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

AMICUS CURIAE BRIEF OF THE MICHIGAN CREDITORS BAR ASSOCIATION IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICUS*[1]

The Michigan Creditors Bar Association ("MCBA") is an organization of Michigan attorneys who practice in the areas of debt collection and creditors' rights. MCBA members are committed to the professional, responsible and ethical representation of creditors, including mortgagees and loan servicers. Michigan law provides for non-judicial foreclosure and, after the Sixth Circuit decided *Glazer v. Chase Home Finance, LLC,* 704 F.3d 453 (6th Cir. 2013), members of the MCBA experienced first-hand the encroachment of federal law on Michigan's non-judicial foreclosure process, to the detriment of both consumers and mortgage lenders. As set forth in this brief, MCBA's members' direct experience with the expansion of the Fair Debt Collection Practices Act ("FDCPA") to non-judicial foreclosure proceedings refutes the contentions of Petitioner and his supporting *amicus* that any conflict between state law and the FDCPA is hypothetical or avoidable. The MCBA hopes the Court will benefit from the MCBA's perspective.

SUMMARY OF ARGUMENT

The experience of Michigan foreclosure attorneys disproves the contention of Petitioner and

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amicus curiae* states that no party or counsel for a party had any role in authoring this brief. No one other than *amicus curiae* and its counsel made a monetary contribution to the preparation and submission of this brief. Counsel for the parties have filed letters of blanket consent to the filing of *amicus* briefs.

his *amicus* that the FDCPA can be reconciled with non-judicial foreclosure statutes. The application of the FDCPA to Michigan's non-judicial foreclosure process has created an actual and material conflict between the FDCPA and Michigan law. Federal district courts faced with the issue uniformly held that an attorney effectuating a non-judicial foreclosure through the Michigan statute violates the FDCPA's prohibition against communicating about a consumer debt with third parties. This Court's required deference to principles of federalism prohibit it from construing the FDCPA in a way that would displace state non-judicial foreclosure statutes because the FDCPA contains no clear indication that Congress intended to preempt state non-judicial foreclosure laws.

ARGUMENT

A. Michigan's Non-judicial Foreclosure Statute Protects Michigan Consumers.

Michigan's foreclosure by advertisement statute, codified at Mich. Comp. Laws § 600.3201 *et seq.*, has been extant for almost 200 years. *See Kimmell v. Willard's Adm'r*, 1 Doug. 217 (Mich. 1843). Michigan's statute only allows foreclosure by advertisement in the event of a default that triggers a "power of sale" provision in a mortgage and if no lawsuit has been filed to collect the debt secured by the mortgage. Mich. Comp. Laws § 600.3204. Only the owner of the underlying indebtedness or its servicer has standing to initiate foreclosure proceedings and, if the party seeking to foreclose is not the original mortgagee, a chain of title must be recorded prior to the sale. *Id.*

The statute also requires that notice of the proposed foreclosure sale be published for four successive weeks in a newspaper distributed in the county where the property is located and that a copy of the notice of foreclosure sale be posted in a conspicuous place on the property. Mich. Comp. Laws § 600.3208. The notice must include, *inter alia,* the name of the mortgagor and the amount due on the note as of the date of the notice. Mich. Comp. Laws § 600.3212. After the appropriate notice period, the property is sold at auction to the highest bidder by "the person appointed for that purpose in the mortgage" or by a county sheriff. Mich. Comp.

Laws § 600.3216. A mortgagor has either six months or one year to redeem the property after it is sold and information related to the redemption period must be included in the notice of foreclosure. Mich. Comp. Laws §§ 600.3212, 600.3240.

