No. 17-_____

In the Supreme Court
of the United States

ARIEL ARENCIBIA

Petitioner,

v.

MORTGAGE GUARANTY INSURANCE CORP.

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

This case presents the same question that this Court recently granted jurisdiction to review in *Henson v. Santander Consumer USA, Inc.*, No. 16-349 (U.S. filed Sept. 16, 2016), due to inter-circuit conflict concerning the Fair Debt Collection Practices Act, 15 U.S.C. §§ 1692–1692p. That question is:

Whether an entity that regularly attempts to collect debts that it owns, but obtained from another after the debt was already in default, is a "debt collector" under the Fair Debt Collection Practices Act?

LIST OF PARTIES

The petitioner in this Court is Ariel Arencibia, who was the appellant and plaintiff below. An additional appellant and plaintiff below was Jose Ayala, but he voluntarily dismissed his appeal below after settlement and is not before this Court.

The respondent in this Court is Mortgage Guaranty Insurance Corporation, who was the appellee and defendant below.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Ariel Arencibia respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The Eleventh Circuit's opinion affirming the district court's judgment is reported at *Arencibia v. Mortgage Guaranty Insurance Corp.*, 659 F. App'x 564, 565 (11th Cir. 2016). (Pet. App. 1a–9a). The order denying rehearing *en banc* was not reported. (Pet. App. 24a–27a). The United States District Court's decision is reported at *Arencibia v. Mortgage Guaranty Insurance Corp.*, No. 2:15-CV-248-FTM-38CM, 2015 WL 7076691, at *1 (M.D. Fla. Nov. 13, 2015). (Pet. App. 10a–23a).

JURISDICTION

The Eleventh Circuit entered its decision on September 12, 2016. (Pet. App. 1a). The appellate court then denied Arencibia's timely motion for rehearing *en banc* on January 9, 2017. (Pet. App. 24a–27a). Per Supreme Court Rule 13.1 and 13.3, this petition was timely filed within 90 days

after the rehearing's denial. *Id.* This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES AND POLICIES AT ISSUE

Arencibia's petition primarily involves the following provisions from the Fair Debt Collection Practices Act, 15 U.S.C. § 1692a:

> (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

A. Factual Background

Petitioner Ariel Arencibia obtained a loan secured by a mortgage from a nonparty lender, Novastar Mortgage, Inc. The loan enabled Arencibia to purchase his homestead.

Arecenbia unfortunately defaulted on the loan. Thereafter, Deutsche Bank National Trust Company as trustee under Novastar Mortgage Funding Trust, Series 2005-4 filed a foreclosure action in a Florida state court, which culminated in a foreclosure judgment.

Almost five years later, Respondent Mortgage Guaranty Insurance Corporation (Mortgage Guaranty) obtained Arencibia's defaulted debt without his knowledge and attempted to collect it by seeking a deficiency judgment.

Mortgage Guaranty is a mortgage insurance company that insures mortgage lenders against the loss of defaulted mortgage loans. After the lender forecloses on the mortgaged property, it submits an insurance claim to Mortgage Guaranty for the balance due after accounting for the fair market value of the property. Mortgage Guaranty then pays the claim to the extent

of the insurance coverage purchased. Thereafter, Mortgage Guaranty attempts to collect the defaulted debt from the original borrowers through subrogation and, like here, assignment. [Dkt. No. 1 at p. 14]. Indeed, Mortgage Guaranty regularly engages in collecting debts as it collects or attempts to collect 65 debts per month on average through various indirect methods and routinely brings legal actions to collect or attempt to collect those debts. [Dkt. Nos. 24-1, ¶¶ 10 & 17; 24-2].

This federal-question action arose because under Florida law, persons who are assigned the right to bill and collect consumer debts must give notice of the assignment to the consumer at least 30 days before pursuing any action to collect the debt. § 559.715, Fla. Stat. (2014). Mortgage Guaranty failed to provide this notice to Arencibia before acting to collect. [Dkt. No. 1, ¶¶ 19–20]. Some federal courts have previously held that failure to comply with section 559.715 can constitute a violation of the Act. *See Schmidt v. Synergetic Comm'ns, Inc.*, No. 2:14-cv-539-FtM-29CM, 2015 WL 248635, at *3 (M.D. Fla. Jan. 20, 2015); *cf. LeBlanc v. Unifund CCR Partners*, 601 F.3d 1185, 1190 (11th Cir. 2010). *But see Wright v. Dyck-O'Neal, Inc.*, No. 2:15-cv-249-FtM-38MRM, 2017 WL 698269 (M.D. Fla. Feb. 15, 2017) (reaching the opposite conclusion as *Schmidt*). Consequently,

Arencibia sued Mortgage Guaranty under 28 U.S.C. § 1331 for violating the Act by failing to comply with Florida law before acting to collect. [Dkt. No. 1].

B. Proceedings in the District Court

Shortly after the lawsuit's filing, Mortgage Guaranty moved for summary judgment, arguing that it was not subject to the Act because it was not a "debt collector." The Act generally applies only to "debt collectors."

"Debt collector" has alternative definitions and several exclusions. The most relevant definition and exclusion are:

> [A]ny person . . . 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*).

Before Arencibia's response deadline, the Eleventh Circuit issued *Davidson v. Capital*

One Bank (U.S.A.), N.A., 797 F.3d 1309 (11th Cir. 2015), which directly favored Mortgage Guaranty's argument that it was not a "debt collector" and which the district court found controlling.

In *Davidson*, the Eleventh Circuit addressed whether banks collecting or attempting to collect debts, which were already in default when they were obtained, qualified as "debt collectors." *Id.* at 1310. Like Arencibia here, the *Davidson* debtor argued that when the above statutory provisions are read together, the line between creditors and debt collectors rests on the debt's default status. *Id.* at 1314. The *Davidson* debtor then argued that when an entity does not originate the debt, but obtains it from another after the borrower's default, then the entity constitutes a "debt collector" subject to the Act. *Id.*

The Eleventh Circuit rejected this argument both in *Davidson* and below. *Id.* According to the court, the exclusion cannot make someone a debt collector if they do not otherwise meet the statutory definition, which makes no express reference to the default's status. *Id.*

Instead, the Eleventh Circuit focused on the following four words in the definition of debt collector: "owed or due another." *Id.* at 1315. Since the Act does not define "another," the panel looked to a dictionary,

which defined the term as " 'one that is different from the first or present one.' " *Id.* at 1315–1316. From this definition, the court reasoned that the phrase "owed or due *another*" was unambiguous and described entities collecting debts for others, rather than for oneself. *Id.* at 1316 (*emphasis in original*). To adopt the debtor's argument, the court reasoned, would require rewriting the operative phrase to read "originally owed or due another." *Id.* Thus, the *Davidson* court concluded that the defendant was not a debt collector because it was collecting a debt that it personally owned—irrespective of the debt's default status at acquisition. *Id.*

Bound by this decision, the district court below adopted it and granted Mortgage Guaranty's summary-judgment motion. (Pet. App. 21a–23a). The district court concluded that the default status of Arencibia's debt was irrelevant since Mortgage Guaranty was seeking to recover money owed to it and not money owed to another lender. (Pet. App. 21a–23a).

