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July 17, 2014

Mr. Malcolm L. Stewart
Deputy Solicitor General
Office of the Solicitor General
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530-0001

Re: *Federal National Mortgage Association v. Sundquist*, No. 13-852

Dear Malcolm:

I am writing on behalf of respondent Loraine Sundquist to urge that the Solicitor General recommend that the Supreme Court deny certiorari in No. 13-852, *Federal National Mortgage Ass'n v. Sundquist*. The case does not merit review for a number of reasons, including the absence of conflict among the lower courts, the narrowness of the issue presented, the absence of reason to believe that it presents issues of national importance, and the lack of a final judgment in the case, which emanates from a state court and is subject to the jurisdictional requirements of 28 U.S.C. § 1257.

In addition, the decision below is fundamentally correct in holding that under the governing federal statute, 12 U.S.C. § 92a(a), a national bank may only engage in foreclosure activity if it is permitted by "State and local law" in the jurisdiction where the foreclosure occurs. The result is also consistent with the basic aim of the statute, which is to place national banks on a footing of competitive equality with state banks. In this case, Utah law limiting bank participation in nonjudicial foreclosure applies equally to state and federal banks, whether located in or outside Utah.

BACKGROUND

1. The Statutes. As you know, the case concerns a Utah statute providing that a nonjudicial foreclosure of a real estate deed of trust may only be carried out by a trustee that is a Utah attorney or a title insurance company doing business in the state and maintaining an office there. The issue is whether that statute is preempted by the a provision of the National Bank Act as applied to a national bank headquartered in Texas that held a deed of trust on a piece of Utah residential real estate. The provision in question, 12 U.S.C. § 92a, provides in relevant part:

(a) Authority of Comptroller of the Currency

The Comptroller of the Currency shall be authorized and empowered to grant by special permit to national banks applying therefor, *when not in contravention of State or local law*, the right to act as trustee, executor, administrator, registrar of stocks and bonds, guardian of estates, assignee, receiver, or in any other fiduciary capacity in which State banks, trust companies, or other corporations which come into competition with national banks are permitted to act under the laws of the State in which the national bank is located.

(b) Grant and exercise of powers deemed not in contravention of State or local law

Whenever the laws of such State authorize or permit the exercise of any or all of the foregoing powers by State banks, trust companies, or other corporations which compete with national banks, the granting to and the exercise of such powers by national banks shall not be deemed to be in contravention of State or local law within the meaning of this section.

(Emphasis added.)

The Utah statutes at issue do *not* prohibit a national bank, regardless of its location, from holding a trust deed as trustee.[1] Applying equally to both state and national banks, they provide that only certain trustees may conduct a nonjudicial foreclosure by exercising the power of sale of the trust property. Specifically, Utah Code § 57-1-23 provides that only a trustee "qualified under Subsection 57-1-21(1)(a)(i) or (iv)" may exercise a power of sale "after a breach of an obligation for which the trust property is conveyed as security." The subsections referenced in § 57-1-23 describe trustees who are attorneys with offices in Utah at which the trustor (i.e., the owner of the property subject to the trust deed) may meet with the trustee to obtain information about the foreclosure or reinstate or pay off the loan, *see id.* § 57-1-21(1)(a)(i), or title insurance companies with offices in Utah, *see id*. § 57-1-21(1)(a)(iv).

Other entities that may serve as trustees of real estate trust deeds under Utah law, including "depository institutions" such as state and national banks, *id*. § 57-1-21(1)(a)(ii), and trust companies, *id*. § 57-1-21(1)(a)(iii), may foreclose on trust deeds

[1] A trust deed is similar to a traditional mortgage. The trustor is the equivalent of the mortgagor, *i.e.*, the property owner who grants a security interest in the property to secure a loan; the beneficiary is the lender. and the trustee holds legal title in order to secure the borrower's obligation to repay the loan. Formally, a trust deed arrangement involves three parties (borrower/trustor, lender/beneficiary, and trustee), while a mortgage involves two (borrower/mortgagor and lender/mortgagee), but there is often a close relationship between the trustee and the beneficiary.

through the same types of judicial proceedings available under Utah law for the foreclosure of a mortgage. *See id*. §§ 57-1-23; 57-1-34.

2. The Trial Court Proceedings. The *Sundquist* case involves Loraine Sundquist, a Utah resident who executed a trust deed in 2006 to secure a loan on her home. After she allegedly defaulted (which is a fact in dispute), the beneficiary appointed ReconTrust, a subsidiary of Bank of America, a national bank, as trustee. In 2011, ReconTrust conducted a trustee's sale (i.e., nonjudicial foreclosure) and deeded the property to the Federal National Mortgage Association (FNMA). FNMA then filed an unlawful detainer action in a Utah state court, seeking to evict Ms. Sundquist and obtain monetary relief.

Among other defenses, Ms. Sundquist argued that the trustee's sale was invalid under Utah law because ReconTrust, which is neither a Utah attorney nor a title insurance company with offices in Utah, is not authorized to carry out a trustee's sale. FNMA countered that 12 U.S.C. § 92a(a) authorizes ReconTrust to engage in trustee's sales in Utah and preempts contrary Utah laws because ReconTrust is a national bank subsidiary, and the law of *Texas*, where ReconTrust conducts its fiduciary business, permits Texas state banks to carry out trustee's sales in Texas. The Utah trial court agreed with FNMA and entered an order granting FNMA possession of Ms. Sundquist's home while the litigation proceeded.

