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1 P R O C E E D I N G S

2 (11:04 a.m.)

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

5 Mr. Blanchard.

6 ORAL ARGUMENT OF E. JOHN BLANCHARD

7 ON BEHALF OF THE PETITIONER

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

10 The dual banking system of State and Federal  
11 regulation in our nation which we've enjoyed for over  
12 140 years is one of the finest examples of cooperative  
13 federalism in our history. For 35 years, the States,  
14 not the OCC, have prudently exercised their authority  
15 over non-bank State-chartered operating local  
16 subsidiaries of national banks. Indeed, respondent  
17 Wachovia Mortgage complied with Michigan law for 6 years  
18 until in 2003 there was a corporate reshuffling and now  
19 it claims it's exempt from the same Michigan laws it  
20 complied with.

21 The OCC through its Regulation 7.40006 has  
22 disrupted the careful balance and seeks to deprive the  
23 States of the regulatory authority that they have  
24 historically exercised.

25 JUSTICE GINSBURG: If the national bank set

1 up its mortgage operations as a division or as a  
2 department, then the sole regulator would be OCC, right?

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

4 But Wachovia Bank and Wachovia Mortgage made a choice.  
5 They made a business judgment to create a  
6 State-chartered operating subsidiary.

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

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

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

21 MR. BLANCHARD: Absolutely, Your Honor.  
22 From -- the conception behind operating subsidiaries was  
23 to separate a certain part of the business and the  
24 attendant risks of that business also to separate.

25 JUSTICE SCALIA: Well, I assume that the

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

11 MR. BLANCHARD: Possibly, but --

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

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

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

21 MR. BLANCHARD: Correct.

22 CHIEF JUSTICE ROBERTS: You're not seeking  
23 visitorial rights with respect to the parent bank.

24 MR. BLANCHARD: Absolutely not.

25 CHIEF JUSTICE ROBERTS: You're not arguing

1     that because you need to see more about the mortgage  
2     subsidiary you need to see what the parent is up to?

3                 MR. BLANCHARD:   No.

4                 CHIEF JUSTICE ROBERTS:   Okay.

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

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

15                MR. BLANCHARD:   As to the national bank?

16                JUSTICE BREYER:   Yes.

17                MR. BLANCHARD:   Yes.

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

20                MR. BLANCHARD:   Yes.

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

23                MR. BLANCHARD:   No.

24                JUSTICE BREYER:   No, they can't?   Where is  
25    it in the law that says they don't have the authority to

1 say that a subsidiary of a national bank owned by a  
2 national bank is a national bank? Is there something  
3 specifically that stops them from saying that?

4 MR. BLANCHARD: Yes.

5 JUSTICE BREYER: What?

6 MR. BLANCHARD: The Gold Foods case, the --

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

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

13 JUSTICE SCALIA: I thought your point was  
14 that the statute defines national bank, but also defines  
15 affiliates, and refers to them as two separate entities.

16 MR. BLANCHARD: Yes, Your Honor.

17 JUSTICE SCALIA: And I thought your point  
18 was that the effect of this regulation is to simply  
19 eliminate that distinction?

20 MR. BLANCHARD: You're right.

21 CHIEF JUSTICE ROBERTS: Their argument, they  
22 haven't argued -- I realize this was a hypothetical, but  
23 they haven't argued that the subsidiary should be  
24 treated as a national bank. They're arguing that  
25 they're entitled to say that the same preemption that

1 applies to the national bank applies to the  
2 subsidiaries.

3 MR. BLANCHARD: Exactly. That's what they  
4 --

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

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

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

22 MR. BLANCHARD: Yes, that is my  
23 understanding of their position.

24 JUSTICE KENNEDY: They say that there's no  
25 area of State law that is applicable to the subsidiary



1 corporation?

2 MR. BLANCHARD: They are saying that  
3 visitorial powers over the State-chartered operating  
4 subs is exclusively --

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

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

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

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

23 JUSTICE GINSBURG: -- that they have to meet  
24 all the requirements for setting up a corporation and  
25 having meetings and all that that North Carolina

1 requires of corporations that are incorporated in that  
2 State?

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

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

22 MR. BLANCHARD: The important point, though,  
23 Your Honor, is that the OCC has no independent power to  
24 preempt the validly enacted legislation of a sovereign  
25 State.

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

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

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

20 MR. BLANCHARD: They do not.

21 First of all, if the OCC -- if Congress  
22 intends to alter the balance that I spoke of earlier, it  
23 must do so with clear and manifest language. There must  
24 be unmistakably clear language that Congress intended to  
25 authorize the OCC to preempt the state law.

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

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

15 JUSTICE GINSBURG: Mr. Blanchard, may I ask  
16 you a question, perhaps preliminary to what you are  
17 launching into? My understanding was that you did not  
18 question the OCC's regulatory authority over a unit that  
19 it says can do what the national bank itself could do in  
20 the real estate business, no more, no less. OCC  
21 regulation, visitation, all the rest, OCC's regulations  
22 validly applied to this subsidiary that has been set up  
23 in North Carolina and is operating in Michigan; is that  
24 right? It is one thing for you to say we have the  
25 authority to regulate. Are you saying at the same time

1     that OCC is out of the picture because its dual  
2     regulation conflicts with the inevitable?

