No. 13-852

In the Supreme Court of the United States

FEDERAL NATIONAL MORTGAGE ASSOCIATION,
PETITIONER

v.

LORAINE SUNDQUIST

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

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

DONALD B. VERRILLI, JR.
Solicitor General
Counsel of Record
JOYCE R. BRANDA
Acting Assistant Attorney General
MALCOLM L. STEWART
Deputy Solicitor General
ALLON KEDEM
Assistant to the Solicitor General

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

AMY S. FRIEND
Senior Deputy Comptroller and Chief Counsel
KAREN O. SOLOMON
DANIEL P. STIPANO
Deputy Chief Counsels
HORACE G. SNEED
Director of Litigation
DOUGLAS B. JORDAN
Attorney
Office of the Comptroller of the Currency
Washington, D.C. 20219

QUESTION PRESENTED

The Office of the Comptroller of the Currency (OCC) may authorize a national bank to exercise fiduciary powers "when not in contravention of State or local law." 12 U.S.C. 92a(a). The question presented is as follows:

Whether the OCC has reasonably construed Section 92a(a) as referring to the laws of the State in which a national bank performs certain core fiduciary activities.

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INTEREST OF THE UNITED STATES

This brief is submitted in response to the order of the Court inviting the Solicitor General to express the views of the United States. In the view of the United States, the petition for a writ of certiorari should be denied.

STATEMENT

1. The National Bank Act (Act), 12 U.S.C. 1 *et seq.*, established a system of nationally chartered banks. "National banks are instrumentalities of the Federal government, created for a public purpose, and as such necessarily subject to the paramount authority of the United States." *Davis* v. *Elmira Sav. Bank*, 161 U.S. 275, 283 (1896).

a. The Office of the Comptroller of the Currency (OCC) is a bureau within the Department of the Treasury charged with administration of the Act and

with "superintendence of national banks." *Nationsbank of N.C., N.A.* v. *Variable Annuity Life Ins. Co.*, 513 U.S. 251, 254 (1995). In furtherance of that role, the OCC is "authorized to prescribe rules and regulations to carry out the responsibilities of the office." 12 U.S.C. 93a.

The Act vests national banks with certain enumerated powers. Among these are the power to "purchase, hold, and convey real estate," including as security for and in satisfaction of debts. 12 U.S.C. 29 (Second) and (Third); see 12 U.S.C. 371 (authorizing mortgage lending). The Act further provides:

> 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).[1]

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[1] Section 92a was originally enacted in 1913 as part of the Federal Reserve Act, ch. 6, § 11(k), 38 Stat. 262. In 1962, Congress removed Section 92a from the Federal Reserve Act and transferred authority from the Board of Governors of the Federal Reserve System to the OCC. See Act of Sept. 28, 1962, Pub. L. No. 87-722, 76 Stat. 668. Although the provision was codified at 12 U.S.C. 92a, the 1962 statutory revision did not purport to amend the National Bank Act or place the provision therein. See *In re Corestates Trust Fee Litig.*, 39 F.3d 61, 67 (3d Cir. 1994). The

The Act authorizes the OCC "to promulgate such regulations as [it] may deem necessary to enforce compliance with the provisions of [Section 92a] and the proper exercise of the powers granted therein." 12 U.S.C. 92a(j). The OCC has issued regulations that specify the requirements for a national bank to obtain approval to act as a fiduciary and the conditions under which fiduciary powers may be exercised. See 12 C.F.R. Pt. 9.

b. In 2001, the OCC undertook notice-and-comment rulemaking to "address[] the application of 12 U.S.C. 92a in the context of a national bank engaging in fiduciary activities in more than one state." 66 Fed. Reg. 34,792 (July 2, 2001). The rulemaking reflected advice from three prior interpretive letters in which the OCC had been asked by national banks to opine on their authority to act in a fiduciary capacity in multiple States and to solicit and service customers across state lines. *Ibid.* The current regulations provide that, if a national bank has been given approval to act as a fiduciary, it "may act in a fiduciary capacity in any state." 12 C.F.R. 9.7(a). The bank may also market fiduciary services to customers in other States, may act as a fiduciary for those customers, and may serve in a fiduciary capacity "for relationships that include property located in other states." 12 C.F.R. 9.7(b).

