No. 11-1013

In The
Supreme Court of the United States

KAREEM SALESSI,

Petitioner,

vs.

WACHOVIA MORTGAGE, FSB, fka WORLD SAVINGS BANK, FSB, A FEDERAL SAVINGS BANK; FIDELITY NATIONAL AGENCY SALES AND POSTING; GOLDEN WEST SAVINGS ASSOCIATION SERVICE CO.; and ANGLIN FLEWELLING RASMUSSEN CAMPELL & TRYTTEN LLP,

Respondents.

On Petition For Writ Of Certiorari To The Court Of Appeal Of California, Fourth Appellate District, Division Three

BRIEF IN OPPOSITION

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Respondent Fidelity National Agency Sales and Posting (hereinafter "ASAP") submits the following Brief In Opposition To The Petition for Certiorari:

STATEMENT OF THE CASE

A. Factual Background

On November 7, 2002, KAREEM SALESSI (hereinafter referred to as the "Petitioner"), purchased the real property located at 28841 Aloma Avenue, Laguna Niguel Beach, California (hereinafter the "subject property") from Patrick Ortiz and Debbie Ortiz. As part of the purchase, Petitioner assumed a loan in the amount of $310,000.00 which was secured by a first trust deed in favor of World Savings Bank, FSB. Additionally, Petitioner assumed a loan in the amount of $88,600.00 which was secured by a second trust deed in favor of World Savings Bank, FSB. After living at the subject property for five years, Petitioner defaulted on his loan payments, and the lender initiated a non-judicial foreclosure sale of the subject property.

ASAP was retained by the foreclosure trustee to post and publish the Notice of Trustee's Sale and to conduct the foreclosure auction. The foreclosure sale was set for June 5, 2008. Plaintiff filed this action on June 4, 2008, and sought a Temporary Restraining Order to stop the foreclosure sale. The case was assigned for all purposes to the Honorable William

Monroe. Judge Monroe issued a Temporary Restraining Order, to enjoin the foreclosure sale and set an OSC Re: Preliminary Injunction for July 8, 2008. Petitioner was originally represented by counsel, Barry Ross, who filed the complaint and the Ex Parte Application for Temporary Restraining Order. Prior to the return hearing on the Order to Show Cause Re: Preliminary Injunction, Petitioner substituted himself in propria persona.

Having reviewed the briefs offered both in support and in opposition to the preliminary injunction, the court issued a tentative ruling, which was posted on the internet. The tentative ruling vacated the temporary restraining order and denied the preliminary injunction. Petitioner, having read the tentative ruling, appeared at the hearing the next day and filed a CCP Section 170.1 Challenge to remove Judge Monroe. The Petitioner claimed that Judge Monroe had to be biased because he did not grant the Preliminary Injunction. All of Petitioner's appeals center upon his belief that Judge Monroe should have been removed for bias.

The underlying premise of Petitioner's lawsuit arises from his claims that the grant deed which transferred title to the subject property to him was forged, and that he was thereby defrauded in the purchase of the subject property. However, the sellers Patrick and Debbie Ortiz are not parties to the action, and have never challenged Petitioner's right to title to the subject property. While the Petitioner claims that he never acquired title to the property, he has

vigorously attempted to prevent the lender from foreclosing, on his home.

B. Procedural Background

Petitioner filed his complaint on June 4, 2008. The complaint contained three causes of action, for declaratory relief, injunctive relief, and damages. At the same time, Petitioner filed an Ex Parte Application for a Temporary Restraining Order and an Order to Show Cause on the Application for a Preliminary Injunction.

On July 25, 2008, following the denial of the Preliminary Injunction, Petitioner filed a Petition for Writ of Mandate, and for Prohibition in the California State Court of Appeal, Case Number G040713. Petitioner's Petition was summarily denied on August 7, 2008 by Justices Rylaarsdam, Fybel, and Ikola. Petitioner then petitioned for review by the California Supreme Court, which was denied.

Subsequently, Defendant ASAP filed a Demurrer to the complaint which was sustained, without leave to amend, and ASAP was dismissed from the action. Petitioner filed several different Notices of Appeal, and the consolidated appeals were eventually briefed and heard in April of 2011. The Court issued its opinion on June 8, 2011, denying the appeal stating that they lacked jurisdiction on the following grounds:

> "[t]he determination of the question of the disqualification of a judge is not an appealable

> order and may be reviewed only by a writ of mandate." *Appendix B to the Petition*.

Petitioner then petitioned the California Supreme Court for Certiorari, which was denied on August 24, 2011. Petitioner now petitions this Court for a Writ of Certiorari.

