

In The
Supreme Court of the United States

—◆—
KIRKLAND TOWNSEND,

Petitioner,

v.

HSBC BANK USA, N.A., as Trustee for
Nomura Home Equity Loan, Inc.
Asset-Backed Certificates, Series 2006-FM1,

Respondent.

—◆—
**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Seventh Circuit**

—◆—
BRIEF IN OPPOSITION
—◆—

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QUESTION PRESENTED

Whether an interim judgment of foreclosure entered pursuant to the Illinois Mortgage Foreclosure Law (“IMFL”), that fixes the amount of money the mortgagor owes the mortgagee and orders sale of the mortgaged property, is final under 28 U.S.C. § 1291 or the effective-finality doctrine articulated in *Forgay v. Conrad*, 47 U.S. 201 (1848) where, before the mortgagor must transfer title to the mortgaged property, the IMFL requires expiration of statutory reinstatement and redemption periods, entry of a sale confirmation order finding the sale correct and just, determination of deficiency and surplus awards, and the expiration of a 30-day stay following the sale confirmation order that permits the mortgagor to appeal the entire case.

RULE 29.6 STATEMENT

HSBC Bank USA, N.A., as Trustee for Nomura Home Equity Loan, Inc. Asset-Backed Certificates, Series 2006-FM1, was the plaintiff-appellee below (“HSBC”). HSBC Bank USA, N.A. is a subsidiary of HSBC USA Inc., which is a subsidiary of HSBC North American Holdings Inc.

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STATEMENT OF THE CASE

1. The IMFL was enacted in 1987. *See* Pub. Act 84-1462, § 2, eff. July 1, 1987. The state legislature integrated existing common law and statutory provisions concerning mortgages and foreclosure into one statute, and modified and updated the Illinois judicial mortgage foreclosure process. *React Fin. v. Long*, 366 Ill. App. 3d 231, 232 (2006). The IMFL, therefore, sets forth a comprehensive statutory scheme governing the judicial foreclosure, sale, and satisfaction of debts secured by mortgaged property. *See* 735 ILCS 5/15-1501, *et seq.*

2. The basic process to foreclose a mortgage under the IMFL is: (a) the mortgagor defaults on the loan; (b) the mortgagee brings a foreclosure action after complying with notice requirements, 735 ILCS 5/15-1504; (c) the mortgagee proves its right to foreclose the mortgage and obtains a foreclosure judgment and order of sale, *id.* at 5/15-1507; (d) a foreclosure sale is held; and (e) the court enters an order confirming the justness of the sale. *Id.* at 5/15-1508(b). Once the court enters the sale confirmation order, the mortgagor may possess the mortgaged property for an additional 30 days, appeal the action before the sale purchaser can evict the mortgagor, and obtain a stay of the title transfer pending appeal. *Id.* at 5/15-1508(g). During this process, a mortgagor may also reinstate or redeem the mortgaged property. 735 Ill. Comp. Stat. Ann. 5/15-1602 (reinstatement rights); 735 Ill. Comp. Stat. Ann. 5/15-1603 (redemption rights).

3. HSBC filed a complaint against Kirkland Townsend (“Townsend” or “Petitioner”) to foreclose its mortgage pursuant to the IMFL. Because the facts of the case are straightforward, HSBC incorporates by reference the factual summary set forth in the Seventh Circuit’s opinion. Pet. App. 1a-5a.

4. The district court entered a judgment of foreclosure and sale order in favor of HSBC. *Id.* at 59a-60a. The district court erroneously included partial Rule 54(b) language in that order. *Id.* at 60a. Townsend then appealed the judgment of foreclosure and sale order.

5. In an opinion by Chief Judge Wood, the Seventh Circuit dismissed the case for lack of jurisdiction. After navigating the IMFL’s procedural steps, the Seventh Circuit concluded that, based on its interpretation of Illinois law, “[w]hen all is said and done, the district court’s judgment of foreclosure and order to conduct a judicial sale leave too much up in the air for us to regard the action as terminated, with nothing left but the mechanical details of collection or other enforcement measures.” *Id.* at 6a.

