No. 19-15899

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

SUSAN MCSHANNOCK, as Executrix of the Estate of Patricia Blaskower, on behalf of the Estate of Patricia Blaskower and all others similarly situated, et al.,
Plaintiffs-Appellees,

v.

JP MORGAN CHASE BANK N.A., dba CHASE BANK,
Defendant-Appellant.

On Interlocutory Appeal from the United States District Court for the Northern District of California, No. 3:18-cv-01873 (Chen, J.)

REPLY BRIEF FOR DEFENDANT-APPELLANT JPMORGAN CHASE BANK, N.A.

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INTRODUCTION

When plaintiffs obtained mortgages from Washington Mutual Bank, FA (WaMu), a federal savings association, they agreed that no interest would be paid on the escrow accounts they were required to maintain for the decades-long duration of their loans. Plaintiffs' submission in this appeal is that when WaMu failed, the financial terms of their mortgages changed and interest must now be paid on escrow by the happenstance that JPMorgan Chase Bank, N.A. (Chase), a national bank, acquired their mortgages. That argument is wrong as a matter of federal banking law, and is also incorrect under the plain terms of plaintiffs' mortgages. And its necessary implication—that the purchasers of federal savings association-originated loans are exposed to a patchwork of state law that was inapplicable to the savings association itself—is fundamentally at odds with Congress's intent to create a robust secondary market for savings association-originated mortgages.

Plaintiffs do not dispute that the Home Owners' Loan Act (HOLA) preempts California Civil Code § 2954.8 as applied to a federal savings association, and so concede that WaMu was under no obligation to pay interest on escrow. They argue, however, that the sale of the mortgage renders HOLA irrelevant. The upshot of this argument is that if WaMu sells a loan, it may only convey to the assignee or purchaser a loan subject to different, more burdensome financial terms.

HOLA's express preemption of state laws that impose requirements on a savings association's "sale or purchase of … mortgages," 12 C.F.R. § 560.2(b)(10) (2018), precludes that result.

Plaintiffs' contrary refrain is that HOLA does not preempt state-law claims concerning the conduct of national banks. That argument misstates the point. The question presented here is whether a state law subjecting the purchasers or assignees of a savings association's mortgages to financially burdensome obligations, which did not apply to the federal savings association, affects *the savings association's* federally authorized power to sell loans and is therefore preempted. HOLA, its implementing regulations, and the relevant case law all confirm that it does.

Plaintiffs argue that conflict preemption applies here, and that the record lacks evidence of significant interference with a savings association's congressionally authorized powers. That is doubly wrong. As this Court has explained, HOLA preempts the field, and if a state law falls within a category of enumerated state laws preempted by regulation, it must give way; the state law at issue here—concerning both escrow accounts and the ability of a savings association to sell loans—is preempted twice over. And even if conflict preemption did apply, the record in this case attests to the significant interference with savings associations' federally authorized power to sell loans that inheres in

requiring purchasers of those loans to pay interest on escrow. Plaintiffs' complaint underscores the impact, itself disclosing the multi-million-dollar magnitude of plaintiffs' class claims. Plaintiffs' remaining arguments—about whether amendments to HOLA are controlling for purposes of determining congressional intent, and the level of deference due to agency opinions—are similarly meritless.

The terms of plaintiffs' mortgages likewise foreclose plaintiffs' attempt to require Chase, as a matter of state law, to pay interest on their escrow accounts. When plaintiffs took out their mortgages with WaMu, they agreed as a term of their contracts that federal law would apply to the exclusion of conflicting state law. That means that they agreed to a contract term freeing the lender from any obligation to pay interest on escrow accounts. Chase inherited that right, both under the plain terms of the mortgages—which expressly provide that the contracts' successors benefit from their original terms—and as a matter of basic contract law—which holds that a contract assignee inherits the rights and benefits the assignor enjoyed under the contract. Plaintiffs' assertion (at 49) that federal preemption is not a "transferable 'contract benefit' that may be assigned," is not responsive. The parties were free to choose what law applied, irrespective of how preemption law operates. The terms of the parties' contracts thus provide an entirely independent ground to conclude that Chase has no obligation to pay interest on plaintiffs' escrow accounts.

