No. 17-566

IN THE
Supreme Court of the United States

RICHARD D. SIBERT,
Petitioner,
v.

WELLS FARGO BANK, N.A.,
Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Fourth Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Section 3953 of the Servicemembers Civil Relief Act protects active servicemembers from non-judicial foreclosures. However, the statute's protections apply only if the servicemember's mortgage obligation "originated before the period of the servicemember's military service." 50 U.S.C. § 3953(a).

The question presented is:

Whether the protections afforded by Section 3953 of the Servicemembers Civil Relief Act apply to an active servicemember who has re-enlisted in the military and whose mortgage obligation originated *during*, rather than "before," a prior enlistment.

RULE 29.6 DISCLOSURE STATEMENT

Wells Fargo Bank, N.A.'s parent corporation is Wells Fargo & Co., and Wells Fargo & Co. is a publicly held company that owns 10% or more of Wells Fargo Bank, N.A.'s stock. With the exception of Wells Fargo & Co., no other publicly held company owns 10% or more of Wells Fargo Bank, N.A.'s stock.

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BRIEF IN OPPOSITION

INTRODUCTION

Section 3953 of the Servicemembers Civil Relief Act protects active servicemembers from non-judicial foreclosures. Its protections apply to a mortgage obligation that "originate[s] *before* the period of the servicemember's military service." 50 U.S.C. § 3953(a) (emphasis added). The question presented in this case is whether Section 3953 applies to a mortgage obligation that originates *during* the period of a servicemember's military service if the foreclosure occurs during a subsequent enlistment.

That question, which would appear to answer itself, is an issue of first impression—not just for this Court, but for *any* court. Indeed, the district court "canvassed existing caselaw and [was] unable to

find" a single case addressing it. Pet. App. 25. Even petitioner acknowledges that the Fourth Circuit was the first court of appeals to address the question, Pet. 5, though of course the dearth of authority runs deeper.

In these circumstances, there is no reason to grant certiorari. There obviously is no "conflict" between federal circuit courts that requires this Court's intervention. Sup. Ct. R. 10(a). Further, given that the protections re-codified in the SCRA have been in existence since World War II, the total absence of case law confirms that the question presented—which is tied to the unusual factual circumstances of this case—does not recur frequently and will not significantly impact other servicemembers.

In the end, then, petitioner must rest entirely on his contention that the Fourth Circuit resolved the question presented incorrectly on the merits. There are two problems with that. First, this would be an extremely poor vehicle to reach that question. Petitioner signed a contract waiving the "rights and protections" of Section 3953. Pet. App. 3 (internal quotation marks omitted). Under the SCRA, that waiver must be enforced. *See* 50 U.S.C. § 3918. And it precludes petitioner from obtaining any relief under the statute. The question presented is thus not even outcome-determinative in this case.

Second, Judge Niemeyer's thorough opinion below correctly answered the question presented. The statute protects obligations that "originate *before* the servicemember enters the military service," but it does not protect obligations originating "*during* the servicemember's military service." Pet. App. 6. Petitioner's argument—that the statute protects all

obligations that originate before the "current" period of military service—would effectively rewrite the statute and undermine its purposes.

The petition for certiorari should be denied.

STATEMENT

1. Petitioner Richard Sibert joined the Navy in 2004. On May 15, 2008, while still on active duty, Sibert purchased a house. He financed the house with a loan, which was secured by a deed of trust on the house. The loan was subsequently acquired by respondent Wells Fargo Bank, N.A. Pet. App. 3.

In July 2008, Sibert was discharged from the Navy. Soon after that, he entered into default on his loan. In March 2009, Wells Fargo notified Sibert that it had begun the process of foreclosing on his house. In April 2009, Sibert re-enlisted in the military. On May 13, 2009, a foreclosure sale was held, and Sibert's house was sold. *Id.*

Shortly after the foreclosure sale, Sibert signed a written "Move Out Agreement" and a "Servicemembers' Civil Relief Act Addendum to Move Out Agreement." The "Move Out Agreement" entitled Sibert to $2,000 to assist him with his relocation efforts. In the "Servicemembers' Civil Relief Act Addendum," Sibert agreed to "affirmatively waiv[e] any rights and protections provided by [50 U.S.C. § 3953] with respect to the May 15, 2008 Deed of Trust . . . and the May 13, 2009 foreclosure sale." Pet. App. 3 (brackets in original). The statute referenced in the Addendum was Section 3953 of the Servicemembers Civil Relief Act (SCRA), which prohibits lenders from foreclosing on a servicemember's property without a court order if the servicemember's mortgage obligation "originated before the period of the servicemem-

ber's military service." 50 U.S.C. § 3953(a). In other words, the Addendum indicated Sibert's waiver of Section 3953's protections against non-judicial foreclosure.

