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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.,

Respondent.

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

BRIEF OF AMICUS CURIAE PUBLIC COUNSEL IN SUPPORT OF PETITIONERS

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Public Counsel is the largest *pro bono* law firm in the nation. Its 71 attorneys and 50 support staff—along with over 5,000 volunteer lawyers, law students, and legal professionals—assist more than 30,000 individuals, families, and community organizations every year. The Consumer Law Project is one of Public Counsel's original projects. From its inception, it has assisted thousands of low-income consumers in resolving claims of unfair business practices, fraud, misrepresentation, and a wide range of consumer issues. Public Counsel regularly brings cases under the Fair Debt Collection Practices Act and California's most closely analogous statute, the Rosenthal Fair Debt Collection Practices Act, and counsels many more consumers on their rights under these acts.

Public Counsel represents consumers who are harassed by unscrupulous debt collectors, including debt purchasers, in violation of the FDCPA. If a firm that purchases and collects defaulted debt is not a "debt collector" under the FDCPA, these consumers will be left exposed to the abusive practices that motivated the FDCPA's enactment, because state law offers little protection.[1]

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[1] No counsel for a party authored this brief in whole or in part, and no person other than amicus made a monetary contribution intended to fund the preparation or submission of this brief. All parties have filed blanket consents to the filing of amicus briefs.

SUMMARY OF ARGUMENT

Congress enacted the FDCPA because it found that the states were unable to protect consumers against abusive debt collectors. State officials explained that they could do little about unscrupulous collectors who harassed local residents by calling from out of state. They pleaded with Congress to do something about the problem. Even spokespeople for the debt collection industry conceded that state regulation was no match for interstate debt collectors. In enacting the FDCPA, Congress recognized that state regulation of the industry was completely ineffective.

In the forty years since the FDCPA was enacted, the inadequacies of state law have been exacerbated by changes in the size and structure of the debt collection industry. The industry, including firms that purchase debt, is hundreds of times larger than it was in 1977. The firms that make up this industry are multinational corporations with computerized call centers all over the world. Today, when a consumer is harassed by an abusive debt collector, the call is likely to be placed by a sophisticated software program, and the person with whom the consumer speaks may be in India or the Philippines. The states are even less able to protect their residents than they were in 1977.

When the FDCPA was enacted, the debt collection industry consisted almost entirely of firms that earned a percentage of each debt collected. Today, the purchase and collection of delinquent debt portfolios generates nearly a third of the industry's revenue. Buying debt has become one of the main methods of collecting it.

If the FDCPA does not prohibit deceptive practices by debt purchasers, those practices will flourish, because state law generally offers very weak protection. Some states have no statutes at all regulating the debt collection industry. Some merely require debt collectors to obtain a license but impose no substantive regulation. These states are entirely reliant on the FDCPA to protect their residents. Among the states that do regulate the conduct of debt collectors in some way, many do not provide consumers with a private right of action. This is a crucial shortcoming, because the enormous volume of complaints makes it impossible for state governments to pursue more than a tiny fraction of violators. Many state laws exempt large categories of debt collectors that are covered by the FDCPA, and many state laws offer weaker substantive protection than the FDCPA does. In short, if firms that purchase defaulted debt and then collect it are not "debt collectors" under the FDCPA, consumers will be left exposed to the abusive practices Congress intended to stop, because the states are not equipped to handle this problem.

ARGUMENT

If the FDCPA does not prohibit deceptive practices by debt purchasers, those practices will flourish, because state law is inadequate to protect consumers.

If the Fair Debt Collection Practices Act does not cover debt purchasers, consumers' primary defense against unscrupulous debt buyers will be state law. But state law is utterly inadequate for this purpose. Congress enacted the FDCPA precisely because it determined that the states were unable to protect consumers from unscrupulous collectors. In the forty years since, the problem has grown even worse. Debt collectors, including debt purchasers, are much larger and more sophisticated than they were when the FDCPA was enacted. The debt collection industry is interstate and even international, so the states have scant ability to regulate it effectively. Some states provide consumers no protection at all, and others have laws substantially weaker than the FDCPA. Debt purchasers' deceptive practices will flourish if debt purchasers are not covered by the FDCPA, because state law offers little recourse.

A. Congress enacted the FDCPA because it found that the states could not protect consumers from unscrupulous debt collectors.

