No. 17-1307

IN THE

Supreme Court of the United States

DENNIS OBDUSKEY,

Petitioner,

v.

MCCARTHY & HOLTHUS, LLP, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF OF *AMICUS CURIAE* NAACP LEGAL DEFENSE & EDUCATIONAL FUND, INC., IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE* [1]

The NAACP Legal Defense & Educational Fund, Inc. ("LDF") is the nation's first and foremost civil rights legal organization. Through litigation, advocacy, public education, and outreach, LDF strives to secure equal justice under the law for all Americans, and to break down barriers that prevent African Americans from realizing their basic civil and human rights.

Throughout its history, LDF has challenged policies that deny housing opportunities to African Americans. *See, e.g.*, *McGhee v. Sipes*, 334 U.S. 1 (1948) (companion case to *Shelley v. Kraemer*, 334 U.S. 1 (1948)) (racially restrictive covenants); *Cent. Ala. Fair Hous. Ctr., Inc. v. Lowder Realty Co.*, 236 F.3d 629 (11th Cir. 2000) (racial steering); *Comer v. Cisneros*, 37 F.3d 775 (2d Cir. 1994) (racial discrimination in public housing and assistance programs); *NAACP v. Am. Family Mut. Ins. Co.*, 978 F.2d 287 (7th Cir. 1992) (redlining); *Kennedy Park Homes Ass'n, Inc. v. City of Lackawanna*, 436 F.2d 108 (2d Cir. 1970) (exclusionary zoning); *Thompson v. U.S. Dep't of Hous. & Urb. Dev.*, 2006 WL 581260 (D. Md. Jan. 10, 2006) (federal government's obligation to affirmatively further fair housing); Consent Decree, *Byrd v. First*

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amicus curiae* state that no counsel for a party authored this brief in whole or in part and that no person other than *amicus curiae*, its members, or its counsel made a monetary contribution to the preparation or submission of this brief. All parties have consented to the filing of this brief.

Real Estate Corp. of Ala., No. 95-CV-3087 (N.D. Ala. May 14, 1998) (racial steering); Complaint, *Morningside, et al. v. Sabree, et al.*, No, 16-8807-CH (Mich. Cir. Ct., July 13, 2016) (discriminatory foreclosures).

LDF has also advocated for the fair and comprehensive interpretation and application of the Fair Housing Act of 1968, 42 U.S.C. § 3605, *see Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc.*, 135 S. Ct. 2507 (2015); *see also* NAACP Legal Def. & Educ. Fund, Inc., *et al.*, *The Future of Fair Housing: Report on the National Commission of Fair Housing and Equal Opportunity* (Dec. 2008), and for protections for African American communities from discriminatory and unfair foreclosure-related practices, *see* Brief of Amicus Curiae NAACP Legal Def. & Educ. Fund, Inc., *Bank of America Corp. v. City of Miami*, No. 15-1111 (U.S. May 1, 2017).

INTRODUCTION AND SUMMARY OF ARGUMENT

The Fair Debt Collection Practices Act ("FDCPA") protects borrowers from a broad range of deceptive, unfair and abusive debt collection practices across all sectors of consumer finance. In passing the law, Congress recognized that such practices can have drastic effects on borrowers, including personal bankruptcy, marital instability, and job loss. 15 U.S.C. § 1692(a). These negative effects are especially pronounced when debt collection threatens a person's home.[2]

Mortgage debt is the primary form of debt held by American consumers, and the FDCPA protects borrowers from unfair, abusive, and deceptive practices when lenders' agents seek to collect that debt through any type of foreclosure proceeding. This conclusion is compelled by the language and purpose of the law, and it is in line with American legal traditions recognizing the need for particular attention to fairness when a person's home is at risk.

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[2] *See, e.g.,* G. Thomas Kingsley, Robin Smith & David Price, *The Impacts of Foreclosures on Families and Communities*, URBAN INST., 11–12 (May 2009), https://www.urban.org/sites/default/files/publication/30426/411909-The-Impacts-of-Foreclosures-on-Families-and-Communities.PDF (noting that foreclosures may make families more vulnerable to marital instability and missed employment); Alexander C. Tsai, *Home Foreclosure, Health, and Mental Health: A Systematic Review of Individual, Aggregate, and Contextual Associations*, PLOS ONE (Apr. 7, 2015), https://doi.org/10.1371/journal.pone.0123182 (finding that home foreclosure adversely affects health and mental health).

The sanctity of the home, and the encouragement and protection of homeownership, has been a bedrock principle of American law dating back even before the Constitution.

Most states allow "nonjudicial" foreclosures, which are conducted outside the oversight of a court and usually through a series of notices published and mailed to borrowers. As in foreclosures generally, the mortgage servicer ordinarily delegates to a third party—often attorneys—the responsibility for initiating, managing, and completing the foreclosure process against a borrower. In nonjudicial foreclosures, however, the foreclosing party does not have to prove its case to a court. Instead, after the notices are sent to the borrower via mail, the property is sold at public auction without a forum in which the borrower may make objections. If there are defects in the process, the borrower herself must find them, document them, and often must file an affirmative lawsuit to challenge the foreclosure. Many actions to enjoin nonjudicial foreclosures face onerous procedural barriers, such as requirements to post a bond before an injunction to stop the foreclosure can be granted.[3] Nonjudicial foreclosures are generally

