

No. 09-9045

IN THE
Supreme Court of the United States

RUEBEN NIEVES,

Petitioner,

v.

WORLD SAVINGS BANK, FSB, ET AL.,

Respondents.

**On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit**

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether Petitioner's state-law claims are federally preempted under the Home Owners' Loan Act, 12 U.S.C. § 1461 *et seq.*

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Wachovia Mortgage, FSB states that since November, 2009 it has been known as Wachovia Mortgage, a division of Wells Fargo Bank, N.A., and that WFC Holdings Corporation, a wholly owned subsidiary of Wells Fargo & Co., owns 10% or more of the stock of Wells Fargo Bank, N.A.

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OPINIONS BELOW

Numerous misstatements appear in the section of the Petition for a Writ of Certiorari entitled “Opinion of the Three Judge Panel”. (Pet. 1). Petitioner there asserts that in the appeal below, the Ninth Circuit affirmed the magistrate’s “Order and Findings and Recommendations” (Pet. App. D). *Id.* Yet, Appendix D is in fact a magistrate’s order that issued in a different district court action (*Nieves v. World Savings Bank, FSB, et al.*, No. CIV S-08-0988 MCE (E.D. Cal. 2008)) than the district court action from which this appeal was brought (*Nieves v. World Savings Bank*, No. CIV S-08-1602 JAM (E.D. Cal. 2009) (*see* Order, *id.* (Pet. App. C) (granting defendant’s Motion to Dismiss)).

Petitioner further asserts that the attorneys’ fee award which issued in the March 30, 2009 “Order Granting Defendant’s Motion for Attorneys’ Fees” (Pet. App. F), is a subject of his appeal to the Ninth Circuit from which this Petition is taken. It is not. Petitioner elsewhere acknowledges that this attorneys’ fees award was challenged in a separate appeal to the Ninth Circuit (*Nieves v. World Savings Bank, FSB*, No. 09-15915 (9th Cir. 2009)), rather than in the appeal which is the subject of this Petition (*Nieves v. World Savings Bank, FSB*, No. 09-15132 (9th Cir. 2009)). (Pet. 4). Attached as Appendix E to the Petition is an order by the Ninth Circuit that denied Petitioner’s motion to consolidate these two appeals. (Pet. App. E).

Lastly, Petitioner claims that Appendix E to his Petition is an order by the Ninth Circuit denying his request for a fee waiver in this appeal. Again, however, this order issued in the appeal in No. 09-15915, rather than the appeal which is the subject of this Petition, No. 09-15132.

STATEMENT OF THE CASE

Petitioner Reuben Nieves (“Nieves”) fell behind on his home mortgage payments and faced foreclosure of his residence. Rather than avoid foreclosure by curing his default or refinancing, Nieves instead brought suit against his lender, Wachovia Mortgage, FSB, asserting multiple state-law tort claims. Nieves charged his lender with having participated in alleged industry-wide predatory loan practices that caused the collapse of the real estate and credit markets and resulted in a decline in his income as a realtor.

The district court entered judgment dismissing Nieves’ state-law tort claims due to their preemption by the Home Owners’ Loan Act (“HOLA”), 12 USC § 1461 *et seq.* Nieves appealed to the Ninth Circuit.

The Ninth Circuit ordered Nieves to show cause why the judgment below should not be summarily affirmed. After reviewing his response to this order to show cause and his opening brief on appeal, the Ninth Circuit issued an order on August 17, 2009 affirming the district court’s judgment, noting that: “A review of the record . . . indicates that the questions raised in this appeal are so insubstantial as

to not require further argument.” (Pet. App. A at 1). The instant Petition followed.

REASONS FOR DENYING THE PETITION

The Petition presents three questions for review. Two of these three questions, however, are not properly raised because they did not arise in the appeal before the Ninth Circuit from which the Petition is brought (*Nieves v. World Savings Bank, FSB*, No. 09-15132 (9th Cir. 2009)). Rather, the *in forma pauperis* status and attorneys’ fees issues were raised and resolved in a different appeal (*Nieves v. World Savings Bank, FSB*, No. 09-15915 (9th Cir. 2009)) (*see* Order, *id.* (denying motion to consolidate with No. 0915132, denying motion to proceed *in forma pauperis*, and awarding attorneys’ fees) (Pet. App. E)).

