

No. 07-4260

In the
United States Court of Appeals
for the **Sixth Circuit**

STATE FARM BANK, FSB, a Federal Savings Association;
GEORGE MEINBERG,
Plaintiffs-Appellants,

v.

JOHN B. REARDON, Superintendent of the Ohio Division of
Financial Institutions, in his official capacity,
Defendant-Appellee.

**On Appeal from the United States District Court
for the Southern District of Ohio at Columbus**

**BRIEF OF *AMICUS CURIAE*, CONFERENCE OF
STATE BANK SUPERVISORS, IN SUPPORT OF
APPELLEE, URGING AFFIRMANCE**

ARTHUR E. WILMARTH, JR.
PROFESSOR OF LAW
GEORGE WASHINGTON
UNIVERSITY LAW SCHOOL
2000 H STREET, N.W.
WASHINGTON, DC 20052
(202) 994-6386

Of Counsel

STEFAN L. JOURET, ESQ.
DONOVAN HATEM, LLP
TWO SEAPORT LANE
BOSTON, MA 02210
(617) 406-4500

*Counsel of Record for Amicus
Curiae*

JOHN ("BUZ") GORMAN
GENERAL COUNSEL
CONFERENCE OF STATE BANK
SUPERVISORS
1155 CONNECTICUT AVE., N.W.
5TH FLOOR
WASHINGTON, DC 20036
(202) 296-2840

Of Counsel

RULE 26.1 DISCLOSURE STATEMENT

The Conference of State Bank Supervisors (“CSBS”) is a not-for-profit corporation. It is not a subsidiary or affiliate of any other publicly-owned corporation. State Regulatory Registry LLC (the “SRR”) is a wholly-owned not-for-profit subsidiary of CSBS. The SRR charges a processing fee from mortgage originators, including mortgage brokers, in states that license such brokers. The Office of Thrift Supervision (“OTS”) has exempted exclusive agents of federal thrifts from all state licensing and registration requirements (including fee requirements) if they meet the criteria set forth in the OTS General Counsel opinion letter at issue in this matter. Mortgage brokers that are exempted by the OTS Chief Counsel’s opinion letter would not pay processing fees to the SRR. CSBS also receives dues from state officials who supervise financial institutions. Those officials assess licensing and registration fees on state-regulated providers of financial services, including mortgage brokers. CSBS is not otherwise aligned with or in any other way affiliated with any publicly-owned corporation, not a party to the appeal, that has a financial interest in the outcome of this litigation.

DATED: February 15th, 2008

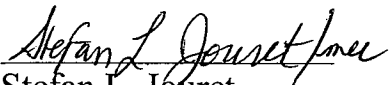

Stefan L. Jéuret
Counsel for *Amicus Curiae*
CSBS

TABLE OF CONTENTS

RULE 26.1 DISCLOSURE STATEMENT.....	i
TABLE OF CONTENTS.....	i
TABLE OF AUTHORITIES	iii
INTEREST OF <i>AMICUS CURIAE</i>	1
INTRODUCTION	2
SUMMARY OF ARGUMENT	3
ARGUMENT	8
I. NEITHER HOLA NOR THE OTS’S REGULATIONS PREEMPT THE OHIO ACT.....	8
A. HOLA Does Not Preempt The Ohio Act.....	8
1. A Federal Statute Should Not Be Construed To Preempt State Consumer Protection Laws Without A Clear And Manifest Expression Of Congressional Intent	8
2. HOLA Does Not Preempt The Application Of The Ohio Act To SFB’s Agents	10
B. The OTS’s Regulations Do Not Preempt The Ohio Act	15
II. THE OTS CHIEF COUNSEL HAD NO AUTHORITY TO PREEMPT THE OHIO ACT WITH AN OPINION LETTER.....	21
A. Only The OTS Director Possesses Statutory Authority To Issue Regulations Preempting State Law	21
B. The Chief Counsel’s Opinion Letter Is Not A Valid OTS Regulation And Therefore Cannot Preempt The Ohio Act	23
1. The Opinion Letter Was A Substantive Regulation Issued In Violation Of 5 U.S.C. § 553(b).....	23

2. Recent Court Decisions Do Not Support Giving Any Preemptive Effect To The OTS Chief Counsel's Opinion Letter	29
CONCLUSION.....	33
CERTIFICATE OF COMPLIANCE.....	34
CERTIFICATE OF SERVICE	35

TABLE OF AUTHORITIES

Cases

<i>American Hosp. Ass'n v. Bowen</i> , 834 F.2d 1037 (D.C. Cir. 1987)	25
<i>Auer v. Robbins</i> , 519 U.S. 452 (1997)	7, 25, 26, 28
<i>Christensen v. Harris County</i> , 529 U.S. 576 (2000)	7, 26, 28
<i>Chrysler Corp. v. Brown</i> , 441 U.S. 281 (1979)	6, 23, 24
<i>Fenning v. Glenfed, Inc.</i> , 47 Cal. Rptr. 715 (Cal. App. 1995), <i>rev. denied</i> (Cal. Mar. 28, 1996)	15
<i>Fidelity Fed. Sav. & Loan Ass'n v. de la Cuesta</i> , 458 U.S. 141 (1982)	14, 15, 20, 21
<i>Florida Lime & Avocado Growers, Inc. v. Paul</i> , 373 U.S. 132 (1963)	4, 9
<i>General Motors Corp. v. Abrams</i> , 897 F.2d 34 (2d Cir. (1990)).....	9
<i>Gregory v. Ashcroft</i> , 501 U.S. 452 (1991)	8
<i>Hillsborough County v. Automated Medical Laboratories, Inc.</i> , 471 U.S. 707 (1985)	14
<i>Lewis v. BT Inv. Managers, Inc.</i> , 447 U.S. 27 (1980)	4, 9
<i>Louisiana Pub. Serv. Comm'n v. FCC</i> , 476 U.S. 355 (1986)	6, 22

<i>Louisiana Public Service Commission v. FCC</i> , 476 U.S. 355 (1986)	21
<i>Maximum Home Health Care, Inc. v. Shalala</i> , 272 F.3d 318 (6th Cir. 2001)	25
<i>Morton v. Ruiz</i> , 415 U.S. 199 (1974)	23
<i>O’Melveny & Myers v. FDIC</i> , 512 U.S. 79 (1994)	14
<i>Ohio Dept. of Human Servs. v. U.S. Dept. of Health & Human Servs.</i> , 862 F.2d 1228 (6th Cir. 1988)	7, 23, 24, 28
<i>OTS v. Paul</i> , 985 F. Supp. 1465 (S.D. Fla. 1997).....	22
<i>SPGGC, LLC v. Ayotte</i> , 488 F.3d 525 (1st Cir. 2007), <i>petition for cert. filed</i> (U.S. Dec. 11, 2007).....	31, 32
<i>SPGGC, LLC v. Blumenthal</i> , 505 F.3d 183 (2d Cir. 2007)	30, 31
<i>Spitz v. Goldome Realty Credit Corp.</i> , 600 N.E.2d 1185 (1992)	15
<i>United States v. Picciotto</i> , 875 F.2d 345 (D.C. Cir. 1989)	25
<i>Watters v. Wachovia Bank, N.A.</i> , 127 U.S. 1559 (2007)	29, 30, 31
Statutes	
5 U.S.C. § 553(b) Administrative Procedure Act, § 4(b)	<i>passim</i>
12 U.S.C. § 24a(g)(3)(A)	30