3                 MR. BLANCHARD: I am not saying that. What  
4     I am saying is the OCC does not have the exclusive  
5     right.

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

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

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

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

24                CHIEF JUSTICE ROBERTS: Right. And I would  
25    have thought your answer to Justice Breyer was yes, that

1 they get to regulate to the extent they want to, and the  
2 state does, and if there's a conflict, the federal  
3 regulation will prevail, but what's the problem here is  
4 that they're issuing a categorical regulation saying the  
5 state can't regulate at all.

6 MR. BLANCHARD: Yes. They are claiming  
7 exclusive preemptive authority.

8 JUSTICE SCALIA: I didn't understand that  
9 you made this --

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

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

22 JUSTICE STEVENS: Can you give me some  
23 specific examples of what Michigan would require that  
24 the OCC does not require? You mentioned licensing, for  
25 example.

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

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

8           MR. BLANCHARD: No.

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

13          MR. BLANCHARD: No. Michigan just wants to  
14 be able to -- and the other states -- to deal with fraud  
15 and deceit and material misrepresentation in mortgage  
16 transactions, and to have a say over the corporations  
17 that come to their state and do business.

18          JUSTICE SCALIA: Mr. Blanchard, if I could  
19 go back to what you were saying before this last line of  
20 questioning, I didn't understand your position to be  
21 that the OCC can come in and regulate this non-Federal  
22 bank up to the point where its -- well, can do it  
23 apparently without limitation. And where its regulation  
24 conflicts with the state regulation, the Federal  
25 prevails.

1 MR. BLANCHARD: Or the more restrictive.

2 JUSTICE SCALIA: Ah, or the more  
3 restrictive.

4 MR. BLANCHARD: That's the difference.

5 JUSTICE SCALIA: The Federal Government says  
6 you can have outstanding loans of \$10 billion and the  
7 state says no, you can have outstanding loans of  
8 8 billion.

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

10 JUSTICE SCALIA: Wait. What happens in that  
11 situation?

12 MR. BLANCHARD: Well, it doesn't happen in  
13 Michigan because --

14 JUSTICE SCALIA: Well, invent some other  
15 hypothetical then. I'm talking about a situation in  
16 which the Federal law is more permissive than the state  
17 law. Which law prevails? The Federal law allows this  
18 bank to do things which the state law would not allow it  
19 to do. As I understood your prior answer, you say oh,  
20 of course, if the Federal law allows to it do things the  
21 state law doesn't allow to it do, the Federal law  
22 prevails. I didn't understand that to be your position.  
23 And if it is your position, I don't know what all this  
24 fuss is about. That's the end of the game, isn't it?

25 MR. BLANCHARD: No, Your Honor. You see,



1 in -- we do not conduct -- they are exempt from an  
2 examination where we go in and look yearly at such  
3 things as capital assets management, earnings,  
4 liquidity. Those aren't the kinds of things that we're  
5 talking about. They, as a registrant, they are exempt  
6 from that, from an annual examination. They're not  
7 incapacitated, nor are --

8 JUSTICE SCALIA: Exempt from state  
9 examination?

10 MR. BLANCHARD: Yes. The state chartered  
11 corporation, Wachovia Mortgage, is exempt under Michigan  
12 law from an annual examination.

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

24 MR. BLANCHARD: They -- their position is  
25 that both laws that we append to our brief, both laws in

1 their entirety, are preempted.

2 CHIEF JUSTICE ROBERTS: Their position is  
3 not that it only preempts in cases of conflict. Under  
4 12c apart, 7.4006, it says, state laws apply to national  
5 bank operated subsidiaries, which is what we're dealing  
6 with here, to the same extent that those laws apply to  
7 the parent national bank, which is to say not at all.

8 MR. BLANCHARD: Correct.

9 CHIEF JUSTICE ROBERTS: So it's not a case  
10 of conflict preemption. They're trying to preempt state  
11 law whether it conflicts or not, right?

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

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

22 MR. BLANCHARD: You are exactly correct.  
23 That's the Michigan regulatory --

24 JUSTICE GINSBURG: So it's kind of a reverse  
25 supremacy. Where it's usually the feds that have the

1 last word, but here you're saying Michigan has decided  
2 that it will let OCC go first and Michigan will be kind  
3 of a supervisor for the adequacy of the OCC's handling  
4 of the consumer's complaint?

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

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

19 MR. BLANCHARD: Another one that --

20 JUSTICE GINSBURG: Where the primary  
21 adjudicator, decision-maker would be the Federal  
22 authority, but then the state can override that if it  
23 thinks the Federal authority hasn't done an adequate  
24 job?

25 MR. BLANCHARD: Well, in a sense, in our

1 statute, the commissioner of the state agency is able to  
2 investigate if the complaint referred to the comptroller  
3 has not been adequately --

4 JUSTICE SCALIA: That's not the question.  
5 Justice Ginsburg is trying to find out if you know any  
6 other situation where when the Federal agency doesn't do  
7 an adequate job, the state agency comes in?

