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No. 16-___

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IN THE

Supreme Court of the United States

RICKY HENSON, IAN MATTHEW GLOVER, KAREN PACOULOUTE, F/K/A KAREN WELCOME KUTEYI, AND PAULETTE HOUSE,

Petitioners,

v.

SANTANDER CONSUMER USA, INC., COMMERCIAL RECOVERY SYSTEMS, INC., AND NCB MANAGEMENT SERVICES, INC.,

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

Cory L. Zajdel
Z LAW, LLC
2345 York Road,
Suite #B-13
Timonium, MD 21093

Kevin K. Russell
Counsel of Record
GOLDSTEIN &
RUSSELL, P.C.
7475 Wisconsin Ave.
Suite 850
Washington, DC 20814
(202) 362-0636
kr@goldsteinrussell.com

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

QUESTION PRESENTED

The Fair Debt Collection Practices Act, 15 U.S.C. § 1692 *et seq.*, regulates the conduct of "debt collector[s]." Respondent Santander Consumer USA, Inc., is in the business of purchasing defaulted debt for pennies on the dollar then attempting to collect on that debt from the defaulting consumer. The Question Presented, upon which the circuits are deeply divided, is:

Whether a company that regularly attempts to collect debts it purchased after the debts had fallen into default is a "debt collector" subject to the Fair Debt Collection Practices Act?

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Ricky Henson, Ian Matthew Glover, Karen Pacouloute, f/k/a Karen Welcome Kuteyi, and Paulette House respectfully petition for 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. 1a-20a) is published at 817 F.3d 131. The opinion of the district court (Pet. App. 21a-40a) is unpublished but available at 2014 WL 1806915.

JURISDICTION

The judgment of the court of appeals was entered on March 23, 2016. Pet. App. 1a. The court of appeals denied petitioner's timely petition for rehearing en banc on April 19, 2016. Pet. App. 41a-42a. On July 5, 2016, the Chief Justice extended the time to file this petition through August 17, 2016. No. 16A12. On August 4, 2016, the Chief Justice further extended the time to file this petition through September 16, 2016. *Id.* This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

Section 1692a of Title 15 provides in relevant part:

> (4) The term "creditor" means any person who offers or extends credit creating a debt or to whom a debt is owed, but such term does not include any person to the extent that he receives an assignment or transfer of a debt in default solely for the purpose of

facilitating collection of such debt for another.

* * *

(6) The term "debt collector" means any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the collection of any debts, or who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another. Notwithstanding the exclusion provided by clause (F) of the last sentence of this paragraph, the term 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. For the purpose of section 1692f(6) of this title, such term also includes any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the enforcement of security interests. The term does not include—

(A) any officer or employee of a creditor while, in the name of the creditor, collecting debts for such creditor;

(B) any person while acting as a debt collector for another person, both of whom are related by common ownership or affiliated by corporate control, if the person acting as a debt collector does so only for persons to whom it is so related

or affiliated and if the principal business of such person is not the collection of debts;

(C) any officer or employee of the United States or any State to the extent that collecting or attempting to collect any debt is in the performance of his official duties;

(D) any person while serving or attempting to serve legal process on any other person in connection with the judicial enforcement of any debt;

(E) any nonprofit organization which, at the request of consumers, performs bona fide consumer credit counseling and assists consumers in the liquidation of their debts by receiving payments from such consumers and distributing such amounts to creditors; and

(F) any person collecting or attempting to collect any debt owed or due or asserted to be owed or due another to the extent such activity (i) is incidental to a bona fide fiduciary obligation or a bona fide escrow arrangement; (ii) concerns a debt which was originated by such person; (iii) concerns a debt which was not in default at the time it was obtained by such person; or (iv) concerns a debt obtained by such person as a secured party in a commercial credit transaction involving the creditor.

STATEMENT OF THE CASE

In 1977, Congress enacted the Fair Debt Collection Practices Act in light of "abundant evidence of the use of abusive, deceptive, and unfair debt collection practices by many debt collectors." 15 U.S.C. § 1692(a). The Act distinguishes between "debt collectors," who are subject to the statute, and "creditors," who generally are not. *See id.* § 1692a(4), (6). The reason for the distinction was that "[u]nlike creditors, who generally are restrained by the desire to protect their good will when collecting past due accounts, independent collectors are likely to have no future contact with the consumer and often are unconcerned with the consumer's opinion of them." S. Rep. No. 95-382, p. 2 (1977).

As the Consumer Financial Protection Bureau has noted, the "advent and growth of debt buying is one of the most significant changes to the debt collection market" since Congress enacted the FDCPA in late 1970s.[1] Unlike traditional debt collectors, who were paid a portion of the debt collected on behalf of the debt originator, members of this new industry "purchase defaulted debt from original creditors" for pennies on the dollar and then "seek to collect on purchased debts themselves."[2]

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[1] Consumer Financial Protection Bureau, Fair Debt Collection Practices Act: CFPB Annual Report 2014 ("CFPB 2014 Annual Report"), at 7 (March 2014), *available at* http://files.consumerfinance.gov/f/201403_cfpb_fair-debt-collection-practices-act.pdf.

