

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 RICKY HENSON, ET AL., :

4 Petitioners : No. 16-349

5 v. :

6 SANTANDER CONSUMER USA, INC., :

7 Respondent. :

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9 Washington, D.C.

10 Tuesday, April 18, 2017

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12 The above-entitled matter came on for oral
13 argument before the Supreme Court of the United States
14 at 11:13 a.m.

15 APPEARANCES:

16 KEVIN K. RUSSELL, ESQ., Bethesda, Md.; on behalf of the
17 Petitioners.

18 KANNON K. SHANMUGAM, ESQ., Washington, D.C.; on behalf
19 of the Respondent.

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1 P R O C E E D I N G S

2 (11:13 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear argument
4 next in Case 16-349, Henson v. Santander Consumer USA,
5 Incorporated.

6 Mr. Russell.

7 ORAL ARGUMENT OF KEVIN K. RUSSELL

8 ON BEHALF OF THE PETITIONERS

9 MR. RUSSELL: Mr. Chief Justice, and may it
10 please the Court:

11 The Fair Debt Collection Practices Act
12 applies to debt collectors. Debt collector is defined
13 in the Act as the most relevant here to include
14 individuals who regularly collect debts owed or due
15 another.

16 When Respondent Santander was originally
17 hired to collect Petitioners' defaulted car loans,
18 there's no question that it was collecting the debt owed
19 or due another under anyone's interpretation of that
20 term. The question in this case is whether that changed
21 when Santander purchased an assignment of that debt.

22 The Fourth Circuit held that it did,
23 wrongly, based on its interpretation of the key phrase
24 "owed or due another," which is used twice in the
25 definition of debt collector, once in the principal

1 definition, and again in the Clause (F) exceptions.

2 The problem with that interpretation is that
3 it cannot be squared with the use of the same phrase in
4 the Clause (F) exceptions, particularly with respect to
5 Clause (F)(iv). With the Court's indulgence, I would
6 like to walk through that exception. And it's found on
7 page 4A of the appendix to the blue brief.

8 As I mentioned, this is an exception for
9 somebody who otherwise qualifies as a debt collector
10 under the main definition for somebody who is collecting
11 a debt owed or due another. And that same requirement
12 is repeated at the beginning of Clause (F). It has to
13 be somebody -- any person collecting or attempting to
14 collect a debt owed or due or asserted to be owed or due
15 another, and then it says to the extent such activity
16 meets one of four qualifications.

17 And the one I want to focus on is the
18 fourth, and that applies to somebody who's engaged in
19 activity concerning a debt obtained by such person as a
20 secured party in a commercial credit transaction
21 involving the creditor.

22 Now, I think the parties agree with the
23 FTC's interpretation of this. This is applying to a
24 situation in which a company, like a car dealership, has
25 gotten a commercial loan from a bank and put up as

1 collateral the debts that it's owed by its customers,
2 say, car loans.

3 The only circumstance in which that kind of
4 entity is ever going to be collecting on a consumer
5 debt, which is required at the beginning of Clause (F),
6 is that they've either foreclosed on the collateral, in
7 which case under the UCC, they will send a notice to
8 the -- the consumers saying we have been assigned this
9 debt; start sending the debt to us. And if the consumer
10 asks for it, they have to send proof of the assignment.
11 Or if the assignment was given to them at the outset as
12 part of the secured credit transaction.

13 The problem for Respondents is that in
14 either case, the bank is only ever going to be doing
15 exactly what a debt purchaser does, which is collecting
16 from the consumers a debt that has been assigned to it
17 and keeping it on its own account.

18 Respondent's only answer to this is to say
19 that this -- no, no, this is a provision that is
20 addressed at the bank that is simply holding the debts
21 as collateral. But that can't be right, because at the
22 very beginning of (F)(iv) -- or (F) -- and Congress made
23 clear that the exception only applies to somebody who is
24 actually collecting or attempting to collect a debt.
25 And somebody who is simply holding a collateral is not

1 collecting or attempting to collect the consumer debts.

2 Now, as a consequence, adopting Respondent's
3 interpretation that somebody who's collecting on its own
4 account through an assignment, as a debt purchaser does,
5 as the commercial creditor does in the scenario we've
6 just described, in our view, they're not collecting the
7 debt owed or due another. And as a consequence, they
8 cannot be the person to whom Congress is referring in
9 subsection (F)(iv). It is an exception that not only is
10 completely surplusage and a null set, it's a -- an
11 exception that renders itself surplusage. The beginning
12 of the -- the requirement makes it impossible to satisfy
13 the -- the second set of requirements in (F) -- at the
14 bottom of (F)(iv).

15 Our interpretation --

16 CHIEF JUSTICE ROBERTS: I understand -- I
17 understand that argument. And I -- I think you're
18 right. It is -- is one that the Respondent has to
19 address. But going back a step earlier than that, the
20 actual text, I mean, your friend makes the point that
21 your reading gives a different tense to "owed" as it --
22 than it does to "due." You read "owed" as referring to
23 the past; you read "due" as referring to the present,
24 and that's -- that's unusual.

25 MR. RUSSELL: I don't think it's that

1 unusual. I don't think we would be surprised, for
2 example, if this phrase read "debts owed or owing
3 another." In that circumstance, it would be perfectly
4 grammatical, and it would be clear that Congress was
5 concerned about the "another," not about the time frame,
6 and that the point of it was to exclude creditors who
7 are collecting debts that they originated themselves.

8 CHIEF JUSTICE ROBERTS: "Owing" is not a
9 common word that's used in that context, though.

10 MR. RUSSELL: But -- but exactly. That's
11 why Congress would use "due." Instead of "owed or
12 owing," it used "owed or due." And we think that that's
13 certainly a permissible interpretation.

14 And once we reach that point, then it
15 becomes important, particularly when the same phrase is
16 used again in another part of the definition, to adopt
17 an interpretation that, while it may not be the first
18 one that come to mind the first time it's used, you
19 still need to have an interpretation that allows the
20 same words to do work when repeated later in the
21 subsection.

22 What we have here is, I think, fundamentally
23 is that the word "owed" is a participle that's
24 ambiguous. It is a participle that can both be a past
25 participle, referring to a prior time frame, or a

1 present participle, referring to the present.

2 This Court encountered a very similar set of
3 words in Robinson v. Shell Oil where it was trying to
4 decide whether Title VII, which prohibits an employer
5 from retaliating against its -- its employees, whether
6 that meant its current employees or could also mean its
7 former employees.