8 MR. BLANCHARD: No situations come directly  
9 to mind.

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

15 CHIEF JUSTICE ROBERTS: Or environmental  
16 regulation where just because the Federal EPA doesn't  
17 take a particular action against a polluter, doesn't  
18 mean that the state can't take action against the  
19 polluter.

20 MR. BLANCHARD: Yes, Your Honor.

21 JUSTICE GINSBURG: Isn't the action an  
22 inadequate action? Michigan is saying yeah, the Federal  
23 authority can do with respect to this unit just what it  
24 would do to a national bank itself, but if we think that  
25 is inadequate, that is a question of just one act or the

1 other, but if the -- it is the state judging the  
2 adequacy of a particular Federal response.

3 MR. BLANCHARD: Yes.

4 CHIEF JUSTICE ROBERTS: So if the Federal  
5 U.S. Attorney prosecutes, decides to prosecute someone  
6 for manslaughter, the state can decide that's not an  
7 adequate enough response and prosecute them for murder,  
8 right?

9 MR. BLANCHARD: Yes, Your Honor.

10 JUSTICE ALITO: Could the OCC --

11 JUSTICE SCALIA: Did this go through your --  
12 can I just ask --

13 JUSTICE ALITO: Sure.

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

20 (Laughter.)

21 JUSTICE SCALIA: Especially after this  
22 lawsuit, get out, we're going to regulate our state  
23 banks?

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

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

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

16 JUSTICE SOUTER: Let me ask the question --  
17 the regulatory question. You do not dispute Michigan  
18 does not dispute that the operating -- well, strike  
19 that.

20 Michigan does not dispute that national  
21 banks can go into business of real estate loans?

22 And Michigan does not dispute that Congress  
23 has authorized national banks to operate through  
24 subsidiaries for specific purposes like this.

25 My question is can you give me any plausible

1 reason to think that Congress would have contemplated  
2 this system of potentially more restrictive State  
3 legislation when its national bank in a given instance  
4 decides to do -- to exercise its Federal banking power  
5 through a subsidiary rather than directly?

6 Can you think of any reason that Congress  
7 would have contemplated the scheme that you're, that  
8 you're defending?

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

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

20 And we also have to assume that there may be  
21 instances -- you brought it up -- in, in which the, the  
22 -- the State burden is heavier. So with those  
23 possibilities in mind, can you think of any reason why  
24 Congress in authorizing the exercise of the Federal  
25 banking power through a subsidiary would have

1 contemplated Michigan or any State would have this  
2 authority?

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

9 What reason would Congress have had for  
10 assuming that might be the result?

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

16 JUSTICE SOUTER: So it is state sovereign  
17 immunity in effect, is the answer -- State sovereignty  
18 is rather the answer?

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

21 CHIEF JUSTICE ROBERTS: You better hurry  
22 then.

23 MR. BLANCHARD: The key, the key point is  
24 that Congress has distinguished clearly and  
25 unequivocally between affiliates and national banks; but



1 it has not included affiliates in either Section 481 or  
2 484 of the National Bank Act.

3 National banks are not synonymous or  
4 equivalent to the State-chartered operating  
5 subsidiaries.

6 THE COURT: Thank you, Mr. Blanchard.  
7 Mr. Long?

8 ORAL ARGUMENT OF ROBERT A. LONG

9 ON BEHALF OF RESPONDENT

10 MR. LONG: Mr. Chief Justice, and may it  
11 please the Court.

12 I would like to start with the question that  
13 Justice Souter asked because there are some important  
14 principles that are really not disputed in this case,  
15 and I think they help to focus the issue that is before  
16 the Court.

17 There is no dispute, as we understand it,  
18 that mortgage lending by national banks is supervised  
19 exclusively by the Comptroller of the Currency. And  
20 there is also no dispute that national banks' incidental  
21 powers under Section 247 include the power to make  
22 mortgage loans through a operating subsidiary. And an  
23 additional point is that both Federal statutes and  
24 Federal regulations state that when national banks make  
25 mortgage loans or exercise their banking powers through

1 subsidiaries they do so subject to the same terms and  
2 conditions that apply to the exercise of the power by  
3 the national --

4 JUSTICE STEVENS: Mr. Blanchard, may I ask  
5 you a question. I just want to understand. Wachovia  
6 has branch banks all over the country. Are they  
7 generally subsidiaries or are they divisions of the  
8 bank?

9 MR. LONG: Well, a branch of a national bank  
10 has a particular status under Section 36 of the National  
11 Bank Act.

12 JUSTICE STEVENS: I understand that. I'm  
13 asking a factual question.

14 MR. LONG: It would not be separately  
15 incorporated. So --

16 JUSTICE STEVENS: They are actually  
17 divisions, in effect, of the national bank itself?

18 MR. LONG: Well, I think they are generally  
19 referred to as branches but I think its would be more a  
20 division. That would be --

21 JUSTICE STEVENS: At least they are not  
22 separate corporate subsidiaries.

23 MR. LONG: That -- that --

24 JUSTICE STEVENS: Why is that, that the Best  
25 bank decided to use the subsidiary approach for this

1 business, rather than the more traditional banking  
2 approach.

