

# ORIGINAL

## ) ) ) ) ) ) ) )

**ALDERSON REPORTING**

**Telephone: (202) 554-2345**

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

IN THE SUPREME COURT OF THE UNITED STATES

----- x

FIDELITY FEDERAL SAVINGS AND :

LOAN ASSOCIATION ET AL., :

Appellants :

v. No. 81-750

REGINALD D. de la CUESTA ET AL. :

----- x

Washington, D., C.

Wednesday, April 28, 1982

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 1:46 p.m.

APPEARANCES:

ERNEST LEFF, ESQ., Los Angeles, Cal., on behalf of the Appellants.

STEPHEN M. SHAPIRO, ESQ., Washington, D.C., on behalf of the FHLBB and the FHLMC as amici curiae.

ROBERT E. BOEHMER, ESQ., Riverside, Cal., on behalf of the Appellees.

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

C O N T E N T S

<u>ORAL ARGUMENT OF</u>	<u>PAGE</u>
ERNEST LEFF, ESQ.,	
on behalf of the Appellants	3
STEPHEN M. SHAPIRO, ESQ., on behalf of	
the FHLBB and the FHLMC as amici curiae	19
ROBERT E. BOEHMER, ESQ.,	
on behalf of the Appellees	27

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

P R O C E E D I N G S

CHIEF JUSTICE BURGER: We will hear arguments

next in Fidelity Federal Savings against de la Cuesta

You may proceed whenever you're ready.

ORAL ARGUMENT OF ERNEST LEFF, ESQ.,

ON BEHALF OF APPELLANTS

MR. LEFF: Thank you. Mr. Chief Justice and  
may it please the Court:

With all due respect, we submit that the  
principle issue in this case is whether federal savings  
and loans associations will be able to enforce the due  
on sale clauses in their mortgage contracts pursuant to  
federal regulation or whether the enforcement of those  
clauses will be subjected to state law.

The due on sale clause in most federal savings  
and loan association mortgage contracts permits the  
association to call the loan whenever there is a  
transfer of the real property security underlying the  
loan. It is a practice that has been long used by  
federal savings and loan associations.

There has been no federal regulation expressly  
mentioning due on sale clauses with respect to federal  
associations until 1976, when the Federal Home Loan Bank  
Board, acting pursuant to the authority vested in it by  
Section 5(a) of the Homeowners Loan Act, adopted a



1 regulation authorizing federal savings and loan  
2 associations across the country to enforce due on sale  
3 clauses in mortgage contracts.

4 QUESTION: Well, isn't that one of the  
5 questions, whether it did act pursuant to the statutory  
6 authority?

7 MR. LEFF: Yes. I think that is one of the  
8 questions, Mr. Justice Rehnquist. And we think that the  
9 Homeowners Loan Act, especially Section 5(a),  
10 specifically vests authority of the Federal Home Loan  
11 Bank Board in the mortgage loan contract in its terms  
12 and its structures.

13 QUESTION: Well, how deeply do you think that  
14 the statute authorizes the Home Loan Board to intrude  
15 into state contract law generally?

16 MR. LEFF: The Section 5(a) of the Homeowners  
17 Loan Act permits the Federal Home Loan Bank Board to  
18 inject itself into the operations of federal savings and  
19 loan associations. One of the principal operations of a  
20 federal savings and loan association is the mortgage  
21 loan contract. In fact, approximately 78 percent of all  
22 the assets of savings and loan associations are in  
23 mortgage loan contracts.

24 So the Federal Home Loan Bank Board has a very  
25 severe and deep interest in the terms and structures of

1 mortgage loan contracts, and since at least 1936 has  
2 denominated the kind of mortgage loan contracts that a  
3 federal association can enter into as well as the terms  
4 of that mortgage loan contract.

5 QUESTION: Well, it's one thing to denominate  
6 the kinds of contracts that a federal savings and loan  
7 can enter into. It's another thing to try to control  
8 state law which is generally applicable to debtors and  
9 creditors.

10 MR. LEFF: Federal associations, Mr. Justice  
11 Rehnquist, are established under federal law, and  
12 therefore what they do is a matter of federal law.

13 QUESTION: Well, I don't happen to agree with  
14 you in the full sweep of your statement. Supposing --  
15 the law as it existed in 1969 when I left private  
16 practice in my home state of Arizona was that, whatever  
17 the form of a security of real property took, it could  
18 only be foreclosed by a proceeding in court the way you  
19 do with a mortgage, where as I understood the law in  
20 California you could foreclose a trustee deed by simply  
21 notice of sale without a judicial proceeding.

22 Now, what if the Home Loan Board back here in  
23 Washington decided that, with all the secondary market  
24 and so on, it was just too confusing to have two  
25 different rules in two sets of states about how you

1 foreclosed a mortgage, and so they said that any  
2 mortgage entered into by a federal savings and loan  
3 shall be foreclosable as a deed of trust without a court  
4 proceeding. Do you think that could supersede the  
5 Arizona rule or the rule of some other states that said  
6 any security of real property has to be foreclosed by a  
7 judicial proceeding?

8 MR. LEFF: I think the direct answer to your  
9 question, Mr. Justice Rehnquist, is that the Federal  
10 Home Loan Bank Board, if the foreclosure procedures of  
11 any state impinge directly on the operations of a  
12 federal savings and loan association, could adopt a  
13 regulation that preempts state law in that respect.

14 QUESTION: Well, you really read a great deal  
15 more into the authorization from Congress than I daresay  
16 Congress thought it was doing in 1933 when it passed  
17 this statute.

18 MR. LEFF: Well, Congress specifically  
19 authorized the Federal Home Loan Bank Board in Section  
20 5(a) to select the best practices of state savings and  
21 loan institutions to adopt in respect to federal  
22 association operations. And giving the Federal Home  
23 Loan Bank Board the right to select and reject among  
24 practices of state associations we believe gave it  
25 sufficient authority to preempt anything that impinged

1 directly on the operation of a federal savings and loan  
2 association, which by law is regulated by the Federal  
3 Home Loan Bank Board.

4 QUESTION: Would that include state taxes?  
5 Could the Federal Board determine that a particular  
6 state tax law couldn't be enforced because it somehow  
7 impinged upon the operation?

8 MR. LEFF: In my view -- and this would be  
9 speculative and hypothetical -- if a particular tax was  
10 directed against federal savings and loan associations  
11 --

12 QUESTION: And all other businesses in the  
13 state?

14 MR. LEFF: -- but not against other businesses  
15 --

16 QUESTION: No. Well, my assumption is a state  
17 tax law that takes in all businesses in some fashion,  
18 including savings and loans. The savings and loans are  
19 in financial difficulty. Under your theory could the  
20 Bank Board, the Federal Home Loan Bank Board, say we  
21 won't --

22 MR. LEFF: Under my theory the Federal Home  
23 Loan Bank Board has been given authority to attack any  
24 infringement on the operations of the federal  
25 associations, including those under tax law. As a



1 matter of practice, the Federal Home Loan Bank Board has  
2 left a number of practices, including the recording  
3 practices, zoning practices, taxing practices, to the  
4 states because the states are more efficient at these  
5 than the Federal Home Loan Bank Board could be in  
6 respect to those operations.

