No.

IN THE

Supreme Court of the United States

JOAN DEMAREST, PETITIONER

v.

HSBC BANK USA, N.A., ET AL

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION(S) PRESENTED

In *Americold Realty Trust v. ConAgra Foods*, 136 S.Ct. 1012 (2016), this Court ruled that, for diversity, a real estate investment trust was a citizen of the states for each of its members. This petition raises a related issue:

> When a mortgage investment trust removes a case from federal court based on diversity, is its citizenship determined by the citizenship of each of its members, or by the citizenship of its trustee?

PARTIES TO THE PROCEEDING

JOAN DEMAREST, PETITIONER

HSBC BANK USA, N.A., AS TRUSTEE FOR the REGISTERED HOLDERS OF NOMURA HOME EQUITY LOAN, INC., ASSET-BACKED CERTIFICATES, SERIES 2006-HE2, incorrectly sued herein as HSBC Bank USA, N.A.; Ocwen Loan Servicing, LLC; Mortgage Electronic Registration Systems, Inc., incorrectly sued herein as Mortgage Electronic Registration Systems; Western Progressive, LLC; Does, 1–10, inclusive, RESPONDENTS.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

STATUTES

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is published at 920 F.3d 1223 (9th Cir. 2019). That opinion is found in the Appendix to the Petition for a Writ of Certiorari (or "Pet. App."), at 1a-18a. The opinion of the United States District Court for the Central District of California, (Pet. App. 19a to 31a), is unpublished. The order denying the petition for rehearing is found at Pet. App. 32a

JURISDICTION

The judgment of the court of appeals was entered on April 8, 2019. Pet. 1 a, 16a. The court of appeals denied Petitioner's timely petition for rehearing on May 15, 2019. Pet. App. 32a. This Court has jurisdiction under 28 U.S.C. § 1254 (1).

RELEVANT PROVISIONS INVOLVED

28 U.S.C. § 1332 (a):

> (a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs, and is between-
>
> (1) citizens of different States;
>
> (2) citizens of a State and citizens or subjects of a foreign state, except that the district courts shall not have original jurisdiction under this

subsection of an action between citizens of a State and citizens or subjects of a foreign state who are lawfully admitted for permanent residence in the United States and are domiciled in the same State;

(3) citizens of different States and in which citizens or subjects of a foreign state are additional parties; and

(4) a foreign state, defined in section 1603(a) of this title, as plaintiff and citizens of a State or of different States.

28 U.S.C. 1332 (c)

"For the purposes of this section and section 1441 of this title- (1) a corporation shall be deemed to be a citizen of every State and foreign state by which it has been incorporated and of the State or foreign state where it has its principal place of business….

28 U.S.C. §§ 1441 (a) and (b):

(a) Generally.-Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.

(b) Removal Based on Diversity of Citizenship. -(1) In determining whether a civil action is removable on the basis of the jurisdiction under section 1332(a) of this title, the citizenship of defendants sued under fictitious names shall be disregarded.

(2) A civil action otherwise removable solely on the basis of the jurisdiction under section 1332(a) of this title may not be removed if any of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.

INTRODUCTION

In *Americold Realty Trust v. ConAgra Foods*, 136 S.Ct. 1012, 1016-1017 (2016) ("*Americold*"), this Court held that, in determining diversity, a real estate investment trust was a citizen of the states of each of its members. The Court attempted to reconcile that holding with its prior holding in *Navarro Savings Association v. Lee*, 446 U.S. 458, 459-460 (1980) ("*Navarro*"), that the citizenship of each trustee for a trust governed diversity when the trustees were suing as individual plaintiffs. It also sought to harmonize that decision with its opinion in *Carden v. Arkoma Associates*, 494 U.S. 185, 195-196 (1990) ("*Carden*"), that the citizenship of each member of a limited partnership controlled diversity.

Lower courts have attempted to apply *Americold*, *Navarro*, and *Carden* to the problems presented by investment trusts. These trusts sell shares or certificates to the investing public, but trustees, frequently banks, run them. When sued, the

trustees often remove the cases to federal court, claiming diversity. They argue that the citizenship of the trustee should decide diversity.

These investment trusts are not corporations or limited partnerships. Because they are different, the lower courts have come up with multiple approaches to determining diversity. Some say the citizenship of the trustee is crucial; others say the key difference is whether the trust is a business trust as opposed to a family or charitable trust. Others focus on the powers given the trustee. No single rule governs; diversity depends on which circuit a party finds itself.

