says can do what the national bank itself could do in
23 the real estate business, no more, no less. OCC
24 regulation, visitation, and all the rest, OCC's
25 regulations validly applied to this subsidiary that has

1 been set up in North Carolina and is operating in Michigan;
2 is that right? If one thing is for you to say we have
3 the authority to regulate. Are you saying at the same
4 time that OCC is out of the picture because there's dual
5 regulation is just -- conflicts will be inevitable if --

6 MR. BLANCHARD: I am not saying that. What
7 I am saying is the OCC does not have the exclusive
8 right.

9 JUSTICE GINSBURG: Ah, you're saying, you
10 started to say they can't have their cake and eat it
11 too, but you're saying they can have the worst of all
12 possible regulatory worlds -- that is they've got two
13 equally competent -- regulators, and they have to meet
14 the requirements of both?

15 MR. BLANCHARD: Yes. I am saying that --

16 CHIEF JUSTICE ROBERTS: And if they don't
17 want to, they don't have to set up a separate
18 subsidiary, right? They can do this business directly
19 as a national bank and they're not going to be subject
20 to any visitation then?

21 MR. BLANCHARD: You are absolutely correct.
22 As I started to say earlier, they made that choice and
23 they came to Michigan, and they obtained a certificate
24 of authority from the Michigan Corporations Division as
25 a foreign for-profit corporation doing business in the

1 State.

2 CHIEF JUSTICE ROBERTS: Right. And I would
3 have thought your answer to Justice Breyer was yes, that
4 they get to regulate to the extent they want to, and the
5 State does, and if there's a conflict, the Federal
6 regulation will prevail, but what's the problem here is
7 that they're issuing a categorical regulation saying the
8 State can't regulate at all.

9 MR. BLANCHARD: Yes. They are claiming
10 exclusive preemptive authority.

11 JUSTICE SCALIA: I didn't understand that
12 you made this --

13 JUSTICE STEVENS: May I just finish, please?
14 You argued, as I understand it, correctly, that the
15 State does, exercises certain regulatory controls that
16 will not be exercised -- will not be replaced by Federal
17 controls; is that right? In other words, you -- that
18 they will be unregulated to a certain extent? There
19 will be less regulation under the Federal sovereign than
20 there is under the State; is that correct?

21 MR. BLANCHARD: You are correct, Your Honor,
22 in that Wachovia Mortgage as a subsidiary of a national
23 bank is a registrant under Michigan law. And as a
24 registrant, it is not subject to an annual --

25 JUSTICE STEVENS: Can you give me some

1 specific examples of what Michigan would require that
2 the OCC does not require? You mentioned licensing, for
3 example.

4 MR. BLANCHARD: Michigan would require
5 Wachovia Mortgage to register. There's a difference
6 between registration and licensure. As a subsidiary of
7 Wachovia Bank, they are a registrant like they've been
8 for the last --

9 JUSTICE STEVENS: Does that have any impact
10 on the way they run their business?

11 MR. BLANCHARD: No.

12 JUSTICE STEVENS: I mean, does it make any
13 difference as a matter of what they have to do in order
14 to comply with the law that they are now exempt from
15 Michigan rules and will be subject to Federal rules
16 instead?

17 MR. BLANCHARD: No. Michigan just wants to
18 be able to -- and the other States -- to deal with fraud
19 and deceit and material misrepresentation in mortgage
20 transactions, and to have a say over the corporations
21 that come to their State and do business.

22 JUSTICE SCALIA: Mr. Blanchard, if I could
23 go back to what you were saying just before this last line
24 of questioning, I didn't understand your position to be
25 that the OCC can come in and regulate this non-Federal

1 bank up to the point where its -- well, can do it
2 apparently without limitation. And where its regulation
3 conflicts with the State regulation, the Federal
4 prevails.

5 MR. BLANCHARD: Or the more restrictive.

6 JUSTICE SCALIA: Ah, or the more
7 restrictive.

8 MR. BLANCHARD: That's the difference.

9 JUSTICE SCALIA: The Federal Government says
10 you can have outstanding loans of \$10 billion and the
11 State says no, you can have outstanding loans of
12 \$8 billion.

13 MR. BLANCHARD: No, Your Honor, the --

14 JUSTICE SCALIA: Wait. What happens in that
15 situation?

16 MR. BLANCHARD: Well, it doesn't happen in
17 Michigan because --

18 JUSTICE SCALIA: Well, invent some other
19 hypothetical then. I'm talking about a situation in
20 which the Federal law is more permissive than the State
21 law. Which law prevails? The Federal law allows this
22 bank to do things which the State law would not allow it
23 to do. As I understood your prior answer, you say oh,
24 of course, if the Federal law allows to it do things the
25 State law doesn't allow to it do, the Federal law

1 prevails. I didn't understand that to be your position.
2 And if it is your position, I don't know what all this
3 fuss is about. That's the end of the game, isn't it?

4 MR. BLANCHARD: No, Your Honor. You see,
5 in -- we do not conduct -- they are exempt from an
6 examination where we go in and look yearly at such
7 things as capital assets management, earnings,
8 liquidity. Those aren't the kinds of things that we're
9 talking about. They, as a registrant, they are exempt
10 from that, from an annual examination. They're not
11 incapacitated, nor are --

12 JUSTICE SCALIA: Exempt from State
13 examination?

14 MR. BLANCHARD: Yes. The State-chartered
15 corporation, Wachovia Mortgage, is exempt under Michigan
16 law from an annual examination.

17 JUSTICE BREYER: We're not looking for that.
18 We're looking for the opposite. As I read this, the
19 banking agency has not said, we wipe out all of your
20 laws. They've said, we wipe out a subset of laws, which
21 are defined as those laws that obstruct, impair, or
22 limit the ability of this bank to fulfill its federally
23 mandated powers. Okay? So they're just saying, we only
24 get the ones that are in conflict. Now, they then have
25 a list of which ones they preempt and which ones they

1 don't. So my question to you is, give me a list here of
2 which ones they think conflict that you think don't.