As noted above, a national bank may exercise fiduciary powers only "when not in contravention of State or local law, * * * under the laws of the State in which the national bank is located." 12 U.S.C. 92a(a). The regulations provide that, "[f]or each fiduciary

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provision is nevertheless commonly referred to as being part of National Bank Act, a convention followed in this brief.

relationship, the state referred to in section 92a is the state in which the bank acts in a fiduciary capacity for that relationship." 12 C.F.R. 9.7(d). For this purpose, the State in which a national bank "acts in a fiduciary capacity" is the State where it performs three core fiduciary functions: "[1] accept[ing] the fiduciary appointment, [2] execut[ing] the documents that create the fiduciary relationship, and [3] mak-[ing] discretionary decisions" regarding the relationship. *Ibid.* "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." *Ibid.* The regulations further provide that a national bank's fiduciary powers are subject only to "the laws of the state in which the bank acts in a fiduciary capacity." 12 C.F.R. 9.7(e)(1). All other "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).

2. a. In 2006, respondent executed a deed of trust as security for a loan on her Utah property. In 2009, she stopped making payments on the mortgage. The beneficiary under the deed of trust appointed ReconTrust Company N.A., a national bank, as the successor trustee. In January 2011, ReconTrust gave notice to respondent of a planned trustee's sale of the property. In May 2011, ReconTrust conducted a nonjudicial foreclosure of the property and deeded it to petitioner. Pet. App. 3a.

Respondent remained in residence, and in June 2011, petitioner filed an unlawful detainer action to take possession of the property. Pet. App. 3a. At a hearing to decide possession during the pendency of

the litigation, respondent argued that ReconTrust had not been authorized by Utah law to conduct the nonjudicial foreclosure. *Id.* at 3a, 30a-31a. Under Utah law, the power of sale in a nonjudicial foreclosure may be exercised only by active Utah State Bar members or by title insurance companies doing business in the State. Utah Code Ann. § 57-1-21(1)(a)(i) and (iv) (LexisNexis 2010); see *id.* §§ 57-1-23, 57-1-24.

Respondent argued that the sale was invalid under Utah law because ReconTrust was neither a member of the state bar nor a title insurance company, and therefore was not a qualified trustee. Pet. App. 3a, 30a-31a. In response, petitioner argued that "ReconTrust, as a national bank, was authorized to conduct the sale under federal law and that federal law preempted the Utah statute." *Id.* at 2a. The district court ruled in favor of petitioner. *Id.* at 3a, 36a.

b. The Utah Supreme Court granted respondent's petition for interlocutory review and stayed her eviction pending appeal. Pet. App. 3a. The court focused on language in Section 92a that gives a national bank authority "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.'" *Id.* at 10a (brackets in original) (quoting 12 U.S.C. 92a(a)). The court stated that the "key inquiry under the statute is determining where a national bank is 'located.'" *Ibid.* The court concluded that "a national bank is located in the place or places[ ]where it acts or conducts business," *id.* at 11a, and that a bank "certainly acts as a trustee in the state in which it liquidates trust assets," *id.* at 12a. The court held on that basis that "Congress ha[d] directly spoken to the question at issue,"

making ReconTrust subject to the law of Utah—the State in which the sale was conducted. *Id.* at 13a.

The Utah Supreme Court further held that, "even if the plain meaning of the statute were not clear," two "clear statement" canons of statutory construction would dictate the conclusion that Utah law controls. Pet. App. 14a; see *id.* at 14a-18a. Under the first canon, a federal statute will not be read to "pre-empt the historic powers of the States" absent "a clear statement of [Congress's] intention to do so." *Id.* at 14a (quoting *Raygor* v. *Regents of the Univ. of Minn.*, 534 U.S. 533, 543 (2002)). Under the second canon, a clear statement is needed to overcome doubt "that Congress would leave the determination of major policy questions to agency discretion." *Id.* at 16a (citing *FDA* v. *Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000)). The court found petitioner's view of Section 92a, under which the "provision delegates to the Comptroller the discretion to authorize one state to regulate the terms and conditions of a foreclosure sale in another state," to be inconsistent with both those canons of construction. *Id.* at 17a.