8 One of the things the Court did, although it
9 recognized that kind of on first blush you would think
10 current employees, is it looked at the statutory
11 interpretation of "employee." And there, "employee" was
12 defined as an individual employed by an employer. So
13 you had individual employed. It's the same structure:
14 A noun modified by a gerund -- or by a participle that
15 is in the past tense, but could refer either to somebody
16 previously employed or somebody currently employed.

17 And the Respondent in that case made the
18 same argument that Respondent makes in this case, which
19 is that it must refer to somebody who is currently
20 employed. This Court unanimously rejected that
21 assertion out of hand and ultimately went and looked at
22 the use of the word "employee" elsewhere in the statute
23 and concluded that it can refer to both.

24 And that's all we're asking the Court to do
25 in this case as well is to recognize --

1 JUSTICE KAGAN: Mr. Russell, do you have a
2 few examples -- I -- I suspect you've thought of this --
3 just of sentences which use the word "owed" to -- to
4 mean what you want it to mean in this case, without any
5 other context clues?

6 MR. RUSSELL: You can talk about somebody
7 collecting a debt owed another. And then the context
8 could make clear that it was a debt that had been paid
9 off or discharged in bankruptcy.

10 JUSTICE KAGAN: Right. But you wouldn't
11 think that, right? I mean, I'm just wondering
12 whether -- and I -- I understand that you have your
13 superfluidity argument, which is, in your view, a kind
14 of context clue. But if you just look at the language,
15 is -- can you come up with any sentence which -- which
16 points toward your reading rather than towards
17 Mr. Shanmugam's?

18 MR. RUSSELL: So, I mean, we've given a
19 couple examples in our reply brief. You know, we can
20 speak of somebody who regularly collects debts that are
21 created by somebody else and even in that context, I
22 think you could refer to that as a debt owed.
23 Another -- I acknowledge that this maybe isn't the first
24 interpretation that leaps to mind, but I do think that,
25 you know, when you encounter a phrase like this, it's

1 not unambiguous. It can refer --

2 JUSTICE KAGAN: Well, usually, when we think
3 about ambiguous phrases, you know, we can say, well, you
4 could say this sentence and then it would mean X. Or
5 you could say this sentence and then it would mean Y.

6 But my problem when I think about this word
7 is that I can never get it to mean what you want it to
8 mean, no matter --

9 MR. RUSSELL: Well --

10 JUSTICE KAGAN: -- how I construct a
11 sentence.

12 MR. RUSSELL: Well, I give you the example,
13 if Congress had said a debt collector is somebody who
14 regularly collects debts owed or owing another, I think
15 that would be a perfectly grammatical sentence. And
16 Congress might not want to use "owing" because it is an
17 awkward, archaic use.

18 But I think, you know, when -- when you
19 confront a -- a provision like this, you have to end up
20 looking at the use in both contexts. And the only way
21 to give the -- the Clause (F) any meaning is to
22 interpret it in a -- what might be the less natural way
23 in the first place.

24 It's also a necessary way to interpret the
25 statute to give meaning to the way -- or to -- to

1 respect the way that Congress has dealt with other
2 assignees, because we recognize that Congress probably
3 didn't have the debt-buying industry in mind when it
4 wrote this statute. But it did have other assignees in
5 mind. And particularly credit -- debt servicers, it's
6 common in the -- the mortgage industry, for example, for
7 servicing to be performed by somebody else.

8 And Congress provided in Clause (F)(iii)
9 that somebody who was assigned -- somebody who obtains a
10 debt after it has gone in default is subject to the act.
11 And that's -- it's very common for debt servicers -- and
12 everybody agrees that this a provision, (F)(iii), that's
13 about debt servicers -- it's very common for mortgage
14 servicers to obtain assignments of debts after it's gone
15 into a default, precisely because they need it in order
16 to be able to enforce the debt in court, to file a
17 lawsuit to collect or to foreclose on a mortgage.
18 And --

19 CHIEF JUSTICE ROBERTS: Is this -- is -- as
20 the case comes to us, we're not addressing the status of
21 Santander as a debt servicer, though.

22 MR. RUSSELL: That's correct. My point here
23 is simply a structural one, and that is, that Congress
24 clearly contemplated that some assignees would be debt
25 collectors, notwithstanding the fact that they are

1 collecting a debt assigned to them by somebody else,
2 which is all that a debt purchase is, it's an assignment
3 of the debt for value.

4 And Congress said that if a -- if a -- a
5 mortgage servicer is assigned a debt after it's gone
6 into a default, Congress intended for them to be treated
7 as a debt collector. But under Respondent's view, that
8 actually isn't going to be what happens, because a
9 mortgage servicer, as soon as they obtain an assignment,
10 under their view, they're collecting debt owed and due
11 themselves, not owed and due another.

12 And so we end up with this situation with a
13 Clause (F)(iii) provision. And, actually, it only
14 applies to a mortgage servicer who has a contract to
15 collect a debt, but not if they've been assigned to the
16 debt. And they're particularly likely, as I mentioned,
17 to be assigned a debt if they obtain it after default,
18 because they need to have that assignment in order to do
19 the things that their customer wants them to do for
20 them, which is to file a lawsuit.

21 JUSTICE ALITO: And I don't see a problem
22 with -- with (F)(iii). The -- the party is attempting
23 to collect a debt owed or due to someone else, and it
24 concerns a debt which was obtained. And -- and if
25 obtained, it doesn't mean owed. You can obtain a debt

1 that you don't own. I don't see any problem with
2 (F) (iii).

3 MR. RUSSELL: So there's -- there's two
4 problems with that. I -- I disagree with that reading
5 of "obtained." I don't think it's a very natural
6 interpretation of it. But what it means, that -- I
7 think the reading you're suggesting is that an assignee,
8 a debt servicer who has an assignment, would not be
9 covered if they are assigned that debt after default.
10 And I think that does quite a bit of violence to how
11 Congress intended the statute to operate. There's no
12 reason for Congress to have thought that it made a
13 difference with respect to the risk that a servicer
14 poses to consumers, whether they have been simply hired
15 on a contract to collect a debt --

16 JUSTICE ALITO: Why would they not be
17 covered if they acquired the debt before it went into --
18 I'm sorry -- after it went into default? They would be
19 collecting a debt owed -- owed or due to someone else.
20 And they acquired the debt after it went into default;
21 therefore, they don't fall into (iii).

