No. 17-1351

In the Supreme Court of the United States

RICK GREER, PETITIONER

v.

GREEN TREE SERVICING LLC

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

REPLY BRIEF FOR THE PETITIONER

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This case presents an important and recurring question that has intractably divided the circuits. The case for review is exceptionally clear: Respondent does not dispute that the question has generated over a hundred conflicting decisions. It does not contest that it has wasted substantial judicial and party time and resources, and it effectively concedes that courts read the FDCPA's key definition (in this critical foreclosure setting) in opposite ways. Respondent never explains how further percolation would sharpen the issues or produce any practical or theoretical benefit. And it takes only a quick glance at the exhaustive analyses on each side of the split to understand the issue arrives fully ventilated from every conceivable angle.

Respondent is thus left grasping for straws. It says the Court can decide this case on the alternative ground that the loan was not "in default" when it was transferred

to respondent. This is false. Respondent conceded below that "[t]he Loan was in default when Green Tree became the servicer," and (for good reason) no one suggested otherwise. Respondent's actual argument is that a debt is somehow not "in default" until a debtor receives a "notice of default." But the entire point of the "notice" is that the debt is *already* in default. (Thus "notice *of default*.") There is a reason the Ninth Circuit addressed other alternative grounds below but ignored this one. This Court can readily do the same.

The question presented is of exceptional legal and practical importance. It has generated a broad conflict in courts nationwide and an acknowledged split among multiple circuits and state supreme courts. It dictates whether the FDCPA's protections apply in thousands of foreclosures with potentially trillions of dollars at stake. The federal government has recognized its "importan[ce]," and the sheer number of decisions from countless jurisdictions confirms its significance. Pet. 2-3, 28-29.

This case easily checks off every box for review, and respondent's strained attempt to muddy the waters falls short. The petition should be granted.

1. As its lead position, respondent argues that this case is an inappropriate vehicle to resolve the circuit conflict because it could be decided on alternative grounds. Br. in Opp. 8-10. According to respondent, petitioner's debt "was not in default at the time it was transferred to respondent." Br. in Opp. 2, 8-10. If that were true, respondent would indeed fall within the FDCPA's exception for persons collecting a "debt which was not in default at the time it was obtained." 15 U.S.C. 1692a(6)(F)(iii). And if that exception applied, respondent would indeed be correct that the Court could theoretically dodge the question presented and decide the case on other grounds.

But respondent is wrong. The entire record below confirmed that the debt was in default when respondent obtained it. Indeed, respondent itself stated "[t]he Loan was in default when Green Tree became the servicer of the Loan." C.A. Supp. E.R. 29 (Green Tree's own declaration). Petitioner alleged as much in his complaint (D. Ct. Doc. 1, at 3 ("Green Tree acquired the alleged debt while it was in default.")), and no court at any stage below suggested the facts were otherwise.

Instead, as respondent acknowledges, its entire argument is that, as a legal matter, an overdue debt is not "in default" until the debt collector issues a "notice of default" under Washington law. Br. in Opp. 6-7; Pet. App. 19a-20a (adopting this theory). That theory is baseless. The state-law notice is simply a predicate requirement under state law before the foreclosure process can proceed. See Wash. Rev. Code §§ 61.24.031(1)(a) ("Notice of default under RCW 61.24.030(8)"), 61.24.030(8) ("Requisites to a trustee's sale"). Indeed, the very point of sending the initial letter *is that the loan is in default*. (That is why it is called a "notice" of default. It provides *notice of a default*.)

It is little surprise that the district court could "find no Washington case" endorsing this view (Pet. App. 20a), and little surprise the Ninth Circuit simply ignored it despite addressing other alternative grounds (Pet. App. 2a). As a matter of common parlance (and common sense), one cannot issue a "notice" of default *until there has been a default*. The undisputed facts below show that the debt was in "default" under any ordinary understanding of that term. Respondent does not cite a single authority, anywhere, suggesting that an unpaid, overdue debt is not in

"default" under the FDCPA until a state-law notice is issued. This argument is wholly insubstantial.[1]

In any event, as respondent admits, the court of appeals declined to address this alternative ground below. Pet. App. 2; Br. in Opp. 7-8 ("[t]he court [of appeals] did not address 15 U.S.C. § 1692a(6)(F)"). This Court can do the same. And if respondent loses on plenary review, it can always ask the Ninth Circuit to expressly decide this curious argument on remand.

