No. 10-1285

In the Supreme Court of the United States

COUNTRYWIDE HOME LOANS, INC., PETITIONER

v.

FRANCISCO AND ANNA RODRIGUEZ

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

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTIONS PRESENTED

Petitioner services a home mortgage for respondents. The terms of the mortgage require respondents to make monthly payments into an escrow account to be used by petitioner to pay property taxes, insurance, and other charges associated with the mortgaged property. After missing several payments, respondents filed a Chapter 13 bankruptcy petition. The questions presented are as follows:

1. Whether respondents' pre-petition breach of their contractual obligation to make monthly escrow payments gave rise to a "claim" within the meaning of the Bankruptcy Code, 11 U.S.C. 101(5).

2. Whether the Bankruptcy Code's automatic stay, 11 U.S.C. 362(a)(6), prohibits petitioner from increasing respondents' post-petition escrow payments to reflect the existing shortage in escrow funds that resulted from respondents' pre-petition breach of their contractual obligations.

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INTEREST OF THE UNITED STATES

This brief is submitted in response to this Court's order inviting the Solicitor General to express the views of the United States. In the view of the United States, the petition for a writ of certiorari should be denied.

STATEMENT

1. a. With certain exceptions not relevant here, the initiation of a bankruptcy case halts efforts to collect debts the debtor incurred before filing the petition. The filing of the petition operates as an "automatic stay" of, *inter alia*, "any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case under this title." 11 U.S.C. 362(a)(6). The Bankruptcy Code defines the term "claim" to mean:

> (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).

b. The Real Estate Settlement Procedures Act of 1974 (RESPA), 12 U.S.C. 2601 *et seq.*, and its implementing regulations (known collectively as Regulation X), 24 C.F.R. Pt. 3500, govern mortgage lenders' use of escrow accounts "for the purpose of assuring payment of taxes, insurance premiums, or other charges with respect to the [mortgaged] property." 12 U.S.C. 2609(a)(1). RESPA prohibits a lender from requiring a borrower to deposit a monthly escrow payment that is greater than (1) one-twelfth of the total costs expected to be incurred in the coming year for taxes, insurance premiums, and other reasonably anticipated charges associated with the property, plus (2) an additional amount sufficient to ensure that the escrow account will maintain a "cushion" balance that is not greater than one-sixth of the estimated total annual payments from the account. 12 U.S.C. 2609(a)(2); 24 C.F.R. 3500.17(c)(1)(ii).

Regulation X sets forth in detail the method a lender should use to determine the maximum monthly amount the borrower may be required to pay into the escrow account. 24 C.F.R. 3500.17(d)(2). First, the lender as-

sumes an escrow account balance of zero and projects a running trial balance for the following year, taking into account all estimated disbursements during that year and assuming that the borrower will make monthly payments equal to one-twelfth of the estimated total annual escrow account disbursements. 24 C.F.R. 3500.17(d)(2)(i)(A). If the projected trial balance is less than zero in any month, the lender adds the amount of that deficit to the opening monthly balance of zero and adjusts the remaining trial balances accordingly. 24 C.F.R. 3500.17(d)(2)(i)(B). The lender then adds to the monthly balances the amount of the permissible cushion. 24 C.F.R. 3500.17(d)(2)(i)(C). See generally 24 C.F.R. Pt. 3500, App. E (providing example of calculations); U.S. Dep't of Hous. & Urban Dev., *FAQs About Escrow Accounts for Consumers*, http://portal.hud.gov/hudportal/HUD?src=/program_offices/housing/ramh/res/respafaq#TM2 (same). The resulting balance is the initial "target balance" for the escrow account. See 24 C.F.R. 3500.17(b). The lender then compares the target balance to the actual balance of the account to determine whether there is a surplus, shortage, or deficiency in the account, and adjusts the required monthly payment amount accordingly. 24 C.F.R. 3500.17(f).