[2] *Id.*; *see also* Federal Trade Commission, The Structure and Practices of the Debt Buying Industry ("Debt Buying Industry"), at ii (January 2013) (on average, debt buyers pay

However, very much like other debt collectors, these purchasers of defaulted debt have powerful incentives to engage in aggressive collection practices and lack the countervailing incentives of ordinary creditors to maintain a good reputation with consumers.

The courts of appeals are deeply and avowedly divided over whether these purchasers of defaulted debt are covered by the FDCPA. This case presents the Court an opportunity to resolve that important conflict.

1. Petitioners obtained car loans from CitiFinancial Auto. When they were unable to make the payments and defaulted, CitiFinancial Auto repossessed their cars, sold the vehicles, and informed petitioners they owed a deficiency balance. Pet. App. 5a. It later sold the defaulted loans to respondent Santander Consumer USA, Inc. (Santander), which is in the business of purchasing defaulted debt for pennies on the dollar, then seeking to recover some or all of the debt from the defaulting debtor. *Id.*

On November 29, 2012, petitioners filed the present putative class action against respondents, alleging violations of the FDCPA. Among other things, petitioners alleged that Santander violated the statute by misrepresenting its authority to collect the debt and the amount of the debt allegedly owed, and by communicating directly with consumers it

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four cents per dollar of debt face value), *available at* https://www.ftc.gov/sites/default/files/documents/reports/structure-and-practices-debt-buying-industry/debtbuyingreport.pdf.

knew to be represented by counsel. *See* Pet. App. 5a, 23a; Complaint ¶ 10.[3]

Santander moved to dismiss, arguing that it did not qualify as a "debt collector" under the statutory definition because it had purchased the defaulted debt it was seeking to collect. Pet. App. 6a. The FDCPA provides that a defendant is a "debt collector" if it meets either of two definitions, subject to a number of exceptions. The term "debt collector," thus, is defined as:

> any person **[1]** who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the collection of any debts, or **[2]** who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another. . . . The term does not include— . . .
>
> (F) any person collecting or attempting to collect any debt owed or due or asserted to be owed or due another to the extent such activity . . . (iii) concerns a *debt which was not in default at the time it was obtained by such person* . . . .

15 U.S.C. § 1692a(6) (emphasis added).

The statute distinguishes debt collectors, so defined, from "creditors." Similar to the definition of "debt collector," the definition of "creditor" includes

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[3] The Complaint is included at pages 5-21 of the Joint Appendix filed with the Fourth Circuit.

an exception that depends on the default status of transferred debt:

> The term "creditor" means any person who offers or extends credit creating a debt or to whom a debt is owed, but such term does not include any person to the extent that he *receives an assignment or transfer of a debt in default solely for the purpose of facilitating collection of such debt for another.*

Id. § 1692a(4) (emphasis added).

Like many purchasers of defaulted debt, Santander, a consumer finance company, conducts a range of other business activities, precluding it from coverage under the first prong of the "debt collector" definition covering businesses whose "principal purpose . . . is the collection of any debts." 15 U.S.C. § 1692a(6). *See* Pet. App. 13a. Accordingly, the question was whether Santander met the second "regularly collects" prong of the definition or was, instead, a creditor.

Pointing to Section 1692a(6)(F)(iii), petitioners argued that "non-originating debt buyers (i.e. Santander) are subject to liability under the FDCPA where the debt acquired was in default." Pet. App. 29a. In contrast, Santander "argue[d] that it is a creditor exempt from liability under the FDCPA because it held the debt and collected the same on its own behalf." *Id.*

The district court agreed with Santander and dismissed. Petitioners appealed. Pet. App. 6a.

2. The Fourth Circuit affirmed, explaining that "[w]hile the FDCPA is a somewhat complex and technical regulation of debt collector practices, we

conclude that it generally does not regulate creditors when they collect debt on their own account and that, on the facts alleged by the plaintiffs, Santander became a creditor when it purchased the loans before engaging in the challenged practices." Pet. App. 4a-5a. In the course of doing so, the court expressly embraced the position of the Ninth and Eleventh Circuits, *id.* 18a, while recognizing that it was departing from the rule applied in the Third, Sixth, and Seventh Circuits, *id.* 12a.

