No. 17-278

In the Supreme Court of the United States

VIEN-PHUONG THI HO, PETITIONER

v.

RECONTRUST COMPANY, N.A., COUNTRYWIDE HOME LOANS, INC., AND BANK OF AMERICA, N.A.

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 petition asks a question whose importance is self-evident: whether ordinary foreclosures are covered by the FDCPA. That question impacts potentially thousands of individuals, and it has sharply divided countless courts. It is a binary, threshold question: if petitioner is right, courts and parties are wasting substantial time litigating whether the FDCPA even applies, rather than resolving disputes on the merits. If respondents are right, plaintiffs are filing hundreds of lawsuits that should never be filed (and *succeeding* in multiple circuits and dozens of district courts).

This issue is not going anywhere. The substantial confusion will persist, and the issue will continue wasting judicial and party resources, until it is finally resolved. Respondents' efforts to avoid review are futile, and their alternative grounds only illustrate why review is warranted. The pressing need for the Court's intervention is clear.

A. There Is An Intractable Conflict

1. Contrary to respondents' contention (Opp. 10-17), the conflict is clear and entrenched. The Ninth Circuit acknowledged that its "sister circuits" have "divide[d]" over "whether foreclosure-related activities constitute debt collection" under the FDCPA. Pet. App. 14a & n.11. Those 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). After extensive analysis, they rejected the rationale suggesting "mortgage foreclosure is not debt collection." *Id.* at 460 (disavowing, *e.g.*, *Hulse* v. *Ocwen Fed. Bank*, 195 F. Supp. 2d 1188, 1204 (D. Or. 2002)); *Wilson* v. *Draper & Goldberg, P.L.L.C.*, 443 F.3d 373, 376 (4th Cir. 2006) ("disagree[ing]" with *Hulse*); *Alaska Trustee, LLC* v. *Ambridge*, 372 P.3d 207, 216-217 (Alaska 2016) (declaring *Hulse* "[un]persuasive").

The Ninth Circuit held the opposite. Pet. App. 4a-14a. It repudiated other circuits' reasoning, and it "affirm[ed]" the "leading case of *Hulse*," which it admitted "circuits ha[d] declined to follow." *Id.* at 5a-6a. Despite recognizing its "path[]" "diverge[d]" (*id.* at 8a), it adopted a view that "has been rejected by every circuit that has decided the issue in a published opinion" (*id.* at 19a (Korman, D.J., dissenting)). Under any fair reading, the circuits are intractably divided.

Indeed, in the short time since the opinion issued, multiple courts have confirmed the conflict. *E.g.*, *Carbone* v. *Caliber Home Loans, Inc.*, No. 15-CV-5190, 2017 WL 4157265, at *2 (E.D.N.Y. Sept. 19, 2017); *Thompke* v. *Fabrizio & Brook, P.C.*, No. 17-10369, 2017 WL 3479529, at *9 (E.D. Mich. Aug. 14, 2017).

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 100 conflicting decisions on this important question (Pet. 29). Instead, respondents argue that the courts' "reasoning" "differs in some respects" without producing "'deep' disagreement on the question presented." Opp. 13. But as established (Pet. 15-29), these courts have refuted every facet of the Ninth Circuit's analysis, and the Ninth Circuit, in turn, canvassed those competing decisions but disagreed. Pet. App. 14a. 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 steps in.

2. To minimize the conflict, respondents tout the "critical role California law plays in the analysis." Opp. 2, 4, 7, 9-12, 14-15. Were this role so critical, one would expect to see passages explaining how the "unique" aspects of California law set this case apart. Yet the Ninth Circuit's

opinion says—*nothing*. Indeed, its "holding" "affirms" the "leading" decision of an *Oregon* district court applying *Oregon law*. Pet. App. 5a. Its analysis turned on the general logic that foreclosure seeks to enforce a security interest, not to collect a debt, and payment comes "from the home's purchaser, not from the original borrower." *Id.* at 5a-10a. It parsed the text of Sections 1692a(5)-(6) and 1692f(6), the FDCPA's structure, and its legislative purpose. *Id.* at 9a-10a & n.6. And the court ultimately *rejected* (not *distinguished*) other circuits' views because the conflict is a *conflict*, not the product of disparate state-law schemes. *Id.* at 6a (declaring Fourth and Sixth Circuit precedent "[un]persuasive").

