

ORIGINAL

20-1278

No.

In the Supreme Court
of the United States

In Re:

Johlen and Melissa Johnson,

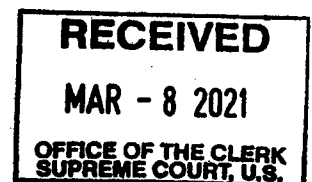
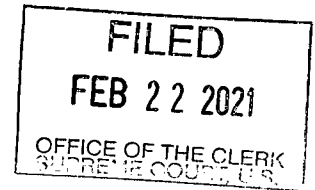
v.

Jp Morgan Chase Bank, N.A.

On Petition for a
Writ of Certiorari to
The Supreme Court of Arizona

PETITION FOR A WRIT OF CERTIORARI

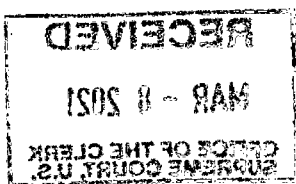
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(i)

QUESTION PRESENTED

Currently Arizona uses a scheme of statutes to effectuate forced conveyances of residential single-family property via a non-judicial foreclosure. It is known as the Deed of Trust Scheme. Generally, the property is taken from its owner, as here, by way of using the county recorder's office where the property is located. The process includes a total of three documents typically all recorded by the lenders substituted trustee in a 90-day period after which time the trustee sells the property at a trustee sale granting the property to the highest bidder at that sale. One particular concern here is that same trustee later initiated the forcible detainer action against the homeowners. Arizona Revised Statutes (A.R.S.) § 12-1177 (A) states a trustee's deed is presumed to comply with Arizona law and under A.R.S. 83-11(c) the homeowner waives all defenses to that sale once it has occurred. Consequently, any subsequent homeowner claims are mute. *See A.R.S. § 12-1177(A) and A.R.S. § 33-811(C) where borrower "waives all*



defenses and objections to the sale not raised in an action that results in the issuance of a Court order granting relief..." Under these combined statutes Petitioner "waived" his claims asserted under A.R.S. § 39-161 which prohibiting any person or entity from recording false instruments that give rise to fraudulent, baseless claims of interest in real property. However, Petitioners clearly did not "waive" these claims and therefore have been deprived of their property without due process of law under the fifth amendment.

In some instances a constitutional injury arises as a result of two or more statutory provisions operating together. *See, Seila Law LLC v. Consumer Financial Protection Bureau, March, 2020* citing, *Free Enterprise Fund, supra*, at 509 (stating that the convergence of "a number of statutory provisions" produce a constitutional violation). The provision requiring "good-cause removal is only one of [the] statutory provisions that, working together, produce a constitutional violation."

Arizona provides no path for a homeowner to assert challenges to the trustee sale after it has occurred and the Deed of Trust Scheme is an arrangement of statutes leading to non-judicial forced conveyances without due process and is therefore unconstitutional. Thus, the question presented here,

Does the prevailing Opinions of the Arizona Deed of Trust Scheme produce a constitutional violation, and therefore provide this Court with good cause for removal of one or more of its provisions under severability?

The answer is of national importance in these unprecedented times of our country's financial uncertainty. Many homeowner's across the county currently await these scheduled trustee sales and also rely on the protections afforded from the Consumer Financial Protection Bureau ("CFPB") and the Judiciary for oversight.

(ii)

PARTIES TO THE PROCEEDING

Petitioners Johlen and Melissa Johnson were Defendants in Mohave County Superior Court and Petitioner in the Court of Appeals, Division One for the State of Arizona.

Respondents, JP Morgan Chase Bank, is a National Association and Plaintiffs in Mohave Superior Court and Respondents to this Petition.

RELATED PROCEEDINGS

There are no proceedings in other courts directly related to the case in this Court Rule 14.1(b).

