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 CREDIIT 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.

APPELLANTS' FINAL BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

CONSTITUTIONS

STATUTES, REGULATIONS and RULES

OTHER AUTHORITIES

INTRODUCTION

Under the Supremacy Clause [U.S. Const. Art. VI, cl. 2], the Master's order is not merely *erroneous*, it is beyond his *power* – and is therefore ***void.*** This conclusion does not apply to pre-emption generally, but only to those laws that pre-empt a State's actual adjudicatory or regulatory power. *Longshoremen v. Davis*, 476 U.S. 380, 391 (1986).

It is clearly within Congress' powers under the Constitution to establish an exclusive federal forum to adjudicate issues of federal law in a particular area that Congress has the authority to regulate. *Longshoremen*, 476 U.S. at 388. Whether Congress has done so *in this specific case* is the question of law that must be answered when a party claims that a state court's adjudicatory power is pre-empted.

Such a determination of Congressional intent – and of the boundaries and character of a pre-empting congressional enactment – is one of federal law. *Id*. 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, e.g., 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.").

Therefore, the resolution of the matter "begins where all such inquiries must begin: with the language of the *statute* itself." *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 241 (1989) (emphasis added). In this case, it is also where the inquiry should end.

First, the relevant statute declares that "no court shall have jurisdiction over 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 [FDIC] has been appointed receiver, including assets which the [FDIC] may acquire from itself as such receiver." 12 U.S.C. § 1821(d)(13)(D)(i). And, most critically, the Master does not nor cannot point to a single independent and adequate state ground in support of his decision. *See Beard v. Kindler,* 558 U.S. 53, 60 (2009).

ISSUES ON APPEAL

1. 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?

2. Does an "independent" state ground from 12 U.S.C. § 1821(d)(13)(D) exist?

3. Does there exist any "firmly established" and "strictly followed" state grounds to support the Master in Equity's decision?

STATEMENT OF THE CASE

As it cannot be disputed that "the sole function of the courts is to enforce [a statute] according to its terms," *Id.* (citing *Caminetti* v. *United States,* 242 U. S. 470, 485 (1917)); *see also Evans v. State,* 344 S.C. 60, 543 S.E.2d 547 (2001). Thus, few facts are needed to appreciate the constitutional issue here.

On June 10, 2004, Barbara Clancy executed a mortgage ("Mortgage") on 117 South Cedar Street, Summerville, South Carolina ("Property") to secure repayment on a Home Equity Line of Credit ("HELOC") granted her son, David Clancy, by Carolina Federal Savings Bank[1] ("CFSB"), insured by the FDIC, not to exceed $258,940.00. [R pp. 566-574].

[1] Carolina Federal Savings Bank (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

Thereafter, CFSB's federal regulator, the Office of the Comptroller of the Currency ("OCC") closed CFSB; pursuant to the Financial Institutions Recovery Reform and Enforcement Act ("FIRREA"), Pub. L. 101-73, 103 Stat. 183 (1989) and it appointed the Federal Deposit Insurance Corporation ("FDIC" or "Corporation") as receiver ("FDIC-R") on June 8, 2012. *See* 12 U.S.C. § 1821(c)(6)(B). [R. p. 481-482].

Upon its appointment, and by operation of law, the FDIC-R succeeded to "all rights, titles, powers, and privileges of the insured depository institution, and of any stockholder, member, accountholder, depositor, officer, or director of such institution with respect to the institution and the assets of the institution; and title to the books, records, and assets of any previous conservator or other legal custodian of such institution," 12 U.S.C. § 1821(d)(2)(A)(i)-(ii). [R. p. 3].

Pursuant to 12 U.S.C. § 1823(d)(1), the FDIC has the legal right to purchase Clancy's HELOC and shall, by operation of law, assume "all of the rights, powers, privileges, and authorities of the [FDIC] as receiver under sections 1821 and 1825(b) of this title," by acquiring such asset. 12 U.S.C. § 1823(d)(3)(A). The FDIC-R or FDIC may "acquire, directly or indirectly, ownership or control through—(i) an acquisition of shares; (ii) an acquisition of assets or assumption of liabilities; (iii) a merger or consolidation; or (iv) any similar transaction." 12 U.S.C. 1823(d)(4). To effectuate the broad powers, "[n]o agreement which tends to diminish or defeat the interest of the Corporation in any asset acquired … by purchase or as receiver of any insured depository institution, shall be valid" to defeat or diminish the interest of the FDIC "unless such agreement (A) is in writing, (B) was executed by the depository institution and any person claiming an adverse interest

1999, the credit union converted its charter to a thrift and changed its name to Carolina Federal Savings Bank.

thereunder, including the obligor, contemporaneously with the acquisition of the asset by the depository institution, (C) was approved by the board of directors of the depository institution or its loan committee, which approval shall be reflected in the minutes of said board or committee, and (D) has been, continuously, from the time of its execution, an official record of the depository institution." 12 U.S.C. 1823(e)(1).