3. The Utah Supreme Court's Ruling. Ms. Sundquist successfully petitioned for an interlocutory appeal to the Utah Supreme Court and obtained a stay pending appeal. The sole issue on appeal was whether 12 U.S.C. § 92a preempts Utah's laws permitting nonjudicial foreclosure only by attorneys and title insurance companies.[2]

On that issue, the Utah Supreme Court reversed the trial court. The court held that under the language of section 92a, read in light of its purposes and principles of federalism, the exercise of trust powers must be "not in contravention of State or local law," *id*. § 92a(a), a condition deemed satisfied when the activity is permitted to a state bank or trust company. *Id*. § 92a(b). Because Utah law does not permit state banks, trust companies, or other national bank competitors to engage in trustee deed sales, section 92a(a) does not authorize national banks to carry out such actions in Utah in contravention of Utah law.

The court rejected FNMA's argument that a regulation issued by the Office of the Comptroller of the Currency (OCC), 12 CFR § 9.7(d), establishes that, under section 92a(a), a national bank acts in a fiduciary capacity only "in the state in which it accepts the fiduciary appointment, executes the documents that create the

[2] Among other things, the court did not address any challenges to the constitutionality of the Utah laws other than FNMA's preemption argument. The court noted, however, that the Tenth Circuit has rejected Commerce Clause, Privileges and Immunities Clause, and Equal Protection Clause challenges to the law. *See Kleinsmith v. Shurtleff*, 571 F.3d 1033 (10th Cir. 2009).

fiduciary relationship, and makes discretionary decisions regarding the investment of fiduciary assets"—actions that, FNMA contended, required that ReconTrust's foreclosure activity comply only with Texas law. The court held that, to the extent the regulation would permit ReconTrust to act in Utah by foreclosing on a trust deed when such action was not in compliance with Utah law, it reflected an unreasonable construction of section 92a.

Based on its holding that section 92a does not preempt Utah law, the Utah Supreme Court reversed the trial court and vacated the court's interlocutory order requiring Ms. Sundquist to turn over her home to FNMA. The court remanded for further proceedings, including consideration of such issues as whether the trustee's violation of the statute invalidated FNMA's deed (an issue FNMA itself had insisted was not before the court). The court declined to address what it characterized as a variety of other issues raised by the parties (some of which were raised for the first time on appeal) as to the validity of the trustee's sale, the resulting deed, and the lower court's order. The court stated that on remand, the parties were free to raise any additional arguments they had concerning FNMA's claim for occupancy and the validity of the trustee's sale and FNMA's deed.

ANALYSIS

1. There Is No Final Judgment, and the Petition for Certiorari Is Untimely. Leaving aside, for the moment, the issues of the correctness of the decision below and whether the merits are sufficiently important to warrant the Supreme Court's attention, denial is warranted because of two jurisdictional barriers to review of the Utah Supreme Court's decision. First, the decision of the state court is not a final judgment. Second, the petition for certiorari itself is untimely.

(a) The case is within the Supreme Court's jurisdiction only if it falls within 28 U.S.C. § 1257, which permits review only of "final" judgments of the highest courts of the states. The statute imposes a "firm final judgment rule," generally requiring that an order be one that terminates litigation. *Jefferson v. City of Tarrant*, 522 U.S. 75, 81 (1997). The decision below, which is explicitly interlocutory and contemplates further proceedings in which either party might prevail, is not final.

Nor does the case fall within any of the four exceptions to the finality rule that the Supreme Court has developed on the basis of *Cox Broadcasting Corp. v. Cohn,* 420 U.S. 469 (1975). *See Florida v. Thomas*, 532 U.S. 774, 777 (2001). Specifically:

(1) The decision does not leave the results of further proceedings "preordained." *Id*. at 777.

(2) Nor is this a case where the federal issue will "survive and require decision regardless of the outcome of future state-court proceedings." *Id*. at 778. FNMA may, for example, prevail on other grounds, mooting the preemption question.

(3) The case is not one of those unusual ones where, whatever the outcome, review of the federal issue will be impossible at the conclusion of the case. *See id.* at 779. There is no barrier to FNMA's bringing the issue before the Supreme Court from a final judgment should it ultimately not prevail in the case.

(4) Finally, the case does not fall into the fourth *Cox* category, comprising cases where immediate review would put an end to litigation of the relevant cause of action, and federal policy would be so seriously eroded by the lack of immediate review that finality may be disregarded. *Id.* at 780. Here, immediate review would not result in the termination of litigation. Moreover, whatever the federal interest may be (and it will be discussed further below, together with relevant state interests), subjecting national banks that seek to foreclose on property in Utah to the requirements of Utah law does not so seriously impede national policies that there is a need for immediate review imperative enough to override the strong finality policy embodied in § 1257.

Given the absence of a final judgment, a grant of certiorari here could lead to the same type of wasteful expenditure of judicial and litigation resources as occurred in *Nike, Inc. v. Kasky*, 539 U.S. 654 (2003), where the Court ultimately dismissed the writ as improvidently granted—evidently after concluding, following briefing and oral argument, that there was no final judgment in the case. *See id.* at 658–60 (Stevens, J., concurring).

(b) In addition to seeking review of a nonfinal decision, the petition for certiorari is out of time because FNMA did not file a timely petition for rehearing below and did not seek an extension of time for filing its petition for certiorari until considerably more than 90 days after the Utah Supreme Court issued its judgment in the case.

It is undisputed that the Supreme Court of Utah entered judgment on July 23, 2013, and that FNMA did not file a petition for rehearing until August 9, 2013, 17 days later. Rule 35(a) of the Utah Rules of Appellate Procedure, however, provides that a petition for rehearing must be filed "within 14 days after the entry of the decision of the court, unless the time is shortened or enlarged by order." No order in this case enlarged the time for a rehearing petition. FNMA did not file a motion for leave to file out of time, even though the Utah Supreme Court's checklist of procedures for rehearing petitions states explicitly that if a filing is untimely, "a motion under Rule 22 will be mandatory for permission to file a late brief." https://www.utcourts.gov/courts/sup/forms/checklist-rehearing.pdf. And FNMA's rehearing petition was not accompanied by a motion for leave to file. The Utah Supreme Court

did not request a response to the petition for rehearing and denied it without comment on September 16, 2014, "[p]ursuant to Rule 35[.]"[3]

Such an untimely petition for rehearing does not toll the 90 days provided for filing a petition for certiorari under Supreme Court Rule 13.3 unless the "lower court appropriately entertains an untimely petition for rehearing." The Utah Supreme Court's order gives no indication that it considered the petition on the merits rather than denying it as untimely, and entertaining it on the merits would not have been "appropriate" under that court's practices given the absence of a motion for permission to file a late petition. Thus, the 90 days for filing a petition for certiorari expired on October 21, 2013, long before FNMA applied for an extension of time to file a petition for a write of certiorari on December 2, 2013.

