No. 17-1307

In the Supreme Court of the United States

DENNIS OBDUSKEY,

Petitioner,

v.

MCCARTHY & HOLTHUS LLP, ET AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF OF MORTGAGE BANKERS ASSOCIATION, AMERICAN BANKERS ASSOCIATION, BANK POLICY INSTITUTE, CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, SECURITIES INDUSTRY AND FINANCIAL MARKETS ASSOCIATION, AND WESTERN BANKERS ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF THE *AMICI CURIAE*[1]

The Mortgage Bankers Association ("MBA") is a national association representing the real estate finance industry. It has more than 2,200 members, including real estate finance companies, mortgage companies, mortgage brokers, commercial banks, thrifts, life insurance companies, and others in the mortgage lending field. MBA seeks to strengthen the nation's residential and commercial real estate markets, to support sustainable homeownership, and to extend access to affordable housing to all Americans.

The American Bankers Association ("ABA") is the principal national trade association of the financial services industry in the United States. Founded in 1875, the ABA is the voice for the nation's $13 trillion banking industry and its million employees. ABA members—located in all fifty states, the District of Columbia, and Puerto Rico—include financial institutions of all sizes and hold a majority of the domestic assets of the U.S. banking industry. The ABA frequently appears in litigation involving issues of widespread importance to the industry.

The Bank Policy Institute ("BPI") is a nonpartisan public policy, research, and advocacy group, and the successor to the Clearing House Association and the Financial Services Roundtable after their merger in 2018. Members of the BPI include universal

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[1] Pursuant to Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part and that no person other than *amici,* their members, and their counsel made a monetary contribution to its preparation or submission. All parties have filed blanket consents to the filing of *amicus curiae* briefs with the Clerk.

banks, regional banks, and major foreign banks doing business in the United States. BPI members employ nearly two million Americans and make 72% of all loans and nearly half of the nation's small business loans.

The Chamber of Commerce of the United States of America (the "Chamber") is the world's largest business federation. It represents 300,000 direct members and indirectly represents the interests of more than 3 million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases that raise issues of concern to the nation's business community.

The Securities Industry and Financial Markets Association ("SIFMA") is a trade association that brings together the shared interests of more than 600 securities firms, banks, and asset managers. Formed as a result of the November 1, 2006 merger between the Securities Industry Association and The Bond Market Association, SIFMA's mission is to promote policies and practices to expand and perfect markets, foster the development of new products and services, and create efficiencies for member firms, while preserving and enhancing the public's trust and confidence in the markets and the industry. SIFMA works to represent its members' interests locally and globally.

The Western Bankers Association ("WBA") is one of the largest banking trade associations and regional educational organizations in the United States, with more than 100 years of combined experience serving banks. The California Bankers Association, a division of the WBA, is the advocate of the western banking industry for needed legislative, regulatory and legal changes.

Many of *amici*'s members are mortgage lenders or servicers that depend on the non-judicial foreclosure processes available in many States in order to prevent serious financial losses on mortgage loans, which enables them to deliver lower-cost credit to home buyers. They therefore have a strong interest in whether entities engaged in a non-judicial foreclosure are subject to the requirements of the Fair Debt Collection Practices Act ("FDCPA"). *Amici* file this brief to explain why applying the FDCPA to non-judicial foreclosures would be inconsistent with the statute's text and introduce an additional, unwarranted layer of complexity in the foreclosure process, thereby harming both lenders and borrowers.

INTRODUCTION AND SUMMARY OF ARGUMENT

Our country's mortgage lending system—a critical element of our national policy of making home ownership available to as many Americans as possible—rests on the foundation of enforceable security interests in real property. By allowing lenders to take possession of collateral through foreclosure when a borrower defaults, the law reduces the risk to lenders—which in turn allows them to make credit available to more home buyers at a lower interest rate.

Some foreclosures occur through lawsuits in court, but more than half of the States provide for non-judicial foreclosures, which streamline the foreclosure process while at the same time including significant procedural protections for borrowers.

The entire purpose of non-judicial foreclosure is to avoid the costs and delay of litigation, which inevitably would result from judicial involvement in the foreclosure process. Under petitioner's view, however, a borrower would be able to circumvent a State's limitation of judicial involvement by instituting a lawsuit under the FDCPA to challenge non-judicial foreclosure activity.

This Court should reject that result and hold that the FDCPA's requirements do not extend to enforcing a security interest by initiating a non-judicial foreclosure.

First, contrary to the suggestions of petitioner and his *amici*, subjecting non-judicial foreclosures to the FDCPA will harm borrowers, not help them. Many States and several federal agencies (such as the Bureau of Consumer Financial Protection) already have regulations in place that protect borrowers facing non-judicial foreclosure. These regulations are designed to fit the non-judicial foreclosure process, and therefore are both consistent with the structure of non-judicial foreclosure and strike the proper balance between allowing borrowers to vindicate their rights and ensuring that appropriate foreclosures can proceed in a timely, efficient, and fair manner.

