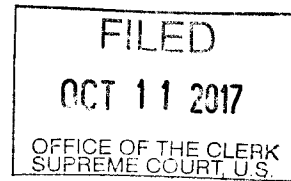


17 566



No. _____

In the Supreme Court of the United States

RICHARD D. SIBERT,

Petitioner,

v.

WELLS FARGO BANK, N.A.,

Respondent.

*On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Fourth Circuit*

PETITION FOR WRIT OF CERTIORARI

Jeremy S. McKenzie
McKENZIE & HART, LLC
21 West Park Avenue
Savannah, Georgia 31401
(912) 335-4977

John D. Hafemann
Counsel of Record
MILITARY JUSTICE ATTORNEYS, PLLC
21 West Park Avenue
Savannah, Georgia 31401
(844) 334-5459
john@militaryjusticeattorneys.com

Counsel for Petitioner

BLANK PAGE

QUESTION PRESENTED

The Servicemembers Civil Relief Act (“SCRA”) at 50 U.S.C. § 3953 bestows upon active members of the military protections against non-judicial foreclosures of their home while they are serving in defense of their country. Specifically, § 3953 states that for any home mortgage that “originated before the period of the servicemember’s military service and for which the servicemember is still obligated,” a foreclosure of the home may not occur “except upon a court order.” In the present case, Petitioner Richard D. Sibert purchased a home during a period of military service with the Navy. He then left the Navy and became a civilian for several months, during which time Respondent Wells Fargo began non-judicial foreclosure proceedings. Sibert then re-enlisted in the Army, and it was during this second period of military service that Wells Fargo conducted its non-judicial foreclosure sale of his home. The Fourth Circuit held that, even though Sibert’s mortgage obligation arose before the period of military service during which Wells Fargo conducted its non-judicial foreclosure, he could not avail himself of the protections of the SCRA since he purchased his home during a prior period of military service.

This case presents the question of whether servicemembers who bravely choose to re-enlist in this country’s armed forces thereby lose the protections of the SCRA and can suffer non-judicial foreclosures of their homes, simply because they purchased their homes during an earlier period of military service.

PARTIES TO THE PROCEEDING

Pursuant to Supreme Court Rule 14(1)(b), petitioner states that, in addition to the parties appearing in the caption of the case on the cover page, Carolyn L. Camardo, the Bankruptcy Trustee for the Estate of Sibert (“Trustee”) with the United States Bankruptcy Court for the Eastern District of Virginia is also a party to this case. The district court approved the substitution of the Trustee as the real party in interest in this action, however, its final order and judgment named Sibert as the named plaintiff. On appeal, the Fourth Circuit retained the designation of Sibert as the appellant. For purposes of clarity and continuity, Petitioner has continued to include Sibert in the caption of this case and will refer to him as the petitioner herein.

TABLE OF CONTENTS

QUESTION PRESENTED	i
PARTIES TO THE PROCEEDING	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
BASIS FOR JURISDICTION	1
STATUTORY PROVISIONS INVOLVED	1
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE PETITION	5
I. Sibert Is Entitled to the Protections of the SCRA Pursuant to the Plain Language of 50 U.S.C. § 3953	6
II. In the Alternative, Even If an Ambiguity Existed As to the Meaning of § 3953, It Should Have Been Construed in Favor of Sibert	10
CONCLUSION	12
APPENDIX	
Appendix A Memorandum in the United States Court of Appeals for the Fourth Circuit (July 17, 2017)	App. 1

Appendix B	Memorandum Opinion and Final Order in the United States District Court for the Eastern District of Virginia, Richmond Division (May 4, 2016)	App. 16
------------	--	---------