FNMA, while not contesting that its rehearing petition was in fact filed more than 14 days after the Utah Supreme Court's judgment, argues that it must have been timely because, under Utah Rule of Appellate Procedure 35(d), a petition for rehearing that is "not timely presented under this rule … will not be received by the clerk." Because the clerk's office received the petition, FNMA argues, it must have been timely. FNMA Pet. Reply 2. Nothing in the rules, however, remotely suggests that the clerk's office can, in the absence of a motion, excuse a concededly untimely filing merely by "receiving" it. The apparent failure of the clerk's office to carry out Rule 35(d) does not make the petition timely.

FNMA also asserts that the Utah Supreme Court entertained the petition because it said the petition was "denied" rather than "dismissed," and it did not separately rule on Ms. Sundquist's motion to strike the petition as untimely. FNMA, however, cites nothing to indicate that the Utah Supreme Court would necessarily "dismiss" rather than "deny" an untimely petition, and nothing in the court's order gives any indication that the court considered the merits of the request for rehearing. The court's denial of leave for FNMA's amicus to file a brief supporting the petition further suggests that the court did *not* consider the merits of the arguments for rehearing.[4]

The U.S. Supreme Court's decisions do not offer a great deal of guidance on how to determine when an untimely rehearing petition has been "entertained," but the relatively few cases on the subject all appear to involve much more substantial indications that a lower court has actually considered and ruled on the merits of arguments as to whether a case should be reheard. *See*, *e.g.*, *Hibbs v. Winn*, 542 U.S.

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[3] Simultaneously, the court granted Ms. Sundquist's request to correct a misstatement of fact in the opinion, but the court's order makes clear that it treated her filing as a motion, not a petition for rehearing, and thus Supreme Corut Rule 13.3, which provides that a timely filed petition for rehearing by any party tolls the time for filing a petition for certiorari, is inapplicable. FNMA has not contended otherwise.

[4] That the court subsequently declined to explain the basis of its order when the matter was before the U.S. Supreme Court does not point in either direction.

88, 97–98 (2004) (lower court recalled mandate and asked for briefing on whether to grant rehearing); *Young v. Harper*, 520 U.S. 143, 147 n.1 (1997) (lower court granted leave to file petition out of time); *Missouri v. Jenkins*, 495 U.S. 33, 47–48 (1990) (lower court treated party's filing as a timely petition for rehearing as well as a suggestion for rehearing en banc); *Pfister v. N. Ill. Fin. Corp.*, 317 U.S. 144, 150–51 (1942) (lower court expressly denied motion to dismiss petition as untimely and denied petition because it had no "merit"). Moreover, the Court's decision in *Coleman v. Thompson*, 501 U.S. 722 (1991), holding in the habeas context that an unexplained state-court decision should be interpreted as based on procedural grounds rather than on the merits when there is an obvious procedural ground for decision and no express indication that the court considered the merits, would similarly suggest that when a petition for rehearing is indisputably out of time and is denied without comment, it should not be considered to have been entertained on the merits.

(c) The presence of two substantial threshold issues of jurisdiction, at a minimum, makes this case a poor one for considering the interaction of section 92a and Utah's foreclosure laws, as the Court and parties would be required, if the case were set for briefing and argument, to expend time and resources addressing these jurisdictional issues, which lack importance outside the particular circumstances of this case but nonetheless would have to be resolved before the merits could be reached. If the question whether Utah foreclosure law is preempted by section 92a were, in fact, sufficiently important to merit review, it could be expected to present itself in future cases without these confounding factors.

2. The Issues Do Not Warrant Review.

(a) Beyond the absence of a final judgment and a timely petition for certiorari, the case does not satisfy the Court's ordinary criteria for a grant of certiorari, which generally favor review of an issue only when it has generated conflicts of authority or otherwise is of national importance. Here, there is no conflict among state supreme courts and/or federal courts of appeals. Although the issue of the authority of a national bank to conduct a trustee's sale under Utah law has arisen in other cases, including cases in the federal courts, no other court has yet addressed the question whether authorizing such sales in violation of Utah law comports with section 92a.

Indeed, the U.S. Court of Appeals for the Tenth Circuit expressly declined to disagree with the Utah Supreme Court's decision in this case when presented with the opportunity in *Garrett v. ReconTrust Co., N.A.*, 546 F. App. 736 (2013). The Tenth Circuit in that unpublished decision decided only that, under the terms of the OCC regulation discussed above, a Texas national bank was authorized to engage in nonjudicial foreclosures in Utah because it had accepted its appointment as a fiduciary, executed documents creating the fiduciary relationship, and made discretionary decisions regarding fiduciary assets in Texas, and Texas law permitted such trustee's sales. The court, however, specifically declined to address whether the OCC regulation reflects a reasonable construction of section 92a because the plaintiff

in the case had not raised that issue below or preserved it on appeal, but had raised it only after the Utah Supreme Court's decision in this case. *See id*. at 739 n.1. Of course, even if *Garrett* had addressed that issue, its nonprecedential nature would obviate any claim of conflict between the Utah Supreme Court and the Tenth Circuit. But beyond declining to publish its opinion, the Tenth Circuit went out of its way to disclaim disagreement with the result in this case.[5]

The issue presented in this case is not one as to which it is impossible for a conflict to arise. Indeed, the issue has been presented in a number of federal district court cases, and it is therefore quite possible that the Tenth Circuit and other state or federal courts may address whether section 92a permits a national bank to resort to nonjudicial foreclosure in violation of Utah law. Application of ordinary principles governing the Supreme Court's exercise of its discretionary jurisdiction would therefore suggest that the Court await further decisions to determine whether conflict or, on the other hand, consensus develops.