The Utah Supreme Court further stated that, even if it were necessary to consider the OCC's regulation, the court would "find the Comptroller's current interpretation of the statute * * * to be unreasonable." Pet. App. 18a. The court described the regulation as "inexplicably defin[ing] a bank's 'location' as the place where it engages in three specific activities," namely, the three core fiduciary functions specified in 12 C.F.R. 9.7(d). Pet. App. 19a. The court found "nothing in the statute itself that ascribes any particular significance [to] these three particular acts," which "could theoretically be performed in any location

without regard to the location of the trust property." *Ibid.*

Having concluded that the Act did not preempt Utah law, the Utah Supreme Court reserved judgment on all other issues. Pet. App. 23a. The court remanded the case to the district court, where "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." *Ibid.*

Justice Lee filed an opinion concurring in part and concurring in the judgment. Justice Lee disagreed with the majority's conclusion that the statute was unambiguous as to the meaning of "located." Pet. App. 24a-27a. He nevertheless agreed that Utah law governed ReconTrust's fiduciary powers, based on the first clear-statement rule relied upon by the majority —"that on a matter of traditional state sovereignty over the disposition of title to property of an inherently local nature, [a court should not] lightly deem Congress to have intruded on the local state's sovereignty." *Id.* at 27a.

DISCUSSION

Although the decision below is incorrect, the petition for a writ of certiorari should be denied. Two serious jurisdictional obstacles would likely prevent the Court from reaching the merits if it granted review in this case. And while the decision below is in substantial tension with an unpublished decision of the Tenth Circuit, it does not squarely conflict with any published appellate decision.

A. The Utah Supreme Court's Interlocutory Decision Is Not A "Final Judgment" Over Which This Court Has Jurisdiction

This Court's jurisdiction to review state-court decisions is limited to "[f]inal judgments or decrees rendered by the highest court of a State in which a decision could be had." 28 U.S.C. 1257(a). That provision "establishes a firm final judgment rule." *Jefferson* v. *City of Tarrant*, 522 U.S. 75, 81 (1997). "To be reviewable by this Court, a state-court judgment must be final 'in two senses: it must be subject to no further review or correction in any other state tribunal; it must also be final as an effective determination of the litigation and not of merely interlocutory or intermediate steps therein. It must be the final word of a final court.'" *Ibid.* (quoting *Market St. Ry.* v. *Railroad Comm'n*, 324 U.S. 548, 551 (1945)).

The Utah Supreme Court's avowedly "interlocutory" (Pet. App. 3a) decision in this case did not finally determine or terminate the litigation. Based on its conclusion that the district court had incorrectly resolved the preemption issue, the Utah Supreme Court "vacate[d] the district court's order of restitution and remand[ed] for additional proceedings." *Id.* at 2a. The Utah Supreme Court recognized that the parties had "raise[d] 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." *Id.* at 23a. Those issues remain to be resolved in the first instance by the district court on remand. *Id.* at 23a-24a.

This case does not fall "within the 'limited set of situations in which [this Court has] found finality as to the federal issue despite the ordering of further pro-

ceedings in the lower state courts.'" *Jefferson*, 522 U.S. at 82; see *Cox Broad. Corp.* v. *Cohn*, 420 U.S. 469 (1975). Of the four *Cox Broadcasting* categories, see *id.* at 477-483, the one most arguably relevant here is the fourth, which includes cases in which "reversal of the state court on the federal issue would be preclusive of any further litigation on the relevant cause of action," *id.* at 482-483. The present case, however, does not appear to meet that description. Even if this Court granted a writ of certiorari and reversed the Utah Supreme Court's non-preemption holding, respondent might nevertheless prevail on one of her remaining defenses.

