

No. _____

In The
Supreme Court of the United States

LEANDER BACON AND IRIS I. DICK BACON,
Petitioners,

v.

UNITED STATES OF AMERICA;
NAVY FEDERAL CREDIT UNION ("NAVY FCU");
COMMONWEALTH ASSET SERVICES, LLC,
Respondents.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This case has involved an effort by a wounded combat veteran and his wife seeking (a) an injunction against eviction based on a disputed foreclosure of their home; and (b) rescission of the foreclosure and restoration to them of ownership of the home. Subsequent to the decision by the Fourth Circuit Court of Appeals (“the Court of Appeals”) below, (a) has become moot because one of the appellees, Navy Federal Credit Union, having previously obtained title from the United States of America, through the Veterans Administration (“the VA”), executed a deed to the home to an investor, which has filed an unlawful detainer summons against the wounded combat veteran, which is now pending in the Stafford County District Court. There remain no grounds for the petitioners to seek an injunction against eviction in this case because none of the appellees in this case now claims ownership of the home. Therefore, the appealable issue in this petition for certiorari is whether there are grounds to set aside the foreclosure.

The questions for consideration by this Court are as follows:

1. Whether the Bacons’ complaint in this case seeking *inter alia* restoration to them of title to their home, has constituted an “ejectment” action.
2. If the Bacons’ complaint is an “ejectment” action, whether their complaint is free of issue preclusion (by reason of eviction orders by Virginia state courts) because a Virginia statute provides that such

eviction orders do not result in issue preclusion in any later ejectment case.

3. If the Bacons complaint is free of issue preclusion, whether their complaint is nevertheless barred by the *Rooker-Feldman* doctrine because their complaint, which they were required to bring in federal court because the opposing claimant of title to their home at that time was the VA, sought both rescission of foreclosure and restoration of their title and also an injunction against eviction of them by the VA pursuant to the state eviction order.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Leander Bacon and Iris I. Dick Bacon (“the Bacons”) respectfully submit this petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit (“the Court of Appeals”)

OPINIONS AND ORDERS BELOW

The Court of Appeals issued an unpublished *per curium* opinion (App. 1) on December 13, 2021 and an Order on the same day (App. 3), and on February 22, 2022 issued an order denying the Bacons’ petition for rehearing *en banc* App. 24. The Court of Appeals affirmed an order by the United States District Court for the Eastern District of Virginia (“the District Court”) which is at App. 4, which dismissed the Bacons’ complaint with prejudice.

JURISDICTION

The Bacons’ complaint had to be filed in federal court because their complaint had to join the Veterans Administration (“the VA”) by suing the United States of America. The District Court entered a final order on June 12, 2020. The Bacons timely appealed on July 12, 2020. The court of appeals had jurisdiction to review the district court’s final judgment pursuant to 28 U.S.C. § 1291. The court of appeals filed its *per curium* opinion on December 13, 2021 and its order based on that opinion also on December 13, 2021 affirming the U.S. District Court. The court of appeals denied Petitioner’s timely petition for rehearing *en banc* on February 22, 2022. This Court’s jurisdiction rests on 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Because one of the defendants was the VA, sued as the United States of America, this case had to be filed in federal court, although it was based on Virginia contract law, which incorporated (as a matter of state law) Title 38 of the U.S. Code in effect at the time of the execution of the deed of trust on the Bacons' home, and the regulations of that statute. The only other statute involved in this case is a Virginia state statute, Va. Code Section 8.01-130.

STATEMENT OF THE CASE

The Bacons filed their complaint in the District Court seeking to prevent eviction based on a disputed foreclosure and seeking rescission of their foreclosure and return of ownership of their home to them. [Joint Appendix ("JA") before the Court of Appeals, pp. 5-42]¹ (The facts set forth hereinafter are not in dispute because this case was dismissed by the District Court, which was affirmed by the Court of Appeals on motions to dismiss in which, for purpose of such motions, the facts pled by the Bacons were taken as correct (although not legal conclusions). The Bacons pled those facts in the alternative. The facts pled by them and the procedures involved in litigation between the parties in this case are set forth below as follows:

¹ References to the Joint Appendix, (stated herein after as "JA" followed by the appropriate page(s), is to the Joint Appendix before the Court of Appeals in this case, of record in the ECF system of that Court in Case No. 20-1774 at Dkt 18.