(b) Not only is there no conflict over the particular question presented here—that is, whether section 92a preempts Utah's nonjudicial foreclosure statute as applied to national banks—but no broader conflict is apparent. FNMA has not pointed to decisions holding similar laws in other states to be preempted, or to decisions that address similar laws in any way. Indeed, neither FNMA nor its amicus curiae, the Clearing House Association, points to the existence of laws comparable to Utah's—that is, laws that prohibit both state and national banks, wherever located, from engaging in nonjudicial foreclosures.

In a footnote in its petition for certiorari, FNMA points to two other decisions that it claims are comparable, *Jaldin* v. *ReconTrust Co., N.A.*, 539 F. App. 97 (4th Cir. 2013), and *JPMorgan Chase Bank, N.A.* v. *Johnson*, 719 F.3d 1010, 1018 (8th Cir. 2013). The first of those decisions—a nonprecedential ruling of the Fourth Circuit—addressed a law that, wholly unlike the one at issue here, *permitted* state banks to engage in nonjudicial foreclosures while prohibiting out-of-state national banks from doing so, thus violating the central proscription of section 92a against laws that upset competitive equality between state and national banks. In the second case, the Eighth Circuit held that an Arkansas statute restricting nonjudicial foreclosures to entities authorized to do business in the state did not, by its terms, prohibit a national bank from engaging in such foreclosures. The court reasoned that by authorizing a national bank to engage in mortgage banking, the OCC had provided the necessary authorization required by state law.

[5] In another case that potentially presented the issue, *Dutcher v. Mathison*, 733 F.3d 980 (10th Cir. 2013), the Tenth Circuit also did not decide it, concluding instead that the doctrines of "complete preemption" and fraudulent joinder did not support removal of the action from state court under either federal question or diversity jurisdiction, respectively, and remanding for a determination whether removal was proper under the Class Action Fairness Act. *See id*. at 985–90.

Both decisions are entirely consistent with the decision of the Utah Supreme Court. Both focus on the law of the state where the foreclosure occurs and conclude either that it permits the activity (in the case of the Eighth Circuit decision), or (in the case of the Fourth Circuit) that because that state's law permits state banks to engage in nonjudicial foreclosures, such activities are not, under section 92a(a)(2), in contravention of state law when conducted by a national bank. Neither decision considers an activity that is prohibited by state law to both state and national banks, and neither remotely suggests that a national bank may carry out such an activity in a state that does not allow banks to perform it because it would be permitted to do so by the law of some *other* state.

(c) Not only is there no arguable conflict of authority among the lower courts, there is also no other strong reason why this case is of sufficient national importance to merit review by the Supreme Court. Although the Utah court's opinion rejects the argument that the OCC's regulation requires that Utah permit national banks to engage in nonjudicial foreclosures, it does not prevent other applications of the regulation outside the circumstances of this case. That is, it does not suggest that in other matters involving the powers of banks to act as fiduciaries (such as the power to provide traditional trust accounts), the controlling law will not be that of the state where the relationship was created, the requisite papers executed, and discretionary trust decisions made, as the OCC regulation provides. It holds only that, as applied to the specific context of trust deed foreclosure, section 92a requires that the law of the state where the foreclosure takes place be consulted to determine whether the action is in "contravention of State or local law." Thus, the ruling does no more than hold that a national bank cannot employ a method of foreclosure on property subject to a trust deed that is not available to other banks and trust companies in the state where the property is located. In light of the narrow and limited impact of the court's holding, it is unlikely significantly to affect national banks or national banking policy, or otherwise present an issue of sufficient national importance to justify review.

3. The Decision Below Is Correct. Certiorari is also unwarranted because the Utah Supreme Court's construction of section 92a was correct. The statute on its face requires that a national bank's exercise of fiduciary powers not be "in contravention of State or local law." That phrase, in which "State" and "local" are used as adjectives modifying the noun "law," is not limited to any particular state, nor can it be sensibly read as implying that a single state's law will govern all the fiduciary activities of any one national bank. Rather, such a generic reference to "State or local law" is most sensibly read as referring to the law of the state that would otherwise apply to whatever particular exercise of fiduciary powers is at issue.[6]

(a) In this case, where the activity in question is the foreclosure in Utah on a trust deed on Utah real property, the state or local law with which the activity must

[6] As OCC has recognized, § 92a(b)'s reference to the laws of "such State" is likewise most sensibly read as referring to the applicable laws of whatever state a bank's activities would otherwise be subject to and contravene. *See infra* 10–11.

comply is that of Utah, as it is Utah law that governs the propriety of foreclosure on a Utah deed of trust. *See*, *e.g.*, Restatement (Second) of Conflict of Laws § 229 (1971) ("The method for the foreclosure of a mortgage on land and the interests in the land resulting from the foreclosure are determined by the local law of the situs."); *id.* Comment a ("The courts of the situs would apply their own local law to determine the method of foreclosure, such as whether the mortgage may be foreclosed by sale without a judicial proceeding, whether upon a judicial foreclosure a sale of the mortgaged land is necessary or whether strict foreclosure is permissible."); *see also* David B. Young, *Mortgages & Party Autonomy in Choice of Law,* 45 Ark. L. Rev. 345, 349 352 (1992) ("The substantive as well as the procedural law of the situs applies in any truly local, in rem action, notably a mortgage foreclosure.").