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

10 JUSTICE STEVENS: It protects from  
11 liability, too.

12 MR. LONG: Well, that is one of the reasons.  
13 Although --

14 JUSTICE STEVENS: -- in the district.

15 MR. LONG: I will say, Justice Stevens, I  
16 have not been able to find examples of national bank  
17 operating subsidiaries that have become insolvent. They  
18 are regulated very heavily by the Comptroller and so  
19 they don't.

20 CHIEF JUSTICE ROBERTS: But you have a  
21 subsidiary that's in the mortgage lending business that  
22 presumably competes with other companies in the mortgage  
23 lending business that are not associated with national  
24 banks, and you're claiming an immunity from the  
25 regulation that their competitors are subject to. Is

1     that right?

2                   MR. LONG:   Well, but again, Mr. Chief  
3     Justice, the national banks compete.  And its undisputed  
4     --

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

12                  MR. LONG:   But again, Mr. Chief Justice,  
13    thrifts, S&Ls, State-Chartered banks in all 50 States  
14    are permitted to have operating subsidiaries.  It's  
15    recognized not just for national banks, but really for  
16    all types of banking institutions, that are operating  
17    subsidiaries are a useful tool of banking.  This is not  
18    a sort of special privilege that's given --

19                  CHIEF JUSTICE ROBERTS:  Justice Breyer's  
20    questions were pointing out, to the extent your  
21    regulation -- the Federal regulation of your subsidiary  
22    conflicts with the State law, that regulation is going  
23    to prevail.  The question is whether or not you are  
24    immune from State regulation across the board --

25                  MR. LONG:   Well, and you asked that

1 question. I mean, I think it might be useful to think  
2 first about national banks and then about the operating  
3 subsidiaries. It is not true that there are no State  
4 laws that apply to national banks.

5 This Court's unanimous Barnett Bank decision  
6 is the clearest statement of the principle. Any State  
7 laws that prevent or significantly impair or impede the  
8 exercise of national banking powers are preempted. But  
9 many State laws having to do with contracts --

10 JUSTICE ALITO: In real world terms, what's  
11 involved here? What are examples of some of the things  
12 that Michigan does or some other State does that impair  
13 or impede the operations to the --

14 MR. LONG: The beginning is, it is a  
15 complete separate set of regulation. You have to  
16 register or obtain a license. You have to submit to  
17 examination by the regulator. Investigation.  
18 Enforcement. There are substantive laws; Michigan has  
19 some that are not directly at issue in this case --

20 CHIEF JUSTICE ROBERTS: One of those laws  
21 might be, I mean, let's say they have a law, when you're  
22 issuing a mortgage to a consumer, you have to give them  
23 a disclosure about how much they're going to end up  
24 paying over the life of the loan and all that. And they  
25 require that of anybody who issues a mortgage in

1 Michigan. Could that law be applied to your subsidiary?

2 MR. LONG: Well, the question, Mr. Chief

3 Justice, would be is it preempted as to the national

4 bank? The Comptroller of the Currency would say yes.

5 But the issue in this case is if it is preempted as to

6 the national bank, then it is also preempted when the

7 national bank chooses to exercise this power that it has

8 under Section 24 --

9 CHIEF JUSTICE ROBERTS: Isn't -- isn't your

10 friend correct then? You are really trying to have your

11 cake and eat it, too. You're saying if we did this

12 without a subsidiary, we wouldn't be subject to that.

13 But you want to be able to operate through a subsidiary

14 and yet not be subject to the same rules that apply to

15 other people.

16 MR. LONG: Well, but it, it with respect, it

17 is not really a case of having our cake and eating it,

18 too. We are in the area of powers of national banks.

19 And the Court has recognized for a century that in that

20 area, when national banks have powers, including

21 incidental powers recognized by the Comptroller, they

22 generally preempt any State law that prevents or

23 significantly interferes --

24 JUSTICE BREYER: That's the question I had.

25 I got somewhat thrown by the Chief Justice's question,

1     because I thought first, when I read the reg, 34.4.ab,  
2     that those things that are preempted are those things  
3     that obstruct, impair or condition, or in other words  
4     limit, the Federal powers of a national bank.

5                 MR. LONG: That, that is correct.

6                 JUSTICE BREYER: But I thought we were  
7     basically dealing with conflict --

8                 MR. LONG: Yes.

9                 JUSTICE BREYER: -- not fielding.

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

11                JUSTICE BREYER: But -- but the last part of  
12     the reg says that what applies, no State law applies to  
13     a national bank operating subsidiary if it doesn't apply  
14     to the parent bank. And I began to think it fields  
15     preemption. Am I right in thinking that it is conflict  
16     preemption, not field, because it is conflict in the  
17     case of a national bank?

18                MR. LONG: Well -- it's, it's a very  
19     important point. And our position is there are actually  
20     several ways in which you could analyze this case and  
21     arrive at the conclusion that the Comptroller's  
22     regulations are valid. One is looking simply at  
23     statutory language and saying we would, we the Court  
24     would reach this result as we did in the Franklin  
25     National Bank case even without any regulation. And

1 second of all is to say the regulations are a reasonable  
2 interpretation of the statute. A third is to say that  
3 the Comptroller has broad rulemaking authority. And as  
4 this Court recognized in De La Cuesta and many other  
5 cases, an agency exercising its rulemaking authority can  
6 preempt State laws even though the statute itself would  
7 not --

8 JUSTICE SCALIA: I think, the question is  
9 not whether it can preempt State laws but whether the  
10 rulemaking authority can, can eliminate a, a basic  
11 division of the statute into a national bank and  
12 affiliates of the national bank. The statute makes a  
13 clear distinction between the two. And the effect of  
14 what, of what the agency has to done here is simply to  
15 eliminate that distinction, and to say really it doesn't  
16 matter.

