No. 24-1261

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

In re: JOHN KOONTZ,
Debtor.

JOHN KOONTZ,
Appellant,

– v. –

SN SERVICING CORPORATION,
Appellee.

On Appeal from the United States District Court
for the Northern District of West Virginia
(No. 5:23-cv-00363-JPG)

BRIEF OF *AMICI CURIAE* THE NATIONAL ASSOCIATION OF CONSUMER BANKRUPTCY ATTORNEYS, NATIONAL CONSUMER BANKRUPTCY RIGHTS CENTER AND THE NATIONAL CONSUMER LAW CENTER IN SUPPORT OF APPELLANT

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RULE 26.1 CORPORATE DISCLOSURE STATEMENT

Pursuant to 4th Cir. R. 26.1 Amici state as follows.

The National Association of Consumer Bankruptcy Attorneys is a nonprofit association. It has no parent corporation, and no publicly held company owns a 10% or more interest in NACBA.

The National Consumer Bankruptcy Rights Center is a nonprofit association. It has no parent corporation, and no publicly held company owns a 10% or more interest in NCBRC.

The National Consumer Law Center is a nonprofit association. It has no parent corporation, and no publicly held company owns a 10% or more interest in NCLC.

This case arises out of a bankruptcy proceeding.

There is no creditors' committee.

RULE 29(a)(2) STATEMENT

Counsel for *Amici* has contemporaneously filed a motion seeking leave of this Court to file this brief in support of the Appellant.

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IDENTITY AND INTEREST OF *AMICI CURIAE*[1]

NACBA is a nonprofit organization of approximately 2,000 consumer bankruptcy attorneys nationwide. NACBA advocates nationally on issues that cannot adequately be addressed by individual member attorneys. It is the only national association of attorneys organized for the specific purpose of protecting the rights of consumer bankruptcy debtors.

NCBRC is a nonprofit organization dedicated to preserving the bankruptcy rights of consumer debtors and protecting the bankruptcy system's integrity. The Bankruptcy Code grants financially distressed debtors rights that are critical to the bankruptcy system's operation. Yet consumer debtors with limited financial resources and minimal exposure to that system often are ill-equipped to protect their rights in the appellate process.

The National Consumer Law Center is a public interest, non-profit legal organization that is a national research and advocacy organization

[1] Pursuant to Fed. R. App. P. 29(c)(5), no counsel for any party authored this brief in whole or in part, and no person or entity other than NCLC, NACBA and NCBRC, its members, and their counsel made any monetary contribution toward the preparation or submission of this brief.

focusing specifically on the legal needs of low income, financially distressed, and elderly consumers.

NACBA and NCBRC regularly file[2] *amicus curiae* briefs in systemically important cases to ensure that courts have a full understanding of the applicable bankruptcy law, the case, and its implications for consumer debtors. See *Hurlburt v. Black*, No. 17-2449, 2019 U.S. App. LEXIS 15603 (4th Cir. May 24, 2019), *Richardson v. Priderock Capital Partners, LLC (In re Richardson)*, 724 F. App'x 238 (4th Cir. 2018), and *Lynch v. Jackson*, 853 F.3d 116 (4th Cir. 2017).

Likewise, NCLC regularly submits amicus briefs to this court. See *Guthrie v. PHH Mortg. Corp.*, 79 F.4th 328 (4th Cir. 2023), *Henderson v. Source For Pub. Data, L.P.*, 53 F.4th 110 (4th Cir. 2022), and *Henson v. Santander Consumer USA, Inc.*, 817 F.3d 131 (4th Cir. 2016).

NACBA and its membership, NCBRC, and NCLC have a vital interest in the outcome of this case. The lower court's error has significant consequences for consumer bankruptcy debtors, who are

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[2] When referencing *amicus curiae* briefs that influence U.S. Supreme Court opinions in bankruptcy cases, it has been noted that, "The contribution of the NACBA briefs is not surprising. Aside from the Solicitor General, the NACBA is the most common single amicus to appear in these cases…" See, Ronald J. Mann, Bankruptcy and the U.S. Supreme Court, p. 213, n. 6 (2017).

individuals trying to recover from financial distress. Similar to many who have sought bankruptcy relief, Mr. Koontz aimed to maintain homeownership by staying current on his post-bankruptcy mortgage payments. Such efforts should be supported, as they advance the fresh start objective of bankruptcy laws.

Respectfully, NACBA, NCBRC and NCLC submit that their membership has an interest in the issue at the heart of this case—whether debtors emerging from bankruptcy are afforded crucial statutory protections against debt collection abuses that are available to consumers who have not filed for bankruptcy.

SUMMARY OF ARGUMENT

If adopted by the Court of Appeals, the lower court's mistaken view of the concept of "debt" as including only a personal obligation to pay and excluding non-recourse debts will inject extensive confusion into the application of an array of consumer protections statutes. This appeal brings the opportunity to correct a lower court's misinterpretation of fundamental bankruptcy principles, an error that has led other West Virginia district courts to make similar mistakes.

The order of discharge entered in a bankruptcy case prohibits acts to collect a discharged debt "as a personal liability of the debtor." 11 U.S.C. § 542(a)(2). The Supreme Court has made clear that this injunction does not apply to the *in rem*

"right to payment" under a mortgage. *Johnson v. Home State Bank*, 501 U.S. 78, 84 (1991). Despite a bankruptcy discharge order, a mortgage debt remains an "enforceable obligation" subject to collection through a forced sale of the property. *Id.* A 2005 amendment to the Bankruptcy Code further clarified that the discharge order does not bar a mortgage lender's routine collection activities related to a debtor's ongoing payment obligations under a home mortgage. 11 U.S.C. § 524(j).

