05-05996

& 05-6001

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

THE CLEARING HOUSE ASSOCIATION, L.L.C.,

Plaintiff-Appellee,

-against-

ELIOT SPITZER, ATTORNEY GENERAL OF THE STATE OF NEW YORK,

Defendant-Appellant.

On Appeal from the United States District Court
for the Southern District of New York

BRIEF IN SUPPORT OF APPEAL BY *AMICI CURIAE* LAWYERS' COMMITTEE FOR CIVIL RIGHTS, WASHINGTON LAWYERS' COMMITTEE FOR CIVIL RIGHTS, FAIR HOUSING JUSTICE CENTER, NATIONAL COMMUNITY REINVESTMENT COALITION, NATIONAL FAIR HOUSING ALLIANCE, CHAUTAUQUA HOME REHABILITATION AND IMPROVEMENT CORP., EMPIRE JUSTICE CENTER, GREATER ROCHESTER COMMUNITY REINVESTMENT COALITION, LEGAL SERVICES FOR THE ELDERLY IN QUEENS, LONG ISLAND HOUSING SERVICES, NEIGHBORHOOD ECONOMIC DEVELOPMENT ADVOCACY PROJECT, SOUTH BROOKLYN LEGAL SERVICES, STATEN ISLAND CENTER FOR INDEPENDENT LIVING, AND UTICA/CENTRAL NEW YORK CITIZENS IN ACTION

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, and to assist judges in making a determination of whether they have any interests in any of a party's related corporate entities that would disqualify the judges from hearing the appeal, *amici curiae* state the following:

The Lawyers' Committee for Civil Rights Under Law ("Lawyers' Committee") has no parent corporations, and no public companies own 10% or more of the Lawyers' Committee stock.

The Washington Lawyers' Committee for Civil Rights and Urban Affairs ("Washington Lawyers' Committee") has no parent corporations, and no public companies own 10% or more of the Washington Lawyers' Committee stock.

The Fair Housing Justice Center ("FHJC") is a program of HELP USA, whose parent corporation is CSC Human Services Corporation. No public companies own 10% or more of HELP USA stock.

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INTEREST OF AMICI

The Lawyers' Committee for Civil Rights Under Law ("Lawyers' Committee") is a nonprofit civil rights organization that was founded in 1963 by the leaders of the American bar, at the request of President Kennedy, to help defend the civil rights of racial minorities and the poor. Among its other fields of specialization, the Lawyers' Committee works with communities across the nation to combat, protest, and remediate discriminatory housing and lending practices. The Lawyers' Committee has independent local affiliates in Boston, Chicago, Denver, Los Angeles, Philadelphia, San Antonio, San Francisco, and Washington, D.C.

The Washington Lawyers' Committee for Civil Rights and Urban Affairs ("Washington Lawyers Committee") is an independently-governed organization established in 1968 by members of the city's leading law firms in response to racial disturbances that had swept Washington and other cities. The Washington Lawyers' Committee addresses issues of discrimination and entrenched poverty in the Washington, D.C. metropolitan area. Leveraging its own broad expertise in discrimination litigation with the resources of Washington, D.C.'s private bar, the Committee's litigation has a national impact in the areas of housing, lending,

employment, public accommodations, education, immigrant and refugee rights, and other aspects of urban life.

The Fair Housing Justice Center ("FHJC") is a program of HELP USA, a non-profit organization that provides housing and social services to homeless individuals and families in New York, Pennsylvania, Texas, and Nevada. The FHJC is located in New York City and its mission is to challenge systemic housing discrimination, promote open and inclusive communities, and strengthen fair housing enforcement.

The National Community Reinvestment Coalition ("NCRC") is a nonprofit organization created in 1990. Along with its network of over 700 member organizations, NCRC works to increase fair and equal access to capital in traditionally underserved communities, including low-income communities and communities of color. Among other things, NCRC seeks to enforce fair lending laws and regularly provides financial education to low- and moderate-income communities, gives financial support and other services to victims of predatory lending, and engages in significant lobbying and advocacy on predatory lending issues.