22 MR. RUSSELL: Well, in Respondent's view,
23 somebody who is collecting on an assignment is
24 collecting a debt that is owed themselves. So if the
25 suggestion is that an assignee is not collecting a debt

1 owed itself --

2 JUSTICE BREYER: Where -- where do they say
3 that?

4 MR. RUSSELL: I mean, I've approached
5 my limit.

6 JUSTICE BREYER: Yeah. The (iv) is
7 Mr. Smith owes some money to a Company Jones, and
8 Company Jones assigns the debt to a servicing company,
9 all right? And so the servicing company might have --
10 be -- it might be said, you can use it this way. They
11 obtained the debt from Company Jones.

12 And so somebody might say that this assignee
13 is collecting a debt from Smith, that Smith owes
14 another, namely Jones. But we don't want to cover them
15 in this statute. We don't want to cover that kind of
16 debt collector. So they write (iv).

17 And the same is true of (iii). They write
18 (iii) because they don't want mortgage -- mortgage
19 servicers to be falling within the statute, unless, of
20 course, the mortgage servicer is serving a dead
21 mortgage. Then why shouldn't they? All right? Now,
22 that reasoning doesn't seem, to me, illogical.

23 On the other hand, if we take your
24 reasoning, you have to interpret this is, so I was
25 thinking of examples. And I thought, well, what about

1 one of these companies that goes and buys up other
2 companies, turns them around, and sells them. When they
3 buy a company, they buy the -- the receivables. And
4 while they own the company, they're going to collect the
5 receivables. And so there they are. You see? On your
6 definition, those receivables were once owed the company
7 that they're bought. So on your definition, that whole
8 category of people falls within the definition.

9 So it seems to me, although you point to
10 problems, they are not insuperable problems with the
11 word "obtained." Or if I accept your definition of
12 "is," I get into a lot of difficulties. Now, that --
13 that was where -- I'm not saying that's my final view of
14 this. I'm just saying, how do you respond?

15 MR. RUSSELL: So let me address your
16 difficulties, and then let me explain why, I think, the
17 problems on the other side are greater than you seem to
18 think that they are.

19 The difficulties arising out of mergers
20 or -- or buyouts of a company, I think, are -- are
21 completely separate from the issues here. It's a
22 question of whether you would treat the -- the company
23 that buys another company or merges with another company
24 as obtaining the debt, or as simply a change in the --
25 the legal title of -- of the owner of the debt.

1 In addition, subsection (6)(B), specifically
2 addresses companies that are collecting debts that are
3 owed to affiliate companies, and I think that that's
4 probably also a solution for that problem.

5 I think when you are talking about trying to
6 minimize the problems on the other side, you seem to be
7 operating on the assumption that it's possible to say
8 that somebody who has an assignment of a debt, say a
9 debt servicer, is not collecting a debt owed or due
10 another, or is -- I'm sorry -- is collecting a debt owed
11 or due another.

12 And we know that that's not right for two
13 reasons. One, textual specific to this statute. And
14 the second is how assignments are understood to operate
15 in the law, generally.

16 First, if you look at the creditor
17 definition, which is on page 2A, Congress defined
18 creditor to include the person to whom the debt is owed.
19 And then it created a special exception for assignees,
20 particular kinds of assignees who -- who are assigned
21 the debt after it is put into default. That assignee
22 exception would be unnecessary, unless Congress
23 understood assignees, generally, to be collecting a debt
24 that is owed to them.

25 And that is consistent with the way

1 assignments work, in general. So, for example, Article
2 3 of the UCC talks about negotiable instruments, and it
3 makes a distinction between the person entitled to
4 enforce the negotiable instrument, and the owner of the
5 debt.

6 And it's the person entitled to enforce the
7 PETE, who has the authority to insist on payment, and if
8 payment isn't delivered, to sue on the payment and to
9 collect on it. And then the PETE is the person, if you
10 pay them -- the assignee, if you pay them the debt, it's
11 extinguished, even if they don't pass that money on to
12 the person that hired them to collect it.

13 So a servicer with an assignment is the
14 person to whom the debt is owed, in any meaningful
15 sense, as Congress recognized. And if that's so, then I
16 don't -- and I do think they do have a serious problem
17 with respect to (F)(iii) with this --

18 JUSTICE ALITO: Why do you have to get into
19 assignments at all? All -- all that's needed to defeat
20 your argument with respect to (iii), is to think of a
21 situation in which a person or an entity is collecting a
22 debt owed to another, and that person or entity obtained
23 the debt at a time when the debt was not defaulted. And
24 that -- it's very easy to think of a situation like
25 that, with respect to the classic debt collector that

1 does nothing but collect other people's debts, if
2 "obtained" means getting that debt for collection.

3 MR. RUSSELL: So --

4 JUSTICE ALITO: Your -- your answer is
5 that's not a reasonable -- that's not the right
6 definition of "obtained."

7 MR. RUSSELL: So I --

8 JUSTICE ALITO: So that's what it comes down
9 to, right?

10 MR. RUSSELL: I have a couple other
11 responses. One is that's not a solution to (F)(iv), to
12 be clear, because --

13 JUSTICE ALITO: No, I'm talking -- I'll take
14 them one at a time.

15 MR. RUSSELL: Okay. Sure.

16 So with respect to (F)(iii), the other
17 problem is that it ends up -- the result is that
18 servicers with assignments are not covered by the
19 statute at all, but servicers with contracts are.

20 And that's a very odd situation, to think
21 that Congress intended servicers who are simply hired to
22 collect a debt are -- if the -- if the debt is in
23 default, they are covered by the statute. But if
24 they're given an assignment in order to facilitate that
25 debt collection, which is very common when the debt in

1 default already, they are not covered, because they are
2 collecting a debt that's owed and due themselves, not
3 another.

4 In addition, I don't think, to the extent,
5 you know, we're looking at what Congress was trying to
6 do here, Congress thought that (F)(iii) was dealing with
7 servicers, who they thought was a different category of
8 people who required different treatment.

9 There's -- but as you just explained,
10 Justice Alito, that interpretation necessarily means
11 that any debt collector who is hired to collect a debt
12 before it goes into default, when it's merely
13 delinquent, which happens a lot, is entitled to this
14 exception, and they escape regulation entirely. And
15 there is nothing in the legislative history, and there
16 is nothing in the reasons people give for why
17 third-party debt collectors are covered by the statute,
18 which would lead Congress to want to provide them that
19 exception.

