No. 81896-7

J.M. JOHNSON, J. (dissenting)—In the financial crisis of the Great Depression, the United States Congress, by statute, created an agency to enact rules that expressly "occup[y] the entire field of lending regulation for federal savings associations." 12 C.F.R. § 560.2(a). The federal regulatory system over these banks includes a limited and narrow exception for state laws of general applicability that "only incidentally affect the lending operations of Federal savings associations . . . ." 12 C.F.R. § 560.2(c). Under the supremacy clause of the United States Constitution article VI, clause 2, all state laws affecting these organizations' lending practices are preempted via field preemption. Because a successful lawsuit by Anne and Chris McCurry and, especially, the national class action they seek to bring would effectively regulate a federal savings bank, the McCurrys' class action claims are preempted. On that basis, the trial court correctly dismissed the

McCurrys' claims under CR 12(b)(6). The majority's opinion contradicts this regulatory policy founded on the interstate commerce clause of the United States Constitution article I, section 8, clause 3 and statutes and regulations enacted by the United States Congress and a federal agency with expressly delegated powers. Therefore, I dissent.

Preemption

In 1933, Congress enacted the Home Owners' Loan Act (HOLA), 12 U.S.C. § 1461, "to restore the public's confidence in savings and loan associations at a time when 40% of home loans were in default." *Bank of Am. v. City & County of San Francisco*, 309 F.3d 551, 559 (9th Cir. 2002). HOLA was a regulatory system for banks designed to ameliorate the widespread lack of home-financing services and respond to "'the inadequacies of the existing state [regulatory] systems.'" *Fid. Fed. Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 159-60, 102 S. Ct. 3014, 73 L. Ed. 2d 664 (1982) (quoting *Conference of Fed. Sav. & Loan Ass'ns v. Stein*, 604 F.2d 1256, 1257 (9th Cir. 1979), *summarily aff'd*, 445 U.S. 921, 100 S. Ct. 1304, 63 L. Ed. 2d 754 (1980)). By federal legislation, the Office of Thrift Supervision (OTS) was empowered to promulgate regulations for this federal

system. 12 U.S.C. §§ 1462a, 1463(a), 1464(a).

Under this authority, OTS has created comprehensive regulation that "occupies the entire field of lending regulation for federal savings associations," which includes Chevy Chase Bank, FSB. 12 C.F.R. § 560.2(a).[1] This regulation preempts all "state laws purporting to regulate *or otherwise affect* their credit activities." *Id*. (emphasis added). However, 12 C.F.R. § 560.2(c) provides that certain generally applicable state laws, including contract and commercial law, are not preempted if "they only

[1] 12 C.F.R. § 560.2(a) reads in its entirety as follows:

> Occupation of field. Pursuant to sections 4(a) and 5(a) of the HOLA, 12 U.S.C. 1463(a), 1464(a), OTS is authorized to promulgate regulations that preempt state laws affecting the operations of federal savings associations when deemed appropriate to facilitate the safe and sound operation of federal savings associations, to enable federal savings associations to conduct their operations in accordance with the best practices of thrift institutions in the United States, or to further other purposes of the HOLA. To enhance safety and soundness and to enable federal savings associations to conduct their operations in accordance with best practices (by efficiently delivering low-cost credit to the public free from undue regulatory duplication and burden), OTS hereby occupies the entire field of lending regulation for federal savings associations. OTS intends to give federal savings associations maximum flexibility to exercise their lending powers in accordance with a uniform federal scheme of regulation. Accordingly, 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, except to the extent provided in paragraph (c) of this section or § 560.110 of this part. For purposes of this section, "state law" includes any state statute, regulation, ruling, order or judicial decision.

incidentally affect the lending operations of Federal savings associations or are otherwise consistent with the purposes of paragraph (a) of this section." Thus, any generally applicable state law that has a greater than incidental impact on a federal savings association's lending operations is not enforceable because it is preempted by the federal scheme.

We give deference to agency interpretations of their own regulations. *Port of Seattle v. Pollution Control Hearings Bd.*, 151 Wn.2d 568, 593, 90 P.3d 659 (2004) (citing *Postema v. Pollution Control Hr'gs Bd.*, 142 Wn.2d 68, 77, 11 P.3d 726 (2000)). OTS has stated that 12 C.F.R. § 560.2 "paragraph (c) is intended to be interpreted narrowly. Any doubt should be resolved in favor of preemption." OTS, Dep't of Treasury Rules & Regulations, 61 Fed. Reg. 50951-01, 50966-67 (Sept. 30, 1996). Further, unlike other areas of federal preemption of state law, there is no presumption against preemption here because there is a significant history of federal regulation of federal savings associations. *See United States v. Locke*, 529 U.S. 89, 108, 120 S. Ct. 1135, 146 L. Ed. 2d 69 (2000). Given (1) the legislative intent of HOLA's and OTS's duty to create a flexible, nationwide regulatory system for federal savings associations; (2) the significant history

of federal regulation of federal savings associations; and (3) our deference to agency interpretations of their own regulations, we are required to presume preemption and carefully examine any state laws affecting federal savings associations' lending practices.

