

enacted into law, concluding that courts are vested with certain inherent powers. *See, e.g., United States v. Hudson and Goodwin*, 11 U.S. 32, 34 (1812) (“Certain implied powers must necessarily result to our Courts of justice from the nature of their institutions.”); *State v. Morrill*, 16 Ark. 384, 1855 WL 607 (Ark.) (1855) (finding that there are express and implied powers, including the power to punish action found in contempt of court, that are inherently vested in courts). In order to avoid a constitutionally impermissible usurpation of the judiciary’s powers, Congress included the “vested in the courts of justice” exception in section 484 and thereby recognized the inherent authority of courts of justice to exercise those powers required to fulfill the courts’ responsibilities.

Congress clearly did not intend, however, to create new visitatorial authority that could be exercised by state authorities when it recognized the authority of courts of justice. It would be completely contrary to the express purposes of section 484 to read the “vested in the courts of justice” exception as enabling state authorities to accomplish exactly what Congress deliberately and expressly intended states *not* to be able to do—namely, inspect and supervise the activities of national banks and compel their adherence to a variety of state-set standards.

This purpose is effectuated by the plain language of the statute. The exception permits the exercise of “visitatorial powers” that are “vested in the courts of justice,” powers, in other words, that *courts possess*. Section 484 *does not create new powers* for state executive, legislative, or administrative authorities to supervise and regulate national banks. It grants no *new* authority and thus does not authorize states to bring suits or enforcement actions that they do not otherwise have the power to bring.

To read the exception to permit state authorities to inspect, regulate, supervise, direct, or restrict the activities of national banks simply by filing a complaint in a court would be to *create* a visitatorial power that states do not otherwise possess under Federal law. Section 484 by its express terms simply does not create such boundless visitatorial powers for state authorities.²³

²³ We note that one Federal district court has reached a different conclusion, but we respectfully disagree with the parts of the opinion in *First Union National Bank et al. v. Burke*, 48 F. Supp. 2d 132, 145–146 (D. Ct. 1999), that suggest a different reading of the exception, since the opinion did not analyze the purpose, plain language, and structure

Where section 484 *does* recognize visitatorial authority for states in section 484(b), by contrast, it is specific and narrow, and expressly stated as an *exception* to the general exclusivity of the OCC’s visitatorial powers recognized in section 484(a).

This construction of the “vested in the courts of justice” exception also is supported by the rule of statutory construction that holds that “[s]tatutory language must be read in context and a phrase ‘gathers meaning from the words around it.’”²⁴ *Jones v. United States*, 527 U.S. 373, 389 (1999) (quoting *Jarecki v. G.D. Searle & Co.*, 367 U.S. 303, 307 (1961)); *Tasini v. New York Times Company, Inc.*, 206 F.3d 161, 166–167 (2nd Cir. 2000), *cert. granted*, 531 U.S. 978 (2000), *aff’d*, 533 U.S. 483 (2001) (*noscitur a sociis* applied to a statute similar in format to section 484). Immediately following the “vested in the courts of justice” exception is an exception that preserves visitatorial authority for Congress or any committee thereof. This exception addresses the need of Congress and its committees to issue subpoenas compelling the production of bank records or witnesses in fulfillment of congressional oversight responsibilities. Similarly, the exception set out in paragraph (b) of section 484 (preserving a state’s ability to examine a national bank’s books and records as necessary to ensure compliance with state unclaimed property and escheat laws) is narrowly focused on a specific purpose. Thus, the statutory context of the “vested in the courts of justice” exception also leads to the conclusion that it is comparably focused on a particular function, not an exception that endorses an indirect route to accomplish precisely what Congress clearly sought to prevent—state regulation and inspection of the banking business of national banks.²⁵

Under this construction of section 484, states remain free to seek a declaratory judgment from a court as to

of section 484. Moreover, we note that the *Burke* court agrees that a state may not directly enforce state law against national banks. *See* 48 F. Supp. 2d at 146.

²⁴ This maxim is sometimes referred to as the *noscitur a sociis* doctrine.

²⁵ The *noscitur a sociis* doctrine as applied to the original National Bank Act also leads to the conclusion that only the OCC may enforce applicable laws. The visitatorial powers language initially appeared in section 54 of the National Bank Act. The section that preceded it governed the forfeiture of a bank’s charter upon a knowing violation of the National Bank Act, while the section that followed addressed penalties for embezzling. This location of section 484 in a series of enforcement-related provisions underscores the point that Congress intended for the OCC to have the exclusive authority to bring enforcement actions against national banks.

whether a particular state law applies to the Federally-authorized business of a national bank or is preempted. However, if a court rules that a state law is not preempted, enforcement of a national bank’s compliance with that law is within the OCC’s exclusive purview. *See National State Bank, Elizabeth, N.J. v. Long*, 630 F.2d 981, 988 (3rd Cir. 1980) (“[W]e find ourselves unable to agree with the district court’s determination that state officials have the power to issue cease and desist orders against national banks for violations of the [state’s] antiredlining statute. Congress has delegated enforcement of statutes and regulations against national banks to the Comptroller of the Currency.”).²⁶

In addition, this position does not preclude private civil actions or actions brought by other governmental entities pursuant to a Federal grant of authority. *See, e.g. Guthrie, supra*, 199 U.S. 148 (an individual shareholder action against a bank for access to its books and records); *Bank of America National Trust & Savings Ass’n v. Douglas*, 105 F.2d 100 (D.C. Cir. 1939) (service of subpoenas on a national bank by the SEC in connection with an investigation under the Securities Exchange Act of 1934).

Accordingly, in light of the purpose of the “vested in the courts of justice” exception, its plain language, and the narrow focus of other exceptions in section 484, we propose to amend § 7.4000(b) to state that national banks shall be subject to such visitatorial powers as are vested in the courts of justice to issue orders or writs compelling the production of information or witnesses. We propose further to clarify that this exception does not create or expand any authority of states or other governmental entities to inspect, regulate, or supervise national banks’ activities, or to compel national banks’ adherence to restrictions or mandates concerning the content of those activities or the manner in which, or standards whereby, those activities are conducted.

IV. Additional Changes to Parts 5, 7, 9, and 34

A. Part 5 Amendments

Section 5.20 of our regulations contains the requirements that govern the organization of a national bank. The proposal amends § 5.20(e)(1) to provide that the newly organized bank may be a special purpose national bank that limits its activities to fiduciary activities or to any other activities within the business of banking. The purpose of this

²⁶ This applies to enforcement of criminal statutes as well. *Easton v. Iowa*, 188 U.S. 220 (1903).