TABLE OF AUTHORITIES

CASES

<i>Boone v. Lightner</i> , 319 U.S. 561 (1943)	10
<i>Brewster v. Sun Trust Mortgage, Inc.</i> , 742 F.3d 876 (9th Cir. 2014)	7, 10
<i>Caminetti v. United States</i> , 242 U.S. 470 (1917)	8
<i>Connecticut Nat. Bank v. Germain</i> , 503 U.S. 249 (1992)	8
<i>Hartford Underwriters Ins. Co. v. Union Planters Bank, N. A.</i> , 530 U.S. 1 (2000)	8
<i>Le Maistre v. Leffers</i> , 333 U.S. 1 (1948)	10
<i>Sibert v. Wells Fargo Bank, N.A.</i> , 863 F.3d 331 (4th Cir. 2107)	1, 7
<i>United States v. Ron Pair Enterprises, Inc.</i> , 489 U.S. 235 (1989)	8
<i>Walters v. Metro. Educ. Enters., Inc.</i> , 519 U.S. 202 (1997)	8

STATUTES AND LEGISLATIVE HISTORY

28 U.S.C. § 1254(1)	1
28 U.S.C. § 1332	4
50 U.S.C. § 3901 <i>et seq.</i>	<i>passim</i>
50 U.S.C. § 3902(1)	6, 7

50 U.S.C. § 3911(3)	11
50 U.S.C. § 3953	6, 7, 8, 9
50 U.S.C. § 3953(a)	1, 7
50 U.S.C. § 3953(c)	1, 2, 3, 7
Pub. L. No. 65-103, 40 Stat. 440	6
Pub. L. No. 76-351, Ch. 888, 54 Stat. 1178	6
Pub. L. No. 77-732, 56 Stat. 769	6
H.R. Rep. 77-219	6
H.R. Rep. 108-81	6

PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully seeks a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-15) is reported at 863 F.3d 331. The district court's order granting respondent's motion for summary judgment (Pet. App. 16-33) is reported at 184 F. Supp. 3d 296.

BASIS FOR JURISDICTION

The opinion and judgment of the court of appeals was entered on July 17, 2017. Pet. App. 1-15. The Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

50 U.S.C. § 3953(a) provides in pertinent part:

This section applies only to an obligation on real or personal property owned by a servicemember that—

(1) originated before the period of the servicemember's military service and for which the servicemember is still obligated; and

(2) is secured by a mortgage, trust deed, or other security in the nature of a mortgage.

50 U.S.C. § 3953(c) provides in pertinent part:

A sale, foreclosure, or seizure of property for a breach of an obligation described in subsection

(a) shall not be valid if made during, or within one year after, the period of the servicemember's military service except—

(1) upon a court order granted before such sale, foreclosure, or seizure with a return made and approved by the court . . .

STATEMENT OF THE CASE

Petitioner Richard D. Sibert ("Sibert") seeks the protections afforded him under the Servicemembers Civil Relief Act ("SCRA"), codified at 50 U.S.C. § 3901 *et seq.*, with regard to the foreclosure of his home by Respondent Wells Fargo Bank, N.A. ("Wells Fargo"). Sibert purchased his home prior to entering the second of two separate and distinct periods of active military service, and Wells Fargo subsequently conducted a non-judicial foreclosure of his residence while he was on active duty. Such action by Wells Fargo is not permitted by the SCRA, which requires that any such foreclosure be accomplished via court order. The fundamental purpose of the SCRA is to provide protections to servicemembers such as Sibert while they are engaged in the defense of our nation.

The district court granted summary judgment in favor of Wells Fargo, reasoning that, because Sibert bought his home during his first period of military service, he could not avail himself of the protections provided by the SCRA when he re-enlisted. The Fourth Circuit Court of Appeals, in a divided opinion, affirmed the lower court's decision, also concluding that the fact that Sibert's purchase of the home during a previous period of active duty stripped him of the SCRA's benefits during a subsequent period of service.

Notably, Judge King authored a strong dissenting opinion, in which he explained how the majority's decision contradicted the clear language and spirit of the SCRA.