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[3] *See, e.g.,* FED. R. CIV. P. 65(c); *Frizzell v. Murray*, 313 P.3d 1171, 1172 (Wash. 2013) (holding that borrower's failure to post $25,000 bond waived her claims in an action to enjoin a nonjudicial foreclosure); *Ferguson v. Commercial Bank*, 578 So. 2d 1234, 1235 (Ala. 1991) (noting that borrowers' attempt to stop a nonjudicial foreclosure sale was dismissed when they failed to pay a $30,000 bond).

faster than judicial foreclosures, and foreclosure rates in states with nonjudicial foreclosure are significantly higher than in states that permit only judicial foreclosure.[4]

Foreclosing parties regularly take advantage of this lack of judicial oversight, misleading borrowers about who owns their loan, misstating amounts owed, inflating fees, and sometimes proceeding with foreclosure even after borrowers have made outstanding payments.[5] These practices represent precisely the kind of conduct Congress sought to address by empowering borrowers with a uniform federal cause of action in the FDCPA. It would therefore lead to a perverse result if the FDCPA applied to judicial foreclosure proceedings, but not to nonjudicial proceedings.

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[4] *See* Atif Mian, Amir Sufi & Francesco Trebbi, *Foreclosures, House Prices, and the Real Economy*, Kreisman Working Papers Series in Housing Law and Policy, No. 6 (2014) (finding that lenders are twice as likely to foreclose on delinquent homeowners in nonjudicial states controlling for income, credit score, and education levels).

[5] *See, e.g.,* LOU PIZANTE, ET AL., OFF. OF THE ASSESSOR-RECORDER, SAN FRANCISCO, FORECLOSURE IN CALIFORNIA: A CRISIS IN COMPLIANCE 1 (2012), http://aequitasaudit.com/images/aequitas_sf_report.pdf (finding that 84% of nonjudicial foreclosure documents recorded in San Francisco County from 2009–2011 contained "clear violations of law"); John Campbell, *Can We Trust Trustees? Proposals for Reducing Wrongful Foreclosures*, 63 CATH. U. L. REV. 103, 114–16 (2013) (collecting examples of wrongful foreclosures, including where borrowers had not taken out a loan at all, and where borrowers had made all required payments).

The prevalence of foreclosures, and the abusive practices that accompany them, disproportionately affect communities of color. African American borrowers were far more likely to be foreclosed upon during the foreclosure crisis, lost more relative wealth than any other group during that crisis, and have seen less recovery since. African American borrowers, regardless of education and income, are more likely to receive risky mortgages and more likely to experience foreclosure. Communities of color also suffer from depressed property values as a result. Exempting nonjudicial foreclosures from the FDCPA's protections would leave borrowers of color—who already face other types of housing-related discrimination—particularly vulnerable.

ARGUMENT

In 1977, Congress recognized that "[a]busive debt collection practices contribute to the number of personal bankruptcies, to marital instability, to the loss of jobs, and to invasions of individual privacy." 15 U.S.C. § 1692(a). In response, Congress enacted the Fair Debt Collection Practices Act (FDCPA) to "eliminate" those practices and their deleterious effects. *Id.* § 1692(e). The Act limits what debt collectors may do when they engage in the "collection of [a] debt." 15 U.S.C. § 1692g(a). And Congress ensured that the FDCPA would have a broad sweep by defining "debt" broadly: "any obligation or alleged obligation of a consumer to pay money arising out of a transaction in which the money, property, insurance, or services which are the subject of the transaction are

primarily for personal, family, or household purposes[.]" 15 U.S.C. § 1692a(5). Congress further ensured that the Act would reach a wide range of unfair debt collection practices by defining "debt collector" as, inter alia, "any person who . . . regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another." *Id.* § 1692a(6).

Petitioner is correct that a nonjudicial foreclosure is the collection of a debt, because it seeks satisfaction of the promise or obligation embodied in the mortgage agreement. That conclusion is clear from the plain text of the FDCPA, as well as the context and purpose of the law. It is confirmed by the particular importance of homeownership in the American legal tradition, and by the need to ensure that homeowners of color in particular have tools to address abusive practices.

I. NONJUDICIAL FORECLOSURE IS DEBT COLLECTION ACCORDING TO THE PLAIN MEANING OF THE FDCPA.

The FDCPA applies to nonjudicial foreclosure proceedings because, under the plain text of the statute, they constitute a form of debt collection. Nonjudicial foreclosure proceedings concern a "debt," which, under the FDCPA, is the "*obligation* . . . to pay money . . . ." 15 U.S.C. § 1692a(5) (emphasis added), and is *not* "synonymous with 'money,'" *Obduskey v. Wells Fargo*, 879 F.3d 1216, 1221 (10th Cir. 2018). Nonjudicial foreclosure seeks to satisfy this obligation by taking possession of the property. And foreclosing parties in nonjudicial foreclosures are "debt collectors"

under the FDCPA because the statute defines that term to include any person who regularly "collects, or attempts to collect, directly *or indirectly*, debts owed or due . . . another." 15 U.S.C. § 1692(a)(6) (emphasis added).

