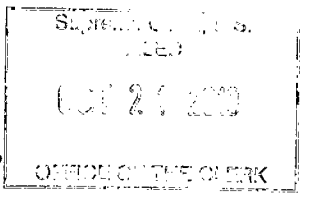
19-7774

No. _____

ORIGINAL

In the Supreme Court of the United States



RONALD MUHAMMAD (AND WIFE W. MUHAMMAD),
Petitioners,

v.

WELLS FARGO BANK, N.A.,
Respondent.

On Petition for a Writ of Certiorari to the
COURT OF APPEALS FOR THE 7TH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

RONALD MUHAMMAD
4345 SOUTH VINCENNES AVE.
CHICAGO, IL 60653

October 21, 2019

1. QUESTION PRESENTED: Is the 7th circuits decision appropriate for this courts review, and if so why must this court hear and decide this?

Proposed Answer: The 7th Circuit's decision is appropriate for this Court's review because it involves an issue "fundamental to the further conduct of this case".

2. QUESTION PRESENTED: Would any irreparable harm, or abuse of discretion, occur should this court not grant Cert.?

Proposed Answer: "Sweeping" new rules of federal preemption would result from a denial of certiorari, not a grant.

3. QUESTION PRESENTED: Can the 7th circuits decision and this courts precedent coexist or be reconciled?

Proposed Answer: The 7th Circuit's decision cannot be reconciled with this Court's precedent.

RULE 29.6 STATEMENT

Petitioners, RONALD MUHAMMAD (AND WIFE W. MUHAMMAD), are individuals NOT publicly held companies.

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INTRODUCTION

On January 17, 2019 the court issued an order requiring that both appellant and appellee file, on or before January 31, 2019, a brief memorandum explaining why the court should NOT dismiss the appeal for lack of jurisdiction. Appellant filed timely, and the other side filed timely, it appears that the court below did not have this information and in their consideration did not include what the Appellant communicated in his submission. As a result on consideration of the Appellees brief memorandum of March 1, 2019 ONLY the court below dismissed the appeal due to a finding of lack of jurisdiction.

The court has stated that it has held, and that it has been upheld that, a dismissal and remand to state court for defect in removal or want of jurisdiction is not reviewable whether it is right or wrong. See The Northern League, Inc v. Gidney, 558 F.3d 614 (7th Cir. 2009) (Per Curiam). They stated that they do not have jurisdiction over a state foreclosure matter however the assertions of the other side presented federal questions under the uniform federal lien foreclosure laws and others.

But specifically, the supreme court has held that in the field of real property secured transactions, there exists a pervasive scheme of statutory and judicial protections for debtors. Although the individual rules vary from state to state, most were enacted to prevent creditor overreaching. Under

federal law, debtors may lose their state law protections if they have any direct connection with the Federal Housing Administration (FHA), the Small Business Administration (SBA), or the Veterans Administration (VA). This results from the federal agency's involvement in transactions through a direct loan, a full or partial guarantee of a private loan, or a partial guarantee as a substitute for an initial down payment. The agency may later be in federal court litigating the transaction by foreclosing on the mortgage and seeking a judgment for the deficiency. This situation presents a federal-state choice of law question. In diversity cases, state law applies. Where a federal statute is clearly on point, federal law applies."

Since 1836, Congress, in certain and unchanged terms, has provided that a U.S. federal question or state law that creates tension between federal jurisdiction and state jurisdiction over a matter falls into the federal schemes authority.

ARGUMENT A. The 7th Circuit's decision is appropriate for this Court's review because it involves an issue "fundamental to the further conduct of this case"

When an issue is "*fundamental* to the further conduct of [a] case" this Court does not hesitate to review final or non-final judgments. *Land v. Dollar*, 330 U.S. 731, 735 n.2 (1947) (emphasis added). *Land*, for instance, involved a non-final judgment

reinstating a dismissed case. *Id.* at 734. This Court nevertheless granted the petition for a writ of certiorari because of the importance of the question presented. *Id.* at 734.

