No. 17-278

In the Supreme Court of the United States

VIEN-PHUONG THI HO, PETITIONER

v.

RECONTRUST COMPANY, N.A., ET AL.

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

BRIEF FOR THE RESPONDENTS IN OPPOSITION

DAVID C. POWELL
CAROLEE A. HOOVER
ANTHONY LE
MCGUIREWOODS LLP
505 Sansome Street, Suite 700
San Francisco, CA 94111

KANNON K. SHANMUGAM
Counsel of Record
ALLISON JONES RUSHING
MASHA G. HANSFORD
WILLIAMS & CONNOLLY LLP
725 Twelfth Street, N.W.
Washington, DC 20005
(202) 434-5000
kshanmugam@wc.com

QUESTION PRESENTED

Whether an original trustee under a California deed of trust, who takes the minimal actions required by California law to enforce a security interest pursuant to that deed of trust, thereby becomes a "debt collector," rather than an entity engaging in the "enforcement of security interests," for purposes of the Fair Debt Collection Practices Act.

PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT

Petitioner is Vien-Phuong Thi Ho. Respondents are ReconTrust Company, N.A.; Countrywide Home Loans, Inc.; and Bank of America, N.A. Respondents are all indirect subsidiaries of Bank of America Corporation. Bank of America Corporation has no parent corporation, and no publicly held company owns 10% or more of its stock.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Cases—continued:

Page

Cases—continued:

Statutes and rule:

In the Supreme Court of the United States

No. 17-278

VIEN-PHUONG THI HO, PETITIONER

v.

RECONTRUST COMPANY, N.A., ET AL.

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

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-43a) is reported at 858 F.3d 568. The opinion of the district court (Pet. App. 44a-60a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on October 19, 2016. A petition for rehearing was denied on May 22, 2017 (Pet. App. 62a-63a). The petition for a writ of certiorari was filed on August 21, 2017. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

This case presents a narrow question tied closely to state law: whether an original trustee under a California deed of trust, who takes the minimal actions required by California law to enforce a security interest under that deed of trust, falls within the definition of "debt collector" in the Fair Debt Collection Practices Act (FDCPA). Respondent ReconTrust Company, N.A., served as the original trustee under the California deed of trust on a residential property that petitioner used to secure a loan. Petitioner subsequently defaulted on the loan. Pursuant to its duties as trustee, ReconTrust initiated a non-judicial foreclosure of the property, sending petitioner two notices required by California law for a debtor's protection.

As is relevant here, petitioner filed suit to challenge the notices under the FDCPA. ReconTrust moved to dismiss the FDCPA claim on the ground that it was not attempting to collect a debt by sending the notices and thus was not a "debt collector" within the meaning of the FDCPA. The district court granted ReconTrust's motion to dismiss, and the court of appeals affirmed.

Petitioner now seeks this Court's review, alleging a circuit conflict on an issue of exceptional importance. But the court of appeals' narrow decision, intertwined with state-law considerations, does not directly conflict with any decision of another federal court of appeals or a state court of last resort. In any event, this case is an exceedingly poor vehicle for resolving the question presented because two FDCPA exclusions apply here, rendering academic the question whether ReconTrust satisfied the FDCPA's general definition of "debt collector." In addition, the court of appeals' carefully circumscribed decision lacks the broader significance that would warrant this Court's intervention. The petition for a writ of certiorari should accordingly be denied.

A. Background

The FDCPA bars "debt collector[s]" from engaging in certain practices while attempting to collect debts. 15 U.S.C. 1692d-1692f, 1692k; see 15 U.S.C. 1692(e). The FDCPA defines a "debt collector" as, *inter alia*, any entity that "regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another," *i.e.*, an entity whose overall practices involve sufficiently frequent debt collection. 15 U.S.C. 1692a(6); *Henson* v. *Santander Consumer USA Inc.*, 137 S. Ct. 1718, 1721 (2017). It defines "debt," in turn, as an actual or alleged "obligation of a consumer to pay money." 15 U.S.C. 1692a(5). For purposes of a more limited set of prohibitions not at issue here, the FDCPA separately defines as a "debt collector" "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." 15 U.S.C. 1692a(6).

The FDCPA excludes certain persons from the general definition of "debt collector." Of particular relevance here, the FDCPA provides that "debt collector" does not include "any person collecting or attempting to collect any debt owed or due or asserted to be owed or due another to the extent such activity * * * is incidental to a bona fide fiduciary obligation or a bona fide escrow arrangement" or "concerns a debt which was not in default at the time it was obtained by such person." 15 U.S.C. 1692a (6)(F)(i), (iii).