This Court should clarify *Americold* by setting down a single rule for diversity in cases involving investment trusts. The citizenship of the trustee should not be the controlling factor. Rather, the language of the diversity statutes must be followed. Those statutes provide special diversity standards for corporations alone. Any other artificial business entity must have its citizenship decided by the citizenship of its members, as this Court indicated in *Americold.*

STATEMENT

I. Demarest sues to save her home.

On May 27, 2016, Joan Demarest ("Demarest") filed her complaint in the Los Angeles County Superior Court. Pet. App. 2a. The complaint named as defendants HSBC, Ocwen Loan Servicing, LLC (or "Ocwen"), Western Progressive, LLC (or "Western Progressive"), and MERS." Pet. App. 2a-3a.

The complaint alleged that on December 23, 2005, Demarest had taken out a loan on her home in West Hills, California. Pet. App. 3a. The promissory

note and deed of trust for this loan were pooled into a securitized trust called "Registered Holders of Nomura Home Equity Loan, Inc., Asset-Backed Certificates, Series, 2006-HE2. Pet. App. 3a. Demarest charged that HSBC acted as trustee for this investment trust. *Ibid.*

The complaint charged that Ocwen acted as the servicer for the loan. *Ibid.* Western Progressive was the foreclosure trustee under Demarest's deed of trust, which secured the loan. *Ibid.* MERS was the "nominee and beneficiary" of the deed of trust. *Ibid.*

The complaint charged none of the defendants owned Demarest's loan or had the power to enforce it through a foreclosure. Pet. App. 3a-4a. Based on this allegation, the complaint alleged six causes of action—wrongful foreclosure under California law, violation of California Civil Code section 2924 (a) (6), cancellation of written instruments, violation of the implied covenant of good faith and fair dealing, declaratory relief, and violation of California's Unfair Competition Law, Business & Professions Code sections 17200 *et seq.* Pet. App. 4a.

II. Demarest's action is removed to federal court.

Ocwen, HSBC, the investment trust, and MERS removed the action to the United States District Court for the Central District of California on July 11, 2016. Pet. App. 4a. The removal petition stated that it was filed on behalf of, among other defendants, "HSBC Bank USA, N.A., as Trustee for the registered holders of Nomura Home Equity Loan, Inc., Asset-Backed Certificate, Series 2006-HE2 ('HSBC as Trustee'), incorrectly sued herein as HSB Bank USA, N.A…." *Ibid.*

The sole basis for removal was diversity. *Ibid.* The petition alleged that Demarest was a citizen of California. *Ibid.* It also stated that Ocwen was a citizen of Delaware and Florida. *Ibid.* The petition then alleged that the citizenship of the investment trust was the same as the citizenship of HSBC, its trustee: "HSBC is a national banking association organized under the laws of the United States with its main office in McLean, Virginia…Since its main office is located in Virginia, HSBC is a citizen of Virginia for diversity purposes. Pet. App. 4a. The petition said nothing else about the citizenship of the investment trust. *Ibid.*

Because none of the defendants was a citizen of California, the petition claimed diversity jurisdiction was established. *Ibid.*

III. The District Court grants summary judgment.

MERS was granted judgment on the pleadings. Pet. App. 4a. The other defendants moved for summary judgment. The District Court granted their motion on two grounds. *Ibid.* One, Demarest lacked standing to challenge the securitization of her loan. Pet. App. 4a-5a. Two, undisputed evidence established her promissory note and deed of trust had been properly transferred to the investment trust. *Ibid.* Because no triable issue of fact existed on whether the investment trust owned the loan, all of Demarest's claims for relief failed. *Ibid.*

IV. The Ninth Circuit finds subject matter jurisdiction.

In the Ninth Circuit, Demarest challenged subject matter jurisdiction for the first time. Pet. App.

5a-6a. She stressed that the investment trust was the main defendant and that under *Americold,* the citizenship of each of its members (investors were called "members" under the trust documents), controlled diversity. Pet. App. 6a-7a.

The Ninth Circuit disagreed. Pet. App. 11a-12a. It recognized that other circuit courts had followed several approaches to the citizenship of a trust after *Americold.* Pet. App. 12a-16a. It used a rule called the "traditional trust" test. *Ibid.*

Under the Ninth Circuit's interpretation of the "traditional trust" approach, the citizenship of the trustee governs diversity provided, "the trustee possesses real and substantial control over the trust's assets…and the rights, powers, and responsibilities of the trustee, as described in the controlling agreement." Pet. App. 13a-14a (citations omitted).

The Ninth Circuit pointed to several provisions of the Pooling and Servicing Agreement (or "PSA") that governed the investment trust. Pet. App. 14a-14a. These provisions, according to court, gave HSBC exclusive power to manage the trust. *Ibid.* HSBC's citizenship alone mattered, not the citizenship of its investors. *Ibid.* The District Court had diversity jurisdiction, and the defendants properly removed the case. *Ibid.*

Nothing in *Americold* changed this result: "*Americold* might have somewhat complicated how we should ascertain the citizenship of a trust, but it upset neither *Navarro* nor our precedent in cases, where, as here, the trustee of a traditional trust is sued in its own name." Pet. App. 15a. Because Demarest raised no other objection to the District Court's ruling, the Ninth Circuit affirmed the summary judgment. *Ibid.*

Demarest filed a petition for rehearing and a suggestion for rehearing *en banc*, which the Ninth Circuit denied. Pet. App. 32a.