ARGUMENT

I. HOLA PREEMPTS THE APPLICATION OF CALIFORNIA CIVIL CODE § 2954.8 TO LOANS ORIGINATED BY A FEDERAL SAVINGS ASSOCIATION

A. HOLA Preempts Plaintiffs' Claims Because They Restrict A Federal Savings Association's Congressionally Authorized Power To Sell Mortgages

The parties agree that HOLA's field-preemptive regime completely displaces any state law that conflicts with federal savings associations' congressionally authorized lending powers. *See Aguayo v. U.S. Bank*, 653 F.3d 912, 921 (9th Cir. 2011). The Office of Thrift Supervision (OTS)—the federal agency to which Congress granted "plenary authority" to regulate savings associations, *Fidelity Fed. Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 144 (1982)—issued regulations preempting any state laws "affecting" the operations of federal savings associations. 12 C.F.R. § 560.2(a) (2018). Those regulations expressly preempt state laws purporting to impose requirements on "escrow accounts," *id.* § 560.2(b)(6), and the "sale or purchase … of mortgages," *id.* § 560.2(b)(10).

Plaintiffs do not dispute that these regulations freed WaMu from paying interest on their mortgage escrow accounts. *See* Pl. Br. 23. They also do not dispute that HOLA itself confers on savings associations a federally authorized power to sell mortgages. *See id.* at 40; *see also* 12 U.S.C. § 1464(c)(1)(B) (savings associations may sell residential loans). The only question, then, is whether

restricting WaMu from conveying a mortgage loan with this escrow term intact implicates HOLA. It does.

If California passed a law requiring federal savings associations to pay a surcharge when they sold mortgages, there is no question that the law would interfere with savings associations' congressionally authorized power to sell mortgages and so would be preempted by HOLA. And if California passed a law requiring purchasers to pay a surcharge when they bought loans from savings associations, that law too would restrict savings associations' federal power to sell mortgages. It makes no difference that the state law is directed to the purchaser side of the savings association transaction; the *effect* of that state law is to impose a requirement concerning the sale of a savings association mortgage loan, thereby restricting the savings association's exercise of its congressionally authorized power. That restriction is precisely what HOLA is meant to preempt.

To that end, the HOLA preemption inquiry is not focused on the identity of the defendant or the holder of a loan; it simply looks to the state law at issue. In particular, if the state law is one of the thirteen categories of laws that are listed in 12 C.F.R. § 560.2(b), the law is preempted. *See Campidoglio LLC v. Wells Fargo & Co.*, 870 F.3d 963, 972 (9th Cir. 2017); *Silvas v. E*Trade Mortg. Corp.*, 514 F.3d 1001, 1006 (9th Cir. 2008). In conducting this analysis, the court is "not limited to assessing whether the state law on its face comes within paragraph (b) of

[12 C.F.R. § 560.2]." *Campidoglio*, 870 F.3d at 971-972. Instead, "[the court] ask[s] whether the state law, 'as applied, is a type of state law contemplated in the list under paragraph (b) … . If it is, the preemption analysis ends.'" *Id.* at 972.

As plaintiffs would apply it, California Civil Code § 2954.8 operates as a restriction on the financial terms of a loan that a savings association can convey to a non-savings-association purchaser through a sale. It explicitly infringes on a savings association's right to sell because it requires financial institutions that have "purchase[d]" certain loans—in this case, from a HOLA-regulated savings association—to pay interest on escrow. Cal. Civ. Code § 2954.8(a). The effect would be identical if the statute referred to "sellers" of loans, which are just the other end of the same sales transaction. It thus prevents savings associations from choosing the terms on which they sell their loans—in this case, whether the purchaser is required to pay interest on mortgage escrow accounts. Stated otherwise, a law that directly imposes conditions on savings associations' ability to convey loans would be preempted under the express terms of Section 560.2(b); plaintiffs' *indirect* imposition of the same condition, by challenging the purchaser's ability to acquire the savings association loan with all of its HOLA-authorized terms intact and effective, achieves the same forbidden result and so is preempted under *Campidoglio*'s as-applied test.

HOLA's implementing regulations underscore this analysis. The regulations of the Federal Home Loan Bank Board (FHLBB)—the OTS's predecessor—preempted "any state law purporting to address the subject of a Federal association's ability or right to … sell … mortgage loan instruments" or "directly *or indirectly* to restrict such ability or right." 12 C.F.R. § 545.6(a)(2) (1983) (emphasis added). When the OTS promulgated its own field preemption regulation, it made clear that the regulation "confirm[ed] and carr[ied] forward its existing preemption position," OTS Final Rule, 61 Fed. Reg. 50,951, 50,965 (Sept. 30, 1996), and "restate[d] long-standing preemption principles applicable to federal savings associations, as reflected in earlier regulations, court cases, and numerous opinions issued by OTS and the [FHLBB]," *id.* at 50,952. Accordingly, 12 C.F.R. § 560.2 also preempts any direct or indirect restrictions on a savings association's right to sell mortgages. Leaving no doubt about its breadth, the regulation emphasizes that it preempts any state law "*affecting*" the operation of savings associations and gives "federal savings associations *maximum flexibility* to exercise their lending powers in accordance with a uniform federal scheme of regulation." 12 C.F.R. § 560.2(a) (2018) (emphases added).

