

No. 04-1186

In the Supreme Court of the United States

WACHOVIA BANK, NATIONAL ASSOCIATION,

Petitioner,

v.

DANIEL G. SCHMIDT III, ET AL.,

Respondents.

**On Writ of Certiorari to the
United States Court of Appeals for the Fourth Circuit**

REPLY BRIEF FOR THE PETITIONER

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REPLY BRIEF FOR THE PETITIONER

Respondents' brief suffers from one especially notable omission: it does not even attempt to explain why the Fourth Circuit's reading of 28 U.S.C. § 1348 makes any sense. Respondents recognize that, under their approach, Section 1348 departs from the ordinary diversity rules that governed all corporations other than national banks at the time of the statute's enactment, makes it uniquely difficult for federally chartered banks to invoke the jurisdiction of the federal courts, and disadvantages national banks vis-à-vis their state-chartered competitors. What they fail to offer is any reason to believe that Congress could possibly have wanted to achieve those anomalous results.

The utter implausibility of the supposition that Congress could actually have intended to make national banks citizens of all states in which they operate branches – thereby, as a practical matter, depriving them of access to federal court diversity jurisdiction in virtually all of their litigation – is in itself reason to have grave doubts about the holding below. But there is more, for respondents' argument fails on every basis. They are unable to demonstrate that the statutory language dictates such a result and their position is belied by the legislative background, which shows that Congress acted to assure parity in the jurisdictional treatment of national and state banks.

Section 1348 accordingly should be read in a manner that comports with the manifest congressional policy, with the background legal principles that animated the statute, and with the dictates of common sense. When that is done, reversal of the decision below is required.

A. The Language of Section 1348 Does Not Support The Fourth Circuit’s Decision

1. Respondents begin their argument (Br. 9-13) with a halfhearted defense of the Fourth Circuit’s conclusion that the word “located” unambiguously refers to all states in which national banks maintain branches. But their arguments in support of this contention are insubstantial. The various dictionaries cited by respondents say only that to be “located” is to be situated in a place; they do *not* say that corporations are ordinarily considered to be “located” in *all* places where they maintain offices, let alone that this is universally so in all contexts.

To the contrary, as we showed in our opening brief, the word “located” is ambiguous. Respondents make no response to the point (see Pet. Br. 12-13) that a substantial majority of the courts and judges to interpret Section 1348 have rejected the Fourth Circuit’s approach. Nor do they deny that the word “located” is used in many places in the National Bank Act to refer to the *single* place where a national bank maintains its main office. See *id.* at 11-12; U.S. Br. 12-13. They also fail to address the United States’ demonstration that, where corporations are concerned, the concept of “location” need not refer to physical presence at all. See *id.* at 10-11. Finally, they make no attempt to explain away this Court’s observation that “[t]here is no enduring rigidity about the word ‘located.’” *Citizens & Southern Nat’l Bank v. Boughas*, 434 U.S. 35, 44 (1977). Respondents’ reliance on the “plain meaning” of the word accordingly is ineffectual.

2. Respondents get no further by trying to attach significance to the contrasting language of Section 1348 and 28 U.S.C. § 1332(c)(1). The latter provision changed the traditional rule under which corporations were treated for diversity purposes as citizens only of their states of incorporation, providing instead that a corporation “shall be deemed a citizen of any State by which it has been incorporated and of the

State where it has its principal place of business.” Respondents assert (Br. 20) that Sections 1348 and 1332(c)(1) “must be read together” in light of “their common origins and their similar purpose and structure,” and that “the term ‘located’ under § 1348[] cannot mean the same thing as ‘the place of incorporation or principal place of business’ as used in § 1332.”