A. Nonjudicial Foreclosure Proceedings Are Designed to Collect on an "Obligation . . . to Pay."

The obligation to pay money is the central feature in any mortgage transaction. A mortgage secures an obligation to pay money with a security interest in property.[6] Where there is no obligation to pay, there is no security interest in the property.[7]

The obligation to pay money is also, therefore, central to any foreclosure. Black's Law Dictionary defines "foreclosure" as "[a] legal proceeding to terminate a mortgagor's interest in property, instituted by the lender (the mortgagee) either to gain title or to force a sale *in order to satisfy the unpaid debt secured by the property*."[8] All foreclosures, judicial and nonjudicial, are mechanisms to satisfy unpaid debts: where there is no debt, there can be no foreclosure. The obligation embedded in the mortgage both mandates

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[6] *See Mortgage*, BLACK'S LAW DICTIONARY (10th ed. 2014) ("1. A conveyance of title to property that is given as security for the payment of a debt[.]").

[7] *See* RESTATEMENT (THIRD) OF PROPERTY (MORTGAGES) § 6.4 (1997) ("[P]erformance in full of the obligation secured by a mortgage . . . redeems the real estate from the mortgage . . . and extinguishes the mortgage.")

[8] *Foreclosure*, BLACK'S LAW DICTIONARY (10th ed. 2014) (emphasis added).

payment and authorizes the seizure and sale of property *if* the debt is not paid as the mortgage directs, and that seizure and sale of property *satisfies the debt* according to the property's value and the underlying state law.

In the decision below, the Tenth Circuit failed to consider key words in the text of the FDCPA, and these basic principles of property law. The Tenth Circuit held that "debt" under the FDCPA is "synonymous with money," and that enforcing a security interest "is not an attempt to collect money from the debtor," as "the consumer has no obligation . . . to pay money." *Obduskey*, 879 F.3d at 1221 (internal quotation marks omitted).

But consumers in foreclosure proceedings—whether judicial or nonjudicial—*do* have an obligation to pay money. That obligation is a necessary condition for the enforcement of the security interest. Here, for example, Respondent could not foreclose on Petitioner if Petitioner paid the debt in full before the foreclosure. Depending on the value of the security interest and the underlying state law, this enforcement may satisfy the consumer's monetary obligation in whole, in part, or with a surplus that must be repaid to the consumer. The entire foreclosure process relies upon and revolves around the consumer's *obligation* to pay a sum of money. The foreclosure process is therefore collection of a "debt" within the meaning of the FDCPA.

B. Nonjudicial Foreclosure Attorneys Collect Debt "Directly or Indirectly."

The Tenth Circuit also suggested that Respondents are not debt collectors because, under Colorado law, a public trustee ultimately sells the property and transfers payment to the mortgagee. *Obduskey*, 879 F.3d at 1221, n.4. But the FDCPA defines a "debt collector" as any person who "regularly collects . . . *directly or indirectly*, debts owed or due . . . another." 15 U.S.C. § 1692a(6) (emphasis added). As attorneys engaging in nonjudicial foreclosure activity, Respondents can be deemed to collect debt "directly" under this definition, because they institute legal actions where the intended remedy (seizure and sale of the borrower's home) will satisfy the borrower's obligation to pay. Indeed, Respondent McCarthy's communications with Petitioner indicate as much. Its initial letter stated that McCarthy "may be considered a debt collector attempting to collect a debt" and that "any information obtained will be used for that purpose." J.A. 37. Among other things, the letter informed Petitioner of "the total amount of the debt currently owed" and informed him that McCarthy "w[ould] assume this debt to be valid unless [Petitioner] dispute[d] its validity, or any part of it, within 30 days[.]" *Id.*

But even if they are not collecting directly, Respondents are certainly collecting *indirectly*. They are undertaking actions intended to enforce a security interest in the borrower's home in order to satisfy the borrower's obligation to pay. Nonjudicial foreclosure

attorneys are therefore "debt collectors," under the text of the FDCPA.

II. THE FDCPA'S PURPOSES CONFIRM THAT THE STATUTE APPLIES TO NONJUDICIAL FORECLOSURE PROCEEDINGS.

Congress enacted the FDCPA to protect consumers from the adverse consequences of abusive and deceptive debt collection practices, and to ensure that there is a uniform nationwide remedy against such practices. The decision below would create an "enormous loophole" in the FDCPA, *Wilson v. Draper & Goldberg, PLLC*, 443 F.3d 373, 376 (4th Cir. 2006), and therefore frustrate both purposes.

In passing the FDCPA, Congress found that "[t]here is abundant evidence of the use of abusive, deceptive, and unfair debt collection practices by many debt collectors. Abusive debt collection practices contribute to the number of personal bankruptcies, to marital instability, to the loss of jobs, and to invasions of individual privacy." 15 U.S.C. § 1692(a). In addition to addressing these devastating effects on borrowers, Congress sought to "promote consistent State action to protect consumers against debt collection abuses." *Id.* § 1692(e).

The risks of abusive debt collection are particularly prevalent with respect to collection of the principal type of debt in this country: mortgage debt. As of the second quarter of 2018, mortgages constitute more than two thirds of all consumer debt in the United States—i.e. more than twice as much as all

other types of consumer debt combined.[9] There are more than 75 million mortgage accounts in the United states.[10] Although foreclosures have been declining since recession-level highs, 1.1% of mortgages, i.e. more than 750,000 borrowers, are "seriously delinquent" as of August 2018,[11] and more than 675,000 borrowers found themselves in the foreclosure process in 2017.[12] The effect of foreclosures is compounded in the African American community in particular by other practices that target or disproportionately affect African American homeowners, including discriminatory targeting for predatory loans,[13] discriminatory property tax and water lien foreclosure practices,[14] and

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[9] *See* FED. RESERVE BANK OF NEW YORK, QUARTERLY REPORT ON HOUSEHOLD DEBT AND CREDIT 2018:Q2, 3 (Aug. 2018), https://www.newyorkfed.org/medialibrary/interactives/householddcredit/data/pdf/HHDC_2018Q2.pdf.

