No. 10-2444

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

DONNA EPPS,
Plaintiff-Appellant,

v.

JPMORGAN CHASE BANK, N.A.
Defendant-Appellee.

Appeal from the United States District Court
for the District of Maryland
No. 10-cv-1504

BRIEF OF *AMICI CURIAE* THE CENTER FOR RESPONSIBLE LENDING AND THE NATIONAL CONSUMER LAW CENTER IN SUPPORT OF APPELLANT DONNA EPPS AND REVERSAL OF THE DISTRICT COURT DECISION

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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. Neither CRL nor its parent organization has issued shares or securities.

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No other party or person (other than *Amici*) has authored the enclosed brief, either in whole or in part. No other person (including either of the parties or their counsel) has contributed money intended to fund the preparation or submission of the enclosed brief.

Dated: April 28, 2011

Respectfully submitted,

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INTEREST OF *AMICI CURIAE*

This brief is filed with the consent of both parties. Fed. R. App. P. 29(a). As detailed in the accompanying motion, *Amici Curiae* CRL and NCLC are national non-profit organizations with a commitment to consumer protection. *Amici* have an interest in seeing strong and effective enforcement of consumer protection laws.

SUMMARY OF ARGUMENT

There are only three ways for a creditor to legally repossess a car in Maryland: (1) self-help repossession in strict compliance with the Retail Installment Sales Act ("RISA"), (2) self-help repossession in strict compliance with the Credit Grantor Closed End Credit Provisions ("CLEC"), or (3) judicial process, such as a replevin action.

Like other creditors, national banks must follow the law when they seize secured property or suffer the consequences of wrongful repossession. No federal law authorizes a bank to take a borrower's personal property without judicial process. But that is exactly what JPMorgan Chase did. It purchased a contract explicitly governed by CLEC, a Maryland statute that authorizes self-help repossession subject to certain requirements, then took Ms. Epps' car without following the rules set out in that statute. But for the very state statute that Chase

claims is preempted, Chase's conduct was nothing more than theft. Chase now claims the right to a deficiency judgment, a privilege provided to creditors by Maryland state law that is conditioned on strict compliance with the notice provisions that Chase ignored.

CLEC's repossession notice provisions do not conflict with federal law and are not preempted when applied to national banks. The longstanding interpretation of the National Bank Act ("NBA"), 12 U.S.C. § 1 *et seq.*, is that it does not preempt state debt collection laws, which have historically been regulated by States as part of their traditional police powers. A contrary interpretation would create a lawless void in which national banks are permitted to take advantage of state laws authorizing non-judicial repossession, but follow their own whims in exercising that authority. The district court upset this settled law by misinterpreting a regulation promulgated by the Office of the Comptroller of the Currency ("OCC"). This Court should reverse the district court's dangerous decision, which would leave Maryland car loan borrowers – and many other borrowers – without basic protections when national banks seize collateral.

ARGUMENT

I. The District Court Erred By Permitting National Banks To Engage In Debt Collection Unconstrained By Any Law

There is no federal law that authorizes non-judicial repossession in the context of a secured car loan, much less a federal law that regulates the manner in

which such repossession may occur. Rather, state debt collection laws, such as CLEC, form part of the framework of bedrock laws, which provide the rules underlying banks' daily operations. The Supreme Court and the OCC have repeatedly acknowledged the validity of such state laws – particularly with respect to debt collection – when applied to national banks. The district court's decision ignored these long-standing principles, leaving national banks at liberty to operate in a legal void.

A. Maryland State Law Authorizes Self-Help Repossession Subject to Balanced and Critical Consumer Protections

Maryland's debt collection laws carefully balance the rights of consumers and creditors. Creditors may unilaterally elect to apply one of two statutes -- either RISA or CLEC -- when originating a car loan[1] and both allow a creditor to engage in self-help repossession. *Compare* Md. Code Ann., Commerical Law § 12-601 *et seq.* (RISA) *with* Md. Code Ann., Commerical Law § 12-1001 *et seq.* (CLEC). A creditor electing CLEC over RISA receives a number of benefits, including the ability to charge higher interest rates, but is also subject to correspondingly more severe penalties for statutory violations. *See Biggus v. Ford Motor Credit Co.*, 613 A.2d 986, 992 (Md. 1992); Md. Code Ann., Commercial Law § 12-1018(b).

[1] Absent a lender's explicit written election of CLEC, RISA applies by default to a financed car sale. *See* Md. Code Ann., Commercial Law § 12-601; Md. Code Ann., Commerical Law § 12-1013.1; 79 Md. Op. Atty. Gen. 98, Opinion No. 94-002, 1994 WL 234287 at *10 (Jan. 7, 1994).

Both RISA and CLEC require that car owners receive basic repossession notices specifying what they must do to recover their cars. In exchange, creditors are allowed to repossess a car without judicial process and to collect a deficiency judgment, a remedy not available at common law. Creditors who do not comply with these basic repossession notice requirements forfeit their right to collect a deficiency judgment following repossession. Md. Code Ann., Commercial Law §§ 12-626(e)(4) & 12-1021(k)(4); *see also Green v. Ford Motor Credit Co.*, 828 A.2d 821, 836 (Md. Ct. Spec. App. 2003) (creditor who sends "invalid notice" has "no right to collect any deficiency judgment"). And in the case of CLEC, a creditor engaging in wrongful repossession may be subject to treble damages. *See* Md. Code Ann., Commercial Law § 12-1018(b).

