No. 16-349

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 OF ACA INTERNATIONAL AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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Table of Contents

Table of Cited Authorities

Cases

Statutes

Other Authorities

BRIEF OF ACA INTERNATIONAL AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER AND REVERSAL

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Interest of the *Amicus Curiae*[1]

ACA International, the Association of Credit and Collection Professionals, is a not-for-profit corporation based in Minneapolis, Minnesota. Founded in 1939, ACA brings together nearly 3,400 member organizations and their more than 300,000 employees worldwide, including third-party collection agencies, asset buyers, attorneys, creditors, and vendor affiliates. ACA produces a wide variety of products, services, and publications, including educational and compliance-related information; and articulates the value of the credit-and-collection industry to businesses, policymakers, and consumers. ACA regularly files briefs as an amicus curiae in cases of interest to its membership.

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[1]No counsel for any Party authored this brief in whole or in part. Neither any such counsel nor any Party made a monetary contribution intended to fund this brief's preparation or submission. No person (other than Amicus Curiae ACA International, its members, and its counsel) made such a monetary contribution.

All the Parties have granted their written consent under Rule 37.3(a) for ACA International to file an *amicus curiae* brief.

ACA's members include sole proprietorships, partnerships, and corporations ranging from small businesses to firms that employ thousands of workers. These members include the very smallest of businesses, which operate within a limited geographic range of a single state; and the very largest of multinational corporations, which operate in every state and outside the United States.[2] About three-quarters of ACA's company members have fewer than 25 employees. ACA helps its members serve their communities and meet the challenges created by changing markets through leadership, education, and service.

ACA's members also help governments in recovering unpaid obligations — a function that is increasingly important as many governments face record budget deficits.

The national credit economy depends on the credit-and-collection industry, whose efficient operation depends on a secondary market in hard-to-collect debt. ACA is the trade association for the credit-and-collection industry, and its members make that secondary market possible because they acquire and service the hard-to-collect debts issued and sold by national banks.

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[2] Respondent NCB Management Services, Inc., is an ACA member.

Summary of Argument

The Fair Debt Collection Practices Act contains numerous requirements and prohibitions, which apply only to debt collectors. More to the point, civil liability under the Act covers only "any *debt collector* who fails to comply," and does not extend to anyone who is not a "debt collector."[3] The Act defines a "creditor" as "any person who offers or extends credit creating a debt *or to whom a debt is owed*."[4] Thus, a "creditor" within the Act's meaning need not be the original creditor — the "person who offers or extends credit creating a debt" — but may also be the person "to whom a debt is owed" at some point after the original offer or extension of credit. While Santander was not the original creditor, Santander stepped into the original creditor's shoes when it obtained the subject debts.

The Petitioners' taxonomy of "players in the consumer-credit and debt-collection markets" ignores many "players" to whom the Fair Debt Collection Practices Act has historically not been applied, but whom the Petitioners' interpretation would sweep into the Act. For example, the sale of a debt by a loan originator to a debt buyer is not the only means by which a debt's ownership passes from one creditor to a successor creditor; it is also common for a loan originator to cease to exist, or at

[3] 15 U.S.C. § 1692k(a) (civil liability) (emphasis added).

[4] 15 U.S.C. § 1692a(4) (emphasis added).

least to change its corporate form, as a result of an internal restructuring within a corporate parent, or of the loan originator's acquisition by a different company — in which case the loan itself is not sold as such, but passes to the successor creditor along with the loan originator's other assets and liabilities. Under the Petitioners' interpretation, the successor creditor has become a "debt collector" under the Act with respect to any loan that was in default (but not with respect to other loans that were not in default at the moment of the sale). Likewise, sometimes a loan originator gets out of the business of lending money, and outsources that function to a new lender. Under the Petitioners' interpretation, each such bank would become a "debt collector" with respect to any credit-card account in default at the moment of transfer. In each example, the lender in whose hands the debt ends up is not the loan originator — but neither is it a debt servicer, or a third-party debt collector, or a debt buyer; it is a successor creditor, who steps into the loan originator's shoes in the ordinary course of business. As first-party creditors, collecting their own debt in their own name, the Act has never been applied to successor creditors. But the Petitioners' interpretation would reclassify them as "debt collectors" within the Act's meaning, at least with respect to any debt that was even momentarily in default when they acquired it.