Recently in *Sprint Communications Co. v. APCC Services, Inc.*, this Court reviewed a non-final judgment of the Court of Appeals for the District of Columbia Circuit involving a question of assignee standing. 128 S. Ct. 2531, 2535 (2008). As this Court explained, certiorari was appropriately granted because the D.C. Circuit's holding that the plaintiffs had standing as assignees involved one of "the most basic doctrinal principles"—Article III, §2's restriction that the federal "judicial Power" may only resolve "Cases" and "Controversies." *Id.* (citing U.S. Const. art. III, §2).

This case similarly presents an issue of standing that is "fundamental to the further conduct" of the case. If Respondent lacks standing, no further proceedings may occur before the District Court because it would lack the Article III power necessary to hear this case. If it does exist, then the decision below is a non-final decision that has the look and feel of finality and unreviewability but it is a farce.

B. "Sweeping" new rules of federal preemption would result from a denial of certiorari, not a grant

This dispute arises from the 7th Circuit's flawed conclusion that the *states* and *foreign governments* may dictate who has standing to enforce *federal* LIEN/REAL PROPERY COMMON LAW

rights. It is a wholly unnecessary dispute because, as the *Amici Curiae* point out, the Uniform Commercial Code ("U.C.C."), which the Federal Circuit relied on, applies only to *rights* in collateral, not *title* to collateral: "the provisions of this title with regard to rights and obligations apply *whether title to collateral is in the secured party or the debtor.*" *Amici Curiae* Br. at 10 (citing U.C.C. §9202 (Petitioners' Supplemental App. 1a)) (emphasis original). The U.C.C. does not "attempt to define whether the secured party is a 'legal' owner" and defers to "other rules of law" with respect to "location and source of title." U.C.C. §9-202 cmt. 3b[1] Because Section 261's requirement that assignments must be "by an instrument in writing," is such a rule of law, the U.C.C. defers to it. [2]

Given the U.C.C.'s ubiquity, *see Delaware v. New York*, 507 U.S. 490, 503-04 (1993) (stating that the U.C.C. "is the law in all 50 states and the District of Columbia"), the Federal Circuit's misunderstanding

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[1] Contrary to Respondent's assertions, the secondary sources that Respondent urges this Court to consider in support of the 7th Circuit's incorrect view of the U.C.C., *see, e.g.* Respondent's Br. at 31 (citing Thomas L. Bahrick, *Security Interests in Intellectual Property* ("Bahrick"), 15 A.I.P.L.A. Q. J. 30, 48 (1987)), acknowledge that the U.C.C. does not address questions of *title*. *See, e.g.*, Bahrick at 40 (stating that "[t]he UCC specifically provides that it supplies no answer to the question of whether title is in the debtor or the secured party upon the creation of a security interest" and that "the conventional security agreement does not operate to transfer title").

of this fundamental principal underlying the U.C.C. is an issue of national importance.

Respondent highlights the national importance of harmonizing *federal* and *state* regulations. For that very reason, this petition should be granted.

Petitioners agree with Respondent that the coexistence of competing *federal* and *state* regulations regarding the ownership of *lienholder rights* was "well-settled" before the Federal Circuit's decision. *See Id.* at 2. Although Respondent rightly points out that the LIEN/REAL PROPERY COMMON LAW Act does not displace every state law relating to federal intellectual property rights, *Id.* at 16, Respondent fails to inform this Court that when "the question of standing in LIEN/REAL PROPERY COMMON LAW cases" is involved, courts rely on "*federal law*," *not state law*. *See, e.g., Board of Trustees of Leland Stanford Junior Univ. v. Roche Molecular Sys., Inc.*, 583 F.3d 832, 841 (Fed. Cir. 2009) (emphasis added).