While the majority obliquely referenced "nuances of California foreclosure law," it never identified what those "nuances" were. None are apparent. The panel focused on traits that are common across foreclosure schemes: authorizing non-judicial foreclosure after sending a "notice of default and [a] notice of sale." Pet. App. 8a & n.5; compare *Kaymark* v. *Bank of America, N.A.*, 783 F.3d 168, 172 (3d Cir. 2015); *Wilson*, 443 F.3d at 377; *Mellentine* v. *Ameriquest Mortg. Co.*, 515 F. App'x 419, 421 (6th Cir. 2013); *Ambridge*, 372 P.3d at 216, 218. That completes the list of relevant "California procedures," and respondents fail to identify anything the panel missed. Nothing in California law dissolves the conflict over this binary federal question.[1]

3. Respondents resist the split because California does not permit post-foreclosure deficiency judgments. Opp. 10-11, 15-16. This factor is irrelevant: not a *single* other

[1] The act of "selling the home at auction[] and applying the proceeds from the sale to pay down the outstanding debt" (*Glazer*, 704 F.3d at 461) occurs in *every* foreclosure. The Ninth Circuit characterized that activity as enforcing a security interest; other circuits declare it "debt collection."

circuit found foreclosure activities covered because deficiency judgments were theoretically available; they found foreclosure covered *because the foreclosure itself* constitutes "debt collection." *Shapiro & Meinhold* v. *Zartman*, 823 P.2d 120, 124 (Colo. 1992) ("foreclosure is a method of collecting a debt by acquiring and selling secured property to satisfy a debt"); accord *Wilson*, 443 F.3d at 376.

The decisions are unambiguous. In *Glazer*, for example, the Sixth Circuit started by "declin[ing] to follow" the very position respondent asserts here: 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. On the contrary, the court held that "*any* type of mortgage foreclosure action, *even one not seeking a money judgment on the unpaid debt*, is debt collection under the Act." *Id.* at 462 (second emphasis added). The court explained, "*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.[2]

Respondents ignore this unequivocal language. They 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. 11. This sen-

[2] Respondents say the "critical point" is that deficiency judgments were "*available*" in other circuits, even if not pursued. Opp. 11. 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) qualified as such.

tence 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 passage 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 Circuit disavows respondents' reading: "*Glazer* rests entirely on the premise that 'the ultimate purpose of foreclosure is the payment of money.'" Pet. App. 6a; accord *Mellentine*, 515 F. App'x at 423.

Respondents retort that "petitioner's approach would render meaningless the FDCPA's statutory distinction between 'the enforcement of [a] security interest[]'" and "'the collection of a[] debt[].'" Opp. 12. This is a *merits* argument, not an argument against review. But suffice it to say that this exact position—also adopted by the Ninth Circuit—was refuted by every court on the opposite side of the split. Pet. 18-23. The conflict on this important question is plain.[3]

4. Respondents also fail to distinguish the cases on their facts. Opp. 13-17.

In *Wilson*, for example, the Fourth Circuit held that trustees "acting in connection with a foreclosure can be 'debt collectors' under the Act." 443 F.3d at 375. It rejected *Hulse*'s argument that "'foreclosing on a deed of

[3] Respondents paint California as an outlier regarding deficiency judgments (Opp. 10), but according to a recent study, 31 States, like California, either prohibit deficiency judgments or circumscribe those judgments. Rao & Walsh, *Foreclosing A Dream* 38-39 (Feb. 2009) <tinyurl.com/foreclosingadream>.

trust is an entirely different path [than collecting funds from a debtor],'" and instead found that "'foreclosure is a method of collecting a debt by acquiring and selling secured property to satisfy a debt.'" *Id.* at 376; contra Pet. App. 5a-7a.