Several of those defenses appear to be tied to the question whether ReconTrust was "authorized" under Utah law to conduct the foreclosure sale. See Resp. Utah S. Ct. Br., 2011 WL 11556544, at *12-*16 (Nov. 3, 2011). That question would become moot if this Court granted review and held that Utah law did not govern ReconTrust's authority to foreclose. But respondent's other defenses to foreclosure, left unresolved by the Utah Supreme Court, would require resolution even if the federal issue were decided in petitioner's favor. See Resp. Utah S. Ct. Reply Br., 2012 WL 10194574, at *7 n.5 (July 27, 2012) (arguing that petitioner was not the beneficiary of the trust deed at the time of the foreclosure sale and therefore was not in a position to make a credit bid for the property). Because reversal of the Utah Supreme Court's ruling would not "be preclusive of any further litigation" regarding the validity of the foreclosure, *Cox Broad.*, 420 U.S. at 482-483, the decision below is not a "final judgment" within the meaning of 28 U.S.C. 1257(a).

B. A Substantial Question Exists As To The Timeliness Of The Petition

Under 28 U.S.C. 2101(c), absent an extension of time, a petition for a writ of certiorari must be filed "within ninety days after the entry of * * * judgment," a requirement that this Court has described as "mandatory and jurisdictional." *Missouri* v. *Jenkins*, 495 U.S. 33, 45 (1990). In this case, the Utah Supreme Court's judgment was entered on July 23, 2013, Pet. App. 1a, making the petition due on October 21. Because petitioner waited until December 2 to seek an extension of time in which to file, respondent argues (Br. in Opp. 1-2, 6-7) that the petition is untimely.

Petitioner contends (Reply Br. 2-3) that the 90-day filing period did not begin to run until the Utah Supreme Court denied its petition for rehearing on September 16, 2013. Under this Court's rules, if a rehearing petition is timely filed, or if the lower court "appropriately entertains" an untimely rehearing petition, the 90-day period for seeking this Court's review begins to run when the lower court disposes of the rehearing petition. Sup. Ct. R. 13.3. Petitioner's rehearing petition in the Utah Supreme Court was apparently untimely, since it was filed three days beyond the 14-day period allowed under Utah Rule of Appellate Procedure 35(a).[2] Pet. App. 41a-43a. Petitioner argues (Reply Br. 2-3) that the Utah Supreme Court nevertheless entertained the rehearing petition because (1) the petition was received and circulated to the court, despite the rule that an untimely rehearing petition "will not be received by the clerk," Utah R.

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[2] Petitioner "maintains that the rehearing petition was timely" (Reply Br. 3) but does not state the basis for that claim.

App. P. 35(d); (2) the court denied the petition rather than dismissing it, employing language in its order similar to language used to deny timely petitions; and (3) the court declined to act on respondent's motion to strike the rehearing petition as untimely, and it has not acted on respondent's request to clarify that the petition was denied as untimely. According to petitioner, this treatment of the rehearing petition shows that the petition was "assuredly 'entertain[ed]' by the court below." Reply Br. 3 (brackets in original).

Although this Court has not precisely defined the term "appropriately entertains" in Supreme Court Rule 13.3, two of its precedents provide guidance. In *Young* v. *Harper*, 520 U.S. 143 (1997), the 90-day clock was deemed reset by a tardy rehearing petition when the court of appeals had granted permission to file a late petition, had treated it as timely, and had delayed issuance of its mandate until the petition was denied. *Id.* at 147 n.1. In *Hibbs* v. *Winn*, 542 U.S. 88 (2004), "[t]he Court of Appeals, on its own motion, recalled its mandate and ordered the parties to brief the question whether the case should be reheard en banc." *Id.* at 97. As this Court explained, the court of appeals' briefing order in *Hibbs*, like the decision in *Young* to entertain the untimely petition, shared a "key characteristic" with a timely rehearing petition: "All three raise the question whether the court will modify the judgment and alter the parties' rights." *Id.* at 98.

Thus, in both *Young* and *Hibbs*, the courts of appeals had expressly indicated, in orders issued *before* the ultimate denials of rehearing, that they would consider on the merits whether the cases should be reheard. To be sure, no decision of this Court holds that the circumstances identified by petitioner are

*in*sufficient to restart the 90-day deadline for filing a petition for a writ of certiorari. To accept the certiorari petition as timely in the present circumstances, however, would substantially expand Supreme Court Rule 13.3 beyond past practice.

