05-5996cv(L)

05-6001-cv(CON)

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

The Clearing House Association, L.L.C.,

Plaintiff-Appellee,

Office of the Comptroller of the Currency,

Plaintiff-Counter-Defendant-Appellee,

v.

Andrew Cuomo, in his official capacity as Attorney General for the State of New York,

Defendant-Counter-Claimant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

PROPOSED BRIEF OF *AMICUS CURIAE* CENTER FOR RESPONSIBLE LENDING IN SUPPORT OF DEFENDANT-APPELLANT'S PETITION FOR REHEARING *EN BANC*

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Dated: February 8, 2008

RULE 26.1 DISCLOSURE STATEMENT

The Center for Responsible Lending ("CRL") is a non-profit supported organization under the Internal Revenue Code. CRL's supporting, or parent, organization is the Center for Community Self-Help, which is tax-exempt under section 501(c)(3) of the Internal Revenue 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.

DATED: February 8, 2008

Respectfully submitted,

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INTEREST OF *AMICUS CURIAE*

Amicus Curiae the Center for Responsible Lending ("CRL") is a non-profit policy, advocacy, and research organization dedicated to exposing and eliminating abusive lending practices in the mortgage market. CRL has published numerous studies on the subprime mortgage market and provided expert testimony to Congress on the mortgage market and the subprime foreclosure crisis. CRL is an affiliate of Self-Help, a non-profit lender that has provided more than $5 billion in financing to help over 50,000 low-wealth borrowers buy homes, build businesses, and strengthen community resources.

SUMMARY OF ARGUMENT

At a time when this nation's economy is currently teetering on the edge of recession as a result of the economic turmoil caused by imprudent and illegal residential mortgage lending practices, a divided panel of this Court in *The Clearing House Association, L.L.C. v. Cuomo* has hamstrung states' ability to redress those practices. The panel held that state officials cannot enforce *nonpreempted* state laws against national banks; a ruling that flies in the face of Supreme Court and other circuit court precedents allowing states to enforce just such laws. By making such an unprecedented ruling at a time when increased regulation of mortgage lending is essential to ensuring economic strength, this case

presents a question of exceptional importance. We therefore urge this Court to grant Attorney General Cuomo's petition for rehearing *en banc*.

ARGUMENT

I. FEDERAL REGULATORS' INATTENTION TO NATIONAL BANKS' COMPLIANCE WITH CONSUMER PROTECTION LAWS IN RESIDENTIAL MORTGAGE LENDING FACILITATED THE CURRENT CREDIT CRISIS.

The panel's ruling in this case comes at a time when the credit crisis resulting from the so-called "subprime meltdown" has dominated media headlines.[1] While there is much room for finger pointing, to be sure, the warning signs of the current crisis were largely ignored by federal regulators until the spring and summer of 2007 when federal agencies issued "guidance" on the issue. *See* Edmund L. Andrews, *Fed and Regulators Shrugged as Subprime Crisis Spread*, N.Y. Times, Dec. 18, 2007, at 1 (observing that federal agencies "waited until it was too late before trying to tame the industry's excesses"); *see also* Greg Ip & Damian Paletta, *Lending Oversight: Regulators Scrutinized in Mortgage Meltdown—States Federal Agencies Clashed on Subprimes as Market Ballooned*, Wall St. J., Mar. 22, 2007, at A1 (discussing the slow response of federal regulators to risky lending practices and their practice of "shield[ing] federally regulated banks from states and private litigants"). Indeed, even since that time,

[1] Indeed, the word "subprime" was chosen word of the year for 2007 by the American Dialect Society. *Bank on "Subprime" as Word of the Year*, Orlando Sentinel, Jan. 6, 2008, at A2.

the federal response has been less than aggressive and has favored the interests of banks over consumers. *See, e.g.*, Ip & Paletta, *supra*, at A1; David Cho, *Fed Plans To Curb Mortgage Excesses: Some in Congress Want Tougher Rules*, Washington Post, Dec. 15, 2007, at D1. Moreover, although the Comptroller of the Currency, John C. Dugan, himself admitted that the Office of the Comptroller of the Currency ("OCC") "hadn't really focused on" subprime lending, the federal government's inaction and lack of focus was particularly amplified by the OCC's aggressive fight to preempt the efforts of states—such as New York here—to fight unfair, discriminatory, and predatory lending practices. *See* Andrews, *supra*, at 1 (quoting John C. Dugan).