12 U.S.C. § 221a(b)	10
12 U.S.C. § 1461 <i>et seq.</i> , Home Owners' Loan Act ("HOLA")	<i>passim</i>
Section 5(a)(1) of HOLA.....	10
Section 5(c)(1)(B) of HOLA	10
Section 5(d)(1)(B) of HOLA.....	10
Section 5(d)(7) of HOLA	12, 19, 22
Section 5(d)(7)(A) of HOLA.....	10, 11
Section 5(d)(7)(E) of HOLA	12
12 U.S.C. § 1462a(h)(4)(A)(ii)	22
12 U.S.C. § 1463(a)(2).....	6, 21
12 U.S.C. § 1464(a)	6, 21
12 U.S.C. § 1464(a)(1).....	10
12 U.S.C. § 1464(c)	6, 22
12 U.S.C. § 1464(c)(1)(B)	10
12 U.S.C. § 1464(c)(4)(B)	17
12 U.S.C. § 1464(d)(1)(A).....	13
12 U.S.C. § 1464(d)(1)(B)	10
12 U.S.C. § 1464(d)(7)(A).....	11
12 U.S.C. § 1464(d)(7)(D).....	4, 11
12 U.S.C. § 1464(d)(7)(E)	6, 22
12 U.S.C. § 1813(u)(1).....	13
12 U.S.C. § 1813(u)(4).....	13
12 U.S.C. § 1818.....	12, 13

Ohio Mortgage Broker Act, Ohio Rev. Code Ann. §§ 1322.01-1322.99	<i>passim</i>
Ohio Rev. Code Chapter 1322	2
Pub. L. No. 105-164, 112 Stat. 32, 33 (1998)	12
Other Authorities	
12 C.F.R. § 545.2	<i>passim</i>
12 C.F.R. § 559.2	<i>passim</i>
12 C.F.R. § 559.3(c).....	5
12 C.F.R. § 559.3(c)(1).....	16, 26, 27, 28
12 C.F.R. § 559.3(c)(2).....	17
12 C.F.R. § 559.3(e).....	5
12 C.F.R. § 559.3(e)(1).....	16, 26, 27, 28
12 C.F.R. § 559.3(e)(2).....	17
12 C.F.R. § 559.3(n)	5, 26
12 C.F.R. § 559.3(n)(1).....	17, 19, 27
12 C.F.R. § 559.3(n)(2).....	17
12 C.F.R. § 560.2	<i>passim</i>
12 C.F.R. § 560.2(a).....	16
12 C.F.R. Part 545.....	15
12 C.F.R. Part 559.....	5, 16
144 Cong. Rec. S929, S931 (daily ed. Feb. 24, 1998) (remarks of Sen. Bennett and Sen. Dodd); <i>id.</i> S1539-40 (daily ed., Mar. 6, 1998) (remarks of Sen. Sarbanes, Sen. Bennett and Sen. Dodd).....	13

48 Fed. Reg. 23032, 23058 (1983)	15
61 Fed. Reg. 50951, 50972 (1996)	16
61 Fed. Reg. 66561, 66562 (1996)	16
61 Fed. Reg. 66561, 66563 (1996)	5, 17, 28
64 Fed. Reg. 43255 (1999)	28
Executive Order 13132 of Aug. 4, 1999	7, 28, 29
Executive Order 13132, § 1(a).....	29
Executive Order 13132, § 4(e).....	29
Executive Order 13132, § 6(b).....	29
Executive Order 13132, § 6(c).....	29
H.R. Rep. No. 105-417, <i>reprinted in</i> 1998 U.S.C.C.A.N. 22; 144 Cong. Rec. H513-14 (daily ed., Feb. 24, 1998) (remarks of Rep. Leach and Rep. LaFalce).....	13, 19
Katie Kuehner-Hebert, “States to Shift Focus from Predators to Foreclosures,” <i>American Banker</i> , Dec. 14, 2007.....	3
The Subprime Lending Crisis: The Economic Impact on Wealth, Property Values and Tax Revenues and How We Got Here,” Report and Recommendations by the Majority Staff of the Joint Economic Committee, U.S. Congress, Oct. 2007	3

INTEREST OF *AMICUS CURIAE*

The Conference of State Bank Supervisors (“CSBS”) is a national association of state banking officials. Member officials regulate state-chartered banks and other financial services providers, including nondepository mortgage lenders and brokers. CSBS is committed to preserving the traditional competitive balance between the state and federal segments of America’s dual banking system. It is keenly interested in making sure that the doctrine of federal preemption is applied in accordance with congressional intent so as not to injure that vital system or offend principles of federalism.

CSBS submits this brief in support of Appellee John B. Reardon, Superintendent of the Ohio Division of Financial Institutions (the “Superintendent”).¹ The decision below correctly held that an informal opinion letter by the Chief Counsel of the Office of Thrift Supervision (“OTS”) did not preempt the Superintendent’s statutory authority to license mortgage brokers. This Court should affirm that decision.

¹ All parties have consented to the filing of this brief *amicus curiae*.

INTRODUCTION

In this case, State Farm Bank, F.S.B. (“SFB”) (an OTS-chartered federal savings bank) and SFB’s independent contractor agent (George Meinberg) brought suit to challenge the application of certain Ohio laws. Based on the OTS Chief Counsel’s opinion letter,² they sought to invalidate provisions of the Ohio Mortgage Broker Act, Ohio Rev. Code Ann. §§ 1322.01-1322.99 (the “Ohio Act”). That act requires mortgage brokers doing business in Ohio to comply with registration requirements the Superintendent administers. The Ohio Act does not apply to depository institutions – such as federal savings associations (“FSAs”) like SFB – or to their subsidiaries, affiliates or employees. R.56, Dist. Ct. Op. 10.