The Fourth Circuit accepted that Santander satisfied the portion of the definition of "debt collector" encompassing a company that "regularly collects or attempts to collect, directly or indirectly, debts." 15 U.S.C. § 1692a(6). But it concluded that purchasers of defaulted debt are saved from regulation by the additional requirement that the debt be "owed or due *another*." *Id.* (emphasis added). The court assumed that Congress meant "owed or due another *at the time of collection*" rather than "owed or due another *at the time of origination*." *See* Pet. App. 17a-18a; *contra FTC v. Check Investors, Inc.*, 502 F.3d 159, 173 (3d Cir. 2007) ("Congress has unambiguously directed our focus to the time the debt was acquired in determining whether one is acting as a creditor or debt collector under the FDCPA."). On that understanding of the statute, the court concluded that Santander was not a debt collector because "the debts that Santander was collecting were owed to it, Santander, not to another." Pet. App. 13a.

The court did not dispute that this interpretation rendered one of the exceptions to the definition of "debt collector" surplusage. Specifically, Section

1692a(6)(F)(iii), provides that the term "debt collector" does "not include . . . any person collecting or attempting to collect any debt owed or due or asserted to be owed or due another to the extent such activity . . . concerns a debt which was not in default at the time it was obtained by such person." On the Fourth Circuit's view, that exemption would never come into play because someone who "obtained" a defaulted debt would not be attempting to collect a debt "owed or due another" but would rather be collecting a debt owed to itself. But the court sidestepped the problem by declaring that if "a person does not satisfy one of the definitions in the main text, the exclusions in subsections § 1692a(6)(A)-(F) do not come into play." *Id.* 11a; *see also id.* 14a-15a.

The court of appeals also made no effort to square its interpretation with the basic purposes of the statute, which is to "eliminate abusive debt collection practices by debt collectors." 15 U.S.C. § 1692(e). It did not contest, for example, that Congress distinguished between creditors and debt collectors because it believed that creditors would be "restrained by the desire to protect their good will when collecting past due accounts," while debt collectors would be "likely to have no future contract with the consumer" and therefore "unconcerned with the consumer's opinion of them." S. Rep. No. 95-382, at 2. Nor did it doubt that the "purchaser of an already-defaulted debt – like a debt collector, and unlike the originator and servicer of a non-defaulted debt – has no ongoing relationship with the debtor and, therefore, no incentive to engender good will by treating the debtor with honesty and respect." *Ruth v. Triumph P'ships*, 577 F.3d 790, 797 (7th Cir. 2009).

3. Petitioner filed a petition for rehearing en banc, noting that the panel decision exacerbated a circuit conflict, but the petition was denied. Pet. App. 41a-42a.

REASONS FOR GRANTING THE WRIT

As the Fourth Circuit documented, the question whether the FDCPA applies to those who purchase defaulted debt is the subject of a deep, mature circuit conflict that has only become more entrenched with time. The question is of vital importance to both consumers and a burgeoning industry of defaulted debt purchasers whose legal responsibilities presently vary dramatically from circuit to circuit. And the Fourth Circuit's resolution of the statutory question is wrong, at odds with the text and purposes of the statute, while also in conflict with the reasonable interpretation of the federal agencies delegated responsibility for its enforcement. This case thus presents the Court an opportunity to resolve an intolerable circuit conflict and restore important protections to consumers throughout the country.

I. There Is A 5-3 Conflict Over Whether Collectors Of Purchased Defaulted Debt Are "Debt Collectors" Under The FDCPA.

As the Fourth Circuit's opinion documents, the circuits are deeply divided over the FDCPA's application to companies that purchase and collect defaulted debt. Four circuits and the District of Columbia Court of Appeals hold that such companies are debt collectors under the Act, while three other circuits have rejected that interpretation.

A. The Third, Fifth, Sixth, And Seventh Circuits, And The District of Columbia Court of Appeals, Hold That Collectors Of Purchased Defaulted Debt Are Debt Collectors Within The Meaning Of The FDCPA.

The decision below directly conflicts with longstanding precedent from the Third, Fifth, Sixth, and Seventh Circuits and the District of Columbia Court of Appeals.

1. ***Third Circuit.*** In *Federal Trade Commission v. Check Investors, Inc.*, 502 F.3d 159 (3d Cir. 2007), the defendant was in the business of purchasing debts arising from bounced consumer checks. *Id.* at 162. The founder of Check Investors had previously served time in prison for posing as an FBI agent in attempts to collect debts. *Id.* at 163. He started his new business on the assumption "that if a debt collection business collected only debts it actually owned based on purchasing [bounced] checks, it would not be subject to the FDCPA, and would therefore be free to use collection techniques prohibited by the FDCPA such as harassment and deception." *Id.*

Acting on that belief, the business's "primary *modus operandi* was to accuse consumers of being criminals or crooks, and threatening them with arrest and criminal or civil prosecution." *Id.* For example, one "consumer was told that if she did not pay, her children would 'watch their mother being taken away in handcuffs,' and they would 'be bringing their mommy care packages in prison.'" *Id.* These threats "were all false," but effective. *Id.* "In one case, Check Investors' repeatedly called a 64-year

old mother regarding her son's debt; fearing that her son would be arrested and carted off to jail, she paid the amount of the demand." *Id.* at 164. The demanded amount typically included "a fee of $125 or $130 [added] to the face amount of each check; an amount that exceeded the legal limit for such fees under the laws of most states." *Id.* at 163.

