No.

In the Supreme Court of the United States

RICK GREER, PETITIONER

v.

GREEN TREE SERVICING LLC, NORTHWEST TRUSTEE SERVICES, INC., AND RCO LEGAL, P.S.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Congress passed the Fair Debt Collection Practices Act (FDCPA) to "eliminate abusive debt collection practices by debt collectors." 15 U.S.C. 1692(e). Under the FDCPA, the term "debt collector" is defined as "any person * * * who regularly collects or attempts to collect, directly or indirectly, debts owed or due * * * another." 15 U.S.C. 1692a(6).

This case presents a clear and intractable conflict regarding whether the FDCPA applies in the foreclosure context. In the decision below, the Ninth Circuit, now joined by the Tenth Circuit, reaffirmed its position that non-judicial foreclosures are not covered by the FDCPA. In doing so, the court further entrenched a conflict that has squarely divided multiple courts of appeals and state high courts. This holding was outcome-determinative below, and it mirrors the fact-pattern that has generated substantial "confusion" and hundreds of conflicting decisions nationwide. This case presents an excellent vehicle for resolving the widespread disagreement over this important issue.

The question presented is:

Whether the FDCPA applies to non-judicial foreclosure proceedings.

PARTIES TO THE PROCEEDING BELOW

Petitioner is Rick Greer, the appellant below and plaintiff in the district court.

Respondents are Green Tree Servicing LLC, Northwest Trustee Services, Inc., and RCO Legal, P.S., the appellees below and defendants in the district court.

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Rick Greer respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The memorandum opinion of the court of appeals (App., *infra*, 1a-3a) is not published in the Federal Reporter but is available at 708 F. App'x 371. The orders of the district court (App., *infra*, 4a-12a, 13a-21a) are unreported but available at 2015 WL 4077432 and 2015 WL 4077735.

JURISDICTION

The judgment of the court of appeals was entered on December 26, 2017. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant provisions of the Fair Debt Collection Practices Act (FDCPA), 15 U.S.C. 1692-1692p, are reproduced in the appendix to this petition (App., *infra*, 22a-26a).

INTRODUCTION

This case presents an important and recurring question of statutory construction that has squarely divided the lower courts. According to the court below, the FDCPA does not apply to non-judicial foreclosure proceedings. That holding now reflects settled law in the Ninth and Tenth Circuits, each of which have openly rejected the contrary decisions of multiple courts of appeals and two state supreme courts.

While the merits of this issue are hotly contested, there is no dispute about the existence of a clear and intractable conflict. All sides agree that this binary question of federal law has divided the circuits, and these courts have split after exhaustively considering each side of the debate. The confusion is extraordinary and entrenched: the question has generated over a hundred conflicting decisions and an acknowledged split among multiple appellate courts. There is no hope of the dispute dissipating on its own.

And the importance of the issue is difficult to overstate. Mortgage debt comprises roughly two-thirds of household debt in the United States, totaling over $8 trillion, and tens of thousands of foreclosures are initiated every month.[1] In 2016 alone, nearly 400,000 homes were lost to foreclosure, including about 200,000 in non-judicial

[1] Federal Reserve Bank of New York, *Quarterly Report on Housheld Debt & Credit* (May 2017).

foreclosure States, and approximately 330,000 homes were in some stage of foreclosure at year's end.[2]

This threshold legal question determines whether homeowners may invoke the FDCPA's protections in this critical context. See Consumer Financial Protection Bureau, *Fair Debt Collection Practices Annual Report 2013* 27 (Mar. 20, 2013) (recognizing the issue's importance and the "divi[sion] among the courts"). Yet after dozens of decisions debating the question, the courts remain hopelessly deadlocked. This confusion will persist without this Court's intervention.

The Court denied review on this question earlier this Term, but the case was subject to multiple vehicle concerns. See Part C, *infra*. This case avoids those concerns, and it presents a clean vehicle for ending the overwhelming flood of cases on this issue. The present conflict is intolerable and urgently needs an answer. Because this case presents an optimal vehicle for resolving this significant question of federal law, the petition should be granted.

STATEMENT

1. a. Congress enacted the FDCPA in response to "abundant evidence of the use of abusive, deceptive, and unfair debt collection practices." 15 U.S.C. 1692(a). It recognized this abuse as "a widespread and serious national problem," and it declared that a "primary" cause of the trouble was "the lack of meaningful legislation on the State level." S. Rep. No. 382, 95th Cong., 1st Sess. 2 (1977). Because "[e]xisting laws and procedures" proved "inadequate to protect consumers" (15 U.S.C. 1692(b)),

[2] See http://www.corelogic.com/research/foreclosure-report/national-foreclosure-report-december-2016.pdf.

Congress sought to impose baseline, comprehensive protections against debt-collector misconduct. 15 U.S.C. 1692(e).

Those protections took the form of "open-ended prohibitions," together with non-exhaustive lists of specific forbidden practices. *Jerman* v. *Carlisle, McNellie, Rini, Kramer & Ulrich LPA*, 559 U.S. 573, 587 (2010); cf. S. Rep. No. 95-382, at 4. The Act targeted everything from aggression and violence (*e.g.*, 15 U.S.C. 1692d(1), (2)), to the use of "false or misleading representations," including misstating the "character, amount, or legal status of the debt," employing "deceptive means to collect" a debt, or demanding amounts not "expressly authorized by the agreement creating the debt or permitted by law" (15 U.S.C. 1692e(2), (10), 1692f(1)). See, *e.g.*, *Heintz* v. *Jenkins*, 514 U.S. 291, 292 (1995) (explaining the general prohibitions). The FDCPA also mandated a process for debt collectors to provide consumers notice of their alleged debts; this process granted consumers a specific right to dispute those debts, and required debt collectors to "cease collection of the debt" pending validation. 15 U.S.C. 1692g.

b. The FDPCA solely regulates professional "debt collectors." The Act broadly defines "debt collector" as "any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the collection of any debts, or who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another." 15 U.S.C. 1692a(6).[3] Any person meeting that definition is subject to the full panoply of the FDCPA's restrictions.

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[3] The Act also broadly defines "debt": the term "means any obligation or alleged obligation of a consumer to pay money arising out of a

The Act further expands its coverage with an additional definition: "For purposes of section 1692f(6) of this title," the "term ['debt collector'] also includes 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) (emphasis added). Section 1692f(6), in turn, regulates conduct typical of repossession agents (*i.e.*, the classic "repo men"):

> Taking or threatening to take any non-judicial action to effect dispossession or disablement of property if—
>
> (A) there is no present right to possession of the property claimed as collateral through an enforceable security interest;
>
> (B) there is no present intention to take possession of the property; or
>
> (C) the property is exempt by law from such dispossession or disablement.

15 U.S.C. 1692f(6). The Act does not textually exclude those qualifying under *both* definitions (the general and the additional) from the Act's general prohibitions.

This two-part definition of "debt collector" is followed by a list exempting six groups from the Act's coverage. See 15 U.S.C. 1692a(6)(A)-(F). That list does not include those pursuing foreclosures or enforcing other security interests.