If the sale proceeds are not sufficient to retire the note, a mortgagee must file suit if it wants to collect any deficiency. The mortgagor may assert as a defense to such action that the sale price was less than the property's "true value." Mich. Comp. Laws § 600.3280. A mortgagor also has a common law right to sue for wrongful foreclosure, because under Michigan law, "defects or irregularities in a foreclosure proceeding result in a foreclosure that is voidable." *Kim v. JP Morgan Chase Bank, N.A.,* 493 Mich. 98, 115, 825 N.W.2d 329 (2012). In order to void a sale, a mortgagor must "show that they would have been in a better position to preserve their interest in the property," had the mortgagee complied with the statute. *Kim,* 493 Mich. at 116.

The Michigan Legislature enacted the statute "'to enlarge and not to cut down the rights of mortgagors." *Northrip v. Federal Nat. Mortg. Ass'n*, 527 F.2d 23, 27 (6th Cir. 1975), citing *Reading v. Waterman*, 46 Mich. 107, 110, 8 N.W. 691 (1881). For example, the notice requirement was implemented "to inform the mortgagor so that he may see that a price adequate to protect his interests is obtained at the sale." *Schulthies v. Barron,* 16 Mich. App. 246, 248, 167 N.W.2d 784 (1969). The Michigan Legislature revised the statute in 2009 to address the foreclosure crisis caused by the Great

Recession by providing mortgagors with additional rights, including the right to request a meeting with the mortgagee or servicer to discuss a loan modification and, if such a meeting were requested, a 90 day stay of the foreclosure sale to allow the parties to attempt to negotiate a loan modification. Mich. Comp. Laws § 600.3205a (2009). These provisions were repealed effective June 20, 2014, after the foreclosure crisis had abated. *See* Michigan Public Act 105 of 2013.

Over the course of its existence, Michigan's foreclosure by advertisement statute has been repeatedly upheld as being consistent with principles of due process. *See e.g. Garcia v. Federal Nat. Mortg. Ass'n*, 782 F.3d 736 (6th Cir. 2015) (holding that the notice required by the statute did not violate the plaintiffs' due process rights); *Cramer v. Metropolitan Savings & Loan Ass'n*, 401 Mich. 252, 259, 258 N.W.2d 20 (1977) (holding that the statute poses no due process question). Michigan law provides mortgagors with the opportunity to redeem the property after a sale and a process for ensuring that the sale was fair. When extensive federal regulation of the mortgage industry failed to stop the foreclosure crisis that devastated Michigan, the Michigan Legislature took swift, direct and focused action to protect its citizens.

B. Grafting the FDCPA on to Michigan's Non-judicial Foreclosure Statute Created an Actual and Material Conflict.

After the Sixth Circuit decided *Glazer v. Chase Home Finance, LLC,* 704 F.3d 453 (6th Cir. 2013), mortgage attorneys in Michigan were besieged with FDCPA lawsuits, charging that the publication of notices of foreclosure under Mich. Comp. Law § 600.3208 violated 15 U.S.C. § 1692c(b)'s prohibition against communicating with third-parties about consumer debts.[2] Thus, what the *Obduskey* court noted as a "potential" area of conflict between Colorado's non-judicial foreclosure statute and the FDCPA, has become an actual conflict in Michigan. *Obduskey v. Wells Fargo, N.A.,* 879 F.3d 1216, 1222 (10th Cir. 2018). Federal district courts sitting in Michigan that were faced with the issue of whether the statutory notice violated the FDCPA

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[2] That section of the FDCPA provides:

> Except as provided in section 1692b of this title, without the prior consent of the consumer given directly to the debt collector, or the express permission of a court of competent jurisdiction, or as reasonably necessary to effectuate a postjudgment judicial remedy, a debt collector may not communicate, in connection with the collection of any debt, with any person other than the consumer, his attorney, a consumer reporting agency if otherwise permitted by law, the creditor, the attorney of the creditor, or the attorney of the debt collector.

found universally that a mortgagor stated a claim against an attorney for a violation of 15 U.S.C. § 1692c(b) based on the attorney's publication of a statutory notice of foreclosure. *See e.g. Thebert v. Potestivo & Assoc.,* Case No. 16-CV-14341, 2017 WL 3581322 at * 5 (E.D. Mich. Aug. 18, 2017), collecting cases. There were no reported exceptions.

