No. 08-453

IN THE
Supreme Court of the United States

ANDREW M. CUOMO, in his Official Capacity
as Attorney General for the State of New York,

Petitioner,

v.

THE CLEARING HOUSE ASSOCIATION, L.L.C.
and OFFICE OF THE COMPTROLLER
OF THE CURRENCY,

Respondents.

**ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT**

BRIEF FOR AMICUS CURIAE THE COMPTROLLER OF THE CITY OF NEW YORK IN SUPPORT OF PETITIONER ANDREW M. CUOMO

LEWIS S. FINKELMAN*
General Counsel
RICHARD S. SIMON
Deputy General Counsel
NEW YORK CITY OFFICE
OF THE COMPTROLLER
1 Centre Street, Room 602
New York, NY 10007
(212) 669-2048

Attorneys for Amicus Curiae
The Comptroller Of
The City of New York

* *Counsel of Record*

221466

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

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STATEMENT OF INTEREST AS AMICUS CURIAE [1]

The interest of the Comptroller of the City of New York, William C. Thompson, Jr. (the "NYC Comptroller"), in this action arises from his statutory role as the independently elected Chief Fiscal Officer of the City of New York. *See* New York City Charter § 93 *et seq*. As such, his mission is to help ensure the financial health of the City of New York (the "City") by advising the Mayor, the City Council and the public of the City's financial condition. Charter § 93(a). The NYC Comptroller also makes "such recommendations, comments and criticisms in regard to the operations, fiscal policies and financial transactions of the city as [he] may deem advisable in the public interest." *Id.*

The NYC Comptroller's interest in this action also arises from his statutory role in the New York City Banking Development District ("BDD") Program. New York State Banking Law § 96-d created a Banking Development District Program for the purpose of establishing bank branches in geographic locations where there is a demonstrated need for banking services. Banking Law § 96-d, and related amendments to New York State General Municipal Law § 10, authorize municipalities to deposit funds at below-

1. No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *amicus curiae*, or his counsel, made a monetary contribution to its preparation or submission. The parties have consented to the filing of this brief and such consents are being lodged herewith.

market rates into bank branches located in a BDD, including branches of state or federally regulated saving banks and savings and loan institutions. The NYC Comptroller's statutory role in the City's BDD program arises under § 1524 of the New York City Charter, which authorizes the New York City Banking Commission, composed of the NYC Comptroller, the Mayor, and the Commissioner of Finance, to designate banks for the deposit of City funds. Such deposits of City funds include those under the BDD Program.

Pursuant to that statutory authorization, the NYC Comptroller and the other members of the New York City Banking Commission have together created 25 BDDs, with City deposits now totaling $200 million, in areas throughout the City of New York that did not have adequate banking services. To further ensure that City residents, both within the BDDs and elsewhere, receive adequate banking services, the NYC Comptroller has also instituted a Foreclosure Prevention Helpline Program, to assist New Yorkers whose homes are threatened with foreclosure.

The NYC Comptroller's role in the City's BDD Program, and data collected from the NYC Comptroller's Foreclosure Prevention Helpline Program, uniquely enable the NYC Comptroller to bring to the attention of the Court relevant matter, which has not already been brought to the attention of the Court by the parties, concerning banks' strikingly disparate and unequal treatment of African-American and Hispanic home mortgage borrowers in the City of New York.

SUMMARY OF ARGUMENT

As Petitioner properly notes in its Brief at pp. 46-47, "this case is not about banking regulations . . . It is about the protection of consumers, where States historically have taken the lead." In this regard, racial disparities reflected in the extensive data collected by the Office of the NYC Comptroller in connection with its Foreclosure Prevention Helpline, and other data from the subprime crisis, show the continuing need for State investigations and enforcement of national banks' compliance with mortgage lending laws. The data also leaves no doubt that the New York State Attorney General's thwarted 2005 investigation into the fact that "a significantly higher percentage of high-interest home mortgage loans are issued to African-American and Hispanic borrowers than to white borrowers," served a critical public policy need that was otherwise unmet. *See Clearing House Association, L.L.C. v. Cuomo*, 510 F.3d 105, 109 (2nd Cir. 2007); *Petitioner's Brief* at p. 12. With that need unmet, abusive subprime lending continued, and ruinous financial crises ensued.

