No. 99-1975

In the Supreme Court of the United States

MICHAEL E. CASEY, PETITIONER

v.

ROBERT E. RHOADES, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

SETH P. WAXMAN
Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
(202) 514–2217

CAROLYN J. BUCK
Chief Counsel

GARY C. ANDERBERG
Special Counsel

JOSEPH F. GRIFFIN
Senior Trial Attorney
Office of Thrift Supervision
Washington, D.C. 20552

QUESTIONS PRESENTED

1. Whether 29 U.S.C. 1056(d)(1), the anti-alienation provision of the Employee Retirement Income Security Act of 1974 (ERISA), barred the Office of Thrift Supervision from issuing a cease-and-desist order that required petitioner to forfeit ERISA pension plan benefits.

2. Whether the district court was barred by 12 U.S.C. 1818(i)(1) from adjudicating the validity of the cease-and-desist order issued by the Office of Thrift Supervision.

3. Whether ERISA preempts the state banking statutes under which the Texas Savings and Loan Department issued a similar cease-and-desist order.

4. Whether the cease-and-desist order issued by the Texas Savings and Loan Department is entitled to res judicata effect under state law.

5. Whether the district court abused its discretion in awarding attorneys' fees to the trustee of the ERISA pension plan in this case.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-23) is reported at 196 F.3d 592. The opinion of the district court (Pet. App. 24-40) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 3, 1999. A petition for rehearing was denied on February 7, 2000 (Pet. App. 41-42). On May 1, 2000, Justice Scalia extended the time to file a petition for a writ of certiorari to and including June 7, 2000. The petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner was the president and chief executive officer of FirstBanc Savings Association of Texas (FirstBanc) as well as a director and shareholder of FirstBanc. He was also the sole trustee of the First-Banc Employee Stock Ownership Plan (ESOP) and a participant in the ESOP. Pet. App. 2.

Shortly after the formation of the ESOP in 1987, the Office of Thrift Supervision (OTS), the federal regulator of FirstBanc, became concerned about the administration of the ESOP. In 1991, OTS commenced a formal examination of FirstBanc and the ESOP to determine whether petitioner had violated banking regulations and breached his fiduciary duty in his administration of the ESOP. Pet. App. 2-3.

In 1993, in order to avoid the initiation of administrative proceedings against him, petitioner entered into a Stipulation and Consent to Issuance of Order to Cease and Desist (Stipulation) with OTS. The Stipulation recited that OTS believed that grounds existed to initiate administrative cease-and-desist proceedings against petitioner because petitioner's "actions and inactions concerning the creation, funding, and operation of the [ESOP] were a breach of his fiduciary duties to FirstBanc, involved unsafe and unsound practices," and violated applicable regulations. Petitioner, without admitting or denying that grounds existed to initiate administrative proceedings, consented to the issuance of a Final Order to Cease and Desist (Final Order). He stipulated that the Final Order was effective and enforceable, agreed to comply with the Final Order, and waived his right to seek judicial review of the Final Order or otherwise to challenge its validity. Pet. App. 34; OTS C.A. Br. 4-5.

The Final Order removed petitioner as a director of FirstBanc and as the trustee of the ESOP. The Final Order further provided, *inter alia*, that petitioner "shall forfeit, waive, and release any ESOP benefits, interests, distribution or claim for ESOP benefits, interests, and distributions." Pet. App. 3.[1]

Petitioner simultaneously entered into a similar stipulation and order with the Texas Savings and Loan Department (TSLD). Pet. App. 3, 26.

2. When OTS directed petitioner to forfeit his ESOP benefits, as required by the Final Order, he refused to do so. He also refused to comply with TSLD's companion order. Pet. App. 4.

