Appeal No. 19-15899

In The United States Court of Appeals For The Ninth Circuit

Susan McShannock, et al,
Plaintiff-Appellee,
v.
JP Morgan Chase Bank NA,
Defendant-Appellant,

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
Case No. 3:18-cv-01873-EMC HON. EDWARD M. CHEN

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Corporate Disclosure Statement

Pursuant to Federal Rule of Appellate Procedure 26.1, Plaintiffs-Appellees Monica Chandler, Mohammed Meky and Susan McShannock state, by and through their counsel, that none is a nongovernmental corporate party.

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INTRODUCTION

It has been said that, when it enacted the Home Owners' Loan Act of 1933[1] (HOLA), Congress empowered the responsible federal agency to enact regulations governing "the powers and operations of every Federal savings and loan association from its cradle to its corporate grave."[2] In this case, however, Defendant JP Morgan Chase, N.A. (Chase) seeks to extend that power well beyond the grave. Indeed, Chase would have this Court extend to it, a national bank, the statutory privileges of a long-dead federal savings association, Washington Mutual Bank, F.A. (WaMu). Neither Congress nor the agencies responsible for administering HOLA have ever indicated an intent to shield national banks' own conduct from state consumer protection laws. Chase's attempt to extend the reach of HOLA to any mortgage originated by a federal savings association (FSA), in perpetuity, should be rejected.

Plaintiffs Monica Chandler, Mohammed Meky and Susan McShannock (collectively, "Plaintiffs" or "Borrowers") took out mortgage-

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[1] 12 U.S.C. § 1461 *et seq.*

[2] *People* v. *Coast Federal Sav. & Loan Assn.*, 98 F. Supp. 311, 316 (S.D. Cal. 1951).

secured loans from WaMu, a federal savings bank, between 2005 and the end of 2007, for single-family homes in California. In 2008, Chase, a national bank, purchased Plaintiffs' mortgages from WaMu after it collapsed. Plaintiffs thereafter made timely payments into their escrow accounts held by Chase, as required by their mortgages. Although California Civil Code § 2954.8(a) requires payment of two percent annual interest on money held in such escrow accounts, Chase never paid any such interest.

After Plaintiffs sued Chase for its refusal to pay interest as required by § 2954.8(a), Chase asserted HOLA preemption as a defense. The district court's well-reasoned decision rejecting Chase's argument should be affirmed. There is no indication that HOLA's enacting Congress ever intended to extend HOLA's shield to a national bank for its own conduct, and Chase cites nothing evincing such intent. Though Congress finally amended HOLA almost 50 years after its enactment merely to permit sales of mortgages by FSAs, the amendment said nothing about HOLA covering subsequent *non*-FSA entities. Nor do the agencies' enacting regulations cover national banks' conduct, instead expressly confining the field of preemption to the conduct of FSAs, a field that does not include Chase. Save for two agency opinion letters issued decades after HOLA was enacted (one

of which is vague and the other factually inapposite), Chase offers no evidence of Congressional intent in support of its position. As "the purpose of Congress is the ultimate touchstone in every pre-emption case," *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996), the stark absence of such purpose here is fatal to Chase's preemption argument.

Chase falls back on a separate argument, that, even though HOLA does not expressly reach Chase for its own conduct, § 2954.8(a) applied to Chase would indirectly affect FSAs' lending and the secondary mortgage market, thereby running afoul of HOLA's implementing regulations. This argument also fails, for multiple reasons.

First, there is no evidence in the appellate record showing that the payment of escrow interest by a national bank would have any effect on FSA lending operations whatsoever. As preemption is an affirmative defense and Chase's burden to prove, this sinks Chase's preemption argument. Second, given that WaMu, the FSA from which Chase purchased Plaintiffs' mortgages, has long been defunct, the notion that requiring Chase to pay escrow interest will adversely affect WaMu rings hollow. Third, the likely effect of non-FSA mortgage purchasers having to pay escrow interest (which in Plaintiff McShannock's case, would be roughly $30.00 per year) is highly

unlikely to "significantly interfere" with an FSA's lending operations, as required for obstacle preemption.

Nor do Chase's two arguments based on Plaintiffs' mortgage agreements preclude application of § 2954.8(a). The first of these arguments, based on the mortgages' choice of law provisions, was never made by Chase in the district court, and is therefore waived. However, even on its merits, it fails because the mortgages' choice of law provisions incorporate "federal and state" law, and therefore ultimately depend on whether HOLA preempts § 2954.8(a) as to Chase for Chase's conduct (which it does not). Finally, Chase's argument that it obtained the contractual "benefit" of HOLA preemption via the generic assignment clause in the mortgages likewise fails, because HOLA preemption is not a contractual benefit, but one that arises from statute, apart from the mortgages. Put differently, the mortgages cannot transfer to Chase something that federal law does not provide.

For these reasons, the Court should affirm the district court's order denying Chase's motion to dismiss due to HOLA preemption.

ISSUE PRESENTED

If a national bank makes a loan to a borrower, HOLA, a New Deal consumer protection statute, does not shield the national bank's conduct by

preempting relevant state consumer protection law. The issue on appeal is whether HOLA preemption shields the conduct of a national bank from state consumer protection statutes if the national bank buys the loan from a defunct federal savings association, as opposed to making the loan in the first instance.

STATEMENT OF JURISDICTION

Plaintiffs agree with Chase's Jurisdictional Statement.

STATEMENT OF THE CASE

A. HOLA was developed to govern Federal Savings Associations and their operations.

Congress enacted HOLA in 1933 to regulate federal savings associations[3] or banks, "at a time when record numbers of homes were in default and a staggering number of state-chartered savings associations were insolvent." *Silvas v. E*Trade Mortg.*, 514 F.3d 1001, 1004 (9th Cir. 2008). HOLA was designed to restore public confidence by creating a nationwide system of federal savings and loan associations to be centrally regulated according to nationwide "best practices." *Fid. Fed. Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 160-61 (1982). One of HOLA's primary regulatory goals

[3] The term "federal savings association" means a federal savings association or federal savings bank chartered under 12 U.S.C. § 1464.

is to encourage thrifts to provide credit for housing and other goods and services in a safe and sound manner. 12 U.S.C.A. § 1464(a)(2). In other words, it's a consumer protection statute.

Because the HOLA, when enacted, contained no provision empowering thrifts to sell mortgages, the district court below ordered the parties to brief issues that would illuminate Congress's intent with respect to the sale of mortgages by thrifts on the secondary market.[4] As both parties' district court briefs made clear, the legislative history revealed that Congress gave absolutely no consideration to the subject of a secondary market for mortgages prior to passing HOLA, nor was there evidence that mortgages were in fact being bought and sold on a secondary market in 1933. (ER 13:21-28.)

The sole focus of HOLA was on relief to the homeowner. The stated purpose was to:

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[4] The district court ordered the parties to brief: (1) "Whether there is legislative history indicating that Congress, in enacting HOLA, contemplated that HOLA-governed mortgage loans originating with federal savings associations would be resold on the secondary market;" and (2) "Whether HOLA-governed mortgage loans were in fact resold at the time HOLA was enacted in 1933, and if so, how common the practice was." (SER 1.)

> [P]rovide emergency relief with respect to home mortgage indebtedness, to refinance home mortgages, to extend relief to the owners of homes occupied by them and who are unable to amortize their debt elsewhere, to amend the Federal Home Loan Bank Act, to increase the market for obligations of the United States, and for other purposes.

H.R. 5240, Report No. 55, at 1 (1933). When HOLA was signed into law in June of 1933, there was nothing in the text (or even in the debates) alluding to a secondary market for home loans. More specifically, although it created Federal Savings Banks, nothing in the HOLA or its legislative history suggests that these banks were to sell the loans they generated in a secondary market.[5]

To the extent there was any contemplation of a secondary market for mortgages prior to passage of HOLA, it was to disapprove of it. In one apt exchange, Mr. Hancock, U.S. Representative from North Carolina, asked, "[is] it not the judgement of the chairman of our committee that none of these bonds will be sold to the public?" to which Mr. Steagall, U.S. Representative from Alabama, responded: "I do not know that they will be sold. ***That is not contemplated***. It is expected that they will be exchanged for mortgages."

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[5] HOLA also created the Home Owners' Loan Corporation ("HOLC"), which exchanged bonds for failing mortgages, and reinstated the mortgages on new, much less onerous, terms, to benefit consumers.

