No. _____

In The

Supreme Court of the United States

MAXWELL & MORGAN, P.C., *et al*.,

Petitioners,

v.

MARTHA A. MCNAIR,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

TOMIO B. NARITA
Counsel of Record
JEFFREY A. TOPOR
R. TRAVIS CAMPBELL
SIMMONDS & NARITA LLP
44 Montgomery Street, Suite 3010
San Francisco, CA 94104
Telephone: (415) 283-1000
tnarita@snllp.com

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

QUESTION PRESENTED

The Fair Debt Collection Practices Act ("FDCPA") regulates the conduct of, and communications made by, "debt collectors" who regularly attempt to collect "debts" due another from "consumers." 15 U.S.C. §§ 1692a(3), (5) & (6).

This case presents a clear example of an important issue on which the circuit courts are deeply divided: whether foreclosure activity is subject to the FDCPA if it does not seek payment of money from the consumer. In the decision below, the Ninth Circuit held that a law firm violated the FDCPA when it filed with the clerk of an Arizona state court an application for a writ as required to judicially foreclose on real property in Arizona. The law firm never served the writ on the property owner, and its contents did not seek money from the owner. The writ sought *only* to enforce the client's security interest in the property. This case is therefore an ideal vehicle for resolving the widespread conflict over this important issue. This Court is already considering this term a case that raises closely related issues, *Obduskey v. McCarthy & Holthus, LLP*, Case No. 17-1307. There, the question presented is whether the FDCPA applies to non-judicial foreclosure proceedings.

Here, the question presented is:

Whether the FDCPA applies to foreclosure activity that does not seek payment of money from a consumer.

PARTIES TO THE PROCEEDING BELOW

Petitioners are Maxwell & Morgan, P.C., an Arizona professional corporation; Charles E. Maxwell, husband; W. William Nikolaus, husband; Lisa Maxwell, wife; Leslie Nikolaus, wife, the defendants-appellees in the court of appeals and the defendants in the district court.

Respondent is Martha A. McNair, appellant in the court of appeals and plaintiff in the district court.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Petitioners hereby state that they are Maxwell & Morgan, P.C., an Arizona professional corporation; Charles E. Maxwell, Lisa Maxwell, W. William Nikolaus and Leslie Nikolaus. There are no parent corporations or publicly held companies owning 10% of Petitioners' stock.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

STATUTES

PETITION FOR A WRIT OF CERTIORARI

Maxwell & Morgan, P.C., *et al.*, respectfully petition 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 opinion of the court of appeals (App., *infra*, 1a-10a) is reported at 893 F.3d 680. The opinion of the district court (App., *infra*, 11a-38a) is reported at 142 F. Supp. 3d 859.

JURISDICTION

The judgment of the court of appeals was entered on June 25, 2018. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

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*, 47a-75a).

INTRODUCTION

This case presents a significant and recurring issue of statutory construction relating to the FDCPA that has hopelessly divided the lower courts. The FDCPA prohibits "debt collectors" from engaging in unfair, abusive, and misleading practices when collecting a "debt" on behalf of another from a consumer. *See* 15 U.S.C. §§ 1692a-1692h. The Act, however, does not define the term "debt collection" and the lower courts have reached conflicting conclusions whether "debt collection" necessarily requires an effort to obtain money from a consumer.[1]

The conflict is particularly pronounced in cases like this one, which arise in the foreclosure context. Decisions from the Ninth and Tenth Circuits have held that communications arising in the nonjudicial foreclosure context that do not seek payment of money are not "debt collection" under the FDCPA.[2]

---

[1] *See Glazer v. Chase Home Fin. LLC*, 704 F.3d 453, 460 (6th Cir. 2013) ("Unfortunately, the FDCPA does not define 'debt collection,' and its definition of 'debt collector' sheds little light, for it speaks in terms of debt collection.") (citations omitted); *Gburek v. Litton Loan Serv. LP*, 614 F.3d 380, 384 (7th Cir. 2010) ("Neither this circuit nor any other has established a brightline rule for determining whether a communication from a debt collector was made in connection with the collection of any debt.").