2. In 2006, petitioner obtained a $214,000 home loan from Sierra Pacific Mortgage Company. App., *infra*, 5a. For years, petitioners made payments on the loan to

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transaction in which the money, property, insurance, or services which are the subject of the transaction are primarily for personal, family, or household purposes, whether or not such obligation has been reduced to judgment." 15 U.S.C. 1692a(5).

GMAC Mortgage, LLC, who held the note and was the beneficiary under the deed of trust. *Ibid.* After petitioner defaulted on the loan, GMAC retained respondent Northwest Trustee to seek a non-judicial foreclosure, and appointed Northwest as successor trustee. *Ibid.* Post-default, GMAC also "transferred its loan servicing" to respondent Green Tree Servicing. *Ibid.*; see also C.A. Supp. E.R. 29 ("The Loan was in default when Green Tree became the servicer of the Loan.").

Between 2011 and 2014, Green Tree and Northwest undertook a variety of non-judicial foreclosure activities. App., *infra*, 5a, 14a-15a. They issued a series of notices to petitioner, including notices of default and notices of a trustee's sale. *Id.* at 5a. At one point, Northwest employed RCO Legal to facilitate a meeting, which was part of the foreclosure process, to discuss options for modifying the loan. *Id.* at 5a, 15a; C.A. Supp. E.R. 193-194, 197. The notices alleged a default "for failure to pay * * * amounts now in arrears," listed the "sum owing on the Obligation," explained that the "Property will be sold to satisfy the expense of sale and the Obligation," noted the date by which "[t]he default(s)" and other expenses "thereafter due[] must be cured * * * to cause a discontinuance of the sale," and affirmed that "[t]his is an attempt to collect a debt and any information obtained will be used for that purpose." *E.g.*, C.A. Supp. E.R. 51-60, 142-144; see also *id.* at 153-154 ("[f]ailure to cure all alleged defaults within 30 days" may lead to foreclosure and sale; further listing the amounts "owe[d]" and "due" together with "[t]he creditor to whom the debt is owed").

Petitioner contested various aspects of the notices and respondents' activities, including an alleged failure to validate the debt or comply with multiple "statutory obligations" in the foreclosure process. App., *infra*, 5a, 15a; D. Ct. Doc. 1 at 3, 6, 11-14.

3. In July 2014, petitioner filed this suit against respondents, asserting claims under the FDCPA and Washington state law. App., *infra*, 6a. As relevant here, petitioner alleged that respondents were debt collectors, and their conduct violated multiple provisions of the FDCPA. *Id.* at 7a-10a, 19a-20a.

Respondents moved for summary judgment, and the district court granted their motions. App., *infra*, 4a-12a, 13a-21a. As the court explained, an FDCPA plaintiff "must allege facts sufficient to show that (1) the defendant was collecting a debt as a debt collector, and (2) its debt collection actions violated a federal statute." *Id.* at 7a-8a. At the time, the court noted, the Ninth Circuit had not yet "addressed" the issue, but "other trial courts ha[d] found that nonjudicial foreclosure actions do not constitute 'debt collection' under the FDCPA, unless alleged as a violation of 15 U.S.C. § 1692f." *Id.* at 8a. The district court "join[ed] in the logic of these other courts, because 'foreclosing on a trust deed is distinct from the collection of the obligation to pay money.'" *Id.* at 9a (quoting *Hulse* v. *Ocwen Fed. Bank, FSB*, 195 F. Supp. 2d 1188, 1204 (D. Or. 2002)).

It accordingly dismissed the FDCPA claims against respondents Northwest and RCO Legal, whose "actions as alleged were part of non-judicial foreclosure proceedings." App., *infra*, 9a-10a. In a separate order, the court also dismissed the claims against respondent Green Tree. The court noted that the FDCPA excludes any person collecting a debt "not in default at the time it was obtained," 15 U.S.C. 1692a(6)(F)(iii), and it further noted petitioner had not received a "notice of default" until after Green Tree obtained the debt. App., *infra*, 19a-20a. According to the court, even though the loan was indisputably in default before Green Tree's acquisition, "it stands to reason that a person is not in default until a notice of default is issued."

Id. at 20a. It thus ruled that Green Tree was not a debt collector.[4]

4. The court of appeals affirmed. App., *infra*, 1a-3a.

Noting it could affirm "on any basis supported by the record," the court held that judgment was proper for all three respondents "because the communications were not attempts to collect a debt as defined by the FDCPA." App., *infra*, 2a. In support, the court quoted two of its prior decisions: (i) "[a]ctions taken to facilitate a non-judicial foreclosure * * * are not attempts to collect 'debt' as that term is defined by the FDCPA"; and (ii) "while the FDCPA regulates security interest enforcement activity, it does so *only* through Section 1692f(6)," and "[a]s for the remaining FDCPA provisions, 'debt collection' refers only to the collection of a money debt." *Ibid.* (quoting *Ho* v. *ReconTrust Co., NA*, 858 F.3d 568, 572 (9th Cir.), cert. denied, 138 S. Ct. 504 (2017), and *Dowers* v. *Nationstar Morg., LLC*, 852 F.3d 964, 970 (9th Cir. 2017)). It accordingly reaffirmed existing Ninth Circuit law holding, categorically, that non-judicial foreclosures are not covered by the FDCPA. *Ibid.*[5]

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[4] The court separately dismissed petitioner's claims under Section 1692f, and dismissed without prejudice his claims under state law. App., *infra*, 9a-10a, 11a-12a, 20a-21a. Petitioner is not challenging those determinations here.

[5] The panel separately affirmed certain claims against Green Tree (those premised on "communications" received "before July 25, 2013") on limitations grounds, and also affirmed the district court's ruling under Section 1692f. Petitioner, again, is not challenging those determinations here.

REASONS FOR GRANTING THE PETITION

A. There Is A Clear And Intractable Conflict Regarding Whether The FDCPA Covers Non-Judicial Foreclosure Proceedings

The decision below further entrenches a preexisting "divi[sion]" over whether the FDCPA applies to non-judicial foreclosures. *Obduskey* v. *Wells Fargo*, 879 F.3d 1216, 1220 (10th Cir.), petition for cert. pending, No. 17-1307 (filed Mar. 13, 2018). That circuit conflict is both clear and undeniable, and it should be resolved by this Court.

1. a. The decision below directly conflicts with settled law in the Fourth Circuit. In *Wilson* v. *Draper & Goldberg, P.L.L.C.*, 443 F.3d 373 (4th Cir. 2006), as here, a creditor hired a firm to "foreclose" after the plaintiff defaulted on a home loan. 443 F.3d at 374. After receiving the firm's initial notice, the plaintiff wrote "to dispute the debt and to request that [the firm] verify it" with the creditor. *Id.* at 374-375. The firm instead "commenced foreclosure proceedings." *Id.* at 375. The plaintiff sued under the FDCPA, "alleging that [the firm] violated the Act by failing to verify the debt, [and] by continuing collection efforts after she had contested the debt." *Ibid.*

On appeal, the Fourth Circuit held that attorneys "acting in connection with a foreclosure can be 'debt collectors' under the Act." 473 F.3d at 375. It rejected the firm's argument that "'foreclosing on a deed of trust is an entirely different path [than collecting funds from a debtor],'" and instead found that "'foreclosure is a method of collecting a debt by acquiring and selling secured property to satisfy a debt.'" *Id.* at 376 (further rejecting the notion that "'[p]ayment of funds is not the object of the foreclosure action'" and the lender is merely "'foreclosing its interest in the property'"). The court held that "foreclosure proceedings were used to collect the debt," and it

refused to "create an enormous loophole in the Act" for "foreclosure proceedings." 443 F.3d at 376.

