

ensuring that the resolution of this case upholds the procedures for fair lending enforcement provided by the FHA.

II. STATEMENT OF FACTS

A. Parties

Plaintiff, USAA, is a federal savings bank chartered pursuant to the Home Owners' Loan Act, 12 U.S.C. § 1461 *et seq.*, and regulated by the federal Office of Thrift Supervision (OTS). Compl. ¶ 2. USAA originates mortgage loans secured by residential real estate located in Pennsylvania. Compl. ¶ 19. USAA filed suit on December 12, 2010 seeking injunctive and declarative relief protecting it from the need to comply with any investigation or subpoena by PHRC. Compl. ¶ 47.

Defendant, PHRC, is an agency of the Commonwealth of Pennsylvania certified by HUD pursuant to 42 U.S.C. § 3610(f) as a substantially equivalent state agency. *See* Notice of Certification and Funding of State and Local Fair Housing Enforcement Agencies Under the Fair Housing Assistance Program, 73 Fed. Reg. 15535 (Mar. 24, 2008) (listing substantially equivalent agencies including Pennsylvania Human Relations Commission); Fair Housing Assistance Program (FHAP) Agencies, <http://www.hud.gov/offices/fheo/partners/FHAP/agencies.cfm> (same); *see also Mitchell v. Cellone*, 389 F.3d 86, 91 (3d Cir. 2004) (recognizing PHRC is a certified state agency under § 3610(f)). HUD regulations require that, in order for PHRC to maintain its substantial equivalence certification, HUD conduct a periodic review and determine that the Pennsylvania Human Rights Act provides substantially the same protections against discrimination and substantially the same administrative adjudicatory procedures provided under the FHA. *See, e.g.*, 24 C.F.R. § 115.204(a) (listing numerous substantive provisions needed for substantial equivalence); *see also id.* §§ 115.208, 115.210-.211 (requiring

PHRC to satisfy HUD on the continued adequacy of its performance and the continued equivalency of the Pennsylvania Human Rights Act).

The parties filed cross motions for summary judgment on April 1, 2011. The parties' responses to the motions are due on April 29, 2011.

B. The FHA Complaint

In June 2009, Madelene Jacob filed a complaint form with HUD pursuant to 42 U.S.C. § 3610(a). Compl. Ex. A. Ms. Jacob alleged that USAA violated the FHA – specifically the ban on discriminatory lending contained in 42 U.S.C. § 3605 – by unfairly denying her attempt to refinance a mortgage secured by residential property she owns in Norristown, Pennsylvania because of her Egyptian national origin. *See* Compl. Ex. A. The complaint was processed by the Philadelphia Regional Office of HUD's Office of Fair Housing and Equal Opportunity (FHEO) because it involved an allegation of housing discrimination occurring in Pennsylvania. *See* Fair Housing Regional Offices, <http://www.hud.gov/offices/fheo/aboutfheo/fhhubs.cfm>; *see generally* Program Offices: Fair Housing / Equal Opportunity, http://portal.hud.gov/hudportal/HUD?src=/program_offices/fair_housing_equal_opp (providing general information about FHEO and HUD's FHA enforcement system). HUD's Philadelphia Regional Office assigned file number 03-09-0511-8 to the complaint. *See* Defendant's Ex. B.

HUD then referred Ms. Jacob's complaint to PHRC on August 12, 2009, pursuant to HUD's authority to refer HUD-filed FHA complaints to substantially equivalent state and local agencies for processing under 42 U.S.C. § 3610(f). *See* Defendant's Ex. B. HUD informed PHRC, at the time it referred the complaint, that HUD would advise USAA and Ms. Jacob that it was referring the investigation to PHRC. *See id.*; *see also* 42 U.S.C. § 3610(f)(1) (specifying

that HUD refers a complaint to a substantially equivalent state or local agency “before taking any action with respect to such complaint”).