Our recent data confirms that mortgage providers' treatment of African-Americans and Hispanics who were buying homes and refinancing mortgages in the City was indeed unfair and unequal. As illustrated on our detailed maps (Appendix), home mortgage foreclosures in New York City have primarily affected home borrowers in minority neighborhoods — *regardless of whether those minority borrowers are lower, middle or high- income earners*. Other recent maps and studies, from independent sources, confirm that in those same neighborhoods, African-Americans and Hispanics,

regardless of their income levels, had earlier been steered disproportionately to subprime mortgages or refinancings, and have also experienced a far greater rate of court foreclosure actions.

In light of the lasting damage to homeowners and to the nation caused by national banks' disparate subprime lending practices, there is a strong public policy need for state officials to be permitted to investigate national banks' compliance with state laws, especially given the candid admission by the Office of the Comptroller of the Currency ("OCC") that it does not even have any procedures for examining banks' compliance with state law. *Petitioner's Brief* at p. 36. The court below erred in granting deference, under *Chevron U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837 (1984), to the OCC's promulgation of 12 C.F.R. § 7.4000, which interpreted 12 U.S.C. § 484(a) to bar state investigations into state law violations of nationwide banks. Accordingly, the decision below should be reversed.

ARGUMENT

I. The NYC Comptroller's Data Shows Lenders' Disparate and Unfavorable Treatment of African-American and Hispanic Home Mortgage Borrowers in the City of New York

In the City of New York, African-American and Hispanic home buyers and owners, at all income levels, have been the victims of disparate and unequal treatment by home mortgage lenders, including national banks and their affiliates. African-American and Hispanic borrowers have, in particular, been subject to a highly disproportionate number of foreclosure proceedings in New York City. That high number of foreclosures came after lenders had steered minority borrowers, regardless of income level, to subprime mortgages. That racial disparity was the very subject of the New York State Attorney General's 2005 investigation that the Respondents blocked with respect to national banks, by means of this court action. New York has therefore been barred from investigating national banks' possible violations of its ban on discriminatory practices, found in NYS Executive Law § 296-a.

After two more years of unchecked subprime lending, the subprime crisis, and then a national and worldwide financial crisis, followed. Earlier scrutiny, exposure and correction of national banks' abusive subprime lending practices, such as unequal treatment of minority borrowers, might have lessened those crises. For that reason, it is vital that Petitioner and other state regulators be permitted to investigate the home lending practices and other state law compliance of national

banks, and that 12 U.S.C. §484(a) and other laws not be interpreted to bar such investigations.

The NYC Comptroller's Office has its own data on the impact of racially disparate home mortgage lending. Under the Office's Foreclosure Helpline Program, the NYC Comptroller's Community Action Center ("CAC") collects relevant information from homeowners, informs them of their options for addressing their foreclosure problems, puts them in contact with bank representatives who could work with them toward a resolution of their mortgage and foreclosure issues, and at times also contacts the banks to assist those homeowners. To date, the NYC Comptroller's Office has responded to over four thousand homeowner inquiries to the Foreclosure Prevention Helpline, many relating to mortgages originated or held by federally regulated banks. As a product of the homeowner inquiries, the CAC, in order to facilitate follow-up with borrowers, state and federally regulated lenders, and third-party counseling agencies, has created individual case files. Those CAC case files are the source of the data used to create the maps that are Figures 1 and 2 in the Appendix to this brief.

As shown on those maps, the data collected by the NYC Comptroller's Office in the past two years could not be more striking in showing the disparate and unequal treatment of African-American and Hispanic home mortgage borrowers in the City. To create those maps, two different maps were first produced using New York City 2000 census data, one based on income data and one based on minority population data. Small red circles ("foreclosure markers"), representing every

address from the NYC Comptroller's CAC Foreclosure Prevention case files as of June 30, 2008, of each of nearly one thousand homeowners facing mortgage foreclosure, were then overlaid upon the two different maps.

On the first map, "CAC Foreclosure Prevention Cases in New York City, by Income Level of Neighborhood" (Appendix, Figure 1), the foreclosure markers are overlaid upon a map of New York City census tracts by income level. On that first map, while there are some clusters of foreclosure markers, the overall arrangement of the markers seems to be random. The foreclosure markers show little or no pattern with respect to whether they are found in low, middle or high-income neighborhoods.

On the second map, "CAC Foreclosure Prevention Cases in New York City, by Racial Composition of Neighborhood" (Appendix, Figure 2), where the foreclosure markers are overlaid upon a map of NYC census tracts by minority population, the pattern is clear and unmistakable: The foreclosure markers are all found almost entirely in those neighborhoods – whether low, middle or high-income – with the highest percentages of African-American or Hispanic residents.