Further, after *Glazer,* foreclosure attorneys attempted to comply with the FDCPA by including in the foreclosure notice the disclaimer mandated by 15 U.S.C. § 1692e(11).[3] This action launched a second round of litigation, with district courts finding that an attorney violates the FDCPA by including the mandatory FDCPA language in a notice of foreclosure, because the FDCPA disclaimer is not required by Michigan's foreclosure statute. *See e.g. Thompke v. Fabrizio & Brook, P.C.,* 261 F. Supp. 3d 798, 811 (E.D. Mich. 2017). These courts thus found that attorneys violated one part of the FDCPA by following a different part of the FDCPA.

Petitioner contends that the conflict between 15 U.S.C. § 1692c(b) and the public notice requirements in most non-judicial foreclosure statutes can be resolved through "sensible" interpretations of the FDCPA, but offers no hint as to what the "sensible" interpretation may be. *See* Brief of Petitioner at p. 27. Certainly the federal courts in Michigan forced to apply *Glazer* failed to

[3] This provision requires debt collectors to disclose in every communication that the communication is from a debt collector.

find a "sensible" resolution to the conflict. *See e.g. Salewske v. Trott & Trott, PC.,* Case No. 16-CV-13326, 2017 WL 9470708 at *5, n. 4 (E.D. Mich. March 16, 2017), aff'd with modifications 2017 WL 2888998 (E.D. Mich. July 7, 2017) (noting that application of FDCPA to non-judicial foreclosures created a "'damned if you do, damned if you don't' plight" and posed an "unavoidable risk of litigation.")

Amicus The National Consumer Law Center ("NCLC") dismisses the patent conflict by noting that the FDCPA's ban against communications with third-parties contains several exceptions which militate against any conflict. *See* Brief of *Amicus* National Consumer Law Center at pp. 23 – 24. NCLC suggests, for example, that the foreclosure notices are exempt from 15 U.S.C. § 1692c(b) because the FDCPA allows communications made with "the express permission of a court of competent jurisdiction." *Id.* Michigan's non-judicial foreclosure statute does not require any court intervention, let alone "the express permission" of a court. Indeed, a similar argument was rejected by a federal district court sitting in Michigan, on the ground that the notice of foreclosure was not required by "order of court." *Walker v. Fabrizio & Brook, P.C.,* Case No. 17-11034, 2017 WL 5068340 at * 6 (E.D. Mich. Nov. 2, 2017).

NCLC's Brief next contends that the "consent to sale" provisions in most mortgages constitutes "the prior consent of the consumer given directly to the debt collector," an additional exception to 15 U.S.C. § 1692c(b)'s bar on third-party

communications. *See* Brief of NCLC at p. 23. Federal courts in Michigan rejected this argument, because the "consent to sale" was not given "directly to the debt collector."[4] *See e.g. Thebert,* 2017 WL 3381322 at *6. NCLC cites one of the Michigan cases rejecting the "prior consent" argument in support of its position that "consent" avoids the conflict. *See* Brief of NCLC at p. 23, citing *Walker,* 2017 WL 5068340 at *3. The *Walker* court found that any consent to publication by the mortgagor was initiated by the inclusion of the 15 U.S.C. § 1692e(a) disclaimers. *Walker,* 2017 WL 5068340 at *1, 4. The *Walker* decision thus underscores the conflict between the Michigan statute and the FDCPA, it does not resolve the conflict, as NCLC suggests.