REASONS FOR GRANTING THE PETITION

I. Certiorari should be granted to state a single rule that governs the citizenships of investment trusts.

Investments trusts are not new. *Carden*, 494 U.S. at 191-192. They are a recent innovation in mortgage financing, however. A lender will issue commercial or home loans to hundreds or thousands of borrowers. It creates a trust to hold those loans. Shares in the trust are sold to investors (called "members" or "certificate holders"). The shares are offered as securities through securities underwriters, much like any public offering. The trust receives income from the loan payments, which it then pays to the trust's investors. *Yvanova v. New Century Mortgage Corp.*, 365 P.3d 845, 849-850 (Cal. 2016). By selling loans to the trust, the lender frees up capital to make more loans. *Ibid.*

A trustee runs the operations of the trust. *Ibid.* The trustee may appoint one or more loan servicers, which collect mortgage payments and deal with borrowers. *Ibid.*

Investment trusts, including those holding mortgages, sue, and get sued. *Ibid.* Many remove cases to federal court, arguing they can establish diversity jurisdiction. Because investment trusts are not corporations but another artificial entity, the lower courts have developed inconsistent tests for analyzing

diversity. This confusion has only increased since *Americold.*

For example, the Fifth Circuit holds that, so long as a plaintiff sues the trustee of a trust, the trust's nature is unimportant. It can be a family trust, charitable trust, or business trust. The citizenship of its trustee alone decides diversity. *SGK Properties, LLC v. U.S. Bank, N.A.*, 881 F.3d 933, 940 (5th Cir. 2018). "Again, as here, because U.S. Bank was sued in its capacity as trustee, *Navarro* [*Savings Assoc. v. Lee*, 446 U.S. 458 (1980)] controls, leaving us to determine only whether U.S. Bank possesses the sort of 'real and substantial' control over the trust's assets to make I more than just a nominal party." (Citations omitted.)

The Seventh Circuit favors this approach. *Doermer v. Oxford Financial Group, Ltd.*, 884 F.3d 643, 647 (7th Cir. 2018). The Ninth Circuit used it in Demarest's case: "In short, *Johnson* [*v. Columbia Properties. Anchorage, LP.*, 437 F.3d 894 (9th Cir. 2006)] remains good law when applied to what *Americold* labeled traditional trusts; in such a case, as *Navarro* held, the trustee is the real party in interest, and so its citizenship, not the citizenships of the trust's beneficiaries, controls the diversity analysis." Pet. App. 15a.

The Fifth Circuit suggests a second approach. This approach recognizes that ordinarily, the citizenship of an unincorporated entity such as a trust rests on the citizenship of its members. But, if the trustee of the trust "possesses…real and substantial control" over the trust, the citizenship of the trustee decides diversity. *SGK Properties, LLC v. U.S. Bank, N.A.*, 881 F.3d at 940; *Bynane v. Bank of New York Mellon*, 866 F.3d at 356. The Ninth Circuit embraced

this approach as well in Demarest's case. Pet. App. 13a-14a.

A third approach focuses on the nature of the trust. If the trust is a "traditional" trust, such as a charitable or family trust, the citizenship of the trustee is the deciding factor. But if the trust is not "traditional"—if it is an investment or business trust--the citizenship of each member must be considered. The Second Circuit followed this approach in *Raymond Loubier Irrevocable Trust v. Loubier*, 858 F.3d 719, 730 (2nd Cir. 2017): "Thus, for these traditional trusts, it is the citizenship of the trustees holding the legal right to sue on behalf of the trusts, not that of the beneficiaries, that is relevant to jurisdiction." (Citations omitted.)

The Third Circuit agrees: "[T]he Court was declaring that, because s business trust is an artificial entity and a traditional trust is not, the citizenship of a traditional trust must be determined differently than that of a business trust. We therefore conclude that the citizenship of a traditional trust is based solely on that of its trustee." *Gbforefront, L.P. v. Forefront Management Group, LLC*, 888 F.3d 29, 39 (3rd Cir. 2018) (citations omitted). The District of Columbia Circuit follows this rule. *Wong ex rel. Wong v. New Mighty U.S. Trust*, 843 F.3d 487, 494 (D.C. Cir. 2016).

