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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM DORCHESTER COUNTY
Court of Common Pleas

The Honorable James E. Chellis
Dorchester County Master in Equity

Unpublished Opinion No. 2023-UP-0293
Filed August 16, 2023
Petition for Rehearing Denied September 21, 2023

NCP PILGRIM, 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 Petitioners.

Appellate Case No. 2020-001168
Lower Court Case No. 2018-CP-18-02053

PETITION FOR CERTIORARI

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CERTIFICATE OF COUNSEL

Pursuant to Rule 242(d)(1) of the South Carolina Appellate Court Rules, the undersigned certifies that a Petition for Rehearing was made and ruled upon by the South Carolina Court of Appeals on September 21, 2023.

INTRODUCTION

In *Weston v. Kim's Dollar Store*, 385 S.C. 520, 527, 684 S.E.2d 769, 773 (Ct. Ap. 2009), *aff'd* 399 S.C. 303, 731 S.E.2d 864 (2012), the South Carolina Court of Appeals cited three United States Supreme Court cases when it held that “the Supremacy Clause of the United States Constitution provides that federal law ‘shall be the supreme Law of the Land ... any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.’”

The *Weston* panel went on to hold that “[w]hen federal law seats exclusive jurisdiction over a particular type of claim in the federal courts, South Carolina courts must examine the federal law to determine whether it preempts state law.” *Id.*, 385 S.C. at 527; 684 S.E.2d at 773. Pretty basic, right?

The Supreme Court unanimously affirmed and remanded *Weston* three years later, praising it as “a well-researched and reasoned opinion.” 399 S.C. at 308, 731 S.E.2d at 866. In fact, in the same vein, in 2012, this Court handed down our state’s definitive opinion on federal preemption in its second decision in *Priester v. Coker* [occasioned by a remand of the United States Supreme Court]:

The preemption doctrine is rooted in the Supremacy Clause of the United States Constitution and provides that any state law that conflicts with federal law is “without effect.” *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516, 112 S.Ct. 2608, 120 L.Ed.2d 407 (1992) “ ‘[T]he purpose of Congress is the ultimate touchstone’ of pre-emption analysis.” *Id.* (quoting *Malone v. White Motor Co.*, 435 U.S. 497, 504, 98 S.Ct. 1185, 55 L.Ed.2d 443 (1978)). **“To discern Congress’ intent we examine the explicit statutory language and the structure and purpose of the statute.”** *Ingersoll–Rand Co. v. McClendon*, 498 U.S. 133, 138, 111 S.Ct. 478, 112 L.Ed.2d 474 (1990). **Preemption “is compelled whether**

Congress' command is explicitly stated in the statute's language or implicitly contained in its structure and purpose.” *Jones v. Rath Packing Co.*, 430 U.S. 519, 525, 97 S.Ct. 1305, 51 L.Ed.2d 604 (1977). **Moreover, “[f]ederal regulations have no less pre-emptive effect than federal statutes.”** *Fidelity Fed. Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 153, 102 S.Ct. 3014, 73 L.Ed.2d 664 (1982).

(emphasis added). 401 S.C. 38, 43, 736 S.E.2d 249, 252 (2012). The citations to United States Supreme Court authority in *Priester* should not pass notice.

Fast forward fourteen years, however, and in this case the Court of Appeals absolutely, flat out ignores federal supremacy when dealing with an explicit federal statute (FIRREA) that denies it jurisdiction to make a key finding. What happened? That is what this petition seeks to answer.

RULE 242, SCACR

Rule 242(b) of the South Carolina Appellate Court Rules (SCACR) governs consideration for the Supreme Court granting certiorari. It says that, while not controlling, the following “indicate the character of reasons which will be considered:

- (3) Where the decisions of the Court of Appeals is in conflict with a prior decision of the Supreme Court;
- (4) Where substantial constitutional issues are directly involved;
- (5) Where a federal question is included and the decision of the Court of Appeals conflicts with a decision of the United States Supreme Court.”

As will be seen from this brief, all three of these factors –Rule 242(b)(3), (4) and (5) – are directly implicated in this petition. Rule 242(b), SCACR..

a. Direct Conflict with South Carolina Supreme Court.