[2] *See Ho v. ReconTrust Co., NA*, 858 F.3d 568, 574 (9th Cir. 2016) (mailing notice of default and notice of sale to debtor was not attempt to collect money from debtor, and thus "debt collection" under FDCPA; "The notices at issue in our case didn't request payment from Ho."); *Obduskey v. Wells Fargo*, 879 F.3d 1216, 1221 (10th Cir. 2018) (following *Ho*; "Because enforcing a security interest is not an attempt to collect money from the debtor, and

Other circuits, however, hold that foreclosure-related communications may constitute "debt collection" under the FDCPA, even if they do not seek money from the debtor.[3]

This case provides the Court with an ideal vehicle to resolve this important issue that has divided the lower courts. Although the Court already has before it in *Obduskey* a more narrow issue – whether the FDCPA applies within the non-judicial foreclosure context – Petitioners submit that the Court should also grant review of this case. A decision of this Court on this central issue of what is, or is not, "debt collection" under the FDCPA will provide much needed guidance

---

the consumer has no "obligation . . . to pay money," non-judicial foreclosure is not covered under FDCPA) (citations omitted), *pet. for cert. granted*, 138 S. Ct. 2710 (2018).

[3] *See McCray v. Federal Home Loan Mortg. Corp.*, 839 F.3d 354, 359 (4th Cir. 2016) ("nothing in [the] language [of the FDCPA] requires that a debt collector's misrepresentation [or other violative actions] be made as part of an express demand for payment or even as part of an action designed to induce the debtor to pay.") (emphasis in original, citation omitted); *Gburek*, 614 F.3d at 386 (letter offering to discuss "foreclosure alternatives" was attempt to collect a debt: "Though it did not explicitly ask for payment, it was an offer to discuss Gburek's repayment options, which qualifies as a communication in connection with an attempt to collect a debt."); *Glazer*, 704 F.3d at 461 (FDCPA applied to state court judicial foreclosure complaint, despite absence of any allegation it sought money from the plaintiff: "Thus, if the purpose of an activity taken in relation to a debt is to 'obtain payment' of the debt, the activity is properly considered debt collection."); *Kaltenbach v. Richards*, 464 F.3d 524, 526-28 (5th Cir. 2006) (attorney who filed state court foreclosure action may be "debt collector" under FDCPA, despite absence of any allegation that a request for payment of money was made).

to creditors, attorneys, and consumers across the country.

STATEMENT OF THE CASE

1. In 2004, Respondent Martha A. McNair ("McNair") purchased a home in an Arizona real estate development known as Neely Commons. She joined other owners in a homeowners' association, the Neely Commons Community Association, Inc. ("the Association"), and agreed to be bound by certain covenants, conditions, and restrictions adopted by the Association. *See* Appendix B at App. 12a. If McNair failed to pay her assessments, the Association was entitled to record a notice of lien on her property, and to collect the unpaid assessments, together with late charges, interest, collection costs, and attorneys' fees, by suing McNair or by bringing an action to foreclose the lien. *Id.*

On December 21, 2009, after McNair failed to pay her assessments, the Association retained Petitioner Maxwell & Morgan, P.C. ("M&M"), a law firm, which filed suit against her and for the Association in the Maricopa County Justice Court. *Id.* McNair subsequently agreed to a payment plan, but when she failed to pay on that plan as agreed, the Association obtained a default judgment of $1,466.80 against her on November 22, 2010. *Id.*

On April 30, 2012, the firm filed a foreclosure action for the Association in the Maricopa County Superior Court, seeking to foreclose on the lien created by

McNair's failure to pay the assessments. *See id.* at 2-3. Rather than contest the foreclosure action, McNair offered to enter into a payment plan, which the Association accepted on the condition that she enter into a stipulated judgment. *Id.* at 3. The stipulated judgment provided that she would make an initial $2,500.00 payment and then twelve monthly payments of $250.00. *Id.*

