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Aug 30 2023
SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM DORCHESTER COUNTY
Court of Common Pleas

The Honorable James E. Chellis
Dorchester County Master-in-Equity

APELLATE CASE NO. 2020-001168

NCP PILIGRIM, LLC, ..... Respondent,

v.

MARY LOU CERCOPELY, DAVID S. CLANCY, SOUTH CAROLINA FEDERAL CREDIT UNION, SOUTHCOAST COMMUNITY BANK, JOAN GEANURACOS and DAVID SEAN CLANCY,

of whom MARY LOU CERCOPELY, DAVID S. CLANCY
and DAVID SEAN CLANCY are the ..... Appellants.

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**APPELLANTS' PETITON FOR REHEARING**

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Pursuant to the Decision dated August 16, 2023, the Petitioners Mary Lou Cercopely, David S. Clancy and David Sean Clancy ("Petitioners") respectfully file the following ***Petition for Rehearing*** pursuant to Rules 221(a) and 240 of the South Carolina Appellate Court Rules.

1.

FIRREA[1] is a federal – not South Carolina – statute. FIRREA was enacted by Congress, not the South Carolina General Assembly. Congress is the supreme legislature in the land, which includes the Palmetto State.

FIRREA says explicitly – and it is absolutely clear – that neither the South Carolina Court of Common Pleas nor the South Carolina Court of Appeals have substantive jurisdiction over any claim or action to find in NCP's favor that "on or about March 8, 2013, the Note and Mortgage was assigned by Carolina to CRE/ADC Venture 2012, LLC …". [R. p. 63 ¶ 12]. 12 U.S.C. § 1821(d)(13)(D)(i). This power is given to the FDIC-R. 12 U.S.C. § 1821(d)(2)(A)(i)-(ii).

Consequently, the Appellants cited the Supremacy Clause of the United States Constitution (U.S. Const. Art. VI, Clause 2), which is the supreme law of the land.[2] Appellants even crafted

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[1] The Financial Institutions Reform, Recovery and Enforcement Act ("FIRREA"), Pub Law 101-73, Statutes at Law 103 Stat. 183 (overwhelmingly enacted by the 101st United States Congress and signed into law by President George H.W. Bush in 1989).

[2] Some of the United States Supreme Court ("SCOTUS") cases cited by Appellants include: *International Longshoremen's Ass'n, AFL-CIO v. Davis,* 476 U.S. 380, 388 (1986) ("Pre-emption, the practical manifestation of the Supremacy Clause, is always a federal question"); *Kalb v. Feuerstein,* 308 U.S. 433, 439 (1940) ("[t]he States cannot, in the exercise of control over local laws and practice, vest state courts with power to violate the supreme law of the land"); *Abie State Bank v. Bryan,* 282 U.S. 765, 773 (1931) (to overcome deciding the federal question of jurisdiction, any "asserted non-federal ground must independently and adequately support the judgment; *Michigan v. Long,* 463 U.S. 1032, 1040-41 (1983) ( To constitute an "independent" state bar, the state law basis for the decision must not be interwoven with federal law and rest purely on state law grounds); *Beard v. Kindler,* 558 U.S. 53, 60 (2009) ("A state procedural rule is "adequate" if it is "firmly established" and "regularly followed."); *Elgin v. Department of Treasury,* 576 U.S. 1, 25 (2012) (explaining that, "[w]hen dealing with an express preclusion clause ... we determine the scope of preclusion simply by interpreting the words Congress has chosen."). *Ake v.*

the first issue on appeal around the Supremacy Clause: "Was the Dorchester County Master in Equity's interpretation of a federal law, 12 U.S.C. § 1821(d)(13)(D), not merely erroneous, but also void under the Supremacy Clause of the United States Constitution?"

Here, though, the Court of Appeals appears to ignore the U.S. Constitution. It passes by all of the analysis of the United States Supreme Court[3] – the supreme authority on the Constitution and federal law. It is as if the Supremacy Clause does not exist at all – that the Appellants pulled it whole cloth out of the air – and therefore it can be safely ignored in South Carolina. It even says that the Appellants waived a big chunk of their lack of subject matter jurisdiction argument – which cannot be waived. *Kalb v. Feuerstein,* 308 U. S. 433, 438 (1940).

The Supreme Court of the United States says that is clearly within Congress' powers under the U.S. Constitution to establish an exclusive federal forum to adjudicate issues of federal law in a particular area that Congress has the authority to regulate. *International Longshoremen's Ass'n, AFL-CIO v. Davis,* 476 U.S. 380, 388 (1986). But the South Carolina Court of Appeals apparently does not need to look at the decisions of SCOTUS when analyzing a federal statutory scheme like FIRREA. It seems that relying on South Carolina law is good enough when dealing with issues of federal preemption.