2. In October 2014, more than five years after the May 2009 foreclosure sale, Sibert sued Wells Fargo in federal district court. Sibert claimed that Wells Fargo had violated Section 3953 of the SCRA by foreclosing on his house without a court order.

The District Court rejected that claim. It concluded that Sibert's loan obligation was not protected by Section 3953 of the SCRA. The District Court explained that "the SCRA does not apply to obligations that originate while a servicemember is already in the military" and that "it is undisputed that Sibert's mortgage originated while he was in the military." Pet. App. 30. In reaching that conclusion, the court explicitly acknowledged that it was addressing "a question of first impression": It indicated that it had "been unable to find *any authority*" in the "existing caselaw" "establishing precisely how multiple periods of service should be treated under the SCRA." *Id.* at 25 (emphasis added). Because the District Court concluded that Section 3953 did not apply to Sibert's loan obligation, it did not need to reach Wells Fargo's alternative argument that Sibert had waived any protections provided by Section 3953. *Id.* at 31.

On appeal, the Fourth Circuit affirmed. Writing for the majority, Judge Niemeyer concluded that Section 3953 "grants protection to obligations incurred *outside of* military service, while denying protection to obligations originating *during* the servicemember's military service." *Id.* at 6. The Fourth Circuit explained that this conclusion fol-

lowed directly from the statutory text, which "provides protection to *only* those obligations that originate *before* the servicemember enters the military service." *Id.* Because Sibert's mortgage obligation was incurred while he was enlisted in the military, the Fourth Circuit concluded that Section 3953 of the SCRA did not apply to Sibert's loan obligation. Accordingly, the Fourth Circuit did not need to reach the question whether Sibert had waived his rights under the SCRA. Judge King dissented, arguing that the phrase "before the period of the servicemember's military service" in Section 3953 extends the statute's protections to any obligations originated before the servicemember's *current* period of service, even if the obligation was incurred *during* a prior period of service. *Id.* at 13 (King, J., dissenting).

REASONS FOR DENYING THE PETITION

This case does not warrant the Court's review. There is no conflict in the lower courts on the question presented. This case is an extremely poor vehicle for resolving the question presented. And the decision below was correct in any event.

I. THERE IS NO CONFLICT IN THE LOWER COURTS ON THE QUESTION PRESENTED

The decision below does not conflict with the decision of any other court. Petitioner concedes that the Fourth Circuit has been the "only circuit to address this issue." Pet. 5. But the absence of conflict in the lower courts goes further than that: The District Court noted that the issue was one "of first impression" and that it had not found *a single court decision* squarely addressing the question presented. *See* Pet. App. 25 ("The Court has canvassed existing caselaw

and has been unable to find any authority establishing precisely how multiple periods of service should be treated under the SCRA."). In other words, aside from the decision below, there is no case law on the question presented, let alone a conflict. That alone demonstrates that the decision below does not merit this Court's review. *See* Sup. Ct. R. 10(a).

Moreover, the absence of case law on the question presented belies petitioner's claims that this case will "impact thousands of military personnel" and that the decision below is "in urgent need of review." Pet. 5. Although the SCRA was enacted in 2003, *see* Pub. L. No. 108-189, 117 Stat. 2835 (2003), petitioner concedes that the SCRA "restated the earlier law's restrictions on covered mortgages," Pet. 6. But even though these statutory foreclosure protections have been in existence for nearly a century, they are rarely the subject of litigation. The silence in the Federal Reporter speaks volumes. The question presented is not a frequently recurring one that warrants this Court's review.