The single question presented for review that was a subject of the appeal below involves federal preemption of state-law claims under the Home Owners’ Loan Act, 12 U.S.C. § 1461 *et seq.* The Petition cannot point to any error in, or any conflict in judicial authority over, the resolution of this federal preemption question by the court below.

I. TWO OF THE THREE QUESTIONS PRESENTED BY THE PETITION WERE NOT RAISED IN THE APPEAL BELOW

The Petition contains a misstatement of fact that directly bears on what issues would be before the Court were certiorari granted.

In his “Statement of the Case” Petitioner asserts that the Ninth Circuit wrongly denied his application

for a fee waiver in the appeal below even though he qualified for *in forma pauperis* status. (Pet. 4). However, the Order in question, attached by Nieves to his Petition (Pet. App. E), shows that the Ninth Circuit's denial of his request to proceed *in forma pauperis* was issued in a different appeal (*Nieves v. World Savings Bank, FSB*, No. 09-15915 (9th Cir. 2009)), not the appeal which is the subject of this Petition (*Nieves v. World Savings Bank, FSB*, No. 09-15132 (9th Cir. 2009)).

Nieves correctly states in his "Statement of the Facts" that the award of attorneys' fees that he seeks to challenge also issued in the appeal in No. 09-15915. (Pet. 4). No challenge to an attorneys' fees award was raised in the appeal from which this Petition is taken, No. 09-15132.

Thus, two of the three questions presented by Nieves are not properly presented in this Petition.

II. THE NINTH CIRCUIT CORRECTLY APPLIED OTS REGULATIONS PREEMPTING STATE-LAW CLAIMS THAT AFFECT THE OPERATION OF A FEDERAL SAVINGS ASSOCIATION

At all pertinent times, Respondent Wachovia Mortgage, FSB., formerly known as World Savings Bank, FSB, ("Wachovia") was a federal savings association. As such, Wachovia was governed by the Home Owners' Loan Act ("HOLA"), 12 U.S.C. § 1461 *et seq.*

HOLA has granted the Office of Thrift Supervision ("OTS") the power "under such regulations, as [it]

may prescribe—(1) to provide for the organization, incorporation, examination, operation, and regulation of . . . Federal savings associations . . .” 12 U.S.C. § 1464(a). The regulations issued by the OTS are recognized to govern the powers and operations of every federal savings and loan association “from its cradle to its corporate grave.” *Bank of America v. City & County of San Francisco*, 309 F.3d 551, 558 (9th Cir. 2002) (internal quotation marks omitted). As this Court observed in *Fidelity Fed. Sav. & Loan Ass’n v. de la Cuesta*, the broad statutory language of HOLA

. . . expresses no limits on [OTS] authority to regulate the lending practices of federal savings and loans. As one court put it, “[i]t would have been difficult for Congress to give the [OTS] a broader mandate.” *Glendale Fed. Sav. & Loan Ass’n v. Fox*, 459 F. Supp. 903, 910 (CD Cal. 1978).

458 U.S. 141 (1982). The OTS regulations explicitly state they are “preemptive of any state law purporting to address the subject of the operations of a federal savings association.” 12 C.F.R. § 545.2. They further declare that: “OTS hereby occupies the entire field of lending regulations for federally savings associations. OTS intends to give federal savings association’s maximum flexibility to exercise their lending powers in accordance with a uniform federal scheme of regulation.” 12 C.F.R. § 560.2(a).

These declarations—in OTS regulations authorized by HOLA—irrefutably establish the preemptive effect of HOLA. Such language of preemption need not

appear within the statute itself. This Court has clearly instructed in *Fidelity Fed. Sav. & Loan Ass'n* that “[f]ederal regulations have no less preemptive effect than federal statutes.” 458 U.S. at 152.