FDIC-R is granted additional rights and duties under that, *inter alia,* declare "no court shall have jurisdiction over 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 has been appointed receiver, including assets which the Corporation may acquire from itself as such receiver." 12 U.S.C. § 1821(d)(13)(D)(i).

To effectuate such an "acquisition," FDIC-R formed 'CRE/ADC Venture 2012-1, LLC' ("Company") on December 5, 2012 as its sole member. Pursuant to the Contribution Agreement, the FDIC-R "*contributed in part and sold in part* to the Company [FDIC-R's] the right title and interest to [certain assets]" including Clancy's HELOC. *See* Private Owner Interest Sale and Assignment Agreement ("Agreement"). The Company then issued a promissory note payable to the FDIC in the amount of $71 million, due December 11, 2019. [R. p. 410].

After conducting a sealed bid auction for a forty percent (40%) limited liability company interest in the Company, the FDIC selected Colony Capital Acquisitions, LLC ("CCA") as the successful bidder. CCA, as required under the Agreement, formed ColFin 2012 CRE ADC-1 Holdco, LLC ("Private Owner" or "PO") as the 40% limited liability company owner; FDIC-R retained a sixty percent (60%) interest in the Company. The Agreement expressly states "that the Private Owner may not assign this Agreement or any

of its rights, interests or obligations hereunder. Any purported assignment or delegation in violation of this Agreement shall be null and *void ab initio."*

On March 13, 2013, the FDIC-R filed an Assignment of Real Estate Mortgage, recorded in Dorchester County RMC Book 8718, Pages 33-37, effective December 11, 2012. The HELOC is not mentioned as part of the assignment. [R. p. 81].

On June 28, 2018, Midland Bank contacted Clancy to inform him that the servicing of his loan was being transferred to NCP Pilgrim, LLC. Thereafter, on October 25, 2018, NCP counsel, Ms. Lauren Williams, wrote Appellants, informing them that her client "had recently purchase the loan from the FDIC," and demanded payment. [R. p. 530].

On November 15, 2018 Respondent filed a foreclosure action against Appellants in Dorchester County, stating it was ~~as~~ 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.

[R. pp. 532-536.].

On January 3, 2019 Respondent filed a Proposed Order of Reference that states "Pursuant to an Order of the South Carolina Supreme Court, this Non-Jury matter is now referred to the Dorchester County Master In Equity with finality," for the Dorchester County Clerk of Court to sign. The Clerk of Court signed the order of reference the next day. [R. p. 1]. Thereafter, on January 22, 2019, the Appellants timely answered with

defenses and counterclaims. [R. pp. 91-117]. The Master did not return the case to the Circuit Court.

At the trial, January 23, 2020, Appellant's counsel moved to dismiss the case, arguing that pursuant to subsection (i) of 12 U.S.C. § 1821(d)(13)(D), no court has jurisdiction over Respondent's declaratory judgment to determine "rights with respect to, the assets of any depository institution for which the Corporation has been appointed receiver, including assets which the Corporation may acquire from itself as such receiver." The Appellant's position is that the plain language of subsection (i) ousts jurisdiction to find "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." [R. p. 15].

Although the entire statutory section moved upon is under one hundred words, the Master conceded: "I have not spent a long time on this because [Appellants] are just raising it this morning," and determined that "the statute appears to me to be talking about claims against the creditor. Not the debtor." [R. p. 457 (p. 14/line 20)].

The Master then determined he had jurisdiction over the foreclosure, but that the Appellants' counterclaim against Respondent under SCUTPA were barred under FIRREA. [R. p. 457]. The Master then took testimony as to the Respondent's right in the HELOC and Mortgage, allowing more than two additional months to obtain possession and present the note to the court. [R. pp. 463, 465].

Interpreting "FIRREA sections 1821(d)(3)-(13) require persons making claims *against* a <u>failed financial institution</u> – or seeking to adjudicate their rights *against* the <u>failed institution</u> to present their claims first to the FDIC through its administrative claims

process" – the Master denied the motion and ultimately awarded a judgment for the Respondent on July 13, 2020 for $367,963.19, with interest accruing at $35.28 per day. (emphasis in original). [R. pp. 20, 21].