The repossession provisions of RISA and CLEC carefully balance protections for Maryland car loan borrowers with creditors' desire for quick and easy collection after default. In contrast, there is no federal law that governs the collection of car secured debt or authorizes self-help repossession. In other words, if a creditor enters a Maryland consumer's property and takes their car without complying with RISA or CLEC, that creditor is committing theft, plain and simple.

(i) Maryland's Seventy Year History of Regulating Self-Help Repossession

Maryland first regulated consumer debt collection methods when it passed RISA in 1941. Prior to RISA, credit transactions and installment sales in Maryland

were "virtually unregulated." *Assoc. Acceptance Corp. v. Bailey*, 174 A.2d 440, 443 (Md. 1961); *see also Retail Instalment Selling*, Research Report No. 6 at 47, Research Division Maryland Legislative Council (1940) ("*Retail Installment Selling*").[2]

Prior to RISA, car dealers and other lenders engaged in a wide variety of repossession abuses, including unilaterally imposing broadly worded "in terrorem" clauses that purported to authorize the use of force when repossessing goods and to relieve the seller of any resulting liability for damages or bodily harm. *See Retail Installment Selling* at 31-32, 40. Although such clauses were considered illegal and void against public policy, sellers included them anyway, trusting that a buyer's ignorance would allow the seller "to coerce the buyer into surrendering some of his rights." *Id.* at 31-32. Pre-RISA installment contracts also failed to provide any right of redemption or accounting when a seller repossessed the buyer's property, causing consumers to frequently "lose their entire equity." *Id.* at 40-41. As a result, some dealers used repossession as "an avenue to lucrative profits." *Id.* at 42. The available facts suggest this is precisely what Chase is trying to do here.

[2] The original report spelled "Instalment" with one "l".

The Maryland General Assembly passed RISA in part to remedy these "glaring abuses … in connection with repossession."[3] *Id.* at 42; *see also Investigation of Repossession of Automobiles by Automobile Accessory Companies*, Maryland Commissioner of Loans (1938) (reporting on systemic abuses in connection with repossession of automobiles); *Stride v. Martin*, 41 A.2d 489, 491-92 (Md. 1945) (Maryland legislature passed RISA in order to "eliminate contract abuses"); *Union Trust Co. v. Tyndall*, 428 A.2d 428, 429 (Md. 1981) (purpose of RISA "is to protect unsophisticated buyers"); *Assoc. Acceptance Corp.*, 174 A.2d at 443 (RISA passed to protect consumers from "oppressive business practices"). Responding to repossession abuses by creditors, the Maryland General Assembly restricted repossession rights by prohibiting the use of force, requiring post-repossession notice and a right to redeem, and requiring a full accounting in the event of a sale. *See* Retail Installment Sales Act, 1941 Md.

[3] RISA remained the primary statute governing repossession and collection of auto-secured financing in Maryland until 1983, when the Maryland General Assembly enacted CLEC. CLEC deregulated the credit market in Maryland to stem the loss of several Baltimore-based banks that moved to Delaware, where banking laws were more favorable. *Biggus*, 613 A.2d at 990-91. In enacting CLEC, the Maryland legislature relaxed many of the strict credit requirements that applied under RISA, but imposed "more severe civil damages" in the event of a violation. *Id.* at 991-92. The provisions of CLEC "dealing with the aspects of repossession up to sale tracked … the substantive and procedural repossession requirements of RISA" with minor exceptions, *id.* at 991, making the legislative history of RISA highly relevant to CLEC's repossession provisions.

Laws, Chapter 851 (S.B. 51), originally codified at Article 83, § 116 *et seq*. of the Public General Laws of Md.

In exchange for limiting creditors' repossession rights, RISA also expanded creditors' remedies by allowing them to obtain both the collateral and a deficiency judgment, a remedy that was not available at common law. *See Cole v. Hines*, 32 A. 196, 197 (Md. 1895) ("a vendor of chattels … has a right either to affirm the contract and sue for the price or to rescind it and retake the goods, but he is bound by his first election"); *see also Retail Installment Selling* at 1-2; James Phillips, Note, *California's Automobile Deficiency Judgment Problem*, 4 U.C. Davis L. Rev. 91, 92-93 (1971) (reviewing history of common law election of remedies).

A key concern underlying repossession notice requirements in RISA (and later CLEC) was self-dealing by lenders who used repossession as a means to "lucrative profits," *Retail Installment Selling* at 42, a problem by no means limited to Maryland, *see Jacobs v. Healey Ford-Subaru, Inc.*, 652 A.2d 496, 504 (Conn. 1995) ("Repossession statutes are enacted to protect the consumer from well-documented repossession abuses"); Philip Shuchman, *Profit on Default: An Archival Study of Automobile Repossession and Resale*, 22 Stan. L. Rev. 20 (1969).