Rather than confront these categorical statements, respondents dismiss *Wilson* because the defendants "sent a letter specifically requesting that money from the debtor be sent directly to them." Opp. 15. That fact was irrelevant to the court's primary holding. It did not say foreclosure is covered *because* of that letter; it said foreclosure was covered because it is "'a method of collecting a debt,'" and the court refused to "create an enormous loophole in the Act" for "foreclosure proceedings." 443 F.3d at 376. The letter was an *independent* ground—introduced in a separate paragraph ("[f]urthermore") *after* the court's key holding.

Moreover, *Wilson* was reaffirmed in *McCray* v. *Federal Home Loan Mortgage Corporation*, 839 F.3d 354 (4th Cir. 2016), which likewise held that foreclosure activities constitute "debt collection": "in *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.

Respondents sidestep that holding and distinguish *McCray* because "the 'whole reason' the law firm in that case was retained by the creditor was 'to collect' on the defaulted amount." Opp. 15. But this truncates the relevant language: "the whole reason" the firm was retained was to "attempt, *through the process of foreclosure*, to collect" on the defaulted amount. 839 F.3d at 360 (emphasis added). The full quote thus 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.[4]

Nor does it matter that some cases involved a creditor's "law firm or lawyer" rather than "a neutral trustee." Opp. 16-17. Respondents fail to identify a *single* decision finding this "distinction" relevant, for obvious reasons: each party (whether a lawyer or "original trustee") conducts the same activities to achieve the same result, and it affects consumers the same way. If "foreclosure-related activities constitute debt collection" (Pet. App. 14a), they do so regardless who does them.

5. Respondents urge the Court to deny review because applying the FDCPA would obstruct California law. Opp. 12-13.

This is a *merits* argument, not a *certworthiness* argument,[5] and a weak one at that. Complying with both state and federal law is not difficult once each regime is read sensibly (*Heintz* v. *Jenkins*, 514 U.S. 291, 296-297 (1995)), which is why no circuit rejecting respondents' theory has

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[4] Respondents' other efforts are unavailing. Opp. 13-16. *Glazer* is indistinguishable (see *supra*). Respondents effectively concede the conflict with *Ambridge* on the core definitional question. *Kaymark* differs only when ignoring its clear holding: "foreclosure meets the broad definition of 'debt collection' under the FDCPA." 783 F.3d at 179 (endorsing the Fourth and Sixth Circuits); see also *Piper* v. *Portnoff Law Assocs., Ltd.*, 396 F.3d 227, 234 (3d Cir. 2005). And respondents misread *Shapiro* (Opp. 16 n.2), which held that "foreclosure is a method of collecting a debt by acquiring and selling secured property to satisfy a debt." 823 P.2d at 124. Each decision contradicts the Ninth Circuit's holding that foreclosure is the mere enforcement of a security interest.

[5] If anything, respondents' point confirms this case as an ideal vehicle: If federalism concerns inform the proper construction of the FDCPA, it is optimal to review a case where those concerns supposedly arise.

encountered problems. And if schemes do conflict, Congress instructed how to respond: federal law preempts state law, not vice versa. 15 U.S.C. 1692n. The FDCPA supplies a backstop against inadequate state procedures (15 U.S.C. 1692(b)); there is no license to displace the FDCPA because a state scheme providing *less* protection gets in the way.

Moreover, the FDCPA's construction is a question of *federal* law. It makes little sense to permanently construe a federal statute—which applies uniformly in all 50 States—to avoid a conflict with a handful of California regulations that could change at any time. The FDCPA assumes a uniform meaning nationwide; it does not vary based on particular "conflicts" that might arise with any local scheme. Cf. *Clark* v. *Martinez*, 543 U.S. 371, 382 (2005). Respondents' contrary approach lets the tail wag the dog.

B. The Question Presented Is Important And Recurring

This case asks whether foreclosures are covered by the FDPCA. That question 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. 30.

Yet respondents insist the case presents only a "narrow" question. Opp. 2. There is nothing "narrow" about it. The Ninth Circuit held that "foreclosure-related activities" fall outside the FDCPA. Pet. App. 14a. 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 Circuit alone. And it leaves courts and litigants to waste time and resources debating a question this Court alone can answer.