Indeed, although the Utah Supreme Court assumed that the case posed an issue of application of section 92a, there is a significant antecedent question whether section 92a is even implicated by the Utah statute. The Utah law does not deny national banks, no matter where located, the "right to act as trustee … or in any other fiduciary capacity." Utah law permits a national bank to act as the trustee of a deed of trust, but limits the power of many such trustees to engage in a nonjudicial foreclosure. Although that power is permitted to certain trustees (not including banks, trust companies, or other competitors of national banks), the national bank still retains the ability to act as a trustee. Because Utah law does not deny the bank the "right" conferred by section 92a (the right to act as a trustee), it is not preempted by section 92a—regardless of which state's law determines the bank's authority to serve as a trustee under section 92a, or which state's law must not be contravened by the exercise of such authority.

(b) Assuming section 92a is implicated at all, the decisive question is not in what state the national bank is "located," but whether its action as a fiduciary is in "contravention of State or local law" in the state where the bank has taken that action. As FNMA itself recognizes, section 92a(a) imposes two distinct requirements on which a national bank's authority to act in a fiduciary capacity is contingent: (1) the "laws of the State in which the national bank is located" must permit state banks, trust companies, or other national bank competitors to act in that capacity; and (2) the exercise of fiduciary powers must not be "in contravention of State or local law." Cert. Pet. at 5.

Thus, although the state where the bank is "located" determines whether it may be granted the authority to act in a particular fiduciary capacity at all, the contravention clause of section 92a(a) provides that even if the laws of the state of the bank's location would permit granting the bank a fiduciary power, the bank may not be authorized to undertake any exercise of fiduciary authority that contravenes the law of a state whose laws are otherwise applicable to the action in question. As OCC put it nearly twenty years ago, section 92a has a "clear meaning": both the phrase "State or local law" in section 92a(a) and the corresponding reference to "such State" in section 92a(b) refer to "that state the laws of which it is asserted the grant of fiduciary powers would be in contravention of," and are applicable to whatever

state has a sufficient level of connection to the exercise of fiduciary authority "to make a national bank potentially subject to that state's laws." OCC Interpretive Letter 695, 1995 WL 788827, at *11 (Dec. 8, 1995). Under that reading of the statute's plain language, the law of whatever state ReconTrust was "located" in within the meaning of section 92a(a) determines whether it can potentially be granted authority to act as a trustee for a deed of trust, but the grant of such authority *also* must not contravene applicable state or local laws—here, the laws of Utah.

To be sure, OCC now takes the position that section 92a makes only the law of the state where the bank took the particular actions specified in 12 CFR § 9.7(d) relevant to the question whether the bank's actions are in contravention of state or local law. At the same time, however, OCC contradicts that view by continuing to recognize that in exercising its fiduciary authority as trustee, the bank must comply with the law of the state where it acts—here, Utah:

> We note … that the national bank is subject to Utah requirements governing the conduct of the foreclosure, including, for example, requirements pertaining to the notice that must be provided to the borrower.

OCC Amicus Brief, at 9, *Dutcher v. Matheson*, No. 12-4150 (10th Cir.). OCC's agreement that a national bank is subject to Utah requirements governing the conduct of the foreclosure is significant for two reasons: First, the requirement at issue here is a requirement about how foreclosures may be conducted, not a limitation on the bank's ability to take on the role of trustee of a trust deed. Therefore, OCC's statement suggests that, properly understood, the Utah law's requirements are not preempted.[7] Second, if one assumes, as OCC does, that the issue whether a trustee of a trust deed may resort to nonjudicial foreclosure is subject to section 92a, then if state law applies to the exercise of that power it must be by virtue of the "not in contravention" clause. And if, as OCC acknowledges, that clause requires compliance with *Utah* law as to the "conduct of the foreclosure," then it cannot be the case that the only law relevant to the "not in contravention" clause is that of the state where the bank is "located" under the criteria set forth in 12 CFR § 9.7(d).

[7] In the sentence of the brief immediately preceding the quoted passage, OCC suggests that the relevant "fiduciary capacity" in which the bank is authorized to act is that of "foreclosure trustee," so that by preventing the bank from engaging in a trustee's sale, Utah is somehow prohibiting it altogether from acting in that fiduciary capacity. In fact, the relevant fiduciary capacity is that of *trustee of a trust deed*, and the issue is whether such a trustee may conduct a foreclosure through nonjudicial means. In other words, to the extent OCC's brief posits a dichotomy between the right to act in a particular fiduciary capacity (subject in OCC's view to section 92a and the requirements only of the law of the state where the fiduciary takes the actions specified in 12 CFR § 9.7(d)) and the conduct of an action taken in that capacity (subject in OCC's view to the law of the state where the action is taken), the Utah law falls on the latter side of the divide.

OCC's brief thus significantly undercuts the view that a national bank's foreclosure in Utah need not comply with Utah law as long as the action would be permissible in the state where the bank is "located" under 12 CFR § 9.7(d). As the brief itself implicitly acknowledges, the "not in contravention" clause is not limited to a singular state where the bank can be said to be "located" in some sense.

(c) Even if, however, the issue turns on where the bank is "located" in relation to the relevant trust services, the Utah Supreme Court was correct in holding that it is unreasonable to conclude that a bank that serves as trustee of a trust deed on Utah real property and that forecloses in Utah on that property is "located" in Texas.

To begin with, no one contends that the statute, as applied to banks engaging in fiduciary activities in multiple states, limits the "location" of the bank and the applicability of state law to the bank's activities to the one state where the bank has its principal place of business. Rather, OCC has long agreed that a bank is "located" for purposes of section 92a in each state where it engages in fiduciary activities. *See*, *e.g.*, OCC Interpretive Letter 695, 1995 WL 788827, at *11; OCC Interpretive Letter 866, 1999 WL 983923, at *4 (Oct. 8, 1999); OCC Interpretive Letter 872, 1999 WL 1251391, at *3–4 (Oct. 28, 1999).

