No. 13-852

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

MOTION FOR LEAVE TO FILE AND BRIEF OF THE CLEARING HOUSE ASSOCIATION L.L.C. AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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February 18, 2014

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FEDERAL NATIONAL MORTGAGE ASSOCIATION,
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LORAINE SUNDQUIST,
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MOTION OF THE CLEARING HOUSE ASSOCIATION L.L.C. FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE*

The Clearing House Association L.L.C. ("The Clearing House Association") hereby seeks leave, pursuant to this Court's Rule 37.2, to file the attached brief as *amicus curiae* in support of Petitioner Federal National Mortgage Association. Petitioner has consented to the filing of this brief. Respondent Loraine Sundquist has refused to consent to the filing of this brief.

The Clearing House Association, established in 1853, is the oldest banking association and payments company in the United States. It is owned by the world's largest commercial banks, which collectively employ 1.4 million people in the United States and hold more than half of all U.S. deposits. The Clearing House Association is a nonpartisan advocacy organization representing, through regulatory comment letters, *amicus* briefs and white papers, the interests of its member banks on a variety of issues of importance to the banking

industry. Its affiliate, The Clearing House Payments Company L.L.C., provides payment, clearing, and settlement services to its member banks and other financial institutions, clearing almost $2 trillion daily and representing nearly half of the automated clearing-house, funds-transfer, and check-image payments made in the United States.

In the conduct of their day-to-day fiduciary operations for both corporate and individual customers, the Clearing House Association's members rely on the rules of the Office of the Comptroller of the Currency ("OCC") that the court below invalidated.[1] Members' customers may enlist banks to act as a trustee on a large financing, or as an executor on an individual's estate where the corpus of the property may span several jurisdictions. The OCC's rules, the product of agency expertise taking into account the full spectrum of relevant considerations, provide a clear and workable framework for conducting these interstate fiduciary operations and offering customers in many jurisdictions choice and competition in the fiduciary marketplace.

By contrast, the lower court's ruling myopically tailored a rule to fit the facts of one case by looking to only one possibly relevant consideration – the physical location of the property – to the exclusion of all other considerations. But in doing so, the lower court created a rule that is unworkable in the context of most interstate fiduciary relationships

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[1] Sixteen of The Clearing House Association's twenty-one members are, or are affiliated with, a national bank.

of national banks because it would subject national banks' powers to the rules of the then-current location of trust property, not the trust itself. This result would have the effect of chilling national banks' ability to provide fiduciary services, particularly where trust property may span multiple jurisdictions and also because of the potential that the rules applicable to national banks would constantly change throughout the life of those servicing relationships. That result would harm consumers – who are often minors and those who cannot care for their own finances – because there will be fewer entrants in the narrow, specialized market for fiduciary services.

The Clearing House Association believes that the attached brief, based on its members' extensive fiduciary operations and reliance on the OCC rules invalidated here, will assist the Court in evaluating the importance of the issue presented by the petition. Accordingly, the Clearing House Association respectfully seeks the Court's leave to file the attached brief supporting Petitioner.

Respectfully submitted,

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INTEREST OF AMICUS CURIAE

The Clearing House Association L.L.C. ("The Clearing House Association"), established in 1853, is the oldest banking association and payments company in the United States.[1] It is owned by the world's largest commercial banks, which collectively employ 1.4 million people in the United States and hold more than half of all U.S. deposits. The Clearing House Association is a nonpartisan advocacy organization representing, through regulatory comment letters, *amicus* briefs and white papers, the interests of its member banks on a variety of issues of importance to the banking industry. Its affiliate, The Clearing House Payments Company L.L.C., provides payment, clearing, and settlement services to its member banks and other financial institutions, clearing almost $2 trillion daily and representing nearly half of the automated clearing-house, funds-transfer, and check-image payments made in the United States.

In the conduct of their day-to-day fiduciary operations for both corporate and individual

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[1] Pursuant to Rule 37.6, *amicus* affirms that no counsel for a party authored this brief in whole or in part and that no person other than *amicus* made any monetary contributions intended to fund the preparation or submission of this brief. Counsel of record for all parties received notice at least 10 days prior to the due date of *amicus*' intention to file this brief; counsel for Petitioner has consented to the filing of this brief, but counsel for Respondent refused to consent to the filing of this brief. Accordingly, *amicus* has filed a motion to file this brief. The parties' correspondence has been lodged with the Clerk.

customers, the Clearing House Association's members rely on the rules of the Office of the Comptroller of the Currency ("OCC") that the court below invalidated.[2] Members' customers may enlist banks to act as a trustee on a large financing, or as an executor on an individual's estate where the corpus of the property may span several jurisdictions. The OCC's rules, the product of agency expertise taking into account the full spectrum of relevant considerations, provide a clear and workable framework for conducting these interstate fiduciary operations and offering customers in many jurisdictions choice and competition in the fiduciary marketplace.

