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SUPREME COURT OF THE STATE OF WASHINGTON

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ANNE and CHRIS McCURRY, on behalf of themselves and others  
similarly situated,

Petitioners,

v.

CHEVY CHASE BANK, F.S.B.,

Respondent.

---

RESPONDENT'S ANSWER TO THE *AMICUS CURIAE*  
BRIEF OF THE STATE OF WASHINGTON

---

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## I. INTRODUCTION

Chevy Chase Bank, F.S.B. ("Chevy Chase") respectfully submits this Answer to the *Amicus Curiae* Brief of the Attorney General of the State of Washington (the "State's Brief") pursuant to RAP 10.2(g).

The State's Brief poses two questions: (1) whether the Home Owners' Loan Act, 12 U.S.C. § 1461 *et seq.* ("HOLA") and regulations adopted under HOLA by the Office of Thrift Supervision ("OTS"), have completely occupied the field of regulating the activities of the federal thrift institutions that were created under HOLA and are regulated by OTS; and (2) whether OTS regulations preempt the application of the Washington Consumer Protection Act ("CPA") to claims concerning "the manner" by which a federal savings bank ("FSB") informed a borrower of certain fees. State's Brief at 1-2 (emphasis in original).

The plain language of HOLA and the OTS regulation unequivocally answer the first question. In enacting HOLA, Congress created uniquely federal financial institutions that were to be comprehensively regulated by federal law. Congress intended to occupy the entire field of regulating FSBs and the OTS has promulgated regulations implementing that direction. *See, e.g., Fidelity Fed. Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 161-62, 102 S. Ct. 3014, 73 L. Ed. 2d 664 (1982); 12 C.F.R. § 560.2(a) (HOLA and OTS regulation

“occupies the entire field of lending regulation” for federal savings banks). The OTS regulation likewise directly answers the other question posed in the State’s Brief: OTS occupies the entire field for regulating federal savings banks (12 C.F.R. § 560.2(a)) and specifically preempts state law to the extent it is used to impose requirements or restrictions on “the manner” in which FSBs charge or disclose loan-related fees to their customers. 12 C.F.R. §§ 560.2(b)(4), (5) and (9).

The State’s Brief argues that the CPA should not be preempted because it is a statute of general application. State’s Brief at 3-6. Three United States Courts of Appeals have considered whether borrowers’ claims under generally applicable state consumer protection statutes can be preempted by the OTS’s preemption regulation. All of these courts have concluded that such claims are preempted if the statute of general application is, in a particular instance, being applied in a way that falls within the preemptive scope of 12 C.F.R. § 560.2(b). *See, e.g., Casey v. Fed. Deposit Ins. Corp.*, --- F.3d ----, 2009 WL 3349950, at \*6 (8th Cir. Oct. 20, 2009) (“We conclude that a state law that either on its face or as applied imposes requirements regarding the examples listed in § 560.2(b) is preempted.”); *Silvas v. E\*Trade Mortgage Corp.*, 514 F.3d 1001, 1003, 1008 (9th Cir. 2008) (claims alleged under California statutes regarding unfair advertising and unfair competition preempted because, as applied,

the statutes fell within areas covered by 12 C.F.R. § 560.2(b)); *In re Ocwen Loan Servicing, LLC Mortgage Servicing Litig.*, 491 F.3d 638 (7th Cir. 2007) (numerous statutory claims preempted by OTS regulations). This Court has repeatedly held that the construction of a federal statute or regulation by a United States Court of Appeals, while not binding, is “entitled to great weight” when the same statute comes before this Court. *S.S. v. Alexander*, 143 Wn. App. 75, 92, 177 P.3d 724 (Div. I, 2008) (citing *Home Ins. Co. of N. Y. v. N. Pac. Ry. Co.*, 18 Wn.2d 798, 808, 140 P.2d 507 (1943)).

Like the federal Courts of Appeals, this Court should look to the OTS’s guidance on how to analyze the preemption issue and decide that when the proposed application of a state law (statute or otherwise) would impose requirements in the areas identified in 12 C.F.R. § 560.2(b), it is preempted. Because the proposed application of the Washington CPA here falls within the areas preempted by 12 C.F.R. § 560.2(b), this Court should conclude that Plaintiffs’ claim under that statute was properly dismissed and affirm the Court of Appeals.