The Federal Trade Commission successfully brought suit, alleging violations of various provisions of the FCPA. On appeal, Check Investors argued, as respondent did below, that it was not a debt collector, but rather a creditor, because it was "collecting debts actually owed to them, as opposed to . . . collecting obligations owed to someone else." *Id* at 172. Relying in part on its prior decision in *Pollice v. National Tax Funding, L.P.*, 225 F.3d 379 (3d Cir. 2000), the Third Circuit affirmed.

The court began by noting that the statute was not entirely clear on this question. Ordinarily, the Act distinguishes between "debt collectors" who are covered by the statute and "creditors" who usually are not. *Check Investors*, 502 F.3d at 173. However, "for debts that do not originate with the one attempting collection, but are acquired from another, the collection activity related to that debt could logically fall into either category." *Id.* (quoting *Schlosser v. Fairbanks Capital Corp.*, 323 F.3d 534, 536 (7th Cir. 2003)). Because one cannot be both a creditor and a debt collector for any given transaction, a line had to be drawn. To draw it, the court looked to statute's exception of those who collect debt "which was not in default at the time it was obtained by such person." 15 U.S.C. § 1692a(6)(F)(iii). The court reasoned that there

would be no point in specifically excluding collectors of *un*defaulted debt from the definition of "debt collector" unless Congress contemplated that collecters of *defaulted* debt counted as debt collectors subject to the statute. 502 F.3d at 173.

The court acknowledged that at the time of collection, a company like Check Investors might be owed the debt and, therefore, could be seen as "at least nominally a creditor." *Id.* "Nevertheless, pursuant to § 1692a, Congress has unambiguously directed our focus to *the time the debt was acquired* in determining whether one is acting as a creditor or debt collector under the FDCPA." *Id.* (emphasis added).

The Third Circuit noted that this interpretation also best accorded with the statute's purpose and rationale. *Id.* at 173 (citing S. Rep. No. 95-382, at 2). The court observed that the purchaser of defaulted debt acted in the same manner, and with the same dangerous incentives, as a typical third-party debt collector rather than an ordinary creditor: "No merchant worried about goodwill or the future of his/her business would have engaged in the kind of conduct that was the daily fare of the collectors at Check Investors." *Id.*

2. ***Sixth Circuit.*** In *Bridge v. Ocwen Federal Bank, FSB*, 681 F.3d 355 (6th Cir. 2012), the Sixth Circuit adopted the Third Circuit's interpretation, "hold[ing] that the definition of debt collector pursuant to § 1692a(6)(F)(iii) includes any non-originating debt holder that either acquired a debt in default or has treated the debt as if it were in default at the time of acquisition." *Id.* at 362.

The court agreed with the Third Circuit that "as to a specific debt, one cannot be both a 'creditor' and a 'debt collector,' as defined in the FDCPA, because those terms are mutually exclusive." *Id.* at 359 (quoting *Check Investors*, 502 F.3d at 173). And it agreed that the "distinction between a creditor and a debt collector lies precisely in the language of § 1692a(6)(F)(iii)." *Id.* On that understanding, for "an entity that did not originate the debt in question but acquired it and attempts to collect on it, that entity is either a creditor or a debt collector depending on the default status of the debt at the time it was acquired." *Id.*

3. ***Seventh Circuit.*** The Seventh Circuit applied the same rule in *Ruth v. Triumph Partnerships*, 577 F.3d 790 (7th Cir. 2009). As in this case, the defendant in *Ruth* was "a company that purchases defaulted debts and attempts to recover them." *Id.* at 793. And as in this case, the defendant argued that because it was collecting defaulted debt it had purchased, "the FDCPA does not apply to it." *Id.* at 796.

The Seventh Circuit rejected that claim. "Where, as here, the party seeking to collect a debt did not originate it but instead acquired it from another party, we have held that the party's status under the FDCPA turns on whether the debt was in default at the time it was acquired." *Id.* (citing *McKinney v. Cadleway Props., Inc.*, 548 F.3d 496, 501 (7th Cir. 2008); *Schlosser v. Fairbanks Capital Corp.*, 323 F.3d 534, 538-39 (7th Cir. 2003)).