Courts take a consistent approach, frequently recognizing that the indirect imposition of state-law requirements infringes federally authorized banking powers just as direct requirements do. *de la Cuesta* is an apt example. The state

restrictions on due-on-sale clauses at issue there did not expressly provide that a savings association could not sell its loans. 458 U.S. at 157. The Supreme Court nonetheless credited the FHLBB's finding that state law restrictions on such clauses would "impair the ability of Federal associations to sell their loans in the secondary market." *Id.* at 168. It was not important to the Court's analysis that the party challenging the state regulation was a savings association (*see* Pl. Br. 36-37); what mattered was that state restrictions precluding savings associations from exercising due-on-sale clauses would make associations' loans less marketable, indirectly interfering with their federal powers.

Plaintiffs argue (at 37) that *de la Cuesta* is distinguishable because due-on-sale clauses are "far more central to lending than payment of interest on an escrow account." But that sort of argument was rejected by *de la Cuesta*. The takeaway from the Supreme Court's opinion is that the responsible agency—and not the courts (or plaintiffs, for that matter)—is tasked with determining whether a state law interferes with a savings association's federal powers. *See* 458 U.S. at 170 ("In promulgating the due-on-sale regulation, the [FHLBB] reasonably exercised the authority, given it by Congress[.] … Our inquiry ends there."). The FHLBB has opined that the preemption of state laws requiring savings associations to pay interest on escrow "would exist regardless of whether the loans in question are sold by the federal association to a third party," FHLBB Op. General Counsel, 1985

FHLBB LEXIS 178, at *5 (Aug. 13, 1985), and the OTS too has recognized "the general principle that loan terms should not change simply because an originator entitled to federal preemption may sell or assign a loan to an investor that is not entitled to federal preemption," OTS Opinion Letter, P-2003-5, 2003 WL 24040104, at *4 n.18 (July 22, 2003). *See also infra* at 17-19.

Another example of a court considering the effect of an indirect restriction on a savings association's federal powers is *SPGGC, LLC v. Ayotte*, 443 F. Supp. 2d 197 (D.N.H. 2006), *aff'd*, 488 F.3d 525 (1st Cir. 2007). In that case, New Hampshire contended that SPGGC, which was not a savings association, could not sell savings association-issued gift cards with expiration dates and administrative fees, even though HOLA allowed the imposition of such expiration dates and fees. *Id.* at 200-201, 204. The court found the applicable state law preempted because requiring SPGGC to comply would require the issuing *savings association* to alter its conduct, which only "Congress or the federal agencies empowered by Congress to oversee … federal savings associations" could do. *Id.* at 207. Accordingly, "[i]n pursuing [SPGGC], the State is indirectly attempting to accomplish that which it cannot do directly: regulate, in New Hampshire, the terms and conditions of stored value cards issued by … federal savings associations." *Id.* at 208. In affirming, the First Circuit likewise recognized that "the New Hampshire [law] indirectly prohibits a national thrift from exercising powers granted to it under the

HOLA and OTS regulations," and accordingly found its application preempted. *SPGGC, LLC v. Ayotte*, 488 F.3d 525, 536 (1st Cir. 2007).[1]

Requiring *Chase* to comply with California Civil Code § 2954.8 by paying escrow interest on savings association-originated mortgage loans would interfere with *savings associations'* federal powers because it would dictate the terms on which associations can sell those loans. Like in *de la Cuesta* and the SPGGC cases, and as HOLA's regulations make clear, such an indirect restriction on the federal power of sale is preempted.