The Bacons pled that in March 2014, they entered into a VA mortgage loan, insured by the VA, which included the following provision:

If the indebtedness secured hereby be guaranteed or insured under Title 38, United States Code, such Title and Regulations issued thereunder and in effect on the date hereof, shall govern the rights, duties, and liabilities of Borrower and Lender.

-- JA 6,7 79; Compl. ¶¶ 7, 10, 11, Exh. B, p. 1 of 3 of VA Guaranteed Loan and Assumption Policy Rider – VA GUARANTEED LOAN COVENANT)

In March 2014, one of the regulations to Title 38 of the U.S. Code was (and remains) 38 U.S.C. § 36.4350 providing, in part, the following:

The holder of a loan guaranteed or insured by the Secretary shall develop and maintain a loan servicing program which follow accepted industry standards for servicing of similar type conventional loans.

The Veterans Administration (“the VA”) prior to a March 20, 2017 foreclosure of the Bacons’ home, sent to Navy Federal Credit Union (“Navy Federal”) a request to postpone the foreclosure. (JA 7, 40; Compl. ¶ 17, Exh. C) The Bacons pled that the VA assured Leander Bacon prior to the foreclosure that it would request that Navy Federal postpone the foreclosure. (JA 7, Compl. ¶16). Navy Federal contended that if it had received that request prior to the foreclosure, it would have stopped the foreclosure (JA 7, 41, Compl. ¶ 19. Exh. D) but did

not receive it until after the foreclosure, at which Navy Federal made the high bid (*Id.*), for an amount the Bacons averred was substantially less than the value of the home. (JA 8, Compl. ¶ 22). The Bacons pled alternative grounds for rescission of the foreclosure, as follows:

- (A) Navy Federal actually received the VA request for foreclosure prior to the foreclosure so that, by going forward with the foreclosure anyway, Navy Federal breached nationally accepted lending practices thereby breaching the terms of the deed of trust which incorporated a VA regulation requiring the owner of the loan to comply with accepted industry standards. (JA 7, 8, 9, Compl. ¶ ¶ 11, 20, 22, 24, 25)
- (B) Alternatively, if the VA did not send the request for postponement in time for Navy Federal to receive it prior to the foreclosure, the VA breached an implied covenant of good faith and fair dealing incorporated into any contract by Virginia common law not to act in such a way as to deprive the other party to a contract of the essential rights of the contract. (JA 11, Compl. ¶ 33)² The Bacons

² The issue of whether the Bacons pled a claim of breach of an implied covenant of good faith and fair dealing was not decided by the Court of Appeals and therefore is not dealt with in detail in this petition. However, there is case law construing Virginia state law holding that, in a proper case, Virginia common law recognizes an implied covenant of good faith and fair dealing. See *In Bourdelais v. JPMorgan Chase Bank, N.A.*, 2012 U.S. Dist. LEXIS 158508 (E.D. Va. 2012).; *Wachovia Bank v. Ranson Tyler Chevrolet*, 73 Va. Cir. 143 (2007)

averred this alternative claim of breach of an implied covenant of good faith and fair dealing on grounds that, in the alternative to (A) above, the VA assured Leander Bacon prior to the foreclosure it would request a postponement of foreclosure, yet did not make such request in time for it to be received by Navy Federal prior to the foreclosure. (JA 11, Compl. ¶ 34).

Having made the high bid, Navy Federal assigned that bid to the VA, in return for payment of the VA insurance on the mortgage lien, so that a deed based on the foreclosure (executed under Virginia's non-judicial foreclosure provisions) was made to the VA rather than to Navy Federal. (JA 8, Compl. ¶ 23)

Taking into consideration the above issues related to the foreclosure, the VA, Navy Federal, and the substitute trustee who conducted the foreclosure filed suit in state court seeking rescission of the foreclosure, but later non-suited that case. (JA 9; Comp. ¶¶ 26, 27)

