No. 16-349

IN THE

Supreme Court of the United States

RICKY HENSON, *et al.*,
Petitioners,

v.

SANTANDER CONSUMER USA, INC.,
Respondent.

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

BRIEF FOR THE STATES OF OREGON, ALASKA, CALIFORNIA, CONNECTICUT, DELAWARE, FLORIDA, HAWAII, ILLINOIS, IOWA, INDIANA, KANSAS, KENTUCKY, MAINE, MARYLAND, MASSACHUSETTS, MICHIGAN, MISSISSIPPI, MINNESOTA, MONTANA, NEW HAMPSHIRE, NEW MEXICO, NEW YORK, NORTH CAROLINA, NORTH DAKOTA, PENNSYLVANIA, RHODE ISLAND, VERMONT, AND WASHINGTON, AND THE DISTRICT OF COLUMBIA AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

The Fair Debt Collection Practices Act, 15 U.S.C. §1692 *et seq*., regulates the conduct of "debt collector[s]." Is a company that regularly attempts to collect debts it purchases after the debts have fallen into default a "debt collector"?

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INTEREST OF THE AMICI STATES

The States of Oregon, Alaska, California, Connecticut, Delaware, Florida, Hawaii, Illinois, Iowa, Indiana, Kansas, Kentucky, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Montana, New Hampshire, New Mexico, New York, North Carolina, North Dakota, Pennsylvania, Rhode Island, Vermont, and Washington, and the District of Columbia, have a strong interest in protecting consumers from unlawful debt-collection practices. Debt-collection abuse is one of the most frequent consumer complaints made to state Attorneys General. As Congress recognized in enacting the Fair Debt Collection Practices Act (FDCPA), abusive debt-collection practices contribute to "personal bankruptcies, to marital instability, to the loss of jobs, and to invasions of individual privacy," inflicting irreparable injury not only on individual consumers but on their families and communities as well. 15 U.S.C. § 1692(a). Abusive debt collectors also strain state resources by clogging the court systems, particularly small-claims courts, with their filings. *See*, *e.g.*, Peter A. Holland, *The One Hundred Billion Dollar Problem in Small Claims Court: Robo-Signing and Lack of Proof in Debt Buyer Cases*, 6. J. Bus. & Tech. L. 259, 261 (2011); Dalié Jiménez, *Dirty Debts Sold Dirt Cheap*, 52 Harv. J. on Legis. 41, 55 (2015).

Congress enacted the FDCPA in part to "promote consistent State action to protect consumers against debt collection abuses." 15 U.S.C. § 1692(e). It understood that although States could regulate debt collectors under state law, they had not all done so in a meaningful way. S. Rep. No. 95-382, at 2 (1977), *reprinted in* 1977 U.S.C.C.A.N. 1695, 1696–97. The FDCPA established a uniform nationwide floor to

protect consumers from, among other things, "unscrupulous debt collectors who harass consumers from another State." *Id.* at 3, 1977 U.S.C.C.A.N. at 1697.

The *Amici* States thus have a direct interest in ensuring that the FDCPA is correctly interpreted to cover those who attempt to collect defaulted debt they have purchased. Debt buyers who purchase defaulted consumer debt—usually for pennies on the dollar—and then attempt to collect that defaulted debt are, from a consumer's perspective, no different from debt collectors who do not own the debt. While debt buyers can and should be able to pursue lawful means of debt collection, the law should protect consumers from unscrupulous and harassing collection tactics by such companies.

Proper interpretation of the FDPCA is also important to the effective enforcement of state consumer-protection laws. State courts frequently look to federal FDCPA decisions when interpreting parallel state laws. And the definitions used in many state consumer-protection laws are expressly linked to the definitions in the FDCPA. Thus, an erroneous interpretation of the federal law threatens to undermine the effective enforcement of state consumer-protection statutes as well.