C. The OCC Has Reasonably Interpreted Section 92a As Applying The Law Of The State In Which A National Bank Performs Certain Core Fiduciary Functions

Section 92a permits a national bank, when authorized by the OCC, to exercise fiduciary powers "when not in contravention of State or local law." 12 U.S.C. 92a(a). The OCC has reasonably interpreted that language, and the other references to "State" in Section 92a, as referring to the State in which a national bank performs certain core fiduciary functions. Under the OCC's approach, a national bank that performs those functions in one State must comply with that State's law (and only with that State's law), even if the trust property is located in another State. The Utah Supreme Court held that, at least in cases involving the sale of real property, the national bank's authority to perform trust functions must instead be determined under the law of the State where the property is located. That holding is incorrect.

1. "National banks are instrumentalities of the Federal government," *Davis* v. *Elmira Sav. Bank*, 161 U.S. 275, 283 (1896), and they possess the powers conferred on them by federal law. The OCC may authorize a national bank to act as a fiduciary, 12 U.S.C. 92a(a), and it is undisputed that ReconTrust received such authorization. The question is whether ReconTrust's exercise of federally granted fiduciary authority in the circumstances of this case would be "in contravention of State or local law." *Ibid.*

In the various National Bank Act provisions that refer to state law, "the references to state laws occur in conjunction with references to, or descriptions of, the national bank's acting in a fiduciary capacity." OCC Interpretive Ltr. No. 866, at 5 (Oct. 8, 1999).[3] The most logical inference, and the one drawn by the OCC, is that the statute uses the term "State"—including in Section 92a(a)'s phrase "the State in which the national bank is located"—to mean the "state where it acts in a fiduciary capacity." *Id.* at 6.

In 1994, Congress enacted the Riegle-Neal Interstate Banking and Branching Efficiency Act of 1994, § 101, 108 Stat. 2339, which permitted national banks to establish branch offices across state lines. That change in the legal regime, combined with "new technologies that greatly facilitate[d] the marketing and delivery of fiduciary services to customers nationwide," produced an "increase in national banks' interstate fiduciary operations." 65 Fed. Reg. 75,875 (Dec. 5, 2000). As a result, the OCC received questions from national banks about their authority to perform fiduciary activities in, and on behalf of customers from, multiple States, as well as questions about the law that would apply to those activities. See OCC Interpretive Ltr. No. 872 (Oct. 28, 1999)[4]; OCC Interpretive Ltr. No. 866; OCC Interpretive Ltr. No. 695 (Dec. 8, 1995).[5]

The OCC accordingly initiated a rulemaking to "address[] the application of 12 U.S.C. 92a in the con-

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[3] Available at http://www.occ.gov/static/interpretations-and-precedents/oct99/int866.pdf.

[4] Available at http://www.occ.gov/static/interpretations-and-precedents/dec99/int872.pdf.

[5] Available at 1995 WL 788085.

text of a national bank engaging in fiduciary activities in more than one state." 66 Fed. Reg. at 34,792. "The purpose of the rulemaking was to provide clarity and certainty for national banks' multi-state fiduciary activities." *Ibid.* After soliciting and reviewing public comments, the OCC promulgated regulations, now codified at 12 C.F.R. 9.7, to govern "Multi-state fiduciary operations."

The regulations confirm that a national bank, "[w]hile acting in a fiduciary capacity in one state, * * * [may] act as fiduciary for[] customers located in any state, and it may act as fiduciary for relationships that include property located in other states." 12 C.F.R. 9.7(b). The regulations further provide 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." 12 C.F.R. 9.7(d).

To determine where a national bank "acts in a fiduciary capacity," the regulations follow the approach that the OCC had outlined in its prior interpretive advice. 66 Fed. Reg. at 34,792. That advice had concluded that "the best construction of the statute" was to define the location of fiduciary activity as "the place at which the bank performs core functions of a fiduciary." OCC Interpretive Ltr. No. 866, at 6. A fiduciary's "core functions include accepting the appointment, executing the documents that create the fiduciary relationship, and making decisions regarding the investment or distribution of fiduciary assets." *Ibid.*; see 12 C.F.R. 9.7(d) (similar). Under widely accepted principles of trust law, those "core functions" constitute essential features of a fiduciary relationship: its establishment, see Restatement (Second) of Trusts

§ 169 (1959) (trustee's duty to administer trust begins "[u]pon acceptance of the trust by the trustee"); its scope, see Restatement (Third) of Trusts § 76(1) (2007) ("The trustee has a duty to administer the trust * * * in accordance with the terms of the trust."); and its proper administration, see *id.* § 87 cmt. a ("The most important of the discretionary powers in most trusts are those having to do with various aspects of the investment function, together with, in many trusts, those having to do with discretionary distributions.").

