No. 17-1307

In the Supreme Court of the United States

DENNIS OBDUSKEY, PETITIONER

v.

MCCARTHY & HOLTHUS LLP, ET AL.

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

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether an entity that sends a notice stating that it will commence a non-judicial foreclosure to enforce a security interest under Colorado law thereby becomes a "debt collector," rather than an entity engaging in the "enforcement of security interests," for purposes of the Fair Debt Collection Practices Act.

PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT

Petitioner is Dennis Obduskey. Respondents are McCarthy & Holthus LLP and Wells Fargo Bank, N.A.

Although Wells Fargo Bank, N.A., was not named in the petition and petitioner's claim against it was resolved on other grounds, it is a proper respondent before the Court under Rule 12.6. Wells Fargo Bank, N.A., is a subsidiary of Wells Fargo & Company. Wells Fargo & Company has no parent corporation, and no publicly held corporation owns 10% or more of its stock.

Wells Fargo, Wells Fargo Bank, Wells Fargo Home Mortgage, and Wells Fargo & Company were improperly named below as defendants.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-13a) is reported at 879 F.3d 1216. The order of the district court (Pet. App. 14a-32a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 19, 2018. The petition for a writ of certiorari was filed on March 13, 2018. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Properly understood, this case presents a narrow question tied to state law: whether a law firm that sent a notice stating it was initiating a non-judicial foreclosure to enforce a security interest under Colorado law thereby falls within the definition of "debt collector" in the Fair Debt Collection Practices Act (FDCPA). Petitioner obtained a loan that was secured by a residential property and serviced by a bank. After petitioner defaulted on the loan, the bank hired a law firm to pursue non-judicial foreclosure on petitioner's property. The law firm notified petitioner that it had been instructed to commence a foreclosure on the property. It then initiated a non-judicial foreclosure to conduct a sale of the property in accordance with Colorado law.

As is relevant here, petitioner filed suit to challenge the bank's and the law firm's actions under the FDCPA. The district court dismissed the claim against the law firm on the ground that, by merely commencing non-judicial foreclosure proceedings, it was not attempting to collect a debt and thus did not qualify as a "debt collector" as defined by the FDCPA. The court of appeals affirmed.

Petitioner now seeks this Court's review, alleging a circuit conflict on an issue of exceptional importance. But the court of appeals' carefully circumscribed decision, intertwined with state-law considerations, does not directly conflict with any decision of another federal court of appeals or a state court of last resort. Moreover, the court of appeals' decision lacks the broader significance that would warrant the Court's intervention, and this case is a poor vehicle in which to address any question concerning the application of the FDCPA in the context of non-judicial disclosure proceedings. The petition for a writ of certiorari should therefore be denied.

A. Background

1. The FDCPA bars "debt collector[s]" from engaging in certain practices while attempting to collect debts. 15 U.S.C. 1692c-1692h, 1692k; see 15 U.S.C. 1692(e). The FDCPA defines a "debt collector" as, *inter alia*, any entity that "regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another": *i.e.*, an entity whose overall practices involve sufficiently frequent debt collection. 15 U.S.C. 1692a(6); *Henson* v. *Santander Consumer USA Inc.*, 137 S. Ct. 1718, 1721 (2017). It defines "debt," in turn, as an actual or alleged "obligation of a consumer to pay money." 15 U.S.C. 1692a(5). For purposes of certain specific prohibitions not at issue here, the FDCPA separately defines as a "debt collector" "any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the enforcement of security interests." 15 U.S.C. 1692a(6).

The FDCPA excludes certain persons from the general definition of "debt collector." Of particular relevance here, the FDCPA provides that "debt collector" does not include "any person collecting or attempting to collect any debt owed or due or asserted to be owed or due another to the extent such activity * * * concerns a debt which was not in default at the time it was obtained by such person." 15 U.S.C. 1692a(6)(F)(iii).

2. This case concerns the actions of a law firm in initiating a non-judicial foreclosure under Colorado law. In Colorado, a creditor can proceed with either judicial or non-judicial foreclosure. A non-judicial foreclosure allows a property to be sold with a lesser degree of involvement by the courts. Under Colorado law, non-judicial foreclosure is available where a loan preauthorizes the sale of the property to pay up to the loan balance in the event of default. See Colo. R. Civ. P. 120(a). Colorado law sets out a

detailed statutory and procedural process for non-judicial foreclosure. See Colo. Rev. Stat. §§ 38-38-100.3 to 38-38-114; Colo. R. Civ. P. 120.