3 MR. BLANCHARD: They -- their position is
4 that both laws that we append to our brief, both laws in
5 their entirety, are preempted.

6 CHIEF JUSTICE ROBERTS: Their position is
7 not that it only preempts in cases of conflict. Under
8 12 CFR 7.4006, it says, "State laws apply to national
9 bank operating subsidiaries" -- that's what we're dealing
10 with here -- "to the same extent that those laws apply to
11 the parent national bank," which is to say not at all.

12 MR. BLANCHARD: Correct.

13 CHIEF JUSTICE ROBERTS: So it's not a case
14 of conflict preemption. It's a case -- they're trying to
15 preempt State law whether it conflicts or not, correct?

16 MR. BLANCHARD: That's correct, Your Honor.

17 JUSTICE GINSBURG: You do have -- the one
18 thing that seems concrete and clear to me -- correct me
19 if I get this wrong -- Michigan is kind of deferring to
20 OCC in a primary jurisdiction sense. It says customer,
21 if you've got a complaint about what this operating
22 subsidiary is doing, you go first to the OCC; and then
23 if we think -- we, Michigan -- think OCC has not given
24 you an adequate response to your complaint, we take
25 over.

1 MR. BLANCHARD: You are exactly correct.
2 That's the Michigan regulatory --

3 JUSTICE GINSBURG: So it's kind of a reverse
4 supremacy. Where it's usually the Feds that have the
5 last word, but here you're saying Michigan has decided
6 that it will let OCC go first and Michigan will be kind
7 of a supervisor for the adequacy of the OCC's handling
8 of the consumer's complaint?

9 MR. BLANCHARD: Yes, you are exactly
10 correct. Our regulatory framework in Michigan says that
11 the complaint is referred to the appropriate Federal
12 agency, and only if that complaint is not being
13 adequately pursued does the commissioner have that
14 window of investigative authority for her to pursue it.
15 It is a cooperative type of statute.

16 JUSTICE GINSBURG: Do you know another
17 arrangement where the Federal agency goes first but then
18 the State agency has authority to say Federal agency,
19 you didn't deal with this consumer adequately, so we
20 will take over? I know schemes that work the other way
21 where the State goes first, and then the Federal
22 authority, but do you know another one?

23 MR. BLANCHARD: Another one that --

24 JUSTICE GINSBURG: Where the primary
25 adjudicator, decisionmaker would be the Federal

1 authority, but then the State can override that if it
2 thinks the Federal authority hasn't done an adequate
3 job?

4 MR. BLANCHARD: Well, in a sense, in our
5 statute, the commissioner of the State agency is able to
6 investigate if the complaint referred to the Comptroller
7 has not been adequately --

8 JUSTICE SCALIA: That's not the question.
9 Justice Ginsburg is trying to find out if you know any
10 other situation where when the Federal agency doesn't do
11 an adequate job, the State agency comes in?

12 MR. BLANCHARD: No situations come directly
13 to mind.

14 JUSTICE SCALIA: Maybe civil rights actions
15 where there's a Federal agency that has some remedial
16 powers and if the Federal agency doesn't act, the
17 citizen is free to bring litigation in State court? I
18 guess that would be --

19 CHIEF JUSTICE ROBERTS: Or environmental
20 regulation where just because the Federal EPA doesn't
21 take a particular action against a polluter, doesn't
22 mean that the State can't take action against the
23 polluter.

24 MR. BLANCHARD: Yes, Your Honor.

25 JUSTICE GINSBURG: Isn't the action an

1 inadequate action? Michigan is saying yes, the Federal
2 authority can do with respect to this unit just what it
3 would do for a national bank itself, but if we think that
4 is inadequate, it's not a question of just one act or the
5 other, but it is the State judging the adequacy of a
6 particular Federal response.

7 MR. BLANCHARD: Yes.

8 CHIEF JUSTICE ROBERTS: So if the Federal
9 U.S. Attorney prosecutes, decides to prosecute someone
10 for manslaughter, the State can decide that's not an
11 adequate enough response and prosecute them for murder,
12 right?

13 MR. BLANCHARD: Yes, Your Honor.

14 JUSTICE ALITO: Could the OCC go through
15 your --

16 JUSTICE SCALIA: I'm sorry -- can I just ask --

17 JUSTICE ALITO: Sure.

18 JUSTICE SCALIA: Because it still goes to the
19 same thing. Does Michigan do this by grace? If Michigan
20 wanted to, could it just tell the Feds to butt out and
21 say, you know, all these years we've been letting you
22 come in first, and we only step in when we think you
23 haven't done a good job, but we've had it.

24 (Laughter)

25 JUSTICE SCALIA: Especially after this

1 lawsuit, get out, we're going to regulate our State
2 banks?

3 MR. BLANCHARD: No, Your Honor. That would
4 be contrary to the express statutory scheme in Michigan.

5 JUSTICE SCALIA: I know in Michigan. I'm
6 saying, could Michigan change its statutory scheme to
7 kick the Feds out? Or would that be prevented by this
8 Federal statute we're discussing here? I'm trying to
9 see what you think this Federal statute does. Or what
10 the --

11 MR. BLANCHARD: The Federal rule provides
12 that the operating -- the State-chartered operating subs
13 are to be treated just like the law pertaining to the
14 parent national bank. And there is no authority from
15 Congress given to the OCC to enact that kind of rule.
16 The OCC only has the authority that Congress gives it,
17 either through a preemptive statute or through the
18 delegation of preemptive authority; and Congress has
19 not given them that kind of power.