McNair made the initial payment of $2,500.00, followed by ten payments of $250.00 through May of 2013. *Id.* On May 5, 2013, she sent M&M a letter asking how much she still owed. *Id.* In an email dated August 21, 2013, an attorney from M&M informed her she had not satisfied the foreclosure judgment as agreed, because she had not made all of the required payments of $250.00, including her 2013 annual assessment. *Id.* The M&M attorney advised her to review the stipulated judgment, and warned her that the Association might have to take legal action against her if she continued to fail to comply with the terms of the stipulated judgment. *Id.* Over a month later, on September 23, 2013, McNair made an additional payment of $275.74 and asked if she owed anything else. *Id*.

On November 6, 2013, after more than another month had passed, the Association sought to foreclose upon its lien by filing a *praecipe* requesting that the clerk of the court issue a writ of special execution. *Id*; *see also* Appendix D, App. 41a-46a. The clerk issued the writ as requested, directing the Sheriff to satisfy the judgment by seizing and selling the property. *Id.* The writ issued by the clerk of the court did not request

payment of money by McNair, and there is no evidence in the record that the writ was ever served on McNair. *Id*.

2. On April 24, 2014, McNair filed suit in the United States District Court for the District of Arizona, asserting FDCPA claims against the firm and its attorneys. *See* Appendix B at 14a. On November 4, 2015, the district court denied McNair's motion for summary judgment and granted Petitioners' motion for summary judgment. *See id.* at 11-38; *see also McNair v. Maxwell & Morgan PC*, 142 F. Supp. 3d 859 (D. Ariz. 2015). Regarding the *praecipe* that sought the writ of special execution, the district court held that Petitioners were not engaged in "debt collection" under FDCPA, because they were merely seeking to foreclose on a security interest for their client. *See* Appendix B at 31a-33a. McNair appealed.

3. A three-judge panel of the Ninth Circuit affirmed the district court on all grounds, save one. *See* Appendix A at 1a-10a. The panel ruled that the filing of the *praecipe* seeking the writ of special execution was part of "defendants' effort to collect homeowner association fees through judicial foreclosure" and that this "constitutes 'debt collection' under the Act." *See id.* at 7-8. The court observed that the unpaid obligation arose from McNair's failure to pay her homeowner association fees, making it a "debt" as defined by section 1692a(5) of the FDCPA. *See id.* at 5. The court pointed out that this Court had held that attorneys can be "debt collectors" subject to the Act, even where their collection activity consists of litigation. *See id.* at 6 (citing *Heintz v. Jenkins*, 514 U.S. 291, 299 (1995)).

The Ninth Circuit rejected Petitioners' argument that their conduct was not "debt collection" under that court's earlier decision in *Ho v. ReconTrust Co., NA*, 858 F.3d 568 (9th Cir.), *cert. denied*, 138 S. Ct. 504 (2017). According to the panel in *McNair*, the *Ho* decision held only that a trustee in a non-judicial foreclosure proceeding in California "that does not allow for deficiency judgments" was not engaged in "debt collection" under the FDCPA. *See* Appendix at 6a-7a. Thus, the court concluded that *Ho* does *not* "preclude FDCPA liability for an entity that seeks to collect a debt through a judicial foreclosure scheme that allows for deficiency judgments." *See id.* at 7. The court reasoned that Petitioners' conduct in filing the *praecipe* and request for the writ was "part of a judicial foreclosure scheme that in many cases allows for deficiency judgments" and therefore "constitutes debt collection under the FDCPA." *See id.* at 7-8.