C. The Court of Appeal's Decision

On appeal, Arencibia acknowledged that the district court was bound by *Davidson*'s decision, but argued that the *Davidson* panel wrongly decided the case and that the Eleventh Circuit should recede from it. In support, Arencibia highlighted that

Davidson conflicts with the majority of other circuits that have addressed the same issue. *See infra* pp. 12–18. Arencibia also argued that *Davidson*'s rationale contravened several canons of statutory interpretation, the Federal Trade Commission's interpretation that those, like Mortgage Guaranty, qualify as debt collectors, and undermines the broad, remedial purposes behind the Act.

The Eleventh Circuit acknowledged Arencibia's arguments—including the inter-circuit conflict—but held that its hands were tied by *Davidson*. (Pet. App. 7a–8a). Although it offered no opinion on *Davidson*'s correctness, the court held that it too was bound by *Davidson* until receded from by the court *en banc* or overruled by the Supreme Court. Consequently, the Eleventh Circuit affirmed the district court, reasoning that it had correctly applied its earlier precedent. (Pet. App. 8a–9a).

Arencibia then timely petitioned the Eleventh Circuit to recede from *Davidson* on rehearing *en banc*, but rehearing was summarily denied. (Pet. App. 24a–27a).

REASONS FOR GRANTING THE WRIT

In 1977, Congress enacted the Fair Debt Collection Practices Act to combat widespread "abusive, deceptive, and unfair debt collection practices by many debt collectors." 15 U.S.C. § 1692(a). The Act was generally designed to apply only to collectors fitting within its broad definition of "debt collector." S. Rep. No. 95-382, p. 2 (1977).

This case presents an important question that has bedeviled circuits of late: Whether entities regularly collecting debts acquired after their default are subject to the Act as debt collectors? For over thirty years, four federal circuits have answered this question in the affirmative. But in the last few years, three circuits have reached the opposite conclusion.

Consequently, the Act affords debtors different degrees of protection depending on where they live. Those living in the 13 states comprising the circuit majority have greater protection than debtors living in the 17 states comprising the circuit minority because collectors in the latter states—like Mortgage Guaranty—can freely engage in conduct that would otherwise violate the Act. Meanwhile, debtors and collectors in the 20 states whose circuits have not weighed in are left unclear about their rights and duties. This unequal protection is the primary reason Congress enacted the

Act in the first place. S. Rep. No. 95-382, p. 2 (1977).

Therefore, the issue presented is certworthy as this Court recently concluded in *Henson v. Santander Consumer USA, Inc.*, No. 16-349 (U.S. filed Sept. 16, 2016), in which this Court granted certiorari to review the same compelling issue. Accordingly, this Court should similarly grant Arencibia's petition so that his arguments in favor of the majority's construction can be considered as well.

I. There is a 4-3 split over whether those obtaining defaulted debt constitute "debt collectors" under the Act.

The four circuits comprising the majority view are surveyed below in section A. The three-circuit minority are discussed in section B. And section C briefly discusses the two circuits that have not squarely addressed the issue, but have alluded to supporting the majority view in their dicta.

A. According to the Third, Fifth, Sixth, and Seventh Circuits, those obtaining defaulted debt are debt collectors within the meaning of the Act.

For over 30 years, the majority view has held that collectors like Mortgage Guaranty,

who obtain debt already in default, are "debt collectors" bound by the Act.

1. Fifth Circuit. This was the first circuit to address the issue. In *Perry v. Stewart Title Co.*, 756 F.2d 1197, 1208 (5th Cir. 1985), the Fifth Circuit reviewed a mortgage loan's transfer shortly after origination. The court held that the Act was inapplicable because the defendants were not debt collectors since the loans were transferred to the defendants two months before default. *Id.* at 1208. According to the court, "the legislative history of section 1692a(6) indicates conclusively that 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*." *Id.* (*emphasis added*).

2. Seventh Circuit. This is the circuit with the most opportunities to address the issue presented. In a long line of cases beginning in 1998, the Seventh Circuit has repeatedly held that whether a person is a creditor or a debt collector under the Act rests on the debt's status at acquisition. *E.g.*, *Ruth v. Triumph P'ships*, 577 F.3d 790, 797 (7th Cir. 2009).

The Seventh Circuit first tackled the issue in *Bailey v. Security National Servicing Corp.*, 154 F.3d 384 (7th Cir. 1998). There, the debtors initially defaulted on their mortgage, but then were given a fresh start after entering forbearance

agreements. *Id.* at 386. The defendants were hired to service the forbearance agreements. *Id.* In affirming summary judgment for the defendants, the Seventh Circuit held that "[t]he plain language of § 1692a(6)(F) tells us that an individual is not a 'debt collector' subject to the Act if the debt he seeks to collect was not in default at the time he purchased (or otherwise obtained) it." *Id.* at 387.

Five years later, the Seventh Circuit reached the same conclusion in *Schlosser v. Fairbank Capital Corp.*, 323 F.3d 534, 536 (7th Cir. 2005), which concerned a collector who purchased a portfolio of debt, some of which was in default. Insofar as the collector attempted to collect the defaulted debt or debt the collector thought was in default, the Seventh Circuit held that if a person acquires debt that it treats as in default, even though it is not, that person qualifies as a debt collector under the Act. *Id.* at 536. The court reasoned that to distinguish between debt collectors and creditors, "the Act treats assignees as debt collectors if the debt sought to be collected was in default when acquired by the assignees, and as creditors if it was not." *Id.*

Another five years later, the Seventh Circuit reaffirmed its precedent again in *McKinney v. Cadleway Properties, Inc.*, 548 F.3d 496, 502 (7th Cir. 2008), holding that the purchaser of defaulted debt constitutes a

debt collector "even though it owns the debt and is collecting for itself." Not only is this holding directly the opposite of the Eleventh Circuit's *Davidson* decision, but its reasoning is as well:

> The Act draws this distinction [between the status of a debt at the time of assignment] in a rather indirect way, however-by the *exclusionary* language . . . . in the statutory definitions of creditor and debt collector. That is, the definition of creditor excludes those who acquire and attempt to collect a "debt *in default*" while the definition of debt collector excludes those who acquire and attempt to collect "a debt which was *not in default* at the time it was obtained. So one who acquires a "debt in default" is categorically *not* a creditor; one who acquires a "debt not in default" is categorically *not* a debt collector.

Id. at 501 (*emphasis in original*). This holding stands in stark conflict to *Davidson*'s reasoning that the Act's exclusionary language cannot "bring entities that do not otherwise meet the definition of 'debt collector' within the ambit of the [Act] solely because the debt on which they seek to collect was in default at the time they acquired it." *Davidson*, 797 F.3d at 1315.