The most glaring problem with this argument, however, is that Sections 1348 and 1332(c)(1) do *not* have remotely “common origins.” The “located” language of Section 1348 was drafted in 1887, put in its current form in 1911, and last re-enacted in 1948. At each of those times, there was *no* explicit statutory provision addressing the citizenship of corporations, although it had been settled by judicial rule that, for purposes of diversity jurisdiction, a corporation was to be treated as a citizen *only* of its state of incorporation. See Pet. Br. 20-21; U.S. Br. 15. In contrast, Congress first expressly addressed the diversity status of corporations generally with the passage of Section 1332(c)(1) in 1958, more than 70 years after Section 1348’s “located” language was written and ten years after the enactment of Section 1348. As we explained in our opening brief (at 24), the enactment of Section 1332(c)(1) did not change – or, indeed, cast any light at all on – the meaning of legislation that had taken its final form many years before. Even when there would be a much more substantial basis to give weight to other post-enactment occurrences or legislative omissions, such a practice is generally resisted. See, e.g., *Patterson v. McLean Credit Union*, 491 U.S. 164, 175 n.1 (1989) (“Congressional inaction cannot amend a duly enacted statute.”); *Helvering v. Hallock*, 309 U.S. 106, 121 (1940) (Frankfurter, J.) (“we walk on quicksand when we try to find in the absence of corrective legislation a controlling legal principle”).

Moreover, it would have been surprising had Congress been moved in 1958 to modify Section 1348 to incorporate language identical to that used in Section 1332(c)(1). Con-

gress enacted the latter provision – providing for the first time that a corporation would be treated as a citizen both of its state of incorporation and of its principal place of business – as a “reaction to an abuse of diversity jurisdiction: [prior to 1958,] corporations in all senses local were permitted to invoke diversity against another local citizen by virtue of being chartered in another state.” 15 J. Moore, *et al.*, MOORE’S FEDERAL PRACTICE § 102App.03[2], at 12 (3d ed. 2005). Congress thus acted to prevent, for example, a business that was headquartered and operated principally in New York from invoking diversity jurisdiction in suits against citizens of New York simply because it was incorporated in Delaware. But there was no corresponding concern in 1958 regarding national banks, because at that time such institutions generally could not operate across state lines. As a consequence, had Congress been thinking about the diversity status of national banks in 1958, it surely would not have found it necessary or appropriate to subject them to the language of Section 1332(c)(1).¹

B. The Meaning Of “Located” As Used In The National Bank Venue Statute Does Not Control Here

Equally unconvincing are respondents’ efforts to rely on the Court’s holding in *Bougas* that the word “located,” as used in a prior version of the national bank venue statute, 12 U.S.C. § 94, included the location of bank branches. Respondents echo the court of appeals’ conclusion that the meaning of “located” “in the venue statute should carry over and be applied to § 1348” because “[b]oth statutes deal with the same or related subject matter” and “they are derived

¹ In addition, the corporations governed by Section 1332(c)(1) are incorporated under state law, whereas national banks are chartered under federal law and have no “state of incorporation.” Because of this distinction, identical provisions could not have been used to set the jurisdictional rules governing national banks and state-chartered corporations.

from the same statutes.” Resp. Br. 23-26. But this contention is wrong.

In fact, Sections 1348 and 94 do not have a common origin. Section 94, in the form addressed in *Bougas*, is traceable to Section 57 of the National Bank Act of 1864, 13 Stat. 116-117, and the Revised Statutes of 1875, § 5198.² Section 1348, in contrast, is descended from the 1882 Act, the first statute that addressed the application of diversity jurisdiction to national banks, and from the 1887 Act, which first applied the “located” language in the context of diversity jurisdiction. See Pet. Br. 15-16. The venue and diversity statutes accordingly were written at different times and to address different concerns.

