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

RESPONDENT'S SUPPLEMENTAL BRIEF

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INTRODUCTION

The brief of the United States, filed by the Solicitor General at this Court's invitation, explains why this case presents a poor "vehicle" for resolving the question presented. U.S. Br. 22. Indeed, calling the case an unsuitable vehicle is an understatement, because the nonfinality of the decision below and untimeliness of the petition for certiorari deprive this Court of jurisdiction.

The Solicitor General also explains that there is no conflict among state supreme courts and federal appellate courts over whether the National Bank Act overrides state laws that do not authorize banks to foreclose trust deeds nonjudicially, and that the Court's consideration of that issue would benefit from further analysis in the lower courts. Thus, the Court should deny certiorari even if it had jurisdiction.

However, the Solicitor General's contention that the Utah Supreme Court decided the case incorrectly, while concededly not sufficient to justify review, rests significantly on a failure to acknowledge the narrowness of the decision. The Utah court did not sweepingly address the law applicable whenever out-of-state national banks engage in fiduciary functions, such as trust account administration. It decided only that federal law does not authorize out-of-state national banks designated as "trustees" of trust deeds on Utah real property—Utah's equivalent of mortgages—to engage in nonjudicial foreclosures in Utah when Utah statutes do not grant that authority to other state and national banks. That holding rests on a straightforward reading of the National Bank Act and its judicial and administrative construction as applied to the specific actions in question, as well as on principles of

state-law primacy over ownership and transfer of real property. The decision does not call into question the possibility that the law of other states may determine the authority of out-of-state national banks to engage in genuine fiduciary actions in other circumstances, nor does it threaten to disrupt national bank operations or their supervision by the Office of the Comptroller of the Currency (OCC).

ARGUMENT

1. As the Solicitor General explains, the petition confronts formidable jurisdictional obstacles. First, 28 U.S.C. § 1257 provides jurisdiction to review only *final* decisions of state supreme courts. The decision below is not final. Not only is the remedy for the improper nonjudicial foreclosure on Ms. Sundquist's home undetermined, but "a variety of other issues" are open on remand. Pet. App. 23a.

The finality requirement is jurisdictional and cannot be waived by a party's failure to argue it. *See Florida v. Thomas*, 532 U.S. 774, 776 (2001). Although the point was not raised in Ms. Sundquist's brief in opposition, newly associated counsel for Ms. Sundquist brought it to the attention of the Solicitor General's office after this Court requested a brief from the United States. The Solicitor General appropriately recognizes that the defect should bar review.

The finality requirement has four narrow "exceptions." *See Thomas*, 532 U.S. at 777–80 (citing *Cox Broadcasting Corp. v. Cohn,* 420 U.S. 469 (1975)). As the Solicitor General implicitly recognizes, this case falls well outside the first three: The final outcome is not "preordained" by the interlocutory decision; the federal issue will not necessarily "survive and require decision," because a variety of possible resolutions of

the case could obviate the need to decide it; and review following final judgment is not impossible. *Id*. at 777–79.

The fourth and most often invoked "exception" applies only where deciding the federal question would "preclu[de]" further litigation on the relevant claims and denying immediate review would "seriously erode" federal policy. *Id*. at 780. This case satisfies either prerequisite. As the Solicitor General explains, deciding the preemption issue would not terminate litigation over FNMA's attempt to take Ms. Sundquist's home. U.S. Br. 9. Although the Solicitor General does not separately analyze whether denial of immediate review would "seriously erode" federal policy, his brief demonstrates that federal policy does not demand immediate review. The observation that the issue would "benefit" from "further consideration … in the lower courts," U.S. Br. 22, reflects a judgment that federal policy will not suffer serious damage in the meantime. National bank operations will not be seriously impeded if lenders who contemplate foreclosures in Utah and have designated a national bank as trust deed "trustee" are required either to proceed judicially or to appoint a "trustee" statutorily qualified to foreclose nonjudicially.