Specifically, the Master's Order of July 13, 2020 states: "First and foremost, NCP is not making a claim against the failed institution, Carolina Federal, or against the receiver, the FDIC, in this action. Instead, 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. Thus, I find the administrative claims process and the limitation on judicial review found in §1821(d)(13)(D) are not applicable." [R. p. 15].

Petitioner timely moved to reconsider on July 23, 2020, citing *Ake v. Oklahoma,* 470 U.S. 68, 75 (1985), for the proposition that whether the Master had jurisdiction to declare "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" is antecedent to a determination as to whether his interpretation of 12 U.S.C. § 1821(d)(13)(D)(i) was correct. [R. pp. 998-1007]. The Master denied Appellants Motion to Reconsider by his order of August 5, 2020. [R. pp. 48-50]. Appellants then timely appealed to the Court of Appeals on August 18, 2020. [R. pp. 144-177].

STANDARD OF REVIEW

It is clearly within Congress' powers to establish an exclusive federal forum to adjudicate issues of federal law in a particular area that Congress has the authority to regulate[2] under the Constitution. *Longshoremen v. Davis,* 476 U.S. 380, 388. (1986).

[2] The Master concedes this point: "FIRREA was enacted in 1989 as an emergency measure to enable the FDIC to expeditiously resolve and liquidate the hundreds

Whether Congress has done so in this specific case is the question that must be answered, when a party claims (as here) that a state court's adjudicatory power is pre-empted. Such a determination of congressional intent and of the boundaries and character of a pre-empting congressional enactment is one of federal law. *Id.* Therefore, federal question raised by the Appellants [and before the Dorchester Country Master in Equity], is purely one of statutory interpretation**.**

The issue of interpretation of a statute is a question of law for the court. *Charleston Co. Parks Rec. Comm'n v. Somers,* 319 S.C. 65, 67, 459 S.E.2d 841, 843 (1995) (holding the determination of legislative intent is a matter of law). Thus, 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, e.g., 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.").

Although this Court is free to decide questions of law with no particular deference to the lower court, a fundamental tenet of the Supremacy Clause of the United States

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of failed financial institutions throughout the country. *Tillman v. Resolution Tr. Corp.*, 37 F.3d 1032, 1035 (4th Cir. 1994). Specifically, FIRREA gives the FDIC the authority to exercise all rights, titles, powers, and privileges of the insured depository institution with respect to the assets of the institution, including the power to transfer any asset or liability of the institution. 12 U.S.C. §1821(d)(2)(A)(i) & (d)(2)(G)(i)(II). Courts across the United States have repeatedly ruled the FDIC's authority includes the power to foreclose on the property of a debtor held by the failed bank as collateral, and no court may enjoin the exercise of that power. *See e.g. Willner v. Dimon*, 849 F.3d 93, 106 (4th Cir. 2017); *Dittmer Properties, L.P. v. F.D.I.C.*, 708 F.3d 1011, 1017 (8th Cir. 2013); *Freeman v. F.D.I.C.*, 56 F.3d 1394, 1399 (D.C. Cir. 1995); *Lloyd v. F.D.I.C.*, 22 F.3d 335, 336-37; 281-300 (1st Cir. 1994); *281-300 Joint Venture v. Onion*, 938 F.2d 35, 39 (5th Cir. 1991), *cert. denied*, 502 U.S. 1057 (1992)." [Order 7/13/20].

Constitution provides that "[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." *Kalb v. Feuerstein,* 308 U.S. 433, 439 (1940); *see also Moriarty v. Garden Sanctuary Church of God,* 341 S.C. 320, 327, 534 S.E.2d 672, 675 (2000) (no particular deference to lower court to decide questions of law). Therefore, because "pre-emption, the practical manifestation of the Supremacy Clause, is always a federal question," *Longshoremen v. Davis,* 476 U.S. at 388, any "asserted non-federal ground must independently and adequately support the judgment." *Abie State Bank v. Bryan,* 282 U.S. 765, 773 (1931).

To constitute an "independent" state bar, such a bar must rest on a purely state law ground. *See e.g. Michigan v. Long,* 463 U.S. 1032 (1983); *Ake v. Oklahoma,* 470 U.S. 68 (1985). A state procedural rule is "adequate" if it is "firmly established" and "regularly followed." *Beard v. Kindler,* 558 U.S. 53, 60 (2009) (quoting *Lee v. Kemna,* 534 U.S. 362, 375 (2002)).