How does a court distinguish a "traditional trust" from a business trust? "The second, and closely related, inquiry the court should make focuses on the purpose of the trust—a traditional trust facilitates a donative transfer, while a business trust implements a bargained-for exchange." *Gbforefront, L.P. v. Forefront Management Group, LLC*, 888 F.3d at 40 (citations omitted).

A court can turn to the principles laid out in the Second Restatement of Trusts. *Id.*, at 41. For example,

a "trust as a device for carrying on a business is not within the scope of the Restatement of this Subject…The business trust is a special kind of business association and can best be dealt with in connection with other business associations.'" Restatement (Second) of Trusts, § 1 cmt. B (1959), *quoted in Gbforefront, L.P. v. Forefront Management Group, LLC*, 888 F.3d at 40-41, fn. 13.

At least three Circuits—the Second, Third and District of Columbia Circuit—interpret diversity rules differently than the Ninth Circuit, They hold that a business or investment trust cannot be a traditional trust. The Ninth Circuit purports to follow the Fifth Circuit and the Seventh Circuit. If the Ninth Circuit opinion stands, the conflict will be obvious.

II. Certiorari should be granted because the Ninth Circuit approach is impractical.

Facts determine diversity jurisdiction. *Americold*, 136 S.Ct. at 1015-1016. The Ninth Circuit opinion focus on the PSA, which it believed gave HSBC the sole power to control the affairs of the investment trust. Pet. App.14a-15a. We do not know if the PSA was carried out. Maybe other entities, such as the loan servicer, determine how the trust operates and how the trust deals with borrowers. And a borrower, such as Demarest, is entitled to discovery. That discovery will be expensive and must be conducted before the parties can move to the merits. Factual disputes will arise and will require judicial resolution.

The Second Circuit proposes a practicable rule. Its interpretation of the "traditional" trust test will eliminate the problems that arise if a court focuses on

the power of the trustee to govern the trust. The panel's holding, because it focuses on the trustee's powers, makes for factual disputes, not easily resolved, substantial delays, and increased expense for all sides.

To determine if a trust is a business trust, a court need only look at its governing documents. Those documents will tell the court if the trust seeks outs investors, is run for a profit or otherwise engages in business activities. In Demarest's case, the analysis was easy. The investment trust sought investors from all over the nation and the world. It registered with the SEC and filed documents with the SEC. It is an investment trust, not a "traditional trust" formed to benefit family members or a charity. Pet. App. 14a-15a. The one problem is that the diversity statutes do not mention this solution.

III. No statute justifies the Ninth Circuit's test for diversity.

This Court recently stressed that federal courts have limited jurisdiction, and federal statutes set that jurisdiction:

> We have often explained that "[f]ederal courts are courts of limited jurisdiction." Article III, § 2, of the Constitution delineates "[t]he character of the controversies over which federal judicial authority may extend." And lower federal-court jurisdiction "is further limited to those subjects encompassed within a statutory grant of jurisdiction." Accordingly, "the district courts may not exercise jurisdiction absent a statutory basis." *Home Depot USA, Inc. v. Jackson*, 139 S.Ct. 1743, 1745 (2019) (citations omitted).

The Ninth Circuit's test for an investment trust's citizenship--the citizenship of the trustee or the extent of a trustee's power—is not justified by statutory language or *Americold.* This Court emphasized that, except for corporations, artificial business organizations should be considered citizens of the states for each of its members. The presumption was not a judicial whim; Congress required it:

> Congress etched this exception into the U.S. Code, adding that a corporation should also be considered a citizen of the State where it had its principal place of business. But Congress never expanded this grant of citizenship to include artificial entities other than corporations, such as joint-stock companies or limited partnerships. For these unincorporated entities, we too have "adhere[d] to our oft-repeated rule that diversity jurisdiction in a suit by or against the entity depends on the citizenship of 'all [its] members.'" *Americold,* 136 S.Ct. at 1015, *quoting Carden v. Arkoma Associates*, 494 U.S. 185, 195-196 (1990).

Under *Americold,* the presumption is that an unincorporated business entity is a citizen of the state of each of its members. *Americold,* 136 S.Ct. at 1015-1016. Only corporations enjoy a narrow exception to this presumption and only because Congress codified the presumption. The Ninth Circuit's ruling, that diversity should turn on a trustee's citizenship or its powers to manage a trust, expands diversity jurisdiction contrary to the plain language of the diversity statute. It creates an exception that Congress has not authorized.

Certiorari should be granted, so this Court reaffirms *Americold*'s rule that "when an artificial entity is sued in *its* name, it takes the citizenship of each of its members." *Americold*, 136 S.Ct. at 1016 (italics in original). Only this rule honors the clear language Congress used in the diversity statutes.

CONCLUSION

For these reasons, petitioner JOAN DEMAREST respectfully requests that the Court grant her petition for a writ of certiorari.

Respectfully submitted,

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