Allowing the McCurrys' claims to proceed will have a greater than incidental impact on Chevy Chase. The impact is obviously aggravated by the nationwide character of the class action. The majority is correct that our state contract and commercial laws are laws of general applicability. Majority at 8. However, the majority then makes several errors in its analysis. First, the majority focuses on whether these generally applicable laws only incidentally affect loan-related fees.[2] Paragraph (c) is concerned with state law impacts on lending operations generally, not merely loan-related fees. Further, the federal regulation clearly indicates that even laws of general applicability have the potential to have a more than incidental impact

[2] The majority incorrectly states "the dispositive issue" for preemption under 12 C.F.R. § 560.2(c) "is whether the generally applicable state law more than incidentally affects [loan-related] fees." Majority at 10; s*ee also* majority at 9 ("Forcing Chevy Chase to adhere to the terms of its contract only incidentally affects the loan-related fees . . . ."). The majority also suggests state contract and commercial laws have only incidental effects on federal loan operations because they are laws of general applicability. *See* majority at 9, 14. The majority thus further errs in equating general applicability with incidental impact.

on lending practices. Second, the majority states that any effect the McCurrys' lawsuit has on Chevy Chase will be incidental "to the purpose of the contract law." Majority at 14. Again, federal law dictates we focus on whether Chevy Chase's lending operations will be more than incidentally impacted. 12 C.F.R. § 560.2(c). A lawsuit may have a minor impact on contract law or a certain contract while having a substantial impact on lending operations. Finally, the majority improperly limits the definition of "incidental" to something "unintended, ancillary, and subordinate." Majority at 14. The definition of "incidental" also includes the notion of slightness of effect. *See* Webster's Third New International Dictionary 1142 (2002) ("incidental" definition includes "lacking effect, force, or consequence"). Because federal law requires us to resolve any doubt in favor of preemption, 61 Fed. Reg. 50951-01, 50966-67, we should not omit part of a dispositive word's meaning.

Even a cursory examination of the likely effects of the McCurrys' suit against Chevy Chase reveal more than incidental impacts on Chevy Chase's lending practices. The conflict is even more obvious if the (sometimes conflicting) laws of many states are applied to national banks. This was the

basis for the United States Constitution's commerce clause empowering Congress to regulate interstate commerce, which undoubtedly includes complex, nationwide lending transactions.

The McCurrys are the named plaintiffs in a putative nationwide class action against Chevy Chase. The subject matter of this suit involves an aspect of Chevy Chase's lending practices relating to fees charged for paying off home loans around the nation. Further, the McCurrys are seeking "an injunction and/or declaratory relief permanently forbidding [Chevy Chase] from committing the practices alleged herein in the future or declaring the same unlawful." Clerk's Papers at 9. If granted, this relief will necessitate alterations in Chevy Chase's lending operations, including fee collection practices and the formatting and content of Chevy Chase's payoff statements.[3] In sum, Chevy Chase's conduct relating to its lending operations and the very forms it uses in those operations will be scrutinized and

[3] In addition to not satisfying the requirements of 12 C.F.R. § 560.2(c), this relief would violate subsection (b), which lists explicit examples of preempted state law. State courts and legislatures cannot impose requirements on the servicing of mortgages or on the content of "billing statements, credit contracts, or other credit-related documents." 12 C.F.R. § 560.2(b)(9), (10). The injunctive relief the McCurrys seek would impose requirements on the content of Chevy Chase's billing and credit-related documents employed in the servicing of mortgages in violation of federal law. *See*, *e.g.*, *Rivera v. Wachovia Bank*, No. 09 CV 0433 JM (AJB), 2009 WL 2406301 (S.D. Cal. Aug. 4, 2009) (breach of contract claims preempted by 12 C.F.R. § 560.2(b)(4), (9), and (10)).

subjected to a Washington court order commanding that the same be altered if we allow this suit to continue. It is highly erroneous to assert that the resulting impact on Chevy Chase's lending operations will be incidental only. As noted previously, applying the different laws of many states would make for incomprehensible regulation.