To prevent lenders from reaping windfall profits by churning cars through serial repossessions, selling repossessed collateral at below-market prices to

favored buyers, or otherwise behaving in a commercially unreasonable manner, the Maryland General Assembly conditioned any deficiency judgment on strict compliance with the notice and accounting provisions, and initially prohibited any deficiency judgment at all "unless the buyer had paid at least fifty percent of the cash price and had satisfied other conditions of the buyer's right to require a public auction sale." *Kline v. Cent. Motors Dodge, Inc.*, 614 A.2d 1313, 1315 (Md. 1992). These restrictions were designed to protect consumers by "prevent[ing] favored buyer private sales that are not 'bona fide' (commercially reasonable) … to the detriment of the defaulting buyer/borrower." *Id.* at 1318 (internal citations omitted). With respect to CLEC, Maryland did not authorize deficiency judgments following a private sale until 1987, and the purpose of the amendment was to benefit consumers by "obtaining the best resale price on repossessed goods." *Id.* at 1317 (quoting senate committee staff report findings).

Statutory notice provisions are critical to protecting debtors' rights in repossessions. "Proper notice provides the debtor the opportunity to: (1) discharge the debt and reclaim the collateral, (2) find another purchaser, or (3) verify that the sale is conducted in a commercially reasonable manner." *State Res. Corp. v. Gregory*, -- S.W.3d --, 2011 WL 1402535 at *4 (Mo. Ct. App. April 12, 2011); *Bank of Am. v. Lallana*, 960 P.2d 1133, 1140 (Cal. 1998) (same).

Even with the protections of notice and an accounting, creditors have "perverse incentives" to abuse the availability of deficiency judgments by engaging in self-dealing with affiliated entities. *See Randolph v. Franklin Inv. Co.*, 398 A.2d 340, 346 & n.10 (D.C. 1979) (describing "common" practice of a lender "resell[ing] the repossessed automobile to the original dealer at a price well below the market value … thereby facilitating an unnecessarily high deficiency claim and an inflated profit on the second resale"); Shuchman, *Profit on Default*, *supra* at 24-33; Ellen Corenswet, Note, *I Can Get It For You Wholesale: The Lingering Problem of Automobile Deficiency Judgments*, 27 Stan. L. Rev. 1081 (1975).

Here, the district court dismissed the case before any discovery had taken place, but the initial facts suggest that Chase engaged in precisely the type of repossession profiteering that RISA and CLEC are designed to prevent. Ms. Epps purchased a 2006 PT Cruiser for $12,783.45, plus fees, for a total of $15,168.45. JA00048-49. Ms. Epps paid $1000 in cash and financed the rest. *Id.* at 48. At an APR of 19.5%, her monthly payments were $337.96 over 72 months, for a total "sale price" of $25,333.12. *Id.* She regularly made payments for approximately two years (i.e., approximately $8,000), but eventually fell behind and defaulted. *Id.* at 53. After repossessing her car without complying with the statute, Chase sold the car to Mannheim Frederickson for $2900 and demanded a deficiency of $11,904.53. *Id.* at 63.

The resale value obtained by Chase is deeply troubling. According to the Kelly Blue Book, the approximate trade-in value (i.e., the amount a consumer could expect to get from a dealer) for Ms. Epps' car today is $5,500.[4] The suggested retail value (i.e., what a dealer can expect to charge) is approximately $8,800. While Chase seeks to recover approximately $22,000 in total, Mannheim Frederickson can sell the same car for nearly $6000 in profit. Together they stand to recover approximately $28,000 for a car with an original cash price of slightly more than $12,000.

As the limited facts in this case demonstrate, strict compliance with CLEC's notice provisions is critically important to protecting consumers' rights, including the right to a commercially reasonable sale and the right to protect any equity in the goods. *Retail Installment Selling* at 40-42; *Jacobs*, 652 A.2d at 505 (conditioning deficiency judgment on strict compliance with notice provisions is intended to "up the ante for those who would abuse the consumer because in most cases, compensatory damages are an insufficient deterrent to creditor misbehavior") (internal citations omitted).

[4] Estimate assumes 90,000 miles, the approximate mileage on Ms. Epps' car according to a search of the VIN. *See* www.kbb.com.

(ii) No Federal Law Authorizes Self-Help Repossession or Provides a Remedy for Unfair Repossessions

Chase can point to no federal law as authority for its self-help repossession of Ms. Epps' car because none exists.[5] Rather, "the power to repossess ultimately stems … from the state law, either statutory or common." 45 A.L.R.3d 1233 § 2(b) (1972); *cf.* 68A Am. Jur. 2d Secured Transactions §§ 560 & 564 (whether a repossession has occurred lawfully is a question of state law). Indeed, the Supreme Court has long recognized that debt collection is a quintessentially state law concern, observing in one of its earliest decisions under the NBA that national banks are governed by state laws when collecting debts. *See First Nat'l Bank v. Kentucky*, 76 U.S. 353, 362 (1869); *see also Atherton v. F.D.I.C.*, 519 U.S. 213, 222-23 (1997). The States' longstanding tradition of regulating debt collection practices and the absence of any applicable federal law authorizing or regulating self-help repossession make clear that CLEC's repossession provisions are not preempted. *See Wyeth v. Levine*, 129 S. Ct. 1187, 1194-95 & n.3 (2009) (a presumption against preemption exists in areas traditionally subject to state regulation); *Anderson v. Sara Lee Corp.*, 508 F.3d 181, 192 (4th Cir. 2007) (presumption against preemption is especially strong in a "field which the States have traditionally occupied").

[5] Federal law restricts national banks' repossession activities only when repossessing a car owned by an active-duty military service member. *See* 50 App. U.S.C. § 532(a).