20 JUSTICE SOUTER: Let me ask the question
21 which is antecedent to the regulatory question. You do
22 not dispute -- Michigan does not dispute -- that the
23 operating -- well, strike that.

24 Michigan does not dispute that national
25 banks can go into the business of real estate loans.

1 And Michigan does not dispute that Congress
2 has authorized national banks to operate through
3 subsidiaries for specific purposes like this.

4 My question is can you give me any plausible
5 reason to think that Congress would have contemplated
6 this system of potentially more restrictive State
7 legislation when its national bank in a given instance
8 decides to do -- to exercise its Federal banking power
9 through a subsidiary rather than directly?

10 Can you think of any reason that Congress
11 would have contemplated the scheme that you're, that
12 you're defending?

13 MR. BLANCHARD: Well, first of all, Your
14 Honor, I'm not defending that Michigan has a more
15 restrictive scheme or that Michigan law in any way
16 incapacitates or significantly interferes with the
17 business of banking.

18 JUSTICE SOUTER: Well, if, if -- if the
19 banks have got, let's say, the subsidiary has to go
20 through two rounds of bank inspection every year instead
21 of one round, it is going to cost them something.
22 Regulation costs the regulated entity something. It is
23 a burden on them.

24 And we also have to assume that there may be
25 instances -- you brought it up -- in, in which the, the

1 -- the State burden is heavier. So with those
2 possibilities in mind, can you think of any reason why
3 Congress in authorizing the exercise of the Federal
4 banking power through a subsidiary would have
5 contemplated that Michigan or any State would have this
6 authority?

7 It seems counterintuitive to me. They're
8 saying you can -- you can -- you bank can exercise
9 the Federal banking power through a subsidiary. It
10 would seem strange to me that Congress would silently
11 say, "and, of course, we acquiesce to a -- a dual system
12 of regulation that would not apply to the bank itself."

13 What reason would Congress have had for
14 assuming that might be the result?

15 MR. BLANCHARD: A recognition that the
16 States have a sovereign, compelling and legitimate
17 interest in regulating those corporations that it
18 charters and that do business within its borders. And
19 -- and that that balance should be respected.

20 JUSTICE SOUTER: So it is State sovereign
21 immunity in effect, is the answer -- State sovereignty
22 is rather the answer?

23 MR. BLANCHARD: But the - but the key point,
24 and I would like to reserve whatever time I may have.

25 CHIEF JUSTICE ROBERTS: You better hurry

1 then.

2 MR. BLANCHARD: The key, the key point is
3 that Congress has distinguished clearly and
4 unequivocally between affiliates and national banks; but
5 it has not included affiliates in either section 481 or
6 484 of the National Bank Act.

7 National banks are not synonymous or
8 equivalent to the State-chartered operating
9 subsidiaries.

10 CHIEF JUSTICE ROBERTS: Thank you,
11 Mr. Blanchard.

12 Mr. Long.

13 ORAL ARGUMENT OF ROBERT A. LONG

14 ON BEHALF OF RESPONDENT

15 MR. LONG: Mr. Chief Justice, and may it
16 please the Court:

17 I would like to start with the question that
18 Justice Souter asked because there are some important
19 principles that are really not disputed in this case,
20 and I think they help to focus the issue that is before
21 the Court.

22 There is no dispute, as we understand it,
23 that mortgage lending by national banks is supervised
24 exclusively by the Comptroller of the Currency. And
25 there is also no dispute that national banks' incidental

1 powers under section 247 include the power to make
2 mortgage loans through an operating subsidiary. And an
3 additional point is that both Federal statutes and
4 Federal regulations State that when national banks make
5 mortgage loans or exercise their banking powers through
6 subsidiaries they do so subject to the same terms and
7 conditions that apply to the exercise of the power by
8 the national --

9 JUSTICE STEVENS: Mr. Blanchard, may I ask
10 you a factual question that I just don't understand.
11 Wachovia has branch banks all over the country. Are
12 they generally subsidiaries or are they divisions of
13 the bank?

14 MR. LONG: Well, a branch of a national bank
15 has a particular status under section 36 of the National
16 Bank Act.

17 JUSTICE STEVENS: I understand that. I'm
18 asking a factual question.

19 MR. LONG: It would not be separately
20 incorporated. So --

21 JUSTICE STEVENS: They are actually
22 divisions of the national bank itself?

23 MR. LONG: Well, I think they are generally
24 referred to as branches but I think it would be more a
25 division. That would be --

1 JUSTICE STEVENS: At least they are not
2 separate corporate subsidiaries.

3 MR. LONG: That -- that --

4 JUSTICE STEVENS: Why is it that the
5 bank decided to use the subsidiary approach for this
6 business, rather than the more traditional banking
7 approach?

8 MR. LONG: Well, of course, anything that a
9 bank does through an operating subsidiary it could do
10 through the bank. It can always do it through the bank.
11 But there are many reasons why a bank may choose an
12 operating subsidiary. They can be managerial reasons;
13 it's -- just sometimes works better as matter of
14 business management.

15 JUSTICE STEVENS: It protects from
16 liability, too.

17 MR. LONG: Well, that is one of the reasons.
18 Although --

19 JUSTICE STEVENS: Because there is business
20 in the district.

21 MR. LONG: I will say, Justice Stevens, I
22 have not been able to find examples of national bank
23 operating subsidiaries that have become insolvent. They
24 are regulated very heavily by the Comptroller and so
25 they don't.

1 CHIEF JUSTICE ROBERTS: But you have a
2 subsidiary that's in the mortgage lending business that
3 presumably competes with other companies in the mortgage
4 lending business that are not associated with national
5 banks, and you're claiming an immunity from the
6 regulation that your competitors are subject to. Is
7 that right?