This case concerns the actions of a trustee in initiating a non-judicial foreclosure under a deed of trust pursuant to California law. A non-judicial foreclosure allows a property to be sold without the involvement of the courts, providing the lender an inexpensive remedy against the defaulting borrower in exchange for limiting the lender's remedies to the price obtained at the sale. See *Yvanova*

v. *New Century Mortgage Corp.*, 365 P.3d 845, 850 (Cal. 2016). California law sets out a complex statutory process for non-judicial foreclosure. See, *e.g.*, Cal. Civ. Code §§ 2924, 2924b, 2924f, 2924g, 2924k, 2941; see generally *Yvanova*, 365 P.3d at 849-850 (describing the requirements of the process).

The non-judicial foreclosure process relies on a trustee, an agent for both the lender and the borrower that holds the legal title to the property on their behalf. The lender is the trust's beneficiary; the borrower holds equitable title to the property. The trustee's role is to transfer the title to the borrower when the loan is paid off in full; it is also authorized to sell the property if the borrower defaults. In the event of a foreclosure sale, the trustee delivers the deed to the purchaser of the property and the proceeds from the sale to the lender. Pet. App. 2a-3a, 11a; see Cal. Civ. Code § 2941(b); *Yvanova*, 365 P.3d at 850.

To effectuate a foreclosure, the trustee must send certain notices to the debtor. See Cal. Civ. Code §§ 2924 (a)(1), 2924(a)(3), 2924b(b)(1), 2924b(b)(2). The process culminates in the sale of the property. See Cal. Civ. Code § 2924g. Critically, under California law, a lender is not permitted to obtain a deficiency judgment after conducting a non-judicial foreclosure pursuant to a deed of trust; regardless of the sale price from the foreclosure, the sale of the property extinguishes the debtor's personal liability on the loan, even if the proceeds from the sale would otherwise be insufficient. See Cal. Civ. Proc. Code § 580d(a). California expressly exempts trustees on deeds of trust from liability under its state-law analogue to the FDCPA. See Cal. Civ. Code § 2924(b).

B. Facts And Procedural History

1. In 2007, petitioner borrowed funds from Countrywide Bank, FSB. The loan was secured by a deed of trust

on a residential property in Long Beach, California. Respondent ReconTrust Company, N.A., served as the original trustee on the deed of trust. Pet. App. 2a.

In 2008, petitioner defaulted on her loan. ReconTrust then initiated a non-judicial foreclosure. A few months after the default, ReconTrust sent petitioner a notice of default. As required by California law, the notice informed petitioner that she was in default on her loan and warned her that ReconTrust would conduct a non-judicial foreclosure sale of the property. Specifically, it advised petitioner that she owed more than $20,000 on her loan; that she "may have the legal right to bring [her] account in good standing by paying all of [her] past due payments" to another entity, respondent Countrywide Home Loans, Inc.; that she would need to contact that entity to learn the amount she must pay or to arrange payment; and that the property may be sold without court action. Pet. App. 2a, 70a-74a.

Several months later, ReconTrust sent petitioner a notice of sale. Again as required by California law, the notice informed petitioner of the date and time of the scheduled sale and advised her that the property would be auctioned unless she took action to protect it. Petitioner sought and obtained a loan modification before the sale occurred. Pet. App. 2a-3a & n.1, 75a-77a.

2. Proceeding pro se, petitioner filed suit against respondents in the United States District Court for the Central District of California, asserting various claims under federal and California law. As is relevant here, petitioner alleged that ReconTrust had violated the FDCPA by sending the two notices, on the ground that the notices inaccurately listed the amount petitioner owed to the lender.

Respondents moved to dismiss the complaint, and the district court granted the motion in relevant part. Pet.

App. 44-60a. As to petitioner's FDCPA claim, the district court observed that the majority of other district courts in the circuit to have considered the issue had held that entities such as ReconTrust fell outside the relevant definition of "debt collector." *Id.* at 52a-53a. Because petitioner had failed to respond to respondents' argument to that effect in opposing their motion to dismiss, the district court dismissed the FDCPA claim without leave to amend. *Id.* at 53a. After further litigation, the court ultimately dismissed the remaining federal-law claims and declined to exercise supplemental jurisdiction over the state-law claims. See *id.* at 3a & n.2.