II. THIS CASE IS AN EXCEEDINGLY POOR VEHICLE FOR RESOLVING THE QUESTION PRESENTED

This case is also an extremely poor vehicle for resolving the meaning of Section 3953 of the SCRA. No matter the proper interpretation of the statute, petitioner is not entitled to relief because he voluntarily executed a waiver of his rights under the statute. Thus, the question presented is not even outcome-determinative in this case.

Shortly after foreclosure, petitioner signed a "Servicemembers' Civil Relief Act Addendum to Move Out Agreement." In that written agreement, peti-

tioner "affirmatively waiv[ed] any rights and protections provided by [50 U.S.C. § 3953] with respect to the May 15, 2008 Deed of Trust . . . and the May 13, 2009 foreclosure sale." Pet. App. 3 (brackets in original).

Congress has expressly provided that such waivers must be enforced by the courts. Section 3918 of the SCRA provides that a "servicemember may waive any of the rights and protections provided by" the SCRA. 50 U.S.C. § 3918. Congress has indicated that a waiver is "effective" if "it is in writing and is executed as an instrument separate from the obligation or liability to which it applies," and so long as the written waiver agreement specifies "the legal instrument to which the waiver applies." *Id.* The waiver petitioner signed plainly meets those criteria: It is in writing, it is executed as a separate agreement, and it specifies the legal instrument—the "May 15, 2008 Deed of Trust"—to which it applies.

The District Court and Fourth Circuit both declined to address petitioner's waiver of his rights under Section 3953 because they rejected his interpretation of the statute on the merits. Pet. App. 9, 31. But the import of petitioner's waiver is clear: He could not obtain relief even if the statute were to protect him from a non-judicial foreclosure. In other words, the question presented has no bearing on petitioner's ultimate entitlement to relief in this case.

This Court does not grant review when doing so would have no impact on the bottom-line judgment in the case. *See California* v. *Rooney*, 483 U.S. 307, 311 (1987) (per curiam) ("This Court reviews judgments, not statements in opinions.") (internal quota-

tion marks omitted); *Hall* v. *Beals*, 396 U.S. 45, 48 (1969) (per curiam). Accordingly, the Court should deny certiorari here.

III. THE DECISION BELOW IS CORRECT

In the end, petitioner's sole basis for certiorari is his assertion that the decision below incorrectly interprets Section 3953 of the SCRA. That, of course, is not a sufficient reason to grant review. But petitioner is wrong in any event: The Fourth Circuit, per Judge Niemeyer, correctly concluded that the statute's protections do not apply to an active servicemember if the mortgage obligation originated "*during* the servicemember's military service." Pet. App. 6.

1. Section 3953 prohibits non-judicial foreclosure on a servicemember's property when the servicemember's obligation "originated before the period of the servicemember's military service." 50 U.S.C. § 3953(a). As Judge Niemeyer explained, writing for the panel majority, the statute "explicitly creates two classes of obligations": obligations that originated *before* the servicemember's military service, and obligations that originated *during* the servicemember's military service. Pet. App. 6. The former obligations are protected; the latter are not. That reading follows straightforwardly from the text of the statute. And it resolves this case: Because petitioner purchased his house during his military service, he is not protected by the statute.

The history of the statute provides strong support for that reading of the text. In 1942, Congress revised the statutory predecessor to Section 3953 of the SCRA. The result of the 1942 revision was that the statute prohibited non-judicial foreclosures on

obligations (1) "originated prior to such person's period of military service," Soldiers' and Sailors' Civil Relief Act Amendments of 1942, Pub. L. No. 77-732, § 9(b), 56 Stat. 769, 771, and (2) "owned by a person in military service at the commencement of the period of the military service and still so owned by him," Soldiers' and Sailors' Civil Relief Act of 1918, Pub. L. No. 65-103, § 302, 40 Stat. 440, 444. Thus, the statute made express that the loan obligation must have originated *before* a person's period of military service and must be owned *during* that period.