Proceedings and Debates of the First Session, 73rd Cong., Vol. 77 Part 3 (April 25, 1933 to May 11, 1933) (emphasis added).

Chase conceded below and concedes again on appeal that HOLA, when enacted in 1933, did not address a secondary mortgage market, and that nothing in the legislative history suggested that one was contemplated. (*See* ER 13:23-28) (acknowledging Chase's concession on this point below); *see also* Chase's Br. at 20 (noting that the power to sell mortgages was not reflected in HOLA until its amendment in 1978).) Five years later, in 1938, Congress created the Federal National Mortgage Association ("Fannie Mae"), establishing a new secondary private market for mortgage loans.[6] Shelly Smith, *Reforming the Law of Adhesion Contracts: A Judicial Response to the Subprime Mortgage Crisis*, 14 Lewis & Clark L. Rev. 1035, 1065 (2010). For the first thirty years following its inception, Fannie Mae held a monopoly over the secondary mortgage market. Alford, Rob "*What Are the Origins of Freddie Mac and Fannie Mae*?" History News Network, (2003).[7]

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[6] On May 28, 1938, the New York Times characterized the new debentures backed by FHA-insured loans, and available to be purchased as investments, issued by Fannie Mae, as a "**new** type of investment." Lee E. Cooper, *FHA Due to Proceed Slowly in Approving Applications for New Mortgage Agencies*, N.Y. Times, May 28, 1938 (emphasis added.)

[7] http://hnn.us/articles/1849.html

Decades after it was enacted, HOLA was finally amended to provide that FSAs could sell mortgages in 1978. *See* Pub. L. No. 95-630, § 1701, 92 State 3641, 3714 (1978). Nonetheless, HOLA has always been and continues to be focused on the conduct of "thrift institutions" of which "federal savings associations" are one type. 12 U.S.C. § 1464(a) & (a)(1).

Following its Congressional mandate, in 1996 OTS enacted implementing regulations that purport to occupy the field of regulation of federal savings associations. 12 C.F.R. § 560.2(a) ("OTS hereby occupies the entire field of lending regulation for federal savings associations."). HOLA repeatedly describes and defines the regulatory field that it proclaims to occupy, referring every time only to "federal savings associations": "OTS is authorized to promulgate regulations that preempt state laws affecting the operations of *federal savings associations*"; "OTS intends to give *federal savings associations* maximum flexibility to exercise their lending powers"; "*federal savings associations* may extend credit as authorized under federal law, including this part, without regard to state laws purporting to regulate or otherwise affect their credit activities." 12 C.F.R. § 560.2(a) (emphasis supplied).

In addition to OTS's enabling regulations, its comments also make clear that § 560.2 is aimed at federal savings associations, and no other entity. For instance, OTS distinguished HOLA's preemption provisions from other federal statutes', like 15 U.S.C. 1610 (TILA) and 12 U.S.C. 2616 (RESPA), by noting that TILA and RESPA "contain preemption disclaimers [that] apply to all types of lenders (including state-chartered lenders), not just federal savings associations." *OTS Final Rule*, 61 FR 50951, 50966 (Sept. 20, 1996). Whereas OTS noted that HOLA "evidenced a specific intent to preempt, or permit a federal regulator to preempt, the application of state laws to a particular category of lender-in this case, federal savings associations." *Id.* Likewise, OTS noted that it had been considering removing some of the existing detailed regulatory language authorizing "federal thrifts" to "establish[ ] escrow accounts." *Id.*

In short, HOLA and OTS's implementing regulations were doubtless intended to establish broad preemption of state laws governing federal savings associations, but were not intended to regulate anything other than federal savings associations.

B. Relevant Facts

Plaintiffs took out mortgage-secured loans from WaMu, a federal savings bank, between 2005 and the end of 2007, for single-family homes in California. (ER 1:22-24; 38-206; 225:5-21; 226:19-25; 227:13-17.) Section 3 of Plaintiffs' mortgage contracts required Plaintiffs to make payments into an escrow account:

> Funds for Escrow Items: Borrower shall pay to Lender on the day Periodic Payments are due under the Note, until the Note is paid in full, a sum (the "Funds") to provide for payment of amounts due for (a) taxes and assessments and other items which can attain priority over this Security Instrument as a lien or encumbrance on the Property; (b) leasehold payments or ground rents on the Property, if any; (c) premiums for any and all insurance required by Lender under Section 5; and (d) Mortgage Insurance premiums, if any, or any sums payable by Borrower to Lender in Lieu of the payment of Mortgage Insurance premiums in accordance with the provisions of Section 10. These items are called "Escrow Items." At origination or at any time during the term of the Loan, Lender may require that Community Association Dues, Fees and Assessments, if any, be escrowed by the Borrower, and such dues, fees and assessments shall be an Escrow Item.

(ER 41; 64; 91; 118; 145; 172; 195.) Section 3 also exempted Chase from paying interest on escrow account funds, "[u]nless an agreement is made in writing or Applicable Law requires Interest to be paid on the Funds," (ER 2:4-9; 42; 65; 92; 119; 146; 173; 196), which includes Cal. Civ. Code § 2954.8(a). (ER 2:4-

9; 39; 62; 89; 116; 143; 170; 193 (incorporating applicable state law).) In addition, Section 13 of Plaintiffs' mortgage contracts states that "[t]he covenants and agreements of this Security Interest shall bind . . . and benefit the successors and assigns of" WaMu. (ER 47; 72; 99; 124; 151; 178; 201.)

In 2008, WaMu failed and Chase acquired WaMu's assets, which included Plaintiffs' mortgages. (ER 1:25-27; 208-251.) Pursuant to the terms of their mortgage contracts, Plaintiffs continued making timely escrow payments to Chase; however, Chase has not paid interest in compliance with Cal. Civ. Code § 2954.8(a). (ER 2:2-4; 26:5-7, 23-27; 27:9-13.)

C. Procedural History

On June 29, 2018, Plaintiffs filed their Consolidated Class Action Complaint against Chase for relief pursuant to the California Unfair Competition Law ("UCL"), California Business and Professions Code § 17200, *et seq.*, stemming from Chase's failure to pay interest on escrow accounts pursuant to California Civil Code § 2954.8(a). (ER 252-264.) Section 2954.8(a) says:

> (a) Every financial institution that makes loans upon the security of real property containing only a one- to four-family residence and located in this state or purchases obligations secured by such property and that receives money in advance for payment of taxes and assessments on the property, for insurance, or for other

> purposes relating to the property, shall pay interest on the amount so held to the borrower. The interest on such amounts shall be at the rate of at least 2 percent simple interest per annum. Such interest shall be credited to the borrower's account annually or upon termination of such account, whichever is earlier.

On August 2, 2018, Chase moved to dismiss the Consolidated Complaint, arguing that: (1) Borrowers did not satisfy the notice and cure requirements contained in the deed of trust, and (2) Section 2954.8(a) is preempted by HOLA. (SER 16-25.) Chase also argued that, (3) "to the extent that the [district court] declines to dismiss this case based on any of the grounds discussed above and believes that NBA preemption is relevant to its decision on this motion, it should grant a stay of the proceedings pending the outcome of the *Lusnak* appeal."

Plaintiffs opposed Chase's motion to dismiss, arguing: (1) the notice and cure provisions do not apply to the claims in this case because (a) Borrowers' "statutory rights under Civil Code section 2954.8(a) and the UCL exist independently of the deeds of trust and, under California law, are unwaivable as a matter of public policy," and (b) even if the notice and cure provisions applied, Borrower Meky complied with the notice and cure requirement before he filed his complaint. Borrowers also argued that: (2)

"HOLA preemption does not apply to the conduct of a national bank that acquires a loan originated by a federal savings bank but is instead limited to conduct occurring before the loan changed hands." Borrowers also opposed Chase's request to stay the case pending a decision by the Supreme Court on the cert petition pending in *Lusnak* because (3) it would (a) prejudice Borrowers, (b) continuing litigation would not cause inequity or hardship to Chase, and (c) a stay would undermine judicial economy.

On Sept. 11, 2018, the district court requested supplemental briefing on two questions pertaining to the HOLA preemption issue:

> (1) Whether there is legislative history indicating that Congress, in enacting HOLA, contemplated that HOLA-governed mortgage loans originating with federal savings associations would be resold on the secondary market.
>
> (2) Whether HOLA-governed mortgage loans were in fact resold at the time HOLA was enacted in 1933, and if so, how common the practice was.