That compelling insight from the CAC data is underscored by a detailed map reflecting all foreclosures filed in New York City during 2006 (Appendix, Figure 3, lower image), that the Neighborhood Economic Development Advocacy Project ("NEDAP") created using New York City 2000 census data and federal Home Mortgage Disclosure Act ("HMDA") data; the HMDA

data is the same source that Petitioner relied upon in framing its investigation. *Petitioner's Brief* at p. 12. That map shows a pattern of home foreclosures, concentrated in New York City's non-white neighborhoods, nearly identical to the pattern on the maps of CAC data on Figures 1 and 2.[2]

The subprime foreclosure crisis in New York City is, therefore, not a matter of low-income minority home purchasers, or of low-income homeowners of all races, failing to pay their bills. Rather, it is a story of African-American and Hispanic homebuyers, being subject to foreclosure, regardless of income — while other homeowners, at comparable levels of income, are not.

This starkly disparate outcome appears to result from the exact issue that Petitioner had attempted to investigate before being enjoined: that "a significantly higher percentage of high-interest home mortgage loans are issued to African-American and Hispanic borrowers than to white borrowers." 510 F. 3d at 109. Such a correlation is shown by reliable independent studies. The second of the NEDAP maps (Appendix, Figure 3, upper image) shows precisely such a correlation in New York City between percentage of minority population and high-cost (*i.e.*, subprime) home refinance loans, as of 2005. As can be seen by comparing the locations of the high cost refinance loans with the map of New York City income levels in Figure 1, the locations of those

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2. The NEDAP map was published in the *New York Times Editorial Blog*, October 26, 2007, in the posting "Foreclosures in Black and White," at *http://theboard.blogs.nytimes.com/2007/10/26/foreclosures-in-black-and-white.*

subprime loans correlate directly with the minority composition of the homeowners' neighborhoods, and not with their incomes.

Similarly, as noted in a 2008 report by New York University's Furman Center for Real Estate & Urban Policy:

> • Blacks are four times as likely to receive a subprime home purchase loan as whites, and Hispanics are three times as likely as whites
>
> • In 2006, black homeowners (though making up only 20% of all homeowner households in the City) received 50% of all subprime refinance loans.

"Risky Lending Patterns and Increasing Foreclosure Filings Pose Significant Threats to Many NYC Neighborhoods," April 24, 2008, at *http://furmancenter.org/files/FurmanCenterStateoftheCity Release2007.pdf*. *See also* "Racial Disparity Found Among New Yorkers With High-Rate Mortgages," *New York Times*, October 12, 2007.

In sum, even as Respondents invoked 12 C.F.R. § 7.4000 to persuade the lower courts to enjoin state officials' investigations into national banks' racially-disparate subprime lending practices, those lenders continued to steer African-American and Hispanic home buyers and owners in all income groups into subprime loans, which has culminated, within the City of New York, in disproportionately high rates of foreclosure for such minority homeowners. The ruinous aftermath, in

the City and nationwide, of the courses of action undertaken by mortgage lenders during the subprime "boom" highlights the compelling need for state authorities, intimately familiar with local housing and lending markets and conditions, to be permitted to investigate national bank lenders' compliance with state law.

II. In Light of the Racial Disparities in Mortgage Lending, and the Inapplicability Here of *Chevron* Deference, the Decision Below Should Be Reversed

Petitioner has ably demonstrated in its brief that nothing in the legislative history of any banking statutes, nor in this Court's interpretations of those statutes, indicates that Congress ever intended to authorize the OCC to exercise any discretion to bar State officials from investigating national banks' violations of state law. *Petitioner's Brief* at pp. 6-9. As such, there is no basis for deference, under *Chevron U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837 (1984), to the OCC's 2004 promulgation of 12 C.F.R. § 7.4000, which first imposed that bar. Such an absence of deference to the OCC, particularly when coupled with the harms that have followed from that regulation's blocking of state investigations, should suffice to result in the reversal of the decision below.