The OCC has also noted that its "core functions" approach is "consistent with [the] analysis employed by the courts and the OCC in other situations." OCC Interpretive Ltr. No. 866, at 6. For instance, federal law permits a national bank to charge interest "at the rate allowed by the laws of the State * * * where the bank is located." 12 U.S.C. 85. For purposes of that provision, a national bank that issues credit cards is not "located" wherever its customers reside or make their credit card purchases, which "would make the meaning of [the] term 'located' too uncertain." OCC Interpretive Ltr. No. 866, at 6 (citing *Marquette Nat'l Bank* v. *First of Omaha Serv. Corp.*, 439 U.S. 299, 311-313 (1978)). Similarly, a national bank's authority to operate a branch, see 12 U.S.C. 36, depends on where "certain key bank activities" occur, not on the location of the bank's interactions with customers. OCC Interpretive Ltr. No. 866, at 6. To tie a bank's fiduciary powers to the location of its customers therefore "would be fundamentally inconsistent with how national banks are permitted to exercise other authorized powers." *Id.* at 7.

The OCC's core-functions approach to determining the location of a national bank's fiduciary activities thus is consistent with trust-law principles, with other parts of the Act, and with the realities of modern banking. It therefore is a "permissible construction of the statute" by the agency charged with its enforcement, *Chevron U.S.A. Inc.* v. *NRDC, Inc.*, 467 U.S. 837, 843 (1984), and should accordingly be given deference, see *Smiley* v. *Citibank (S.D.), N.A.*, 517 U.S. 735, 739 (1996) ("The Comptroller of the Currency * * * is charged with the enforcement of 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.") (citation, quotation marks, and brackets omitted).

2. The Utah Supreme Court held that its own reading of Section 92a was compelled by the "plain meaning" of the statute, Pet. App. 10a-13a, and that the OCC's regulation was unreasonable, *id.* at 18a-21a. The court also held that its view was compelled by two "clear statement" canons of statutory interpretation. *Id.* at 14a-18a. Those holdings are erroneous.

a. This Court has recognized that "the term 'located,' as it appears in the National Bank Act, has no fixed, plain meaning." *Wachovia Bank, N.A.* v. *Schmidt*, 546 U.S. 303, 313 (2006); see *id.* at 318 ("'[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."). In using such a plastic term, "Congress * * * understood that the ambiguity would be resolved, first and foremost, by the agency." *Smiley*, 517 U.S. at 740-741.

The Utah Supreme Court stated that "[a] national bank is located in those places where it acts or conducts business." Pet. App. 12a. By itself, that statement is not logically inconsistent with the OCC's determination that a bank is "located" in the State where it performs enumerated fiduciary activities. The court went astray, however, in concluding that, when a national bank sells trust assets as a trustee, it "acts or conducts business" *only* in the State where the *property* is located. *Ibid.*

Because Section 92a refers to "*the State* in which the national bank is located," 12 U.S.C. 92a(a) (emphasis added), the most natural inference is that the laws of a single State will apply to the management of a particular trust. Because a single trust may contain property located in several different States, the Utah Supreme Court's property-based rule could subject a national bank's conduct of a single fiduciary relationship to the laws of several different States—a result that could "throw into confusion the complex system of modern interstate banking." *Marquette Nat'l Bank*, 439 U.S. at 312. The OCC's core-functions approach, by contrast, means that for each fiduciary relationship, there is only "one state in which [a national bank] acts in a fiduciary capacity for purposes of 12 U.S.C. 92a." 66 Fed. Reg. at 34,792-34,793; see *id.* at 34,795 (recognizing the need "to simplify the determination of where a bank with multi-state operations is acting in a fiduciary capacity").