The court explained that this view of the text finds additional support "in the rationale behind Congress' decision to treat the originator of a debt

obligation differently from a party whose only interest is in the collection of a debt that already has fallen into default." *Id.* at 797. "The purchaser of an already-defaulted debt – like the debt collector, and unlike the originator and servicer of a non-defaulted debt – has no ongoing relationship with the debtor and, therefore, no incentive to engender good will by treating the debtor with honesty and respect." *Id.*

4. ***Fifth Circuit and District of Columbia Court of Appeals.*** The Fifth Circuit and the District of Columbia Court of Appeals have also construed the FDCPA to apply to "those entities whose interest in the debt was acquired when the debt was in default." *Logan v. LaSalle Bank Nat'l Ass'n*, 80 A.3d 1014, 1021 (D.C. 2013) (citing *Ruth*, 577 F.3d at 796-97; *Check Investors*, 502 F.3d at 172-73); *Perry v. Stewart Title Co.*, 756 F.2d 1197, 1208 (5th Cir. 1985) ("[A] debt collector does not include . . . an assignee of a debt, *as long as the debt was not in default at the time it was assigned.*" (emphasis added)).

B. The Fourth, Ninth, And Eleventh Circuits Reject The Majority Rule.

The Fourth, Ninth, and Eleventh Circuits have reached the opposite conclusion.

1. ***Fourth Circuit.*** As discussed above, the Fourth Circuit in this case acknowledged the decisions of the Third, Sixth, and Seventh Circuits, but rejected their reasoning, concluding instead that "the default status of a debt has no bearing on whether a person qualifies as a debt collector under the threshold definition set forth in 15 U.S.C. § 1692a(6)." Pet. App. 8a. "That determination," the court believed, ordinarily turns instead "on whether a

person collects debt *on behalf of others* or *for its own account*." *Id.* (emphasis in original). Because "the debts that Santander was collecting were owed to it, Santander, not to another," respondent was excluded from the Act's coverage. *Id.* 13a-14a.

2. ***Ninth Circuit.*** The Ninth Circuit had previously reached the same conclusion based on similar reasoning in *Schlegel v. Wells Fargo Bank, NA*, 720 F.3d 1204 (9th Cir. 2013). In that case, Wells Fargo acquired a defaulted mortgage as part of a bankruptcy proceeding. *Id.* at 1206. Without acknowledging or engaging with the contrary views of other circuits, the Ninth Circuit held that because Wells Fargo had acquired the debt, it could not be a debt collector because it was not attempting to collect a debt owed to "another" within the meaning of the statutory definition of a "debt collector." *Id.* at 1209.

3. ***Eleventh Circuit.*** In *Davidson v. Capital One Bank (USA), N.A.*, 797 F.3d 1309 (11th Cir. 2015), the Eleventh Circuit likewise was required to decide "whether a bank that collects or attempts to collect on a debt, which was in default at the time it was acquired by the bank, qualifies as a 'debt collector' under the" FDCPA. *Id.* at 1310. Like the Fourth Circuit below, the Eleventh Circuit rejected the claim that "the line between creditors and debt collectors is drawn by the default status of the debt." *Id.* at 1314. Instead, the court concluded that it needed to

> look no further than the statutory text to conclude that, under the plain language of the FDCPA, a bank (or any person or entity) does not qualify as a "debt collector" where the bank does not regularly collect or

> attempt to collect on debts "owed or due another" . . . even where the consumer's debt was in default at the time the bank acquired it.

Id. at 1311; *see also id.* at 1316 ("[W]e reject Davidson's argument that a non-originating debt holder is a 'debt collector' for purposes of the FDCPA solely because the debt was in default at the time it was acquired.").[4]

The Federal Trade Commission filed an amicus brief supporting rehearing en banc in *Davidson*, arguing that the question decided by the panel "is exceptionally important, and the panel incorrectly decided it in conflict with the decisions of four other courts of appeals." Amicus Brief of the Federal Trade Commission Supporting Rehearing En Banc, *Davidson*, *supra*, at 5 (hereinafter "FTC *Davidson* Br.").[5] However, the Eleventh Circuit denied the petition.

C. Only This Court Can Resolve The Circuit Conflict.

There is no genuine prospect that the circuit split will resolve itself without this Court's intervention.

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[4] The Eleventh Circuit held open that purchasers of defaulted debt could fall under the first prong of the statutory definition of a "debt collector," if its "principal purpose" is the collection of debts. *Id.* at 1316 n.8. But it did not dispute that even if this were so, it would exclude a great many companies (like the defendant before it and respondent here) that regularly collect defaulted debt as a significant – but not "principal" – portion of their business.

[5] *Available at* 2015 WL 5608572.

The Fourth Circuit issued its decision fully aware of the contrary authority in other circuits, *see* Pet. App. 12a, and denied a rehearing petition premised on the circuit conflict. The Eleventh Circuit likewise persisted in its position despite the Federal Trade Commission's amicus brief in support of rehearing, which pointed out the circuit conflict and the importance of the question. At the same time, the Government's support for the majority position makes it unlikely all five of the courts on the other side of the divide will go en banc and reverse course.