SUMMARY OF ARGUMENT

A debt buyer is a "debt collector" if it regularly attempts to collect debts that were in default at the time the debts were purchased. Although the FDCPA's relevant definition of debt collector requires that the debts be "owed or due or asserted to be owed or due another," 15 U.S.C. § 1692a(6), the proper inquiry is whether the debt was owed or due another at the time it originated, not at the time of collection.

That interpretation of the statute is consistent not only with the FDCPA's text and purpose, but also with common sense. Congress enacted the FDCPA to regulate the practices of debt collectors because collectors, unlike original creditors, have no ongoing relationship with debtors, and thus are unlikely to be concerned about preserving their reputation or goodwill. Debt buyers, like debt collectors, have no ongoing relationship with debtors. Indeed, from the consumer's perspective, a debt buyer is no different from a debt collector, and there is no reason to treat one differently from the other.

Even more importantly, excluding debt buyers from the FDCPA's definition of debt collector would create a regulatory void that Congress could not have intended. Many States' debt collection laws are modeled on the FDCPA's protections. Other States have no comprehensive debt collection legislation, relying almost entirely on the FDCPA to curb abusive practices in their states. If debt buyers were not covered by the FDCPA, then consumers in those States would have little to no protection against harassing debt-collection practices by debt buyers. Because of the challenges posed by enforcement actions against national or out-of-state companies, States often rely on federal standards to rein in the worst offenders. Thus, although States are free to enact legislation that is more protective than the FDCPA, it remains important for federal law to set a robust floor for this industry.

ARGUMENT

The FDCPA defines a "debt collector" in relevant part as "any person . . . who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another." 15

U.S.C. § 1692a(6). The question presented here turns on *when* the debts must have been "owed or due another"—specifically, whether they must have been owed another at the time of *collection*, or whether it is enough that they were owed another at the time the debts *originated*.

As explained below, a debt is "owed or due another" if it was originated by someone else, even if the debt is no longer "owed or due" to the originator. Thus, a debt buyer who—like respondent—regularly attempts to collect debts it purchases after the debts have fallen into default is a debt collector regulated by the FDCPA. The text and the broader structure of the statute support that conclusion, and a contrary holding would leave a gaping regulatory void that Congress could not have intended.

A. The FDCPA's text demonstrates that whether debts are "owed or due another" depends upon the status of the debts at the time of origination, regardless of who owns the debts at the time of collection.

Two key provisions of the FDCPA confirm that debts are "owed or due another" if they were owed or due another at the time of origination, regardless of who owns or possesses the right to pursue the debts at the time of collection.

The first provision is the definition of "debt collector." Congress specifically excluded from the definition of debt collector "any person collecting or attempting to collect any debt owed or due another to the extent such activity . . . (iii) concerns a debt which was not in default at the time it was obtained by such person." 15 U.S.C. § 1692a(6)(F)(iii). That exception makes sense only if a person may "obtain[]" a debt that remains

"owed or due another." It would be rendered meaningless if the act of obtaining a debt from another means that the debt is no longer "owed or due another." Thus, debts are "owed or due another" if they were originally owed another, regardless of who owns the debt at the time of collection. And the exclusion applies only if the person obtained such a debt when it was not in default.

The second provision is the definition of "creditor." The FDCPA defines "creditor" as "any person who offers or extends credit creating a debt or to whom a debt is owed." 15 U.S.C. § 1692a(4). But it excludes "any person to the extent that he receives an assignment or transfer of a debt in default solely for the purpose of facilitating the collection of such debt for another." 15 U.S.C. § 1692a(4). Thus, the statute contemplates that a person can receive an "assignment or transfer" of a debt but still be collecting the debt "for another." This too suggests that whether the debt is owed another must be determined as of the time the debt originated, not the time of collection.

Together, these two provisions resolve any ambiguity that the phrase "owed or due another" might have in isolation. Because someone can obtain (by assignment, transfer, or otherwise) a debt that is owed another, it must be the time of origination, not the time of collection, that governs whether the debt is owed another. Thus, a company that regularly attempts to collect defaulted debt that it has purchased is a "debt collector" as the FDCPA defines that term.