b. The Utah Supreme Court also erred in holding that its interpretation of the statute was compelled by two "clear statement" canons of statutory construction. Pet. App. 14a-18a.

i. The presumption against construing statutes to "alter the usual constitutional balance between the States and the Federal Government," Pet. 14a (citation omitted), has no application here. Because national banks derive their authority from federal law, the scope of that authority is presumed to be set by federal law and to preempt any inconsistent state law. "[I]n the context of national bank legislation, * * * grants of both enumerated and incidental 'powers' to national banks as grants of authority [are] not normally limited by, but rather ordinarily pre-empt[], contrary state law." *Barnett Bank of Marion Cnty., N.A.* v. *Nelson*, 517 U.S. 25, 32 (1996). "[W]here Congress has not expressly conditioned the grant of 'power' upon a grant of state permission, the Court has ordinarily found that no such condition applies." *Id.* at 34.

In any event, the OCC's core-functions approach "does not mean that national banks may engage in fiduciary activities free from state-imposed restrictions. Rather, [it] simply identifies *which* state's laws will apply." OCC Interpretive Ltr. No. 866, at 7. The regulations thus provide much-needed "clarity and certainty for national banks' multi-state fiduciary activities," 66 Fed. Reg. at 34,792, while preserving an appropriate role for state law.

ii. Any presumption against delegating "major questions of policy" to an agency, Pet. App. 16a (quotation marks omitted), would be similarly inapplicable here. Section 92a authorizes the OCC "to grant [fiduciary powers] by special permit to national banks applying therefor, when not in contravention of State or local law." 12 U.S.C. 92a(a). The statute itself thus resolves the "major questions of policy," by making clear both that national banks may exercise fiduciary

powers and that they must do so in compliance with state law.

Although the statute does not set forth a standard for determining *which* State's law will apply to a particular fiduciary activity (beyond indicating that it is "the State in which the national bank is located," 12 U.S.C. 92a(a)), Congress's intent to vest the OCC with interpretive authority on this interstitial question is beyond reasonable dispute. Section 92a empowers the OCC "to promulgate such regulations as [it] may deem necessary to enforce compliance with the provisions of this section and the proper exercise of the powers granted therein." 12 U.S.C. 92a(j). Identifying the State whose laws will govern particular fiduciary activities is undoubtedly a prerequisite to determining whether a national bank has "proper[ly] exercise[d]" its fiduciary authority. See Br. in Opp. 8-10.

c. The Utah Supreme Court suggested that, under the OCC's core-functions approach, "a national bank based in Texas . . . would have a competitive advantage over a national bank based in Utah as well as Utah-chartered banks." Pet. App. 21a (citation and brackets omitted). It is true that, under the OCC's approach, some national banks may exercise fiduciary powers with respect to property located in Utah in circumstances where a Utah bank would be unable to. That potential disparity, however, is merely the consequence of the "national banking system" that "Congress intended to facilitate." *Marquette Nat'l Bank*, 439 U.S. at 314-315 (citation omitted).

In *Marquette National Bank*, this Court interpreted a provision of the Act that authorized national banks to charge interest "at the rate allowed by the laws of the State in which the bank is 'located.'" 439

U.S. at 308 (quoting 12 U.S.C. 85). The Court read that language as authorizing a national bank located in Nebraska to issue credit cards to Minnesota residents at interest rates that were consistent with Nebraska law but were in excess of the rates permitted by Minnesota's usury laws. *Id.* at 313-314. The Court rejected the argument, made by a bank subject to Minnesota law, that this result would "upset[] the competitive equality now existing between state and national banks." *Id.* at 314. The Court observed that "such inequalities" were a "necessary part" of the "system of interstate banking" that Congress had created. *Ibid.* Substantially the same analysis applies here.

D. The Decision Below Is In Substantial Tension, Though Not In Direct Conflict, With An Unpublished Decision Of The Tenth Circuit

Petitioner contends (Pet. 28-30) that the decision below conflicts with the Tenth Circuit's decision in *Garrett* v. *ReconTrust Co.*, 546 Fed. Appx. 736 (2013). Although substantial tension exists between the two decisions, the two are not squarely in conflict.

