No. 13-

IN THE

Supreme Court of the United States

FEDERAL NATIONAL MORTGAGE ASSOCIATION,
Petitioner,

v.

LORAINE SUNDQUIST,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF UTAH

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Federal law authorizes national banks to serve as a fiduciary when doing so is "not in contravention of State or local law," *i.e.*, "the laws of the State in which the national bank is located." 12 U.S.C. § 92a(a). The Comptroller of the Currency has promulgated a regulation defining, for purposes of this provision, which state is "the State in which the national bank is located." *See* 12 C.F.R. § 9.7(d).

The question presented is:

Whether a state can restrict a national bank's exercise of its fiduciary powers in connection with real property in that state if the bank is authorized to act as a fiduciary by the Comptroller of the Currency and not prohibited from doing so by the (different) state in which the bank is "located" under 12 U.S.C. § 92a and 12 C.F.R. § 9.7.

PARTIES TO THE PROCEEDINGS

Petitioner Federal National Mortgage Association (FNMA) was the plaintiff and counterclaim defendant in the trial court, and the appellee in the Utah Supreme Court.

Respondent Loraine Sundquist was the defendant and counterclaim plaintiff in the trial court, and the appellant in the Utah Supreme Court.

CORPORATE DISCLOSURE STATEMENT

FNMA does not have a parent corporation and no publicly held company owns ten percent or more of its stock.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Federal National Mortgage Association (FNMA) respectfully petitions for a writ of certiorari to review the judgment in this case of the Utah Supreme Court.

OPINIONS BELOW

The opinion of the Utah Supreme Court (App. 1a-28a) is reported at 311 P.3d 1004. That court's order denying rehearing (App. 39a-40a) is not reported, nor is the decision of the Utah trial court (App. 29a-37a).

JURISDICTION

The judgment of the Utah Supreme Court was entered on July 23, 2013, and a petition for rehearing was denied on September 16, 2013. On December 4, 2013, Justice Sotomayor extended the time to file a petition

for certiorari to and including January 14, 2014. This Court's jurisdiction rests on 28 U.S.C. § 1257(a).[1]

STATUTE AND REGULATION INVOLVED

Section 92a of title 12 of the U.S. Code 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.

12 U.S.C. § 92a(a).

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[1] After FNMA applied for an extension of time to file this petition, Sundquist contacted FNMA and asserted that its rehearing petition below was untimely and thus that the time to seek review by this Court ran from the date of the Utah Supreme Court's original decision. That is incorrect. Utah Rule of Appellate Procedure 35(d) states that an untimely rehearing petition "will not be received by the clerk." FNMA's petition was not only received by the clerk, but also acted on by the court—which denied the petition rather than dismissing it as untimely. *See* App. 39a. Hence, whether the petition was timely or instead untimely yet "entertain[ed]" by the court, the time to seek certiorari runs from the date of the rehearing denial. U.S. S. Ct. R. 13.3.

Less than two weeks ago, Sundquist asked the Utah Supreme Court to "modif[y]" its (September) order denying rehearing so as to "clarify" that the court rejected FNMA's rehearing petition as untimely. App. 41a-43a. That motion remains pending.

The Comptroller of the Currency's regulation for "[m]ulti-state fiduciary operations," 12 C.F.R. § 9.7, provides:

> (a) *Acting in a fiduciary capacity in more than one state.* Pursuant to 12 U.S.C. 92a and this section, a national bank may act in a fiduciary capacity in any state. If a national bank acts, or proposes to act, in a fiduciary capacity in a particular state, the bank may act in the following specific capacities:
>
> > (1) Any of the eight fiduciary capacities expressly listed in 12 U.S.C. 92a(a), unless the state prohibits its own state banks, trust companies, and other corporations that compete with national banks in that state from acting in that capacity; and
> >
> > (2) Any other fiduciary capacity the state permits for its own state banks, trust companies, or other corporations that compete with national banks in that state.
>
> (b) *Serving customers in other states.* While acting in a fiduciary capacity in one state, a national bank may market its fiduciary services to, and act as fiduciary for, customers located in any state, and it may act as fiduciary for relationships that include property located in other states. The bank may use a trust representative office for this purpose.
>
> (c) *Offices in more than one state.* A national bank with fiduciary powers may establish trust offices or trust representative offices in any state.

(d) *Determination of the state referred to in 12 U.S.C. 92a.* For each fiduciary relationship, the state referred to in section 92a is the state in which the bank acts in a fiduciary capacity for that relationship. A national bank acts in a fiduciary capacity in the state in which it accepts the fiduciary appointment, executes the documents that create the fiduciary relationship, and makes discretionary decisions regarding the investment or distribution of fiduciary assets. If these activities take place in more than one state, then the state in which the bank acts in a fiduciary capacity for section 92a purposes is the state that the bank designates from among those states.

(e) *Application of state law—*

(1) State laws used in section 92a. The state laws that apply to a national bank's fiduciary activities by virtue of 12 U.S.C. 92a are the laws of the state in which the bank acts in a fiduciary capacity.

(2) Other state laws. Except for the state laws made applicable to national banks by virtue of 12 U.S.C. 92a, state laws limiting or establishing preconditions on the exercise of fiduciary powers are not applicable to national banks.

12 C.F.R. § 9.7.

Relevant portions of the Utah Trust Deed Act are set forth in the Appendix. App. 45a-53a.

STATEMENT

1. *Federal banking laws.* Federal law authorizes national banks to make loans secured by real estate. *See* 12 U.S.C. § 371(a). National banks are further authorized to acquire real property through foreclosure on loans or in satisfaction of contractual debts, and to hold and convey such property in the course of their dealings. *See id.* § 29 (Second), (Third); *see also* OCC Interpretive Ltr. No. 646, 1994 WL 271179 (Apr. 12, 1994).

As an adjunct to these authorized real-estate activities, national banks regularly serve as trustees on deeds of trust securing real property. Federal law authorizes that activity as well, among other fiduciary activities. In particular, section 92a of title 12 of the U.S. Code prescribes national banks' "[t]rust powers." It provides that the Comptroller of the Currency may grant national banks "the right to act as trustee … 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." 12 U.S.C. § 92a(a). Such powers can only be granted, however, "when not in contravention of State or local law." *Id.*[2]

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[2] The portion of section 92a authorizing national banks to act as trustees "when not in contravention of State or local law" was enacted in 1913. *See* Federal Reserve Act, Dec. 23, 1913, ch. 6 § 11(k), 38 Stat. 251, 262. The remainder was added in 1918. *See* Act of Sept. 26, 1918, ch. 177, 40 Stat. 967, 968-969. In 1962, Congress transferred authority over national banks from the Board of Governors of the Federal Reserve System to the Comptroller of the Currency, repealed the pertinent provisions of the Federal Reserve Act, and re-codified them as 12 U.S.C. § 92a. *See* National Bank Act of 1962, Pub. L. No. 87-722, 76 Stat. 668 (enacting H.R. 12,577).

As contemplated by federal law, national banks frequently undertake these lending and fiduciary duties across state lines. The Comptroller of the Currency thus promulgated a regulation governing "[m]ulti-state fiduciary operations." 12 C.F.R. § 9.7. The regulation provides that national banks "may act in a fiduciary capacity in any state," and more specifically may act in any fiduciary capacity that a "state permits for its own state banks, trust companies, or other corporations that compete with national banks in that state." *Id.* § 9.7(a). The regulation expressly authorizes a national bank to "act as fiduciary for relationships that include property located in other states." *Id.* § 9.7(b); *see also* Fiduciary Activities of National Banks, 66 Fed. Reg. 34,792, 34,793 (July 2, 2001); 12 C.F.R. § 9.2(k) (among the "ancillary activities" a national bank serving as a trustee may carry on is "holding title to real property").

A central question left unanswered by section 92a is which state's law governs a national bank's fiduciary activities, *i.e.*, what is "the State in which the national bank is located"? 12 U.S.C. § 92a(a). The Comptroller's regulation addresses this question, enumerating the standards for "[d]etermination of the state referred to in 12 U.S.C. 92a." 12 C.F.R. § 9.7(d). The answer the regulation provides is that "[f]or each fiduciary relationship, the state referred to in section 92a is the state in which the bank acts in a fiduciary capacity for that relationship." *Id.* The regulation then elaborates that "[a] national bank acts in a fiduciary capacity in the state in which it [1] accepts the fiduciary appointment, [2] executes the documents that create the fiduciary relationship, and [3] makes discretionary decisions regarding the investment or distribution of fiduciary assets." *Id.* The OCC has explained that it selected these three "key" fiduciary functions as the benchmark for

determining the state in which the national bank acts as a trustee so as "to provide clarity and certainty for national banks' multi-state fiduciary activities." 66 Fed. Reg. at 34,792.[3]

The Comptroller's regulation also preempts conflicting state law, providing that "[e]xcept for the state laws made applicable to national banks by virtue of 12 U.S.C. 92a, state laws limiting or establishing preconditions on the exercise of fiduciary powers are not applicable to national banks." 12 C.F.R. § 9.7(e)(2).[4]

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[3] Where a national bank engages in the three key activities in more than one state, "the state in which the bank acts in a fiduciary capacity for section 92a purposes is the state that the bank designates from among those states." 12 C.F.R. § 9.7(d).

[4] Section 92a and 12 C.F.R. § 9.7 govern fiduciary activities beyond real estate trusteeships, such as a national bank's "right to act as trustee, executor, administrator, registrar of stocks and bonds, guardian of estates, assignee, [or] receiver," 12 U.S.C. § 92a(a). National banks thus rely on section 92a—and the OCC's interpretation of it—when they engage in a broad range of trust relationships. *See, e.g.*, OCC Interpretive Ltr. 1106, 2008 WL 7137071, at *3 (Oct. 10, 2008) (addressing application of section 92a and 12 C.F.R. § 9.7 to a national bank's service as "personal representative for the estate of a person" domiciled in a state that purported to impose residency restrictions for executors); OCC Interpretive Ltr. 973, 2003 WL 23675954 (Aug. 12, 2003) (addressing application of section 92a and 12 C.F.R. § 9.7 to a national bank's service as indenture trustee on municipal bonds); OCC Interpretive Ltr. 872, 1999 WL 1251391 (Oct. 28, 1999) (addressing application of section 92a to a national bank's plan to offer "a full range of trust services" in California, while conducting "the core functions that are essential to the creation and administration of the fiduciary relationship" in other states); OCC Interpretive Ltr. 866, 1999 WL 983923 (Oct. 8, 1999) (addressing application of section 92a to a national bank's retail-trust business, which would establish "a retail brokerage account that holds cash, securities and similar financial products and … provide[] a variety of trust services to assist in meeting a customer's estate, investment, and tax planning goals").

2. *Utah's trust deed statute.* Utah enacted its Trust Deed Act in 1961. *See* Utah Code Ann. §§ 57-1-19 to -36. The Act provides that a trust deed "convey[s] real property to a trustee … to secure the performance of an obligation of the trustor or other person named in the deed." *Id.* § 57-1-19(3). Among a trustee's obligations under such a deed are to foreclose on and sell property if a borrower defaults. The Trust Deed Act spells out elaborate notice and procedural requirements for sale of the pledged property. *See id.* § 57-1-24, -27.

Until 2001, any person or entity permitted to act as a trustee under the Trust Deed Act could exercise the power of sale. In 2001, however, Utah limited that power to certain trustees. *See* Utah Laws 2001, c. 236, § 2, eff. Apr. 30, 2001. In particular, the power of sale may be exercised only by an "active member of the Utah State Bar who maintains a place within the state where the trustor or other interested parties may meet with the trustee" or a "title insurance company or agency that holds a certificate of authority or license ... to conduct insurance business in the state; is actually doing business in the state; and maintains a bona fide office in the state." Utah Code Ann. § 57-1-21(1)(a)(i), (iv); *see id.* § 57-1-21(3).[5]

3. *Proceedings below.* In 2006, respondent Loraine Sundquist executed a deed of trust as security for the loan on her Utah home. She stopped making pay-

[5] There is no dispute that acting as a trustee on a deed of trust entails the exercise of a fiduciary power within the meaning of 12 U.S.C. § 92a. The "right to act as a trustee" is a designated "fiduciary capacity" under section 92a. 12 C.F.R. § 9.2(e); *see also* OCC Interpretive Ltr., 1986 WL 143993 (June 13, 1986) ("act[ing] as trustee under deeds of trust in favor of [a] Bank as beneficiary" and "conduct[ing] trustee sales" are "permissible for a national bank as an aspect of trust powers granted by 12 U.S.C. 92a").

ments on the loan three years later. FNMA, the beneficiary under the deed of trust, appointed ReconTrust Company, N.A., a national bank chartered by the Comptroller, as the successor trustee. ReconTrust, a wholly owned subsidiary of Bank of America, N.A., initiated non-judicial foreclosure proceedings pursuant to the Utah Trust Deed Act. In early 2011, ReconTrust provided Sundquist with notice of a trustee's sale, and four months later it foreclosed on her property, which it then deeded to FNMA.

Sundquist continued to live in the house after the foreclosure sale, so FNMA filed an unlawful-detainer action in Utah state court. In defending against the suit, Sundquist contended that ReconTrust had wrongfully exercised the power of sale because it was neither a member of the Utah State Bar nor a title insurance company with an office in Utah, and therefore was not authorized under the Trust Deed Act to conduct the sale. FNMA asserted in response that "ReconTrust, as a national bank, was authorized to conduct the sale under federal laws and that federal law preempted the Utah statute." App. 2a. Without specifically addressing this preemption argument, the trial court awarded FNMA possession of the property during the pendency of the litigation.