(iii)
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Court of Appeals, Division One
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Appendix B

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Appendix C

Petitioners Opening Brief

OPINIONS BELOW

Petitioners ask a Writ of Certiorari be issued and Review of the resulting judgments below:

The unpublished April 23, 2020 Memorandum Decision of the Arizona Court of Appeals, Division One, designated as **Appendix A**.

The November 13, 2020 Arizona Supreme Courts denial of discretionary review designated as **Appendix B**.

JURISDICTION

The jurisdiction of the Supreme Court is invoked under 28 U. S. C. § 1257(a) and Jurisdiction is proper under 28 U.S.C. § 1254(1) and Rule 13.3. Equally Arizona's Deed of Trust statutory scheme is unjust in light of the Fifth Amendment as well as the Fair Debt Collection Practices, which is an issue of federal importance that should be settled by this Court. The date on which the highest state court decided the case was November 13, 2020. A copy of that decision appears at Appendix B.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This injury was caused as the result of at least two statutory provisions which all operating together lead to unconstitutional fact finding. See, *e.g.*, *Free Enterprise Fund, supra*, at 509 (stating that the convergence of "a number of statutory provisions" produce a constitutional violation); *Booker*, 543 U. S., at 316–317 (opinion of THOMAS, J.) (explaining that "the concerted

action of [18 U. S. C.] §3553(b)(1) *and* the operative Guide-lines *and* the relevant Rule of Criminal Procedure resulted in unconstitutional judicial factfinding”). The Deed of Trust scheme enacted in 1971 is articulated in Title 33 of Arizona Revised Statutes (A.R.S.) §§ 33-801-821 and is commonly used as “an alternative to the cumbersome judicial foreclosure system.” *See In re Krohn*, 203 Ariz. 205, 208. P.3d 774, 777 (2002). This combination of statutory provisions in Arizona’s nonjudicial foreclosure scheme, when implemented with those statutes interpretations deprive homeowners from the outset from defending their property rights in the Forcible Detainer Action (“FED”) and are denied due process under the fifth amendment.

STATEMENT OF THE CASE

The Johnsons residence is the subject property in dispute commonly known as 1668 Alta Vista Road in Bullhead, Arizona. Respondents JP Morgan Chase Bank, NA (“Chase”) is their lender

according to the Deed of Trust. Chase substituted a trustee to auction the property at a trustee sale which occurred on January 22, 2019. The highest bidder also being Chase bank. The trustees deed recorded on January 25, 2019 confirms these events. Shortly following the sale, the same substituted trustee initiated a complaint for forcible detainer in the superior court pursuant to ARS 12-117.01 in Mohave County where the Johnsons were later found guilty and thereafter appealed the superior court's ruling to the Court of Appeals, Division One. After appellants entering their Opening brief, Chase entered a 'Notice of Substitute Counsel with Consent' withdrawing the substituted trustee as representatives for Chase. Notably the 'Notice' did not include an address as required or the Plaintiffs signatory's name because it was illegible and unnotarized. The issue raised by the Johnsons on appeal was that Plaintiffs Chase could not use their substituted trustee to state a

claim or bring an action for forcible detainer on their behalf under the deed of trust scheme since they are both beneficiary and substituted trustee and because of that the recorded trustees deed is voidable by the Johnsons. (See *Opening Brief Appendix C*) Division One did not agree however and upheld the trial court, in their memorandum concluded...

“Her sole argument attacks the validity of the trustee’s sale: “[Chase] and the trustee are one in the same and additionally they are both beneficiary, and substituted trustee, therefore the Trustees Deed is void and the sale must be set aside because this trustee lacked authority to conduct the sale. ¶6 But this argument addresses the merits of title and thus is beyond the scope of a forcible detainer action. See A.R.S. § 12-1177(A) (“On the trial of an action of . . . forcible detainer, the only issue shall be the right of actual possession and the merits of title shall not be inquired into.”); see also Curtis v. Morris, 186 Ariz. 534, 534 (1996). Moreover, any challenge to the trustee’s sale

must be pursued before the sale has been completed; the trustor may not challenge the completed sale based on pre-sale objections. See A.R.S. § 33-811(C); BT Capital, LLC v. TD Serv. Co. of Ariz., 229 Ariz. 299, 301, ¶ 11 (2012). The trustee's deed raised a presumption that the sale comported with statutory requirements, see A.R.S. § 33-811(B), and Johnson has offered no basis to overcome either this presumption or waiver under § 33-811(C). Accordingly, we affirm the forcible detainer judgment."