8 MR. LONG: Well, but again, Mr. Chief
9 Justice, the national banks compete. And its undisputed
10 --

11 CHIEF JUSTICE ROBERTS: And that's fine, and
12 they have an express provision in 48 -- 484(a) that says
13 they're, they're exempt from regulation. The question
14 is whether a separate subsidiary that is not a national
15 bank that competes with other mortgage lending companies
16 is immune from the regulation that those other
17 companies --

18 MR. LONG: But again, Mr. Chief Justice,
19 thrifts, S&Ls, State-chartered banks in all 50 States
20 are permitted to have operating subsidiaries. It's
21 recognized not just for national banks, but really for
22 all types of banking institutions, that operating
23 subsidiaries are a useful tool of banking. This is not
24 a sort of special privilege that's given --

25 CHIEF JUSTICE ROBERTS: Justice Breyer's

1 questions were pointing out, to the extent your
2 regulation -- the Federal regulation of your subsidiary
3 conflicts with the State law, that regulation is going
4 to prevail. The question is whether or not you are
5 immune from State regulation across the board --

6 MR. LONG: Well, and you asked that
7 question. I mean, I think it might be useful to think
8 first about national banks and then about the operating
9 subsidiaries. It is not true that there are no State
10 laws that apply to national banks.

11 This Court's unanimous Barnett Bank decision
12 is the clearest statement of the principle. Any State
13 laws that prevent or significantly impair or impede the
14 exercise of national banking powers are preempted. But
15 many State laws having to do with contracts --

16 JUSTICE ALITO: In real world terms, what's
17 involved here? What are examples of some of the things
18 that Michigan does or some other State does that impair
19 or impede the operations to the greatest extent --

20 MR. LONG: The beginning is, it is a
21 complete separate set of regulation. You have to
22 register or obtain a license. You have to submit to
23 examination by the regulator. Investigation.
24 Enforcement. There are substantive laws; Michigan has
25 some that are not directly at issue in this case --

1 CHIEF JUSTICE ROBERTS: One of those laws
2 might be, I mean, let's say they have a law, when you're
3 issuing a mortgage to a consumer, you have to give them
4 a disclosure about how much they're going to end up
5 paying over the life of the loan and all that. And they
6 require that of anybody who issues a mortgage in
7 Michigan. Could that law be applied to your subsidiary?

8 MR. LONG: Well, the question, Mr. Chief
9 Justice, would be is it preempted as to the national
10 bank? The Comptroller of the Currency would say yes.
11 But the issue in this case is if it is preempted as to
12 the national bank, then it is also preempted when the
13 national bank chooses to exercise this power that it has
14 under section 247 --

15 CHIEF JUSTICE ROBERTS: Isn't -- isn't your
16 friend correct then? You are really trying to have your
17 cake and eat it, too. You're saying if we did this
18 without a subsidiary, we wouldn't be subject to that.
19 But you want to be able to operate through a subsidiary
20 and yet not be subject to the same rules that apply to
21 other people.

22 MR. LONG: No, but it, with respect, it
23 is not really a case of having our cake and eating it,
24 too. We are in the area of powers of national banks.
25 And the Court has recognized for a century that in that

1 area, when national banks have powers, including
2 incidental powers recognized by the Comptroller, they
3 generally preempt any State law that prevents or
4 significantly interferes with the exercise of that power
5 --

6 JUSTICE BREYER: That's the question I had.
7 I got somewhat thrown by the Chief Justice's question,
8 because I thought first, when I read the reg, 34.4.(a)(B),
9 that those things that are preempted are those things
10 that obstruct, impair or condition, or in other words
11 limit, the Federal powers of a national bank.

12 MR. LONG: That, that is correct.

13 JUSTICE BREYER: So I thought we were
14 basically dealing with conflict --

15 MR. LONG: Yes.

16 JUSTICE BREYER: -- not fielding.

17 MR. LONG: It's -- that's one level --

18 JUSTICE BREYER: But -- but the last part of
19 the reg says that what applies, no State law applies to
20 a national bank operating subsidiary if it doesn't apply
21 to the parent bank. Then I began to think it fields
22 preemption. Am I right in thinking that it is conflict
23 preemption, not field, because it is conflict in the
24 case of a national bank?

25 MR. LONG: Well -- it's, it's a very

1 important point. And our position is there are actually
2 several ways in which you could analyze this case and
3 arrive at the conclusion that the Comptroller's
4 regulations are valid. One is looking simply to
5 statutory language and saying we would, we the Court
6 would reach this result as we did in the Franklin
7 National Bank case even without any regulation. A
8 second way is to say the regulations are a reasonable
9 interpretation of the statute. A third is to say that
10 the Comptroller has broad rulemaking authority. And as
11 this Court has recognized in de la Cuesta and many other
12 cases, an agency exercising its rulemaking authority can
13 preempt State laws even where the statute itself would
14 not --

15 JUSTICE SCALIA: I think, the question is
16 not whether it can preempt State laws but whether the
17 rulemaking authority can, can eliminate a, a basic
18 division of the statute into a national bank and
19 affiliates of a national bank. The statute makes a
20 clear distinction between the two. And the effect of
21 what, of what the agency has done here is simply to
22 eliminate that distinction, and to say really it doesn't
23 matter.

24 MR. LONG: No. It -- I --

25 JUSTICE SCALIA: If you are an affiliate of

1 a national bank, you have the same immunity that the
2 national bank has. That's not what the statute says.

3 MR. LONG: I have a two-part answer to that
4 question, Justice Scalia. One is that section 484 of
5 the section you're referring to does limit the
6 visitorial authority as to national banks, but it is
7 silent as to operating subsidiaries or any other type of
8 affiliate. States do exercise visitorial authority over
9 some affiliates of national banks. That's established.
10 Operating subsidiaries are a special type of affiliate;
11 484, which was enacted during the Civil War, a hundred
12 years before operating subsidiaries were authorized,
13 really doesn't address the question of visitorial
14 authority.