In its Interpretive Letter 695, OCC recognized explicitly that for purposes of section 92a(a)'s authorization of a national bank's exercise of fiduciary powers, a bank is "located" in a state whose laws would apply to the exercise of such powers for purposes of the "in contravention" clause of section 92a(a) and section 92a(b)'s definition of activities that are not "deemed" to be in contravention of state laws. As OCC explained:

> Textually, the introductory phrase [to section 92a(b)] ("whenever the laws of such State …") is a reference to that state the laws of which it is asserted the grant of fiduciary powers would be in contravention of. That is, "such State" is the state referred to in the State Law Conditiion ("when not in contravention of State or local law"). The phrase may also be a reference to "the State in which the national bank is located" in the immediately preceding sentence. But all three of these terms refer to the same state: *the state in which the national bank proposes to engage in fiduciary activities*. In other words, the same level of contact with a state that is sufficient to make a national bank potentially subject to that state's laws under the State Law Condition in section 92a(a) also makes the bank located in that state for other section 92a(a) purposes.

OCC Interpretive Letter 695, 1995 WL 788827, at *11 (second emphasis added). Under that reading of the statute, Utah law would clearly govern the authority of the bank to act as a trustee for a deed of trust recorded in Utah for Utah real property, and specifically the bank's ability to foreclose on that property, as that is the state where the bank "engaged in" the relevant "fiduciary activities," and the state with the contacts with those activities that would suffice to make them potentially subject

to its laws. Thus, Utah law would not only govern under the "in contravention clause," but also determine the bank's authority to act as trustee as the law of the state in which the bank was "located" for that purpose.

In subsequent interpretive letters, OCC adhered to the view that the state in which a bank carried out its fiduciary activities was both the state whose law must be consulted under the "in contravention" clause and the state where the bank was "located" under section 92a(a). *See* Interpretive Letter 866, 1999 WL 983923, at *4; OCC Interpretive Letter 872, 1999 WL 1251391, at *3–4. As OCC stated in both letters:

> [W]e conclude that for purposes of section 92a a national bank is "located" in a state where it acts in a fiduciary capacity. Accordingly, in order to determine where a national bank is located under section 92a (and thereby know which state's laws apply), one must determine where the bank is acting in a fiduciary capacity.

Interpretive Letter 866, 1999 WL 983923, at *4 (footnote omitted); OCC Interpretive Letter 872, 1999 WL 1251391, at *3 (footnote omitted).

OCC further stated that "the best construction of the statute is to determine that location by looking to the place at which the bank performs core functions of a fiduciary." Interpretive Letter 866, 1999 WL 983923, at *4; OCC Interpretive Letter 872, 1999 WL 1251391, at *4. Without attempting to create an exclusive definition of "core functions," OCC elaborated that they "*include* accepting the appointment, executing the documents that create the fiduciary relationship, and making decisions regarding the investment or distribution of fiduciary assets." Interpretive Letter 866, 1999 WL 983923, at *4 (emphasis added); OCC Interpretive Letter 872, 1999 WL 1251391, at *4 (emphasis added).

Again, under that construction of the statute, Utah law governs here. Wherever the "core functions" of other types of fiduciary relationships (such as the acceptance of trust accounts) may be performed, the core functions of the trustee of a trust deed to real property are performed in the state where the property subject to the deed is located: namely, the recording of the deed, the filing of the designation of trustee with the county clerk (which constitutes the creation of the fiduciary relationship),[8] and any foreclosure activity. Thus, a national bank that accepts appointment as trustee of a trust deed for Utah real property is acting in a fiduciary capacity *in Utah*, and Utah is its "location" for purposes of that trusteeship as well as the state whose law the trusteeship must not contravene under section 92a(a).

(d) In amending its regulations in 2001, however, OCC adopted the current version of 12 CFR § 9.7(d), which OCC interprets as establishing an exclusive set of

[8] *See* Supplemental Brief of [Amicus Curiae] State of Utah, at 4, n.4, *Garrett v. ReconTrust Co., N.A.*, No. 12-4060 (10th Cir.).

criteria for determining the state in which a national bank acts as a fiduciary for purposes of section 92a(a), under which only the laws of the state in which a bank accepts its fiduciary appointment, executes the documents creating the relationship, and makes decisions about the investment or disposition of trust assets are applicable for purposes of both the "in contravention" and "location" clauses of section 92a(a).[9] FNMA contends that those factors point toward Texas as the state where ReconTrust was "located" and whose laws ReconTrust's fiduciary activities must not "contravene[e]" for purposes of section 92a(a).[10]

Notably, however, in adopting the regulation, OCC expressly stated that it was not changing its construction of section 92a, but merely implementing the "detailed analysis" of the statute contained in Interpretive Letters 695, 866 and 872. OCC, *Fiduciary Activities of National Banks*, Final Rule, 66 Fed. Reg. 34792, 34792, 34795 (July 2, 2001). In particular, OCC reiterated that "the Contravention Clause of section 92a requires that a bank look to the laws of the state in which it acts in one or more fiduciary capacities in order to determine the limits on those capacities," *id*. at 34794–95. And it further confirmed that where a bank acted as a fiduciary was to be determined by where it performed "key fiduciary activities." *Id.* As explained above, the analysis of the statute set forth in the interpretive letters that whose analysis the regulation claims to adopt would point toward Utah, and not Texas, as the state whose law is determinative in the circumstances here.