3. The court of appeals affirmed in relevant part. Pet. App. 1a-43a.[1]

a. In its opinion, as amended, the court of appeals, agreeing with California state courts, held that the FDCPA did not apply to ReconTrust's actions because ReconTrust was not attempting to collect a debt by sending the notices in the non-judicial foreclosure and thus was not a "debt collector" within the meaning of the FDCPA. Pet. App. 5a & n.3, 9a-15a. The court of appeals began by noting that, given the unavailability of a deficiency judgment under California law, "[t]he object of a non-judicial foreclosure is to retake and resell the security, not to collect money from the borrower." *Id.* at 4a. Because non-judicial foreclosure "extinguishes the entire debt" under California law, "actions taken to facilitate a

[1] The court of appeals vacated the district court's dismissal of petitioner's claim under the Truth in Lending Act and remanded for further proceedings on that claim. See Pet. App. 15a-16a. It affirmed the dismissal of petitioner's other claims in an unpublished opinion. See *id.* at 3a n.2.

non-judicial foreclosure * * * are not attempts to collect 'debt' as that term is defined by the FDCPA." *Id.* at 4a-5a.

The court of appeals observed that the FDCPA recognizes the "enforcement of [a] security interest[]" as an activity distinct from "debt collection," with the result that "enforcement of security interests is not always debt collection." Pet. App. 6a-7a (citing 15 U.S.C. 1692a(6)). The court then determined that "all of ReconTrust's activities * * * fall[] under the umbrella of 'enforcement of a security interest.'" *Id.* at 8a. Petitioner "ma[de] no argument" that ReconTrust did anything more than "what was required by California law to enforce the deed of trust"; to the contrary, ReconTrust merely sent notices "scripted by the California legislature." *Id.* at 8a n.5. Those notices did not request payment; instead, they simply informed petitioner that she could contact another party if she wished to make a payment—information that California law required in order to "*protect* the debtor." *Id.* at 9a-10a. Because ReconTrust did nothing beyond enforcing a security interest, the court of appeals determined that it did not qualify as a "debt collector" for purposes of the FDCPA. *Id.* at 10a.

The court of appeals explained that a contrary determination "would render meaningless the FDCPA's carefully drawn distinction between debt collectors and enforcers of security interests[] and expand the scope of the FDCPA well past the boundary of clear congressional intent and common sense," because "all security enforcers would be debt collectors." Pet. App. 10a. To the extent that petitioner relied on the decisions of other circuits, moreover, the court of appeals specifically noted that those decisions did not "concern[] the nuances of California foreclosure law," and it reasoned that "neither case [was] persuasive here." *Id.* at 6a.

As an alternative basis for its conclusion that the FDCPA did not apply to ReconTrust's actions, the court of appeals determined that, even if ReconTrust fell within the general definition of "debt collector," the actions at issue in this case satisfied the FDCPA's exclusion for activity "incidental to * * * a bona fide escrow arrangement." Pet. App. 11a (citing 15 U.S.C. 1692a(6)(F)). The court noted that ReconTrust, which held legal title to the property on behalf of both the lender and the borrower until the occurrence of a prescribed condition, "function[ed] as an escrow." *Ibid.* And because ReconTrust was the original trustee under the deed of trust, not an entity hired by the lender after default to collect the debt, any purported "collection" activity was "incidental to" the escrow arrangement. *Ibid.*

The court of appeals cited a "final consideration" supporting its conclusion that the FDCPA did not apply to ReconTrust's actions: namely, that holding California trustees liable in these circumstances would subject them to various obligations that "would frustrate their ability to comply with the California statutes governing non-judicial foreclosure." Pet. App. 11a. According to the court, that "would create sustained friction between the federal statute and the state scheme" in a "traditional area of state concern." *Id.* at 13a. "When one interpretation of an ambiguous federal statute would create a conflict with state foreclosure law and another interpretation would not," the court explained, "respect for our federal system counsels in favor of the latter." *Id.* at 14a.

Emphasizing the narrow nature of its holding, the court of appeals noted that entities that enforce security interests may well be "debt collectors" under the FDCPA when they "engage in activities that constitute debt collection." Pet. App. 7a. The court underscored, however, that it was holding "only that the enforcement of security

interests is not *always* debt collection." *Ibid.* (emphasis added). Because ReconTrust merely took "the actions required to enforce a security interest," it could not qualify as a "debt collector" on that basis. *Id.* at 8a & n.5.

b. Judge Korman dissented in relevant part. Pet. App. 17a-43a. He would have held that a trustee pursuing a non-judicial foreclosure proceeding is, by virtue of that action, a "debt collector" under the FDCPA. *Id.* at 17a. He charged that the majority had "applie[d] California law in a way that overrides the arrangements that Congress has made for the protection of debtors." *Id.* at 43a.