Nor does it matter that the Ninth Circuit suggested "additional" conduct may sweep foreclosures within the FDCPA. Opp. 20. The question presented is whether foreclosure activities *without* additional conduct qualify as debt collection. That question has "divide[d]" the courts (Pet. App. 14a), 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.

C. This Case Is An Optimal Vehicle

This case is the perfect vehicle for deciding this significant question. It has no factual or procedural impediments. The complaint alleged respondents were "debt collectors" and targeted notices sent during the foreclosure process. Those allegations implicate the full range of the conflict. The question was outcome-determinative below, and the case is otherwise stayed. The issue is cleanly presented.

1. Respondents' two "alternative" grounds for affirmance are not obstacles to review.

First, respondent argues that ReconTrust qualifies under Section 1692a(6)(F)(i)'s exception for activities "incidental" to a "bona fide escrow arrangement." Opp. 17-18. This "escrow" argument is a further reason to *grant* review, not deny it. This "exception" itself has divided the circuits, and every district court (save one) has rejected respondents' position (Pet. 27-28), a fact respondents do not dispute. Respondents' position flouts the ordinary understanding of "escrow," and ignores the obvious reality that foreclosure activities are "central" to the trustee's role—its entire job is to ultimately convey title or initiate

foreclosure, and neither role is "incidental" to those responsibilities. *State ex rel. Bowen* v. *Bank of Am. Corp.*, 126 Cal. App. 4th 225, 231 (Cal. Ct. App. 2005) (trustees' "principal functions" include "foreclos[ure]"). There is a reason no other circuit relies on respondents' argument and courts overwhelmingly reject it.[6]

In short, the same facts here trigger FDCPA coverage in every other circuit that has decided the question. Review is warranted.

Second, respondents, for the first time, argue that ReconTrust is excluded under Section 1692a(6)(F)(iii) because its activity "concerns a debt which was not in default at the time [ReconTrust] obtained it." Opp. 19. This argument was neither raised nor resolved below, and accordingly is forfeited. Cf., *e.g.*, *Lewis* v. *Clarke*, 137 S. Ct. 1285, 1293 n.2 (2017).

The argument is also insubstantial. It is literally unsupported—respondents fail to offer a single authority (from *any* court) endorsing its position, and for good reason: There is an obvious distinction between holding title *to property* and holding title *to the underlying debt*. ReconTrust may obtain *title* before default, but never the *debt*, which is what Section 1692a(6)(F)(iii) textually demands.

This Court does not typically postpone review on important, recurring questions whenever a creative litigant conjures up last-minute theories that no court has ever accepted—a recipe, given boundless lawyer inventiveness,

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[6] Respondents misread *Wilson*. That decision did not find the defendants "assumed the role of trustees 'solely for the purpose of conducting a foreclosure sale.'" Contra Opp. 18 n.3. It found Section 1692a(6)(F)(i) inapplicable because *"foreclosure" was "central" to the trustee's obligations*. 443 F.3d at 377; accord *McCray*, 839 F.3d at 361.

for indefinitely delaying review of *all* issues. The deep, entrenched conflict is ripe for the Court's review.

2. Respondents' final efforts to avoid review are meritless. It makes no difference that petitioner might ultimately prevail on her TILA *rescission* claim (Opp. 21), which has different elements than her FDCPA *damages* claim. Pet. App. 15a-16a.[7]

Nor does it matter that the case is "interlocutory." Opp. 21. Further proceedings would not sharpen the issue, and the Court routinely grants review in this posture to decide important, dispositive federal questions. *E.g.*, *Midland Funding, LLC* v. *Johnson*, 137 S. Ct. 1407 (2017).

[7] Respondents question whether petitioner may rely on "new allegations" added "in support of an unrelated claim" after her FDCPA claim was dismissed. Opp. 19 n.4. These new allegations are irrelevant to the question presented, which is identical under either set of allegations. Pet. 7 n.4.

Respectfully submitted.

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NOVEMBER 2017