Subsequently the VA filed an unlawful detainer summons against Leander Bacon in the General District Court of Stafford County, Virginia ("the general district court") (JA 9, Compl. ¶ 24) Although Leander Bacon defended against eviction on the grounds set forth in (A) and (B) above, the general district court entered an order awarding the VA possession of the home. (*Id.*) Leander Bacon appealed to the Circuit Court of Stafford County, Virginia ("the state circuit court") and pled that that court lacked jurisdiction on grounds its appellate

jurisdiction was the same as the jurisdiction of the general district court, which he contended lacked jurisdiction on grounds he had pled a *bona fide* challenge to the validity of the foreclosure, which he contended deprived both the general district court and the state circuit court of jurisdiction under the holding of the Virginia Supreme Court in *Brian D. Parrish and Teresa D. Parrish v. Federal National Mortgage Association*, 292 Va 44; 787; S.E. 2d 116 (2016). (JA 9-10, ¶ 28) The state circuit court denied that motion, holding that Leander Bacon had not pled a *bona fide* challenge to the VA's title, and, on that basis, entered an order awarding possession of the home to the VA. (JA 10, Compl. ¶ 25) Leander Bacon appealed to the Virginia Supreme Court, which denied appeal and denied a petition to rehear that denial. (JA 7, Compl. ¶ 27)

The Bacons filed this case in the U.S. District Court for the Eastern District of Virginia, Alexandria Division ("the District Court"), seeking rescission of the foreclosure and injunction against eviction. (JA 5-42) In Count One of their complaint, the Bacons pled that Navy Federal received a VA request to postpone the foreclosure but did not, thereby breaching a contract right of the Bacons that Navy Federal comply with accepted lending practices. (JA 7-10, 37; Compl. Count One, Exh. B) In Count Two of their complaint, the Bacons pled (in the alternative) that the VA breached an implied covenant of good faith and fair dealing by telling Leander Bacon it was seeking postponement of foreclosure yet sent such request so late it was not received before the

foreclosure. (JA 10-12; Compl. Count Two) In both counts, the Bacons sought (a) an injunction to prevent enforcement of the state court eviction order; (b) rescission of the foreclosure; and (c) return of legal title to the home to them. JA 10, 12, Compl. ¶¶ 30, 38 Concl. (Prayer for Relief). The Bacons pled that the state court eviction decisions were not issue preclusion because of a Virginia statute, Va. Code Section 8.01-130. (JA 10, Compl. ¶ 27)

The District Court held that the complaint was barred by the *Rooker-Feldman* doctrine (App. 3-22) (citing *District of Columbia Court of Appeals, v Feldman*, 460 U.S. 462, 482 (1983) and *Rooker v. Fidelity Tr. Co*, 263 U.S. 413 (1923)). (App. 9-13) The District Court also cited other grounds for dismissal of the complaint. (App. 13-22)

On appeal, the Appeals Court affirmed based on an unpublished *per curiam* opinion which only stated that the District Court had been correct as to the *Rooker Feldman* doctrine. (App. 2) The Bacons filed a petition for rehearing *en banc*, which the Court of Appeals denied on February 22, 2022 (App. 24)

This case, at bottom, asks this Court to hold that a wounded combat veteran should not be denied the opportunity to file an affirmative challenge to a contested foreclosure where required to file suit in federal court because the VA (part of the federal government) sought to lock him out of his home where a non-veteran would be able to file such a suit, the only difference being that the wounded veteran must file in federal court (because suing the

VA) whereas a non-veteran could file in state court suing a private foreclosing creditor.

REASONS FOR GRANTING THE PETITION

I. THE BACONS' COMPLAINT WAS AN EJECTMENT ACTION AND THEREFORE NOT BARRED BY ISSUE PRECLUSION

Va. Code Section 8.01-130, in effect at all time relevant to this case, provides as follows:

Judgment not to bar action of trespass or ejectment.—No judgment in an action brought under the provisions of this article shall bar any action of trespass or ejectment between the same parties, nor shall any such judgment or verdict be conclusive, in any future action, of the facts therein found.

That statute applied to unlawful detainer actions brought for the first time in a Virginia general district court (a court not of record in Virginia). The eviction action against Leander Bacon was originally brought in the General District Court of Stafford County, Virginia, was upheld on appeal by the Circuit Court of Stafford County, Virginia after which the Virginia Supreme Court denied appeal. Consequently, Va Code Section 8.01-130 applies to the eviction orders based on the unlawful detainer summons brought by the VA against Leander Bacon.

It follows that if the Bacons' complaint in this case is an ejectment action, under the provisions of

Va. Code Section 8.01-130, their complaint is not barred by issue preclusion.

As set forth by the Bacons below, the word “ejectment” on the Internet has included a case to seek to recover title to land. Va Code Section 8.01-132 provides as follows:

No person shall bring such ejectment action unless he has, at the time of commencing it, a subsisting interest in the premises claimed and a right to recover the same, or to recover the possession thereof, or some share, interest or portion thereof.