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

18 JUSTICE SCALIA: If you are an affiliate of  
19 a national bank, you have the same immunity that the  
20 national bank has. That's not what the statute says.

21 MR. LONG: I have a two-part answer to that  
22 question, Justice Scalia. One is that Section 484 of  
23 the section you're referring to does limit the  
24 visitorial authority as to national banks, but it is  
25 silent as to operating subsidiaries or any other type of



1 affiliate. States do exercise visitorial authority over  
2 some affiliates of national banks. That's established.  
3 Operating subsidiaries are a special type of affiliate;  
4 484, which was enacted during the Civil War, a hundred  
5 years before operating subsidiaries were authorized,  
6 really doesn't address the question of visitorial  
7 authority.

8 JUSTICE SCALIA: I mean, an operating  
9 subsidiary is an affiliate, right? What kind of  
10 affiliates did they have before they had operating  
11 subsidiaries? Did they rent pool halls, or what?

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

13 JUSTICE SCALIA: I would have thought that  
14 any affiliate of a national bank would, would be engaged  
15 in essentially banking business.

16 MR. LONG: But, but this really became  
17 clear, in answer to your question, in part two of my  
18 answer. In 1999 when Congress enacted the  
19 Gramm-Leach-Bliley Act, it directly addressed this  
20 question of affiliates of national banks. And this is  
21 on page 2A of our appendix. It refers to, it created a  
22 new type of affiliate, for the first time, financial  
23 subsidiaries which can do anything financial in nature.  
24 So they can actually engage in activities that the  
25 parent national bank could not.

1           But if you look at the bottom of page 2A of  
2   our appendix, this is Section 24A now of the act, it  
3   said that financial subsidiaries can also engage in  
4   activities that are permitted for national banks to  
5   engage in directly, subject to the same terms and  
6   conditions that govern the conduct of the activities by  
7   a national bank.

8           And then at the bottom of 3A and going over  
9   to 4A where they actually define financial subsidiaries,  
10   they do so by distinguishing them from the operating  
11   subsidiaries which had existed for decades. And at the  
12   top of 4A you see that the operating subsidiary again  
13   engages only in activities that the national banks may  
14   engage in directly and are conducted subject to the same  
15   terms and conditions.

16           Then if you'll bear with me a moment longer,  
17   on page 12A of our appendix some additional provisions  
18   of GLBA -- actually, that's the Gramm-Leach-Bliley Act,  
19   GLBA people call it -- said -- this is on 12A -- that  
20   securities activities and insurance activities,  
21   activities that have been traditionally subject to State  
22   regulation, if they're engaged in by a functionally  
23   regulated subsidiary, operating subsidiary or a  
24   financial subsidiary, then they may be regulated by  
25   relevant State securities authorities or State insurance

1 authorities.

2 So Congress was actually quite specific.

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

12 And so, going back to the Chief  
13 Justice's question, you have this question of would it  
14 be a preempted State preempted state law if it were  
15 applied to the national bank when the national bank is  
16 making a mortgage loan. Not every State law is  
17 preempted because not every State law conflicts. But if  
18 it does --

19 CHIEF JUSTICE ROBERTS: What authority  
20 do you have for the proposition that when then Federal  
21 law says subject to the same terms and conditions that  
22 they're referring To State regulation as opposed to the  
23 same Federal regulation that applies to the national  
24 banks?

25 MR. LONG: Well, I mean, we have section

1 7.4006, which is the OCC's regulation interpreting that  
2 language in the statute and in its own OPSUB  
3 regulations, section 5.34. And we also relied simply on  
4 the ordinary meaning of "terms and conditions." It  
5 means prerequisites, limitations.

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

8 MR. LONG: GLBA?

9 CHIEF JUSTICE ROBERTS: Yes. Or did it  
10 predate that?

11 MR. LONG: 7.4006 was issued pursuant to  
12 24-7, which is this incidental powers provision, and  
13 24(a), which I've just been walking you through, which  
14 is a provision of GLBA. So it is based partly upon  
15 GLBA, and it is an interpretation of the same terms and  
16 conditions language.

17 JUSTICE BREYER: Conflict preemption  
18 basically strikes down a State law that stands as an  
19 obstacle to the full enforcement of the Federal law.

20 MR. LONG: Yes.

21 JUSTICE BREYER: All right. Now, with that  
22 in mind, suppose that you didn't have either 7.4006 or  
23 34.4(a)(B). Neither existed. But we listened to what  
24 the agency said as a Court and they explained how the  
25 regulation worked. Would you expect to come to

1 precisely the same result?

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

3 JUSTICE BREYER: Would you or not?

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

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

8 MR. LONG: Yes. We would say that if you  
9 start with 24-7 and the incidental powers of national  
10 banks and the undisputed point that one of those  
11 incidental powers is for the national bank --

12 CHIEF JUSTICE ROBERTS: How does it conflict  
13 with Federal banking authority for the State to audit  
14 the books of the mortgage subsidiary?