Finally, because courts on both sides of the conflict believe their conclusions are compelled by the statute, there is no prospect that a federal agency could resolve the dispute by issuing regulations. *Compare Check Investors*, 502 F.3d at 173 ("Congress has *unambiguously* directed our focus to the time the debt was acquired in determining whether one is acting as a creditor or debt collector under the FDCPA." (emphasis added)), *with Davidson*, 797 F.3d at 1316 ("The statute is *not susceptible* to [that] interpretation. Instead, applying the *plain language* of the statute, we find that a person who does not otherwise meet the requirements of § 1692a(6) is not a 'debt collector' under the FDCPA, even where the consumer's debt was in default at the time the person acquired it." (emphasis added)).

II. The FDCPA's Application To Purchasers Of Defaulted Debt Is A Question Of Substantial Importance.

The Federal Trade Commission had ample grounds for telling the Eleventh Circuit that the question presented in that case (and now by this petition) is exceptionally important. *See* FTC

Davidson Br. 5. The Fourth Circuit's decision "will remove important protections for consumers in the states of [that] Circuit and may hamper both government and private efforts to combat abusive debt-collection practices." *Id.* 1-2. At the same time, the current circuit split disserves the growing debt buying industry, which finds itself subject to dramatically different federal requirements across a hodge-podge of states.

1. Congress enacted the FDPCA because it recognized the importance of protecting consumers from the documents abuses of the debt collection industry. 15 U.S.C. § 1692(a). Those practices, Congress determined, impose significant harm on their victims, contributing to "the number of personal bankruptcies, to marital instability, to the loss of jobs, and to invasions of individual privacy." *Id.*

In the decades since the FDCPA was passed, Government enforcement efforts have documented that the abuses that gave rise to the statute continue to afflict many consumers. In 2016 alone, the debt collection industry was the subject of more than 85,000 complaints to federal consumer protection agencies, more than any other industry.[6] At the same time, federal enforcement actions resulted in

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[6] *See* Consumer Financial Protection Bureau, Fair Debt Collection Practices Act: CFPB Annual Report 2016 ("CFPB 2016 Annual Report"), at 18 (March 2016), *available at* http://files.consumerfinance.gov/f/201603_cfpb-fair-debt-collection-practices-act.pdf.

over $360 million in relief to consumers and $79 million in civil penalties.[7]

Whether the FDCPA provides a remedy for such abuses when perpetrated by debt buyers is a question of critical importance to consumers and government enforcement agencies. The FTC has called the advent and growth of debt buying "the most significant change in the debt collection business in the past decade." Federal Trade Commission, Collecting Consumer Debts: The Challenges of Change – A Workshop Report ("The Challenges of Change"), at iv (February 2009).[8] Debt buying was rare at the time the FDCPA was enacted. *See* Debt Buying Industry, *supra*, at 12 ("The practice of creditors selling consumer debts on a large scale has its origins in the savings and loan crisis of the late 1980s and early 1990s."). It now constitutes a multi-billion dollar industry with "hundreds, if not thousands, of entities of varying sizes that purchase debts." *Id.* at 14.

As the cases in the circuit split demonstrate, the risk of abusive collection practices is not eliminated when a debt collector purchases the defaulted debt it is seeking to collect. Indeed, the Federal Government has asserted FDCPA claims against numerous debt buyers, alleging serious misconduct. For example, in 2004, the Government settled claims against one debt buyer it alleged had "threatened and harassed

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[7] *Id.* at 27.

[8] *Available at* https://www.ftc.gov/sites/default/files/documents/reports/collecting-consumer-debts-challenges-change-federal-trade-commission-workshop-report/dcwr.pdf.

thousands of consumers to get them to pay old, unenforceable debts or debts they did not owe," "[u]sing obscene or profane language," "[c]alling consumers continuously with the intention of annoying and abusing them," "misrepresenting themselves as attorneys," and "[t]hreatening imprisonment, seizure, garnishment, attachment or sale of property or wages with full knowledge that such action could not legally be taken."[9] Even after the settlement, the debt buyer continued to engage in illegal misconduct, requiring further enforcement action.[10]

More recently, the Government filed FDCPA claims against the country's two largest debt buyers, alleging, among other things, that "[w]ithout verifying the debt, the companies collected payments by pressuring consumers with false statements and churning out lawsuits using robo-signed court documents," including lawsuits that they knew or should have known were barred by the statute of limitations.[11] Similar abuses have been documented elsewhere.[12]

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[9] *See* Release, FTC, Debt Buyer/Debt Collection Companies and Their Principals Settle FTC Charges (Mar. 24, 2004), *available at* https://www.ftc.gov/news-events/press-releases/2004/03/debt-buyerdebt-collection-companies-and-their-principals-settle.