As indicated here, because a recorded trustee's deed raises the presumption that the trustee sale comported with statutory requirements and thereby proof of a valid trustee sale, it cannot and should not also be used by the recorder of that trustee's deed to later initiate a forcible detainer action by the same named lender. Arizona's deed of trust scheme holds as its cornerstone a recorded trustee's deed affirming the trustee sale comported with all of Arizona statutory requirements under A.R.S. § 33-811(B).

REASONS FOR GRANTING THIS PETITION

Arizona Trustees Deeds are used as prima facie evidence in forcible detainer actions. The deed of trust scheme enacted in 1971 is articulated in Title 33 of our Arizona Revised Statutes. They are A.R.S. §§ 33-801 -821 and used as an alternative to the often-cumbersome mortgage and judicial foreclosure system. *In re Krohn*, 203 Ariz. 205, 208. P.3d 774, 777 (2002). One of the primary purposes served by a deed of trust is that it permits a non-judicial foreclosure sale. *Hogan*, 230 Ariz. at 585, ¶ 5, 277 P.3d at 782. A.R.S. § 33-807 empowers the trustee to sell the real property securing the underlying note through a non-judicial sale because it creates rights and responsibilities in three individuals or entities: “trustee,” “trustor,” and “beneficiary.” A.R.S. §§ 33-801(1), -801(10), 801(11); *Snyder v. HSBC Bank, USA, N.A.*, 873 F. Supp. 2d 1139, 1148 (D. Ariz. 2012). The borrower, or trustor, transfers legal title in the property to a trustee, while at the

same time retaining possession of the property and enjoying the benefits of ownership. A.R.S. §§ 33-801(8), -801(10); *Eardley v. Greenberg*, 164 Ariz. 261, 264, 792 P.2d 724, 727 (1990); *Brant v. Hargrove*, 129 Ariz. 475, 480-81, 632 P.2d 978, 983-84 (App. 1981). The trustee only holds bare legal title for the beneficiary, here Chase, however the trustee's title is supposed to be limited essentially holding legal title for the sole purpose of selling the property if the trustor/borrower defaults on the note. A.R.S. § 33-807(A); *Eardley*, 164 Ariz. at 264, 792 P.2d at 727. The trustor Johnsons rights were ignored due to the chosen activities stated herein concerning both the beneficiary and the trustee which lead to a skewed forcible detainer action. Borrowers are already stripped of many protections available in judicial foreclosure which is the reason lenders are required to strictly comply with the Deed of Trust statutes and "the statutes and Deeds of Trust must be strictly construed in favor of the

borrower". *Patton v. First Fed. Sav. & Loan Ass'n. of Phx.*, 118 Ariz. 473, 477 P.2d 152, 156 (1978).

This Petition should be granted because Arizona is in direct conflict with prevailing cases decided in California which rightfully acknowledge wrongful foreclosure actions. "If a purported assignment necessary to the chain by which the foreclosing entity claims that power is absolutely void, meaning of no legal force or effect whatsoever, the foreclosing entity has acted without legal authority by pursuing a trustee's sale, and such an unauthorized sale constitutes a wrongful foreclosure. *Barrionuevo v. Chase Bank, N.A.*, at pp. 973-974. "A void contract is without legal effect. (*Rest.2d Contracts*, § 7, com. A.) "It binds no one and is a mere nullity." (*Little v. CFS Service Corp.* (1987) 188 Cal.App.3d 1354, 1362, 233 Cal.Rptr. 923.) "Such a contract has no existence whatever. It has no legal entity for any purpose and neither action nor inaction of a party to it can validate it...." (*Colby v. Title Ins. And Trust Co.* (1911) 160 Cal. 632, 644, 117 P. 913.) California properly recognizes

wrongful foreclosure as a valid defense thereby ensuring due process for its property owners.