At each of these times, as we note above, corporations were understood to be citizens for diversity purposes only of their states of incorporation. Thus, it was settled that a “corporation of one state, owning property and doing business in another state by permission of the latter, does not thereby become a citizen of this state also.” *Pennsylvania R.R. v. St. Louis, Alton & Terre Haute R.R.*, 118 U.S. 290, 295 (1886). See U.S. Br. 15-16 (citing cases). This rule meant that, although a corporation could “by its agents transact business anywhere,” the corporate entity could “have its legal home only at the place where it is *located by or under the authority of its charter.*” *Ex parte Schollenberger*, 96 U.S. 369, 377 (1877) (emphasis added). Congress therefore naturally would have understood national banks, like other corpora-

² The 1864 Act addressed federal question jurisdiction and venue, providing: “That suits, actions, and proceedings against any association under this act, may be had in any circuit, district or territorial court of the United States held within the district in which such association may be established; or in any State, county, or municipal court in the county or city in which said association is located having jurisdiction in similar cases.” The relevant provision of the Revised Statutes of 1875 was identical in substance.

tions, to be “located” for diversity purposes only in the states where they were chartered. And as the United States explains (U.S. Br. 17), absent compelling evidence that Congress intended to depart from that background understanding – evidence that does not exist in this case – it must be presumed that Congress “favor[ed] the retention of long-established and familiar principles.” *Isbrandtsen Co. v. Johnson*, 343 U.S. 779, 783 (1952).

Moreover, insofar as respondents seek to rely on *Bougas*, it is important to appreciate the contrasting implications of *Bougas* and the Fourth Circuit’s decision in this case. The broad holding of *Bougas* preserved parity of treatment between national banks and other corporations because, at the time that case was decided, venue in suits against state banks and other corporations lay *everywhere* those entities did business. See 17 MOORE’S FEDERAL PRACTICE § 110.03[4][b], at 33; § 110App.103[3], at 40; 19 C.J.S. CORPORATIONS § 717(d) at 374 (1990) (under typical state venue statutes, “[v]enue in action against domestic corporation can be laid in any county where corporation maintains branch office,” citing, *e.g.*, *American Savs. & Loan Ass’n v. Enfield*, 551 S.W.2d 552 (Ark. 1977)).³ By contrast, the decision below *destroyed* that parity by severely constricting national banks’ access to diversity jurisdiction as compared to that available to corporations generally.

³ Congress provided in 1948 that a corporation could be sued wherever it was “incorporated or licensed to do business or is doing business.” See 17 MOORE’S FEDERAL PRACTICE § 110App.103[1], at 40. This was the venue rule in force when the Court decided *Bougas*. The federal corporate venue language was broadened and put in its current form in 1988; 28 U.S.C. § 1391(c) now provides that a corporation “shall be deemed to reside in any judicial district in which it is subject to personal jurisdiction.”

C. Section 1348’s Legislative History And Use Of The Term “Established” Do Not Justify An Expansive Interpretation Of “Located”

1. Respondents make similar errors when they invoke the legislative history of Section 1348 to support the assertion that “a national bank may be a citizen of any state where it maintains a branch office.” Resp. Br. 26. Respondents read the 1882 Act to have provided that national banks were citizens of states in which they were “doing business,” and conclude that the 1887 Act continued this meaning when “[t]he phrase ‘doing business’ was later replaced with the word ‘located.’” *Id.* at 29. While respondents are correct that the 1887 Act was not intended to change the rule of the 1882 Act, their argument rests on a plain misreading of the 1882 Act.

The express purpose of that statute was to subject national banks to the same jurisdictional rule as similarly situated state banks: it provided that jurisdiction for suits involving national banks “shall be the same as” jurisdiction for suits involving state banks “which do or might do banking business where such national-banking associations may be doing business.” See Pet. Br. 15. The provision thus did not indicate that national banks were citizens of all states in which they were “doing business”; rather, it looked to the jurisdictional rule applicable to a similarly situated *state bank* doing business where the national bank operated. And it is undisputed that any state bank operating in two states in 1882 (if there were any such banks) would have been a citizen for diversity purposes only of its state of incorporation.⁴ Thus,

⁴ By referring to state banks that “do or might do banking business” where the litigating national bank “may be doing business,” Congress surely had in mind banks with geographically similar banking businesses. See 13 Cong. Rec. 4049 (1882) (remarks of Rep. Hammond) (“the jurisdictional limits for and as to a national bank shall be the same as they would be in regard to a State bank

respondents’ manifestly correct premise that Congress did not change the meaning of the 1882 Act when it adopted the “located” language in 1887 leads inexorably to the conclusion that Congress continued to require parity in the treatment of national and state banks and did not intend “located” to have the meaning given it by the Fourth Circuit.