That determination, itself a federal question, must be addressed on the merits by our Supreme Court, subject to review by the United States Supreme Court ("SCOTUS[3]"). *See Michigan v. Long,* 463 U.S. at 1038-1040 (1983). Therefore, because Appellants' principle issue involves a constitutional challenge to the state court's adjudicatory powers, this Appeal should be transferred to the South Carolina Supreme Court pursuant to S.C. Code Ann. 14-8-200(b)(3).

ARGUMENT

[3] As we are faced with interwoven questions of state and federal laws, for clarity the Appellants will refer to the U.S. Supreme Court as 'SCOTUS' to avoid any confusion with the South Carolina Supreme Court.

I. The Dorchester County Master in Equity's interpretation of 12 U.S.C. 1821(d)(13)(D) was erroneous and violates the Supremacy Clause of the United States Constitution.

The relevant subsection of FIRREA, 12 U.S.C. § 1821(d)(13)(D)(i), is absolutely clear that the Court is without substantive jurisdiction over any claim or action of the type put forth in the Respondent's action herein. The statute provides:

> (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 [FDIC] has been appointed receiver, including assets which the [FDIC] may acquire from itself as such receiver; or
>
> (ii) any claim relating to any act or omission of such institution or the [FDIC] as receiver.

Under sub-paragraph (i), there can be no dispute that CFSB was a "depository institution." Nor can there exist any dispute that, pursuant to 12 U.S.C. § 1821(c)(6)(B), the Office of the Comptroller of the Currency ["OCC"] has statutory authority to appoint the FDIC as receiver. Therefore, there can be no dispute that upon its appointment, and by operation of law, on June 8, 2012 the FDIC-R succeeded to: "all rights, titles, powers, and privileges of the insured depository institution, and of any stockholder, member, accountholder, depositor, officer, or director of such institution with respect to the institution and the assets of the institution; and title to the books, records, and assets of any previous conservator or other legal custodian of such institution," 12 U.S.C. § 1821(d)(2)(A)(i)-(ii).

The error is absolutely clear, as the SCOTUS has "stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there." *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); *United States v. Goldenberg*, 168 U. S. 95, 102-103 (1897); *Oneale* v. *Thornton*, 6 Cranch 53, 68 (1810).

The Master simply rejected the plain language of the statute, which extends the jurisdictional bar in clause (i) to any (1) claim or (2) action for payment from or (3) any action seeking a determination of rights with respect to the assets of any depository institution for which the [FDIC] has been appointed receiver, including assets which the [FDIC] may acquire from itself as such receiver.[4] When the words of a statute are unambiguous, then, this first canon is also the last: "judicial inquiry is complete." *Rubin v. United States*, 449 U.S. 424, 430 (1981); *see also In Re Estate of Brown*, 430 S.C. 474, 493, 846 S.E.2d 342, 352 (2020) ("[i]n construing a statute, we need not resort to rules of construction where the statute's language is plain").

II. No "independent" state ground from 12 U.S.C. § 1821(d)(13)(D) exists.

Because "pre-emption, the practical manifestation of the Supremacy Clause, is always a federal question," [*Longshoremen*, 476 U.S. at 388], any "asserted non-federal ground must independently and adequately support the judgment." *Abie State Bank* at 773.

[4] Assuming, *arguendo*, there exists some ambiguity as to what defines "*the assets* of any depository institution for which the [FDIC] has been appointed receiver," SCOTUS interprets assets to include the HELOC and Mortgage. *Langley v. FDIC*, 484 U.S. 86, 92 (1987). Therefore, the Master "like any other state or federal court, is bound by [the United States Supreme Court's] interpretation of federal law." *James v. City of Boise, Idaho*, 136 S.Ct. 685, 686, 2016 WL 280883 (2016) (*per curiam*) (citing *Nitro-Lift Technologies, L.L.C. v. Howard*, 568 U.S. 17, 20-21 (2012) (*per curiam*)).

For a state law or procedure to be "independent," the state law basis for the decision must *not* be interwoven with federal law. *Michigan v. Long,* 463 U.S. at 1040-41; *Harris v. Reed,* 489 U.S. 255, 265 (1989).

A.

In *Michigan v. Long,* the SCOTUS adopted a "plain statement rule," requiring courts "need only make clear by a plain statement in its judgment or opinion that the federal cases are being used only for the purpose of guidance, and do not themselves compel the result that the court has reached." *Long,* at 1041. The Master's Order; however, contains no such statement. [R. pp. 10-26].

Therefore, when, as in this case, "a state court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion, we will accept as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it to do so." *Id.* at 1040-1041.

B.