20 I would say, in addition, you know,
21 "obtained" is also used in the Clause (iv) exception,
22 and, as I said, it's used in a way there that cannot be
23 referring to somebody who simply --

24 JUSTICE ALITO: All right. As to Clause
25 (iv), I'm not sure I understood what you said. So let's

1 say your company is owed a debt by other -- to -- other
 2 people owe the company a debt. They get a loan. They
 3 give the -- the party extending the loan a security
 4 interest in that debt, and now there's an effort to
 5 collect that debt.

6 Who is owed that debt? Is not -- is it not
 7 still owed to the -- the original party? It's not owed
 8 to the person with the security interest, is it?

9 MR. RUSSELL: So if -- just to be clear with
 10 the hypothetical, the -- the debt hasn't been -- the
 11 security interest hasn't been foreclosed on?

12 JUSTICE ALITO: Yes. Right.

13 MR. RUSSELL: So at that point, it's the
 14 borrowers, the car dealership, in my example, who is
 15 collecting the debt, not the secured party. And the --
 16 the Clause (F) exception only applies to the secured
 17 party. Right?

18 It says, obtained -- "concerns a debt which
 19 was not in default at the time it was obtained" -- I'm
 20 sorry. I'm reading the wrong provision -- "concerns a
 21 debt obtained by such person as a secured party in a
 22 commercial credit transaction."

23 So it's only the bank. And the only
 24 circumstance in which the bank is going to be collecting
 25 from the consumer is if the -- the security interest has

1 been foreclosed upon.

2 And then it's also important -- so you could
3 say, in that circumstance, well, maybe the bank is
4 trying to collect from the commercial borrower, from the
5 car dealership, but "debt" is a defined term in the
6 statute, and it only applies to consumer loans.

7 So the only time, under (F)(iv), any person
8 would be collecting a consumer loan as a secured
9 creditor, is when they have obtained an assignment of
10 that loan as a result of either foreclosing on that loan
11 because of default, or because it was assigned to them
12 in the first place.

13 But in either case, they're doing exactly
14 the same thing as a debt purchaser. They are collecting
15 a debt on their own account that was originated by
16 somebody else, and assigned to them.

17 JUSTICE ALITO: Well, this situation -- I --
18 I mean, it's possible to think of situations that would
19 fall within that. It may be that they are not things
20 that are -- they are not situations that are very likely
21 to come up in -- in the real world.

22 But the strength of your -- the -- the
23 degree of absurdity that you have to show under (iv),
24 depends on the ambiguity of the phrase due -- "owed or
25 due," and I mean, I think that's not just -- not the

1 first way you'd read that. It's not the fiftieth way
2 you would read that. It's just you're -- you're
3 fighting -- you're really going uphill on that. You
4 need something really strong to overcome that, I would
5 say.

6 MR. RUSSELL: Well, taking that -- that I'm
7 unlikely to change your view about that, I think we have
8 identified something pretty strong, because we now have
9 a provision that renders itself surplusage. You know,
10 it says, if Congress has enacted a statute that
11 regulates taxis only to the extent they're driven by
12 poodles, right?

13 The first set of requirements cannot be met
14 in any situation with the second set of requirements.
15 Venn diagrams with circles that do not touch. And I
16 think that that is a very serious problem. At the same
17 time, you know, in interpreting the -- the ambiguous
18 language of the statute.

19 Now, if you don't think it's ambiguous in
20 either provision, I -- I don't know that I can do much
21 beyond trying to dissuade you of that. But of course,
22 if you do think that there's some room for
23 interpretation here, I think it's important to look at
24 the underlying purposes of the statute, and the way that
25 Congress has treated other similarly situated entities.

1 And the fact is, a debt buyer is much like a
2 debt servicer with an assignment, which, I think,
3 Congress clearly intended to be treated as a debt
4 collector when it obtained that assignment after the
5 debt was in default.

6 CHIEF JUSTICE ROBERTS: You don't dispute,
7 I -- I take it, that this particular context, with this
8 particular type of entity, is not what Congress had
9 before it when it passed the law.

10 MR. RUSSELL: I think that --

11 CHIEF JUSTICE ROBERTS: The industry has
12 evolved in a way that has -- has raised these sorts of
13 questions.

14 MR. RUSSELL: I think --

15 CHIEF JUSTICE ROBERTS: This is not
16 something that Congress was addressing.

17 MR. RUSSELL: I think it probably -- I don't
18 think it had this specific industry in mind. It did,
19 though, have assignees in mind. And all a debt buyer
20 is, is somebody who has purchased an assignment, as
21 opposed to having been given one as a servicer to
22 facilitate collection. And I don't think there is
23 anything in the language of the statute that
24 distinguishes between them because, in both instances,
25 the assignee is the person to whom the debt is presently

1 owed.

2 JUSTICE BREYER: That's true about -- I take
3 your -- I understand your point on assignees, I think.

4 Now, look at (iv). Where is the word
5 "assignment"? It's not there. And what they are
6 talking about is a person who takes a secured interest
7 in the debt, I suppose, or he lends some money to the
8 creditor, and in return, he takes some kind of secured
9 interest; doesn't really say what kind. And as part of
10 that, the initial creditor might assign him the original
11 debt. It might not. And what you've said is, oh, they
12 almost always do. Do they? I don't know that. How do
13 we know that?

14 I mean, I remember, vaguely, commercial
15 transactions. And -- and I remember that there are all
16 kinds of secured interest. You could take a secured
17 interest in a car, you could take a secured interest in
18 their house, you could take a secured interest in all
19 kinds of things.

20 So where did you get this idea that, in
21 fact, a creditor with a secured interest who has
22 taken -- you didn't say assignment?

23 MR. RUSSELL: Sure.

24 JUSTICE BREYER: But now, so where did this
25 come from that we're only talking about assignees? And

1 it's important. For if we're not always talking about
2 assignees, but only some of the time, you can't raise
3 your objection except to a subset of the section (iv)
4 people. And as -- if you were talking about a subset,
5 assuming you're right, no one writes statutes perfectly.
6 You'll always under-include or over-include.

7 MR. RUSSELL: So let me turn you back to the
8 language of the provision, because I think, ultimately,
9 you don't need to know that much about commercial credit
10 transactions to be persuaded of our point.

11 The beginning of (F) makes clear that all
12 the Clause (F) exceptions, including (F)(iv), only apply
13 to any person collecting or attempting to collect a
14 consumer debt, right? And so then you have to ask
15 yourself, under what circumstances?