(SER 1.)

On Sept. 25, 2018, Chase and Plaintiffs filed simultaneous supplemental briefs in response to the district court's order. On Dec. 7, 2018, the district court denied the Motion to Dismiss and Motion to Stay, concluding that: (1) any failure to comply with the notice and cure

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provisions does not foreclose Borrowers' claims (ER 8:27-28); (2) HOLA does not preempt § 2954.8(a) with respect to Borrowers' loans (ER 15:28); and (3) Chase's motion to stay is moot because the United States Supreme Court denied Bank of America's petition for writ of certiorari. (ER 16:2-5.) In analyzing the HOLA preemption issue, the district court noted that there were at least three lines of authority among the Ninth Circuit's district courts addressing the HOLA preemption issue.

> The first position is [that HOLA preemption applies to all conduct relating to a loan originating with a federal savings bank]. The second position . . . is that HOLA preemption does not apply to national bank[s] . . . . The third position is that whether HOLA preemption applies depends on whether the claims arise from actions taken by the federal savings association or from actions taken by the national bank. Under the third line of cases, only those claims arising from actions taken by the federal savings association would be subject to a HOLA preemption analysis. If the loan is later sold to a national bank and the plaintiff's claims arise from actions taken by the national bank, those claims would not be subject to a HOLA preemption analysis.

(ER 10:19-25 (citations omitted).) In concluding that the growing trend among courts adopting the third position is the most persuasive, the district court reasoned that:

(1) "[C]ongressional intent remains the 'ultimate touchstone' of preemption inquiry." (ER 13:17-18 (citing *Medtronic*, 518 U.S. at 485));

(2) "It is not clear from either the language or the legislative history of HOLA that Congress intended the Act's preemptive effect to attach to a loan even after it is sold by a federal savings association." (ER 13:21-23);

(3) In addition to no support in HOLA itself nor its legislative history, "there is no indication in the subsequent legislative history that Congress intended HOLA preemption to apply to loans sold to non-HOLA entities." (ER 14:25-27);

(4) "[F]inding preemption here would run afoul of one of the original purposes of HOLA enactment: consumer protection." (ER 14:28; ER 15:1 (quotation marks and citations omitted));

(5) "Allowing preemption may run contrary to HOLA's purpose and could result in a gross miscarriage of justice." (ER 15:15-16 (quotation marks and citations omitted)); and

(6) "[N]othing in the record before the Court suggests that requiring national banks to comply with state laws such as the escrow interest law here would threaten the stability of the secondary mortgage loan market for federal savings associations." (ER 15:22-24.)

Chase then filed two motions: one seeking certification for an interlocutory appeal pursuant to 28 U.S.C. § 1292(b); and a second motion to stay this case pending review of the potential interlocutory appeal. (ER 18.) Plaintiffs opposed both motions.

On Feb. 21, 2019, the district court held a hearing on both motions. The district court then issued an order (i) certifying the HOLA preemption issue for appeal, (ii) declining to certify the notice and cure issue for appeal, and (iii) granting Chase's motion to stay the proceedings pending the outcome of this appeal. (ER 21:14-16.) In arriving at its conclusions, the district court noted that:

(1) "[A]lthough the Court ultimately joined the current trend of court rulings declining to extend HOLA preemption to conduct by national banks occurring after the loan is transferred . . . courts in this circuit continue to disagree." (ER 20:4-6.);

(2) Borrower Meky "gave Chase notice on his own behalf before he joined the suit, so the litigation would not terminate with respect to his claims even if Chase were to prevail on interlocutory appeal [as to the notice and cure issue]." (ER 20:16-18);

(3) Alternatively, the notice and cure issue is inappropriate for interlocutory appeal because it requires a case-by-case determination based on individual facts and factors. (ER 20:22-23); and

(4) A stay would be most efficient for its own docket and the fairest course of action for the parties. (ER 21:6-12.)

On Mar. 8, 2019, Chase petitioned this Court for permission to file an interlocutory appeal, and this Court granted Chase's petition on Apr. 23, 2019. (ER 17.) The instant appeal followed.

STANDARD OF REVIEW

Federal preemption determinations and questions of statutory interpretation are reviewed *de novo*. *Lusnak v. Bank of Am., N.A.*, 883 F.3d 1185, 1190 (9th Cir. 2018).

SUMMARY OF THE ARGUMENT

HOLA does not preempt California Civil Code § 2954.8(a) as applied to Chase for its refusal to pay interest on Plaintiffs' escrow accounts for several reasons.

First, HOLA's reach is expressly limited to federal savings associations. Chase is a national bank and not a federal savings association, and the conduct at issue in this suit is exclusively Chase's, acting on its own behalf. Subjecting *Chase* to § 2954.8(a)'s requirement to pay interest on escrow accounts in no way imposes any "requirements" on WaMu at odds with 12 C.F.R. § 560.2(b), even aside from the fact that WaMu is long defunct.

Second, Chase's argument that § 2954.8(a) as applied to Chase *indirectly* interferes with FSAs' lending operations, is purely speculative and unsupported by the appellate record. Moreover, Chase's assertion is quite unlikely, as the amount of escrow account interest at issue here is relatively inconsequential, falling well below the bar for what would "substantially

interfere" with such lending operations. And here, the case for substantial "indirect interference with the FSA's lending operations" is exceptionally weak given that WaMu has been defunct for over a decade.

Third, there is a total absence of Congressional intent to extend HOLA to non-FSA entities like Chase, either from before or after HOLA was enacted. Nor is there anything in HOLA's implementing regulations showing an intent to extend HOLA to national banks for their own conduct. Chase hangs its hat regarding Congressional intent entirely on two agency opinion letters. One of the letters, however, dealt not with escrow interest, but with a state statute seeking to regulate nearly every aspect of lending. The other dealt with escrow interest, but was vague and contained no reasoning or analysis relevant to that point. Juxtaposed against HOLA's purpose as a consumer protection statute, this thin evidence of contrary intent is not persuasive.

Chase's arguments that the mortgage terms preclude application of § 2954.8(a) also fail. Chase's argument based on the mortgages' choice of law provision was not asserted in the district court and is therefore waived. It also fails because the mortgages' choice of law clauses include "federal and state law," and here, federal law does not preempt California's escrow

interest statute as to Chase. Chase's separate mortgage-based argument—based on assignment—likewise fails, for a similar reason. Plaintiffs' rights under § 2954.8(a) and Chase's (if any) under HOLA arise from statute, not from the mortgages.

HOLA preemption, therefore, does not shield Chase for its own refusal to pay interest on Plaintiffs' escrow accounts. The order denying its motion to dismiss should be affirmed.

ARGUMENT

I. HOLA does not preempt Cal. Civ. Code § 2954.8(a)

A. HOLA does not preempt application of Cal. Civ. Code § 2954.8(a) to a national bank for the national bank's own conduct.

Although the Supreme Court avoided deciding whether HOLA or the OTS's regulations occupy the field of federal savings and loan regulation, see *de la Cuesta*, 458 U.S. at 159 n.14, this Court has so held. *Campidoglio LLC v. Wells Fargo & Co.*, 870 F.3d 963, 971 (9th Cir. 2017) (citing *Silvas*, 514 F.3d at 1005). However, this Court also noted, "HOLA does not preempt all state laws." *Campidoglio*, 870 F.3d at 971; *see also*, *Wigod v. Wells Fargo Bank, N.A.*, 673 F.3d 547, 577 (7th Cir. 2012) (rejecting HOLA field preemption as to state law claims for "breach of contract, fraud, and violation of *consumer protection*

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statutes," and differentiating HOLA from federal statutes like the NLRA and ERISA that "displace virtually all state laws in the neighborhood.") (emphasis added).

The basic preemption framework set up by the OTS regulations is not in dispute, but several prefatory considerations should be remembered before applying them here. First, there is no dispute that Chase is a national bank and not a federal savings association.[8] (*See* Chase Br. at 11 ("Chase, a national bank, 'purchased substantially all of the assets' . . . of WaMu, including plaintiffs' loans [ ]."))