Equally problematic for purposes of jurisdiction is the petition's untimeliness. As the Solicitor General notes, there is no genuine argument that FNMA's petition for rehearing in the Utah Supreme Court was timely filed. FNMA points out that Utah rules say the clerk will not receive an untimely petition, but that does not empower the clerk's office to excuse a jurisdictional defect by "receiving" a late-filed petition.

Nor does the Utah Supreme Court's denial of the petition indicate that the court "entertained" it on the merits: The term "deny," as opposed to "dismiss," does not signify that the court overlooked a jurisdictional defect and reached the merits. As the Solicitor General explains, this Court's few decisions holding that a lower court "entertained" an untimely rehearing petition involve circumstances where the lower court granted leave to file or otherwise expressly addressed the merits. U.S. Br. 11 (citing *Hibbs v. Winn*, 542 U.S. 88, 97–98 (2004); *Young v. Harper*, 520 U.S. 143, 147 n.1 (1997)). *See also Missouri v. Jenkins*, 495 U.S. 33, 47–48 (1990) (lower court treated party's filing as a timely petition for rehearing); *Pfister v. N. Ill. Fin. Corp.*, 317 U.S. 144, 150–51 (1942) (lower court denied petition because it had no "merit").

FNMA neither sought nor received leave to file out of time as required by the Utah court's rehearing procedures. *See* Utah Supreme Court, Checklist for Petition for Rehearing, https://www.utcourts.gov/courts/sup/forms/checklist-rehearing.pdf. Under such circumstances, this Court should conclude that the denial rested on FNMA's clear procedural default, not the merits. *Cf. Coleman v. Thompson*, 501 U.S. 722 (1991) (holding, in the habeas context, that an unexplained state-court decision is based on procedural grounds rather than the merits when there is an obvious procedural default and no express indication that the court considered the merits).

The finality and timeliness defects deprive this Court of power to entertain the petition under 28 U.S.C. § 1257. They thus do more than show that this case is not a "suitable vehicle," U.S. Br. 22, but they *at least* do that much. If the Court granted the peti-

tion, the parties and Court would have to devote much time and attention to the jurisdictional issues, which do not independently merit review but require definitive resolution before the Court may rule on the merits. The need to address jurisdiction would detract from focus on the merits, and the entire process would prove a waste of judicial and litigation resources if the Court ultimately concluded that it could not reach the merits. *Cf. Nike, Inc. v. Kasky*, 539 U.S. 654 (2003) (dismissing writ as improvidently granted when some Justices concluded, after briefing and argument, that there was no final judgment).

2. As the Solicitor General demonstrates, this case presents no conflict among state courts of last resort and federal courts of appeals. No other court at those levels has yet addressed and decided whether the National Bank Act provision at issue, 12 U.S.C. § 92a, can be validly construed to require a state to allow a national bank to engage in nonjudicial foreclosure on a trust deed without state statutory authority merely because *another* state authorizes its banks to foreclose nonjudicially on property within its borders. FNMA's claim of conflict rests primarily on a *nonprecedential* Tenth Circuit opinion that expressly declined to reach the question and secondarily on two appellate decisions addressing wholly different issues.

Absent a conflict, certiorari is unwarranted here. The novelty of the issue, the usefulness of allowing its further development in the lower courts, and the absence of any suggestion by the government that the decision has any immediate consequences creating a pressing need for review—combined with the jurisdictional issues discussed above—all point toward denial.

3. The Solicitor General is too hasty, however, in arguing that the decision below, while not meriting review, is incorrect. The Solicitor General wrongly suggests that the Utah Supreme Court has broadly rejected the OCC's construction of section 92a as applied to the full range of trusteeships and fiduciary activities engaged in by national banks. Not so: The Utah court held only that it is unreasonable to construe section 92a as providing that a national bank's authority to foreclose trust deeds on Utah property is determined by another state's law.