The Utah Supreme Court granted Sundquist's petition for review and reversed. The court did not dispute FNMA's contention that under the terms of 12 C.F.R. § 9.7, ReconTrust was "located" in Texas "because the substitution of trustee, notice of default, and trustee's deed all were executed and notarized in Texas." App. 7a. Nor did the court deny ReconTrust's authority under Texas law to conduct a non-judicial foreclosure sale. App. 6a (citing Tex. Fin. Code §§ 32.001, 182.001). The court nevertheless held that ReconTrust was barred

from exercising the power of sale as to Sundquist's property because, on the court's reading of section 92a, ReconTrust was "located" in Utah and therefore subject to Utah law in the exercise of its national-bank trustee authority. App. 2a.

The court recognized that its decision was governed by *Chevron USA, Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). The court thus first addressed whether the critical phrase in section 92a(a)—"the laws of the State in which the national bank is located"—is ambiguous. Relying on a dictionary definition of "locate" ("'to determine or indicate the place, site, or limits of'" something, App. 10a (quoting Merriam-Webster Online Dictionary)), the court concluded that the term "located" in section 92a "is clear. A national bank is located … where it acts or conducts business. And it certainly acts as a trustee in the state in which it liquidates trust assets." App. 12a. The court thought this conclusion "bolstered" by the legislative history of an unrelated section of the Federal Reserve Act of 1913. App. 12a. In particular, the court found—in the Senate debate over a provision of the Federal Reserve Act concerning the ability of state banks to convert their charters into national banks—"clear" evidence that the phrase "when not in contravention of State or local law" indicates congressional intent "to preclude any inference that a national bank may disregard local State law in performing its duties as trustee." App. 13a.

The court also sought support for its reading by invoking two "substantive canons of statutory construction." App. 14a. *First*, the court pointed to a canon requiring (according to the court) a clear statement from Congress of its intent to intrude in an area of traditional state prerogative, *i.e.*, disposition of real property.

App. 14a-15a. The court found no such clear statement in the federal banking laws. *Second*, the court invoked a canon of administrative law that "deem[s] it highly unlikely that Congress would leave the determination of major policy questions to agency discretion, and thus require[s] a clear statement of congressional intent to do so." App. 16a. Again, the court found no such statement. The court concluded, in other words, that Congress's decision to expressly authorize the Comptroller of the Currency to grant national banks "the right to act as trustee … or in any other fiduciary capacity … under the laws of the State in which the national bank is located," 12 U.S.C. § 92a(a), did not entail any delegation of authority to construe the statutorily undefined term "located." App. 17a.

Notwithstanding its holding that the term "located" was clear on its face, the Utah Supreme Court undertook a *Chevron* step-two analysis. And perhaps not surprisingly given its conclusion at step one, the court held that the Comptroller's regulation interpreting section 92a "is unreasonable—if not irrational—and therefore does not deserve deference." App. 18a (internal quotation marks omitted). More specifically, the court took issue with the Comptroller's identification of the three "key" fiduciary activities, *see supra* pp.6-7, that guide the determination of where a national bank is "located." It found "nothing in the statute itself that ascribes any particular significance [to] these three particular acts." App. 19a. The regulation was also unreasonable, in the court's view, because "missing from this list [of relevant fiduciary activities] is where the bank engages in an act which liquidates the trust assets, *e.g.*, engaging in a nonjudicial foreclosure of real property where the trust asset is located." App. 19a (internal quotation marks omitted).

Justice Lee concurred in part and in the judgment. While agreeing with the majority's conclusion that Utah law governed ReconTrust's authority to sell real property located in Utah, Justice Lee deemed key parts of the majority's reasoning inconsistent with this Court's jurisprudence. In particular, he disagreed with the majority's conclusion that the statutory reference to the "laws of the State in which the national bank is located" is clear, observing that this Court has held that "the term 'located' as it appears in the National Bank Act [NBA], has no fixed, plain meaning." App. 25a (citing *Wachovia Bank* v. *Schmidt*, 546 U.S. 303, 313 (2006)). Justice Lee offered a number of other "grammatically tenable" and "linguistically possible" definitions for "located." App. 26a. He also disagreed with the majority's reliance on the legislative history of "an unrelated section of the NBA," explaining that because "'located' takes on different meanings throughout the NBA, it is by no means clear that legislative history concerning the use of the term in one section has any relevance to its use in another." App. 27a. He nonetheless concurred in the judgment on the basis of the "clear statement principle" the majority invoked. In particular, Justice Lee agreed with the majority "that on a matter of traditional state sovereignty over the disposition of title to property of an inherently local nature, we cannot lightly deem Congress to have intruded on the local State's sovereignty." App. 27a.

4. *Other relevant proceedings.* At the same time that this case was before the Utah Supreme Court, two cases in the Tenth Circuit presented the identical question of a national bank's authority to exercise the power of sale as the trustee of a trust deed in Utah. In one of the two, *Dutcher* v. *Matheson*, the court of appeals invited the Comptroller to file a brief addressing the ap-

plication of section 92a and his regulation to the question presented there. The Comptroller accepted the invitation and answered the question unequivocally:

> A national bank otherwise authorized to exercise fiduciary powers under 12 U.S.C. § 92a pursuant to the laws of the state where it is "located" for purposes of the particular fiduciary relationship may transact business … with respect to property that is the subject of the fiduciary relationship, even though the law of the state where the property is located restricts that activity to fiduciaries recognized under the law of the state where the property is located.

OCC Br. 9, *Dutcher* v. *Matheson*, No. 12-4150, 2013 WL 3795800 (10th Cir. July 12, 2013). The Comptroller went on to explain that 12 C.F.R. § 9.7 reflects a reasonable interpretation of an ambiguous statute (section 92a), and thus is entitled to deference. OCC *Dutcher* Br. 12-13. Section 9.7, the Comptroller elaborated, is a "full-dress regulation," issued after a formal notice-and-comment rulemaking that was "designed to provide clarity and certainty for national banks' multi-state fiduciary activities." *Id.* at 12, 13. During the rulemaking, moreover, "[t]he OCC considered, and stated the reasons for accepting or not accepting, the arguments advanced by the[various] commenters." *Id.* at 12.[6]

The court in *Dutcher* ultimately did not reach the question presented here, instead vacating and remanding for the district court to address an issue regarding

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[6] The Comptroller filed his amicus brief in *Dutcher* eleven days before the Utah Supreme Court decided this case. FNMA petitioned that court for rehearing, attaching the amicus brief as an exhibit, but the court denied the petition without comment.

subject-matter jurisdiction. *See* 733 F.3d 980, 990 (10th Cir. 2013). One month later, however (and two months after the Utah Supreme Court decided this case), the Tenth Circuit decided *Garrett* v. *ReconTrust, N.A.*, reaching the question it had left undecided in *Dutcher*.

Relying on this Court's precedent, the court in *Garrett* first held that "Section 92a provides no direction as to the critical question: in which 'State' is the national bank 'located' where, as here, activities related to the foreclosure sale occur in more than one state?" *Garrett* v. *ReconTrust, N.A.*, ___ F. App'x ___, 2013 WL 5273125, at *2 (10th Cir. Sept. 19, 2013) (citing *Citizens & S. Nat'l Bank* v. *Bougas*, 434 U.S. 35, 44 (1977)). In view of this statutory ambiguity, the court turned to the Comptroller's regulation, as well as his amicus brief in *Dutcher*, which the court determined was entitled to deference under *Auer* v. *Robbins*, 519 U.S. 452 (1997).[7] The court deferred to the Comptroller's view, as set forth in the brief, that "a national bank is 'located' in (and hence, permitted to act as a foreclosure trustee to the same extent as allowed by the laws of) the 'State' where it 'acts in a fiduciary capacity,'" as defined by reference to the three key fiduciary functions. 2013 WL 5273125, at *5. Because there was no dispute that ReconTrust performed those functions in Texas, the court of appeals determined the bank was "located" in Texas and permitted to exercise the power of sale as to Garrett's property in Utah, notwithstand-

[7] Because Garrett did not challenge the reasonableness of the Comptroller's regulation, the court did not undertake a *Chevron* step-two analysis. *See Garrett*, 2013 WL 5273125, at *2 & *4 n.3.

ing the contrary provisions of the Utah Trust Deed Act. *Id.*[8]

REASONS FOR GRANTING THE PETITION

The Utah Supreme Court's decision in this case undermines the uniform operation of federal law, subjecting national banks to a patchwork of state-law qualifications, even when they exercise their federally-authorized trust powers with regard to a single fiduciary relationship. The court thus injected substantial uncertainty into the federal regulatory regime for national banks' multi-state fiduciary operations, the very point of which is to ensure that national banks can structure their trust operations in a manner that subjects them to the clear and consistent operation of law. The court imposed these harmful effects, moreover, by departing from this Court's precedent in several important respects, including in regard to the deference owed to the Comptroller's interpretation of the federal

[8] The question presented here is not unique to Utah, and recently two other courts of appeals have similarly held that a state statute purporting to restrict national banks' ability to engage in non-judicial foreclosures could not be enforced consistent with federal banking laws. *See Jaldin* v. *ReconTrust Co., N.A.*, ___ F. App'x ___, 2013 WL 4566519, at *2-4 (4th Cir. Aug. 29, 2013) (Virginia statute barring national banks that do not have their principal office in Virginia from non-judicially foreclosing on real property in the Commonwealth held inapplicable under section 92a (citing *Watters* v. *Wachovia Bank, N.A.*, 550 U.S. 1 (2007))), *pet. for cert. filed*, No. 13-___ (Dec. 23, 2013); *JPMorgan Chase Bank, N.A.* v. *Johnson*, 719 F.3d 1010, 1018 (8th Cir. 2013) (Arkansas law permitting only entities authorized to do business in the state to engage in non-judicial foreclosure held inapplicable to national banks because "'Congress would not want States to forbid, or to impair significantly, the exercise of a power that [it] explicitly granted.'" (quoting *Barnett Bank of Marion Cnty., N.A.* v. *Nelson*, 517 U.S. 25, 33 (1996))).

banking laws. Given all this, and given that the decision below is inconsistent with rulings of the federal courts of appeals, this Court's review is warranted.

I. THE DECISION BELOW IS WRONG

The Utah Supreme Court committed two manifest errors in deciding this case.

A.1. First, the court concluded that the term "located" in section 92a(a) is unambiguous. This Court has recognized, however, that "[t]here is no enduring rigidity about the word 'located.'" *Bougas*, 434 U.S. at 44. Rather, "'located,' as its appearances in the banking laws reveal, … is a chameleon word; its meaning depends on the context in and purpose for which it is used." *Schmidt*, 546 U.S. at 318. Indeed, in clear conflict with the decision below, this Court has stated that "the term 'located,' as it appears in the National Bank Act, has no fixed, plain meaning." *Id.* at 313.[9]

In seeking to justify its contrary view, the Utah Supreme Court referred to a dictionary definition of "locate"—namely, "to determine or indicate the place, site, or limits of" something"—and opined that this definition "suggests that a national bank is located in the place or places where it acts or conducts business." App. 11a. That much is true, but the court then made the unjustified leap that a trustee "certainly" acts or conducts business "in the state in which it liquidates trust assets." App. 12a. Nothing in the statute compels that conclusion. *See* App. 26a (Lee, J., concurring in

[9] For example, "[i]n some [NBA] provisions, the word unquestionably refers to a single place: the site of the banking association's designated main office. In other provisions, 'located' apparently refers to or includes branch offices." *Schmidt*, 546 U.S. at 313 (citations omitted).

part and concurring in the judgment) ("The key question under the majority's definition … is *what* 'determines' or 'indicates' the place of a person['s] or entity's location. And that question is not at all answered—certainly not clearly or unambiguously—by the statutory text.").[10]

Nor does the legislative history that the court cited illuminate the meaning of "located." The court relied on one senator's statement about section 11(k) of the Federal Reserve Act of 1913, which allowed the conversion of state banks to national banks "'[p]rovided … [t]hat said conversion shall not be in contravention of State law.'" App. 12a (quoting Federal Reserve Act of 1913, Dec. 23, 1913, ch. 6, § 11(k), 38 Stat. 262). This language, the court explained, was "'put … in to show that there was no purpose on the part of Congress to disregard the local State law, but merely to give its assent provided the State law permitted it to be done.'" App. 13a (quoting 51 Cong. Rec. S879 (Dec. 15, 1913)). Because Congress used similar language in the provision that eventually became section 92a, it followed (in the court's view) "that Congress intended to preclude any inference that a national bank may disregard local State law in performing its duties as trustee." App. 13a.

The flaw in the court's reasoning is that the legislative history—like section 92a itself—does not address the critical issue, namely *which* "State['s] law" Congress was contemplating. *See* App. 27a (Lee, J., concurring in part and concurring in the judgment) ("[T]he cited legislative history does not answer the key ques-

[10] The majority's reading would be correct if section 92a referred to the state in which the subject *property* is located. But Congress instead referred to the state in which the bank is located.

tion: Local to what? To the bank's physical location, or to the fiduciary acts it performs?"). To be sure, the evident intent in both the legislative history and section 92a was to respect "State law." But by its terms section 92a limits that respect to "the State in which the national bank is located." 12 U.S.C. § 92a(a). To say that Congress wanted to respect state law—which is all the legislative history provides—does nothing to answer the question of which state law is at issue, *i.e.*, where the bank is "located."