Here, this Court held in 2012’s second *Priester* decision that “preemption is compelled whether Congress’s command is explicitly stated in the statute’s language ...” 401 S.C. at 43, 736 S.E.2d at 252. This has been the general law expressed by this Court since *Episcopal Housing*

Corp. v. Federal Ins. Co., 269 S.C. 631, 239 S.E.2d 647 (1977) (finding that the Federal Arbitration Act must be enforced over state common law) all the way through to three years ago, in *Adams v. McMaster*, 432 S.C. 225, 851 S.E.2d 703 (2020) (which found no clear congressional intent in the education provisions of the CARES Act to allow the Governor to allocate the GEER funds in his discretion in contravention of our State Constitution); *see also Palmetto Construction Group, LLC v. Restoration Specialists, LLC*, 432 S.C. 633, 638, 856 S.E.2d 150, 153 (2021) (saying that in *Episcopal Housing Corp.*, the South Carolina Supreme Court held that “this Court must recognize that federal statutes enacted pursuant to the United States Constitution are the supreme law of the land.”).

So, in the case at bar, does a federal statute – as a manifestation of direct, Congressional intent – preempt both the Court of Common Pleas and the Court of Appeals from exercising jurisdiction over a critical finding? The answer is **yes**. The statute is 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). Therein, Congress states in pertinent part:

(D) Limitation on judicial review

Except as otherwise provided in this subsection, no court shall have jurisdiction over —

- (i) any claim or action for payment from, or any action seeking a determination of rights with respect to, the assets of any depository institution for which the Corporation [FDIC] has been appointed receiver, including assets which the Corporation [FDIC] may acquire from itself as such receiver; or
- (ii) any claim relating to any act or omission of such institution or the Corporation [FDIC] as receiver.

12 U.S.C. § 1821(d)(13)(D)(i) (emphasis added).

Here, there is absolutely no dispute that Carolina Federal Savings Bank¹ (“CFSB”) – which gave a promissory note to David Clancy in 2004 – meets the definition of a “depository institution.” Likewise, there is no dispute that CFSB’s federal regulator, the Office of the Comptroller of the Currency (“OCC”) closed CFSB and appointed the Federal Deposit Insurance Corporation as receiver (“FDIC”). [R. p. 481-482]. The FDIC also had the legal right to purchase the promissory note and, further, had the right to form ‘CRE/ADC Venture 2012-1, LLC’ on December 5, 2012 (as its sole member; FDIC could contribute in part and sell in part to CRE/ADC many assets, including the promissory note at issue).

But FIRREA [at § 1821(d)(13)(D)] explicitly precludes South Carolina Courts – or *any* court for that matter – from having jurisdiction over a claim of the kind that the Respondent NCP asserts it needs to prove its case (i.e., that “NCP is seeking to exercise its lawful authority to enforce the subject note and mortgage it was assigned by virtue of the assignment from CRE/ADC Venture 2012-1, LLC”).² This power is instead given to the FDIC. 12 U.S.C. § 1821(d)(2)(A)(i)-(ii).

However, on November 15, 2018, Respondent NCP filed a foreclosure action against Petitioners, stating it was the “holder of said loan documents,” and seeking, *inter alia*, a declaratory judgment as to perfect its mortgage based on the following allegations in the complaint:

“March 8, 2013, the Note and Mortgage was assigned by Carolina to CRE/ADC Venture 2012-1, LLC, as recorded with the ROD in Book 8718 at Page 33 (Exhibit 4).” Complaint ¶ 12; and

“Thereafter, on or about August 23, 2018, CRE/ADC Venture 2012-1, LLC assigned the Note and Mortgage to NCP Pilgrim, LLC, as recorded with the ROD in Book 11512 at Page 126 (Exhibit 5).” Complaint ¶ 13.

¹ CFSB was chartered in August 1960 as a federal credit union under the name of Sacred Heart of Charleston, S.C. Federal Credit Union. In August 1999, the credit union converted its charter to a thrift and changed its name to Carolina Federal Savings Bank.

² Where in the Appendix can the Court of Appeals make a finding that a *Note* was assigned to NCP too? See § b (p. 7) for a discussion of why this is important.

[R. pp. 63, 532-536]. Setting aside the fact that NCP cannot legally be the “holder” of a *promissory note* instead of a negotiable instrument, any determination by the Dorchester County Court of Common Pleas that NCP has a right to sue Petitioners under because of an assignment by the FDIC to CRA/ADC Venture 2012, LLC is specifically the type of determination that FIRREA says that “no court shall have jurisdiction” over – because the FDIC was appointed receiver of CFSB. Again, such jurisdiction belongs to the FDIC itself. 12 U.S.C. § 1821(d)(2)(A)(i)-(ii).

It’s not Petitioners who have precluded NCP in this case from going to the South Carolina Courts to determine this key component to their chain of title, but the United States Congress. Regardless of whether it is a *good* statute, it is still a statute of the federal government. The U.S. Congress specifically made this rule. It’s *supposed* to be followed by the states, not “gotten around” using state law.