The national credit economy depends on the credit-and-collection industry, whose efficient operation depends on a secondary market in hard-to-collect debt, which maximizes recovery from that debt and thereby keeps interest rates down. That secondary market lets a lender sell hard-to-collect debt to debt buyers who are willing to assume the burden and risk of collecting on that debt, and whose resources are better aligned with the collection of such debt and whose experience lets them collect on that debt more efficiently. The Petitioners' interpretation would depress that market by subjecting potential successor creditors — particularly successor creditors who are acquiring debt that is not in default — to costly litigation over their hitherto entirely lawful collection practices. A reversal of the Fourth Circuit's decision will make debt less attractive to debt buyers, and will therefore disadvantage lenders in managing their hard-to-collect debt.

Argument

I. Congress excluded creditors from liability under the Fair Debt Collection Practices Act, and Santander was a creditor with respect to the subject debts.

The Fair Debt Collection Practices Act contains numerous requirements and prohibitions, which apply only to debt collectors.[5] More to the

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[5] For example, the Act provides that "a *debt collector* may not communicate with a consumer in connection with the

point, civil liability under the Act covers only "any *debt collector* who fails to comply," and does not extend to anyone who is not a "debt collector."[6] Creditors "are not covered by the Act,"[7] since they

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collection of any debt" except under certain restrictions. 15 U.S.C. § 1692c(a) (communications in connection with debt collection) (emphasis added). "A *debt collector* may not engage in any conduct the natural consequence of which is to harass, oppress, or abuse any person in connection with the collection of any debt." 15 U.S.C. § 1692d (harassment or abuse) (emphasis added). "A *debt collector* may not use any false, deceptive, or misleading representation or means in connection with the collection of any debt." 15 U.S.C. § 1692e (false or misleading representations) (emphasis added). "A *debt collector* may not use unfair or unconscionable means to collect or attempt to collect any debt." 15 U.S.C. § 1692f (unfair practices) (emphasis added).

[6] 15 U.S.C. § 1692k(a) (civil liability) (emphasis added); *Schaffhauser v. Citibank (S.D.) N.A.*, 340 F. App'x 128, 130 n.4 (3d Cir. 2009) ("The FDCPA's provisions generally apply only to debt collectors." (citing *Pollice v. Nat'l Tax Funding, L.P.*, 225 F.3d 379, 403 (3d Cir. 2000)); *FTC v. Check Investors, Inc.*, 502 F.3d 159, 171 (3d Cir. 2007) (citing *Pollice*).

[7] *Schlosser v. Fairbanks Capital Corp.*, 323 F.3d 534, 536 (7th Cir. 2003); *accord Davidson v. Capital One Bank (USA), N.A.*, 797 F.3d 1309, 1313 (11th Cir. 2015) ("§ 1692e applies only to debt collectors"); *Schaffhauser*, 340 F. App'x at 130 n.4 ("Creditors — as opposed to 'debt collectors' — generally are not subject to the FDCPA." (quoting *Pollice*, 225 F.3d at 403)); Robert J. Hobbs, *Fair Debt Collection* § 4.2.5 at 119 (8th ed. 2014) ("Creditors are generally exempt from FDCPA coverage."); *see also United States v. ACB Sales & Serv., Inc.*, 590 F. Supp. 561, 576 (D. Ariz. 1984) (rejecting

"generally are restrained by the desire to protect their good will when collecting past due accounts."[8] Thus, "[a]n entity that may collect on a debt owned by and owed to it in the course of doing business falls outside of the Act's intended scope."[9]

The Fair Debt Collection Practices Act defines both "creditor" and "debt collector." The two definitions are similar in that they each contain a substantive requirement, followed by an exclusion to the substantive definition that depends on whether the subject debt is in default when obtained:

> 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*

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argument "that the FDCPA unfairly discriminates against independent debt collectors" because others "such as the actual creditor or his lawyer, are not regulated by the Act").

[8] S. Rep. No. 95-382, at 2 (1977), *as reprinted in* 1977 U.S.C.C.A.N. 1695, 1696, *quoted in Schlosser*, 323 F.3d at 536.