[10] *Id*. at 4.

[11] *Id*. at Summary.

[12] ATTOM DATA SOLS., U.S. FORECLOSURE ACTIVITY DROPS TO 12-YEAR LOW IN 2017, (Jan. 16, 2018), https://www.attomdata.com/news/foreclosure-trends/2017-year-end-u-s-foreclosure-market-report/ (finding 676,535 U.S. homes with foreclosure filings in 2017).

[13] *See infra* Section IV.

[14] *See, e.g.* Michael Sallah, Debra Cenziper & Steven Rich, *Left with Nothing*, WASH. POST (Sept. 8, 2013), http://www.washingtonpost.com/sf/investigative/2013/09/08/left-with-nothing/ (finding hundreds of homeowners in primarily minority neighborhoods in Washington D.C. lose their homes to tax foreclosure over amounts as small as $134); Fred Schulte & June Arney, *Small Unpaid Bills Put Residents at Risk*, BALT. SUN (Mar. 25, 2007), http://www.baltimoresun.com/bal-

disproportionate neglect of bank-owned properties, which devalues surrounding properties in predominantly African American neighborhoods.[15] If the decision below is affirmed, the FDCPA would not apply to the most common type of foreclosure proceedings in over half the states, thereby seriously undermining Congress's purpose of protecting consumers from abusive and deceptive debt collection practices.

Congress also enacted the FDCPA to apply consistent protections for borrowers in different states. 15 U.S.C. § 1692(e). Here, too, Respondent's interpretation would frustrate Congress's purpose.

In the decision below, the Tenth Circuit exempted only nonjudicial foreclosures from the FDCPA, noting that "*judicial* mortgage foreclosures may be covered under the FDCPA[.]" *Obduskey*, 879 F.3d at 1221. This is consistent with decisions by other Circuits, which have held judicial foreclosures subject to FDCPA claims,[16] and, more generally, with this Court's

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te.bz.waterbills25mar25-story.html# (finding hundreds of Baltimore residents lose their homes due to unpaid water bills, half of which are $500 or less).

[15] *See* NAT'L FAIR HOUS. ALLIANCE, ZIP CODE INEQUALITY: DISCRIMINATION BY BANKS IN THE MAINTENANCE OF HOMES IN NEIGHBORHOODS OF COLOR (Aug. 27, 2014), https://nationalfairhousing.org/wp-content/uploads/2017/04/2014-08-27_NFHA_REO_report.pdf (finding that banks often fail to maintain real estate owned properties in communities of color).

[16] *See, e.g. McNair v. Maxwell & Morgan PC*, 893 F.3d 680, 683 (9th Cir. 2018) (holding that attorneys pursuing judicial

precedent regarding FDCPA applicability to litigation. *See Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA*, 559 U.S. 573, 578–79 (2010); *Heintz v. Jenkins*, 514 U.S. 291, 299 (1995). No Circuit has held that the FDCPA does not apply to judicial foreclosures.

But applying the FDCPA to judicial foreclosures, but not nonjudicial foreclosures, would create precisely the patchwork Congress was seeking to avoid through the uniform FDCPA. And it would do so in a particularly anomalous fashion: the FDCPA would protect borrowers who already have more protection from, and recourse for, abusive practices by virtue of being a party to a judicial proceeding. Borrowers who face unfair, abusive, or deceptive practices in nonjudicial foreclosures, by contrast, would be denied a federal cause of action to redress the same kinds of harms, even though they already have fewer protections given the lack of judicial oversight.

Indeed, evidence indicates that the deceptive and abusive practices Congress sought to address through the FDCPA are common in nonjudicial foreclosure

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foreclosure are covered by the FDCPA); *Glazer v. Chase Home Fin. LLC*, 704 F.3d 453, 461 (6th Cir. 2013) (holding that judicial foreclosure is debt collection under the FDCPA and stating that "[i]n fact, *every* mortgage foreclosure, judicial or otherwise, is undertaken for the very purpose of obtaining payment on the underlying debt"); *Kaltenbach v. Richards*, 464 F.3d 524, 529 (5th Cir. 2006) (holding that "a party who satisfies § 1692a(6)'s general definition of a 'debt collector' is a debt collector for the purposes of the entire FDCPA even when enforcing security interests").

proceedings. Sections 1692e and 1692g of the FDCPA protect borrowers from misrepresentations about the amount or character of a debt, and from attempts to collect amounts not authorized by the underlying agreement. But a 2008 study in Texas found that nonjudicial foreclosure filings in that state routinely inflated charges and misrepresented amounts owed.[17] These abuses were only remedied because the borrowers in this study declared bankruptcy—for countless others they went unaddressed. The *amicus curiae* brief of the National Consumer Law Center provides many more instructive examples. *See* Br. of Amicus Curiae National Consumer Law Center at Section IV.

Similarly, Sections 1692e and 1692g protect borrowers from threats of action that cannot legally be taken, and from foreclosures by parties who have no right to possession. But a 2012 study of nonjudicial foreclosure filings in San Francisco County showed that foreclosing entities often use nonjudicial foreclosure to strip people of their homes despite having no legal right to the property.[18]

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[17] Katherine Porter, *Misbehavior and Mistake in Bankruptcy Mortgage Claims*, 87 TEX. L. REV. 121 (2008).