Second, Chase acted on its own behalf, not on behalf of a federal savings association, when it purchased Plaintiffs' loans and when it failed to pay interest on their escrow accounts. This is relevant because other federal courts that have had to determine whether protected status under a federal statute would extend to another entity not itself covered by the federal statute have considered whether the uncovered entity was acting on behalf of an entity entitled to preemption. *See, e.g.*, *Madden v. Midland Funding, LLC*,

[8] National banks are "corporate entities chartered not by any State, but by the Comptroller of the Currency of the U.S. Treasury." *Wachovia Bank v. Schmidt*, 546 U.S. 303 306 (2006).

786 F.3d 246, 251 (2d Cir. 2015) (refusing to extend national bank preemption from national bank seller to consumer debt buyer because the buyer-entity was neither a national bank nor acting on behalf of a national bank).

Third, Plaintiffs' suit is aimed solely at *Chase's* conduct; specifically, its failure to pay interest on monies it held in Plaintiffs' escrow accounts. (ER 26, ¶7; ER 27, ¶14.) No conduct of a federal savings association is at issue in this action, ER 22-34, a fact critical to the preemption analysis.

HOLA's preemption framework is found in OTS's implementing regulations. 12 C.F.R. § 560.2(a) identifies regulation of the lending operations of *federal savings associations* as the field that is being occupied by the OTS regulations. § 560.2(b) provides that the "types of state laws preempted by paragraph (a)" "include, without limitation, state laws purporting to impose requirements regarding" thirteen different categories of lending operations. These categories include "escrow accounts" and "sale . . . of mortgages." § 560.2(b)(6) & (10). § 560.2(c) provides a list of state laws that "are not preempted to the extent that they only incidentally affect the lending operations of Federal savings associations or are otherwise consistent with the purposes of paragraph (a) of this section." Examples of

such state laws listed are contract law, commercial law, real property law, tort law and criminal law. § 560.2(c).

The three-step process prescribed by OTS for applying this analysis provides:

> [T]he first step is 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 presumption 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.

Campidoglio, 870 F.3d at 971.

HOLA's preemption framework, applied to Cal. Civ. Code § 2954.8(a), shows that the California statute is not preempted. Under the first step of the framework, Chase argues that § 560.2(b)(6) applies to § 2954.8(a) because the latter is a state law purporting to "impose requirements" on an "escrow account." (Chase Br. at 17.) However, Chase ignores that § 560.2(a) limits the field of preemption to lending activities of *federal savings associations*, and 560.2(b), therefore, is properly read as providing a non-exhaustive list of state laws that, if applied to a federal savings association's lending operations, would be preempted. But that is not the case here. Plaintiffs are

not seeking to have § 2954.8(a) impose *any* escrow account requirements on a federal savings association, since Chase is not a federal savings association, nor is it acting on behalf of one. Put differently, Chase would be hard-pressed to argue that § 560.2 would preempt a state law requiring it to pay escrow interest if Chase had *originated* the loan to Plaintiffs. This is because § 560.2 has no bearing on whether a national bank must comply with a state law rule like § 2954.8(a). The same result obtains here, where Chase bought the loan from a defunct entity rather than originating it.

Likewise, Chase's argument that § 560.2(b)(10) preempts § 2954.8(a) (Chase Br. at 20) is misplaced. § 560.2(b)(10) preempts state laws "purporting to impose requirements regarding . . . sale or purchase of mortgages." But by requiring that interest be paid on escrow accounts held by a subsequent mortgage purchaser, § 2954.8(a) does neither—it imposes no "requirements regarding sale or purchase of a mortgage" simply by placing requirements on what must be done *after* a mortgage is acquired. If the escrow interest requirement makes purchase or sale slightly less desirable, that does not transform it into a "sale or purchase requirement."

Because § 2954.8(a), applied to a national bank that has failed to pay interest on a mortgage that it owns solely on its own behalf, is simply outside

of § 560.2's ambit, HOLA does not preempt § 2954.8(a). This result finds support in the case law as well. For instance, in *Madden v. Midland Funding, LLC*, 786 F.3d 246, 251 (2d Cir. 2015), the Second Circuit directly confronted whether the beneficial effects of preemption travel with a loan to a purchaser that is outside the scope of the relevant federal statute.

The *Madden* plaintiff sued two Midland entities for violations of the federal Fair Debt Collection Practices Act and New York state usury law. The plaintiff in *Madden* had opened a credit card account with Bank of America, a national bank. The credit program (and plaintiff's credit card obligations) was thereafter sold to FIA, another national bank, and then again to Midland Funding, a debt purchaser that was not a national bank. *Madden*, 786 F.3d at 248. Neither Bank of America nor FIA retained any interest in the plaintiff's account after it was acquired by Midland. *Id.* The district court held that the plaintiff's state law usury claims were preempted[9] by the National Bank Act (NBA), 12 U.S. § 38 *et seq.*, reasoning that the

[9] The district court specifically held that the National Bank Act would preempt the plaintiff's state law usury claims if Midland could prove at trial that the plaintiff had actually received the Cardholder Agreement and Change In Terms, a wrinkle not relevant to *Madden*'s application here.

"assignees are entitled to protection of the NBA if the originating bank was entitled to the protection of the NBA." *Madden*, 786 F.3d at 248.

The Second Circuit disagreed, reversing. The *Madden* court noted that the NBA, "provides the exclusive cause of action" for usury claims against a national bank, and "completely preempts analogous state-law usury claims," such that "there is no such thing as a state-law claim of usury against a national bank." *Madden*, 786 F.3d at 250. Nevertheless, the Second Circuit held that, unless a non-national bank entity is exercising the powers of a national bank by, "i.e., act[ing] on behalf of the national bank in carrying out the national bank's business," NBA preemption would not be extended to a non-national bank entity. *Id.* at 251. Finding that in the case before it the Midland defendants had "acted solely on their own behalves, as owners of the debt," the court held that NBA preemption did not extend to the non-national bank Midland entities. *Id.*, *see also Rijhwani v. Wells Fargo Home Mortgage, Inc.*, 2014 U.S. Dist. LEXIS 27516, *22 (N.D. Cal. March 3, 2014) ("preemption is not some sort of asset that can be bargained, sold, or transferred.") (quoting *Gerber v. Wells Fargo, N.A.*, 2012 U.S. Dist. LEXIS 15860, *10 (D. Ariz. Feb. 9, 2012)).

Chase addresses *Madden* only to cite a brief filed by the United States in support of Midland's unsuccessful petition for certiorari. (Chase Br. at 23-24.) In its brief, the United States argued that NBA preemption should extend to non-national bank assignees because such extension would avoid the possibility that "a national bank's loan portfolio could be significantly diminished" if the benefits of NBA preemption could not be freely transferred to other entities. *Id.* (citing U.S. Br. 7-8). The Second Circuit in *Madden* addressed that concern, noting that, "[a]lthough it is possible that usury laws might decrease the amount a national bank could charge for its consumer debt in certain states (i.e., those with firm usury limits, like New York) such an effect would not 'significantly interfere' with the exercise of a national bank power." *Madden*, 786 F.3d at 251.

Chase makes the same argument, that without permitting the benefits of HOLA preemption to attach in perpetuity to a loan originated by a federal savings association and then sold, irrespective of buyer, it would "destabilize the market" and "significantly impair" a savings association's power to sell loans. (Chase Br. at 24.) As discussed in greater detail below (section I(B), *infra*), there is no evidence supporting this dire prediction. Also, Chase's related argument that "the same rationale [as advocated by the

U.S.'s brief] applies here, only more strongly in the field preemption regime of HOLA as compared to the conflict preemption regime of the NBA," misses the mark. As discussed above, HOLA's field preemption regime was created by the OTS for the benefit of *federal savings associations*, and not to immunize national banks like Chase from having to comply with state law escrow interest requirements. *See Gerber*, 2012 U.S. Dist. LEXIS 15860, *10.