Respondent does not identify any other impediments to review because none exist. It does not contest that the sole basis for the decision below was the question presented. It does not identify any obstacle to reaching the merits. This question presented is exceptionally important, and it is cleanly presented on these facts. The question is ripe for review.

2. Respondent's half-hearted attempt to dodge the actual split is baseless.

a. Contrary to respondent's contention (Br. in Opp. 7, 10-11), the circuit conflict is square and entrenched:

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[1] The single case cited by the district court (Pet. App. 19a) contradicts its own theory: it found that the entity there, unlike respondent here, "acquired the debt before it was payable," and further emphasized legislative history "construing 'in default' to mean a debt that is at least delinquent, and sometimes more than overdue." *De Dios* v. *Int'l Realty & Invs.*, 641 F.3d 1071, 1074, 1075 n.3 (9th Cir. 2011). For its part, respondent's own authority undermines its position. See Br. in Opp. 9 ("'loan servicers" are exempt "so long as the debts were not in default when taken for servicing'"; "'[t]he amended complaint does not allege that CitiMortgage acquired Roth's debt after it was in default and so fails to plausibly allege that CitiMortgage qualifies as a debt collector under the FDCPA'"; "'[a]ccording to Glazer's own allegations, Chase obtained the Klie loan for servicing *before* default," thus "'Chase is not a "debt collector"'"; etc.). Given the uncontroverted facts here (*e.g.*, D. Ct. Doc. 1, at 3; C.A. Supp. E.R. 29), respondent would qualify as a debt collect under all of its own authority.

"Whether the FDCPA applies to non-judicial foreclosure proceedings has divided the circuits." *Obduskey* v. *Wells Fargo*, 879 F.3d 1216, 1220 (10th Cir.), petition for cert. pending, No. 17-1307 (filed Mar. 13, 2018); *Ho* v. *ReconTrust Co., NA*, 858 F.3d 568, 576 & n.11 (9th Cir. 2016) (acknowledging its "sister circuits" have "divide[d]").

The courts recognizing a conflict are not confused. Multiple circuits hold 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* v. *Chase Home Fin. LLC*, 704 F.3d 453, 462 (6th Cir. 2013); *Wilson* v. *Draper & Goldberg, P.L.L.C.*, 443 F.3d 373, 376 (4th Cir. 2006); *Alaska Trustee, LLC* v. *Ambridge*, 372 P.3d 207, 216-217 (Alaska 2016).

The Ninth and Tenth Circuits hold the opposite. *Ho* repudiated other circuits' reasoning, and "affirm[ed]" the "leading case of *Hulse*," which it admitted "circuits ha[d] declined to follow." 858 F.3d at 572-573 (recognizing its "path[]" thus "diverge[d]"). The Tenth Circuit recognized the same contrary authority, but "endorse[d]" the decision in *Ho*. *Obduskey*, 879 F.3d at 1220-1221. Under any fair reading, the circuits are intractably divided. *E.g.*, *Williams* v. *Rushmore Loan Mgmt. Servs., LLC*, No. 15-cv-673, 2018 WL 1582515, at *7-*8 & n.14 (D. Conn. Mar. 31, 2018) (confirming the conflict).

Respondent does not dispute the "confusion" this question generates (*Glazer*, 704 F.3d at 460; *Ambridge*, 372 P.3d at 212), or deny that lower courts, astoundingly, have issued over a hundred conflicting decisions on this important question (Pet. 2, 28). Instead, respondent argues that these decisions somehow do not "squarely conflict[]." Br. in Opp. 10. But as the petition established (at 9-28), multiple circuits (and two state supreme courts) have refuted every facet of the Ninth and Tenth Circuit's

analysis, and those courts, in turn, canvassed the competing decisions but "disagree[d]" (*Obduskey*, 879 F.3d at 1220-1223). While respondent tepidly resists the obvious, the contrast could not be starker. This untenable conflict will continue to confound lower courts until this Court intervenes.

b. Respondent says this clear split is irrelevant because "[n]one of the federal circuit cases petitioner cites involved non-judicial foreclosure." Br. in Opp. 10.[2] As respondent explains, "*[j]udicial* foreclosure permits a creditor to recover money, an act clearly contemplated by the FDCPA, whereas *non-judicial* foreclosure permits a creditor solely to secure the sale of a property." *Id.* at 11.