Respondents also err when they argue that the words “located” and “established” in Section 1348 should be given different meanings because both of those words appeared in the National Bank Act of 1864 and it must be presumed that different words appearing in the same statute have different meanings. Resp. Br. 27-28; see *id.* at 16-17. Those words no doubt appeared in varying contexts in a number of early banking provisions, and the Court held in *Bougas* that the words meant different things when used together in the *venue provisions* of the National Bank Act and the Revised Statutes.⁵ But this hardly proves respondents’ point: it is undis-

actually doing or which might be doing business by its side; they shall be one and the same”). So if it is assumed that Congress in 1882 contemplated a national bank based in state A with a branch in state B, it must also be assumed that Congress pegged the diversity rules governing that bank to those applicable to a state-chartered bank that was incorporated in state A with a branch in state B. And all agree that such a state bank would have been a citizen only of state A.

⁵ In fact, a close look at the 1864 Act raises serious doubts about whether Congress used these words with any care, or saw any difference at all between them. That provision had three relevant clauses (the first of which previously had appeared as Section 59 of the National Currency Act of 1863): “That suits, actions, and proceedings against any [national banking] association under this act, may be had in any circuit, district or territorial court of the United States held within the district in which such association may be *established*; or in any State, county, or municipal court in the county or city in which said association is *located* having jurisdiction in similar cases; provided, however, that all proceedings to

puted that the National Bank Act of 1864 employed both words and, sometimes, unquestionably used “located” to refer only to the place of the bank’s main office. As this reality shows, the interpretive aid invoked by respondents, like all such canons of construction, must yield to firmer indicia of congressional intent.

Moreover, as explained in our opening brief (at 33-34), the words “located” and “established” as they ultimately appeared in *Section 1348* were drafted at *different* times and to address *different* types of jurisdiction. That makes it illogical, and improper, to assume that Congress attributed significance to the use of different words in Section 1348’s two sentences. Respondents offer no answer to this point.

D. The Very Limited Branching That Was Permissible Prior To 1948 Does Not Support Respondents’ Argument

We argued in our opening brief (at 25-30) that our understanding of Section 1348 and its predecessors is confirmed by Congress’s repeated re-enactment of the “located” language *after* this Court’s rulings (in 1892, 1915, and 1928) reading that language to require parity in the jurisdictional

enjoin the comptroller under this act shall be had in a circuit, district, or territorial court of the United States, held in the district in which the association is *located*.” National Bank Act of 1864, § 57, 13 Stat. 116-117. The first of these clauses creates federal jurisdiction over all suits against national banks (in the district where the bank is *established*); the second allows many such suits to be brought in state court (where the bank is *located*); the third makes federal jurisdiction exclusive for a limited subset of the first category (in the district where the bank is *located*). It is very difficult to imagine why Congress would have wanted different rules to apply to suits brought in federal court under the first, as opposed to the third, of these clauses – especially in 1864, when Congress had not yet made *any* provision for national banks to operate branches under any circumstances. See Pet. Br. 28 n.14.

treatment of national and state banks. We also suggested that it is improbable that Congress meant the terms “established” and “located” to have different meanings because, when the words were combined in Section 1348’s predecessor in 1911, national banks still had only one place of business. Pet. Br. 32-33.

The Fourth Circuit rejected these arguments because it believed that Congress “change[d]” the law in 1927 to permit interstate branching, so that re-adoption of the “located” language subsequent to that supposed change meant that Congress did not intend “located” to refer only to a bank’s principal place of business. Pet. App. 12a. As we showed in our opening brief (at 27-30), the court of appeals’ reasoning in this respect was premised on a plain historical error. Taking issue with our point, respondents now contend that Congress contemplated interstate branching as early as 1865. Resp. Br. 32-33. For several reasons, however, this argument is unavailing.