That holding has no applicability to actual trust accounts and other fiduciary activities of national banks because of the fundamental differences between a *trust deed* and a trust or fiduciary account. A trust deed is not a trust in the traditional sense, but merely a label for a statutory device some states use as a substitute for a mortgage. Under a trust deed, a "trustee" nominally holds legal title to a property solely to secure a loan and must reconvey title to the owner upon repayment. In the event of default, the "trustee" may, if authorized by statute, sell the property through a nonjudicial "trustee's sale" in lieu of judicial foreclosure. Meanwhile, the "trustee" makes no discretionary decisions concerning the property, which is no more held in "trust" than is property subject to a traditional mortgage.

Tellingly, both Utah law and Texas law (the law that, according to FNMA, should govern the authority of the national bank in this case to conduct a nonjudicial foreclosure in Utah) provide that the "trustee" of a trust deed is not a fiduciary. A Texas statute states unambiguously that a trust deed trustee "may not be … held to the obligations of a fiduciary." Tex. Prop.

Code § 51.0074(b)(2). Utah case law is to the same effect. *See*, *e.g.*, *First Sec. Bank of Utah, N.A. v. Banberry Crossing*, 780 P.2d 1253, 1256 (Utah 1989). Because a bank designated as a trust deed "trustee" is not acting in a fiduciary capacity *at all*, section 92a cannot be validly construed to apply to the bank's activity because it is triggered only when applicable state law authorizes state-chartered banks to act in a "fiduciary capacity." 12 U.S.C. § 92a(a).

Even if a trust deed "trustee" could be said to act in a "fiduciary capacity," Utah law, like Texas law, *permits* a national bank to act as a trust deed trustee. Utah law differs in that it does not authorize any bank acting in that capacity to transfer ownership of the property in a particular manner—through nonjudicial foreclosure. The law of real property in general, and of foreclosure in particular, is quintessentially a matter of the law of the state where the property is located. *See*, *e.g.*, Restatement (Second) of Conflict of Laws § 229 (1971) ("The method for the foreclosure of a mortgage on land and the interests in the land resulting from the foreclosure are determined by the local law of the situs."); David B. Young, *Mortgages & Party Autonomy in Choice of Law,* 45 Ark. L. Rev. 345, 349 (1992) ("The substantive as well as the procedural law of the situs applies in any truly local, in rem action, notably a mortgage foreclosure.").

Nothing in section 92a's provisions authorizing national banks to act in a fiduciary capacity when state banks may do so, and when the activity does not contravene state law, suggests an intent to excuse such banks from complying with state-law requirements governing the manner in which real property may be transferred (including through foreclosure), or

to supply statutory authorization for conveyances not recognized by state law. OCC itself, in an earlier case where related issues were raised (but not decided) conceded that an out-of-state national bank foreclosing on Utah property "is subject to Utah requirements governing the conduct of the foreclosure," but the agency inexplicably failed to acknowledge that the state laws at issue govern the conduct of foreclosures. OCC Amicus Brief, at 9, *Dutcher v. Matheson*, No. 12-4150 (10th Cir. filed July 12, 2013).

Assuming arguendo that section 92a's concerns are even implicated by the absence of statutory authority for banks to perform nonjudicial foreclosures in Utah, the Utah Supreme Court was right to hold that it would be unreasonable to interpret section 92a as requiring reference to a *Texas* statute to determine the authority of a national bank to foreclose nonjudicially in *Utah*. Texas law neither can, nor purports to, authorize Texas state banks to foreclose nonjudicially in Utah, so it is nonsensical to extend such authority to national banks under section 92a on the theory that Texas state banks possess it. Nor is it reasonable to say that a bank foreclosing on a Utah trust deed in Utah acts in a fiduciary capacity in Texas.

Section 92a, all agree, provides that a national bank may not act in a fiduciary capacity in contravention of state law and that OCC may authorize it to act in a particular fiduciary capacity only if state banks in the state where it is "located" may do so. In addition, a national bank will not be deemed to act in contravention of a state's law if that state permits state banks to engage in the same activity. *See* 12 U.S.C. § 92a(a), (b). The question here is which state's law

determines these issues of authorization and contravention.