The Fourth Circuit also dismissed the firm's reliance on Section 1692a(6)'s additional definition for "'the enforcement of security interests.'" 443 F.3d at 378. The court explained that this provision applies to entities like repossessors, "whose *only* role in the debt collection process is the enforcement of a security interest." *Ibid.* The "provision is not an exception to the definition of debt collector, it is an inclusion to the term debt collector." *Ibid.* It therefore "does not exclude those who enforce security interests but who also fall under the general definition." *Ibid.* (citing *Piper* v. *Portnoff Law Assocs., Ltd.*, 396 F.3d 227, 236 (3d Cir. 2005)).

The court accordingly "h[eld] that [the firm's] foreclosure action was an attempt to collect a 'debt,'" and the firm "can still be 'debt collectors' even if they were also enforcing a security interest." 443 F.3d at 378-379.

The Fourth Circuit reaffirmed *Wilson* in *McCray* v. *Fed. Home Loan Mortg. Corp.*, 839 F.3d 354 (4th Cir. 2016). As here, "Wells Fargo retained" a firm "to pursue foreclosure" after the plaintiff defaulted on a home loan. 839 F.3d at 357. The court held that foreclosure activities constitute "debt collection": "in *Wilson*, we explicitly rejected the argument 'that foreclosure * * * is not the enforcement of an obligation to pay money or a "debt," but is [merely] a termination of the debtor's equity of redemption relating to the debtor's property.'" *Id.* at 360. On the contrary, the court found, "the whole reason that the [firm was] retained by Wells Fargo was to attempt, *through the process of foreclosure*, to collect on the $66,500 loan in default." *Ibid.* (emphasis added). As the court concluded, the firm's "debt collection" was anticipated *via foreclosure*, and the firm acted as "debt collectors" for foreclosure ac-

tivities despite never "'express[ly] demand[ing]'" payment. *Id.* at 359. That holding is irreconcilable with the decision below. App., *infra*, 2a.

b. Also in direct conflict with the decision below, the Sixth Circuit likewise "hold[s] that mortgage foreclosure is debt collection under the Act." *Glazer* v. *Chase Home Fin. LLC*, 704 F.3d 453, 455 (6th Cir. 2013); see also, *e.g.*, *Mellentine* v. *AmeriQuest Mortg. Co.*, 515 F. App'x 419, 421, 423 (6th Cir. 2013) (following *Glazer* in holding a law firm was a "debt collector" under the FDCPA for "sen[ding] a letter to the [plaintiffs] notifying them of their default and informing them that Chase was beginning foreclosure proceedings").

In *Glazer*, Chase Bank hired a law firm to foreclose on a defaulted home loan. 704 F.3d at 456. The plaintiff alleged the firm violated the FDCPA by, among other things, including false statements in its foreclosure complaint and "refus[ing] to verify the debt upon request." *Id.* at 457.

The Sixth Circuit began by "declin[ing] to follow" the very position adopted by the Ninth Circuit: that "mortgage foreclosure is not debt collection" unless "a money judgment is sought against the debtor in connection with the foreclosure." 704 F.3d at 460; contra *Ho*, 858 F.3d at 571-572, 580. On the contrary, the court held, "*any* type of mortgage foreclosure action, *even one not seeking a money judgment on the unpaid debt*, is debt collection under the Act." *Id.* at 462 (second emphasis added). As the court explained, "*every* mortgage foreclosure, judicial or otherwise, is undertaken for the very purpose of obtaining payment on the underlying debt, either by persuasion (*i.e.*, forcing a settlement) or compulsion (*i.e.*, obtaining a judgment of foreclosure, selling the home at auction, and applying the proceeds from the sale to pay down the out-

standing debt)." *Id.* at 461. In short, "[t]here can be no serious doubt that the ultimate purpose of foreclosure is the payment of money." *Id.* at 463.[6]

The Sixth Circuit supported its view with the FDCPA's "plain language" and a close analysis of its overall provisions, including Section 1692i's venue provision (showing that "filing *any* type of mortgage foreclosure action * * * is debt collection under the Act"). 704 F.3d at 460-462. It further disagreed that its interpretation would render Section 1692a(6)'s additional definition surplusage. *Id.* at 463-464. As the court explained, this additional definition concerns "the business of repossessors." *Id.* at 464. The sentence "operates to *include* certain persons under the Act (though for a limited purpose); it does not *exclude* from the Act's coverage a method commonly used to collect a debt." *Id.* at 463. "Indeed," as the court concluded, "all of the cases we found where §§ 1692f(6) and 1692a(6)'s third sentence were held applicable involved *repossessors*." *Id.* at 464.

While the court recognized the "confusion" over the question and that "courts have taken varying approaches on the issue," it found the approach adopted below "unpersuasive" and instead declared that "mortgage foreclosure is debt collection under the Act." 704 F.3d at 460, 464.

c. The Ninth Circuit's decision is also directly at odds with law in the Third Circuit. As the Ninth Circuit recognized, the Third Circuit holds that "foreclosure-related activities constitute debt collection," even without a deficiency judgment. *Ho*, 858 F.3d at 576 & n.11 (citing *Piper*, 396 F.3d at 235-236).

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[6] Although not pertinent to the court's categorical analysis, the firm in *Glazer* emphasized that it did not seek a deficiency judgment. C.A. Answering Br. 28 n.5, 39, No. 10-3416 (6th Cir. Nov. 1, 2010).

In *Kaymark* v. *Bank of Am., N.A.*, 783 F.3d 168 (3d Cir. 2015), the court of appeals held that "foreclosure meets the broad definition of 'debt collection' under the FDCPA." 783 F.3d at 179 (relying on *Wilson*, *Glazer*, and *Piper*). That case, as here, involved a firm retained to pursue a foreclosure after the plaintiff defaulted on a home loan. *Id.* at 171-172. The plaintiff alleged that the firm misstated the amounts due in the foreclosure complaint, and sued under the FDCPA. *Id.* at 173.[7]

The court of appeals held that foreclosure activities are subject to the FDCPA. *Id.* at 179. The court first set aside the firm's argument that "foreclosure actions cannot be the basis of FDCPA claims." *Id.* at 176, 178. As the court explained, "the statutory text, as well as the case law interpreting the text, renders this argument meritless." *Ibid.* It found that the firm "acted as a 'debt collector' when, by filing the Foreclosure Complaint, it 'attempt[ed] to collect' a debt on behalf of BOA." *Id.* at 176-177. Moreover, the court reasoned, "[n]owhere does the FDCPA exclude foreclosure actions from its reach." *Id.* at 179. "On the contrary," the court explained, "foreclosure meets the broad definition of 'debt collection' under the FDCPA": it qualifies as "'activity undertaken for the general purpose of inducing payment,'" and "it is even contemplated in various places in the statute." *Ibid.* (citing 15 U.S.C. 1692i).