## II. OVERVIEW OF FACTS AND PROCEDURE

The McCurrys allege that Chevy Chase charged them a fee for delivering their loan payoff statement by fax and that they were charged a notary fee when they paid off their home loan. CP 4-5. They assert the

legal conclusion that their Deed of Trust did not secure or allow Chevy Chase to charge such fees. CP 4-5, 7-8. Based on these allegations and legal contentions, they claim that Chevy Chase, by charging the fees and including them on the payoff statement, breached the contract or used a deceptive trade practice. CP 7-9.

The Superior Court of King County granted Chevy Chase's motion under CR 12(b)(6) to dismiss the McCurrys' claims as preempted, because federal law exclusively governs what fees a federal thrift may charge and how it must disclose them. The Court of Appeals affirmed the dismissal. *McCurry v. Chevy Chase, Bank, F.S.B.*, 144 Wn. App. 900, 913, 193 P.3d 155 (2008).

The State's Brief apparently contends that there is some special privilege against preemption for CPA claims. Federal and state courts routinely dismiss such claims as preempted by applicable federal law. The decisions below dismissing those claims were correct as a matter of law.

### III. ARGUMENT

#### A. **The United States Supreme Court Has Already Ruled That HOLA Authorizes The Adoption Of Regulations Displacing State Law.**

The State's Brief makes the remarkable argument that the only preemption authorized by HOLA is found in a provision regarding interest rate ceilings. State's Brief at 11 ("By negative implication, HOLA

authorizes no other preemption.”). This argument simply misreads the underlying purposes of HOLA, the express statutory language of HOLA and the explicit holding of the United States Supreme Court in its *de la Cuesta* decision.

Under Section 5(a) of HOLA, Congress vested the agency that is now OTS with plenary authority to issue regulations “to provide for the organization, incorporation, examination, operation, and regulation of associations to be known as Federal savings associations.” 12 U.S.C. § 1464(a)(1). The states “had developed a hodgepodge of savings and loan laws and regulations, and Congress hoped that [the Board’s] rules would set an example for uniform and sound savings and loan regulations.” *Conference of Fed. Sav. & Loan Ass’ns v. Stein*, 604 F.2d 1256, 1258 (9th Cir. 1979) (quoting Thomas B. Marvell, *The Federal Home Loan Bank Board* 26 (1969)), *aff’d*, 445 U.S. 921, 100 S. Ct. 1304, 63 L. Ed. 2d 754 (1980).

The United States Supreme Court has made clear that “[t]he broad language of § 5(a) expresses no limits on the Board’s authority to regulate the lending practices of federal savings and loans” and “[i]t would have been difficult for Congress to give the [Board] a broader mandate.” *de la Cuesta*, 458 U.S. at 161 (quoting *Glendale Fed. Sav. & Loan*

*Ass'n v. Fox*, 459 F. Supp. 903, 910 (C.D. Cal. 1978)). The Court in *de la Cuesta* concluded:

Congress plainly envisioned that federal savings and loans would be governed by what the Board – not any particular State – deemed to be the “best practices.” . . . Thus, the statutory language suggests that Congress expressly contemplated, and approved, the Board’s promulgation of regulations superseding state law.

458 U.S. at 161-62 (citation omitted).

This statutory authority gave the regulators overseeing FSBs the authority to issue regulations that governed the “powers and operations of every Federal savings and loan association from its cradle to its corporate grave.” *Id.* at 145 (quoting *People v. Coast Fed. Sav. & Loan Ass'n*, 98 F. Supp. 311, 316 (S.D. Cal. 1951)). The regulation of federal savings associations has therefore been characterized as being so “pervasive as to leave no room for state regulatory control.” *Stein*, 604 F.2d at 1260.

There is no question that decisions from the United States Supreme Court interpreting federal statutes are binding on this Court. *See, e.g., Alexander*, 143 Wn. App. at 92 (“[t]he statute being a federal one, we are, of course, bound by the construction placed upon it by the Supreme Court of the United States.”) (quoting *N. Pac. Ry. Co. v. Longmire*, 104 Wash. 121, 125 (1918)). Contrary to the contention in the State’s Brief, *de la Cuesta* has already decided that HOLA Section 5(a) unquestionably

authorizes OTS to promulgate regulations that displace state law. The remaining question posed by the State's Brief is whether the CPA has, in this instance, been displaced by the regulations adopted by OTS.<sup>1</sup>

**B. State Law Claims Based On The Manner In Which An FSB Discloses Terms of Credit and Loan-Related Fees Are Expressly Preempted By OTS Regulation.**