Unlike in most other States, the non-judicial foreclosure process in Colorado relies on a public trustee, an impartial party appointed by the governor, to conduct the sale. See Colo. Rev. Stat. §§ 38-38-101, 38-38-105, 38-38-108, 38-38-110; *Plymouth Capital Co.* v. *District Court*, 955 P.2d 1014, 1015-1017 (Colo. 1998). Upon default, the creditor or its attorney may file a "notice of election and demand" with the public trustee and provide documentation, including evidence of the debt. See Colo. Rev. Stat. § 38-38-101(1), (4). The public trustee then reviews the filing and, if the filing is complete, records the notice. See Colo. Rev. Stat. § 38-38-102(1). The creditor and public trustee must provide several notices to the debtor containing information about the proposed sale and the debtor's rights. See Colo. Rev. Stat. §§ 38-38-102.5, 38-38-103.

The creditor must also obtain an order from a state court authorizing the sale by establishing a "reasonable probability that a default justifying the sale has occurred." Colo. R. Civ. P. 120; see Colo. Rev. Stat. § 38-38-105. That allows a court, even in a non-judicial foreclosure, to address "issues related specifically to the existence of a default." *Plymouth Capital*, 955 P.2d at 1016. During that process, the debtor is entitled to additional notices and an opportunity to object to the sale. See Colo. R. Civ. P. 120(a)-(c). The creditor must provide notice directly to the debtor, even if the debtor is represented by counsel, as well as to any third parties that may have acquired an interest in the property. See Colo. R. Civ. P. 120(a), (b).

Once the sale is authorized, the public trustee advertises and conducts the sale. See Colo. Rev. Stat. § 38-38-

110. If the sale price of the property is less than the amount of outstanding debt secured by the property, the creditor may not seek to collect any deficiency from the borrower as part of the non-judicial foreclosure process; to obtain a deficiency payment, the creditor must file a separate judicial action. See Colo. Rev. Stat. § 38-38-106(6); *Bank of America* v. *Kosovich*, 878 P.2d 65, 66 (Colo. App. 1994).

B. Facts And Procedural History

1. In 2007, petitioner obtained a loan to buy a residential property in Bailey, Colorado. The loan was secured by the residential property and serviced by respondent Wells Fargo Bank, N.A. Petitioner defaulted on the loan in 2009. Pet. App. 2a, 15a; C.A. Supp. App. 107, 109.

In 2014, Wells Fargo hired respondent McCarthy & Holthus LLP, a law firm, to pursue a non-judicial foreclosure on the property. The allegations against McCarthy focus on an undated letter that it sent petitioner, in which it stated that it had been "instructed to commence foreclosure against the * * * property." McCarthy informed petitioner that it "may be considered a debt collector attempting to collect a debt." McCarthy further stated the amount owed to Wells Fargo; noted that it would assume the debt to be valid unless petitioner disputed the debt within thirty days; and warned that foreclosure could be commenced before the end of that period. C.A. Supp. App. 127.

Petitioner alleged that he responded to the letter, asking for verification of the debt, but that he did not receive any. Pet. App. 2a; C.A. App. 10.[1] Petitioner also "demand[ed]" that McCarthy "cease all unauthorized contact

[1] On appeal, however, petitioner produced a letter from McCarthy dated August 4, 2015, providing verification. See Pet. App. 2a n.1; Pet. C.A. Supp. Reply Br., Ex. 3.

regarding th[e] debt" in accordance with "[f]ederal and Colorado law[]," and indicated that he was represented by counsel. C.A. Supp. App. 125.

In May 2015, McCarthy initiated a non-judicial foreclosure pursuant to Colorado law. Shortly thereafter, petitioner filed a complaint with the Consumer Financial Protection Bureau alleging that McCarthy had not responded to his verification request. To date, the sale of the property has not occurred. Pet. App. 2a, 16a.

2. On August 12, 2015, petitioner filed suit against respondents (as well as other improperly named entities) in the United States District Court for the District of Colorado, asserting various claims under the FDCPA and Colorado state law. Pet. App. 2a-3a, 16a. As to McCarthy, the complaint's allegations focused on its alleged failure to provide verification of the debt before commencing the non-judicial foreclosure. *Id.* at 16a; C.A. App. 9-10. As to Wells Fargo, the complaint's allegations focused primarily on its provision of allegedly "confusing information" before McCarthy was retained. Pet. App. 4a, 15a-16a; C.A. App. 5-12.

