

ORIGINAL

No. 20-1801

**IN THE SUPREME COURT OF
THE UNITED STATES**

Supreme Court, U.S.
FILED

JUN 16 2021

OFFICE OF THE CLERK

IN RE:

DARREL MENDEZ

V.

NRZ REO X LLC

**ON PETITION FOR A
WRIT OF CERTIORARI TO
THE ARIZONA SUPREME COURT**

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 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. 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, Petitioner clearly did not “waive” these claims and therefore has been deprived of his property without due process of law under the fifth amendment. In some instances, as here, 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 Arizona Deed of Trust Scheme provide good cause for removal of one or more of its provisions under severability?

The answer from this Court is of national importance in these unprecedented times of our country's financial uncertainty. Many homeowners across the county currently await these scheduled trustee sales and also rely on the ability of the Consumer Financial Protection Bureau ("CFPB") for oversight and to enforce the protections of homeowner's potential excess proceeds after the trustee sale from these same trustees who later represent the lender to acquire them from the county treasurer.

(ii)

**LIST OF PARTIES TO PROCEEDING
AND RELATED CASES**

All parties are listed in the caption of the case on the cover of which Respondent party is a Limited Liability Company.

Petitioner Darrel Mendez is Petitioner here and was also Petitioner in the Arizona Supreme Court and the Court of Appeals.

NRZ REO X, LLC are Respondents here and were also Respondents in the Arizona Supreme Court and the Court of Appeals.

RELATED CASES

Petitioner is aware of no other proceedings in other courts directly related to the case in this Court Rule 14.1(b)(iii).

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Arizona Court of Appeals

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Decision of Arizona Supreme Court
Denying Review March 29, 2021

Enclosures:

Proof of Service
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OPINIONS BELOW

Petitioner respectfully prays a Writ of Certiorari be issued by this Court for review of the September 1, 2020 Memorandum Decision from the Court of Appeals for the State of Arizona, designated as Appendix A to the petition and is unpublished.

The March 29, 2021 Denial of discretionary review from the Arizona Supreme Court, designated as Appendix B to the petition and is unpublished.

JURISDICTION

The date on which the highest state court decided the case was March 29, 2021. A copy of that decision appears at Appendix B. Jurisdiction is invoked under 28 U. S. C. § 1257(a) and proper under 28 U.S.C. § 1254(1) and Supreme Court Rule 13.3. As 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.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This injury was caused as the result of 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). However, problematic here is 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. In Arizona, a Recorded Trustees Deed is a prima summary judgment in favor of the grantee as a result of these strictly interpreted statutes. For instance, 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.

Mendez was barred from asserting his claims against the fraudulent trustee for the sole reason that the trustee was expressly designated as grantee and owner of the property by virtue of the recorded trustee's deed. Recently in *Obduskey v. McCarthy and Holthus LLP*, 17-1307 this 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 were 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 purchaser plaintiff in a forcible detainer action. These important issues have not been fully resolved including the legitimate concerns of this Court.

"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.

STATEMENT OF THE CASE

In May 2006, Mendez executed a promissory note secured by a deed of trust on his home in Arizona ("the property"). In February 2019, U.S. Bank National Association ("U.S. Bank"), acting "not in its individual capacity but solely as Trustee" for a NRZ trust, purchased the property at a trustee's sale. After the appointed trustee conveyed the property to U.S. Bank through a trustee's deed, U.S. Bank executed a warranty deed transferring the property to NRZ. In early March 2019, NRZ demanded he vacate the premises within five days. Nine days later, NRZ sued Mendez for forcible detainer. After a bench trial, the superior court entered judgment in favor of NRZ, finding Mendez guilty of forcible detainer. Mendez timely appealed as his rights were disregarded under Arizona Rules of Civil Procedure 17(a). NRZ lacked capacity having brought the action via a warranty deed purportedly from US Bank which led to an inherently faulted forcible detainer action.

REASONS FOR GRANTING THE PETITION

This Petition should be granted because Arizona is in direct conflict with prevailing cases decided in California which rightfully acknowledge wrongful foreclosure actions where, "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.) Clearly

California correctly recognizes that wrongful foreclosure is a valid defense and ensures due process for its property owners. Arizona Trustees Deeds are used as prima facia 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. 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 (1978). 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.”

At issue here, the convergence of the 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. This Court should determine whether the public policy of protecting borrowers outweighs the interest in enforcing the waiver of challenges continuously recited in all post sale rulings, and if routinely waiving trustee sale irregularities seriously disrupts protecting homeowners in light of constitutional due process verses Arizona overall statutory scheme in totality gives good cause for this Court to severe parts of it including A.R.S. §33-811(B) and A.R.S. § 33-811(C) and determining judgment routinely validates recorded trustees deed allowing the purported highest bidder unopposed rights to actual possession of Arizona properties.

CONCLUSION

Petitioner was denied his right to constitutional due process as a result of the convergence of these statutory provisions. 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 of any related actions, especially to recover the proceeds of those sales. This Petition for a Writ of Certiaori should be granted to allow homeowner challenges to the recorded trustees deed, the trustee sale, and allow for wrongful foreclosure claims and oversight from the CFPB of any related actions to the proceeds of those sales.

Respectfully Submitted, June 21, 2021

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