The NYC Comptroller notes further that based upon the facts adduced in this amicus brief, and the arguments in Petitioner's Brief, there is one more basis for denying *Chevron* deference as to 12 C.F.R. § 7.4000. Racial disparities, such as the sharply disparate impacts of subprime lending demonstrated in this brief, have been a uniquely painful and controversial issue

throughout American history, the subject of Congressional legislation for decades, and the subject of Constitutional enactments since the adoption of the Thirteenth, Fourteenth and Fifteenth Amendments. It is inconceivable, particularly in light of the complete Congressional silence on such a delegation, that the OCC could claim that any Congressional enactment authorized it to promulgate a regulation to bar State officials from investigating violations of anti-discrimination laws, such as New York State's Executive Law § 296-a.

Under the precedents of this Court, the silence of Congress on the delegation to the OCC of authority over such a uniquely controversial issue is another firm basis for denying *Chevron* deference to the OCC's rulemaking here. *See FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159-60 (2000) (in light of tobacco's "unique" historical, social and political status, and absence of clear evidence of Congressional intent to delegate regulation to FDA, no *Chevron* deference given to FDA's tobacco regulation); *Gonzalez v. Oregon*, 546 U.S. 243, 267 (2006) (No deference given to U.S. Attorney General's regulation on assisted suicide: "The importance of the issue of physician-assisted suicide, which has been the subject of an 'earnest and profound debate' across the country . . . makes the oblique form of the claimed delegation all the more suspect"; citation omitted). For that reason, too, *Chevron* deference is unwarranted here.

CONCLUSION

The judgment of the Court of Appeals should be reversed.

Respectfully submitted,

LEWIS S. FINKELMAN*
General Counsel
RICHARD S. SIMON
Deputy General Counsel
NEW YORK CITY OFFICE
OF THE COMPTROLLER
1 Centre Street, Room 602
New York, NY 10007
(212) 669-2048