15 MR. LONG: Well, it has been established  
16 since the beginning of the national banking system  
17 that -- and this goes back to the history of the first  
18 and second Bank of the United States in McCullough  
19 against Maryland -- that the national banking system is  
20 protected from possibly unfriendly State legislation.

21 CHIEF JUSTICE ROBERTS: Take my earlier case  
22 about the consumer disclosure. Michigan has a law, I  
23 assume, that any mortgage lender has to tell the  
24 consumer all this information. Would that conflict with  
25 the authority of a national bank?

1           MR. LONG: The Comptroller's view as I  
2 understand it is that it would. But again let me  
3 emphasize --

4           THE COURT: How?

5           MR. LONG: Because --

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

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

13          THE COURT: I'm trying to get a handle on  
14 it. As I understood the case that came, I don't think  
15 there's disagreement on either side about how conflict  
16 preemption works. But I thought your position was that  
17 more is involved here and that the State can't regulate  
18 it at all, and you're not getting into a conflict  
19 preemption question. It's just if it's a State  
20 regulation it can't --

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

24          JUSTICE STEVENS: But you do take a field  
25 preemption position, don't you?

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

3                   JUSTICE STEVENS: I mean, it's truly broader  
4 than just conflict preemption.

5                   MR. LONG: Yes.

6                   JUSTICE STEVENS: Literally.

7                   MR. LONG: Yes. And the agency has broad  
8 rulemaking power. It's exercised it here. There's  
9 really no dispute about what the OCC's rules mean. The  
10 only question is whether they're valid and then what is  
11 --

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

15                  MR. LONG: That an agency and not the --  
16 certainly the Delaquesta line of cases stand for the  
17 proposition that if an agency has preempted State law by  
18 regulation, the questions are simply whether the agency  
19 has acted within the scope of its delegated authority  
20 and whether it is a reasonable accommodation of the  
21 conflicting principles and whether there's any reason to  
22 think that Congress would have disagreed with it. Are  
23 there -- I mean, there are examples. For example, in  
24 the world of Federal thrifts OTS has a sort of field  
25 preemption as I understand it. It's evolved differently

1 in the world of national banks. That's conflict  
2 preemption.

3 JUSTICE SCALIA: What is a functionally  
4 regulated subsidiary of a depository institution.

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

16 JUSTICE SCALIA: And is that a functionally  
17 regulated subsidiary?

18 MR. LONG: Yes.

19 JUST SCALIA: If it's just engaging in  
20 banking activities?

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

24 JUSTICE STEVENS: Does Wachovia have any  
25 branch banks in Michigan?



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

7           JUSTICE STEVENS: Are there States in which  
8   Wachovia has both branch banks and subsidiaries  
9   comparable to this?

10          MR. LONG: Yes, yes. North Carolina and  
11   others.

12          I will add, there was a point at the  
13   beginning that this Wachovia Mortgage Company actually  
14   was regulated by Michigan for 6 years and there were no  
15   problems. During that period it was a subsidiary of a  
16   bank holding company, and that's a completely different  
17   situation. Those are not regulated at all by the OCC.  
18   So of course they were regulated by Michigan. That's  
19   the way subsidiaries of bank holding companies are  
20   regulated. That's simply a different situation.

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

22          CHIEF JUSTICE ROBERTS: Thank you, Mr. Long.  
23   Mr. Srinivasan.

24          ORAL ARGUMENT OF SRI SRINIVASAN

25          ON BEHALF OF THE UNITED STATES, AS AMICUSCURIAE,

1 SUPPORTING RESPONDENTS

2 MR. SRINIVASAN: Thank you, Mr. Chief  
3 Justice, and may it please the Court:

4 Let me begin by addressing this question of  
5 whether what's going on here is conflict preemption or  
6 field preemption. Now, it depends on how one defines  
7 those terms. But as we understand it it's conflict  
8 preemption, not field preemption, in the following  
9 sense. Our position is not that State laws have no  
10 application to operating subsidiaries or to national  
11 banks for that matter. It's that State laws apply to  
12 the same extent to operating subsidiaries as they would  
13 to national banks. And as this court has made clear in  
14 the Atherton case and in the Barnett Bank case, State  
15 laws do apply to national banks and operating  
16 subsidiaries in a variety of respects, and State  
17 contract law would be an example. But with operating  
18 subsidiaries in particular, State laws dealing with  
19 corporate governance questions, for example the process  
20 of incorporation, dissolution, shareholder voting, and  
21 things of that sort, would be controlling and so federal  
22 law doesn't control those sorts of aspects.

23 CHIEF JUSTICE ROBERTS: It's field  
24 preemption when it comes to regulation. Yes, if the  
25 bank is sued the normal rules of contract are going to

1     apply for enforcing a contract. But you're claiming  
2     field preemption with respect to regulation, correct?

3                 MR. SRINIVASAN: Well, I guess it depends on  
4     the degree to which the regulations apply to the  
5     national banks. That's my only point, is that State  
6     laws apply to the same extent to the operating  
7     subsidiary as to the national bank.