PHRC commenced an investigation of Ms. Jacob’s referred lending discrimination complaint. USAA answered the complaint by informing PHRC that it did not treat Ms. Jacob less favorably than other customers. Compl. ¶ 25. PHRC sent a letter to USAA in April 2010 requesting it provide specific documents to substantiate this defense. Compl. Ex. B. USAA objected to the breadth of documents requested, Compl. Ex. C, and PHRC narrowed its document request in an August 2010 letter, Compl. Ex. D. USAA then ceased communications with PHRC, which led PHRC, later in August 2010, to send a second letter encouraging a response to the narrower set of requests and noting PHRC’s ability to subpoena USAA’s records if USAA did not provide them voluntarily. Compl. Ex. E. PHRC formally subpoenaed the narrower set of records on October 18, 2010, with a response due December 14, 2010. Compl. Ex. F. USAA never responded to the subpoena, and instead filed this case on December 12, 2010.

III. ARGUMENT

The Fair Housing Act, 42 U.S.C. § 3610(f), expressly authorizes a state agency to investigate a housing discrimination complaint filed with HUD in the manner that PHRC has followed in this case. USAA’s request for injunctive and declaratory relief to shut down PHRC’s investigation of Ms. Jacob’s lending discrimination complaint is premised on the argument that a different federal law – the Home Owners’ Loan Act and its implementing regulations – forbid PHRC from conducting such an investigation pursuant to *state* law. Because PHRC is acting pursuant to authority explicitly granted to it by federal law, USAA’s preemption claim fails as a matter of law. Therefore, this Court should grant PHRC’s motion for summary

judgment seeking dismissal of the lawsuit, and it should deny USAA's motion for summary judgment. *See Emp'rs Res. Mgmt. Co. v. James*, 853 F. Supp. 920, 921 (E.D. Va. 1994) (granting state's motion for summary judgment and denying plaintiff's motion for summary judgment upon making the determination that a challenged law was not preempted); *see also NBT Bank, Nat'l Ass'n v. First Nat'l Cmty. Bank*, 393 F.3d 404, 418 (3d Cir. 2004) (holding summary judgment was proper when legal claim failed as a matter of law).

A. The FHA Enforcement Structure

The FHA establishes procedures whereby victims of housing discrimination¹ can obtain meaningful relief through administrative investigation and adjudication of their complaints. *See Mitchell*, 389 F.3d at 90-91 (describing Congress as envisioning that the process commenced by victims of housing discrimination filing administrative complaints under 42 U.S.C. § 3610 would be "the primary means of enforcing FHA claims"). As an integral part of this administrative process, Congress created a system by which the federal government shares responsibility with state and local governments to investigate HUD-filed complaints alleging violations of the FHA. *See H.R. Rep. No. 100-711*, at 35 (House Committee Report to the Fair Housing Amendments Act of 1988 noting "the valuable role state and local agencies play in the [FHA] enforcement process").

Specifically, the FHA provides that when the Secretary of HUD receives a complaint filed pursuant to 42 U.S.C. § 3610(a) alleging a discriminatory housing practice in violation of the FHA, HUD shall refer it for investigation and resolution to the state or local agency with jurisdiction over the location where the practice is alleged to have occurred, if the state or local agency has been certified by HUD to enforce rights, and provide a process and remedies, that are

¹ Lending secured by residential real estate is one of the housing-related transactions covered by the FHA. 42 U.S.C. § 3605(b)(1)(B).

“substantially equivalent” to those provided under the FHA. 42 U.S.C. § 3610(f)(1).²

Certifications of substantial equivalence are made by the Secretary of HUD, who has delegated that authority to the Assistant Secretary for Fair Housing and Equal Opportunity. Currently, HUD has certified substantially equivalent agencies that cover all or parts of 39 states and the District of Columbia. *See* Fair Housing Assistance Program (FHAP) Agencies, <http://www.hud.gov/offices/fheo/partners/FHAP/agencies.cfm>.