6. The court observed that “entry of the foreclosure judgment marks the beginning of a period in which critical matters remain to be resolved: whether the mortgagor will exercise her statutory redemption and reinstatement rights, and, should a judicial sale occur, whether it complies with all statutory requirements.” *Id.* at 7a. The mortgagor could undo the foreclosure judgment by exercising redemption or

reinstatement rights. *Id.* at 6a-7a. Similarly, the court could refuse to confirm the sale because it determined that “justice was . . . not done.” *Id.*

7. The court further found that numerous questions about damages exist until the district court confirms the sale. The court, for example, observed that “[t]he amount that the judicial sale yields depends not only on the price obtained at the auction but also on, for example, whether the auction was conducted in a commercially reasonable way to maximize the price. If it was not, the court might confirm the sale but decline to enter a deficiency judgment.” *Id.* at 8a. The prejudgment interest amount could also vary based on the time lapse between the auction sale and the sale confirmation order. *Id.* at 8a-9a.

8. Finally, the court concluded that “the judgment of foreclosure and judicial sale posed no imminent threat of irreparable harm to Townsend.” *Id.* at 15a. Illinois law permits the mortgagor to retain possession of the mortgaged property for 30 days after entry of the sale confirmation order. During that period, Illinois law permits the mortgagor to obtain a stay of the title transfer pending appeal. *Id.* at 15a-17a. And, “[s]o long as a stay is in place, a purchaser at a foreclosure sale is obliged to return the property if the judgment of foreclosure is reversed on appeal.” *Id.* at 17a.

9. The court ultimately dismissed the case for lack of jurisdiction because the IMFL left too many events “between a foreclosure judgment entered

pursuant to Illinois law and eventual exchange of property for money and deficiency judgment.” Pet. App. at 11a.

10. Judge Hamilton dissented, finding the judgment of foreclosure and sale order final because it fixed the amount Petitioner owed HSBC, identified the property to be sold, and resolved priority of claims. *Id.* at 19a.



ARGUMENT

Petitioner frames the question presented broadly as concerning the finality of “a judgment that conclusively determines liability, sets for the amount of a money judgment, and order the sale of property.” Pet. at i. Petitioner’s question, however, ignores the variation in state foreclosure proceedings, as well as the Illinois-specific, statutory mortgage foreclosure safeguards that permit a mortgagor to undo the foreclosure sale, which are outcome determinative of the jurisdictional issues in this case.

Because this case turns on the statutory “weeds” of the IMFL, it does not conflict with this Court’s 19th century precedents involving historical common law foreclosure processes, or with precedents of other circuit courts of appeals. Nor does the case have national importance. Rather, the Seventh Circuit’s decision is applicable only to Illinois mortgagors defending themselves against an IMFL action filed in

federal court by the mortgagee. This case does not merit the Court's review.

I. The decision below correctly dismissed the case for lack of jurisdiction because the judgment of foreclosure was an interim step in the IMFL process.

The Court does not normally grant petitions for certiorari to review application of state law. *Leavitt v. Jane L.*, 518 U.S. 137, 144 (1996). This case is a diversity action applying Illinois state law. Pet. App. 6a (“Illinois law specifies the various steps that must be taken; it is the governing law in this diversity action, and so we must see how the district court’s actions fit into the regime Illinois creates for foreclosures.”). While finality for appeal in federal court is clearly a question of federal law, even a quick scan of the majority and dissenting opinions show that the answer to this question turns entirely on the particularities of Illinois law.