[9] *Davidson v. Capital one Bank (USA), N.A.*, 797 F.3d 1309, 1316 n. 8 (11th Cir. 2015) (citing S. Rep. No. 95-382, at 2–3).

facilitating collection of such debt for another.[10]

> 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. . . . The term does not include—
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> (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* . . . .[11]

[10] 15 U.S.C. § 1692a(4) (emphasis added).

[11] 15 U.S.C. § 1692a(6) (emphasis added).

But for each definition, the default-status exclusion comes into play only if the substantive definition is already satisfied.[12]

The Act defines a "creditor" as "any person who offers or extends credit creating a debt *or to whom a debt is owed*."[13] Thus, a "creditor" within the Act's meaning need not be the original creditor — the "person who offers or extends credit creating a debt" — but may also be the person "to whom a debt is owed" at some point after the original offer or extension of credit.

The definition of "debt collector" reinforces this conclusion. Santander is not a business "the principal purpose of which is the collection of any debts." And Santander does not "regularly collect[] or attempt[] to collect, directly or indirectly, debts owed or due or asserted to be owed or due another." Santander therefore does not satisfy the substantive definition of "debt collector." The exclusion is therefore irrelevant.

While Santander was not the original creditor, Santander stepped into the original creditor's shoes when it obtained the subject debts.

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[12] *Davidson*, 797 F.3d at 1314 ("However, where a person does not fall within subsection (F) or any one of the six statutory exclusions, he is not deemed a 'debt collector' as a matter of course. Before a person can qualify as a 'debt collector' under the FDCPA, he must satisfy the Act's substantive requirements.").

[13] 15 U.S.C. § 1692a(4) (emphasis added).

Santander became the "person . . . to whom a debt is owed," and therefore satisfies the substantive definition of "creditor." Santander did not "receive[] an assignment or transfer of a debt in default solely for the purpose of facilitating collection of such debt for another," and therefore does not fall within the definition's exclusion.

The Petitioners argue that "[u]ntil recently, the lower courts uniformly [held] that debt buyers are 'debt collectors' to the extent that they are collecting debt obtained while in default . . . ." But the Petitioners are often misreading these cases. Most lower-court cases that reached the Petitioners' desired result either found that the defendants were not debt collectors,[14] or were analyzing

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[14] *See Miller v. BAC Home Loans Servicing, L.P.*, 726 F.3d 717, 722 (5th Cir. 2013) (affirming dismissal where "the magistrate judge concluded that BAC was not a debt collector, and thus was not subject to the FDCPA because, on the Millers' pleadings, BAC already had acquired the mortgage when the Millers defaulted on it); *Wadlington v. Credit Acceptance Corp.*, 76 F.3d 103, 106 (6th Cir. 1996) ("We turn now to the question whether Credit Acceptance itself came within the statutory definition of a 'debt collector.' The district court held that it did not. We agree."); *Perry v. Stewart Title Co.*, 756 F.2d 1197, 1208 (5th Cir. 1985) ("In this case, the FDCPA is inapplicable, since neither Hammond nor FNMA are debt collectors."); *see also Spreitzer v. Deutsche Bank Nat'l Trust Co.*, 610 F. App'x. 737, 742 (10th Cir. 2015) (affirming dismissal where "[t]he district court concluded Spreitzer's FDCPA claims failed because the Bank Defendants are not "debt collectors" within the meaning of the FDCPA.").

whether the defendant fell within the default-status exclusion only after finding that the person collecting the debt satisfied the substantive definition of "debt collector."[15]

Santander does not satisfy the substantive definition of "debt collector" — indeed, Santander satisfies the substantive definition of "creditor," unlike the defendants in most of the cases that the Petitioners cite — so here, the debts' default status is irrelevant.