Superimposing the FDCPA's requirements on this already-extensive framework of regulation would create considerable uncertainty, leaving lenders and servicers to determine whether and to what extent the FDCPA preempted state laws and, if not, how to comply with both state and federal requirements. The resulting confusion would make it more costly for lenders and servicers to do business—and thus more costly for home buyers to obtain credit.

Nor would borrowers reap any benefit from application of the FDCPA. The FDCPA's procedural requirements were enacted decades ago chiefly to address third-party collection of unsecured consumer debts—not the very different process of foreclosure. They would add little protection for borrowers that is not already provided by the robust protections under state and federal law. Indeed, the FDCPA's provisions—such as its restrictions on when "debt collectors" may communicate with borrowers—would interfere with lenders and servicers' attempts to provide borrowers with information to help them avoid foreclosure and stay in their homes, communications that are mandated by state and federal law.

Second, settled principles of statutory interpretation establish that the FDCPA does not cover non-judicial foreclosure activity. The FDCPA applies to the collection of money from borrowers—and a non-judicial foreclosure does not involve collecting *money* from a borrower. Indeed, the entire point of non-judicial foreclosure is that the mortgage is satisfied (in whole or in part) by the sale of the property collateralizing the mortgage and *not* through repayment by the borrower. And the title to the property involved in a foreclosure is often held not by the borrower but rather by a trustee to secure the mortgage.

Moreover, the FDCPA's text makes plain that entities seeking to enforce a security interest are covered by the FDCPA only for the purposes of one narrow statutory provision—and the inclusion of that specific provision makes clear that such entities are *not* covered by the rest of the statute. To hold otherwise would be inconsistent with the statutory language—and would imply that many valuable communications directed at borrowers are unlawful. This Court should reject that result.

ARGUMENT

The FDCPA Does Not Apply To Non-Judicial Foreclosures.

A. Subjecting Foreclosures To The Detailed Requirements Of The FDCPA Would Harm Consumers, Create Confusion, And Increase Borrowing Costs.

Many States and the federal government have long recognized that non-judicial foreclosure is different in kind from the types of debt collection that led to the FDCPA's enactment and therefore have subjected these distinct procedures to different regulatory regimes. Layering the FDCPA's requirements on top of the existing regulations governing non-judicial foreclosure is both unnecessary and unwise. Doing so will serve only to increase the regulatory burden on lenders, thereby needlessly driving up costs for lenders and borrowers.

1. Non-judicial foreclosure is different in kind from the third-party collection of consumer debt targeted by the FDCPA.

Petitioner and his *amici* assume that non-judicial foreclosure on a security interest is not meaningfully different from third-party collection of consumer debt and should therefore be regulated the same way. See

Pet. Br. 22-23; NAACP Br. 11. That assumption is misguided.[2]

The first and most obvious difference is that mortgage debt is *secured* debt. Unsecured debt—in other words, debt that is not guaranteed by any collateral—has long been recognized as falling under the FDCPA. In a mortgage transaction, by contrast, the property that the borrower purchases serves as collateral (similar to collateralized debt in the auto lending context).[3] And precisely because enforcement of the security interest provides a fallback when a borrower fails to pay the money owed, mortgage lenders bear less risk from nonpayment.[4]

Moreover, the foreclosure context is different because mortgage debt tends to involve greater amounts of money and higher monthly payments

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[2] *Amici* here focus on the question presented—whether non-judicial foreclosure activities fall within the scope of the FDCPA—and take no position on whether the FDCPA applies to judicial foreclosures.

[3] This brief refers to mortgages and deeds of trust interchangeably except where the differences between the two types of instruments are relevant. Significantly, in most States that authorize non-judicial foreclosures, "the deed of trust is the most commonly used mortgage instrument." Grant S. Nelson, 1 Real Estate Finance Law § 7:20 (6th ed. 2014); see also Freddie Mac, *First Lien Security Instruments*, http://www.freddiemac.com/uniform/unifsecurity.html#highlights (indicating that in 19 of the 33 States permitting non-judicial foreclosure, the applicable Fannie Mae/Freddie Mac Security Instrument is a deed of trust).