As the district court observed, “[t]he Ohio General Assembly enacted [Ohio Rev. Code] Chapter 1322 to protect Ohio mortgage loan consumers from potential abuses that could pose a threat to consumers’ homes and financial security.” *Id.* at 9. The Ohio Act is similar to mortgage broker laws many other states have adopted to protect consumers against fraudulent

² The letter asserted that federal law preempted, with respect to SFB’s agents, all “state registration and licensing laws.” It did not assert preemption with regard to any other category of state law. *See* R.1, Exh. A, OTS Chief Cnsl. Op., Oct. 25, 2004, at 1, 4, 5 & n.8, 9, 13-15.

and abusive practices.³ Unqualified and unscrupulous mortgage brokers have contributed significantly to the current subprime lending crisis by persuading borrowers to enter into mortgages they could not afford. Defaults and foreclosures on subprime mortgages are inflicting massive losses on many states and local communities.⁴

The trial court dismissed the suit. SFB and the OTS wrongly maintain that federal law preempts the application of the Ohio Act's registration requirements to mortgage brokers operating in Ohio who happen to be SFB's independent contractor agents.⁵

SUMMARY OF ARGUMENT

Throughout this nation's history, the states have enacted and enforced laws designed to protect consumers against abusive and unfair financial services practices. Ohio has the authority to regulate nondepository

³ See, e.g., Katie Kuehner-Hebert, "States to Shift Focus from Predators to Foreclosures," *American Banker*, Dec. 14, 2007, at 1 (reporting that "nearly 40 states enacted laws that ranged from strengthening licensing requirements for mortgage brokers and lenders to stiffening penalties for mortgage fraud").

⁴ See, e.g., "The Subprime Lending Crisis: The Economic Impact on Wealth, Property Values and Tax Revenues and How We Got Here," Report and Recommendations by the Majority Staff of the Joint Economic Committee, U.S. Congress, Oct. 2007 (available at www.jec.senate.gov), at 4-22.

⁵ The agents are also independent contractor agents of SFB's parent company, State Farm Mutual Automobile Insurance Company ("State Farm Mutual").

mortgage brokers to protect its consumers because “sound financial institutions and honest financial practices are essential to the health of any State’s economy and to the well-being of its people.” *Lewis v. BT Inv. Managers, Inc.*, 447 U.S. 27, 38 (1980). The Supreme Court has affirmed that state consumer protection laws represent “an exercise of the historic police powers of the States.” *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 146 (1963) (internal quotation marks and citation omitted). Therefore, courts should not conclude that federal law preempts state consumer protection laws “in the absence of an **unambiguous congressional mandate** to that effect.” *Id.* at 146-47 (emphasis added).

To support their preemption claim, Appellants and the OTS cite the Home Owners’ Loan Act, 12 U.S.C. § 1461 *et seq.* (“HOLA”), two OTS regulations, 12 C.F.R. §§ 545.2 & 560.2, and the OTS Chief Counsel’s opinion letter. None of these authorities preempts Ohio’s authority to require SFB’s agents to register as mortgage brokers under the Ohio Act.

HOLA does not preempt state licensing or registration laws for agents who provide services to FSAs. The single HOLA provision referring to agents simply states that the OTS may examine and regulate agents’ or contractors’ “performance” of “services” for FSAs. *See* 12 U.S.C. § 1464(d)(7)(D). But the “OTS is not given plenary authority” over agents

under § 5(d)(7)(D). R.56, Dist. Ct. Op. 19 n.9. The statute establishes no federal licensing scheme for FSA agents and expresses no congressional policy barring states from applying nondiscriminatory licensing or registration requirements to them.

Similarly, the OTS preemption rules in 12 C.F.R. §§ 545.2 and 560.2 make no mention of FSA agents. Shortly after the OTS issued § 560.2, it adopted a separate regulation, 12 C.F.R. Part 559, addressing FSA “subordinate organizations.” In that regulation, the OTS gave preemptive treatment **only** to FSA **operating subsidiaries**. An operating subsidiary must satisfy three criteria: (i) its activities must be limited to those permissible for its parent FSA, (ii) its parent FSA must own a majority of its voting shares, and (iii) its parent FSA must exercise **exclusive control** over it. Service corporations do not meet the criteria for operating subsidiaries. They thus receive no preemptive immunity and remain subject to state law. *See* 12 C.F.R. §§ 559.2, 559.3(c), (e), (n); 61 Fed. Reg. 66561, 66563 (1996).

SFB’s agents likewise satisfy none of the OTS’s criteria for operating subsidiaries. The agents are allowed to offer products on behalf of State Farm Mutual that are not permissible for FSAs. SFB has no ownership interest in them. The agents are also under the control not only of SFB but

also of State Farm Mutual. Accordingly, SFB's agents do not qualify for preemptive immunity under the OTS's regulations. They must therefore comply with Ohio law.

While the Chief Counsel's letter concluded otherwise, he has no power to bind others with an informal opinion letter. Congress has authorized only the OTS **Director** to issue regulations carrying out the OTS's statutory responsibilities. *See, e.g.*, 12 U.S.C. §§ 1463(a)(2), 1464(a), 1464(c), 1464(d)(7)(E); *cf. Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986) (warning of agency actions constituting "power to override Congress"). The Director has not delegated this authority to anyone. The OTS Chief Counsel was therefore powerless to significantly modify and expand the scope of the OTS's preemptive regulations.

Beyond the delegation difficulties, the opinion letter also violated Section 4(b) of the Administrative Procedure Act, 5 U.S.C. § 553(b). The letter was a substantive regulation improperly adopted without notice or opportunity for comment. It declared that SFB's agents need not comply with the Ohio Act's registration requirements in order to provide mortgage broker services. It thereby purports to have "the force and effect of law" by "pre-emp[ting] state law under the Supremacy Clause." *Chrysler Corp. v. Brown*, 441 U.S. 281, 295-96 (1979). The letter also confers significant

rights on private parties. Its claim that SFB's agents are equivalent to operating subsidiaries for preemption purposes "was not implicit in the [agency's] regulation from the beginning, [and] it could not be imposed later on without compliance with the notice and comment requirements" of 5 U.S.C. § 553(b). *Ohio Dept. of Human Servs. v. U.S. Dept. of Health & Human Servs.*, 862 F.2d 1228, 1233, 1236 (6th Cir. 1988).

Further, the opinion letter breached Executive Order 13132 of Aug. 4, 1999. That order requires agencies to consult with states (including notice and comment protections) when state law is to be preempted or there are other "federalism implications." *See* Exec. Order No. 13132, 64 Fed. Reg. 43255, at 43258 (Aug. 10, 1999).

Finally, the OTS Chief Counsel's opinion letter is entitled to no deference under *Auer v. Robbins*, 519 U.S. 452, 461 (1997). The applicable OTS regulations unambiguously fail to support the letter's preemption claim. This Court should reject the letter's conclusion because the OTS Chief Counsel improperly attempted, "under the guise of interpreting a regulation, to create *de facto* a new regulation." *Christensen v. Harris County*, 529 U.S. 576, 588 (2000).

ARGUMENT

I. NEITHER HOLA NOR THE OTS'S REGULATIONS PREEMPT THE OHIO ACT.

A. HOLA Does Not Preempt The Ohio Act.

1. A Federal Statute Should Not Be Construed To Preempt State Consumer Protection Laws Without A Clear And Manifest Expression Of Congressional Intent.