2a. Equally infirm was the Utah Supreme Court's attempt to bolster its reading of "located" by invoking two related clear-statement canons. First, the court pointed to the canon that a clear statement of congressional intent is required to "alter the usual constitutional balance between the States and the Federal government, or intrude on a field of traditional state sovereignty." App. 14a (citations and internal quotation marks omitted). That canon has no application here because as this Court has long recognized, Congress *did* alter the federal-state balance when it passed the National Bank Act and related laws, and the regulatory scheme for national banks inherently contemplates a significant displacement of state regulatory authority.

Over 140 years ago, this Court explained that federal law establishes national banks as "National favorites" and shields them from "the hazard of unfriendly legislation by the States." *Tiffany* v. *National Bank of Mo.*, 85 U.S. (18 Wall.) 409, 413 (1873). Under the federal regime, "the States can exercise *no control* over [national banks], nor in any wise affect their operation, except in so far as Congress may see proper to permit." *Farmers' & Mechanics' Nat'l Bank* v. *Dearing*, 91 U.S. 29, 34 (1875) (emphasis added). Relatedly, the Court has repeatedly remarked on Congress's paramount ob-

jective of uniformity in the regulation of national banks, and explained that the comprehensiveness of the federal banking scheme weighs strongly against the application of conflicting state law. *See Beneficial Nat'l Bank* v. *Anderson*, 539 U.S. 1, 10-11 (2003) (need for "[u]niform rules limiting the liability of national banks … supports the established interpretation of §§ 85 and 86 [of the NBA] that gives those provisions the requisite pre-emptive force to provide removal jurisdiction"); *Barnett Bank of Marion Cnty., N.A.* v. *Nelson*, 517 U.S. 25, 32 (1996) ("[I]n the context of national bank legislation, … grants of both enumerated and incidental 'powers' to national banks [are] not normally limited by, but rather ordinarily pre-empt[], contrary state law."). Against this backdrop, no further statement of congressional intent in section 92a was necessary.

Indeed, this Court has made clear that if there is any clear-statement rule in this context, it is the opposite of the one embraced by the court below. Because Congress "intended to facilitate … a national banking system," the Court has stated, "[w]e would certainly be exceedingly reluctant to read … a hiatus into the [federal banking laws] in the absence of evidence of specific congressional intent." *Marquette Nat'l Bank* v. *First of Omaha Serv. Corp.*, 439 U.S. 299, 314-315, 318 (1978). And in direct refutation of the Utah court's reasoning, this Court has stated that a banking "regulation's force does not depend on express congressional authorization to displace state law." *Fidelity Fed. Sav. & Loan Ass'n* v. *de la Cuesta*, 458 U.S. 141, 154 (1982).

b. The second clear-statement canon relied on by the court below similarly lends no support to the court's conclusion. That canon provides that "[a]bsent a clear, non-cryptic indication of congressional intent to leave … questions [of fundamental significance] up to agency

discretion," the statute will be read to foreclose that delegation. App. 17a. As this Court has observed, however, that canon applies only in "extraordinary cases," *FDA* v. *Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159 (2000), where "an agency's expansive construction of the extent of its own power would have wrought a fundamental change in the regulatory scheme," *City of Arlington* v. *FCC*, 133 S. Ct. 1863, 1872 (2013). That is not the situation here. As just discussed, this Court has long recognized that Congress permissibly altered the federal-state balance in passing national banking laws, including by preempting significant portions of state law. The Comptroller's regulation thus involves no "fundamental change."

The case the Utah Supreme Court principally relied on in discussing this canon, *Brown & Williamson*, confirms that the "extraordinary" circumstances required to invoke the canon are not present here. *Brown & Williamson* concerned the authority of the FDA to regulate tobacco products against the backdrop of "repeated[]" congressional efforts "to preclude *any* administrative agency from exercising significant policymaking authority on the subject of smoking and health." 529 U.S. at 149. Those steps informed the Court's determination that Congress had spoken to the precise question at issue. There is no sound basis to reach a similar conclusion here, as Congress has taken no remotely similar steps to preclude agency policymaking with respect to trustee powers.

Even if the canon applied here, its clear-statement requirement would be satisfied. The question under the canon is simply whether Congress clearly delegated interpretive authority on a particular question to the agency. Congress unquestionably gave the Comptroller full authority to administer and interpret section

92a(a), including construing the term "located." Section 92a(a), which is entitled "Authority of the Comptroller of the Currency," states that "[t]he Comptroller … shall be authorized and empowered to grant … to national banks …, when not in contravention of State or local law, the right to act … in [various] fiduciary capacit[ies]," so long as state banks or similar entities are permitted to engage in those capacities "under the laws of the State in which the national bank is located." 12 U.S.C. § 92a(a). This express congressional "authoriz[ation] and "empower[ment]" necessarily entails the authority to construe the term "located," because without that authority—*i.e.*, without knowing what state banks may do "under the laws of the State in which the national bank is located," the Comptroller could not carry out his delegated duty of granting national banks the permits authorized by section 92a(a).

Perhaps recognizing all this, the Utah Supreme Court characterized the Comptroller's regulation as "authorizing one state to regulate non-judicial sales for the foreclosure of real property in another state." App. 18a. That description is inaccurate. The regulation (like section 92a itself) does not affect the application of substantive state fiduciary law to national banks—or, with regard to the disposition of real property, the requirements of state foreclosure laws. *See* 66 Fed. Reg. at 34,795-34,796 ("Section 9.7(e) does not affect the applicability of state substantive laws that govern the fiduciary relationship, such as the standard of care to be exercised by the fiduciary, or ability of a grantor to designate which state's laws govern the trust itself."). The regulation is concerned only with the *authorization* of the national bank to carry on fiduciary activities, and with preventing states from imposing authorization requirements beyond those imposed by the state where

the national bank is located. Contrary to the Utah court's suggestion that the regulation authorizes another state to "to regulate non-judicial sales for the foreclosure of real property in" Utah, App. 18a, a "national bank is [still] 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 *Dutcher* Br. 9.

In sum, the Utah Supreme Court gravely erred in holding that the term "located" in section 92a is unambiguous.

B.1. The Utah Supreme Court's second overarching error was refusing to defer to the Comptroller's interpretation of section 92a. As this Court has explained, courts "defer[] to agencies under *Chevron* … because of a presumption that Congress, when it left ambiguity in a statute meant for implementation by an agency, understood that the ambiguity would be resolved, first and foremost, by the agency, and desired the agency (rather than the courts) to possess whatever degree of discretion the ambiguity allows." *Smiley* v. *Citibank (S.D.), N.A.*, 517 U.S. 735, 740-741 (1996). An agency's interpretation of a statute need not be "the only reasonable one," in order to "garner[] the Court's respect under *Chevron*[.]" *Astrue* v. *Capato ex rel. B.N.C.*, 132 S. Ct. 2021, 2026 (2012). Rather, a court is bound to defer to any "permissible construction of the statute," even if that is not "the reading the court would have reached if the question initially had arisen in a judicial proceeding." *Chevron*, 467 U.S. at 843 & n.11.

Deference to the Comptroller was required here. To begin with, the Comptroller is explicitly authorized to administer section 92a, *see* 12 U.S.C. § 92a(a), (j)-(k),

including through the promulgation of rules and regulations, *see id.* § 93a. More generally, this Court has repeatedly explained that "[t]he Comptroller … is charged with the enforcement of the banking laws to an extent that warrants the invocation of [the rule of deference] with respect to his deliberative conclusions as to the meaning of these laws." *NationsBank of N.C., N.A.* v. *Variable Annuity Life Ins. Co.*, 513 U.S. 251, 256-257 (1995); *accord, e.g.*, *Clarke* v. *Securities Indus. Ass'n*, 479 U.S. 388, 403-404 (1987). Indeed, the Court has stated that it "cannot come lightly to the conclusion that the Comptroller has authorized activity that violates the banking laws." *Investment Co. Inst.* v. *Camp*, 401 U.S. 617, 626 (1971). That is surely particularly true where, as here, the Comptroller adopted § 9.7 after a full notice-and-comment process that involved the submission of comments by "four … state bank supervisors" and "one … state bank supervisors' organization." OCC *Dutcher* Br. 12

In disregard of the precedent just discussed, the Utah Supreme Court substituted its own view—that the only fact relevant to determining where a national *bank* is "located" in the circumstances here is the situs of the subject property—for the Comptroller's considered determination in promulgating a regulation that affects a range of fiduciary activities, many of which have nothing to do with the disposition of trust property. The court based its refusal to defer on its conclusion that the Comptroller's regulation is "unreasonable—if not irrational." App. 18a. But in reality, it was entirely reasonable for the Comptroller to define a national bank's "location" with reference to three activities that apply not just to some of the fiduciary relationships enumerated in section 92a(a) but to all of them. *See* 12 U.S.C. § 92a(a) (referring to "trustee, executor, admin-

istrator, registrar of stocks and bonds, guardian of estates, assignee, receiver"). That approach, which does not conflict with any of the pertinent statutory language, allows national banks to structure their various fiduciary activities in a way that subjects them to clear and consistent application of state law. *Cf.* 61 Fed. Reg. 68,543, 68,545 (Dec. 30, 1996) (final OCC rule adopting definition of "fiduciary capacity" in 12 C.F.R. § 9.2: "The OCC believes that 'fiduciary capacity' should be defined in a manner that fosters consistent application of part 9 throughout the national banking system.").

The decision below, by contrast, would make the location of a national bank turn on the object of the fiduciary activity in which the bank is engaged—here, real property. Under that approach, national banks' location would vary from fiduciary activity to fiduciary activity. Indeed, a national bank could be "located" in multiple states even when serving as trustee for one trustor, based on the particular fiduciary activity the bank was conducting. Section 92a does not compel such a confusing and inefficient result. *Cf.* OCC Interpretive Ltr. 995, 2004 WL 3418856, at *2-3 (June 22, 2004) ("For each fiduciary relationship, a national bank will only refer to one state's laws for purposes of defining the extent of its fiduciary powers pursuant to Section 92a. The Bank would look to the laws of that state to determine which fiduciary capacities it may engage in, and may then engage in any of these capacities for customers both in that state and in other states.").

Further underscoring the reasonableness of the Comptroller's regulation is the fact that it is consistent with this Court's view of a national bank's powers. This Court has endorsed the view that a national bank "located" in one state, and authorized under the laws of

that state to carry on certain activities, may export those activities to other states notwithstanding any conflicting law in those other states. For example, construing a provision of the NBA that similarly refers to the laws of the state in which the national bank is "located," 12 U.S.C. § 85, this Court approved the exportation of a national bank's interest-rate powers—and, as a result, the preemption of host-state usury laws. *See Marquette Nat'l Bank*, 439 U.S. at 311. The Court explained that this approach furthered the purposes of the federal banking laws in creating a "national banking system," and that a contrary rule would "throw into confusion the complex system of interstate banking." *Id.* The Comptroller's adoption of a similar approach suggests that his regulation is, at the very least, a permissible construction of the statute.

That conclusion is reinforced by the careful explanation that the Comptroller provided in promulgating § 9.7. In particular, the Comptroller considered the history of how "located" was added to section 92a, and determined from that history and the attendant context that the state in which the national bank was located must be the one in which the bank acted in a fiduciary capacity. *See* 66 Fed. Reg. at 34,794 n.6. The Comptroller also considered this Court's precedent, which emphasized that state laws cannot prohibit or restrict out-of-state national banks from performing their federally authorized fiduciary powers. *See id.* at 34,795 & n.7 (citing *Barnett Bank*, 517 U.S. 25).

Finally, the reasonableness of the Comptroller's interpretation is confirmed by the fact that it is consistent with section 92a(b). That subsection provides that if a state grants fiduciary powers to its own banks, trust companies, or other corporations that compete with national banks, then 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." 12 U.S.C. § 92a(b). As the Comptroller has explained, "Congress's purpose in adding section 92a(b) … was to prevent states from preventing national banks from exercising fiduciary powers through prohibitory laws while allowing their own state banks and trust companies to have these powers." OCC *Dutcher* Br. 3 n.3. The Comptroller's interpretation of section 92a(a) similarly eliminates state attempts to discriminate against national banks.[11]

2. The analysis that led the Utah Supreme Court to reject the Comptroller's interpretation is untenable. The court began by stating that "'[i]f [section] 92a is to mean what it says (*i.e.*, the plain meaning), the reference to "State or local" law at a minimum should be construed to mean the State in which the trust activity occurs.'" App 19a (alterations in original) (quoting *Bell* v. *Countrywide Bank, N.A.*, 860 F. Supp. 2d 1290, 1304 (D. Utah 2012)). If that were true, then the Comptroller's regulation would indeed be difficult to defend. But nothing in the statute remotely suggests that "State or local law" must be "construed to mean the State in which the trust activity occurs." *Id.* What the statute refers to is "the State in which the national bank is lo-

[11] The Utah Supreme Court rejected FNMA's argument that even if ReconTrust was "located" in Utah for purposes of its conduct here, that conduct was authorized under section 92a(b) because ReconTrust competes with Utah title insurance companies. *See* App. 22a-23a. That conclusion was erroneous. Utah title insurance companies perform the same fiduciary duties as ReconTrust, and they engage in "competition" as this Court has defined that term: they undertake similar operations as trustees and they vie for the same commercial business from the same consumer group in the same locality. *See First Nat'l Bank of Hartford* v. *Hartford*, 273 U.S. 548, 557-559 (1927).

cated." 12 U.S.C. § 92a.[12] The court below simply put its preferred gloss on section 92a and then faulted the Comptroller for adopting a regulation inconsistent with that gloss. That was error because the court's gloss is in no way compelled by the statutory text.[13]

In short, because the Comptroller's approach to defining "located" reasonably promotes clarity and consistency for national banks across the range of fiduciary activities expressly permitted by section 92a, and does not conflict with any language in the statute, the Utah

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[12] As the Comptroller stated in his amicus brief in *Dutcher*, "section 92a(a) refers to a single state.… The most natural reading of [its] text, and the only reading consistent with canons of statutory construction and with the statutory purpose, is that the three references to 'State' refer to the same state and not to different states." OCC *Dutcher* Br. 10-11 n.5.