The Solicitor General contends that the Utah Supreme Court's choice of Utah law as the relevant law for purposes of determining a bank's authority to foreclose on a trust deed on Utah property reflects a failure to defer to OCC's regulatory construction of the supposedly ambiguous statutory term "located." But OCC does not disagree with the Utah Supreme Court on what "located" means in this statute: OCC has long maintained, including in the regulation on which the Solicitor General relies, that *all* the references to state law in section 92a refer to *the state where the bank acts in a fiduciary capacity*. *See* OCC, *Fiduciary Activities of National Banks*, Final Rule, 66 Fed. Reg. 34792, 34794–95 (July 2, 2001) (promulgating 12 CFR § 9.7(d)); *see also* OCC Interpretive Letter 695, 1995 WL 788827, at *11 (Dec. 8, 1995); OCC Interpretive Letter 866, 1999 WL 983923, at *4 (Oct. 8, 1999); OCC Interpretive Letter 872, 1999 WL 1251391, at *3–4 (Oct. 28, 1999). The Utah Supreme Court gave the statutory language that same construction. Pet. App. 19a.

The point of difference is only over whether it is reasonable to say that a bank that conducts a nonjudicial foreclosure on a trust deed on residential property in Utah *acts in a fiduciary capacity in Texas*. OCC's regulation may reasonably define where a bank that opens a trust account, or undertakes other fiduciary functions, "acts," but the regulation's criteria bear no reasonable relationship to trust deeds secur-

ing residential loans.[1] Indeed, when OCC promulgated the regulation, it did not mention trust deeds, much less indicate that it had considered the possibility that the regulation might apply to them or explain how the factors set forth in the regulation were appropriate for determining where a national bank that forecloses on a trust deed acts for purposes of section 92a. *See* Final Rule, 66 Fed. Reg. at 34792 ff.

Moreover, the Utah Supreme Court's decision cannot have the adverse consequences hypothesized by the Solicitor General because it applies only to foreclosure of trust deeds, which create security interests in individual properties that are necessarily governed by the law of the state where they are located. The decision does not address the disposition of properties actually held by trusts, and hence could never apply to circumstances in which "a single trust may contain property located in several different States." U.S. Br. 17.

By contrast, the Solicitor General's position would have bizarre consequences, effectively allowing the export of one state's foreclosure laws to another and applying out-of-state law to property transactions the foreign state has no power to regulate. Indeed, under the Solicitor General's view, a lender making a loan in a state that does not even use trust deeds or allow nonjudicial foreclosures could override the laws of

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[1] A bank that is appointed trustee of a trust deed does not "execute" any documents creating a fiduciary relationship, nor does it "accept" a fiduciary appointment in some location remote from where the deed is recorded; and a trust deed trustee makes no "discretionary decisions regarding the investment or distribution of fiduciary assets." 12 CFR § 9.7(d).

that state by purporting to appoint an out-of-state national bank as a trust deed "trustee," and having the bank claim to "accept" that appointment in a state that uses trust deeds and permits nonjudicial foreclosures. At the same time, however, the Solicitor General's view permits only out-of-state national banks to take advantage of out-of-state laws, while state banks and in-state national banks remain bound by the foreclosure laws of the state where the property is located.

Such results would contravene not only the principle that property law is a core area of state concern, *see Butner v. U.S.*, 440 U.S. 48, 55 (1979); *Oregon ex rel. State Land Bd. v. Corvallis Sand & Gravel Co.*, 429 U.S. 363, 378–79 (1977), but also the National Bank Act's fundamental legislative intent of ensuring competitive equality between state and national banks, *see*, *e.g.*, *First Nat'l Bank v. Dickinson*, 396 U.S. 122, 131 (1969); *Franklin Nat'l Bank v. New York*, 347 U.S. 373, 375 (1954). Nothing in the National Bank Act requires Utah to permit a national bank to conduct nonjudicial foreclosures on *Utah* property, which *no* state bank may do, simply because a *Texas* state bank could nonjudicially foreclose on property in *Texas*.

CONCLUSION

For the foregoing reasons, as well as those set forth in Ms. Sundquist's brief in opposition and the brief of the United States as amicus curiae, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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