In *Garrett*, the plaintiff alleged that the defendant national bank had conducted a nonjudicial foreclosure sale of his Utah residence in violation of Utah law. 564 Fed. Appx. at 737. The plaintiff "argue[d] that Section 92a, by its plain language, dictates that Utah law, not Texas law, applied to the foreclosure sale of [his] residence." *Id.* at 738. The Tenth Circuit concluded that Section 92a is ambiguous because it "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?" *Ibid.* The court accordingly resolved the case based on the OCC's regulations, as well as on

statements made by the OCC in a brief filed at the invitation of the court in another case, *Dutcher* v. *Matheson*, 733 F.3d 980 (10th Cir. 2013).[6] See *Garrett*, 546 Fed. Appx. at 739-742.

The Tenth Circuit in *Garrett* granted the parties leave to file supplemental briefs addressing the Utah Supreme Court's decision in this case. 546 Fed. Appx. at 739 n.1. The court ultimately declined, however, to resolve the plaintiff's challenge to the validity of the pertinent OCC regulation because that challenge had not been raised in a timely manner. *Ibid.*; see *id.* at 739 (explaining that, because the plaintiff had timely "raise[d] arguments only as to the *meaning* of [the pertinent OCC rule], and not to the *reasonableness* of the regulations themselves," the court would "limit [its] inquiry accordingly"). Because the Tenth Circuit expressly reserved the question whether the OCC regulation is valid, no square conflict between the two decisions exists. And because the decision in *Garrett* is nonprecedential, the question presented here remains open within the Tenth Circuit. There is substantial tension between the two decisions, however, because the Tenth Circuit's conclusion that Section 92a(a) is ambiguous is logically irreconcilable with the Utah Supreme Court's holding that "the plain meaning of the statute" compels application of Utah law. Pet. App. 12a.[7]

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[6] In *Dutcher*, the Tenth Circuit remanded for further proceedings to determine whether the district court had subject-matter jurisdiction, without addressing the preemption issue presented here. See 733 F.3d at 983, 990.

[7] Petitioner also suggests (Pet. 29-30) that the decision below conflicts with the Fourth Circuit's decision in *Jaldin* v. *ReconTrust Co.*, 539 Fed. Appx. 97 (2013) (per curiam), cert. denied, 134 S. Ct.

E. Although The Question Presented Will Likely Warrant This Court's Review In An Appropriate Case, This Is Not A Suitable Vehicle

The OCC's regulations constitute an integral part of the national banking system, on which national banks rely to determine their authority and legal obligations. See Clearing House Ass'n Amicus Br. 8 ("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."). The ruling below significantly undermines the "clarity and certainty" that the OCC regulations are designed to achieve. 66 Fed. Reg. at 34,792.

In light of the jurisdictional obstacles identified above (see pp. 8-12, *supra*), however, this case is not a suitable vehicle for resolution of the question presented. And because the Utah Supreme Court is the only appellate court that has squarely addressed a challenge to the validity of the OCC rule at issue here, this Court's resolution of the question presented might benefit from further consideration of the issue in the lower courts. The Court therefore should wait to address the issue in an appropriate case.

2293 (2014). The court in *Jaldin* held that Section 92a preempted a Virginia statute that granted certain fiduciary powers to "state banks, but not national banks that do not have their principal office in Virginia." *Id.* at 101. Because Utah law does not permit state banks to conduct nonjudicial foreclosures, the *Jaldin* court's primary rationale for finding preemption is inapplicable here.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DONALD B. VERRILLI, JR.
Solicitor General
JOYCE R. BRANDA
Acting Assistant Attorney General
MALCOLM L. STEWART
Deputy Solicitor General
ALLON KEDEM
Assistant to the Solicitor General

AMY S. FRIEND
Senior Deputy Comptroller and Chief Counsel
KAREN O. SOLOMON
DANIEL P. STIPANO
Deputy Chief Counsels
HORACE G. SNEED
Director of Litigation
DOUGLAS B. JORDAN
Attorney
Office of the Comptroller of the Currency

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