As this Court has noted, while the states are free to provide additional safeguards to LIEN/REAL PROPERY COMMON LAW transfers beyond Congress' written assignment requirement, *see, e.g., Allen v. Riley*, 203 U.S. 347, 356 (1906), the states are forbidden from enacting laws that "nullif[y] the laws of Congress which regulate [their] transfer, and destroy the power conferred upon Congress by the Constitution." *Id.* at 355. This case squarely presents the 7th Circuit's radical departure from this rule by allowing the *states* to circumvent Congress' rules for

determining which parties have standing to assert *federal removal* rights.[3]

C. The 7th Circuit's decision cannot be reconciled with this Court's precedent

This Court's landmark decisions interpreting the same language of the LIEN/REAL PROPERY COMMON LAW Act at issue here cannot be dismissed merely because they "predate the first version of the UCC by as much as 100 years or more." Congress' repeated use of consistent language in Section 261 since 1870 requires courts to apply the decisions of this Court interpreting that language: "[w]e must give the words of the [LIEN/REAL PROPERY COMMON LAW] statute the meaning they had in 1870, the year in which the current version of §261 was enacted." *In re Cybernetic Servs., Inc.*, 252 F.3d 1039, 1048 (9th Cir. 2001) (citing *Perrin v. United States*, 444 U.S. 37, 42 (1979)).

The adoption of the U.C.C. by the states is not a talismanic event that revoked the Supremacy Clause. U.S. Const. art. VI, cl. 2. Ever since Congress enacted the first LIEN/REAL PROPERY COMMON LAW Act in 1790, the rule is that "state regulation of intellectual property *must yield* to the extent it clashes with the balance struck by Congress in our

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[3] The Federal Circuit's decision and Respondent's position also require this Court to affirm the Federal Circuit's untenable holding that although *federal* law governs Section 261's bona fide purchaser defense, *see Rhone-Poulenc Agro, S.A. v. DeKalb Genetics Corp.*, 284 F.3d 1323, 1327-28 (Fed. Cir. 2002), *state* law governs Section 261's written assignment requirement, upon which the bona fide purchaser defense is based.

LIEN/REAL PROPERY COMMON LAW laws." *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 152 (1989) (emphasis added). To the extent the U.C.C. is contrary to this Court's interpretation of the Act's language,[4] it is the U.C.C. that must yield.

The 7th Circuit's decision, however, requires *federal* lien and consumer protection to yield to *state* creditor law. This, being contrary to this Court's precedent, is beyond the 7th Circuit's ability to decree.

Generally, real property loan transactions are not covered by a federal statute and are not before the court on diversity. Indeed, SBA, FHA, and VA loans and loan guarantees do not fit the definitions of diversity or federal question jurisdiction. No federal question is presented because resolution of questions involving real property does not require interpretation of the Constitution or an act of Congress. Where a federal agency is a party to a real property loan transaction, the federal district courts have jurisdiction because the United States is the plaintiff. Choice of federal or state law is ill-defined where jurisdiction is not founded on federal question or diversity. Where jurisdiction exists solely because the United States is a party, choice of law is determined on a case-by-case basis. This comment will examine this gray area and attempt to delineate appropriate standards to govern the choice of law issue where a federal agency is a party to a real property loan transaction. The author concludes that many courts

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[4] The U.C.C., properly interpreted, is entirely consistent with this Court's decisions because the U.C.C. deals with *rights* in collateral, not *title* to collateral.

have not applied the traditional preemption balancing test but instead have applied federal law without properly considering the issues in the context of real property loan transactions, thereby depriving a debtor of all state law protections. EXISTING CHOICE OF LAW RULES Preemption Although federal preemption traditionally involves a balancing of federal and state policies, the analysis in real property cases has been obscured. State debtor protections have been preempted in an overwhelming majority of real property loan transaction cases with only conclusory analysis of state and federal policies. Nevertheless, since state law has been the rule of decision on occasion, it is necessary to consider the arguments that have successfully brought about application of state law. Two theories have been suggested to define the status of state law. The first theory is that state law should apply of its own force where consistent with federal programs.'

This view has not been adopted by any court, but several have declined to decide the issue.' The second theory is that state law may be incorporated as the federal rule if, in substance, it would promote the objectives of the federal program." It is the second theory that has found acceptance in some courts. Where state law hinders rather than promotes the objectives of the federal program, a federal common law rule may be formulated-the rationale being that Congress did not intend for state law to defeat the purposes of federal legislation. Obviously, this federal common law rule may replace state debtor protections with protection of the federal investment.