Neither the district court nor Chase identified any federal law addressing the numerous issues in repossession: how to seize collateral, how to notify borrowers of seizure, or how to resell collateral. Yet Chase would have this Court hold that conflict preemption principles prevent Maryland from regulating the manner in which repossessions may occur. In essence, Chase takes the position that it may repossess private property unconstrained by any law at all.[6]

That repossession is a uniquely state concern is evident in the all too frequent consequences of repossessions that go wrong. *See Repo Madness: How Automobile Repossessions Endanger Owners, Agents and the Public*, National Consumer Law Center (March 2010) ("Repo Madness"), *available at* http://www.nclc.org/images/pdf/car_sales/Repo_madness_Report_0310.pdf. Repossessions are extremely volatile and easily devolve into violence. *See, e.g.*, *Ford Motor Credit Co. v. Ryan*, 939 N.E.2d 891, 927 (Ohio Ct. App. 2010) (courts

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[6] Chase's citation to the UCC in its argument to the district court, does nothing to change this position. (*See* Chase Motion to Dismiss at 10 n.6.) The UCC applies as a matter of **state** law, not federal, and is only applicable as enacted and modified by individual states. *See Barnhill v. Johnson*, 503 U.S. 393, 398 & n.5 (1992); OCC Interpretive Letter No. 1005 at 2, 2004 WL 3465750 (June 10, 2004). And in Maryland, compliance with the relevant notice requirements is a condition precedent to a deficiency judgment under Article 9 of the UCC, as in CLEC. *See First Nat'l Bank v. DiDomenico*, 487 A.2d 646, 649 (Md.1985) (holding secured creditor forfeits its right to a deficiency judgment when it fails to comply with the notice provisions of the UCC as incorporated by Maryland); *Rudden v. Citizens Bank & Trust Co.*, 638 A.2d 1225, 1236 (Md. Ct. Spec. App. 1994) (distinguishing failure to comply with pre-repossession notice requirements from other aspects of collection and sale under the UCC); *see also* Md. Code Ann., Commercial Law §§ 9-614, 9-625 & 9-626.

recognize that repossession is an "inherently dangerous activity" because it "appear[s] to the public as theft" and therefore gives rise to a special non-delegable duty to prevent a breach of peace). And while Maryland explicitly prohibits the use of force in connection with self-help repossession, such prohibitions frequently are inadequate to prevent violent repossessions.[7] *See Repo Madness* at 8 & Appendix 1 (detailing dozens of violent incidents associated with repossessions in 23 states during a three year period). For example, following the death of an Alabama citizen whose vehicle was violently repossessed, the Alabama State Sheriffs' Association is seeking expanded notice to law enforcement and restricted hours to reduce violence incident to repossessions. *See id.* at 16

Nor can consumers and the general public count on federal law to ensure that repossessions are conducted safely and without force, or to provide even the most basic protections against wrongful repossession. And since there is no

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[7] Unfortunately, repeated instances of violence continue to plague the repossession industry, and it is state legislatures and law enforcement (not federal) who are responsible for curtailing such violence, whether by requiring repossession agents to be licensed, as Maryland does, *see* Md. Code Ann., Bus. Regulation § 7-101, *et seq.*, or mandating some type of notice and opportunity to cure. Indeed, in authorizing self-help repossession under RISA, Maryland explicitly prohibited what had been a common practice up to that point: the use of force in repossessions, a practice that often resulted in physical violence. *See* Retail Installment Sales Act, 1941 Md. Laws, Chapter 851, § 123; *Retail Installment Selling* at 31, 40; *Repossession of Automobiles by Automobile Accessory Companies* at 6. And if they chose to, states could ban self-help repossession altogether, as they do in both evictions and foreclosures. *See Repo Madness* at 6-7 (recounting history of self-help repossession in connection with evictions and real property).

federal law authorizing repossession, there is no federal remedy for wrongful repossession. The NBA gives consumers virtually no right to take action against national banks for wrongful treatment, no matter how unfair or egregious the banks' conduct.[8] *See Driesbach v. Murphy*, 658 F.2d 720, 730 (9th Cir. 1981) (no private right of action under the Federal Trade Commission ("FTC") Act, the general federal consumer protection statute); *King v. Wilmington Transit Co.*, 976 F. Supp. 356, 358-59 (E.D.N.C. 1997) (same), *aff'd* 155 F.3d 559 (4th Cir. 1998).

To hold that the NBA preempts the exercise of such quintessential state police power as regulating the manner in which a private citizen may take the property of another without the involvement of law enforcement flies in the face of hundreds of years of legal precedent, and would allow national banks to operate with respect to repossession, unconstrained by any law at all.[9] *See Wyeth*, 129 S. Ct. at 1194-95 ("touchstone" of any preemption analysis is "assumption that the historic police powers of the States were not to be superseded by [federal law] unless that was the clear and manifest purpose of Congress").

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[8] The NBA provides a federal cause of action for usury. *See* 12 U.S.C. § 86.

[9] State statutes authorizing self-help or non-judicial repossession effectively provide a limited exception to such traditional state law prohibitions as trespass and conversion. *See Madden v. Deere Credit Servs., Inc.*, 598 So. 2d 860, 864-66 (Ala. 1992).