A deed of trust and accompanying promissory note define an obligation to pay. A bankruptcy discharge does not extinguish this contractual obligation. It limits certain remedies for enforcement. After a discharge, the deed of trust and note still embody an enforceable obligation to pay. Before and after a discharge, payment of this obligation is "voluntary" in the sense that the consequence of a debtor's nonpayment will be loss of the collateral property. The discharge order does not change this fundamental dynamic.

The Supreme Court and the Consumer Financial Protection Bureau ("CFPB") have acknowledged that a borrower's obligation to pay under a mortgage or deed of trust, even absent recourse to personal liability of the borrower, is a debt for purposes of the Fair Debt Collection Practices Act. Likewise, non-recourse debt is treated as a debt obligation for purposes of the Truth-in-Lending Act, the Fair Credit Reporting Act, and state consumer protection statutes. Inserting a "personal liability" qualifier to limit the types of

debts covered by a consumer protection statute, as the court below did, is a marked departure from widely accepted judicial interpretation of similar statutory provisions enacted at the federal and state levels.

The implications of the lower court's error are severe for consumer bankruptcy debtors. These are individuals recovering from financial distress. Like many individuals who obtained bankruptcy relief, Mr. Koontz was seeking to retain homeownership by keeping current on his post-bankruptcy home loan payments. These efforts should be encouraged, as they further the fresh start goal of the bankruptcy laws. The lower court held that the obligation of a debtor to continue paying on a home mortgage is no longer a "debt" after a bankruptcy. The ruling effectively strips discharged debtors of important statutory protections against debt collection abuses, protections that are available to consumers who have not filed bankruptcy cases. This error of law should be reversed.

ARGUMENT

I. The discharge order under § 524(a)(2) of the Bankruptcy Code enjoins collection of a debt as a personal liability of the debtor, but does not extinguish the debt.

The lower court dismissed Mr. Koontz's claims under the Fair Debt Collection Practices Act (FDCPA) and the West Virginia Consumer Credit Protection Act (WVCCPA) because, according to the court, he failed to allege an essential element of a claim under both statutes. A claim under the FDCPA must

pertain to a "debt," defined as "an obligation or alleged obligation of a consumer to pay money" 15 U.S.C. § 1692a(5). To bring a claim under the WVCCPA the plaintiff must be a "consumer," which the state law defines as "any natural person obligated or allegedly obligated to pay any debt." W. Va. Code § 46A-2-122(a). The court appropriately noted that an unfair debt collection claim under either statute must involve an *obligation* to pay.

In the lower court's view, Mr. Koontz was under no obligation to pay on his mortgage loan. The court opined that after a bankruptcy discharge "[t]here is no obligation – either actual or alleged – with respect to plaintiff and the loan." *Koontz v. SN Servicing Corp.*, Civil Action No. 5:23-CV-363, 2024 U.S. Dist. LEXIS 58962, at *12 (N.D.W. Va. Feb. 26, 2024). The absence of any obligation to pay on the mortgage loan was due to "the uncontroverted fact that the plaintiff's personal obligation on the loan was discharged by way of his Chapter 7 bankruptcy proceeding." *Id.* For the principle that a bankruptcy discharge extinguishes all obligations to pay a mortgage loan the court cited only one authority, *Johnson v. Home Loan Bank*, 501 U.S. 78, 83 (1991). *Id.*

The court could not have relied on a more inappropriate authority. *Johnson* holds precisely the opposite of what the court read it to say. The *Johnson* Court explained the effect of a bankruptcy discharge under 11 U.S.C. § 524(a)(2) as follows:

> Even after the debtor's personal obligations have been extinguished, the mortgage holder still retains a "right to payment" in the form of its right to the proceeds from the sale of the debtor's property. Alternatively, the creditor's surviving right to foreclose on the mortgage can be viewed as a "right to an equitable remedy" for the debtor's default on the underlying obligation. Either way, there can be no doubt that the surviving mortgage interest corresponds to an "enforceable obligation" of the debtor.

501 U.S. at 84 (quoting *Pennsylvania Dept. of Public Welfare, v. Davenport*, 495 U.S. 552, 559 (1990)). The *Johnson* Court could not have been clearer: after a bankruptcy discharge, the creditor under a deed of trust or mortgage has an "enforceable right" and a "right to payment" of the underlying debt.

The Bankruptcy Code's definition of the term "debt" indicates that it encompasses a wide range of obligations, not just those that are enforceable as a personal liability. The Code defines a "debt" as a "liability on a claim." 11 U.S.C. § 101(12). Congress adopted "the broadest available definition of 'claim'" for the Code. *Johnson v. Home Loan Bank, supra,* 501 U.S. at 83. The Code defines a "claim" as

> (A) right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured; or
> "(B) right to an equitable remedy for breach of performance if such breach gives rise to a right to payment, whether or not such right to an equitable remedy is reduced to judgment, fixed, contingent,

matured, unmatured, disputed, undisputed, secured, or unsecured.

11 U.S.C. § 101(5). Notably, this "right to payment" can be "secured, or unsecured." *Id.* A bankruptcy claim includes "an equitable remedy for breach of performance." *Id.* The rights and remedies under a mortgage are equitable in nature. *Home Bldg. & Loan Ass'n v. Blaisdell, 29*0 U.S. 398, 446-47 (1934). The same equitable principles apply to a deed of trust enforceable through non-judicial foreclosure remedies. *Wells Fargo Home Mortg., Inc. v. Neal*, 922 538, 552 (Md. 2008). Thus, the right of a creditor to pursue equitable remedies for breach of a mortgage or deed of trust is included in a bankruptcy claim, but the enforcement of those equitable remedies is excepted from the prohibitions of the discharge order. *See USAA Fed. Sav. Bank*, 532 P.3d 1024, 1034 (Wash. 2023) (*en banc*) (describing how the equitable rights and remedies under a deed of trust survive a bankruptcy discharge).

