No. 04-12420

IN THE UNITED STATES COURT OF APPEALS FOR
THE ELEVENTH CIRCUIT

BANKWEST, INC., ADVANCE AMERICA,
CASH ADVANCE CENTERS OF GEORGIA, INC.
Plaintiffs-Appellants,

COMMUNITY STATE BANK, FIRST AMERICAN CASH ADVANCE OF GEORGIA, LLC, CASH AMERICA FINANCIAL SERVICES, INC., GEORGIA CASH AMERICA, INC., FIRST BANK OF DELAWARE, CREDITCORP OF GEORGIA, LLC, COUNTY BANK OF REHOBOTH BEACH DELAWARE, EXPRESS CHECK ADVANCE OF GEORGIA LLC.
Consolidated Plaintiffs-Appellants,

v.

THURBERT E. BAKER, Attorney General of the State of Georgia
CATHY COX, Secretary of State, for the State of Georgia
Defendants-Appellees

On Appeal from the United States District Court
for the Northern District of Georgia

MOTION OF THE CENTER FOR RESPONSIBLE LENDING FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* IN SUPPORT OF DEFENDANTS-APPELLEES' OPPOSITION TO THE PETITIONS FOR REHEARING EN BANC

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CORPORATE DISCLOSURE STATEMENT AND CERTIFICATE OF INTERESTED PERSONS

The Center for Responsible Lending ("CRL") is a nonprofit corporation which is tax-exempt under section 501(c)3 of the Internal Revenue Code and an affiliate of the Center for Community Self-Help, which is also a nonprofit corporation tax-exempt under section 501(c)3 of the Internal Revenue Service Code. The Center for Community Self-Help's mission is to create ownership and economic opportunities for minorities, women, rural residents, and low-wealth families. Neither CRL nor the Center for Community Self-Help has issued shares or securities.

The following is a list of all persons and entities that have an interest in the outcome of this appeal in addition to those listed by plaintiffs-appellants in their Petitions for Rehearing *En Banc* and in the *amicus curiae* brief of the American Financial Services Association:

Calhoun, Michael

Center for Responsible Lending

Halperin, Eric

McGill, Yolanda

The Center for Responsible Lending (CRL), by and through its counsel, respectfully requests leave to file the attached brief *amicus curiae* in support of the State of Georgia's Opposition to the Petitions for Rehearing *En Banc* filed in the above-captioned case. In support of this Motion, CRL states the following:

1. CRL is an affiliate of state-chartered Self-Help Credit Union, which, along with its nonprofit affiliates, comprises one of the nation's largest community development financial institutions. Self-Help has provided more than $3.9 billion in financing to more than 43,000 low- and moderate-income homeowners, small business owners, and nonprofits nationwide.

2. CRL seeks to provide a counterpoint to the brief submitted by *amicus curiae* American Financial Services Association (AFSA), by offering a different industry perspective on the policy implications of Georgia's Senate Bill 157 ("Georgia Act"), codified at OCGA § 16-17-1 *et seq*.. Specifically, reversal could create uncertainty in the law and encourage non-bank lenders to enter into contractual relationships with state-chartered banks for the purpose of avoiding oversight by their primary regulators, the states. This would dramatically limit the states' ability to protect their citizens from predatory financial products offered by non-bank lenders.

3. CRL conducts research on financial services markets and practices. CRL also works with market participants and state and federal policymakers to craft workable solutions to market abuses. CRL has a fundamental interest in the Court's interpretation of current laws governing banking and lending.

4. CRL was directly involved in the passage of the Georgia Act. CRL provided supporters of the Act technical, drafting, and legal expertise.

5. CRL, by this motion and the attached brief, is responding to a direct request for support from the State of Georgia.

6. In compliance with Federal Rule of Appellate Procedure 29(d), the attached *amicus* brief is half the length authorized by Federal Rule of Appellate Procedure 35(b)(2) for Defendants-Appellees' Opposition to Petitions for Rehearing *En Banc*.

WHEREFORE, for the above reasons, the Center for Responsible Lending respectfully requests this Court grant its Motion for leave to file the attached brief as *amicus curiae* in support of the State of Georgia's Opposition to the Petitions for Rehearing *En Banc*.

Respectfully submitted,

_____

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Defendants-Appellees

On Appeal from the United States District Court
for the Northern District of Georgia

ORDER GRANTING LEAVE FOR
THE CENTER FOR REPONSIBLE LENDING
TO FILE A BRIEF AS *AMICUS CURIAE*

WHEREAS, the Center for Responsible Lending (CRL) has submitted a timely Notice of Appearance in this proceeding and has shown good cause to file a brief as *amicus curiae,* the MOTION of the Center for Responsible Lending for leave to file a brief *amicus curiae* in support of Defendants-Appellees' Opposition to the Petitions for Rehearing *En Banc* is hereby GRANTED.