Next, the court examined the *praecipe* filed by Petitioners, which had "requested that the Clerk of the Maricopa County Superior Court issue the attached Writ of Special Execution against McNair." *See id.* at 8-9. The proposed writ that had been attached to the *praecipe* stated that "attorney fees of $1,687.50, plus accruing attorney fees of $1,597.50 . . . are now at the date of this Writ due" under the stipulated judgment that had been previously executed by the parties. *See id.* at 9. Although the state court ultimately awarded all the attorney's fees identified in the *praecipe* and writ, at the time those pleadings were filed with the clerk, "no court had yet approved the quantification of

the 'accruing' attorneys' fees claimed in the Writ." *Id*. Thus, the Ninth Circuit held that M&M had "falsely represented the legal status of this debt, by implicitly claiming that the accruing attorneys' fees of $1,597.50 already had been approved by a court." *See id.* at 9-10. The Ninth Circuit reversed and remanded.

4. McNair filed a petition for panel rehearing, and M&M filed a petition for rehearing or rehearing en banc. On September 11, 2018, the Ninth Circuit denied these petitions. *See* Appendix C at 39a-40a.

REASONS FOR GRANTING THE PETITION

I. The Petition Should Be Granted To Resolve The Split In The Circuits By Clarifying That Under The FDCPA, "Debt Collection" Requires An Effort To Obtain Money From A Consumer

This case is the perfect vehicle for the Court to decide an important issue of statutory construction that has hopelessly divided the lower courts. The FDCPA was enacted to prohibit collectors from engaging in a broad range of unfair and misleading debt collection practices. *See* 15 U.S.C. § 1692(a) (referring to "abundant evidence of" improper "debt collection practices" and observing that certain "debt collection practices" can cause undesired effects); *id*. at § 1692a (defining certain terms). Congress, however, did not define the term "debt collection." The absence of a definition for this key term has led circuit courts to reach different

conclusions about what is, and what is not, "debt collection" subject to the Act. This conflict in the courts has confounded collection practitioners around the country who need a clearer set of rules to follow.

Decisions of the Ninth and Tenth Circuits have correctly held "debt collection" under the FDCPA requires an effort to seek payment of money from a consumer. In *Ho*, defendant mailed a notice of default to the consumer, which advised that although she "may have the legal right to bring [her] account into good standing by paying all of [her] past due payments," it was also true that her home "may be sold without any court action." 858 F.3d at 570-71. A subsequent notice of sale mailed by defendant advised the consumer that her home would be auctioned "unless [she took] action to protect [her] property." *Id*. at 571. That notice explained that after the trustee's sale, the deed would be delivered to the purchaser, the proceeds of the sale would be delivered to the lender, and the consumer would lose possession of her home and her right of redemption. *Id*.

On appeal, the consumer argued that the notices "threatened foreclosure unless [she] brought her account current" and thus she "reasonably viewed those documents as an inducement to pay up." *Id*. The Ninth Circuit rejected this, however, and held that because there was no attempt to collect money from the consumer, there was no "debt collection" subject to the FDCPA:

> For the purposes of the FDCPA, the word "debt" is synonymous with "money." 15 U.S.C. § 1692a(5). **Thus, ReconTrust would only be liable if it attempted to collect money from Ho.** And this it did not do, directly or otherwise. The object of a nonjudicial foreclosure is to retake and resell the security, not to collect money from the borrower.

Id. at 571 (emphasis added).[4] The Ninth Circuit acknowledged that the "prospect of having property repossessed may, of course, be an inducement to pay off a debt. But that inducement exists by virtue of the lien, regardless of whether foreclosure proceedings actually commence." *Id*. at 572.

The *Ho* court observed that a "debt" under the FDCPA is an obligation of "a *consumer* to pay money," and following a trustee's sale of a home, the trustee collects money from the purchaser, *not* from the consumer. *Id*. "Because the money collected from a trustee's sale is not money owed by a consumer, it is not a "debt" as defined by the FDCPA." *Id.*

Ho reasoned that the defendant's activities fell under the umbrella of "enforcement of a security interest" and thus sending the notices directly to the consumer as required by state law did not transform the defendant into a general "debt collector" subject to the entire

---

[4] The Court noted that California law does not allow the lender to seek a deficiency judgement following a non-judicial foreclosure, meaning that a completed foreclosure would extinguish the entire debt even if it results in recovery of less than the full amount due. *Id*.