This Petition should also be granted because this Court's precedents are questionable as to good cause for severability and should be resolved "...the severability inquiry moves away from statutory interpretation and falls back on this Court's questionable precedents. See *Murphy*, 584 U. S., at (THOMAS, J., concurring) (slip op., at 4-6). An analysis of the Court's decisions in *Booker* and *Free Enterprise Fund* illustrates the Court's approach to determining which provision to sever when confronting an injury caused by an unconstitutional convergence of multiple statutory provisions."

The convergence of Arizona's deed of trust statutory provisions, a framework which streamlines the foreclosure process" and yet is still supposed to maintain protections for borrowers and the public. Recently in *Obduskey v. McCarthy and Holthus LLP*, 17-1307 the Court held that a business engaged in nonjudicial foreclosure proceedings

was not a debt collector under the Fair Debt Collection Practices Act as long as they are engaged only in that act. In Arizona these Plaintiffs are engaged in more than just the sale including the recovery of excess proceeds after the sale, representing the lender, or represent purchaser as plaintiff in a forcible detainer actions and these important issues were not fully resolved.

“I would see as a different case one in which the defendant went around frightening homeowners with the threat of foreclosure without showing any meaningful intention of ever actually following through. There would be a question, in such a case, whether such an entity was in fact a “business the principal purpose of which is the enforcement of security interests,” see §1692a(6), or whether it was simply using that label as a stalking horse for something else.” See *Obduskey v. McCarthy and Holthus LLP*, Justice Sotomayor, concurring.

This Court should determine whether the enforcement of the waiver of challenges regularly recited in all post sale rulings and routinely abandons all claims of trustee sale irregularities seriously disrupts protecting homeowners in light of constitutional due process. And if Arizona's overall statutory scheme in totality gives good cause to severe parts of its provisions including A.R.S. §33-811(B) and A.R.S. § 33-811(C) which have been interpreted to validate any recorded trustees deed and consequently allowing the purported highest bidder unopposed rights to actual possession of Arizona properties. A recorded trustees deed is prima summary judgment in favor of the grantee as a result of these strictly interpreted statutes. A person subject to A.R.S. § 33-811(C) "*cannot later challenge the sale based on pre-sale defenses or objections.*" See *BT Capital*, 229 Ariz. at 301 ¶ 11, 275 P.3d at 600. Also A.R.S. § 12-1177(A) explains the purpose of the FED is limited and intended to afford a summary, speedy and adequate remedy for obtaining possession.

In a FED action, "the only issue shall be the right of actual possession and the merits of title shall not be inquired into." Thus, the merits of the Plaintiffs title are beyond the scope of an FED action. *See* A.R.S. § 12-1177(A) ("[In an FED action], the only issue shall be the right of actual possession and the merits of title shall not be inquired into."); *see also* *Curtis v. Morris*, 186 Ariz. 534, 534 (1996). Since the only issue is the right of possession, the Plaintiff has the right of possession under the trustee's deed which will stand forever unopposed as allowed by this presumption. Here is Petitioners were barred from asserting claims against the trustee by virtue of the recorded trustee's deed, which the same trustee had recorded, and later initiated a forcible detainer action against the homeowners.

CONCLUSION

The recorded trustee's deed used in the action here by its recorder, raised the presumption that the trustee sale, conducted by its recorder, comported with statutory requirements that were material in rendering the decision This Petition for a Writ of Certiaori should be granted to allow challenges to the recorded trustees deed, the trustee sale, and wrongful foreclosure claims with oversight from the CFPB

The Johnsons request review of the Memorandum Decision as well as the actions leading thereto.

Respectfully submitted February 15, 2021

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