This only proves *petitioner's* point: The precise fact-pattern of every case on either side of the split, including this one, involves entities pursuing foreclosure *without seeking an additional money judgment*. That is the subject of the open conflict, and it reflects how those courts themselves understand the issue. Pet. 9-25. The entire debate is whether a foreclosure is (i) the mere enforcement of a security interest (as respondent argues); or (ii) an attempt, "directly or indirectly," to collect debt (as petitioner argues).

And courts have taken clear sides of that debate. According to the Third, Fourth, and Sixth Circuits (and Alaska and Colorado Supreme Courts), "*any* type of mortgage foreclosure action, *even one not seeking a*

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[2] Even the respondents in *Obduskey* were willing to admit that at least "one" case involved a non-judicial foreclosure, and others involved so-called "quasi-judicial" foreclosures (*Obduskey* Br. in Opp. 11), a telling quibble. In any event, the actual courts facing these issues understand the situation differently. See, *e.g.*, *Obduskey*, 879 F.3d at 1221 ("[*Glazer*] held that *a non-judicial mortgage foreclosure* was covered under the FDCPA.") (emphasis added).

money judgment on the unpaid debt, is debt collection under the Act." *Glazer*, 704 F.3d at 462 (second emphasis added). As these courts explain, "*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 outstanding debt)." *Id.* at 461.

In so holding, these courts expressly repudiate respondents' side of the split. They reject the proposition that "mortgage foreclosure is not debt collection" unless "a money judgment is sought against the debtor in connection with the foreclosure." *Glazer*, 704 F.3d at 460. And they reject the view that lenders are merely "'foreclosing [their] interest in the property'" and "'[p]ayment of funds is not the object of the foreclosure.'" *Wilson*, 443 F.3d at 376. Each decision, in short, contradicts the Ninth and Tenth Circuit's holding that foreclosure is the mere enforcement of a security interest. Contra *Obduskey*, 879 F.3d 1220-1223 (adopting the opposite position); *Ho*, 858 F.3d at 573 ("We view all of ReconTrust's activities as falling under the umbrella of 'enforcement of a security interest.'"); Opp. 11.

It blinks reality to suggest these courts would have come out differently had a different label ("judicial" or "non-judicial") been slapped on identical facts. The entire analysis is rooted in a close examination of the FDCPA's text, structure, and purpose, and the outcome turns on how those courts characterize, under federal law, the act of foreclosing *without* seeking a money judgment. If respondent's "distinction" were actually relevant, courts would actually discuss it, and at least *some* decision would explain away any "conflict" due to these differences. Instead, petitioner is unaware of *any* case—spanning over a

hundred conflicting decisions—adopting respondent's unusual position, which respondent offered without one whit of support. This acknowledged conflict cannot be brushed aside so easily.

c. Respondent argues that this case is factually distinguishable because it involves a "loan servicer," not a "trustee" or "law firm." Br. in Opp. 11. But respondent fails to explain why that conceivably matters. Respondent was not merely a passive actor. It sent repeated letters declaring petitioner in default, warning of foreclosure, offering loan modifications, and engaging in the foreclosure process. Pet. 6; C.A. Supp. E.R. 51, 53-55, 60-61. It acted in the same capacity as any other entity seeking a foreclosure. It is little surprise that respondent, again, fails to identify a *single* decision finding this "distinction" relevant. If "foreclosure-related activities constitute debt collection" (*Ho*, 858 F.3d at 576), they do so regardless who does them.[3]

3. Respondent argues that the Court should deny review, "just as it did five months ago" in *Ho*. Br. in Opp. 7. But *Ho* rested on independent grounds and implicated other vehicle concerns. Petitioner explained these obvious distinctions (Pet. 30-32), and respondent answers with—silence.

Since the petition in *Ho* was denied, the issue has already arisen in dozens of conflicting decisions, including the one below. There is no conceivable advantage from delay. The competing views are developed and entrenched, and neither side is standing down. Further percolation

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[3] Respondent does implicitly admit that *Obduskey* is a proper vehicle, which it assuredly is. See Br. in Opp. 11 (referencing *Obduskey* as fitting within the fact-pattern of cases making up the split). The Court should grant in both cases—thus providing an additional view of the issue in context—or grant in *Obduskey* and hold this petition pending the Court's disposition of that case.

would be pointless. This massive waste of judicial and party time will continue until the Court intervenes.

This Court regularly grants certiorari where an issue arises only a fraction of the time it arises here. The deep, entrenched conflict warrants immediate review, and the petition should be granted.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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JUNE 2018