Moreover, the Master's finding 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," is also fatal, because he believes federal law requires the result. The Master concedes his decision is based on how other courts have analyzed 12 U.S.C. § 1821(d)(13)(D), *as opposed to any particular South Carolina law*. He concludes those cases "do not support the argument that a third-party purchaser cannot proceed with a judicial foreclosure," and "does not did not require the third-party purchaser to engage in the FDIC's administrative claims review and allowed the foreclosure action

to proceed as filed;" nor "stand for the assertion that a third-party purchaser of a loan owned by the FDIC must participate in the FDIC's administrative claims process before foreclosing on its purchased loan;" or "states that a master in equity does not have jurisdiction over a foreclosure of a loan previously held by the FDIC in each case." [R. pp. 10-26].

C.

Respondent will undoubtably argue that we accept, as a matter of law, that there exists "firmly established" and "regularly followed" South Carolina law that *the note* ***follows*** *the mortgage.* [See § II., D., infra]. Ironically, the very order Respondent provided the Master and the Master signed proves fatal to its cause by citing *Twelfth RMA Partners, L.P. v. National Safe Corp.*, 335 S.C. 635, 640, 518 S.E.2d 44, 46 (Ct. App. 1999), for "the universally recognized principle that an assignee has all the same rights and privileges as the assignor to hold that a third-party who purchases an asset from the FDIC also has the authority to pursue the foreclosure of the assigned asset." The principle is applicable here because the HELOC is not a negotiable instrument. *See Northwestern Bank v. Neal*, 271 S.C. 544, 546, 248 S.E.2d. 585, 586 (1979) (declaring "[w]hether or not a writing is negotiable is governed by § 3-104(1) of the Uniform Commercial Code.").

In the final analysis, Respondent's attempt to use the transaction between the FDIC-R and CRE/ADC Venture 2012-1, L.L.C.[5] is utterly futile. Clearly, because no court has

[5] 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

jurisdiction over "any action seeking a determination of rights with respect to, the assets of any depository institution for which the [FDIC] has been appointed receiver," 12 U.S.C. § 1821(d)(13)(D)(i), the "universally recognized principle that an assignee has all the same rights and privileges as the assignor to hold that a third-party who purchases an asset from the FDIC also has the authority to pursue the foreclosure of the assigned asset," is *interwoven in and not independent of federal law*. As conceded by the Respondent, an assignment confers rights and the principle "is not an independent and adequate state ground supporting the judgment." *Longshoremen v. Davis*, 476 U.S. at 388 (1987).

D.

In *Kalb* v. *Feuerstein,* 308 U. S. 433 (1940), the SCOTUS faced an issue involving state jurisdiction in a bankruptcy case (which was strikingly similar to the issue presented in the case at bar). In *Kalb*, a state court had entered a judgment of foreclosure against the appellants. Although the appellants had a petition pending concurrently in the Bankruptcy Court, the state rejected their challenge that the foreclosure was invalid because of the pending bankruptcy proceedings on the basis of a procedural default.

In the face of the appellees' assertion that the procedural default presented an adequate nonfederal ground for the State's judgment, the SCOTUS accepted the appellants' contention that federal law itself "oust[ed] the jurisdiction of the state court." *Kalb*, 308 U.S. at 436. The state judgment thus "was not merely erroneous but was beyond

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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 state court's] power, void, and subject to collateral attack." *Id.*, 308 U.S. at 438. The SCOTUS based this holding on Congress' exclusive right to regulate bankruptcy, which gave it the power to vest jurisdiction over bankruptcy proceedings exclusively in one forum and to withdraw that jurisdiction from all other forums, and Congress' statutory exercise of that right.

Since then, the SCOTUS has held that "[e]nactment of such exclusive jurisdiction must, by operation of the Supremacy Clause, pre-empt conflicting state-court jurisdiction," *Longshoremen*, 476 U.S. at 393.

Under the relevant statutory section of FIRREA, Congress did not merely lay down a substantive rule of law to be enforced by any tribunal competent to apply law generally to the parties. Rather, Congress adopted 12 U.S.C. § 1821(d)(13)(D)(i) as a jurisdictional bar for which, consequently, any reliance on "waiver" or failure to secure a supersedeas "does not protect a state-court judgment from pre-emption." *Id.*

III. There exists no "firmly established" and "strictly followed" state grounds to support the Master in Equity's decision.

In order to defeat the jurisdictional bar contained in the plain language of 12 U.S.C. § 1821(d)(13)(D)(i), any "asserted non-federal ground must independently and adequately support the judgment." *Abie State Bank v. Bryan*, 282 U.S. 765, 773 (1931). Assuming, *arguendo*, an "independent" state ground existed, "state courts may not avoid deciding federal issues by invoking procedural rules that they do not apply evenhandedly to all similar claims." *Hathorn v. Lovorn*, 457 U.S. 255, 262-63 (1982) (quoting *Barr v. City of Columbia*, 378 U.S. 146, 149 (1964)).[6]

[6] The SCOTUS has added no requirement of a showing of manipulative intent on the part of the state court.