The National Fair Housing Alliance ("NFHA") is a consortium of non-profit fair housing organizations, state and local civil rights groups, and individuals that was formed in 1988 to lead the fight against housing and lending discrimination in

this country. In conjunction with its members, NFHA strives to eliminate housing and lending discrimination and to ensure equal housing and lending opportunities for all people. NFHA engages in education, outreach, membership services, public policy initiatives, advocacy, and enforcement.

Each of the following New York non-profit organizations is committed to ending discriminatory home mortgage lending practices that harm low- and moderate-income individuals and families based on race, color, national origin, gender, disability, marital status, age, and other bases prohibited by federal, state, and local civil rights laws: Chautauqua Home Rehabilitation and Improvement Corporation ("CHRIC"), Mayville, New York; Empire Justice Center, Albany, New York; Foreclosure Prevention Project of South Brooklyn Legal Services ("SBLS"), Brooklyn, NY; Greater Rochester Community Reinvestment Coalition ("GRCRC"), Rochester, New York; Legal Services for the Elderly in Queens; Queens, New York; Long Island Housing Services ("LIHS"), Bohemia, NY; Neighborhood Economic Development Advocacy Project ("NEDAP"), New York, NY; Staten Island Center for Independent Living, Staten Island, New York; and Utica/Central New York Citizens in Action, Utica, NY. These organizations work within a variety of local communities across the State of New York to provide education, counseling, policy research, legal referrals and/or direct legal assistance, and public policy advocacy on a wide range of fair housing, affordable housing,

and fair lending issues, including equal access to home mortgage financing. As organizations that directly challenge tremendous and growing predatory and discriminatory lending practices in New York, these groups represent a broad range of communities harmed by such practices. In furtherance of each organization's commitment to fair lending, these organizations support broad enforcement of federal, state, and local fair lending laws.

In sum, *amici* have extensive experience and a strong interest in combating discriminatory housing and lending practices.

INTRODUCTION

Because of their extensive experience and interest in fair lending enforcement, *amici* focus this brief solely on the important issue raised in these consolidated cases of whether the National Bank Act ("NBA") bars a State Attorney General's investigation of national banks to determine if the banks are violating the fair lending provisions of the Fair Housing Act ("FHA" or "Act"). Stated another way, do the efforts of an Attorney General to investigate and enforce the FHA fall within the exception of the NBA that provides "[n]o national bank shall be subject to any visitorial powers *except as authorized by Federal law*"?[1]

The district court indicated that several of the FHA enforcement provisions fall within this exception, including "administrative enforcement by the U.S. Secretary of Housing and Urban Development; administrative enforcement by certified state or local agencies; private causes of action by aggrieved persons; and civil enforcement by the U. S. Attorney General where the federal official discerns a 'pattern or practice' of violations." *Clearing House Association, L.L.C. v. Eliot Spitzer,* 394 F. Supp. 2d 620, 628 (S.D.N.Y. 2005). However, the district court held that because the FHA does not explicitly or expressly give such enforcement authority to a state attorney general, either as the chief law enforcement officer of a

[1] 12 U.S.C. § 484 (1982) (emphasis added).

state or in the role of *parens patriae,* that the Attorney General's investigation into the fair lending practices of national banks cannot be considered an exception to the exclusive visitorial authority of the NBA. *Id.* at 622, 629. Accordingly, the Attorney General was permanently enjoined from conducting *any* fair lending investigations.

It is ironic that the chief federal regulator of national banks, with the primary responsibility for ensuring fair lending practices by national banks, is bringing a lawsuit to broadly enjoin fair lending enforcement by states against national banks – enforcement that would complement and strengthen the OCC's important responsibility to ensure compliance with fair lending laws. In any event, *amici* contend that the OCC's argument and the district court's holding enjoining such fair lending enforcement activities by the Attorney General is erroneous and should be reversed – permitting the Attorney General to continue his investigation and enforcement of the fair lending provisions of the FHA.

The district court's unduly restrictive interpretation of the state's role in enforcing the FHA runs counter to the text and legislative history of the FHA, in addition to well-settled case law. First, when debating the FHA in 1968 and the amendments to the Act in 1988, Congress repeatedly made clear its intention to combat the societal ill of discrimination and recognized the need for broad, multi-layered enforcement at all levels of government. The district court's holding will

undercut congressional intent by virtually eliminating enforcement of fair lending laws by states.