15 JUSTICE SCALIA: I mean, an operating
16 subsidiary is an affiliate, right? What kind of
17 affiliates did they have before they had operating
18 subsidiaries? Did they rent pool halls, or what?

19 MR. LONG: It's a type of affiliate --

20 JUSTICE SCALIA: I would have thought that
21 any affiliate of a national bank would, would be engaged
22 in essentially banking business.

23 MR. LONG: But, but this really became
24 clear, in answer to your question, in part two of my
25 answer. In 1999 when Congress enacted the

1 Gramm-Leach-Bliley Act, it directly addressed this
2 question of affiliates of national banks. And this is
3 on page 2a of our appendix. It referred to, it created
4 a new type of affiliate, for the first time, financial
5 subsidiaries which can do anything financial in nature.
6 So they can actually engage in activities that the
7 parent national bank could not.

8 But if you look at the bottom of page 2a of
9 our appendix, this is section 24(a) now of the act, it
10 said that financial subsidiaries can also engage in
11 activities that are permitted for national banks to
12 engage in directly, subject to the same terms and
13 conditions that govern the conduct of the activities by
14 a national bank.

15 And then at the bottom of 3a and going over
16 to 4a where they actually define financial subsidiaries,
17 they do so by distinguishing them from the operating
18 subsidiaries which had existed for decades. And at the
19 top of 4a you see that the operating subsidiary again
20 engages only in activities that the national banks may
21 engage in directly and are conducted subject to the same
22 terms and conditions.

23 Then if you'll bear with me a moment longer,
24 on page 12a of our appendix some additional provisions
25 of GLBA -- actually, that's the Gramm-Leach-Bliley Act,

1 GLBA people call it -- said -- this is on 12a -- that
2 securities activities and insurance activities,
3 activities that have been traditionally subject to State
4 regulation, if they're engaged in by a functionally
5 regulated subsidiary, an operating subsidiary or a
6 financial subsidiary, then they may be regulated by
7 relevant State securities authorities or State insurance
8 authorities.

9 So Congress was actually quite specific.
10 I mean, your question is about statutory language. You
11 don't find this in 484, which is, since it's a century
12 old, doesn't really get into this. But in this 1999
13 statute, it's all about subsidiaries of national banks.
14 Congress was pretty clear if it's securities, if it's
15 insurance, it can be regulated by States. They were
16 specific about that. If it's a banking activity that
17 the bank itself can undertake, it's subject to the same
18 terms and conditions.

19 And so, going back to the Chief
20 Justice's question, you have this issue of would it
21 be a preempted State law if it were applied to the
22 national bank when the national bank is making a
23 mortgage loan. Not every State law is preempted
24 because not every State law conflicts. But if it
25 does --

1 CHIEF JUSTICE ROBERTS: What authority
2 do you have for the proposition that when then Federal
3 law says subject to the same terms and conditions that
4 they're referring to State regulation as opposed to the
5 same Federal regulation that applies to the national
6 banks?

7 MR. LONG: Well, I mean, we have section
8 7.4006, which is the OCC's regulation interpreting that
9 language in the statute and in its own OPSUB
10 regulations, section 5.34. And we also relied simply on
11 the ordinary meaning of "terms and conditions." It
12 means prerequisites, limitations.

13 CHIEF JUSTICE ROBERTS: Was 7.4006 issued
14 pursuant to -- what did you call it, GLBA?

15 MR. LONG: GLBA?

16 CHIEF JUSTICE ROBERTS: Yes. Or did it
17 predate that?

18 MR. LONG: 7.4006 was issued pursuant to
19 24-7, which is this incidental powers provision, and
20 24(a), which I've just been walking you through, which
21 is a provision of GLBA. So it is based partly upon
22 GLBA, and it is an interpretation of the same terms and
23 conditions language.

24 JUSTICE BREYER: Conflict preemption
25 basically strikes down a State law that stands as an

1 obstacle to the full enforcement of the Federal law.

2 MR. LONG: Yes.

3 JUSTICE BREYER: All right. Now, with that
4 in mind, suppose that you didn't have either 7.4006 or
5 34.4(a)(B). Neither existed. But we listened to what
6 the agency said as a Court and they explained how the
7 regulation works. Would you expect to come to
8 precisely the same result?

9 MR. LONG: Well, I mean, of course --

10 JUSTICE BREYER: Would you or not?

11 MR. LONG: We do have them and we think that
12 makes the case easier, of course.

13 JUSTICE BREYER: I know, but would you --
14 would you expect to come to the same result or not?

15 MR. LONG: Yes. We would say that if you
16 start with 24-7 and the incidental powers of national
17 banks and the undisputed point that one of those
18 incidental powers is for the national bank --

19 CHIEF JUSTICE ROBERTS: How does it conflict
20 with Federal banking authority for the State to audit
21 the books of the mortgage subsidiary?

22 MR. LONG: Well, it has been established
23 since the beginning of the national banking system
24 that -- and this goes back to the history of the first
25 and second Bank of the United States in McCullough

1 against Maryland -- that the national banking system is
2 protected from possibly unfriendly State legislation.

3 CHIEF JUSTICE ROBERTS: Take my earlier case
4 about the consumer disclosure. Michigan has a law, I
5 assume, that any mortgage lender has to tell the
6 consumer all this information. Would that conflict with
7 the authority of a national bank?