FDCPA. "The right to 'enforce' the security interest necessarily implies the right to send the required notices; to hold otherwise would divorce the notices from their context." *Id*. at 573. In reaching its holding, the *Ho* court expressly rejected the reasoning used by the Sixth Circuit in *Glazer* and the Fourth Circuit in *Wilson*. *See Ho*, 858 F.3d at 574-75.

Ultimately, the Ninth Circuit held the FDCPA did not apply, because "[t]he notices at issue in our case **didn't request payment from Ho**. They merely informed Ho that the foreclosure process had begun, explained the foreclosure timeline, apprised her of her rights and stated that she could contact Countrywide (not ReconTrust) if she wished to make a payment." *Id*. at 574 (emphasis added). In other words, even though the notices were directed at the consumer, were received by the consumer, and informed her what she needed to do to restore her account to good standing, there was no request for payment and thus no "debt collection" under the FDCPA.[5]

---

[5] Although *Ho* involved non-judicial foreclosure, its logic and reasoning should also apply in the context of judicial foreclosure if the foreclosing party seeks only to enforce its security interest and does not seek to recover money from the property owner. *See Ho*, 858 F.3d at 571-75; *see also*, *e.g.*, *Baylon v. Wells Fargo Bank NA*, 2015 WL 11111348, at *7-8 (D.N.M. Oct. 30, 2015) (judicial foreclosure action seeking only to enforce security interest, and not seeking deficiency judgment, did not constitute "debt collection" under FDCPA); *Doughty v. Holder*, 2014 WL 220832, at *3-5 (E.D. Wash. Jan. 21, 2014) (distinguishing between "deficiency judgment" and "foreclosure judgment," explaining that latter "is for the purpose of enforcing the creditor's security interest through a foreclosure," while former "is not for the purpose of

Similarly, in *Obduskey*, a law firm sent a letter to a borrower in Colorado, listing the amount due, and explaining that the firm had been "instructed to commence foreclosure against" the consumer's home by the lender. *Obduskey*, 879 F.3d at 1218. The district court dismissed the FDCPA claims filed against the law firm, and the Tenth Circuit affirmed. *Id*. at 1219. Relying on the Ninth Circuit's reasoning in *Ho*, the Court observed:

> Because enforcing a security interest **is not an attempt to collect money from the debtor**, and the consumer has **no 'obligation . . . to pay money**,' non-judicial foreclosure is not covered under FDCPA. We have previously seemed to endorse such a view, . . . , and now endorse it fully.

Id. at 1221 (citations omitted, emphasis added). As the Ninth Circuit had done in *Ho*, the Tenth Circuit in *Obduskey* rejected the reasoning used by the Sixth Circuit in *Glazer* when that court reached a contrary result. *See id.* at 1221-22. A non-judicial foreclosure proceeding in Colorado only allows the trustee to "obtain proceeds from the sale of the foreclosed property, and no

---

enforcing the security interest, but for seeking payment of funds. . . . It is an action to collect a debt[,]" concluding that "[s]o long as the foreclosure proceedings, be they non-judicial or judicial, involve no more than mere enforcement of security interests, the FDCPA does not apply[,]" and holding that "judicial foreclosure complaints filed by [defendants] sought only to enforce security interests via obtainment of a foreclosure judgment to be followed by a foreclosure sale" and thus were not subject to FDCPA). In other words, the substance of the action, not the form, is what matters.

more. Had McCarthy attempted to induce Mr. Obduskey **to pay money** by threatening foreclosure, the FDCPA might apply." *Id*. (citations omitted, emphasis added).

> Whether or not more aggressive collection efforts leveraging the threat of foreclosure **into the payment of money** constitute "debt collection" is left for another day. In this case, however, the answer is clear – McCarthy **did not demand payment** nor use foreclosure as a threat to **elicit payment**.