16 And then (iv) only applies to the secured
17 party, the bank, right? Concerns a debt obtained by
18 such person as a secured party. So it's only ever going
19 to be the bank. And so you ask yourself, when will a
20 bank be collecting on a consumer debt? And the only
21 circumstance that anybody has proposed is when they've
22 either been assigned the debt or it's been foreclosed.
23 Very able counsel on the other side has not been able to
24 come up with any of the examples that -- that people
25 seem -- seem to think might be out there.

1 JUSTICE GINSBURG: Counsel, before you --
 2 you sit down, you did make an alternative argument based
 3 on 1692a(6); that is, you say, whatever else your person
 4 here regularly collects or attempts to collect debts
 5 owed or due to another, that's part of its business.
 6 And then it also is -- purchases a debt.

7 I think you're making the argument that
 8 if -- if they include the servicing that you described,
 9 part of their business is that they are regularly
 10 collecting or attempting to collect debts owed to
 11 another, then even as to transactions that don't fit
 12 that type, that they are -- well -- well, they are
 13 creditors themselves -- their whole business gets
 14 stamped with debt collection. Is that right?

15 MR. RUSSELL: That's correct, because the
 16 main definition looks at the business model. If you
 17 qualify by virtue of your servicing third-party debt as
 18 a debt collector, you're subject to the Act under the
 19 substantive provisions with respect to all your
 20 collection activities, subject to the Clause (F)
 21 exceptions.

22 And that's the important point in response
 23 to their argument that Congress couldn't possibly have
 24 intended to regulate financial services industry --

25 JUSTICE GINSBURG: But you didn't -- you

1 didn't -- the court of appeals didn't agree with you,
2 and you didn't raise that as a question.

3 MR. RUSSELL: We did not raise that as a
4 separate question. I do think, because it is a
5 predicate to resolving the question presented it's
6 fairly before you. But regardless, it is an important
7 point about why their argument that -- that the
8 financial services industry couldn't have been --

9 CHIEF JUSTICE ROBERTS: Why -- why is it a
10 predicate? I read that part of your brief. You said
11 it's a predicate, it's necessary. I don't understand
12 why it's a predicate at all. We can fully answer the
13 question presented without getting into that in any way.

14 MR. RUSSELL: I think it's -- it's an
15 important part of our structural argument about why
16 their interpretation of "owed or due another" is not --
17 cannot be correct, because they say the financial
18 services industry is not what Congress had in mind here.
19 And we make the point that, look, on a plain writing of
20 the text, even under their interpretation of owed or due
21 another, financial services providers are covered.

22 If I could reserve the remainder of my time.

23 CHIEF JUSTICE ROBERTS: Thank you, counsel.

24 Mr. Shanmugam.

25 ORAL ARGUMENT OF KANNON K. SHANMUGAM

1 ON BEHALF OF THE RESPONDENT

2 MR. SHANMUGAM: Thank you, Mr. Chief
3 Justice, and may it please the Court:

4 The sole question presented by this case is
5 whether an entity that purchases debts and then attempts
6 to collect them for its own account, qualifies as a debt
7 collector under the FDCPA on the ground that it is
8 regularly attempting to collect debts owed or due
9 another.

10 The answer to that question is plainly no,
11 because such an entity is attempting to collect debts
12 owed or due itself. Now --

13 JUSTICE SOTOMAYOR: I -- I just want to
14 understand this. Okay? I thought the decision below
15 had said that your other side's claim that this was a
16 debt collector entity failed because they didn't allege
17 that this was their principal business. So let's assume
18 that the principal business of your client is to collect
19 debts that are owed to others.

20 Would your position be that they're exempted
21 from the Act simply because this debt they own?

22 MR. SHANMUGAM: No, we would not contend
23 that, Justice Sotomayor.

24 JUSTICE SOTOMAYOR: So if your client, if
25 they had pled it right and proven that the principal

1 part of your client's business was debt collection of
2 debts owed to others, you would be covered.

3 MR. SHANMUGAM: So Petitioners concede that
4 we do not fall within the principal purpose definition.
5 I would note parenthetically that the principal purpose
6 definition applies to any entity, the principal purpose
7 of whose business is the collection of any debts,
8 regardless of to whom those debts are owed.

9 I would also note parenthetically that, to
10 the extent that Mr. Russell advances an alternative
11 argument, this argument concerning Santander's alleged
12 servicing activity, that that's also an argument under
13 the provision at issue here; namely, the "regularly
14 collects" provision. And with regard to the language of
15 the "regularly collects" provision, I don't think that
16 Petitioners really dispute that ours is the most natural
17 interpretation of that provision.

18 As I understand Petitioners' arguments, both
19 in their briefs and now at oral argument today, they are
20 really making two principle arguments. The first is
21 this argument concerning the exclusions; that our
22 interpretation somehow renders certain exclusions from
23 the definition of debt collector nonsensical. And the
24 second is a policy argument, an argument that if
25 Congress had focused on this issue, Congress would have

1 wanted to regulate debt purchasers as well as dedicated
2 debt collectors and servicers.

3 And I hope over the course of this argument
4 to cover both of those points, but let me go directly to
5 this point concerning the exclusions, because I think
6 that really was the focus of Mr. Russell's argument this
7 morning.

8 We believe that our interpretation not only
9 gives meaning to those exclusions, which is all that's
10 really required, but actually gives those exclusions
11 Congress's intended meaning. And let me start with the
12 exclusion in Clause (F)(iv), which got comparatively
13 little treatment in Petitioners' opening brief, but now
14 appears really to be the centerpiece of Petitioners'
15 argument.

16 We believe that that exclusion has meaning,
17 and indeed has Congress's intended meaning, with regard
18 to a type of financing to which Mr. Russell alluded, so
19 called accounts receivable financing. And these are
20 circumstances in which a secured party could attempt to
21 collect on debts even before they foreclose on the
22 collateral because, of course, once a secured party
23 forecloses on the collateral, it is essentially in the
24 same position as a debt purchaser.

25 Let's take Mr. Russell's example. Let's

1 suppose you have a situation where a car dealership --
2 let's call it Sam's Cars -- comes to my client,
3 Santander, and says, we'd like to borrow some money.
4 And Santander says in response, fine, what are you going
5 to put up as collateral? And Sam's Cars says, we're
6 going to put up these accounts receivable that we have,
7 and we're going to give you, Santander, the entitlement,
8 in order to pay off this loan, to collect some or all of
9 the money owed on those accounts receivable.