As the court explained, the firm "would have us 'create an enormous loophole in the [FDCPA] [by] immunizing any debt from coverage if that debt happened to be secured by a real property interest and foreclosure proceedings were used to collect the debt.'" *Ibid.* (quoting *Wilson*,

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[7] "Mortgage foreclosure in Pennsylvania is strictly an *in rem* or '*de terris*' proceeding. Its purpose is solely to effect a judicial sale of the mortgaged property." *Nicholas* v. *Hofmann*, 158 A.3d 675, 696 (Pa. Super. Ct. 2017).

443 F.3d at 376). The court refused that invitation: "'if a collector were able to avoid liability under the FDCPA simply by choosing to proceed *in rem* rather than *in personam*, it would undermine the purpose of the FDCPA." *Ibid.* (quoting *Piper*, 396 F.3d at 236). *Kaymark* is now irreconcilable with contrary precedent in the Ninth and Tenth Circuits.[8]

d. The Ninth Circuit's decision also directly conflicts with the decisions of two state high courts, including an intra-regional conflict with the Alaska Supreme Court.

First, in *Shapiro & Meinhold* v. *Zartman*, 823 P.2d 120 (Colo. 1992), the court reached the opposite conclusion on materially indistinguishable facts: whether the FDCPA covered attorneys hired to pursue a foreclosure on a defaulted home loan. *Id.* at 121. The Court held that the FDCPA applied:

> The section 1692a(6) definition of the term debt collector includes one who 'directly or indirectly' engages in debt collection activities on behalf of others. Since a foreclosure is a method of collecting a debt by acquiring and selling secured property to satisfy a debt, those who engage in such foreclosures are included

[8] *Piper* is likewise out of step with the decision below. There, the creditor, as here, retained a firm, which sought an *in rem* foreclosure to enforce a lien arising from unpaid water and sewer obligations. 396 F.3d at 229. In addition to finding that the firm demanded payment while enforcing the lien (*id.* at 233-234), the court rejected the firm's reliance on Section 1692a(6)'s additional definition of security enforcers: "The portion of § 1692a(6) upon which [the firm] relies is not among the six listed *exceptions* to the general definition. It is cast in terms of *inclusion*, and we believe it was intended to make clear that some persons who would be without the scope of the general definition are to be included where § 1692f(6) is concerned." *Id.* at 236 (citing, for example, "an automobile repossession business").

> within the definition of debt collectors if they otherwise fit the statutory definition.

Id. at 124.

The court further rejected the firm's argument that those enforcing security interests, including "foreclosures," are subject only to Section 1692f(6), not the Act's general requirements. 823 P.2d at 123 (relying on Section 1692a(6)'s additional definition). As the court explained, that additional definition "does not limit the definition of debt collectors, but rather enlarges the category of debt collectors for the purpose of section 1692f(6)." *Id.* at 124. "If Congress had intended to exempt from the FDCPA one whose principal business is the enforcement of security interests, it would have provided an exception in plain language." *Ibid.*

Second, the Alaska Supreme Court, again on indistinguishable facts, held that "an entity pursuing non-judicial foreclosure is a debt collector subject to the FDCPA." *Alaska Trustee, LLC* v. *Ambridge*, 372 P.3d 207, 213 (Alaska 2016); see also *id.* at 212-213 & nn.14-15 (acknowledging the "split" of authority, and "join[ing] those courts holding that mortgage foreclosure, whether judicial or nonjudicial, is debt collection"); contrast *id.* at 227-234 (Winfree, J., dissenting) (rejecting, *e.g.*, *Glazer*, in reaching the same conclusion as the Ninth and Tenth Circuits).

The court started with "the Act's broad language," and declared *Wilson* and *Glazer* persuasive: "foreclosing on property, selling it, and applying the proceeds to the underlying indebtedness constitute one way of collecting a debt—if not directly at least indirectly." 372 P.3d at 213-216. As the court reasoned, "the real nature of a home mortgage foreclosure" is debt collection, and "a reasonable consumer *would* read the notice as a demand for payment." *Id.* at 217-218.

Addressing Section 1692a(6)'s additional definition, the court agreed with the Third, Fourth, and Sixth Circuits: "Th[e] general definition [of 'debt collector'] is explicitly *expanded*, not qualified," by the inclusive language targeting security interests. 372 P.3d at 219; see also *id.* at 219-220 (explaining how the additional definition is not redundant, as it covers "repossession agenc[ies]" that "may take automobiles off the street" without any communication).

Finally, the court rejected the proposition that the firm could escape liability because foreclosure notices were "statutorily required" by state law: "[T]hat a notice is required in order to advance a state foreclosure proceeding does not mean it cannot at the same time be an attempt to collect a debt and thus subject to the FDCPA." *Id.* at 217-218 (discussing *Romea* v. *Heiberger & Assocs.*, 163 F.3d 111, 116 (2d Cir. 1998)). And it likewise refuted the contention that the FDCPA would "wreak havoc" on Alaska's non-judicial foreclosure process, given the ease of complying with the FDCPA's provisions. *Id.* at 218.

The decision below is thus particularly intolerable in Alaska, where the same federal law now means different things in state and federal court. That encourages the kind of unpalatable forum-shopping that this Court has studiously worked to avoid.[9]

f. Numerous district courts outside these jurisdictions have reached similar conclusions. See, *e.g.*, *Rinaldi* v. *Green Tree Servicing LLC*, No. 14-CV-8351(VB), 2015 WL 5474115, at *3 (S.D.N.Y. June 8, 2015); *Saccameno* v. *Ocwen Loan Servicing, LLC*, No. 15-C-1164, 2015 WL 7293530, at *5 (N.D. Ill. Nov. 19, 2015); *Castrillo* v. *Am.*

[9] The same problem now also arises in Colorado in light of the acknowledged conflict between the Tenth Circuit's decision in *Obduskey* and the Colorado Supreme Court's decision in *Shapiro*.

Home Mortgage Servicing, Inc., 670 F. Supp. 2d 516, 525 (E.D. La. 2009); *Bieber* v. *J. Peterman Legal Group Ltd.*, 104 F. Supp. 3d 972, 974-976 (E.D. Wisc. 2015); *Muldrow* v. *EMC Mortgage Corp.*, 657 F. Supp. 2d 171, 175-176 (D.D.C. 2009).

2. a. A divided panel of the Ninth Circuit reached the opposite conclusion in *Ho* v. *ReconTrust Co., NA*, 858 F.3d 568 (9th Cir.), cert. denied, 138 S. Ct. 504 (2017). The majority recognized that the "circuits [have] divide[d]" over the question presented (*id.* at 576), but it held that the FDCPA does not apply to non-judicial foreclosures. See 858 F.3d at 576 & n.11 (citing conflicting decisions from the Third, Fourth, Fifth, Sixth, Tenth, and Eleventh Circuits).[10] The decision below reaffirms that holding.