The normal presumption against federal preemption of state law has no effect on HOLA. This Court has held that the preemption presumption does not apply when the State regulates in an area where there has been a history of significant federal presence. *United States v. Locke*, 529 U.S. 89, 108 (2000). Regulation of federally chartered savings associations is just such an area. *See Flagg v. Yonkers Sav. & Loan Ass'n, FA*, 396 F.3d 178, 183 (2nd Cir. 2005). HOLA and the ensuing OTS regulations have created a centralized, nationwide system of “best practices” regulation. *Fidelity Fed. Sav. & Loan Ass'n*, 458 U.S. at 160-61. This constitutes a “radical and comprehensive response to the inadequacies of the existing state systems,” (*id.*) that is “so pervasive as to leave no room for state regulatory control.” *Id.* at 160, 151 n.9 (internal quotation marks omitted); *see also Conference of Fed. Sav. & Loan Ass'ns v. Stein*, 604 F.2d 1256, 1257, 1260 (9th Cir. 1979), *summarily aff'd*, 445 U.S. 921 (1980). There is thus no presumption against HOLA’s preemption of state law. *Silvas v. E*Trade Mortgage Corp.*, 514 F.3d 1001, 1004-05 (9th Cir. 2008).

A. Petitioner’s State-Law Claims Are Expressly Preempted by HOLA.

OTS regulation 12 C.F.R. § 560.2(b) expressly preempts state laws that would impose requirements on federal savings banks regarding:

(4) **The terms of credit, including amortization of loans and the deferral and capitalization of interest and adjustments to the interest rate, balance, payments due, or term to maturity of the loan, including the circumstances under which a loan may be called due and payable upon the passage of time or a specified event external to the loan;**

(5) **Loan-related fees, including without limitations, initial charges, late charges, prepayment penalties, servicing fees, and overlimit fees;**

* * *

(9) **Disclosure and advertising, including laws requiring specific statements, information, or other content to be included in credit application forms, credit solicitations, billing statements, credit contracts, or other credit-related documents and laws requiring creditors to supply copies of credit reports to borrowers or applicants;**

(10) **Processing, origination, servicing, sale or purchase of, or investment or participation in, mortgages;”**

(Emphasis added). Nieves’ three claims for relief challenge the lending disclosures, processing,

origination, and/or terms of credit of Wachovia. Each falls within at least one of the categories of preemption at § 560.2(b) quoted above. As applied, the claims would use state law to regulate lending activities expressly preempted by § 560.2(b).

Nieves' first claim for relief asserts that the power of sale granted to Wachovia in the promissory note and deed of trust was unconscionable¹ and that Nieves was never given an adequate explanation of its legal effect. This unconscionability claim falls squarely within the scope of HOLA preemption. Whether Wachovia's explanation of the power of sale was so inadequate to be "unconscionable" is governed by § 560.2(b)(9), which preempts claims involving "disclosure . . . or other content to be included . . . in . . . credit related documents." This claim also affects the "origination" and the "processing" of Nieves' loan, and is thus further preempted by § 560.2(b)(10).

Nieves' second claim for breach of the implied covenant of good faith and fair dealing, charges that loans originated by Wachovia and the rest of the lending industry caused a downturn in the housing and credit markets. Nieves adds that the adjustment

¹ The propriety of nonjudicial foreclosure through a power of sale in California was first recognized by the California Supreme Court nearly 150 years ago. *Koch v. Briggs*, 14 Cal. 256, 264 (Cal. 1859). It has been held enforceable ever since. *See Garfinkle v. Superior Court of Contra Costa County*, 21 Cal. 3d 268, 277-78 (Cal. 1978). Such clauses are not disfavored. *New York Life Ins. Co. v. Doane*, 13 Cal.App.2d 233 (Cal. Ct. App. 1936). "[T]he validity of such a contractual power of sale is unquestionable." *Scott v. Paisley*, 271 U.S. 632, 635 (1926).

of his interest rate from 6.7% to 7.4%, as permitted under his note, was also a breach of the implied covenant of good faith and fair dealing.

This second claim is likewise preempted by subparagraphs (4), (9) and (10) of § 560.2(b). Subparagraph (4) expressly preempts state law that would govern “adjustments to the interest rate.” Subparagraphs (9) and (10) operate to preempt Plaintiff’s allegations about lending practices that allegedly damaged the housing and credit markets.