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[1] Amicus Public Citizen cites (at 16) *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Insurance Co.*, 514 U.S. 645 (1995), for the proposition that state laws having an "indirect economic effect" on activity otherwise subject to preemption are not themselves preempted. Public Citizen overreads the case, and its point is in any event misplaced here. First, *Travelers*, an ERISA case, expressly contemplated that a state law might "produce such acute, albeit indirect, economic effects" that it would "substantive[ly]" change the coverage offered by an ERISA plan, and so would be preempted. 514 U.S. at 668. That is precisely the case here, where the application of California law changes, materially and with respect to each and every loan, the financial terms of a mortgage. Moreover, as the Supreme Court made clear, ERISA preempts only those state laws that "relate to an[] employee benefit plan," and "nothing in the language of the Act or the context of its passage indicates that Congress chose to displace general health care regulation, which historically has been a matter of local concern." *Id.* at 661. Here, by contrast, there is no history of local concern over federal savings associations or national banks. *See Bank of Am. v. City & Cty. of San Francisco*, 309 F.3d 551, 558 (9th Cir. 2002). Moreover, "ERISA's preemptive scope is significantly narrower than the preemptive scope of federal banking law." *New York Bankers Ass'n v. City of New York*, 119 F. Supp. 3d 158, 188 n.10 (S.D.N.Y. 2015) (disparaging *Travelers*' relevance to bank preemption dispute).

B. Plaintiffs' Contrary Arguments Misunderstand HOLA Preemption

Plaintiffs advance three contrary arguments, none of which overcomes the plain text of HOLA and its implementing regulations, which preempt any state-law requirement that directly or indirectly interferes with a federal savings association's ability to sell its loans.

1. Field, not conflict, preemption applies here.

Ignoring this Court's repeated recognition that HOLA is a field-preemptive regime not subject to an ordinary conflict-preemption analysis, plaintiffs contend (at 31) that California Civil Code § 2954.8 "is only preempted if it significantly interferes with lending by a federal savings association," and that (at 32-39) there is no evidence of any interference in the record. Plaintiffs never made this "significant interference" argument below, and for good reason. The question presented in this case is whether plaintiffs' state-law claims affect a federal savings association's congressionally authorized power to sell loans; that question is clearly answered by HOLA, which preempts the *field* of state-law requirements concerning any of the topics specified in 12 C.F.R. § 560.2(b). *See Campidoglio*, 870 F.3d at 971-972. Because plaintiffs' claims proceed under a state law that imposes requirements on a savings association's ability to sell mortgages, the analysis ends there, and no evidence of "significant interference" is needed. Indeed, in both *Campidoglio* and *Silvas*, this Court decided the preemption

question in reviewing motions to dismiss. *See Campidoglio*, 870 F.3d at 972; *Silvas*, 514 F.3d at 1006. Any argument that the Court cannot do that here is wrong.

For the same reason, *Madden v. Midland Funding, LLC*, is inapposite. 786 F.3d 246 (2d Cir. 2015), *cert. denied*, 136 S. Ct. 2505 (2016). *Madden* dealt with a conflict preemption regime—the National Bank Act (NBA)—whereas this case deals with the expansive, pre-Dodd-Frank HOLA field preemption. Plaintiffs contend that this distinction is irrelevant because "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." Pl. Br. 28. But in *Madden*, the Second Circuit considered whether failing to apply NBA preemption to a national bank-originated loan once that loan was in the hands of *a non-national bank* would significantly interfere with *a national bank's* ability to exercise its powers under the NBA. The same analysis ought to apply here, but with a different result based on the broader preemptive force of HOLA. As in *Madden*, the question presented here is whether changing the terms of savings association-originated loans in the hands of *non-savings associations* restricts *savings associations'* powers under HOLA to sell mortgages. What may not "significantly interfere" with a bank's powers under the

NBA's conflict preemption regime could still—and does—run afoul of a savings association's powers under HOLA's field preemption regime.[2]

Even if a conflict preemption regime governed here (and it does not), the case is replete with evidence that recognizing plaintiffs' state-law claims would significantly interfere with savings associations' power to sell loans. First, as amici explain, a decision that the law governing savings association-originated loans suddenly changes if those loans are acquired by non-savings associations would require secondary market participants to ensure the loans they hold comply with 50 States' applicable laws—and not just interest-on-escrow laws—upending long-settled expectations and dissuading potential purchasers. BPI Amicus Br. 2-3. These risks, in turn, will be passed on to homeowners in the form of higher borrowing costs. *Id.* at 4. Thus, separate and apart from the financial burden imposed by effectively repricing savings association-originated loans upon sale or transfer, plaintiffs' rule would impose significant administrative burden and risk, interfering with associations' congressionally authorized power to sell.