Second, the district court invented an improperly limited interpretation as to who may initiate a FHA claim. The definition of an "aggrieved party" under 42 U.S.C. § 3613, the standing provision of the FHA, is unusually broad. The district court's parsimonious reading of § 3613 runs counter to the text, legislative history, and case law associated with this provision. FHA suits by the Attorney General in his *parens patriae* capacity consistently have been approved by the courts.[2] Requiring an explicit authorization in the FHA to create an exception to the exclusive visitorial authority of the NBA is an erroneous legal conclusion because it is inconsistent with the broad standing afforded by the FHA. There is nothing in the FHA that requires an "express" authorization. The broad standing of § 3613 meets the requirement that state enforcement of the FHA is an exception to the OCC's exclusive visitorial authority.

I. THE STATUTORY SCHEME OF THE FHA ENVISIONS AN IMPORTANT ROLE FOR THE STATES.

The OCC's attempt to block state fair lending investigations of national banks undermines the clear objectives of the FHA. As such, the district court's interpretation of the NBA impermissibly conflicts with congressional intent to authorize state enforcement of fair housing and lending laws.

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[2] *See, infra*, § II(A).

The district court correctly noted that to assess the Attorney General's authority to enforce the FHA, courts must look to congressional intent and consider "the relevant statutory scheme, including what types of enforcement mechanisms are – and are not – expressly provided for by Congress."[3] However, the district court erred in assuming that, because the FHA does not explicitly grant states the authority to bring *parens patriae* lawsuits, Congress did not intend to allow such actions.[4]

In fact, in light of the unusually broad scope of the FHA, and recognizing the need for strong enforcement tools to combat the societal ills of racial discrimination in housing and lending, courts consistently have authorized a multi-layered enforcement of the FHA that allows housing discrimination lawsuits by individuals and families, by non-profit and fair housing organizations,[5] and by local governments.[6] In addition, the FHA expressly provides for administrative enforcement of the FHA by states under the "substantially equivalent" provisions of 42 U.S.C. § 3610. The district court conceded that, if this case was initiated by a substantially equivalent state agency, that agency would be authorized by federal law to investigate fair lending practices under the FHA. *See Clearing House Ass'n,* 394 F. Supp. 2d at 630. But, contrary to congressional intent to provide a

[3] *Clearing House Ass'n, LLC v. Spitzer*, 394 F.Supp. 2d 620, 629 (S.D.N.Y 2005) (citing *Connecticut v. Physicians Health Services of Connecticut, Inc.* 287 F.3d 110, 120-21 (2d Cir. 2002)).
[4] *Clearing House Ass'n*, 394 F.Supp. 2d at 622.
[5] *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982).
[6] *See, infra*, Section II(B).

very broad enforcement mechanism for the FHA, the court erroneously limited state investigative and enforcement authority to that situation only.

A. The Legislative History of the FHA and its Amendments Demonstrate Congress's Intent to Authorize State and Local Governments to Enforce the Law.

Cognizant of the ongoing need for increased fair housing and lending enforcement, Congress plainly intended that state and local enforcement of anti-discrimination laws be bolstered, not restricted, when it passed the FHA in 1968 and later amended the Act in 1988. This is evident from a review of the legislative history of these two bills. Legislators recognized the important role states had played in enforcing fair housing laws prior to passage of the FHA and intended the FHA to add to that role, not to replace or reduce it.

From the very first debates over what eventually became the 1968 FHA, Congress recognized the importance of cooperation between the federal and state governments in its enforcement.[7] For example, during the debates over the fair housing law proposed in 1966, the House resoundingly rejected an amendment which would have eliminated the states' role in enforcing federal fair housing law.[8] Representative Robert McClory (R-Ill.) introduced an amendment to create

[7] When testifying about the FHA of 1967, the then Secretary of Housing and Urban Development noted: "The Secretary could cooperate with State and local agencies charged with the administration of State and local fair housing laws and, with their consent, utilize their services." *Hearings on S. 1358, S. 2114, and S. 2280 before the Subcomm. on Housing and Urban Affairs of the Senate Comm. on Banking and Currency*, 90th Cong., 1st Sess. , 31 (1967); *see also* 114 Cong. Rec. 3,422 (1968); 114 Cong. Rec. 3,252 (1968).