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Circuit Court Judge

No. 04-12420

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CENTER FOR RESPONSIBLE LENDING'S BRIEF AS AMICUS CURIAE IN SUPPORT OF DEFENDANTS-APPELLEES' OPPOSITION TO THE PETITIONS FOR REHEARING EN BANC

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INTEREST OF AMICUS CURIAE

The Center for Responsible Lending ("CRL") is dedicated to protecting homeownership and family wealth by working to eliminate abusive financial practices. CRL is an affiliate of state-chartered Self-Help Credit Union, which, along with its nonprofit affiliates, comprises one of the nation's largest community development financial institutions. Self-Help Credit Union and its affiliates have provided more than $3.9 billion in financing to more than 43,000 low- and moderate-income homeowners, small business owners, and nonprofits nationwide. Self-Help's 25 years' experience in lending to low-wealth individuals provides a practical basis for CRL's policy work.

CRL submits this brief in opposition to the petition for rehearing *en banc* because the panel's opinion is consistent with the language of relevant banking statutes, particularly section 27(a) of the Federal Deposit Insurance Act (FDIA),[1] and existing case law.

ARGUMENT

Petitioners argue that because section 27(a) of the FDIA is substantially similar to section 85 of the National Bank Act (NBA),[2] the FDIA gives non-bank payday lenders who have contractual relationships with state banks the right to defy Georgia law. In fact, Petitioners urge the Court to interpret section 27(a) as

[1] 12 U.S.C. § 1831d(a) (2004).
[2] 12 U.S.C. § 85 (2004).

providing a broader grant of authority than section 85 of the NBA. As the district court and the appellate panel have correctly held, this interpretation is without merit.

National banks derive their authority to use non-banks to export their rates with minimal interference from host state law through the *combination* of section 85 and the 'incidental powers' language set forth in NBA section 24 (Seventh).[3] Congress, however, has chosen not to include the NBA's incidental powers language in the FDIA.

I. THE PETITIONERS' INTERPRETATION OF SECTION 27(A) IS INCONSISTENT WITH THE PLAIN LANGUAGE OF THE STATUTE.

Petitioners assert that FDIA section 27(a)'s grant of exportation authority to state banks also confers express authority to engage in other activities incidental to banking that facilitate exportation. Petitioners' assertions ignore the current structure of federal and state banking laws and stretch section 27(a) beyond its intended scope. In 1980, Congress passed the Depository Institutions Deregulation and Monetary Control Act (DIDMCA), and section 521 of that Act amended the FDIA to change the test for determining the maximum rate of interest that state-chartered banks could charge their customers.[4] Congress intentionally

[3] 12 U.S.C. § 24 (Seventh) (2004).
[4] Depository Institutions Deregulation and Monetary Control Act of 1980, P.L. 96-221, §521, 94 Stat. 132 (1980).

grafted language from the National Bank Act, including sections 85 and 86 of the NBA, on to the "bare bones" of DIDMCA. *See Greenwood Trust Co. v. Massachusetts*, 971 F.2d 818, 826-27 (1st Cir. 1992). However, Congress only incorporated certain NBA provisions into DIDMCA. As a result, neither DIDMCA nor the amended FDIA is equivalent to the NBA. *See Grunbeck v. Dime Savings Bank of New York, FSB,* 74 F.3d 331, 338 n.7 (1st Cir. 1996). Most importantly for the instant case, Congress did not add to the FDIA any language from section 24 (Seventh) of the NBA.

FDIA section 27(a) does not give federally insured state-chartered banks express federal powers to conduct interstate banking business through or in concert with non-banks. In fact, the parallel provision of the NBA, section 85, does not confer that authority on national banks. National banks derive the authority to use third parties with minimal interference from state law from section 24 (Seventh) of the NBA, known as the "incidental powers" provision.[5] Since the Georgia statute in question focuses exclusively on non-bank lenders, this difference between the NBA and FDIA is fatal to the petitioners' case.

[5] "To exercise by its board of directors or duly authorized officers or agents, subject to law, all such incidental powers as shall be necessary to carry on the business of banking; by discounting and negotiating promissory notes, drafts, bills of exchange, and other evidences of debt; by receiving deposits; by buying and selling exchange, coin, and bullion; by loaning money ...." 12 U.S.C. § 24 (Seventh) (2004).