ARGUMENT

I. THE PETITIONER HAS FAILED TO PROPERLY RAISE A FEDERAL ISSUE

Rule 14(g)(i) of this Court requires, when review is sought of a state-court judgment, that a Petitioner:

> Specif[y] . . . when the federal questions sought to be reviewed were raised; the method or manner of raising them . . . with specific reference to the places in the record where the matter appears . . . , so as to show that the federal question was timely and properly raised.

During his many appeals, the Petitioner has never raised the constitutional issue which he now urges this Court to consider.

It is essential to the jurisdiction of the Supreme Court under 28 U.S.C. § 1257(a) that a substantial federal question has been properly raised in the state court proceedings. The Policy considerations underlying this jurisdictional requirement are (1) federal questions not raised in the state court "are those on which the record is very likely to be inadequate, since

it certainly was not complied with those questions in mind"; (2) in a federal system "it is important that state courts be given the first opportunity to consider the applicability of state statutes in light of [federal] constitutional challenge, since the statutes may be construed in a way that saves their constitutionality"; (3) the federal question, if raised below, might "be blocked" by the state court on an adequate and independent state ground, thereby rendering unnecessary any Supreme Court review of the federal issue. *Cardinale v. Louisiana*, 394 U.S. 437, 439 (1969); see also *Illinois v. Gates*, 462 U.S. 213, 218-220 (1983).

Assuming a federal question has been properly framed, it is essential that it be raised, presented, and pursued in a timely and proper manner at the appropriate point or points in the state court proceedings. *Godchaux Co. v. Estopinal*, 251 U.S. 179, 181 (1919); *Beck v. Washington*, 369 U.S. 541, 550-554 (1961).

Petitioner has never raised the bankruptcy issue prior to the present petition. It is unknown if there is any merit to his contention that the lender never received relief from a bankruptcy stay or if there was a bankruptcy stay in effect. Furthermore, if in fact there was a violation of the automatic stay, Petitioner, should properly raise those questions with the Bankruptcy Court.

The only other federal issue presented by the Petitioner in his Petition for Certiorari, is whether Judge Monroe's failure to recuse himself from hearing the case denied Petitioner due process under the 14th

Amendment to the U.S. Constitution. This argument has never been offered by the Petitioner in any of the numerous challenges, appeals, and petitions filed in this matter. (1) This issue was not raised before Judge Monroe; (2) it was not raised when the Petitioner sought his Writ of Mandate from the California Appellate Court; (3) it was not raised when he petitioned the California Supreme Court for Certiorari on the denial of the Writ of Mandate; (4) it was not raised in any of his numerous appeals nor was it mentioned in the briefs that he submitted to the Appellate Court; (5) and it was not raised when he petitioned the California Supreme Court on the denial of the appeal. It is too late, of course, to raise the federal question for the first time in the petition for certiorari to this court. The paper is not part of the record of the state court proceeding, and it is that record which must affirmatively show a raising of the federal issue. See *White River Lumber Co. v. Arkansas ex. rel. Applegate*, 279 U.S. 692, 700 (1929); *Whitney v. California*, 274 U.S. 357, 362-363 (1927).

Petitioner's Writ of Mandate, his State Court Appeal and the Petition for Certiorari to the California Supreme Court were all solely based upon Petitioner's statutory claims of bias on the part of Judge Monroe. In short, this issue has never been briefed, and the argument has never been made prior to Petitioner's current Petition for Certiorari.

The *California Code of Civil Procedure* Sections 170 et seq. provides the proper procedure for disqualifications of Judges. Petitioner availed himself of the

process, and followed up by requesting both proper and improper appellate review. Petitioner now seeks to have the court review the disqualification of Judge Monroe by application of the test in *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 129 S.Ct. 2252 (2009). In *Caperton, supra,* the court stated that:

> "The failure to consider objective standards requiring recusal is not consistent with the imperatives of due process. We find that Blankenship's significant and disproportionate influence – coupled with the temporal relationship between the election and the pending case – " "offer a possible temptation to the average . . . judge to . . . lead him not to hold the balance nice, clear and true." *Caperton*, *supra*, at 2265.

In discussing the Caperton decisions, the California Supreme Court stated:

> " . . . the United States Supreme Court's due process case law focuses on actual bias. This does not mean that actual bias must be proven to establish a due process violation. Rather, consistent with its concern that due process guarantees an impartial adjudicator, the court has focused on those circumstances where, even if actual bias is not demonstrated, the probability of bias on the part of a judge is so great as to become "constitutionally intolerable." *People v. Freeman*, 47 Cal.4th 993, 1001 (2009).