4. The court of appeals subsequently denied a petition for rehearing without recorded dissent. Pet. App. 62a-63a.

ARGUMENT

In her petition for certiorari, petitioner asserts that this case concerns a circuit conflict on a question of exceptional importance. Quite to the contrary, this case actually implicates a narrow question bound up in state law that no other court of appeals has directly addressed. Nor would this case be a suitable vehicle for reviewing the question that petitioner presents. The Court would not need to answer that question in order to resolve this case, because, even if ReconTrust qualified as a "debt collector" under the FDCPA, the activities at issue here fall within statutory exclusions from that definition. Moreover, because application of the exclusions turns on ReconTrust's unique role as the original trustee under the deed of trust, resolving the applicability of those exclusions would provide only limited guidance for other cases.

In the decision below, the court of appeals held only that the actions of a trustee under a California deed of trust do not *always* render the trustee a debt collector. That narrow holding—addressing a sliver of foreclosure-

related activities, specific to California, and touching an area subject to ample other regulations—lacks the broader significance that would warrant this Court's intervention. The petition for a writ of certiorari should therefore be denied.

A. The Decision Below Does Not Squarely Conflict With Any Decision Of Another Court Of Appeals Or A State Court Of Last Resort

Petitioner contends (Pet. 15-29) that the decision below conflicts with several decisions of other courts of appeals and state courts of last resort. In resolving the FDCPA issue in this case, however, the court of appeals necessarily relied heavily on California state law. No other court of appeals or state court of last resort facing a similar FDCPA issue has addressed the activities of an original trustee proceeding under a deed of trust pursuant to California law. Consequently, the decision below does not squarely conflict with any of the decisions petitioner cites. Nor is any disagreement in reasoning nearly as deep as petitioner suggests; rather, most of the decisions petitioner cites present different factual circumstances from those presented here. There is therefore no conflict that warrants this Court's review.

1. Petitioner asserts that this case would have come out differently but for "the happenstance that her suit arose in California." Pet. 17. That may be true, but it is no "happenstance"; the legal regime governing non-judicial foreclosure in California was central to the court of appeals' analysis in several respects.

First, unlike the vast majority of other States, California does not permit a deficiency judgment after a non-judicial foreclosure. See Cal. Civ. Proc. Code § 580d(a). That is because the purpose of a non-judicial foreclosure in California is to liquidate a security, not to collect money

from a debtor. See Pet. App. 4a-5a. Actions taken to effectuate a non-judicial foreclosure thus do not constitute "attempts to collect * * * debts" under the FDCPA. See *ibid.*; 15 U.S.C. 1692a(5), (6).

Petitioner repeatedly notes that, in some of the decisions in the asserted conflict, a deficiency judgment was not sought. See Pet. 16, 19 n.6, 20 & n.8. For present purposes, however, the critical point is that a deficiency judgment after a foreclosure was *available* under the applicable state law in each of the court of appeals decisions she cites. See Ga. Code § 44-14-161 (Eleventh Circuit); La. Code Civ. Proc. art. 2771 (Fifth Circuit); Md. Rule 14-216 (Fourth Circuit); Mich. Comp. Laws § 600.3280 (Sixth Circuit); Miss. Code § 11-5-111 (Fifth Circuit); Ohio Rev. Code § 2329.08 (Sixth Circuit); 42 Pa. Cons. Stat. § 8103(a) (Third Circuit); see also Colo. Rev. Stat. §§ 38-38-106(6), 38-38-302(4)(c) (Colorado Supreme Court). As the Sixth Circuit explained in addressing an Ohio foreclosure, "the *potential* for deficiency judgments demonstrate[s] that the purpose of foreclosure is to obtain payment on the underlying home loan." *Glazer* v. *Chase Home Finance LLC*, 704 F.3d 453, 461 (2013) (emphasis added). The non-judicial foreclosure scheme in California, which does not provide for deficiency judgments and instead "extinguishes" a debtor's personal liability upon foreclosure, is different in this critical respect. See *Yvanova*, 365 P.3d at 850.

Second, under California law, a trustee initiating a non-judicial foreclosure is required to send the notices that ReconTrust sent here and to inform the debtor about the possibility of bringing his account up-to-date by paying the lender. See Cal. Civ. Code §§ 2924(a)(1), 2924(a)(3), 2924b(b)(1), 2924b(b)(2). Accordingly, the only way for a trustee under a California deed of trust to enforce a

security interest is to engage in actions that, on petitioner's theory, would automatically render the trustee a debt collector.