[18] *See* PIZANTE, *supra* note 5, at 1 (finding that 84% of nonjudicial foreclosure documents recorded in San Francisco County from 2009–2011 contained "clear violations of law"). *See also* Timothy A. Froehle, *Standing in the Wake of the Foreclosure Crisis: Why Procedural Requirements Are Necessary to Prevent Further Loss to Homeowners*, 96 IOWA L. REV. 1719, 1738–40 (2011) (describing examples of parties foreclosing without proper ownership of the underlying mortgage).

Borrowers going through foreclosure with judicial oversight are less vulnerable to these abusive practices. Foreclosing parties must file documents in court sufficient to show the truth of the amounts they claim borrowers owe, and sufficient to show that they may legally foreclose, consistent with pleading and evidence rules in state courts. But borrowers in nonjudicial foreclosure proceedings have no comparable access to this information, and no already-assigned judge to ask for relief from abuse. Borrowers in nonjudicial foreclosures are therefore more vulnerable to these abusive collection practices, and more in need of the protections of the FDCPA.

Mortgages are often the most important and most complicated transactions consumers enter in their lives. Sorting out available options when a mortgage payment is impossible to make is no small undertaking. Borrowers must document their own finances accurately and repeatedly, explore the possibility of refinances, modifications, and short sales, and determine their legal rights simultaneously. FDCPA application in the nonjudicial foreclosure process provides an incentive for foreclosing parties to provide accurate, understandable information on which consumers can rely. And this application also accomplishes Congress's goal of uniformity and consistency in consumer protection from debt collection abuses nationwide.

III. THE FDCPA'S APPLICATION TO NONJUDICIAL FORECLOSURES IS CONSISTENT WITH THE SOLICITUDE FOR HOMEOWERS IN OUR LEGAL TRADITION.

Our constitutional and common-law tradition give the home the highest solicitude in a host of areas.

Long before the Founding, Anglo-American law prized the importance and indeed sanctity of the home. In 1604, *Semayne's Case* held that "the house of every one is to him as his [] castle and fortress, as well for his defence against injury and violence, as for his repose[.]" 77 Eng. Rep. 194, 195 (K.B.). A century and a half later, Blackstone observed that English law had "so particular and tender a regard to the immunity of a man's house that it styles it his castle and will never suffer it to be violated with impunity[.]" 4 William Blackstone, *Commentaries on the Laws of England* 223 (Phila., J.B. Lippincott Co., 1893). Indeed, Blackstone recognized this principle as predating positive law. Discussing the origin of property in "house and home-stall," he noted that even animals "maintain[] a kind of permanent property in their dwellings, especially for the protection of their young . . . the invasion of which they esteemed a very flagrant injustice[.]" 2 William Blackstone, *Commentaries on the Laws of England* 4 (Phila., J.B. Lippincott Co., 1893); *see also* 4 Blackstone, *supra*, at 222 (observing that the "right of habitation" could be acquired "even in a state of nature").

The Founders were aware of, and relied upon, this legacy, even before the Founding. So, for example,

John Adams could argue with confidence in 1774 that "[a]n Englishmans dwelling House is his Castle. . . . every Member of Society has entered into a solemn Covenant with every other that he shall enjoy in his own dwelling House as compleat a security, safety and Peace and Tranquility as if it was surrounded with Walls of Brass, with Ramparts and Palisadoes and defended with a Garrison and Artillery[.]" Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 Mich. L. Rev. 547, 642 n.260 (1999) (quoting 1 *Legal Papers of John Adams* 137 (L. Kinvin Wroth & Hiller B. Zobel eds., 1965)).

The Bill of Rights reflected their understanding. As Justice Joseph Story explained in his influential *Commentaries on the Constitution of the United States*, the Third Amendment's bar on the quartering of soldiers in homes aimed "to secure the perfect enjoyment of that great right of the common law, that a man's house shall be his own castle, privileged against all civil and military intrusion." 3 Joseph Story, *Commentaries on the Constitution of the United States* 747 (Bos., Hilliard, Gray & Co. 1833). And the Fourth Amendment, with its explicit protection of "houses," was in Story's view "the affirmance of a great constitutional doctrine of the common law." *Id.* at 748; *see also* Davies, *supra*, at 603, 608 (discussing the relevance of the house's "special status at common law" to the Framers).

Consistent with this history, this Court has deemed the home "first among equals" for Fourth Amendment purposes. *Florida v. Jardines*, 569 U.S. 1,

6 (2013); *see also Payton v. New York*, 445 U.S. 573, 597 n.45 (1980) ("[O]ne of the most essential branches of English liberty is the freedom of one's house.") (quoting 2 *Legal Papers of John Adams* 142 (L. Kinvin Wroth & Hiller B. Zobel eds. 1965))). Because we have "lived our whole national history with an understanding of the ancient adage that a man's house is his castle," one occupant's consent for the police to enter and search is invalid if a present co-occupant objects. *Georgia v. Randolph*, 547 U.S. 103, 115 (2006) (internal quotation marks omitted). To preserve that sanctity, the Court recognizes a prophylactic protection for the area "immediately surrounding and associated with the home," *Jardines*, 569 U.S. at 6, and has held that employing thermal imaging from a public street to detect heat levels within the home must satisfy Fourth Amendment scrutiny, *see Kyllo v. United States*, 533 U.S. 27, 29, 40 (2001).