Attorneys for Amicus Curiae
The Comptroller Of
The City of New York

* *Counsel of Record*

APPENDIX

FIGURE 1

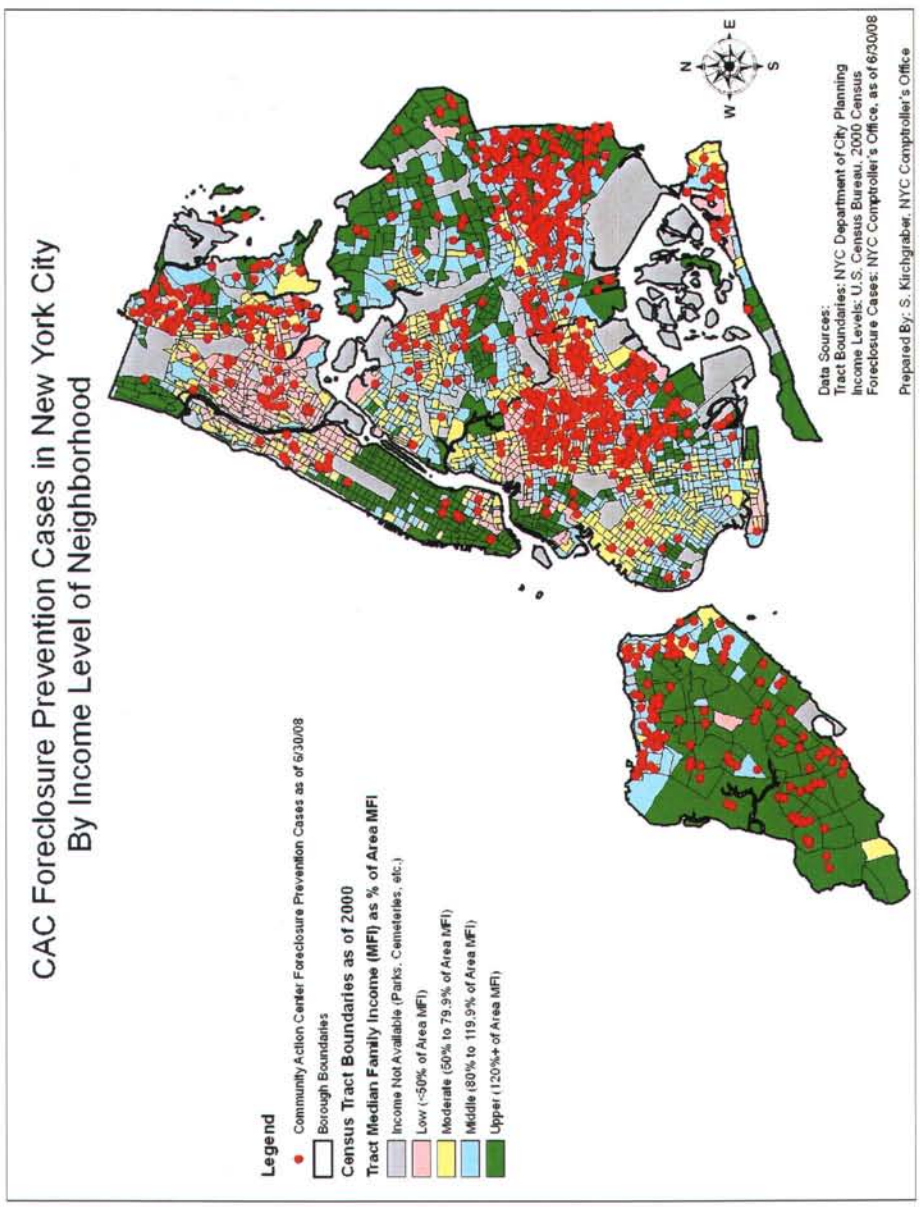

CAC Foreclosure Prevention Cases in New York City
By Income Level of Neighborhood
Legend
Community Action Center Foreclosure Prevention Cases as of 6/30/08
Borough Boundaries
Census Tract Boundaries as of 2000
Tract Median Family Income (MFI) as % of Area MFI
Income Not Available (Parks, Cemeteries, etc.)
Low (<50% of Area MFI)
Moderate (50% to 79.9% of Area MFI)
Middle (80% to 119.9% of Area MFI)
Upper (120%+ of Area MFI)
N
E
S
W
Data Sources:
Tract Boundaries: NYC Department of City Planning
Income Levels: U.S. Census Bureau, 2000 Census
Foreclosure Cases: NYC Comptroller's Office, as of 6/30/08
Prepared By: S. Kirchgraber, NYC Comptroller's Office

FIGURE 2

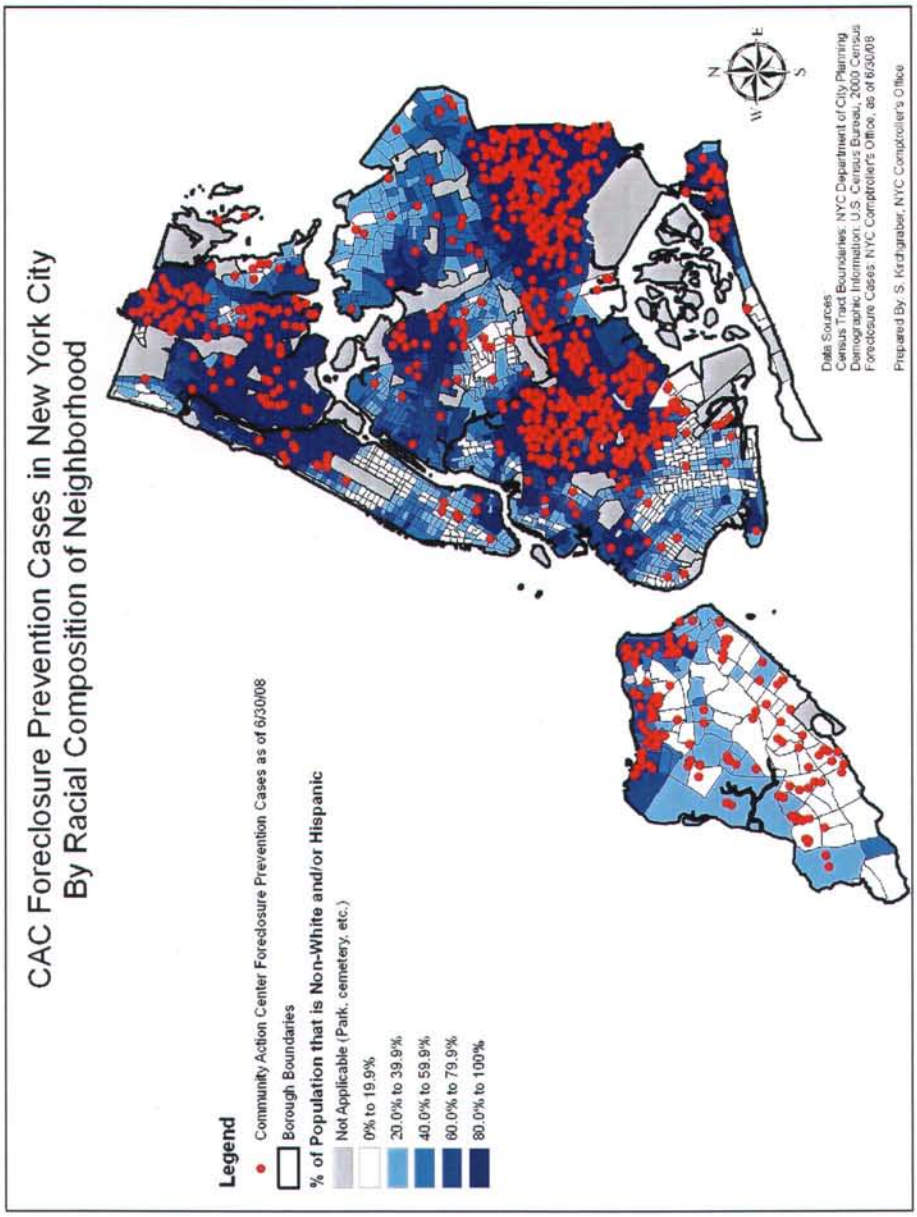
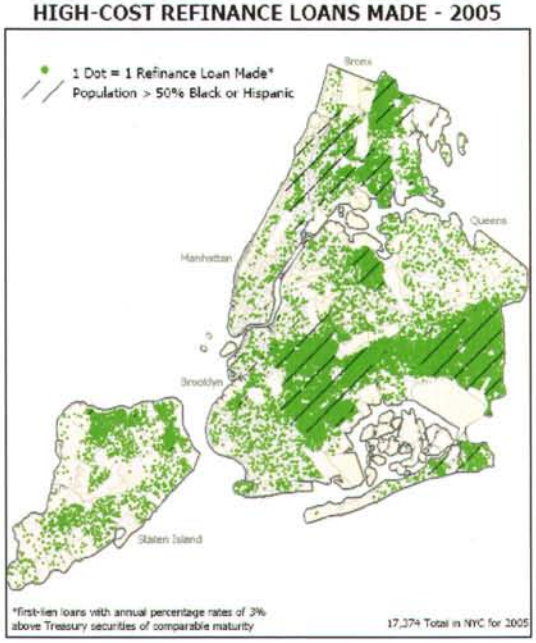