10 In that circumstance, Santander certainly
11 could be said to have obtained rights in the debt. But
12 the debt is still owed or due Sam's Cars in the relevant
13 sense. It's still owed or due Sam's Cars because in
14 that circumstance, the creditor retains an interest in
15 the accounts, it retains the right to demand payments on
16 those accounts as well.

17 And this is a situation that Congress seems
18 to have expressly contemplated. And for those members
19 of the Court who are interested in legislative history,
20 or might be tempted to be interested in legislative
21 history, I'd point to the Senate report at page 4 where
22 it says that this exemption targets, quote, "the
23 collection of debts owed to a creditor when the creditor
24 is holding the receivable account as collateral for
25 commercial credit extended to the creditor."

1 And so Congress seemed to contemplate a
2 circumstance in which the secured party would be engaged
3 in collection activity even before it foreclosed on the
4 collateral. And if you take a look at the sources cited
5 in footnote 4 of Petitioners' reply brief, I think
6 Petitioners essentially acknowledged that this was a
7 type of financing that is contemplated and that is
8 potentially covered by this exclusion. And the very
9 sources the Petitioners cite in the Uniform Commercial
10 Code, again, contemplate the possibility that the
11 secured party could be taking action even before default
12 and foreclosure.

13 And in particular --

14 JUSTICE BREYER: I think -- I might not have
15 this right, but I think that they're replying to that is
16 what happens in the situation that you mentioned is that
17 the initial creditor who sold the car or whatever, and
18 they're going to give as collateral that. They get --
19 the -- the person who takes the collateral, say
20 Santander, takes an assignment of the debt.

21 And they're saying taking an assignment of
22 the debt, once that happens, it isn't true that the car
23 buyer owes anything to the car dealer. But if I've got
24 it right -- good bet, maybe, maybe not -- but if it's --
25 if it's true -- that's true, then he is not collecting

1 the debt for another.

2 MR. SHANMUGAM: So --

3 JUSTICE BREYER: Am I right about what you
4 think his reply is?

5 MR. SHANMUGAM: Well, I think that that is
6 Mr. Russell's reply. And Mr. Russell really fixates on
7 this concept of assignment.

8 But as you pointed out and as Justice Alito
9 pointed out, assignment is neither here nor there with
10 regard to this exclusion. The concept of assignment
11 appears only once in the FDCPA, that is in the assignee
12 exclusion to the creditor definition, which I think both
13 sides acknowledge is not dispositive of the inquiry
14 here.

15 I think that the dispositive consideration
16 is whether the servicer in the context of
17 Clause (F)(iii) or the secured party in the context of
18 Clause (F)(iv) acquires complete ownership or acquires
19 something less than that.

20 And I think that when Congress used the word
21 "obtain" in both of these provisions, it was
22 contemplating the full panoply of arrangements where an
23 entity could obtain something less than full ownership.

24 And so to move to Clause (F)(iii), and I
25 think the analysis is analogous under both Clauses,

1 there are all sorts of ways in which an assignment --
2 excuse me -- a servicing arrangement could be
3 structured. And one of the ways in which it could be
4 structured is through a so-called assignment for
5 collection, the type of arrangement that this Court
6 considered, albeit in a quite different context, in the
7 Sprint Communications case where you have the original
8 entity retaining equitable title, but passing legal
9 title to the entity that engages in collection. And so
10 if a servicer had legal title but not complete title,
11 the servicer would, of course, come within the
12 exclusion.

13 And so, again, we think that with regard to
14 both of these exclusions, we're really giving these
15 exclusions their intended meaning, because Congress
16 wanted to ensure that where you have a servicer or where
17 you have a secured party that engages in collection
18 activity when either of those entities has not acquired
19 full ownership, that there is an exemption from the
20 statute in the context of servicers. That exemption
21 only applies to pre-defaulted debt, but in both
22 circumstances, the exclusions have meaning.

23 And that's really all that is required when
24 the -- by far the more natural reading of the relevant
25 statutory provision is ours.

1 And I do want to take just a minute to
2 address that provision, because we shouldn't lose sight
3 of it, because after all, it's what this Court has been
4 asked to interpret.

5 I want to go directly to the hypotheticals
6 that Mr. Russell has offered today, and they're
7 hypotheticals both of which appear in his reply brief,
8 and explain why the language of those hypotheticals
9 differs in critical respects from the language that we
10 have here. The first is the hypothetical -- and these
11 are both at page 4 of the reply brief -- of a statute
12 that refers to a person who regularly creates debts
13 created by another. Now, of course, as we argue in our
14 brief, we believe that the grammatical way to express
15 that view would be to say a person who regularly
16 collects debts that had been created by another.

17 But even if you didn't agree with that, I
18 think that hypothetical is distinct in a very important
19 way. The act of creation is a discrete act, and it's an
20 act that, of necessity, has to have taken place in the
21 past. It would be very odd to talk about regularly
22 collecting debts as they are being created. You would
23 necessarily think, well, that debt had been created at
24 some prior time.

25 The word "owed", by contrast, refers to the

1 status of a debt. And the current status of a debt may
2 be very different from the status of the debt at an
3 earlier time. And so that language, again, I think, is
4 very different from the language we have here.

5 With regard to Mr. Russell's other
6 hypothetical, the hypothetical of the statute that
7 covers a person who regularly collects debts owed or
8 owing another, we explain in our brief that "owed" and
9 "owing" are words that are essentially used synonymously
10 and have come to have the same meaning. And so I do
11 think that that would be a circumstance in which
12 Congress could be using a doublet that is essentially
13 superfluous, much like a phrase like "aid and abet" or
14 "cease and desist" or "null and void" and many other
15 examples that this Court has cited in the past.

16 But, again, even if you disagreed with that,
17 the only reason why you would be saying that "owed"
18 is -- refers to a different tense is in an effort to
19 give meaning to that word.

20 By contrast here, we have a phrase "debts
21 owed or due another." Again, we don't think that
22 there's much difference in meaning, if any, between the
23 words "owed" or "due." And indeed, those words often
24 appear together in various permutations, both in other
25 statutes and at common law. It may very well be that

1 the words have a subtly different meaning because, as we
2 explain in a footnote of our brief, it is possible to
3 talk about a debt being owed, but not yet due.

4 And so if I receive a credit card bill from
5 my credit card company and it says that I have to make a
6 payment by May the 15th, that debt -- debt is indeed
7 presently owed, but not yet due.