OCC's "primary mission and long-standing cultural focus," like that of other federal depository regulators, "has been monitoring the safety and soundness of their institutions"—not protecting consumers. Christopher L. Peterson, *Federalism and Predatory Lending: Unmasking the Deregulatory Agenda*, 78 Temp. L. Rev. 1, 73 (2005). Indeed, only recently has the OCC even looked for authority to replace the authority of the attorneys general in protecting consumers. Thus, the OCC undertook its very *first* enforcement action under Section 5 of the Federal Trade

Commission Act against a national bank's unfair and deceptive practices in 2000.[2] Even then, that action came only after a decade in which the target bank "had been well known in the … industry as the poster child of abusive consumer practices" and after the OCC was "embarrassed … into taking action" by a California prosecutor.[3] Strikingly, in light of the current media frenzy detailing abusive practices in subprime lending, the OCC currently lists only eleven actions in a section on its website captioned "[a]ctions the OCC has taken against banks engaged in abusive practices"—and the last action was taken in *2005*. *See* OCC, Consumer Protection News: Unfair and Deceptive Practices, http://www.occ.treas.gov/Consumer/Unfair.htm. Moreover, the OCC has a history of ignoring consumer complaints regarding predatory lending practices by its banks, and indeed refusing to intervene on behalf of consumers, considering

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[2] *See* Julie L. Williams & Michael L. Bylsma, *On the Same Page: Federal Banking Agency Enforcement of the FTC Act To Address Unfair and Deceptive Practices by Banks*, 58 Bus. Law. 1243, 1244, 1246 & n.25, 1253 (2003) (citing authority from the early 1970s indicating that the OCC had the authority to bring such an action under Section 8 of the Federal Deposit Insurance Act; noting that the OCC brought its first such case in 2000; and observing that "[a]n obvious question is why it took the federal banking agencies more than twenty-five years to reach consensus on their authority to enforce the FTC Act").

[3] Duncan A. MacDonald (former General Counsel, Citigroup Inc.'s Europe and North American card business), Letter to the Editor, *Comptroller Has Duty to Clean Up Card Pricing Mess*, Am. Banker, Nov. 21, 2003, at 17; *see also* Frontline, *Secret History of the Credit Card*, Transcript at 16-17, http://www.pbs.org/wgbh/pages/frontline/shows/credit/etc/script.html.

allegations of abusive practices "private party situation[s]." *See* Ip & Paletta, *supra*, at A1 (quoting OCC response to an elderly consumer with an abusive loan originated by a national bank). By contrast, during the quarter century since the widespread enactment of general consumer protection laws, state attorneys general have vigilantly brought actions to curb improper practices by national banks. *See, e.g.*, *Minnesota v. Fleet Mortgage Corp.*, 158 F. Supp. 2d 962 (D. Minn. 2001); *Alaska v. First Nat'l Bank of Anchorage*, 660 P.2d 406 (Alaska 1982); *Attorney Gen. v. Mich. Nat'l Bank*, 312 N.W.2d 405 (Mich. Ct. App. 1981); *Arizona v. Sgrillo*, 859 P.2d 771 (Ariz. 1993); *Wisconsin v. Ameritech*, 517 N.W.2d 705 (Wis. Ct. App. 1994); *West Virginia v. Scott Runyan Pontiac-Buick, Inc.*, 461 S.E.2d 516 (W. Va. 1995).

Even under specific federal consumer protection and fair lending laws,[4] the OCC's record of enforcement is thin. From 1999 to 2007, the OCC made only six fair lending referrals to the U.S. Department of Justice, only one of which involved

[4] Federal consumer protection and some fair lending laws give the OCC enforcement authority over national banks independent of the NBA. *See, e.g.*, 15 U.S.C. § 1691c(a)(1)(A) (Equal Credit Opportunity Act); 15 U.S.C. § 1607(a)(1)(A) (Truth in Lending Act).

discrimination on the basis of race or national origin.[5] The lack of enforcement is not because national banks abstain from predatory lending. As newspapers announce everyday—and even the OCC itself now admits—national banks are a significant participant in the current subprime foreclosure crisis. *See* OCC, *Annual Report: Fiscal Year 2007*, at 1, *available at* http://www.occ.treas.gov/annrpt/annual.htm ("While the national bank share of subprime loans was proportionally smaller than at other lenders, it was significant nevertheless."). Thus, it is hardly surprising that national banks or their operating subsidiaries are defendants in an ever-growing host of cases seeking to combat predatory lending.[6] Moreover, a 2005 study that analyzed which borrowers receive higher-cost loans using the enhanced data reported under the Home Mortgage Disclosure Act