CAC Foreclosure Prevention Cases in New York City
By Racial Composition of Neighborhood
Legend
Community Action Center Foreclosure Prevention Cases as of 6/30/08
Borough Boundaries
% of Population that is Non-White and/or Hispanic
Not Applicable (Park, cemetery, etc.)
0% to 19.9%
20.0% to 39.9%
40.0% to 59.9%
60.0% to 79.9%
80.0% to 100%
N
W
E
S
Data Sources
Census Tract Boundaries: NYC Department of City Planning
Demographic Information: U.S. Census Bureau, 2000 Census
Foreclosure Cases: NYC Comptroller's Office, as of 6/30/08
Prepared By: S. Kirchgraber, NYC Comptroller's Office

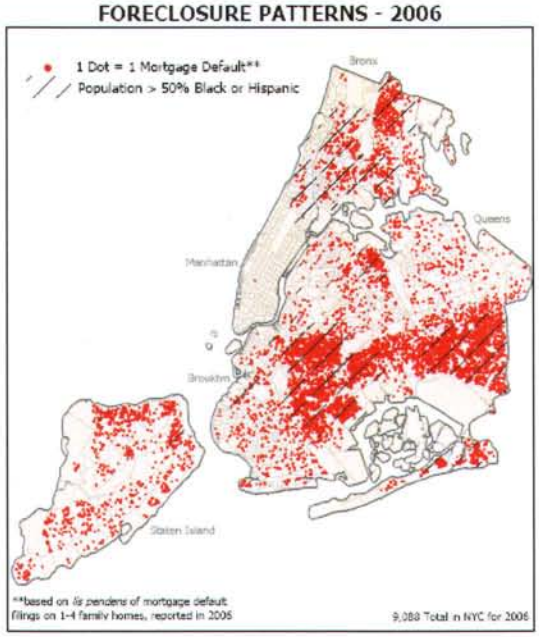
FIGURE 3

New York City

HIGH-COST REFINANCE LOANS MADE - 2005



FORECLOSURE PATTERNS - 2006



NEDAP
Neighborhood Economic Development Advocacy Project (NEDAP)
(212) 680-5100 | www.nedap.org