8 But what you can't get from this statutory
9 language -- and, again, even if you agreed with
10 98 percent of Mr. Russell's argument, I don't think you
11 can get over the last 2 percent. You can't get from the
12 statutory language the fact that "owed" and "due" refer
13 to different points in time. In other words, under
14 Mr. Russell's interpretation, it would be as if the
15 statute reached any person who attempts to -- regularly
16 attempts to collect debts that had been owed or are due
17 another.

18 And the reason why Mr. Russell puts those
19 two terms into difference -- different reference points
20 is simply because if both of those terms referred back
21 to the point of origination, you really would have a
22 superfluidity problem with the statute. At that point,
23 you would render the originator exclusion in
24 Clause (F)(ii) wholly superfluous.

25 But the problem with the interpretation that

1 Petitioners now proffer is that, again, you have to take
2 this additional step of having these two words refer to
3 different points in time. And even if you thought that
4 the use of the word "owed" could refer to two different
5 points in time, you wouldn't be able to take that
6 additional step of saying that "due" refers to a
7 different time from "owed."

8 JUSTICE KAGAN: Mr. Shanmugam, it doesn't
9 make much sense, though, does it? I mean, take this
10 very case. So your clients serviced this debt and
11 counted as a debt collector at that time. And then your
12 client purchased the debt and all of a sudden is not a
13 debt collector. And I guess the question is: What
14 happened in between the time when your client serviced
15 the debt and the time when your client purchased the
16 debt that in any way changed its relationship with the
17 borrower such that Congress wouldn't be concerned any
18 longer with its behavior?

19 MR. SHANMUGAM: So, Justice Kagan, we don't
20 concede that simply by virtue of the fact that we
21 serviced Petitioners' debt and certain other debts
22 involved in this case that that was sufficient to render
23 us an entity that regularly collects or attempts --

24 JUSTICE KAGAN: Let's assume that for the --
25 for the purposes of the question.

1 MR. SHANMUGAM: But -- but I'm happy to
2 assume that for purposes of the question.

3 The relevant inquiry is whether we were a
4 debt collector at the time of the alleged violation. If
5 you take a look at the substantive provisions of the
6 FDCPA, provisions like 1692e and -f, they're all keyed
7 off conduct engaged in by an entity that is a debt
8 collector. And I think the fair inference is that you
9 have to be a debt collector at that time.

10 And, notably, at the point at which we
11 acquired essentially the remainder of Citi's auto
12 lending business, we really stepped into Citi's shoes in
13 a practically significant way. At that point, we took
14 over the business, and it was as if we were the original
15 creditor.

16 And while this is not in the record, I hope
17 the Court will permit me one liberty. When we sent out
18 notices to borrowers, we obviously sent out those
19 noticers in -- notices in Santander's own name. And at
20 that point, it was as if we had all of the same
21 incentives as the originator of the debt. We certainly
22 had an incentive to ensure payment, but we also had an
23 incentive to maintain a business relationship with those
24 customers. And so --

25 CHIEF JUSTICE ROBERTS: Well, why is -- why

1 is that? I mean, you're -- you -- you were an entirely
2 different business than -- than the person that -- in
3 whose shoes you stepped. I don't see that -- and -- and
4 you -- they've already got the loans. I don't see why
5 you have the same incentives to maintain their goodwill.

6 MR. SHANMUGAM: Well, I do think that we
7 would have incentives to maintain their goodwill in the
8 way that the sort of fly-by-night debt collectors that
9 Congress was seeking to target 40 years ago, when it
10 enacted the FDCPA, didn't. We could have an incentive
11 to try to market other financial products to their
12 customers. And, again, the only sense in which we were
13 different from Citi, was that, first, as you say, we
14 didn't originate the loans, and, second, we, again,
15 stepped into the shoes of the relationship at a later
16 time.

17 But to the extent that this argument really
18 goes to the broader policy arguments that petitioners
19 are making, and I think petitioners rely on the fact
20 that we were previously servicers, kind of as a door
21 into those policy arguments.

22 Again, we don't think that if Congress had
23 focused on debt purchasers, it would have been concerned
24 about entities like Santander, precisely because --

25 JUSTICE SOTOMAYOR: You don't -- you don't

1 think that the definition of "creditor," in excluding
2 only those who have bought debt that's not in default,
3 tells -- gives you a sign of who they are concerned
4 about?

5 MR. SHANMUGAM: So I think both sides now
6 recognize that the question of whether or not respondent
7 is a debt collector doesn't in any way depend on the
8 question of whether or not respondent falls within the
9 definition of creditor or not. Those two provisions
10 operate perpendicularly.

11 But I would say that with regard to the
12 definition of "creditor," we believe we would plainly
13 fall within the definition of creditor, because we would
14 be a -- a person to whom a debt is owed. Indeed, as
15 you'll be aware, Justice Sotomayor, in our brief, we
16 rely on the fact that that definition is expressly
17 framed in the present tense, as yet another textual cue
18 as to why our interpretation is correct.

19 I think with regard to the assignee
20 exclusion from that definition, I think that the one
21 thing I would say is that Petitioners go to great length
22 to suggest that we would fall within that exclusion, but
23 I think that the gymnastics that Petitioners have to go
24 through are much greater than any gymnastics we have to
25 get -- go through to justify our interpretation.

1 Because if you take a look at page 49 of
2 Petitioner's brief, they argue that we would fall within
3 the assignee exclusion, which refers to a -- a person
4 who receives an assignment or transfer of a debt in
5 default, solely for the purpose of facilitating
6 collection of such debt for another.

7 To reach even a situation in which an entity
8 is collecting a debt for itself, their argument as to
9 why we would fall within that exclusion is that we would
10 be standing in the shoes of the originator; and,
11 therefore, when we are collecting the debt for
12 ourselves, we are collecting the debt for another, in
13 other words, for an entity other than the originator.

14 And so to the extent that Congress included
15 that exclusion, it works perfectly well under our
16 interpretation. This Court need not address the
17 definition of "creditor," because, again, the parties
18 both acknowledge that the definition of creditor sheds
19 little direct light on the interpretation of the
20 definition of "debt collector."

21 But in our view, the -- the assignee
22 exclusion in that definition covers situations in which
23 you have either a sham transaction, or a situation in
24 which the assignee, in fact, obtains full title to a
25 debt, but has a contractual obligation, once it

1 collects, to pay that money back to the counterparty to
2 the transaction.