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[2] Even if *Madden*'s NBA analysis bore on the HOLA question presented here—and it does not—this Court ought not follow it. Chase explained why in its opening brief (at 23-24 & n.6), and the federal banking agencies recently confirmed the point, explaining in an amicus brief submitted in a different matter that "*Madden* is wrong because a state law that prohibits assignees from enforcing the transferred rates actually makes the *banks'* rights to transfer those interest rates non-assignable in practice." FDIC & OCC Br. 24, *In re Rent-Rite Superkegs West Ltd.*, No. 1:19-cv-01552-REB (D. Colo.), Dkt. No. 11.

Second, plaintiffs' own complaint provides evidence of "significant interference." Contrary to their blithe and unsupported argument (at 38) that requiring non-savings associations to pay interest on escrow has a "minimal (if any) effect on the marketability of the loan," plaintiffs invoked the district court's subject matter jurisdiction under the Class Action Fairness Act, 28 U.S.C. § 1332(d), which requires that the amount in controversy for this California-only class exceed $5 million. ER27. If potential purchasers risk paying millions of dollars in unforeseen interest on loans they acquire from savings associations, those purchasers will self-evidently be hesitant to engage in such transactions, resulting in a far greater effect on the loans' marketability than the "minimal" burden plaintiffs claim.

Courts have warned against the unintended consequences such legal uncertainty would create. For example, the Sixth Circuit explained that requiring the FDIC to comply with state-law usury defenses on notes it acquired through a purchase and assumption transaction would "prevent otherwise desirable … transactions by making the transactions more expensive than liquidations and by forcing the FDIC to examine the bank's files to determine the value of its notes in light of the defenses to them." *FDIC v. Leach*, 772 F.2d 1262, 1266 (6th Cir. 1985). The same result would follow here, which would significantly interfere with savings association lending.

Plaintiffs insist (at 3, 35, 39) that any significant interference with savings association lending is limited because WaMu no longer exists. They cite no authority for the proposition that a state-law rule that would apply to *all* federal savings associations somehow escapes scrutiny in this case because the *one* savings association at issue failed. The result they are advocating for would not be limited to purchasers or assignees of WaMu-originated loans, but would extend to all savings associations and the entities that purchase or acquire their loans. That population is large: There are currently 305 savings associations operating in the United States, with 21 headquartered in the Ninth Circuit, BPI Amicus Br. 4 (citing FDIC, *Institution Directory Report – Insured Savings Institutions with Federal Charter*), and savings associations hold over $197 billion in real estate loans, *id.* at 5.

Finally, the principles of this case extend beyond California Civil Code § 2954.8. Under the result plaintiffs are urging, purchasers and assignees of savings association-originated loans would not be able to rely on the terms of the loans they acquire, but would instead have to determine if any of those terms (not just those related to interest on escrow accounts) change after transfer. This burdensome exercise would make other financial institutions hesitant to purchase savings association-originated loans, significantly interfering with the associations' power to sell.

2. Plaintiffs misunderstand what congressional intent controls the preemption inquiry.

The parties agree that congressional intent provides the touchstone for any preemption analysis. *See, e.g.*, Pl. Br. 3, 39. Where they differ, however, is over *which* Congress's intent controls. In plaintiffs' view, the Court should ignore the plain language of the statute making explicit savings associations' federal power to sell loans: The 1978 amendment that added this language is entitled to "limited weight," plaintiffs contend, because "'the views of subsequent Congresses cannot override the unmistakable intent of the enacting one,'" and the 1933 Congress that enacted HOLA made no mention of a secondary market. *Id.* at 40.

This argument is plainly meritless. First, the relevance of the 1978 amendment is not to serve as post-enactment legislative history indicating the meaning of a 1933 law. Rather, the relevance of the 1978 amendment is that it is the very law governing this case. And Congress's amendment of *the text of HOLA itself* makes clear that savings associations have the power to sell residential mortgage loans. *See International Bhd. of Teamsters v. United States*, 431 U.S. 324, 354 n.39 (1977) ("It is the intent of the Congress that enacted [the section] … that controls.").

Second, regardless of Congress's duly enacted amendments to HOLA itself, the Supreme Court has explained that HOLA was "enacted hurriedly and its legislative history … is somewhat sparse." *de la Cuesta*, 458 U.S. at 163. But one

thing that is clear from that legislative history is that Congress did not intend to spell out every rule for federal savings associations in the statute itself. Rather, Congress looked to a federal agency to issue such rules, giving the FHLBB (later the OTS) "plenary authority to issue regulations governing federal savings and loans." *Id.* at 160. Indeed, "[n]owhere [in the 1933 legislative history] is there a suggestion of any intent somehow to limit the Board's authority." *Id.* at 164. And both the FHLBB and OTS have shared the view that removing HOLA preemption from a savings association-originated loan once that loan is in the hands of a non-savings association could interfere with savings associations' federal power to sell loans and disrupt the secondary market that Congress intended to support. *See infra* at 18-19.