The overall objective of the escrow account analysis is to calculate a monthly payment that will be sufficient to cover the estimated total disbursements, while ensuring that the account maintains a monthly balance that is greater than or equal to the allowable cushion. Using the accounting method set out in the regulations, a lender may examine a borrower's escrow account at any time to determine whether the borrower's payment obligations should be recalculated. 24 C.F.R. 3500.17(f)(1)(ii). The extent to which a lender is permitted to adjust a bor-

rower's escrow payment depends on whether the current balance includes a "surplus" (*i.e.*, an actual balance that is greater than the target balance), a "shortage" (*i.e.*, an actual balance less than the target balance), or a "deficiency" (*i.e.*, a negative actual balance). See 24 C.F.R. 3500.17(b) and (f). As relevant here, when a borrower is not current on payments, a lender may recover a "deficiency" and retain a "surplus" pursuant to the terms of the loan documents. See 24 C.F.R. 3500.17(f)(2)(ii) and (4)(iii). When there is a "shortage," a lender may opt either to do nothing, to require the borrower to repay the shortage amount within 30 days if it is less than one month's escrow payment, or to require the borrower to repay the shortage in equal monthly payments over at least a 12-month period. 24 C.F.R. 3500.17(f)(3); see 12 U.S.C. 2609(a)(2) (stating in a proviso that a lender "shall not be prohibited from requiring additional monthly deposits" to "avoid or eliminate [a] deficiency").

2. Respondents financed the purchase of their home with a mortgage that petitioner eventually acquired. Pet. App. 2a. The terms of the mortgage obligated respondents to make monthly payments consisting of (1) principal and interest and (2) "[e]scrow [f]unds" to cover taxes, insurance, and other charges associated with the property. *Ibid.*; C.A. App. A119-A120 ¶¶ 1-2. Under the mortgage, petitioner was entitled to collect escrow payments "in an aggregate amount not to exceed the maximum amount" authorized by RESPA and Regulation X. *Id.* at A120 ¶ 2. The mortgage further provided that "[t]he Escrow Funds are pledged as additional security for all sums secured by this Security Instrument," *ibid.*, and that, if respondents failed to "pay in full any monthly payment required" by the mortgage

by the due date of the next monthly payment, petitioner could accelerate the loan by requiring "immediate payment in full of all sums secured" by the mortgage (except as prohibited by governing regulations), *id.* at A121 ¶ 9(a). The mortgage stated in addition that, if respondents could not pay off the full loan after acceleration, petitioner could foreclose and could seek "any other remedies permitted by applicable law." *Id.* at A123 ¶ 18.

3. a. On October 10, 2007, after missing eight mortgage payments, respondents filed a voluntary petition for relief under Chapter 13 of the Bankruptcy Code. Pet. App. 3a. At that time, respondents were $20,844.40 in arrears on their mortgage, $5657.60 of which was attributable to missed escrow payments. *Ibid.* During the eight months when respondents failed to make their mortgage payments, petitioner continued to pay the taxes, insurance, and other contemplated costs associated with respondents' property, including by expending $3869.91 of its own funds. *Ibid.* If respondents had timely submitted all of the escrow payments that were due before they filed the bankruptcy petition, respondents' escrow account would have contained $1787.69—the difference between $5657.60 and $3869.91—on the date they filed their petition. *Ibid.*[1]

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[1] There is some disagreement in the briefs and decisions in this case about the exact amount of the pre-petition escrow arrearage and the corresponding hypothetical non-delinquent escrow-account balance. See Pet. App. 3a n.1; Pet. Cert. Reply Br. 3 n.1. Because the legal issues in this case do not turn on the precise amount of the escrow arrearage and associated hypothetical escrow-account balance, this brief follows the court of appeals in assuming that the escrow arrearage was $5657.60 and that the relevant hypothetical non-delinquent escrow balance would have been $1787.69.

Approximately one week after respondents filed their bankruptcy petition, petitioner sent respondents a revised escrow analysis indicating that their post-petition monthly escrow payment would increase from $707.20 to $947.77. Pet. App. 3a; C.A. App. A63-A65. In performing the relevant calculations under RESPA and Regulation X, petitioner treated the actual starting balance of the account as zero rather than either -$3869.91 (the actual balance at that time) or $1787.69 (the balance the account would have contained if respondents had not missed any pre-petition escrow payments). Pet. App. 4a; C.A. App. A63-A65. Petitioner calculated that respondents' new monthly escrow payment should be the sum of (1) $650.10 to cover the estimated expenditures for taxes and insurance premiums, (2) $210.65 to ensure that the escrow account would not have a negative balance over the next year, and (3) $87.02 to maintain the cushion permitted by RESPA. *Id.* at A63-A64; Pet. App. 3a.