As a result, petitioner's approach would render meaningless the FDCPA's statutory distinction between "the enforcement of [a] security interest[]," on the one hand, and "the collection of a[] debt[]," on the other. 15 U.S.C. 1692a(6). That consequence of holding the trustee here liable—which was important to the court of appeals in the decision below, see Pet. App. 6a-7a—may not arise in cases involving the foreclosure laws of other States. See, *e.g.*, *Reese* v. *Ellis, Painter, Ratterree & Adams, LLP*, 678 F.3d 1211, 1217 (11th Cir. 2012) (considering a situation in which state law "does not require a demand for payment of the debt" but the defendant "included one anyway").

Third, deeming trustees under California deeds of trust to be "debt collectors" under the relevant definition in the FDCPA would create an array of conflicts with California's state-law requirements governing the non-judicial foreclosure process. See Pet. App. 11a-15a. Indeed, doing so could "literally prevent California's foreclosure system from functioning." *Id.* at 12a (alteration, internal quotation marks, and citation omitted). In part because of those conflicts, the court of appeals read the FDCPA not to encompass trustees under California deeds of trust within its general definition of "debt collector," even if the result would potentially be different for other types of trustees. See *id.* at 15a (citing *Sheriff* v. *Gillie*, 136 S. Ct. 1594, 1601 (2016)).

The decisions petitioner cites in support of her asserted circuit conflict had no occasion to grapple with the particular aspects of California's non-judicial foreclosure scheme and the array of conflicts with California law that the application of the FDCPA to the activities at issue

here would engender. Confirming the critical role California law plays in the analysis, the vast majority of courts that have addressed California's non-judicial foreclosure scheme have held that a trustee under a California deed of trust does not necessarily engage in debt collection so as to qualify as a "debt collector" under the FDCPA's general definition. See, *e.g.*, *Fonteno* v. *Wells Fargo Bank, N.A.*, 176 Cal. Rptr. 3d 676, 690-692 (Cal. Ct. App. 2014); *Pfeifer* v. *Countrywide Home Loans, Inc.*, 150 Cal. Rptr. 3d 673, 682-684 (Cal. Ct. App. 2012); *Natividad* v. *Wells Fargo Bank, N.A.*, Civ. No. 12-3646, 2013 WL 2299601, at *5-*9 (N.D. Cal. May 24, 2013); *Dubose* v. *Suntrust Mortgage, Inc.*, Civ. No. 11-3264, 2012 WL 1376983, at *2 (N.D. Cal. Apr. 19, 2012); *Cromwell* v. *Deutsche Bank National Trust Co.*, Civ. No. 11-2693, 2012 WL 244928, at *2-*3 (N.D. Cal. Jan. 25, 2012); *Geist* v. *OneWest Bank*, Civ. No. 10-1879, 2010 WL 4117504, at *2-*3 (N.D. Cal. Oct. 19, 2010); but see, *e.g.*, *Katz* v. *Aurora Loan Services, LLC*, Civ. No. 11-1806, 2012 WL 78399, at *3-*4 (S.D. Cal. Jan. 10, 2012). On the narrow question the court of appeals actually resolved, then, there is no conflict warranting this Court's review.

2. In any event, petitioner's assertion of "deep" disagreement on the question presented, see Pet. 2, 15, does not withstand scrutiny. To be sure, the reasoning of the decision below differs in some respects from the reasoning of some of the decisions petitioner cites. But most of those decisions involved sharply different factual circumstances.

Consider, for example, the Third Circuit's decision in *Piper* v. *Portnoff Law Associates, Ltd.*, 396 F.3d 227 (2005). See Pet. 20-21. That case involved a defendant law firm retained by a municipality to collect payment for overdue water and sewer obligations. See 396 F.3d at 229. The law firm sent letters "urging" the debtors to make

payment directly to it and subsequently threatening to file a lien against the debtors' property. See *id.* at 229-230. The law firm proceeded to file the lien and continued to "demand[] payment" in letters and phone calls, using the lien as leverage. *Id.* at 230. Those communications sought "personal payment of money," and the law firm readily admitted that it was "not looking to liquidate the real property" but rather to get "the individuals to pay the money." *Id.* at 233 (internal quotation marks and citation omitted).

Given those facts, it is unsurprising that the Third Circuit held that the law firm's activity constituted debt collection, reasoning that enforcing a security interest did not "immun[ize]" the defendant law firm where its "activities fit the statutory definition of a 'debt collector.'" *Piper*, 396 F.3d at 236. Here, by contrast, ReconTrust's action in sending the notices required by California law to carry out its circumscribed task of effectuating a foreclosure sale was not an "attempt[] to collect money from [petitioner]" and thus did not qualify under the FDCPA's general definition of "debt collector." Pet. App. 4a-5a.