[8] *See* 112 Cong. Rec. 18,134-18,138 (1966).

separate tracks for state and federal fair housing laws,[9] but the House rejected this amendment by a vote of 131 to 48.[10] In 1967, both the House and the Senate discussed at length the important role states had played in promoting fair and open housing. At hearings concerning the fair housing law proposed in 1967, the then Attorney General testified that, as of 1967, twenty-three states had enacted fair housing laws.[11] Legislators acknowledged the vital role states had played in enforcing fair housing laws and envisioned a cooperative relationship between the state and federal governments for the future.

More recently, when passing the Fair Housing Amendments Act of 1988 ("FHAA"), Pub. L. No. 100-430, 102 Stat. 1619 (1988), Congress expressly preserved an important role for state enforcement of fair housing and lending laws. During these congressional debates, members of Congress were concerned that the effectiveness of the FHA had been undermined by inadequate enforcement:

> Although [the FHA] provides a clear national policy against discrimination in housing, it provides only limited means for enforcing the law. The Committee . . . views this shortcoming as the primary weakness in existing law. . . . Twenty years after the passage of the [FHA], discrimination and segregation in housing continue to be pervasive. . . . Existing law has been

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[9] *Id.* at 18,134. The amendment proposed that the chief executive officer of each state could file a complaint against the United States alleging that state or local law effectively provided for housing free from racial discrimination. In turn, "the court may enter an order providing that the provisions of this title shall not apply with respect to such State or political subdivision." *Id.* at 18,138.

[10] *Id.* at 18,134.

[11] *Hearings on S. 1358, S. 2114, and S. 2280 before the Subcomm. on Housing and Urban Affairs of the Senate Comm. on Banking and Currency*, 90th Cong., 1st Sess., 24 (1967).

> ineffective because it lacks an effective enforcement mechanism.[12]

To supplement the enforcement efforts of private parties, which Congress saw as "restricted by the limited financial resources of litigants and the bar, and by disincentives in the law itself,"[13] the FHAA specifically strengthened the enforcement powers of private persons and federal enforcement agencies.[14] Importantly, the 1988 amendments maintained the enforcement role that the original FHA had established for state and local agencies in 1968. Indeed, Congress specifically "recognize[d] the valuable role state and local agencies play in the [FHA] enforcement process."[15]

The important role played by states in enforcing the FHA is recognized in the text of the statute itself, which provides that nothing in the FHA shall be construed to "invalidate or limit any law of a State or political subdivision of a

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[12] H.R. Rep. No. 100-711, at 15-16.

[13] *Id.* at 16.

[14] The FHAA strengthened the Act's private enforcement provisions by extending the statute of limitations, 42 U.S.C. § 3613(a)(1), removing a limitation on punitive damages, 42 U.S.C. § 3613(c)(1), and authorizing the award of attorney fees and costs, 42 U.S.C. § 3613(c)(2). The 1988 amendments also set forth an administrative enforcement scheme for HUD, 42 U.S.C. §§ 3610-3612, which allows the HUD Secretary to self-initiate complaints, 42 U.S.C. § 3610 (a)(1)(A)(i), allows HUD to issue subpoenas and order discovery to aid fair housing investigations, 42 U.S.C. § 3611(a), allows parties and complainants to elect judicial, rather than administrative, action, 42 U.S.C. § 3612, and allows the HUD Secretary to authorize prompt judicial action by the Attorney General, 42 U.S.C. § 3610(e). The FHAA also considerably strengthened the Department of Justice's enforcement authority, allowing the Attorney General to seek monetary damages for any person aggrieved by discrimination, 42 U.S.C. § 3614(d)(1)(B), and to seek substantial civil monetary penalties against violators, 42 U.S.C. § 3614(d)(1)(C).

[15] H.R. Rep. No. 100-711, at 35.