Finally, in 2009, the Seventh Circuit addressed the issue a fourth time in *Ruth*, 577 F.3d at 790. Like Mortgage Guaranty, the defendant in *Ruth* argued that it was not a debt collector because it personally owned the debt. *Id.* at 796. According to the court, its precedent foreclosed this argument because "[w]here, 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.* at 796.

3. Third Circuit. This circuit reached the same conclusion as best illustrated by *Federal Trade Commission v. Check Investors*, 502 F.3d 159 (3d Cir. 2007), in which the defendant purchased the rights to and began collecting on dishonored checks. *Id.* at 162. The defendant argued—much like the Eleventh Circuit's reasoning in *Davidson*—that it was not subject to the Act's prohibition since it owned these debts and thus was collecting them as a creditor for itself, rather than for another. *Id.* at 163 & 172. Thus, the defendant brazenly argued that it could freely use collection tactics prohibited under the Act like harassment and deception. *Id.* at 163.

The Third Circuit described this argument as "rather clever," but ultimately wrong since "it would elevate form over

substance and weave a technical loophole into the fabric of the [Act] big enough to devour all of the protections Congress intended in enacting that legislation." *Id.* at 172–73. Rather, the Third Circuit held that Congress "unambiguously directed our focus to the time the debt was acquired in determining whether one is acting as a creditor or a debt collector under the [Act]." *Id.* at 173; *see also Pollice v. Nat'l Tax Funding, L.P.*, 225 F.3d 379 (3rd Cir. 2000) (agreeing that "an assignee of an obligation is not a 'debt collector' if the obligation is not in default at the time of the assignment; conversely, an assignee may be deemed a 'debt collector' if the obligation is already in default when it is assigned.").

4. Sixth Circuit. Finally, the Sixth Circuit has likewise looked to the debt's default status at acquisition to distinguish between "creditors" and "debt collectors." For example, in *Bridge v. Ocwen Federal Bank, FSB*, 681 F.3d 355 (6th Cir. 2012), the defendant acquired a mortgage that their records mistakenly showed as in default when, in fact, it was not in default. *Id.* at 356–57. Agreeing with the Third and Seventh Circuits, the Sixth Circuit held 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; *see also Wadlington v. Cred. Acceptance Corp.*, 76 F.3d 103, 107 (6th Cir. 1996) (finding the collector was a creditor, rather than a "debt collector," because the debt was not in default when it was assigned).

B. The Fourth, Ninth, and Eleventh Circuit reject the majority rule.

Within the last three years, the Fourth, Ninth, and Eleventh Circuits have reached the opposite interpretation about the meaning of "debt collector" under § 1692a(6). Taking the conflicting decisions chronologically:

1. The Ninth Circuit. This was the first circuit to depart from the majority rule. In *Schlegel v. Wells Fargo Bank, NA*, 720 F.3d 1204, 1208 (9th Cir. 2013), the defendant acquired a defaulted mortgage as part of a bankruptcy proceeding. *Id.* at 1206. Without acknowledging the majority view, the Ninth Circuit held—in a relatively conclusory opinion—that since the defendant was attempting to collect debt that it acquired and now owned, it could not be a debt collector under § 1692a(6) because it was not attempting to collect a debt owed to "another." *Id.* at 1209–10.

2. The Eleventh Circuit. Independent of the Ninth Circuit, the Eleventh Circuit reached the same conclusion in a more

detailed opinion in *Davidson*, 797 F.3d at 1309, which was extensively discussed above, *supra* pp. 7–9. Notably, *Davidson* also did not recognize or otherwise discuss the majority view, which the Eleventh Circuit did not acknowledge until this case. (Pet. App. 7a–8a).

3. The Fourth Circuit. The first circuit to acknowledge the majority view was the Fourth Circuit in *Henson v. Santander Consumer USA, Inc.*, 817 F.3d 131, 135 (4th Cir. 2016), *cert. granted*, No. 16-349, 2017 WL 125669 (U.S. Jan. 13, 2017). In that case, the debtor's defaulted car loans were sold to the defendants, who began collection efforts using prohibited practices. *Id.* at 133. The Fourth Circuit rejected the majority view, concluding 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)." *Id.* at 135. Instead, that determination turns on "whether a person collects debt *on behalf of others* or *for its own account* . . . ." *Id.* (*emphasis in original*). Because the defendants were collecting on behalf of themselves, rather than another, they were beyond the Act's coverage. *Id.* at 138.

C. Of the circuits waiting on the sideline for guidance, two appear to favor the majority view in dicta.

Although the Eighth and Tenth Circuits have not specifically ruled on the issue, they have commented in line with the majority.

In *Volden v. Innovative Financial Systems, Inc.*, 440 F.3d 947 (8th Cir. 2006), the defendant took ownership of the rights to dishonored checks due to others and began collection efforts thereon. *Id.* at 949–50. Though the Eighth Circuit affirmed the summary judgment in the defendant's favor, it held that the defendant was not a "creditor" under the Act because it took ownership after default. *Id.* at 951–52.

And the Tenth Circuit affirmed a complaint's dismissal under the Act because it contained "no plausible allegations that the Bank Defendants obtained the Note while it was in default—allegations that would be necessary to skirt the relevant exclusion from the [Act's] definition of 'debt collector' in 15 U.S.C. § 1692a(6)(F)." *Spreitzer v. Deutsche Bank Nat'l Trust Co.*, 610 Fed. App'x 737, 743 (10th Cir. 2015).

D. 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. Indeed, both camps believe that the statute's plain language supports their rulings. *Compare Check Invests.*, 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 [Act].") (*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 [Act], even where the consumer's debt was in default at the time the person acquired it." (*emphasis added*).

Despite the debtors in this case and in *Davidson* making the Eleventh Circuit aware of the majority view, the court persisted in its position. Indeed, Arencibia requested that the Eleventh Circuit recede from *Davidson en banc* both during the merits briefing and on rehearing, but the Eleventh Circuit denied both requests. Similarly, the Fourth Circuit acknowledged the majority view, but flat rejected it. *Henson*, 817 F.3d at 135.

And it's highly unlikely that the four circuits in the majority will freely jettison over 30 years of precedent to adopt the minority view, especially when the Federal Trade Commission—the entity charged with the Act's enforcement—agrees with the majority's interpretation. *See infra* pp. 29–30.

Accordingly, only this Court can resolve these differing interpretations.

II. Whether the Act applies to those obtaining defaulted debt is exceptionally important to debtors and collectors alike.

When Congress enacted the Act in 1977, 24 states representing nearly 40% of the nation's population either had no debt-collection laws or had laws offering little protection against debt-collection abuse. S. Rep. No. 95-382, p. 2 (1977). Consequently, Congress enacted the Act to eliminate widespread abusive practices through meaningful, uniform legislation. *Id.*; 15 U.S.C. § 1692(b) & (e).

But the present inter-circuit conflict frustrates this laudable goal and slides the nation back into the same inconsistent enforcement that existed before the Act's adoption.