Whether Congress has preempted state law *in the case of FIRREA* is the question that must be answered, especially when the appeal is based on Appellants' claims that the state court's adjudicatory power has actually been pre-empted. The courts are to examine whether "the text ...

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*Oklahoma,* 470 U.S. 68 (1985). *Beard v. Kindler,* 558 U.S. 53, 60 (2009) (A state procedural rule is "adequate" if it is "firmly established" and "regularly followed.").

[3] *E.g., United States v. Ron Pair Enterprises, Inc.,* 489 U.S. 235, 241 (1989) (resolution of the matter "begins where all such inquiries must begin: with the language of the *statute* itself.") Others include: *Connecticut National Bank v. Germain*, 503 U.S. 249, 253-54 (1992); *United States* v. *Ron Pair Enterprises, Inc.,* 489 U. S. 235, 241-242 (1989); *Rubin v. United States,* 449 U.S. 424, 430 (1981); *United States v. Goldenberg,* 168 U. S. 95, 102-103 (1897).

expressly limit[s] the jurisdiction that other statutes confer." *Free Enterprise Fund v. Public Company Accounting Oversight Board,* 561 U.S. 477, 489 (2010); *see also, Elgin v. Department of Treasury,* 576 U.S. 1, 25 (2012) (explaining that, "[w]hen dealing with an express preclusion clause ... we determine the scope of preclusion simply by interpreting the words Congress has chosen."). The failure of the Court of Appeals to examine the applicability of the Supremacy Clause and preemption law is a fatal error.

2.

The Court of Appeals also erred when it relied on *Silva for Est. of Silva v. Allstate Prop. & Cas. Ins. Co.,* 424 S.C. 512, 517, 818 S.E.2d 753, 756 (2018) for the holding "[t]he true guide for statutory construction is not the phraseology of an isolated section or provision, but the language of the statute as a whole considered in the light of its manifest purpose" to render an opinion on FIRREA. FIRREA is a federal scheme.

In *Board of Governors, FRS v. MCorp Financial, Inc.,* 502 U.S. 32, 38-39 (1991), SCOTUS held that "FISA's preclusion provision speaks directly to the jurisdictional question at issue in this litigation" and that (with respect to actions under 12 U.S.C. § 1818): "Congress has spoken clearly and directly: '[N]o court shall have jurisdiction to affect by injunction or otherwise the issuance or enforcement of any [OCC] notice or order under this section.'" Similarly, the D.C. Circuit held in *CityFed Fin. Corp.,* 58 F.3d 741 (D.C. Cir. 1995) that to prevent regulated parties "from interfering with the comprehensive powers of the federal banking regulatory agencies, Congress severely limited the jurisdiction of courts to review ongoing administrative proceedings brought by banking agencies."

When a federal statute contains an express provision regarding preemption, the preemption inquiry must focus on the plain wording of that provision, which generally contains the most

reliable evidence as to whether Congress intended to preempt state law. *CSX Transp. v. Easterwood,* 507 U.S. 658 (1993).

This is a specific type of pre-emption that is recognized by the S.C. Supreme Court in *City of Cayce v. Norfolk Southern Railroad Co.*, 391 S.C. 395, 402, 706 S.E.2d 6, 9 (2011). In *Cayce*, our Supreme Court explained that "[w]hen a federal statute contains an express provision regarding preemption, the preemption inquiry must focus on the plain wording of that provision, which generally contains the most reliable evidence as to whether Congress intended to preempt state law. *CSX Transp. v. Easterwood*, 507 U.S. 658, 113 S.Ct. 1732 (1993) (other citations omitted)."

Thus, the Court of Appeals erred in using the state court's "manifest purpose" rule – in what should have been a preemption case – rather than SCOTUS's rule that it needs to look at the plain wording of the ***provision*** to determine 12 U.S.C. § 1821(d)(13)(D)'s applicability. *Cayce*, 391 S.C. at 402, 706 S.E.2d at 9.

3.

A finding on subject matter jurisdiction adverse to NCP would mean that NCP lacks standing "to recover satisfaction for such money out of the land by foreclosure and sale according to law." *See*, e.g., S.C. Code Ann. § 29-3-210

The only lawful way to avoid such a finding under the federal preemption standard is for the Court of Appeals to have found "firmly established" and "regularly followed" state procedural ground that overcomes 12 U.S.C. § 1821(d)(13)(D). *See e.g., Michigan v. Long,* 463 U.S. 1032 (1983); *Ake v. Oklahoma,* 470 U.S. 68 (1985).

The Court of Appeals does not even try. But, significantly, the way that the Court of Appeals discusses South Carolina case law and statutes in the Opinion shows that there is nothing

even remotely approaching firmly established or regularly followed state procedural grounds in this state.