State. . . . that grants, guarantees or protects the same rights as are granted by [the FHA]. . . ." 42 U.S.C. § 3615 (formerly § 815).[16]

In sum, the district court's holding that the enforcement of fair lending laws by states is prohibited by the NBA undercuts and, indeed, guts the purpose of the FHA and its subsequent amendments – to *strengthen* enforcement of fair housing and fair lending laws. The legislative history of the FHA and specific provisions in the Act demonstrate that Congress intended a "coordinated intergovernmental enforcement effort to further fair housing"[17] that includes a strong state role. Congress has encouraged and authorized vigorous investigation and enforcement of the FHA by state officials. The OCC's suggestion that such enforcement is duplicative runs counter to the clear congressional intent that *underenforcement* – not overenforcement – of fair housing and lending laws must be corrected. In short, the text and legislative history of the FHA indicates that enforcement of the FHA by states is "authorized by Federal law."[18]

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[16] To encourage state agency enforcement of the FHA, HUD has developed the Fair Housing Assistance Program ("FHAP"), which provides financial assistance to state and local agencies. *See* 24 C.F.R. § 115.300. "The intent of this funding program is to build a coordinated intergovernmental enforcement effort to further fair housing and to encourage the [state and local] agencies to assume a greater share of responsibility for the administration and enforcement of their fair housing laws and ordinances."

[17] 24 C.F.R. § 115.300.

[18] 12 U.S.C. § 484.

B. Courts Consistently Have Recognized that the FHA Is a Broad Remedial Statute that Congress Intended to Eradicate the Societal Ills of Discrimination in Housing and Lending.

The FHA is at the core of our nation's deep commitment to civil rights and more specifically, fair housing and fair lending. It prohibits discrimination based on race, color, religion, national origin, sex, handicap, and family status in a wide variety of housing transactions – including mortgage lending.[19] Courts have consistently recognized that "the provisions of [the FHA] are to be given broad and liberal construction, in keeping with Congress' intent in passing the Fair Housing Act of replacing racially segregated housing with 'truly integrated and balanced living patterns.' " *Woods-Drake v. Lundy*, 667 F.2d 1198, 1201 (5th Cir. 1982) (quoting *Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205, 211 (1972)).

Consistent with congressional intent, the FHA creates a statutory scheme which promotes broad enforcement authority for both federal and state government. In interpreting this statutory scheme, courts have recognized that "Congress intended to confer broad rights to enforce the Fair Housing Act." *Fair Hous. Council v. Montgomery Newspapers*, 141 F.3d 71, 86 (3d Cir. 1978) (citing *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 374 (1982)). In order to carry out

[19] Section 3605 prohibits discrimination "in making available a [residential real estate] transaction, or in the terms and conditions of such a transaction." 42 U.S.C. § 3605(a). Residential real estate transactions include "[t]he making . . . of loans or providing other financial assistance: for purchasing, constructing, improving, repairing or maintaining a dwelling; or secured by residential real estate." 42 U.S.C. § 3605(b)(1). Such prohibitions plainly apply to national banks and their subsidiaries. *See* 42 U.S.C. § 3605(a) (covering "any person or other entity whose business includes engaging in residential real estate-related transactions").

its declared policy – to provide "for fair housing throughout the United States"[20] – the text of the FHA is "'broad and inclusive' and therefore must be given a 'generous construction.'" *Samaritan Inns v. District of Columbia*, 114 F.3d 1227 (D.C. Cir. 1997) (quoting *Trafficante*, 409 U.S. at 209).

Because illegal discrimination in housing and lending continues to plague our nation, the courts have had ample opportunity to explore the scope of various enforcement mechanisms under the FHA and its amendments. Courts properly have followed the directive of generous construction to give the statute its broadest possible reach. The Supreme Court has noted "precedent recognizing the FHA's 'broad and inclusive' compass, and therefore according a 'generous construction' to the Act's complaint-filing provision." *City of Edmonds v. Oxford House*, 514 U.S. 725, 730 (1995) (quoting *Trafficante*, 409 U.S. at 209, 212). Moreover, the Supreme Court established that "with the FHA, Congress intended to establish a broad set of rights to be free from housing discrimination, and that as a general rule, courts should not erect standing barriers – other than the minima required by Article III – to those seeking to vindicate these rights." *Smith v. Pac. Props. & Dev. Corp.*, 358 F.3d 1097, 1102 (9th Cir. 2003) (citing *Havens*, 455 U.S. at 372-73; *Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91, 103 (1979)).