Respondents moved to dismiss the complaint, and the district court granted the motions. Pet. App. 3a, 32a. As to McCarthy, the district court held that it was not a "debt collector" under the FDCPA because the complaint "d[id] not allege that [it] took any action to obtain payment on a debt." *Id.* at 20a. The court rejected the contention that the foreclosure proceeding could itself constitute the "collection of a debt." *Id.* at 21a. The court added that the disclaimer in McCarthy's letter stating that it was serving as a debt collector was "insufficient to state an FDCPA claim." *Ibid.* The district court dismissed the FDCPA claim against Wells Fargo on the ground that it was not a "debt collector," citing the discrete statutory exclusion for "any person collecting or attempting to collect any debt

* * * which was not in default at the time it was obtained by such person." 15 U.S.C. 1692a(6)(F); Pet. App. 18a-20a.[2]

3. The court of appeals affirmed. Pet. App. 1a-13a. As a preliminary matter, the court of appeals agreed with the district court that Wells Fargo was entitled to invoke the statutory exclusion for persons who obtained debt before default, because petitioner had "admit[ted] that Wells Fargo began servicing the loan before he went into default." *Id.* at 4a-5a.[3]

As is relevant here, the court of appeals then addressed whether McCarthy qualified as a "debt collector" under the FDCPA. While noting that petitioner's complaint was "far from perfect," the court proceeded to consider whether McCarthy qualified as a "debt collector" because it had not previously addressed that question in the context of non-judicial foreclosure proceedings. Pet. App. 5a-6a.

The court of appeals explained that, under the "plain language" of the FDCPA, an entity qualifies as a debt collector when it is attempting to collect money from a debtor. Pet. App. 7a. Merely enforcing a security interest, the court continued, is not inherently an attempt to collect money; to the contrary, a consumer has no obligation to pay money in a non-judicial foreclosure proceeding. *Ibid.* The court deemed persuasive the Ninth Circuit's reasoning in its recent decision in *Ho* v. *ReconTrust Co., N.A.*, 858 F.3d 568, 571-572 (2016), cert. denied, 138 S. Ct. 504 (2017), which held that initiating a non-judicial

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[2] The district court dismissed petitioner's state-law claims on other grounds. See Pet. App. 21a-31a.

[3] Petitioner does not seek review of that holding in this Court, and the judgment in favor of Wells Fargo is therefore final. See Pet. 8 n.4.

foreclosure without seeking a payment of money does not render an entity a "debt collector" for purposes of the FDCPA. Pet. App. 7a.

The court of appeals declined to follow sweeping language in a Sixth Circuit decision that asserted that "*every* mortgage foreclosure, judicial or otherwise," triggers application of the FDCPA. Pet. App. 8a (quoting *Glazer* v. *Chase Home Finance LLC*, 704 F.3d 453, 463 (6th Cir. 2013)). The court of appeals observed that the foreclosure at issue in the Sixth Circuit's decision was a judicial foreclosure; "[t]here is an obvious and critical difference between judicial and non-judicial foreclosures," because a trustee in a non-judicial foreclosure cannot "collect any deficiency in the loan amount personally against the mortgagor." *Ibid.* (citation omitted).

According to the court of appeals, that distinction was significant under Colorado law, which requires a creditor to collect any deficiency in a separate action. Pet. App. 8a. Because the non-judicial foreclosure at issue would allow the public trustee only to "obtain proceeds from the sale of the foreclosed property, and no more," McCarthy's letter notifying petitioner about the non-judicial foreclosure did not constitute an attempt to seek the payment of money from petitioner. *Id.* at 9a (citation omitted).

In making that determination, the court of appeals emphasized that the FDCPA might apply if McCarthy had "demand[ed] payment" or "attempted to induce [payment] by threatening foreclosure." Pet. App. 9a, 12a. Here, however, petitioner did not allege that McCarthy had done either; instead, petitioner alleged simply that McCarthy had "sent * * * one letter notifying [petitioner] that it was hired to commence foreclosure proceedings." *Id.* at 12a.

The court of appeals observed that a contrary holding would create a conflict between the FDCPA and Colorado

law. Pet. App. 10a. As the court noted, Colorado law requires that notice be provided directly to a debtor (such as petitioner) who is represented by counsel, as well as to any interested third parties, in advance of a non-judicial foreclosure, while the FDCPA forbids such communications. *Id.* at 10a-11a. The court reasoned that Congress did not express a "clear and manifest" intention to supplant state law in an area of traditional state regulation, especially given that Colorado's provisions are designed to "*protect* the consumer." *Id.* at 11a (citation omitted). The court thus construed the FDCPA so that the "mere act of enforcing a security interest through a non-judicial foreclosure proceeding" under Colorado law did not constitute debt collection. *Id.* at 12a.