A.

Pursuant to Rule 53(b), SCRCP: "In an action where the parties consent, in a default case, or an action for foreclosure, some or all of the causes of action in a case may be referred to a master or special referee by order of a circuit judge or the clerk of court. In all other actions, the circuit court may, upon application of any party or upon its own motion, direct a reference of some or all of the causes of action in a case."

On January 3, 2019 Respondent filed a Proposed Order of Reference that states: "[p]ursuant to an Order of the South Carolina Supreme Court, this Non-Jury matter is now referred to the Dorchester County Master In Equity with finality," for the Dorchester County Clerk of Court to sign. The Clerk of Court signed the order of reference the next day. The Appellants were not in default, nor did they consent. SCRCP includes no provision to allow a clerk to refer "non-jury" matters. The procedural rule is clearly not "strictly followed."

B.

The South Carolina Supreme Court has elucidated that when a state court interprets state statute, "[w]ords must be given their plain and ordinary meaning without resort to subtle or forced construction to limit or expand the statute's operation." *Sloan v. Hardee,* 371 S.C. 495, 499, 640 S.E.2d 457, 459 (2007). After all, "[w]hat a legislature says in the text of a statute is considered the best evidence of the legislative intent or will. Therefore, the courts are bound to give effect to the expressed intent of the legislature.". *Hodges v. Rainey*, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000). If this rule was "firmly established" and "strictly followed," then the Master would have been unable to reach his conclusion. Certainly, this rule has not been "strictly followed" either.

C.

Respondent appears to assert that jurisdiction is *waivable*, but this argument fails because there are no "firmly established" and "regularly followed" rules pertaining jurisdiction in this state. For example, compare: "[a] court's subject matter jurisdiction is determined by whether it has the authority to hear the type of case in question. *e.g*, *Dove v. Gold Kist, Inc.*" [as cited in *Allison v. WL Gore & Associates*, 394 S.C. 185, 188, 714 S.E.2d 547, 549 (2011)], with the holding that "[s]ubject matter jurisdiction is 'the power to hear *and* determine cases of the general class to which the proceedings in question belong.' *Dove v. Gold Kist, Inc.* (emphasis added)" [as cited in *Gantt v. Selph*, 423 S.C. 333, 337, 814 S.E.2d 523, 525 (2018)].

Similarly, in certain circumstances, jurisdiction is authorized pursuant to S.C. Const. Art. V, § 11 ("The [c]ircuit [c]ourt shall be a general trial court with original jurisdiction in civil and criminal cases. . .)" and, therefore, lack of jurisdiction can be raised at any time, even on appeal. But at other times, subject matter jurisdiction is a procedural matter which must be raised and preserved. S*ee, e.g., State v. Oxner*, 391 S.C. 135, 134, 705 S.E. 2d 51, 52 (2011). This is another example of a rule not being "strictly followed."[7]

D.

The Respondent's entire case is built upon the assertion that as the "predecessor in interest," [Complaint ¶. 6.], to CFSB, it is the "holder" of certain "loan documents,"

[7] Regardless, the fact that *in this case* the issue was both raised and preserved, *Oxner's* conflict with *Ake v. Oklahoma* need not addressed.

[Complaint] – implicating procedural rules pertaining to standing and/or real party in interest. But, again, no such rules are strictly followed in South Carolina.

In *Freemantle v. Preston*, 398 S.C. 186, 192-193, 728 S.E.2d 40, 43 (2012), our Supreme Court elucidated two strict[8] ways standing is obtained. When as here, rights depend upon an alleged assignment of a mortgage, standing is conferred by statute. S.C. Code Ann. §§ 36-9-203(g); -309(4); -313(h). When rights are asserted as a "holder" of a promissory note, that question is answered by:"[w]hether or not a writing is negotiable is governed by § 3-104(1) of the Uniform Commercial Code." *Northwestern Bank v. Neal*, 271 S.C. 544, 546, 248 S.E.2d. 585, 586 (1979).