B. The Daily Operations of National Banks Are Largely Controlled by State Laws.

The Supreme Court has consistently held that national banks "are subject to the laws of the State … All their contracts are governed and construed by State laws. Their acquisition and transfer of property, ***their right to collect their debts***, and their liability to be sued for debts, are all based on State law." *First Nat'l Bank*, 76 U.S. at 362 (emphasis added); *Cuomo v. Clearing House Ass'n*, 129 S. Ct. 2710, 2720 (2009) ("States . . . have always enforced their general laws against national banks"); *Watters v. Wachovia Bank*, 550 U.S. 1, 11 (2007) ("Federally chartered banks are subject to state laws of general application in their daily business to the extent such laws do not conflict with the letter or the general purposes of the NBA").

The NBA preempts state laws only if they "prevent or significantly interfere with the national bank's exercise of its powers." *Barnett Bank of Marion County v. Nelson*, 517 U.S. 25, 33 (1996); *see also Watters*, 550 U.S. at 12; *Anderson Nat'l Bank v. Luckett*, 321 U.S. 233, 248 (1944). The test is not whether the state law has *any* effect on banking powers—or even whether the state law has more than an "incidental" effect on those powers. Instead, the level of interference must be "significant."[10]

[10] That conflict preemption in general—and the *Barnett Bank* language in particular—is the proper test for preemption under the NBA and OCC regulations

Preemption of state debt collection and repossession law would not protect the primacy of federal law, but would create a void in the legal landscape. Since there is no federal law authorizing or governing self-help repossession (and no federal remedy for wrongful repossession), CLEC's provisions governing self-help repossession do not "significantly interfere" with Chase's banking powers. *Barnett Bank*, 517 U.S. at 33; *see also Anderson*, 508 F.3d at 192 (presumption against preemption "is stronger still … when no federal remedy exists) (internal citations omitted); *Smith v. BAC Home Loans Servicing, LP*, -- F. Supp. 2d --, No. 2:10-cv-00354, 2011 WL 843937 at *4 (S.D.W. Va. March 11, 2011) (presumption against preemption applies to "state consumer-protection statutes, which fit squarely within the States' traditional police powers"); *Dietrich v. Key Bank*, 72 F.3d 1509, 1514 (11th Cir. 1996) (holding federal Ship Mortgage Act does not preempt state law regarding self-help repossession because "the Act nowhere describes the procedures to be followed when parties to a preferred ship mortgage seek to enforce the mortgage using nonjudicial, self-help remedies"). To hold otherwise

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was recently confirmed by Congress's passage of Dodd-Frank, which explicitly states that under the NBA, state consumer financial laws are preempted "only if, . . . in accordance with … *Barnett Bank* …. the State consumer financial law prevents or significantly interferes with the exercise by the national bank of its powers." Dodd Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 1044 (2010). *Barnett Bank* shows that the NBA has always had this meaning; Dodd-Frank merely underscores the point. *See Loving v. United States*, 517 U.S. 748, 770 (1996) ("subsequent legislation declaring the intent of an earlier statute is entitled to great weight in statutory construction") (quotation omitted).

would allow Chase to repossess private property unconstrained by any law at all, including state laws prohibiting the use of force in self-help repossessions.

As the Supreme Court's recent decision in *Cuomo* makes clear, the OCC lacks the authority to unilaterally declare the preemptive effect of the NBA or to set its own preemption standard for state law. 129 S. Ct. at 2721;[11] *Smith*, 2011 WL 843937 at *10 ("while the OCC's regulation may be a helpful tool in distilling 150 years' worth of NBA preemption jurisprudence, it is not the actual stuff from which conflict preemption arises"). The OCC regulations at issue here may set no different standard from that established by the NBA as articulated in *Barnett Bank*, and must be read consistently with that standard to avoid the fate of the OCC regulation struck down in *Cuomo*; that is, they must be read with the understanding that only state laws that "significantly interfere" with Chase's national bank powers may be preempted. Thus, the district court erred in relying solely on the OCC's regulations in holding CLEC preempted by the NBA, without conducting an independent analysis of whether compliance with CLEC's repossession

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[11] The OCC has also acknowledged this limitation. *See* Testimony of Julie Williams, First Senior Deputy Comptroller and Chief Counsel for the OCC, *Congressional Review of OCC Preemption: Hr'g Before the Subcomm. on Oversight & Investigations of the H. Comm. on Fin. Servs.*, 108th Cong. 108-65 (2004) ("[t]he regulation carefully follows standards established by the U.S. Supreme Court"), *available at* http://www.access.gpo.gov/congress/house/pdf/108hrg/93717.pdf at 13.

provisions "significantly interfere[s]" with Chase's exercise of its banking powers. *See Barnett Bank*, 517 U.S. at 33.

Furthermore, CLEC is clearly exempted from preemption even under a plain reading of the OCC's regulation. The OCC specifically carves out seven categories of state laws, including laws related to "rights to collect debts," that are not preempted. 12 C.F.R. § 7.4008(e). If repossession does not implicate the "right to collect debts," then nothing does.

C. The District Court's Logic Allows National Banks to Claim they are Unrestrained by State Foreclosure Laws.

This case does not only affect whether national banks must comply with state repossession laws, or even whether a national bank is entitled to a deficiency judgment if it violates the statute. By ignoring the role that state debt collection laws play in the daily operations of national banks, the district court potentially calls into question the real estate foreclosure laws of all 50 states.