II. The FDCPA applies to the indirect collection of a debt through enforcement of a security interest.

According to the lower court, because Mr. Koontz's obligation under the deed of trust could be collected only from the proceeds of a foreclosure sale of the property, it did not qualify as "debt" subject to the FDCPA. The debt collector made this same argument in *Obduskey v. McCarthy & Holthus L.L.P., 58*6 U.S. 466 (2019). Brief of Respondent McCarthy & Holthus, LLP, 2018 WL 5840498,

at *45 (U.S. 2018). The Tenth Circuit's decision in *Obduskey* adopted the debt collector's argument. *Obduskey v. Wells Fargo*, 879 F.3d 1216, 1221 (10th Cir. 2018). The Ninth Circuit had articulated a similar position in *Ho v. ReconTrust Co*., 858 F.3d 568, 572 (9th Cir. 2017), *cert denied* 138 S. Ct. 504 (2017) ("Because the money collected from a [foreclosure] trustee's sale is not money owed by a consumer, it isn't 'debt' as defined by the FDCPA.").

The Supreme Court in *Obduskey* affirmed the Tenth Circuit on the narrow issue of whether the limited purpose "debt collector" definition under 15 U.S.C. §1692a(6) applied to the debt collector and the collection activities at issue. However, in doing so the Court examined and rejected the view of the Ninth and Tenth circuits on the nature of mortgages in debt collection. The Court emphasized that even a nonjudicial foreclosure seeking only *in rem* relief was debt collection subject to the FDCPA. According to the Court, "even if nonjudicial foreclosure were not a *direct* attempt to collect a debt, because it aims to collect on a consumer's obligation by way of enforcing a security interest, it would be an *indirect* attempt to collect a debt" (emphasis in original). *Obduskey*, 586 U.S. at 475.

It is undisputed that the FDCPA's limited purpose "debt collector" definition does not apply to the defendants in the instant case. They are "debt collectors" under the FDCPA's broad primary definition of that term. *Koontz*,

2024 U.S. Dist. LEXIS 58962, at *17 (referencing 15 U.S.C. § 1692a(6)).[3] In *Obduskey* the Supreme Court noted that under the FDCPA's "capacious" primary definition of "debt collector" the enforcement of a security interest through nonjudicial foreclosure (even where no deficiency is sought) is in connection with collection of a debt: "foreclosure is a means of collecting a debt." *Obduskey*, 586 U.S. at 474-75. Later decisions from courts within the Ninth Circuit have recognized that *Obduskey* rejected the line of decisions that excluded *in rem* enforcement of deeds of trust from coverage as debt collection under the FDCPA. *Best v. Ocwen Loan Servicing, L.L.C.*, 279 Cal. Rptr. 3d 69, 75 (Cal. Ct. App. 2021) (describing as "absurd" former position of federal courts within Ninth Circuit that the object of foreclosure is not to obtain payment); *Benko v. Quality Loan Serv. Corp.*, 454 P.3d 1263, 1267 n.4 (Nev. 2019) (noting that, in *Obduskey*, the Supreme Court rejected the body of Ninth Circuit law which held that a

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[3] The Fourth Circuit's earlier rulings on the applicability of the FDCPA to foreclosures are overruled by *Obduskey* to the extent that those decisions addressed full FDCPA coverage for a debt collector subject to the FDCPA's limited purpose debt collector definition. 15 U.S.C. § 1692a(6)). *McCray v. Fed. Home Loan Mortg. Corp.*, 839 F.3d 354 (4th Cir. 2016); *Wilson v. Draper & Goldberg, P.L.L.C., 44*3 F.3d 373 (4th Cir. 2006). Because there is no dispute as to the applicability of the FDCPA's primary definition of "debt collector" to the defendants in the instant case, *Obduskey's* partial abrogation of the *McCray* and *Wilson* decisions does not impact this appeal. Aside from clarifying a narrow limitation on the FDCPA's definition of "debt collector," *Obduskey* does not limit the FDCPA's broad applicability to collection of mortgage debt. *Best v. Fed. National Mortg. Assn.,* 450 F. Supp. 3d 606, 628-29 (D. Md. 2020).

business enforcing a security interest through nonjudicial foreclosure was not collecting a debt).

The *Obduskey* Court's view that secured mortgage debt is subject to the FDCPA was recently reinforced by the Consumer Financial Protection Bureau ("CFPB"). The CFPB has authority to interpret and enforce the FDCPA. In a recent Advisory Opinion the CFPB acknowledged that enforcement of a mortgage involves the collection of a debt subject to the FDCPA. CFPB, Fair Debt Collection Practices Act (Regulation F); Time-Barred Debt, 88 Fed. Reg. 26475, 26476 (May 1, 2023). The Bureau's Opinion addressed the practices of buyers of "zombie" second mortgagees who seek to collect and foreclose when enforcement of the underlying debts is time-barred. In noting that these collection practices violate the FDCPA, the Bureau observed that a mortgage debt "falls within the plain language" of the FDCPA's definition of 'debt.' " *Id.,* referencing 15 U.S.C. § 1692a(6); 12 C.F.R. § 1006.2(i).

In the instant case both named defendants are debt collectors under the FDCPA's primary debt collector definition.[4] They are entities that regularly collect consumer debts for others or have debt collection as their primary purpose. *Koontz*, 2024 U.S. Dist. LEXIS 58962, at *17 referencing 15 U.S.C. § 1692a(6). The

[4] It is acknowledged that only defendant SN Servicing remains a party to this appeal.