Sibert enlisted in the United States Navy in July 2004. While still serving in the Navy, Sibert purchased a home for himself and his wife in Virginia Beach, Virginia on May 15, 2008. The purchase of the home was financed with a loan of \$174,650, which was subsequently acquired by Wells Fargo.

In July 2008, Sibert was honorably discharged from the Navy. Shortly thereafter, Sibert went into default on his mortgage and, by March 2009, Wells Fargo had commenced a non-judicial foreclosure of the home. In April 2009, Sibert enlisted in the United States Army and was assigned to the Army's artillery forces at Fort Sill, Oklahoma. The following month, Wells Fargo sold Sibert's house at a foreclosure sale. As a result of the sale, Sibert's pregnant wife was forced to leave their home and secure another residence elsewhere.

Sibert commenced this action on October 29, 2014, seeking damages as a result of Wells Fargo's failure to comply with the SCRA. Specifically, the SCRA requires a lender to obtain a court order before foreclosing on or selling property owned by a current or recent servicemember where the mortgage obligation "originated before the period of the servicemember's military service." 50 U.S.C. § 3953(c). Since Sibert purchased his home prior to entering the Army, Wells Fargo could foreclose upon and sell his home only after obtaining a court order.

Sibert filed this action in the United States District Court for the Eastern District of Virginia, which had diversity jurisdiction based upon 28 U.S.C. § 1332. The district court granted summary judgment in favor of Wells Fargo, holding that the SCRA did not apply to a home purchased during a prior period of military service, even if the homeowner re-enlisted in the armed forces. The Fourth Circuit, in a split opinion, affirmed the lower court's decision. In doing so, the Circuit Court viewed the SCRA as creating two different types of obligations that a servicemember could incur – those incurred during military service and those incurred outside military service. According to the Circuit Court, since Sibert's home purchase occurred during a period of active duty (albeit a prior and distinct period of service), he lost the protections of the SCRA during his subsequent period of military service. In reaching their conclusions, the lower courts have misapplied the plain language of the SCRA or, alternatively, have failed to liberally construe the SCRA as required by law.

REASONS FOR GRANTING THE PETITION

There are currently more than 1.3 million members of the United States armed services.¹ Similar to Sibert, more than a quarter of a million of these servicemembers will likely choose to re-enlist in the military after their current period of military service expires. It is reasonable to assume that many of these servicemembers have purchased homes during their initial period of military service. In the unfortunate event that these servicemembers face foreclosure of their home during their subsequent period of service in defense of this nation, they would lose the protections of the SCRA if the Fourth Circuit's decision is allowed to stand.

This important question of federal law that could impact thousands of military personnel and their families has not been, but should be, settled by this Court. The only circuit to address this issue to date, the Fourth Circuit, has reached an erroneous conclusion that conflicts with both the language of the SCRA and pronouncements from this Court that servicemembers such as Sibert should receive the benefit of any doubts as to whether the SCRA affords them protection. In light of the lower court's ruling, a significant number of servicemembers, both within the Fourth Circuit and elsewhere, may now lose a significant right to require a court order before their homes are foreclosed upon. This situation is in urgent need of review (and correction) by this Court to

¹ *Source:* U.S. Defense Department Defense Manpower Data Center, https://www.dmdc.osd.mil/appj/dwp/dwp_reports.jsp, last checked 10/6/2017.

minimize and prevent the harm that will result to this nation's soldiers, sailors, airmen, and marines, particularly during this time of increased foreign threats and its heightened burdens upon our military.

I. Sibert Is Entitled to the Protections of the SCRA Pursuant to the Plain Language of 50 U.S.C. § 3953

Initially enacted during World War I, the Soldiers' and Sailors' Civil Relief Act, Pub. L. No. 65-103, 40 Stat. 440 (1918), provided certain protections to servicemembers, including the requirement that any mortgages originated prior to the law's enactment could only be foreclosed upon pursuant to a court order. After this initial law expired following World War I, it was resurrected and revised in response to World War II. *See* Pub. L. No. 76-351, Ch. 888, 54 Stat. 1178 and Pub. L. No. 77-732, 56 Stat. 769. This World War II-era enactment precluded the non-judicial foreclosure of mortgage obligations "owned by a person in military service at the commencement of the period of the military service and still so owned by him which obligations originated prior to such person's period of military service." H.R. Rep. 77-219, at 11.