Congress enacted the FDCPA because "collection abuse has grown from a State problem to a national problem." S. Rep. No. 382, 95th Cong., 1st Sess. 2 (1977). Congress found that "State officials are unable to act against unscrupulous debt collectors who harass consumers from another State." *Id.* at 3. Before the FDCPA was enacted, the problem was so bad that the House Banking Committee called interstate debt collection "a major lawless area. State laws do not and cannot regulate interstate debt collection practices." H.R. Rep. No. 131, 95th Cong., 1st Sess. 3 (1977).

Congress reached this conclusion after hearing extensive testimony from state officials about the difficulties they faced when trying to protect their residents from out-of-state debt collectors. The Chief of California's Bureau of Collection and Investigative Services lamented that his state could not "in an effective manner control calls coming into California from outside of the State," even though California had "the best regulatory effort in the Nation." *The Debt Collection Practices Act: Hearings on H.R. 29 Before the Subcomm. on Consumer Affairs of the House Comm. on Banking, Finance and Urban Affairs*, 95th Cong., 1st Sess. 337 (1977).

The Director of Minnesota's Office of Consumer Services agreed that her own state's law "does not offer citizens the necessary protections." *Id.* at 349. She estimated that 30 to 40 percent of debt collection complaints in Minnesota were about collectors located in other states. *Id.* at 366. She provided multiple examples of frustrated Minnesotans who had been hounded by out-of-state debt collectors. *Id.* at 350-51. "We do need Federal standards that govern interstate activity," she urged. "It is very difficult to police, for example, a California-based agency effectively." *Id.* at 365.

Officials from other states described similar enforcement problems. An Assistant Attorney General of Massachusetts explained that his office could do little about debt collectors who harmed Massachusetts residents "without actually coming physically into the state." *Fair Debt Collection Practices Act: Hearings on S. 656 et al. Before the Subcomm. on Consumer Affairs of the Senate Comm. on Banking,* *Housing and Urban Affairs*, 95th Cong., 1st Sess. 608 (1977). An Assistant District Attorney from New York called abusive debt collection practices "crimes of the telephone" that were impossible to prosecute when committed by "an out-of-state corporation that kept all managerial control at the home office." *Id.* at 598. He despaired that state law was "useless in curbing serious abuses in the debt collection area." *Id.*

Even spokespeople for the debt collection industry recognized that state regulation was no match for interstate debt collectors. The President of the American Credit and Collection Institute conceded: "when you say that the States aren't handling it, you're absolutely right. And when you say that we need Federal legislation, we do." *Id.* at 199. The Secretary-Treasurer of the International Consumer Credit Association likewise acknowledged that "[t]he collection agency field is one that particularly lends itself to federal regulation" because "collection agencies are increasingly operating across state lines." *Id.* at 767.

Congress found that new technology was compounding the problem of interstate debt collection. The advent of WATS lines—flat-rate long-distance telephone service—greatly reduced the cost of making large numbers of interstate telephone calls. The House Banking Committee noted that this development "has multiplied the number of interstate debt collection abuses. A debt collector can harass a consumer with impunity by calling from one State into another." H.R. Rep. No. 131, at 3. The Senate Banking Committee agreed that "State law enforcement officials have pointed to this development as a prime reason why federal legislation is necessary." S. Rep. No. 382, at 2-3.

In addition to recognizing the inherent inability of the states to regulate interstate debt collection, Congress also determined that the FDCPA was necessary because state laws were too few, too lenient, and too inconsistent to protect consumers. "The primary reason why debt collection abuse is so widespread," explained the Senate Banking Committee, "is the lack of meaningful legislation on the State level." *Id.* at 2. Thirteen states, with a total population of 40 million, had no debt collection laws at all. *Id.* Another eleven states, with another 40 million citizens, had "laws which in the committee's opinion provide little or no effective protection." *Id.* And of the remaining states, few had laws that gave consumers any civil remedy against abusive debt collectors. *Id.* In many states, the field was regulated by debt collection boards, the majority of the members of which had to be debt collectors. *Id.* As the House sponsor of the FDCPA quipped, "[t]his is not even sending the fox to guard the chickens; it is sending the chickens to the fox's house to be guarded." *Hearings on H.R. 29*, at 333.

In short, Congress enacted the FDCPA because state regulation of the debt collection industry was "so weak as to be totally ineffective." *Id.* at 1. It was simply "impossible for the individual States to control the debt collection industry." *Id.*

B. Changes in the size and structure of the debt collection industry since 1977 have only exacerbated the inadequacies of state law.

In the forty years since the FDCPA was enacted, the inadequacies of state law have been exacerbated by changes in the size and structure of the debt collection industry. Debt collectors, including firms that purchase debt, are much larger and more sophisticated than they were in 1977. They operate on an international scale, with call centers around the world, which makes effective state regulation impractical. State laws governing debt collectors, ineffective in 1977, have become even less effective today, as states have come to rely ever more on the federal government to protect their residents against unscrupulous collectors.