FDCPA violations alleged in the complaint do not pertain to steps necessary to carry out a nonjudicial foreclosure under state law. *Obduskey* does not preclude FDCPA claims arising from collection on mortgage debt, even in jurisdictions where non-judicial foreclosure is the primary means of foreclosure. [5]

Finally, it should be kept in mind that the dispute in *Obduskey* arose solely from the conflicting interpretations of the FDCPA's complex definition of "debt collector." The WVCCPA does not define "debt collector." The FDCPA's limited purpose debt collector definition does not impact the applicability of the WVCCPA in this appeal.

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[5] *See, e.g.,* R*eppy v. Cenlar F.S.B., Inc., CASE NO. 5:23-CV-5227, No. ?DOCKET?, No. ?DOCKET?, No. ?DOCKET?,* No. ?DOCKET?, 2024 WL 947473, at *3 (W.D. Ark. Mar. 5, 2024) (rejecting Obduskey defense where mortgage servicer's letter was not a communication that Arkansas nonjudicial foreclosure law required to be sent to debtors); *Best v. Federal Nat'l Mortg. Ass'n,* 450 F. Supp. 3d 606, 628-29 (D. Md. 2020) (FDCPA claims based on communications that misrepresented non-judicial foreclosure procedures not precluded by *Obduskey*); *Cooke v. Carrington Mortg. Servs*., 2019 WL 3241128, at *2 (D. Md. July 17, 2019) (*Obduskey's* limitation inapplicable where law firm not retained solely to execute a nonjudicial foreclosure and the alleged FDCPA violations involved conduct beyond standard procedures in a nonjudicial foreclosure); *Gagnon v. Hal P. Gazaway & Assoc*., 2019 WL 4539926, at *2 (D. Alaska Sept. 19, 2019 ("the requirement of state law was central to [*Obduskey's*] holding that the letter at issue there did not subject the law firm to the full range of the FDCPA"); *Eastman v. NPL Capital, L.L.C.*, 2019 WL 1596142, at *3 (D. Colo. Apr. 15, 2019) ("I am doubtful that repeated phone calls and communications with a homeowner's parents are required to pursue a nonjudicial foreclosure under Colorado state law").

III. A limitation on one set of remedies for enforcement of a debt obligation does not extinguish the debt.

A legal bar to one remedy for enforcement of a debt obligation does not eliminate the debt. The Supreme Court recognized this principle in a case addressing debt collection claims under the FDCPA. *Midland Funding, LLC v. Johnson,* 581 U.S. 224 (2017). The consumer in *Midland Funding* asserted that a debt collector had engaged in an unfair and deceptive collection practice by filing a poof of claim in her bankruptcy case when the statute of limitations to sue on the underlying debt had expired.

The *Midland Funding* Court disagreed, holding that the debt collector had not violated any provision of the FDCPA. 581 U.S., at 235. The debt collector had done nothing wrong in filing the proof of claim and asserting that a debt existed. The proof of claim had not made any representations about the enforceability of the debt. The claim form accurately disclosed the relevant dates for determining whether a challenge to the claim as stale was appropriate.

The ruling in *Midland Funding* came down to the question of whether the creditor had a valid "claim" to file in the bankruptcy case. As discussed in Section I, above, the Bankruptcy Code defines a "claim" as a "right to payment." 11 U.S.C. § 101(5)(A). To determine whether the creditor had a valid right to payment the Court looked to state law. Under the applicable Alabama law, as under most

state laws, a creditor has a right to payment after expiration of the statute of limitations. The limitation period controls only the deadline to file a lawsuit in court to enforce the claim. Expiration of the statute of limitations does not extinguish the debt or destroy the creditor's "right to payment." *Midland Funding, L.L.C.*, 581 U.S. at 228-29. The *Midland Funding* Court concluded that, after the statute of limitations expired, it was not unfair or deceptive for a debt collector to ask for payment of the debt or to use means other than judicial process to seek collection. The creditor had not lost the right to payment of the obligation.

IV. The bankruptcy discharge did not extinguish Mr. Koontz's obligation to pay under his deed of trust and promissory note.

a. Mr. Koontz has an obligation to pay under the deed of trust.

West Virginia law defines a deed of trust as a conveyance "in the nature of a mortgage" that "convey[s] land to a trustee as mere collateral security for the payment of a debt when due, and with power to the trustee to sell the land and pay the debt, in case of default on the part of the debtor." *Arnold v. Palmer*, 686 S.E.2d 725, 733 (W. Va. 2009) (quoting *Sandusky v. Faris*, 38 S.E. 563, 573 (W. Va. 1901))). Until the deed of trust creditor exercises its contractual power of sale upon a default, the borrower, not the creditor, holds the estate in land and right to possession of the property. *Arnold v. Palmer, supra,* 686 S.E.2d at 732-33. Until a foreclosure sale, the borrower has the right to redeem the trust property by payment of the debt in full and thereby acquire unencumbered title. This right to

redeem, sometimes referred to as the borrower's "equity of redemption," is a significant property interest that is extinguished upon a foreclosure sale. *In re Bardell,* 374 B.R. 588, 592 (N.D. W. Va. 2007). The property that is subject to Mr. Koontz's deed of trust has never been sold at a foreclosure sale.

After a bankruptcy discharge, the borrower continues to have the same right as before the discharge to pay the debt obligation under the deed of trust and obtain clear title to the property. Before a bankruptcy discharge, if the borrower defaults, the creditor party has the right to foreclose and extinguish the borrower's equity of redemption. After a discharge, the creditor has this same right. The discharge does not affect the deed of trust's mutual obligations centered upon the equity of redemption.

The borrower's obligation to pay in order to preserve the right to redeem is the essence of a deed of trust or mortgage transaction: " a performance in full of the *obligation* secured by a mortgage, or a performance that is accepted by the mortgagee in lieu of performance in full, by one who is primarily responsible for performance of the *obligation*, redeems the real estate from the mortgage, terminates the accrual of interest on the *obligation*, and extinguishes the mortgage." Restatement (Third) of Property (Mortgages) § 6.4 (1997) (emphasis added).