Federal preemption does not happen casually. In *Gregory v. Ashcroft*, 501 U.S. 452 (1991), the Supreme Court explained that the “federalist structure of joint sovereigns preserves to the people numerous advantages. It assures a decentralized government that will be more sensitive to the diverse needs of a heterogeneous society; . . . [and] it allows for more innovation and experimentation in government.” *Id.* at 458. In order to preserve the “delicate balance” between federal and state power, the Court declared that preemption is “an extraordinary power . . . that we must assume Congress does not exercise lightly.” *Id.* at 460. Accordingly, the Court held that “Congress should make its intention clear and manifest if it intends to pre-empt the historic powers of the States.” *Id.* at 461 (citation and internal quotation marks omitted).

This caution is especially appropriate concerning state efforts to protect consumers by monitoring financial services practices and providers. In *Lewis v. BT Inv. Managers, Inc.*, 447 U.S. 27 (1980), the Supreme Court affirmed that regulation of providers of financial services is a matter of “profound local concern,” because “sound financial institutions and honest financial practices are essential to the health of any State’s economy and to the well-being of its people.” *Id.* at 38. The Court has also held that state laws “designed to prevent the deception of consumers” represent “an exercise of the historic police powers of the States.” *Florida Lime*, 373 U.S. at 146 (internal quotation marks and citation omitted); *see also Lewis*, 447 U.S. at 43 (“protecting the citizenry against fraud [is] undoubtedly [a] legitimate state interest[]”).

In view of the states’ power to protect their citizens from fraudulent or abusive business methods, courts should not construe federal statutes as preempting state consumer protection laws “in the absence of an **unambiguous congressional mandate** to that effect.” *Florida Lime*, 373 U.S. at 146-47 (emphasis added); *see also General Motors Corp. v. Abrams*, 897 F.2d 34, 41-42 (2d Cir. 1990) (“Because consumer protection law is a field traditionally regulated by the states, **compelling evidence of an intention to preempt is required in this area**”) (emphasis added).

Appellants and the OTS have not challenged Ohio's general authority to regulate nondepository mortgage brokers for the purpose of protecting consumers. They claim, however, that HOLA and the OTS's regulations preempt the application of the Ohio Act's registration requirements to SFB's agents. Yet neither HOLA nor any valid OTS regulation exempts SFB's agents from their duty to register under the Ohio Act.

2. HOLA Does Not Preempt The Application Of The Ohio Act To SFB's Agents.

There is no HOLA provision that exempts SFB's independent contractor agents from their duty to comply with the Ohio Act's registration requirements.

To be sure, HOLA does give the OTS Director certain important powers. For example, HOLA § 5(a)(1) authorizes the Director of OTS "to provide for the organization, incorporation, examination, operation, and regulation of . . . Federal savings associations (including Federal savings banks)." 12 U.S.C. § 1464(a)(1). Section 5(c)(1)(B) permits "a Federal savings association" to make residential mortgage loans "[t]o the extent specified in regulations of the [OTS] Director." 12 U.S.C. § 1464(c)(1)(B). Section 5(d)(1)(B) permits the Director to examine an FSA and each of its "affiliates," a term that includes each business organization the FSA controls. 12 U.S.C. §§ 1464(d)(1)(B), 221a(b). Further, § 5(d)(7)(A)

provides that a “service company or subsidiary that is owned in whole or in part by a savings association shall be subject to examination and regulation by the Director to the same extent as that savings association.” 12 U.S.C. § 1464(d)(7)(A).

Yet each of these HOLA provisions refers either to FSAs or to their affiliates, subsidiaries or service companies. None refers to independent FSA contractor agents. Nor do they indicate any congressional intent to preempt state regulation of such agents.⁶

SFB and the OTS primarily rely on HOLA § 5(d)(7)(D). It provides that if a savings association “causes to be performed for itself, by contract or otherwise, any service authorized under [HOLA], . . . (i) **such performance** shall be subject to regulation and examination by the **Director** to the same extent as if such services were being performed by the savings association on its own premises.” 12 U.S.C. § 1464(d)(7)(D) (emphasis added).

The OTS Director’s authority over agents and contractors under § 5(d)(7)(D) is much more limited than his authority over service companies or subsidiaries under § 5(D)(7)(A). As to agents and contractors, the Director may only regulate and examine their “performance” of “services”

⁶ See R.56, Dist. Ct. Op. 11 n.7 (noting that the OTS regulation governing “subordinate organizations” of FSAs, 12 C.F.R. Part 559, does not refer to independent contractors or agents).

for an FSA. *See* R.56, Dist. Ct. Op. 19 n.9 (noting that “OTS is not granted plenary authority” over agents and contractors under § 5(d)(7)(D)). In contrast, the Director can regulate and examine service companies and subsidiaries to the same extent that he regulates and examines their parent FSAs.

Section 5(d)(7)(E) authorizes the OTS Director to issue regulations and orders (including enforcement orders under 12 U.S.C. § 1818) to carry out the provisions of § 5(d)(7). Section 5(d)(7)(E) does not mandate the establishment of licensing requirements for FSA agents, and the OTS Director has not established any. Nor, apparently, does he intend to.⁷ Sections 5(d)(7)(D) and (E) also do not express any congressional policy to prevent the states from adopting licensing or registration requirements that apply evenhandedly to all mortgage brokers, including those who act on behalf of FSAs and other financial institutions.

Section 5(d)(7) was enacted in 1998. *See* Pub. L. No. 105-164, 112 Stat. 32, 33 (1998). The section’s legislative history indicates that Congress was primarily concerned with giving the OTS Director adequate authority to regulate and examine the performance of services that agents or contractors provide to FSAs. It includes **no** expression of congressional intent to

⁷ *See* R.56, Dist. Ct. Op. 4 (“The [OTS] does not propose to issue federal licenses to mortgage brokers”).

preempt the states' authority to require FSA agents and contractors to comply with state licensing or registration requirements.⁸

The OTS has enforcement authority over FSA “institution-affiliated parties,” including agents and independent contractors, under 12 U.S.C. §§ 1464(d)(1)(A), 1813(u)(1), and 1818. But none of those statutes forbids state licensing or registration requirements for FSA agents or contractors. Additionally, under 12 U.S.C. § 1813(u)(4) independent contractors acting on behalf of FSAs cannot be treated as “institution-affiliated parties” and are **not** subject to the OTS Director’s enforcement authority, **unless** they “knowingly or recklessly” participate in a violation of law, breach of fiduciary duty or unsafe or unsound practice. *Id.* Federal statutes thus provide the OTS Director with limited enforcement authority over independent contractors. This a further indication that Congress did not intend to preempt the states’ authority to license such contractors.