[4] See, *e.g.*, Experian, *Secured vs. Unsecured Loans: What You Should Know*, perma.cc/DV5X-9TMX ("Because a secured loan ensures the lender walks away with something of value even if you don't repay the loan, secured loans are generally considered lower risk.").

than other kinds of debt. For example, the median family's debt secured by a primary residence was $111,000 in 2016, whereas the median family's credit card debt was $2,300.[5]

A mortgage borrower is therefore less likely than other kinds of debtors to catch up and repay his debt in full once he has fallen behind in his payments.[6] The character of lenders' communication with borrowers reflects this reality: Mortgage lenders take an approach that focuses on loss mitigation, working with borrowers to restructure the debt or to help make monthly payments more manageable for the borrower. Thus, even if certain collection activities by servicers are covered by the FDCPA, it makes more sense to regulate *foreclosure* with an eye toward the special characteristics of foreclosures—which is just what States and federal agencies have done.

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[5] See, *e.g.*, Federal Reserve, *Changes in U.S. Family Finances from 2013 to 2016: Evidence from the Survey of Consumer Finances* (Sept. 2017), perma.cc/CG9K-N86F.

[6] Compare, *e.g.*, S&P Global Ratings, *U.S. Residential Mortgage Performance Snapshot* 14 (July 2018), perma.cc/5T7V-5GXH (indicating that the cure rate for various tranches of U.S. prime mortgages as of July 2018 fell between 2% and 6%), *with* Philippe d'Astous & Stephen H. Shore, *Liquidity Constraints and Credit Card Delinquency: Evidence from Raising Minimum Payments* 3 (Apr. 25, 2015), http://ibhf.cornell.edu/docs/Symposium%20Papers/LiquidityConstraints.pdf (finding a "base cure rate of 52%" for delinquent credit card borrowers at a particular large financial institution).

2. Borrowers in non-judicial foreclosure proceedings already have extensive protections under state and federal law.

Non-judicial foreclosure is already regulated intensively at both the state and federal levels—with each State and each federal agency making a policy judgment about the regulatory standards appropriate in light of the special characteristics of the non-judicial foreclosure context.

Many of these procedures are designed specifically to apply to the foreclosure process, and their features are accordingly tailored to the particular needs of mortgage lenders and borrowers. Application of the FDCPA to non-judicial foreclosure activity is therefore a solution in search of a problem.

1. Thirty-three States and the District of Columbia permit non-judicial foreclosures.[7] The primary purpose of this procedure is to reduce the need for judicial involvement in order to make the process more efficient.

Lengthier judicial foreclosures have significant drawbacks—including the "misallocation of public funds" on adjudicating uncontested foreclosures and the risks of "vandalism, fire loss, depreciation, damage, and waste" to the property while the process is drawn out in court. See Nat'l Conf. of Commissioners on Uniform State Laws, Uniform Nonjudicial Fore-

[7] These States are: Alabama, Alaska, Arizona, Arkansas, California, Colorado, Georgia, Hawaii, Idaho, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, North Carolina, Oklahoma, Oregon, Rhode Island, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, Washington, West Virginia, and Wyoming. See Nelson, *supra* note 3, § 7:20 n.1.

closure Act, Prefatory Note at 2 (2002), http://www.uniformlaws.org/shared/docs/nonjudicial%20foreclosure/nonjudicial_foreclosure_final_02.pdf. These adverse consequences of judicial foreclosures "have a negative impact on local property values, particularly during periods of recession," and drawn-out foreclosures can also "lead to direct costs for local governments" that must deal with abandoned properties. See Americans for Fin. Reform, *We All Pay a Price for the Foreclosure Crisis*, Feb. 28, 2011, http://ourfinancialsecurity.org/2011/02/we-all-pay-a-price-for-the-foreclosure-crisis.

To achieve the goal of making foreclosures more expeditious and efficient without reducing protections for borrowers, States impose stringent requirements on lenders seeking to conduct non-judicial foreclosures, many of which supplement or overlap with the requirements of federal laws directed at the foreclosure process. See, *e.g.*, *Rossberg* v. *Bank of Am., N.A.*, 219 Cal. App. 4th 1481, 1492 (2013) (noting that the purposes of California's statutory scheme are "to provide the [lender] with a quick, inexpensive and efficient remedy" and "to protect the [borrower] from wrongful loss of the property") (quotation marks omitted); *Cox* v. *Helenius*, 693 P.2d 683, 685-86 (Wash. 1985) (explaining that the objectives of Washington's non-judicial foreclosure law include ensuring "efficient and inexpensive" procedures and "provid[ing] an adequate opportunity for interested parties to prevent wrongful foreclosure").

For example, in a number of States, the lender must notify the borrower of available options for loss mitigation (such as a loan modification) before commencing the non-judicial foreclosure process. California's Homeowner Bill of Rights, for instance, requires a mortgage servicer to make initial contact with a delinquent borrower by phone or in person to "assess the borrower's financial situation and explore options for the borrower to avoid foreclosure." Cal. Civil Code § 2923.5(a)(2). The borrower has the right to request a subsequent meeting on these issues, which must occur within 14 days. *Ibid*. Similarly, Minnesota's Homeowner Bill of Rights requires servicers to notify a borrower in writing of "available loss mitigation options offered by the servicer that are applicable to the [borrower's] loan before referring the mortgage loan to an attorney for foreclosure." Minn. Stat. § 582.043, subd. (5)(1).