Chase's cited authorities do not actually support a different conclusion. For instance, Chase relies on *Flagg v. Yonkers Sav. & Loan Ass'n, FA*, 396 F.3d 178, 182 (2d Cir. 2005), in which the plaintiffs alleged that Yonkers was required to pay interest on their escrow account based on a New York state statute. (Chase Br. at 18.) Because Yonkers was a federal savings and loan, the court held that HOLA preempted the state statute requiring the payment of interest on escrow accounts. *Id.* at 182. Whether HOLA preempts § 2954.8(a) as applied to a *federal savings association*, in requiring the federal savings association to pay interest on an escrow account, is not an issue in this appeal. The determinative issue here is

whether Chase, a national bank, must comply with California's law. *Flagg* does nothing to help answer that question.[10]

Chase also cites *Martinez v. Wells Fargo Home Mortg., Inc.*, 598 F.3d 549 (9th Cir. 2010). (Chase Br. at 17.) In *Martinez*, this Court held that the plaintiffs' claims under California's Unfair Competition Law (UCL) were preempted by the National Bank Act because the UCL, as applied in *Martinez*, was not "a state law of general application," merely requiring all businesses (including national banks) to refrain from engaging in unfair, fraudulent or illegal behavior. *Martinez*, 598 F.3d 555. Instead, the *Martinez* court held that the plaintiffs' UCL claim challenged the bank's setting of underwriting and tax service fees. *Id.* at 556. Because the setting of non-interest fees is a power specifically allotted to the banks by the OCC's implementing regulations, the *Martinez* court held that the plaintiffs' claims were preempted. *Id.* Here, there is no dispute that § 2954.8(a) is aimed at

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[10] *First Fed. Sav. & Loan Ass'n of Boston v. Greenwald*, 591 F.2d 417 (1st Cir. 1979), also relied on by Chase (Chase Br. at 18), is inapposite for the same reason as *Flagg*. *Greenwald* involved application of a Massachusetts state law to First Federal, a *federal savings and loan association*. Because the Massachusetts law would have placed greater escrow interest requirements on First Federal than HOLA, the state law was held to be preempted. *Id.* at 425-26. Chase is not a federal savings and loan association.

specific conduct relating to payment of interest on escrow accounts. The reason it isn't preempted is because HOLA's implementing regulations do not purport to preempt state laws that would require a *national bank* to pay such interest—nowhere in HOLA or the relevant OTS regulations are national banks even mentioned. *Martinez* thus involves a different issue, and does not apply here.

In short, HOLA and its implementing regulations preempt state laws that "impose requirements" on federal savings associations. Nothing in HOLA, and no authority cited by Chase, holds that HOLA was intended to prevent state law from imposing on a national bank requirements relating to the national bank's own conduct. The most closely analogous federal appellate case law, the *Madden* decision, supports this "no preemption" conclusion.

B. Chase's argument that § 2954.8(a) is preempted for restricting FSAs' sales of mortgages finds no support in the record and is undermined by WaMu having been defunct for over a decade.

As discussed above, Chase's obligation to pay escrow account interest under California law falls outside § 560.2's field preemption. At most, Civil Code § 2954.8(a), as applied to a national bank for the bank's own conduct,

would be subject to an ordinary conflict preemption analysis, where it is only preempted if it significantly interferes with lending by a federal savings association.[11] *See Lusnak v. Bank of Am., N.A.*, 883 F.3d 1191, 1194 (9th Cir. 2018) (§ 2954.8(a) is not preempted by the National Bank Act because it does not prevent or significantly interfere with Bank of America's exercise of its powers).

Indeed, Chase implicitly concedes that a conflict preemption analysis applies, given its emphasis on the imaginary impairment of FSAs' power to sell loans that would be wrought by upholding a "no-preemption" order. (*See, e.g.*, Chase Br. at 24 ("A savings association's federally authorized power to sell loans would be 'significantly impaired' by application of [§ 2954.8(a)]."); Chase Br. at 13 (suggesting that application of § 2954.8(a) would make the sale of mortgages "substantially more difficult.")) If § 560.2's field preemption applied, the extent (or even the fact) of the "impairment" would be irrelevant, as the mere existence of state law

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[11] Even *de la Cuesta*, Chase's primary case, applied conflict preemption, finding it did not need to reach the question of whether or to what extent field preemption applied. *De la Cuesta*, 458 U.S. at n.14. In any event, *de la Cuesta* is inapposite because it involved application of state law to a federal savings association for its own conduct, unlike in the instant case.

intrusion into the defined field would suffice for preemption. Instead, the nature of Chase's argument is that California's escrow interest statute obstructs the purposes and objectives of HOLA, which implicates conflict preemption.

As for the imaginary impairment of non-party FSAs' mortgage sales, the burden is on Chase to prove that it exists.[12] *Lusnak*, 833 F.3d at 1191 (observing that Bank of America bore the burden of proving its preemption defense) (citation omitted). Although Chase has offered much attorney argument for the imaginary impairment, both in the district court, (ER 15:18-19) and on appeal, (Chase Br. at 22), there is no record evidence to support its speculation.[13]

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[12] Where a presumption against preemption applies, the defendant bears the burden of showing that it was Congress's "clear and manifest" intent to preempt State law. *California v. ARC Am. Corp.*, 490 U.S. 93, 101 (1989). Where no presumption against preemption applies, a defendant would still need to demonstrate "clear evidence of conflict" to support its theory that State law is preempted. *Geier v. Am. Honda Motor Co., Inc.*, 529 U.S. 861, 885 (2000). Here, though no presumption against preemption applies, Chase must still "affirmatively demonstrate that Congress intended to preclude states from enforcing their escrow interest laws." *Lusnak*, 883 F.3d at 1191.

[13] Affirmative defenses such as preemption, that raise disputed issues of fact, are inappropriate for a motion to dismiss. *See Asarco, LLC v. Union Pac. R.R. Co.*, 765 F.3d 999, 1004 (9th Cir. 2014) ("If, from the allegations of the

Chase may argue that, despite the complete absence of record evidence to support the imaginary effects on FSAs of not extending HOLA preemption to national banks, *some* effect should simply be assumed. Even if any could be assumed, however, such a slight effect would be insufficient to meet Chase's burden. *See, e.g.*, *Californians for Safe & Competitive Dump Truck Transp. v. Mendonca*, 152 F.3d 1184, 1189 (9th Cir. 1998) (California's prevailing wage requirement, which increased a motor-carrier defendant's prices by 25 percent, had an effect that was "no more than indirect, remote, and tenuous," and was therefore not preempted by the FAAAA); *cf. Air Transport Ass'n of Am. v. City & County of S.F.*, 266 F.3d 1064, 1074 (9th Cir. 2001) (antidiscrimination ordinance not preempted by the Airline Deregulation Act because, among other reasons, the record showed the cost of providing the domestic partner employment benefits at issue was a

complaint as well as any judicially noticeable materials, an asserted defense raises disputed issues of fact, dismissal under Rule 12(b)(6) is improper."). Because of Chase's reliance on the speculative effect of non-preemption on FSAs, a factual issue very much in dispute, Chase's motion was properly denied for this reason, among others. (ER 15 ("nothing in the record before the Court suggests that requiring national banks to comply with state laws such as the escrow interest law here would threaten the stability of the secondary mortgage loan market for federal savings associations.")).

"small, if not inconsequential" fraction of the airlines' costs in flying through SFO).

The relevant case law shows that, with no demonstration that § 2954.8(a), as applied to Chase, "significantly interferes" with FSA lending, there is no preemption. *See Madden*, 786 F.3d at 251 ("Although it is possible that [state] usury laws might decrease the amount a national bank could charge for its consumer debt in certain states (i.e., those with firm usury limits like New York), such an effect would not 'significantly interfere' with the exercise of a national bank power.").[14] And a bank shot argument,

[14] Chase argues that *Madden* was "wrongly decided because it failed to appreciate the valid-when-made-principle." (Chase Br. at 24, n.6.) Amicus Bank Policy Institute likewise relies on this point in its brief. (BPI Amicus Br. at 10-11.) However, the "valid-when-made principle" is limited to the context of usury. *See Gaither v. Farmers & Mechs. Bank of Georgetown*, 26 U.S. (1 Pet.) 37, 43 (1828) ("[I]f the note [be] free from usury, in its origin, no subsequent usurious transactions respecting it, can affect it with the taint of usury"); *Nichols v. Fearson*, 32 U.S. (7 Pet.) 103, 105 (1833) ("[A] contract which in its inception is unaffected by usury can never be invalidated by any subsequent usurious transaction"). However, no case cited by Chase or BPI applies the "valid when made rule" to a state escrow interest statute. Also, the "valid when made" doctrine does not even apply in the *Madden* situation. *See* Levitin, Adam J., *Bank Think: 'Madden fix' bills are a recipe for predatory lending*, American Banker (August 28, 2017). Finally, the "valid-when-made" principle has "little, if any, bearing on the issue of complete preemption." *Meade v. Avant of Colo., LLC*, 307 F. Supp. 3d 1134, 1151 (D. Colo. 2018)

wherein preemption is supported by an indirect effect on a non-party (WaMu, which no longer even exists), is far too speculative to support a preemption finding. *SPGGC, LLC v. Blumenthal*, 505 F.3d 183, 190 (2d Cir. 2007) (rejecting argument by SPGCC, a prepaid gift card company that is neither a national bank nor a subsidiary of a national bank, that NBA preemption should be extended to it because non-preemption would indirectly limit non-party B of A's ability to issue such cards).