To be certified, a state or local agency must demonstrate that it administers a law that, in comparison to the FHA: (1) protects substantially equivalent substantive rights; (2) follows substantially equivalent procedures; (3) has substantially equivalent remedies; and (4) makes available judicial review of the agency’s action. 42 U.S.C. § 3610(f)(3)(A); *see also* 24 C.F.R. §§ 115.201, 115.204, 115.206. The FHA regulations provide that a certified state agency will apply its own substantially equivalent state law in investigating and adjudicating the complaint, 24 C.F.R. § 115.204, and require – as a condition of certification as substantially equivalent to the FHA – that such state laws grant subpoena power to the certified agency to aid in its investigations, *id.* § 115.204(a)(2), (b)(1)(ii). Consistent with the certification requirements, Pennsylvania statutory provisions governing PHRC’s investigation of fair housing complaints explicitly incorporate provisions of the FHA. *See* 43 Pa. Cons. Stat. § 959(b)(2)-(3), (c), (d.1), (h) (requiring that various PHRC procedures must follow those “required by the Fair Housing Act”).

² In certain circumstances, HUD can itself investigate housing discrimination complaints involving jurisdictions that are covered by certified state or local substantially equivalent agencies. *See, e.g.*, 42 U.S.C. § 3610(f)(2).

B. HOLA Does Not Preclude PHRC's Investigation Under the FHA

USAA seeks to enjoin PHRC's investigation by arguing that the Home Owners' Loan Act's (HOLA) broad grant to OTS of regulatory control over banks chartered under that law precludes investigations into those banks by state agencies authorized by state law. *See* 12 U.S.C. § 1464(a) ("In order to provide thrift institutions for the deposit of funds and for the extension of credit for homes and other goods and services, the Director [of OTS] is authorized, under such regulations as the Director may prescribe . . . to provide for the organization, incorporation, examination, operation, and regulation of associations to be known as Federal savings associations (including Federal savings banks) . . ."). Specifically, USAA claims that PHRC's use of subpoena power is 1) prohibited by regulations specifying that HOLA preempts certain "state laws affecting the operations of federal savings associations," 12 C.F.R. § 560.2; *see also id.* § 545.2 (declaring OTS's exercise of authority "is preemptive of any state law purporting to address the subject of the operations of a Federal savings association"), or 2) a form of state-authorized "visitation" banned by HOLA.

Because the state investigation is authorized by federal law, however, it is not preempted. Under the FHA's statutory structure, PHRC's role in investigating fair lending complaints is established by *federal law*. 42 U.S.C. § 3610(f). Congress provided that complaints alleging violations of the federal FHA filed with HUD are processed by state and local agencies that HUD has certified as administering housing discrimination law substantially equivalent to the FHA. HUD certified PHRC as one such agency after determining that the Pennsylvania Human Rights Act is substantially equivalent to the FHA. Indeed, PHRC's exercise of the subpoena power granted to it by the Pennsylvania Human Rights Act, which USAA identifies as its fundamental objection to PHRC's investigation, USAA Br. 7, is specifically required by federal

law. 24 C.F.R. § 115.204(a)(2), (b)(1)(ii). Therefore, the fact that PHRC is a state agency enforcing the Pennsylvania Human Rights Act is not controlling despite USAA's focus on it, USAA Br. 5-6, because the federal FHA authorizes and mandates that precise arrangement.

1. HOLA's Preemption Provisions Do Not Apply to an Investigation Procedure Established by Federal Law

Rather than being preempted, the FHA's anti-discrimination provisions work together with the HOLA preemption regulations, which provide that federal savings associations must only "extend credit as authorized under federal law." 12 C.F.R. § 560.2. Neither the HOLA regulations nor the caselaw interpreting the preemptive effect of HOLA on state laws includes any suggestion that its preemption extends to federal law mandates. Because USAA's preemption argument relies solely on these inapplicable regulations and cases decided thereunder, USAA Br. 16-20, this argument fails as a matter of law.³

The preemption claimed by USAA would directly conflict with the system that Congress has established for state-federal cooperation in enforcing the FHA. Preemption occurs where the Supremacy Clause dictates that federal law trumps state law. On the other hand, it is well established that a conflict between two federal statutory schemes should be avoided whenever possible. *See, e.g., Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 254 ("[S]o long as there is no 'positive repugnancy' between two laws, a court must give effect to both." (citation omitted)).