Although the district court's opinion technically interprets only the OCC's preemption regulation related to national banks' non-real estate lending powers, 12 C.F.R. § 7.4008, the OCC used largely identical language in its preemption regulation related to national banks' real estate loans, 12 C.F.R. § 34.4. Indeed, the language in 12 C.F.R. § 7.4008, used by the district court to justify preemption of CLEC, parallels 12 C.F.R. § 34.4, in OCC's real estate loan preemption regulation. For all practical purposes, interpreting how preemption regulation applies to CLEC

broadly dictates the continued applicability of any state law requiring a creditor to give notice to a defaulting borrower for any type of loan.

State-foreclosure laws are such laws. Many states have enacted non-judicial foreclosure statutes that carefully prescribe notices borrowers must receive to safeguard against unauthorized or unnecessary foreclosures, and in exchange for strict compliance, permit creditors to foreclose on families' homes without the delay and expense of obtaining a court judgment. But foreclosure law has always been understood to be highly state-specific. *See BFP v. Resolution Trust Corp.*, 511 U.S. 531, 541-42 (1994) ("[T]he States have created diverse networks of judicially and legislatively crafted rules governing the foreclosure process, to achieve what each of them considers the proper balance between the needs of lenders and borrowers"). Because "[i]t is beyond question that an essential state interest is at issue" in state foreclosure laws, the Supreme Court has specified that "the federal statutory purpose must be clear and manifest" to preempt them. *Id*. at 544.

This Court must avoid any holding that places into doubt the continued authority of state-foreclosure laws over national banks.

II. The OCC Does Not Protect Consumers From Unfair Bank Practices

The district court's ruling has dire implications for auto buyers across the nation – not just in Maryland. If their consumer protection laws are preempted,

state officials cannot help their citizens when a national bank owns their loan. As in Ms. Epps case, consumers cannot avoid national banks and retain the protection of state laws – for the dealer made the decision to sell the car loan to Chase in a commercial transaction and Ms. Epps was not a party. If the law is preempted, consumers are left with nothing when national banks ignore basic protections in commercial transactions, including repossession, as their interests are left unprotected by the national banks' federal regulator, the OCC.[12]

Instead, the OCC has focused on allowing national banks to maximize their short-term profits without regard to their treatment of consumers – a decision now understood to have had dire consequences for the nation's economy.[13] *See* Patricia A. McCoy et al., *Systemic Risk Through Securitization: The Result of Deregulation and Regulatory Failure*, 41 Conn. L. Rev. 1327, 1344-57 (2009) (reviewing the

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[12] The Bureau of Consumer Financial Protection will ultimately enforce federal consumer protection rights against national banks with assets over $10 billion; the OCC will retain enforcement authority over national banks with assets under $10 billion. Dodd-Frank §§ 1025 & 1026.

[13] Recent research reveals that the auto-financing industry continues to engage in many of the same abusive and deceptive lending practices, including hidden interest-rate markups that exceed the rate for which a consumer would otherwise qualify. *See* Delvin Davis and Joshua M. Frank, Center for Responsible Lending, *Under the Hood: Auto Loan Interest Rate Hikes Inflate Consumer Costs and Loan Losses* (2011), *available at* http://www.responsiblelending.org/other-consumer-loans/auto-financing/research-analysis/Under-the-Hood-Auto-Dealer-Rate-Markups.pdf. Given the high interest rate charged on Ms. Epps' loan, it would be unsurprising to learn that she was victimized by this practice as well.

role that federal bank regulators' failure to protect consumers in mortgage underwriting played in causing the ongoing global credit crisis).

The OCC has a reluctant and inadequate history of protecting consumers, especially if it means challenging the practices of large national banks, such as Chase, who fund most of its operations. The OCC has *never* taken a consumer protection enforcement action against a national bank for unfair or deceptive-car lending or repossession practices, and the OCC's enforcement against national banks' unfair deceptive acts or practices generally is both recent and anemic. The OCC admits that it did not invoke its long-dormant consumer protection authority under the 1975 amendments to the FTC Act until the year 2000. *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 (2003).

In the decade since the OCC dusted off its FTC Act enforcement authority, its consumer protection efforts have remained lax. It has routinely ignored consumer complaints regarding its banks and refused to intervene on their behalf —outright dismissing allegations of abusive practices as "private party situation[s]." 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 Al (quoting the

OCC's response to an elderly consumer with an abusive loan originated by a national bank).

For instance, the ongoing mortgage crisis had its roots in the disappearance of underwriting from the subprime and "Alt-A" (other non-prime) markets, combined with risky loan products and terms. Although the OCC issued guidance about underwriting and best practices, the record of some banks it supervises suggests poor follow-through and intentional actions to protect the banks, at the expense of consumers. For example, in 2002, at the request of National City Mortgage, the OCC prevented Washington State from inquiring into that bank subsidiary's mortgage practices. *See* Eric Nalder, *Mortgage System Crumbled While Regulators Jousted*, Seattle Post-Intelligencer, Oct. 10, 2008, at A1. The next year its parent, National City Bank, and subprime-operating subsidiary, First Franklin, sought and obtained an OCC ruling exempting national banks from state anti-predatory mortgage lending laws designed to protect consumers from unsafe loans. *See* Preemption Determination and Order, 68 Fed. Reg. 46, 264 (Aug. 5, 2003). Having been given a virtual green light, these two entities concentrated on such poorly underwritten loans that neither institution survived the recent economic downturn.