Chase's reliance on the supposedly deleterious effect of a "no preemption" rule is especially misplaced in this case. Chase acquired Plaintiffs' loans after WaMu failed, in 2008. (ER 1.) Therefore, even if HOLA's primary purpose were to foster a secondary market for the FSA-original lender's mortgage portfolio, that purpose is not promoted by extending preemption *after* the FSA is already defunct.[15] *See, e.g.*, *Purganan*

(rejecting similar argument, emphasized by BPI's amicus counsel, in that case submitting an amicus on behalf of other banking groups).

[15] Chase's policy argument that extending preemption to non-FSAs is necessary to facilitate "Purchase and Assumption" transactions ("P&A" transactions) after FSAs fail, (Chase Br. at 31-34), is wrong for several reasons. It directly undermines Chase's position that preemption is necessary to keep FSAs healthy. Chase also cites no authority suggesting that Congress intended HOLA to make such P&A transactions easier. And

v. Wells Fargo Bank, N.A., 2019 U.S. Dist. LEXIS 102811, *8 (N.D. Cal. June 19, 2019) (HOLA did not apply to conduct of Wells Fargo, a national bank, occurring after it acquired loans from World Savings Bank, a failed FSA, as extending preemption in that way "would not serve the original intent of HOLA").

Also, the requirement that a lender pay interest on escrow accounts has minimal, if any, effect on the marketability of the loans. Appellant relies primarily upon *Fidelity Federal Savings & Loan Ass'n v. de la Cuesta*, 458 U.S. 141 (1982) in its discussion of the ability of federal savings associations to sell their loans on the secondary market. (Chase Br.at 20-22.) *De la Cuesta* involved due-on-sale clauses and a California statute that attempted to limit the power of a federal savings association to enforce them. *Id.* at 148. *De la Cuesta* is distinguishable because the party challenging the state statute was

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again, there is nothing in the appellate record supporting Chase's position that potentially having to pay escrow interest under California law would inhibit any future P&A transactions. Chase's position is nothing more than a desire for different legislative policies, and is irrelevant to preemption. *E.g.*, *Am. Hotel & Lodging Ass'n v. City of L.A.*, 119 F. Supp. 3d 1177, 1203 (C.D. Cal. 2015) ("Plaintiffs argue that the Wage Ordinance is preempted under the NLRA. A review of Plaintiffs' arguments and evidence, however, make clear that Plaintiffs' biggest concern with the Wage Ordinance is that it is bad economic policy.")

a federal savings association. The instant case involves a challenge by a national bank, unlike *de la Cuesta*. Indeed, the federal savings association—WaMu—that originated Plaintiffs' mortgages ceased to exist over a decade ago.

De la Cuesta is also distinguishable because due-on-sale clauses are far more central to lending than payment of interest on an escrow account. A due-on-sale clause enables a lender to protect its assets because it can require that the full amount of the loan be paid upon transfer of the property, if the transfer is without consent of the lender. *Id.* at 145, n. 2. This provides the lender a high degree of control over the mortgage, ensuring that the person or entity to whom the property is transferred has the "ability to repay the loan and properly maintain the property[.]" *Id.* at 146. The Federal Home Loan Bank Board[16] (FHLBB) was concerned about limits on due-on-sale clauses such as those imposed by the California statute, which would greatly diminish the ability of federal savings associations to protect their assets, including the ability to resell the mortgages. *Id.* at 146 - 47, & n. 4.

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[16] The FHLBB was the predecessor to the OTS. *United States v. Winstar Corp.*, 518 U.S. 839, 856 (1986).

In contrast to due-on-sale clauses, which directly affect the security of the loan, requiring a *non*-federal savings association to pay interest on an escrow account has a minimal (if any) effect on the marketability of the loan on the resale market. *See, e.g., Madden*, 786 F.3d at 252 (holding that an even more central limitation–a cap on the amount of interest a non-bank could charge–would not "'significantly interfere' with the exercise of a national bank power"). In the case of Plaintiff McShannock, her escrow payments would have yielded approximately $30.00 in interest per year, a far cry from the control over the security for the entire loan at issue with a due-on-sale clause.[17] Also, because the payment of interest on escrow accounts is already required of non-federal savings association lenders, it would put all loans held by non-FSAs on the same footing. (ER 15 (the district court noting that, "[a]t most, non-preemption would make the loans slightly less attractive to prospective buyers, putting them on par, in terms of regulation, with national bank loans.").

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[17] *See* ER 26 (Plaintiff McShannock's allegation that she paid often more the $700 per month into her escrow account). Assuming an average at the end of each month in the escrow account of $1,500, multiplied by 0.166 percent interest (two percent per annum interest, divided by 12 months), equals $2.50 interest per month, or approximately $30.00 of interest per year.

The appellate record contains nothing that supports Chase's argument that a non-preemption finding would have any measureable effect on the secondary mortgage market, and the relatively small amount of money involved with payment of mortgage interest makes any such effect unlikely. Moreover, the facts in this case specifically undermine such an argument, given that the FSA that originated Plaintiffs' loans has long been defunct. Chase's arguments on this score should be rejected.

C. Chase misconstrues congressional intent.

"[T]he purpose of Congress is the ultimate touchstone in every pre-emption case." *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996). Also, "[i]n all pre-emption cases . . . we 'start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.'" State consumer protection laws like § 2954.8(a) are, as this Court has held, within the state's historic police powers. *See, e.g.*, *Lusnak*, 883 F.3d at 1191 ("[w]here, as here, we are confronted with state consumer protection laws, 'a field traditionally regulated by the states, compelling evidence of an intention to preempt is required.'") Indeed, *Lusnak* dealt with the precise state law at

issue here. Therefore, as § 2954.8(a) deals with "state regulation of consumer credit," Chase must "affirmatively demonstrate that Congress intended to preclude states from enforcing their own escrow interest laws." *Id*.

As discussed above, at page 6, there was no consideration of a secondary market for mortgages (much less with purchases by national banks) prior to passage of HOLA, nor did such a secondary market even exist. (*See also*, ER 13:23-24 (the district court observing that the "parties do not seriously dispute" the absence of such Congressional intent in 1933).) It was not until nearly a half-century after it was enacted that HOLA was finally amended to provide that FSAs could sell mortgages. *See* Pub. L. No. 95-630, § 1701, 92 State 3641, 3714 (1978). This after-the-fact evidence of intent is entitled to limited weight in interpreting earlier law, *In re Adams*, 761 F.2d 1422, 1426 (9th Cir. 1985), but generally "the views of subsequent Congresses cannot override the unmistakable intent of the enacting one." *Seatrain Shipbuilding Corp. v. Shell Oil Co.*, 444 U.S. 572, 596 (1980).

Chase does not dispute that Congress has never addressed whether HOLA preemption would protect the conduct of non-FSAs for their own conduct. Nor do the implementing regulations of HOLA, at § 560.2, apply to a national bank for its own refusal to comply with state escrow interest

statutes. (*See supra*, at 21-29.) Rather, Chase argues that the requisite Congressional intent can be located in two opinion letters by the agency, OTS (and its predecessor the FHLBB). (Chase Br. at 25-29.) However, as the district court found, a close reading shows that neither opinion letter clearly supports Chase's interpretation.