³ Because HOLA clearly does not preempt PHRC's federal-law-authorized investigation, the Court need not decide whether HOLA, outside of the context of a HUD-certified state or local agency's lending discrimination investigation, preempts state lending discrimination laws or investigations of compliance with such laws by state or local agencies. *Compare* PHRC Br. 10-20, *with* USAA Br. 16-20. This question will be clarified by a new federal statute that takes effect in July. *See* Consumer Financial Protection Act of 2010, Pub. L. No. 111-203, §§ 1046(a), 1047(b), 1048, 124 Stat. 1955, 2017-18 (to be codified at 12 U.S.C. § 1465); Designated Transfer Date, 75 Fed. Reg. 57252 (Sept. 20, 2010) (setting July 21, 2011 as the date upon which the amendment becomes effective). The new statute expressly provides that HOLA does not create field preemption, superseding the regulations and caselaw USAA relies upon in seeking summary judgment. *See* Consumer Financial Protection Act of 2010, § 1046(a), 124 Stat. at 2017 (to be codified at 12 U.S.C. § 1465(b)).

In this case the conflict is easily avoided – and HOLA is harmonized with the FHA – by interpreting HOLA not to preclude state fair housing investigations authorized by federal law. This is consistent with the basic principle of statutory construction that the specific provisions of the federal FHA establishing mechanisms for conducting investigations should take precedence over the general provision of HOLA on supervision of federal savings associations. *See, e.g., Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 384 (1992) (“[I]t is a commonplace of statutory construction that the specific governs the general . . .”). These principles apply in this case because every level – rights, remedies, and procedure – of the PHRC enforcement scheme is determined by federal law.

It is clear from the plain language of the FHA that PHRC legally can investigate Ms. Jacob’s lending discrimination allegation concerning USAA, and nothing in HOLA or its regulations contradicts this statutory mandate. In addition, administrative interpretations of the relevant statutes confirm PHRC’s authority. In 2006, HUD published its official position that federally chartered financial institutions, such as federal savings associations, are subject to the FHA’s scheme of investigation by HUD-certified substantially equivalent state and local agencies:

[I]t is HUD’s statement of policy that state and local fair housing enforcement agencies who are administering fair housing laws that HUD has certified as substantially equivalent to the Federal Fair Housing Act have the authority to enforce those statutes and ordinances against *any respondent*, including a national bank, within their jurisdiction.

Authority of Agencies in the Fair Housing Assistance Program To Investigate Allegations of Discrimination in Lending Compliance, 71 Fed. Reg. 33138 (June 7, 2006) (emphasis added).

This guidance adds further support to the otherwise clear federal statutory mandate giving PHRC authority to investigate USAA for lending discrimination, because HUD’s interpretations of the

FHA are owed substantial deference. *See Trafficante v. Metro. Life Ins. Co.*, 409 U.S. 205, 210 (1972) (holding HUD’s interpretation of the FHA “is entitled to great weight”). Although the OTS does not have interpretative authority over the FHA, it also has acknowledged implicitly that the FHA’s scheme for fair housing investigations by HUD-certified substantially equivalent state and local agencies is relevant to a state or local agency’s ability to investigate federal savings associations. *See* OTS, Letter Re: Preemption of Certain Lending-Related Provisions in the Code of Montgomery County, Maryland, 2006 WL 6195027, at *3 n.15 (Mar. 7, 2006) (drawing attention to the fact that the investigation authorized by a local ordinance, which OTS opined was preempted, would not be conducted by a HUD-certified agency).

2. PHRC’s Investigation Is Not Barred by the Supreme Court Decision in *Cuomo*

The Supreme Court’s holding in *Cuomo v. Clearing House Ass’n*, 129 S. Ct. 2710 (2009), that the National Bank Act precluded the New York State Attorney General from exercising “visitorial powers” over national banks, does not support USAA’s claim for an injunction. The State Attorney General’s fair lending investigation of national banks was allowed to proceed, but the Court held that exercise of state subpoena power would constitute prohibited visitation. *See id.* at 2721-22. *Cuomo* has no application here because, among other things, unlike the New York Attorney General’s investigation, PHRC’s investigation is authorized by federal law.