In conclusion, the court of appeals stressed the narrow scope of its holding, which was limited to non-judicial foreclosure proceedings and was "also limited to the facts of the case." Pet. App. 12a. The court made clear that it was not addressing whether an entity engaged in "more aggressive collection efforts" would qualify as a "debt collector" as defined in the FDCPA. *Ibid.* Accordingly, the court explained, its reasoning would not "immunize" entities in cases in which a foreclosure was used to collect a debt. *Ibid.* The court added that petitioner was still free to contest the non-judicial foreclosure in a proceeding under Colorado law. *Ibid.*

ARGUMENT

Petitioner asserts that this case presents a circuit conflict on a question of exceptional importance: namely, whether the FDCPA "applies to non-judicial foreclosure proceedings." Pet. i. But petitioner has not identified a square conflict on that question; in fact, none of the court of appeals decisions on which petitioner primarily relies even involved non-judicial foreclosure.

The court of appeals' decision in this case was narrow and fact-bound. The court of appeals held that McCarthy's act of sending a notice stating that it was initiating a non-judicial foreclosure under Colorado law, standing alone, did not render it a "debt collector" under the FDCPA. In so holding, the court of appeals expressly left open whether an entity that takes additional actions would qualify as a debt collector. The court of appeals' holding relates to a tiny portion of foreclosure-related activities and touches on an area in which debtors have ample other protections, as this case well illustrates. Nor is this case a suitable vehicle in which to review the question presented given the deficiencies in the complaint recognized by the court of appeals, which would effectively require the Court to consider the question in the abstract.

Just five months ago, the Court denied a petition for a writ of certiorari on a materially identical question, filed by the same counsel representing petitioner here. See *Ho* v. *ReconTrust Co., N.A.*, 138 S. Ct. 504 (2017). There is no valid reason for a different result in this case. The petition for a writ of certiorari should therefore be denied.

A. The Decision Below Does Not Squarely Conflict With Any Decision Of Another Court Of Appeals Or A State Court Of Last Resort

Petitioner contends (Pet. 11-19) that the decision below conflicts with several decisions of other courts of appeals and state courts of last resort. But none of those decisions squarely conflicts with the decision below. Not one of the published court of appeals decisions petitioner cites in asserting a direct conflict addressed non-judicial foreclosure proceedings. The two state-court decisions petitioner cites are similarly inapposite. Nor is any apparent disagreement in reasoning nearly as deep as petitioner suggests: the vast majority of the cited decisions

involve factual circumstances the decision below expressly did not reach. There is therefore no conflict that warrants this Court's review.

1. a. Petitioner contends (Pet. 11, 13, 15) that there is a "direct conflict[]" on the question presented between the decision below and decisions of the Third, Fourth, and Sixth Circuits. But petitioner has not identified a conflict among the courts of appeals on the question whether the FDCPA "applies to non-judicial foreclosure proceedings," Pet. i, for the simple reason that none of the published decisions from those circuits involved non-judicial foreclosures; all but one involved *judicial* (or quasi-judicial) foreclosures. See *McCray* v. *Federal Home Loan Mortgage Corp.*, 839 F.3d 354, 357 (4th Cir. 2016); *Kaymark* v. *Bank of America, N.A.*, 783 F.3d 168, 172-173 (3d Cir. 2015), cert. denied, 136 S. Ct. 794 (2016); *Glazer* v. *Chase Home Finance LLC*, 704 F.3d 453, 456 (6th Cir. 2013); *Wilson* v. *Draper & Goldberg, P.L.L.C.*, 443 F.3d 373, 375 (4th Cir. 2006). And the remaining decision did not involve a foreclosure proceeding at all. See *Piper* v. *Portnoff Law Associates*, 396 F.3d 227, 229-230 (3d Cir. 2005).

As petitioner appears to recognize in his question presented, the distinction between judicial and non-judicial foreclosure is critical to the FDCPA analysis, which turns on whether an entity was seeking to collect money from a debtor. See 15 U.S.C. 1692a(5) (defining "debt"); 15 U.S.C. 1692a(6) (defining "debt collector"). Judicial foreclosure generally permits a creditor to recover from the debtor the remaining deficiency on a debt in the foreclosure proceeding itself, whether through a deficiency decree or through some other mechanism provided by state law. See generally Grant S. Nelson & Dale A. Whitman, *Real Estate Finance Law* § 8.1, at 1041-1042 (6th ed. 2014) (Nelson & Whitman).

Accordingly, even if initiating a *judicial* foreclosure qualifies as debt collection under the FDCPA, initiating a non-judicial foreclosure plainly does not. A non-judicial foreclosure proceeding allows a creditor only to secure the sale of the property; it does not permit the creditor to obtain the payment of any money. See, *e.g.*, Colo. Rev. Stat. §§ 38-38-101, 38-38-106(6). If initiating a non-judicial foreclosure were sufficient to make an entity a debt collector, it would render meaningless the FDCPA's distinction between "the enforcement of [a] security interest[]" and "the collection of a[] debt[]." 15 U.S.C. 1692a(6).