For example, the 17 states now governed by the three-circuit minority view constitute

40% of the nation's population. *See* U.S. Census Bureau, *U.S. Census 2010*, at "Population Finder," http://www.census.gov/2010census/ (last visited Feb. 22, 2017).[1] Due to the minority view, those who obtain debts after default can now prey on 40% of the nation's population through extremely offensive collection practices like those that occurred in *Check Investors*, which included routinely adding illegal fees; falsely threatening debtors with jail; misrepresenting to debtors' family members that the debtor would be jailed if the family members did not pay the debt; placing 17 harassing collection calls within a 10-minute period; and telling debtors' children that they would be " 'watching their mother taken away in handcuffs . . . ." 502 F.3d at 163.

And, as long as the collectors are collecting the debt for themselves—rather than for another—then 40% of the nation's population have no recourse against these abusive practices. Indeed, that portion of the population does not even have the protection

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[1] Wikipedia has summarized state population statistics based on the 2010 United States Census along circuit-court lines at Wikipedia, the Free Encyclopedia, *United States court of appeals*, at "Circuit population," https://en.wikipedia.org/wiki/United_States_courts_of_appeals#Circuit_population (last visited Feb. 22, 2017).

of good will and potential repeat business that may restrain the typical creditor since the collectors who obtain debt after default often have no relationship with the debtors beyond collecting the outstanding debt. *See* S. Rep. No. 95-382, p. 2 (1977).

But just across the border, in the 13 states governed by the four-circuit majority, 36% of the nation's population have the right to sue collectors who obtain defaulted debt and engage in the egregious practices described above. Census Bureau, *supra* p. 23. While the remaining 24% of the population in the six states whose circuits have not entered the fray are left unsure about their rights and protections under the Act. Thus, whether the Act provides a remedy for abusive practices perpetrated by debt purchasers is a question of critical importance to government enforcement agencies and consumers.

This question is equally important to those obtaining defaulted debt, like Mortgage Guaranty. As the Third Circuit observed, unethical collection practices can yield substantial profits. *Check Invests.*, 502 F.3d at 164 ("Between January 1, 2000, and January 6, 2003, Check Investor's collection efforts netted $10.2 million from more than 42,000 consumers."). In enacting the Act, Congress recognized that uniform laws prohibiting unethical collection practices would level the playing field between

respectable collectors and unscrupulous ones. § 1692(e). But as it stands now, an ethical debt buyer with a nationwide practice is at a competitive disadvantage in the 17 states where unscrupulous debt buyers may collect by using any means necessary without fear of recourse under the Act.

Accordingly, this case presents an exceptionally important, reoccurring issue that will have a significant impact on both collectors and debtors.

III. The Eleventh Circuit's decision (and the minority view) is wrong.

Certiorari is further warranted because the decision below is wrong.

A. The Eleventh Circuit's decision conflicts with the text and several canons of statutory interpretation.

The Eleventh Circuit believed that it would be rewriting § 1692a(6) to exclude purchasers of defaulted debt when the statutory definition does not expressly reference the default's status. *Davidson*, 797 F.3d at 1315–16. Focusing on the phrase "owed or due another," *Davidson* reasoned that the second definition was unambiguous and included only those collecting debts "for another" and not for oneself. *Id.* at 1316.

That reading, however, conflates the second definition's operative phrase into only the last four words. The full phrase contains two distinct, independent clauses connected by a coordinating conjunction: "debts [1] owed or due *or* [2] asserted to be owed or due another." § 1692a(6). The Eleventh Circuit's construction renders the first phrase superfluous.

Further, the Eleventh Circuit's attempt to have "another" modify both clauses also violates the last-antecedent canon of statutory construction. *See Barnhart v. Thomas*, 540 U.S. 20, 26-28, 124 S. Ct. 376 (2003). Under this canon, words and phrases should be construed as modifying only the closest preceding words or phrases and not as extending to or including others that are more remote in the sentence. *Osorio v. State Farm Bank, F.S.B.*, 746 F. 3d 1242, 1256 (11th Cir. 2014).

Applying this canon to section 1692(a)(6)'s second definition shows that "another" modifies only the preceding phrase "asserted to be owed or due" and does not reach back to the first phrase "owed or due." Had Congress intended "another" to modify both clauses, then it would have added commas, making the phrase read: "debts owed or due, or asserted to be owed or due, another." *Cf. Osorio*, 746 F. 3d at 1257 (" 'Where the modifier is set off from two or more antecedents by a comma, the

supplementary 'rule of punctuation' states that the comma indicates the drafter's intent that the modifier relate to more than the last antecedent.' ") (citations omitted).

Since the first clause ("debts owed or due") must have a distinct meaning and since the pronoun "another" does not modify that clause, this shows that § 1692a(6)'s second definition is broadly intended to include both those collecting debts for themselves and for another. From there, the reader must consider the exclusions in the last sentence of subsection (6)(f), which winnow out from this definition those (1) who originated the debt and (2) who obtained it before default. § 1692a(6)(F)(ii) & (iii). Indeed, these exclusions would never apply if the definition of debt collector was not broad enough to also include those collecting debts for themselves.

Therefore, the Eleventh Circuit's reading is incorrect. Once properly considered, section 1692a(6)'s second definition becomes consistent with the majority view without needing to rewrite the statute.

At a minimum, the statute is ambiguous. Ambiguity arises when a statute is "susceptible to more than one reasonable interpretation." *Med. Transp. Mgmt. Corp. v. Comm'r of I.R.S.*, 506 F.3d 1364, 1368 (11th Cir. 2007). Here, section 1692a(6)'s

second definition is arguably ambiguous in two respects.

First, the definition's punctuation (or lack thereof) makes it susceptible to different meanings since "another" could modify either the entire second definition, as *Davidson*'s held, or only the clause "asserted to be due or owed," as argued above.

Second, the pronoun "another" is itself susceptible to two different meanings. The *Davidson* panel looked to the dictionary to define "another" as "one that is different from [1] the first *or* [2] *present one*." *Davidson*, 797 F.3d at 1316 (*emphasis added*). Relying on only the second phrase, the Eleventh Circuit concluded that debt collectors under § 1692a(6) are limited to only those "collecting debts *for others*. . . ." *Id.* (*emphasis in original*).

Implicitly, the *Davidson* panel incorrectly focused on the second meaning of "another" as "one that is different from the present one" and ignored the more natural reading under the Act as "one that is different from the *first one*." The latter supports the majority view without rewriting the statute because even when rights to a debt are transferred, the debt is technically still owed to the first one (*i.e.*, the originator) because the instrument's face will always refer to the originator, while the assignee must prove standing to enforce. Thus, in its most basic

sense, a debt is *always* "owed or due another" when it is transferred.

B. The decision below also conflicts with the view of those agencies Congress charged with enforcing the Act.

This Court has long recognized that courts must give considerable deference to an executive department's interpretation of a statute that Congress entrusted it to administer. *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 844, 104 S. Ct. 2778 (1984).