7 But if we're talking about the scope of the  
8 authority of the Federal Home Loan Bank Board, their  
9 authority reaches any contrary state law, in my  
10 judgment, which impinges directly on the operation,  
11 examination, organization, incorporation, or regulation  
12 of federal savings and loan associations, which are the  
13 words of Section 5(a) of the Homeowners Loan Act.

14 QUESTION: What is the interest of the Federal  
15 Government to justify this intrusion, if we were to call  
16 it an intrusion, into state law?

17 MR. LEFF: Well, the Federal Home Loan Bank  
18 Board has conducted a study in respect to the due on  
19 sale operations.

20 QUESTION: I was going back earlier than  
21 that. Why is the Federal Home Loan Bank Board concerned  
22 with it at all? What's its interest in the  
23 collectability of these loans?

24 MR. LEFF: The Federal Home Loan Bank Board is  
25 the Government agency that supervises all federal

1 savings and loan associations and charters them  
2 initially. They have an obligation with respect to the  
3 financial stability of these organizations and their  
4 continued viability. In respect to the regulation --

5 QUESTION: Is this connected with the  
6 guarantee of deposits in some way?

7 MR. LEFF: The guarantee of deposits involves  
8 a different statute, Your Honor, the National Housing  
9 Act, and it has nothing --

10 QUESTION: It's the same Government that's  
11 guaranteeing the deposits.

12 MR. LEFF: It's the same Government, but a  
13 different, related agency, but not the same agency as  
14 the Federal Home Loan Bank Board. The Homeowners Loan  
15 Act of 1933 does not insure deposits of any  
16 institution.

17 So the Bank Board has, to answer your  
18 question, a very direct interest in the financial  
19 stability of these institutions because they are the  
20 sole regulators of these institutions.

21 QUESTION: And if they collapse fiscally,  
22 another part of the Government has got to pick up the  
23 tab.

24 MR. LEFF: That's right, Your Honor.

25 QUESTION: Is that the basis for justifying

1 some regulatory control?

2 MR. LEFF: Yes, Mr. Chief Justice, it  
3 certainly is in my judgment.

4 In 1978, two years after the federal  
5 regulation was promulgated and enrolled under the  
6 Administrative Procedures Act, the Supreme Court of  
7 California, reversing its previous position which had  
8 been in force up until September 1978, stated that a due  
9 on sale clause could not be enforced as a result of a  
10 simple transfer and could only be enforced where there  
11 was an impairment of the underlying security or a risk  
12 of default. And having said that, they said that the  
13 use of a due on sale clause constituted an illegal  
14 restraint on alienation.

15 My client, Appellant, Fidelity Federal Savings  
16 & Loan Association, made three loans. They made a loan  
17 in 1971, a loan in 1972, and another loan in 1973.  
18 Those loans are before this honorable Court.

19 Fidelity Federal, in relying upon the federal  
20 regulation and the longstanding practice of use of due  
21 on sale clause for federal associations, when it learned  
22 that these loans had been transferred to third parties  
23 in connection with the sale of the underlying security,  
24 called the loans, sought to foreclose, and we found  
25 ourselves in state court.

1           In the state court, the trial court held that  
2 Section 5(a) and the regulations adopted thereunder  
3 preempted the jurisdiction of the state courts and  
4 granted summary judgment in favor of Fidelity Federal.  
5 The Court of Appeals, relying on the Supreme Court  
6 opinion, which is called Wellenkamp versus Bank of  
7 America, issued in September 1978, held that that  
8 opinion was applicable to federal savings and loan  
9 associations and held that Fidelity Federal could not  
10 foreclose on these loans, even though they had made the  
11 call and the loan balances were due, because these loans  
12 were subject to the restraint on alienation decision of  
13 the Supreme Court of California.

14           We say that the decision of the Supreme  
15 Committee of California and the court below, the Court  
16 of Appeals below in this matter, presents a clear,  
17 direct and inescapable conflict between federal  
18 regulation and state regulation such as to call the  
19 attention of this Court to the issue of the supremacy  
20 clause of the Constitution.

21           The conflict takes two spheres. The first is,  
22 there's a conflict between federal and state standards.  
23 The federal standard is broad; it says you can enforce a  
24 due on sale clause whenever there's a transfer of the  
25 real property security underlying it, with limited



1 exceptions such as in case of death or if you put a  
2 second trust deed or a limited term lease. The state  
3 standard is very much narrower, more narrow, more  
4 restrictive, and says essentially that you can only  
5 enforce a due on sale clause if you can demonstrate an  
6 impairment of the security or a risk of default.

7           So these two standards cannot be reconciled,  
8 despite the fact that the Court of Appeals and the  
9 Appellees in this matter suggest to us that they are not  
10 in conflict and can be harmonized. I suggest that the  
11 only way these two conflicting standards can be  
12 harmonized is by having the federal associations comply  
13 with the state standards, because they cannot comply  
14 with the federal standards and escape from state control  
15 if state control applies.

16           The Court of Appeals has also suggested --

17           QUESTION: Well, the regulation just says to  
18 an association that it may, it may use these clauses.  
19 It doesn't require them to.

20           MR. LEFF: That is correct.

21           QUESTION: And if they use the clause they  
22 could put in it, if they wanted to, precisely what the  
23 state law says.

24           MR. LEFF: They can adopt the clause in any  
25 fashion that they want to, but they cannot utilize the

1 right given to them in the federal statute, in the  
2 federal regulation. And I would call your attention,  
3 Mr. Justice White, to the fact that the --

4 QUESTION: Well, they can use the clause. The  
5 question is whether the clause is subject to the  
6 stricter state requirement.

7 MR. LEFF: It is a much more narrow --

8 QUESTION: What evidence do you have that  
9 Congress intended to prevent the state from imposing a  
10 higher standard on the use of these clauses?

11 MR. LEFF: We refer again to Section 5(a) of  
12 the Homeowners Loan Act, which directed the Federal Home  
13 Loan Bank Board in adopting rules and regulations,  
14 including regulations, I submit, on due on sale clauses,  
15 to give respect to the best practices of the savings and  
16 loan business in the United States other than the  
17 federal savings and loan business, which --

18 QUESTION: Does the statute refer to due on  
19 sale clauses in so many words?

20 MR. LEFF: The statute does not refer to due  
21 on sale clauses.

22 QUESTION: And certainly it didn't adopt a  
23 uniform standard at all. It just said, all these  
24 associations could use them if they wanted to; didn't  
25 have to if they didn't want to.

1           MR. LEFF: It may be use of it is optional.  
2 But in practical terms it wasn't optional, because most  
3 savings and loan associations have long used the due on  
4 sale language in their mortgage contracts. And we find  
5 in this case they were used as long ago as 1971 and  
6 1972, when these loans were made.

7           But the optional provision is simply to allow  
8 the federal savings and loan associations to deal with  
9 the unusual cases, which is traditional in the savings  
10 and loan business, because in many instances you will  
11 find forbearance being issued by the Federal Home Loan  
12 Bank Board and the institutions they govern when there's  
13 floods and fire, and if you make it mandatory to use due  
14 on sale in every case then you're going to do some  
15 injustice to some consumers.

16           So the Federal Home Loan Bank Board, while it  
17 said you don't have to use it, simply meant that in  
18 certain cases the institutions may not seek to use the  
19 due on sale clause because of considerations that they  
20 have long used in their practices.