The other Third Circuit case that petitioner cites, *Kaymark* v. *Bank of America, N.A.*, 783 F.3d 168 (2015), is even further afield. See Pet. 20. That case involved a law firm's effort to collect fees for legal services not yet performed on behalf of a lender in a judicial foreclosure action—patently an effort to obtain money from the debtor, rather than simply to liquidate the underlying property. See 783 F.3d at 172-173. The Third Circuit declined to "immuniz[e]" the action simply because it came in the context of a foreclosure complaint, see *id.* at 179 (internal quotation marks and citation omitted)—a result entirely consistent with the court of appeals' reasoning in this case that "the enforcement of securities interests is not always debt collection," Pet. App. 7a.

Petitioner's reliance on *Wilson* v. *Draper & Goldberg, P.L.L.C.*, 443 F.3d 373 (4th Cir. 2006), is similarly flawed. See Pet. 17-18. There, the defendants—once again, a law firm and one of its lawyers hired by the lender to foreclose on the debtor's property—sent a letter specifically requesting that money from the debtor be sent directly to them. See 443 F.3d at 374, 376-377. Similarly, in *McCray* v. *Federal Home Loan Mortgage Corporation*, 839 F.3d 354 (2016), the Fourth Circuit observed that the "whole reason" the law firm in that case was retained by the creditor was "to collect" on the defaulted amount, and the record illustrated that the defendants (the law firm and its lawyers) "were seeking repayment" of the debt. *Id.* at 360-361.

The Sixth Circuit's decision in *Glazer* also arose in a meaningfully different context. See Pet. 18-19. The defendants in that case, a law firm and its lawyers hired by the lender after the loan was in default, filed a judicial foreclosure action. See 704 F.3d at 456. Although the Sixth Circuit used broad language that purported to address all foreclosure actions, see *id.* at 462, it relied on generalizations about foreclosure actions that do not hold true for California's non-judicial foreclosure process. In particular, as discussed above, the Sixth Circuit cited the potential for deficiency judgments as well as the existence of redemption rights (*i.e.*, the ability of a debtor to redeem a mortgage after foreclosure), see *id.* at 461—neither of which is a feature of the California non-judicial foreclosure regime, see *Alliance Mortgage Co.* v. *Rothwell*, 900 P.2d 601, 607 (Cal. 1995) (noting that a debtor has "no postsale right of redemption" and "the creditor may not

seek a deficiency judgment"). In light of the factual differences among all of the foregoing cases, petitioner's assertion of a deep conflict does not hold water.[2]

3. Indeed, with the sole exception of the Alaska Supreme Court's split decision in *Alaska Trustee, LLC* v. *Ambridge*, 372 P.3d 207 (2016), each of the decisions petitioner cites as part of the supposed conflict involved an entirely different entity—a law firm or lawyer working on behalf of a creditor client—not a neutral trustee appointed on behalf of both the debtor and the creditor and carrying out a specific function heavily regulated by state law. See *McCray*, 839 F.3d at 357; *Kaymark*, 783 F.3d at 172; *Mellentine* v. *Ameriquest Mortgage Co.*, 515 Fed. Appx. 419, 421 (6th Cir. 2013); *Glazer*, 704 F.3d at 456; *Reese*, 678 F.3d at 1214; *Brown* v. *Morris*, 243 Fed. Appx. 31, 33 (5th Cir. 2007) (per curiam); *Kaltenbach* v. *Richards*, 464 F.3d 524, 526 (5th Cir. 2006); *Wilson*, 443 F.3d at 374; *Piper*, 396 F.3d at 229; *Shapiro & Meinhold*, 823 P.2d at 121.

What is more, this case stands alone even from the Alaska Supreme Court's decision in *Alaska Trustee*, because it involves an *original* trustee on a deed of trust—that is, an entity that obtained legal title before any default occurred and whose responsibilities extend beyond the foreclosure process. See 372 P.3d at 209. ReconTrust's purpose in sending the notices at issue thus dif-

---

[2] Petitioner's reliance on the Colorado Supreme Court's decision in *Shapiro & Meinhold* v. *Zartman*, 823 P.2d 120 (1992), suffers from the same shortcomings. See Pet. 23. In that case, law firms and a lawyer representing creditors initiated judicial foreclosure proceedings on the creditors' behalf. See 823 P.2d at 121. The court held that the law firms and lawyer were not "exempt" from the FDCPA merely because they performed purely legal activities involving foreclosures. See *id.* at 124-125.

fered from that of an entity hired after default, and, as explained below, that distinction is critical to the operation of the FDCPA exclusions that apply here. See pp. 17-19. In short, petitioner has not identified any case on all fours with this one, and there is therefore no square conflict warranting the Court's intervention.