The State's Brief contends that the CPA should not be preempted here because it embodies a strong public policy (State's Brief at 13) and because states have an important role in enforcing consumer protection laws (State's Brief at 15). Both arguments miss the point entirely. Under the United States Constitution's Supremacy Clause, Congress has the authority to displace state law. State law can be preempted by a statute enacted by Congress or by regulations adopted by a federal agency under authority granted to it by Congress. *de la Cuesta*, 458 U.S. at 153. Put differently, "[f]ederal regulations have no less pre-emptive effect than

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<sup>1</sup> The State's Brief relies on decisions interpreting different federal statutory schemes. *See, e.g.*, State's Brief at 3-4 (citing decisions about preemptive scope of the National Bank Act); State's Brief at 8 (citing a case under the statutes governing the Food & Drug Administration); State's Brief at 13-14 (discussing regulations issued by Office of the Comptroller of the Currency under National Bank Act). These cases are not pertinent here, for the question is the intended preemptive scope of HOLA and its implementing regulations, not the operations of other statutes or regulatory schemes. Likewise, the HOLA-related cases cited at page 4, footnote 4 of the State's Brief do not take into account the decisions in *Silvas* and *Casey* and should be disregarded.

federal statutes.” *Id.* Preemption is always a question of federal law, not state public policy.

Under the mandate given to it by Congress in HOLA, OTS promulgated a comprehensive regulation that “occupies the entire field of lending regulation for federal savings associations.” 12 C.F.R. § 560.2(a) (emphasis added). In furtherance of Congress’s goal that FSBs should operate under a “uniform federal scheme of regulation” (12 C.F.R. § 560.2(a)), the OTS regulation preempts state laws that purport to limit a federal savings bank’s “terms of credit,” including “adjustments to . . . payments due.” 12 C.F.R. § 560.2(b)(4). Additionally, courts may not use state law to second-guess an FSB’s “[l]oan-related fees, including without limitation . . . prepayment penalties [and] servicing fees,” 12 C.F.R. § 560.2(b)(5), or its manner of “[d]isclosure.” 12 C.F.R. § 560.2(b)(9). The state law that is preempted includes judicial decisions. 12 C.F.R. § 560.2(a).

Here, the State’s Brief advocates exactly what HOLA preempts – a judicial decision construing the CPA as imposing requirements on how Chevy Chase discloses terms of credit and loan-related fees to borrowers. It is no answer to argue, as the State’s Brief does, that 12 C.F.R. § 560.2(c) exempts some state laws from preemption if they only “incidentally affect” lending. State’s Brief at 4-6. As one court has

observed, “[i]t would not do to let the broad standards characteristic of such fields [in § 560.2(c)] morph into a scheme of state regulation of federal S & Ls.” *In re Ocwen*, 491 F.3d at 643. State law claims based on a federal savings bank’s terms of credit, loan-related fees and disclosures are expressly preempted by 12 C.F.R. §§ 560.2(b)(4), (5) and (9). Accordingly, state law, including the CPA, does not apply and the McCurrys’ CPA claims were properly dismissed.<sup>2</sup>

**C. Application of the Washington CPA Is Also Preempted By OTS Regulation Because The Underlying Allegations Deal With Disclosure of Terms of Credit and Loan-Related Fees.**

Proper application of the OTS regulation leads to the conclusion that the CPA, as applied to the manner in which a federal savings bank discloses terms of credit and loan-related fees, is a type of state law contemplated by 12 C.F.R. § 560.2(b) and is thus preempted. The first step in analyzing whether a state law is preempted by 12 C.F.R. § 560.2 is to determine if the type of law in question, “as applied,” is a type of state

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<sup>2</sup> Additionally, RCW 19.86.170 provides a carve-out to the CPA’s application that is triggered by the OTS’s pervasive regulation of the fees that FSBs may charge. *See Interstate Prod. Credit Ass’n v. MacHugh*, 61 Wn. App. 403, 410, 810 P.2d 535 (1991) (CPA inapplicable to activities that are “closely regulated under federal law” (citing *Tokarz v. Frontier Fed. Sav. & Loan Ass’n*, 33 Wn. App. 456, 464, 656 P.2d 1089 (1982))). The OTS has repeatedly permitted the charging of the fees at issue, making the CPA inapplicable. *See* RCW 19.86.170 (exempting actions or transactions “permitted by any other regulatory body or officer acting under statutory authority”). This is an alternative basis for affirming the courts below.

law contemplated in the list under 12 C.F.R. § 560.2(b). *Silvas*, 514 F.3d at 1005 (citing OTS, Final Rule, 61 Fed. Reg. 50951, 50966-67 (Sept. 30, 1996)); *id.* at 1006. If so, “the preemption analysis ends,” and the law is preempted. *Id.* at 1006.