21           QUESTION: May I ask you a question, Mr. Leff,  
22 about your view of the scope of the power given to the  
23 Board. Do you think under the statute the Board could  
24 have authorized loans at interest in excess of the rate  
25 permitted by the local state law?

1           MR. LEFF: Well, there is a statute, the  
2 Federal Home Loan Bank Board Act, that deals with usury  
3 laws. But assuming there was not such a statute, it  
4 would be my judgment that under the specific areas of  
5 concern expressed in the Homeowners Loan Act in Section  
6 5(a) the Federal Home Loan Bank Board has the authority  
7 to issue regulations which could deal with the rate of  
8 interest on mortgage loans.

9           QUESTION: And could authorize interest rates  
10 higher than those permitted by state law. How about  
11 shortening the period of redemption in the event of a  
12 foreclosure of a mortgage? Could they do that?

13          MR. LEFF: I think it could, and I would refer  
14 to the fact that in United States versus Shimer this  
15 Court has held that federal law can preempt law, state  
16 law --

17          QUESTION: I don't doubt that Congress would  
18 have the power to authorize such a regulation. But you  
19 think this statute does give that broad power?

20          MR. LEFF: The statute gives the Federal Home  
21 Loan Bank Board extremely broad powers to deal with the  
22 areas of concern expressed in the statute, including the  
23 operation of federal savings and loan associations. In  
24 that respect, a mortgage contract is the most important  
25 function of a savings and loan association.



1           QUESTION: And they could supersede basically  
2 any provision of state law that they thought was not in  
3 the best interests of the savings and loan?

4           MR. LEFF: That's correct, To the extent that  
5 they exceeded what Congress thought was prudent,  
6 Congress could cut back their authority to do so.

7           QUESTION: Mr. Leff, this statute was passed  
8 in 1933.

9           MR. LEFF: Yes, Your Honor.

10          QUESTION: And the regulation which you refer  
11 to about due on sale clauses was promulgated in 1976?

12          MR. LEFF: Yes, the first expression of it was  
13 in 1976.

14          QUESTION: When was the first time that the  
15 Board began to exercise this type of power to supersede  
16 state substantive law? Was it prior to 1976?

17          MR. LEFF: As a practical matter, they have  
18 prior to 1976 exercised concern about the due on sale  
19 clause. But they did not promulgate a regulation using  
20 the words "due on sale clause."

21          But as a practical matter, if you take  
22 California, for example, California permitted the due on  
23 sale clause to be enforced up until 1978. So with  
24 respect to these loans, these loans could have been  
25 enforced even under state law up until September of

1 1978.

2 QUESTION: Well, are there any other analogous  
3 regulations that the Board issued before '76 kind of  
4 exempting savings and loans from complying with state  
5 law?

6 MR. LEFF: Yes.

7 QUESTION: What are they?

8 MR. LEFF: There's a whole body of regulations  
9 which we refer to in our reply brief --

10 QUESTION: Could you just identify two or  
11 three of them quickly?

12 MR. LEFF: -- which speak in terms of mortgage  
13 loan contracts and what mortgage loan contracts can  
14 contain and what limitations there are on mortgage loan  
15 contracts. The due on sale clause is simply another  
16 clause in a mortgage loan contract, and the Bank Board  
17 since 1936 has issued regulations with respect to  
18 variable interest rate loans, graduated payment loans.

19 QUESTION: It's one thing to authorize a  
20 savings and loan to enter into an agreement as a matter  
21 of its internal authority. It's another -- of its own  
22 regulator, just like a state banking commission might  
23 authorize a bank to enter into a wide variety of loans,  
24 but state law generally might provide otherwise. And I  
25 see no evidence in the regulations that have been

1 mentioned of any intent to supersede state law until  
2 1976.

3 And it seems to me if Congress intended the  
4 Board to have that power it's strange that it went  
5 unexercised for 43 years.

6 MR. LEFF: The Federal Home Loan Bank Board  
7 generally does not try to invade the field or enlarge  
8 the field of its operations unless and until there is  
9 some impingement upon their authority by federal -- by  
10 state law, and when that occurs they have the authority  
11 to issue a regulation to do so.

12 Thank you.

13 QUESTION: Where are there other examples,  
14 counsel, of it superseding state law in other areas?

15 MR. LEFF: Well, in terms of the contents of a  
16 mortgage loan contract -- I think that was the question  
17 -- in Section -- in 12 CFR Section 545 and subdivisions  
18 of that section, there are numerous regulations that  
19 expressly state the nature and content of mortgage loan  
20 contracts. And a lot of them have been --

21 QUESTION: But do they say, notwithstanding  
22 contrary state law they shall prevail?

23 MR. LEFF: No, they don't, because in our  
24 judgment they don't have to. They are preeminent in  
25 this respect. The Congress gave them the authority to

1 directly deal with the operations of federal savings and  
2 loans.

3 QUESTION: Well, has there ever been a  
4 judicial decision, apart from this area of the law, that  
5 any of those provisions supersede contrary state law?

6 MR. LEFF: Well, there have been a number of  
7 decisions of the Court of Appeals that say -- the Ninth  
8 Circuit and the First Circuit -- that say that  
9 prepayment provisions of a mortgage loan contract is  
10 preempted by federal law, that say variable interest  
11 rate provisions are preempted by state law, that  
12 redlining provisions relating to mortgage contracts.

13 And this Court in Conference of Federal  
14 Savings and Loan Associations versus Stein very recently  
15 has affirmed by summary opinion the redlining preemption  
16 of federal savings and loan associations over state law  
17 on the question of mortgage contracts and what areas,  
18 geographic areas, they can be entered into.

19 Thank you.

20 CHIEF JUSTICE BURGER: Mr. Shapiro?

21 ORAL ARGUMENT OF STEPHEN M. SHAPIRO, ESQ.,  
22 ON BEHALF OF THE FHLBB AND FHLMC AS AMICI CURIAE

23 MR. SHAPIRO: Thank you. Mr. Chief Justice  
24 and may it please the Court:

25 The Federal Government contends that the



1 Board's due on sale regulation is a valid exercise of  
2 statutory rulemaking power --

3 QUESTION: Mr. Shapiro, how far does the  
4 Government contend that the preemptive power goes? Do  
5 you go as far as Mr. Leff in saying that the Board could  
6 if it chose, to protect savings, federally insured  
7 savings and loans, preempt by regulation state tax laws,  
8 state zoning laws, other state regulatory laws?

9 MR. SHAPIRO: We do go --

10 QUESTION: Or do you see a limitation?

11 MR. SHAPIRO: We go, I believe, just as far,  
12 although in the area of taxes there is a federal statute  
13 that specifically covers the extent to which the states  
14 may tax a federal instrumentality. In the absence of  
15 such a statute, we think that there would be regulatory  
16 power.

17 I would point out that in the old case of  
18 McCullough against Maryland this Court held that the  
19 states were not empowered to tax a federal banking  
20 institution at all unless the United States Government  
21 gave the states permission to do that.

22 We rely in making this broad argument on  
23 Section 5 of the Homeowners Loan Act, which empowers the  
24 Board not only to charter and examine federal  
25 associations, but also to issue rules and regulations

1 governing the operation, without any limitation on the  
2 word "operation," of such associations.

3           And in setting up these new federal  
4 instrumentalities, Congress didn't simply incorporate  
5 existing local practices, but instead required the Board  
6 to look selectively across the land for those practices  
7 which were beneficial. Congress expressly provided that  
8 in adopting rules to govern financial operations the  
9 Board must give "primary consideration to the best  
10 practices of local mutual thrift institutions throughout  
11 the United States."

