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

BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF QUESTION PRESENTED

Whether the Office of the Comptroller of the Currency has authority under the National Bank Act to preempt the application of Utah's real property and debt collection laws to national banks, specifically those state statutes prescribing who may conduct non-judicial foreclosure sales.

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JURISDICTIONAL OBJECTION

Respondent objects to Petitioner's assertion that this Court has jurisdiction over this case. Petitioner's petition for rehearing with the Utah Supreme Court was not timely filed pursuant to Utah Rule of Appellate Procedure 35(a), and therefore its petition for writ of certiorari is not timely under U.S. Supreme Court Rule 13.3.

The judgment of the Utah Supreme Court was entered on July 23, 2013. Under Utah Rule of Appellate Procedure 35(a), Petitioner had 14 days from the entry of judgment to petition for rehearing, which would have been August 6, 2013. Instead, Petitioner filed its petition for rehearing on August 9, 2013, three days after the deadline.

On September 16, 2013, the Utah Supreme Court denied Petitioner's petition for rehearing citing Utah Rule of Appellate Procedure 35 as its reason for denial. *See* Pet. App. 39a. Utah Rule of Appellate Procedure 35 states that a petition for rehearing presented in an "untimely or consecutive" manner will not be received by the clerk.

Contrary to Petitioner's assertion, there is no indication in the order denying rehearing that the petition for rehearing was "entertained" for purposes of extending the time for filing a petition for writ of certiorari with this Court under U.S. Supreme Court Rule 13.3. *See* Pet. App. 39a. To be timely filed before this Court, Petitioner's request for an extension of time to file a petition for writ of certiorari must have

been filed on or before October 21, 2013. Because Petitioner waited until December 2, 2013, to request an extension of time to file its petition for a writ of certiorari, the petition is untimely and beyond the jurisdiction of this Court.

STATEMENT OF THE CASE

Factual Background

Contract and real property law are traditionally the domain of state law. *See Fidelity Fed. Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 174 (1982) (Rehnquist, C.J., dissenting). Some states, including Utah, have enacted statutes allowing foreclosures upon real property to be conducted without involving the courts. Utah's non-judicial foreclosure statutes provide that a qualified trustee can be "given the power of sale by which the trustee may . . . cause the trust property to be sold." Section 57-1-23 of the Utah Code. Section 57-1-21(1)(a) defines a qualified trustee as:

> (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.

ReconTrust Company, N.A. ("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.

In 2006, respondent Loraine Sundquist executed a deed of trust as security for the loan on her Utah home (the "Property"). In 2009, Ms. Sundquist became concerned about the servicing of her loan and requested documents from Bank of America's servicing division, BAC Home Loans Servicing ("BAC," a wholly owned subsidiary of Bank of America). BAC sent Ms. Sundquist loan documents from an unrelated borrower in Florida. Concerned, Ms. Sundquist challenged BAC and Bank of America's ownership of the loan and stopped making loan payments. BAC commenced foreclosing upon the Property and appointed ReconTrust (a wholly owned subsidiary of Bank of America) the foreclosing trustee.

In May 2011, ReconTrust conducted a nonjudicial foreclosure of Ms. Sundquist's home. FNMA purportedly purchased the property at the foreclosure sale with a beneficiary's credit bid. Ms. Sundquist, recognizing ReconTrust's lack of authority to conduct a nonjudicial sale, refused to vacate the Property.

Proceedings Below

In June 2011, FNMA filed an unlawful detainer action in the Third Judicial District Court for the State of Utah. Ms. Sundquist filed a counterclaim. The district court conducted an evidentiary hearing to determine which party should have possession of the Property during pendency of litigation. At the hearing, Ms. 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's property and debt collection laws with respect to the actions of a national bank are preempted by federal law, specifically the National Banking Act. The district court sided with FNMA, and awarded it possession of the Property.

Ms. Sundquist promptly filed a petition for interlocutory appeal, which was granted. The order of restitution was stayed pending appeal. After consideration of the pleadings and briefing submitted, including an amicus brief by the Utah Attorney General in support of Ms. Sundquist, the Utah Supreme Court issued its opinion on July 23, 2013. The Utah Supreme Court reversed the ruling of the district court, finding that ReconTrust lacks authority to conduct nonjudicial foreclosures in the State of Utah, and remanded the case for further proceedings. Pet. App. 22a.