SFB ignores the absence of any explicit statutory prohibition on state licensing or registration requirements for mortgage brokers. It argues that HOLA establishes a comprehensive federal scheme that prevents Ohio’s

⁸ See H.R. Rep. No. 105-417, at 4, 9-12, *reprinted in* 1998 U.S.C.C.A.N. 22, 23, 28-32; 144 Cong. Rec. H513-14 (daily ed., Feb. 24, 1998) (remarks of Reps. Leach and LaFalce); *see also* 144 Cong. Rec. S929, S931 (daily ed. Feb. 24, 1998) (remarks of Sens. Bennett and Dodd).; *id.* S1539-40 (daily ed., Mar. 6, 1998) (remarks of Sens. Sarbanes, Bennett and Dodd).

registration requirements from applying to FSA agents. *See* Appellants' Br. 53. The Supreme Court, however, has held that the comprehensiveness of a federal statute does **not** provide a sufficient basis for finding statutory preemption. In *Hillsborough County v. Automated Medical Laboratories, Inc.*, 471 U.S. 707 (1985), the Court held that "merely because the federal provisions were sufficiently comprehensive to meet the need identified by Congress [does] not mean that States and localities [are] barred from identifying additional needs or imposing further requirements in the field." *Id.* at 717.⁹

Moreover, in *Fidelity Fed. Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141 (1982), the Supreme Court expressly refrained from deciding whether "HOLA or the [OTS's predecessor agency's] regulations occupy the . . . entire field of federal savings and loan regulation." *Id.* at 159 n.14; *see also id.* at 171 (O'Connor, J., concurring and declaring that "the authority of the [OTS's predecessor agency] to pre-empt state laws is not limitless"). Instead of basing its decision on a finding of field preemption, the *de la Cuesta* Court held that California's due-on-sale law was preempted because it created an "actual conflict" with an agency regulation HOLA authorized.

⁹ Similarly, in *O'Melveny & Myers v. FDIC*, 512 U.S. 79 (1994), where the Court considered a "federal statutory regulation that is comprehensive and detailed," the Court said that "matters left unaddressed in such a scheme are presumably left subject to the disposition provided by state law." *Id.* at 85.

Id. at 159 n.14, 154-56. Here, however, SFB cannot demonstrate any “actual conflict” between the Ohio Act and a valid OTS regulation.

B. The OTS’s Regulations Do Not Preempt The Ohio Act.

SFB claims that two OTS regulations (12 C.F.R. §§ 545.2 and 560.2) preempt the Ohio Act’s application to FSA broker agents. Neither rule does so.

The OTS adopted 12 C.F.R. § 545.2 in 1983. 48 Fed. Reg. 23032, 23058 (1983). It provides that “[t]he regulations in this part 545 . . . [are] preemptive of any state law purporting to address the subject of the operations of a Federal savings association.” The OTS’s regulations in 12 C.F.R. Part 545 grant no powers or immunities to FSA agents.

Two courts have held that Section 545.2 does **not** preempt the application of state laws to FSA service corporations. *See Fenning v. Glenfed, Inc.*, 47 Cal. Rptr. 2d 715, 719-21 (Cal. Ct. App. 1995), *rev. denied* (Cal. Mar. 28, 1996); *Spitz v. Goldome Realty Credit Corp.*, 151 Ill.2d 71, 600 N.E.2d 1185, 1186-88 (1992). *Spitz* also involved an opinion letter. That letter concluded that HOLA and the agency’s regulations did **not** preempt the application of state mortgage broker licensing laws to FSA service corporations. *Spitz*, 600 N.E.2d at 1187-88. The OTS’s current

regulations continue to recognize the general applicability of state laws to service corporations.

The OTS adopted 12 C.F.R. § 560.2 in 1996. 61 Fed. Reg. 50951, 50972 (1996). Section 560.2(a) provides that “federal savings associations may extend credit as authorized under federal law, including this part, without regard to state laws purporting to regulate or otherwise affect their credit activities, except to the extent provided in paragraph (c) of this section.” Like § 545.2, § 560.2 refers only to the activities of FSAs and does not refer to subsidiaries, service corporations or FSA agents.

Shortly after adopting § 560.2, the OTS issued 12 C.F.R. Part 559, which governs FSA “subordinate organizations,” including operating subsidiaries and service corporations. 61 Fed. Reg. 66561, 66562 (1996). In order to qualify as an **operating subsidiary**, a subsidiary must (i) engage only in activities permitted to its parent FSA; (ii) have more than 50% of its voting shares be owned by its parent FSA; **and** (iii) be under the **exclusive** operating control of its parent FSA. 12 C.F.R. §§ 559.2, 559.3(c)(1) & (e)(1). In contrast, a **service corporation** (i) may engage in activities permissible for an FSA and additional activities OTS regulations allow; (ii) must be owned by one or more savings associations, though it need not be majority owned by any single FSA; and (iii) need not be under the exclusive

control of any single FSA. 12 U.S.C. § 1464(c)(4)(B); 12 C.F.R. §§ 559.2, 559.3(c)(2) & (e)(2); *see also* 61 Fed. Reg. at 66653 (describing the “three basic characteristics of an operating subsidiary” and noting differences from a service corporation).

OTS’s regulations provide that state laws apply to an operating subsidiary only to the extent that state laws apply to the parent FSA. 12 C.F.R. § 559.3(n)(1). However, the OTS’s regulations also recognize – consistent with prior case law and agency opinions – that **state laws generally apply to FSA service corporations.** 12 C.F.R. § 559.3(n)(2).

The OTS explained in 1996 that it was preempting state laws with respect to **operating subsidiaries** because those subsidiaries “may only engage in activities permissible for its parent [FSA] . . . must be controlled by the investing [FSA] . . . [and are] treated as the equivalent of a department of the parent thrift for regulatory and reporting purposes.” 61 Fed. Reg. at 66563. In contrast, the OTS decided that it would continue its policy of **not** preempting state laws with respect to **service corporations.** Because service corporations do not satisfy the three criteria for status as operating subsidiaries, the OTS concluded that “service corporations are **not so closely tied to the parent thrift. . . . [and] broad federal preemption for service corporations is not necessary.**” *Id.* (emphasis added).

Thus, in 1996, shortly after the OTS adopted 12 C.F.R. § 560.2, the agency extended the preemptive effect of § 560.2 to FSA operating subsidiaries but chose not to apply § 560.2 to service corporations. The OTS also made clear that **all three criteria** for operating subsidiary status must be satisfied before a “subordinate organization” could gain the benefit of its parent FSA’s preemptive immunity from state law. The OTS’s regulation on “subordinate organizations” contains no reference to FSA agents or independent contractors. R.56, Dist. Ct. Op. 13 n.7.

SFB’s independent contractor agents do not satisfy any of the three operating subsidiary criteria. First, the OTS Chief Counsel’s opinion states that the agents sell “products” on behalf of State Farm Mutual in addition to the “banking products and services” they sell for SFB. R.1, Exh. A, OTS Chief Cnsl. Op. 2 n.2. Thus, the agents’ activities are not limited to FSA-permissible activities. Second, SFB does not have any ownership interest – let alone a majority voting interest – in any of the agents. Third, SFB does not exercise **exclusive** control over the agents’ operations. Each SFB agent is also an agent of State Farm Mutual and operates under its oversight as well as SFB’s. *See* R.56, Dist. Ct. Op. at 6; R.1, Exh. A, OTS Chief Cnsl. Op. at 2; R.1, Complaint, ¶¶ 11, 18.