Recognizing that distinction, the court of appeals in this case emphasized the "obvious and critical difference between judicial and non-judicial foreclosures," and it expressly limited its holding to non-judicial foreclosures. Pet. App. 8a-9a, 12a. The court thus left open the question addressed in the cases on which petitioner primarily relies.

b. Moreover, none of the court of appeals decisions cited by petitioner is on point, because all of them involve the legal regimes of other States. Colorado law was critical to the analysis below. The court of appeals specifically distinguished the Colorado non-judicial foreclosure regime from the regime at issue in *Glazer*, *supra*. Pet. App. 8a. And the court concluded that applying the FDCPA here would displace aspects of the Colorado non-judicial foreclosure scheme designed to "*protect* the consumer" in a core area of state concern. *Id.* at 10a-11a. Colorado law requires that notice be provided directly to a debtor, like petitioner, who is represented by counsel, as well as to any interested third parties, in advance of a non-judicial foreclosure, see Colo. R. Civ. P. 120(a)-(b), while the FDCPA forbids such communications, see 15 U.S.C. 1692c(a)(2), (b).

Critically, those provisions are particular to Colorado law. Other States have "varying types and degrees of notice" requirements, many of which are far less stringent than Colorado's. Nelson & Whitman § 7:20, at 944. Only a few States require direct notice to all interested third parties, and some do not require direct notice to anyone. See *ibid.* Applying the FDCPA to foreclosure proceedings governed by the laws of those States may well pose little or none of the conflict with state law found by the court below.

c. In addition, nearly all of the court of appeals decisions on which petitioner relies involved entities that did more than merely initiate a foreclosure proceeding in accordance with the relevant state law. The entities in those cases demanded payment from the debtor, thereby seeking to collect a debt. Those cases thus implicate a distinct question—whether an entity that engages in actual debt collection is exempt from the FDCPA because those efforts arise in connection with a foreclosure proceeding.

By contrast, McCarthy made no express or implicit demands for payment. See Pet. App. 9a, 12a. This case thus implicates an entirely different question: whether initiating a non-judicial foreclosure under Colorado law *itself* constitutes debt collection. The Tenth Circuit expressly "left for another day" whether additional activity that amounted to an "attempt[] to induce [petitioner] to pay money" would have rendered McCarthy a debt collector. *Ibid.*

2. Even beyond the foregoing distinctions, petitioner errs in asserting that there is a "clear and undeniable" circuit conflict on the question presented. Pet. 11. To be sure, the reasoning of the decision below differs in some respects from that of some of the decisions petitioner

cites. But those decisions involved sharply different factual circumstances, and their holdings are entirely consistent with the holding below.

a. Petitioner argues that the court of appeals' decision conflicts with two Third Circuit decisions. See Pet. 15-16 & n.10. Petitioner is incorrect.

In *Kaymark*, *supra*, the defendant law firm brought a *judicial* foreclosure action under Pennsylvania law. See 783 F.3d at 172-173. It sought not only to liquidate the underlying property, but also to collect fees for legal services not yet performed on behalf of the creditor—a patent effort to obtain money from the debtor in the context of a judicial foreclosure proceeding. See *ibid.* Given those facts, the Third Circuit easily deemed the law firm a "debt collector" under the FDCPA; it declined to "immuniz[e]" the firm's efforts to collect money simply because they occurred in the context of a foreclosure "litigation." *Id.* at 176-177, 179. *Kaymark* is thus consistent with the decision below, which "left for another day" whether additional activity that amounted to an "attempt[] to induce [petitioner] to pay money" would have rendered McCarthy a debt collector. Pet. App. 9a, 12a.

The other Third Circuit decision the petitioner cites, *Piper*, is even further afield. The defendant law firm in that case was retained by a municipality to collect payment for overdue water and sewage obligations. See 396 F.3d at 229. The law firm sent letters urging the debtors to make payment directly to it and threatening to file a lien against the debtors' property. See *id.* at 229-230. It then acted on that threat and continued to "demand[] payment" in letters and phone calls, using the lien as leverage. *Id.* at 230. The law firm's communications sought "personal payment of money," and the law firm readily admitted it was "not looking to liquidate the real property" but rather to cause the debtors to "pay the money."

