

20-758  
No. \_\_\_\_\_

In The  
Supreme Court of the United States

Audie Jay Reynolds,

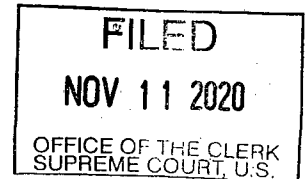
*Petitioner,*

v.

US Bank National Association

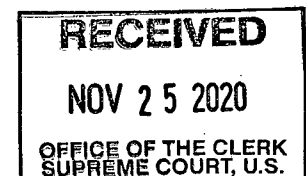
*Respondents.*

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



**PETITION FOR A WRIT OF CERTIORARI**

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## 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 is:

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.

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

All parties are listed in the caption of the case on the cover of which no party is a corporation. There are no proceedings in other courts directly related to the case in this Court Rule 14.1(b)(iii).

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### **Appendix A**

Decision of Division One, Arizona Court of Appeals

### **Appendix B**

Decision of the Arizona Superior Court

### **Appendix C**

Decision of Arizona Supreme Court

Denying Review



### OPINIONS BELOW

Petitioner respectfully prays a Writ of Certiorari be issued by the Supreme Court of the United States for review of the preceding judgments below:

The December 26, 2019 Memorandum Decision of Division One Court of Appeals for the State of Arizona designated as **Appendix A** to the petition and is unpublished.

The August 14, 2018 Ruling of the Superior Court, upheld by Division One, Court of Appeals, designated as **Appendix B** to the petition and is unpublished .

The August 26, 2020 Arizona Supreme Courts denial of discretionary review designated as **Appendix C** to the petition and is unpublished.

## **JURISDICTION**

The date on which the highest state court decided the case was August 26, 2020. A copy of that decision appears at Appendix C. 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.

## 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).

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.

Problematic here is Mr. Reynolds was also 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 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.

## STATEMENT OF THE CASE

Plaintiff purchased the subject property at 3322 Pine Ridge Dr., in Overgaard, Arizona in 2005 and November 11, 2017 the Trustees Deed Upon Sale is recorded in Navajo County where Western Progressive as Appellees duly appointed trustee... "hereby Grants and Conveys, but without covenant or warranty express or implied to US Bank..." However, this recording is in direct conflict to Western Progressives Notice of the sale also recorded in Navajo which stated the "Trustee Sale Assistant" C. Scott, signatory of Western Progressive as the said Trustee notarized the document in Cobb County Georgia *"Pursuant to ARS 33-803(A)(6), the trustee qualifies as a trustee of the Deed of Trust in the trustee's capacity as a corporation all the stock of which is owned by Premium Title Agency, Inc. an escrow agent in the state of Arizona. The regulators of Premium Title Agency are the Arizona Department of Insurance and the Arizona Department Financial*

*Institutions...*" In addition, the sole mailing address for Western Progressive is the Statutory Agent CT Corp with the same Delaware Statutory Agent and mailing address. CT Corp does not offer or provide trustee sale or foreclosure services for Arizona homeowners.

January 4, 2018 The forcible detainer complaint is filed, and Mr. Reynolds timely answered and asserted his defenses including lack of capacity. June 14, 2018 Mr. Reynolds attended the forcible detainer hearing where he testified and responded to the original complaint served by Plaintiffs. At that hearing Plaintiffs informed Mr. Reynolds they had motioned to amend their complaint. However, the trial court and Mr. Reynolds did not receive a copy of the motion the day of the hearing and later Mr. Reynolds never received the motion, the ruling on the motion, or the amended complaint.



August 14, 2018 two months later the trial court issued the initial order on appeal which is incorrect as to the facts and the law. Stating in pertinent part “Mr. Reynolds has made untimely and irrelevant attacks of the Trustees Deed upon Sale, See ARS § 33-811(c).” Mr. Reynolds timely Appealed although the appellant court also affirmed the forcible detainer judgment December 26, 2019 upholding the recorded trustees deed. As stated by the Court...

*“¶5 Reynolds argues the superior court erred by entering judgment in favor of US Bank. First, he claims that US Bank was not “executor, administrator, guardian, bailee, or grantee” of the trustee’s deed and thus could not prosecute the FED action as real party in interest. But US Bank—specifically, “U.S. Bank National Association, as Trustee for Residential Asset Mortgage Products, Inc., Mortgage Asset-Backed Pass- Through Certificates, Series 2006-NC2”—was expressly designated as*

*grantee under the trustee's deed. And as owner of the property by virtue of the trustee's deed, US Bank established its right to possession. See Carrington Mortg. Servs. LLC v. Woods, 242 Ariz. 455, 457, ¶ 12 (App. 2017).*

*¶6 Second, Reynolds urges that defects in the trustee's sale render the trustee's deed invalid and thus undermine US Bank's asserted right to possession. But the merits of US Bank's 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). The only issue was the right of possession, and as described above, US Bank had the right of possession under the trustee's deed."*

Mr. Reynolds Petitioned the Arizona Supreme Court for Review and was denied on August 26, 2020.

## 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.

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 any 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 sever parts of its provisions including A.R.S. §33-811(B), and A.R.S. § 33-811(C) when determining judgment routinely validate any recorded trustees deed which allows the purported highest bidder unopposed rights to actual possession of Arizona properties. Consequently, any Arizona homeowner in default is denied due process.

## CONCLUSION

Petitioner was denied his right to constitutional due process as a result of these combined statutory provisions. An individual must qualify as a trustee of a trust deed to conduct a foreclosure sale of an Arizona property but because of these statutory provisions Mr. Reynolds was and was unable to assert his claims to defend his property.

*"A trustee of a trust deed who qualifies under subsection A shall not lend or delegate the trustee's name or corporate capacity to any individual or entity that does not qualify as a trustee of a trust deed. An individual, company, association or corporation shall not circumvent the requirements of subsection A by acting in concert with a nonqualifying trustee."* A.R.S. § 33-803 (C). C. Scott "Trustee Sale Assistant" as Western Progressives signatory does not qualify as an Arizona Trustee.

**Assistant** Trustees are not recognized and do not have the Power of Sale in Arizona and thus the property was sold by a non-qualified individual located out of the state of Arizona and purporting to be an Arizona Trustee with the Power of Sale under a Deed of Trust. Consequently, Plaintiffs did not have capacity to initiate litigation. An action must also be prosecuted in the name of the real party in interest. Here, Plaintiffs were not. They were not executor, administrator, guardian, bailee, or grantee, of the trustees deed they rely on. Without a proper successor trustee, there is no power of sale under A.R.S. § 33-807(A) and has no authority to notice the trustee's sale under A.R.S. § 33-808, and no right to conduct the sale under A.R.S. § 33-810, or to collect the funds and issue a trustee's deed under A.R.S. § 33-811 because the false instruments including the trustees deed won't cure a defective sale.

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, November 14, 2020

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