The borrower under a deed of trust can always choose to default on the payment obligation and lose the right of redemption through a foreclosure sale. In this sense, the borrower's making payments on the obligation is always "voluntary." The lower court focused on the "voluntary" nature of Mr. Koontz's post-discharge payments. *Koontz*, 2024 U.S. Dist. LEXIS 58962, at *12. The court missed the point that a borrower's payments are no more "voluntary" after a bankruptcy discharge than they were before the discharge. The court focused on a distinction without a difference. The borrower can always not pay and lose the home.

Many consumer debtors who own homes subject to a mortgage seek bankruptcy relief. They often desperately need a fresh start after a job loss, illness, divorce, or similar hardship. Relief from the burdens of excessive unsecured debt, such as medical debt, allows the debtor to focus on secured debt payments, such as a home mortgage, after bankruptcy. Retention of a family home can be the key to financial rehabilitation. The lower court's dismissive characterization of a debtor's efforts to keep current on home loan payments after a bankruptcy as merely "voluntary" acts undermines important bankruptcy goals and policies. *In re Wilson*, 372 B.R. 816, 819 (Bankr. D.S.C. 2007) (noting important role of "ride-through" option in promoting bankruptcy's fresh start goal).

b. Mr. Koontz has an obligation to pay under the promissory note.

When he entered into the loan transaction at issue here, Mr. Koontz executed two documents, a security instrument (a deed of trust) and a promissory note. *Arnold v. Palmer, supra,* 686 S.E. 2d at 732. In a mortgage or deed of trust transaction it is the promissory note that creates the obligation to pay. *Horvath v. Bank of New York,* 641 F.3d 617 (4th Cir. 2011) (applying Virginia law); *Bank of America v. Draper,* 746 S.E. 2d 478 (S.C. App. 2013); *Anderson v. Burson,* 35 A.3d 452 (Md. 2011); *In re Simpson,* 711 S.E. 2d 165 (N.C. App. Ct. 2011); *Arnold v. Palmer, supra,* 686 S.E. 2d at 732-33.

Promissory notes associated with home mortgage transactions are typically negotiable instruments, with enforceability determined by Article 3 of the Uniform Commercial Code. *In re* Veal, 450 B.R. 897 (B.A.P. 9th Cir. 2011); *Anderson v Burson, supra,* 35 A.3d at 460; *Arnold v. Palmer*, *supra* 686 S.E.2d at 732. The negotiable note defines the amount the borrower must pay to acquire unencumbered title to the property that is subject to the deed of trust. Each dollar that a borrower like Mr. Koontz pays to the noteholder reduces the redemption amount by one dollar. *In re Veal,,* 450 B.R at 910 (referencing U.C.C. § 3-602).

A bankruptcy discharge does not extinguish the promissory note or reduce the obligation that the note embodies. A foreclosure sale conducted after a

bankruptcy discharge functions essentially the same as a foreclosure sale conducted in the absence of a discharge. The sale proceeds must be applied dollar for dollar to reduce the debt obligation defined by the note. The only difference occurs when the sale proceeds are less than the amount due on the note. In this situation there is a deficiency, defined as the difference between the sale proceeds and the amount due on the note. In the case of a bankruptcy discharge, the noteholder cannot collect this deficiency as a personal liability of the borrower. Regardless of bankruptcy, the noteholder can apply all sale proceeds to the extent needed to satisfy the debt obligation defined by the note.

In an analysis that elucidates the flaws in the lower court's reasoning, the Ohio Supreme Court examined how a bankruptcy discharge impacts the enforcement of a mortgage note. *Deutsche Bank Nat'l Trust Co. v. Holden,* 60 N.E. 3d 1243 (Ohio 2016). Prior to commencement of the foreclosure, the borrower in *Holden* had received a chapter 7 discharge. Facing foreclosure, he argued that because he had no personal liability under the note, the note's owner did not have standing enforce the note through foreclosure against his home. *Id.* at 60 N.E. 3d at 1247-48. The borrower argued that as a consequence of the bankruptcy discharge, the note no longer represented an enforceable obligation.

In rejecting the borrower's argument the *Holden* court focused on the U.S. Supreme Court's analysis in *Johnson v. Home Loan Bank. Holden,* 60 N.E.3d at

1249-50 (quoting from *Johnson,* 501 U.S. at 82-83). Relying on *Johnson,* the *Holden* court held that after a bankruptcy discharge a mortgage note continued to represent an enforceable obligation. The note still determined who had authority to foreclose and the amount of the debt. *Id.* at 60 N.E.3d at 1250. The party seeking to foreclose could proceed as long as "it is the party entitled to enforce the note – regardless of whether it can obtain a personal judgment on it against [the obligors]. " Id. The noteholder was enforcing the note by collection from the foreclosure sale proceeds. Id. at 1252. *See also, USAA Federal Savings Bank*, *supra,* 532 P.3d at 1034 (after a bankruptcy discharge, terms of deed and trust and note "remain in place: the payment schedule remains unchanged, payments still become due under the terms of the contract, and the maturity date remains the same").

A Maryland U.S. district court addressed the same issue presented by this appeal in *Farber v. Brock & Scott, LLC,* 2016 WL 5867042, at *9 (D. Md. Oct. 6, 2016). There, the court correctly held that debtors who continued making payments due under a deed of trust after a chapter 7 discharge "continued to have an 'obligation or alleged obligation' to pay money arising out of a transaction." *Id.* at 9. The debtors faced the consequence of loss of possession and title to the property if they failed to pay. Therefore, they still had a "debt" within the meaning of the FDCPA. See 15 U.S.C. § 1692a(5)." Id.