Several months later, petitioner filed a proof of claim seeking a total of $21,283.71 in pre-petition arrears. Pet. App. 4a. Petitioner attributed $3869.91 of that claim—*i.e.*, the amount petitioner had paid out-of-pocket to cover tax and insurance bills that came due while respondents were behind on their mortgage—to escrow account arrearage. *Ibid.* Petitioner did not include in its proof of claim the remaining $1787.69 of pre-petition escrow payments that petitioner would have received if respondents had fulfilled their obligations under the mortgage. *Ibid.*

b. Shortly thereafter, respondents filed a motion in bankruptcy court to enforce the automatic stay, arguing that petitioner's notice regarding the increased escrow payments constituted an impermissible post-petition

effort to collect a pre-petition claim. Pet. App. 4a. The bankruptcy court denied the motion. See *id.* at 23a-39a. The court held that petitioner had no pre-petition "right to payment" of the $1787.69 at issue and therefore no "claim" to that money within the meaning of the Bankruptcy Code because, under respondents' mortgage, missed escrow payments become additional debt only when petitioner expends its own funds to pay for taxes and other charges. *Id.* at 34a-35a.

c. The district court affirmed. Pet. App. 40a-47a. The court stated that "[petitioner's] recalculation of [respondents'] monthly escrow payment was authorized by and calculated in accordance with RESPA as well as the underlying loan agreement." *Id.* at 46a. The court concluded that "[a]ny modification of [petitioner's] right to conduct the post-petition recalculation would impermissibly modify the rights of a holder of a claim secured only by a security interest in a debtor's principal residence." *Id.* at 46a-47a.

d. The court of appeals reversed. Pet. App. 1a-22a. Relying in substantial part on the Fifth Circuit's decision in *Campbell* v. *Countrywide Home Loans, Inc.*, 545 F.3d 348 (2008), the court framed the relevant inquiry as whether respondents' loan documents created an enforceable obligation for respondents to make escrow payments. Pet. App. 11a-14a. The court concluded that "the terms of [respondents'] mortgage establish that the obligation to pay into the escrow account was enforceable," *id.* at 13a-14a, even though "the unpaid escrow amounts may not have constituted 'debt' under the terms of the mortgage until [petitioner] actually disbursed its own funds to cover an escrow expense," *id.* at 14a. The court also stated that "the principle of protecting the debtor from all efforts to collect pre-petition

claims outside of the Chapter 13 structure takes precedence over [petitioner's] other rights under RESPA to recalculate the escrow payments." *Id.* at 14a n.4. The court of appeals remanded the case to allow the lower courts to determine whether "[petitioner] willfully violated the automatic stay when it sent [respondents] a demand for higher monthly escrow payments." *Id.* at 15a.

Judge Sloviter dissented. Pet. App. 16a-22a. In her view, the majority's analysis "set[] up an irreconcilable conflict" between RESPA and the Bankruptcy Code. *Id.* at 19a-22a. Judge Sloviter would have held, consistent with the bankruptcy court's decision, that petitioner had no "claim" to unpaid escrow funds (other than those for which petitioner was actually out-of-pocket) because a "right to payment * * * implicitly encompasses a right of retention, which is not subsumed in [petitioner's] right to collect escrow items." *Id.* at 20a (internal quotation marks omitted). Judge Sloviter also stated that respondents' mortgage "provides no means of recovering the non-paid escrow funds." *Id.* at 21a. As she read the mortgage agreement, the "only remedy" available to petitioner for respondents' non-payment of required escrow amounts was "acceleration of payment of other sums—the sums actually secured by the mortgage." *Ibid.*

DISCUSSION

The petition for a writ of certiorari should be denied. The court of appeals correctly held that petitioner had a "claim," within the meaning of 11 U.S.C. 101(5), to the full $5657.60 in pre-petition escrow funds that respondents ought to have paid under the terms of their mortgage. That holding does not warrant this Court's re-

view, both because it does not conflict with any decision of another circuit and because its correctness depends in part on factors specific to this case (*i.e.*, applicable New Jersey law and the terms of respondents' mortgage).

The court of appeals remanded the case to allow the lower courts to decide in the first instance whether petitioner willfully violated the automatic stay, 11 U.S.C. 362(a)(6), by notifying respondents that their monthly escrow payments would increase going forward. Neither the court below nor any other court of appeals has meaningfully analyzed the question whether a notice of increased escrow payments like the one at issue here constitutes an impermissible attempt to collect a pre-petition debt. Because the Third Circuit's ruling does not conflict with any decision of this Court or another court of appeals, and because the decision below is interlocutory, the petition for a writ of certiorari should be denied.