Caperton involved a Judge who refused to recuse himself from a case where one of the parties had

provided a $3 million campaign contribution to the election campaign of the Judge. The *Caperton* court stated that

> "Our decision today addresses an extraordinary situation where the Constitution requires recusal. Massey and its *amici* predict that various adverse consequences will follow from recognizing a constitutional violation here – ranging from a flood of recusal motions to unnecessary interference with judicial elections. We disagree. The facts now before us are extreme by any measure. The parties point to no other instance involving judicial campaign contributions that presents a potential for bias comparable to the circumstances in this case." *Caperton*, *supra,* at 2265.

Clearly, the *Caperton* decision was not intended to broaden the scope of review of Due Process Claims arising from judicial recusals, but rather to limit them to extraordinary situations. Here, Petitioner's only claim is that not simply Judge Monroe, but "all" California judges must recuse themselves from any mortgage-related litigation, because as California employees, their pension benefits are managed by CALPERS, and CALPERS owns mortgage-backed securities. Aside from the previously stated fact that this issue has never been raised in this action, the underlying premise is ill conceived and fraught with peril. If no California judge may hear a mortgage-related case, where should they be filed? Cannot

similar specters be raised to federal judges and judges in other states?

Once again, there is no evidence in the state court records that would substantiate Petitioner's claims concerning CALPERS. And, of course, if there were any evidence that CALPERS invested in mortgage-backed securities, would that be sufficient to require the recusal of Judge Monroe or any other California judge? Even if we assume that Petitioner's statement is correct, there is no suggestion that Petitioner's loan was pooled as a mortgage-backed security. It has not been suggested that CALPERS held an ownership interest in Petitioner's loan. Nor has Petitioner offered any coherent argument that would lead us to believe that the non-judicial foreclosure of a residential property would materially affect anyone's pension. There simply is nothing here that would indicate that a reasonable person would be incapable of ruling on the issues fairly.

II. PETITIONER IMPROPERLY SEEKS A FACTUAL REVIEW OF THE PURPORTED BIAS IN THE TRIAL COURT.

The Supreme Court has stated that "We do not grant certiorari to review evidence and discuss specific facts." *United States v. Johnston*, 268 U.S. 227 (1925); *Texas v. Mead*, 465 U.S. 1041 (1984). The court has also held that the responsibility of assessing a record to determine whether agency findings are supported by substantial evidence "is not ours," but "primarily"

that of the court of appeals. "This Court will intervene only in what ought to be the rare instances where the standard appears to have been misapprehended or grossly misapplied." *Mobil Oil Corp. v. FPC*, 417 U.S. 283, 210 (1974); *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 491 (1951).

Virtually the entire Petition is devoted to Petitioner's request that this Court engage in a factual review of whether the appellate court failed to "recognize bias" on the part of Judge Monroe. As identified above it is extremely rare indeed for this Court to engage in such a review. It would be particularly unusual in this case, where the appellate record is incredibly sparse. Petitioner's record on appeal contains no reporter's transcript and a 79-page Appendix which contains the complaint, the Ex Parte Application for Temporary Restraining Order, the Statutory Challenge to Judge Monroe, Defendant, Wachovia Mortgage, FSB's objections to the Statutory Challenge to Judge Monroe, and Judge Monroe's orders striking the Statutory Challenge. The "record on appeal" contains very little information of any kind, let alone glaring facts that would require granting of the present Petition for Certiorari.

III. PETITIONER HAS CONSISTENTLY DISTORTED THE RECORD BY MISSTATING FACTS THAT ARE NOT PART OF THE RECORD ON APPEAL OR BY FABRICATING FACTS THAT DO NOT EXIST.

Petitioner has, in all of his briefs, made purported statements of fact that he claims are undisputed. In fact, there is nothing contained in the courts records that in any way support Petitioner's statements. Of the 18 footnotes contained in Petitioner's paperwork, five reference legal authorities, the other thirteen are directed to unverified exterior sources which are not now nor ever have been part of the record on appeal. Petitioner has, in every Petition and Appellate Brief, cited his own personal blog in an attempt to mislead them of the factual background of this litigation. Petitioner's paperwork is filled with claims of forged documents; however, there has never been an evidentiary hearing in this matter where a court has made a factual ruling on these claims.

Petitioner claims that the trial judge " . . . called himself "a nutcase" in open court, as a threat . . . ", yet there has never been a reporter's transcript submitted as part of the record on appeal, and there is no evidence that this ever occurred. Once again this is simply hearsay argument made by the Petitioner with no factual support. Yet it is the underlying premise for one of the key questions presented.

In the event that this Court determines that there is a federal question identified in the Petition and that Petitioner has properly raised the issue in the state courts, Respondent objects to Petitioner's use of citations of dubious sources of information that have never been made a part of the court's records in this matter.

CONCLUSION

For the reasons stated above, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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