The debt collection business, including firms that purchase debt, is hundreds of times larger than it was when the FDCPA was enacted. In 1977, the entire industry attempted to collect $3 billion of debt. *The Debt Collection Practices Act: Hearings on H.R. 11969 Before the Subcomm. on Consumer Affairs of the House Comm. on Banking, Currency and Housing*, 94th Cong., 2d Sess. 23 (1976). Today that number is over $750 billion. EY [formerly Ernst & Young], *The Impact of Third-Party Debt Collection on the U.S. National and State Economies in 2013*, at 5 (2014).[2] The debt collection industry employs more than 130,000 people, most of whom are tele-

[2] Available at http://www.wacollectors.org/Media/Default/PDFs/_images_21594_impacteconomies2014.pdf.

phone collectors who call consumers regarding overdue bills. *Id.* at 8.

The individual firms that make up the debt collection industry are also much larger than they were when the FDCPA was enacted. In 1977, the states were stymied by small companies making phone calls across state lines. Now the leading debt collectors are huge firms with call centers all over the world. Expert Global Solutions, the firm with the largest market share in the industry, has over 42,000 employees in ten countries, including the Philippines and India. *IBISWorld Industry Report 56144: Debt Collection Agencies in the US* 26 (December 2016).[3] Encore Capital Group, another major debt collector with approximately 6,700 employees (and one of the largest purchasers of debt), reports that "[a]ccounts originated in the United States are serviced through our call centers in the United States, India and Costa Rica." Encore Capital Group, Annual Report (Form 10-K) 1, 13 (Feb. 24, 2016).[4] It was hard enough for the states to control debt collectors a few miles away in another state; it is now virtually impossible for states to control debt collectors on the other side of the world.

Debt collectors can now reach consumers by exploiting technologies that were scarcely imaginable in 1977. When the FDCPA was enacted, debt collection consisted primarily of manually dialed calls to

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[3] Available at http://clients1.ibisworld.com/reports/us/industry/default.aspx?entid=1474.

[4] Available at http://phx.corporate-ir.net/External.File?item=UGFyZW50SUQ9NjExNzY5fENoaWxkSUQ9MzI1MTY3fFR5cGU9MQ==&t=1.

landline telephones (which lacked answering machines) and letters, typed one-by-one and sent by U.S. mail. Federal Trade Commission, *Collecting Consumer Debts: The Challenges of Change* 15 (2009).[5] Now debt collectors use predictive dialers—computer systems that determine whom and when to call, and then place the calls automatically. *Id.* at 16. Debt collectors also reach consumers through mobile phones and email. *Id.* at 15. As it has become harder for states to restrain unscrupulous collectors, it has simultaneously become much easier for unscrupulous collectors to harass consumers.

On top of all these developments, "[t]he most significant change in the debt collection business in recent years has been the advent and growth of debt buying." *Id.* at 13. When the FDCPA was enacted, the debt collection industry consisted almost entirely of firms that earned a percentage of each debt collected. Now, "[t]he purchasing of delinquent debt portfolios generates about 32.0% of industry revenue, and has become an increasingly popular alternative to contingent-fee servicing over the past two decades." *IBISWorld Industry Report* at 15. "Industry operators typically purchase these portfolios at a deep discount from the aggregate principal value of the accounts," and then "employ traditional collection techniques to obtain payment of nonperforming accounts." *Id.* These are the traditional techniques of *collectors*, not the relationship-maintaining methods

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

used by original lenders. More and more, buying debt has become just one more way of collecting it.

Debt purchasing is dominated by a handful of very large international firms. Nine of the ten largest debt buyers purchased 76.1 percent of all consumer debt sold in 2008. Federal Trade Commission, *The Structure and Practices of the Debt Buying Industry* 7 (2013).[6] For example, one of the largest debt buyers is The PRA Group (formerly called Portfolio Recovery Associates). The PRA Group has call centers in the United Kingdom, Germany, Austria, Finland, Luxembourg, Spain, Norway, Sweden, Canada, and Brazil—not to mention Alabama, Pennsylvania, California, Virginia, Texas, Kansas, Tennessee, Nevada, and Illinois. PRA Group, Inc., Annual Report (Form 10-K) 30 (Feb. 26, 2016).[7] Heaven help the state official responsible for protecting local residents against abusive debt purchasers.