Faced with competing claims to petitioner's ESOP benefits, Robert E. Rhoades, the new trustee for the ESOP, filed an interpleader action and deposited the $77,064.04 in dispute with the district court registry. OTS, in turn, filed an action seeking to enforce the terms of the Final Order. The two actions were consolidated. OTS, TSLD, and petitioner all filed motions for summary judgment. The ESOP trustee filed a motion for discharge and payment of his attorneys' fees. Pet. App. 4-5.

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[1] In conjunction with the entry of the Final Order, OTS notified the Department of Labor's Pension and Welfare Benefits Administration (PWBA) of its concerns regarding the administration of the ESOP. PWBA, after conducting its own investigation, found that petitioner had committed multiple violations of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1001 *et seq.*, and the ESOP governing documents. In particular, PWBA found that petitioner had breached his fiduciary duties by allowing the ESOP to purchase FirstBanc stock at a price greater than its fair market value. OTS C.A. Br. 2-3.

3. The district court granted OTS's and TSLD's motions for summary judgment and denied petitioner's motion. Pet. App. 24-40.

The district court held that it had jurisdiction only to enforce the Final Order, not to adjudicate its validity. The court relied on 12 U.S.C. 1818(i)(1), which confers jurisdiction on district courts to "order and require compliance" with cease-and-desist orders of federal banking agencies, but which provides that "no court shall have jurisdiction * * * to review, modify, suspend, terminate, or set aside any such * * * order," except as otherwise provided. Pet. App. 31-32.

The district court also observed that, even if it had jurisdiction to review or rescind the Final Order, petitioner's challenge to the Final Order would fail. The court concluded that the Final Order did not, as petitioner claimed, violate the anti-alienation provision of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1056(d)(1), which states, in relevant part, that benefits provided under an ERISA pension plan may not be "assigned or alienated." The court reasoned that Section 1056(d)(1) "does not prevent a plan participant from knowingly and voluntarily waiving or releasing his right to benefits." Pet. App. 33.

The district court also rejected petitioner's challenges to the order issued by TSLD. The court held that the order, as an exercise of TSLD's statutory authority to regulate state-chartered banks, falls within ERISA's savings clause, 29 U.S.C. 1144(b)(2)(A), which provides that "nothing in this subchapter shall be construed to exempt or relieve any person from any law of any State which regulates * * * banking." Pet. App. 35-36. The court alternatively held that petitioner was

barred by res judicata from challenging the TSLD order. *Id.* at 37-38.

The district court granted the ESOP trustee's motion for payment of $23,955.21 in attorneys' fees and ordered that the remaining $53,108.83, plus interest, be paid to the other ESOP participants. Pet. App. 5, 38-40.

4. The court of appeals affirmed. Pet. App. 1-23.

The court of appeals held, "based on the plain and preclusive language of § 1818(i)(1)," that the district court did not have jurisdiction in OTS's enforcement action to modify or terminate the Final Order. Pet. App. 9. But the court of appeals held that the district court, as part of its "effort to fashion a solution to the interpleader action," could consider petitioner's claim that the Final Order violated ERISA's anti-alienation provision. *Id.* at 11.

The court of appeals then concluded that the anti-alienation provision did not apply to the Final Order. The court noted that petitioner "knowingly and voluntarily entered into a settlement agreement with OTS in which he agreed to waive his retirement benefits" as part of "a bargained for exchange" in which "OTS agreed not to pursue formal administrative litigation against [petitioner], which could have resulted in [his] being ordered to pay civil penalties." Pet. App. 13-14.

The court of appeals next held that the companion TSLD order was enforceable against petitioner. The court concluded, as a matter of Texas law, that petitioner's challenge to the TSLD order was barred by res judicata. Pet. App. 19-21. The court therefore found it unnecessary to decide whether ERISA preempted the state statutes under which TSLD issued the order. *Id.* at 21.

Finally, the court of appeals upheld the award of attorneys' fees to the ESOP trustee. Pet. App. 22-23.

The court reviewed the attorneys' fee award only for plain error, noting that petitioner "admit[ted] that he failed to timely challenge" the award. *Id.* at 22.