First, the *Ho* majority asserted that a non-judicial foreclosure does not attempt to collect a "debt." 858 F.3d at 571-573. According to the majority, non-judicial foreclosures aim only "to retake and resell the security, not to collect money from the borrower." *Id.* at 571. As the majority explained, foreclosure might "induce[]" the borrower "to pay off a debt," but "that inducement exists by virtue of the lien, regardless of whether foreclosure proceedings actually commence." *Id.* at 572. In taking this position, the majority expressly "affirm[ed] the leading case of *Hulse* v. *Ocwen Federal Bank*, 195 F. Supp. 2d 1188, 1204 (D. Or. 2002), which held that 'foreclosing on a trust deed is an entirely different path' than 'collecting funds from a debtor.'" *Ibid.*

The court openly admitted that the Fourth and Sixth Circuits "have declined to follow *Hulse*." 858 F.3d at 572

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[10] As an independent ground, the court separately held that the original trustee was not a "debt collector" under the exception for activities "'incidental to * * * a bona fide escrow arrangement.'" 858 F.3d at 574-575 (quoting 15 U.S.C. 1692a(6)(F)). That exception (which applies, if at all, to original trustees) is irrelevant here.

(citing *Glazer*, 704 F.3d at 461; *Wilson*, 443 F.3d at 378-379). But the majority found "neither case persuasive." *Ibid.* It asserted that the Fourth Circuit eschewed the FDCPA's text to close "what it viewed as a 'loophole in the Act.'" *Ibid.* (quoting *Wilson*, 443 F.3d at 376). And it disagreed with the Sixth Circuit's "premise that 'the ultimate purpose of foreclosure is the payment of money,'" because a foreclosure sale "collects money from the home's purchaser, not from the original borrower." *Ibid.* (quoting *Glazer*, 704 F.3d at 463).

The majority next bolstered its conclusion with Section 1692a(6)'s "narrower definition of 'debt collector'"—an entity "whose principal business purpose is 'the enforcement of security interests.'" 858 F.3d at 572-573. The panel reasoned that "[t]his provision would be superfluous if all entities that enforce security interests were already included in the definition of debt collector for purposes of the entire FDCPA." *Id.* at 573. As such, the majority explained, "[t]he most plausible reading of the statute is that the foreclosure notices" fit only that narrower definition. *Id.* at 572.

Here the majority again "diverge[d]" from *Wilson* and *Glazer*. 858 F.3d at 573. It stated that the Sixth Circuit "rejected this view" on the logic that the security-enforcement definition governs repossessors who need not communicate with the debtor. *Id.* at 573-574. The majority found "this distinction unpersuasive" because even "repossessors will communicate with debtors." *Id.* at 574. And the majority again declared it irrelevant that the notices may have "pressured [the debtor] to send money to Countrywide": if that pressure "transform[ed] the enforcement of security interests into debt collection," it "would render meaningless the FDCPA's carefully drawn

distinction between debt collectors and enforcers of security interests." *Ibid.*[11]

Finally, the majority maintained that its view would avoid frustrating "California statutes governing non-judicial foreclosure." 858 F.3d at 575. It offered a handful of state-law duties that might conflict with the FDCPA's requirements, and thus declined "to construe federal law in a manner that interferes with California's system for conducting non-judicial foreclosures." *Id.* at 575-577.[12]

Judge Korman dissented. 858 F.3d at 577-590. In an extensive opinion, he addressed each of the majority's points, and concluded that "the only reasonable reading [of the FDCPA] is that a trustee pursuing a nonjudicial

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[11] The act of "selling the home at auction[] and applying the proceeds from the sale to pay down the outstanding debt" (*Glazer*, 704 F.3d at 461) occurs in *every* foreclosure. The Ninth and Tenth Circuits characterize that activity as enforcing a security interest; other circuits declare it "debt collection."

[12] The majority also asserted that its decision was tied to "the nuances of California foreclosure law" (858 F.3d at 572), but it never identified what those "nuances" were. None are apparent. Indeed, its "holding" "affirms" the "leading" decision of an *Oregon* district court applying *Oregon law*. *Ibid.* Its analysis turned on the general logic that foreclosure seeks to enforce a security interest, not to collect a debt, and payment comes "from the home's purchaser, not from the original borrower." *Id.* at 571-575. The court ultimately *rejected* (not *distinguished*) other circuits' views because the conflict is a *conflict*, not the product of disparate state-law schemes. *Id.* at 574 (declaring Fourth and Sixth Circuit precedent "[un]persuasive"). And the Ninth Circuit has since repeatedly applied *Ho* to cases arising outside California—*like this very case*—and treated the holding as categorical. See, *e.g.*, *Hamilton* v. *Tiffany & Bosco PA*, No. 15-15473, 2018 WL 1042528, at *1 (9th Cir. Feb. 26, 2018) (applying *Ho* to Arizona case); *Dowers*, 852 F.3d at 969-970 (applying *Ho* to Nevada case). The panel here was able to adopt *Ho* without citing "nuances" of Washington law for an obvious reason: the circuit conflict turns on *federal* law, not the law of any particular State.

foreclosure proceeding is a debt collector." *Id.* at 578 (citing decisions from the Third, Fourth, and Sixth Circuits, and the Alaska Supreme Court and Colorado Supreme Court).

As Judge Korman explained, foreclosure, at its irreducible core, is "intended to obtain money by forcing the sale of the property being foreclosed upon." 858 F.3d at 578. It either "*directly*" obtains money by "prompt[ing]" or "scar[ing]" the borrower into paying to prevent foreclosure, or "*indirectly*" obtains money by eliminating "the debtor's interest and equity in the property." *Id.* at 581. Indeed, as Judge Korman noted, the majority did not "even address the language of section 1692a(6) that defines 'debt collector' as one who attempts to collect 'indirectly' debts owed to another." *Id.* at 582.

Judge Korman next refuted the majority's reliance on Section 1692a(6)'s additional definition for repossessors. 858 F.3d at 582-583. He explained that nothing in Section 1692a(6)'s language suggests that including the extra definition—which *expanded* the provision's reach—somehow excludes those who also satisfy the general definition, especially when Section 1692a directly exempts other groups. *Id.* at 583 (citing 15 U.S.C. 1692a(6)(A)-(F)). As Judge Korman explained, this additional definition was designed to cover entities who enforce security interests without engaging in traditional collection activity—as is often the case when repo men "effect dispossession or disablement" of *personal* property. *Id.* at 583-584.

Judge Korman also argued (858 F.3d at 584) that the FDCPA's venue clause confirms that foreclosures satisfy the general "debt collection" definition: "Any debt collector" suing "to enforce an interest in real property securing the consumer's obligation" must sue "only in a judicial district" where "such real property is located." 15 U.S.C. 1692i(a)(1). Congress thus "understood that a mortgage

foreclosure proceeding * * * constitutes debt collection." 858 F.3d at 584.

