No. 17-1307

In the Supreme Court of the United States

DENNIS OBDUSKEY, PETITIONER

v.

MCCARTHY & HOLTHUS LLP, ET AL.

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

REPLY BRIEF FOR THE PETITIONER

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This case presents an important and recurring question that has openly divided the circuits. The case for review is exceptionally clear: Respondents do not dispute that the question has generated over a hundred conflicting decisions. They do not contest that it has wasted substantial judicial and party time and resources, and they effectively concede that courts read the FDCPA's key definition (in this critical foreclosure setting) in opposite ways. Respondents never explain 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.

Respondents are thus left grasping for marginal distinctions to explain away the acknowledged conflict. Yet none of respondents' distinctions are mentioned in any of the cases. They do not appear on the face of the opinion below. No one (until now) thinks those distinctions matter, which is why so many courts have recognized a square conflict over this issue—and, indeed, it is not possible to read the actual cases and conclude there is no split.

The Court denied review in *Ho*, which, unlike here, rested on *independent* grounds and otherwise faced multiple vehicle concerns. This case, by contrast, is clean: the panel below vetted the complaint, held it stated a claim, and decided the key issue as the sole basis for decision. And these facts represent the quintessential pattern dividing the circuits, as the respondent in *Ho* (represented by the same counsel here) readily admitted.

In the end, the best case for a grant comes from—*respondents themselves*. When not trying to avoid review, respondents are more candid: "Given the split among the circuits, the issue of the applicability of the FDCPA to nonjudicial foreclosures may be ripe for consideration by

the U.S. Supreme Court." Holly Shilliday & Andrew Boylan, McCarthy & Holthus LLP, *Circuit Split Deepens: Tenth Circuit Opines that Colorado Nonjudicial Foreclosure Activity is Not Debt Collection under the FDCPA*, USFN (Feb. 13, 2018) <tinyurl.com/concedingcertworthiness>.

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

A. There Is A Clear And Intractable Conflict

1. Contrary to respondents' contention (Opp. 10-20), the circuit conflict is square and entrenched: "Whether the FDCPA applies to non-judicial foreclosure proceedings has divided the circuits." Pet. App. 5a; *Ho* v. *ReconTrust Co., NA*, 858 F.3d 568, 576 & n.11 (9th Cir. 2016) (acknowledging its "sister circuits" have "divide[d]").

This is not mere "disagreement in reasoning." Contra Opp. 10. 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 (Pet. App. 6a), but "endorse[d]" *Ho*. 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).

Respondents do 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, respondents argue that the courts' "reasoning" "differs in some respects" without producing "deep" disagreement. Opp. 10, 13. But as established (Pet. 11-28), these courts have refuted every facet of the Ninth and Tenth Circuit's analysis, which, in turn, canvassed the competing decisions but "disagree[d]" (Pet. App. 5a-12a). While respondents have an understandable incentive to paper over the split, the contrast could not be starker. This untenable conflict will continue to confound lower courts until this Court intervenes.

2. Respondents say this obvious split is irrelevant because "all but one" of the conflicting cases "involved *judicial* (or quasi-judicial) foreclosures." Opp. 11. This is baseless. Courts distinguish *true* "judicial foreclosures" because *that distinct process produces deficiency judgments*. *Ibid.* But the precise fact-pattern in every case in the split, including this one, involves entities pursuing foreclosure *without seeking a deficiency judgment*. That is the subject of the open conflict, and it reflects how those courts themselves understand the issue. Pet. 11-24. The entire debate is whether a foreclosure is the mere enforcement of a security interest *or* instead an attempt ("directly or indirectly") to collect debt (15 U.S.C. 1692a(6)).

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 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, those courts expressly repudiate the very position asserted by respondents' side of the split: 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. These courts disagree that "'[p]ayment of funds is not the object of the foreclosure action'" and lenders are merely "'foreclosing [their] interest in the property.'" *Wilson*, 443 F.3d at 376. Contra Pet. App. 7a-9a, 12a (adopting the opposite position); *Ho*, 858 F.3d at 573 ("We view all of Recon-Trust's activities as falling under the umbrella of 'enforcement of a security interest.'"); Opp. 12.

It blinks reality to suggest these courts would have come out differently had a different label ("quasi-judicial" or otherwise) 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 respondents' "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 respondents' unusual position, which respondents offered unsupported. The split cannot be brushed aside so easily.[1]

3. Respondents also fail to distinguish the cases on their facts. Opp. 13-18.

a. Respondents say both Fourth Circuit cases, unlike this case, "involved demands for payment from the debtor." Opp. 15-16 (citing *Wilson*, *supra*, and *McCray* v. *Federal Home Loan Mortgage Corporation*, 839 F.3d 354 (4th Cir. 2016)). This is meritless. The Fourth Circuit has already rejected exactly this argument respecting *Wilson*: "[Defendant] seeks to distinguish *Wilson* on the ground that the debt collector in that case made specific demands for payment before initiating the foreclosure proceedings. *We do not read* Wilson *to ground its holding on the existence of those demands*." *Rawlinson* v. *Law Office of William M. Rudow, LLC*, 460 F. App'x 254, 256 & n.3 (4th Cir. 2012).