B. The Petition Does Not Present An Important Question Warranting The Court's Review In This Case

Petitioner contends (Pet. 29-31) that the question presented is exceptionally important and that this case is an optimal vehicle in which to resolve it. Far from it. The Court need not even reach the question presented in this case because it can affirm the judgment on two different alternative bases independent of the question presented. In light of the court of appeals' narrow holding in the decision below, this case also lacks sufficient importance to warrant the Court's attention.

1. This case would be an exceedingly poor vehicle in which to consider the question presented for the simple reason that resolution of that question is unnecessary to affirm the decision below. Even if ReconTrust were to fall within the FDCPA's general definition of "debt collector," its activities would be excluded from FDCPA liability. Two FDCPA exclusions apply here: the exclusion for activity that "is incidental to a bona fide fiduciary obligation or a bona fide escrow arrangement," and the exclusion for activity that "concerns a debt which was not in default at the time it was obtained by [the debt collector]." 15 U.S.C. 1692a(6)(F)(i), (iii).

a. As the court of appeals expressly held, ReconTrust's activities at issue in this case were incidental to a bona fide escrow arrangement. See Pet. App. 11a. Application of the escrow exclusion in Section 1692a(6)(F)(i) is straightforward. ReconTrust's role as a trustee under a

California deed of trust was a classic escrow arrangement, because ReconTrust held legal title to the property on behalf of both parties until the occurrence of a specified condition. See *ibid.*; Cal. Fin. Code § 17003. And sending notices to effect a foreclosure sale for the benefit of a lender was "incidental"—that is, not central—to ReconTrust's role as the parties' agent. See Pet. App. 11a.

Indeed, petitioner effectively concedes as much by invoking the Federal Trade Commission's guidance on this point, which provides that a "trust department[]" that is not "named as a debtor's trustee solely for the purpose of conducting a foreclosure sale" qualifies for the escrow exclusion. Pet. 28 (citing *Federal Trade Commission Statements of General Policy or Interpretation Staff Commentary on the Fair Debt Collection Practices Act*, 53 Fed. Reg. 50,097, 50,103 (Dec. 13, 1988) (*FTC Commentary*)). That is precisely the case here: ReconTrust was named the original trustee on the deed of trust in 2007, before any default occurred. See C.A. E.R. 385. If petitioner had fulfilled her obligations, ReconTrust's role would have been to convey title to her, extinguishing the security interest. See *id.* at 397; Cal. Civ. Code § 2941. As the court of appeals, the Federal Trade Commission, and (apparently) petitioner herself recognize, a trust department's actions in enforcing the security interest in these circumstances are plainly incidental to its overall role as trustee.[3]

---

[3] In challenging the application of the escrow exclusion, petitioner asserts that the Fourth Circuit has "rejected an identical argument." Pet. 27 (citing *Wilson*, 443 F.3d at 377). But the Fourth Circuit held that the defendants' actions were "central" to their role as trustees precisely because the defendants—a law firm and lawyer retained by the creditor to foreclose on the property—assumed the role of trustees "solely for the purpose of conducting a foreclosure sale." *Wilson*, 443 F.3d at 374, 377 (quoting *FTC Commentary*, 53 Fed. Reg. at 50,103).

b. In addition, the non-defaulted-debt exclusion in Section 1692a(6)(F)(iii) applies here, because this case (alone among the cases in petitioner's asserted split) involves an entity that served as original trustee on the deed of trust: that is, an entity that obtained legal title to the property before any default occurred. Section 1692a (6)(F)(iii) excludes activity by debt collectors that "concerns a debt which was not in default at the time it was obtained by such person." 15 U.S.C. 1692a(6)(F)(iii). As this Court made clear just last Term, the term "obtain" in this provision is a broad one that includes "tak[ing] possession * * * without taking full ownership." *Henson*, 137 S. Ct. at 1723-1724. For that reason, too, ReconTrust, which obtained any debt before default, cannot be held liable for the activities at issue under the FDCPA. And in light of the availability of alternative grounds for affirmance, the Court could readily affirm the judgment below without reaching the question presented if it were to grant certiorari in this case.[4]

2. Finally, petitioner asserts that the decision below has a wide-ranging impact that "is difficult to overstate." Pet. 3. But the court of appeals narrowly circumscribed its decision, holding "only that the enforcement of security