Id. at 1223 (citations omitted, emphasis added). Again, as in *Ho*, the notices in *Obduskey* were addressed to the consumer, were received by the consumer, listed the amount due, and advised the consumer who to contact if he wished to cure the delinquency. They were deemed not "debt collection," however, because they did not seek payment of money from the consumer.[6]

Other circuits have disagreed, holding that a party may engage in "debt collection" under the FDCPA, even where there is no attempt to obtain payment of

---

[6] By contrast, in *Mashiri v. Epsten Grinnell & Howell*, 845 F.3d 984 (9th Cir. 2017), the Ninth Circuit held that a law firm's notice mailed directly to the consumer that "requested payment" of a homeowner's assessment fee from the consumer was "attempting to collect payment of a debt" and was subject to the FDCPA. *Id*. at 990. Similarly, in *Reese v. Ellis, Painter, Ratterree & Adams, LLP*, 678 F.3d 1211 (11th Cir. 2012), because the law firm's letter included an express demand for payment of money from the consumer, the Eleventh Circuit declined to decide whether "a party enforcing a security interest without demanding payment on the underlying debt is attempting to collect a debt within the meaning of §1692e." *Id*. at 1218, n.3.

money from the consumer. In *McCray*, for example, the Fourth Circuit evaluated FDCPA claims filed against attorneys who had mailed letters to a consumer regarding her unpaid mortgage. 839 F.3d at 356. The letters advised the consumer the firm had "been instructed to initiate foreclosure proceedings to foreclose on the mortgage on [her] property," that her loan payments were "154 days past due," and that the amount required to cure the default was $4,282.91. *Id*. at 357. The district court had dismissed the claims, because the letters did not contain "an express demand for payment" from the debtor, but the Fourth Circuit reversed. *Id*. at 358.

> As we have previously explained, however, nothing in the language of the FDCPA requires that a debt collector's misrepresentation or other violative acts be made as part of an express demand for payment or even as part of an action designed to induce the debtor to pay.

Id. at 359. (citations and brackets omitted).[7]

Likewise, the Sixth Circuit in *Glazer* evaluated an FDCPA claim based on the contents of a complaint filed in a judicial foreclosure action. *See Glazer*, 704 F.3d at 456. The plaintiff did not allege that the complaint had made a demand for payment of money from

---

[7] In reaching this conclusion, the Fourth Circuit relied on its earlier decision in *Wilson v. Draper & Goldberg, P.L.L.C.*, 443 F.3d 373 (4th Cir. 2006), which held that a notice from a law firm indicating that it was preparing a foreclosure proceeding was subject to the FDCPA.

him. Rather, he claimed it listed him as "someone possibly having an interest in the property" that was the subject of the foreclosure. *Id*. Despite this, the Sixth Circuit held the filing of the complaint was "debt collection" subject to the FDCPA. The Court acknowledged the term "debt collection" was not defined by the Act, and that "confusion has arisen" on whether mortgage foreclosure was debt collection. *Id*. at 460. Because the object of mortgage foreclosure, judicial or otherwise, was "obtaining payment on the underlying debt" either by persuasion or compulsion, the Court concluded foreclosure was "debt collection" subject to the FDCPA. *Id.* at 461. The fact that the foreclosure complaint did not seek payment of money *from* Glazer was not determinative. "There can be no serious doubt that the ultimate purpose of foreclosure is the payment of money." *Id*. at 463.