Finally, Judge Korman rejected the majority's concerns about interfering with California's non-judicial foreclosure scheme. 858 F.3d at 585-586, 587-590. He highlighted the lack of any trouble in the multiple jurisdictions where the FDCPA covers foreclosure activities, and he showed how the specific conflicts the majority identified were illusory: each could be accommodated with easy practical steps or a sensible reading of state or federal law. *Ibid.* (noting "how readily the California foreclosure system can function alongside the FDCPA").

In any event, Judge Korman concluded, even if an actual conflict existed, the FDCPA expressly preempts inconsistent state laws (15 U.S.C. 1692n), and has a mechanism for exempting acceptable collection practices (15 U.S.C. 1692o). 858 F.3d at 588-590. This "promote[s] consistent State action to protect consumers against debt collection abuses" (15 U.S.C. 1692(e)), and prevents States from "undermining the minimum national standards that Congress has adopted." *Id.* at 579. He declared the majority's concerns were insufficient to "adopt an unnatural reading of the term 'debt collector.'" *Id.* at 590.[13]

b. In *Obduskey* v. *Wells Fargo*, 879 F.3d 1216 (10th Cir.), petition for cert. pending, No. 17-1307 (filed Mar. 13, 2018), the Tenth Circuit recognized the stark disagreement over the question presented, and ultimately sided with the Ninth Circuit, "hold[ing] that the FDCPA does

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[13] See also, *e.g.*, *Piper*, 396 F.3d at 236 n.11 ("Congress enacted the FDCPA despite the fact that some states already had procedural requirements for debt collectors * * * in place, because it 'decided to protect consumers who owe money by adopting a different, and in part more stringent, set of requirements that would constitute minimum national standards for debt collection practices.'") (quoting *Romea*, 163 F.3d at 115).

not apply to non-judicial foreclosure proceedings." 879 F.3d at 1219-1220.

At the outset, the court noted that "[w]hether the FDCPA applies to non-judicial foreclosure proceedings has divided the circuits." 879 F.3d at 1220. It stated that the "Ninth Circuit, along with numerous district courts, has held that non-judicial foreclosure proceedings are not covered under the FDCPA" (*ibid.*), while "[t]he Fourth, Fifth, and Sixth Circuits, as well as the Colorado Supreme Court," have taken the opposite position. *Ibid.* (citing *Wilson*, *Kaltenbach*, *Glazer*, and *Shapiro*). The court also flagged conflicting decisions and "confusion" in the District of Colorado, emphasizing the need "to provide clarity in this circuit." *Id.* at 1219-1220 & n.3.

The court started its analysis with the "plain language of the FDCPA." 879 F.3d at 1220-1221. Agreeing with the Ninth Circuit, the court reasoned that "debt is synonymous with 'money,'" and the FDCPA applies "'only when an entity is attempting to collect' money." *Id.* at 1221 (quoting *Ho*, 858 F.3d at 571-572). Because non-judicial foreclosures do not obligate consumers "'to pay money,'" the court reasoned, such foreclosures are "not covered under the FDCPA." *Ibid.*

In reaching this conclusion, the court expressly rejected "the Sixth Circuit's decision in *Glazer*." 879 F.3d at 1221 (quoting *Glazer*'s "contrary" holding that "'*every* mortgage foreclosure' * * * is undertaken for the very purpose of obtaining payment on the underlying debt, either by persuasion * * * or compulsion'"). According to the Tenth Circuit, this "contrary position" fails because non-judicial foreclosure does not permit collection "'personally against the mortgagor.'" *Ibid.* While a creditor could "collect a deficiency" in a "separate action" after the "non-judicial foreclosure sale" (*ibid.* (citing Colorado

law)), the foreclosure itself "only allows 'the trustee to obtain proceeds from the sale of the foreclosed property, and no more'" (*id.* at 1221-1222). The court thus found that it did not qualify as a "direct[] or indirect[]" attempt (15 U.S.C. 1692a(6)) to collect a debt. *Id.* at 1220-1222.

Next, the Tenth Circuit rejected other courts' reliance on "§ 1692i—'Legal actions by debt collectors'—as evidence that Congress intended the FDCPA to apply to mortgage foreclosures." 879 F.3d at 1222. Although other courts read this language as necessarily confirming that "debt collection" includes foreclosure actions (the subject of Section 1692i), the Tenth Circuit "disagree[d]." *Ibid.* It reasserted its view that seeking non-judicial foreclosure falls outside Section 1692a(6), and it further noted that Section 1692i only covers "judicial proceeding[s]," whereas "*non-judicial*" foreclosures "plainly do[] not fall under this definition." *Ibid.*

Finally, the court asserted that "policy considerations" support its holding. 879 F.3d at 1222-1223. It reasoned that applying the FDCPA in this context "would conflict with Colorado mortgage foreclosure law." *Id.* at 1222 (citing two examples where Colo. R. Civ. P. 120 requires "notice" arguably conflicting with the FDCPA). The court stated that "mortgage foreclosure is 'an essential state interest,'" and found "no 'clear and manifest' intention on the part of Congress to supplant state non-judicial foreclosure law." *Id.* at 1222-1223.[14] In doing so, the Tenth Circuit rejected other courts' "contrary conclusion" that Congress would not have intended to "immunize debt

[14] The court earlier acknowledged commentary from the "Colorado Rule 120 Committee" recommending, in response to "'considerable debate'" over the FDCPA's applicability, that persons conducting non-judicial foreclosures "'comply'" with the FDCPA, "'notwithstanding any provision of this Rule.'" 879 F.3d at 1220 n.3.

secured by real property where foreclosure was used to collect the debt." *Id.* at 1223 (citing conflicting decisions from the Third and Fourth Circuits).[15]

The court accordingly "h[eld] that [respondent's] mere act of enforcing a security interest through a non-judicial foreclosure proceeding does not fall under the FDCPA." 879 F.3d at 1223.

c. Like the Ninth and Tenth Circuits, numerous district courts have held that the FDCPA does not regulate foreclosure-related activities. This side of the split is thus also fully ventilated. *E.g.*, *Glazer*, 704 F.3d at 460 (noting the "pervasiveness" of *Hulse*'s view); *Hahn* v. *Anselmo Linberg Oliver LLC*, No. 16-cv-8908, at *3-*4 (N.D. Ill. Mar. 31, 2017); *Iroh* v. *Bank of Am., N.A.*, No. 4:15-CV-1601, 2015 WL 9243826, at *4 (S.D. Tex. Dec. 17, 2015); *Delisfort* v. *U.S. Bank Trust, N.A.*, 2017 WL 1337620, at *3 (S.D. Fla. Feb. 7, 2017); *Beadle* v. *Haughey*, No. Civ.-04-272-SM, 2005 WL 300060, at *3 (D.N.H. Feb. 9, 2005); *Sylvia* v. *Bank of N.Y. Mellon*, No. 1:12-CV-02598-WSD-JFK, 2012 WL 12844769, at *8 (N.D. Ga. Oct. 25, 2012); *Fleming* v. *U.S. Nat'l Bank Ass'n*, No. 14-3446(DSD/JSM), 2015 WL 505758, at *2 (D. Minn. Feb. 6, 2015); *Speleos* v. *BAC Home Loans Servicing LP*, 824 F. Supp. 2d 226, 232-233 (D. Mass. 2011); *Williams* v. *Ocwen*

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[15] The court "left for another day" the distinct question whether "more aggressive collection efforts leveraging the threat of foreclosure into the payment of money" would "constitute 'debt collection.'" 879 F.3d at 1223. While both the Ninth and Tenth Circuits have raised that possibility, the core split among the circuits is whether non-judicial foreclosure *without* such additional conduct qualifies as debt collection. *Id.* at 1220 (acknowledging the conflict over this question). This is why the Tenth Circuit recognized its holding was necessary to resolve the rampant "confusion" in the lower courts. *Id.* at 1219-1220 & n.3.