Credit card debt is by far the most common kind of debt that is purchased. FTC, *Structure and Practices* at 8. Much purchased debt, including nearly half of purchased credit card debt, is then resold to other debt buyers. Government Accountability Office, *Credit Cards: Fair Debt Collection Practices Act Could Better Reflect the Evolving Debt Collection Marketplace and Use of Technology* 29 (2009).[8] Debt buyers often "purchase portfolios, attempt collection

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[6] Available at https://www.ftc.gov/sites/default/files/documents/reports/structure-and-practices-debt-buying-industry/debtbuyingreport.pdf.

[7] Available at http://files.shareholder.com/downloads/PRAA/3783072699x0xS1185348-16-67/1185348/filing.pdf.

[8] Available at http://www.gao.gov/new.items/d09748.pdf.

for a certain period, and then resell accounts for which collection was not successful." *Id.*

This frequent transfer of debts from one collector to another poses additional obstacles to effective state regulation. Consumers receive calls and emails from multiple debt purchasers, one after another, each attempting to collect the same debt. Making matters worse, the Federal Trade Commission has found that "debt sellers typically do not provide dispute history information to buyers at the time of sale." FTC, *Structure and Practices* at 37. The buyer of a debt thus does not know whether the ostensible debtor in fact owes the debt, or even whether the ostensible debtor has previously disputed the debt. *Id.* A single alleged debt can give rise to a series of interactions with different collectors in different states and countries, even where the putative debtor has demonstrated to a prior collector's satisfaction that he is not liable for the debt. It would be hard enough for a state to handle a single collector per debt. The existence of multiple collectors in different states and countries makes the job even more difficult.

Every year, the Consumer Financial Protection Bureau receives more complaints—more than 85,000 in 2015—about debt collection than about any other matter. Consumer Financial Protection Bureau, *Fair Debt Collection Practices Act: CFPB Annual Report 2016* at 17-18.[9] The numbers were similar in earlier years, before the creation of the CFPB, when the FTC had primary enforcement responsibility. FTC,

[9] Available at http://files.consumerfinance.gov/f/201603_cfpb-fair-debt-collection-practices-act.pdf.

Collecting Consumer Debts at 67. Policing this industry already exceeded the capacity of the states when the FDCPA was enacted. The dramatic changes in the size and structure of the industry in the last forty years have only exacerbated the inadequacies of state regulation.

C. State law will offer little protection if the FDCPA does not protect consumers against abusive debt purchasers.

In light of the challenges states face in protecting consumers against unscrupulous debt collectors, it is hardly surprising that state law offers weak protection. *See generally* 2 National Consumer Law Center, *Fair Debt Collection* 801-12 (8th ed. 2014).

Eight states (Kansas, Kentucky, Mississippi, Missouri, Montana, Ohio, South Dakota, and Virginia) have no statutes at all regulating the debt collection industry. Five others merely require debt collectors to obtain a license, but provide no substantive protection for consumers. Ala. Code § 40-12-80; Del. Code tit. 30, § 2301(a)(11); Ind. Code §§ 25-11-1-1 to 25-11-1-16; N.J. Stat. §§ 45:18-1 to 45:18-6.1; Utah Code §§ 12-1-1 to 12-1-11.

These thirteen states are entirely reliant on the FDCPA to protect their residents. In Virginia, for example, the state Attorney General's website directs consumers to the FTC's website if they wish to file a complaint. Virginia Office of the Attorney General, *Consumer—Debt Collection*.[10] In Mississippi,

[10] Available at http://www.oag.state.va.us/13-resource/194-consumer-protection-debt-collection.

the state Attorney General simply informs state residents of their rights under the FDCPA. Mississippi Office of the Attorney General, *A Consumer's Guide to Mississippi Consumer Protection Law* 9.[11]

Of the 37 states that do regulate the conduct of debt collectors in some way, just over half provide consumers with a private right of action. Ark. Stat. § 17-24-512; Cal. Civ. Code § 1788.30; Colo. Rev. Stat. § 12-14-113 (statute will sunset on July 1, 2017, *id.* § 12-14-137); Fla. Stat. § 559.77; Haw. Rev. Stat. § 480D-4; Iowa Code § 537.5201.1(a)(25); Me. Rev. Stat. tit. 32, § 11054; Md. Code § 14-203; Mass. Gen. Laws ch. 93, § 12; Mich. Comp. Laws. § 339.916; N.H. Stat. § 358-C:4; N.C. Gen. Stat. § 58-70-130; Okla. Stat. tit. 15, § 761.1; Or. Rev. Stat. § 646.641; 73 Pa. Cons. Stat. § 2270.5; R.I. Gen. Laws § 19-14.9-13; S.C. Code § 37-5-108(2); Tex. Fin. Code § 392.403; Vt. Stat. tit. 9, § 2461(b); Wash. Rev. Code. § 19.86.090; W. Va. Code § 46A-5-101; Wis. Stat. § 427.105. The rest leave enforcement to the state government.