12           And under this broad rulemaking power the  
13 Board traditionally has adopted a very detailed regimen  
14 of rules and regulations governing the lending practices  
15 of federal associations. These regulations prescribe,  
16 for example, the kinds of loans that can be made, the  
17 kinds of collateral that can be received, the schedule  
18 for repayment, the kinds of penalty and prepayment  
19 provisions that can be included in --

20           QUESTION: Isn't it true, Mr. Shapiro, that  
21 most of those regulations are in the nature of  
22 restrictions on the practices rather than grants of  
23 authority to go beyond some other restriction?

24           MR. SHAPIRO: Well, in the prepayment area and  
25 in the area of interest rate on mortgage escrow

1 accounts, the Board has regulations that specifically  
2 say that inconsistent state law that prescribes a  
3 different rule is preempted, and it's had those  
4 standards since the early seventies.

5 QUESTION: For purposes of this case, Mr.  
6 Shapiro, do you need to go so far as to say that the  
7 Board could determine and fix the interest rate at a  
8 rate different from that provided by state law?

9 MR. SHAPIRO: No, Your Honor, we certainly  
10 don't. Our position here is that this narrow regulation  
11 dealing with prudent lending practices by federally  
12 chartered associations is reasonably related to the  
13 operation of these associations. We go no further than  
14 that, and we submit it's a very narrow contention that  
15 is before the Court in this case.

16 In 1975 the Board turned its attention to the  
17 issue of due on sale clauses in mortgage loan agreements  
18 and issued an opinion, which is contained in the record  
19 on appeal in this case, that stated that it had long  
20 approved and sanctioned the use of due on sale clauses  
21 and that state restrictions on due on sale clauses would  
22 "endanger the financial stability of federal  
23 associations and generally require them to charge higher  
24 interest rates across the board." The agency supported  
25 these conclusions with a detailed economic analysis.

1           In view of certain state court litigation  
2 attacking the use of due on sale clauses, the Board  
3 began formal rulemaking procedures one year later. It  
4 published notice of its proposed rule and set forth the  
5 rule in full text in the Federal Register. The Board  
6 received numerous comments from interested parties,  
7 including the State of California, which argued at some  
8 length that preemption was unnecessary in this context.

9           After reviewing all of these suggestions and  
10 comments, the Board adopted its regulation in final  
11 form, and the regulation provides that federal  
12 associations may continue to include due on sale clauses  
13 and may enforce them according to their literal terms.  
14 The Board explained that its regulation was exclusive  
15 and that federal associations are not bound by or  
16 subject to any inconsistent or conflicting state law  
17 requirement.

18           No party sought judicial review of the Board's  
19 regulation under the Administrative Procedure Act. A  
20 federal regulation which is adopted in this manner is  
21 the law of the land. Under the supremacy clause --

22           QUESTION: It's the law of the land if it's  
23 authorized by statute.

24           MR. SHAPIRO: That's correct.

25           QUESTION: It's certainly not the law of the

1 land if it's not authorized by statute.

2 MR. SHAPIRO: And our submission is that it's  
3 clearly authorized by the broad language of Section 5 of  
4 the Homeowners Loan Act. We refer in our brief to  
5 evidence in the legislative history that Congress was  
6 actually aware in 1933 when it adopted this measure that  
7 the Board would have power to adopt regulations in the  
8 due on sale area.

9 QUESTION: Mr. Shapiro, was this the first  
10 time that the Board has publicly adopted regulations  
11 designed to supersede state law in this general area, in  
12 1976?

13 MR. SHAPIRO: No, Justice Rehnquist. In other  
14 areas it has adopted preemptive regulations. In '76 it  
15 first adopted a preemptive regulation in the due on sale  
16 area.

17 QUESTION: What other areas has it adopted  
18 preemptive regulations?

19 MR. SHAPIRO: Fair credit practices,  
20 discrimination in lending, interest on escrow accounts,  
21 prepayment penalties, areas such as this which are --

22 QUESTION: Redlining? Redlining?

23 MR. SHAPIRO: Redlining, that's correct.  
24 These are all areas where the Board previously has taken  
25 this approach.



1           QUESTION: When was the first of the ones  
2 you've referred to adopted?

3           MR. SHAPIRO: It was adopted in the early  
4 seventies. But as Mr. Leff pointed out, there have been  
5 many regulations in addition to these which have been  
6 held to supersede inconsistent state law. Back to the  
7 1950's the lower courts have held that, and indeed this  
8 Court affirmed one of those lower court decisions in the  
9 Stein case which is cited in our brief.

10           This Court has recognized --

11           QUESTION: Each of those, each of those  
12 examples you cited were in the nature of restrictions on  
13 the power of the savings and loan rather than  
14 authorizations of power.

15           MR. SHAPIRO: That's correct, these have a  
16 somewhat different content.

17           This Court has recognized repeatedly in its  
18 cases that a validly authorized federal regulation  
19 supersedes state law, and we draw to the Court's  
20 attention Free against Bland and United States against  
21 Shimer. In the Shimer case this Court upheld a VA  
22 regulation which superseded state property law. A state  
23 foreclosure statute was overridden by a validly adopted  
24 federal regulation.

25           And in the Bland case this Court pointed out

1 that the relative importance to the state of its own law  
2 is not material when there is a conflict with a valid  
3 federal law, and the Court's reference here was to a  
4 validly adopted federal regulation.

5           Finally, as this Court made quite clear in the  
6 Franklin National Bank case, there is a preemptive  
7 conflict whenever federal banking law permits a federal  
8 financial institution to engage in a practice which  
9 state law forbids. And that's precisely the situation  
10 here. California forbids the use of a due on sale  
11 clause to adjust interest rates, while the federal  
12 statute, the federal regulation adopted under the  
13 statute, authorizes that very practice.

14           Appellees nonetheless have argued to the Court  
15 that it is inappropriate for federal law to govern in  
16 this case because California has a strong policy in the  
17 same area. This ignores, however, the paramount federal  
18 interest.

19           As this Court pointed out in Fahey against  
20 Mallonee, savings and loan associations that are  
21 chartered under this Act are created, insured, and aided  
22 by the Federal Government to serve important national  
23 purposes. And these federal instrumentalities now are  
24 in a state of economic distress. As the Chairman of the  
25 Home Loan Bank Board testified before Congress only last

1 month, thrift institutions are suffering a level of  
2 financial distress they have not suffered since the  
3 worst days of the great depression.

4           The Board has made clear that its due on sale  
5 regulation protects associations by permitting them to  
6 upgrade their loan portfolios during periods of sharply  
7 rising interest rates. In the words of the Board, "The  
8 due on sale clause normally is a valuable and often an  
9 indispensable source of protection for the financial  
10 soundness of the federal association."

11           I would like to emphasize in conclusion that  
12 the United States is not asking this Court to set aside  
13 state property law on any broad or novel theory of  
14 preemption. Our contention here is narrow and it is  
15 precise. We ask the Court only to reaffirm the  
16 well-settled principle that a duly promulgated federal  
17 regulation has the force of law and that it supersedes  
18 state laws which conflict with it.

19           For these reasons and those reasons that we  
20 state in our brief amicus curiae, we respectfully  
21 request that the decision of the California Court of  
22 Appeal be reversed.