In *Gburek*, the Seventh Circuit reviewed an FDCPA claim filed against a loan servicer that offered to discuss "foreclosure alternatives" with the delinquent borrower. *See* 614 F.3d at 381. The district court had dismissed the complaint, because the letter did not contain "an explicit demand for payment" but the Seventh Circuit reversed. "Gburek's mortgage was in default, and the text of the letters indicate they were sent to induce her to settle her mortgage-loan debt in order to avoid foreclosure." *Id.* The Court acknowledged that no circuit court had created a "bright-line rule" for determining whether a communication was made in connection with collecting a debt. *Id*. at 384. After reviewing its own precedent, the court concluded that

"the absence of a demand for payment is just one of several factors that come into play in the commonsense inquiry of whether a communication from a debt collector is made in connection with the collection of any debt." *Id*. at 385. The Seventh Circuit adopted a multifactor test, which considers both the "nature of the parties' relationship" and the "purpose and context of the communications" at issue. *Id.* Applying this test, the Court found that a letter from a loan servicer's partner that explicitly stated that it would *not* accept money from the consumer was subject to the FDCPA, because "the purpose of the letter was to encourage Gburek to contact Litton to discuss debt-settlement options." *Id*. at 386.

Finally, in *Kaltenbach v. Richards*, the Fifth Circuit assessed an FDCPA claim filed against an attorney who had been retained to initiate an executory process foreclosure on a mobile home. 464 F.3d at 526. There was no allegation that the foreclosure action filed by the attorney had demanded payment of money from the debtor. *Id*. Rather, it was alleged that the mobile home was seized and sold. *Id*. The district court dismissed the claim, but the Fifth Circuit reversed, holding that the attorney may be a "debt collector" under section 1692a(6) of the Act even when engaged solely in enforcing security interests. *Id*. at 529.

Petitioner urges the Court to accept this case for review so it may clarify that a defendant must be seeking money from a debtor in order to be engaged in "debt collection" subject to the FDCPA. It should not matter whether the conduct or communication was made in

connection with non-judicial or judicial foreclosure proceedings, or in some other context. Nor should it matter if the conduct or communication was undertaken by a lawyer or other entity that fits the general definition of a "debt collector" under the FDCPA. If the challenged act or communication is not an attempt to get the debtor's money, the FDCPA simply should not apply.

II. The Federalism Concerns Expressed By The Court In *Sheriff v. Gillie* Counsel In Favor Of Granting The Petition

In *Sheriff v. Gillie*, this Court observed that the FDCPA should not be interpreted in a manner that interferes with state law, unless Congress clearly intended to displace that law. *See Sheriff v. Gillie*, 136 S. Ct. 1594, 1602 (2016); *see also Bates v. Dow Agrosciences LLC*, 544 U.S. 431, 449 (2005) ("In areas of traditional state regulation . . . a federal statute has not supplanted a state law unless Congress has made such an intention 'clear and manifest'"); *BFP v. Resolution Trust Corp*., 511 U.S. 531, 544 (1994) ("To displace traditional state regulation in such a manner, the federal statutory purposes must be 'clear and manifest.'").

Gillie involved a claim that a law firm retained by the Ohio Attorney General had used a false or misleading letterhead. *See Gillie*, 136 S. Ct. at 1600-02. The Attorney General had appointed the firm as "special counsel" for the State pursuant to Ohio law, and had required the firm to use the letterhead. *Id*. In a

unanimous opinion, the Court held the firm's use of the Attorney General's letterhead was not false or misleading under the FDCPA. *Id*. at 1598, 1600-02. The Court expressed:

> the 'federalism concern' that a contrary result would create: Ohio's enforcement of its civil code – by collecting money owed to it – [is] a core sovereign function. [citation omitted]. Ohio's Attorney General has chosen to appoint special counsel to assist him in fulfilling this obligation to collect the State's debts, and he has instructed his appointees to use his letterhead when acting on his behalf. There is no cause, in this case, to construe federal law in a manner that interferes with States' arrangements for conducting their own governments.

Id.

An even more compelling "federalism concern" is at stake in this case. The regulation of foreclosure activity (be it judicial or non-judicial) is indisputably a "core sovereign function" of the states. This Court recognized in *BFP* the "essential state interest" states have in regulating the enforcement of security interests in property:

> It is beyond question that an essential state interest is at issue here: We have said that 'the general welfare of society is involved in the security of the titles to real estate' and the power to ensure that security 'inheres in the very nature of [state] government.' [citation, brackets in original]. Nor is there any doubt

> that the interpretation urged by petitioner would have a profound effect upon that interest: The title of every piece of realty purchased at foreclosure would be under a federally created cloud.