B. The broader structure and purpose of the FDCPA confirm that purchasers of defaulted debt are debt collectors.

The FDCPA distinguishes between "debt collectors," who are subject to the statute's requirements, and

"creditors," who are not. 15 U.S.C. §§ 1692a to 1692k. Congress chose to distinguish between debt collectors and creditors, and to regulate collection practices by debt collectors only, because it recognized that creditors "generally are restrained by the desire to protect their good will when collecting past due accounts." S. Rep. No. 95-382, at 2, *reprinted in* 1977 U.S.C.C.A.N. at 1696. By contrast, "independent collectors are likely to have no further contact with the consumer and often are unconcerned with the consumer's opinion of them." *Id.*

Recognizing this practical difference, Congress crafted the definitions of "debt collectors" and "creditors" to ensure that the statute covers the category of actors and relationships it was concerned about. For example, Congress expressly included in the definition of "debt collector" companies who use a third-party name to collect. 15 U.S.C. § 1692a(6) ("debt collector" "includes any creditor who in the process of collecting his own debts, uses any name other than his own which would indicate that a third person is collecting or attempting to collect such debts"). Creditors who collect by using a third-party name would not have the same reputational constraints as creditors collecting in their own name.

Similarly, as discussed above, Congress exempted from the definition of "debt collectors" a person who attempts to collect a debt that was *not* in default at the time the person obtained it. 15 U.S.C. § 1692a(6)(F)(iii). This makes sense: If a company acquires a non-defaulted debt to service it, it is acting more like the original creditor and has an ongoing relationship with the consumer. The company's interest in protecting its reputation and good will with customers may be enough to constrain it from engaging in abusive practices.

Thus, Congress did not see the need to extend the FDCPA's protections to that particular type of relationship.

But regular buyers of *defaulted* debt generally do not have similar incentives. If a company acquires debt that is in default for the purpose of collecting that defaulted debt, it does not have the ongoing servicing relationship with the consumer that Congress envisioned. It is instead acting like what it is—a debt collector.

Congress would not have intended to exempt debt buyers because debt buyers pose the same threat to consumers as other regulated debt collectors. Debt buyers are generally entities who specialize in collections, even if collection is not their principal purpose. Jiménez, *supra*, at 42, 52. They purchase defaulted debt, usually for pennies on the dollar, that has been deemed uncollectable by the original creditor. Holland, *supra*, at 260. The debt is usually part of a large portfolio of defaulted debts. Jiménez, *supra*, at 52–54. The underlying debts are often sold many times over. *Id.*

These characteristics of debt buyers lead them to engage in the very kind of debt-collection activities that the FDCPA is meant to prevent. For example, debt buyers often lack the "formal proof that complies with the forum state's rules of evidence." Holland, *supra*, at 261. That is so because when a debt buyer purchases defaulted debt, it often does not acquire documentation about the underlying accounts such as monthly statements, contracts, or account applications. Jiménez, *supra*, at 65. Instead, the debt buyer usually purchases the "assignment of the right to collect and a spreadsheet" with minimal information about the alleged debt and debtor. *Id.* at 43.

Nonetheless, the debt buyer sues; the alleged debtor rarely responds; and the debt buyer obtains a default judgment against the alleged debtor—without ever documenting the debt's validity. Jiménez, *supra*, at 55. Thousands of debt-collection lawsuits are filed every day, "most of them by debt buyers." *Id.* Of those filed by debt buyers, a remarkable 70-90% result in default judgments. *Id*.

These suits are of at least equal concern when brought by debt buyers rather than traditional debt collectors. A key reason consumers fail to respond to lawsuits by debt buyers is that the consumer often does not recognize the company or the asserted debt because there is no identifiable tie to the original debt or creditor. From a consumer's perspective, there is no difference between a debt collector who bought the defaulted debt and one who is trying to collect for someone else.