ARGUMENT

The court of appeals correctly upheld OTS's Final Order requiring petitioner to forfeit his ESOP plan benefits. The court of appeals' decision does not conflict with any decision of this Court or of any other court of appeals. Nor does this case present any other federal question of general significance. Further review therefore is not warranted.

1. a. Petitioner contends (Pet. 11-16) that the court of appeals erred in rejecting his claim that the Final Order, in requiring the forfeiture of his ESOP benefits, violates ERISA's provision that pension plan benefits may not be "assigned or alienated," 29 U.S.C. 1056(d)(1). But no such claim could properly have been adjudicated in this case. The district court and the court of appeals had no jurisdiction to review the Final Order for compliance with the provisions of ERISA or any other federal statute.

OTS and other banking regulatory agencies have broad statutory authority to remedy conditions resulting from unsound banking practices and violations of banking laws, including the authority to issue cease-and-desist orders requiring a financial institution or affiliated persons to "make restitution or provide reimbursement," to "dispose of any loan or asset involved," to "rescind agreements or contracts," and to "take such other action as the banking agency determines to be appropriate." 12 U.S.C. 1818(b)(6); see also 12 U.S.C. 1463(a). As the court of appeals recognized (Pet. App. 9-11), in an action by a federal banking agency to enforce its cease-and-desist order, such as the OTS

Final Order in this case, a district court does not have jurisdiction to review the validity of the order. See 12 U.S.C. 1818(i)(1) (providing, with certain exceptions not applicable here, that "no court shall have jurisdiction to affect by injunction or otherwise the issuance or enforcement of" such cease-and-desist orders "or to review, modify, suspend, terminate, or set aside" such orders). The validity of such orders may be challenged only in the court of appeals on a petition filed within 30 days of the issuance of the order. See 12 U.S.C. 1818(h)(2).

The court of appeals nonetheless concluded (Pet. App. 11-12) that, because OTS's action to enforce the Final Order had been consolidated with the ESOP trustee's interpleader action, the district court could consider the validity of the Final Order. That conclusion is incorrect. It is inconsistent with the statutory scheme for judicial review of federal banking agencies' cease-and-desist orders provided in Sections 1818(i)(1) and 1818(h)(2) and with the underlying congressional intent that all challenges to the validity of such orders be resolved in the courts of appeals expeditiously upon the issuance of the order. See generally *Board of Governors of the Federal Reserve System* v. *MCorp Financial, Inc.*, 502 U.S. 32, 42 (1991) (holding that "the specific preclusive language in 12 U.S.C. § 1818(i)(1) (1988 ed., Supp. II) is not qualified or superseded by the general provisions" of other jurisdictional grants).

By contrast, the court of appeals allowed petitioner to challenge, albeit unsuccessfully, the validity of the Final Order for the first time in district court more than two years after its issuance, and notwithstanding his earlier voluntary agreement not to seek judicial review of the Order or otherwise to challenge its validity (see Pet. App. 34). But, as the district court recognized (*id.*

at 31-33) although the court of appeals did not (*id.* at 11-12), those courts, for the reasons that we have explained, did not have jurisdiction to reach the merits of petitioner's claim based on ERISA's anti-alienation provision. Nor, therefore, could that claim properly be reached by this Court in this case.[2]

b. In any event, contrary to petitioner's assertions (Pet. 11-16), the court of appeals' holding on the merits of petitioner's challenge to the Final Order based on ERISA's anti-alienation provision does not conflict with *Boggs* v. *Boggs*, 520 U.S. 833 (1997). The circumstances of this case are entirely unlike those in *Boggs*.