Grafting the FDCPA onto Michigan's non-judicial mortgage foreclosure process did not result in litigation targeted at the alleged fraud and abuse in the foreclosure process, as the Petitioner and his supporting *amicus* suggest. Rather, the *Glazer* decision launched a concerted attack aimed at eliminating Michigan's non-judicial foreclosure process all together. Simply put, under the current

[4] NCLC also relies on *Maynard v. Cannon,* 650 F. Supp. 2d 1138, 1144 (D. Utah 2008) for its position. In that case, the court held that non-judicial foreclosures were not covered by the FDCPA. The *Maynard* court found in the alternative that the plaintiff gave her consent to disclose the debt "directly to the debt collector" when she executed a deed in trust in favor of a "trustee" because the defendant-debt collector was made trustee prior to initiating the foreclosure process. Attorneys following the Michigan statute are agents of the mortgagee or servicer and the reasoning in *Maynard* does not apply to them.

rulings of federal courts, it is not possible for attorneys to follow the foreclosure process outlined in the Michigan statute without violating the FDCPA's prohibition against disclosing a consumer debt to a third-party. The conflict is real and unavoidable.

C. The Definition of "Debt Collector" Should Not Be Construed to Include Attorneys Effecting Non-judicial Foreclosures.

Whether the FDCPA proscribes the conduct of attorneys engaged in non-judicial foreclosures requires judicial construction of the term "debt collector." *Vien-Phuong Thi Ho v. ReconTrust Co., N.A.,* 858 F.3d 568, 576 (9th Cir. 2017); *Glazer,* 704 F.3d at 460. Because foreclosure is a "field which the states have traditionally occupied,"[5] this Court's interpretation of the FDPCA must start with the "assumption that the historic powers of the State were not to be superseded" by the federal statute. *Rice v. Santa Fe Elevator Corp.,* 331 U.S. 218, 230 (1947) (considering whether the United States Warehouse Act, 7 U.S.C. § 241, *et seq.* prohibits state agency from setting grain warehousing rates). Put another way, this Court should not interpret a federal statute in a way that "would generate a

[5] *BFP v. Resolution Trust Corp.,* 511 U.S. 531, 544 (1994) ("It is beyond question that an essential state interest is at issue here: We have said that 'the general welfare of society is involved in the security of the titles to real estate' and the power to ensure that security 'inheres in the very nature of [state] government... '"), citations omitted.

conflict between state and federal law," because our federalist system demands that "the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Ho,* 858 F.3d at 576, citing *Rice, supra.*

This "clear and manifest" purpose or "plain statement" test is founded on this Court's strong fidelity to federalism. *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991). Under this rubric, "it is incumbent upon the federal courts to be certain of Congress' intent before finding that federal law overrides" the balance between state and federal powers. *Id, citing Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 243 (1985). In short, "if Congress intends to alter the 'usual constitutional balance between the States and the Federal Government,' it must make its intention to do so 'unmistakably clear in the language of the statute.'" *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 65 (1989), citing *Atascadero State Hospital*, 473 U.S. at 242.

This Court has already applied these principles in reviewing the issue of whether federal law should be construed to displace state foreclosure law, albeit in a different context. *BFP v. Resolution Trust Corp.,* 511 U.S. 531 (1994). The question in *BFP* was whether a mortgagor who filed bankruptcy could bring a fraudulent transfer suit under 11 U.S.C. § 548 in order to void a foreclosure sale performed under state law. The debtor maintained that the sale price reached at the foreclosure sale was below market and therefore not "reasonably

equivalent value" under 11 U.S.C. § 548(a)(2). The *BFP* court found that the bankruptcy code could not be construed in a way that would allow a debtor to void a sale that was valid under state foreclosure law. This Court held that regulating "the security of titles to real estate" is "beyond question" an "essential state interest" and that interest should not be displaced absent the "clear and manifest" intention of Congress to do so. *BFP,* 511 U.S. at 544. In responding to the dissent's insistence that state practice cannot "trump the plain meaning of federal statutes" [*BFP,* 511 U.S. at 567], the *BFP* court found:

> We have no quarrel with the dissent's assertion that where the 'meaning of the Bankruptcy Code's test is itself clear,' [citation omitted], its operation is unimpeded by contrary state law or prior practice. Nor do we contend that Congress must override historical state practice 'expressly or not at all.' [citation omitted]. The Bankruptcy Code can of course override by implication when the implication is unambiguous. ***But where the intent to override is doubtful, our federal system demands deference to long-established traditions of state regulation.***

BFP, 511 U.S. at 546, emphasis added.