[10] *See* Release, FTC, Debt Collector Settles with FTC for Abusive Practices (Mar. 12, 2007), *available at* https://www.ftc.gov/news-events/press-releases/2007/03/debt-collector-settles-ftc-abusive-practices.

[11] *See* Release, CFPB, CFPB Takes Action Against the Two Largest Debt Buyers for Using Deceptive Tactics to Collect Bad

The Government has also found that the debt buying process may itself contribute to violations of consumer's rights as important information (*e.g.*, regarding the amount and validity of a debt) may be lost as a debt is sold from one entity to another.[13]

2. Resolution of the question presented is also important for debt buyers. In those circuits exempting debt buyers from FDCPA coverage, companies that engage in ethical collection practices are put at precisely the competitive disadvantage Congress intended the FDCPA to eliminate. *See* 15 U.S.C. § 1692(e).

At the same time, the many debt buyers operating in multiple circuits are subject to varying legal requirements. Increasingly, the debt buying market has come to be dominated by large national firms operating in many states. Debt Buying Industry, *supra*, at 7 (finding that nine of the largest debt buyers "collectively purchased 76.1% of all consumer debt sold in 2008"). Presently, the same buyer may be subject to radically different obligations

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Debts, *available at* http://www.consumerfinance.gov/about-us/newsroom/cfpb-takes-action-against-the-two-largest-debt-buyers-for-using-deceptive-tactics-to-collect-bad-debts.

[12] *See, e.g.*, Neil L. Sobol, *Protecting Consumers from Zombie-Debt Collectors*, 44 N.M. L. REV. 327 (2014); Rick Jurgens & Robert J. Hobbs, Nat'l Consumer Law Ctr., The Debt Machine: How the Collection Industry Hounds Consumers and Overwhelms Courts, at 18 (July 2010), *available at* https://www.nclc.org/images/pdf/debt_collection/debt-machine.pdf.

[13] *See* CFPB 2016 Annual Report, *supra*, at 10-11.

depending on whether a debtor is living in Atlanta or Knoxville, Philadelphia or Richmond.

The existing circuit conflict also creates an incentive for forum shopping. While consumers presumably prefer to litigate FDCPA cases in their home districts, they always have the right to sue a corporate defendant in its state of incorporation or principal place of business, *see Daimler AG v. Bauman*, 134 S. Ct. 746, 760 (2014), which may be in a circuit with different law on the question presented.

III. The Fourth Circuit's Decision Is Wrong.

Certiorari is further warranted because the decision below is wrong.

A. The Decision Below Conflicts With The Text, Structure, And Purposes Of The FDCPA.

1. The Fourth Circuit believed that the text of the statute unambiguously excludes purchasers of defaulted debt from FDCPA responsibilities by defining "debt collectors" to include only those who attempt to collect debts "owed or due *another*." 15 U.S.C. § 1692a(6) (emphasis added); *see, e.g.*, Pet. App. 8a, 10a, 11a. Because debt buyers attempt to collect debts owed to themselves, it reasoned, they are not attempting to collect a debt due "another." Pet. App. 10a.

The unspoken premise of this reasoning is that a debt originated by a creditor becomes "due another" within the meaning of the statute upon assignment to a third party debt buyer. But that is far from obvious. To be sure, the assignee becomes entitled to demand that the payment owed the originator be tendered to the assignee. *See* RESTATEMENT

(SECOND) OF CONTRACTS § 317(1). But in common parlance, it is easy enough to say that the debt is owed to the originator, with the assignee simply entitled to collect it. *See id.* chp. 15 introductory note (explaining that assignments were originally conceived as a form of "power of attorney enabling the assignee to sue in the assignor's name"). Or put another way, the statute's reference to a debt "due another" simply does not say whether the debt must be "due another *at the time of collection*" or "due another *at the time of origination.*"

If there was nothing in the statute beyond the reference to a debt "due another," the Fourth Circuit's resolution of that ambiguity might be plausible. But there *is* more to the statute, and that additional language cuts decisively against the court of appeal's interpretation. In the very same definitional paragraph Congress stated that the term "debt collector" does *not* include "any person collecting or attempting to collect any debt . . . owed or due another to the extent such activity . . . 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) (emphasis added).

The subsection (F)(iii) exception demonstrates that Congress did *not* intend that the main definition's reference to debt "due another" automatically exclude any defendant collecting an assigned debt – if that were so, the exception in subsection (F)(iii) would be superfluous. That is, all of the entities described in subsection (F)(iii) have "obtained" the debt they are attempting to collect. As a result, on the Fourth Circuit's interpretation, none is attempting to collect a debt that is "due another"

within the meaning of the main definition. And if that is right, an entity attempting to collect a debt that "was not in default at the time it was obtained" has no need of the subsection (F)(iii) exception – it was never in danger of being considered a debt collector in the first place.