Id. at 233 (citation omitted). In light of those facts, it is unsurprising that the Third Circuit deemed the law firm a "debt collector," reasoning that enforcing the security did not "immun[ize]" the defendant where its "activities fit the statutory definition of a 'debt collector.'" *Id.* at 234, 236. Here, by contrast, McCarthy did not attempt to collect money from petitioner; as a result, it did not qualify as a "debt collector" under the FDCPA's general definition. See Pet. App. 7a-9a, 12a.

b. Both Fourth Circuit decisions cited by the petitioner are similarly inapposite. To begin with, both cases involved quasi-judicial foreclosure actions filed in court, which allowed the recovery of money from the debtor. See *McCray*, 839 F.3d at 357; *Wilson*, 443 F.3d at 375; Appellee Br. at 2, *Wilson*, *supra*; Md. Rules 14-201(b), 14-207.1(a), 14-212(b); Md. Real Prop. Code § 7-105.13. More broadly, the entities at issue in those cases took concrete steps beyond merely enforcing a security interest—steps that constituted clear efforts to collect money owed.

In *Wilson*, the defendant law firm sent the debtor a letter that "contained a specific request for money to 'reinstate the [mortgage] account.'" 443 F.3d at 376. The same letter "instructed" the borrower to pay her debt, along with foreclosure fees, "by cashiers check made payable to the [creditor] and to send it to [the defendant]." *Id.* at 377. The Fourth Circuit explained that the FDCPA "does not exclude those who enforce security interests but who also fall under the general definition of 'debt collector.'" *Id.* at 378.

Similarly, in *McCray*, the Fourth Circuit addressed defendants retained by the creditor to "collect" on the defaulted amount where the record demonstrated that the defendants "were seeking repayment" of the debt. 839 F.3d at 360-361. Indeed, the defendants expressly threatened foreclosure in an "attempt[] to collect on a debt" by

stating, *inter alia*, that "a foreclosure action may be filed in court" if "[the borrower] did not bring the loan current." *Id.* at 361 (internal quotation marks omitted).

Both cases thus involved demands for payment from the debtor. Here, by contrast, McCarthy "did not demand payment nor use foreclosure as a threat to elicit payment." Pet. App. 12a. And the court of appeals expressly reserved the possibility that, if McCarthy had done so, it would in fact qualify as a debt collector. *Ibid.*

c. The Sixth Circuit's decision in *Glazer*, *supra*, is also inapposite because it involved judicial foreclosure proceedings. See 704 F.3d at 456. The Sixth Circuit held that filing a judicial foreclosure action in Ohio state court amounted to an effort to collect debt under the FDCPA. See *id.* at 464-465.

To be sure, the Sixth Circuit also stated that "every mortgage foreclosure, judicial or otherwise," constitutes "debt collection under the Act." *Glazer*, 704 F.3d at 461-462. But that statement is plainly dictum and would not bind subsequent Sixth Circuit panels in cases involving non-judicial foreclosure proceedings. Moreover, in so stating, the Sixth Circuit relied on generalizations about foreclosure proceedings that do not apply to the Colorado non-judicial foreclosure proceeding at issue here. In particular, the Sixth Circuit explained that, even if the defendants had not sought a deficiency judgment, "the *potential* for deficiency judgments demonstrate[s] that the purpose of foreclosure is to obtain payment on the underlying home loan." *Id.* at 461 (emphasis added). But as the court of appeals recognized, that reasoning does not apply here, because recovery of a deficiency is not an available remedy in non-judicial foreclosure proceedings under Colorado law. See Pet. App. 8a-9a. There is thus no direct conflict as to the application of the FDCPA to the non-judicial foreclosure scheme at issue here.

3. Petitioner also asserts a "direct[] conflict[]" with the decisions of two state courts of last resort. See Pet. 17-19. That assertion similarly lacks merit.

a. The Alaska Supreme Court's decision in *Alaska Trustee, LLC* v. *Ambridge*, 372 P.3d 207 (2016), addressed a non-judicial foreclosure by an entirely different entity: a private trustee empowered by Alaska law to conduct a foreclosure sale and collect the proceeds. See *id.* at 210, 218; Alaska Stat. § 34.20.070. *Ambridge* thus differs in a critical respect from this case; here, the defendant was a law firm representing a creditor merely for the purpose of *initiating* Colorado's non-judicial foreclosure process, which would be conducted by an impartial public trustee. See Colo. Rev. Stat. §§ 38-38-101, 38-38-110.

What is more, the trustee in *Ambridge* actually attempted to collect money from the borrower. The Alaska Supreme Court "conclude[d] that a reasonable consumer would read the [trustee's] notice as a demand for payment," which allowed the debtor to "avoid the threatened action only by paying the debt." 372 P.3d at 218 (emphasis omitted). In this case, by contrast, it was "clear" that McCarthy "did not demand payment nor use foreclosure as a threat to elicit payment." Pet. App. 12a. *Ambridge* thus did not resolve whether initiating a non-judicial foreclosure process *itself* amounts to a request for payment from the debtor, let alone whether initiating the *Colorado* non-judicial foreclosure process does so.

b. Contrary to petitioner's claim (Pet. 17), the decision below does not create an "intra-regional conflict" with the Colorado Supreme Court's decision in *Shapiro & Meinhold* v. *Zartman*, 823 P.2d 120 (1992). In that case, the court held that a plaintiff had adequately pleaded that an entity that initiated a non-judicial foreclosure proceeding was a "debt collector" under the FDCPA. See *id.* at 123. That holding, however, resulted from the application

of a now-outmoded pleading standard: Colorado state courts then applied the "no set of facts" standard, under which a motion to dismiss would be granted "only if it appear[ed] beyond doubt that the plaintiff can prove no set of facts in support of [the asserted] claim." *Warne* v. *Hall*, 373 P.3d 588, 592 (Colo. 2016).