Moreover, SFB's agent agreement stipulates that the agents are "independent contractors" and are not employees of the bank or State Farm Mutual. R.1, Exh. A, OTS Chief Cnsl. Op. at 2 & n.2, 3. Under that agreement, each agent has "full control of his/her daily activities, with the right to *exercise independent judgment* as to the time, place, and manner of marketing and selling [SFB's] Products." Appellee's Br. 5-6 (quoting agreement, emphasis added).

Given these terms, the agents are hardly subject to SFB's **exclusive** control. Yet such exclusive control is required for operating subsidiary status under 12 C.F.R. § 559.3(n)(1). The agents also have separate agreements with State Farm Mutual and owe separate duties to it. This relationship further precludes a finding that they are under SFB's exclusive control.

Moreover, the OTS did not refer to independent contractor agents of FSAs when it adopted 12 C.F.R. § 545.2 in 1983 or when it promulgated 12 C.F.R. § 560.2 in 1996. Prior to 1998, the OTS doubted whether it was authorized to make compulsory examinations of agents. Congress enacted HOLA § 5(d)(7) in 1998 because the OTS said it lacked power to examine contractors who provided services to FSAs but who were unwilling to "consent" to OTS examinations. *See* H.R. Rep. No. 105-417, at 10 (stating

that the OTS often found it difficult to obtain the “service provider’s consent” for an examination, and the OTS was therefore requesting “clear authority” to make compulsory examinations), reprinted in 1998 U.S.C.C.A.N. at 29.¹⁰

The OTS plainly did not even contemplate that 12 C.F.R. §§ 545.2 and 560.2 would preempt the application of state licensing laws to FSA independent contractor agents when it adopted those rules. In *de la Cuesta*, the Supreme Court clarified that a federal agency’s regulation cannot preempt state law unless the agency intended the regulation to have preemptive effect with respect to the particular type of state law at issue. *See* 458 U.S. at 154, 159 (holding that a regulation of the OTS’s predecessor agency preempted California’s due-on-sale law because the regulation “was meant to pre-empt conflicting state limitations on the due-on-sale practices of [FSAs]”). On this ground too, SFB’s preemption claim fails.

¹⁰ *See also* 144 Cong. Rec. S929, S931 (daily ed. Feb. 24, 1998) (remarks of Sens. Bennett and Dodd).

II. THE OTS CHIEF COUNSEL HAD NO AUTHORITY TO PREEMPT THE OHIO ACT WITH AN OPINION LETTER.

A. Only The OTS Director Possesses Statutory Authority To Issue Regulations Preempting State Law.

In *Louisiana Public Service Commission v. FCC*, 476 U.S. 355

(1986), the Supreme Court declared that “a federal agency may pre-empt state law only when it is acting within the scope of its congressionally delegated authority. . . . [A]n agency literally has no power to act, let alone pre-empt the validly enacted legislation of a sovereign State, unless and until Congress confers power upon it.” *Id.* at 374. Similarly, in *de la Cuesta*, the Court held that a regulation cannot preempt state law unless the issuing agency “acted within its statutory authority . . . that Congress delegated to the [agency].” 458 U.S. at 159.

In this case, “the [OTS] Director . . . is the only person authorized under federal law to issue regulations” on behalf of the OTS. R.56, Dist. Ct. Op. 3. All of the relevant HOLA provisions stipulate that the **Director** is the only person empowered to issue regulations to carry out the OTS’s statutory responsibilities. *See* 12 U.S.C. § 1463(a)(2) (“[t]he **Director** may issue such regulations as the **Director** determines to be appropriate to carry out the responsibilities of the **Director**”); *id.* § 1464(a) (the **Director** is authorized

“to provide for the . . . examination, operation, and regulation” of FSAs “under such regulations as the **Director** may prescribe”); *id.* § 1464(c) (FSAs may make loans and investments “[t]o the extent specified in regulations of the **Director**”); *id.* § 1464(d)(7)(E) (“[t]he **Director** may issue such regulations . . . as may be necessary to enable the **Director** to administer and carry out” § 5(d)(7) of HOLA) (all emphases added).

The OTS has not shown that the Director delegated his rulemaking authority to the Chief Counsel pursuant to 12 U.S.C. § 1462a(h)(4)(A)(ii).¹¹ Further, as demonstrated below, the OTS Chief Counsel’s opinion letter is a substantive regulation because it purports to preempt state laws that are not already preempted under 12 C.F.R. §§ 545.2 and 560.2. The opinion letter is therefore invalid. The Chief Counsel significantly expanded the preemptive scope of the OTS’s regulations without congressional approval and without any delegation of the Director’s rulemaking authority. *See La. Pub. Serv. Comm’n*, 476 U.S. at 374 (barring such unauthorized exercises of power).

¹¹ *Compare OTS v. Paul*, 985 F. Supp. 1465, 1474 (S.D. Fla. 1997) (finding that the OTS Director made a valid delegation of enforcement authority to the Deputy Director).

B. The Chief Counsel’s Opinion Letter Is Not A Valid OTS Regulation And Therefore Cannot Preempt The Ohio Act.

1. The Opinion Letter Was A Substantive Regulation Issued In Violation Of 5 U.S.C. § 553(b).

A “substantive” or “legislative” regulation is a rule that “grant[s] rights, impose[s] obligations, or produce[s] other significant effects on private interests.” *Ohio Dept. of Human Servs. v. U.S. Dept. of Health & Human Servs.*, 862 F.2d 1228, 1233 (6th Cir. 1988) (internal quotation marks and citation omitted); *see also Chrysler Corp.*, 441 U.S. at 302 (a substantive or legislative rule is one “affecting individual rights and obligations”) (quoting *Morton v. Ruiz*, 415 U.S. 199, 232 (1974)). In contrast, interpretive rules do not “foreclose alternative courses of action or conclusively affect rights of private parties.” *Ohio Dept. of Human Servs.*, 862 F.2d at 1233 (internal quotation marks and citation omitted).

The OTS Chief Counsel’s opinion letter is plainly a substantive rule. As the district court found, the letter “preempt[ed] the statutory schemes of several states” and “**conclusively affected the rights and obligations of private parties.**” R.56, Dist. Ct. Op. 26-27, 30 (emphasis added). The letter declares that “state licensing and registration requirements that do not apply to [SFB] also do not apply to [SFB’s] agents.” R.1, Exh. A, OTS Op.

Chief Cnsl. 1. Thus, the letter purports to have “the force and effect of law” by “pre-emp[ting] state law under the Supremacy Clause.” *Chrysler Corp.*, 441 U.S. at 295-96 (footnotes omitted). It also confers significant rights on SFB and its agents by proclaiming that the agents can provide mortgage broker services without regard to the Ohio Act’s registration requirements. The opinion letter’s announced “rule” is “mandatory, not advisory, and the mandate was a new one.” *Ohio Dept. of Human Servs.*, 862 F.2d at 1234. It is therefore a substantive rule.