[13] The Utah Supreme Court also believed that the position the Comptroller took in a prior interpretive letter (Number 695) was inconsistent with 12 C.F.R. § 9.7, and thus was evidence of the regulation's unreasonableness. *See* App. 19a-21a. In fact, the regulation codifies the guidance offered in the prior letter (and two others). *See* OCC *Dutcher* Br. 14; 66 Fed. Reg. at 34,792 (stating that 12 C.F.R. § 9.7 "reflected the positions taken" in Interpretive Letters 695, 866, and 872). What the court below overlooked was that under the facts at issue in letter 695, the national bank would carry on fiduciary activities in multiple states through "brick-and-mortar trust offices in each state," and would therefore be subject to the laws of each of those states. *See* OCC *Dutcher* Br. 12 n.7; OCC Interpretive Ltr. 695, 1995 WL 788085 at *34 n.7 (Dec. 8, 1995). The Comptroller's regulation, by contrast, contemplates a national bank carrying on its fiduciary activities in one state, including with regard to property located in another state. That is the factual scenario presented in *Dutcher* and in this case. In any event, any inconsistency with the prior letter would be irrelevant to the *Chevron* analysis because the letter pre-dates the Comptroller's notice-and-comment rulemaking. *See Smiley*, 517 U.S. at 742-743.

Supreme Court erred in refusing to defer to his interpretation.

II. THE DECISION BELOW CONFLICTS WITH FEDERAL COURT OF APPEALS DECISIONS

The Utah Supreme Court's decision conflicts with the Tenth Circuit's decision in *Garrett*. Addressing the same question presented here—in regard to the same national bank—the Tenth Circuit reached the opposite conclusion about the application of section 92a in the circumstances of this case. *Garrett* correctly held that the term "located" in Section 92a is ambiguous. And while the Tenth Circuit did not rule on the reasonableness of the Comptroller's regulation (because no reasonableness challenge was raised), the court deferred to the Comptroller's views on the proper interpretation of section 92a, as set forth in its amicus brief in *Dutcher*. *See Garrett*, 2013 WL 5273125, at *5. In particular, the court held that a national bank is "located" where it executes the three key fiduciary functions related to the trust relationship at issue. *Id.* The court of appeals likewise accepted the Comptroller's conclusion that the situs of the real property at issue is not among the determinative facts, and thus that "'[a] national bank permitted to act as a foreclosure trustee under the laws of the state where it is located, here Texas, may act in that role in another state even though the laws of that state, here Utah, may limit eligibility to act as a fiduciary for that type of transaction to specific entities.'" *Id.* at *4 (quoting OCC *Dutcher* Br. 9).

The contrast between the two courts' approaches, and the conflict between their holdings, warrant this Court's review. *See Barnett Bank*, 517 U.S. at 30 (explaining that the Court "granted certiorari due to uncertainty among lower courts about the pre-emptive

effect of this Federal statute," and citing as evidence of the conflict one decision of the Sixth Circuit and one decision of the Louisiana Court of Appeals, in addition to the decision of the Eleventh Circuit on review).

The Fourth Circuit's decision in *Jaldin* both deepens the conflict and confirms the national importance of the question presented. Like the Tenth Circuit in *Garrett* but unlike the court below, the Fourth Circuit recognized that "'[a] state law may not significantly burden a national bank's own exercise of its real estate lending power, just as it may not curtail or hinder a national bank's efficient exercise of any other power.'" *Jaldin* v. *ReconTrust Co., N.A.*, ___ F. App'x ___, 2013 WL 4566519, at *3 (4th Cir. Aug. 29, 2013) (quoting *Watters* v. *Wachovia Bank, N.A.*, 550 U.S. 1, 13 (2007)), *pet. for cert. filed*, No. 13-___ (Dec. 23, 2013). The court of appeals accordingly determined that the Virginia statute was inapplicable to national banks, under section 92a, to the extent that it would impose an additional qualification on the banks' federally-authorized exercise of its powers as a trustee. *Id.*

Garrett and *Jaldin* thus pay due regard to the considerations affecting a national bank's exercise of its multi-state fiduciary powers, whereas *Sundquist* prioritizes one consideration, the location of the real property at issue, above all else. The consequence of that holding for national banks is significant, as it would require them to reconfigure their trust operations to accommodate a patchwork of fifty states' laws governing the qualifications of trustees. That is manifestly inconsistent with Congress's intent in passing section 92a, as well as decades of guidance from the Comptroller, pursuant to which national banks have carried on their trust activities. *See Marquette Nat'l Bank*, 439 U.S. at 312 ("If the location of the bank were to depend on the

whereabouts of each credit-card transaction, the meaning of the term 'located' would be so stretched as to throw into confusion the complex system of modern interstate banking. A national bank could never be certain whether its contacts with residents of foreign States were sufficient to alter its location for purposes of [12 U.S.C.] § 85. We do not choose to invite these difficulties by rendering so elastic the term 'located.'").

That *Garrett* and *Jaldin* were unpublished decisions is not a sound basis to deny review. In *Crawford* v. *Metropolitan Government of Nashville & Davidson County*, 555 U.S. 271 (2009), this Court granted review of an unpublished decision that conflicted with published decisions by other circuits, *see id.* at 275. The need for review is even stronger here because it is the decision below—the decision that, as explained above, is manifestly inconsistent with this Court's case law in several respects—that is published.

Finally, further percolation would serve no salutary purpose. The Utah Supreme Court refused to reconsider its decision here in light of the Comptroller's amicus brief in *Dutcher*. The conflict is thus unlikely to resolve itself. Moreover, the Comptroller has articulated his views on the question presented, and offered a detailed defense of its regulation. With the issues and relevant views thus fully developed and squarely presented, no further consideration by the lower courts is needed.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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JANUARY 2014

APPENDICES

APPENDIX A

SUPREME COURT OF UTAH

FEDERAL NATIONAL MORTGAGE ASSOCIATION,
Plaintiff and Appellee,
v.

LORAINE SUNDQUIST,
Defendant and Appellant.

No. 20110575
July 23, 2013
Rehearing Denied Sept. 16, 2013

Justice PARRISH, opinion of the Court:

INTRODUCTION

¶ 1 Appellant Loraine Sundquist appeals from an interlocutory order requiring her to vacate her home during the pendency of an unlawful detainer action. Appellee Federal National Mortgage Association (FNMA) initiated the unlawful detainer action, claiming ownership of Sundquist's home. FNMA claimed ownership pursuant to a trustee's deed that it obtained from ReconTrust. ReconTrust is a national bank that conducted a nonjudicial foreclosure sale in its capacity as trustee of the trust deed that Sundquist had executed to secure her mortgage.

¶ 2 The interlocutory order at issue was entered at the conclusion of an immediate occupancy hearing held just two weeks after FNMA initiated the unlawful detainer action. At that hearing, Sundquist argued that

ReconTrust lacked authority to conduct the foreclosure sale and convey her home to FNMA. Specifically, she argued that sections 57–1–21 and 57–1–23 of the Utah Code limit the power of sale to trustees who are either members of the Utah State Bar or title insurance companies with an office in Utah. In response, FNMA argued that ReconTrust, as a national bank, was authorized to conduct the sale under federal law and that federal law preempted the Utah statute. The district court agreed with FNMA and entered an order of restitution, requiring that Sundquist vacate her home.

¶ 3 We reverse. Utah Code sections 57–1–21 and 57–1–23 are not preempted by federal law. A national bank seeking to foreclose real property in Utah must comply with Utah law. We therefore vacate the district court's order of restitution and remand for additional proceedings.

¶ 4 Because our ruling in this matter is limited to the preemption issue, the parties may, on remand, raise any additional issues they may see fit with respect to FNMA's claim for immediate occupancy.[1] Similarly, the parties remain free to raise any additional arguments they may have regarding the validity of the trustee's deed in connection with the final resolution of the unlawful detainer action.

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[1] FNMA has raised at least some additional arguments for the first time on appeal. However, because the district court agreed with FNMA on the preemption issue, FNMA did not need to raise these arguments in the district court and the district court did not rule on them. We decline to address them for the first time on appeal.

FACTUAL & PROCEDURAL BACKGROUND

¶ 5 In 2006, Sundquist executed a deed of trust as security for the loan on her Utah home (Property). In 2009, Sundquist stopped making payments on her mortgage. The beneficiary under the deed of trust appointed ReconTrust, a wholly-owned subsidiary of Bank of America, as the successor trustee. In January 2011, ReconTrust placed a notice of trustee's sale on Sundquist's door. In May 2011, ReconTrust conducted a nonjudicial foreclosure of Sundquist's home and thereafter deeded it to FNMA.

¶ 6 In June 2011, FNMA filed an unlawful detainer action. Pursuant to Utah Code section 78B–6–810, the district court conducted an evidentiary hearing to determine which party would have possession of the Property during the pendency of the litigation. At the hearing, Sundquist argued that Utah law regarding the qualification of trustees did not authorize ReconTrust to conduct a nonjudicial foreclosure. In response, FNMA asserted that Utah law was preempted by federal law, which authorized ReconTrust to conduct the foreclosure sale. The district court sided with FNMA and awarded it possession of the Property during the pendency of the litigation.

¶ 7 Sundquist filed a petition for interlocutory appeal, which was granted. The order of restitution was stayed pending appeal. We have jurisdiction under Utah Code section 78A–3–102(3).

¶ 8 Sundquist argues that ReconTrust lacked authority to conduct a nonjudicial foreclosure of her home because such authority is granted only to members of the Utah State Bar or title insurance companies with an office in Utah. Utah Code §§ 57–1–21; 57–1–23. She asserts that it necessarily follows that ReconTrust's

deed is "null and void," that FNMA lacks title to the Property, and that FNMA is without standing to bring an unlawful detainer action. She concludes that the district court lacked subject matter jurisdiction to entertain the eviction action brought by FNMA.

¶ 9 FNMA counters that ReconTrust is a national bank exercising fiduciary powers subject to section 92a of the National Banking Act (NBA), which preempts Utah law regarding qualification of trustees. Utah Code §§ 57–1–21, 57–1–23; 12 U.S.C. § 92a. Specifically, FNMA claims that ReconTrust is subject to the laws of Texas because that is where ReconTrust is "located" and where it conducts its fiduciary business, and that ReconTrust is authorized to conduct nonjudicial foreclosures under Texas law. FNMA also argues that the order of restitution was proper because Sundquist suffered no prejudice by virtue of ReconTrust's role as a trustee inasmuch as she was unable to demonstrate an ability to make up her missed mortgage payments or post a bond. FNMA further argues that the other issues raised by Sundquist are not ripe for appeal inasmuch as the district court has yet to determine whether Sundquist's challenge to ReconTrust's authority has any effect on the validity of the trust deed.

STANDARD OF REVIEW

¶ 10 We generally will not disturb a district court's order of restitution unless it abuses its discretion. *State v. Snyder*, 747 P.2d 417, 422 (Utah 1987). However, when the validity of an order of restitution turns on interpretation of a statute, it presents issues of law. *State v. Garcia*, 866 P.2d 5, 6 (Utah Ct. App. 1993). "We accord a lower court's statutory interpretations no particular deference but assess them for correctness, as we

do any other conclusion of law." *State v. Rio Vista Oil, Ltd.*, 786 P.2d 1343, 1347 (Utah 1990).

ANALYSIS

I. SECTION 92a OF THE NATIONAL BANKING ACT DOES NOT PREEMPT SECTIONS 57–1–21 AND 57–1–23 OF THE UTAH CODE AND A NATIONAL BANK SEEKING TO FORECLOSE REAL PROPERTY IN UTAH MUST THEREFORE COMPLY WITH UTAH LAW

¶ 11 Sundquist appeals the order of restitution directing her to vacate the Property during the pendency of the unlawful detainer action. In an unlawful detainer action, a court may hold an evidentiary hearing under section 78B–6–810(2)(b)(i) of the Utah Code to "determine who has the right of occupancy during the litigation's pendency." The district court held such a hearing in this case.[2] At this hearing, Sundquist argued that ReconTrust was not qualified to conduct the foreclosure because Utah law establishing the qualifications of trustees is not preempted by the NBA. The district court rejected this argument and ordered Sundquist to vacate the Property.

¶ 12 Under section 57–1–23 of the Utah Code, a qualified trustee "is given the power of sale by which the trustee may ... cause the trust property to be sold." Section 57–l–21(*l*)(a) defines qualified trustee as:

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[2] It is unclear from the record if either party actually requested this hearing. Under the statute, however, it is clear that such a hearing should be scheduled only "upon request of either party." Utah Code § 78B–6–810(2)(a). We therefore note that district courts should not schedule such hearings unless requested to do so by one of the parties.