As originally enacted, the Act empowered the Federal Trade Commission to enforce compliance with the Act using its powers under the Federal Trade Commission Act. 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 as to non-bank financial institutions. § 1692*l*(b)(6).

Both agencies have agreed with the majority view. For example, the Commission has routinely construed "debt collector" under the Act as including non-originating owners who obtained the debt after it was already in default. *E.g.*, *Check Investors*, 502 F.3d at 164; Amicus Brief for the Federal Trade Commission Supporting Rehearing En Banc at 5, *Davidson*, 797 F.3d

1309 (No. 14-14200), 2015 WL 5608572, at *6–*15; *Arencibia*, No. 2:15-cv-248-FTM-38CM, at Dkt. No. 24-3 (containing Hutchinson, FTC Informal Staff Letter at 4-6 (June 22, 1987) (opining that mortgage-insurance companies taking loans by subrogation well after default qualify as debt collectors under the Act)).

More recently, the Bureau has also embraced the same interpretation in publications, enforcement actions, and reports to Congress. *E.g.*, CFPB Bulletin 2013-07, *Prohibition of Unfair, Deceptive, or Abusive Acts or Practices in the Collection of Consumer Debts* at p. 2 (July 10, 2013), http://files.consumerfinance.gov/f/201307_cfpb_bulletin_unfair-deceptive-abusive-practices.pdf (last visited Feb. 20, 2017); Consumer Financial Protection Bureau, *Fair Debt Collection Practices Act: CFPB Annual Report 2016* at p. 33–34 (March 2016), http://files.consumerfinance.gov/f/201603_cfpb-fair-debt-collection-practices-act.pdf (last visited Feb. 20, 2017).

The Eleventh Circuit erred by failing to defer to these agencies' interpretations of the Act.

CONCLUSION

This case presents an extremely important question for debtors and those who may or may not be "debt collectors" under the Act. The current circuit-court split muddies the waters for each side in circuits that have not yet addressed the issue and results in inconsistent applications of the law between the circuits that have addressed it. Such results provide less protections for debtors in the minority circuits as well as a competitive advantage to persons who only collect debts in the minority circuits over those with a national or majority circuit presence.

Therefore, this Court should grant Arencibia's petition for a writ of certiorari as it was in *Henson*, No. 16-349 (U.S. filed Sept. 16, 2016).

Dated: March 13, 2017

Respectfully submitted,

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APPENDIX A

United States Court of Appeals,
Eleventh Circuit.

No. 15–15387

Ariel Arencibia, on behalf of themselves and all others similarly situated, Plaintiffs–Appellants, Jose Ayala, on behalf of themselves and all others similarly situated,

Plaintiff-Appellants,

v.

Mortgage Guaranty Insurance Corporation, a Wisconsin corporation,

Defendant–Appellee.

Appeal from the United States District Court for the Middle District of Florida, at Ft. Myers. Sheri Polster Chappell, District Judge (No. 2:15–cv–00248–SPC–CM)

Decided: September 12, 2016

Before MARTIN, ROSENBAUM, and ANDERSON, Circuit Judges.

David W. Fineman, Carmen Dellutri, The Dellutri Law Group, PA, Fort Myers, FL; Christopher Dale Donovan, Roetzel & Andress, LPA, Naples, FL, for Plaintiff–Appellant.

Dale Thomas Golden, Golden Scaz Gagain, PLLC, Tampa, FL, for Defendant–Appellee.

Brian Melendez, Dykema Gossett, PLLC, Minneapolis, MN, for Amicus Curiae ACA International.

PER CURIAM:

Plaintiff–Appellant Ariel Arencibia[1] filed this class-action lawsuit against Defendant Mortgage Guaranty Insurance Corporation ("Mortgage Guaranty") under the Fair Debt Collection Practices Act ("FDCPA"), 15 U.S.C. § 1692, *et seq.* Mortgage Guaranty, a mortgage-insurance provider, acquired Arencibia's remaining debt from his lender after the lender had obtained a foreclosure judgment against him.[2] Mortgage Guaranty

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[1] Arencibia was joined in the district court by Plaintiff Jose Ayala. We dismissed the appeal as to Ayala at his request. *See* 11th Cir. Dkt. No. 15–15387, Order dated June 17, 2016.

[2] Mortgage Guaranty compensates lenders for losses in the event of borrower default and lack of full

then filed a deficiency lawsuit against Arencibia to collect on the debt, allegedly without providing him prior notice under Florida law of assignment of the debt. See Fla. Stat. § 559.715 ("[T]he assignee [of a consumer debt] must give the debtor written notice of such assignment as soon as practical after the assignment is made, but at least 30 days before any action to collect the debt."). Arencibia alleged that Mortgage Guaranty violated the FDCPA under § 1692e by failing to provide him, and numerous others, prior notice under Fla. Stat. § 559.715.

For Mortgage Guaranty to be liable under § 1692e, Arencibia needed to show that it was a "debt collector," as that term is defined in the statute. *See* 15 U.S.C. § 1692e ("A debt collector may not use any false, deceptive, or misleading representation or means in connection with the collection of any debt."). The statute defines "debt collector" in two ways: (1) "any person who uses any instrumentality of interstate commerce or the mails in any business the principle purpose of which is the collection of any debts"; or (2) any person "who regularly collects or attempts to collect,

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recovery. Once Mortgage Guaranty pays a claim, it steps into the shoes of the lender and can then pursue a deficiency judgment against the borrower.

directly or indirectly, debts owed or due or asserted to be owed or due another." 15 U.S.C. § 1692a(6). The statute also provides a list of exclusions to these definitions, *see id.* § 1692a(6)(A)–(F), such as "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," *id.* § 1692a(6)(F)(iii).

Arencibia attempted to qualify Mortgage Guaranty as a "debt collector" under the second definition. Arencibia alleged that Mortgage Guaranty regularly collected or attempted to collect debts that were *originally* owed to others and acquired after default. Mortgage Guaranty moved for summary judgment, arguing that it was not a "debt collector" because, *at the time of collection*, it was collecting on debts it owned and not collecting a debt owed or due another.

Little more than a week after Mortgage Guaranty filed for summary judgment, this Court issued its decision in *Davidson v. Capital One Bank (USA), N.A.*, 797 F.3d 1309 (11th Cir. 2015), which settled the dispute in Mortgage Guaranty's favor. *Davidson*, like this case, involved an FDCPA claim under § 1692e against an entity which regularly collected debts owed to it, but did not collect or attempt to collect debts owed

or due another. The panel in *Davidson* held that "a person must regularly collect or attempt to collect debts *for others* in order to qualify as a 'debt collector' under the second definition of the term." *Id.* at 1316 (*emphasis in original*). An entity collecting on its own debts—even debts originally owned by another and acquired after default—does not qualify as a "debt collector." *See id.* at 1315–16.