Other States require the lender to provide opportunities for loss mitigation at other stages of the process. For example, in Maryland, a lender must include a loss mitigation application, and instructions for completing it, with the initial notice of intent to foreclose on any owner-occupied residential property. Md. Code. Ann. Real Prop. § 7-105.1(c)(5). Idaho similarly requires a loan modification form to accompany a notice of default. Idaho Code § 45-1506C(2)(a).

States may also give a homeowner a right to request mediation with the lender regarding loss mitigation options. In Nevada, a homeowner who has a documented financial hardship may file a petition with a state court electing mediation. Nev. Rev. Stat. § 107.0865(1). The lender must include information on how to petition for mediation with the initial notice of default. *Id*. § 107.086(2)(a)(4). Similarly, Rhode Island gives borrowers the right to a mediation conference and requires lenders to notify borrowers of their mediation rights before they may foreclose. 34 R.I. Gen. Laws § 34-27-3.2(d). The Washington Department of Commerce administers a mediation program, to which borrowers can be referred by housing counselors or attorneys. See Wash. Rev. Code § 61.24.163. And borrowers in Idaho have the right to request a meeting with representatives of their lenders with authority to modify their loans. Idaho Code § 45-1506C(4).

A borrower's application for a loan modification or other loss-mitigation option may trigger the protections of State "dual tracking" laws. These laws prohibit lenders from proceeding with a non-judicial foreclosure while a loss-mitigation application is pending. See, *e.g.*, Cal. Civil Code § 2924.11(a); Minn. Stat. § 582.043(6)); Nev. Rev. Stat. § 107.530(1). In certain States, these stays of foreclosure also extend through a borrower's appeal if the application for loss mitigation is denied. Minn. Stat. § 582.043, subd. 6(a)(1); Nev. Rev. Stat. § 107.530(5)(b).

If the debtor does not pursue loss mitigation or if loss mitigation efforts are unsuccessful and a lender commences a non-judicial foreclosure, every non-judicial foreclosure State requires the lender to send the debtor notice of its intent to foreclose and to sell the property. See 4 Powell on Real Property § 37.42[4]. These notices "giv[e] debtors fair warning so they can take protective steps to preserve their equity in the property by attempting to redeem, refinance, or sell the property." *Ibid.* The content of such notices is often regulated by statute,[8] and lenders must carefully adhere to notice regulations in or-

[8] See, *e.g.*, Me. Rev. Stat. Ann. tit. 14, § 6203-A (required contents of notice of sale and suggested form); Or. Rev. Stat. § 86.771 (2017) (required content of notice of sale); Va. Code Ann. § 55-62 (permissible form of notices of sale).

der to preserve their ability to foreclose.[9] Although some States permit publication notice, most States require at least notice by mail to the borrower, and some require personal service. See, *e.g.*, Md. Code Ann. Real Prop. § 7-105.1(h)(1) (personal service of notice to docket); Minn. Stat. § 580.03 (personal service of notice of sale); Okla. Stat. Ann. tit. 46, § 45 (same); Or. Rev. Stat. Ann. § 86.774(1) (same); S.D. Codified Laws § 21-48-6.1 (same).

Finally, a number of States provide for judicial or other neutral supervision of non-judicial foreclosures. Petitioner's home state of Colorado, for example, designates a "public trustee" in each county who oversees non-judicial foreclosures. See Colo. Rev. Stat. §§ 38-37-101 to -113. In order to initiate a non-judicial foreclosure, a lender must file a notice of demand and evidence of the debt with the public trustee (*id.* § 38-38-101(1)), and the public trustee must review the filing for completeness and record the notice of demand in order to commence the process (*id.* § 38-38-102(1)).

[9] See, *e.g.*, *Fed. Nat'l Mortg. Ass'n* v. *Marroquin*, 74 N.E.3d 592, 593 (Mass. 2017) ("[A] foreclosure by statutory power of sale * * * is invalid unless the notice of default strictly complies with paragraph 22 of the standard mortgage."); *Nat'l Commerce Bank* v. *Stiehl*, 866 S.W.2d 706, 708 (Tex. App. 1993) (noting that "[c]ompliance with notice conditions contained in a deed of trust and as prescribed by law is a prerequisite to the right" to conduct non-judicial foreclosure sale); *Deep* v. *Rose*, 364 S.E.2d 228, 232 (Va. 1988) (holding that foreclosure sales made in violation of mandatory time periods between advertisement and sale are void); *LeDesma* v. *Pioneer Nat'l Title Ins. Co.*, 629 P.2d 1007, 1009 (Ariz. Ct. App. 1981) ("[S]trict compliance with notice requirements is essential to a valid [foreclosure] sale.").