The language in that statute indicates alternatives to the right to ejectment, one of such alternatives being a right to possession, and a different alternative being a right to recover the property (not by possession) which supports a conclusion that ejectment can include a suit to recover title.

On grounds that their complaint in this case was an ejectment action to recover title to their home, the Bacons submit Va. Code Section 8.01-130 applies to this case and, therefore, their complaint has not been issue precluded by the eviction judgment against Leander Bacon in the unlawful detainer case initiated in the Stafford County General District Court, with the same result in the Stafford County Circuit Court, with appeal from that court denied by the Virginia Supreme Court.

**II. A WOUNDED COMBAT VETERAN
SHOULD NOT BE DENIED THE
OPPORTUNITY OPEN TO A NON-
VETERAN BY REASON OF *ROOKER-
FELDMAN***

In the courts below, the Bacons made the point, not contested by the appellees, that when they filed their complaint in this case, they were not able to file an affirmative lawsuit seeking rescission of the contested foreclosure of their home in state court, rather had to file such suit in federal court because a necessary defendant was the VA, a part of the United States government, which had obtained an eviction order against them, which, absent an affirmative rescission lawsuit seeking an injunction and foreclosure rescission, could result in a lock-out of Leander Bacon, a wounded combat veteran, from his home.

The appellees countered with two arguments relevant to the *Rooker-Feldman* doctrine:

- (A) That the state court eviction orders constituted issue preclusion and that, as a result, the Bacons were precluded from contesting eviction by an affirmative lawsuit seeking injunctive relief and rescission.
- (B) That even if issue preclusion did not apply, *Rooker-Feldman* precluded the District Court from granting the Bacons any relief because their complaint sought in federal court to prevent enforcement of eviction based on a state court decision upheld on appeal.

The Bacons submit that Section I of their argument above rebuts (A) above. As to (B) above, the Bacons submit that the position taken by the appellees, upheld by the District Court and the Court of Appeals, should be overruled by this Court.

The District Court's Order cited the Appeals Court on *Rooker-Feldman* as follows:

'[u]nder the *Rooker-Feldman* doctrine, a party losing in state court is barred from seeking what is substance would be appellate review of state judgments in a United States district court. *American Reliable Ins. Co. v. Stollwell*, 336 F. 3d 311, 316 (4th Cir. 2003) (citing cases) This is so because (1) Congress ... vested the authority to review state court judgments in the United States in the United States Supreme Court alone" and (2) "Congress has empowered the federal district courts to exercise only original jurisdiction." (citing case).

-- App. 10

In *Wood v. Orange County*, 715 F. 2d 1543 (11th Circuit 1983), the Court of Appeals for the Eleventh Circuit held that a litigant's inability to raise a federal issue in a state court proceeding created an exception to the *Rooker-Feldman* doctrine and, as a result, that doctrine did not take away federal court jurisdiction to consider such issue in federal court. The holding in that case is commonly referred to as an exception to the *Rooker-Feldman* doctrine based

on lack of reasonable opportunity to raise issues in the applicable state court proceeding.

This case is distinguishable from *Wood v. Orange County, supra*. because in this case the Bacons were not precluded from raising their claims as defenses in the state eviction litigation. Rather, they were precluded from raising those claims in a new state court action which they would have been able to do under state law, except that one of the defendants (one of the appellees) is a part of the federal government.

Despite the difference between *Wood v. Orange County, supra*. and this case, the Bacons submit that the equitable considerations are alike and, on that basis, they ask this Court to hold that where state law specifically provides that an eviction defendant who does not prevail in defense of eviction in state court can raise those same defenses to support an affirmative rescission claim in state court, such party should not be precluded from such an affirmative lawsuit only because a necessary party defendant is a federal agency so that such a lawsuit would have to be filed in federal court.

Having based this petition on an issue of fairness, the Bacons urge in favor of their petition the fact that, as set forth above, all of the appellees in this case effectively recognized the unfairness of the foreclosure by filing a suit seeking foreclosure rescission, yet obtained a non-suit of that lawsuit, which was followed by the unlawful detainer summons by the VA against Leander Bacon.

The Bacons ask this Court to consider this issue one of first impression.

CONCLUSION

On the foregoing grounds, the Bacons pray that this Court grant certiorari in this case.

Respectfully submitted,

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