V. WVCCPA § 46A-2-122(a) contains no limitation that requires the consumer to be subject to an *in personam* obligation to pay.

The court below acknowledged that a significant body of case law has been running counter to its view of how a bankruptcy discharge affects a mortgage. *Koontz*, 2024 U.S. Dist. LEXIS 58962, at *24. However, the court found support for its position in its own ruling ten years earlier in *Fabian v. Home Loan Ctr., Inc.*, 2014 WL 1648289, at *5 (N.D.W. Va. Apr. 24, 2014) (Bailey C.J.) and in a line of cases construing the WVCCPA that cited favorably to *Fabian*. *Id*.[6] These decisions addressed the "allegedly obligated to pay" prong of the WVCCPA "consumer" definition. The courts added language to the WVCCPA that is not there. Section 46A-2-122(a) defines a "consumer," as "any natural person obligated or allegedly obligated to pay any debt." W. Va. Code § 46A-2-122(a). The text does not limit the term "consumer" to someone who is "personally" obligated to pay or is alleged to be "personally" obligated to pay.

More significantly, the decisions the lower court relied upon predated the U.S. Supreme Court's ruling in *Obduskey.* As described above in Section II, the

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[6] *Ballard v. Bank of America, N.A.,* 2013 WL 5963068, * 11 (S.D.W. Va. Nov. 17, 2013) (Copenhaver, J.) aff'd 578 Fed. Appx. 226 (4th Cir. 2014) (Mem.); *Hanshaw v. Wells Fargo Bank, N.A.,* 2015 WL 5345439, at *14-15 (S.D.W. Va. Sept. 11, 2015) (Johnston, J.); *Carter v. National City Mortgage, Inc.,* 2015 WL 966260, at *5-6 (N.D.W. Va. Mar. 4, 2015) (Keeley, J.); *Harrison v. PNC Bank, Nat. Ass'n*, 2015 WL 2171632, at *4 (S.D.W. Va. May 8, 2015) (Chambers, J.).

Court in *Obduskey* concluded that enforcement of *in rem* rights under a mortgage was debt collection subject to the FDCPA. *Obduskey*, 586 U.S. at 474-75. The holding of *Fabian* and its progeny no longer hold up against this ruling.

VI. Other federal consumer protection statutes regulate non-recourse debt as enforceable obligations of the debtor.

The FDCPA is not the only federal statute that regulates collection of consumer debt obligations. When applying other consumer protection statutes, courts and enforcement agencies have had occasion to address the impact of a bankruptcy discharge on home mortgage debt. They consistently find that an obligation to pay on a mortgage exists after a discharge, and the obligation constitutes a debt. For example, the Truth in Lending Act ("TILA"), 15 U.S.C. § 1601, *et seq.* and the Fair Credit Reporting Act ("FCRA"), 15 U.S.C. § 1681, *et seq*, make no distinction between non-recourse and recourse debt. Consumers are not personally obligated to repay a non-recourse debt, but they face the loss of an interest in collateral property if they fail to pay. The non-recourse creditor's remedy is limited to sale or repossession of property.

The TILA regulates the extension of credit to consumers. TILA defines "credit" as "the right granted by a creditor to a debtor to defer payment of a *debt* or to incur *debt* and defer its payment." *Id.* § 1602(f) (emphasis added).[7] The

[7] The Equal Credit Opportunity Act (ECOA) incorporates the same definition of "credit." *Id.* § 1691a(d).

existence of a "debt" is essential for TILA coverage. Although TILA does not define the term "debt," courts and the agencies charged with TILA's interpretation have consistently applied the TILA to non-recourse loan transactions.

Reverse mortgages are non-recourse obligations. TILA applies to reverse mortgages. *Id.* § 1648. Pawnbrokers have argued that were not subject to TILA because of the non-recourse nature of pawn transactions. The Federal Reserve Board ("FRB") rejected these arguments and adopted an Official Staff Interpretation that made pawnbrokers subject to TILA. 61 Fed. Reg. 14,952, 14,954 (April 4, 1996), now Official Interpretation 15 C.F.R. § 1026.17(c)(1)-18. In addition, many courts have held that non-recourse pawn transactions create debts and therefore involve extensions of credit under TILA. *Burnett v. Ala Moana Pawn Shop*, 3 F.3d 1261, 1262 (9th Cir. 1993) (the transactions were "loans secured by the property, regardless of whether Burnett was personally liable for the debt"); *In re Spinner*, 398 B.R. 84 (Bankr. N.D. Ga. 2008) (pawn transactions are extensions of credit under TILA definitions); *Dennis v. Handley*, 453 F. Supp. 833, 836 (N.D. Ala. 1978) (provision for forfeiture of collateral upon failure to pay is essentially an obligation to repay).

Payday loans typically limit the lender's recourse to a post-dated check, a future pay check, or title to a motor vehicle. Payday loans are extensions of credit subject to TILA. *Turner v. E-Z Check Cashing, Inc.*, 35 F. Supp. 2d 1042, 1048

(M.D. Tenn. 1999). The FRB and CFPB have interpreted TILA to cover payday loans. FRB/CFPB TILA Official Interpretations, 12 C.F.R. § 1026.2(a)(14)-2). In 2017, the CFPB issued an extensive set of regulations of vehicle title payday loans. 82 Fed. Reg. 54472 (Nov. 17, 2017), *codified at* 12 C.F.R. pt. 1041.[8]

The Fair Credit Reporting Act ("FCRA"), 15 U.S.C. § 1681, *et seq.* sets standards for how creditors and credit reporting companies can report information about consumer debts. In construing the FCRA, courts have considered the impact of a bankruptcy discharge on mortgage debt in two contexts.