> (i) any active member of the Utah State Bar who maintains a place within the state where the trustor or other interested parties may meet with the trustee [or]
>
> ...
>
> (iv) any title insurance company or agency that:
>
> > (A) holds a certificate of authority or license ... to conduct insurance business in the state;
> >
> > (B) is actually doing business in the state; and
> >
> > (C) maintains a bona fide office in the state.[3]

¶ 13 ReconTrust is neither a member of the Utah State Bar nor a title insurance company or agency with an office in the State of Utah. ReconTrust was therefore not a qualified trustee with the power of sale under Utah Code sections 57–1–21 and 57–1–23. However, FNMA argues that Utah law does not apply to ReconTrust because, as a national bank, ReconTrust is subject to the laws of Texas, not Utah. Under Texas law, ReconTrust is arguably authorized to conduct a nonjudicial foreclosure sale. *See* Tex. Fin. Code §§ 32.001, 182.001.

¶ 14 Whether ReconTrust is subject to the laws of Utah or Texas depends on where it is "located." As a national bank, ReconTrust operates under the National Banking Act, 12 U.S.C. § 1 *et seq.*, and is regulated by the Office of the Comptroller of Currency (Comptroller). The NBA gives the Comptroller authority "to

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[3] This statute survived constitutional challenge in *Kleinsmith v. Shurtleff*, 571 F.3d 1033 (10th Cir. 2009).

grant ... to national banks ... the right to act as trustee ... *under the laws of the State in which the national bank is located.*" 12 U.S.C. § 92a(a) (emphasis added). And section 92a(b) of the NBA provides that "exercise of such powers by national banks shall not be deemed to be in contravention of State or local law."

¶ 15 The Comptroller's current interpretation of section 92a is contained in the Code of Federal Regulations. 12 C.F.R. § 9.7. The applicable regulation provides that a national bank is "located" in "the state in which the bank acts in a fiduciary capacity." 12 C.F.R. § 9.7(d). And the regulations define the state in which the bank acts in a fiduciary capacity as "the state in which it accepts the fiduciary appointment, executes the documents that create the fiduciary relationship, and makes discretionary decisions regarding the investment or distribution of fiduciary assets." 12 C.F.R. § 9.7(d).

¶ 16 Despite the fact that the Property at issue is located in Utah, FNMA argues that ReconTrust acted in a fiduciary capacity in Texas because the substitution of trustee, notice of default, and trustee's deed all were executed and notarized in Texas. It therefore concludes that the laws of Texas apply and that, under Texas law, ReconTrust has the authority to conduct a nonjudicial foreclosure of property located in Utah.

¶ 17 The issue of whether the NBA preempts Utah law governing the qualification of trustees has been addressed by the Utah federal district courts, with differing results. In three cases, the federal district courts have found that federal law preempts Utah law and have therefore concluded that the laws of Texas apply. *Garrett v. ReconTrust Co., N.A.*, 2011 WL 7657381, at *2 (D. Utah 2011) (holding that because ReconTrust is

located in Texas, it acts as a trustee in Texas, and therefore "the state laws that apply to ReconTrust by virtue of section 92a are those of Texas, rather than Utah."); *Dutcher v. Matheson*, 2012 WL 423379, at *7 (D. Utah 2012) (holding that Texas law governs ReconTrust, and even if it did not, that section 92a of the NBA preempts Utah law because Utah title insurance companies compete with ReconTrust); *Baker v. BAC Home Loans Servicing LP*, 2012 WL 464024, at *4 (D. Utah 2012) (following *Dutcher*).

¶ 18 In four cases, however, the federal district courts have reached the contrary result and held that Utah law is not preempted. *Cox v. ReconTrust Co., N.A.*, 2011 WL 835893, at *6 (D. Utah 2011) (stating that "[u]nder a straight forward reading of [section] 92a(b), this court must look to Utah law in its analysis of whether ReconTrust's activities in Utah exceed ReconTrust's trustee powers"); *Coleman v. ReconTrust Co., N.A.*, U.S. Dist. LEXIS 138519 (D. Utah 2011) (agreeing with the reasoning applied in *Cox*); *Loomis v. Meridias Capital, Inc.*, 2011 WL 5844304 (D. Utah 2011) (same); *Bell v. Countrywide Bank, N.A.*, 860 F.Supp.2d 1290 (D. Utah 2012) (same). We find Judge Jenkins' analysis in *Bell* to be particularly persuasive, and follow much of this same analysis here. Like Judge Jenkins, we conclude that ReconTrust is subject to the laws of Utah when exercising the power to sell property located in Utah.

¶ 19 In arguing that ReconTrust is subject to Texas law, FNMA relies heavily on the regulations interpreting section 92a, which provide that a national bank is located in the state where it accepts its fiduciary appointment, executes the documents creating the fiduciary relationship, and makes discretionary decisions regarding the asset. 12 C.F.R. § 9.7(d). The first ques-

tion confronting us, therefore, is the level of deference that we owe to the regulation.

> When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.

Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842–43, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984) (footnotes omitted).

¶ 20 With this standard in mind, our task is clear. We must first examine the language of section 92a of the NBA to see if it unambiguously addresses the question of where a national bank is located. If so, that is the end of the matter. On the other hand, if the statute is ambiguous, we then look to the federal regulations to determine whether the interpretation they adopt is based on a permissible construction of the NBA.

A. Under the Plain Language of Section 92a, a National Bank Performing Trustee's Duties Must Comply with the Law of the State in Which the Duties Are Performed

¶ 21 We now turn to the relevant statutory language to determine if Congress has directly spoken to the issue of where a national bank is "located." *See Robinson v. Shell Oil Co.*, 519 U.S. 337, 341, 117 S.Ct. 843, 136 L.Ed.2d 808 (1997) ("The plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole."); *Marion Energy, Inc. v. KFJ Ranch P'ship*, 2011 UT 50, ¶ 14, 267 P.3d 863 ("The best evidence of the [L]egislature's intent is the plain language of the statute itself." (internal quotation marks omitted)).

¶ 22 Under section 92a of the NBA, the Comptroller has authority to authorize national banks to act as a trustee or in a fiduciary capacity "when not in contravention of [the] State [law] ... in which the national bank is located," whenever State banks are permitted to act as a trustee under that State's laws. 12 U.S.C. § 92a(a). As mandated by section 57–1–23, Utah banks are not given "the power of sale by which the trustee may ... cause the trust property to be sold." And there is nothing in the text of the NBA to suggest that a national bank may appoint a Texas trustee toforeclose on Utah property when a Utah bank could not do so.

¶ 23 The key inquiry under the statute is determining where a national bank is "located." Locate is a commonly used term. Webster's dictionary defines "locate" as "to determine or indicate the place, site, or limits of" something. "Locate," Merriam–Webster Online

Dictionary, 2013, http://www.merriamwebster.com (last visited July 8, 2013). This suggests that a national bank is located in the place or placeswhere it acts or conducts business. As Judge Jenkins correctly reasoned, "[t]he statute's plain meaning indicates that the national bank is 'located' in each state in which it carries on activities as trustee." *Bell*, 860 F.Supp.2d at 1300.

> When acting as a trustee of a trust deed, one necessarily acts in the capacity as trustee in the State where the real property is located, where notice of default is filed, and where the sale is conducted. In this case, ReconTrust is acting as trustee of a trust deed for real property in the State of Utah. ReconTrust, as trustee, filed notice of default and election to foreclose on real property within the State of Utah.
>
> The notice is filed in Utah. The sale is conducted in Utah, often on the steps of the local county courthouse. Those *acts* do not occur in Texas. Those *acts* may not be performed by Utah-chartered banks.

Id. at 1300–01.

¶ 24 Judge Waddoups' reasoning in *Cox* was similar. He stated that he was

> unconvinced by ReconTrust's argument that [section] 92a(b) dictates that the court look to some state law other than Utah state law to evaluate ReconTrust's foreclosure activities in Utah.... Here, ... ReconTrust is conducting foreclosure activities on behalf of Bank of America in several states, including Utah....
>
> Under a straight forward reading of [section] 92a(b), this court must look to Utah law in

> its analysis of whether ReconTrust's activities in Utah exceed ReconTrust's trustee powers. The powers granted to ReconTrust under federal law in this case are limited by the powers granted by Utah state law to ReconTrust's competitors. Accordingly, the extent of ReconTrust's federal powers must be determined by reference to the laws of Utah, not by reference to the laws of some other state. Under Utah law, the power to conduct a nonjudicial foreclosure is limited to attorneys and title companies. The scope of the powers granted by federal law is limited to the same power Utah statute confers on ReconTrust's Utah competitors.

Cox v. ReconTrust Co., N.A., 2011 WL 835893, at *6 (D.Utah 2011).

¶ 25 In short, the plain meaning of the statute is clear. A national bank is located in those places where it acts or conducts business. And it certainly acts as a trustee in the state in which it liquidates trust assets.

¶ 26 Our conclusion is bolstered by the legislative history of the NBA, specifically the history of section 92a, which limits the Comptroller's authority to grant trustee powers to national banks only when "not in contravention of State or local law." 12 U.S.C. § 92a(a). We again summarize Judge Jenkins' analysis.

¶ 27 "The phrase, 'when not in contravention of State or local law' originated with [section] 11(k) of the Federal Reserve Act of 1913." *Bell*, 860 F.Supp.2d at 1301. Section 11(k) of the Federal Reserve Act of 1913 allowed conversion of state banks to national banks "[p]rovided ... [t]hat said conversion shall not be in contravention of the State law." Federal Reserve Act of

1913, Dec. 23, 1913, ch. 6 § 11(k), 38 Stat. 262. This language was also included in section 8 of the same Act, but was expanded to include local law as well. Discussions in the Senate as to this language stated that it was "put ... in to show that there was no purpose on the part of Congress to disregard the local State law, but merely to give its assent provided the State law permitted it to be done." 51 Cong. Rec. S879 (December 15, 1913) (statement of Sen. Owen).

¶ 28 As Judge Jenkins reasoned, taken together, the language of sections 11(k) and 8 is nearly identical to language later included in section 92a(a) of the NBA, which similarly limits the Comptroller's authority to grant trustee powers to national banks only "when not in contravention of State or local law." 12 U.S.C. § 92a(a). Thus, "[i]n light of the near-identical nature of the phrases in [sections] 8 and 11(k), it seems clear that Congress intended to preclude any inference that a national bank may disregard local State law in performing its duties as trustee."[4] *Bell*, 860 F.Supp.2d at 1302.

¶ 29 The plain meaning of the statutory language is therefore consistent with the legislative history. And through the plain language of section 92a, Congress has directly spoken to the question at issue. "[T]he law that shall apply to a national bank acting as trustee under a trust deed is the local State law, which in this instance is Utah law." *Bell*, 860 F.Supp.2d at 1304.

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[4] *See also First Nat'l Bank of Bay City v. Fellows ex rel. Union Trust Co.*, 244 U.S. 416, 426, 37 S.Ct. 734, 61 L.Ed. 1233 (1917) (holding that under section 11(k) of the Federal Reserve Act of 1913, a state must allow a national bank to conduct the same business as it allows a state bank to conduct).

B. Because Real Property is Traditionally an Area of State Concern, Utah Law Governs When a National Bank Seeks to Foreclose Property Located in Utah

¶ 30 The concurring opinion suggests that section 92a is not clear on its face. However, even if the plain meaning of the statute were not clear, two substantive canons of statutory construction dictate the same result.

¶ 31 The first is the clear statement canon, which applies where Congress is thought to have legislated in a manner that would "alter the usual constitutional balance between the States and the Federal Government," *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 65, 109 S.Ct. 2304, 105 L.Ed.2d 45 (1989) (internal quotation marks omitted), or "intrude" on a field of traditional state sovereignty, *Gregory v. Ashcroft*, 501 U.S. 452, 470, 111 S.Ct. 2395, 115 L.Ed.2d 410 (1991). In such fields, courts do not lightly "attribute to Congress an intent to intrude," but instead require that Congress "make its intention to do so unmistakably clear in the language of the statute." *Id.* at 460, 470, 111 S.Ct. 2395 (internal quotation marks omitted).

¶ 32 When Congress "intends to pre-empt the historic powers of the States or when it legislates in traditionally sensitive areas," *Raygor v. Regents of the Univ. of Minn.*, 534 U.S. 533, 543, 122 S.Ct. 999, 152 L.Ed.2d 27 (2002) (internal quotation marks omitted), a clear statement of intention to do so is required.[5] This clear

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[5] *See Vermont Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765, 787, 120 S.Ct. 1858, 146 L.Ed.2d 836 (2000) (relying in part on the clear statement rule to decide that a qui tarn relator may not bring an action in federal court against a state under the False Claims Act); *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 655,

statement canon "assures that the [L]egislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision." *United States v. Bass*, 404 U.S. 336, 349, 92 S.Ct. 515, 30 L.Ed.2d 488 (1971). It thus reflects "an acknowledgment that the States retain substantial sovereign powers under our constitutional scheme, powers with which Congress does not readily interfere." *Gregory*, 501 U.S. at 461, 111 S.Ct. 2395.