Moreover, this Court has considered the special importance of the home in interpreting constitutional protections that do not specifically mention it. For example, in the Second Amendment context, *District of Columbia v. Heller* emphasized that the Amendment "elevates above all other interests the right of law-abiding, responsible citizens to use arms in defense of hearth and home." 554 U.S. 570, 635 (2008). And, invalidating a ban on same-sex intimate conduct as violating the liberty protected by the Fourteenth Amendment, this Court in *Lawrence v. Texas* recognized that "[i]n our tradition the State is

not omnipresent in the home." 539 U.S. 558, 562 (2003).

This Court's treatment of the home in *Jones v. Flowers*, 547 U.S. 220 (2006), is particularly notable here. Settled Fourteenth Amendment due-process law required notice and opportunity for a hearing "[b]efore a State [could] take property and sell it for unpaid taxes[.]" *Id.* at 223. The question in *Flowers* was whether the government could seize a homeowner's property based on nothing more than the undelivered return of a notice of tax sale mailed to the owner. *See id.* The nature of the process due "varies according to specific factual contexts[,]" *Hannah v. Larche*, 363 U.S. 420, 442 (1960), and the linchpin in *Flowers* was the home. In holding that more process was constitutionally required, the Court in *Flowers* emphasized repeatedly that the petitioner's home was at stake. *See, e.g.*, *Flowers*, 547 U.S. at 229 (stating that at issue was "the adequacy of notice prior to the State extinguishing a property owner's interest in a home"); *id.* at 238 ("[S]omeone who actually wanted to alert Jones that he was in danger of losing his house would do more[.]"); *id.* at 239 ("In this case, the State is exerting extraordinary power against a property owner—taking and selling a house he owns.").

In short, it does not overstate the matter to call the home "the most constitutionally protected place on earth." *United States v. Craighead*, 539 F.3d 1073, 1083 (9th Cir. 2008). As this Court has recognized, the "interest in protecting the well-being, tranquility, and privacy of the home" is "of the highest order in a free

and civilized society." *Carey v. Brown*, 447 U.S. 455, 471 (1980).

Consistent with this legal tradition, the home has been uniquely linked to the idea of the "American dream."[19] Both before and after slavery—despite antebellum bars on property ownership and postbellum barriers to its acquisition—African Americans sought to be part of this tradition.[20] Similarly, for successive generations of new Americans, a home of their own has been a central, driving ambition and a marker of self-sufficiency and accomplishment.[21]

For these reasons, a long line of Congresses before the 95th Congress—which enacted the FDCPA—recognized the home's importance. For example, the

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[19] *See* Heather K. Way, *Informal Homeownership in the United States and the Law*, 29 ST. LOUIS U. PUB. L. REV. 113, 126 (2009); President Barack Obama, Remarks by the President on Responsible Homeownership (Aug. 6, 2013), https://obamawhitehouse.archives.gov/the-press-office/2013/08/06/remarks-president-responsible-homeownership (describing "the chance to own your own home" as "the most tangible cornerstone that lies at the heart of the American dream").

[20] *See, e.g.*, Charles Lewis Nier III, *The Shadow of Credit: The Historical Origins of Racial Predatory Lending and Its Impact Upon African American Wealth Accumulation*, 11 U. PA. J.L. & SOC. CHANGE 131, 135–37, 143, 148, 167–69 (2008) (discussing relevant history).

[21] *See* Charu A. Chandrasekhar, *Can New Americans Achieve the American Dream? Promoting Homeownership in Immigrant Communities*, 39 HARV. C.R.-C.L. L. REV. 169, 170–172 (2004) (collecting studies).

National Housing Act, Pub. L. No. 73-479, 48 Stat. 1246 (1934), created the Federal Housing Administration to "address a crisis in mortgage delinquencies and foreclosures[.]"[22] And the Housing Act of 1949, Pub. L. No. 81-171, 63 Stat. 413, declared Congress's "goal of a decent home and a suitable living environment for every American family" to "advance[] . . . the growth, wealth, and security of the Nation." 42 U.S.C. § 1441. We had, in short, "[d]ecades of federal policy designed to expand and improve the nation's housing supply[.]"[23]

Of course, as this Court recently recognized, African Americans and other minorities were in large part excluded—sometimes by government action—from this housing policy. *See, e.g.*, *Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc.*, 135 S. Ct. 2507, 2515–16 (2015); *see also* Brief of Amici Curiae Housing Scholars Supporting Respondent, *Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc.*, 135 S. Ct. 2507 (2015) (No. 13-1371), 2014 WL 7405732, at *10–21 (discussing this history). These exclusionary practices often relegated African Americans to substandard, exploitative housing. For example, the Federal Housing Administration intentionally imposed racially restrictive covenants

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[22] Brad Greenburg, *Consolidation After Crisis: How a Few Private Investors Bought Distressed, Federally-Insured Mortgages After the Foreclosure Crisis*, 20 N.Y.U. J. LEGIS. & PUB. POL'Y 887, 890 (2017) (internal quotation marks omitted).

[23] Lawrence B. Simons, *Towards a New National Housing Policy*, 6 YALE L. & POL'Y REV. 259, 264 (1988).

and "redlined" African American families into blocks ineligible for Federal Housing Administration insured mortgages.[24] Seeking to eliminate these and other injustices, Congress passed the Fair Housing Act, which aimed to create "truly integrated and balanced living patterns." *Trafficante v. Metro. Life Ins. Co.*, 409 U.S. 205, 211 (1972) (citation omitted). As one of our most significant civil rights statutes, the Fair Housing Act represents our recognition that the promise of security, stability, and full citizenship that a home represents must be available to all Americans.