8 MR. LONG: The Comptroller's view as I
9 understand it is that it would. But again let me
10 emphasize --

11 THE COURT: How?

12 MR. LONG: Because --

13 CHIEF JUSTICE ROBERTS: So you think any
14 regulation would conflict with the national bank status?

15 MR. LONG: Well, I think that may go too
16 far. But I think what Comptroller has done, it has --
17 has been to look at a series of these State regulations
18 and determine whether in fact they do impair or impede
19 the exercise --

20 CHIEF JUSTICE ROBERTS: I'm trying to get a
21 handle on it. As I understood the case that came, I don't
22 think there's disagreement on either side about how conflict
23 preemption works. But I thought your position was that
24 more is involved here and that the States can't regulate
25 it at all, and you're not getting into a conflict

1 preemption question. It's just if it's a State
2 regulation it can't apply --

3 MR. LONG: I think our position is there are
4 multiple roots that we can win this case. One is based
5 on conflict preemption. Another --

6 JUSTICE STEVENS: Yes, but you do take a field
7 preemption position, don't you?

8 MR. LONG: Yes, of course. And another
9 route is simply that the agency has --

10 JUSTICE STEVENS: I mean, it's clearly broader
11 than just conflict preemption.

12 MR. LONG: Yes.

13 JUSTICE STEVENS: Clearly.

14 MR. LONG: Yes. And the agency has broad
15 rulemaking power. It's exercised it here. There's
16 really no dispute about what the OCC's rules mean. The
17 only question is whether they're valid and we submit
18 that they are --

19 JUSTICE KENNEDY: What's your best case for
20 the proposition that an agency and not the Congress
21 defines the extent of field preemption?

22 MR. LONG: That an agency and not the --
23 certainly the de la Cuesta line of cases stand for the
24 proposition that if an agency has preempted State law by
25 regulation, the questions are simply whether the agency

1 has acted within the scope of its delegated authority
2 and whether it is a reasonable accommodation of the
3 conflicting principles and whether there's any reason to
4 think that Congress would have disagreed with it. Are
5 there -- I mean, there are examples. For example, in
6 the world of Federal thrifts OTS has a sort of field
7 preemption as I understand it. It's evolved differently
8 in the world of national banks. That's conflict
9 preemption.

10 JUSTICE SCALIA: What is a functionally
11 regulated subsidiary of a depository institution?

12 MR. LONG: Well, that again goes to
13 this scheme of GLBA that I was trying to describe. The
14 notion that Congress had is that you're going to
15 regulate by function. So if it's insurance, the State
16 can regulate it whether it's in the subsidiary or in the
17 bank. If it's securities, the SEC and in some
18 circumstances the States can regulate it. But if it's
19 core banking functions like mortgage lending, that's
20 going to be regulated subject to the same terms and
21 conditions that apply when the bank itself conducts
22 those activities.

23 JUSTICE SCALIA: And is that a functionally
24 regulated subsidiary?

25 MR. LONG: Yes.

1 JUST SCALIA: If it's just engaging in
2 banking activities?

3 MR. LONG: That is the concept as I
4 understand it. It's going by function and we think that
5 shows actually Congress did --

6 JUSTICE STEVENS: Does Wachovia have any
7 branch banks in Michigan?

8 MR. LONG: Wachovia does not, although -- I
9 mean, an interesting feature of the Michigan law is if
10 they did Michigan's law would not apply, which we think
11 is not consistent with their view that the OCC is an
12 inadequate regulator, because it would be exactly the
13 same whether or not there's a branch.

14 JUSTICE STEVENS: Are there States in which
15 Wachovia has both branch banks and subsidiaries
16 comparable to this?

17 MR. LONG: Yes, yes. North Carolina and
18 others.

19 I will add, there was a point at the
20 beginning that this Wachovia Mortgage Company actually
21 was regulated by Michigan for 6 years and there were no
22 problems. During that period it was a subsidiary of a
23 bank holding company, and that's a completely different
24 situation. Those are not regulated at all by the OCC.
25 So of course they were regulated by Michigan. That's

1 the way subsidiaries of bank holding companies are
2 regulated. That's simply a different situation.

3 If there are no further questions, I will --

4 CHIEF JUSTICE ROBERTS: Thank you, Mr. Long.

5 Mr. Srinivasan.

6 ORAL ARGUMENT OF SRI SRINIVASAN

7 ON BEHALF OF THE UNITED STATES, AS AMICUS CURIAE,

8 SUPPORTING RESPONDENTS

9 MR. SRINIVASAN: Thank you, Mr. Chief

10 Justice, and may it please the Court:

11 Let me begin by addressing this question of
12 whether what's going on here is conflict preemption or
13 field preemption. Now, it depends on how one defines
14 those terms. But as we understand it it's conflict
15 preemption, not field preemption, in the following
16 sense. Our position is not that State laws have no
17 application to operating subsidiaries or to national
18 banks for that matter. It's that State laws apply to
19 the same extent to operating subsidiaries as they would
20 to national banks. And as this Court has made clear in
21 the Atherton case and in the Barnett Bank case, State
22 laws do apply to national banks and operating
23 subsidiaries in a variety of respects, and State
24 contract law would be an example. But with operating
25 subsidiaries in particular, State laws dealing with

1 corporate governance questions, for example the process
2 of incorporation, dissolution, shareholder voting, and
3 things of that sort, would be controlling and so Federal
4 law doesn't control those sorts of aspects.

5 CHIEF JUSTICE ROBERTS: It's field
6 preemption when it comes to regulation. Yes, if the
7 bank is sued the normal rules of contract are going to
8 apply for enforcing a contract. But you're claiming
9 field preemption with respect to regulation, correct?

10 MR. SRINIVASAN: Well, I guess it depends on
11 the degree to which the regulations apply to the
12 national bank. That's my only point, is that State
13 laws apply to the same extent to the operating
14 subsidiary as to the national bank.