A recent decision from the United States Court of Appeals from the Eighth Circuit carefully considered how to implement the preemptive force of the OTS regulation in the context of a statute that, on its face, is not specifically directed to the lending activities of an FSB. *Casey v. Fed. Deposit Ins. Corp.*, --- F.3d ----, 2009 WL 3349950 (8th Cir. Oct. 20, 2009). In *Casey*, the Eighth Circuit agreed with regulatory opinions from OTS, a prior decision from the Ninth Circuit and with the Court of Appeals decision in this case in concluding that “a state law that either on its face or as applied imposes requirements regarding the examples listed in § 560.2(b) is preempted.” *Id.* at \*6 (footnote omitted); *see also id.* at \*7 n.2 (citing with approval *McCurry v. Chevy Chase Bank, F.S.B.*, 144 Wn. App. 900, 193 P.3d 155 (2008)).

The position taken by the State’s Brief would unquestionably require an application of the CPA that “imposes requirements regarding the examples listed in § 560.2(b).” Plaintiffs claim that Chevy Chase violated the CPA when it used an allegedly misleading form of payoff statement to tell Plaintiffs how much money was needed when they paid

off their home loan before maturity. CP 8 (Compl. at 6) and CP 32 (Compl. Ex. B). Under their CPA claim, Plaintiffs seek, among other things, an injunction directing Chevy Chase to alter its practices as to the fees it charges at payoff and how it discloses those fees to its borrowers. CP 8-9 (Compl. at 6-7). In other words, the State's Brief urges the Court to do precisely what HOLA sought to prevent – apply state law to dictate the business practices of FSBs. Congress, through HOLA, and the OTS, through its preemption regulation, have superseded such hodge-podge applications of state law so that FSBs can “exercise their lending powers in accordance with a uniform federal scheme of regulation.” 12 C.F.R. § 560.2(a).

Contrary to the State's incorrect assertion, the issue is not whether the CPA is a law of general applicability that falls under 12 C.F.R. § 560.2(c) but whether the CPA, as it is purported to be applied in a particular context, is a type of state law contemplated in the list under 12 C.F.R. § 560.2(b). The State's argument – that the CPA is a law of general applicability that falls under the exemption from preemption set forth in 12 C.F.R. § 560.2(c) – erroneously skips the first step of the preemption analysis.<sup>3</sup>

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<sup>3</sup> In support of its “law of general applicability” approach, the State's Brief relies primarily on decisions from the California state courts such as

The decision in *Silvas* illustrates the proper application of the preemption analysis. In that case, borrowers claimed that the federal thrift violated California's generally applicable consumer protection laws by charging a rate lock-in fee, by failing to refund that fee and by issuing allegedly misleading advertising and disclosures about whether the fee was refundable if they exercised their rights to rescind the loan transaction. *Silvas*, 514 F.3d at 1002, 1006 n.2. Plaintiffs in that case had no cause of action available under federal law, so they sued under California's false advertising and unfair competition laws. *Id.* After reviewing the history of HOLA, the *Silvas* court concluded that HOLA and the OTS regulation preempted state law remedies by way of field preemption. *Id.* at 1004.

With this established, the *Silvas* court then looked to the OTS regulation and OTS's guidance on how it should be applied. *Id.* at 1005. "As outlined by OTS, the first step is to determine if [the CPA], as applied, is a type of state law contemplated in the list under paragraph (b) of 12 C.F.R. § 560.2. If it is, the preemption analysis ends." *Id.* at 1006.

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*Gibson v. World Sav. & Loan Ass'n*, 103 Cal. App. 4th 1291, 128 Cal. Rptr. 2d 19 (2002), and *Lopez v. World Sav. & Loan Ass'n*, 105 Cal. App. 4th 729, 130 Cal. Rptr. 2d 42 (2003). This approach has been rejected by the U.S. Courts of Appeals in favor of the "as applied" analysis outlined above and should likewise be rejected by this Court.