[5] This information is contained in annual reports that the Federal Reserve Board and U.S. Attorney General provide to Congress. *See* 15 U.S.C. §§ 1613, 1691f. The relevant pages for the FRB Annual Reports by year are as follows: for 2006, 3; 2005, 2; 2004, 69-73; 2003, 67-71; 2002, 75-79; 2001, 134-37; 2000, 104-08; 1999, 106-11; 1998, 220-24; 1997, 192-95; 1996, 199-203; 1995, 211-15; 1994, 224-28; 1993, 210-15; 1992, 196-201; 1991, 180-84; 1990, 166-69; 1989, 146-49; 1988, 149-51; 1987, 157-60. The U.S. Attorney General's Reports to Congress for 1999 to 2006 are available at http://www.usdoj.gov/crt/housing/housing_special.htm.

[6] For example, the City of Baltimore has sued Wells Fargo Bank for the huge losses the city has incurred as a result of predatory discriminatory lending practices. Gretchen Morgenson, *Baltimore Is Suing Bank over Foreclosure Crisis*, N.Y. Times, Jan. 8, 2008, at 12; s*ee also e.g.*, Comments of National Consumer Law Center et al., Docket No. 03-16, § 2 (Oct. 6, 2003), http://www.nclc.org/initiatives/test_and_comm/10_6_occ.shtml (listing examples of cases and banks that profit from predatory mortgage lending).

("HMDA"), 12 U.S.C. § 2801 *et seq.*, found that national banks regulated by the OCC displayed the *greatest* disparities based on race, ethnicity, and income of all of the institutions studied. Cal. Reinvestment Coal., *Who Really Gets Higher-Cost Home Loans?* 3, 18 (2005). For example, national banks were 4.15 times more likely to make higher-cost refinance loans to African-Americans than they were to make higher-cost loans to white borrowers. *Id.*

Against this backdrop of almost non-existent consumer protection and fair lending enforcement under *federal* law, the OCC's effort to displace attorneys general from their role in enforcing applicable *state* law is even more troubling. Rather than vigilantly enforcing consumer protection and discrimination laws, the OCC has frequently intervened on the side of the banks it regulates when consumer rights are at stake. As just the most recent—and perhaps one of the most egregious—example, the OCC has encouraged national banks to disregard simple requests about mortgage delinquency and modification rates from state officials seeking to address the foreclosures crises in their jurisdictions. *See* State Foreclosure Prevention Working Group, *Analysis of Subprime Mortgage Servicing Performance: Data Report No. 1*, at 7 (Feb. 2008), *available at* http://www.csbs.org/Content/NavigationMenu/Home/StateForeclosurePrevention WorkGroupDataReport.pdf. The OCC's complaint in the instant action—filed simultaneously with the commercial bank association's complaint—provides yet

another example of the OCC acting in concert with banks. Rather than bringing an action of its own utilizing the enhanced HMDA data, the OCC has opted to use its limited resources to curtail law enforcement.

That the OCC sides with banks rather than consumers when their interests conflict is not surprising, given the OCC's funding mechanism and the system of allowing depository institutions to choose their regulator, leading to "charter competition" in banking. An institution may choose between the federal charters issued by the OCC or the Office of Thrift Supervision or choose a state charter. Agency leaders have made no secret that the OCC, in essence, markets its charter.[7] The OCC has a financial stake in the success of that marketing. According to the OCC's Annual Report, the agency's revenue for fiscal year 2007 was $695.4 million of which 95.8% came from assessments. *Annual Report: Fiscal Year 2007*, *supra*, at 9.

As of June 30, 2007, the OCC supervised banks holding $7.062 trillion—sixty-eight percent of the total assets of all U.S. commercial banks. *Id*. Large banks accounted for 86.3% of the bank assets under OCC jurisdiction, and the

[7] A former Comptroller, John D. Hawke, Jr., described the OCC's use of its power to override state laws protecting consumers as "one of the advantages of a national charter," and asserted that he was "not the least bit ashamed to promote it." Jess Bravin & Paul Beckett, *Friendly Watchdog: Federal Regulator Often Helps Banks Fighting Consumers—Dependent on Lenders' Fees, OCC Takes Their Side Against Local, State Laws—Defending Uniform Rules*, Wall St. J., Jan. 28, 2002, at A1 (quoting John D. Hawke, Jr.).

assessment revenue from those large banks constitutes 67.5% of the OCC's assessment revenue. *Id*. at 70. Thus, it is obvious that the OCC's revenues are extremely dependent upon large players. Bank of America's $40 million annual assessment, for example, was reportedly 10% of the OCC's annual budget in one recent year. Bravin & Beckett, *supra*, at A1.