In purporting to limit the "key fiduciary activities" to the three specified in 12 CFR § 9.7(d), moreover, OCC appears not to have considered the application of the statute to trust deed securing real estate and to foreclosure activities involving such deeds. Nowhere does the OCC's final rulemaking notice explain why, in applying section 92a to the specific form of fiduciary relationship involved in a trust deed securing real property, the "key fiduciary activities" are not those that occur in the state where the property is located, the trust deed and appointment of trustee are recorded, and the most critical task of the trustee—foreclosure in the event of default on the indebtedness secured by the deed—is performed. Indeed, trust deeds and foreclosure are not even mentioned in the Federal Register notice explaining OCC's adoption of the rule. OCC's apparent failure to consider the effect of its regulation in the context of trust deeds and their foreclosure negates any claim the regulation

[9] If those activities occur in more than one state, the regulation further provides that the bank may designate the state in which it is located for purposes of section 92a(a). *See* 12 CFR § 9.7(d).

[10] As the State of Utah pointed out in its supplemental amicus brief in *Garrett*, that proposition is itself debatable, as the creation of the fiduciary relationship with respect to a Utah trust deed occurs when papers are recorded in a Utah county clerk's office; those papers should also be deemed to have been executed in Utah; and to the extent there are decisions made about the disposition of trust assets, they are effectively made in Utah, as Utah law governs the disposition of the proceeds of a trust deed foreclosure. *See* Supplemental Brief of [Amicus Curiae] State of Utah, at 4, n.4, *Garrett v. Recontrust Co., N.A.*, No. 12-4060 (10th Cir.). The Utah Supreme Court did not reach that question in this case, but assumed that the regulation would specify application of Texas law for purposes of section 92a(a).

might otherwise have to deference as a construction of section 92a to the particular circumstances here.

(e) It may make sense, in the context of other forms of fiduciary relationships, to define the key fiduciary activities determining which state's laws are applicable under section 92a as those set forth in 12 CFR § 9.7(d). But as applied to the duties of a trustee of a trust deed for real property, determining the applicable state law based exclusively on the activities listed in the regulation is both irrational and contrary to OCC's own basic construction of the statute, under which the applicable law is that of the state where the bank acts as a fiduciary by carrying out the core functions of the particular relationship involved. In the case of trust deeds in general and their foreclosure in particular, those functions are performed in the state where the property subject to the deed is located.

Indeed, attempting to apply the regulation woodenly to the trust deed context has the incongruous effect of making a bank's authority to engage in activities in one state contingent on whether those activities are "in contravention of" the law of a state that by definition could not apply to them: Texas has no authority to regulate the ownership of real estate in Utah and thus cannot define whether trust deeds are even permissible under Utah law, let alone determine by whom and how they may be foreclosed upon. It is therefore nonsensical to consult Texas law to determine whether the bank's foreclosure activities contravene Utah law.

The incongruity of allowing a national bank's authority to engage in nonjudicial foreclosure of a trust deed to depend on the law of a state other than the one in which the foreclosure occurs is starkly illustrated by considering what the consequences of that view would be if Utah law did not permit nonjudicial foreclosures at all. Even in that circumstance, under FNMA's view that a national bank's exercise of the power to engage in a nonjudicial foreclosure contravenes state law only if nonjudicial foreclosure is impermissible in the state where the bank carries out its internal paperwork relating to the trust deed, the bank would still be empowered to engage in a nonjudicial foreclosure in Utah.[11]

Indeed, even if Utah did not recognize trust deeds as a valid alternative to traditional mortgages, FNMA's view that the law of the state where the bank performs the actions specified in 12 CFR § 9.7(b) is the sole determinant of its power to enter into any form of fiduciary relationship, including that of trustee of a trust deed, would imply that a bank that took those actions in a state that did recognize

[11] That Utah law in fact permits some trustees to engage in nonjudicial foreclosures does not render this hypothetical irrelevant, because, under section 92a(b), that fact is only pertinent if *Utah* is the state whose law the bank's activities must not contravene. If, as FNMA argues here, it is only Texas law that determines whether the bank may engage in nonjudicial foreclosures, then under section 92a(b) such foreclosures would not contravene state law if *Texas* law permitted other trustees to engage in them. Whether *Utah* law permitted other trustees to do so would not factor into the equation at all.

trust deeds would have to be permitted to hold a trust deed on Utah property notwithstanding Utah law to the contrary.

This criticism is not merely theoretical: Although Utah allows the use of trust deeds as mortgage alternatives to secure loans for the purchase of real property, a number of states do not provide for the use of trust deeds on real property to secure debts. Laws on foreclosure also vary from state to state, and several states do not permit nonjudicial foreclosure through the exercise of a power of sale.[12]

(f) The view that the law of the state where a national bank chooses to execute papers related to trust deeds determines the permissibility of its exercise of the power to engage in nonjudicial foreclosures in another state effectively allows a bank to export the real property law of that state to others whose law may be fundamentally different. FNMA's construction of section 92a thus would result in a substantial interference with a traditional state power: the power to regulate matters relating to the ownership of real property located within the state's borders. The Supreme Court has long recognized that states have a fundamental interest in establishing the law governing interests in real property within their territorial jurisdiction.

> Under our federal system, property ownership is not governed by a general federal law, but rather by the laws of the several States. "The great body of law in this country which controls acquisition, transmission, and transfer of property, and defines the rights of its owners in relation to the state or to private parties, is found in the statutes and decisions of the state." … This is particularly true with respect to real property, for even when federal common law was in its heyday under the teachings of *Swift v. Tyson*, 16 Pet. 1 (1842), an exception was carved out for the local law of real property.

See Oregon ex rel. State Land Bd. v. Corvallis Sand & Gravel Co., 429 U.S. 363, 378–79 (1977) (citations omitted); *see also Butner v. U.S.*, 440 U.S. 48, 55 (1979) (holding state law concerning rights of mortgagees applicable in bankruptcy proceedings because "[p]roperty interests are created and defined by state law").