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[15] *See Bridge v. Ocwen Fed. Bank, FSB*, 681 F.3d 355, 360 (6th Cir. 2012) (reversing dismissal where "the Bridges have made allegations addressing all elements of the statutory definition of debt collector under the first sentence of § 1692a(6)"); *FTC v. Check Investors, Inc.*, 502 F.3d 159, 174 (3d Cir. 2007) ("Check Investors acquired the defaulted checks only for collection purposes. Indeed, it is in business to do just that: acquire seriously defaulted debt, the age of which allows Check Investors to acquire it for a few pennies on the dollar."); *Pollice v. National Tax Funding, L.P.*, 225 F.3d 379, 404 (3d Cir. 2000) ("there is no question that the 'principal purpose' of NTF's business is the 'collection of any debts,' namely, defaulted obligations which it purchases from municipalities"); *see also Volden v. Innovative Fin. Sys.*, 440 F.3d 947, 950 (8th Cir. 2006).

II. The Petitioners' taxonomy of "players in the consumer-credit and debt-collection markets" ignores many "players" whom the Petitioners' interpretation would sweep into the Fair Debt Collection Practices Act with undesirable consequences.

The Petitioners say that "[i]n general, the FDCPA has potential application to four kinds of entities that collect consumer debt":[16] loan originators, debt servicers, third-party debt collectors, and debt buyers. But that taxonomy is incomplete, and ignores many other "players" to whom the Fair Debt Collection Practices Act has historically not been applied, but whom the Petitioners' interpretation would sweep into the Act.

Two examples illustrate the unwisdom of that approach: a loan originator's successor by some means other than purchase of the debt, such as a successor by merger; and a lender that succeeds the loan originator as the issuer of a co-branded credit-card portfolio.

First, the sale of a debt by a loan originator to a debt buyer is not the only means by which a debt's ownership passes from one creditor to a successor creditor. It is also common for a loan originator to cease to exist, or at least to change its corporate form, as a result of an internal

[16] Pet'rs' Br. at 6.

restructuring within a corporate parent, or of the loan originator's acquisition by a different company — in which case the loan itself is not sold as such, but passes to the successor creditor along with the loan originator's other assets and liabilities. For example:

- Bank A issues a loan to a consumer.
- The consumer usually pays on time but, on one isolated occasion, pays one installment late enough to bring the loan into default.
- On that day, while the consumer's payment is overdue, Bank A is acquired by Bank B — along with the debtor–creditor relationship with the consumer, who promptly brings the loan back into good standing.
- Bank A ceases to exist, and Bank B is now the creditor.

Under the Petitioners' interpretation, Bank B has become a "debt collector" under the Fair Debt Collection Practices Act with respect to the loan that was momentarily in default (but not with respect to other loans that were not in default at the moment of the sale).

Second, sometimes a loan originator gets out of the business of lending money, and outsources that function to a new lender. For example, many retailers offer store-branded credit cards to their customers as an incentive (often coupled with a discount) to shop at the retailers' stores. But since the Great Recession, many retailers have outsourced their credit-card operations to banks that issue a co-branded card[17] — usually a national bank, which can operate in a nationwide market without competitive disadvantage.[18] Some retailers wrapped up their in-house banks as part of that process and, sometimes, a retailer moves its credit-

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[17] *See, e.g.*, Barbara Farfan, "Retail Stores with Credit Card Loyalty Incentives," The Balance (Aug. 12, 2016), https://www.thebalance.com/which-retail-stores-have-credit-card-offers-2892559 (accessed Mar. 22, 2017) ("A large number of the largest U.S. retail chains have aggressively marketed their own branded retail store credit cards in the past as a way to make it easy for credit-oriented customers to spend more and return often. . . . The days of standalone in-house retail company credit programs are pretty much a thing of the past for the U.S. retail industry, and have been replaced by credit cards that are co-branded with large national or multinational banking companies like Chase and credit services companies like American Express."); *see also* Lindsay Konsko, "Why Are Retailers Dumping Their Credit Cards?," Nerdwallet (June 10, 2014), https://www.nerdwallet.com/blog/credit-cards/retailers-dumping-credit-cards-target-macys-nordstrom/ (accessed Mar. 22, 2017).

[18] *See Tiffany v. Nat'l Bank of Mo.*, 85 U.S. 409, 411–13 (1873) (National Bank Act "is an enabling statute, not a restraining one," which "could not have been intended . . . to expose [national banks] to the hazards of unfriendly legislation by the States, or to ruinous competition with State banks").

card portfolio from one outside bank to another.[19] Under the Petitioners' interpretation, each such bank would become a "debt collector" with respect to any credit-card account in default at the moment of transfer.