Misstatements of Fact Made In The Petition For Writ of Certiorari

1. Petitioner's claim that there is "no dispute" that the conduct of a non-judicial foreclosure sale in the State of Utah is a fiduciary activity covered by the National Banking Act. *See* Petition 8 n.5. This is misstatement of the facts and record. However, for purposes of its opinion, the Utah Supreme Court adopted Petitioner's assumption that it was a fiduciary activity. Pet. App. 17a n.6. The case precedent in Utah holds that conducting a nonjudicial foreclosure sale is not a fiduciary activity. *See Russell v. Lundberg*, 120 P.3d 541, 547 (Utah App. 2005). Likewise, the conduct of a non-judicial foreclosure sale is not a fiduciary activity in the State of Texas (the state in which FNMA alleges ReconTrust was "located"). *See* Texas Statute Sec. 51.0074. Duties of Trustee (stating, "(b) A trustee may not be: . . . (2) held to the obligations of a fiduciary of the mortgagor or mortgagee").

2. Petitioner makes a misstatement of fact in its Petition when it states, "The court did not dispute FNMA's contention that under the terms of 12 C.F.R. § 9.7, ReconTrust was "located" in Texas. Petition 9. In fact, in its opinion below, the Utah Supreme Court wrote:

> "¶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.merriam-webster.com (last visited July 8, 2013). This suggests that a national bank is located in the place or places where 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 v. Countrywide Bank, et al.,* 860 F. Supp. 2d 1290, 1300 (2012).

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, Recon-Trust is acting as trustee of a trust deed for real property in the State of Utah. Recon-Trust, 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.

REASONS FOR DENYING THE PETITION

I. The Petition Is Not Timely

As discussed above in the jurisdictional objection, there is no dispute that Petitioner filed its petition for rehearing with the Utah Supreme Court three days

late according to the rules. The petition was summarily denied pursuant to Rule 35, which suggests the denial was based on timeliness. Pet. App. 39a.

Because the Petition for Rehearing was untimely filed below, Petitioner's request to this Court for an extension of time to file a petition for certiorari was untimely, as was its petition for certiorari. Accordingly, the Petition for Writ of Certiorari should be denied.

II. The Decision Below Does Not Conflict With A Published Decision of Any Federal Appellate Court.

Respondent argues that the decision below conflicts with decisions of the Tenth and Fourth Circuits. The Tenth Circuit case on which it relies, however, *Garrett v. ReconTrust, NA*, 2013 WL 5273125 (10th Cir. 2013), is unpublished. In the Tenth Circuit, "[u]npublished decisions are not precedential." Tenth Cir. R. 32.1(a). Similarly, the Fourth Circuit case, *Jaldin v. ReconTrust Co. NA*, 2013 WL 4566519 (4th Cir. 2013), is designated "Not for Publication." The decision below therefore poses no conflict with any published decision of any appellate court.

Further, while the outcome in the non-precedential *Garrett* decision is different from the outcome below, the plaintiff there waived the argument that the OCC's interpretation of the pertinent regulations was unreasonable. *See* 2013 WL 5273125, at *2 & n.1. The court therefore was required to "limit

[its] inquiry accordingly." *Id*. The court further noted that the plaintiff had "conceded below that the relevant fiduciary acts took place in Texas," and did not "fail even to mention Rule 9.7," the relevant OCC regulation. *Id.* at *5. The court opinion thus makes clear that the briefing did not present it with the adequate facts or arguments, and its choice to make the decision non-precedential suggests that the court was loathe to establish precedent where potentially significant arguments were not developed or even preserved in the briefing.

III. The Decision Below Is Correct and Consistent With This Court's Jurisprudence.

Recognizing the correct standard to apply in its analysis of the issues presented, the Utah Supreme Court conducted a thorough and thoughtful *Chevron* analysis of the NBA in its opinion below. Pet. App. 9a. "A petition for writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." Sup. Ct. R. 10. In this case, the Utah Supreme Court properly stated and applied the rule of law below as guided by the jurisprudence of this Court.