And *McCray* itself confirmed that defendants acted as "debt collectors" for foreclosure activities despite never "'express[ly] demand[ing]'" payment. 839 F.3d at 359. Instead, it reaffirmed *Wilson*: "we explicitly rejected the argument 'that foreclosure by a trustee under a deed of trust is not the enforcement of an obligation to pay money or a "debt."'" 839 F.3d at 360.

Nor can respondents sidestep *McCray* because the firm was "retained" "to 'collect' on the defaulted amount." Opp. 15. This omits key language: the firm was retained to "collect" "*through the process of foreclosure*." 839 F.3d

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[1] Respondents say the "critical" point is that deficiency judgments were "*available*" in other circuits, even if not pursued. Opp. 16. But the question was whether the *activity in question*—sending foreclosure notices and initiating foreclosure—constituted "debt collection," not whether *hypothetically doing something else* (like seeking *waived* deficiency judgments) so qualified.

at 360 (emphasis added). The full quote proves *petitioner's* point: the "debt collection" was anticipated *via foreclosure*, and the court declared defendants "debt collectors" for foreclosure activities despite never "'express[ly] demand[ing]'" payment. *Id.* at 359. Petitioner would have prevailed under this authority, but not below.

b. Contrary to respondents' suggestion, *Glazer* is indistinguishable. Respondents cannot account for *Glazer*'s holding (*supra*), so they call it dictum. But the Sixth Circuit thinks otherwise. *Estep* v. *Manley Deas Kochalski, LLC*, 552 F. App'x 502, 505 (6th Cir. 2014) (*Glazer* "hold[s] that mortgage foreclosure is debt collection under the FDCPA").

Rather than address *Glazer*'s language or logic, respondents instead isolate a single sentence from *Glazer*'s extended discussion: "'the *potential* for deficiency judgments demonstrate[s] that the purpose of foreclosure is to obtain payment on the underlying home loan." Opp. 16. This sentence was tucked in the middle of a paragraph in an analysis spanning *seven pages* of the Federal Reporter (704 F.3d at 459-465); read in context, it illustrates why *all* foreclosure activity aims to collect debt: "[s]uch remedies," the *next* sentence explained, "would not exist if foreclosure were not undertaken for the purpose of obtaining payment." *Id.* at 461. Respondents thus ignore the court's operative rationale, the passages specifically *rejecting* their theory, and the express declaration that all foreclosures are covered, "even [when] not seeking a money judgment on the unpaid debt." *Id.* at 460-462. Even the Ninth and Tenth Circuits disavow respondents' reading: "*Glazer* rests entirely on the premise that 'the ultimate purpose of foreclosure is the payment of money.'" *Ho*, 858 F.3d at 576; Pet. App. 8a.

c. Respondents say *Kaymark* v. *Bank of Am., N.A.*, 783 F.3d 168 (3d Cir. 2015), involved a "*judicial* foreclosure" under Pennsylvania law (Opp. 14), but ignore that "[m]ortgage 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). *Kaymark*'s *holding* was unambiguous: "foreclosure meets the broad definition of 'debt collection' under the FDCPA." 783 F.3d at 179 (endorsing the Fourth and Sixth Circuits). That is why courts in the Third Circuit deem it "well-settled" that the FDCPA regulates foreclosure activity. *Strader* v. *U.S. Bank Nat'l Ass'n*, No. 17-cv-684, 2018 WL 741425, at *11 (W.D. Pa. Feb. 7, 2018).

d. Respondents effectively concede the conflict with *Ambridge* on the core definitional question. Yet they argue that *Ambridge* differs in a "critical respect" because it involved a trustee rather than a law firm. Opp. 17. That "critical" respect had nothing to do with the court's reasoning, and respondents offer no explanation how this is relevant. No one reading *Ambridge*'s extensive analysis (Pet. 18-19) is left with any doubt how it resolved the question presented here: "mortgage foreclosure, whether judicial or nonjudicial, is debt collection," as "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 212-216 & nn.14-15.

e. Respondents attempt to blunt *Shapiro & Meinhold* v. *Zartman*, 823 P.2d 120 (Colo. 1992), as a product of a "now-outmoded pleading standard." Opp. 17-18. This is perplexing. *Shapiro* held that "foreclosure is a method of collecting a debt by acquiring and selling secured property to satisfy a debt," and it faulted the "trial court" for "misinterpret[ing] the definition of debt collectors in [15

U.S.C. 1692a(6)]." 823 P.2d at 124-125. That square legal disposition had nothing to do with factual pleading standards, which is why no court, anywhere, agrees with respondents. *E.g.*, Pet. App. 5a-6a (acknowledging split with *Shapiro*).

Each decision contradicts the Ninth and Tenth Circuit's holding that foreclosure is the mere enforcement of a security interest. This Court alone can resolve that split.