The majority of the opinion contained in FHLBB Op. General Counsel, 1985 FHLBB LEXIS 178 focuses on whether *FSAs* would have to pay interest on escrow accounts. The General Counsel opined that FSAs would only be required to pay such interest if required by contract, but not by state law. *Id.* at *4. At the end of the letter, it provides, "It is our opinion that such preemption would exist regardless of whether the loans in question are sold by the federal association to a third party, are being serviced by a third party, or whether the escrow deposits are held at a federal association while the loans have been sold in the secondary market." *Id.* at *5. This conclusion was unsupported by analysis, and it is unclear whether the General Counsel letter was referring to purchase by another FSA in the secondary market, or contemplated preemption attaching to non-FSAs for their own conduct. Therefore, this opinion letter's bare assertion regarding preemption should be afforded little weight. *See Wyeth v. Levine*, 555 U.S. 555, 577 (2009)

(rejecting agency's conclusion as to preemption, and stating: "The weight we accord the agency's explanation of state law's impact on the federal scheme depends on its thoroughness, consistency and persuasiveness.")[18]

Similarly, in OTS Opinion Letter, *Preemption of New Jersey Predatory Lending Act*, P-2003-5 (July 22, 2003), the Chief Counsel examined the New Jersey Home Ownership Security Act of 2002 ("NJ Act"), N.J. Stat. Ann § 46:10B-22 *et seq.*, to determine whether it was preempted by HOLA. This was a comprehensive state home financing statute, regulating the terms of credit, loan-related fees, disclosures, mortgage processing, origination, refinancing, servicing, and disbursements. Op. Letter, at 1. Notably, paying interest on escrow accounts was not required by the NJ Act. The NJ Act's scope was so broad, that the General Counsel predictably found that subjecting a federal savings association to it would "have more than an incidental affect [sic] on the lending operations of federal savings associations." *Id.* at 3.

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[18] While the Court in *Wyeth* noted that the FDA had not been authorized by Congress directly to pre-empt state law, this does not distinguish *Wyeth* from our case. The "plenary authority" granted to the FHLBB to administer HOLA, *de la Cuesta*, 458 U.S. at 144-145, was limited to regulation of *FSAs*, and does not extend to national banks. *See* § 560.2(a) (limiting the field of preemption to lending activities of federal savings associations).

The July 22, 2003 OTS Letter also addressed whether an assignee or purchaser of a loan originated by an FSA would "be subject to claims and defenses that would not apply to the federal savings association that originated the loans." *Id.* First, the General Counsel noted that the *NJ Act* had a provision making purchasers and assignees of loans subject to the same claims and defenses as the original lender. *Id.* ("On its face, the NJ Act only subjects purchasers and assignees to the same claims and defenses that a borrower could assert against the original creditor.") Therefore, in New Jersey a non-FSA purchaser of a mortgage from an FSA would be entitled to HOLA defenses under this *state law*, as well as federal. California's escrow interest law, on the other hand, does not provide a defense depending on the originator of the loan.

The larger point about the NJ Act, and the reason why the OTS's opinion in the July 22, 2003 letter is inapposite, is that the NJ Act's comprehensive set of lending regulations, even as applied to non-FSAs, would likely substantially interfere with the uniform scheme of federal lending regulation. *See, e.g., Barnett Bank of Marion Cty., N.A. v. Nelson*, 517 U.S. 25, 33 (1996) (state usury laws preempted if application would "*significantly interfere* with the national bank's ability to exercise its powers

under the NBA") (emphasis added). California's escrow interest law is extremely narrow, and in the case of Plaintiff McShannock, would amount to about $30.00 of interest per year. (*See* ER 26 (Plaintiff McShannock's allegation that she paid often more the $700 per month into her escrow account)). The NJ Act is thus not comparable to § 2954.8(a).

Moreover, an agency's interpretation of its own regulations is controlling under *Auer v. Robbins*, 519 U.S. 452 (1997) only if the regulation the agency is interpreting is ambiguous and the interpretation is not "plainly erroneous or inconsistent with the regulation." *Bassiri v. Xerox Corp.*, 463 F.3d 927, 930 (9th Cir. 2006) (quoting 519 U.S. 452, 461 (1997)). In its analysis under *Auer*, a court must therefore first determine whether a regulation is ambiguous. *Id.* at 931 (citing *Christensen v. Harris County*, 529 U.S. 576, 588 (2000) ("*Auer* deference is warranted only when the language of the regulation is ambiguous. . . . To defer to the agency's position [where the regulation is not ambiguous] would be to permit the agency, under the guise of interpreting a regulation, to create *de facto* a new regulation.").

Here, 12 C.F.R. § 560.2 is not ambiguous on the issue of whether preemption is transferable to assignees, or protects the conduct of national banks. The regulation is totally silent on this issue. Thus, *Auer* deference

does not apply. To defer to the agency's position on an issue not addressed in the regulation would be to impermissibly permit the creation of "a new *de facto* regulation." *Christensen*, 529 U.S. at 588. Moreover, because section 560.2 is silent on the issue, any interpretation by the agency that purports to make such preemption assignable would be plainly erroneous.

Finally, Chase ignores Congress's intent in enacting HOLA to help consumers. HOLA's animating pro-consumer purpose, to "provide emergency relief with respect to home mortgage indebtedness" and "provide for the relief of the man who is about to lose his home," *de la Cuesta*, 458 U.S. at 159, 164, is hardly well-served by displacing California's consumer protection laws. *See*, *Madden*, 786 F.3d at 252 ("extending [NBA] protections to third parties would create an end-run around usury laws for non-national bank entities that are not acting on behalf of a national bank."); *Penermon v. Wells Fargo Bank, NA*, 47 F. Supp. 3d 982, 994-995 (N.D. Cal. 2014) ("If Wells Fargo's position that HOLA preemption shields its own post-acquisition conduct were adopted, [it] would have license to . . . oust borrowers without any private recourse, so long as their loans originated with a federal savings bank."). Indeed, consumer protection law, because it is a field traditionally regulated by the states, can only be overcome by

"compelling evidence of an intention to preempt." *Lusnak*, 883 F.3d at 1191. Chase's speculative claims about the imaginary effect on the secondary lending market due to payment of small interest payments on escrow accounts falls far short of such a showing.

Nothing in the HOLA's text, legislative history, or enacting regulations evinces an intent to shield national banks from state law. *See Penermon*, 47 F. Supp. 3d at 993-94 ("HOLA is strictly limited to federal savings institutions and is not intended to affect the operations of national banks.") (citing 12 C.F.R. § 560.2). Neither of the two isolated agency opinion letters offered by Chase suggests otherwise. The 1985 letter is a bare, vague assertion, and the July, 2003 letter is factually inapposite. Non-preemption, and respect for California's consumer protection statute, would further HOLA's pro-consumer purpose of protecting homeowners.

II. The parties' mortgage agreements do not support extending HOLA preemption to Chase for its own conduct.

A. The mortgages' choice of law provisions merely depend on the HOLA preemption analysis.

Chase argues that California Civil Code § 2954.8(a) does not apply because Plaintiffs' mortgages say that federal law applies. Plaintiffs' mortgages provide that Chase is required to pay interest on funds held in

escrow accounts only if "an agreement is made in writing or Applicable Law requires interest to be paid on the [escrow] Funds." ER 42, 65, 92, 119, 146, 173, 196. "Applicable Law" is defined to mean "all controlling applicable federal, state and local statutes, regulations, ordinances, and administrative rules and orders (that have the effect of law) as well as all final, non-appealable judicial opinions." ER 39, 62, 89, 116, 143, 170, 193. "The mortgages provide that they are to be "governed by federal law and the law of the jurisdiction in which the property is located." ER 72. And the mortgages provide that "all rights and obligations contained in the [mortgage] are subject to any requirements and limitations of Applicable Law." *Id.*

Chase now argues that the first three of the provisions listed above "make clear" that federal law applied to the Plaintiffs' mortgages, because these provisions should be understood as having incorporated HOLA preemption. (Chase Br. at 36.) Chase grounds this argument in *de la Cuesta* and *Flagg*, which it argues are on all fours with this case. (*Id.* at 36-38.)

First, Chase did not make this argument in the district court, and therefore it is waived on appeal. *Nghiem v. NEC Elec., Inc.*, 25 F.3d 1437, 1442 (9th Cir. 1994) ("An appellate court will dismiss arguments not raised at the

district court unless there are exceptional circumstances."). Although Chase in the district court offered what it referred to as a "contract" argument, it was comprised of the "valid when made" point, and the argument that an assignee's rights are "coterminous with those of the assignor." (SER 25:1-11; SER 14:17-18; SER 8:18-9:1.) In the district court, Chase never cited or sought to interpret any language in the Plaintiffs' mortgages in support of its "contract" argument, never cited either *Flagg* or *de la Cuesta*, and never made the legal argument that the mortgages merely incorporated language required by Fannie Mae, all part of its argument on appeal. (Chase Br. at 37, n.11.) Therefore, this argument at pages 35 through 38 of Chase's brief should be deemed waived.