A. The Court Of Appeals Correctly Held That Petitioner Had A "Claim" Under The Bankruptcy Code To All Pre-Petition Escrow Amounts That Respondents Had Breached A Contractual Obligation To Pay

1. Under the terms of respondents' mortgage and applicable state law, petitioner had a "claim" to all missed pre-petition escrow payments, including the $1787.69 at issue here. The Bankruptcy Code defines the term "claim" to include 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." 11 U.S.C. 101(5). This Court has recognized that "Congress intended by this language to adopt the

broadest available definition of 'claim.'" *Johnson* v. *Home State Bank*, 501 U.S. 78, 83 (1991); see H.R. Rep. No. 595, 95th Cong., 1st Sess. 309 (1977) (stating that, "[b]y this broadest possible definition," the term "contemplates that all legal obligations of the debtor, no matter how remote or contingent, will be able to be dealt with in the bankruptcy case"); S. Rep. No. 989, 95th Cong., 2d Sess. 22 (1978) (same). The Court has further held that the term "right to payment" as used in Section 101(5)(A) means "nothing more nor less than an enforceable obligation." *Pennsylvania Dep't of Pub. Welfare* v. *Davenport*, 495 U.S. 552, 559 (1990). In the absence of a controlling federal rule, a court should determine whether a "right to payment" exists in a particular case by looking to state law—here, the law of New Jersey. See *Nobelman* v. *American Sav. Bank*, 508 U.S. 324, 329 (1993); *Butner* v. *United States*, 440 U.S. 48, 54-55 (1979).

It is undisputed that respondents' mortgage required them to make monthly escrow payments to petitioner. See C.A. App. A119-A120 ¶ 2. The dissenting judge below concluded, however, that petitioner's "only remedy" for a breach of that obligation was "acceleration of payment of other sums—the sums actually secured by the mortgage." Pet. App. 21a. She would have held on that basis that petitioner had "no enforceable claim against the debtor." *Ibid.* That analysis is wrong for two reasons.

First, the dissenting judge's approach appears to reflect a misunderstanding of respondents' mortgage as construed in light of applicable state law. Under New Jersey law, mortgage lenders in petitioner's position are generally entitled to sue borrowers for breach of contract to compel payment of overdue escrow amounts.

See *Frederico* v. *Home Depot*, 507 F.3d 188, 203 (3d Cir. 2007). Nothing in respondents' mortgage documents appears to preclude such a remedy. If respondents had not sought relief under the Bankruptcy Code, petitioner therefore could have enforced its right to the escrow payments in the most direct way possible—by filing a breach-of-contract suit to recover the money owed.

Second, even if the remedies of acceleration and foreclosure were the only means by which petitioner could enforce respondents' obligation to make pre-petition escrow payments, petitioner would still have a "claim" for those escrow amounts within the meaning of 11 U.S.C. 101(5). This Court made clear in *Davenport* that a right to payment can be enforceable—and therefore constitute a "claim" under the Bankruptcy Code—even if the creditor cannot file a civil suit to compel payment of the money owed. See 495 U.S. at 559-560. The Court in *Davenport* held that a restitution order imposed as a condition of probation in state criminal proceedings gave rise to a "claim" under Section 101(5)(A) because it was "enforceable by the substantial threat of revocation of probation and incarceration." *Id.* at 559.[2] Here, the mortgage provided that, if respondents failed to make timely escrow payments, petitioner was entitled to (1) add any out-of-pocket expenses it incurred (and associated costs) to the amount of the debt secured by the mortgage, C.A. App. A121 ¶ 7; (2) declare respondents to be in default and require immediate payment in full of

[2] Although the Criminal Victims Protection Act of 1990, Pub. L. No. 101-581, § 3, 104 Stat. 2865, subsequently withdrew the power of bankruptcy courts to discharge restitution orders under 11 U.S.C. 1328(a), that law did not "disturb[] [the *Davenport* Court's] general conclusions on the breadth of the definition of 'claim' under the Code." *Johnson*, 501 U.S. at 83 n.4.

all sums secured by the mortgage (except as prohibited by governing regulations), *id.* at A121 ¶ 9(a); and (3) foreclose on the property, seek any other remedies permitted by applicable law, and collect all expenses incurred in doing so, *id.* at A123 ¶ 18. Even if those enforcement mechanisms were exclusive, respondents' escrow obligation would give rise to an enforceable claim.