The Seventh Circuit concluded the judgment of foreclosure and sale order is not a final appealable order only after walking through the numerous protections the IMFL provides mortgagors. The court observed that the IMFL provides mortgagors redemption and reinstatement rights allowing them “to undo the foreclosure, scuttling the need for the process of executing the judgment.” *Id.* Illinois law also requires post-sale judicial inquiry into whether “justice was otherwise not done” through a formal sale confirmation

hearing. *Id.* at 6a-8a. And the parties only know the extent of any deficiency judgment or surplus and sale price after the sale confirmation hearing. *Id.* Finally, the court noted that “[u]nder Illinois law, the judgment of foreclosure and judicial sale posed no imminent threat of irreparable harm to Townsend,” because after the district court enters a sale confirmation order, a mortgagor can ordinarily delay permanent transfer of title in the mortgaged property for 30 days, file an appeal during this time, and then obtain a stay of the title transfer pending appeal. *Id.* at 15a-17a.

Judge Hamilton’s dissent is just as focused on Illinois law. Judge Hamilton warned readers of his dissent about the extent to which the minutia of Illinois foreclosure law controlled this case: “With fair warning to readers, Part II digs into the weeds of the execution process under Illinois foreclosure law that have persuaded my colleagues that this judgment of foreclosure is not yet final.” *Id.* at 20a. Part II of Judge Hamilton’s dissent spends nearly 20 pages analyzing Illinois law on execution of judgments, redemption and reinstatement, the sale confirmation process, and the calculation of deficiency judgments and pre-judgment interest. *Id.* at 33a-52a.

Chief Judge Wood spent several pages rebutting her dissenting colleague’s criticism of her “description of Illinois law.” *Id.* at 9a-11a. A central point of disagreement between the majority and dissent is whether Illinois courts have discretion to reduce deficiency judgments after the foreclosure sale to promote

equity and fairness amongst the parties. *Id.* at 9a. The majority and dissent's disagreement concern the nature of the IMFL's post-sale procedures, not federal jurisdictional rules.

If the decision below did not make it clear enough that this case presents jurisdictional issues unique to Illinois' judicial mortgage foreclosure process, the Seventh Circuit's decision three weeks later in *United States v. Williams*, 796 F.3d 815 (7th Cir. 2015), removes any doubt. In *Williams*, the court wrestled with whether an order of foreclosure in a federal tax lien case was "final" for the purpose of appellate jurisdiction. 796 F.3d at 816. The Seventh Circuit distinguished this case, and held that it was. The court described this case as holding "that a mortgage foreclosure governed by Illinois law is not final, and thus not appealable under 28 U.S.C. § 1291 or Fed.R.Civ.P. 54(b), because the amount of a deficiency judgment (if any) depends on the reasonableness of the price realized at the sale, and the validity of the sale itself is contestable under an open-ended state standard calling on the judge to determine whether the outcome is equitable" and because "Illinois provides debtors with multiple opportunities to redeem before a transfer takes effect." *Id.* By contrast, the internal revenue code does not provide for deficiency judgments, require the court to confirm the justness of the sale, or provide a right of redemption. *Id.* at 817.

Because the jurisdictional issue here turns entirely on the Illinois' judicial mortgage foreclosure laws, this case does not merit the Court's review.

II. The decision below does not conflict with the Court's precedents.

The Seventh Circuit correctly determined that it did not have jurisdiction, and its decision does not conflict with decisions of this Court concerning finality.

1. Petitioner claims the decision below runs afoul of the Court's precedents on finality because the judgment of foreclosure and sale order in this case ends the merits of the foreclosure action and leaves nothing for the court to do but execute the judgment. Pet. at 8. Petitioner relies heavily on three 19th century cases to support his proposition: *Whiting v. The Bank of the United States*, 38 U.S. 6, 15 (1839); *Bronson v. La Crosse & M.R. Co.*, 67 U.S. 524 (1862); and *N.C. R.R. Co. v. Swasey*, 90 U.S. 405 (1874). But *Whiting*, *Bronson*, and *Swasey* each involved common law foreclosure as it existed in the 19th century, which has been significantly modified by the IMFL.