4. Respondents next attack the split by saying "all" conflicting cases "involve the legal regimes of other States," not Colorado. Opp. 12. But Colorado follows the same "general rule" applied in other States (Pet. App. 8a), and these courts did not "disagree" over aspects of state law; they rejected each other's reading of the FDCPA's text, structure, and purpose. This is why the Tenth Circuit ultimately "endorse[d]" *Ho* (which involved *California* law), which itself "affirm[ed]" *Hulse* (which involved *Oregon* law), 858 F.3d at 572. Colorado law entered the picture only in the court's *preemption* analysis, which is ultimately a federal question. Pet. App. 10a-12a.

These courts have not divided due to nuances of state law, but have exhaustively undertaken traditional statutory analysis: they dissect Section 1692a's text and structure; they look to the FDCPA's related provisions (like Section 1692i); they look to the FDCPA's statutory purpose; and they consider federalism concerns. These exhaustive reviews have produced different outcomes because courts emphatically disagree over these critical elements. That disagreement over this important federal issue cries out for review.

B. The Question Presented Is Important And Recurring

1. The question presented is of exceptional legal and practical importance. 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. 3, 29.

Yet respondents insist the case presents only a "narrow" question. Opp. 2. There is nothing "narrow" about it. The Tenth Circuit held that "non-judicial foreclosure[s]" fall outside the FDCPA. Pet. App. 10a. That "holding" resolves the very question that has generated over a hundred conflicting decisions and an acknowledged split among multiple circuits and two state supreme courts. It strips homeowners of federal protection in the Ninth and Tenth Circuits alone. And it leaves courts and litigants to waste time debating a question this Court alone can answer. Respondents say (without citation) that the issue affects only a "tiny portion" of foreclosures (Opp. 10), but cannot explain the constant litigation the issue generates.[2]

Nor does it matter that the Tenth Circuit suggested "additional" conduct may sweep foreclosures within the FDCPA. Opp. 13. The question is whether foreclosure activities *without* additional conduct qualify as debt collection. That question has "divide[d]" the courts (Pet. App. 5a), and it alone determines whether the FDCPA reaches entities conducting foreclosures. The fact that some entities seeking foreclosure might *separately* pursue other modes of debt collection is irrelevant.

Respondents argue the holding was "fact-bound." Opp. 10. The Tenth Circuit did not understand its holding that way; fact-bound decisions do not "settle [lower-court] confusion" or wade into circuit splits. Pet. App. 3a, 5a-6a.

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[2] Respondents assembled a remarkable cast of able counsel for an insignificant question tied exclusively to the law of a single State.

The court's express "hold[ing]" was significant and unequivocal: the "mere act of enforcing a security interest through a non-judicial foreclosure proceeding does not fall under the FDCPA." Pet. App. 12a.

C. This Case Is An Optimal Vehicle

This case is the perfect vehicle for deciding this significant question. Pet. 30-32.

1. Respondents argue that this vehicle is flawed because petitioner's complaint was "'far from perfect.'" Opp. 7, 10. But the court *held* that petitioner stated a claim; it was not merely assumed arguendo or left unaddressed. It actually vetted the complaint and determined it provided a "sufficient[]" ground for relief. Pet. App. 5a. That makes this the ideal vehicle: the panel's disposition of the question presented is the sole ground supporting dismissal, and the issue is thus outcome-determinative. That is as concrete as it gets.

Respondents' quibbling with petitioner's complaint is also meritless. Respondents admit that McCarthy "failed to verify [petitioner's] debt after it was disputed." Pet. App. 5a. That is an indisputable violation of Section 1692g. Its text plainly states that debt collectors "shall cease" any further action until a debt is verified. 15 U.S.C. 1692g(b). Here, McCarthy's verification letter in August 2015 came *after* McCarthy initiated a foreclosure despite failing to first validate the debt. That is a paradigmatic violation of this provision.

Nor is this merely a technical error. In petitioner's separate bankruptcy case, the parties currently dispute the proper owner of the loan and the proper recipient of any funds. The validation process works to avoid problems where a debt collector's mistake leads to the payment of too much money to the right person or the payment of any money to the wrong person. It also ensures that debtors are fully aware of their rights and obligations

so they can make an informed decision whether to pay the debt or accede in the consequences of default.

Under respondents' (forfeited) theory, any defendant could negate liability under Section 1692g by simply providing a tardy notice after being sued. That atextual reading would eliminate this important safeguard.

2. Respondents note the denial in *Ho* and insist "there is no valid reason for a different result" here. Opp. 10, 20. But *Ho* rested on independent grounds and implicated other vehicle concerns. Petitioner explained these obvious distinctions (Pet. 30-32), and respondents have no response.

Since *Ho* was denied, the issue has already arisen in *dozens* of conflicting decisions, including the one below. Respondents argue this Court's review would be "premature" (Opp. 22-23), but fail to explain the conceivable advantage from delay. The competing views are developed and entrenched, and neither side is standing down. There is no point to further percolation. This massive waste of judicial and party time will continue until the Court intervenes.

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

Respectfully submitted.

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