2. Petitioner contends (Pet. 9-11) that it could not have had a claim for respondents' missed escrow payments because the missed payments would not constitute "debt" unless and until petitioner expended its own funds to cover a cost that should have been paid out of the escrow account (*i.e.*, until there was a "deficiency" in the account). Although petitioner does not dispute that respondents were contractually required by the mortgage to make timely escrow payments, it asserts (Pet. 7) that any escrow funds respondents might have deposited would not have belonged to petitioner while such funds were held in the escrow account because they were "an asset to be used for [respondents'] benefit." As discussed above, however, petitioner had the right to enforce respondents' contractual obligation to make escrow payments, and petitioner would have had a state-law interest in such money if it had been paid in accordance with the mortgage agreement.

Respondents' mortgage specifies that required escrow payments were "pledged as additional security for all sums secured by" the mortgage. C.A. App. A120 ¶ 2. Petitioner therefore would have had a property interest in any escrow funds remaining in respondents' escrow account after petitioner had made required tax and insurance payments (as long as the amount of those funds did not exceed by $50 or more the cushion permitted by

RESPA at a time when petitioner conducted an escrow account analysis, see 24 C.F.R. 3500.17(f)(2)). And petitioner would have had a right under the mortgage to retain such funds in the event that respondents defaulted and were unable to pay all sums due under the mortgage.

It is true that, if petitioner had accelerated or foreclosed on respondents' mortgage before respondents filed their bankruptcy petition, the only portion of the missed escrow payments that petitioner could have retained was the $3869.91 deficiency. But that fact does not undermine the court of appeals' conclusion that petitioner had a "claim" to the full amount of the missed escrow payments. Petitioner had a "right to payment" (11 U.S.C. 101(5)(A)) of the full escrow amounts and a right to enforce that obligation in the event of nonpayment, even though the mortgage agreement limited the uses to which those funds could be put and the circumstances under which petitioner could retain them.[3]

[3] The court of appeals' holding that petitioner had a "claim" to all of respondents' missed escrow payments is consistent with a proposed bankruptcy form that will become effective on December 1, 2011, in the absence of contrary congressional action regarding the related proposed revision to the Bankruptcy Rules. The revised rules will require that mortgage creditors attach the proposed form (Attachment A to proposed Form B10) to all proofs of claim. The form requires disclosure of (1) the sum of overdue installment payments (apparently including escrow payments), and (2) the sum of other pre-petition fees, expenses, and charges, including any "[e]scrow shortage or deficiency" that is not included in the "installment payments" sum. Proposed Fed. R. Bankr. P. Form B10 (Att. A) Pts. 2 & 3, http://www.uscourts.gov/FormsAndFees/Forms/BankruptcyForms/BankruptcyFormsPendingChanges.aspx. The resulting sum constitutes the "[a]mount of arrearage and other charges, as of the time case was filed, included in secured claim." Proposed Fed. R. Bankr. P. Form B10 § 4, http://www.uscourts.gov/FormsAndFees/Forms/BankruptcyForms/Bankruptcy

B. The Court Of Appeals Did Not Separately Analyze The Question Whether Petitioner's Notice Of Increased Escrow Payments Violated The Automatic Stay

Under the "automatic stay" provision of the Bankruptcy Code, petitioner was prohibited from engaging in, *inter alia*, "any act to collect, assess, or recover a claim against [respondents] that arose before the commencement of the [bankruptcy] case." 11 U.S.C. 362(a)(6). The court of appeals stated that, "[h]aving determined that the $1,787.69 escrow cushion should have been part of [petitioner's] proof of claim, the question arises as to whether [petitioner] violated the automatic stay when it sought the cushion outside of the bankruptcy proceeding." Pet. App. 15a. The court of appeals did not separately analyze that question, however, but instead remanded the case to allow the lower courts to determine in the first instance whether petitioner had "willfully violated the automatic stay when it sent [respondents] a demand for higher monthly escrow payments." *Ibid.* Review of the issue by this Court therefore would be premature.