By contrast, the lower court's ruling myopically tailored a rule to fit the facts of one case by looking to only one possibly relevant consideration – the physical location of the property – to the exclusion of all other considerations. But in doing so, the lower court created a rule that is unworkable in the context of most interstate fiduciary relationships of national banks because it would subject national banks' powers to the rules of the then-current location of trust property, not the trust itself. This result would have the effect of chilling national banks' ability to provide fiduciary services, particularly where trust property may span multiple jurisdictions and also because of the potential that the rules applicable to national banks would

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[2] Sixteen of The Clearing House Association's twenty-one members are, or are affiliated with, a national bank.

constantly change throughout the life of those servicing relationships. That result would harm consumers – who are often minors and those who cannot care for their own finances – because there would be fewer entrants in the narrow, specialized market for fiduciary services.

INTRODUCTION AND SUMMARY OF ARGUMENT

At issue in this case are the OCC's interstate fiduciary rules that provide necessary certainty and clarity for national banks to act as fiduciaries on an interstate basis, based on where the bank performs its fiduciary functions, without the threat of changing powers and duties depending on where property happens to be located or moved to. The Utah Supreme Court's decision, by contrast, looks only to where a particular item of property is located, and then requires the national bank (regardless of where it is performing its fiduciary functions) to exercise as to that property only those fiduciary powers that are permitted by such state's laws with respect to each such piece of property. The lower court's ruling is not only unworkable but is also contrary to 12 U.S.C. § 92a as reasonably interpreted by the expert agency charged with administering it, as well as prior decisions of this Court.

National banks rely on the OCC's interstate fiduciary rules to provide the full range of fiduciary activities authorized by Section 92a to customers on an interstate basis. These services include acting as trustees, executors, registrars for stocks and bonds,

administrators, investment advisors, and guardians for minors, among others.

Section 92a incorporates by reference the local law where the national bank is "located" to determine the scope of national banks' fiduciary powers under federal law. The statute, which was enacted before national banks could branch, does not expressly address the situation where national banks provide fiduciary services across state lines. Having considered the various alternatives over the years, the OCC has addressed this statutory ambiguity in a full-dress notice and comment rule. The agency ultimately concluded that a national bank is "located" where it "acts in a fiduciary capacity," a phrase which the agency defines as wherever the national bank performs three core fiduciary activities with respect to a particular relationship.

The OCC's rule fully comports with the history of the National Bank Act as construed by this Court. This Court has previously held that the word "located," as it appears in the National Bank Act, has no fixed meaning and, in fact, has attributed different meanings to the word in various provisions of the Act. The OCC's construction of Section 92a closely mirrors this Court's application of another provision of the National Bank Act, 12 U.S.C. § 85, in the interstate banking context. The OCC's interpretation of Section 92a is reasonable, and its regulation should be accorded deference under the decisions of this Court.

The Utah Supreme Court's decision, by contrast, presents an unworkable system for national banks to exercise trust powers on an interstate basis.

The Utah Supreme Court's decision would significantly impede national banks' interstate trust activities and harm consumers, who include the most vulnerable and those unable to manage their own finances.

Moreover, the Utah Supreme Court's construction violates federal law regardless of whether a national bank is "located" in Utah. Section 92a expressly grants national banks the authority to compete with any local corporate fiduciary, and Utah law expressly permits Utah-licensed title insurance companies the trust power at issue in this case. Thus, as a matter of federal law, the Utah statute cannot prohibit national banks from having the same authority.

This Court should grant the petition to remedy the error of the Utah Supreme Court and the negative consequences that will affect both the banking industry and consumers.

ARGUMENT

Federal law requires national banks acting in a fiduciary capacity to adhere to "the laws of the State in which the national bank is located." 12 U.S.C. § 92a(a). Recognizing the ambiguity of the term "located," the OCC has reasonably interpreted it to mean that a national bank is located where it performs the core responsibilities of a fiduciary. 12 C.F.R. § 9.7(d). The Utah Supreme Court, however, refused to defer to this interpretation. Pet. App. 18a. Instead, it imposed its own interpretation of Section 92a: that national banks are "located" in the state – indeed, in *all* the states – in which the property held

in a fiduciary capacity is located. Pet. App. 10a. This incorrect and unworkable interpretation warrants this Court's review.