In *Shapiro*, the Colorado Supreme Court permitted the plaintiff to proceed on conclusory allegations that "the attorneys are 'debt collectors,'" determining that those allegations satisfied the then-governing pleading standard because they "substantially track[ed]" the language of the FDCPA's general definition of "debt collector." 823 P.2d at 123 (citing 15 U.S.C. 1692a(6)). The court then declined to "exempt" the defendants simply because they engaged in conducting foreclosures, explaining that the definition of "debt collector" encompasses those who engage in non-judicial foreclosures "if they otherwise fit the statutory definition." *Id.* at 124. The court thus did not address the specific question whether *initiating* a non-judicial foreclosure proceeding constituted debt collection for purposes of the FDCPA.

4. Petitioner further contends (Pet. 24-27) that the decision below creates a "tension" with decisions of the Fifth Circuit and that the case "arguably" would have come out the other way in the Eleventh Circuit. In fact, the decisions of those courts underscore the absence of a conflict on the facts presented here.

a. In a case involving a law firm initiating an executory-process foreclosure, the Fifth Circuit explained that "the entire FDCPA can apply to a party whose principal business is enforcing security interests" *if* that party "nevertheless fits [the FDCPA's] general definition of a debt collector." *Kaltenbach* v. *Richards*, 464 F.3d 524, 528-529 (2006). The Fifth Circuit subsequently inter-

preted that decision as implicitly recognizing that involvement in a non-judicial foreclosure "is *not per se* FDCPA debt collection." *Brown* v. *Morris*, 243 Fed. Appx. 31, 35 (2007). The Fifth Circuit's decisions thus support the court of appeals' holding in this case that merely initiating a non-judicial foreclosure without seeking a payment of money does not render an entity a "debt collector" for purposes of the FDCPA. See Pet. App. 12a.

b. As for the Eleventh Circuit: in *Reese* v. *Ellis, Painter, Ratterree & Adams, LLP*, 678 F.3d 1211 (2012), the defendant law firm had sent the debtor documents that both provided notice of a non-judicial foreclosure proceeding and expressly "demand[ed] full and immediate payment of all amounts due," threatening that failure to pay would result in additional liability for attorney's fees. *Id.* at 1217 (emphasis omitted). The Eleventh Circuit concluded that the letter had a "dual purpose[]": to give "notice of the foreclosure" *and* to "demand payment on the underlying debt." *Ibid.* Accordingly, the court deemed the law firm a "debt collector" under the FDCPA. *Id.* at 1217-1219. Consistent with that reasoning, the Eleventh Circuit subsequently recognized that an entity is not a debt collector where, as here, it merely engages in foreclosure activities without *also* seeking to induce the debtor to make a payment. See *Saint Vil* v. *Perimeter Mortgage Funding Corp.*, 630 Fed. Appx. 928, 931 (2015).

5. Petitioner acknowledges (Pet. 19-24) that the decision below is consistent with the Ninth Circuit's decision in *Ho*, *supra*. There, the Ninth Circuit held that a trustee that sent a borrower multiple notices initiating non-judicial foreclosure proceedings pursuant to California's non-judicial foreclosure scheme, but that did not seek the payment of money from the debtor, did not qualify as a "debt collector" as defined by the FDCPA. 858 F.3d at 570-572. Like the court of appeals in this case, the Ninth Circuit

observed that, under the relevant state law, "[t]he object of a non-judicial foreclosure is to retake and resell the security, not to collect money from the borrower." *Id.* at 571. It further explained that "debt collection" is not "coextensive" with "the enforcement of [a] security interest[]" under the FDCPA. *Id.* at 573. And it emphasized that its holding meant only that "the enforcement of security interests is not *always* debt collection"; an entity that enforces security interests could be a "debt collector" under the FDCPA if it also "engage[s] in activities that constitute debt collection." *Ibid.* (emphasis added).

As noted above, this Court recently denied a petition for a writ of certiorari in *Ho* that presented materially the same question and alleged the same conflict. See 138 S. Ct. 504 (2017). The same outcome is warranted here.