As the Utah Supreme Court properly recognized, when federal legislation potentially "pre-empt[s] the historic powers of the States," operates in "traditionally sensitive areas," or threatens to "alter the usual constitutional balance between the States and the Federal Government," it will not be read to do so unless "Congress make[s] its intention to do so unmistakably clear in the language of the statute." *Raygor v. Regents of the Univ. of Minn.,* 534 U.S. 533, 543 (2002) (internal quotation marks and citations omitted); *see also Gregory v. Ashcroft*, 501 U.S. 452, 470, 111 S.Ct. 2395, 115 L.Ed.2d 410 (1991); *Will v. Mich. De"t of State Police*, 491 U.S. 58, 65,

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[12] A state-by-state summary of foreclosure laws as of 2009 can be found in Appendix A of Andra C. Ghent & Marianna Kudlyak, *Recourse and Residential Mortgage Default: Theory and Evidence from U.S. States* 44-55, Federal Reserve Bank of Richmond Working Paper No. 09-10R (2010), http://www.richmondfed.org/publications/research/working_papers/2009/pdf/wp09-10r.pdf.

(1989). "[S]olicitude for state interests" in the area of property arrangements dictates that state laws concerning such matters should not be displaced "in the absence of specific congressional action" demonstrating that "clear and substantial interests of the National Government, which cannot be served consistently with respect for such state interests, will suffer major damage if the state law is applied." *United States v. Yazell*, 382 U.S. 341, 352 (1966).

Application of this clear-statement principle here yields no indication that Congress ever contemplated the absurd result that Utah's laws concerning foreclosure on real property located within its borders would be displaced by the laws of Texas. As shown above, the statutory language does not unmistakably require that result. The best reading of the statute's "not in contravention" clause, as OCC itself formerly recognized, would require that Utah law govern. OCC's subsequent amendment of its regulations, even if it could otherwise claim deference as a construction of arguably ambiguous statutory language, does not itself supply the needed clarity of congressional intent to displace Utah law with respect to the foreclosure of trust deeds on real property within the state.

(g) Moreover, permitting Utah to apply its law concerning the nonjudicial foreclosure of trust deeds will not do "major damage" to "clear and substantial interests of the National Government." *Yazell*, 382 U.S. at 352. Indeed, the federal interests underlying section 92a are not threatened at all by the application of Utah law here, because the federal policy section 92a serves—competitive equality between state-chartered financial institutions and national banks—would not be advanced by allowing Texas law to govern foreclosures in Utah.

A host of judicial precedents as well as agency pronouncements leave no doubt that ensuring competitive equality between state and national banks is the policy underlying section 92a, as well as much of the rest of the National Bank Act insofar as it defines national bank powers by reference to activities states permit state banks to undertake. *See Franklin Nat. Bank of Franklin Square v. New York*, 347 U.S. 373, 375 (1954); *see also First Nat. Bank in Plant City, Fla. v. Dickinson*, 396 U.S. 122, 131 (1969); *Missouri ex rel. Burnes Nat. Bank of St. Joseph v. Duncan*, 265 U.S. 17, 22 (1924) *First Nat. Bank of Bay City v. Fellows ex rel. Union Trust Co.*, 244 U.S. 416, 425 (1917); *St. Louis County Nat. Bank v. Mercantile Trust Co. Nat. Ass'n*, 548 F.2d 716, 720 (8th Cir. 1976); OCC Interpretive Letter No. 525, 1990 WL 364915, at *11 (Aug. 8, 1990). The competitive equality principle embodied in section 92a ensures that national banks are not placed at a disadvantage relative to state banks, but it does "not permit the creation of a competitive imbalance in favor of national banks by permitting those banks' fiduciary power to exceed those of [their] competitor fiduciaries under local law." *Id*. at *5.

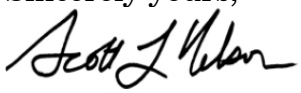
The outcome sought by FNMA here would create precisely such a competitive imbalance. Permitting Texas national banks to engage in nonjudicial foreclosures *in Utah* because Texas state banks may engage in nonjudicial foreclosures *in Texas* would give them a competitive advantage over all state-chartered financial

institutions. No state bank or trust company, whether located in Utah, Texas, or any other state, may execute a nonjudicial foreclosure on real property in Utah. Reversal of the Utah Supreme Court's decision in this case would mean that national banks would be the only banks that could foreclose nonjudicially on Utah properties subject to deeds of trust. Moreover, not all national banks would have that power, but only those that did their paperwork in states that allowed banks to engage in nonjudicial foreclosures within their own borders. Those national banks would not only have a competitive advantage over all state banks, but also over other national banks, based on an entirely arbitrary factor—the law of a state that has *no authority* to regulate the activity in question. What state banks are permitted to do with Texas properties has no conceivable relationship to what any bank should be permitted to do in Utah, where Texas has no legitimate interests in controlling the conduct of foreclosures.

Utah's foreclosure laws are an exercise of the state's undoubted authority over real property within its borders. In limiting the exercise of the power of nonjudicial foreclosure to certain trustees who are subject to stringent ethical oversight and whose financial interests are substantially different from those of banks and other financial institutions, Utah law seeks to protect consumers from the possibility of abusive foreclosure outside the judicial system. Unfortunately, such abuses have been rampant in recent years. Whether or not the limitations Utah has chosen reflect the best approach to addressing such abuses, section 92a is not properly read to override Utah's choices simply because another state—here, Texas—has not chosen to impose similar limits on the foreclosure of properties within its own borders. The Utah Supreme Court therefore correctly held that section 92a does not require it to permit national banks to engage in nonjudicial foreclosures in violation of Utah's laws that evenhandedly prohibit such foreclosures by all banks and trust companies.

For all of the reasons set forth above, the Solicitor General should recommend denial of the petition for a write of certiorari in this case.

Sincerely yours,



Scott L. Nelson

cc: J. Kent Holland
Dan Morse