For example, the note is a promissory note (HELOC) [S.C. Code Ann. § 36-9-102(65)], and therefore can only be properly assigned under U.C.C. Article 9, at S.C. Code Ann. § 36-9-203. The note is most definitely *not* a negotiable instrument (or "instrument") [S.C. Code Ann. § 36-9-102(47)], and therefore it cannot be "transferred" under U.C.C. Article 3, codified at S.C. Code Ann. 36-3-203. The same holds true for a "mortgage". Also, the term transfer is basically a U.C.C. term of art which is defined by Article 3. Yet, the Court of Appeals uses 3-203 twice to say there was a proper assignment of a *mortgage*.

So, when the Court of Appeals incorrectly mixes and matches defined terms like "transfer", "assignment" and "instrument" interchangeably (Opinion, §§ II and II.A) … or uses pre-U.C.C. caselaw (*e.g.*, *Hahn v. Smith*, 157 S.C. 157. 154 S.E. 112 (1930)) … or employs common-law assignment principles not from the U.C.C. (e.g., *Twelfth RMA Partners, L.P. v. National Safe Corp.*, 335 S.C. 635, 518 S.E.2d 44 (Ct. App. 1999)) – or even (as far as Appellants can tell) apparently defines the Mortgage as an "instrument" [which seems to be utilizing a common-law definition not a U.C.C. Article 3 definition] … then *a fortiori* it is <u>not</u> applying "firmly established" and "regularly followed" state procedural grounds[4]. There exists no "firmly established" and

[4] This is because the S.C. Supreme Court has repeatedly and unequivocally held that the doctrine of "displacement" applies in the context of the UCC. *See e.g. Hitachi Electronic Devices (USA), Inc. v. Platinum Technologies, Inc.*, 366 S.C. 163, 170, 621 S.E.2d 38, 41 (2005). Under the principle of displacement, "[o]nly where the UCC is incomplete does the common law provide applicable rules." *Hitachi*, 366 S.C. at 170, 621 S.E.2d at 41. In *In Re Estate of Rider,* the S.C. Supreme Court held that "the UCC provisions were created to provide a uniform method of resolving issues in order to promote liquidity and finality, to be supplemented by (not thwarted by) the rules of agency and other applicable laws." 407 S.C. 386, 398, 756 S.E.2d 136, 143 (2014). By ignoring this rule and interposing new, interchangeable definitions, the Court of Appeals shows there is nothing firmly established in South Carolina to get around federal preemption.

"strictly followed" state grounds to support the Court of Appeals finding that the FDIC assigned its interest to CRE/ADC Venture 2012-1, LLC.

4.

*Virginia Uranium, Inc. v. Warren* , 139 S.Ct. 1894, 1901 (2019) is misapplied. It is a case which discusses preemption – which the Court of Appeals promptly ignores – but instead it chooses to cite it for the proposition that "a litigant must point specifically to 'a constitutional text or federal statute' that does the displacing or conflicts with state law" and then states that it is "**the Appellant's … burden** to point specifically to a federal statute the displaces or conflicts with state law (emphasis added) – as if the Appellant's somehow haven't done just that in multiple references to 12 U.S.C. § 1821(d)(13)(D)! Here, it is tautology to ignore the broader holding of *Virginia Uranium,* while citing it to absolve the Respondents from pointing to their own constitutional text or statute.

5.

*Tillman v. Resolution Tr. Corp*., 37 F.3d 1032 (4th Cir. 1994) is also inapplicable. The *Tillman* court explains that "[w]hile we recognize that FIRREA's jurisdictional bar is not limited to creditors, we believe it is limited to claims against a failed financial institution or its receiver and should not be extended to include foreclosure claims against mortgagors." 37 F.3d at 1035-1036.

Here, it is important to note that Appellant's appeal is not based on a foreclosure *claim* against a mortgagor; rather, the mortgagor is (1) raising subject matter jurisdiction against NCP, who has gone to the circuit court seeking a finding from circuit court that its mortgage assignment gives it the right to sue Appellants; and (2) indicating that 12 U.S.C. § 1821(d)(13)(D) prevents

NCP from doing this. Thus, *Tillman's* holding (that FIRREA should not be extended to include foreclosure claims against mortgagors) is therefore inapplicable in this fact pattern.

## Conclusion

For the foregoing reasons, the South Carolina Court of Appeals should reverse its Opinion of August 16, 2023.

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**CERTIFICATE OF SERVICE**

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The undersigned hereby certifies that the ***Appellants' Petition for Rehearing*** in the above referenced case has been served upon counsel of record by mailing a copy in an envelope properly addressed with postage prepaid on this day to the following, on the 28th Day of August 2023:

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