BFP, 511 U.S. at 544 (refusing to interpret Bankruptcy Code in manner that would disrupt state foreclosure schemes).[8]

Here, as in *Gillie*, interpreting the FDCPA as urged by McNair, to apply even in the absence of an attempt to obtain money from the consumer, will disrupt the operation of state law on a matter of essential state interest. Under Arizona law, M&M's client was required to use the judicial process to foreclose on its judgment lien. *See* A.R.S. § 33-725. Consistent with state law, M&M filed a request with a state court clerk, asking the clerk to issue a writ to the Sheriff ordering the sale of the property. Though the request for the writ accurately recited the amount of attorney's fees incurred by M&M's client, and the writ was later determined to be proper by the state court, the firm and two of its attorneys and their spouses now face liability under a federal statute.

---

[8] *See also Ho*, 858 F.3d at 576 ("When one interpretation of an ambiguous federal statute would create a conflict with state foreclosure law and another interpretation would not, respect for our federal system counsels in favor of the latter."); *Mahmoud v. De Moss Owners Assoc. Inc.*, 865 F.3d 322, 334 (5th Cir. 2017) ("To construe §§ 1692e and f the way Mahmoud and Jackson request would interfere with Texas's carefully articulated arrangements for conducting nonjudicial real property foreclosures by creating causes of action where state law finds no wrongful foreclosure.").

The Ninth Circuit's opinion also has the potential to disrupt foreclosure schemes of nearly every state in the circuit. States frequently require that notice of a foreclosure sale be published in newspapers or other public media prior to sale. *See, e.g.*, Cal. Civ. Code § 2924f(b)(2); Wash. Rev. Code § 61.24.040(5); Alaska Stat. § 34.20.080(a); Or. Rev. Stat. § 86.774(2)(a). These state statutes also frequently require that notice of the foreclosure be sent directly to various third parties. *See, e.g.*, Cal. Civ. Code § 2924b(c)(1)-(2); Wash. Rev. Code § 61.24.040(1)(b); Alaska Stat. § 34.20.070(c). The FDCPA, however, prohibits collectors from communicating with any third parties "in connection with the collection of any debt" except in narrow circumstances that would not apply to such notices. *See* 15 U.S.C. § 1692c(b).

Similarly, many states require that certain foreclosure notices be provided directly to debtors, even if they are represented by counsel. *See, e.g.*, Or. Rev. Stat. § 86.774(1)(a); Wash. Rev. Code § 61.24.030(8). The FDCPA, however, prohibits collectors from communicating with debtors who are represented by counsel "in connection with the collection of any debt" except in very narrow circumstances, none of which apply here. *See* 15 U.S.C. § 1692c(a)(2).

Consistent with *Gillie*, this Court should grant the petition and reverse the Ninth Circuit. The Court should again clarify that the FDCPA should not be interpreted in a manner that would displace carefully crafted state foreclosure laws. The same "federalism concern[s]" apply to both judicial and non-judicial

foreclosure. Both methods of foreclosure seek to enforce a secured interest in property; they do not seek payment of money from the debtor. As a result, this Court should hold that the FDCPA does not apply, regardless of which method is employed, so long as the challenged communication or conduct does not include a demand for payment of money from the debtor.

CONCLUSION

For each of the foregoing reasons, the petition for writ of certiorari should be granted.

Dated: December 5, 2018

Respectfully submitted,

TOMIO B. NARITA
Counsel of Record
JEFFREY A. TOPOR
R. TRAVIS CAMPBELL
SIMMONDS & NARITA LLP
44 Montgomery Street, Suite 3010
San Francisco, CA 94104

Attorneys for Petitioners