1. The automatic stay serves to "afford the debtor a 'breathing spell' by halting the collection process," thereby "enabl[ing] the debtor to attempt a repayment or reorganization plan with an aim toward satisfying existing debt." *In re Schaefer Salt Recovery, Inc.*, 542 F.3d 90, 100 (3d Cir. 2008) (quoting *In re Siciliano*, 13 F.3d 748, 750 (3d Cir. 1994)). Any "act to collect, assess, or recover" respondents' pre-petition escrow arrearage would undercut that purpose. "As a general rule," however, Chapter 13 "bankruptcy proceedings do not ad-

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FormsPendingChanges.aspx. The proposed form thus presumes that all missed escrow payments are part of a mortgagee's "claim."

dress postpetition claims: 'The basic scheme of the Bankruptcy Code is to affect claims arising prior to the filing of the petition under title 11.'" *In re Ripley*, 926 F.2d 440, 443 (5th Cir. 1991) (quoting 5 *Collier on Bankruptcy* ¶ 1304.01[1] (Lawrence P. King ed., 15th ed. 1988) (footnotes omitted)); but see note 4, *infra*. Section 362(a)(6) did not relieve respondents of their obligation to make *post*-petition escrow payments under the terms of the mortgage (which incorporates by reference RESPA's computation methodology, see p. 4, *supra*).[4]

Respondents acknowledge (see Br. in Opp. 14 n.8), moreover, that petitioner was not categorically precluded from increasing respondents' monthly escrow payments after the Chapter 13 petition was filed. If the city in which respondents' property is located had increased the amount of property taxes due, or if respondents' home insurer had increased the applicable premium, petitioner could have increased respondents' monthly escrow payments without violating Section 362(a)(6). Even though petitioner filed a proof of claim based on pre-petition arrearages, an escrow increase premised on post-petition changes in tax or insurance rates would properly be viewed as an effort to enforce respondents' *ongoing* contractual obligation to make

[4] Although Section 362(a)(6) applies exclusively to pre-petition claims, 11 U.S.C. 362(a)(3) restricts creditors' acts to obtain property of the estate, and 11 U.S.C. 362(a)(4) restricts actions to create or perfect liens against property of the estate. Those provisions constrain the steps a lender may take to enforce its post-petition rights under a mortgage on property of the bankruptcy estate. Respondents do not contend, however, that petitioner's notice of increased escrow payments violated either of those provisions. See Br. in Opp. 2, 8 (relying on Section 362(a)(6) and on 11 U.S.C. 362(a)(1), which prohibits specified measures "to recover a claim against the debtor that arose before the commencement of the [bankruptcy] case").

escrow payments calculated under the RESPA methodology.

2. The dispute between the parties in this case concerns the specific computation methodology—and, in particular, the use of zero as the petition-date escrow-account balance—that petitioner employed to calculate respondents' post-petition escrow obligations. See, *e.g.*, Br. in Opp. 14-15. Petitioner asserts that "RESPA and [Regulation] X require a 100% forward-looking analysis to determine the amount of post-petition escrow deposits," and that "[t]he analysis does not look back in time to pre-petition events or to 'recoup' anything." Pet. 13. That assertion is logically relevant, not to the question whether petitioner had a "claim" to the $1787.69, but to the distinct issue whether the challenged post-petition escrow increase represented an impermissible attempt to collect that pre-petition "claim," or was instead a permissible effort to enforce respondents' post-petition obligations. For their part, respondents rely on the fact that, if they had made the pre-petition escrow payments they were contractually required to make, the escrow account balance would have been $1787.69, and the monthly payments that petitioner could have required going forward would have been significantly lower. Respondents argue on that basis that the announced increase was the practical equivalent of a demand for the $1787.69, and therefore was barred by Section 362(a)(6). See, *e.g.*, Br. in Opp. 1-3; see also 11 U.S.C. 1322(b)(5) (Chapter 13 plan may provide for the curing of mortgage debtor's pre-petition defaults "within a reasonable time"). The court of appeals did not explicitly resolve that disagreement between the parties.