In *Boggs*, the Court was concerned with whether ERISA preempted a state community property law that allowed the wife of a pension plan participant to transfer by will her interest in the participant's undistributed benefits. The wife had died before her husband retired, leaving her interest in those benefits to her husband and sons. The husband remarried, retired, and ultimately died, at which time the sons sought to enforce their asserted state-law interest in

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[2] There is thus no reason for the Court to hold the petition in this case for disposition in light of *Egelhoff* v. *Egelhoff*, No. 99-1529, which presents the question whether ERISA preempts a state law that purports to revoke upon divorce a plan participant's designation of his spouse as beneficiary pursuant to the terms of an ERISA plan. In that case, the petitioner and the United States, as amicus curiae, have argued, among other things, that the state law, as applied to ERISA pension plans, conflicts with ERISA's anti-alienation provision. See Pet. Br. 36-41; U.S. Br. 24-25. Moreover, the Final Order in this case, as the product of a federal regulatory agency issued with the express consent of a plan participant, bears no resemblance to the state law at issue in *Egelhoff*.

the benefits against the second wife. See *Boggs*, 520 U.S. at 836-837.

The Court held that the state law on which the sons based their claim to benefits was preempted as "conflict[ing] with the provisions of ERISA" and "operat[ing] to frustrate its objects." *Boggs*, 520 U.S. at 841. In addressing the sons' claim to various benefits that had been distributed to their father during his retirement, the Court explained that the sons had no right to those benefits under ERISA itself, because the sons were "neither participants nor beneficiaries" under the plan as those terms are defined in ERISA. *Id*. at 848. The Court declined the sons' invitation to "ignore" ERISA's definition of participant and beneficiary and to permit the use of state law to "create a new class of persons for whom plan assets are to be held and administered." *Id*. at 850. The Court added that its "conclusion that Congress intended to pre-empt [the sons'] nonbeneficiary, nonparticipant interests in the retirement plans is given specific and powerful reinforcement by the pension plan anti-alienation provision"; the Court explained that the first wife's testamentary transfer was "a prohibited 'assignment or alienation' " because, as of the time that the transfer occurred, the sons "would have acquired * * * an interest in [the father's] pension plan at the expense of plan participants and beneficiaries." *Id*. at 851-852.

The OTS Final Order, unlike the state community-property law in *Boggs*, presents no issue of federal preemption. Instead, if petitioner's challenge to the Final Order were properly presented in this case, the issue would be whether ERISA's anti-alienation provision operates to constrain the authority of OTS, a federal regulatory agency, with respect to "the examination, safe and sound operation, and regulation of savings

associations," such as FirstBanc, and affiliated persons, such as petitioner, 12 U.S.C. 1463(a)(1). That issue requires a different analysis than does an issue of federal preemption of state law. Compare 29 U.S.C. 1144(a) (providing that ERISA "shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan") with 29 U.S.C. 1144(d) (providing that "[n]othing in [ERISA] shall be construed to alter, amend, modify, invalidate, impair, or supersede any law of the United States * * * or any rule or regulation issued under any such law"). Accordingly, although the court of appeals should not have reached the merits of petitioner's challenge to the Final Order, the court of appeals' resolution of that challenge does not conflict with *Boggs*.

c. Petitioner does not contend that the decision below conflicts with any decision of any other court of appeals. Instead, petitioner asserts (Pet. 10-11) that "[t]his case presents the Court with an opportunity to correct those courts who fail or refuse to acknowledge that the anti-alienation clause of ERISA applies across the board to voluntary and involuntary assignments of future retirement benefits alike."[3] But this case is

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[3] Petitioner does not specifically identify any such cases. Presumably, he is referring to the cases cited by the court of appeals—*Finz* v. *Schlesinger*, 957 F.2d 78 (2d Cir.), cert. denied, 506 U.S. 822 (1992), and *Lumpkin* v. *Envirodyne Industries, Inc.*, 933 F.2d 449 (7th Cir.), cert. denied, 502 U.S. 939 (1991)—which, consistent with the decision below, upheld a knowing and voluntary waiver of pension plan benefits made as part of the settlement of a private dispute. Those cases stand for the unexceptional proposition that litigants claiming contested pension benefits may settle their dispute and are not required by the anti-alienation provision to litigate to the bitter end. See *Lumpkin*, 933 F.2d at 455.