3. Plaintiffs' efforts to disparage the federal agencies' guidance are meritless.

HOLA and its implementing regulations explicitly authorize federal savings associations to sell mortgages; HOLA's regulations provide that any state laws that restrict that federal power are preempted; and California Civil Code § 2954.8, as applied, interferes with a savings association's right to sell mortgages because it would prescribe the terms on which the association can sell its loans. Accordingly, the Court need not even consider the agencies' interpretation of their own regulations, as those regulations unambiguously make clear that HOLA preempts California Civil Code § 2954.8 as applied to this case. *Cf. Kisor v. Wilkie*, 139 S.

Ct. 2400, 2415 (2019) ("[A] court must 'carefully consider[ ]' the text, structure, history, and purpose of a regulation, in all the ways it would if it had no agency to fall back on. Doing so will resolve many seeming ambiguities out of the box, without resort to *Auer* deference." (second brackets in original)).

Even if the OTS's preemption regulations were ambiguous (and they are not), the agency opinion letters indicating that HOLA preemption survives the transfer of a loan from a savings association to a third party "must be given controlling weight under *Auer v. Robbins*." *Silvas*, 514 F.3d at 1005 n.1 (citing 519 U.S. 452 (1997)).[3]

In 2003, the OTS found that a New Jersey law containing provisions of the type listed in 12 C.F.R. § 560.2(b)(10) was preempted, referring specifically to Section 560.2(b)(10)'s preemption of "state laws on … sale" of mortgages. OTS Opinion Letter, P-2003-5, 2003 WL 24040104, at *3. The OTS also recognized "the general principle that loan terms should not change simply because an originator entitled to federal preemption may sell or assign a loan to an investor that is not entitled to federal preemption." *Id.* at *4 n.18.[4] This opinion was

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[3] Notwithstanding plaintiffs' mischaracterization (*see* Pl. Br. 44-45), courts consider an agency's interpretation if the statute or regulation is "silent *or* ambiguous." *Barboza v. California Ass'n of Prof'l Firefighters*, 799 F.3d 1257, 1267 (9th Cir. 2015) (emphasis added).

[4] Plaintiffs contend that the OTS only reached the conclusion it did because "the NJ Act's comprehensive set of lending regulations, even as applied to non-

longstanding. In 1985, the FHLBB opined that "state laws or regulations which would impose upon federal associations obligations to pay interest on escrow accounts other than those provided for in their loan contracts are preempted," FHLBB Op. General Counsel, 1985 FHLBB LEXIS 178, at *4, and that "such preemption would exist regardless of whether the loans in question are sold by the federal association to a third party," *id.* at *5. The latter opinion was not just an afterthought (Pl. Br. 41), but one of the core questions the FHLBB addressed. *See* 1985 FHLBB LEXIS 178, at *1. Accordingly, to the extent 12 C.F.R. § 560.2 is ambiguous (which it is not), the agencies' consistent opinion—implicating their substantive expertise—that HOLA preemption follows a loan controls. *See Kisor*, 139 S. Ct. at 2417.[5]

FSAs, would likely substantially interfere with the uniform scheme of federal lending regulation," citing *Barnett Bank of Marion Cty., N.A. v. Nelson*, 517 U.S. 25, 33 (1996), which addressed preemption under the NBA. Pl. Br. 43. But the OTS's opinion never mentions the NBA and only cites *Barnett Bank* in noting that "[t]he comprehensiveness of the HOLA language demonstrates that Congress intended the federal scheme to be exclusive." 2003 WL 24040104, at *2 & n.10.

[5] *Wyeth v. Levine*, 555 U.S. 555 (2009), does not mandate a different result. First, Congress had not authorized the Food and Drug Administration (FDA) to preempt state law, *id.* at 576; with HOLA, Congress gave plenary authority to the federal agencies to ensure savings associations could operate efficiently. Second, in arguing for preemption, Wyeth relied on the preamble to an FDA regulation that did not itself have a preemption provision, *id.* at 575; here, the OTS regulations themselves preempted the field. Third, the preamble reversed the FDA's own longstanding position, *id.* at 577-578; here, the agencies have consistently reiterated that HOLA preemption follows the loan, *see supra* at 18-19.