First, courts have addressed the basic question of whether a mortgage debt subject to credit reporting exists after the debtor's bankruptcy discharge. Some consumers have argued that credit reporting agencies violated the discharge order by reporting mortgage debts as still owing after a discharge. The courts resoundingly rejected these arguments. *In re Irby*, 337 B.R. 293, 295 (Bankr. N.D. Ohio 2005) ("it is difficult to discern how . . . . the sole act of reporting a debt, whose existence was never extinguished by the bankruptcy discharge, violates the discharge injunction. All that is being reported is the truth"); *In re Vogt*, 257 B.R.

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[8] Implementation of the CFPB's payday lending rules was delayed due to litigation. This litigation recently culminated in a Supreme Court ruling upholding the CFPB's rulemaking authority. *CFPB v. Community Financial Services of America, Ltd,* 601 U.S. 416 (2024).

65, 70 (Bankr. D. Colo. 2000) (no error to report that "debt was still due and owing, notwithstanding the order of discharge").

Second, courts have considered the impact of a bankruptcy discharge on mortgage debt in the context of the FCRA's standard for what constitutes a "permissible purpose" for someone to obtain a consumer's credit report. 15 U.S.C. § 1681b(a)(3) According to the FCRA, a creditor pulls a credit report for a permissible purpose when, *inter alia,* it "intends to use the information in connection with a credit transaction involving the consumer" or for a "review or collection of an account of [,] the consumer" *Id.* Consumers have argued that after discharge of a home mortgage debt, a "credit transaction" or an "account" of the consumer no longer exists, negating any permissible purpose for obtaining a credit report about the mortgage debt. Courts rejected this argument as failing to acknowledge a continuing post-bankruptcy *in rem* obligation to pay. *Saumweber v Green Tree Servicing, LLC*, 2015 WL 2381131, at *4 (D. Minn. May 19, 2015) (a credit relationship for purposes of FCRA existed where mortgagors "had an obligation to [the mortgagee] to make payments on the mortgage, even after the bankruptcy proceedings were concluded, or face foreclosure"); *Germain v Bank of Am., N.A.,* 2014 WL 5802018, at *7 (W.D. Wis. Nov. 7, 2014) (after discharge, the mortgagor "still held an obligation" to the mortgagee from the credit originally extended to him and "a credit relationship and 'account' existed between them.").

In the instant case the lower court inserted a term requiring personal liability for a debt into statutory definitions that contain no such requirement. If affirmed, this judicial redrafting will spread confusion into similar statutory schemes that regulate debt collection. Across a range of federal and state consumer protection statutes there is a notable uniformity in the treatment of non-recourse debt. Non-recourse debt is routinely subject to regulation along the same lines as debts for which the consumer has personal liability. For example, in *Oasis Legal Finance. Group, LLC v. Coffman*, 361 P.3d 400, 407-08 (Colo. 2015) the Colorado Supreme Court construed the Uniform Commercial Credit Code's definition of the term "debt." The court reviewed treatment of non-recourse debt under the FDCPA, the Bankruptcy Code, state debt collection laws, the U.C.C. and Black's Law Dictionary. The court found that none of these sources limited the application of the term "debt" to obligations for which the consumer had personal liability. The court refused to "shoehorn the word 'recourse' " into the Uniform Consumer Credit Code. *Oasis Legal Fin. Grp., L.L.C.*, 361 P.3d at 809.

VII. The lower court's ruling is inconsistent with Bankruptcy Code Section 524(j).

a. The text and purpose of section 524(j)

The lower court ruling conflicts with a provision added to the Bankruptcy Code after the *Johnson v. Home Loan Bank* decision, 11 U.S.C. § 524(j). Congress added § 524(j) to the Code in 2005 as guidance for creditors seeking to enforce

their *in rem* remedies that survive the discharge of personal liability for a mortgage debt. Section 524(j) clarifies that certain post-discharge activities to collect on a home mortgage debt are not subject to the discharge injunction of § 524(a)(2). The section provides:

> Subsection (a)(2) [of § 524] does not operate as an injunction against an act by a creditor that is the holder of a secured claim, if-
> (1) such creditor retains a security interest in real property that is the principal residence of the debtor;
> (2) such act is in the ordinary course of business between the creditor and the debtor; and
> (3) such act is limited to seeking or obtaining periodic payments associated with a valid security interest in lieu of pursuit of in rem relief to enforce the lien.

11 U.S.C. § 524(j). The plain language of § 524(j) provides that, following a discharge of a mortgage debt, the creditor has both a right to seek ongoing payments from the borrower and a right to "pursue in rem relief" if the borrower does not pay. Section 524(j) is consistent with the judicially recognized option of a chapter 7 debtor to let a mortgage debt "pass through" a bankruptcy case, keep current in payments, and avoid foreclosure. *In re Lopez*, 440 B.R. 447, 447 (Bankr. E.D. Va. 2010); *In re Wilson,* 372 B.R. 816, 819-20 (Bankr. D. S.C. 2007).

Section 524(j) serves the interests of both creditors and debtors. It protects creditors from unfounded complaints that they violated the discharge order. At the same time, it facilitates post-bankruptcy communications between the mortgagor and the mortgagee. This ongoing communication benefits the many chapter 7

debtors who wish to preserve homeownership as a critical aspect of their fresh start.

If mortgagors had no obligation to pay a mortgage debt after a chapter 7 discharge, Congress would not have enacted § 524(j).

b. The defendants can collect ongoing post-discharge payments as allowed by § 524(j) without including unauthorized charges in violation of the FDCPA.