The Court found the common law judgments of foreclosure in those cases to be final because a good-faith sale purchaser had irrevocable title regardless of any defect in the foreclosure judgment:

For, if the sale had been completed under the decree, the title of the purchaser under the decree would not have been overthrown, or

invalidated even by a reversal of the decree; and consequently the title of the defendants to the lands would have been extinguished; and their redress upon the reversal would have been of a different sort from that of a restitution of the land sold.

Whiting, 38 U.S. at 15. The Court's reasoning was the same in *Bronson*:

If this Court should find that [the appellants] are entitled to their whole claim, and in the meantime the property is sold and out of their control, how would their success benefit them? It would be a victory barren of results. If the decree was reversed there could be no restitution of the road, its property and franchises; for purchasers at a judicial sale are protected.

A rule, from which consequences so injurious to the rights of parties litigant would necessarily result, has never received the sanction of this Court.

Bronson, 67 U.S. at 531-532. By contrast, the sale order was not final in *Swasey* because the order specifically stated the sale would proceed only if the borrower failed to pay the debt owed within the next four years. *Swasey*, 90 U.S. at 410. The sale could thus be undone during that time.

Under the IMFL, all sales are not final. The foreclosure sale can be undone, and the Petitioner in this case can still retain permanent possession and title of the mortgaged property in several ways. First,

the Petitioner could successfully challenge entry of a sale confirmation order once a sale occurs. Second, the Petitioner could exercise his right of redemption post sale. Third, the Petitioner could retain possession of the mortgaged property for 30 days after the entry of the sale-confirmation order, appeal the entire foreclosure case, and seek to stay transfer of the property pending appeal.

The common law foreclosure process used in *Whiting*, *Bronson*, and *Swasey* did not contain such protections, nor did the common law process require the court to approve the sale as equitable and just. Common law foreclosure is different than the statutory process of the IMFL, just as the tax foreclosure process of *Williams* is. This case does not conflict with the Court's historical precedents.¹

2. The decision below similarly does not conflict with the effective-finality doctrine articulated in *Forgay v. Conrad*, 47 U.S. 201 (1848), because the IMFL's post-sale procedural protections spare the Petitioner from suffering irreparable harm as the result of the judgment of foreclosure and sale order. In *Forgay*, the Court determined it had jurisdiction over an order decreeing immediate transfer of slaves and land to creditors, notwithstanding that the order

¹ Judge Hamilton's dissent cites several other 19th century cases that are distinguishable for the same reasons. See *McGourkey v. Toledo & O.C. Ry. Co.*, 146 U.S. 536 (1892); *Leadville Coal Co. v. McCreery*, 141 U.S. 475 (1891); *Thomson v. Dean*, 74 U.S. 342 (1868); *Ray v. Law*, 7 U.S. 179 (1805).

also required accounting of profits from the “property.” 47 U.S. at 204. The Court determined the incomplete accounting adjustments did not undermine “finality” for appeal purposes, because the order annulled the defendant’s title to the property, directed immediate transfer of the property to creditors, and the property would be sold in satisfaction of the debt before the accounting would be completed causing irreparable injury. *Id.*

Under the IMFL, however, the judgment of foreclosure and sale order does not compel Petitioner to immediately transfer the mortgage property nor does it annul his title to the mortgaged property. The Petitioner does not have to transfer possession or title of the property until after a sale-confirmation order is entered and the subsequent 30-day stay lapses without an appeal of the underlying case. Notably, Judge Hamilton’s dissenting opinion also held that the *Forgay* doctrine would not confer jurisdiction in this case. Pet. App. 19a-20a.

III. The decision below does not create a circuit split.

The petition argues that decisions of three courts of appeals conflict with the decision below. But the foreclosure procedures in each case are meaningfully different from the IMFL’s procedures. No circuit conflict exists here.