On appeal from the dismissal of his complaint, Davidson had argued that an entity which collects on debts it acquires after default qualifies as a "debt collector" under the second definition. Relying on the exclusion in § 1692a(6)(F)(iii), Davidson asserted that "creditors" and "debt collectors" are mutually exclusive terms under the FDCPA, and the line that separates the two, in the case of acquired debt, is "the default status of the debt at the time it was acquired." *Id.* at 1314. In other words, as succinctly summarized by the *Davidson* panel, "if the debt was *not* in default when it was acquired, § 1692a(6)(F)(iii) excludes the entity from the definition of 'debt collector,' and the entity is a 'creditor'; on the other hand, if the debt was in default when it was acquired, § 1692a(6)(F)(iii) does not apply, and the entity is a 'debt collector.' " *Id.*

Davidson rejected the argument that the line between "creditors," who "typically are

not subject to the FDCPA," and "debt collectors," who are, "is drawn by the default status of the debt." *Id.* at 1313–14. The panel found Davidson's reliance on § 1692a(6)(F)(iii) unavailing because "§ 1692a(6)(F)'s exclusions do not obviate the substantive requirements of § 1692(a)(6)'s definition." *Id.* at 1314. In other words, the exclusions come into play only once one of the two substantive definitions of "debt collector," set forth above, is satisfied; the exclusions do not alter the substantive definitions. *Id.* at 1314–15. And, while default status of the debt may affect the application of the § 1692a(6)(F)(iii) exclusion, "the statutory definition of 'debt collector' applies without regard to the default status of the underlying debt." *Id.* at 1314. Therefore, "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." *Id.* at 1316.

Looking to the "entirely transparent" statutory text, the *Davidson* panel held that the second definition of "debt collector" unambiguously is limited "to those persons who regularly collect or attempt to collect debts owed or due or asserted to be owed or due *another*." *Id.* at 1316 (*emphasis in original*). In common usage, "[t]he term 'another' most naturally connotes 'one that

is different from the first or present one.' " *Id.* This means, according to the panel, that a "debt collector" under the second definition must collect debts or attempt to collect debt "*for others*." *Id.* (*emphasis in original*). The Court went on to affirm the dismissal of Davidson's complaint because it made "no factual allegations from which we could plausibly infer that [the defendant] regularly collects or attempts to collect debts owed or due to someone other than [the defendant]." *Id.* at 1318.

Finding *Davidson* controlling, the district court in this case granted summary judgment to Mortgage Guaranty. The court ruled that Mortgage Guaranty was not a "debt collector" under the FDCPA because "[t]he undisputed facts show that Defendant does not regularly collect or attempt to collect debts owed or due someone other than Defendant."

Arencibia appeals the district court's grant of summary judgment, arguing that *Davidson* was wrongly decided. He asserts that *Davidson* conflicts with the decisions of a majority of other circuit courts to have addressed the same issue.[3] *See, e.g.*, *Bridge*

[3] We note that the Fourth Circuit recently decided the issue in line with *Davidson*. *See Henson v. Santander Consumer USA, Inc.*, 817 F.3d 131, 136–37 (4th Cir. 2016).

v. Ocwen Fed. Bank, FSB, 681 F.3d 355, 359 (6th Cir. 2012) ("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."); *Ruth v. Triumph P'ships*, 577 F.3d 790, 796 (7th Cir. 2009) ("[A] party that seeks to collect on a debt that was in default when acquired is a debt collector under the FDCPA, even though it owns the debt and is collecting for itself."). Arencibia also asserts that the *Davidson* panel's rationale contravenes several canons of statutory interpretation and undermines the broad, remedial purposes of the FDCPA.

As Arencibia acknowledges, however, we are bound by *Davidson* under the prior panel precedent rule, which provides that the holding of a prior panel is binding "unless and until it is overruled or undermined to the point of abrogation by the Supreme Court or this court sitting *en banc*." *United States v. Archer*, 531 F.3d 1347, 1352 (11th Cir. 2008). Arencibia makes no claim that an exception to this rule applies.[4] Therefore, even if we believed

[4] In recognition of that fact, Arencibia has filed a petition for initial hearing en banc, Fed. R. App. P. 35, which has been denied by separate order.

that *Davidson* had been wrongly decided, which, to be clear, we offer no opinion on the matter, we would nevertheless be bound by *Davidson*'s holding. *See United States v. Steele*, 147 F.3d 1316, 1317–18 (11th Cir. 1998) (*en banc*) ("Under our prior precedent rule, a panel cannot overrule a prior one's holding even though convinced it is wrong.").

Applying *Davidson* to the facts of this case, the district court quite clearly was correct to grant summary judgment to Mortgage Guaranty. There is no evidence that Mortgage Guaranty regularly collected or attempted to collect on debts "for others." *See Davidson*, 797 F.3d at 1316. Accordingly, Mortgage Guaranty does not qualify as a "debt collector" under the second definition of that term in the FDCPA. *See id.*; 15 U.S.C. § 1692a(6).

The judgment of the district court is **AFFIRMED**.[5]

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[5] In light of our disposition of this appeal, we **DENY AS MOOT** Mortgage Guaranty's "Motion to Supplement the Record and to Take Judicial Notice," which relates to an alternative argument for affirming the district court.

APPENDIX B

United States District Court,
M.D. Florida,
Fort Myers Division.

Ariel Arencibia and Jose Ayala, on behalf of themselves and all others similarly situated,
Plaintiffs,

v.

Mortgage Guaranty Insurance Corporation,
Defendant.

Case No: 2:15-cv-248-FtM-38CM

Signed November 12, 2015

Filed 11/13/2015

ORDER[1]

[1] Disclaimer: Documents filed in CM/ECF may contain hyperlinks to other documents or websites. These hyperlinks are provided only for users' convenience. Users are cautioned that hyperlinked documents in CM/ECF are subject to PACER fees. By allowing hyperlinks to other websites, this Court does not endorse, recommend, approve, or guarantee any third parties or the services or products they provide on their websites. Likewise, the Court has no agreements with any of these third parties or their websites. The Court accepts no responsibility for the availability or functionality of any hyperlink. Thus,

Sheri Polster Chappell, United States District Judge.

This matter comes before the Court on Defendant Mortgage Guaranty Insurance Corporation's Motion for Summary Judgment (Doc. #13) filed on August 12, 2015. With leave of Court, Plaintiffs Ariel Arencibia and Jose Ayala filed a Response in Opposition to Defendant's Motion for Summary Judgment (Doc. #24) on September 18, 2015. Defendant then filed a reply (Doc. #30) on October 1, 2015, to which Plaintiffs filed a sur-reply (Doc. #32) on October 13, 2015. This matter is ripe for review.

BACKGROUND

This putative class action arises under the Fair Debt Collection Practices Act ('FDCPA'). Defendant is a mortgage insurance company that issues insurance policies to compensate lenders for losses due to defaulted mortgage loans. (Doc. #13-1 at ¶ 6). Defendant insured the mortgages on Plaintiffs' homes. When Plaintiffs defaulted, their lenders submitted claims to Defendant. (Doc. #13-1 at ¶ 6). After Defendant paid the claims, it sought

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the fact that a hyperlink ceases to work or directs the user to some other site does not affect the opinion of the Court.

deficiency judgments against Plaintiffs. (Doc. #1 at ¶¶ 15-16; Doc. #13-1 at ¶ 8).