I. The Rules Of The Office of the Comptroller of the Currency Invalidated By The Court Below Are Of Great Importance to The Banking Industry.

A. National Banks Rely On The OCC's Interstate Fiduciary Regulations To Provide Such Services Nationwide.

The law and regulations at issue allow national banks to compete with local institutions (bank and non-bank) notwithstanding state laws that favor in-state institutions. 12 U.S.C. § 92a grants national banks the federal authority to act in enumerated fiduciary capacities when not in contravention of "state or local law" of the state in which the national bank is "located":

> 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). The statute goes on to explain that:

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

Id. § 92a(b).

The OCC's interpretation of these provisions in the context of national banks' interstate fiduciary operations designates the state in which the national bank "acts in a fiduciary capacity" for an individual fiduciary relationship as the state in which the national bank is "located" for purposes of applying the state law of reference under Section 92a. *See* 12 C.F.R. § 9.7(d). The OCC further defines "acting as in a fiduciary capacity" as occurring in the location in which the national bank performs the core fiduciary functions of "accept[ing] the fiduciary appointment"; "execut[ing] the documents that create the fiduciary relationship"; and "mak[ing] discretionary decisions regarding the investment or distribution of fiduciary assets." *Id.*

National banks, acting on an interstate basis, rely on this regulation in exercising all of the fiduciary powers of Section 92a(a) for fiduciary relationships, including acting as "trustee, executor, administrator, registrar of stocks and bonds, transfer agent, guardian, assignee, receiver, or custodian under the uniform gifts to minors act; [or] investment advisor . . . ." 12 C.F.R. § 9.2(e). The property held pursuant to such relationships may span different states.

The Comptroller has addressed several of these areas specifically with respect to the interstate fiduciary operations of national banks and the need for national banks to have one – and only one – "local law" to refer to with respect to each fiduciary relationship undertaken pursuant to Section 92a. The fiduciary activities that have been specifically addressed in the OCC's published guidance include, among others: providing executor services (OCC Interp. Ltr. No. 1106 (Dec. 2008)); acting as an indentured trustee for corporate bonds (OCC Interp. Ltr. No. 973 (Sept. 2003)); and serving as an investment advisor (OCC Interp. Ltr. No. 628 (July 1993)).

National banks rely heavily on the OCC's interstate fiduciary regulations to provide fiduciary services on an interstate basis to their customers, wherever such customers, and their property, happen to be located.

B. The OCC's Interstate Fiduciary Regulations Are A Reasonable Interpretation Of An Ambiguous Statute.

The OCC's interpretation – that a national bank should only be located in a single state for purposes of each fiduciary relationship – makes sense not only as a practical matter, but also in the historical context of Section 92a. This history makes clear that Congress envisioned a single state law governing fiduciary relationships.

Congress originally enacted Section 92a in 1913 before national banks had the power to branch. Indeed, in *First National Bank in St. Louis v. Missouri*, 263 U.S. 640, 656-57 (1924), the Court held that national banks had no federal authority under the National Bank Act, as then enacted, to operate a branch office. It was not until 1927 that national banks were given the power to branch, and even then, they were prohibited from doing so across state lines. *See* Act of Feb. 25, 1927, ch. 191, § 7, 44 Stat. 1228.

In this context of entirely local, intra-state operations, Congress granted national banks fiduciary powers to compete with local, state-chartered institutions, with the additional benefit that national banks, as a matter of federal law, were granted the rights of the "most favored fiduciary" located in that state. The Court recognized this principle in *Missouri ex rel. Burnes National Bank of St. Joseph v. Duncan*, 265 U.S. 17 (1924), in which Justice Holmes, writing for the Court, held that "[Section 92a] says in a roundabout and polite but

unmistakable way that whatever may be the State law, national banks having the permit of the Federal Reserve Board [then administering Section 92a] may act as executors if trust companies competing with them have that power." *Id.* at 23.[3]

Unsurprisingly, because it was enacted during a period in which national banks could not branch, let alone branch across state lines, Section 92a refers to a single state in which the national bank is "located." *See* 12 U.S.C. § 92a; *see also* Brief of the OCC, *Dutcher v. Matheson*, No. 12-4150 (10th Cir.), at 10 n.5 ("The text of section 92a(a) refers to a single state."). The issue of interstate fiduciary operations by national banks was not squarely presented until 1994, when Congress allowed national banks to operate on an interstate basis. *See* Pub. L. No. 103-328, Title I, §§ 102(b)(1), 103(a), 108 Stat. 2338 (Sep. 29, 1994) (codified at 12 U.S.C. § 36).

