No. 18-729

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

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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INTRODUCTION

This petition presents a simple question that would resolve a clear, well-entrenched circuit split on the following issue: whether the Fair Debt Collection Practices Act ("FDCPA" or "the Act") applies to foreclosure activity that does not seek payment of money from a consumer. Respondent does not dispute that the circuit split exists or that this case would be an ideal vehicle to resolve it. Instead, she seeks to sidestep this Court's review by pointing out that no split exists as to a completely different question – whether the FDCPA applies to judicial foreclosure generally. She does not explain how her question (or the answer she offers) has anything to do with whether the Court should answer the question presented in this petition. Her analysis of and answer to her own question is no basis to reject the petition.

As explained in the petition, and as undisputed by Respondent, the Ninth and Tenth Circuits have held that the FDCPA does not apply unless the foreclosure activity requests the payment of money from the consumer. Petition for a Writ of Certiorari ("Petition") at pp. 8-13. The Fourth, Fifth, Sixth, and Seventh Circuits disagree, and hold that foreclosure activity may be subject to the Act regardless of whether payment is requested. *Id*. at pp. 13-16.

The issue of whether "debt collection," which is not defined by the Act (15 U.S.C. §§ 1692a(1)-(8)), includes situations, like here, where no money is demanded from the consumer, is thus a firmly-entrenched circuit

split. It is undisputed in this case that the writ of special execution prepared by Petitioners relating to the sale of Respondent's house did not request any payment from her. As a result, this case is the perfect vehicle to resolve the circuit split. The petition should be granted.

ARGUMENT

I. Respondent Does Not Dispute That A Circuit Split Exists On The Question Petitioners Identified

Respondent does not dispute that circuits are split over whether a demand for payment from the consumer is necessary before foreclosure activity is considered "debt collection" under the FDCPA. Instead, she argues the question "ignores the important distinction between judicial and non-judicial foreclosures that the Ninth Circuit identified," and "[t]here is no circuit split over whether the FDCPA applies to judicial foreclosure activity." Respondent's Brief in Opposition ("Opposition") at p. 1. Respondent cannot avoid the clear split identified by Petitioners by simply rewriting the question.[1]

As explained by Petitioners (Petition at pp. 8-13), the Ninth and Tenth Circuits have held "debt

[1] Respondent attempts to address the merits of the question presented in this petition at the last page of her brief. *Id*. at pp. 20.D-21. Her merits argument is both incorrect and irrelevant at this stage.

collection" under the FDCPA requires an effort to seek payment of money from a consumer. *See*, *e.g.*, *Ho v. ReconTrust Co., NA*, 858 F.3d 568, 571, 574 (9th Cir. 2016), *cert. denied*, 138 S. Ct. 504 (2017); *Obduskey v. Wells Fargo*, 879 F.3d 1216, 1221-23 (10th Cir.), *cert. granted sub nom. Obduskey v. McCarthy & Holthus, LLP*, 138 S. Ct. 2710 (2018), No. 17-1307 (argued Jan. 7, 2019). Although those cases arose in the non-judicial foreclosure context, the lack of any demand for payment from the consumer was critical to their holding that the FDCPA did not apply to the notices at issue.[2]

On the other hand, as Petitioners explained (Petition at pp. 13-16), the Fourth, Fifth, Sixth, and Seventh Circuits have held that "debt collection" under the FDCPA does not require an effort to seek payment from the consumer. *See*, *e.g.*, *McCray v. Federal Home Loan Mortg. Corp*., 8316879 F.3d 354, 359 (4th Cir. 2016); *Kaltenbach v. Richards*, 464 F.3d 524, 526-28 (5th Cir. 2006); *Glazer v. Chase Home Fin. LLC*, 704 F.3d 453, 461 (6th Cir. 2013); *Gburek v. Litton Loan*

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[2] *See*, *e.g.*, *Ho*, 858 F.3d at 574 (holding 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.") (emphasis added); *Obduskey*, 879 F.3d at 1223 (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**.) (citations omitted, emphasis added).

Serv. LP, 614 F.3d 380, 384 (7th Cir. 2010). Those cases were decided in both the judicial and non-judicial foreclosure context.

Thus, the question that has split the circuits is: must a defendant engaged in foreclosure activity seek money from a debtor in order to engage in "debt collection" subject to the FDCPA? Indeed, although not directly presented in *Obduskey v. McCarthy & Holthus, LLP*, whether "debt collection" requires a demand for payment to the consumer was discussed at length at the January 7, 2019 oral argument before this Court. Oral Argument, *Obduskey v. McCarthy & Holthus, LLP*, 138 S. Ct. 2710 (2018) (No. 17-1307). It makes perfect sense to grant this petition and resolve this question on the heels of *Obduskey*.

II. Respondent Does Not Dispute This Case Is A Perfect Vehicle To Resolve The Circuit-Split Identified By Petitioners

This case presents the perfect vehicle for this Court to decide the circuit split Petitioners have identified. The only violation of the FDCPA identified by the Ninth Circuit in this case was a statement made in a writ of special execution attached to the *praecipe* that petitioner Maxwell & Morgan, P.C. ("M&M") filed with the clerk of the state court, pursuant to state law, in connection with the sale of Respondent's property. Petition at pp. 6.3-8.4. Respondent concedes that the writ did not request payment of money from her, and she

points to nothing in the record showing that the writ was even sent to her. Opposition at pp. 2-4.[3] Rather, the clerk issued the writ, which directed the Sheriff to seize and sell the property. Petition at pp. 5-6.

Respondent's contention that the decision below "is correct" because "judicial foreclosure inherently involves the collection of money" is irrelevant to the question presented or whether the Court should grant this petition. Opposition at p. 14.III. It is undisputed that the writ at issue here did not request any money from Respondent. Nevertheless, the panel held the writ constituted "debt collection" under the FDCPA. Petition at p. 7. Thus, the undisputed facts of this case are ideal for this Court to decide the question.

[3] Respondent's argument that other communications M&M sent her sought to collect money from her (Opposition at pp. 18.C-20.D) is irrelevant, because the Ninth Circuit held only that the writ of special execution violated the FDCPA. Petition at pp. 6.3-8.4).

CONCLUSION

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

Dated: February 15, 2019

Respectfully submitted,

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