15 CHIEF JUSTICE ROBERTS: State laws generally
16 -- State agencies generally don't regulate national
17 banks at all, right?

18 MR. SRINIVASAN: State agencies don't
19 generally do that because there's a specific statutory
20 prohibition on that. And Justice Scalia, this goes to
21 your questions about the scope of these provisions at 12
22 U.S.C. 484(a) and 481. It's true that those provisions
23 say by their terms that visitorial authority resides
24 exclusively with the Comptroller of the Currency with
25 respect to national banks, and there's another provision

1 that deals with affiliates.

2 And so that's the point with visitorial
3 authority. But visitorial authority by its very nature
4 is asserted in service of and enforcement of some
5 underlying substantive requirement, and the underlying
6 substantive requirement at issue here is the requirement
7 that operating subsidiaries register with the State.
8 And so there's a question of conflict preemption that
9 applies both to the national bank and the operating
10 subsidiary of whether that underlying substantive
11 registration requirement could be applied to the
12 national bank or could be applied to the operating
13 subsidiary.

14 JUSTICE STEVENS: Yes, but it is true, is it
15 not, that as long as this mortgage company was a
16 subsidiary of a holding company rather than the bank
17 itself, the State would have done the visiting, the
18 visitorial power, whereas once they changed the Federal
19 Government assumed that responsibility?

20 MR. SRINIVASAN: Well, I don't know what you
21 mean by "holding company," Justice Stevens.

22 JUSTICE STEVENS: Well, as your co-counsel
23 pointed out, previously this very company was a
24 subsidiary of a holding company that also owned the
25 bank, and at that time it was exclusively regulated by

1 Michigan.

2 MR. SRINIVASAN: That's right, because it
3 wasn't an operating subsidiary of a federally chartered
4 national bank.

5 JUSTICE STEVENS: And the change in the
6 corporate structure is the sole basis for saying now
7 it's exclusively regulated by the OCC?

8 MR. SRINIVASAN: It is, but it's changing
9 the corporate structure in a fundamentally important
10 way. That's that it's now owned and controlled by a
11 federally chartered national bank.

12 JUSTICE STEVENS: But it did result in field
13 preemption to the extent that the exercise of visitorial
14 power is a regulatory function?

15 MR. SRINIVASAN: Well, again it depends on
16 how one defines those terms. And I don't take issue
17 with the fact that as a consequence of the fact that
18 this became a subsidiary --

19 JUSTICE STEVENS: Well, it is now only the
20 Federal agency that does the visiting, whereas it used
21 to be only the State agency?

22 MR. SRINIVASAN: That's right.

23 JUSTICE STEVENS: And the question that led
24 me to is how many additional personnel did OCC employ
25 when it took over this area for 48 States?

1 MR. SRINIVASAN: Well, I don't have an
2 empirical answer to that question.

3 JUSTICE STEVENS: But it was certainly quite
4 a few people, I assume.

5 MR. SRINIVASAN: But Justice Stevens, in the
6 regulatory materials that attended the promulgation of
7 these rules OCC specifically addressed the question
8 whether it had sufficient resources to exercise
9 oversight authority over operating subsidiaries of
10 national banks. And let's be clear. It's not that the
11 OCC previously had no authority over operating
12 subsidiaries. The question is whether the OCC has
13 exclusive authority over operating subsidiaries. And
14 the OCC determined in the regulatory materials that it
15 had sufficient resources to exercise oversight authority
16 over operating subsidiaries --

17 JUSTICE STEVENS: But the authority under
18 the old regime was just to make sure that the operation
19 did not affect the financial stability of the parent
20 bank.

21 MR. SRINIVASAN: But that's because it
22 wasn't an operating subsidiary of a federally chartered
23 national bank, and that changes things in a fundamental
24 way for the following reason: That under the Barnett
25 Bank case the rule of preemption, the special rule of

1 preemption that applies in the context of national
2 banking, is that when you're dealing with enumerated or
3 incidental powers of national banks -- and one
4 incidental power of a national bank is undisputed to be
5 the power to conduct affairs through an operating
6 subsidiary -- that the grants of those powers are
7 normally preemptive of rather than preempted by State
8 law. And so once the operating --

9 CHIEF JUSTICE ROBERTS: That was an effort
10 of the State to prohibit the national bank from engaging
11 in the activity, correct?

12 MR. SRINIVASAN: Well, that was. But the
13 Court --

14 CHIEF JUSTICE ROBERTS: That's an obvious
15 case of conflict preemption. Here we have a question of
16 whether or not the State can regular the operating
17 subsidiary to any extent.

18 MR. SRINIVASAN: But the Court's decisions
19 aren't limited to prohibitions of that sort. I'd make
20 two points in that regard. First of all, in one sense
21 this is a prohibition, because the operating subsidiary
22 can't engage in federally authorized activities unless
23 and until it gets the State's permission. So at least
24 there is a prohibition at the outset. But more
25 importantly, the Court's cases aren't limited to

1 situations involving prohibitions of the sort that Your
2 Honor posits, because in the Franklin National Bank case
3 that was a situation in which the national bank had the
4 power to accept savings deposits and the State law that
5 was deemed to be preempted there didn't prohibit the
6 national bank from accepting savings deposits.

7 JUSTICE SCALIA: What comes next? Can the
8 OCC say, well, the corporate law of this State doesn't
9 really allow subsidiaries to do as much as we think a
10 subsidiary of a national bank ought to be able to do, so
11 we're going to attribute additional corporate powers to
12 this subsidiary? Can it do that?

13 MR. SRINIVASAN: No, not if you're talking
14 about corporate powers, because those are governed by
15 State law. What it could do, though, is regulate the
16 subsidiary's conduct of the business of banking,
17 because, after all, an operating subsidiary has one
18 purpose and one purpose only, and that's to carry out
19 functions that the national bank itself could perform.