23           Thank you.

24           CHIEF JUSTICE BURGER: Mr. Boehmer.

25           ORAL ARGUMENT OF ROBERT E. BOEHMER, ESQ.

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

ON BEHALF OF APPELLEES

MR. BOEHMER: Mr. Chief Justice and may it please the Court:

We disagree on the central issue in this case. The central issue in this case is not the power of the Federal Home Loan Bank Board to regulate the affairs of the federal associations. The issue in this case involves the recent intent of the Federal Home Loan Bank Board to govern the rights of parties, of third parties who contract with federal associations, under state real property and mortgage law. That's the true issue in this case.

We do not question the ability of the Federal Home Loan Bank Board --

QUESTION: Well, maybe you'll explain what the difference is between your specific and the general propositions, I take it?

MR. BOEHMER: Pardon me, Your Honor?

QUESTION: You're going to explain what's the difference between the specific proposition you just advanced and the general propositions we were discussing with your friend.

MR. BOEHMER: Yes, Your Honor.

We do not question the ability of the Federal Home Loan Bank Board to issue the regulation that is at

1 issue in this case.

2 QUESTION: You mean the authority under the  
3 statute?

4 MR. BOEHMER: The authority under the statute  
5 to issue the regulation as it is written. What we do  
6 question is the extraneous intent which was expressed in  
7 the preamble to the regulation in what the regulation  
8 would mean and its effect on preempting state law. That  
9 is the issue of this case. Without the intent --

10 QUESTION: Mr. Boehmer, do you concede that  
11 the Board had statutory authority to issue the  
12 regulation including the preamble as a guide for  
13 interpretation?

14 MR. BOEHMER: We concede that the regulation  
15 as it is worded the Board had the authority to issue.  
16 We do not concede that the preamble and the intent of it  
17 is effective for preemption purposes.

18 QUESTION: Well, but suppose -- well then, if  
19 in the main body of the regulation the regulation had  
20 concluded, "and any inconsistent state law will be  
21 preempted." Suppose it had just said that. I take it  
22 you would not question the authority of the Board to  
23 issue such a regulation under the statute? Your point  
24 is that they just haven't issued such a regulation?

25 MR. BOEHMER: At that point we would question



1 the authority of the Board to issue a regulation which  
2 preempts state real property and mortgage law, yes. The  
3 intent of the Board in this particular regulation was  
4 --

5 QUESTION: So you would say the Board could  
6 never issue a regulation that preempted state law?

7 MR. BOEHMER: No, no, certainly not. The  
8 Board has the power to tell the federal associations  
9 what they can put in their contracts or what they cannot  
10 put in their contracts. That is the Board's regulatory  
11 power over the federal associations.

12 QUESTION: Well, suppose they had just said,  
13 you must put in your mortgage contracts these due on  
14 sale clauses, you can't issue or you can't take a  
15 mortgage that doesn't have it in it, and you must  
16 enforce it.

17 MR. BOEHMER: Yes.

18 QUESTION: Now, do you think that that would  
19 preempt state law?

20 MR. BOEHMER: No, certainly not. The Board  
21 has, as I said, the right to tell the associations, you  
22 can put this contract provision in, you can put this  
23 contract provision in.

24 QUESTION: Well, it's got the authority to say  
25 it must, too.

1           MR. BOEHMER: It has the authority, you're  
2 quite right, it has the authority to say it must.  
3 However, it does not have the authority then to control  
4 the interpretation and the validity of that provision  
5 when that provision is contained in a trust deed which  
6 is solely governed by California law.

7           QUESTION: Well, you solve the whole thing  
8 just by saying "solely governed by California law."

9           MR. BOEHMER: Well, when an association --  
10 when an association puts these provisions into their  
11 trust deed and they go out into a state and they  
12 contract with a member of the public in that state, they  
13 are contracting under state real property and mortgage  
14 law. The entire deed of trust was created by California  
15 law and it is governed and interpreted by California  
16 law.

17           Nowhere in the deed of trust, with the  
18 exception of the word "federal" in the name "Fidelity  
19 Federal" is there any implication that federal law in  
20 any way governs that deed of trust. It's solely  
21 governed by California law.

22           Now, the question comes about, what is the  
23 "operations" under Section 5(a) --

24           QUESTION: Just a minute. I don't quite  
25 understand this. You just conceded to my brother White

1 that the Board could say you must put these due on sale  
2 clauses --

3 MR. BOEHMER: Yes.

4 QUESTION: -- in the contract. Isn't the  
5 contract the deed of trust?

6 MR. BOEHMER: A deed of trust is a contractual  
7 agreement between the parties, yes.

8 QUESTION: Well, and it's that instrument in  
9 which the due on sale clause, in compliance with the  
10 mandate of the Board to the savings association, would  
11 appear, would it not?

12 MR. BOEHMER: Yes, it would.

13 QUESTION: And if it were not in it, under the  
14 regulation the savings and loan association couldn't  
15 execute the contract?

16 MR. BOEHMER: They would certainly not be  
17 following the regulations of the Federal Home Loan Bank  
18 Board, that's true.

19 QUESTION: I know, but if they were mandated  
20 to include it then would they not have to insist on its  
21 inclusion?

22 MR. BOEHMER: Inclusion is not the point  
23 here. The point is --

24 QUESTION: No. They have to insist on it --

25 MR. BOEHMER: The Board could insist that they

1 include it.

2 QUESTION: And if you're a borrower they'd say  
3 to you either -- if you want to borrow from us you've  
4 got to take a deed of trust with that provision in it.

5 MR. BOEHMER: That's true.

6 QUESTION: And if you did, then what?

7 MR. BOEHMER: If you did, the deed of trust  
8 has to be interpreted by some law. The federal law does  
9 not give the interpretation of the due on sale clause.  
10 State law does. State law has traditionally interpreted  
11 the due on sale clause.

12 In fact, in California the due on sale clause  
13 has been interpreted as a provision which provides for  
14 protection of the security interest of the lender, not  
15 as a provision --

16 QUESTION: I think you missed my point. When  
17 you made this trust and you signed it, you signed it  
18 with full knowledge of the federal law, didn't you?

19 MR. BOEHMER: No, Your Honor.

20 QUESTION: You mean you don't have to know the  
21 federal law?

22 MR. BOEHMER: When the borrowers made, signed  
23 this deed of trust as trustor --

24 QUESTION: He signed it with the understanding  
25 that it was controlled by federal law.

1 MR. BOEHMER: No, Your Honor, I disagree with  
2 that respectfully.

3 QUESTION: How?

4 MR. BOEHMER: There is nothing in that deed of  
5 trust located anywhere --

6 QUESTION: But there's something in the  
7 statute.

8 MR. BOEHMER: Two of the deeds of trust in  
9 this particular situation were executed prior, before  
10 any regulation by the Federal Home Loan Bank Board.

11 QUESTION: You mean that the federal law is  
12 not there?

13 MR. BOEHMER: The federal law, at the time  
14 that two of them were executed, the regulation did not  
15 exist. It was years before the regulation existed.