All courts of appeals that have considered the issue have ruled that the Bankruptcy Code does not implicitly repeal key FDCPA protections for debtors. *Manikan v. Peters & Freedman, L.L.P.,* 981 F.3d 712, 717 n. 5 (9th Cir. 2020) (collecting cases). This court recently held that the Bankruptcy Code does not preempt a state debt collection statute similar to the WVCPPA. *Guthrie v PHH Mtge. Corp.,* 79 F.4th 328, 342 (4th Cir. 2023), *cert denied*, 2024 WL 1839108 (U.S. Apr. 29, 2024). The doctrines of implied repeal and preemption of FDCPA or WVCCPA claims by the Bankruptcy Code do not come into play for Mr. Koontz's claims. His FDCPA and WVCCPA claims do not arise from violations of the Bankruptcy Code.

Mr. Koontz does not dispute that pursuant to Bankruptcy Code § 524(j) the discharge order did not prohibit defendants from communicating with him about the status of ongoing installments due on his deed of trust. He does not allege that defendants sought to collect on a mortgage debt as a personal liability in violation

of the discharge order. Instead, Mr. Koontz asserts that defendants violated the FDCPA in enforcing an *in rem* obligation. In *Prindle v. Carrington Mtge. Services*, LLC, 2016 WL 4369424 (M.D. Fla. Aug. 16, 2016) the court noted that the FDCPA and Bankruptcy Code § 524(j) work consistently in ensuring that parties to a mortgage communicate fairly and effectively after a bankruptcy discharge:

> In the specific context of this case, the FDCPA and § 524(j) can coexist. A secured creditor can exercise its rights under § 524(j) while also complying with the FDCPA by sending a communication seeking payment in lieu of foreclosure that does not contain language that, to the least-sophisticated consumer, would be false, deceptive, or misleading.

Prindle, 2016 WL 4369424, at *14-15. In the instant case, defendants had a right to collect post-discharge deed of trust payments from Mr. Koontz. However, they could not use false, deceptive, and misleading communications in connection with their collection efforts. A mortgage servicer's inclusion of unlawful fees and charges in an account statement communicated to the borrower violates the FDCPA. *Daniels v. Select Portfolio Servicing, Inc.,* 34 F.4th 1260, 1271 (11th Cir. 2022).

The defendants' assessment of excessive late charges caused a concrete harm to Mr. Koontz. Each dollar in improper fees added to a debt secured by a deed of trust diminishes dollar for dollar the debtor's equity in the property. Each

prohibited fee adds to the amount the borrower owes to redeem. While each fee may be for a small amount, fees add up month after month. Given the economies of scale in the mortgage servicing industry, fees become a significant source of revenue for a servicer.[9]

In addition to diminishing the value of a debtor's property interest, an improper assessment of fees has long-term effects on the loan account. As the debtor makes ongoing payments, these must be applied to past-due fees instead of to reduction of the loan principal. Courts routinely recognize that assessment of improper fees, such as late fees, to a mortgage borrower's account is a concrete harm, regardless of whether the mortgagor paid the fees. *Smith v. Specialized Loan Servicing, LLC*, 2017 WL 1711283, * 6 (S.D. Cal. May 3, 2017) (assessment of foreclosure costs and fees, property inspection charges, and corporate advances); *Gritters v. Ocwen,* 2014 WL 7451682, * 9 (N.D. Ill. Dec. 31, 2014) ("prolonged and repeated assessment of sums not owed"); *Padgett v. OneWest Bank, FSB*, 2010 WL 1539839 (N.D. W.Va. April 19, 2010) (improper assessment of late fees); *Enis v. Bank of America*, 2013 WL 840696 (N.D. Tex. Mar. 7, 2013) (late fees). Placing

[9] In the case of mortgage servicer Wells Fargo one court noted that if Wells collected a $15.00 inspection charge annually from each borrower in its portfolio, this would generate an annual revenue for the servicer of $115,000,000. *In re Stewart*, 391 B.R. 327, 343 n. 34 (Bankr. E.D. La. 2008), *affd*, 2009 WL 2448054 (E.D. La. Aug. 7, 2009), vacated in part, appeal dismissed in part, 647 F.3d 553 (5th Cir. 2011).

the borrower in the position where each ongoing payments is being misapplied is a concrete harm. *Marais v. Chase Home Mortgage Finance, LLC*, 24 F. Supp. 3d 712, 729 (S.D. Ohio 2014).

A disclaimer of an intent to collect a debt does not insulate a communication from the FDCPA. *Tabb v Ocwen Loan Servicing, LLC*, 798 Fed. Appx. 726, 729 (3d Cir. 2020). The lower court refers repeatedly to the "disclaimer" language in defendants' communications. *Koontz v. SN Servicing Corp.*, No. 5:23-CV-363, 2024 U.S. Dist. LEXIS 58962, at *14 (N.D.W. Va. Feb. 26, 2024). However, this "disclaimer" language works against defendants. According to the disclaimers, defendants were not attempting to collect an unauthorized fee "as a personal liability." *Id.* This is not the problem. No one is saying that defendants were trying to collect the fees as a personal liability. Defendants' communications to Mr. Koontz say in the same sentence that the communication "is instead a step in the enforcement of a mortgage lien against your property." *Id.* This is the problem. And it is the basis for a valid FDCPA claim.

CONCLUSION

For these reasons, *Amici Curiae* respectfully request that the Order and Judgment of the district court be VACATED, and this case be remanded to the Bankruptcy Court.

Respectfully submitted, this the 19th day of July, 2024.

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CERTIFICATE OF COMPLIANCE

I certify that the foregoing Brief complies with the type-volume limitation of Fed. R. App. P. Rule 29(a)(5) because this brief contains 6,680 words, excluding the portions thereof exempted by Fed. R. App. P. 32(f); and,

I certify that the foregoing Brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 14-point Century Schoolbook.

CERTIFICATE OF SERVICE

I certify that on July 19, 2024 the foregoing document was served on all parties or their counsel of record through the CM/ECF system:

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