The *Freemantle* Court is also explicit in its holding that "when standing is conferred by statute," there exists no requirement that a Plaintiff also establish "constitutional standing by showing "he has suffered an "injury in fact — an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61, 112 S.Ct. 2130 (1992) (internal quotations and citations omitted))." *Freemantle*, 398 S.C. at 194, 728 S.E.2d at 44; *see also Hitachi Electronic Devices USA, Inc. v. Platinum Technologies, Inc.*,

[8] *Freeman* also cites a third option, citing *ATC South, Inc. v. Charleston County*, 380 S.C. 191, 198, 669 S.E.2d 337, 341 (2008), for the proposition that our Supreme Court "has *long* recognized the 'public importance' exception to the general standing requirements," (emphasis added), by citing cases less than a decade past. It should be axiomatic that the recently created "public importance" exception, works to assure the two previous "firmly established" rules are no longer "strictly followed."

366 S.C. 163, 170, 621 S.E.2d 38, 41 (2005) ("[o]nly where the U.C.C. is incomplete does the common law provide applicable rules)".[9]

Our Supreme Court has determined more than once that when a debt collector obtains an assignment for mere collection purposes only, and pay no value as required under S.C. Code Ann. § 36-9-203(g), the Plaintiff "is not representing its own legal interests ... but the legal interests of others, [and] it is engaging—without license or other authorization—in the practice of law." *Roberts v. LaConey*, 375 S.C. 97, 105, 650 S.E2d 474, 478 (2007); *Rogers Townsend & Thomas, PC v. Peck*, 419 S.C 240, 244, 797 S.E.2d 396, 298 (2017). Thus, unless a Plaintiff meets the statutory requirements under the Uniform Commercial Code, no constitutional standing can be found because no legal interests are acquired.

Completely inapposite, however, is the holding in *Bank of America v. Draper*, 405 S.C. 214, 746 S.E.2d 478 (2013) – which declared that because "[s]everal bankruptcy courts and federal district courts, including those in South Carolina, have recognized the servicer of a loan to be a real party in interest and able to initiate a foreclosure," by virtue of the fact that [Bank of America] "is the servicer of [Draper's] loan" – it then concluded that "the master correctly found [Bank of America] had standing to foreclose on the

[9] Together, these procedural rules, as highlighted by our Supreme Court's reliance on *Lujan*, would indicate that absent a remedy provided by the U.S. Constitution, federal statute or South Carolina statute, a court in this state is without jurisdiction. *See Grant v. Grant*, 12 S.C. 29, 31, 1879 WL 4923 (1879) (explaining "[n]o remedy is complete without a definition of the cases to which it should extend, and the [S.C.] constitution is wholly silent on this subject. There is, therefore, nothing in the [S.C.] constitution tending to deprive the legislature of full power of granting or withholding such remedy which the legislature primarily possesses"). After all, it is the "doctrine of standing," that serves "to identify those disputes which are appropriately resolved through the judicial process." *Lujan* at 560 (citing *Whitmore* v. *Arkansas*, 495 U. S. 149, 155 (1990)).

mortgage." *Id.*, 405 S.C. at 223, 746 S.E.2d at 482. Not only has *Draper* rejected the S.C Supreme Court's finding [*see LaConey* supra], but the decision is contrary to federal law, which explicitly denies such rights to a mortgage servicer. *See* 11 U.S.C. § 541(d); 15 U.S.C. § 1641(f). In *Draper*, it was actually found perfectly acceptable to allow a third party to record assignments of a mortgage. *Id.*, 405 S.C. at 217, 746 S.E.2d at 479 ("MERS transferred its rights under the mortgage to BAC Home Loans Servicing, L.P. by an assignment").

However, while *Draper* recognizes that "[s]tanding is a fundamental requirement for instituting an action," and "refers to a party's right to make a legal claim or seek judicial enforcement of a duty or right." [*Draper*, 405 S.C. at 220, 746 S.E.2d at 481], it then cites to *Sloan v. School District of Greenville Co*., 342 S.C. 515, 524, 537 S.E.2d 229, 334 (Ct. App. 2000) for "the requirement of standing is not an inflexible one." *Id.* But the case relied on by *Sloan* for this kernel – *Thompson v. S.C. Comm'n on Alcohol & Drug Abuse*, 267 S.C. 463, 467, 229 S.E.2d 718, 719 (1976) -- never articulates this rule explicitly.[10]

To further illustrate that rules are not strictly followed, the *Draper* Court determines that at times

> "'[t]he assignment of a note secured by a mortgage carries with it an assignment of the mortgage, but ... the assignment of the mortgage alone does not carry with it an assignment of the note.' *Hahn v. Smith*, 157 S.C. 157, 167, 154 S.E. 112, 115 (1930); *see also Ballou v. Young*, 42 S.C. 170, 176, 20 S.E. 84, 85 (1894) ('The transfer of a note carries with it a mortgage given to secure payment of such note.')."