Loan Servicing, No. 1:15-CV-3914-ELR-JSA, 2016 WL 5339359, at *11 (N.D. Ga. May 9, 2016).

3. The decision below also exacerbates substantial tension with decisions in the Eleventh and Fifth Circuits, which themselves have adopted inconsistent positions.

First, the prevailing rule in the Eleventh Circuit is opaque. While the Ninth Circuit suggested the Eleventh Circuit supported its interpretation (*Ho*, 858 F.3d at 577 n.11), the Eleventh Circuit adopted the *opposite* position on these facts: it held that *foreclosure-related notices* may trigger FDCPA liability, even if the *actual foreclosure itself* cannot. *Reese* v. *Ellis, Painter, Ratterree & Adams, LLP*, 678 F.3d 1211, 1217-1218 (11th Cir. 2012).[16]

In *Reese*, the court confronted a non-judicial foreclosure in which the defendant notified the borrower that a foreclosure sale would be conducted unless the loan was satisfied in accordance with the lender's demand for full payment. 678 F.3d at 1214. The court rejected the argument that the notice only "inform[ed]" the borrower that the lender "intended to enforce its security deed through the process of non-judicial foreclosure"; instead, citing *Wilson* and *Piper*, the court held: "The fact that the letter and documents relate to the enforcement of a security interest does not prevent them from also relating to the collection of a debt within the meaning of § 1692e." *Id.* at 1217-1218. The court merely disclaimed that it was deciding "whether enforcing a security interest is itself debt-collection activity." *Id.* at 1218 n.3. Under the holding in *Reese*, petitioner's claims would have come out the other way.

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[16] The Ninth Circuit cited an earlier, unpublished Eleventh Circuit decision holding that "foreclosing on a home is not debt collection" but only the enforcement of a security interest. *Warren* v. *Countrywide Home Loans, Inc.*, 342 F. App'x 458, 460-461 (11th Cir. 2009).

Although subsequent unpublished decisions are less clear, the current rule in the Eleventh Circuit reflects a middle ground—the foreclosure itself does not constitute debt collection, but communications pertaining to the foreclosure can trigger FDCPA liability. Compare, *e.g.*, *Birster* v. *Am. Home Mortg. Servicing, Inc.*, 481 F. App'x 579, 580, 583 (11th Cir. 2012) (explaining that the defendant "was both attempting to enforce a security interest *and* collect a debt" when it sent a letter advising the borrowers that it "would proceed with foreclosure unless [they] cured the default by paying" a specified sum), with, *e.g.*, *Dunavant* v. *Sirote & Permutt, P.C.*, 603 F. App'x 737, 740 (11th Cir. 2015) (holding that the publication of foreclosure notices was solely enforcement of a security interest); *Saint Vil* v. *Perimeter Mortg. Funding Corp.*, 630 F. App'x 928, 931 (11th Cir. 2015) (holding that foreclosure notices were not debt collection when they "did not state a money amount, request payment, or explain how the debt could be settled" and thus could not "be interpreted as trying to induce payment of the debt"); *Tharpe* v. *Nationstar Mortg.*, 632 F. App'x 586, 587 (11th Cir. 2016); *Hampton-Muhamed* v. *James B. Nutter & Co.*, No. 15-15504, 2017 WL 1906654, at *2 (11th Cir. May 9, 2017). This middle position is in tension with the rule in the Third, Fourth, and Sixth Circuits that *any* attempt to foreclose (or to notify consumers about foreclosure) itself "directly or indirectly" attempts to collect a debt; but the middle position is also at odds with the Tenth Circuit's rule, which requires, at a minimum, a "threat" or "demand [for] payment." *Obduskey*, 879 F.3d at 1223.

Second, the confusion is equally pronounced in the Fifth Circuit, which has not squarely settled the question. On the one hand, it has rejected *Hulse* in a published opinion: "the entire FDCPA can apply to a party whose prin-

cipal business is enforcing security interests but who nevertheless fits § 1692a(6)'s definition of a debt collector." *Kaltenbach* v. *Richards*, 464 F.3d 524, 528-529 (5th Cir. 2006) (remanding for the district court to consider whether the defendant initiating foreclosure satisfied that general definition). On the other hand, the circuit later interpreted *Kaltenbach* to "implicitly recogniz[e] that a foreclosure is *not per se* FDCPA debt collection." *Brown* v. *Morris*, 243 F. App'x 31, 35 (5th Cir. 2007). District courts within the Fifth Circuit have accordingly suggested that "whether the initiation of foreclosure proceedings qualifies as collecting a debt under the FDCPA remains an open question." *Fath* v. *BAC Home Loans*, No. 3:12-cv-1755, 2013 WL 3203092, at *12 (N.D. Tex. June 25, 2013).[17]

This wide disconnect only underscores the deep confusion this issue has produced, and the obvious need for this Court's immediate intervention.

* * *

The conflict on the interpretation of "debt collector" is indisputable, mature, and entrenched. The debate has been fully exhausted at the district and circuit level. The stark division among the courts of appeals readily reflects

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[17] See also, *e.g.*, *Green* v. *Brice, Vander Linden & Wernick, P.C.*, No. 3:11-cv-1498, 2015 WL 2167996, at *8 (N.D. Tex. May 7, 2015); *Brooks* v. *Flagstar Bank, FSB*, No. 11-67, 2011 WL 2710026, at *6 (E.D. La. July 12, 2011). The Fifth Circuit recently reaffirmed *Kaltenbach* without further addressing the issue. See *Mahmoud* v. *De Moss Owners Ass'n Inc.*, 865 F.3d 322, 330 (5th Cir. 2017). Judge Higginson's separate opinion suggests that the Ninth Circuit's decision is consistent with *Glazer*, *Wilson*, and *Piper* (*id.* at 336 & n.2)—*by endorsing the views of* Glazer, Wilson, *and* Piper. The Ninth Circuit, however, did not understand its decision the same way. See *Ho*, 858 F.3d at 577 n.11 (counting those very cases on the opposite side of the split).

the broader division in jurisdictions nationwide. The decision below emphatically reaffirms the split decision in *Ho* (which the Ninth Circuit itself refused to reconsider before the full court) and the Tenth Circuit's *Obduskey* decision was unanimous. There is no realistic prospect that *multiple* courts of appeals will suddenly abandon their own precedent—especially where each side has thoroughly confronted, and rejected, the opposing analysis.