The OCC's dependence on fees and banks' choice of charter create conditions conducive to regulatory capture and may well explain the absence of "a single public prosecution of a major national bank for violating a consumer protection law." Arthur E. Wilmarth, Jr., *The OCC's Preemption Rules Exceed the Agency's Authority and Present a Serious Threat to the Dual Banking System and Consumer Protection*, 23 Ann. Rev. of Banking & Fin. Law 225, 232 (2004). To be sure, "the OCC has a powerful financial interest in pleasing its largest regulated constituents, and the OCC therefore faces a clear conflict of interest whenever it considers the possibility of taking an enforcement action against a major national bank." *Credit Card Practices: Current Consumer and Regulatory Issues: Hearing Before the Subcomm. on Financial Institutions and Consumer Credit of the H. Comm. on Financial Services*, 110th Cong. 80 (2007) (written testimony of Arthur E. Wilmarth, Jr., Professor of Law, George Washington University Law School), *available at* http://www.house.gov/apps/list/hearing/financialsvcs_dem/hr042607.shtml.

Given its conflict of interest, it is not shocking—although extremely disappointing—that the OCC enforcement record has not improved even in the face of the subprime crisis. As we now show, the OCC's impotent protections coupled with its aggressive assertion of preemption ignores the states' proper role in regulating mortgage lending and leaves consumers at the mercy of unscrupulous and discriminatory practices prohibited by state law.

II. STATE REGULATORS SERVE AN ESSENTIAL ROLE IN AMELIORATING THE CURRENT CREDIT CRISIS.

A. Federal Policymakers Have Recognized the Need for a State Role in Regulating Residential Mortgage Lending.

Ironically, the panel's decision displaces the role of state regulators at the very time as federal policymakers have been highlighting the important role these same regulators must play in combating current problems in the mortgage lending industry.

Such recognition of state regulators' role was highlighted by the recent congressional testimony by the Federal Reserve Governor who oversees the agency's consumer protection activities. He detailed to the House Financial Services Committee that "[a]s the mortgage industry has diversified, increasing coordination among regulators has been helpful. In particular, our need to cooperate with state bank regulators has increased in importance . . . ." *Accelerating Loan Modifications, Improving Foreclosure Prevention and*

Enhancing Enforcement: Hearing Before the H. Comm. on Financial Services, 110th Cong. 4 (2007) (written testimony of Randall S. Kroszner, Member, Board of Governors of the Federal Reserve System), *available at* http://www.house.gov/apps/list/hearing/financialsvcs_dem/htkroszner_-_fed120607.pdf.

Even more bluntly, former Federal Reserve chairman Alan Greenspan recently has responded to problems of criminal or illegal acts related to mortgage lending by noting that the response to such problems "should be with the states' attorney general and, frankly, it should be beefed up a considerable amount from where it is at this stage." Jane Wardell, *Greenspan Defends Subprime Market*, St. Louis Post-Dispatch, Oct. 3, 2007, at D1 (internal quotation marks omitted). He has also explained that predatory lending is "something which Federal Reserve regulators, or examiners, are ill prepared to actually supervise, and, indeed, we were very good at looking at balance sheets and judging concentration risks[[8]] but extremely inept on all criminal issues." *Fresh Air*, Interview by Terry Gross with Alan Greenspan (NPR radio broadcast Sept. 17, 2007), http://www.npr.org/templates/story/story.php?storyId=14500893.

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[8] Looking at recent earnings reports and their implications for the economy, it is questionable how competent the regulators were at looking at balance sheets and concentrations as well. *See* David Enrich et al., *World Rides to Wall Street's Rescue—Citigroup, Merrill Tap Foreign-Aid Lifelines; Damage Tops $90 Billion*, Wall St. J., Jan. 16, 2008, at A1.