II. BY THEIR TERMS, PLAINTIFFS' MORTGAGES PRECLUDE APPLICATION OF CALIFORNIA CIVIL CODE § 2954.8

For the reasons just discussed, HOLA preempts the application of California Civil Code § 2954.8 as applied to plaintiffs' WaMu-originated mortgages, regardless of who purchased the loans. That is a matter of federal banking law. This conclusion also follows from contract law. By explicitly choosing, as a term of their mortgages, to have federal law (*i.e.*, HOLA) apply to the exclusion of conflicting state law, plaintiffs agreed that the lender would not have to pay interest on escrow. And by agreeing that "[t]he covenants and agreements" of their mortgages "shall bind … and benefit the successors and assigns of" WaMu, plaintiffs also acknowledged that this term would apply regardless of whether the loan was transferred or sold.

Plaintiffs do not dispute that their mortgages explicitly chose to have federal law dictate whether interest would be paid on escrow accounts: The mortgages provide that no interest need be paid on escrow "[u]nless … Applicable law requires" it; "Applicable law" includes federal and state law; and, as plaintiffs concede (at 49), where "the mortgage provision incorporates federal and state law … the state law must yield." The "Applicable" federal law that governed the mortgages at their origination was HOLA and, as discussed above, HOLA preempts any state law requiring interest to be paid on escrow. As a result, plaintiffs agreed—as a contract term—that the lender would be freed from paying

interest on their escrow accounts. That contract provision controls regardless of who holds the mortgage at any particular point in time.[6]

Plaintiffs' principal response on this point is to argue that Chase waived it, contending that Chase failed to "interpret any language in the Plaintiffs' mortgages" in the district court, or to cite *Flagg v. Yonkers Savings & Loan Ass'n, FA*, 396 F.3d 178 (2d Cir. 2005), and *de la Cuesta*. *See* Pl. Br. 47-48. Both arguments are wrong.

Chase expressly pointed to "Plaintiffs' Deeds of Trust" in arguing that "the broad preemptive [HOLA] regime continues to be the relevant law" to determine whether California Civil Code § 2954.8 applied. SER16. And Chase explained, at length, how the mortgage provisions discussed above yielded this conclusion. SER17 n.8. The point could not have been more clearly made: Chase argued that "HOLA preemption informs the 'applicable law' incorporated into the 'terms' of the Deeds of Trust," and urged the district court to consider the application of HOLA "in construing the terms of those loans." SER23.

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[6] Plaintiffs' deeds are variations of the uniform Fannie Mae and Freddie Mac instrument. Chase Br. 10 & 37 n.11. The general term "Applicable Law" allows the many financial institutions that transact with those entities to use these instruments, and what law is "applicable" will vary depending on the identity of the original contracting parties. But once those parties enter into the contract, its terms—including the applicable law that governed at execution—do not change.

Chase also invoked the relevant authority. It quoted *Flagg*'s rejection of plaintiffs' argument that "a provision in the mortgage stating that the contract was governed by 'federal law and the law that applies in the place where the Property is located'" obligated a savings association to comply with a state law requiring the association to pay interest. SER19 (quoting *Flagg*, 396 F.3d at 186). And it discussed at length the OTS's identical conclusion that a "reference in [a] mortgage loan document to the law of the place the property is located … , together with a reference to federal law, is insufficient to establish a contractual agreement to pay interest on escrow funds.'" SER19 n.10 (quoting OTS Opinion Letter, P-2003-7, 2003 WL 24040106, at *2 (Oct. 6, 2003)). The OTS quoted *de la Cuesta* for the proposition that a provision in the "deeds of trust stating that they were to be governed by the law of the jurisdiction in which the property is located" did not "constitute[] an agreement to be bound by local law." 2003 WL 24040106, at *3.

On the merits of Chase's contract claims, plaintiffs have little to say except to repeat their preemption argument that HOLA does not apply to Chase as a national bank. *See, e.g.*, Pl. Br. 48-49, 51. But even if that were true as a matter of federal banking law—it is not, for the reasons discussed above—it does not matter for purposes of interpreting the terms of the parties' contracts. The assignment language of the mortgages—providing that "[t]he covenants and agreements of this

Security Instrument shall bind … and benefit the successors and assigns of" WaMu—underscores the point. ER42, 72, 99, 124, 151, 178, 201. Consistent with the basic tenet that an assignee to a contract "'stands in the shoes' of the assignor," 1 Witkin, *Summary of Cal. Law, Contracts* § 758 (11th ed. 2018), this provision means that, just as WaMu was under no contractual obligation to pay interest on plaintiffs' escrow accounts, Chase—as the successor and assign of WaMu—is entitled to the same benefits.