These general preemption principles combined with the federal system of government can cause a variety of rules to be applied. Because federal courts can only incorporate state rules consistent with the federal program, one state's law may be adopted while a neighboring state's law may not be adopted. Where state law is incorporated as the federal rule, a different rule would be used in each state. In those states where the law is inconsistent with federal policy, the federal courts would fashion a federal rule to be applied only in those states.

In the absence of an individually negotiated contract or a specific choice of law provision in the contract, federal law has almost universally become the rule of decision. Federal law is applied as a consequence of the "need" for uniformity and protection of the federal fisc. Both the uniformity and federal fisc arguments have been taken from other areas of preemption law and have been applied without any real consideration of their meaning in real property loan transactions.

CONCLUSION

Federal common law has almost universally taken the place of state real property debtor protections. Talismanic use of the goals of uniformity and protection of federal revenues has led the 7th Circuit analysis away from the traditional balancing of the preemption doctrine to virtual automatic rejection of state law. The 7th Circuit has developed three additional factors to guide its choice of law decisions. Federal regulations on point will preempt state law. An individually negotiated contract,

coupled with a strong state interest or a choice of law provision in the contract, may outweigh the federal interest and result in application of state law. Under this analysis, state law has been applied in a few instances. The 7th Circuit has misapplied the uniformity argument and guarded the federal fisc too jealously.

The Appellant did file timely, but assuming arguendo that he did not – though he did – the fact is that this court cannot allow the tension between federal and state law to be perpetuated where Appellant objected timely to the claims of lack of jurisdiction and clearly showed why – and it is known in this judicial circuit – that the fed courts have authority in these matters where invoked.

Petitioners respectfully urge this Court to grant their Petition for a Writ of Certiorari to correct the 7th Circuit's error before it is followed and perpetuated throughout the nation.

Respectfully submitted,

By: Ronald Muhammad

RONALD MUHAMMAD (AND WIFE W. MUHAMMAD)
4345 SOUTH VINCENNES AVE.

CHICAGO, IL 60653

APPENDIX

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Appendix A Uniform Commercial Code §9-202

Sec. 9-202. Title to Collateral Immaterial. Except as otherwise provided with respect to consignments or sales of accounts, chattel paper, payment intangibles, or promissory notes, the provisions of this article with regard to rights and obligations apply whether title to collateral is in the secured party or the debtor.

OFFICIAL COMMENT

1. **Source.** Former Section 9-202.
2. **Title Immaterial.** The rights and duties of parties to a secured transaction and affected third parties are provided in this Article without reference to the location of "title" to the collateral. For example, the characteristics of a security interest that secures the purchase price of goods are the same whether the secured party appears to have retained title or the debtor appears to have obtained title and then conveyed title or a lien to the secured party.
3. **When Title Matters.**
    a. **Under This Article.** This section explicitly acknowledges two circumstances in which the effect of certain Article 9 provisions turns on ownership (title). First,

in some respects sales of accounts, chattel paper, payment intangibles, and promissory notes receive special treatment. *See, e.g.*, Sections 9-207(a), 9-210(b), 9-615(e). Buyers of 2a receivables under former Article 9 were treated specially, as well. *See, e.g.*, former Section 9-502(2). Second, the remedies of a consignor under a true consignment and, for the most part, the remedies of a buyer of accounts, chattel paper, payment intangibles, or promissory notes are determined by other law and not by Part 6. *See* Section 9-601(g).

b. **Under Other Law.** This Article does not determine which line of interpretation (e.g., title theory or lien theory, retained title or conveyed title) should be followed in cases in which the applicability of another rule of law depends upon who has title. If, for example, a revenue law imposes a tax on the "legal" owner of goods or if a corporation law makes a vote of the stockholders prerequisite to a corporation "giving" a security interest but not if it acquires property "subject" to a security interest, this Article does not attempt to define whether the secured party is a "legal" owner or whether the transaction "gives" a security interest for the purpose of such laws. Other rules of law or the agreement of the parties determines the location and source of title for those purposes.