Of the three purportedly conflicting cases, the Ninth Circuit’s ruling in *Citicorp Real Estate, Inc. v.*

Smith, is the only statutory judicial foreclosure case. 155 F.3d 1097, 1100-1101 (9th Cir. 1998). *Smith* was a diversity action applying California law. *Id.* at 1101. The key difference between *Smith* and this case is that the appeal in *Smith* was taken after the entire foreclosure action had ended – summary judgment was entered, the mortgaged property had been sold, and the court had entered a deficiency judgment. *Id.* In a consolidated appeal, the Ninth Circuit reviewed the district court’s sale approval and calculation of post-judgment interest, as well as its interim summary judgment order authorizing the foreclosure. *Id.* at 1105-1108. *Smith*’s discussion of the final judgment rule is pure *dicta*, because the appeal ultimately was resolved after the entire process was complete and deficiency judgments had been entered. *Smith* also did not address the particular contours of California’s statutory judicial foreclosure process.

The Fifth Circuit’s decision in *Citibank, N.A. v. Data Lease Fin. Corp.* concerns a common law foreclosure action to foreclose on stock that was collateral for a loan. 645 F.2d 333, 337 (5th Cir. 1981). The case was not governed by the IMFL or any other statutory judicial foreclosure scheme. The Fifth Circuit held the sale order was a final and appealable order because under Florida common law a good-faith purchaser at a judicial sale takes permanent title to the collateral. Accordingly, the finality rule applied in *Citibank* is simply the rule articulated by the Court’s 19th century precedents such as *Whiting*, *Bronson*, and *Swasey*, which found sale orders to be final if the sale would

result in permanent transfer of title that could not be undone. In the decision below, Chief Judge Wood explained at length how the IMFL provides procedural protections different from common law that allow mortgagors to “undo” the judgment of foreclosure and sale order, including redemption and reinstatement periods, entry of a sale-confirmation order based upon a finding of justness, and the mortgagor’s ability to keep possession of the mortgaged property, appeal the entire case, and obtain a stay pending appeal within the 30 days following the sale confirmation order. For the same reasons the decision below does not conflict with the Court’s 19th century precedents, the ruling does not conflict with the Fifth Circuit’s decision in *Citibank*.

The Eighth Circuit decision in *Chase v. Driver*, 92 F. 780, 781 (8th Cir. 1899), heralds from the same era as this Court’s common law foreclosure cases and is just as distinguishable. In *Chase*, a mortgagee sued to foreclose its mortgage and obtained a foreclosure judgment under common law foreclosure processes. *Id.* A sale was held and confirmed, but the court also appointed a special master to render an accounting. *Id.* at 783. Following the accounting decree, the debtor appealed, claiming there were defects in the foreclosure judgment and confirmation. *Id.* The Eighth Circuit expressed befuddlement in construing the 19th century finality decisions, but ultimately held that the technical accounting did not preclude finality of the sale order. *Id.* at 783-787. The common law process used in the *Driver* era, however, did not contain the procedural safeguards that the Seventh

Circuit found the IMFL provided mortgagors. Given state codification of the mortgage foreclosure process, it is perhaps unsurprising, and noteworthy, that the Eighth Circuit has not cited *Driver* since 1936.

Far from creating a circuit split, the decision below is consistent with the finality principles applied by these circuit courts. Indeed, the Petitioner, HSBC, and the Seventh Circuit have all failed to cite or find a single court that has issued a conflicting decision involving a statutory judicial foreclosure scheme similar to the IMFL.

IV. Because the case is limited to IMFL foreclosure judgments, the case does not present a frequently occurring issue of national importance.