16 QUESTION: Well, don't you keep up with the  
17 regulations? If not, you shouldn't be advising people.

18 MR. BOEHMER: Your Honor, the borrowers at the  
19 time that they --

20 QUESTION: The borrowers should know what the  
21 regulations are.

22 MR. BOEHMER: There's nothing in the deed of  
23 trust anywhere which would tell the borrowers that  
24 federal regulations have anything to do with it. In  
25 fact, all the references in the --



1           QUESTION: And so your defense is you're  
2 ignorant of the law?

3           MR. BOEHMER: No, Your Honor. Our defense is  
4 that the federal regulation --

5           QUESTION: You didn't know the gun was  
6 loaded?

7           MR. BOEHMER: Your Honor, I believe our  
8 defense is, one, in respect to the borrowers, the  
9 borrowers had no inclination whatsoever. It doesn't  
10 say, for instance, in the United States versus Bland or  
11 United States versus Shimer -- in Shimer it said  
12 directly in the contract that it was governed by federal  
13 law and it was going to be governed by regulations of  
14 the VA Administration. That's not true in any of the  
15 cases present before this Court.

16           In all of those cases -- in fact, in two of  
17 them it says that it is going to be governed by the law  
18 of the jurisdiction where the property is located, which  
19 is California law.

20           QUESTION: You know -- so that the person  
21 knows the California law but doesn't know the federal  
22 law?

23           MR. BOEHMER: I believe all the persons  
24 entering --

25           QUESTION: Is that your contention?

1           MR. BOEHMER: -- into these contracts believed  
2 it was totally under California law, since there was no  
3 indication by either of the parties for it to be  
4 controlled by any other law.

5           QUESTION: So you think that the only way that  
6 these regulations can apply is for them to be put into  
7 every contract?

8           MR. BOEHMER: No, Your Honor.

9           QUESTION: Well, what do you suggest?

10          MR. BOEHMER: I feel on a matter of fair  
11 principles of contract and equity that the borrower  
12 should be given fair notice if indeed it is going to be  
13 controlled by another law other than --

14          QUESTION: Well, how else could you do it  
15 other than putting all of the regulations in every  
16 contract?

17          MR. BOEHMER: No, I do not propose that at  
18 all. A simple statement, for instance, at the point  
19 where they say the law of the jurisdiction --

20          QUESTION: Well, is your proposal that you're  
21 not bound by it?

22          MR. BOEHMER: Our position in this case is  
23 that the Federal Home Loan Bank Board does not have the  
24 authority to preempt the state law in reference to the  
25 due on sale clauses in mortgages secured by California

1 real property.

2 QUESTION: But it applies in the other 49  
3 states? It applies in the other 49 states, but it  
4 doesn't apply in California?

5 MR. BOEHMER: I don't believe -- I'm not  
6 arguing for the other 49 states, but I don't believe  
7 that they have the power or the authority from Congress  
8 to preempt those state laws, either. Not all of the  
9 states have restrictions upon the enforcement of the due  
10 on sale clause. Many of them do and several of them do  
11 not. So it is not something which is consistent  
12 throughout all of the states.

13 I think an important term that has been used  
14 here is the word "operations." Fidelity Federal has  
15 asserted that under 5(a) of the Homeowners Loan Act of  
16 1933 that the Federal Home Loan Bank Board was given the  
17 authority to regulate the operations. Operations ends  
18 when an association enters into a contract under state  
19 law. That is the point at which the Federal Home Loan  
20 Bank Board's authority terminates and the authority of  
21 interpretation of the contract begins.

22 Now, there's two systems of law out there. In  
23 California we have the same thing. We have a savings  
24 and loan commissioner and regulations pursuant to the  
25 commissioner and the financial and institutions code,

1 which regulates state savings and loan associations in  
2 the same manner in which the Federal Home Loan Bank  
3 Board regulates federal savings and loans.

4 But at the time that the savings and loan  
5 associations enter into a contract with an individual in  
6 the state, state real property and mortgage law takes  
7 over as far as the interpretation of those instruments.  
8 And that is the situation we have here.

9 Operations under the Homeowners Loan Act of  
10 1933 does not include and does not imply a regulatory  
11 authority by the Federal Home Loan Bank Board over the  
12 borrowers. They were never given the authority over the  
13 borrowers. They were simply given the authority over  
14 the associations.

15 Another -- and this is all lenders in  
16 California are subject to the due on sale clause  
17 restrictions. This makes no difference whether they're  
18 regulated by California authorities, federal  
19 authorities, or private lenders. Recently the  
20 California Supreme Court reaffirmed the Wellenkamp rule  
21 and stated that it applies to private lenders as well as  
22 institutional lenders and on all types of property,  
23 whether it be commercial --

24 QUESTION: Certainly the Wellenkamp rule  
25 hasn't been the California law forever, has it?

1 MR. BOEHMER: That's true, Your Honor.

2 QUESTION: Weren't there California Supreme  
3 Court decisions exactly the opposite way prior to  
4 Wellenkamp?

5 MR. BOEHMER: Originally the purpose of the  
6 due on sale clause was the protection of the security  
7 interest of the lender. When in the late sixties the  
8 lenders -- and this was really brought about by the  
9 increasing inflation rate and the high interest rates --  
10 the lenders attempted to use it for other purposes other  
11 than its traditional purpose, the California court was  
12 then presented with a series of cases involving the due  
13 on sale clause and its use in various contexts.

14 And through a series of cases beginning in the  
15 early seventies, California law consistently restricted  
16 the ability to use the due on sale clause solely for  
17 economic purposes. The due on sale clause was designed  
18 for a defensive purpose. If an irresponsible grantee  
19 took over the property, the lender could evaluate that  
20 and they could file a notice of default, or call the  
21 loan and file a notice of default if the money was not  
22 paid.

23 Now, this was for the protection of the  
24 security. California law does protect the security and  
25 is consistent with, for instance, the full protection



1 regulation that was promulgated by the Board in 1948,  
2 because it functions as an instrument where, if a  
3 situation arises because of the transfer where there is  
4 an increased risk of default by the new owner or he is  
5 likely to impair the security of the loan, the lender  
6 may call it. But that is the burden that the lender  
7 must show.

8           Now, the reason for this rule is important.  
9 The transferability of property is a key issue in the  
10 survivability of any economy. It is even more important  
11 in times of high interest rates.

12           The Wellenkamp rule is designed to keep the  
13 mobility of title flexible even during times of high  
14 interest rates, and those are the times when flexibility  
15 and transferability of property is at its worst. Right  
16 now in California the only transactions that are  
17 occurring are transactions involving the assumption of  
18 existing loans, because with interest rates at 17 or 18  
19 percent the average family could not buy a home, much  
20 less even the more wealthier families would have  
21 problems buying a home with new financing at 17-1/2  
22 percent.

23           That's not really a problem as far as the  
24 borrowers or as far as the lenders. The inflation and  
25 the high interest rates are a problem which affects

1 society across the board.

2           The Wellenkamp rule simply allows the  
3 flexibility of the movement of property in high interest  
4 times as well as in other times. And it also supports  
5 the traditional reason and the traditional rationale for  
6 the due on sale clause, which was never until the late  
7 sixties used to update loan portfolios. Instead, it was  
8 used as a defensive measure to protect the security.

9           Another issue that has been brought up is the  
10 best practices, and Congress' intent that the Bank Board  
11 look at the best practices of the savings and loan  
12 institutions in the country in 1933 and to use those  
13 best practices in their administration of the federal  
14 savings and loans.