distinguishable from the cases of other courts that petitioner believes to be in need of correction. None of those cases involved a consent order entered by a federal regulatory agency in settlement of potential cease-and-desist proceedings.[4]

2. Petitioner also challenges (Pet. 18-19) the court of appeals' ruling that 12 U.S.C. 1818(i)(1) barred the district court from adjudicating the validity of the Final Order in an action by OTS to enforce that Order. Petitioner contends (Pet. 18) that the court of appeals and the district court adopted an "overly broad reading" of Section 1818(i)(1), but petitioner identifies no decision of this Court or any other court that adopted a different reading. Indeed, this Court recognized in *MCorp Financial*, 502 U.S. at 44, that Section 1818(i)(1) "provides * * * clear and convincing evidence that Congress intended to deny the District Court jurisdiction to review" or otherwise affect banking agency orders. In any event, the court of appeals, notwithstanding its ruling on Section 1818(i)(1), considered and rejected petitioner's challenge to the Final Order on the merits.[5]

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[4] We are advised by OTS that no cases involving similar cease-and-desist orders are likely to arise in the future.

[5] Petitioner's other challenges to the enforcement of the Final Order are without merit and wholly fact-bound. For example, petitioner asserts (Pet. 21-24) that the Final Order should not have been enforced because his beneficiaries were not parties to the proceedings in the district court. Petitioner failed to raise such an argument in the district court; indeed, petitioner signed a pre-trial stipulation that no additional parties were needed for adjudication of the matter. OTS C.A. Br. 6. The court of appeals, after noting that petitioner's wife had not sought to intervene in the action to

3. Petitioner further contends (Pet. 11, 16-18) that the court of appeals erred in rejecting his challenge to the order issued by TSLD. The court of appeals' holding with respect to the TSLD order rested solely on state-law grounds—*i.e.*, that the TSLD order was entitled to res judicata effect as a matter of Texas law. See Pet. App. 19-21. And petitioner concedes (Pet. 16) that "Texas law governs the preclusive effect of a judgment rendered by * * * a Texas administrative agency" such as TSLD. This Court does not grant certiorari to review the lower federal courts' applications of state law. See, *e.g.*, *Haring* v. *Prosise*, 462 U.S. 306, 314 n.8 (1983); *Wolf* v. *Weinstein*, 372 U.S. 633, 636 (1963).

Moreover, because the court of appeals held that petitioner was barred by res judicata from challenging the TSLD order, the court of appeals found it unnecessary to address the merits of petitioner's challenge, *i.e.*, that the state statutes under which TSLD issued its order were preempted by ERISA. Pet. App. 21. The court of appeals also noted that those statutes had since been repealed by the Texas Legislature. *Ibid*. There is no more reason for this Court to address petitioner's preemption claim than there was for the court of appeals to do so.

4. Finally, petitioner argues (Pet. 24-29) that the district court abused its discretion in awarding attorneys' fees to the ESOP trustee. The court of appeals, after noting that petitioner "admit[ted] that he failed to timely challenge" the attorneys' fee award, reviewed the award under the plain-error standard.

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assert her interests as beneficiary, correctly declined to consider any claims regarding those interests. Pet. App. 21.

Pet. App. 22. Petitioner does not attempt to demonstrate that the award constituted reversible error under that standard. In any event, petitioner's challenge to the award turns on the particular facts of this case, and thus presents no issue of general significance warranting the Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

SETH P. WAXMAN
Solicitor General

CAROLYN J. BUCK
Chief Counsel

GARY C. ANDERBERG
Special Counsel

JOSEPH F. GRIFFIN
Senior Trial Attorney
Office of Thrift Supervision

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