8                 CHIEF JUSTICE ROBERTS: State laws generally  
9     -- State agencies generally don't regulate national  
10    banks at all, right?

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

20                And so that's the point with visitorial  
21    authority. But visitorial authority by its very nature  
22    is asserted in service of and enforcement of some  
23    underlying substantive requirement, and the underlying  
24    substantive requirement at issue here is the requirement  
25    that operating subsidiaries register with the State.

1 And so there's a question of conflict preemption that  
2 applies both to the national bank and the operating  
3 subsidiary of whether that underlying substantive  
4 registration requirement could be applied to the  
5 national bank or could be applied to the operating  
6 subsidiary.

7 JUSTICE STEVENS: Yes, but it is true, is it  
8 not, that as long as this mortgage company was a  
9 subsidiary of a holding company rather than the bank  
10 itself, the State would have done the visiting, the  
11 visitorial power, whereas once they changed the Federal  
12 Government assumed that responsibility?

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

15 JUSTICE STEVENS: Well, as your co-counsel  
16 pointed out, previously this very company was a  
17 subsidiary of a holding company that also owned the  
18 bank, and at that time it was exclusively regulated by  
19 Michigan.

20 MR. SRINIVASAN: That's right, because it  
21 wasn't an operating subsidiary of a federally chartered  
22 national bank.

23 JUSTICE STEVENS: And the change in the  
24 corporate structure is the sole basis for saying now  
25 it's exclusively regulated by the OCC?

1           MR. SRINIVASAN: It is, but it's changing  
2 the corporate structure in a fundamentally important  
3 way. That's that it's no owned and controlled by a  
4 federally chartered national bank.

5           JUSTICE STEVENS: But this results in field  
6 preemption to the extent that the exercise of visitorial  
7 power is a regulatory function?

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

12          JUSTICE STEVENS: Well, it is now only the  
13 Federal agency that does the visiting, whereas it used  
14 to be only the State agency?

15          MR. SRINIVASAN: That's right.

16          JUSTICE STEVENS: And the question that led  
17 me to is how many additional personnel did OOC employ  
18 when it took over this area for 48 States?

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

21          JUSTICE STEVENS: But it was certainly quite  
22 a few people, I assume.

23          MR. SRINIVASAN: But Justice Stevens, in the  
24 regulatory materials that attended the promulgation of  
25 these rules OCC specifically addressed the question

1 whether it had sufficient resources to exercise  
2 oversight authority over operating subsidiaries of  
3 national banks. And let's be clear. It's not that the  
4 OCC previously had no authority over operating  
5 subsidiaries. The question is whether the OCC has  
6 exclusive authority over operating subsidiaries. And  
7 the OCC determined in the regulatory materials that it  
8 had sufficient resources to exercise oversight authority  
9 over operating subsidiaries --

10 JUSTICE STEVENS: But the authority under  
11 the old regime was just to make sure that the operation  
12 did not affect the financial stability of the parent  
13 bank.

14 MR. SRINIVASAN: But that's because it  
15 wasn't an operating subsidiary of a federally chartered  
16 national bank, and that changes things in a fundamental  
17 way for the following reason: That under the Barnett  
18 Bank case the rule of preemption, the special rule of  
19 preemption that applies in the context of national  
20 banking, is that when you're dealing with enumerated or  
21 incidental powers of national banks -- and one  
22 incidental power of a national bank is undisputed to be  
23 the power to conduct affairs through an operating  
24 subsidiary -- that the grants of those powers are  
25 normally preemptive of rather than preempted by State

1 law> And so once the operating --

2 CHIEF JUSTICE ROBERTS: That was an effort  
3 of the State to prohibit the national bank from engaging  
4 in the activity, correct?

5 MR. SRINIVASAN: Well, that was. But the  
6 Court --

7 CHIEF JUSTICE ROBERTS: That's an obvious  
8 case of conflict preemption. Here we have a question of  
9 whether or not the State can regular the operating  
10 subsidiary to any extent.

11 MR. SRINIVASAN: But the Court's decisions  
12 aren't limited to prohibitions of that sort. I'd make  
13 two points in that regard. First of all, in one sense  
14 this is a prohibition, because the operating subsidiary  
15 can't engage in federally authorized activities unless  
16 and until it gets the State's permission. So at least  
17 there is a prohibition at the outset. But more  
18 importantly, the Court's cases aren't limited to  
19 situations involving prohibitions of the sort that Your  
20 Honor posits, because in the Franklin National Bank case  
21 that was a situation in which the national bank had the  
22 power to accept savings deposits and the State law that  
23 was deemed to be preempted there didn't prohibit the  
24 national bank from accepting savings deposits.

25 JUSTICE SCALIA: What comes next? Can the

1 OCC say, well, the corporate law of this State doesn't  
2 really allow subsidiaries to do as much as we think a  
3 subsidiary of a national bank ought to be able to do, so  
4 we're going to attribute additional corporate powers to  
5 this subsidiary? Can it do that?

6 MR. SRINIVASAN: No, not if you're talking  
7 about corporate powers, because those are governed by  
8 State law. What it could do, though, is regulate the  
9 subsidiary's conduct of the business of banking,  
10 because, after all, an operating subsidiary has one  
11 purpose and one purpose only, and that's to carry out  
12 functions that the national bank itself could perform.