15           Best practices does not mean that they can  
16 look at state laws and choose the best laws that they  
17 wanted. Best practices refers to the things that a  
18 board of directors does for a corporation. They  
19 determine where they're going to lend, they determine on  
20 what terms they're going to lend, they determine what  
21 type of security that they should take back.

22           These things are practices. State law is  
23 totally different. If --

24           QUESTION: Do these regulations have some  
25 connection with the future solvency of the savings and

1 loan associations in California?

2 MR. BOEHMER: I would submit that they do not,  
3 and that even though --

4 QUESTION: Well, did someone think that they  
5 did?

6 MR. BOEHMER: Apparently at this time the  
7 Federal Home Loan Bank Board does. The trial court, of  
8 course, decided --

9 QUESTION: Was there any rational basis for  
10 the Board's thinking that?

11 MR. BOEHMER: I don't believe that the  
12 evidence, first, that has been presented to this Court  
13 shows the necessity for the survivability or the  
14 necessity of the due on sale clause for the  
15 survivability of the associations.

16 QUESTION: Is that the test, that someone sows  
17 that evidence?

18 MR. BOEHMER: Well, I believe there is no  
19 record as far as the trial court is concerned in this  
20 case.

21 QUESTION: But is the Home Federal -- this  
22 Board is an arm of the Congress, is it not?

23 MR. BOEHMER: Yes, Your Honor.

24 QUESTION: An arm of the savings and loans.

25 MR. BOEHMER: It's certainly an agency of the

1 Federal Government. And I think that it should be  
2 pointed out that the due on sale enforcement may affect  
3 one S&L here and a couple S&L's here, but it is not  
4 affecting the whole of the S&L's. This is true for a  
5 lot of reasons:

6           One, because not all states restrict the  
7 enforcement of the due on sale clause;

8           Secondly, not all federal savings and loans  
9 would enforce the due on sale clause even if they were  
10 given the absolute right to do so. California is a  
11 classic example of why that's true. In California we  
12 have a very lender-oriented society. We have a lot of  
13 lenders and a lot of different types of lenders in  
14 California. The competition is very heavy in California  
15 for the borrowers.

16           In that type of a situation we have seen in  
17 the past federal associations not using the due on sale  
18 clause because to do so puts them on a different scale  
19 than the state institutions and a loan -- if you have a  
20 loan on one house and you have a loan on another house,  
21 and one's with a state institution that has a due on  
22 sale clause which is under California law and is  
23 restricted by California law, and another one has a due  
24 on sale clause which is not, the lender -- the borrower  
25 or the purchaser is going to buy the house that has it

1 on there, because obviously there are some advantages to  
2 the restrictions on the due on sale clause.

3           So in an area of competition with other  
4 lenders, such as California, I don't believe we're going  
5 to see federal S&L's enforcing it across the board. And  
6 to do so, to accomplish the purpose of financial  
7 stability for the federal savings and loans as a whole,  
8 I believe that that is what's necessary.

9           QUESTION: In California do you have many  
10 S&L's or other lending institutions that are not  
11 federally insured?

12           MR. BOEHMER: Yes, Your Honor. Yes, Your  
13 Honor, we do. The task force report which has been put  
14 forth to this Court -- and I would first make the  
15 comment that the task force report, of course, was not  
16 part of the record of this case. The trial court  
17 decided on occupation of the field. The Court of  
18 Appeals reversed and found no occupation of the field  
19 and found no conflict with the California law with the  
20 applicable federal laws.

21           So the task force report was not taken into  
22 consideration by any trial court in this matter.  
23 However, even the task force report points out that the  
24 federal S&L's and the state S&L's really don't differ  
25 that much in California, even though the state S&L's



1 have been under Wellenkamp clearly since 1978 and have  
2 been systematically restricted on various types of  
3 transactions since early 1971. So even though they have  
4 been restricted and the federal savings and loans have  
5 not, there is no substantial difference between them.

6 Another point is that they have not shown  
7 anywhere that there is any difference between, let's  
8 say, interest rates or profitability of federal savings  
9 and loans in states which allow them to enforce the due  
10 on sale without restrictions. There has been nothing of  
11 that sort shown to this Court, because it simply doesn't  
12 exist.

13 High interest rates are what is controlling  
14 the profitability of the savings and loans, as well as  
15 the rate at which loans are being given to the public.  
16 As Mr. Pratt said in his comments a couple weeks ago  
17 before the Committees in Congress, neither he nor the  
18 Federal Home Loan Bank Board has control over high  
19 interest rates.

20 QUESTION: Mr. Boehmer, let me ask you a  
21 question. It's sort of collateral, but I'm curious  
22 about it. Under your California rule, does the seller  
23 of the property remain liable on the mortgage? Does the  
24 savings and loan have to release the seller from the  
25 note?

1           MR. BOEHMER: No, they do not. They do not.

2           QUESTION: So that what happens in effect is  
3 that they're both liable at the original interest rate,  
4 both the seller and the buyer?

5           MR. BOEHMER: In effect that's what happens.  
6 There are certain other California statutes dealing with  
7 anti-deficiency, which in some ways because of the  
8 purchase money obligation would protect the original  
9 owner. But the true test of it is that the person that  
10 takes over the property, if he doesn't make the  
11 payments, if he doesn't do everything under the trustee  
12 that a normal owner would do --

13          QUESTION: Then they can call the loan --

14          MR. BOEHMER: -- they can call the loan and  
15 they can foreclose, and they will. So that's really  
16 their protection. And if they have not lent on a piece  
17 of property which they have oversecured the piece of  
18 property, then they are perfectly adequately protected  
19 by the statutes in California.

20          Another important point to consider is the  
21 source of the rights and obligations on the deed of  
22 trust which is before this Court. As I said before,  
23 federal S&L's have relied upon state law from the time  
24 that they came into existence in California. They have  
25 relied upon state law to lend, they have relied upon

1 state law to collect the debts, they have relied upon  
2 state law for the foreclosure proceedings. And this has  
3 been consistent.

4           The areas in which state law has been in  
5 controversy with the authority of the Federal Home Loan  
6 Bank board have been primarily in the areas of the  
7 internal affairs of state savings and loans. In the  
8 case of Conference versus Stein, which this Court  
9 affirmed, the secretary of business and transportation  
10 in the state of California had attempted to tell the  
11 federal savings and loans where they could lend and  
12 where they couldn't lend, and it was held that this is  
13 under the regulatory authority of the Federal Home Loan  
14 Bank Board, not the state regulatory authorities.

15           This is not a case like that. The de la  
16 Cuesta's and the other Plaintiffs involved in this case  
17 are not telling the federal savings and loans how they  
18 have to operate their business. They're not trying to  
19 make any judgments as far as the internal affairs. They  
20 are only relying upon the state real property and  
21 mortgage law, which controls the interpretation of the  
22 contracts that were entered into and secured by real  
23 property in the state of California.

24           And this makes this case quite unlike the  
25 cases of U.S. versus Shimer and Free versus Bland. In

1 U.S. versus Shimer the contract was directly between the  
2 VA, an agency of the United States Government, and the  
3 veteran, Mr. Shimer. It was control -- it was created  
4 under federal law, under a federal benefit that was  
5 given to VA. It was interpreted under federal law and  
6 it clearly stated it in the contract.

7 In Free versus Bland, the same situation. A  
8 U.S. savings bond is an evidence of debt of the United  
9 States Government and it is a contract between the  
10 person who buys it and the U.S. Government. The  
11 obligation was created under federal law and it is  
12 interpreted solely by federal law.