By itself, moreover, the sending of a notice of a calculation of a debt ordinarily does not violate the automatic

stay. Indeed, some courts of appeals have held that even requests for payment of a debt do not violate the stay absent coercion or harassing acts. See *Morgan Guar. Trust Co.* v. *American Sav. & Loan Ass'n*, 804 F.2d 1487, 1491 (9th Cir. 1986), cert. denied, 482 U.S. 929 (1987); *LTV Corp.* v. *Gulf States Steel, Inc.*, 969 F.2d 1050, 1059 (D.C. Cir.), cert. denied, 506 U.S. 1022 (1992). Thus, even if the courts below concluded that petitioner's recalculation of escrow payments was in substance an assertion of a pre-petition claim, they would need to determine whether petitioner performed coercive or harassing acts to collect that debt. The court of appeals did not conduct that inquiry, but instead remanded the case to allow the district court to determine whether "[petitioner] willfully violated the automatic stay when it sent [respondents] a demand for higher monthly escrow payments." Pet. App. 15a.[5]

Thus, while the court of appeals correctly held that petitioner had a "claim" for the $1787.69 component of respondents' escrow arrearage, neither the court below nor any other court of appeals has explored in any meaningful way the distinct question whether petitioner's notice of increased escrow payments constituted an impermissible attempt to collect that claim.[6] If this

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[5] Although the Third Circuit's opinion is not entirely clear on this point, we believe the opinion is best read to leave open the question whether Section 362(a)(6) was violated at all, not simply whether the violation was willful. The court of appeals' opinion contains no explicit statement that petitioner's conduct violated the automatic stay, and the court did not discuss whether petitioner's conduct rose to the level of an attempt to collect the increased escrow payments.

[6] In *Campbell* v. *Countrywide Home Loans, Inc.*, 545 F.3d 348, 354-357 (2008), the Fifth Circuit held that the lender (Countrywide, the petitioner in this case) had not violated the automatic stay by including

Court's review of that issue ultimately becomes appropriate, the Court would likely benefit from further percolation of the question in the lower courts. And because the court of appeals remanded to allow the lower courts to determine whether petitioner willfully violated the automatic stay (Pet. App. 15a), this Court's consideration of the automatic-stay issue would be especially premature at the present stage of this case.

C. Neither Of The Questions Presented Warrants This Court's Review At The Present Time

1. Both of the courts of appeals that have addressed the question have held that petitioner (the mortgage lender in both cases) had a "claim" under the Bankruptcy Code to a debtor's missed pre-petition escrow payments, including missed payments that did not cause petitioner to incur any out-of-pocket expenses. Pet. App. 5a-14a; *Campbell* v. *Countrywide Home Loans, Inc.*, 545 F.3d 348, 353-354 (5th Cir. 2008). And neither court analyzed in any meaningful way the question whether a notice of increased escrow payments, when issued outside the framework of the bankruptcy case, would constitute an impermissible attempt to collect the pre-petition claim. See Pet. App. 15a; notes 5-6, *supra*.

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in its proof of claim a paragraph stating that the debtors' post-petition escrow payments would increase. The court emphasized, however, that the lender's only statement concerning the contemplated increase was contained in the proof of claim itself, and that "Countrywide did not collect this new amount or take any action outside the bankruptcy proceeding to collect it." *Id.* at 355; see *id.* at 356 (stating that the court had "f[ou]nd no precedents in which a court has held that asserting a right to payment in a Proof of Claim constitutes a violation of the automatic stay"). In this case, by contrast, petitioner's notice of increased escrow charges was issued outside the framework of the bankruptcy case.

Although petitioner contends (Pet. 17-18, 28-30) that the Third and Fifth Circuits employed inconsistent approaches in reaching the same conclusion, there is no conflict between the two decisions warranting intervention by this Court.

Petitioner argues (Pet. 17, 28) that the Third Circuit characterized petitioner's right to payment as a "contingent claim" within the meaning of 11 U.S.C. 101(5)(A) (*i.e.*, contingent on petitioner's incurring future out-of-pocket expenses for tax or insurance charges), while the Fifth Circuit in *Campbell* determined that petitioner's claim had matured. That purported disparity provides no basis for this Court's review. The court below discussed *Campbell* at some length (see Pet. App. 11a-13a) and stated that it "f[ou]nd *Campbell* persuasive." *Id.* at 13a. The court also noted that it saw "nothing in [respondents'] mortgage that would prevent [petitioner] from suing for the [escrow] payments." *Id.* at 11a n.2. Petitioner relies (Pet. 17, 26-28) on the Third Circuit's additional statement that, even if petitioner's right to payment were "contingent on a disbursement by [petitioner] of its own funds to satisfy an escrow item for which there is a deficiency," such a right would still give rise to a Bankruptcy Code "claim" because 11 U.S.C. 101(5)(A) includes "contingent claims." Pet. App. 14a. That is a correct statement of the law, see *Travelers Cas. & Sur. Co. of Am.* v. *Pacific Gas & Elec. Co.*, 549 U.S. 443, 451 (2007), and it was at most an alternative rationale for the Third Circuit's decision. In any event, any divergence in reasoning between two courts of appeals that reached the same ultimate conclusion would not create a circuit conflict warranting this Court's review.