20 JUSTICE SCALIA: What troubles me, and maybe
21 you can answer to it more specifically than you have, is
22 that the core function of a banking regulatory agency is
23 the visitation power, and the Banking Act makes it very
24 clear that there is visitation power to national banks
25 and makes it very clear that there is not for

1 subsidiaries.

2 And here is a regulation which under the
3 guise, it seems to me, of defining the powers of the
4 national bank simply eliminates that distinction. And
5 it seems to me that perhaps goes beyond what an agency
6 regulation is allowed to do.

7 MR. SRINIVASAN: With respect,
8 Justice Scalia, I don't think the statutes say that at
9 all. There is a statute, 484(a), that says that the
10 OCC's visitorial authority is exclusive with respect to
11 national banks. But there is no statute that says that
12 the OCC's visitorial authority is not exclusive with
13 respect to subsidiaries. There's another statute that
14 deals with affiliates. Now one point is that affiliates
15 are not limited to subsidiaries, but they could include
16 for example, I guess brother and sister corporations for
17 lack of a better term, that are controlled by a common
18 parent. But another point is that at the time these
19 statutes were enacted, Congress simply didn't have
20 within its field of vision the notion that a national
21 bank would have the power to exercise its functions
22 through a subsidiary corporation.

23 CHIEF JUSTICE ROBERTS: Why should we assume
24 that they wanted to preempt State laws to that extent?

25 MR. SRINIVASAN: Because what Congress was

1 trying to do is to make sure that the OCC had exclusive
2 visitorial authority with respect to the conduct of
3 national bank functions. It's just at the time that
4 these statutes were enacted, the only place that national
5 bank functions were being conducted was by a national
6 bank itself. Now later on, when the laws of all 50
7 states, the OTS, the Federal Reserve with respect to
8 State member banks, and the Comptroller give banks the
9 authority to conduct national -- to conduct bank
10 functions through a subsidiary, then this issue
11 arises about who exercises visitorial authority with
12 respect to the conduct of those functions through a
13 subsidiary. And it stands to reason that if the
14 baseline rule is that with respect to the conduct of
15 national bank functions through a national bank itself,
16 the OCC's visitorial authority is exclusive, then when a
17 national bank exercises its Federal entitlement to
18 conduct those very same functions through an operating
19 subsidiary, the OCC's visitorial authority, likewise,
20 would be exclusive. That seems to me to be an entirely
21 reasonable regulatory determination by the Comptroller,
22 and there's nothing in those statutory provisions that
23 speaks directly to that issue and that in any way
24 precludes the Comptroller from reaching that
25 determination.

1 JUSTICE GINSBURG: Practically, is there any
2 difference between the way they operated when they were
3 sister corporations before, and now a parent and sub?

4 MR. SRINIVASAN: Well, there could be. I
5 don't know about in this particular case but there
6 absolutely could be, Justice Ginsburg, because when they
7 become subsidiaries they are controlled by the national
8 bank and not by some other entity. And the reason that
9 a national bank would choose to engage in this sort of
10 structure rather than folding the enterprise into the
11 bank itself are many fold. And in part it's for
12 efficiency purposes because you can have focused
13 management, especially when you're dealing with the sort
14 of specialized things that operating subsidiaries
15 typically do. But there's also other reasons. For
16 example, there's a modularity component to this in the
17 sense that the best specialized functions such as
18 mortgage lending, very often a national bank will
19 purchase an entity that conducts that activity, and may
20 be interested in selling the entity later, and it's much
21 more straightforward to do that if those functions are
22 maintained in a separate subsidiary corporation.

23 CHIEF JUSTICE ROBERTS: Yes, there are various
24 aspects of State law, including liability limitation, that
25 they want to take advantage of by establishing a subsidiary

1 chartered under State law, Michigan or another State,
2 and yet they're claiming immunity from all other State
3 regulations?

4 MR. SRINIVASAN: Well, with respect to
5 liability limitation in particular, Mr. Chief Justice, I
6 should clarify that veil piercing principles and things
7 of that sort, we think, would be governed by State law with
8 respect to the operating subsidiary. So if the question is
9 whether the corporate veil is pierced, State law would
10 dictate an answer to that question.

11 But, can I just finish one thought?

12 Which is that States won't have an incentive
13 to liberally construe veil piercing principles with respect
14 to national banks precisely because State member banks in
15 all 50 states also have operating subsidiaries through
16 which State-chartered banks to conduct their banking functions.
17 Thank you.

18 CHIEF JUSTICE ROBERTS: Thank you, counsel.
19 Mr. Blanchard, you have a minute remaining.

20 REBUTTAL ARGUMENT OF E. JOHN BLANCHARD

21 ON BEHALF OF THE PETITIONER

22 MR. BLANCHARD: Two key points.

23 First, Section 484 and 481 have been amended
24 subsequent to the time operating subsidiaries came into
25 play. Congress knew of operating subsidiaries when it

1 amended 484 twice in the 1980s, and 481 was amended four
2 times. Yet, never did Congress insert the word
3 "affiliates" into the exclusive power of the OCC in 484.

4 Secondly, the Gramm-Leach-Bliley act is
5 being greatly distorted. The same terms and conditions
6 language that my opponent referred to was meant to
7 return op subs only to the authority that the parent
8 bank could engage in. It wasn't preemptive or meant to
9 preempt the states. The Comptroller had issued a
10 rule 34 -- 34.F, (f), and they had allowed operating
11 subsidiaries to do things differently from the parent
12 bank.

13 CHIEF JUSTICE ROBERTS: Thank you,
14 Mr. Blanchard. The case is submitted.

15 (Whereupon, at 12:03 p.m., the case in the
16 above-entitled matter was submitted.)

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