B. The Federal Regulators Have No History of Enforcing State Laws Against National Banks.

The panel's majority attempts to minimize the effect of foreclosing enforcement of nonprempted state law by state officials by noting that the OCC can still enforce these laws. Slip op. at 24.[9] This assurance, however, is completely illusory as the OCC has no record of enforcing state laws, nor certainly any expertise in enforcing such laws. By definition, this case is about the enforcement of *nonpreempted* state laws against national banks and their operating subsidiaries. To deprive America's consumers of the state attorneys general's resources and expertise in their own state laws at a time when more, not less, resources and expertise are clearly needed, is neither legally required by 12 U.S.C. § 484 nor a wise policy result. As detailed earlier, the OCC has a woefully limited record in enforcing *any* consumer protection laws. But even in the rare instances

[9] The panel also notes that nonprempted state laws can be enforced through private causes of action. Slip op. at 24 & n.9. In other words, by foreclosing state officials' enforcement power, the panel majority effectively holds that Congress intended for private parties to have more ability than state government officials to seek redress for consumer injuries through the visitorial power restriction. Beyond the troubling federalism implications of depriving state officials of powers enjoyed by their own citizens to enforce valid state laws correctly noted by the dissent, it is quite out-of-step with recent federal court jurisprudence to hold that Congress intended private parties to have greater ability than government officials to seek redress for legal violations. *See Nat'l Collegiate Athletic Ass'n v. Smith*, 525 U.S. 459, 467 n.5 (1999) ("We think it would be anomalous to assume that Congress intended the implied private right of action to proscribe conduct that Government enforcement may not check.")

when it has taken enforcement action, it has only looked to federal consumer protection laws and never once filed an action alleging a state law violation.

Moreover, the OCC appears not even to look for violations of nonpreempted state consumer protection laws. In defending the OCC's consumer protection record before Congress, the Comptroller chronicled various federal laws that its examiners ensure national banks meet but did not once speak of any effort to enforce state consumer protection laws. Most tellingly, he summarized OCC's consumer protection role as being "responsible for ensuring that national banks comply with applicable *federal* consumer protection laws." *Improving Federal Consumer Protection in Financial Services: Hearing Before the H. Comm. on Financial Services*, 110th Cong. 128 (2007) (written testimony of John C. Dugan, Comptroller of the Currency) (emphasis added), *available at* http://www.house.gov/apps/list/hearing/financialsvcs_dem/ht061307.shtlm. And specifically relevant to this case, involving Attorney General Cuomo's ability to enforce New York's antidiscrimination laws, the OCC's handbook detailing fair lending examination procedures for its bank examiners fails to include *any* mention of state antidiscrimination laws, including Executive Law § 296-a. *See* OCC, *Fair Lending Examination Procedures: Comptroller's Handbook* (2006), *available at* http://www.occ.treas.gov/handbook/fairlep.pdf.

The OCC's complete inattention to nonpreempted state consumer protection laws is confirmed by the recent congressional testimony of the Massachusetts Commissioner of Banks. Notwithstanding that the Riegle-Neal Act clearly leaves national banks subject to state community reinvestment acts, 12 U.S.C. § 36(f)(1)(A), the Commissioner reported that he was "not aware of any communication at any time by the OCC relative to seeking input from [state regulators] on [national] banks' compliance with the Massachusetts Community Reinvestment Act. Given the exclusive visitorial powers of the OCC, the [state regulators are] unable to determine either whether out-of-state national banks operating in Massachusetts are in compliance with Massachusetts CRA, fair lending, and consumer protection laws, or whether the OCC is fulfilling its mandate to examine for compliance with these provisions." *Improving Federal Consumer Protection in Financial Services*, *supra*, at 76 (written testimony of Steven L. Antonakes, Massachusetts Commissioner of Banks); *see also id*. at 86 ("[I]t is not clear what [state laws] they are enforcing, if anything.").

The panel failed to recognize what its holding effective does: leave *nonpreempted* state laws unenforced. Therefore the panel for all practical purposes preempts Executive Law § 296-a, notwithstanding its explicit recognition that the law is *not* preempted by the National Bank Act. Given the exceptional importance of properly regulating the mortgage industry to prevent further turmoil in the credit

markets driving the American economy into recession, this Court should not allow a result that even the panel recognized was contrary to law and therefore should grant Attorney General Cuomo's petition for rehearing *en banc*.

CONCLUSION

For the reasons explained above, Attorney General Cuomo's petition for rehearing *en banc* should be granted.

DATED: February 8, 2008

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PROOF OF SERVICE

I, Daniel Mosteller, being duly sworn, depose and say:

1. I am not a party to this action, and I am over 18 years of age.

2. On February 8, 2008, I caused to be served true and correct copies of the PROPOSED BRIEF OF *AMICUS CURIAE* CENTER FOR RESPONSIBLE LENDING IN SUPPORT OF DEFENDANT-APPELLANT'S PETITION FOR REHEARING *EN BANC*, by first class mail, postage prepaid, and one portable document format (PDF) copy by electronic mail upon the following:

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