Further, Chevy Chase need not receive an adverse judgment at trial for its lending operations to be impacted in a more-than-incidental manner. The McCurrys envision extensive discovery to determine the composition of their putative nationwide class. This discovery will also doubtlessly require extensive expenditures on Chevy Chase's part. Other disruptive effects inherent in nationwide class actions, including researching and arguing the nature and impact of state contract, commercial, and consumer protection laws of every applicable state (perhaps all 50), will also induce great expense. These expenses will incentivize Chevy Chase to alter its lending practices, whether those claims are meritorious or not. This kind of pressure is more than incidental on lending activities, and it is irrelevant that the impact is indirect. The federal regulations are clear that state laws, even those generally applicable, are preempted if they have a more than incidental impact

on federal savings associations' lending operations, and that we should resolve doubt in favor of preemption.

OTS, not 50 state court (or legislative or agency) systems, has been charged by Congress with regulating and enforcing this category of interstate commerce. Under the supremacy clause, and as other courts have recently concluded, we must defer to Congress and OTS.[4] *See*, *e.g.*, *Rivera v. Wachovia Bank*, No. 09 CV 0433 JM (AJB), 2009 WL 2406301, at *2 (S.D. Cal. Aug. 4, 2009) (breach of contract claim preempted by HOLA); *Spears v. Wash. Mut., Inc.*, No. C-08-00868 RMW, 2009 WL 2761331, at *4-6 (N.D. Cal. Aug. 30, 2009) (breach of contract claim preempted by HOLA); *Wilkerson v. World Sav. & Loan Ass'n*, No. CIV S-08-2168 LKK DAD PS, 2009 WL 2777770, at *3 (E.D. Cal. Aug. 27, 2009) (tort claims preempted by HOLA).

Motion to Dismiss

Because the McCurrys' claims are preempted, the superior court's

[4] It is irrelevant whether we are familiar with OTS's procedures for protecting consumers or whether we feel those procedures are adequate. This case is about whether the McCurrys' claims were properly dismissed at trial, not whether OTS regulation is an adequate safeguard. The adequacy of OTS regulation is properly left in the hands of Congress and OTS itself, which are in better positions to take evidence and modify OTS procedures as appropriate.

dismissal of their claims was proper. However, I further note that the McCurrys attempted to raise a fraud claim in their response to Chevy Chase's CR 12(b)(6) motion by suggesting hypothetical facts that bear no logical relation to the claims raised in their complaint. Because the McCurrys failed to comply with court rules, their fraud claim was improperly raised and any related hypothetical facts provide no basis for the trial court's CR 12(b)(6) decision.

The McCurrys argued at their CR 12(b)(6) hearing and before this court that Chevy Chase may have fraudulently charged a $2 notary fee when in fact nothing was notarized. However, there is no fraud allegation in their complaint. If the McCurrys had a good-faith belief that fraud occurred, the proper mechanism to include that claim was via a motion to amend their complaint under CR 15, "Amended and Supplemental Pleadings." The burden imposed on amending a complaint under CR 15 is light: a party may amend "once as a matter of course at any time before a responsive pleading is served," or if such a pleading has been served, "by leave of court . . . and leave shall be freely given when justice so requires." CR 15(a).

Our rules require all claims to be raised in a complaint or amended

complaint, not imported under the guise of "hypothetical facts" that bear no relation to the formal complaints in response to a CR 12(b)(6) motion. CR 8, 15. The McCurrys' complaint only contends that Chevy Chase improperly conditioned conveyance of the deed of trust on the McCurrys' payment of notary and fax fees. No mention of fraud exists, so the trial court could not properly consider hypothetical facts that bear no relation to a fraud claim when considering Chevy Chase's CR 12(b)(6) motion.[5]

Conclusion

Chevy Chase Bank, FSB is a national financial institution engaged in complex interstate commerce and headquartered in the Washington D.C./Baltimore metropolitan area. Washington state laws have been preempted and Washington state courts may not interfere in federally regulated matters of complex, interstate banking commerce. Indeed, our nation's founders realized that regulation of such interstate commerce is best done by the federal government. *See* U.S. Const. art. I, § 8, cl. 3. In the midst of the Great Depression, Congress passed legislation empowering a

[5] My discussion of CR 12(b)(6) should not be confused with the Fed. R. Civ. Pr. 12(b)(6) standard articulated by the United States Supreme Court. *See Ashcroft v. Iqbal*, ___ U.S. ___, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007). I do not suggest we modify our rule to align with the federal "plausible" standard in our decision today.

federal agency, now OTS, to regulate federal banks and preempting state laws that have greater than incidental impact. These regulations are binding on Washington state laws by virtue of the supremacy clause. U.S. Const. art. VI, cl. 2.

The McCurrys' claims are thus preempted because this suit will have more than incidental effects on lending practices of Chevy Chase, a federally regulated bank. I dissent.

AUTHOR:
Justice James M. Johnson

WE CONCUR:

Justice Susan Owens

Justice Charles W. Johnson