A more recent enactment of this law, the Servicemembers Civil Relief Act, occurred in 2013 which restated the earlier law's restrictions on covered mortgages. H.R. Rep. 108-81. The purpose of the SCRA was "to provide for, strengthen, and expedite the national defense through protection extended . . . to servicemembers of the United States to enable such persons to devote their entire energy to the defense needs of the Nation." *See* 50 U.S.C. § 3902(1). The SCRA seeks to accomplish this goal through "the

temporary suspension of judicial and administrative proceedings and transactions that may adversely affect the civil rights of servicemembers during their military service.” *Id.* § 3902(1). In other words, the SCRA sought “to enable [servicemembers] to devote their entire energy to the defense needs of the Nation.” *Brewster v. Sun Trust Mortgage, Inc.*, 742 F.3d 876, 878 (9th Cir. 2014).

As it currently reads, 50 U.S.C. § 3953 prohibits the non-judicial foreclosure sale of a servicemember’s property “during, or within one year after, the period of the servicemember’s military service.” *Id.* § 3953(c). This prohibition applies

only to an obligation on real or personal property owned by a servicemember that –

- (1) originated before the period of the servicemember’s military service and for which the servicemember is still obligated; and
- (2) is secured by a mortgage, trust deed, or other security in the nature of a mortgage.

Id. § 3953(a).

In its opinion, the Fourth Circuit interpreted this language to apply only to mortgage “obligations incurred *outside* of military service, while denying protection to obligations originating during the servicemember’s military service.” *Sibert v. Wells Fargo Bank, N.A.*, 863 F.3d 331, 334 (4th Cir. 2107) (emphasis in original). However, such a distinction is found nowhere in the actual language of the SCRA.

This Court has “stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there.” *Connecticut Nat. Bank v. Germain*, 503 U.S. 249, 253-254 (1992). When the statutory “language is plain, the sole function of the courts--at least where the disposition required by the text is not absurd -- is to enforce it according to its terms.” *Hartford Underwriters Ins. Co. v. Union Planters Bank, N. A.*, 530 U.S. 1, 6 (2000) (quoting *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 241 (1989), in turn quoting *Caminetti v. United States*, 242 U.S. 470, 485 (1917); internal quotation marks omitted). “In the absence of any indication to the contrary, words in a statute are assumed to bear their ordinary, contemporary, common meaning.” *Walters v. Metro. Educ. Enters., Inc.*, 519 U.S. 202, 207 (1997).

In the present case, the straightforward and undisputed facts are that Sibert obtained a mortgage in May 2008 and was then discharged from active duty with the Navy in July 2008. He was then a civilian for nearly ten months before entering into another “period of military service” with the Army in April 2009. All that is required under the SCRA is that the loan have originated, “before the period of the servicemember’s military service” in order for a servicemember to receive the protections afforded by § 3953. Sibert’s mortgage clearly originated before “the period of military service” during which he was foreclosed upon. If it was the intent of Congress to deprive servicemembers of the SCRA’s protections under § 3953 if they secured a loan during “a period” or “any period” of military service, it could have worded the Act to say as much. Furthermore, if § 3953 was intended to apply

only to mortgages originated prior to a servicemember's "*initial*" or "*first*" period of military service, it could have easily been written to say so. Alternatively, the statute could have used the plural form of "period" to provide protections only to those mortgage debts that "originated before the *periods* of military service."²