Due to the tremendous variability in state mortgage foreclosure laws, the applicability of the jurisdictional questions presented in this case are limited to Illinois mortgagors. Illinois is one of only thirteen states that exclusively require judicial foreclosure of all mortgages.² In fact, in only eighteen states is judicial mortgage foreclosure the most common type

² The others are Connecticut, Delaware, Florida, Indiana, Kansas, Kentucky, Louisiana, New Jersey, New York, Ohio, Pennsylvania, and South Carolina. See LexisNexis 50-State Survey: Non-Judicial Foreclosure (Jan. 2015); LexisNexis 50-State Survey: Real Property Mortgages & Deeds of Trust (Nov. 2014).

of residential foreclosure.³ In thirty-two states and the District of Columbia, non-judicial foreclosure is the most common form of residential foreclosure.⁴ Even assuming that all judicial foreclosure statutory schemes are the same – and they are not – this case has no bearing on mortgage disputes arising in more than half of the country.

Amongst the minority of states in which judicial foreclosure predominates, there are widespread procedural differences concerning post-sale order protections such as redemption, judicial sale confirmation, and title transfer. While the IMFL provides mortgagors specific statutory redemption periods, *see* 735 ILCS 5/15-1603 and 735 ILCS 5/15-1604, other judicial foreclosure states such as Delaware and Pennsylvania do not provide any statutory redemption periods. Similarly, only Illinois and a handful of other judicial foreclosure states require the mortgage holder to commence a formal judicial sale confirmation hearing. *See* N.J. Rule 4:65-6(b); N.Y. Real Prop. Acts Law § 1355; Vt. Stat. Ann. tit. 12, § 4954; Wis. Stat. § 846.165.⁵ Moreover, although some states seek

³ *See* National Consumer Law Center, Foreclosure Report Survey of State Foreclosure laws, *available at* https://www.nclc.org/images/pdf/foreclosure_mortgage/state_laws/survey-foreclosure-card.pdf.

⁴ *See id.*

⁵ Some other states have sale confirmation mechanisms, however, nothing on the face of their applicable statutes or rules affirmatively require the mortgage holder to seek confirmation or describes the processes or standards that govern confirmation. *See, e.g.*, Fla. Stat. § 45.031(6) (insinuating confirmation is

(Continued on following page)

to determine “fair value” after the sale, *e.g.*, Kan. Stat. Ann. § 60-2415(b) or require that the sale be conducted in conformity with the law, *e.g.*, Okla. Stat. tit. 12, § 765.B; Or. Rev. Stat. § 18.948(2), few statutes require the court to provide a post-sale equitable review for “justice” like the IMFL. And perhaps the most distinctive post-sale protection afforded Illinois mortgagors is the 30-day stay of title transfer following entry of the sale confirmation order, which permits the mortgagor to retain possession of the mortgaged property and undo the entire sale upon successful appeal of the case. 735 ILCS 5/15-1701(b)(1) & (c).

Though HSBC was unable to locate precise data measuring the number of diversity jurisdiction mortgage foreclosure actions filed in Illinois federal district courts, the United States Courts report that approximately 2,139 diversity actions entitled “Real Property Actions, Foreclosure” were filed in 2014 across the country. *Judicial Business of the United States Courts*, Annual Report of the Director, Table C-2. Even assuming each of these cases were actions filed by mortgagees in judicial foreclosure states, as opposed to wrongful foreclosure or injunctive actions filed in non-judicial foreclosure states, if the 2,139 cases were spread evenly across the eighteen judicial foreclosure states, that would amount to approximately 119 judicial foreclosures action filed per year in Illinois federal courts. These numbers do not indicate

automatic). Other states that utilize judicial foreclosure do not require confirmation at all. *See, e.g.*, Pa.R.C.P. No. 3135.

a “frequently recurring issue of national importance,” as the petition suggests. Pet. at 19. Far from a frequently recurring issue, the few decisions addressing appellate jurisdiction of foreclosure judgment in statutory foreclosure states indicates that it is an issue that seldom arises.

The Seventh Circuit’s decision to dismiss the case for lack of jurisdiction was based on its careful consideration of Illinois law. To the extent jurisdictional issues arise under other states’ laws, the same careful review is necessary. Accordingly, the case does not present issues of national or widespread importance.

CONCLUSION

For these reasons, Townsend’s petition for a writ of certiorari should be denied.

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