13 JUSTICE SCALIA: What troubles me, and maybe  
14 you can answer to it more specifically than you have, is  
15 that the core function of a banking regulatory agency is  
16 the visitation power, and the Banking Act makes it very  
17 clear that there is visitation power to national banks  
18 and makes it very clear that there is not for  
19 subsidiaries.

20 And here is a regulation which under the  
21 guise, it seems to me, of defining the powers of the  
22 national bank simply eliminates that distinction. And  
23 it seems to me that perhaps goes beyond what an agency  
24 regulation is allowed to do.

25 MR. SRINIVASAN: With respect,



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

16 CHIEF JUSTICE ROBERTS: Why should we assume  
17 that they wanted to preempt state laws to that extent.

18 MR. SRINIVASAN: Because what Congress was  
19 trying to do is to make sure that the OCC had exclusive  
20 visitorial authority with respect to the conduct of  
21 national bank function. It's just at the time that  
22 these statutes were enacted, the only play that national  
23 bank functions were being conducted was by a national  
24 bank itself. Now later on, when the laws of all 50  
25 states, the OTS, the Federal Reserve with respect to

1 state member banks, and the comptroller gives banks the  
2 authority to conduct national -- to conduct bank  
3 functions through its subsidiaries, then this issue  
4 arises about who exercises visitorial authority with  
5 respect to the conduct of those functions for a  
6 subsidiary. And it stands to reason that if the  
7 baseline rule is that with respect to the conduct of  
8 national bank functions through a national bank itself,  
9 the OCC visitorial authority is exclusive, then when a  
10 national bank exercises its Federal entitlement to  
11 conduct those very same functions through an operating  
12 subsidiary, the OCC's visitorial authority, likewise,  
13 would be exclusive. That seems to me to be an entirely  
14 reasonable regulatory determination by the comptroller,  
15 and there's nothing in those statutory provisions that  
16 speaks directly to that issue and that in any way  
17 precludes the comptroller from reaching that  
18 determination.

19 JUSTICE GINSBURG: Practically, is there any  
20 difference between the way they operated when they were  
21 just a corporation as before, and now a parent and sub?

22 MR. SRINIVASAN: Well, there could be. I  
23 don't know about this particular case but there  
24 absolutely could be, Justice Ginsburg, because when they  
25 become subsidiaries they are controlled by the national

1 bank and not by some other entity. And the reason that  
2 a national bank would choose to engage in this sort of  
3 structure rather than folding the enterprise into the  
4 bank itself are many fold. And in part it's for  
5 efficiency purposes because you can have focused  
6 management, especially when you're dealing with the sort  
7 of specialized things that operating subsidiaries  
8 typically do. But there's also other reasons. For  
9 example, there's a modularity component to this in the  
10 sense that the best specialized functions such as  
11 mortgage lending, very often a national bank will  
12 purchase an entity that conducts that activity, and may  
13 be interested in selling the entity later, and it's much  
14 more straightforward to do that if those functions are  
15 maintained in a separate subsidiary corporation.

16 CHIEF JUSTICE ROBERTS: Is there any aspect  
17 of state law, including liability limitation, that they  
18 want to take advantage of by establishing a subsidiary  
19 chartered under state law, Michigan or another state,  
20 and yet they're claiming immunity from all other state  
21 regulations?

22 MR. SRINIVASAN: Well, with respect to  
23 liability limitation in particular, Mr. Chief Justice, I  
24 should clarify that veil piercing principles and things  
25 of that sort would be governed by state law with respect

1 to the operating subsidiary. So if the question is  
2 whether the corporate veil is pierced, state law would  
3 dictate an answer to that question.

4 But, may I just finish one thought?

5 States won't have an incentive to liberally  
6 construe veil piercing principles with respect to  
7 national banks precisely because state member banks in  
8 all 50 states also have operating subsidiaries through  
9 which they charter banks to conduct banking functions.  
10 Thank you.

11 CHIEF JUSTICE ROBERTS: Thank you, counsel.  
12 Mr. Blanchard, you have a minute remaining.

13 REBUTTAL ARGUMENT OF E. JOHN BLANCHARD  
14 ON BEHALF OF THE PETITIONER

15 MR. BLANCHARD: Two key points.

16 First, Section 484 and 481 have been amended  
17 subsequent to the time operating subsidiaries came into  
18 play. Congress knew of operating subsidiaries when it  
19 amended 484 twice in the 1980s, and 481 was amended four  
20 times. Yet, never did Congress insert the word  
21 "affiliates" into the exclusive power of the OCC in 488.

22 Secondly, the Gramm-Leach-Bliley act is  
23 being greatly distorted. The same terms and conditions  
24 language that my opponent referred to was meant to  
25 return op subs only to the authority that the parent

1 bank could engage in. It wasn't preemptive or meant to  
2 preempt the states. The comptroller had issued a  
3 ruling, 34.F, (f), and they had allowed operating  
4 subsidiaries to do things differently from the parent  
5 bank.

6 CHIEF JUSTICE ROBERTS: Thank you,  
7 Mr. Blanchard. The case is submitted.

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

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