B. The Petition Does Not Present An Important Question Warranting The Court's Review In This Case

Petitioner contends (Pet. 28-32) that the question presented is exceptionally important and that this case is an optimal vehicle in which to resolve it. Petitioner is wrong on both scores. This case is a poor vehicle, and it lacks sufficient importance to warrant the Court's attention.

1. Petitioner asserts (Pet. 30) that this case is an "ideal" vehicle because it does not present the same vehicle issues as *Ho*. But this case is flawed on its own terms. If anything, the complaint in this case contains even sparser allegations than the complaint in *Ho*—particularly with regard to McCarthy, the sole potentially remaining defendant. While the challenged communications in *Ho* suggested (consistent with the governing state law) that the debtor could bring her account into good standing by making all the past due payments, see *Ho*, 858 F.3d at 570-571, the notice at issue in this case in no way urged petitioner to pay the debt, see Pet. App. 12a.

The court of appeals found that petitioner sufficiently pleaded only "that McCarthy failed to verify [petitioner's] debt after it was disputed, in violation of § 1692g." Pet. App. 5a. But petitioner himself produced a verification notice that McCarthy sent in 2015, leaving (at most) an argument that the notice came too late. See C.A. Supp. Reply Br., Ex. 3. Resolving whether the FDCPA applies here would thus be a largely hypothetical exercise. Recognizing that problem, the court of appeals characterized petitioner's allegations as "far from perfect," but looked past the "deficiencies" in order to "provide clarity" on the legal issue for the benefit of district courts in the circuit. Pet. App. 5a, 6a. If the Court were inclined to consider the applicability of the FDCPA in the context of non-judicial foreclosure proceedings, therefore, it should at a minimum do so in a case with clearer and more substantial factual allegations.

2. Petitioner contends that the decision below has a wide-ranging impact that "is difficult to overstate." Pet. 2. That is a singularly odd thing to say about a decision that is dependent on the law of a single State and is on its face circumscribed "to the facts of th[is] case." Pet. App. 12a. What is more, the court of appeals expressly noted that the outcome might be different in a case involving a judicial foreclosure (or "more aggressive collection efforts" in a non-judicial foreclosure), and it held only that initiating a non-judicial foreclosure without seeking a payment of money does not render an entity a "debt collector" under the FDCPA. See *ibid.* By its terms, therefore, the decision below reaches only a sliver of foreclosure-related activities under the legal regime of a particular State.

Debtors facing non-judicial foreclosure, moreover, are protected by a panoply of other provisions under Colorado and federal law. Colorado extensively regulates non-judicial foreclosures through a complex statutory scheme that

ensures a debtor receives notice throughout the process. See p. 4, *supra*. Foremost among those protections is Colorado's unique pre-foreclosure procedure, in which a private party seeking to foreclose must first obtain an order from a state court authorizing the sale. See Colo. R. Civ. P. 120; Colo. Rev. Stat. § 38-38-105. That procedure—which allows a debtor to contest the loan default, Pet. App. 12a—gives a debtor clear notice of the prospect of a non-judicial foreclosure and an opportunity to object to the sale. See Colo. R. Civ. P. 120(a)-(c). Indeed, as the court of appeals recognized, applying the FDCPA here could serve to undermine some of the protections afforded by state law. See Pet. App. 10a-12a.

Federal law also offers extensive protections for debtors facing foreclosure, as this case illustrates. The Consumer Financial Protection Bureau has issued lengthy regulations relating to mortgage servicing that, among other things, prohibit a loan servicer from foreclosing on a property in various circumstances. See 12 C.F.R. 1024. 30-1024.41. In this very case, petitioner indicates that he sought relief from the Consumer Protection Financial Protection Bureau on the basis of the same factual allegations asserted here. See Pet. App. 16a.

3. Finally, the Court will have ample opportunity to address the question presented if a conflict develops in the application of the FDCPA to a particular fact pattern in the context of non-judicial foreclosure proceedings. As noted above, just five months ago, this Court denied a petition for a writ of certiorari filed by the same counsel, presenting materially the same question. See 138 S. Ct. 504 (2017). And another petition filed by the same counsel and presenting the same question is pending before the Court. See *Greer* v. *Green Tree Servicing LLC*, No. 17-1351 (filed Mar. 26, 2018). Should a valid conflict arise, there will be

ample opportunities to address it (perhaps even in a petition filed by the same counsel). But it would be premature for the Court to grant review in the absence of such a conflict, especially in a case with such thin factual allegations.

* * * * *

In sum, petitioner has not identified a square conflict on the question presented, nor has he established that the court of appeals' narrow holding is of sufficient importance to warrant further review by this Court. The petition for certiorari should therefore be denied.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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