Default judgments against such consumers are particularly troubling because, in many cases, the debt should not have been collected at all—it was paid in full, cleared in bankruptcy, or the statute of limitations had passed. *See*, *e.g.*, Holland, *supra*, at 270 n.75 (identifying numerous cases in which a debtor had settled or paid the debt prior to being sold). The most common consumer complaint about debt collection is that the collector continues to try to collect a debt that is not owed. Jiménez, *supra*, at 75; Fair Debt Collection Practices Act, CFPB Annual Report 2016 at 18 (March 2016).[1]

Applying the FDCPA to debt buyers ensures that those entities are subject to important restrictions and

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[1] *Available at* http://files.consumerfinance.gov/f/201603_ cfpb-fair-debt-collection-practices-act.pdf.

obligations for their activity across the country. For example, the FDCPA requires that within five days of first communicating with a consumer, a debt collector provide written notice about the amount of the debt, the consumer's right to contest the validity of the debt, and the consumer's right to request the name of the original creditor. 15 U.S.C. § 1692g(a). That information is just as important to a consumer dealing with a collector who *purchased* defaulted debt as it is to a consumer dealing with one who did not.

Not surprisingly, then, both regulators and regulated entities have long understood the FDCPA to cover purchasers of defaulted debt, as Congress intended. The Federal Trade Commission and Consumer Financial Protection Bureau, which share authority to enforce the FDCPA, have consistently taken that position. *See*, *e.g.*, *FTC v. Check Investors*, 502 F.3d 159, 172–74 (3d Cir. 2007); FTC, *The Structure and Practices of the Debt Buying Industry* 3–4 (Jan. 2013) (debt buyers are within the FDCPA's definition of "'debt collectors," and so the FDCPA "applies to the activities of debt buyers that purchase accounts in default"); Press Release, *CFPB Takes Action Against the Two Largest Debt Buyers for Using Deceptive Tactics to Collect Bad Debts*, CFPB (Sept. 9, 2015)[2] (settlement of suit against debt buyers who purchased defaulted debt); Press Release, *Debt Buyer/Collection Companies and Their Principles Settle FTC Charges*, FTC (Mar. 24, 2004)[3] (settlement

[2] *Available at* https://www.consumerfinance.gov/about-us/newsroom/cfpb-takes-action-against-the-two-largest-debt-buyers-for-using-deceptive-tactics-to-collect-bad-debts/.

[3] *Available at* https://www.ftc.gov/news-events/press-releases/2004/03/debt-buyerdebt-collection-companies-and-their-principals-settle.

of suit against debt buyers who purchased defaulted debt).

Similarly, trade associations for the debt-buying industry have acknowledged that "[a]lthough 15 U.S.C. § 1692a(6) exempts creditors from the definition of 'debt collector,' debt buyers who purchase debts after default do not enjoy the benefits of that exemption and they are treated as 'debt collectors' for FDCPA purposes." Brief for the Commercial Law League of America and DBA International as Amici Curiae Supporting Respondents, at 12, *Jerman v. Carlisle*, *McNellie, Rini*, *Kramer & Ulrich LPA*, 559 U.S. 573 (November 30, 2009) (No. 08-1200).

These views reflect a commonsense understanding of the FDCPA and the congressional intent behind it. From consumers' perspective, a company that buys defaulted debts and then tries to collect them is no different from a company that tries to collect debts without buying them. The overall structure and purpose of the FDCPA confirm that Congress intended both to be subject to the statute's requirements for debt collectors.

C. Excluding debt buyers from the FDCPA would result in regulatory voids that Congress could not have intended.

Respondent has suggested that it is unimportant for the FDCPA to cover debt buyers, because state law can fill the resulting regulatory voids. Br. in Opp. 25. That suggestion misunderstands the limitations of state law in this area. Although States can enact laws that are more protective of consumers than the FDCPA,[4]

[4] *See* 15 U.S.C. § 1692n (FDCPA does not "annul, alter, or affect, or exempt any person subject to the provisions of this subchapter from complying with the laws of any State with

there are important reasons for the FDCPA to set a uniform floor for debt-collection protections that includes debt buyers. *See* 123 Cong. Rec. 10,244 (1977) (FDCPA provides for important "standardization and uniformity" in debt-collection protections).