¶ 33 A second clear-statement canon is also implicated. It holds that the *Chevron* analysis as to whether Congress has already spoken to the precise question at issue and clearly expressed its intent is informed by a threshold inquiry into whether "a statute's ambiguity constitutes an implicit delegation from Congress to the agency to fill in the statutory gaps." *Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159, 120 S.Ct. 1291, 146 L.Ed.2d 121 (2000). And it recognizes that not all ambiguities can reasonably be seen as a legislative delegation of discretion to

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115 S.Ct. 1671, 131 L.Ed.2d 695 (1995) ("[W]here federal law is said to bar state action in fields of traditional state regulation ... we have worked on the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." (internal quotation marks omitted)); *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516, 112 S.Ct. 2608, 120 L.Ed.2d 407 (1992) ("[T]he historic police powers of the States [are] not to be superseded by ... Federal Act unless that [is] the clear and manifest purpose of Congress." (all but first alteration in original)); *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 65, 109 S.Ct. 2304, 105 L.Ed.2d 45 (1989) (relying on a clear statement rule to decide that states are not "persons" within the meaning of a section 1983 claim); *United States v. Bass*, 404 U.S. 336, 349, 92 S.Ct. 515, 30 L.Ed.2d 488 (1971) ("[W]e will not be quick to assume that Congress has meant to effect a significant change in the sensitive relation between federal and state criminal jurisdiction.").

an agency. Thus, in *Brown & Williamson*, the Court drew a distinction between "major questions" of policy and mere "interstitial matters" of "daily administration." *Id.* (internal quotation marks omitted). It deemed it highly unlikely that Congress would leave the determination of major policy questions to agency discretion, and thus required a clear statement of congressional intent to do so. *Id.* at 159–60, 120 S.Ct. 1291.

¶ 34 In *Brown & Williamson*, the lack of a clear statement persuaded the Court that Congress had not intended to delegate to the FDA the discretion to decide whether to regulate tobacco. *Id.* Because such authority was so politically and economically significant, the Court was "confident that Congress could not have intended to delegate" such a decision "to an agency" in a less-than-clear, "cryptic ... fashion." *Id.* at 160, 120 S.Ct. 1291. A parallel conclusion was adopted in *MCI Telecommunications Corp. v. American Telephone & Telegraph Co.*, 512 U.S. 218, 114 S.Ct. 2223, 129 L.Ed.2d 182 (1994). There the Court held that the statutory delegation of agency authority to "modify" common carrier tariff requirements did not encompass the authority to make fundamental changes in the nature of waiving the tariff requirement altogether. *Id.* at 225, 114 S.Ct. 2223. It rooted its holding in a parallel clear-statement canon, deeming it "highly unlikely that Congress would leave the determination of whether an industry will be ... rate-regulated to agency discretion—and even more unlikely that it would achieve that through such a subtle device as permission to 'modify' rate-filing requirements." *Id.* at 231, 114 S.Ct. 2223.

¶ 35 The lack of a clear statement on matters of fundamental significance persuaded the Court in *Brown & Williamson* and *MCI* to repudiate any inference of delegation of agency authority: Absent a clear,

non-cryptic indication of congressional intent to leave these questions up to agency discretion, the Court construed the governing statutes to foreclose it.

¶ 36 These clear-statement rules would inform our construction of section 92a of the NBA were we to find it ambiguous. Under ReconTrust's view, this provision delegates to the Comptroller the discretion to authorize one state to regulate the terms and conditions of a foreclosure sale in another state. But such delegation would intrude on core matters of traditional state sovereignty.[6] "It is beyond question that ... the general welfare of society is involved in the security of the titles to real estate and the power to ensure that security inheres in the very nature of [state] government." *BFP v. Resolution Trust Corp.*, 511 U.S. 531, 544, 114 S.Ct. 1757, 128 L.Ed.2d 556 (1994) (third alteration in original) (internal quotation marks omitted).

¶ 37 A delegation of authority to intrude on matters of such intensely local concern may not simply be inferred. Rather, a clear statement of an intent to permit the laws of a foreign state to regulate the man-

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[6] *See Santa Fe Indus. v. Green*, 430 U.S. 462, 479, 97 S.Ct. 1292, 51 L.Ed.2d 480 (1977) (stating that "state law will govern" fiduciary obligations). Though only real property law is implicated in this case, the power to act in a fiduciary capacity impacts contract and probate law as well, which are also traditional areas of state concern. *See Fidelity Fed. Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 174, 102 S.Ct. 3014, 73 L.Ed.2d 664 (1982) (Rehnquist, C.J., dissenting) ("Contract and real property law are traditionally the domain of state law."); *Zschernig v. Miller*, 389 U.S. 429, 440, 88 S.Ct. 664, 19 L.Ed.2d 683 (1968) ("The several States, of course, have traditionally regulated the descent and distribution of estates."). Accordingly, if we interpreted section 92a as abrogating state law, it would nullify a large swath of Utah law on matters related to national banks acting in a fiduciary capacity, not just the law of real property.

ner and mode of a foreclosure sale in another state should be required.

¶ 38 *Brown & Williamson* and *MCI* dictate a similar conclusion. The matter of authorizing one state to regulate non-judicial sales for the foreclosure of real property in another state would be monumental—hardly the sort of interstitial administrative detail that Congress would likely leave for an agency. Any inference of an intent to leave that to the Comptroller would accordingly require a clear statement of such intent.

C. The Comptroller's Interpretation of Section 92a is Unreasonable and Not Entitled to Deference

¶ 39 Although consideration of the regulation interpreting section 92a is unnecessary because the statutory language is not ambiguous and because Congress did not intend to delegate to the Comptroller the power to preempt the historic power of the states to regulate the foreclosure of real property, we think it worth noting that we find the Comptroller's current interpretation of the statute, which is found in the Code of Federal Regulations, to be unreasonable. Again, we quote from Judge Jenkins. "[E]ven if the statute is not clear and demands interpretation," the "interpretation in 12 C.F.R. [section] 9.7(d) modifies the statute and is unreasonable—if not irrational—and therefore does not deserve deference." *Bell*, 860 F.Supp.2d at 1298.

¶ 40 Under *Chevron*, we give deference to an agency's interpretation of a statute only so long as such an interpretation is neither contrary to Congressional intent, nor unreasonable. 467 U.S. 837, 842–43, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984); *see also LPI Servs. v. McGee*, 2009 UT 41, ¶ 7, 215 P.3d 135 (stating that "where the [L]egislature has granted discretion to an

agency to interpret the statutory provision at issue, we will affirm the agency's interpretation if it is reasonable.").

¶ 41 As Judge Jenkins astutely reasoned, "[i]f [section] 92a is to mean what it says (i.e., the plain meaning), the reference to 'State or local law' at a minimum should be construed to mean the State in which the trust activity occurs." *Bell*, 860 F.Supp.2d at 1304. And as discussed above, the State in which the trust activity occurred in this case is Utah.

¶ 42 Despite the straight forward statutory language, the federal regulation setting forth the Comptroller's interpretation of the statute inexplicably defines a bank's "location" as the place where it engages in three specific activities: where it "accepts the fiduciary appointment, executes the documents that create the fiduciary relationship, and makes discretionary decisions regarding the investment or distribution of fiduciary assets." 12 C.F.R. § 9.7(d). But there is nothing in the statute itself that ascribes any particular significance of these three particular acts, while rendering other acts undertaken to the bank irrelevant. Moreover, the three activities identified in the regulation could theoretically be performed in any location without regard to the location of the trust property, thereby allowing national banks to dictate the applicable law. Notably missing from this list is where the bank engages "in an act which liquidates the trust assets, e.g., engaging in a nonjudicial foreclosure of real property where the trust asset is located." *Bell*, 860 F.Supp.2d at 1300. We therefore conclude that the regulation is not a reasonable construction of the statute.

¶ 43 While the current regulation is not reasonable, the Comptroller's former interpretation of the statute,

found in Interpretive Letter Number 695, 1996 WL 187825 (December 8, 1995), is reasonable. This interpretation states that

> the effect of section 92a is that in any specific state, the availability of fiduciary powers is the same for out-of-state national banks or for in-state national banks and is dependent upon what the state permits for its own state institutions. A state may limit national banks from exercising any or all fiduciary powers in that state, but only if it also bars its own institutions from exercising the same powers. Therefore, a national bank with its main office in one state ... may conduct fiduciary business in that state and other states, depending upon—with respect to each state—whether each state allows its own institutions to engage in fiduciary business.

Id. at *4.

¶ 44 While this interpretation is consistent with the statutory text, the two interpretive letters that subsequently followed reversed Interpretive Letter Number 695 and actually contradict the plain meaning and legislative history of section 92a's contravention clause. Like the current federal regulation, Interpretive Letter Number 866, 1999 WL 983923 (October 8, 1999), and Interpretive Letter 872, 1999 WL 1251391 (October 28, 1999), state that a bank's location is to be determined by where the bank acts in a fiduciary capacity. *See e.g.* 1999 WL 983923 at Part II.B. And like the current regulation, the letters state that a bank acts in a fiduciary capacity only where it reviews proposed trust appointments, executes trust agreements, and makes dis-

cretionary decisions about the investment or distribution of trust assets. *See id.* at Part II.C.

¶ 45 Like Judge Jenkins, we conclude that Congressional intent is clear from the statutory text. Congress intended "that a national bank based in Texas which performs fiduciary functions in Utah cannot have a competitive advantage over a Utah-based national bank that performs its fiduciary functions in Utah." *Bell*, 860 F.Supp.2d at 1305. "[T]he national statutes which created a dual banking system operate to deny out-of-state national banks any competitive advantage over local, state-chartered banks or in-state national banks." *Id.* at 1308. However, the interpretation in section 9.7(d) would not just level the playing field as Congress intended. Rather, it would mean that "a national bank based in Texas ... [would] have a competitive advantage over a national bank based in Utah as well as Utah-chartered banks." *Id.* at 1305.

¶ 46 In short, the regulation's interpretation is not entitled to deference because it

> modifies the statute and gives out-of-state national banks a sizeable competitive advantage over their state-chartered counterparts and in-state national banks in states—such as Utah—where state-chartered banks and in-state national banks are not allowed to perform certain fiduciary functions, namely exercising the power of sale in nonjudicial trust deed foreclosures.

Id. at 1308.

D. Utah Law is Not Preempted by the NBA Because a National Bank Does Not Compete With Any Utah Institution Authorized to Foreclose Under Utah Law

¶ 47 We now turn to FNMA's alternative argument. FNMA asserts that even if ReconTrust exercised its fiduciary duties in Utah, Utah law is nevertheless preempted by section 92a(b)'s "competition clause." The Competition Clause provides that

> whenever the laws of [a] State authorize or permit the exercise of [trustee] 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.

12 U.S.C. § 92a(b).

¶ 48 FNMA asserts that ReconTrust competes with Utah title insurance companies and reasons that Utah law is therefore preempted. We are unpersuaded. As a national bank, ReconTrust competes with Utah banks. It is not subject to competition from either members of the Utah State bar or Utah title insurance companies. And under sections 57–1–21 and 57–1–23 of the Utah Code, even State banks "must procure the services of either an active member of the State bar or title insurance company in order to comply with the Utah law." *Bell*, 860 F.Supp.2d at 1309.

¶ 49 As a national bank operating in Utah under the NBA, ReconTrust is precluded from exercising the power of a trustee under Utah statute for purposes of conducting a nonjudicial foreclosure. It would be irrational to interpret section 92a(b) or section 9.7 as giving a national bank such as ReconTrust authority to exer-

cise a power that Utah law specifically prohibits even Utah banks from exercising. We therefore hold that sections 57–1–21 and 57–1–23 of the Utah Code are not preempted by the NBA. A national bank seeking to foreclose on real property in Utah must comply with Utah law.

II. WE DECLINE TO REACH THE OTHER ISSUES RAISED BY THE PARTIES

¶ 50 Our opinion in this matter is limited to the narrow issue of whether Utah law regarding the qualification of trustees is preempted by the NBA. In briefing and oral argument, the parties have attempted to raise a variety of other issues relating to the validity of the nonjudicial foreclosure sale, the validity of the trustee's deed, and the propriety of the order of restitution. Because these issues were not fully litigated below, we decline to reach them on interlocutory appeal. On remand, the parties are free to raise any arguments they may have regarding the validity of the foreclosure sale and trustee's deed and the appropriateness of the order of restitution.

CONCLUSION

¶ 51 The district court erred in concluding that Utah Code sections 57–1–21 and 57–1–23 are preempted by the NBA. A national bank operating in Utah is authorized to act only to the extent Utah law allows Utah banks to do so. As Judge Jenkins stated in *Bell v. Countrywide Bank, N.A.*, "[a] state bank which seeks to foreclose on real property in Utah must comply with Utah law. A federally chartered 'bank' which seeks to foreclose on such property must comply with Utah law as well." 860 F.Supp.2d 1290, 1297 (D.Utah 2012). We remand this matter to the district court for considera-

tion of other arguments or defenses the parties may properly raise.

Justice PARRISH authored the opinion of the Court, in which Chief Justice DURRANT, Justice DURHAM, and Justice ORME joined.

Having recused himself, Associate Chief Justice NEHRING does not participate herein; Court of Appeals Judge GREGORY K. ORME sat.

Justice LEE filed a concurring opinion.

Justice LEE, concurring in part and concurring in the judgment:

¶ 52 I am on board with the majority's disposition of this case and with its conclusion that section 92a of the National Bank Act forecloses application of the Comptroller's regulation in 12 C.F.R. § 9.7. Specifically, I agree that a national bank physically located in one state (Texas) but performing a nonjudicial foreclosure sale in another (Utah) is governed by the law of the latter state, not the former. And I agree that that conclusion flows from a construction of section 92a under *Chevron* step one—in that the "laws of the State in which the national bank is located," 12 U.S.C. § 92a(a), must have reference to the state in which the foreclosure sale is performed, and not the state in which the bank is physically located.