In *Silvas*, as in the portion of this case addressed by the State's Brief, plaintiffs' claims had to do with allegedly misleading disclosures. Such claims are "within the specific type of law listed in § 560.2(b)(9). Therefore the preemption analysis ends." *Id.* The claim was properly dismissed with prejudice on a Rule 12(b)(6) motion because the statute, "as applied in this case is preempted by federal law." *Id.* at 1006, 1008.<sup>4</sup>

More than a dozen decisions from United States District Courts have come down this year implementing this "as applied" analysis, several of which have found that claims under state consumer protection laws are preempted by 12 C.F.R. § 560.2. By way of example, the Northern District of California expressly followed *Silvas* in *Spears v. Wash. Mut., Inc.*, No. C-08-00868 RMW, 2009 WL 605835 (N.D. Cal. Mar. 9, 2009). In that case, the court dismissed with prejudice claims under California's Unfair Competition Law and Consumer Legal Remedies Act. *Id.* at \*6-7. As applied, the statutes were preempted by 12 C.F.R. § 560.2(b)(10) because the underlying allegations dealt with processing and origination of mortgages. *Id.* at \*6. Similarly, in *Naulty v. GreenPoint Mortgage Funding, Inc.*, Nos. C 09-1542 MHP, C 09-1545 MHP, 2009 WL

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<sup>4</sup> Like the Court of Appeals in this case, the *Silvas* court went on to hold that it did not need to do any analysis under 12 C.F.R. § 560.2(c), but found that if such an analysis had been warranted, the state law claims would still have been dismissed. *Silvas*, 514 F.3d at 1006-07 & n.3.

2870620, at \*4, \*7 (N.D. Cal. Sept. 3, 2009), the court dismissed state law claims against a federal savings bank under state deceptive advertising and unfair business practices laws. The claims were preempted because the plaintiffs sought to apply the statutes to situations involving terms of credit, loan-related fees, disclosure and advertising, and processing, origination and sale of mortgages, all of which are covered by the preemption provisions in 12 C.F.R. §§ 560.2(b)(4), (5), (9) and (10). *Id.* at \*4. Likewise in *Murillo v. Aurora Loan Servs., LLC*, No. C 09-00504 JW, 2009 WL 2160580, at \*3-4, \*6 (N.D. Cal. July 17, 2009) the court dismissed state law claims against a federal savings bank and its subsidiary for violation of unfair competition law and unfair business practices as preempted by 12 C.F.R. §§ 560.2(b)(4) and (9) because they related to disclosures and terms of credit.<sup>5</sup>

Here, the State seeks to apply the CPA to the manner in which Chevy Chase disclosed terms of credit and loan-related fees to borrowers.

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<sup>5</sup> Pursuant to RAP 10.3(f), Chevy Chase has limited the cases cited in this brief to the issue raised in the State's Brief – that is, preemption of claims arising under general consumer protection statutes. In fact, numerous federal district court cases decided since *Silvas* have dismissed a multitude of state law claims as preempted, including negligence, misrepresentation, breach of contract, unjust enrichment, fraud and breach of fiduciary duty, when such generally applicable state laws were sought to be applied to areas preempted by 12 C.F.R. § 560.2(b). For the Court's convenience, Chevy Chase has submitted copies of those decisions, including the examples cited above, with Chevy Chase's Statement of Additional Authorities.

As applied in this context, the CPA is a type of state law that falls under 12 C.F.R. §§ 560.2(b)(4), (5) and (9). Therefore, "the preemption analysis ends," and the McCurrys' CPA claim is preempted.

#### IV. CONCLUSION

Plaintiffs seek to apply the Washington CPA to impose state law requirements on the disclosures made by Chevy Chase to its borrowers when they pay off loans. This is an area in which Congress and the Office of Thrift Supervision have precluded the application of state law. Accordingly, Chevy Chase respectfully requests that this Court reject the positions advocated in the State's Brief and affirm the Court of Appeals and the Superior Court's dismissal of this action.

RESPECTFULLY SUBMITTED this 29<sup>th</sup> day of October, 2009.

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DECLARATION OF SERVICE 09 OCT 29 PM 4:00

I, Neil A. Dial, declare as follows:

BY RONALD R. CARPENTER

I am one of the Attorneys for Chevy Chase Bank, F.S.B. and am a resident of the State of  
Washington, residing and employed in Seattle, Washington. CLERK

I am over the age of eighteen years old and am not a party to the above-titled action. My business address is 1111 Third Avenue, Suite 3400, Seattle, Washington 98101.

On October 29, 2009, 2009, I caused the following documents to be served on the parties:

- (1) Respondent's Answer To Brief Of Amici Curiae Washington State Association For Justice Foundation & American Association For Justice;
- (2) Respondent's Answer To The Amicus Curiae Brief Of The State Of Washington; and
- (3) this Declaration of Service:

in the manner noted:

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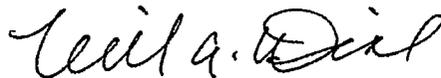
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I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed on this 29th day of October 2009, in Seattle, Washington.

DATED this 29<sup>th</sup> day of October, 2009.

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