The National Bank Act, at issue in *Cuomo*, provides that “[n]o national bank shall be subject to any visitorial powers *except as authorized by Federal law . . .*” 12 U.S.C. § 484(a) (emphasis added); *see also* 12 C.F.R. § 7.4000(a) (“State officials may not exercise visitorial powers with respect to national banks . . . *except in limited circumstances authorized by federal law.*” (emphasis added)). Consistent with this language, the Supreme Court noted that the

prohibition on visitation does not “preclude law enforcement by federal agencies.” *Cuomo*, 129 S. Ct. at 2717. Therefore, even if *Cuomo*’s holding could be applied to banks chartered pursuant to HOLA,⁴ PHRC’s investigation of USAA would not be subject to *Cuomo*’s restrictions because PHRC’s investigation is “authorized by federal law” – namely the FHA.

Indeed, USAA’s visitorial powers argument acknowledges that the FHA authorizes HUD and the Department of Justice to investigate USAA’s lending practices for discrimination. USAA Br. 15-16. This same power to investigate federally chartered banks must similarly apply to the other entity – state agencies certified to enforce substantially equivalent state laws – that the FHA explicitly authorizes to investigate housing discrimination complaints. *Compare* 42 U.S.C. §§ 3610-3612 (authorizing investigation and enforcement by HUD), *and id.* § 3614 (authorizing enforcement by the Department of Justice), *with id.* § 3610(f) (authorizing investigative referrals to certified state and local agencies). USAA’s view that enough federal regulators have power to investigate its fair lending practices, USAA Br. 12-16, does not allow it to second-guess Congress’s decision in the FHA that it is appropriate to empower state agencies like PHRC to enforce prohibitions against housing and lending discrimination.

USAA’s visitorial powers argument also ignores key factual distinctions between this case and *Cuomo*. In *Cuomo*, the New York State Attorney General’s Office was *not* a state agency certified by HUD as substantially equivalent, and it was *not* conducting an FHA investigation referred by HUD. *See Clearing House Ass’n v. Spitzer*, 394 F. Supp. 2d 620, 628 (S.D.N.Y. 2005). Therefore, the New York State Attorney General’s fair lending investigation

⁴ Notably, despite its extensive discussion of the term “visitation,” USAA does not cite any authority that applies the term to determining the propriety of an investigation conducted against a bank chartered pursuant to HOLA. *See* USAA Br. 12. Because *Cuomo* does not prevent a HUD-certified substantial equivalent state agency like PHRC from conducting a FHA fair lending investigation referred by HUD, the Court need not decide what relevance *Cuomo*’s holding would have to banks chartered pursuant to HOLA.

did not implicate the banking law provision that allows state officials to exercise visitorial powers authorized by federal law, and the Supreme Court's holding has no bearing on a fair lending investigation like PHRC's that is so authorized by the FHA.⁵

IV. CONCLUSION

PHRC, as a state agency certified by HUD to enforce a state fair housing law substantially equivalent to the FHA, is authorized by the federal Fair Housing Act to investigate Ms. Jacob's lending discrimination complaint as a matter of law. PHRC's motion for summary judgment dismissing USAA's lawsuit should be granted, and USAA's motion for summary judgment should be denied.

Respectfully submitted,

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⁵ Consistent with the position set forth here, the United States argued in *Cuomo* that HUD-certified state and local substantially equivalent agencies have the power to investigate national banks for lending discrimination. See Brief for the Federal Respondent at 36 n.5, *Cuomo*, 129 S. Ct. 2710 (2009) (No. 08-453), 2009 WL 815241.

CERTIFICATE OF SERVICE

I, Michael Blume, hereby certify that on this 28th day of April, 2011, the foregoing Statement of Interest of the United States has been filed electronically and is available for viewing and downloading from the ECF system. I further certify that I caused a true and correct copy of same to be served upon the following counsel for Plaintiff and Defendant via electronic filing:

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