[4] Injecting further complexity into this case as a vehicle for resolving the question presented, petitioner seeks to invoke allegations in a non-operative version of the complaint that she filed after her FDCPA claim was dismissed without leave to amend. See Pet. 7, 13. The court of appeals never considered the allegations in the amended complaint, resolving the case on the premise that ReconTrust did nothing beyond "what was required by California law to enforce the deed of trust." Pet. App. 8a n.5. Moreover, petitioner's new allegations were added in support of an unrelated claim, and there is no indication that they were directed at ReconTrust's conduct rather than that of another respondent. Petitioner's reluctance to rely on the allegations in the operative version of the complaint is telling.

interests is not *always* debt collection." Pet. App. 7a (emphasis added); cf. *Mahmoud* v. *De Moss Owners Association*, 865 F.3d 322, 336 & n.2 (5th Cir. 2017) (Higginson, J., dissenting in part) (citing the decision below in identifying a consensus for the proposition that foreclosure proceedings can give rise to debt collection). The court of appeals expressly acknowledged that entities enforcing security interests can become debt collectors by engaging in additional activities. See Pet. App. 7a. And the court of appeals resolved the question presented only for California trustees doing the minimum required under the California non-judicial foreclosure scheme. See *id.* at 4a, 8a & n.5, 10a & n.8, 11a-15a. By its terms, therefore, the decision below reaches only a subset of foreclosure-related activity even in California.

Debtors facing foreclosure, moreover, are protected by a panoply of other provisions of California and federal law. California extensively regulates the foreclosure process. See, *e.g.*, Cal. Civ. Code §§ 2924(a)(1), 2924(a)(3), 2924b(b)(1), 2924b(b)(2); Cal. Civ. Proc. Code § 580d(a); see *Valbuena* v. *Ocwen Loan Servicing, LLC*, 188 Cal. Rptr. 3d 668, 671-672 (Cal. Ct. App. 2015) (explaining the protections available to debtors under California's Homeowner Bill of Rights, including damages and injunctive relief). Indeed, the California legislature has codified its view that a trustee under the deed of trust is not acting as a debt collector by expressly excluding trustees from the state-law equivalent of the FDCPA—a statute that incorporates virtually all of the FDCPA's prohibitions and remedies. See Cal. Civ. Code §§ 1788.17, 2924(b). That choice—by a State that is hardly a laggard when it comes to consumer protection—reflects the judgment that the protections provided by the State's foreclosure regime are already sufficient.

Federal law also offers alternative avenues for relief in the foreclosure context, as this case illustrates. The court of appeals reinstated petitioner's claim under the Truth in Lending Act (TILA), see Pet. App. 16a, which, if successful, would entitle petitioner to a similar universe of remedies. Compare 15 U.S.C. 1640(a) (TILA), with 15 U.S.C. 1692k (FDCPA). The decision below is thus of potentially limited importance even to this very petitioner.

Indeed, by virtue of the reinstatement of petitioner's TILA claim, this case is now in an interlocutory posture. That is itself a "sufficient ground for the denial of the [writ]." *Hamilton-Brown Shoe Co.* v. *Wolf Brothers*, 240 U.S. 251, 258 (1916). Petitioner could prevail on her TILA claim on remand, getting effectively the same relief she is seeking under the FDCPA. And if respondents prevail, petitioner will have another opportunity to raise the question presented at that time, along with any other questions that might arise with respect to her TILA claim. See *Virginia Military Institute* v. *United States*, 508 U.S. 946, 946 (1993) (Scalia, J., respecting the denial of certiorari).

* * * * *

In sum, this case presents no occasion to resolve the question petitioner raises, because the straightest path to affirmance sidesteps that question entirely. Nor is this case otherwise suitable for further review. The court of appeals limited the reach of its decision to California's non-judicial foreclosure scheme and to ReconTrust's role as an original trustee under a deed of trust. Petitioner has not identified a square conflict on the question presented, nor has she established that the court of appeals' narrow holding is of sufficient importance to trigger further review by this Court. The petition for certiorari should therefore be denied.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DAVID C. POWELL
CAROLEE A. HOOVER
ANTHONY LE
MCGUIREWOODS LLP
505 Sansome Street,
Suite 700
San Francisco, CA 94111

KANNON K. SHANMUGAM
ALLISON JONES RUSHING
MASHA G. HANSFORD
WILLIAMS & CONNOLLY LLP
725 Twelfth Street, N.W.
Washington, DC 20005
(202) 434-5000
kshanmugam@wc.com

OCTOBER 2017