First, States have shaped their laws in reliance on the FDCPA's protections. Some States, like Delaware, have not enacted any comprehensive state law governing debt-collection practices, instead relying on the FDCPA to protect their consumers. If the FDCPA did not apply to debt buyers, consumers in those States might have no protection from harassing debt-collection practices by debt buyers.

Even among those States with debt-collection laws, many expressly link the scope of their laws to the FDCPA. *See*, *e.g.*, Ala. Code § 40-12-80 (2016) (incorporating FDCPA definition of "debt collector"); Idaho Code Ann. § 26-2229A (2016) (providing for a state cause of action by director of finance against licensed collection agencies for violation of any provision of the FDCPA that is not inconsistent with a state statute); Minn. Stat. § 332.37(12) (2017) (incorporating provisions of the FDCPA); Wash. Rev. Code. § 19.16.100(10) (2016) (defining "out-of-state collection agency" to exclude any person who is excluded from "debt collector" under the FDCPA).

In other States, the interpretation of the FDCPA may affect the meaning of state law. *See*, *e.g.*, Fla. Stat. § 559.77(5) (2016) (Florida courts must give "great

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respect to debt collection practices, except to the extent those laws are inconsistent with any provision" of the FDCPA and "a State law is not inconsistent with" the FDCPA "if the protection such law affords any consumer is greater than the protection provided by this subchapter.").

weight" to federal interpretations of the FDCPA when interpreting and applying the Florida Consumer Collection Practices Act); *Centurion Capital Corp. v. Druce*, 828 N.Y.S.2d 851, 853 (Civ. Ct. 2006) (because local statute was patterned on the FDCPA, court looks to interpretations of the federal act for guidance).

And even States that have enacted statutes that are entirely independent of the FDCPA may have chosen, in view of the FDCPA's remedial provisions, to have narrower remedies under state law. For example, the FDCPA provides for a private right of action and statutory damages. 15 U.S.C. § 1692k. Not all state debt collection laws offer those same remedies. *See*, *e.g.*, N.Y. Gen. Bus. Law §§ 600 to 603 (2017) (no private remedy for most unlawful debt collection practices under state law); Md. Code Ann., Com. Law § 14-203 (2016) (violator of state's debt collection statutes only "liable for any damages proximately caused by the violation").

Second, there are practical and legal drawbacks to relying on state rather than federal law for enforcement efforts. Debt buyers are a difficult target for state enforcement even when a state's laws reach those companies' collection activities. As Congress recognized in enacting the FDCPA, debt collectors can harass consumers from across state lines, and state Attorneys General may find it hard to enforce their more protective laws in those circumstances. S. Rep. No. 95-382, at 3, *reprinted in* 1977 U.S.C.C.A.N. at 1697.

A strong federal law also facilitates coordinated federal and state enforcement targeting the worst offenders. Debt buyers tend to be large national companies with deep pockets who are costly targets for state Attorneys General to pursue. States sometimes

can address that concern by pooling resources to collaborate on multistate enforcement actions. But to do so effectively, States generally must focus only on areas where the same legal standards apply, which can limit their reach. And companies are generally more willing to settle enforcement actions that involve a uniform federal standard instead of a patchwork of state laws.

Ultimately, if purchasers of defaulted debt like respondent were not subject to the FDCPA, then many abusive debt-collection practices would continue unfettered. Nothing in the text or legislative history of the FDCPA indicates that Congress would have intended that result.

CONCLUSION

The Court should reverse the judgment of the Court of Appeals dismissing petitioners' complaint and remand for further proceedings.

Respectfully submitted,

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