At the same time, the Fourth Circuit's interpretation does violence to subsection (F)(iii)'s necessary implication that assignees of defaulted debt are otherwise included as "debt collectors" under the provision's main definition.

Both problems are avoided by the interpretation adopted by the majority of circuits, which understand the main definitions' reference to a debt "due another" to refer to debts due another at the time of origination, not the time of collection. So understood, the main definition captures debt buyers and other assignees, but the subsection (F)(iii) exception then eliminates assignees who obtain the debt before it falls into default, as is typical of debt servicing companies, whom Congress intended to leave unregulated by the Act. *See* S. Rep. No. 95-382, at 3-4.

2. This harmonization of the various parts of the "debt collector" definition best aligns with the statute's overall structure and basic rationale.

For one thing, the definition of a "creditor" contains an exception roughly parallel to the subsection (F)(iii) exception to the definition of a "debt collector." *See* 15 U.S.C. § 1692a(4). That creditor exception again turns on whether the collector acquired the debt before or after it went into default. *See id.* As construed by the majority of courts, these definitions and their exceptions work in

tandem – one who collects a debt obtained before it went into default is a creditor, not a debt collector; one who obtains the debt after default is a debt collector, not a creditor.

Drawing this distinction is also "reasonable in light of the conduct regulated by the statute." *Schlosser*, 323 F.3d at 538. "If the one who acquired the debt continues to service it, it is acting much like the original creditor that created the debt. On the other hand, if it simply acquires the debt for collection, it is acting more like a debt collector." *Id.* at 536. A purchaser of defaulted debt has the same incentives for aggressive collection as any other third party debt collector, while similarly lacking the countervailing market pressures to maintain the goodwill of debtors. There is no reason for Congress to treat them differently and nothing in the text of the statute that requires courts to overlook this important reality.

B. The Decision Below Conflicts With The Considered View Of The Agencies Congress Tasked With Enforcing The FDCPA.

Finally, the decision below warrants review because it conflicts with the longstanding interpretation of the agencies Congress assigned principal responsibility for enforcing the FDCPA.

As originally enacted, the FDCPA authorized the Federal Trade Commission to "enforce compliance with" the Act, using its powers under the Federal Trade Commission Act. *See* 15 U.S.C. § 1692*l*(a). As part of the Consumer Financial Protection Act of 2010, the Consumer Financial Protection Bureau was also given overlapping enforcement authority with

respect to non-bank financial institutions. *See id.* § 1692*l*(b)(6).

These two agencies and the Solicitor General have consistently construed the FDCPA to apply to purchasers of defaulted debt. For example, defending the Federal Trade Commission's victory in *Check Investors* in 2008, the Solicitor General took the position in this Court that the "statutory distinction between a 'creditor' and a 'debt collector' depends, in the case of a third party to whom a debt has been transferred or assigned, solely upon whether the debt in question was in default at the time of the transfer or assignment." U.S. BIO 12, *Check Investors, Inc. v. FTC*, No. 08-37. [14] And as noted above, the Commission filed an amicus brief urging rehearing of the Eleventh Circuit's contrary decision in *Davidson*, stating that a "company that regularly buys debts owed to others and collects them is a 'debt collector' under the FDCPA for debts that were in default at the time it acquired those debts, even though, in acquiring them outright, the company was collecting them on its own behalf rather than 'for' another entity with a continuing ownership interest in them." FTC *Davidson* Br. 9. The Commission has also expressed its interpretation in other official documents and publications.[15] More recently, the

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[14] *Available at* 2008 WL 4533650. The petition in *Check Investors* was filed prior to the emergence of the circuit conflict. *See id.* at 12.

[15] *See, e.g.*, The Challenges of Change, *supra*, at 5; Federal Trade Commission, Repairing a Broken System: Protecting Consumers in Debt Collection Litigation and Arbitration, at 6

Consumer Finance Protection Bureau has embraced the same interpretation in publications, enforcement actions, and reports to Congress. [16]

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

Cory L. Zajdel
Z LAW, LLC
2345 York Road,
Suite #B-13
Timonium, MD 21093

Kevin K. Russell
Counsel of Record
GOLDSTEIN &
RUSSELL, P.C.
7475 Wisconsin Ave.
Suite 850
Washington, DC 20814
(202) 362-0636
kr@goldsteinrussell.com

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n.15 (July 2010), *available at* www.ftc.gov/os/2010/07/debtcollectionreport.pdf.

[16] *See, e.g.*, CFPB Bulletin 2013-07, Prohibition of Unfair, Deceptive, or Abusive Acts or Practices in the Collection of Consumer Debts, *available at* http://files.consumerfinance.gov/f/201307_cfpb_bulletin_unfair-deceptive-abusive-practices.pdf; CFPB 2016 Annual Report, *supra*, at 33-34 (discussing enforcement actions in report to Congress).