Indeed, the parties were free to decide that HOLA would govern escrow accounts maintained under the mortgages, and that is precisely what they did. That does not make HOLA preemption "a contractual right to be freely assigned," as plaintiffs contend (at 49); it simply means that the parties agreed to a broadly-used deed of trust that provided for no interest to be paid on escrow unless the "Applicable Law" (for this WaMu contract, HOLA) required it. *See Barzelis v. Flagstar Bank, F.S.B.*, 784 F.3d 971, 974 (5th Cir. 2015) (irrespective of what federal preemption law provides, "a bank and a borrower [may] voluntarily agree[] to substantially the same protections in their contract"). Once they reached that agreement, the term freeing the lender from an obligation to pay escrow interest stuck. If the mortgages had provided that the lender need not pay interest, *regardless* of applicable law, there should be no question that Chase, under the deeds' terms, would not be obligated to pay interest. That is in effect what the

parties agreed to: Because applicable law did not require WaMu to pay interest, Chase succeeded to contracts with a term that freed the lender from paying interest on escrow funds.[7]

Madden and the two district court cases that plaintiffs cite (at 49-50) are of no help. *Madden* held that, as a matter of federal banking law, application of state usury law to a third-party debt buyer would not significantly interfere with a national bank's exercise of its federally authorized powers; it did not address what law would apply under the relevant credit-card agreement's choice-of-law provision or whether "[p]reemption by a federal statute" is a "transferable 'contract benefit' that may be assigned" (Pl. Br. 49). *Gerber v. Wells Fargo Bank, N.A.*, 2012 WL 413997 (D. Ariz. Feb. 9, 2012), likewise did not address a contract law argument. *Davis v. Wells Fargo, N.A.*, 2016 WL 7116681 (E.D. Cal. Dec. 6,

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[7] Plaintiffs disparage *Olvera v. Blitt & Gaines, P.C.*, 431 F.3d 285 (7th Cir. 2005), and *Progressive Consumers Federal Credit Union v. United States*, 79 F.3d 1228 (1st Cir. 1996), but those cases prove the same point at issue here. In *Olvera*, the question was whether "the assignee … [was] free to charge the same interest rate that the assignor … charged the debtor," even if the assignee independently could not charge that rate under the state statute. 431 F.3d at 286; *see also id.* at 287. It was: "[O]nce assignors were authorized to charge interest, the common law kicked in and gave the assignees the same right, because the common law puts the assignee in the assignor's shoes, whatever the shoe size." *Id.* at 289. And in *Progressive*, the original mortgagee assigned its interest in the mortgage to Progressive, which meant that Progressive was entitled to "assert any equitable rights and defenses that" the original mortgagee could have asserted because "the assignee of a mortgage succeeds to all of the assignor's rights, power and equities." 79 F.3d at 1238.

2016), is a magistrate judge's report and recommendation; it simply cites *Gerber*, and the district court's decision adopting the recommendation does not cite to or rely on this aspect of the magistrate judge's reasoning. *See* 2017 WL 729541 (E.D. Cal. Feb. 23, 2017).[8]

CONCLUSION

The judgment of the district court should be reversed and the case remanded with instructions to enter judgment in favor of Chase.

Respectfully submitted,

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[8] *Davis* is also factually distinguishable: There, the borrower sued Wells Fargo, a national bank, for negligence and fraud. Wells Fargo argued that these claims were preempted by HOLA because the borrower's mortgage had been originated by Wachovia, a federal savings association; in support, Wells Fargo pointed to language in the deed of trust providing that the instrument would be governed by "'federal law and federal rules and regulations including those for federally chartered savings institutions.'" 2016 WL 7116681, at *7. The court rejected the argument that Wells Fargo could insulate its own tortious (*i.e.*, noncontractual) conduct by pointing to a mortgage provision. Here, however, the dispute turns on what bargain the parties struck, and the terms of the contract prescribe that the lender is not obligated to pay interest on escrow.

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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I hereby certify that on this 27th day of November, 2019, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit using the appellate CM/ECF system. I certify that all participants in the case other than Professor Adam J. Levitin are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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November 27, 2019