The record of five of the nation's largest banks, which are all under OCC supervision, further illustrates the OCC's utter inattention to consumer protection:

> The five largest U.S. banks in 2005 . . . made heavy inroads into low-and no-documentation loans. The top-ranked Bank of America, N.A., had a thriving stated-income and no-documentation loan program. … Bank of America securitized most of those loans, which may explain why the OCC tolerated such lax underwriting practices. Similarly, in 2006, the OCC overrode public protests about a "substantial volume" of no-documentation loans by JPMorgan Chase Bank, N.A., the second largest bank in 2005, on grounds that the bank had adequate "checks and balances" in place to manage those loans.

McCoy et al., *supra*, at 1354.

The few consumer protection actions taken by the OCC further demonstrate its reluctance to protect consumers. OCC undertook no public-consumer enforcement action against a major bank until its 2008 action against Wachovia Bank for its relationships with telemarketing scammers, who fraudulently obtained bank account information and used the information to deposit "remotely created checks." *See* Press Release, OCC, OCC Directs Wachovia to Make Restitution to Consumers Harmed by the Bank's Relationships with Telemarketers and Payment Processors (Apr. 25, 2008), *available at* http://www.occ.gov/news-issuances/news-releases/2008/nr-occ-2008-48.html; *see also* Charles Duhigg, *Papers Show Wachovia Knew of Thefts*, N.Y. TIMES, Feb. 6, 2008, at C1*; see also* 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. Banking & Fin. L. 225, 232 (2004) ("during the past decade the OCC has not initiated a single public prosecution of a major national bank for violating a

consumer protection law"). That investigation occurred only after it received information from private attorneys and federal prosecutors. *See* Plaintiffs' Memorandum in Support of the Petition for Approval of Agreed Attorney's Fees and Costs at 3-4, 12, 15, *Faloney v. Wachovia Bank*, 07-cv-1455 (E.D. Pa. Dec. 22, 2008) (Dkt. No. 104).

The OCC's original settlement with Wachovia was so inadequate, leaving many victims without relief and permitting large, unclaimed settlement funds to revert to the bank, that it was challenged in court, with the support of three Congressmen, as *amici*; only then did the OCC amend the settlement to provide direct restitution payments to victims. *See* Motion and Brief of Representatives Barney Frank, Edward Markey and Joseph Sestak, in support of Intervenor Faloney Plaintiff's Motion for an Injunction Under the All Writs Act, *USA v. Payment Processing Center, LLC*, 06-cv-0725 (E.D. Pa. May 29, 2008) (Dkt. No. 351); Press Release, OCC, Wachovia Enter Revised Agreement to Reimburse Consumers Directly (Dec. 11, 2008), *available at* http://www.occ.gov/news-issuances/news-releases/2008/nr-occ-2008-143.html.

Likewise, the OCC entered into a settlement with Capital One Bank, for unfairly charging fees to credit-card accountholders who closed their accounts, only after a rigorous investigation by state attorneys general into violations of state-consumer protection laws. *See* Press Release, OCC Reaches

Agreement with Capital One on Unfair Credit Card Account Closing Practices (Feb. 18, 2010) ("The practices in question were brought to the OCC's attention by the offices of the California and West Virginia Attorneys General."), *available at* http://www.occ.gov/news-issuances/news-releases/2010/nr-occ-2010-16.html. West Virginia had been engaged in litigation with the bank for almost three years regarding its abusive treatment of credit-card account holders, when the OCC permitted Capital One to receive a national bank charter, in 2008. *See Capital One Bank v. McGraw*, 563 F. Supp. 2d 613, 614-15 (S.D.W. Va. 2008) (detailing litigation history).

Finally, the OCC's most recent enforcement action against eight national banks (including Chase) for their systemic "robo-signing" practices and foreclosure abuses has prompted nearly universal criticism for its superficial investigation and tepid response. *See e.g.* Joe Nocera, *Letting the Banks Off the Hook*, N.Y. Times, April 18, 2011, at A25 (describing settlement as "laughable"); David Streitfield, *New Rules for Top Mortgage Servicers Face Early Criticisms*, N.Y. Times, April 11, 2011, at B3 ("'a sham settlement' that is worse than no settlement at all" (quoting Adam Levitin, former special counsel to the Congressional Oversight Panel supervising the Troubled Asset Relief Program)).

Although OCC found that each major national bank—not a single bank was excluded —had "engaged in unsafe or unsound practices" in pursuing home

foreclosures, it imposed no financial penalty, nor did it direct the banks to engage in remedial action other than to comply with operable law.[14] While commending federal regulators for recognizing "that the status quo for mortgage servicing is intolerable," Congressman Frank criticized the enforcement orders as "insufficient" and emphasized the need for further state action. *See* Press Release on Mortgage Servicer Agreement, Representative Barney Frank (April 15, 2011) ("enforcement orders are in no way preemptive of any state actions to address mortgage servicing standards, nor are they intended to be the final word on this issue"), *available at* http://democrats.financialservices.house.gov/press/PRArticle.aspx?NewsID=1417.