Petitioner also argues (Pet. 18, 30) that the Third and Fifth Circuits disagree about the total amount that lend-

ers may assert as escrow-related "claims." As petitioner explains (*ibid.*), the Third Circuit held that a lender has a claim to the entire amount of overdue pre-petition escrow payments ($5657.60), including both the portion attributable to the deficiency ($3869.91) and the remainder ($1787.69). Petitioner is incorrect, however, in construing the Fifth Circuit's opinion in *Campbell* to hold that a lender has a claim to the *sum* of the missed payments ($5657.60 here) and the deficiency ($3869.91 here). Rather, as in this case, the parties in *Campbell* agreed that petitioner had a pre-petition claim for any out-of-pocket expenses that the missed escrow payments had caused it to incur. The court in *Campbell* therefore focused only on the four overdue pre-petition escrow payments that would have yielded a positive escrow account balance if the debtors had made all of their escrow payments on time. And, as in this case, the court concluded that petitioner had a "claim" to those missed payments. See *Campbell*, 545 F.3d at 351-354. There is consequently no disagreement between the Third and Fifth Circuits about the total amount that a lender may assert as a "claim" in these circumstances.

Petitioner's reliance (Pet. 16, 20-21) on *In re Villarie*, 648 F.2d 810 (2d Cir. 1981) (per curiam), is also misplaced. In *Villarie*, a city employee took out a loan from the city's retirement system, a disbursement that functioned as "an advance against [the employee's] future retirement benefits." *Id.* at 811. After the employee filed a bankruptcy petition, the Second Circuit held that the city retirement system did not have a Bankruptcy Code "claim" against the debtor because, under the city's administrative code, the only mechanism to recover the loan was to offset the amount owed against the employee's retirement benefits when the employee ulti-

mately retired or was terminated. *Id*. at 812. Here, by contrast, respondents' obligation to make monthly escrow payments was enforceable through either a breach-of-contract suit or acceleration and foreclosure of the mortgage. Pet. App. 11a & n.2, 13a-14a; see pp. 9-13, *supra*.

2. Petitioner is also wrong in arguing (*e.g.*, Pet. 12-13, 18-19) that the court of appeals' decision conflicts with or otherwise subverts the operation of RESPA. Petitioner relies on 12 U.S.C. 2609(a)(2), which states that "in the event the lender determines there will be or is a deficiency"—*i.e.*, a negative balance in the account, see 24 C.F.R. 3500.17(b)—"he shall not be prohibited from requiring additional monthly deposits in such escrow account to avoid or eliminate such deficiency." That language appears in a proviso that immediately follows language *limiting* the amounts that lenders may require borrowers to deposit into escrow accounts. See 12 U.S.C. 2609(a)(2) (imposing such limitations and then preceding the text petitioner relies upon with the words, "Provided, however").

"The general office of a proviso is to except something from the enacting clause, or to qualify and restrain its generality and prevent misinterpretation." *United States* v. *Morrow*, 266 U.S. 531, 534-535 (1925) (citations omitted). The language on which petitioner relies is therefore best understood to mean simply that, when there is an actual or projected deficiency in an escrow account, the lender is not prohibited *by RESPA* from requiring the borrower to pay over additional sums. To construe Section 2609(a)(2) more broadly to limit the effect of the automatic stay in bankruptcy is particularly unwarranted because the purpose of the automatic stay is to limit creditors' use of debt-collection mechanisms

that would otherwise be permissible under non-bankruptcy law.

3. As explained above, the interlocutory posture of the case also counsels against plenary review at this time. See *VMI* v. *United States*, 508 U.S. 946 (1993) (opinion of Scalia, J., respecting the denial of the petition for a writ of certiorari). The court of appeals remanded the case to the lower courts to determine whether petitioner's actions constituted a willful violation of the automatic stay. See Pet. App. 15a. Petitioner may yet prevail before the lower courts, and it will have an opportunity to raise all of its arguments in a subsequent petition for a writ of certiorari if it does not.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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