Thus, Respondent NCP’s attempt to use the transaction between the FDIC and CRE/ADC Venture 2012-1, LLC³ is utterly futile to prove its chain of title. FIRREA § 1821(d)(13)(D) is directly on point. In the underlying case, the Master declined to rule in the Petitioners’ favor despite federal supremacy. Thus, in their appeal, Petitioners also cited the Supremacy Clause of the United States Constitution (U.S. Const. Art. VI, Clause 2) – the supreme law of the land and

³ The Respondent’s position conflicts with the FDIC’s own explanation of how FIRREA’s statutory scheme that contemplates the FDIC’s sweeping authority to manage the affairs of a failed bank to further the purpose of expeditious resolution of the failed bank’s affairs, regardless of whether the FDIC retains assets outright or through a “structured transaction.” *See McCarthy v. FDIC*, 348 F.3d 1075, 1079 (9th Cir. 2003). As further explained by the Corporation’s Office of Inspector General: “In a structured transaction, the FDIC-R pools a group of similar assets, such as single-family, commercial real estate, or construction-type loans, from one or more failed-bank receiverships and transfers the assets into a newly created LLC. In exchange for contributing the assets, FDIC-R obtains the entire ownership interest, or equity, in the LLC. Following a competitive bid process FDIC-R then sells a portion of the equity in the LLC to prequalified, private-sector investors, but still retains its majority interest.” *See* Report No. AUD-12-012, Background, ¶. 2, September 2012.

the basis for federal preemption – and relied on decisions of the United States Supreme Court in their brief (just as the S.C. Supreme Court did in *Priester* and the Court of Appeals did in *Weston*).⁴ Petitioners even crafted their 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?”

But despite this being a case which begged for federal supremacy analysis – and where a federal statute [FIRREA § 1821(d)(13)(D)] forbids any courts from determining the rights of NCP under these “assignments” – the Court of Appeals totally ignored the subject. Instead, the Court acts as if the Supremacy Clause never existed; as if it were something Petitioners just made up. The Court of Appeals does not even provide Petitioners with even a single footnote on preemption; it ignores all the cited authority of the United States Supreme Court; and it utterly disregards Petitioners’ arguments.

The South Carolina Supreme Court has to take this case up if for no other reason than to show that federal supremacy still means something in the Palmetto State. The Court of Appeals

⁴ 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) (“Preemption, the practical manifestation of the Supremacy Clause, is always a federal question”); *Kalbf 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. 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.”).

cannot knowingly ignore the Supremacy Clause, but that is precisely what it does. This is a fatal and embarrassing error and marks their opinion as not in keeping with either *Priester* or *Weston*.

b. Substantial Constitutional Issues Are Directly Involved.

The next part of Rule 242(b), SCACR to be triggered is sub-section (4), which deals with “substantial constitutional issues.”

Petitioners submit that an action by the Court of Appeals which ignores *per se* a provision of the United States Constitution (i.e., the Supremacy Clause) presents *per se* a substantial constitutional issue. *See South Carolina Dep’t of Social Services v. Benjamin*, 430 S.C. 235, 236, 844 S.E.2d 373, 373 (2020) (“[t]his Court has held it will grant certiorari to the court of appeals only where special reasons justify the exercise of that discretion ... such as Substantial constitutional issues ...”). How can it be otherwise?

Whether Congress has preempted state law is the question that must be answered – that this Court mandates must be answered – especially when the appeal is based on Appellants’ claims that a critical part of the state court’s adjudicatory power (establishing chain of title) has actually been pre-empted. The courts are to examine whether “the text ... 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.”); *cf. Preister*, 401 S.C. at 43, 736 S.E.2d at 252.

The failure of the Court of Appeals to answer this question and examine the applicability of the Supremacy Clause and preemption law is again a fatal error. 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 conclusion under federal preemption 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). However, it does not even try to do this. Even more to the point, the way the Court of Appeals’ Opinion discusses South Carolina case law and statutes demonstrates that there is nothing *even remotely* approaching ‘firmly established’ or ‘regularly followed state procedural grounds’ in this state.

For example, the note that brings us here is *not* a negotiable instrument (or simply an “instrument”) [S.C. Code Ann. § 36-9-102(47)], and therefore cannot be “transferred” under U.C.C. Article 3 [S.C. Code Ann. 36-3-20]. In fact, the term ‘transfer’ is a U.C.C. term of art which is defined by Article 3. Rather, the note at issue is merely a *promissory note* [S.C. Code Ann. § 36-9-102(65)], and, thus, can only be properly “assigned” – not transferred – under U.C.C. Article 9 [S.C. Code Ann. § 36-9-203].