13 In those cases there is no question that state  
14 law cannot stand as an interference or cannot be in  
15 conflict with those types of rights that are given by  
16 the Federal Government.

17 QUESTION: What about the case we affirmed  
18 summarily, 445 U.S.

19 MR. BOEHMER: Conference versus Stein. Again,  
20 that was a redlining case. The secretary of --

21 QUESTION: What was that?

22 MR. BOEHMER: It involved redlining.

23 QUESTION: Exactly.

24 MR. BOEHMER: The secretary of business and  
25 transportation in California was attempting to tell the

1 federal savings and loans where they could lend. This  
2 is clearly within the internal affairs and it's clearly  
3 something that the Federal Home Loan Bank Board should  
4 be telling the federal savings and loans, not the state  
5 of California.

6 QUESTION: What was the rationale of the Court  
7 of Appeals?

8 MR. BOEHMER: The rationale of the Court of  
9 Appeals in that was that Section 5(a) of the Homeowners  
10 Loan Act of 1933 gave plenary power to the Federal Home  
11 Loan Bank Board to govern the operations --

12 QUESTION: The thing that preempted state law  
13 in that case was a series of regulations of the Board.

14 MR. BOEHMER: That's true, and they were  
15 regulations which the Board had the power under the  
16 Homeowners Loan Act of '33 to promulgate.

17 QUESTION: Just like I take it you agree that  
18 they had the authority to issue this regulation in the  
19 form that they issued it.

20 MR. BOEHMER: I think, yes, the exact language  
21 of the regulation says, first, that they can as a matter  
22 of contract between the buyer and the association  
23 include a due on sale clause. Then it goes on to  
24 describe the due on sale clause, and then it says that  
25 all --



1           QUESTION: So they may use it, they may use  
2 the form of a due on sale clause that would be  
3 inconsistent with state law?

4           MR. BOEHMER: The due on sale clause is not  
5 inconsistent with state law.

6           QUESTION: The one that's permitted, that they  
7 are permitted to use?

8           MR. BOEHMER: Is not inconsistent with state  
9 law at all. The same due on sale clause is found in  
10 Bank of America's deeds of trust, which were involved in  
11 the case.

12          QUESTION: But anyway, the rationale of the  
13 Conference case was that the Board had complete  
14 authority to regulate?

15          MR. BOEHMER: Yes.

16          QUESTION: To the exclusion of state lawe.

17          MR. BOEHMER: Yes.

18          QUESTION: And what do you think we affirmed?

19          MR. BOEHMER: You affirmed the authority of  
20 the Federal Home Loan Bank Board to do so. And I think  
21 this case is substantially different than that, in that  
22 we are not trying to regulate the federal savings and  
23 loans. It is the contracts that they entered into --

24          QUESTION: Well, you're going to keep them  
25 from enforcing a particular kind of due on sale clause.

1                   MR. BOEHMER: State law --

2                   QUESTION: Well, the state law will say, you

3 may not enforce a due on sale clause unless certain

4 conditions are satisfied. That's what the state law

5 says.

6                   MR. BOEHMER: That's true.

7                   QUESTION: And the Board has said, you may use

8 a due on sale clause that doesn't require that sort of

9 conditions.

10                  MR. BOEHMER: No, the Board hasn't said that.

11                  QUESTION: Well, it says you may use a clause

12 that says that the proceeds are due, that you can

13 accelerate and the proceeds are due or the debt is due

14 when the property is sold.

15                  MR. BOEHMER: The regulation does not say

16 that. The regulation says --

17                  QUESTION: What if it did? What if it did?

18 The Board thinks they did.

19                  MR. BOEHMER: Okay. The regulation itself

20 doesn't say that. If they did, if they put in there

21 that you may enforce this and you may enforce it any

22 time that it's sold regardless of any state law to the

23 contrary, I would take the position that they have

24 exceeded their authority that we've given them under the

25 Homeowners Loan Act of 1933.

1 QUESTION: Despite the holding in the  
2 Conference case?

3 MR. BOEHMER: Despite the holding in the  
4 Conference case. The reason is, although they have the  
5 authority to regulate the savings and loans by saying  
6 what they can or cannot put in the contract, they have  
7 never been given the authority to regulate the rights  
8 and the remedies of third parties who contract with the  
9 federal savings and loan.

10 QUESTION: Do you have an idea that Congress  
11 isn't interested in the third parties?

12 MR. BOEHMER: Congress was interested in  
13 providing financing.

14 QUESTION: Isn't Congress interested in the  
15 ordinary citizens of the United States?

16 MR. BOEHMER: Most certainly.

17 QUESTION: Of course it is.

18 MR. BOEHMER: Most certainly.

19 QUESTION: So why do you say it isn't? What  
20 makes this case different is that we're dealing with  
21 third parties.

22 MR. BOEHMER: If Congress was interested in  
23 changing all the state laws and was interested in  
24 regulating the --

25 QUESTION: Congress had a hearing, had a

1 public hearing. Everybody had a chance to come and put  
2 their two bits in. And after the hearing they passed  
3 this regulation. Now you say they can't do it?

4 MR. BOEHMER: I say that they cannot affect  
5 the rights of the third parties to this contract. While  
6 they may be able to regulate --

7 QUESTION: Well, why did they have a public  
8 hearing except to consider the third parties? That's  
9 why they're public, p-u-b-l-i-c.

10 MR. BOEHMER: Well, to consider --

11 QUESTION: The third parties are public,  
12 aren't they?

13 MR. BOEHMER: Yes, and it was to consider not  
14 the parties, because the Federal Home Loan Bank Board  
15 was not given the authority over those third parties,  
16 and indeed those third parties may not even have existed  
17 at the time.

18 QUESTION: Well, you tell me any way the home  
19 loan -- the savings and loans can operate without third  
20 parties?

21 MR. BOEHMER: They cannot. They cannot.

22 QUESTION: I didn't think they could.

23 MR. BOEHMER: And the Federal Home Loan Bank  
24 Board's regulatory power extends to the savings and  
25 loans. The public hearing was for them. The regulation

1 is directed to them. It is not directed to the public  
2 out here and it was not meant to control the rights of  
3 the parties on the other side of the contract.

4 The Federal Home Loan Bank Board's authority  
5 goes to the federal savings and loans and to their  
6 operations. It would be like the board of directors of  
7 a corporation saying, well, we have the authority to say  
8 what's in this contract and therefore the contract has  
9 to be enforced according to our intent.

10 CHIEF JUSTICE BURGER: Your time has expired,  
11 counsel.

12 Thank you, gentlemen. The case is submitted.

13 (Whereupon, at 2:48 p.m., the case in the  
14 above-entitled matter was submitted.)

15 \* \* \*

16

17

18

19

20

21

22

23

24

25



CERTIFICATION

Alderson Reporting Company, Inc. hereby certifies that the attached pages represent an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of the United States in the matter of:

FIDELITY FEDERAL SAVINGS AND LOAN ASSOCIATION ET AL., v.

REGINALD D. de la CUESTA ET AL # 81-750

and that these pages constitute the original transcript of the proceedings for the records of the Court.

BY Reene Hammond

RECEIVED  
SUPREME COURT, U.S.  
MARSHAL'S OFFICE

982 MAY 5 AM 10 25