In light of the 1994 legislation, the OCC confronted, over time, national banks' interstate fiduciary operations and the specific issues presented by such activities. In response to these issues being

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[3] The system adopted by Congress in Section 92a is similar to the one it also adopted in Section 85 with regard to the charging of interest rates with reference to state law. In *Tiffany v. National Bank of Missouri*, 85 U.S. 409 (1873), this Court construed Section 85 to provide national banks "at least equal advantages" to state-chartered institutions in the charging of maximum interest rates. *Id.* at 412. In other words, national banks were held to be able to take advantage of the most favorable authority available to any state-chartered institution in which they might come into competition in the state in which the national bank was "located."

raised with respect to what constituted the local law of reference pursuant to Section 92a, the OCC formulated an interpretation that, given the text of Section 92a and its similarities to Section 85, as construed by this Court, *see supra* n.3 & *infra* pp. 13-14, a national bank should only be located in a single state for purposes of an individual fiduciary relationship. To give certainty with regard to which state law would apply to a particular fiduciary relationship undertaken by a national bank, the OCC focused on the core functions of a fiduciary relationship to determine the national bank's location for purposes of Section 92a. Notably, in advance of its rulemaking, the OCC had specifically considered, and declined to adopt, an approach that focused on where the national bank's customers reside or where trust property is located. *See* OCC Interp. Ltr. No. 866 (Oct. 1999).

Instead, the OCC determined that national banks should be deemed to be "located," for purposes of exercising their fiduciary powers pursuant to Section 92a with respect to an individual fiduciary relationship, where they exercise the three core fiduciary activities of accepting the fiduciary appointment, executing the documents that create the fiduciary relationship, and exercising investment discretion with respect to each such relationship. OCC Final Rule, 66 Fed. Reg. 34792-01, 34794 (Jul. 2, 2001). That location is the state in which the national bank "acts in a fiduciary capacity" with respect to such relationship. *See* 12 C.F.R. § 9.7(d).

As a practical matter, the OCC's interpretation is both workable and sensible. With

respect to each fiduciary relationship under Section 92a, a national bank has the same powers no matter where the corpus of the property encompassed by that fiduciary relationship may be located. The national bank's trustee powers are not limited because the assets for which it has fiduciary authority happen to be located in a state which restricts its authority, when the national bank is not acting in a fiduciary capacity in such state. *See infra* pp. 15-16. Nor is the national bank trustee subject to myriad changing powers depending on where the trust corpus may exist at any moment in time, or subject to multiple and potentially conflicting rules given that there may be trust corpus in several different states.

C. The OCC's Interstate Fiduciary Regulations Also Fully Align With the Decisions Of This Court.

This Court has held that the OCC's construction of national banks' powers is entitled to "great weight." *Clarke v. Securities Indus. Ass'n*, 479 U.S. 388, 403 (1987); *see also Smiley v. Citibank (S.D.), N.A.*, 517 U.S. 735, 739 (1996); *NationsBank of N.C., N.A. v. Variable Annuity Life Ins. Co.*, 513 U.S. 251, 257 (1995). Deference is especially warranted where these interpretations of national banks' powers take the form of a full-dress notice and comment regulation. *See United States v. Mead Corp.*, 533 U.S. 218 (2001). Here, the OCC's full-dress regulation construing the scope of national banks' interstate fiduciary operations, adopted after notice and comment, fully aligns with this Court's decisions.

The OCC adopted Section 9.7 in order to resolve the inherent ambiguity of Section 92a with respect to the state in which a national bank should be deemed to be "located" in the context of interstate banking. Indeed, the Court has previously adjudicated that the term "located" as used in the National Banking Act has "no enduring rigidity." *Wachovia Bank, N.A. v. Schmidt*, 546 U.S. 303, 314 (2006) (quoting *Citizens & Southern Nat. Bank v. Bougas*, 434 U.S. 35, 44 (1977)). "'[L]ocated,' 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." *Id.* at 318.