First, respondents simply miss our point. We argued that this Court repeatedly read the “located” language to require jurisdictional parity between national and state banks, that state banks were citizens only of their states of incorporation, and that Congress must be taken to have meant to endorse this rule for national banks when it re-enacted the “located” language. The Fourth Circuit rejected this argument because it believed that federal branching law had *changed* in 1927. But as respondents’ own statutory citations demonstrate (see Resp. Br. 33), there was no relevant change in the federal branching rules until 1994; the limited grandfathering of interstate branches discussed by respondents was permitted from the earliest days of the national bank system and predated the 1887 Act. Accordingly, there was no intervening change in the law that could have vitiated the repeated congressional re-enactment of statutory language embodying the parity principle.

Second, it is most improbable that Congress had interstate branching in mind when it enacted Section 1348's predecessors. As we noted in our opening brief (28 n.14), Congress in the nineteenth century provided for the grandfathering of branches operated by state banks that converted to or merged with national banks. As we also explained, however, the number of such branches was vanishingly small at the time Congress enacted the "located" language in 1887 and when it combined "established" and "located" into one jurisdictional provision in 1911. *Ibid.*⁶ As a consequence, Congress would have understood "established" and "located" to be functionally equivalent for jurisdictional purposes at the time that Section 1348 and its predecessors were enacted. See Pet. Br. 32-33.⁷

⁶ So far as we are aware, only a single national bank, the Bank of California, operated an interstate branch prior to the codification of Section 1348 in 1948. See Pet. Br. 26 n.13, 28 n.14. That was the institution involved in *American Surety Co. v. Bank of California*, 133 F.2d 160 (9th Cir. 1943). Even assuming that Congress was aware of the *American Surety* decision, it hardly seems likely that it intended to change *sub silentio* the meaning of the statute to address that single institution when it codified Section 1348 in 1948. To the contrary, as we argue in our opening brief (at 26), to the extent Congress was aware of that decision, it must be presumed that it meant to *endorse* it when it codified Section 1348 without change after *American Surety* was handed down.

⁷ Respondents neither deny that this is so nor explain the oddity of Congress bothering to ascribe different meanings to the words used in the two clauses of what became Section 1348 when, as respondents themselves acknowledge, it had no reason to anticipate any difference in results. See Resp. Br. 44 ("The fact that interstate branch banking was so rare in 1948, when the statute was enacted in its present form, indicates that this possibility was not a significant factor in the congressional intent."). Instead, respondents assert that the Court rejected a similar argument in *Bougas*, where it distinguished between the terms even though, during the period prior to authorization of branch banking, "the words 'estab-

Third, if it be assumed that Congress did have interstate branching in mind, that would not help respondents' case. Had Congress been aware of interstate national bank branches, it necessarily also would have known of the existence of interstate *state bank branches*, since national banks could have interstate branches only by inheritance of banks previously operated as state-chartered institutions. See Pet. Br. 28 n.14. And state banks with interstate branches unquestionably would have been deemed citizens only of their states of incorporation for purposes of diversity jurisdiction. See Pet. Br. 20-21. Because Congress intended to maintain jurisdictional parity between national and state banks, a Congress that was aware of the possibility of interstate branching also must be assumed to have intended national banks – even those with branches – to be citizens only of the states in which they were chartered.

E. Respondents' Remaining Arguments Lack Merit

Echoing the Fourth Circuit, respondents argue that “jurisdictional parity” requires only that national and state banks both have some access to diversity jurisdiction, not that the same diversity rules apply to both. Resp. Br. 33-35. As we suggested in our opening brief (at 22-23), this argument is untenable. Congress provided in the 1882 Act that “jurisdiction for suits hereafter brought by or against any” national bank “shall be the same as * * * the jurisdiction for suits by or against” similarly situated state banks. Because the citizenship rules are the crucial determinant of whether diversity

lished’ and ‘located’ led to the same ultimate venue result.” 434 U.S. at 44. See Resp. Br. 16, 32-33. In *Bougas*, however, the Court found “no sure indicators of congressional intent” (434 U.S. at 43); as noted above, the result there reached also had the signal virtue of maintaining parity between national and state banks. Here, in contrast, the congressional policy of jurisdictional parity between national and state banks would be destroyed by reading the two terms to have different meanings.

jurisdiction exists, jurisdiction for national and state banks cannot be “the same” unless both sets of banks are subject to the same definition of citizenship.