Nieves’ third claim asserts that Wachovia’s lending practices (including loan disclosures, processing, origination and/or terms of credit) either negligently or intentionally inflicted emotional distress. This claim also is subject to preemption under subparagraphs (4) (9) and (10) of § 560.2(b).

B. Petitioner’s Claims Are Not Rescued by 12 C.F.R. § 560.2(c).

12 C.F.R. § 560.2(c) creates a carve-out from HOLA preemption for a general state law that only “incidentally affect[s]” the loan operations of a federal savings association. But this exception only comes into play if a claim falls outside of the categories specifically listed in § 560.2(b). The OTS has issued a Final Rule, which explains this point:

When analyzing the status of state laws under § 560.2, the first step will be to determine whether the type of law in question is listed in *paragraph (b)*. **If so, the analysis will end there; the law is preempted.** If the law is not covered by *paragraph (b)*, the

next question is whether the law affects lending. If it does, then, in accordance with *paragraph (a)*, the presumption arises that the law is preempted. This preemption can be reversed only if the law can clearly be shown to fit within the confines of *paragraph (c)*. For these purposes, *paragraph (c)* is intended to be interpreted narrowly. Any doubt should be resolved *in favor* of preemption.

61 Fed. Reg. 50951, 50966-67 (Sept. 30, 1996) (emphasis added). This construction of §§ 560.2(b) and (c) by the OTS “must be given controlling weight under *Auer v. Robbins*, 519 U.S. 451, 117 S.Ct. 905, 137 L.Ed. 2d 79 (1997).” *Silvas*, 514 F.3d at 1005 n.1. An agency’s interpretation of its own regulation receives great deference, and will be accepted as controlling unless it is “plainly erroneous or inconsistent with the regulation.” *Kennedy v. Plan Adm’r for DuPont Sav. & Inv. Plan*, ___ U.S. ___, 129 S.Ct. 865, 867 (2009), (quoting *Auer*, 519 U.S. at 461). Thus, when a claim is listed in 560.2(b), the preemption “analysis ends”. *Silvas*, 514 F.3d at 1006.

Each of Nieves’ state-law claims asserted below would affect interest rates, marketing, disclosures, and/or the terms of credit of a federal savings association. The Ninth Circuit correctly decided that because those claims fall within the categories listed at § 560.2(b), federal preemption is established.

III. THERE IS NO CONFLICT IN JUDICIAL
AUTHORITY OVER THE PROPER
RESOLUTION OF THE QUESTION
PRESENTED

Nieves submits that the Ninth Circuit's affirmation that his claims are preempted by HOLA constitutes a "departure from the sound reasoning" of the Seventh Circuit in *In re Ocwen Loan Servicing, LLC Mortgage Servicing Litig.*, 491 F.3d 638 (7th Cir. 2007). (Pet. 5).

There is, however, no conflict between the *Ocwen* decision by the Seventh Circuit and the ruling by the Ninth Circuit below. Encountering a complaint it described as "a hideous sprawling mess" (*Id.* at 641), the Seventh Circuit in *Ocwen* directed the district court to first require the plaintiffs to specifically allege what acts violated state law and then readdress the defense of HOLA preemption. It concluded that:

... the case is largely unripe for a determination of preemption. Despite its length, the complaint is vague. Some of the charges are pretty clearly, even certainly, preempted, as we have tried to indicate. Others probably are not, though this may depend on particulars omitted from the complaint. Many of the charges are so vaguely worded that we cannot guess whether they are preempted or not.

Id. at 648. *Ocwen*, therefore, is not a preemption ruling of any kind, much less a ruling in conflict with

the decision below. It is simply a remand to require the plaintiff to make a comprehensible pleading. Nothing in *Ocwen* suggests that the Seventh Circuit would have reached any different result on Nieves' complaint.

CONCLUSION

In his Petition, Nieves fails to provide any colorable basis, much less a compelling reason, for granting certiorari. Two of the three questions presented were the subject of a different appeal than that from which the Petition is brought. The ruling by the Ninth Circuit on the remaining question of federal preemption affirmed the district court's application of OTS preemption regulations authorized by HOLA, in conformity with prior federal appellate rulings. The Petition should be denied.

Respectfully submitted,

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