Congress recodified the 1942 statute in the SCRA, and those express temporal requirements remain relevant to interpreting the SCRA. The SCRA was "designed only as a 'comprehensive restatement' of prior versions, made for the sake of 'clarity.'" Pet. App. 8 (quoting H.R. Rep. No. 108-81, at 35, 45 (2003)). It thus carried forward the temporal restrictions from the 1942 statute: Obligations must be (1) originated *before* the servicemember's military service and (2) owned by the servicemember *during* the servicemember's service. *See* 50 U.S.C. § 3953 (statute applies to obligations "originated before the period of the servicemember's military service and for which the servicemember is still obligated"). As Judge Niemeyer correctly concluded: "In order to give these two requirements independent legal force, the word 'before' (or 'prior' in the 1942 version) must be read as excluding obligations made during military service." Pet. App. 8.

In short, only obligations incurred outside a period of military service are eligible for Section 3953's protection against non-judicial foreclosure.

2. Petitioner argues (at 8), following Judge King's dissenting opinion, that the statute must provide protection for any obligation incurred before the servicemember's *current* enlistment, even if that obligation was incurred during a *prior* enlistment. In other words, petitioner's (and Judge King's) theory is that the statutory phrase "before the period of military service" must mean "before the *current* period of military service." That theory finds no support in the statute.

For one thing, Section 3953 does not say that its protections against non-judicial foreclosure apply to all obligations incurred "before the *current* period of military service." Congress's omission of the word "current" is telling. Petitioner himself contends that "Congress was aware that a significant percentage of servicemembers chose to re-enlist after an initial period of service." Pet. 9 n.2. But even though Congress was apparently aware of the issue, it did not explicitly distinguish between a servicemember's current and prior enlistments. *See Bob Jones Univ.* v. *United States*, 461 U.S. 574, 601 (1983) (explaining that, "[i]n view of [Congress's] prolonged and acute awareness of so important an issue," Congress's "failure to act" on the issue is relevant to interpreting statutory language). Had Congress wished to refer only to the current period of military service, it "could easily have chosen clearer language." *See NLRB* v. *SW Gen., Inc.*, 137 S. Ct. 929, 939 (2017). That Congress "did not adopt" the "readily available and apparent alternative" in those circumstances "strongly supports" the conclusion that the statute does not apply to all obligations incurred before the current period of military service. *Id.* (internal quotation marks omitted).

Moreover, the statute's use of the singular phrase "the period of military service" does not mean that the statute refers only to one period—the current period—of military service. As this Court has explained, the article "the" can "refer to a term used generically or universally," and not just to "a particular thing." *NLRB* v. *Noel Canning*, 134 S. Ct. 2550, 2561 (2014) (internal quotation marks omitted). Accordingly, the phrase "the period of military service" can and should be read as referring not just to the servicemember's current enlistment period, but to *any* period of military service. That reading is bolstered by Congress's instruction that, in "determining the meaning of any Act of Congress," words "importing the singular include and apply to several persons, parties, or things" unless the "context indicates otherwise." 1 U.S.C. § 1; *see Bruce* v. *Samuels*, 136 S. Ct. 627, 632 n.4 (2016). Here, petitioner does not point to anything in the statutory context indicating that the phrase "the period of military service" should be interpreted as referring only to a single period of service. To the contrary, the statutory context plainly supports respondent's reading: Other closely related provisions of the SCRA apply only to obligations incurred outside any period of military service, and Section 3953 should be interpreted the same way. *See* Pet. App. 28-29 (citing 50 U.S.C. §§ 3937, 3952).

Petitioner's reading also would have problematic consequences. As Judge Niemeyer explained: "Under Sibert's reading, a servicemember could incur an obligation fully aware of his military pay and lifestyle, yet defeat the statutory exclusion of his obligation by leaving military service and thereafter reenlisting." *Id.* at 8. For that reason, petitioner's read-

ing would likely make it harder for servicemembers to buy homes during their military service: Financial institutions would be less likely to underwrite mortgages for active-duty servicemembers if those servicemembers could evade foreclosure by leaving the military and later re-enlisting.[1]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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[1] Thus, even if the SCRA were somehow ambiguous and therefore needed to be "read with an eye friendly to those who dropped their affairs to answer their country's call," *Le Maistre* v. *Leffers*, 333 U.S. 1, 6 (1948), it is the Fourth Circuit—not petitioner—that has supplied the better reading of the statute.