Indeed, as a practical matter the Fourth Circuit’s decision effectively obliterates national banks’ access to federal diversity jurisdiction. Wachovia, for example, has branches in 15 states and the District of Columbia, and the vast bulk of its litigation occurs in those states. Bank of America has branches in 29 states and the District. See Br. of *Amicus Curiae* Clearing House Association L.L.C. at 2 n.3. If these banks are citizens of every one of the states in which they operate branches, it will be the rare occasion indeed when they might be eligible to avail themselves of diversity jurisdiction.

Respondents get no further by arguing (Br. 36) that, in the unusual circumstances where a corporation is incorporated in more than one state, it would be deemed a citizen of both states of incorporation.⁸ That doctrine is wholly beside the point here; the relevant rule for present purposes was that corporations were citizens *only of their states of incorporation* and *not* of all states in which they did business. See Pet. Br. 20-21; U.S. Br. 15-16. As we showed in our opening brief (at 40-45), the parallel rule makes a national bank the citizen only of the state identified in its organization certificate (or, when different, in which its main office is located).⁹

⁸ Under the “forum doctrine” that generally prevailed when Section 1348 and its predecessors were enacted, a corporation that was incorporated in more than one state would be treated as a citizen *only* of the forum state when suit was brought by or against the corporation in one of its states of incorporation. See 13B Wright, Miller, & Cooper, FEDERAL PRACTICE AND PROCEDURE: JURISDICTION 2D § 3626, at 644-651 (1984 & 2005 Supp.); *Railway Co. v. Whitton’s Adm’r*, 80 U.S. 270 (1871).

⁹ Respondents are being misleading when they assert that “with regard to banks, there is no practical limitation to multiple citizen-

Finally, respondents err in arguing that the policy of competitive equality between national and state banks, described in our opening brief at 30-32, is inapplicable here because that policy relates only to “business practices” and not “legal procedures.” Resp. Br. 38. Congress’s application of the “policy of equalization” has been sweeping, expressed in provisions as diverse as those dealing with taxation, the authority to operate branches, and the power to act as a fiduciary. *Lewis v. Fidelity & Deposit Co. of Maryland*, 292 U.S. 559, 564-565 (1934). See, e.g., *Franklin Nat’l Bank of Franklin Square v. New York*, 347 U.S. 373, 375 (1954). The frequency with which litigation over the scope of diversity jurisdiction reaches this Court illustrates the reality that access to the federal courts likewise is a matter of substantial practical and business importance; it is an area where Congress would not have wanted national banks to be disadvantaged. And that point is confirmed by the plain language of the 1882 Act that underlies Section 1348 – language that expressly equated the treatment of national and state banks.

ship” and that “the predecessor of the Petitioner * * * operated separate banking companies” in North and South Carolina. Resp. Br. 45. For one thing, First Union Corporation of North Carolina and First Union Corporation of South Carolina, the entities mentioned by respondents, were neither “banking companies” nor national banks; the former was a service company and the latter a South Carolina corporation that functioned as a bank holding company. Their access to diversity jurisdiction would have been governed by Section 1332(c)(1), not Section 1348. More fundamentally, respondents appear to have in mind an ownership structure in which a bank holding company – a state corporation – owned multiple national banks, each of which operated in a single state. Each of those banks (as well as the bank holding company itself) was a citizen of only a single state and could access diversity jurisdiction on that basis. This structure had nothing to do with, and provides no support for, respondents’ contention “that corporations may have multiple citizenship.” *Id.* at 44.

CONCLUSION

For the foregoing reasons and those stated in the opening brief, the judgment of the United States Court of Appeals for the Fourth Circuit should be reversed.

Respectfully submitted.

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