The same is doubly-true for a “mortgage” – since a “mortgage” is just the security for either an instrument *or* a promissory note; our legislature has codified that a mortgage follows either a transfer of an instrument or assignment of a promissory note, but not the other way around! S.C. Code Ann. §§ 36-3-203, 36-9-203. In other words, you can’t assign just a mortgage and not assign the promissory note (or otherwise assign a mortgage but not transfer an instrument). But, the evidence adduced at trial shows that, in fact, only the mortgage was assigned; there is nothing offered about the promissory note.

Despite this, the Court of Appeals uses Article 3, Section 3-203 not once but twice to say there was a proper assignment of a *mortgage*. But how can this be? Article 3 deals with “transfer” or an instrument, so how does Article 3 involve a *mortgage*? Or even Article 9 for that matter. What the Court of Appeals appears to be doing is incorrectly mixing and matching and interchangeably statutorily defined terms like “transfer” “assignment” and “instrument” (Opinion, §§ II and II.A) ... *and* using pre-U.C.C. caselaw (*e.g.*, *Hahn v. Smith*, 157 S.C. 157, 154 S.E. 112 (1930)) ... *and* employing 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)).

As far as Petitioners can tell, the Court of Appeals even apparently defines the mortgage as an “instrument” [and in doing so seems to be utilizing a common-law definition *not* a U.C.C. Article 3 definition]. *A fortiori* the Court of Appeals is not applying “firmly established” and “regularly followed” state procedural grounds⁵.

In fact, there exists no “firmly established” and “strictly followed” state grounds as a matter of law in this State to foreclose a mortgage which secures a promissory note outside the U.C.C.; therefore, nothing “firmly established” and “strictly followed” supports the Court of Appeals’ finding that the FDIC assigned its interest to CRE/ADC Venture 2012-1, LLC – a preempted

⁵ 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. Also, 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 that gets around federal preemption in this case. Either *Hitachi* and *Rider* mean what they say, or they do not.

conclusion – and, therefore, NCP could foreclose on the ‘assigned’ mortgage without it offering any evidence that the promissory note was also assigned.

c. Court of Appeals Decision Conflicts with Decision of the U.S. Supreme Court.

Rule 242(b)(5), SCACR deals with the Court of Appeals conflicting with the decisions of the United States Supreme Court. This is also a grave issue in the case at bar. Not only did the Court of Appeals ignore all the authority in footnote 3, *supra*, but it 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 that “[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.

Once again, FIRREA is a federal scheme. “To discern Congress' intent we examine the explicit statutory language and the structure and purpose of the statute.” *Preister*, 401 S.C. at 43, 736 S.E.2d at 252 (quoting *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 138 (1990)(emphasis added)). Therefore, when a federal statute contains an express provision regarding preemption, then under 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, 664 (1993). “If the statute contains an express pre-emption clause, the task of statutory construction must in the first instance focus on the plain wording of the clause, which necessarily contains the best evidence of Congress' pre-emptive intent” *Preister*, 401 S.C. at 43, 736 S.E.2d at 252 (citing *Shaw v. Delta Air Lines, Inc.*, 462 U.S. 85, 95 (1983)).

This is a specific type of pre-emption that was 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 – in what should have been a preemption case – the Court of Appeals erred in using the state court’s “manifest purpose” rule rather than SCOTUS’s and the S.C. Supreme Court’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. *Ingersoll-Rand*, 498 U.S. at 138; *Preister*, 401 S.C. at 43, 736 S.E.2d at 252; *Cayce*, 391 S.C. at 402, 706 S.E.2d at 9.

d. Tillman is Inapposite.

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 Petitioners’ argument is not based on a foreclosure *claim* against a mortgagor. Petitioners make no claims against NCP; rather, the mortgagees (Petitioners) raise an issue of subject matter jurisdiction to the Court, because NCP has sought and received a finding from circuit court that a mortgage assignment – which Petitioners believe the circuit court is federally preempted from finding – supposedly gives NCP the ability to sue Appellants.

Specifically, Petitioners assert that 12 U.S.C. § 1821(d)(13)(D) prevents NCP from doing this and that, and there is no exception of a “firmly established” and “regularly followed” state procedural ground to allow it. Thus, *Tillman’s* holding (that FIRREA should not be extended to

include foreclosure claims against mortgagors) is therefore inapplicable in this fact pattern which sounds in subject matter jurisdiction.

Conclusion

For the foregoing reasons, the South Carolina Supreme Court should grant review of the Court of Appeals' Opinion of August 16, 2023.

/s Robert B. Varnado

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that the *Petition for Certiorari* 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, AND VIA EMAIL, on the 23rd Day of September 2023:

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