A similar analysis is warranted here. The word "foreclosure" does not appear in the FDCPA or its legislative history. S. Rep. 95-382 (1977). If Congress intended the FDCPA to displace state non-judicial foreclosure statues, "its failure to hint at it is spectacularly odd," given the prevalence of such statutes at the time the FDCPA was enacted. *Medtronic, Inc. v. Lohr,* 518 U.S. 470, 491 (1996) (finding 21 U.S.C. § 360(k) did not bar state tort law causes of action where legislative history did not suggest "a sweeping pre-emption of traditional common law remedies.") *See* Brief of NCLC at p. 4 (noting the jurisdictions permitting non-judicial foreclosures). Given that Michigan's statute would in fact be displaced by the application of the FDCPA to non-judicial foreclosures, the question before the Court is not whether the FDCPA could be construed to indicate such a displacement, but whether it is "unmistakably clear in the language of the statute" that Congress intended such a displacement. *Will,* 491 U.S. at 65. The answer is unequivocally, "No." Indeed, the analytical gymnastics employed by the Circuit Courts of Appeals that found the term "debt collector" to include attorneys engaged in foreclosure practice (exercises mimicked by Petitioner and his supporting *amicus)* evidences the lack of "clear and manifest intent" by Congress to use the FDCPA to displace state non-judicial foreclosure law. *See e.g. Glazer,* 704 F.3d at 460 – 465; *Wilson v. Draper & Goldberg, PLLC,* 443 F.3d 373, 375 – 377 (4th Cir. 2006).

Finally, Petitioner suggests but does not really argue that 15 U.S.C. § 1692n demonstrates

Congress's express intent to preempt all state laws that touch on the field of "debt collection." That provision provides:

> This subchapter does not annul, alter, or affect, or exempt any person subject to the provisions of this subchapter from complying with the laws of any State with respect to debt collection practices, except to the extent that those laws are inconsistent with any provision of this subchapter, and then only to the extent of the inconsistency. For purposes of this section, a State law is not inconsistent with this subchapter if the protection such law affords any consumer is greater than the protection provided by this subchapter.

This statute cannot be construed to preempt every state law that impacts the debtor-creditor relationship. Plainly, in enacting 15 U.S.C. § 1692n, Congress had in mind that a state debt collection practices statute (like Michigan's Regulation of Collection Practices Act, Mich. Comp. Laws § 445.252, *et seq.*) should be preempted where, for example, the state law permitted a debt collector to place collection calls until 6 p.m., but the FDCPA (hypothetically) only permitted calls until 5 p.m. There is no indication that Congress intended 15 U.S.C. § 1692n to annul state laws allowing non-judicial foreclosures. *See, e.g., Walls v. Wells Fargo Bank, N.A.,* 276 F.3d 502, 510 (9th Cir. 2002)

(finding debtor did not have a claim under the FDCPA for violation of the discharge injunction on ground there was no indication in either FDCPA or Bankruptcy Code that "Congress intended to allow debtors to bypass the Code's remedial scheme when it enacted the FDCPA.")

Michigan's non-judicial foreclosure statute benefits consumers in that it ensures a fair sale price, provides significant redemption rights and eliminates excessive court costs (which are chargeable to the mortgagor by statute) and attorneys' fees (which are typically awarded in loan documents). As stated above, Michigan's Legislature and its courts have provided Michigan citizens with a well-regulated procedure to protect mortgagors from improper foreclosure practices. That system and similar regimes in other states (including Colorado) cannot be displaced based on a tortured rendering of the FDCPA.

CONCLUSION

For the foregoing reasons, the judgment of the Tenth Circuit Court of Appeals should be affirmed.

Respectfully, submitted,

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