Second, Chase's argument fails because "Applicable Law" under the mortgages invokes both federal and state statutes. Chase contends that this means "federal law, and state law only to the extent it does not conflict." (Chase Br. at 36.) But this is precisely what Plaintiffs showed above, at pages 29-36, that § 2954.8(a) does not conflict with § 560.2 under the facts in this case. *See also*, ER 8:9 ("Applicable Law here is § 2954.8, which requires lenders to pay two percent interest on escrow funds.") § 560.2 by its terms does not apply to a national bank, and does not apply to a national bank for

its own conduct. So there is no conflict between it and California's escrow interest law.

Chase's reliance on *de la Cuesta* and *Flagg* is misplaced. In both cases, the defendant was a federal savings association, and the issue was application of state law to it for its own conduct. If the mortgage provision incorporates federal and state law in such a situation, the state law must yield. This is not the case in the instant action, where Chase is outside the reach of HOLA. Here, state law need not yield and applies to Chase for its conduct.

This "contract" argument, even if not deemed waived, adds nothing to Chase's preemption arguments, and likewise fails.

B. Preemption is not a contractual right to be freely assigned.

Finally, Chase argues that Chase is entitled to HOLA preemption as an assignee of WaMu's contractual rights which, it argues, include freedom from state escrow interest law. (Chase Br. at 38-40.) Chase is mistaken.

Preemption by a federal statute is not a transferable "contract benefit" that may be assigned. *See, e.g.*, *Madden*, 786 F.3d at 250 (rejecting Midland's argument that they were entitled to preemption under the NBA of state

usury laws, as assignees of debt contracts from a national bank); *Gerber*, 2012 U.S. Dist. LEXIS 15860, *9 ("But preemption is not some sort of asset that can be bargained, sold, or transferred.") *Davis v. Wells Fargo, N.A.*, No. 2:16-cv-00890 JAM AC, 2016 U.S. Dist. LEXIS 168645, at *21 (E.D. Cal. Dec. 2, 2016) (holding that the parties' mortgage, which applied "federal law," can require "no more than" HOLA preemption, independent of the mortgage, would support).

The parties' contractual rights are separate from the parties' statutory rights (or lack thereof) under HOLA. *Barzelis v. Flagstar Bank, F.S.B.*, 784 F.3d 971, 974 (5th Cir. 2015) ("It may be the case, for example, that a state law regulating interest-rate adjustments to protect borrowers is preempted by HOLA. But that does not prevent a bank and a borrower from voluntarily agreeing to substantially the same protections in their contract, and in that case, the bank may not later invoke HOLA preemption to stop the borrower from enforcing those terms.") Indeed, the district court recognized this in its rejection of Chase's argument that Plaintiffs' claims were foreclosed by their failure to have complied with the mortgages' "notice and cure" provisions. *See* ER 8 (referring to section 20 of the mortgages, at ER 49)). The district court held that Plaintiffs need not have complied with their

mortgages' "notice and cure" provisions because "Chase's alleged non-payment of mortgage interest is not 'pursuant to' the Deeds of Trust," but was instead "pursuant to" Cal. Civ. Code § 2954.8(a). ER 8:8-13. Likewise, the district court held that Chase's "statutory duty [to pay escrow interest] '*exists independent of any contract between the parties*.'" ER 8:15-16 (citing *Gerber v. First Horizon Home Loans Corporation*, No. 05-1554P, 2006 WL 581082 (W.D. Wash. Mar. 8, 2006) (emphasis added)).

HOLA preemption rights were not explicitly identified in the Plaintiffs' mortgages as a "covenant" or "agreement" that could be transferred to assigns, because Chase's obligations under HOLA preemption do not arise from the contract at all. Such rights, if they exist, arise from statute. Here, HOLA preemption does not exist for Chase (for reasons explained at length above), and Chase can receive no more through the Plaintiffs' mortgages than federal law provides independent of the contracts. Chase's "assignment" argument therefore fails just as its preemption argument does.

Chase's reliance on *Olvera v. Blitt,* 431 F.3d 285, 286 (7th Cir. 2005) is misplaced. *Olvera* did not involve preemption, but instead involved the construction of a state statute, Section 5 of the Illinois Interest Act. Section 5

forbids anyone to charge a higher interest rate "than is expressly authorized by this Act or other laws of this State." *Olvera*, 431 F.3d at 287. Creditors not licensed or not banks were limited to charging five or nine percent interest; banks and licensed creditors were exempt and charged upwards of 20 percent. The Seventh Circuit interpreted Section 5's language ("or other laws of this State") as referring to the Illinois common law of assignment, which permitted the assignee debt collectors to charge the higher interest rates identified in the Illinois Interest Act.

Unlike the state statutory construction exercise at issue in *Olvera*, here Chase seeks to extend HOLA preemption via the parties' mortgage terms, which generically state that the "covenants and agreements" contained in the mortgages "shall bind and benefit the successors and assigns" of WaMu. *See, e.g.*, ER 47. While this may invoke assignment of identified contractual rights and obligations, this cannot transfer to Chase more than HOLA would allow. In *Olvera*, the Seventh Circuit may also have felt unconstrained to read the Illinois Interest Act and Illinois common law broadly, as they concerned consumer protection, which is within the state's traditional police powers. *See, e.g.*, *Aguayo v. U.S. Bank*, 653 F.3d 912, 917 (9th Cir. 2011) ("consumer-protection laws fall in an area that is traditionally within

the state's police powers to protect its own citizens."); *Time Warner Cable v. Doyle*, 66 F.3d 867, 883 (7th Cir. 1995) (Ferguson, J. dissenting) ("In contrast to free speech and other cases involving federal rights, the protection of consumers falls within the traditional police power of the state.") In contrast, HOLA preemption, which would displace a California consumer protection law, and which requires "compelling evidence" that Congress sought to preempt such law, is therefore properly read more narrowly. *Lusnak*, 883 F.3d at 1191; *Aguayo*, 653 F.3d at 917 ("Because consumer protection law is a field traditionally regulated by the states, compelling evidence of an intention to preempt is required in this area.")

Finally, *Progressive Consumers Fed. Credit Union v. United States,* 79 F.3d 1228, 1230, 1234 (1st Cir. 1996) is also inapposite. *Progressive* focused on the priority of liens under Massachusetts law of equity in an assigned mortgage. *Id.* It did not address federal preemption at all, much less whether HOLA preemption follows a federal savings association-originated mortgage to non-federal savings associations to shield their own conduct, and, accordingly, does not support the proposition that preemption can be assigned along with the terms of the contract.

In short, Chase's position that it obtained WaMu's exceptional position under HOLA through a private contract with a generic assignment clause fails. Such a contract can only transfer as much as HOLA would independently support. As discussed above, HOLA does not extend to a national bank for its own conduct. Therefore, Chase could not obtain HOLA preemption as an assignee either.

CONCLUSION

HOLA does not preempt California Civil Code § 2954.8(a) as applied to Chase, a national bank, for its own refusal to pay interest on the Plaintiffs' escrow account funds. Nor do Plaintiffs' mortgages exempt Chase from § 2954.8(a), because, here, no HOLA preemption can be read into the mortgages' choice of law provisions, and HOLA preemption cannot be assigned if it does not independently exist. The district court's well-reasoned decision denying Chase's motion to dismiss should be affirmed.

Respectfully submitted,

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STATEMENT OF RELATED CASES

Other than the cases listed by Chase, Plaintiffs are aware of no related cases.

Certificate of Compliance

1. This brief complies with the type-volume limitation of Cir. R. 32-1 because it contains 11,704 words, excluding the parts of the brief exempted by Cir. R. 32-1(c) and Fed. R. App. P 32(f).

2. This brief complies with the typeface and type-size requirements of Fed. R. App. P. 32(a)(5) and (a)(6) because it has been prepared in proportionally-spaced typeface using Microsoft Word, in 14–point size.

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CERTIFICATE OF SERVICE

I hereby certify that on October 7, 2019 I electronically filed the foregoing with the Clerk and the Court using the CM/ECF system which will send notification of such filing to the e-mail addresses denoted on the Electronic Mail Notice List. I certify under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

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