Plaintiffs have filed this action alleging that Defendant violated the FDCPA by seeking to collect Plaintiffs' debts before notifying them that their debts had been assigned to Defendant as Florida Statute § 559.715 requires. (Doc. #1 at ¶¶ 2, 23-24, 36). Defendant answered the Complaint, (Doc. #11), but two months later filed the instant motion for summary judgment. Defendant asserts that it is not liable under the FDCPA as a matter of law because it is not a 'debt collector' as the statute defines that term. (Doc. #13). Plaintiff opposes that argument.

STANDARD OF REVIEW

'The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and [she] is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). An issue is genuine if there is sufficient evidence such that a reasonable jury could return a verdict for either party. *See Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248 (1986). Similarly, an issue of fact is material if it may affect the outcome of the suit under governing law. *Id.*

The moving party bears the burden of showing the absence of any genuine issue of material fact. *See Celotex Corp. v. Catrett,*

477 U.S. 317, 323 (1986). In deciding whether the moving party has met this initial burden, courts must review the record and draw all reasonable inferences from the record in a light most favorable to the non-moving party. *See Whatley v. CNA Ins. Co.,* 189 F.3d 1310, 1313 (11th Cir. 1999). Once the court determines the moving party has met this burden, the burden shifts to the non-moving party to present facts showing a genuine issue of fact exists to preclude summary judgment. *See Matsushita Elec. Indus. Co. Ltd. v. Zenith Radio Corp.,* 475 U.S. 574, 587 (1986). The evidence presented cannot consist of conclusory allegations, legal conclusions or evidence which would be inadmissible at trial. *See Avirgan v. Hull,* 932 F.2d 1572, 1577 (11th Cir. 1991). Failure to show sufficient evidence of any essential element is fatal to the claim and the court should grant summary judgment. *See Celotex,* 477 U.S. at 322-23. Conversely, if reasonable minds could find a genuine issue of material fact then summary judgment should be denied. *See Miranda v. B & B Cash Grocery Store, Inc.,* 975 F.2d 1518, 1532 (11th Cir. 1992).

DISCUSSION

Congress enacted the FDCPA "to eliminate abusive debt collection practices by debt collectors, to ensure that those debt collectors who refrain from using abusive

debt collection practices are not competitively disadvantaged, and to promote consistent State action in protecting consumers against debt collection abuses." 15 U.S.C. § 1692(e). To prevail on an FDCPA claim, a plaintiff must prove (1) he has been the object of collection activity arising from a consumer debt; (2) the defendant is a debt collector as defined by the FDCPA; and (3) the defendant has engaged in an act or omission prohibited by the FDCPA. *See Reese v. Ellis, Painter, Ratterre & Adams, LLC*, 678 F.3d 1211, 1216 (11th Cir. 2012). The second element is at issue here.

In accordance with its stated purpose, the FDCPA prohibits a "debt collector" from using any "false, deceptive, or misleading representation or means in connection with the collection of any debt." 15 U.S.C. § 1692e. The FDCPA defines "debt collector" as

> [1] any person who uses any instrumentality of interstate commerce or the mails in any business the principle purposes of which is the collective 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.

15 U.S.C. § 1692a(6). The FDCPA excludes from this definition several categories of persons, including "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[.]" 15 U.S.C. § 1692a(6)(F)(iii).

'Unlike debt collectors, creditors typically are not subject to the FDCPA. ' *Davidson v. Capital One Bank (USA), N.A.*, 797 F.3d 1309, 1313 (11th Cir. 2015).[2] The FDCPA defines a 'creditor' as '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 from another.' 15 U.S.C. § 1692a(4).

The issue before the Court is whether Defendant qualifies as a "debt collector" under § 1692a(6)'s second prong.[3] Defendant argues that it is not a "debt collector"

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[2] The Eleventh Circuit denied the plaintiff-appellant's petition(s) for rehearing. *See Davidson v. Capital One Bank (USA), N.A.*, No. 14-14200-AA, ORD-42 (11th Cir. Oct. 22, 2015).

[3] It is undisputed that Defendant is not a 'debt collector' under § 1692a(6)'s first prong.

because it was collecting on debts it owned and not collecting a debt owed or due another. The Court needs look no further than the Eleventh Circuit's recent decision in *Davidson* to decide this issue.

In *Davidson*, the Eleventh Circuit addressed "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, qualified as a 'debt collector' under the FDCPA." *Id.* at 1310. Davidson appealed the district court's dismissal of his FDCPA claim that alleged Capital One violated the act when it tried to collect on his credit card account that was in default at the time Capital One had acquired it from another bank. *Id.* at 1311-12. On appeal, Davidson argued – much like Plaintiff does here – that the line between creditors and debt collectors was drawn by the default status of the debt. *Id.* at 1314. Drawing on the exclusion at § 1692a(6)(F)(iii), Davidson argued that an entity that does not originate a debt, but acquires it from another, is deemed either a creditor or a debt collector depending on the default status of the debt at the time it was acquired. *Id.* The Eleventh Circuit rejected Davidson's argument "because § 1692a(6)(F)'s exclusions do not obviate the substantive requirements of § 1692a(6)'s definition." *Id.* It stated, in pertinent part, that:

Section 1692a(6) clearly, plainly, and directly states that a person who is engaged in any business the principal purpose of which is debt collection or a person who regularly collects or attempts to collect debts owed or due another qualifies as a 'debt collector.' *See* § 1692a(6). So, if subsection (F)(iii)'s exclusion is inapplicable because, for example, the subject debt was in default at the time it was acquired or the subject person is not collecting for another, the person *may* be a debt collector, but the person is not undoubtedly a debt collector; one of two statutory standards still must be met. *See* § 1692a(6). Davidson cannot rely on § 1692a(6)(F)(iii) to bring entities that do not otherwise meet the definition of 'debt collector' within the ambit of the FDCPA solely because the debt on which they seek to collect was in default at the time they acquired it. Section 1692a(6)(F)(iii) is an exclusion; it is not a trap door.

Davidson's misunderstanding of the effect of § 1692a(6)(F)(iii) also results in a strained construction of § 1692a(6)'s second definition of 'debt collector.' Drawing on subsection (F)(iii), Davidson contends that an

entity that regularly collects debts originally owed to another, which debts were in default at the time they were acquired, qualifies as 'debt collector' under the FDCPA. Put another way, Davidson reads the definition of 'debt collector' to encompass any regular purchaser of a debt in default even if the purchaser owns the debt and is collecting for himself. As noted above, the term 'debt collector' includes any person who 'regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another.' § 1692a(6). Davidson's interpretation succeeds only if we rewrite the statutory text to read 'regularly collects or attempts to collect, directly or indirectly, debts *originally* owed or due or asserted to be originally owed or due another.' But we are not in the business of rewriting statutes.