This history and context should illuminate the question presented here. Given our long history of granting the home pride of place, there can be no serious dispute that the 95th Congress understood the home's importance. Nor can it be doubted that Congress knew that mortgages were a form of debt that can be collected upon. After all, the Senate Report explicitly recognizes that they are. In explaining why "persons who originated" loans could collect on those debts without being considered debt collectors, Congress gave "*mortgages* and student loans" as examples of collectible debts. S. Rep. No. 95-382, at 3 (1977), *as reprinted in* 1977 U.S.C.C.A.N. 1695, 1698 (emphasis added).

And, finally, it was clear in 1977, as it is today, that mortgages were a significant form of debt. In the

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[24] *See, e.g.*, David Reiss, *Underwriting Sustainable Homeownership: The Federal Housing Administration and the Low Down Payment Loan*, 50 GA. L. REV. 1019, 1050–51 (2016).

thirty years between 1949 and 1979, mortgage debt rose: from 20 percent of total American household income to 46 percent of household income, from 15 percent of household assets to 28 percent of household assets, and from just over ten percent of GDP to just under thirty percent of GDP.[25] It would have been strange indeed had Congress drafted a statute focused on curbing abusive debt collection practices that exempted an enormous amount of American household debt relating to one of the most prized possessions in American thought and law—the home. It did not.

IV. THE DECISION BELOW CREATES PARTICULAR RISKS FOR AFRICAN AMERICAN HOMEWONERS.

In the years following the Second World War, federal, state, and local governments enforced and subsidized discriminatory policies that prevented Black families from acquiring homes.[26] Federal agencies initiated the practice of redlining,[27] and the Federal Housing Administration required developers to include racially restrictive covenants in their deeds

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[25] *See* Richard K. Green & Susan M. Wachter, *The American Mortgage in Historical and International Context*, 19 J. OF ECON. PERSP. 93, 93–94 (2005).

[26] See generally, DOUGLAS S. MASSEY & NANCY A. DENTON, AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS (1993).

[27] Benjamin Howell, *Exploiting Race and Space: Concentrated Subprime Lending as Housing Discrimination*, 94 CALIF. L. REV. 101, 107–08 (2006).

to obtain federal financing.[28] This combination of racially discriminatory government policies and private sector prejudice prevented many Black people from owning homes, and "segregation continued unabated" through the early 1960s.[29] While the overall homeownership rate in the United States increased from 43.6 percent in 1940 to 62 percent in 1960, that increase inured exclusively to the benefit of the white middle class.[30] The resultant "residential spatial segregation in America's cities has contributed to the growth of an African-American underclass that threatens to make urban poverty and racial injustice a permanent fixture of American society."[31]

More recently, a number of major lenders developed and aggressively pushed forms of "reverse redlining." They did so by marketing high-risk, subprime loans, "offering easier and faster approvals" to borrowers of color while downplaying the exorbitant costs that would later be exacted through inflatable interest rates, balloon payments, negative amortization features, and/or stricter repayment

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[28] *See* Richard Rothstein, *Race and Public Housing: Revisiting the Federal Role*, 21 POVERTY & RACE RES. ACTION COUNCIL 2 (Nov.–Dec. 2012).

[29] Ira Rheingold, *et al.*, *From Redlining to Reverse Redlining: A History of Obstacles for Minority Homeownership in America*, 34 CLEARINGHOUSE REV. 642, 645 (2001).

[30] MECHELE DICKERSON, HOME OWNERSHIP AND AMERICA'S FINANCIAL UNDERCLASS: FLAWED PREMISES, BROKEN PROMISES, NEW PRESCRIPTIONS 181 (Cambridge Univ. Press 2014).

[31] John P. Relman, *Foreclosures, Integration, and the Future of the Fair Housing Act*, 41 IND. L. REV. 629, 629, 641 (2008).

terms.[32] Studies that control for income, credit score, and other risk variables consistently show that borrowers of color were and continue to be disproportionately steered into predatory high-risk loans.[33]

Given this historical and contemporary discrimination in the housing market, it is no surprise that Black borrowers fared significantly worse than others during and since the foreclosure crisis. "[T]he group with the smallest percentage of homeownership, African Americans, had the greatest dive in homeownership rates."[34] Indeed, a study examining foreclosures during the housing crisis found that predominantly Black neighborhoods experienced 8.1 foreclosures per 100 homes, while predominantly

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[32] *See* Rick Brooks & Ruth Simon, *Subprime Debacle Traps Even Very Credit-Worthy*, WALL STREET J. (Dec. 3, 2007), https://www.wsj.com/articles/SB119662974358911035.

[33] *See, e.g.*, Robert G. Schwemm & Jeffrey L. Taren, *Discretionary Pricing, Mortgage Discrimination, and the Fair Housing Act*, 45 HARV. C.R.-C.L. L. REV. 375, 399–400 (2010); Carolina Reid & Elizabeth Laderman, *The Untold Costs of Subprime Lending: Examining the Links among Higher-Priced Lending, Foreclosures and Race in California* 7, INST. FOR ASSETS & SOC. POL'Y, BRANDEIS UNIV. (2009); MONIQUE W. MORRIS, NAACP, DISCRIMINATION AND MORTGAGE LENDING IN AMERICA: A SUMMARY OF THE DISPARATE IMPACT OF SUBPRIME MORTGAGE LENDING ON AFRICAN AMERICANS (Mar. 2009), https://naacp.3cdn.net/4ca760b774f81317c4_klm6i6yxg.pdf.