Section 92a of the NBA gives the Comptroller 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). Under Utah state law, however, Utah banks are not given "the power of sale by which the trustee may . . . cause the trust property to be sold." As the Utah Supreme Court held, "there is nothing in the text of the NBA to suggest that a national bank may appoint a Texas trustee to foreclose on Utah property when a Utah bank could not do so." Pet. App. 10a.

In *Raygor v. Regents of the Univ. of Minn.*, 534 U.S. 533, 543 (2002), this Court held that when Congress "intends to pre-empt the historic powers of the States or when it regulates in traditionally sensitive areas," a clear statement of intention to do so is required. Pet. App. 14a *quoting Vermont Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765, 787. The Utah Supreme Court performed a comprehensive analysis of the NBA in its opinion below and determined, "through the plain language of Section 92a, Congress has directly spoken to the question at issue. 'The 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.'" Pet. App. 13a *quoting Bell*, 860 F. Supp. 2d at 1304. Because there is no "clear statement" of intention by Congress to preempt the real property laws of the States, the reasoning and conclusion of the opinion below is correct.

The opinion below further analyzed the reasonableness of the Comptroller's interpretation of the NBA, and reached the considered conclusion that the agency's interpretation was not entitled to deference.

Pet. App. 18a-21a. Interpreting federal law to permit a national bank "located" in a state with nonjudicial foreclosure processes to use such processes in a state where the foreclosure process otherwise requires judicial oversight is not a reasonable interpretation of the National Banking Act. Neither is a system that gives national banks advantages in nonjudicial foreclosures over state banks, which is what the Petitioner seeks from this Court. Petitioner's request offends common sense and should be denied. In dealing with National Banking Act preemption issues, this Court has been careful to narrowly tailor its opinions so as not to create absurd results that erode the rights of states to enforce reasonable statutes of general applicability to all banks operating within their borders.

In *Watters v. Wachovia Bank, N.A.*, 550 U.S. 1 (2007), this Court held that a State may not exercise "'general supervision and control'" over a subsidiary of a national bank, *id*. at 8, because "multiple audits and surveillance under rival oversight regimes" would cause uncertainty, *id*. at 21. There is no argument below that Utah's nonjudicial foreclosure statutes rise to a level of "general supervision or control" over banking activities of a subsidiary of a national bank, as addressed in *Watters*, and the statutes are recognized as ones of general application to all who would take advantage of the nonjudicial foreclosure process in the State of Utah.

In *Cuomo v. Clearing House Ass'n, LLC*, 557 U.S. 519, 531-32 (2009), this Court recognized the limits of

preemption by quoting the Comptroller's own statements:

> Evidently realizing that exclusion of state enforcement of *all* state laws against national banks is too extreme to be contemplated, the Comptroller sought to limit the sweep of its regulation by the following passage set forth in the agency's statement of basis and purpose in the Federal Register:
>
> > "What the case law *does* recognize is that 'states retain some power to regulate national banks in areas such as contracts, debt collection, acquisition and transfer of property, and taxation, zoning, criminal, and tort law.' [citing a Ninth Circuit case.] Application of these laws to national banks and their implementation by state authorities typically does not affect the content or extent of the Federally-authorized business of banking . . . but rather establishes the legal infrastructure that surrounds and supports the ability of national banks . . . to do business." 69 Fed. Reg. 1896 (2004) (footnote omitted).

Accordingly, this Court's jurisprudence recognizes that preemption of state laws does not necessarily extend to debt collection and the acquisition and transfer of property. The decision below is consistent with this recognition.

In challenging the decision below, Petitioner seeks to revisit the deliberations this Court had only

five years ago in the *Cuomo* case. However, the opinions of this Court and the Utah Supreme Court are fundamentally sound with respect to the preemption of Utah's nonjudicial foreclosure statutes. To hold otherwise would lead to absurd results as discussed above.

CONCLUSION

Petitioner has not carried its burden of demonstrating any "compelling reasons" for the Petition to be granted. For the foregoing reasons, the Petition should be denied.

Respectfully submitted,

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