Colorado Rule of Civil Procedure 120 then provides for a limited, streamlined form of judicial oversight. Under Rule 120, a lender seeking to foreclose and sell the property must file a verified motion in a state district court for authorization of the sale. Colo. R. Civ. P. 120(a). The borrower is notified of the motion and afforded an opportunity to respond. *Id.* 120(b)-(c). Even if the borrower does not respond, the court cannot authorize the foreclosure sale unless it determines that "there is a reasonable probability that a default justifying the sale has occurred" and that the moving party "is the real party in interest." *Id.* 120(d)(1).

North Carolina similarly requires a pre-sale hearing before the clerk of the court in the county where the property is located. At the hearing, the clerk examines whether the underlying debt is valid and the party seeking to foreclose is its proper holder, whether a default has occurred, and whether all state-law requirements have been met. N.C. Gen. Stat. § 45-21.16(d). If the clerk finds that the foreclosure may proceed, the borrower may appeal that decision to a state court after posting a bond. *Id.* § 45-21.16(d1).

Maryland takes a different approach by providing for court involvement in ratification of the sale at the end of the non-judicial foreclosure process. A borrower may identify any "irregularity" in the sale (Md. R. 14-305(d)(1)), and the court must be satisfied that the sale "was fairly and properly made" before the sale may be ratified (*id.* 14-305(e)).

Most significantly, even if a State does not provide for judicial involvement in the non-judicial foreclosure process itself, the "results are always subject to judicial review" on certain limited grounds. 4 Powell on Real Property § 37.42[1]. A borrower who experiences a wrongful foreclosure can bring an equitable proceeding to have a sale enjoined or set aside, or he or she may bring an action at law seeking damages for a wrongful sale. *Id.* § 37.42[6].

In short, non-judicial foreclosure is generally subject to a broad range of state-law protections, including loss-mitigation and notice requirements, the involvement of independent third parties in the sale, and the availability of judicial confirmation or review after the sale is complete. See Baxter Dunaway, 2 Law of Distressed Real Estate § 17:1 (2018). These statutory requirements, which "must be scrupulously followed" (*ibid.*), ensure a fair procedure for borrowers.

2. Several federal agencies also regulate the mortgage industry to protect borrowers from wrongful or unnecessary foreclosures. The Bureau of Consumer Financial Protection, for example, has promulgated a set of foreclosure regulations that emphasize early communication with borrowers facing foreclosure or the potential for foreclosure. Under the Bureau's rules:

- A servicer must attempt to make "live contact" with a borrower within 36 days of when the borrower becomes delinquent, and provide the borrower with written notice of loss mitigation options and available opportunities for homeownership counseling within 45 days. 12 C.F.R. § 1024.39(a), (b).
- Servicers must make personnel available to assist borrowers with loss mitigation

options until they are out of delinquency. *Id.* § 1024.40(a).

- Servicers must also offer application processes for loss mitigation options, and they may not initiate any foreclosure (whether judicial or non-judicial) before a borrower's application for loss mitigation (including an appeal as of right from any denial thereof) has been resolved. *Id.* § 1024.41.
- Finally, to the extent its existing regulations are insufficient, the Bureau retains the authority to use its enforcement and rulemaking powers to address "unfair, deceptive, or abusive act[s] or practice[s]" facing borrowers. See 12 U.S.C. § 5531.

The Federal Housing Administration imposes additional protections for borrowers whose mortgages it insures. Servicers of these mortgages must evaluate a defaulted mortgage for potential loss mitigation options, including forbearance plans and loan modifications, and implement those options "whenever feasible." See FHA Single Family Housing Policy Handbook 4000.1(III)(A)(2)(j) at 605-606. In addition, they must attempt to contact delinquent borrowers and document these communications. *Id.* 4000.1(III)(A)(2)(h) at 584-588.

The foregoing state- and federal-law protections are effective at ensuring that borrowers in non-judicial foreclosure States are given opportunities to avoid foreclosure. There is "almost no evidence that the longer judicial foreclosure process decreases the foreclosure rate."[10] Put another way, there is no greater risk to borrowers of a foreclosure in States that authorize non-judicial foreclosure than in States that do not. Contrary to the suggestions of petitioner and his *amici*, therefore, there is no reason to believe that imposing the requirements of the FDCPA on non-judicial foreclosures is needed to protect borrowers against unjustified foreclosures, or that doing so would curb any alleged abuse in the system.