Further demonstrating this point, this Court has construed the term "located" as having different meanings under different provisions of the National Bank Act, giving great deference to the OCC's construction of the term. Thus, a national bank is "located" where the bank has a branch for purposes of the federal venue statutes, *see Bougas*, 434 U.S. at 44, where the bank has its main office for purposes of the federal diversity jurisdiction statute, *see Schmidt*, 546 U.S. at 313-14 (deferring to the OCC), and where the bank has either its main office or performs the core non-ministerial functions in connection with the extension of credit for purposes of exportation of interest rates under Section 85, *see Marquette National Bank of Minneapolis v. First of Omaha Service Corp.*, 439 U.S. 299 (1978); OCC Interp. Ltr. No. 822 (Mar. 1998).

It is *Marquette* that is most analogous to the present case. In *Marquette*, this Court addressed the application of Section 85 with respect to the making

of interstate credit card loans. Section 85 refers to the maximum "rate allowed by the laws of the State, Territory, or District where the bank is located. . . ." 12 U.S.C. § 85. *Marquette* unanimously held that a national bank is "located" for purposes of Section 85 where it lists its main office in its organizational certificate, 439 U.S. at 310, and not wherever the bank's loan customers reside.

In 1994, when Congress permitted interstate branching, it specifically addressed the setting of interest rates in the interstate branching context, preserving the application of *Marquette*. *See* 12 U.S.C. § 1811 note. Reviewing the history of this statutory provision preserving *Marquette*'s construction, the OCC concluded that, while *Marquette*'s main office rule would continue to apply, the legislative sponsors of the rule also indicated that a national bank should be deemed to be "located" for purposes of calculating maximum interest rates at a host state branch when (and only when) the national bank performs the three core lending functions with respect to an individual loan at such host state branch. *See* OCC Interp. Ltr. No. 822.

Analogously, when addressing interstate fiduciary operations of national banks in its 2001 rulemaking, the OCC determined that national banks should be deemed to be "located," for purposes of exercising their fiduciary powers pursuant to Section 92a with respect to an individual fiduciary relationship, where they exercise the three core fiduciary activities. *See supra* p. 11. Such a rule provides a workable – and sensible – relationship-

specific uniformity that benefits customers and national bank fiduciaries alike, in accord with the statutory purposes of Section 92a as recognized by decisions of this Court.

II. Review Of The Utah Supreme Court's Erroneous Decision Is Warranted In Light Of The Serious Threat It Poses To Predictability And Certainty In Fiduciary Obligations, And Ultimately To The Interests Of Consumers.

A. The Utah Supreme Court's Holding Arbitrarily Limits National Banks' Fiduciary Powers.

The Utah Supreme Court's jettisoning of administrative deference to the OCC's construction of Section 92a has serious practical consequences to national banks providing fiduciary services on an interstate basis. Beyond the facts of this case, trusts and estates may have property – both real and personal – located in many states. The OCC's regulations provide a clear, administrable rule for each fiduciary relationship, specifying which law is the state law of reference for purposes of Section 92a. The Utah Supreme Court's approach would limit a national bank's powers depending on where fiduciary assets fortuitously happen to be located or moved to and would raise potentially conflicting powers if those assets were located in several different states.

Under the Utah Supreme Court's approach, a national bank could be "located" in multiple jurisdictions *with respect to the same fiduciary*

relationship. Thus, for example, a national bank acting in a fiduciary capacity in one state for a decedent's estate might not be able to exercise powers to sell or safeguard the estate's property, if some of the decedent's property is located in another jurisdiction whose law would not allow the trustee the same authority over the property. If, for instance, an executor is not allowed to exercise the power of sale under the host state's local law – as is the case here – then this restriction will significantly impede the out-of-state executor's administration of an estate that spans multiple jurisdictions. In short, a rule that applies the law of the physical location of trust property to determine the scope of a national bank's fiduciary powers is unworkable. Many of the enumerated national bank fiduciary activities and relationships that they generate – such as acting as an executor, a registrar for stocks and bonds, an investment advisor, or a trustee of a trust with property located in various jurisdictions – are not amenable to a fifty-state patchwork of laws that would expand and contract national banks' fiduciary powers with respect to the very same relationship based on the fortuity of the location(s) of property the bank holds pursuant to such relationship.[4]

By contrast, under the OCC's interpretation of Section 92a, a national bank is located where it acts

[4] The Utah Supreme Court's decision would presumably be equally applicable to both real and personal property given that it purportedly relied on the plain text of Section 92a, which itself makes no distinction with respect to the types of property the national bank holds as fiduciary.

in a fiduciary capacity – that is, where it performs the core fiduciary functions – for a trust or estate, and thus has the federal authority to exercise consistent fiduciary powers with respect to a trust or estate across all fifty states. The Utah Supreme Court's ruling failed to take into account the critical function that the OCC's interstate fiduciary regulations serve to provide clear rules of the road for national banks to follow when administering interstate trusts and estates.