[34] Aleatra P. Williams, *Lending Discrimination, the Foreclosure Crisis and the Perpetuation of Racial and Ethnic Disparities in Homeownership in the U.S.*, 6 WM. & MARY BUS. L. REV. 601, 618 (2015).

white neighborhoods experienced only 2.3 homes per 100 on average.[35]

The implications for wealth accumulation in the Black community have been devastating. Homeownership is strongly linked to wealth accumulation, due in large part to the transferability of real estate between generations.[36] The decades of federal policies and private discriminatory practices expanding white homeownership and restricting Black homeownership steadily widened the racial wealth gap through the 20th century.[37] The great recession and foreclosure crisis exacerbated this trend:

> [B]etween 2005 and 2009, fully two-thirds of median household wealth in [communities of color] was wiped out. From Jamaica, Queens, New York, to Oakland, California, strong, middle class African American neighborhoods saw nearly two decades of gains reversed in a matter of not years – but months.[38]

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[35] Matthew Hall, Kyle Crowder & Amy Spring, *Neighborhood Foreclosures, Racial/Ethnic Transitions, and Residential Segregation*, 80 AM. SOC. REV. 526, 534 (2015) (examining the years 2005–2009). .

[36] Lynnise E. Phillips Pantin, *The Wealth Gap and the Racial Disparities in the Startup Ecosystem*, 62 ST. LOUIS U. L.J. 419, 436 (2018).

[37] *See id.*; Thomas M. Shapiro, *Race, Homeownership and Wealth*, 20 WASH. U. J.L. & POL'Y 53, 58–59 (2006).

[38] Shaun Donovan, *Prepared Remarks of Secretary Shaun Donovan During the Countrywide Settlement Press Conference*, U.S. DEP'T OF HOUS. & URBAN DEV., PRESS ROOM (Dec. 21, 2011),

This dramatic and disproportionate decline in household wealth also reflects the fact that home equity "represents a much larger share of the net worth of the typical black or Hispanic homeowner (58 percent) than of the typical white homeowner (37 percent)."[39] The downstream effects of the foreclosure crisis, particularly decreased property values and depressed credit scores, likewise disproportionately harm Black families and communities of color.[40]

These downstream effects also restrict Black families' options for preventing foreclosure. Black families are less likely to qualify for refinancing due to disproportionately high loan balances, low property values, and weak credit scores. For these same

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https://archives.hud.gov/remarks/donovan/speeches/2011-12-21.cfm. *See also* Jacob S. Rugh & Douglas S. Massey, *Racial Segregation and the American Foreclosure Crisis,* 75 AM. SOC. REV. 629, 633 (2010) ("[S]egregation and the new face of unequal lending combined to undermine black residential stability and erode any accumulated wealth.").

[39] JOINT CTR. FOR HOUS. STUDIES, HARV. UNIV., THE STATE OF THE NATION'S HOUSING: 2015 17 (2015), http://www.jchs.harvard.edu/sites/default/files/jchs-sonhr-2015-full.pdf.

[40] *See e,g.*, Ylan Q. Mui, *For Black Americans, Financial Damage from Subprime Explosion Is Likely to Last*, WASH. POST (July 8, 2012), https://www.washingtonpost.com/business/economy/for-black-americans-financial-damage-from-subprime-implosion-is-likely-to-last/2012/07/08/gJQAwNmzWW_story.html?utm_term=.1417963b278b ("[C]redit scores of black Americans have been systematically damaged, haunting their financial futures.").

reasons, as well as a racial income gap,[41] Black families also have a harder time qualifying for loan modifications.[42] The result is that Black families often have fewer options for escaping foreclosure, and they have a particular need for accurate information to evaluate what options they do have.

FDCPA protections are particularly essential for African American and other borrowers of color. As explained above, nonjudicial foreclosure is ripe for, and rife with, the abuses the FDCPA is meant to prevent, and those abuses disproportionately harm minority borrowers. Congress's intent for the FDCPA was to require debt collectors to be honest and forthright with borrowers about their obligations. Nowhere is this more important than in nonjudicial foreclosure, where the borrowers' stakes are enormous and their access to information is limited.

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[41] A recent study found that race is a significant factor in determining income, even after controlling for neighborhood and socioeconomic background. *See* Jenny Gathright, *Forget Wealth and Neighborhood. The Racial Income Gap Persists*, NPR (Mar. 19, 2018), https://www.npr.org/sections/codeswitch/2018/03/19/594993620/forget-wealth-and-neighborhood-the-racial-income-gap-persists.

[42] *See, e.g.* CAL. REINVESTMENT COALITION, RACE TO THE BOTTOM: AN ANALYSIS OF HAMP LOAN MODIFICATION OUTCOMES BY RACE AND ETHNICITY FOR CALIFORNIA (July 2011), http://www.calreinvest.org/system/resources/W1siZiIsIjIwMTEvMDcvMTIvMTFfMTBfMjdfOTg3X0hBTVBfUkVQT1JUX0ZJTkFMLnBkZiJdXQ/HAMP%20REPORT%20FINAL.pdf.

CONCLUSION

Because the FDCPA applies to nonjudicial foreclosure proceedings, the judgment of the Tenth Circuit should be reversed.

Respectfully submitted,

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