[20] 42 U.S.C. § 3601.

II. COURTS HAVE BROADLY INTERPRETED STANDING UNDER THE FHA.

The district court erred by beginning and ending its analysis with the conclusion that it was unable to locate an "express provision in the Fair Housing Act authorizing states to bring parens patriae actions against national banks[.]" *Clearing House Ass'n,* 394 F. Supp. at 629. More specifically, in holding that an express grant of authority is required by the authorized by law exception of the NBA,[21] the district court relied on the OCC's interpretation of the NBA found at 12 C.F.R. § 7.4000 (b)(1). However, the OCC regulations do not require an express grant of authority to satisfy the authorized by law exception. This regulation merely gives examples that qualify for the authorized by law exception, not an exhaustive list. None of these examples parallel the broad standing conferral of the FHA. *See* 12 C.F.R. § 7.4000 (b)(1). Never before have the broad standing provisions of the FHA been read to require such an express grant of standing.

The district court's conclusion ignores the broad judicial interpretation of the FHA's grant of a private right of action to *any* "aggrieved person," 42 U.S.C. § 3613. The FHA authorizes broad enforcement of the FHA by the federal government pursuant to 42 U.S.C. § § 3610, 3614.[22] With respect to private rights

[21] 12 U.S.C. § 484.
[22] 42 U.S.C. § 3614 (U.S. Attorney General); § 3610 (HUD Secretary).

of action by "aggrieved person[s]," courts have held that a wide variety of individuals, groups, and governments are considered "aggrieved person[s]." *Id.* at § 3613. For example, courts have allowed lawsuits by minority and white individuals and families who claim their right to live in integrated communities have been violated by discrimination, by organizations whose resources have been diverted to combat discrimination or whose mission has been frustrated by discrimination, and by municipalities.[23] Congress also intended that states be allowed to deploy the FHA to protect their citizens from invidious discrimination. Moreover, the plain language of the NBA does not require that an exception be express or explicit to be "authorized by Federal law."[24]

A. State Attorneys General Have *Parens Patriae* Authority to Protect Their Vulnerable Citizens, Particularly Against Invidious Discrimination.

Despite the broad standing afforded a variety of individual groups and governments, the district court found that the FHA did not authorize the Attorney General to sue in his *parens patriae* capacity. The district court reasoned that the FHA provides no express authority for such a suit. *See Clearing House Ass'n,* 394 F. Supp. at 629. However, never before have courts required an express grant of *parens patriae* standing, especially with regard to statutes such as the FHA which have broad standing provisions.

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[23] *See, infra* at 26-27, Section II.B.
[24] 12 U.S.C. § 484.

By the breadth of its language, § 3613 authorizes the State, in its capacity as *parens patriae*, to bring suit for its residents under the FHA. The term *parens patriae* refers to the traditional "role of state as sovereign and guardian of persons under legal disability." *See Alfred L. Snapp & Son, Inc. v. Puerto Rico, ex rel., Barez* ,458 U.S. 592, 600 (1982) (quoting BLACK'S LAW DICTIONARY 1003 (5th ed. 1979). *Parens patriae* standing allows a state to intervene to protect the rights of its most vulnerable citizens. *Id.* By proceeding in this manner, a state is asserting a "quasi-sovereign interest" which permits it to bring suit on behalf of its citizens. *Id.* at 601. A case involving discrimination is likely to implicate a quasi-sovereign interest. *People by Abrams v. 11 Cornwall Co., 695 F2d 34, 38 (2d Cir. 1982).*

Parens patriae standing is an essential tool to combat invidious discrimination. The Supreme Court has noted that "[t]his Court has had too much experience with the political, social, and moral damage of discrimination not to recognize that a State has a substantial interest in assuring its residents that it will act to protect them from these evils." *Snapp.* at 609. Following this reasoning, a New York federal district court specifically has held that the FHA provides for *parens patriae* standing. *Support Ministries for Persons with AIDS, Inc. v. Waterford*, 799 F.Supp. 272 (N.D.N.Y. 1992).