The OCC's failure to impose any meaningful penalties on national banks in the face of a "robo-signing" scandal, in which Chase and other banks and servicers filed thousands of fraudulent affidavits in court proceedings around the country, demonstrates its focus on protecting banks from a more in-depth and comprehensive investigation by the 50 state Attorneys' General instead of on

[14] Cease and desist orders were issued to all eight large national banks subject to OCC's investigation including Bank of America, Citibank, HSBC, JPMorgan Chase, MetLife Bank, PNC, U.S. Bank and Well Fargo. The OCC also entered into consent orders with two service providers: Lenders Processing Services ("LPS") and MERSCORP. *See* Press Release, OCC Takes Enforcement Action Against Eight Servicers for Unsafe and Unsound Foreclosure Practices (April 13, 2011), *available at* http://www.occ.treas.gov/news-issuances/index-news-issuances.html. Banks are required to choose an independent consultant to investigate further.

protecting borrowers from banks' abusive conduct. *See* Nocera, *Letting the Banks Off the Hook*, *supra* at A25 (OCC is "back to its old tricks" of protecting its self-proclaimed "clients" from any meaningful regulation); Marian Wang, *Lawyer at Center of Robo-Signing Scandal Sees 'More of the Same' From Banks*, ProPublica, Blog, Oct. 28, 2010, *available at* http://www.propublica.org/blog/item/lawyer-at-center-of-robo-signing-scandal-sees-more-of-the-same-from-banks.

Beyond the headline-grabbing aspect of robo-signers lurk even graver and more systemic problems, including servicing and accounting practices that are so "shoddy" and "sloppy" that banks routinely foreclose when borrowers are in the midst of modification proceedings with another arm of the bank, or even when borrowers are not behind on their mortgage payments at all. *See In re Wilson,* No. 07-11862, 2011 WL 1337240 at *12 (Bankr. E.D. La. April 7, 2011) (sanctioning Option One and LPS for repeatedly seeking to foreclose on home of couple whose payments were current, and for filing fraudulent affidavits with the court).

Despite widespread evidence of wrongful foreclosures, the OCC did not dig deeply to investigate the problem of foreclosures "that should not have proceeded" as the regulators' interagency report concedes. Editorial, *Wrongful Foreclosures*, N.Y. Times, April 16, 2011, *available at* http://www.nytimes.com/2011/04/17/opinion/17sun2.html?ref=opinion. The investigation was admittedly superficial and "may not have uncovered certain facts

… that would lead an examiner to conclude that a foreclosure otherwise should not have proceeded.” *Interagency Review of Foreclosure Policies and Practices* at 2 (April 2011), http://www.occ.gov/news-issuances/news-releases/2011/nr-occ-2011-47a.pdf.

As Judge Elizabeth Magner recently stated in sanctioning LPS for its fraudulent conduct, “[t]he deference afforded the lending community has resulted in an abuse of trust.” *In re Wilson,* 2011 WL 1337240 at *10. Unfortunately, the OCC’s settlement, with its focus on self-correction and absence of punitive measures, is unlikely to prompt any genuine changes by the banks.

Several reasons explain the OCC’s failure to protect consumers. One reason, in particular, involves “regulatory arbitrage.” This permits institutions to examine various federal and state bank charters to identify the most favorable legal framework and regulatory enforcement. *See* Oren Bar-Gill & Elizabeth Warren, *Making Credit Safer*, 157 U. Pa. L. Rev. 1, 79-83 (2008). OCC regulators have unabashedly conveyed that the OCC markets its charter. *See* 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 Al (quoting former Comptroller, John D. Hawke, Jr., describing the OCC’s use of its power to override state laws protecting consumers as “one of the advantages of a national

charter" and asserting he was "not the least bit ashamed to promote it"). This conclusion was seconded by the "Financial Crisis Inquiry Commission, [which] found that the OCC had pointed to its use of pre-emption to try to persuade banks to be regulated by and pay fees to the agency, 'offering pre-emption as an inducement to use a national bank –charter.'" Tom Braithwaite, *Caution Urged On US Bank Foreclosure Fines*, Financial Times, April 25, 2011, http://www.ft.com/cms/s/0/084e1870-6f84-11e0-952c-00144feabdc0,s01=1.html.

The OCC has the incentive to cater to this arbitrage because its funding is dependent on keeping banks within its ranks. The OCC's revenue, for fiscal year 2010, was $794 million—of which 97% derived from assessments levied on national banks. OCC, Annual Report Fiscal Year 2010, at 42, 54, *available at* http://www.occ.gov/static/publications/annrpt/2010AnnualReport.pdf.

Additionally, the OCC's focus on safety and soundness may explain its reluctance to protect consumers from banks' unfair practices, although recent events have proven these interwined. Bar-Gill & Warren, *supra*, at 90; Christopher L. Peterson, *Federalism and Predatory Lending: Unmasking the Deregulatory Agenda*, 78 Temp. L. Rev. 1, 73 (2005).

Whatever the explanation, neither federal law nor regulators manage the conduct of repossession or protect consumers from unfair practices by national

banks. State repossession laws cannot create a duty that conflicts with this federal void. Accordingly, without any such conflict, those laws cannot be preempted.

CONCLUSION

For the reasons stated in Appellant's brief, and including the foregoing arguments, in support, by *amici curiae*, the district court should be reversed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P 29(d) and 32(a)(7)(B). It contains 6,964 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). It has been prepared in a 14-point proportionally spaced font using Microsoft Word.

Dated: April 28, 2011

Center for Responsible Lending

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing Brief of *Amici Curiae* the Center for Responsible Lending and the National Consumer Law Center in Support of Appellant Donna Epps and Reversal of the District Court Decision with the Fourth Circuit by using the appellate CM/ECF system on April 28, 2011.

I certify that all participants in the case are registered CM/ECT users and that service will be accomplished using the appellate CM/ECF system.

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Dated: April 28, 2011

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