¶ 53 I would base that conclusion on only one of the two grounds articulated by the court, however. In my view, the statutory reference to the "laws of the State in which the national bank is located" is not at all clear or unambiguous on its face. So I cannot concur in part LA of the court's opinion, which rests on that conclusion.

¶ 54 Section 92a allows the Comptroller of the Currency to grant a national bank, "when not in contravention of State or local law, the right to act ... in any ... fiduciary capacity in which" entities "which come into competition with national banks are permitted to act under the laws of the State in which the national bank is located." 12 U.S.C. § 92a(a). If entities competing with national banks are permitted to perform fiduciary acts "under the laws of the State in which the national bank is located," then national banks may likewise be authorized to perform such acts.

¶ 55 This case turns on the meaning of the term "located." If ReconTrust is located in Texas by virtue of the physical situs of its offices there, then Texas law dictates the terms and conditions of its authority to act as a fiduciary in conducting a nonjudicial sale for the foreclosure of real property in Utah. On the other hand, if ReconTrust is located in Utah based on the situs of the real property subject to foreclosure, then it is Utah law that governs its authority in this regard.

¶ 56 I see no clear or unambiguous answer to this question on the face of the National Bank Act. As the United States Supreme Court has indicated, the term "located" "as it appears in the National Bank Act, has no fixed, plain meaning." *See Wachovia Bank v. Schmidt,* 546 U.S. 303, 126 S.Ct. 941, 163 L.Ed.2d 797 (2006). "In some provisions, the word unquestionably refers to a single place: the site of the banking association's designated main office. In other provisions, 'located' apparently refers to or includes branch offices." *Id.* at 313, 126 S.Ct. 941 (citations omitted).

¶ 57 Loraine Sundquist proffers another possible meaning of the term—one divorced from physical location. She suggests that a bank performing a fiduciary

act is "located" in the state in which the bank performs the act at issue. That seems grammatically tenable. In circumstances where a bank is physically officed in one or more states and conducting business in another, any or all of those states are plausibly the place where it is "located." The dictionary definitions of the intransitive form of the verb "locate," after all, have reference to the place where one "establish[es] one's business or residence in a place," or where one "settle[s]." RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE, 1129 (2d ed.1987). Such definitions beg the key question, which is what sorts of actions are sufficient to rise to the level of establishing a "business," or of "settling." Without more, I would say that either a physical office or the performance of a fiduciary act on behalf of another could suffice. And thus I cannot say, as the majority does, that the statutory language, standing alone, is clear.

¶ 58 The court bases its contrary conclusion on an alternative definition of "locate"—" 'to determine or indicate the place, site or limits of' something." *Supra* ¶ 23 (quoting Merriam–Webster Online Dictionary). Even assuming a definition of the transitive form of "locate" to be relevant, this one is similarly question-begging. It could certainly be said "that a national bank is located in the place or places where it acts or conducts business," *supra* ¶ 23, but that does not at all eliminate the alternative conclusion that a bank could also be located in the place or site where its physical offices are situated. The key question under the majority's definition, in other words, is *what* "determines" or "indicates" the place of a person or entity's location. And that question is not at all answered—certainly not clearly or unambiguously—by the statutory text.

¶ 59 Nor is the question resolved in the legislative history cited by the majority. It may be that the addition of "local" to the phrase "not in contravention of State or local law" in an unrelated section of the NBA was meant "to preclude any inference that a national bank may disregard local State law." *See supra* ¶ 28 (internal quotation marks omitted). But given that "located" takes on different meanings throughout the NBA, *see Wachovia*, 546 U.S. at 313–14, 126 S.Ct. 941, it is by no means clear that legislative history concerning the use of the term in one section has any relevance to its use in another. And again, the cited legislative history does not answer the key question: Local to what? To the bank's physical location, or to the fiduciary acts it performs?

¶ 60 Thus, I see no basis for the conclusion that section 92a clearly mandates any particular notion of "located" among the range of definitions that seem linguistically possible under the statute. I would instead acknowledge that the statute, on its face, is susceptible to a range of constructions—encompassing both physical locations and the state(s) where a bank conducts its fiduciary acts.

¶ 61 That ambiguity, however, cuts in favor of the construction rendered by the court. It does so under the clear statement rules identified by the majority. I accordingly concur in part LB of the court's opinion, and would rest the construction of section 92a on the clear statement principle articulated there—that on a matter of traditional state sovereignty over the disposition of title to property of an inherently local nature, we cannot lightly deem Congress to have intruded on the local state's sovereignty.

APPENDIX B

IN THE THIRD JUDICIAL DISTRICT—WEST JORDAN COURT
SALT LAKE COUNTY, STATE OF UTAH

FEDERAL NATL MORTGAGE,
Plaintiff,

vs.

LORAINE SUNDQUIST,
Defendant.

EVICTION HEARING
CASE 110408730
APPEAL 20110575
JUDGE MARK KOURIS
[file stamps omitted]
June 27, 2011

OFFICIAL CERTIFIED TRANSCRIPT
(From Electronic Recording)

BE IT REMEMBERED that this matter came on hearing before the above-named court on June 27, 2011.

WHEREUPON, the parties appearing and represented by counsel, the following proceedings were held:

* * *

P-R-O-C-E-E-D-I-N-G-S

(June 27, 2011)

THE JUDGE: Good morning.

MR. HOLLAND: Your Honor, number 12.

THE JUDGE: Which is?

MR. HOLLAND: Fannie Mae versus Loraine Sundquist,

THE JUDGE: All right. Fannie Mae. I don't see it here. Versus Sundquist?

MR. HOLLAND: Yes, Your Honor.

THE JUDGE: Oh, here it is. I'm sorry. Let's call the case of Federal National Mortgage versus Loraine Sundquist. This is a case that ends in 8730. Counsel?

MR. LUNDBERG: Brigham Lundberg for Fannie Mae.

THE JUDGE: Thank you.

MR. HOLLAND: Kent Holland for Loraine Sundquist.

THE JUDGE: Okay.

MR. HOLLAND: We prepared a brief to show why that Fannie Mae is not entitled to, to evict Loraine Sundquist.

THE JUDGE: All right, Go ahead and tell me what the reason is. I've had, I reviewed your brief on Friday when it came in.

MR. HOLLAND: Yes.

THE JUDGE: But go ahead and let's create a record here. Go ahead.

ARGUMENT BY MR. HOLLAND

MR. HOLLAND: To handle, to be able to foreclose on her property the trustee has to be a certain type of trustee under Utah law uner 57-1-2 and 57-1-23. And they have to be a member of the Utah State Bar in good standing, residing in Utah, or they have to be an authorized title insurance authorized to do business in

the State of Utah. The trust company that conducted the foreclosure is neither of those and a, so they, they fail on that point.

Now, ReconTrust is a division apparently of Bank of America who claims that under the federeal banking laws they can, they can be the trustee. But in quoting the 12 USC 92A(a)(b), these powers to be exempt as long as they are not in, were not in contravention of state and local law is what is contained in the fedeal law. So they can't be it.

And they have tried to act as the trustee for purposes of the foreclosure of her, of her property and they… And the attorney general in his letter of May 19 to Bank of America, which I attached as a copy, specifically points that out that they cannot do that.

And in fact, there's a senate bill that is set for, that is signed by the governor and hasn't gone into effect I don't think yet, it may be in effect right now, and that is for penalties for, against people or like, or companies like ReconTrust who have wrongfully done foreclosures when they are not authorized to do so.

THE JUDGE: So what are you objecting to today? The actual eviction?

MR. HOLLAND: Yes, we are. They can't evict if they don't, if they weren't in any, if they couldn't have tendered the deed to Fannie Mae.

THE JUDGE: When was the, when was the defaiult entered into?

MR. HOLLAND: When was the foreclosure?

THE JUDGE: Default. Did they default on the property? And it was foreclosed soon after? Is that how it went?

MR. HOLLAND: Well, it went for some time.

THE JUDGE: How long?

MR. HOLLAND: Over two and a half years my client tried to get—

THE JUDGE: So for two and a half years—

MR. HOLLAND: She's tried to get the authority—

THE JUDGE: your client hasn't made a payment yet then. Is that right?

MR. HOLLAND: No. She's made payments up, up until she was told not to do so by Bank of America so that she could get a, qualify for a new loan.

THE JUDGE: And how long ago was that?

MR. HOLLAND: That was in March of 2009.

THE JUDGE: So she hasn't made a house payment since March of 1009?

MR. HOLLAND: I don't believe so. We don't even know who we are supposed to making house payments. She had been making house payments to Countrywide up to that point.

And she just asked authority to show how they, that she was, why she was supposed to make them to them. And they went, as you can see by the brief and all of the documents they, they not only, she wanted to see the trust deed note that they were authorizing and they sent her a trustee note from somebody in Florida.

THE JUDGE: Well, give me, well, I think we are moving in time now.

So after she quit making payments when was it? Why did she stop making payments?

MR. HOLLAND: Because she wasn't sure she was making payments to the correct entity, number one.

THE JUDGE: So she's got that money sitting in escrow now—

MR. HOLLAND: I don't know what—

THE JUDGE: —so when if we figure out who the right payment is—

MR. HOLLAND: I cannot tell you that, Your Honor. I don't know whether she does or not. But—

THE JUDGE: Will she be prepared then to make up those back payments to stay in the house?

MR. HOLLAND: If, if she needs to. I think—

THE JUDGE: All right. What is—

MR. HOLLAND: —down the road—

THE JUDGE: —the mortgage payment currently, do you know?

MR. HOLLAND: I don't know. I think it's $700 a month.

THE JUDGE: So if we times 700 by what, 24, 37 times, what is that, $42,000, she'd be ready to pay that at this point as a bond?

MR. HOLLAND: I don't know. But I don't think that's what we are here for right now. What we are here for is Fannie Mae is trying to evict her—

THE JUDGE: Right. So if I stay—

MR. HOLLAND: —based on their transfer—

THE JUDGE: Right. But if I, right, if I stayed the eviction, if I stayed the—

MR. HOLLAND: And they don't have any right to it.

THE JUDGE: —eviction to allow you to, to litigate this matter—

MR. HOLLAND: Yes.

THE JUDGE: —then she would put in the bank the amounbt that she owed up to this point in escrow?

MR. HOLLAND: Well, she could maybe post a bond, I don't know if she has all of the cash, but she could probably post a bond.

THE JUDGE: Well, she could post a bond that would equal the amount of payments that she had missed at that point?

MR. HOLLAND: I would think that would be possible.

THE JUDGE: You do think so?

MR. HOLLAND: I don't know. That I don't know. I'd have to discuss her finances with her.

THE JUDGE: Counsel?

ARGUMENT BY MR. LUNDBERG

MR. LUNDBERG: Your Honor, the only issue here seems to be ReconTrust's authority to foreclose. This has already been litigated. The only actual opinion out there is from Judge Waddoups in the federal court and it spefically states that through the Naitonal Banking Act it preempts the legislation here in the State of Utah. Therefore there's, there's nothing currently that prevents ReconTrust from foreclosing in the state. That's been appealed to the 10th Circuit. There's been no decision at this point. Therefore, the current state of the law allows them to foreclose.

THE JUDGE: Tell me the relevance of the, I know the governor made some, or not the governor rather, but the attorney general made some proclamation.

MR. LUNDBERG: They filed—

THE JUDGE: Tell me what that's about.

MR. LUNDBERG: Yes. They filed an amecus [sic] brief on behalf of the home owner in that case. They've also written letter to Bank of America and began discussions to try to work things out. I don't know what action Bank of America is going to take, if they are going to start using an attorney licensed here to do their foreclosure work.

However, currently there's nothing that prevents ReconTrust from foreclosing. There had been a TRO at one point for a week, it was dissolved by Judge Waddoups. And that's been the state of the la for a year now.

There's no dispute that there was a defauilt here way back in early 2009. The property was sold on May 17. Notices to quit were served on June 1st. The defendants haven't made payments and have not vacated the property. Therefore, we would argue Fannie Mae should be entitled to an order of restitution.

THE JUDGE: Okay.

MR. HOLLAND: I think the Utah statutes are extremely clear and as is that the bank act they claim to have this authority under says as long as it's not in contravention with Utah law. And those, both those points are pointed out in Attorney General Shurtliff's letter to the president of the Bank of America—

THE JUDGE: But that letter certainl isn't the law though. Right.

MR. HOLLAND: No, it isn't the law.

THE JUDGE: Okay.

MR. HOLLAND: But it is, it is a specific pointing out what the law is under the statute.

THE JUDGE: Has the house been resold? Has the House been resold?

MR. LUNDBERG: It hasn't yet, Your Honor, because Fannie Mae doesn't have possession of it yet. They are still in the home and that's what we are trying to get.

The arguments that have been made in the amecus [sic] brief and the letter, those were made in front of Judge Waddoups and he overruled them that, you know, the National Banking Act preempts this. So there are claims that can be made. But until there's a ruling to that effect, the state of the law is that Recon-Trust can move forward.

COURT'S RULING

THE JUDGE: Okay. I'm going to deny the motion at this point to, to vacate the eviction and I will sign an order of restitutin when you have it prepared. Okay?

MR. LUNDBERG: I will prepare that, Your Honor.

MR. HOLLAND: Now, how much time do we have for the eviction?