[10] The *Thompson* Court merely held "that public officials may not contest the validity of a statute, the rule is not an inflexible one" but never articulated that the requirement of standing, in general, is inflexible. 267 S.C. at 467, 229 S.E.2d at 719.

Draper, 405 S.C. at 220, 746 S.E.2d at 481. But then, at other instances, *Draper* holds that: "[a] mortgage and a note are separate securities for the same debt." *Id.* [11] Unable to find a resolution, the *Draper* court concluded, based solely on federal decisions, that the "mortgage follows the servicer." *Id.* 405 S.C. at 223, 746 S.E.2d at 482.

More conflicting is that less than two years after *Draper* established that having a copy of a note under Rule 1003, SCRE is sufficient to identify a "holder" (defined by S.C. Code Ann. 36-1-201), our Supreme Court correctly identified Rule 902(9), SCRE, to resolve the matter in *Deep Keel v. Atlantic Private Group,* 413 S.C. 58, 67, 773 S.E.2d 607, 611-612 (2015) ("[e]xtrinsic evidence of authenticity as a condition precedent to admissibility is not required with respect to ... *[c]ommercial paper*, signatures thereon, and documents relating thereto to the extent provided by general commercial law" (emphasis added)).

CONCLUSION

In the final analysis, 12 U.S.C. 1821(d)(13)(D) ousts the jurisdiction of a state court to determine the rights as it pertains to a promissory note secured by a mortgage. Because South Carolina has no "firmly established" and "strictly followed" grounds as it pertains to foreclosure actions in this state, no "adequate" state ground exists.

The Supremacy Clause supplies a rule of priority. It provides that the "Constitution, and the Laws of the United States which shall be made in Pursuance thereof," are "the

[11] Like the popular children's game "Chinese whispers," *Draper* similarly cites to *US Bank Trust Nat. Ass'n v. Bell*, 385 S.C. 364, 374, 684 S.E.2d 199, 204 (2009) [which in turn cites to *Lever v. Lighting Galleries, Inc.*, 374 S.C. 30, 33, 647 S.E.2d 214, 216 (2007)] for the proposition that "[a] mortgage and a note are separate securities for the same debt." However, *Lever* drew its citation from *Platt v. Carroll*, 125 S.C. 493, 119 S.E. 180 (1923), but *Lever* took the substituted the word "note" in place of "**bond**" from *Platt* (*i.e.* a personal guarantee executed by a third party) – two distinctly different concepts!

supreme Law of the Land ... any Thing in the Constitution or Laws of any state to the Contrary notwithstanding." U.S. Const., Art. VI, cl. 2.

Although both our Supreme Court and the SCOTUS have sometimes used different labels to describe the different ways in which federal statutes may displace state laws – for example, of express, field, and conflict preemption – but these categories "are not rigidly distinct." *See Crosby v. National Foreign Trade Council*, 530 U. S. 363, 372, n. 6, (2000) (internal quotation marks omitted).

In fact, at least one feature unites them; invoking some brooding federal interest or appealing to a judicial policy preference should never be enough to win preemption of a state law; a litigant must point specifically to "a constitutional text or a federal statute" that does the displacing or conflicts with state law. *Puerto Rico Dept. of Consumer Affairs v. ISLA Petroleum Corp.*, 485 U. S. 495, 503, (1988); *see also* 3 J. Story, *Commentaries on the Constitution of the United States* § 1831, p. 694 (1st ed. 1833) ("the supremacy of the laws is attached to those only, which are made in pursuance of the constitution").

The Appellants have done just that. Because 12 U.S.C. 1821(d)(13)(D)(i) "imposes restrictions on private actors" and "a state law confers rights that conflict with the federal law," then "the federal law takes precedence and the [court's jurisdiction] is preempted." *Murphy v. National Collegiate Athletic Assn.*, __ U.S. __, 138 S.Ct. 1461, 1480 (2018).

It really is that simple – because, after all, "the point is not whether *state* law gives the state courts jurisdiction over particular controversies but whether jurisdiction provided by state law is itself pre-empted by *federal* law vesting exclusive jurisdiction over that controversy in another body." *Longshoremen*, 476 U.S. at 388.

TRANSFER TO SUPREME COURT

Appellants' principle issue involves a constitutional challenge to the state court's adjudicatory powers, this Appeal should be transferred to the South Carolina Supreme Court, pursuant to S.C. Code Ann. § 14-8-200(b)(3) and Rule 204, SCACR.

Respectfully submitted,

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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 CREDIIT 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.

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that the ***Appellant's Final Brief*** contains all material proposed to be included by any of the parties, not any other material.

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