3. Subjecting non-judicial foreclosures to the FDCPA would create regulatory confusion and increase consumers' borrowing costs.

Applying the FDCPA in addition to the state and federal laws governing non-judicial foreclosure is not merely unnecessary to protect borrowers in the non-judicial foreclosure context. That result would also create unnecessary confusion, increase borrowing costs, and make borrower protections less, rather than more, effective.

Unlike the state and federal rules just discussed, Congress did not enact the provisions of the FDCPA with non-judicial foreclosures in mind; rather, the statute was aimed at addressing the practices of third-party debt collectors in connection with other kinds of debt. For example, the FDCPA requires that debt collectors: refrain from communicating with debtors represented by counsel (15 U.S.C. § 1692c(a)); cease communicating with a debtor once the debtor informs them that he wishes the communication to cease or that he "refuses to pay a debt"

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[10] See, *e.g.*, Yianni D. Lagos, *Fixing a Broken System: Reconciling State Foreclosure Law with Economic Realities*, 7 Tenn. J. L. & Pol'y 84, 104 (2011) (describing analysis of foreclosure rates per household in all 50 States over a three-year period).

(*id.* § 1692c(c)); refrain from communicating with any third party regarding a debt without the debtor's prior consent (*id.* § 1692c(b)); and "cease collection of [a] debt" that the debtor disputes until they can adduce verification of the debt (*id.* § 1692g(b)).

Because the FDCPA expressly preempts state laws to the extent they are "inconsistent with any provision" of the FDCPA (15 U.S.C. § 1692n), application of the FDCPA to non-judicial foreclosure could well invalidate many of the foreclosure-specific regulations adopted by States to provide borrowers with critical information and mitigation opportunities.

For example, many States' laws require lenders to provide particular notices to borrowers at particular times before a non-judicial foreclosure may proceed. See pages 12-13, *supra*. But the FDCPA prohibits communications with represented debtors, or with debtors who have indicated that they wish such communications to cease. In certain circumstances, these federal prohibitions would be in direct tension with state-law notification requirements and might preempt them—a counterproductive result that would deprive borrowers of information that many States have concluded is necessary to protect those borrowers' interests.

Similarly, the FDCPA's prohibition on contacting third parties without the debtor's permission might preempt state-law requirements for advertising a foreclosure sale. The preemption of these state-law regulations would not only interfere with States' own policy choices about how to regulate mortgage lending; it would also risk clouding the title of numerous properties, given that strict compliance with state laws is usually a prerequisite for a valid non-judicial foreclosure sale.

The FDCPA's requirements could also conflict with the requirements of federal laws. For example, FHA regulations require a face-to-face meeting between the lender and the borrower before three monthly payments are unpaid or after a default occurs (24 C.F.R. § 203.604(b))—a requirement that again could conflict with FDCPA provisions restricting communications with debtors, depending on the circumstances. Resolving conflicts such as this would be difficult for lenders and might require litigation.

In circumstances in which the conflict between the FDCPA and state law did not rise to the level necessary to trigger preemption, the FDCPA would impose additional federal requirements on top of existing state and federal regimes. Those additional requirements would be a poor fit for the foreclosure context and add needless regulatory complexity.

For example, the FDCPA's process for validating debts that are disputed (see 15 U.S.C. § 1692g(b)) would be an unnecessary overlay on top of Colorado's state-mandated non-judicial foreclosure process, which already prescribes procedures for verifying a debt and the lender's entitlement to foreclose. Forcing lenders to comply with these sorts of overlapping or duplicative requirements would increase the regulatory burden they face, with no corresponding benefit to borrowers.

The regulatory overlap and confusion that would result if non-judicial foreclosures were subject to the FDCPA would make it harder for many Americans to buy and keep homes, in two important ways.

First, imposing additional regulatory requirements on lenders and servicers will multiply their compliance costs. Lenders and servicers would have to invest additional resources in ensuring that their day-to-day practices are in full compliance with the FDCPA, in addition to the costs of complying with already-applicable state and federal laws and regulations. In particular, they would need to anticipate when the various state laws with which they currently must comply are preempted by the FDCPA—and those preemption issues will require extensive litigation to resolve.

To the extent FDCPA obligations as well as state and federal foreclosure standards all applied to non-judicial foreclosures, lenders and servicers would be obligated to develop and implement strategies for complying with all of these requirements (where possible). The cost of all of these compliance efforts would be considerable, and lenders and servicers would likely be forced to pass some of those costs on to customers in the form of increases in the cost of credit.

Second, subjecting non-judicial foreclosures to the additional requirements imposed by the FDCPA would generally make it more difficult for lenders and servicers to foreclose when necessary. Increasing the number of steps that a party must take in order to obtain relief inevitably imposes added cost and delay.