B. The Utah Supreme Court's Reading Of Section 92a Encourages Protectionism To The Detriment Of Banks And Consumers.

12 U.S.C. § 92a and Section 9.7(d) of the OCC's rules allow national banks to compete with local institutions notwithstanding state laws that may favor in-state institutions. This was recognized as an imperative of Section 92a by this Court in Justice Holmes' opinion in *Burnes*. *See supra* pp. 9-10. Indeed, the text of Sections 92a(a) and (b) expressly recognizes this principle of "at least equal advantages," *Tiffany*, 85 U.S. at 412.

The OCC's interstate fiduciary regulation applies this principle on an interstate basis – allowing national banks to compete with local institutions. In so doing, the OCC has repeatedly promoted national banks' rights to conduct fiduciary business on an interstate basis, subject only to the laws of the state in which they are deemed to be "located." *See, e.g.*, OCC Interp. Ltr. No. 1106 (concluding that a North Carolina-based national

bank may offer fiduciary services as an executor in South Carolina pursuant to Section 92a, finding inapplicable a South Carolina law that prevented a national bank "not having a business in [the] state" from acting as an executor for the estate of a decedent domiciled in the state (alteration in original)); OCC Interp. Ltr. No. 1103 (Dec. 2008) (determining that a national bank may offer fiduciary services in North Carolina pursuant to Section 92a, finding inapplicable a North Carolina statutory requirement that a national bank maintain a physical presence in the state before conducting fiduciary services); OCC Interp. Ltr. No. 973 (concluding that a national bank trustee acting in a fiduciary capacity in California may serve as an indentured trustee in Washington State; "[a]s expressly provided in [the] regulation [12 C.F.R. § 9.7(e)], the laws of any state other than California – including Washington – that purport to limit or establish preconditions on the exercise of that fiduciary power are not applicable to the Bank"); OCC Interp. Ltr. No. 872 (Dec. 1999) (determining that a national bank may act as a fiduciary in California notwithstanding a California law requiring the bank to have a branch in the state before exercising such powers).

Were the Utah Supreme Court's ruling the law of the land, these efforts by the OCC to ensure consistent and uniform application of national banks' trust powers across jurisdictions with respect to individual trust relationships would be in jeopardy. Absent the applicability of the rules set forth in Section 9.7, the users of such services, or national banks acting in a fiduciary capacity, would need to

engage the assistance of a series of local fiduciaries. The result would be that consumers would be offered less choice of providers of fiduciary services, and would face higher costs for such services that were available to them.

III. Regardless Of The "Location" Issue, Section 92a Preempts The Utah Laws At Issue.

As discussed above, pp. 9-10 & n.3, national banks are given "most favored fiduciary" status in the state in which they are "located," by having the same fiduciary powers as the state grants to "other corporations which compete with national banks." 12 U.S.C. § 92a(b). This federal authority permits national banks to exercise the fiduciary powers that the location state allows any other corporate fiduciary to exercise that comes into "competition" with national banks. *See Burnes*, 265 U.S. at 23.

It is undisputed that Utah permits Utah-licensed title insurance companies to exercise the trustee power at issue in this case, but it refuses that authority to national bank trustees. Utah Code §§ 57-1-21, 57-1-23. But for the Utah restriction, national banks would compete with these Utah-licensed entities in the exercise of their trust powers. By application of Section 92a, national banks therefore have that same power pursuant to the plain text of Sections 92a(a) and (b), notwithstanding the Utah restriction. In other words, federal law also preempts the Utah laws at issue because the Utah laws prevent national banks located in Utah from exercising their federal trust powers. *See Barnett*

Bank of Marion County, N.A. v. Nelson, 517 U.S. 25, 32-33 (1996).

For this additional reason, the decision of the Utah Supreme Court warrants review.

CONCLUSION

For the foregoing reasons, as well as the reasons set forth in the petition for writ of certiorari, the Court should grant the petition.

Respectfully submitted,

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