This question is binary: If petitioner is right, courts and parties are wasting substantial time litigating whether the FDCPA even applies, rather than resolving disputes on the merits. If respondents are right, plaintiffs are filing hundreds or thousands of lawsuits that should never be filed (and wrongly *winning* in multiple circuits and dozens of district courts). Until this Court intervenes, the rampant confusion over this important threshold question will persist. The Court's immediate review is warranted.

B. The Question Presented Is Exceptionally Important And Frequently Recurring

The question presented is of exceptional legal and practical importance. Whether the FDCPA covers non-judicial foreclosures is a dispositive threshold issue. It dictates whether the FDCPA's protections apply in thousands of foreclosures with potentially trillions of dollars at stake. The sheer number of decisions from a multitude of jurisdictions underscores its obvious significance. As it now stands, however, there is a square split over the meaning of a core provision in the FDCPA, and countless courts and parties will continue wasting time and resources sorting out a binary question that begs for a clear answer.

Nor is there any hope of the issue resolving itself. As the discussion above illustrates, courts are well aware of

the competing sides of the argument; they have repeatedly picked those sides without a uniform consensus emerging, and the confusion only promises to worsen as more courts weigh in. With tens of thousands of foreclosures initiated every month, and the staggering magnitude of total household mortgage debt (exceeding *$8 trillion*), these issues will continue to confound lower courts until this Court resolves the question.

In the meantime, the decision below threatens to deprive consumers of the FDCPA's protections in an area that hits (literally) closest to home. Congress passed the Act precisely because other "[e]xisting laws and procedures for redressing these injuries are inadequate." 15 U.S.C. 1692(b). The CFPB has confirmed the risks to consumers imposed by the Ninth and Tenth Circuits' approach. In its statutorily-required 2013 annual report (see 15 U.S.C. 1692m(a)), the Bureau noted that "FDCPA coverage in the foreclosure context" is "an important issue on which the federal district courts have been divided," remarking that "[t]hese decisions have left consumers vulnerable to harmful collection tactics as they fight to save their homes from foreclosure." CFPB Report, *supra*, at 27. And borrowers are particularly vulnerable in the nonjudicial foreclosure context, where judicial oversight is limited. See John Campbell, *Can We Trust Trustees? Proposals for Reducing Wrongful Foreclosures*, 63 Cath. U. L. Rev. 103 (2014). The FDCPA, by design, serves as a necessary backstop to these (otherwise) beneficial state procedures.

The Ninth Circuit's decision upsets Congress's scheme, entrenches a conflict at the circuit level, and eliminates essential protections for vulnerable consumers. The issue has been treated from every conceivable angle, and it is not going anywhere. Indeed, in the past months

alone, this issue has generated dozens of additional decisions, and multiple courts have confirmed the obvious conflict. *E.g.*, *Lapan* v. *Greenspoon Marder P.A.*, No. 5:17-cv-130, 2018 WL 1033224, at *3 (D. Vt. Feb. 22, 2018) ("the circuits that have dealt with the question are divided"); *Strader* v. *U.S. Bank Nat'l Ass'n*, No. 2:17-cv-684, 2018 WL 741425, at *11 (W.D. Pa. Feb. 7, 2018). This Court alone can provide a clear answer. Further review is plainly warranted.

C. This Case Is An Optimal Vehicle For Deciding The Question Presented

This case is an excellent vehicle for deciding this significant question. It was decided below on purely legal grounds. App., *infra*, 2a. It has no factual or procedural impediments. The question presented was squarely resolved and the sole basis for dismissing the claims at issue. *Ibid.* Petitioner's pertinent allegations are straightforward and representative: he targeted a standard non-judicial foreclosure preceded by standard foreclosure notices. *Id.* at 2a, 5a, 13a-16a. And Washington's foreclosure scheme is typical of schemes nationwide; the decision turned on the Ninth Circuit's interpretation of the federal statute (*id.* at 2a), not any "nuances" of state law.

This case also avoids the vehicle concerns raised in *Ho* (see Br. in Opp. 9-21, *Ho* v. *ReconTrust Co., N.A.*, No. 17-278 (filed Oct. 23, 2017) (BIO)):

*In *Ho*, the Ninth Circuit ultimately premised its holding on two *independent* grounds: (i) non-judicial foreclosure is not covered by the FDCPA; and (ii) the trustee was protected by the FDCPA's *exception* for activities "incidental to * * * a bona fide escrow arrangement." BIO 17-18. That latter, alternative ground is not present here. The first question—which has squarely divided the circuits—is alone teed up for decision.

*In *Ho*, the original trustee claimed it was protected because the case concerned a debt that was not in default at the time it was obtained. (The trustee in *Ho* was appointed at the time the mortgage was originally executed.) See BIO 19. Here, by contrast, respondents were retained *after* the default. App., *infra*, 5a.

*In *Ho*, the trustee distinguished contrary circuit authority on the ground that each case involved law firms retained specifically to pursue the foreclosure, while *Ho* involved a "neutral trustee." BIO 9, 15-17. Here, again, the facts below map directly onto the facts of cases in other circuits: respondents were specifically retained to pursue a non-judicial foreclosure. App., *infra*, 5a; BIO 16 ("each decision" involved "a law firm or lawyer working on behalf of a creditor").

*In *Ho*, the trustee emphasized the (supposedly) complex foreclosure scheme under California law. BIO 10. Here, the Ninth Circuit did not identify (or even mention) *any* aspect of Washington law, much less one that might cabin its decision. (There are none.)

*And, finally, in *Ho*, the Ninth Circuit remanded for further proceedings on a different federal claim, which the trustee argued might itself provide full relief and otherwise rendered the case interlocutory. BIO 21. Here, the case is final, and the only mechanism for relief is reversing on the question presented.[18]

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[18] In *Ho*, California law prohibited deficiency judgments, and the trustee argued that this fact explained away the contrary rulings in other circuits. BIO 10-11. The trustee was wrong. That fact had nothing to do with those decisions (which is why those circuits held that "*any* type of mortgage foreclosure action, *even one not seeking a money judgment on the unpaid debt*, is debt collection under the Act," *Glazer*, 704 F.3d at 462 (second emphasis added)). The fact that

At bottom, multiple circuits have now issued comprehensive opinions building upon the vast body of law regarding the question presented, exploring every aspect of the debate. The question is cleanly presented. The arguments have been fully vetted and further percolation promises nothing but additional conflicts and wasteful litigation. The issue is ripe for review and cries out for a definitive resolution from this Court.

Washington law does not permit deficiency judgments is thus irrelevant.

But to the extent the Court believes the issue warrants consideration, it should grant review in this case and in *Obduskey*, *supra*; *Obduskey* involves Colorado law, which permits separate actions to collect on a deficiency. *Obduskey* Pet. 31. Granting in both cases would thus permit the Court to dispose of the existing conflicts and confusion across *all* state foreclosure schemes. Otherwise, the Court should grant in *Obduskey* and hold this petition pending its disposition of that case.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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