Making it harder for lenders to foreclose would not benefit borrowers; on the contrary, it would disserve borrowers' interests by making it harder for would-be home buyers to get mortgages. Although foreclosure is never an optimal outcome for borrowers or lenders, the mortgage lending system depends on lenders' ability to foreclose as a last resort in the event of a default. Lenders are able to offer more mortgages—and to charge borrowers lower interest rates for mortgage loans than for other kinds of debt—precisely because mortgages are secured by real property that can be foreclosed on when a mortgage cannot be repaid.

Non-judicial foreclosure, where authorized by state law, is a critical mechanism for ensuring that the foreclosure system works both fairly and efficiently. Judicial foreclosure—like any court proceeding—is a slow and resource-intensive process that makes it more expensive to provide mortgages. By contrast, non-judicial foreclosure, which avoids some of the procedural complications of judicial foreclosure, is a more "inexpensive and efficient remedy." *Vien-Phuong Thi Ho* v. *ReconTrust Co., NA*, 858 F.3d 568, 581 n.2 (9th Cir. 2017) (quotation marks omitted). It provides certainty and cost savings to lenders—which, in turn, translates into lower loan costs for borrowers.[11]

Applying the FDCPA to non-judicial foreclosures—making it harder for lenders to rely on the

[11] Several federal regulators have recognized the importance of efficiency in the foreclosure process. For example, Department of Housing and Urban Development ("HUD") regulations require foreclosing lenders for FHA-insured mortgages to "exercise reasonable diligence in prosecuting the foreclosure proceedings to completion" (24 C.F.R. § 203.356) and set out what timeframe constitutes "reasonable diligence" in each State (see HUD, Mortgagee Letter 2016-03 at attach. 1 pp. 1-2 (Feb. 5, 2016), https://www.hud.gov/sites/documents/16-03ml.PDF). Fannie Mae and Freddie Mac likewise impose maximum time limits for foreclosures on mortgages they own. See Fannie Mae, *Foreclosure Time Frames and Compensatory Fee Allowable Delays Exhibit*, https://www.fanniemae.com/content/guide_exhibit/foreclosure-timeframes-compensatory-fees-allowable-delays.pdf; Freddie Mac, *Freddie Mac State Foreclosure Timelines*, http://www.freddiemac.com/singlefamily/service/pdf/exh83.pdf.

non-judicial foreclosure process and increasing judicial involvement in that process notwithstanding the judgment of many States that the process should be *less* encumbered by litigation—would leave borrowers worse off by increasing the cost of credit and the amounts they owe.

Moreover, applying the FDCPA to non-judicial foreclosures would create a new and significant source of litigation risk for lenders and servicers. That too, would increase credit costs.

FDCPA litigation has exploded over the last decade, with the number of FDCPA cases filed each year more than doubling between 2007 and 2015.[12] Subjecting lenders and servicers to the FDPCA when engaging in non-judicial foreclosure activity will surely lead to more lawsuits against these businesses.

That result is directly contrary to the entire reason that many States have adopted non-judicial foreclosure, which is to *avoid* protracted litigation in connection with the foreclosure process.

In sum, petitioners' position, if accepted by this Court, would for multiple reasons produce an increase in mortgage costs. The housing sector accounts for between 15% and 18% of gross domestic product each year[13]—which means that the resulting decrease in home sales, because of that increased cost, would have harmful ripple effects throughout the economy.

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[12] Consumer Fin. Protection Bureau, *Fair Debt Collection Practices Act: CFPB Annual Report 2016*, at 15 (Mar. 2016).

[13] See Nat'l Ass'n of Home Builders, *Housing's Contribution to Gross Domestic Product*, perma.cc/S8Y6-D6NF.

Given these adverse consequences, the Court should not presume that Congress intended to introduce an unnecessary layer of regulation into the area of non-judicial foreclosure by making it subject to the FDCPA—especially when, as we next discuss, the text of the statute provides no reason to do so.

B. A Non-Judicial Foreclosure Is Not The "Collection" Of A Debt Within The Meaning Of The FDCPA.

On the merits of the question presented, the FDCPA provisions at issue here do not apply to non-judicial foreclosure activity. That is because enforcing a security interest by initiating a non-judicial foreclosure proceeding does not involve the activity that triggers the FDCPA: collection of money to satisfy a debt. Moreover, interpreting the FDCPA's provisions governing debt collection to include non-judicial foreclosures would improperly stretch the statute to cover a variety of other activities that Congress plainly did not intend to reach.

1. Non-judicial foreclosure does not involve the collection of money.

To constitute "debt collection" for purposes of the FDCPA, non-judicial foreclosure would have to involve collection of a "debt," as that term is defined by the statute—and it does not.