Adopting a literal interpretation of the SCRA to afford Sibert and others like him protection under § 3953 would not produce an absurd or unintended result. In finding to the contrary, the Fourth Circuit claimed that Sibert was well aware of his financial situation due to his military service with the Navy when he purchased his home. Thus, the lower court reasoned, Sibert should have foreseen his financial obligations when he re-enlisted with the Army. However, this assertion assumes that a servicemember's financial capability and lifestyle will be identical or substantially similar from one period of military service to the next. This assumption is not supported by the record in this case. To the contrary, a servicemember's financial picture could change drastically from one period of service to another. For example, a servicemember's level of compensation and benefits from the government could change depending on his rank and assignment. In addition, a servicemember's personal situation could change, such

² By 2013, when Congress re-enacted the SCRA, it was aware that a significant percentage of servicemembers chose to re-enlist after an initial period of service. According to the Military Diversity Leadership Commission, re-enlistment rates across all branches of the military ranged from approximately twenty percent (20%) to as high as eighty percent (80%) between 2000 and 2008. *Source*: <https://www.hsdl.org/?view&did=716162> (last checked 10/4/17).

as the birth of a child (or children) or the unexpected need to care for and support a loved one during a subsequent period of service. Indeed, Sibert was expecting a baby during his second period of service with the Army.

Under the lower courts' rulings, even though the financial situation of a servicemember who purchased a home during her first period of military service may have significantly deteriorated during a subsequent period of service, she would nonetheless be deprived of the SCRA's mortgage protections. Such a result would flatly contradict the spirit and purpose of the SCRA. In accordance with the plain terms of the SCRA, Sibert should have received the SCRA's protection against a non-judicial foreclosure of his home.

II. In the Alternative, Even If an Ambiguity Existed As to the Meaning of § 3953, It Should Have Been Construed in Favor of Sibert

This Court long ago held that the statutory predecessor to the SCRA “must be read with an eye friendly to those who dropped their affairs to answer their country’s call.” *Le Maistre v. Leffers*, 333 U.S. 1, 6 (1948). Such legislation “is always to be liberally construed to protect those who have been obliged to drop their own affairs to take up the burdens of the nation.” *Boone v. Lightner*, 319 U.S. 561, 575 (1943). *See also Brewster v. Sun Trust Mortgage, Inc.*, 742 F.3d 876 (9th Cir. 2014) (“[T]he United States Supreme Court has unambiguously required courts to give a broad construction to the statutory language of the SCRA to effectuate the Congressional purpose of granting active-duty members of the armed forces repose from some of the trials and tribulations of

civilian life . . .”). Yet, rather than liberally construing the SCRA to provide protection to Sibert, the Fourth Circuit has *narrowly* interpreted the Act to strip him of its benefits.

The term “the period of military service” is defined in the SCRA as, “...the period beginning on the date on which the servicemember enters military service and ending on the date on which the servicemember is released from military service...” 50 U.S.C. § 3911(3). As such, this term must be construed broadly. Here, the statute specifically uses the words “the period of military service” when discussing the timing of the mortgage obligation. In applying ordinary rules of statutory interpretation in conjunction with the requirement that the SCRA must be read broadly, it is clear that “the period” refers to the specific period during which foreclosure proceedings are initiated. The Fourth Circuit’s narrow construction of the SCRA that effectively treated Sibert’s separate and distinct periods of military service as a single period of service is erroneous and should be reversed.

CONCLUSION

Since the Fourth Circuit's holding misconstrued the plain language of the SCRA and failed to resolve any ambiguities in favor of Sibert, this Court should grant the writ of certiorari.

Respectfully submitted,

Jeremy S. McKenzie
MCKENZIE & HART, LLC
21 West Park Avenue
Savannah, Georgia 31401
(912) 335-4977

John D. Hafemann
Counsel of Record
MILITARY JUSTICE
ATTORNEYS, PLLC
21 West Park Avenue
Savannah, Georgia 31401
(844) 334-5459
john@militaryjustice
attorneys.com

Counsel for Petitioner