Substantive rules must comply with the notice-and-comment procedures established by § 4(b) of the Administrative Procedure Act (“APA”), 5 U.S.C. § 553(b). “Section 553 is designed to ensure that affected parties have an opportunity to participate in and influence agency decision making at an early stage, when the agency is more likely to give real consideration to alternative ideas.” *Ohio Dept. of Human Servs.*, 862 F.2d at 1236 (internal quotation marks and citation omitted).¹² In this case, “[t]he State of Ohio was never asked for comment, nor even given formal notice of the federal agency’s new position. Instead, . . . [SFB] notified the

¹² See also *Nat’l Family Planning & Reproductive Health Ass’n v. Sullivan*, 979 F.2d 227, 240 (D.C. Cir. 1992) (“[t]he laudable goals of § 553’s notice and comment requirement [are] to increase public participation and fairness in agency decisionmaking and to establish a mechanism by which an agency can improve its own information base”).

State of Ohio, for the first time, that the [OTS] contended that Ohio law had been preempted by the agency's actions." R.56, Dist. Ct. Op. 3-4.

The courts have held that the exemptions to § 553(b)'s notice-and-comment requirements, such as interpretive rulings, "must be **narrowly construed.**" *United States v. Picciotto*, 875 F.2d 345, 347 (D.C. Cir. 1989) (quoting *American Hosp. Ass'n v. Bowen*, 834 F.2d 1037, 1044-45 (D.C. Cir. 1987)) (emphasis added). Accordingly, the courts have refused to give effect to substantive regulations masquerading as interpretive rules or policy statements. In *Maximum Home Health Care, Inc. v. Shalala*, 272 F.3d 318 (6th Cir. 2001), this Court struck down an agency's attempt to issue a policy manual provision that was "inconsistent with the governing regulations" because the agency's action "creates for itself a kind of open-ended discretion in its administrative investigations, and opens the door to disparate treatment of interested parties." *Id.* at 321. Similarly, in *National Family Planning*, the court refused to allow agency officials "to alter their requirements for affected public members at will through the ingenious device of 'reinterpreting' their own rule." 979 F.2d at 232.

Appellants and the OTS assert that the OTS Chief Counsel's opinion letter qualifies for judicial deference under *Auer v. Robbins*, 519 U.S. 452, 461 (1997). They say the letter is an "interpretation" of the OTS's

regulations. Yet in *Christensen v. Harris County*, 529 U.S. 576 (2000), the Supreme Court held that “*Auer* deference is warranted only when the language of the regulation is ambiguous.” *Id.* at 588. The Court also warned that *Auer* deference may not be used “to permit the agency, under the guise of interpreting a regulation, to create *de facto* a new regulation.” *Id.*

In this case, the OTS’s regulations are **not** ambiguous on the question of whether the preemptive impact of 12 C.F.R. §§ 545.2 and 560.2 extends to FSA agents. As shown above in Part I(B), §§ 545.2 and 560.2 do not even **refer** to agents of FSAs. Further, 12 C.F.R. § 559.3(n) provides that **operating subsidiaries** are the **only** “subordinate organizations” that enjoy the preemptive immunity granted to FSAs under §§ 545.2 and 560.2. Moreover, SFB’s agents do not meet any of the three mandatory criteria for status as operating subsidiaries under 12 C.F.R. §§ 559.2, 559.3(c)(1) and (e)(1).

The OTS Chief Counsel did not merely “interpret” the OTS’s regulations when he declared that SFB’s agents were exempted from the Ohio Act’s registration requirements. Instead, he legislated. Specifically, he concluded that, because SFB “exercises **sufficient** control over an agent’s performance of authorized banking activities,” the agent is “**like** an

operating subsidiary” and “federal preemption of state license and registration requirements apply to the agent, **just as it would apply to an operating subsidiary.**” R.1, Exh. A, OTS Chief Cnsl. Op. 13 (emphasis added). These assertions are obviously “inconsistent with the governing regulations” because the Chief Counsel did not require SFB’s agents to satisfy any of the three mandatory criteria for status as operating subsidiaries. *Maximum Home Health Care*, 272 F.3d at 321.

First, the Chief Counsel made only a finding of “sufficient” control rather than **exclusive** control, as required by 12 C.F.R. § 559.3(c)(1). Second, he did not determine that SFB controlled more than 50% of the voting shares of each agent, as the same regulation requires. Third, he considered only the agents’ involvement in “authorized banking activities” and did **not** evaluate the agents’ activities in selling State Farm Mutual’s products. Accordingly, the Chief Counsel could not find that the agents were **exclusively** engaged in activities permissible for FSAs, as 12 C.F.R. § 559.3(e)(1) requires.

Thus, the Chief Counsel did not make any of the three findings that are preconditions for determining that a subordinate organization qualifies as an operating subsidiary and, therefore, is entitled to claim preemptive immunity under 12 C.F.R. § 559.3(n)(1). The OTS’s regulations do not

authorize the Chief Counsel to provide preemptive immunity to entities that he thinks are sufficiently “like” operating subsidiaries but which fail to satisfy the three mandatory criteria under 12 C.F.R. §§ 559.2 and 559.3(c)(1) and (e)(1). On the contrary, the OTS made clear in its 1996 rulemaking for subordinate organizations – **after** it adopted §§ 545.2 and 560.2 – that it would **not** preempt state law with respect to organizations that fail to qualify as operating subsidiaries. *See* 61 Fed. Reg. at 66561, 66563 (1996).

In sum, the OTS’s Chief Counsel’s opinion letter is an unlawful substantive regulation because the letter’s preemption claim “was not implicit in the [agency’s] regulation from the beginning, [and] it could not be imposed later on without compliance with the notice and comment requirements” of 5 U.S.C. § 553(b). *Ohio Dept. of Human Servs.*, 862 F.2d at 1236. For the same reason, the letter is not entitled to *Auer* deference because the OTS Chief Counsel attempted, “under the guise of interpreting a regulation, to create *de facto* a new regulation.” *Christensen*, 529 U.S. at 588.

In addition to violating 5 U.S.C. § 553(b), the OTS Chief Counsel’s opinion letter also contravened Executive Order 13132 of Aug. 4, 1999 (“E.O. 13132”). 64 Fed. Reg. 43255 (Aug. 10, 1999). Under E.O. 13132, an executive branch agency like the OTS must consult with the state

officials (including providing notice and opportunity for comment by state officials) whenever the agency proposes to adopt a rule, order or policy that preempts state law or otherwise has “federalism implications.” *See* E.O. 13132, §§ 1(a), 4(e), 6(b) & 6(c). In clear violation of E.O. 13132, the OTS Chief Counsel did not consult with state officials or provide them with any prior notice or opportunity to comment before issuing a letter that purported to preempt the laws of at least a dozen states.