This Court, in *Connecticut v. Physicians Health Services of Connecticut, Inc. ("Physicians Health Services")*, 287 F.3d 110, 120 (2d Cir. 2002), provided a road map to follow to determine whether a particular statute grants *parens patriae* authority. First, a court must consider the breadth of the statutory language. For example, "the federal statutes under which states have been granted parens patriae standing all contain broad civil enforcement provisions that permit suit by any 'person' that is 'injured' or 'aggrieved.'" *Id.* at 121 (internal quotations omitted) (quoting *Connecticut v. Physicians Health Services of Connecticut, Inc.*, 103 F. Supp. 2d 495, 509-10 (D. Conn. 2002).

Applying this analysis to the case at bar, the FHA's civil enforcement provision, 42 U.S.C. § 3613, allows any "aggrieved person" to commence a civil action.[25] The district court itself recognized that the language in the FHA is precisely the kind of broad statutory language that is typically interpreted to authorize *parens patriae* standing. *Clearing House Ass'n*, 394 F.Supp.2d at 628. ("This grant of standing to any 'aggrieved person' is the type of statutory language cited by the Second Circuit as that which is generally interpreted to reflect Congressional intent to permit states to enforce the rights protected by federal statutes through parens patriae actions.") By contrast, other precedent relied on by

[25] The FHA broadly defines an "aggrieved person" as any person who "claims to have been injured by a discriminatory housing practice" or "believes that such person will be injured by a discriminatory housing practice that is about to occur." 42 U.S.C. § 3602(i).

the district court analyzed much narrower civil enforcement provisions, such as the Clayton Act's limitation to those injured in their "business or property," *see Hawaii v. Standard Oil Co.*, 405 U.S. 251 (1972), or ERISA's "careful[ ] limit" of standing to a "participant, beneficiary or fiduciary" in a covered plan. *See Physicians Health Services*, 287 F.3d at 121.

Second, courts must attempt to discern whether Congress intended to allow for *parens patriae* standing by analyzing the statutory scheme, including any enforcement mechanisms that are or are not provided for by Congress. *Physicians Health Services*, 287 F.3d at 120-21. Though the district court in the matter *sub judice* properly considered several of the FHA's enforcement mechanisms, *see Clearing House Ass'n*, 394 F.Supp.2d at 630, it erred in concluding that Congress did not intend for 42 U.S.C. § 3613 to authorize states to bring *parens patriae* actions against national banks. *Id.*

The Second Circuit has stated unambiguously that: "[W]e do not of course intend to imply that states may only sue in their parens patriae capacity when a statute specifically provides for suits by states." *Id. at 121* In fact, the statutory scheme of the FHA consists of a multi-layered enforcement structure. The FHA authorizes lawsuits by: (i) private individuals and families, (ii) for-profit

developers and non-profit housing organizations,[26] (iii) local governments,[27] (iv) the United States Attorney General,[28] (v) the Secretary of the U.S. Department of Housing and Urban Development,[29] and (iv) state agencies that are deemed substantially equivalent to the federal administrative process.[30] This statutory scheme demonstrates congressional intent to enable the broadest possible enforcement of the federal antidiscrimination law.

Moreover, because of the national importance of combating discrimination in housing and lending, 42 U.S.C. § 3608(d) mandates that all executive department and agencies – including, notably, the OCC – "shall administer their programs and activities related to housing and urban development . . . . in a manner affirmatively to further the purpose of [the FHA] and shall cooperate with the Secretary [of HUD] to further such purposes." 42 U.S.C § 3608(d). This unusual directive stands in stark contrast to the narrower statutory standing in statutes analyzed by the district court. In fact, this "affirmatively furthering" requirement places a burden on the OCC to encourage – instead of enjoin – state enforcement.

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[26] *Havens*, 455 U.S. 363.
[27] See § II(B), *infra*.
[28] 42 U.S.C. § 3614.
[29] 42 U.S.C. § 3610.
[30] 42 U.S.C. § 3610(f).