The statutory text is entirely transparent. A 'debt collector' includes any person who regularly collects or attempts to collect debts owed or due another. *See* § 1692a(6). The statute does not define 'another,' so we will look to the common usage of the word for its meaning. *See, e.g.,*

Consol. Bank, N.A. v. United States Dep't of Treasury, 118 F.3d 1461, 1464 (11th Cir. 1997). The term 'another' most naturally connotes 'one that is different from the first or present one.' Merriam–Webster's Collegiate Dictionary 48 (10th ed. 1996). Applying this definition to the statutory language, this means that a person must regularly collect or attempt to collect debts *for others* in order to qualify as a 'debt collector' under the second definition of the term. The word 'another' is not modified or otherwise limited, and Davidson has pointed us to nothing that would indicate that Congress had any intention to limit the term. *See CBS Inc.*, 245 F.3d at 1224-26.

In construing a statutory provision, '[w]e do not start from the premise that [the statutory] language is imprecise.' *United States v. LaBonte*, 520 U.S. 751, 757 (1997). Congress limited the second definition of 'debt collector' to those persons who regularly collect or attempt to collect debts owed or due or asserted to be owed or due *another,* and there is no ambiguity in the words that Congress chose to employ....Because we are not permitted to 'do to the statutory

> language what Congress did not do with it,'..., we will not write into the phrase 'owed or due another' the limiting adverb 'originally' in order to express what Davidson thinks Congress intended[.]

Davidson, 797 F.3d at 1315-16 (internal citations and footnotes omitted). Based on the foregoing, the Eleventh Circuit rejected 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. *Id.* at 1316. The Eleventh Circuit ultimately found that Capital One fell within neither prong of 'debt collector.'

The Court turns now to Defendant's motion for summary judgment. As to the second definition of 'debt collector,' Plaintiff does not dispute that Defendant owns and sought to collect on deficiencies for itself. Instead, Plaintiff contends that Defendant still fits that definition of 'debt collector' because it received the right to file the deficiency judgments from another, i.e., the lenders of Plaintiffs' residence. (Doc. #24 at 4-5). From there, Plaintiff argues – much like the plaintiff in *Davidson* – that Defendant does not satisfy § 1692a(6)(F)(iii)'s exception to 'debt collector' because their debts were in default at the time Defendant acquired the right to collect

on them. (Doc. #24 at 5). Consequently, Plaintiff concludes that Defendant is a 'debt collector' under the FDCPA.

Plaintiff's assertions are a nonstarter in light of *Davidson*. The Eleventh Circuit made clear in *Davidson* that a person who falls under either of the two definitions in § 1692a(6) is a 'debt collector,' but a person who falls under neither is not. It further clarifies that § 1692a(6)'s second definition is limited to entities attempting to collecting debts 'owed or due another.' As discussed above, the question under § 1692a(6) is not whether Defendant regularly collects on debts *originally* owed or due another and now owed to Defendant. Rather, the question is whether Defendant regularly collects on debts owed or due another at the time of collection. The undisputed facts show that Defendant does not regularly collect or attempt to collect debts owed or due someone other than Defendant.

At no time did Defendant seek to recover money owed to the lenders that owned the defaulted mortgages in this case. Rather, Defendant sought to recoup money owed to it pursuant to subrogation law. (Doc. #13-1 at ¶¶ 8-9). Because Defendant stepped into the shoes of the lenders under subrogation law, Defendant's collection efforts in this case relate only to debts owed to it –and not 'to another.' That Plaintiffs had defaulted on their mortgages before Defendant started its

collection actions does not bear on the Court's determination here. As such, the Court finds that Defendant is not a 'debt collector' and is not subject to liability under the FDCPA. *See generally Albert v. Ill. Farmers Ins. Co.*, No. 06-1250 (JNE/JJG), 2007 WL 2122145, at *1 (D. Minn. July 19, 2007) (dismissing plaintiff's FDCPA claim against the insurer and insurance agent because they were in the insurance business, their principal business is not the collection of debts, and they did not regularly collect or attempt to collect debts owed to others).

To avoid the inescapable conclusion that it is not a 'debt collector' after *Davidson*, Plaintiffs advocate that the *Davidson* holding is mistaken and 'runs afoul to the majority of case law on the issue including other circuits court of appeals, the federal trade commissioner's interpretation, and Congressional intent.'[4] (Doc. #32 at 2; Doc. #24 at 7-11). Given the Eleventh Circuit's

[4] Plaintiff relies heavily on the Federal Trade Commission's ('FTC ') interpretation of the FDCPA in arguing that the Eleventh Circuit's decision in *Davidson* is incorrect. (Doc. #24; Doc. #32) Plaintiff attached the FTC's amicus brief that it submitted to the Eleventh Circuit when the court was deciding – and ultimately denied – Davidson's *en banc* petition. (Doc. #32-1). The Eleventh Circuit did not find the FTC's amicus brief to sway its decision, and this Court follows suit.

strong and unequivocal language on an issue analogous to the one presented in this case, the Court declines Plaintiff's invitation to depart from the binding precedent.

As it is undisputed that Defendant does not regularly collect debts 'due another,' it does not qualify as a 'debt collector' under the FDCPA. Consequently, the Court dismisses the Complaint (Doc. #1) as a matter of law.

Accordingly, it is now

ORDERED:

(1) Defendant Mortgage Guaranty Insurance Corporation's Motion for Summary Judgment (Doc. #13) is **GRANTED**.

(2) The Clerk of Court is **DIRECTED** to enter judgment accordingly, terminate all pending deadlines and motions, and close the file.

DONE and **ORDERED** in Fort Myers, Florida this 12th day of November, 2015.

APPENDIX C

In the United States Court of Appeals
For the Eleventh Circuit.

No. 15–15387-FF

Ariel Arencibia, on behalf of themselves and all others similarly situated,
Plaintiffs–Appellants,

Jose Ayala, on behalf of themselves and all others similarly situated,
Plaintiff,

v.

Mortgage Guaranty Insurance Corporation, a Wisconsin corporation,
Defendant–Appellee.

Appeal from the United States District Court for the Middle District of Florida

Decided: January 9, 2017

Before MARTIN, ROSENBAUM, and ANDERSON, Circuit Judges.
PER CURIAM:

The petition(s) for panel rehearing filed by the Appellant is DENIED.

ENTERED FOR THE COURT:

/s

United States Circuit Judge

In the United States Court of Appeals
For the Eleventh Circuit.

No. 15–15387-FF

Ariel Arencibia, on behalf of themselves and all others similarly situated,
Plaintiffs–Appellants,

Jose Ayala, on behalf of themselves and all others similarly situated,
Plaintiff,

v.

Mortgage Guaranty Insurance Corporation, a Wisconsin corporation,
Defendant–Appellee.

Appeal from the United States District Court for the Middle District of Florida

Decided: January 9, 2017

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

Before MARTIN, ROSENBAUM, and ANDERSON, Circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s

United States Circuit Judge