The lack of a private right of action is a crucial shortcoming, because the enormous volume of complaints means that state governments can pursue only a tiny fraction of abusive debt collectors. As the FTC found, "[b]ecause the Commission receives more than 70,000 third-party debt collection complaints per year, it is not feasible for federal government law enforcement to be the exclusive or primary means of

[11] Available at http://www.ago.state.ms.us/wp-content/uploads/2013/08/Consumer-Guide-to-Mississippi-Consumer-Protection-Law.pdf.

deterring all possible law violations. Private actions therefore are critical." FTC, *Collecting Consumer Debts* at 67. State agencies, with much less funding and much less power than the FTC or the CFPB, are even less able to enforce the law against unscrupulous debt collectors.

Many state laws exempt large categories of debt collectors that are covered by the FDCPA. Several states exempt banks and similar financial institutions, and some of these exemptions include subsidiaries and affiliates of banks, such as the respondent in this case. *See, e.g.*, Ark. Stat. § 17-24-102(2); Conn. Gen. Stat. § 36a-800(2); Haw. Rev. Stat. § 443B-1; Ill. Stat. c. 225, § 425/2.03(1); Minn. Stat. § 332.32; Neb. Rev. Stat. § 45-602(3); Nev. Rev. Stat. § 649.020(2)(b): Wash. Rev. Code § 19.16.100(5)(c). Several states also exempt lawyers. *See, e.g.*, Idaho Code § 26-2239(1); N.J. Stat. § 45:18-6; N.C. Gen. Stat. § 58-70-15(c)(8); N.D. Cent. Code § 13-05-02.3(1); Tenn. Code § 62-20-103(a)(2).

Moreover, many of these state laws offer weaker substantive protection against abusive debt collection than the FDCPA does. Oklahoma, for example, prohibits debt collectors from using profane language, from filing suit to collect debts that are time-barred, and from using automated dialing at certain hours, but not from the other abuses covered by the FDCPA. Okla. Stat. tit. 15, §§ 753(31), 753(32), 755.1. Louisiana regulates the frequency with which a debt collector may contact a consumer, but barely restricts abusive practices by debt collectors. La. Rev. Stat. § 9:3562. New York prohibits certain communications between debt collectors and consumers, but New York's statute lacks the FDCPA's clear prohibition of specific false, misleading, and deceptive representations. N.Y. Gen. Bus. L. § 601.

The states are largely relying on the FDCPA to protect their residents against abusive debt collectors. Some states do so explicitly. Pennsylvania, for example, simply prohibits violations of the FDCPA. 73 Pa. Cons. Stat. § 2270.4(a). Wyoming, by regulation, has adopted the entire text of the FDCPA as it existed in 2006. Wyo. Regs., Dep't of Audit, Collection Agency Bd., c. 4, § 6. Minnesota, in addition to prohibiting specified practices, likewise provides that a debt collector may not "violate any of the provisions of the Fair Debt Collection Practices Act of 1977." Minn. Stat. § 332.37(12).

Other states have enacted statutes nearly identical to the FDCPA, such as the Arkansas Fair Debt Collection Practices Act, Ark. Stat. §§ 17-24-501 to 17-24-512, and the Rhode Island Fair Debt Collection Practices Act, R.I. Gen. Laws §§ 19-14.9-1 to 19-14.9-14. Because these statutes are likely to be interpreted in tandem with the FDCPA, debt purchasers not covered by the FDCPA will not be covered by state law either.

State law weakness in the field of debt collection is no accident. DBA International, the trade association that "serves as the voice of the debt buying industry," declares that it recently "engaged lobbyists in numerous states, and saw successes in California, Connecticut, Maine, New Hampshire, Washington, and West Virginia, to name a few." DBA International, *Government Advocacy*.[12] The association boasts of a perfect record: "DBA has had a positive outcome on every bill that we negotiated at the state level." *Id.* In state legislatures, as in the marketplace, state regulators are no match for debt purchasers.

If firms that purchase and collect defaulted debt are not "debt collectors" under the FDCPA, consumers will be left exposed to the abusive practices Congress intended to stop. The states are simply not equipped to handle this problem.

CONCLUSION

The judgment below should be reversed.

Respectfully submitted,

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[12] Available at https://dbainternational.org/advocacy.