In sum, the district court's reliance on the fact that the FHA does not expressly grant the state *parens patriae* authority to enforce the Act to enjoin state enforcement is in conflict with the statute itself and the law of this Circuit.[31]

B. State Attorneys General Have Standing Under the FHA to File Civil Actions to Eliminate Discrimination in Housing and Lending.

State attorneys general also have standing to enforce the FHA in light of well-settled case law that provides exceptionally generous standing. The Supreme Court repeatedly has held that standing under the FHA is as broad as is permitted under the Constitution. *See, e.g., Trafficante,* 409 U.S. 205; *Havens*, 455 U.S. 363.

In fact, the Supreme Court has declared that entities complaining of discrimination in violation of the FHA benefit from an exception to normal prudential rules governing standing. *Bellwood*, 441 U.S. 91. Thus, after considering the "profound" harms visited upon a community by racial discrimination, including a reduction in the total number of homebuyers and a concomitant lowering of property values, the Supreme Court in *Bellwood* granted standing to a local government to use the FHA to combat those harms. *Id.* Following *Bellwood*, the courts have consistently authorized local governments to sue under the FHA. *See, e.g., Heights Cmty. Congress v. Hilltop Realty, Inc.*, 774 F.2d 135, 139 (6th Cir. 1985) (municipality can assert standing based on actual or

[31] The district court in the matter *sub judice* relied on the holding in *Hawaii v. Standard Oil of California,* 405 U.S. 251 (1972) in requiring express authorization to enforce the FHA. However, the Second Circuit appropriately interpreted *Standard Oil Co.* when it distinguished between statutes with narrow and broad enforcement provisions. *Physicians Health Services*, 287 F.3d at 121.

even threatened injury: "plaintiffs were in a *position* to be injured by defendants' alleged Fair Housing violations, and thus they have alleged and proven facts sufficient to establish actual *or threatened* injury."); *Chicago v. Matchmaker Real Estate Sales Center*, 982 F.2d 1086, 1094 (7th Cir. 1992) (municipality had standing to assert a violation of the FHA); *Bellwood v. Dwivedi*, 895 F.2d 1521, 1525 (7th Cir. 1990) (same); *Bellwood v. Dwayne Realty*, 482 F.Supp. 1321, 1329 (N.D. Ill. 1979) (same); *City of New York v. Fillmore Real Estate*, 665 F. Supp. 178, 181 (E.D.N.Y. 1987) (same).

The district court erred when it carved out an exception to the FHA's broad conferral of standing to exclude enforcement of the FHA by state attorneys general. Well-settled case law allows municipalities to redress violations of the FHA which primarily concern discrimination in residential real estate development and sales. This type of discrimination tends to take place in a local market and, thus, is best addressed at the local level. By contrast, the effects of unfair lending practices often spread beyond individual localities. Residential mortgage lending tends to take place in a national market governed by state-by-state practices. Given the state-wide harms of lending discrimination – such as that alleged in the case at bar – states must be permitted fight it at the state level. There is no logical reason to bar states from combating discrimination within their borders by suing under the FHA, but permitting local governments to do so. Exactly like

municipalities, state attorneys general have a crucial interest in "promoting stable, racially integrated housing."[32]

Indeed, it is quite remarkable that the agency that has primary responsibility for ensuring compliance with fair lending laws would seek to enjoin states from participating in this effort, and thus reduce overall fair lending enforcement. This Court should reverse the district court and permit the State to continue its efforts to fight lending discrimination in New York.

CONCLUSION

For the reasons set forth herein, *amici* respectfully urge this Court to adopt a reading of the Fair Housing Act commensurate with its broad purpose, as evidenced by its statutory framework, legislative history, and well-settled case law. Accordingly, the decision of the district court should be reversed, and the judgment should be vacated and awarded to the Defendant-Appellant.

[32] *Bellwood,* 441 U.S. at 111.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 32(A)

Pursuant to Fed. R. App. P. 32(a), the *amicus* certifies that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 4669 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Office Word Version 2003 in 14-point Times New Roman font.

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