It is well-settled that the Office of the Comptroller of the Currency (OCC) relies on section 24 (Seventh) of the NBA to promulgate regulations allowing national banks to engage in a range of activities across state lines with minimal interference from state law. *See, e.g.*, *Wachovia Bank, N.A. v. Burke*, 414 F.3d 305, 315-16 (2d. Cir. 2005) (deferring to the OCC's interpretation of section 24 (Seventh) and holding that the NBA's grant of "incidental powers" includes the right to conduct business through operating subsidiaries); *Bank of America, N.A. v. City and County of San Francisco*, 309 F.3d 551, 563-64 (9th Cir. 2002) (deferring to the OCC's interpretation of section 24 (Seventh) and holding that the "incidental powers" provision of 24 (Seventh) of the NBA gives national banks the right to provide ATM services to non-depositors at a charge). Congress' choice of the specific NBA provisions to incorporate into the FDIA through DIDMCA was not "mere happenstance," *Greenwood Trust Co.*, 971 F.2d at 827, but a clear indication of Congress' intent to vest state banks with only a subset of the privileges available to national banks.

Amicus American Financial Services Association (AFSA) asserts, without support, that the panel's interpretation of section 27(a) would prevent banks from making interstate loans through agents. The panel opinion does not question that state banks, like national banks, may use third parties to facilitate lending.

However, the panel opinion recognizes that agents of state and national banks are not treated identically by federal law.

II. PETITIONERS AND THEIR *AMICUS* ARE UNABLE TO CITE A SINGLE DECISION SHOWING THAT THE 11TH CIRCUIT PANEL ERRED IN UPHOLDING THE GEORGIA ACT.

Petitioners and their *amicus*, AFSA, are unable to cite a single decision that supports their expansive reading of the FDIA. Nor have Petitioners or AFSA relied upon decisions that conflict with the panel's opinion. In an attempt to manufacture a conflict where one does not exist, AFSA relies primarily on two cases: *Greenwood Trust Co. v. Massachusetts*, 971 F.2d 818 (1st Cir. 1992) and *Marquette National Bank v. First of Omaha Service Corp.*, 439 U.S. 299 (1978). Neither of these decisions can hold the weight that AFSA places on it.

In *Greenwood Trust Co.*, the court addressed which interest rate, and definition of interest, was available to an FDIC-insured state-chartered bank that offered credit cards to customers nationwide through a wholly-owned subsidiary. *Greenwood Trust Co.*, 971 F.2d at 821. The court observed that the principle of exportation is solidly embedded in section 27(a) and "provides the mechanism whereby a bank may continue to use the favorable interest laws of its home state in certain transactions with out-of-state borrowers." *Greenwood Trust Co.*, 971 F.2d at 827. Defendants-Appellees have no quarrel with *Greenwood's* holding, since *Greenwood* simply **does not** address whether the FDIA shields in-state third party

lenders from state statutes. *Greenwood* thus does not conflict with the panel's holding, namely that section 27(a) does not preempt the Georgia Act because the Act applies to certain loans made through local non-bank agents. AFSA's reliance on *Greenwood Trust Co.* is misplaced.

The *Marquette* decision, which pre-dates section 27(a), is completely inapposite to this case. In *Marquette*, the Court decided where a national bank is "located" for purposes of NBA section 85, which permits a national bank to charge interest up to the rate allowed by the state in which it is located. *Marquette*, 437 U.S. at 310. The Marquette case dealt with the authority of a national bank, not a state bank. Moreover, the *Marquette* Court **expressly** stated that it had no reason to reach questions related to the bank's agents or other in-state lenders.

> There is no allegation in petitioners' complaint that either the [bank subsidiary] Omaha Services Corp. or the Minnesota merchants and banks participating in the BankAmericard program are themselves extending credit in violation of Minn.Stat. 48.185 (1978) and we therefore have no occasion to determine the application of the National Bank Act in such a case.

Marquette, 439 U.S. at 307-308. Therefore, petitioners' reliance on *Marquette* is misplaced.

III. CONCLUSION

To adopt the reasoning of petitioners and their *amicus* would be to eliminate state regulatory powers over in-state corporations simply by virtue of those corporations' contractual relationships with a state bank that itself is subject to

both federal **and** state laws. Such a broad reading of section 27(a) cannot be reconciled with the language of FDIA and is unsupported by case law.

For the foregoing reasons, CRL supports the State of Georgia's opposition to the petitions for rehearing *en banc*. The petitions should be rejected.

Respectfully submitted,

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