In each of these examples, the lender in whose hands the debt ends up is not the loan originator — but neither is it a debt servicer, or a third-party debt collector, or a debt buyer (at least not in the traditional sense in which the Petitioners are using it, where the "debts are . . . assigned as a way of selling the debt to investors"[20]). The lender in whose hands the debt ends up is a successor creditor, who steps into the loan originator's shoes in the ordinary course of business. Not all creditors are loan originators, but all creditors are creditors — and as first-party creditors, collecting their own debt in their own name, the Fair Debt Collection Practices Act has never been applied to them. But the Petitioners' interpretation would reclassify them as "debt collectors" within the Act's meaning, at least with respect to any debt that was even momentarily in default when they acquired it.

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[19] *See, e.g.*, Fred O. Williams, "What to Do When Your Retail Store Card Switches Banks," CreditCards.com, http://www.creditcards.com/credit-card-news/retail-store-card-changes-banks-1267.php (accessed Mar. 22, 2017).

[20] Pet'rs' Br. at 7.

III. The national credit economy depends on the credit-and-collection industry, whose efficient operation depends on a secondary market in hard-to-collect debt, which the Petitioners' interpretation would depress.

As part of the process of attempting to recover outstanding payments, debt collectors and debt buyers are an extension of every community's businesses. Debt collectors and debt buyers work with these businesses, large and small, to obtain payment for the goods and services already received by consumers. Their efforts have resulted in the annual recovery of billions of dollars — dollars that are returned to and reinvested by businesses, and that would otherwise constitute losses on those businesses' financial statements. Recovering rightfully owed consumer debt helps prevent job losses; keeps credit, goods, and services available; and reduces the need for tax increases to cover governmental budget shortfalls. And without effective collections, consumers would be forced to pay more for their purchases to compensate for uncollected debts.

In 2014, ACA commissioned a study to measure the various impacts of third-party debt collection on the national and state economies. The study included both debt sold to a debt buyer, which acquired the issuer's interest in the debt; and debt assigned to a third-party debt collector, who acted as the issuer's (or the issuer's successor's) agent but did not acquire the issuer's interest in the debt. The study found that, in calendar year 2013:

- Third-party debt collectors recovered $55.2 billion from consumers on behalf of creditor and government clients.
- The third-party collection of consumer debt returned an average savings of $389 per household by keeping the cost of goods and services lower.[21]

The credit-and-collection industry keeps bad debt from being a total loss for the original creditor. A lender loans out money with the expectation of being repaid according to the loan's terms, and its resources and operations are geared toward that expectation. But sometimes the expectation is disappointed and, in those cases, a debt buyer is a more attractive option for a lender than continued collection activity by the lender itself. Without debt buyers, the lender would simply charge off the loan, which would be a total loss — and would drive up the interest that the lender must charge in order to recoup that loss. But with a secondary market in hard-to-collect debt, the lender can sell the charged-

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[21]ACA International, *The Impact of Third-Party Debt Collection on the U.S. National and State Economies in 2013* (2014), cited in Josh Adams, ACA International White Paper, *The Role of Third-Party Debt Collection in the U.S. Economy* 2 (Jan. 2016), http://www.acainternational.org/assets/research-statistics/aca-wp-role3rdparty.pdf (accessed Mar. 22, 2017).

off loan to a debt buyer — at a discount, to be sure, but half a loaf is better than none. The national credit economy depends on the credit-and-collection industry, whose efficient operation depends on a secondary market in hard-to-collect debt, which maximizes recovery from that debt and thereby keeps interest rates down.

That secondary market lets a lender sell hard-to-collect debt to debt buyers who are willing to assume the burden and risk of collecting on that debt, and whose resources are better aligned with the collection of such debt and whose experience lets them collect on that debt more efficiently. The Petitioners' interpretation would depress that market by subjecting potential successor creditors — particularly successor creditors who are acquiring debt that is not in default — to costly litigation over their hitherto entirely lawful collection practices. A reversal of the Fourth Circuit's decision will make debt less attractive to debt buyers, and will therefore disadvantage lenders in managing their hard-to-collect debt.

Conclusion

This Court should affirm the Court of Appeals' judgment.

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