THE JUDGE: How much time can you give them?

MR. HOLLAND: A week?

MR. LUNDBERG: We could give them a week, Your Honor.

THE JUDGE: Okay. We'll give them seven days.

MR. HOLLAND: And we'll have time for an appeal.

THE JUDGE: Absolutely.

MR. HOLLAND: Thank you.

THE JUDGE: You bet.

WHEREUPON, the hearing was concluded.

APPENDIX C

IN THE SUPREME COURT FOR THE STATE OF UTAH

FEDERAL NATIONAL MORTGAGE ASSOCIATION,
Plaintiff and Appellee,
v.

LORAINE SUNDQUIST,
Defendant and Appellant.

[FILED: UTAH APPELLATE COURTS
SEP 16 2013]

ORDER

This matter is before the court upon Appellant's Petition to Correct Misstatement of Fact Stated in Opinion, filed on August 1, 2013, and Appellee's Petition for Rehearing and Utah Bankers Association's Motion for Leave to File an Amicus Brief with Respect to Appellee's Petition for Rehearing, both filed on August 9, 2013.

IT IS HEREBY ORDERED that Appellant's motion to correct the language in ¶5 of the opinion is granted; ¶5 has been modified to provide clarification of language. Additionally, the language in ¶22 of the opinion has been modified to clarify language concerning a power of sale by Utah banks. A copy of the modified opinion is included with this order. There is no change in the overall result of the opinion.

Pursuant to Rule 35 of the Utah Rules of Appellate Procedure, Appellee's Petition for Rehearing is denied.

Utah Bankers Association's motion for leave to file an amicus brief is also denied.

FOR THE COURT:

Sept. 16, 2013
Date

/s/ Jill N. Parrish
Jill N. Parrish
Justice

APPENDIX D

IN THE SUPREME COURT OF UTAH

FEDERAL NATIONAL MORTGAGE ASSOCIATION,
Appellee and Plaintiff,
vs.

LORAINE SUNDQUIST, INDIVIDUALLY, AND JOHN DOE AND JANE DOE,
Appellant and Defendant.

District Court No. 110408730 EV
Case No. 20110575-SC
Jan. 3, 2014

REQUEST TO CLARIFY ORDER DENYING APPELLEE'S PETITION FOR REHEARING

COMES NOW the Appellant and respectfully requests the Court to clarify its previous Order denying Appellee's Petition for Rehearing, as issued on or about September 16, 2013. Appellant also request the Court to dispense with any response.

Specifically Appellant requests that the Order be modified to reflect that Appellee's Petition for Rehearing was in fact denied pursuant to Rule 35 for being filed in an untimely manner, because it was filed three (3) days late under the plain language of Rule 35(a), and thus was not in fact entertained or considered by this Court since Rule 35(d) prohibits the Court from considering untimely Petitions for Rehearing by prohibiting the clerk from even accepting them in the first place.

This clarification is urgently needed due to the fact that Appellee has misrepresented to the U.S. Supreme Court (in a request for additional time to file a petition for a writ of certiorari to this Court) that its Petition for Rehearing to this Court was "timely," even though it clearly was not under Rule 35(a).

Once it was pointed out to Appellee's counsel that the Petition for Rehearing was in fact untimely, he indicated he nevertheless intends to argue to the US Supreme Court that even if it was untimely the Petition was in fact entertained or considered by this Court, thereby extending the time period for seeking a writ of certiorari.

Appellee's counsel is seeking to take unfair advantage of the fact this Court did not specifically state the Petition was "untimely," and did not expressly state that it had not entertained or considered the motion, in order to try bootstrap an untimely petition for a writ of certiorari.

If in fact this Court denied the Petition for Rehearing as untimely under Rule 35(a), and therefore did not entertain or consider the Petition, then Appellee cannot seek a writ of certiorari because any petition for a writ of certiorari would itself be untimely under the US Supreme Court's rules (as was the request to the US Supreme Court for an extension). Appellee is improperly using the date of denial of its Petition for Rehearing, rather than the entry ofthe Court's actual decision, for calculating it's time to appeal this Court's ruling, based on perceived ambiguity in the September 16th Order.

It is thus necessary for this Court to make this clarification promptly as a matter of judicial economy and certainty so that the US Supreme Court may know that this Court in fact held the Petition for Rehearing to be

untimely under Rule 35(a) and therefore, in accord with Rule 35(d), declined to even entertain or consider it.

DISPENSING WITH A RESPONSE

Inasmuch as there is nothing that Appellant could contribute as to what the Court did or did not in fact hold, or the basis therefore, since only the Court itself knows and can clarify its own holding, there is good cause for dispensing with any response by Appellant to this request as expressly allowed by Rule 23(b).

There is no substantive argument which Appellant can make in response to this request without improperly attempting to reargue the Court's prior denial. Allowing Appellant to respond might also be improperly used by Appellant as an argument that this Court has now reconsidered its denial, rather than merely clarify it.

It is therefore respectfully requested that the Court summarily clarify its denial without awaiting a response so that the parties may know immediately whether the Court in fact previously considered the Petition for Rehearing, or summarily denied it as untimely.

Then the parties will not need to expend a significant amount of time and effort in debating the issue, and the US Supreme Court will clearly know from which point in time to calculate the timeliness of Appellant's intended petition for a writ of certiorari.

Respectfully submitted this 3rd day of January, 2014.

/s/ Douglas R. Short
Douglas R. Short

APPENDIX E

STATUTORY PROVISIONS

Utah Stat. § 57-1-19. Trust deeds—Definitions of terms.

As used in Sections 57-1-20 through 57-1-36:

(1) "Beneficiary" means the person named or otherwise designated in a trust deed as the person for whose benefit a trust deed is given, or his successor in interest.

(2) "Trustor" means the person conveying real property by a trust deed as security for the performance of an obligation.

(3) "Trust deed" means a deed executed in conformity with Sections 57-1-20 through 57-1-36 and conveying real property to a trustee in trust to secure the performance of an obligation of the trustor or other person named in the deed to a beneficiary.

(4) "Trustee" means a person to whom title to real property is conveyed by trust deed, or his successor in interest.

(5) "Real property" has the same meaning as set forth in Section 57-1-1.

(6) "Trust property" means the real property conveyed by the trust deed.

Utah Stat. § 57-1-21. Trustees of trust deeds—Qualifications.

(1) (a) The trustee of a trust deed shall be:

(i) any active member of the Utah State Bar who maintains a place within the state where the trustor or other interested parties may meet with the trustee to:

(A) request information about what is required to reinstate or payoff the obligation secured by the trust deed;

(B) deliver written communications to the lender as required by both the trust deed and by law;

(C) deliver funds to reinstate or payoff the loan secured by the trust deed; or

(D) deliver funds by a bidder at a foreclosure sale to pay for the purchase of the property secured by the trust deed;

(ii) any depository institution as defined in Section 7-1-103, or insurance company authorized to do business and actually doing business in Utah under the laws of Utah or the United States;

(iii) any corporation authorized to conduct a trust business and actually conducting a trust business in Utah under the laws of Utah or the United States;

(iv) any title insurance company or agency that:

(A) holds a certificate of authority or license under Title 31A, Insurance Code, to conduct insurance business in the state;

(B) is actually doing business in the state; and

(C) maintains a bona fide office in the state;

(v) any agency of the United States government; or

(vi) any association or corporation that is licensed, chartered, or regulated by the Farm Credit Administration or its successor.

(b) For purposes of this Subsection (1), a person maintains a bona fide office within the state if that person maintains a physical office in the state:

(i) that is open to the public;

(ii) that is staffed during regular business hours on regular business days; and

(iii) at which a trustor of a trust deed may in person:

(A) request information regarding a trust deed; or

(B) deliver funds, including reinstatement or payoff funds.

(c) This Subsection (1) is not applicable to a trustee of a trust deed existing prior to May 14, 1963, nor to any agreement that is supplemental to that trust deed.

(d) The amendments in Laws of Utah 2002, Chapter 209, to this Subsection (1) apply only to a trustee that is appointed on or after May 6, 2002.

(2) The trustee of a trust deed may not be the beneficiary of the trust deed, unless the beneficiary is qualified to be a trustee under Subsection (1)(a)(ii), (iii), (v), or (vi).

(3) The power of sale conferred by Section 57-1-23 may only be exercised by the trustee of a trust deed if the trustee is qualified under Subsection (1)(a)(i) or (iv).

(4) A trust deed with an unqualified trustee or without a trustee shall be effective to create a lien on the trust property, but the power of sale and other trustee powers under the trust deed may be exercised only if the beneficiary has appointed a qualified successor trustee under Section 57-1-22.

Utah Stat/ 57-1-21.5. Trustees of trust deeds—Duties—Prohibited conduct—Penalties.

(1) Until a beneficiary under a trust deed or the beneficiary's agent provides a trustee of the trust deed written instructions directing the trustee to exercise powers under this chapter, the trustee has no duty or obligation to the beneficiary or to the agent of a beneficiary.

(2) Except as provided in Subsection (3), the following duties of a trustee may not be delegated:

(a) a preparation and execution of:

(i) a notice of default and election to sell;

(ii) a cancellation of notice of default and election to sell;

(iii) a notice of sale; and

(iv) a trustee's deed;

(b) the notification of foreclosure through publication, posting, and certified or registered mail;

(c) the receiving and responding to requests for reinstatement or payoff requirements; and

(d) the handling of reinstatement or payoff funds.

(3) Nothing in this section is intended to prevent:

(a) a trustee from using clerical or office staff:

(i) that is under the trustee's direct and immediate supervision; and

(ii) to assist in the duties described in Subsection (2);

(b) a trustee from using the services of others for publication, posting, marketing, or advertising the sale; or

(c) a beneficiary of a trust deed or the servicing agent of the beneficiary from directly performing the functions described in Subsection (2)(c) or (d).

(4) The amendments in Laws of Utah 2002, Chapter 209, to Subsection (3) do not apply to a foreclosure if the notice of default related to the foreclosure was filed before May 6, 2002.

(5) (a) Except as provided in Subsection (5)(c), a trustee may not solicit or receive any fee for referring business to a third party.

(b) A fee prohibited under Subsection (5)(a) includes:

(i) a commission;

(ii) a referral based fee, including a fee for the referral of:

(A) title work;

(B) posting services; or

(C) publishing services; or

(iii) a fee similar to a fee described in Subsection (5)(b)(i) or (ii).

(c) Subsection (5)(a) does not apply to:

(i) a fee received by a trustee for the trustee acting as co-legal counsel, if the trustee is otherwise permitted by law to receive fees as co-legal counsel; or

(ii) a nonpreferred participation in net profits based upon an ownership interest or franchise relationship that is not otherwise prohibited by law.

(6) A trustee may not require the following to pay any costs that exceed the actual costs incurred by the trustee:

(a) a trustor reinstating or paying off a loan; or

(b) a beneficiary acquiring property through foreclosure.

(7) (a) A person that violates Subsection (5) or (6) is guilty of a class B misdemeanor.

(b) In addition to a person's liability under Subsection (7)(a), if a person violates Subsection (5) or (6), the person is liable to the trustor for an amount equal to the greater of:

(i) the actual damages of the trustor as a result of the violation; or

(ii) $1,000.

(c) In an action brought under Subsection (7)(b), the party that does not prevail in the action that is brought under Subsection (7)(b) shall pay the attorney fees of the prevailing party.

Utah Stat. ¶ 57-1-23. Sale of trust property—Power of trustee—Foreclosure of trust deed.

The trustee who is qualified under Subsection 57-1-21(1)(a)(i) or (iv) is given the power of sale by which the trustee may exercise and cause the trust property to be sold in the manner provided in Sections 57-1-24 and 57-1-27, after a breach of an obligation for which the trust property is conveyed as security; or, at the option of the beneficiary, a trust deed may be foreclosed in the manner provided by law for the foreclosure of mortgages on real property. The power of sale may be exercised by the trustee without express provision for it in the trust deed.

Utah Stat. § 57-1-23.5. Civil liability for unauthorized person who exercises power of sale.

(1) As used in this section:

(a) "Unauthorized person" means a person who does not qualify as a trustee under Subsection 57-1-21(1)(a)(i) or (iv).

(b) "Unauthorized sale" means the exercise of a power of sale by an unauthorized person.

(2) (a) An unauthorized person who conducts an unauthorized sale is liable to the trustor for the actual damages suffered by the trustor as a result of the unauthorized sale or $2,000, whichever is greater.

(b) In an action under Subsection (2)(a), the court shall award a prevailing plaintiff the plaintiff's costs and attorney fees.

Utah Stat. § 57-1-24. Sale of trust property by trustee—Notice of default.

The power of sale conferred upon the trustee who is qualified under Subsection 57-1-21(1)(a)(i) or (iv) may not be exercised until:

(1) the trustee first files for record, in the office of the recorder of each county where the trust property or some part or parcel of the trust property is situated, a notice of default, identifying the trust deed by stating the name of the trustor named in the trust deed and giving the book and page, or the recorder's entry number, where the trust deed is recorded and a legal description of the trust property, and containing a statement that a breach of an obligation for which the trust property was conveyed as security has occurred, and setting forth the nature of that breach and of the trustee's election to sell or cause to be sold the property to satisfy the obligation;

(2) not less than three months has elapsed from the time the trustee filed for record under Subsection (1); and

(3) after the lapse of at least three months the trustee shall give notice of sale as provided in Sections 57-1-25 and 57-1-26.