The FDCPA defines "debt" as an "*obligation * * * to pay money* arising out of a transaction" for personal, family, or household purposes. 15 U.S.C. § 1692a(5) (emphasis added). But a non-judicial foreclosure does not collect on any "obligation * * * to pay money" on the part of the borrower. As respondent explains (Resp. Br. 16-17), the natural meaning of collecting on a borrower's obligation is to demand payment *from the borrower*. And in a non-judicial foreclosure, no payment is demanded from the borrower.

Indeed, the collection of payment from the borrower generally is not possible in non-judicial foreclosure. In many non-judicial foreclosures, the property involved is held pursuant to a deed of trust—an alternative instrument that "involves a conveyance of the realty to a third person in trust to hold as security for the payment of the debt to the lender-noteholder." 1 Real Estate Finance Law § 1:6. Thus, although the borrower receives notice of his or her default and is responsible for curing it, nothing is obtained from the borrower; rather, "the trustee exercises the power of sale." *Id.* § 7:20.

And whether a property is held under a deed of trust or a mortgage, the money collected as a result of a non-judicial foreclosure sale is not paid by the *debtor*; it is paid by the *purchaser* of the foreclosed property. If the foreclosure sale proceeds do not exceed the borrower's balance, the lender may be able to collect the deficiency from the borrower, but this requires the lender to bring a *separate judicial* action against the borrower after the foreclosure sale.[14]

Nor is the collection of money from the borrower the goal of a lender that institutes foreclosure proceedings. By the time other loss mitigation methods have failed and a lender has commenced foreclosure, the lender has generally abandoned the hope that the borrower will repay the loan and is interested on-

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[14] See, *e.g.*, Pet. App. 8a (discussing Colorado law); 4 Powell on Real Property § 37.42[6]. A deficiency action *would* entail collection of a debt and be subject to the FDCPA, assuming that the other requirements of the statute were met.

ly in preventing further losses by selling the property.

Thus, the fact that the debtor's mortgage is satisfied—at least in part—through a sale resulting from a foreclosure does not imply that the foreclosure amounts to collecting on the *debtor's* "obligation to pay money" within the meaning of the FDCPA.

The FDCPA's definition of a "debt collector" confirms this reading of the statute. That definition provides that a "debt collector" is "any person * * * who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another." 15 U.S.C. § 1692a(6). Then, two sentences later, the statute provides that, for purposes of one provision of the statute—Section 1692f(6)'s prohibition on improper threats to repossess property—the term "*also* includes any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the enforcement of security interests." *Ibid.* (emphasis added).

This expansion of the definition for only a limited purpose confirms that the generally-applicable definition of a debt collector in Section 1692a(6)'s first sentence does not encompass entities that enforce security interests. As this Court recently held, the term "also" is used to "add[]" to the entities covered by a statutory category in specified circumstances, "rather than clarify[]" the scope of that category. *Mt. Lemmon Fire Dist.* v. *Guido*, No. 17-587, slip op. at 4 (U.S. Nov. 6, 2018). If such entities *were* properly classified as debt collectors under the generic definition, there would be no need to specify that in certain circumstances, the definition "also" includes them.

Interpreting the statutory definition of debt collection to *exclude* non-judicial foreclosure is the only reading that is consistent with this Court's well-established obligation to "give effect, if possible, to every word Congress used." *Nat'l Ass'n of Mfrs.* v. *Dep't of Def.*, 138 S. Ct. 617, 632 (2018).

2. Petitioner's proposed definition of "debt collection" is unreasonably broad.

Petitioner asserts that any communication that *discusses* a debtor's obligations and their potential consequences constitutes "debt collection," even if there is no attempt to collect any money directly from the debtor. Pet. Br. 14-16. But that position is untenable.

Petitioner's definition would sweep in a variety of activities that have nothing to do with debt collection. For example, a lender might be held to have engaged in debt collection if it sent information about automatic payment options or alternate payment plans to a borrower who has missed a payment. Similarly, communications between a credit reporting company and a consumer about the consumer's debts might be covered if they were viewed as providing the consumer with an incentive to pay the debts.

Congress did not intend the FDCPA to encompass these sorts of benign communications: It was concerned with abusive and deceptive practices by "independent debt collectors"—such as "obscene or profane language, threats of violence, telephone calls at unreasonable hours, misrepresentation of a consumer's legal rights," or use of other false pretenses. S. Rep. 95-382, at 2 (1977). Applying FDCPA standards to these communications would discourage lenders from making them. That would deprive borrowers of information that would assist them in being informed about, and prepared for, the harmful consequences that can arise out of difficulties with credit. And lenders, faced with a lower likelihood of loss mitigation due to the chilling effect on their communications with borrowers, would be compelled to increase the cost of credit.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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