2. Recent Court Decisions Do Not Support Giving Any Preemptive Effect To The OTS Chief Counsel’s Opinion Letter.

Appellants and the OTS also contend that the OTS Chief Counsel’s letter should be upheld as preemptive based on a single passage in *Watters v. Wachovia Bank, N.A.*, 127 S. Ct. 1559 (2007). *See* Appellants’ Br. 21, 52; OTS Am. Br. 4-5, 16. In *Watters*, the Supreme Court rejected the argument that “the preemptive reach of the [**National Bank Act (“NBA”)] extends only to a national bank itself.” *Id.* at 1570. In the same passage, the Court stated that “in analyzing whether state law hampers the federally permitted activities of a national bank, we have focused on the exercise of a national bank’s *powers*, not on its corporate structure.” *Id.* However, the Court made those comments in the context of a decision that addressed the question of whether preemption **under the NBA** extends to **operating****

subsidiaries of national banks. The Court emphasized that, in 1999, Congress enacted 12 U.S.C. § 24a(g)(3)(A), which recognized that operating subsidiaries “may engage only in activities national banks may engage in directly.” *Id.* Based on that statute, the Court found that “an operating subsidiary is tightly tied to its parent [bank] by the specification that it may engage only in ‘the business of banking’ as authorized by the [NBA].” *Id.* at 1571-72 (citations omitted).

The Supreme Court gave no indication in *Watters* that it would have extended preemption under the NBA to **independent contractor agents** that engage in activities **not** permissible for a national bank and that are **not** “tightly tied” to the bank. Thus, *Watters* provides no support for the preemption asserted by the OTS Chief Counsel with respect to SFB’s agents. This is so because those agents are allowed to sell products that are not permissible for SFB and are not “tightly tied” to SFB through majority voting ownership and exclusive control.

In *SPGGC, LLC v. Blumenthal*, 505 F.3d 183 (2d Cir. 2007), the court addressed *Watters* in the context of national bank agents. SPGGC, a subsidiary of Simon Property Group (which operates shopping malls in more than thirty states) sold gift cards as a national bank agent. The Second Circuit rejected SPGGC’s attempt “to analogize its relationship with [a

national bank] to the relationship between an operating subsidiary and its parent national bank.” *Id.* at 190. The court refused “to read *Watters* so broadly as to obscure the unique role assigned to operating subsidiaries in the context of national banking regulation.” *Id.* The court therefore held that SPGGC must comply with a Connecticut statute that prohibited the sale of gift cards with dormancy fees. Under SPGGC’s agency agreement in *Blumenthal*, SPGGC collected and retained the dormancy fees, and the national bank that issued the gift cards received transactional fees that were **not** limited by Connecticut law. The Second Circuit upheld the Connecticut statute because it “affect[ed] only the conduct of SPGGC, which is neither protected under federal law nor subject to the OCC’s exclusive oversight.” *Id.* at 191.

Appellants and the OTS cite another Simon-related case, *SPGGC, LLC v. Ayotte*, 488 F.3d 525 (1st Cir. 2007), *petition for cert. filed* (U.S. Dec. 11, 2007). *Ayotte* likewise does not support the alleged preemptive effect of the Chief Counsel’s opinion letter. In *Ayotte*, the First Circuit held that the NBA preempted New Hampshire laws that prohibited SPGGC from selling gift cards with dormancy fees. Under the agency agreements in *Ayotte* – **unlike** the agency agreement in *Blumenthal* – SPGGC sold gift cards issued by a national bank and an FSA, but the bank and the FSA

retained the right to collect the dormancy fees. *Id.* at 528-29, 533. As a result, the New Hampshire laws struck down in *Ayotte* “regulate[d] the terms and conditions of the giftcards” issued by the national bank and the FSA and prevented those institutions from collecting dormancy fees the NBA and HOLA authorize. *Id.* at 533, 536.

In *Ayotte*, the First Circuit emphasized that the New Hampshire laws were “not concerned with [SPGGC’s] activity, which is limited to how and where the giftcards are marketed,” and the court expressed “no opinion as to whether state regulation of these aspects of a giftcard program might be preempted by the [NBA].” *Id.* at 533 n.5. The First Circuit further explained that the New Hampshire statute “seeks to prohibit the sale of the bank product itself” and was not directed at the “actions of the third party agent.” *Id.* at 534.

The case at bar is similar to *Blumenthal* and distinguishable from *Ayotte*. Unlike the New Hampshire statute in *Ayotte*, the Ohio Act does not prohibit SFB’s use of agents. It also does not seek to regulate the terms and conditions of SFB’s mortgage products. Instead, the Ohio Act simply requires that SFB’s agents must register as mortgage brokers if they wish to solicit customers for mortgage loans. The same is required for all other similarly-situated persons in Ohio. The Ohio Act is directed solely at the

qualifications of any person who seeks to act as a mortgage broker, and it does not impair SFB's ability to offer mortgage products in Ohio through agents who meet those qualifications.

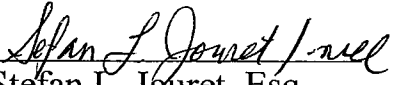
CONCLUSION

This Court should affirm the decision below.

Respectfully submitted,

Of Counsel:

Arthur E. Wilmarth, Jr.
Professor of Law
George Washington University
Law School
2000 H Street, N.W.
Washington, DC 20052
Tel. (202) 994-6386


Stefan L. Jouret, Esq.
DONOVAN HATEM, LLP
Two Seaport Lane
Boston, MA 02210
Tel. (617) 406-4500

Counsel of Record

John Gorman
General Counsel
Conference of State Bank
Supervisors
1155 Connecticut Ave., N.W.
5th Floor
Washington, DC 20036
Tel. (202) 296-2840

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(c) and 6th Cir. R. 32(a), I certify that this brief complies with the type-volume limitations.

1. Exclusive of the portions of the brief exempted by Fed. R. App. P. 32 (a)(7)(B)(iii), the brief contains 6,977 words.
2. The brief has been prepared in Times New Roman typeface, 14-point font.
3. If the court so requests, I will provide an electronic version of the brief and/or a copy of the word or line printout.
4. I understand that a material misrepresentation in completing this certificate, or circumvention of the type-volume limits in Fed. R. App. P. 32, may result in the Court's striking the brief and imposing sanctions against me.

DATED: February 15th, 2008


Stefan L. Jouret

CERTIFICATE OF SERVICE

I, counsel for *Amicus Curiae*, the Conference of State Bank Supervisors, hereby certify that I caused two copies of the foregoing to be served this 15th day of February, 2008, by UPS as follows:

ARNOLD & PORTER
Howard N. Cayne
A. Patrick Doyle
Nancy L. Perkins
555 Twelfth St., N.W.
Washington, DC 20004

OFFICE OF THE ATTORNEY GENERAL OF OHIO
William P. Marshall
William J. Cole
Robert J. Krummen
30 E. Broad Street
17th Floor
Columbus, OH 43215


Stefan L. Jouret