3 There's nothing about that exclusion that
4 suggests any intent on Congress's part to reach debt
5 purchasers. And I think everyone acknowledges that
6 Congress was not focusing on debt purchasers in 1977.
7 There was no direct reference to debt purchasers in any
8 of the legislative history, of which we are aware. And
9 really what Petitioners are asking this Court to do is
10 to extend the definition of "debt collector" to "debt
11 purchasers," based on these sorts of policy
12 considerations. And just --

13 JUSTICE GINSBURG: So he left that argument.

14 What about the argument that was not made
15 part of the -- the question presented? The -- what is
16 it? 1592(a)(6), the -- not -- not the principle place
17 of business -- not the principle business, but what --
18 what was -- what was the language?

19 MR. SHANMUGAM: Yes. Justice Ginsburg, this
20 is the argument.

21 JUSTICE GINSBURG: Regularly -- yeah.
22 Regularly -- the argument, as I understand it, is that
23 one who regularly collects or attempts to collect debts
24 owed to another. But this particular category that
25 we're dealing with, this person who regularly collects

1 or attempts to collect, is a creditor themselves.

2 That doesn't matter, because if he regularly
3 collects or attempts to collect for another, he is
4 stamped a debt collector, and everything that that debt
5 collector does will be --

6 MR. SHANMUGAM: So, Justice Ginsburg, we
7 acknowledge that the question of whether an entity falls
8 within the "regularly collects" definition requires an
9 inquiry into the entity's overall practices. But what
10 Petitioners are attempting to do is to inject a quite
11 different theory, both legally and factually, as to why
12 we satisfy that definition into this case.

13 If you take a look at the question presented
14 in the petition, the question presented focuses on
15 whether a company -- and I'm quoting from Roman numeral
16 I, "Whether a company that regularly attempts to collect
17 debts it purchased after the debts had fallen into
18 default, is a debt collector subject to the act."

19 Petitioners' alternative theory is that we
20 somehow fall within that definition because of our
21 servicing activity. And in particular, Petitioners
22 point to one of our SEC filings for the proposition that
23 we engage in other servicing activity; namely, servicing
24 activity of other debts for other entities.

25 Now, that's not within the scope of the

1 question presented, and as Petitioners acknowledge in
2 their reply brief, that argument was not made in the
3 body of the petition, nor was that the argument that
4 Petitioners made in the lower courts.

5 If you take a look at both the Fourth
6 Circuit's opinion and the briefing in the Fourth Circuit
7 and in the district court, I think that the most that
8 can be said about Petitioners argument is that they made
9 an argument along the lines of what Justice Kagan
10 suggested. They made an argument that by virtue of the
11 fact that we serviced the very debts at issue in this
12 case, that there would be something inequitable, as a
13 policy matter, about saying that by virtue of that
14 servicing activity, we're now no longer within the scope
15 of the statute.

16 I think what Petitioners are trying to do
17 here, is quite different. They are attempting to make
18 an argument that by virtue of, again, our other
19 servicing activity, that is sufficient to bring us
20 within the ambit of the definition. And there is no
21 allegation in the complaint, which you can see for
22 yourself in the Joint Appendix, to that effect, and that
23 has never been Petitioners' theory in this case.

24 And I would make one parenthetical note
25 about that. Even if you thought that as a -- a court of

1 first view, you could somehow take judicial notice of
2 these SEC filings or anything else in an effort to
3 bolster this now long-forfeited argument, the relevant
4 inquiry for purposes of the definition of "debt
5 collector" concerns our activities at the time we
6 engaged in the alleged violations, as I noted earlier.

7 Those violations are alleged to have taken
8 place five years ago, and I can represent to this Court
9 that Santander's business was, in some respects, very
10 different. And in particular, Santander had much less
11 servicing activity in 2012 than it does today.

12 All of this, of course, would be a matter to
13 be alleged in the complaint, if that were, in fact,
14 Petitioners' alternative theory as to how we qualify as
15 a definition of debt collector. And Petitioners had
16 every opportunity, in every court along the way, to
17 advance that theory, and yet, they put all of their eggs
18 in one basket when they came to this Court, and
19 attempted to argue that we qualify as a debt collector
20 solely by virtue of our purchases.

21 And under the more natural interpretation of
22 the relevant statutory language: Such purchasers --
23 such purchases simply do not count toward whether or not
24 an entity is engaged in regularly collecting debts owed
25 or due another.

1 JUSTICE GINSBURG: But wouldn't we, assuming
2 we agree with you, have to leave open that -- the
3 question of the character of the business, the sixth
4 definition. It's true it's not raised before us here,
5 but there might be another person similarly situated who
6 wanted to ride with that argument.

7 MR. SHANMUGAM: Justice Ginsburg, I think
8 that that is an issue that could be raised in another
9 case. Our submission is simply that it can't be raised
10 in this case, because it has been forfeited. And
11 entirely contrary to the argument that Petitioners make
12 in their reply brief, they seem to suggest that -- that
13 this is something that we're advancing as an alternative
14 ground for affirmance. That is not correct. This would
15 be an alternative ground for reversal.

16 If you were to give Petitioners another bite
17 at the apple to pursue this theory, you would have to
18 vacate the judgment of the court of appeals and remand
19 on that ground and allow Petitioners at this late stage
20 in the litigation to amend their complaint in order to
21 provide factual support for that argument. And I'm
22 certainly not aware of any precedent for this Court
23 giving a litigant that opportunity when they have had
24 every opportunity to do so in the lower courts but have
25 yet not pursued that theory.

1 At the point at which we moved to dismiss in
2 the district court on the ground that Petitioners had
3 not satisfied the element of liability that we be a debt
4 collector, that was the point at which you would expect
5 Petitioners to seek leave to amend if they wanted to
6 pursue a theory not within the four corners of their
7 complaint, and they can conspicuously did not do so
8 there, nor did they ask the court of appeals for that
9 opportunity.

10 Let me just say --

11 JUSTICE GINSBURG: Court of appeals did
12 address the issue, but it said even under this
13 "regularly collects," it would have to be a debt owed
14 to -- what are the magic words?

15 Well, first tell me, am I right that the
16 alternative argument that was not raised here was
17 raised --

18 MR. SHANMUGAM: I actually don't think that
19 it was raised below or passed upon by the court of
20 appeals. I think the most that can be said about the
21 court of appeals' opinion is that it passed on what is
22 effectively a policy argument, though it has a factual
23 premise to it; namely, this argument that by, virtue of
24 the fact that we serviced this relatively small number
25 of debts at issue, that there would be something

1 inequitable about saying that we are no longer a debt
2 collector once we have acquired those debts. That's the
3 argument that the court of appeals is addressing at
4 pages 18A to 19A of the appendix to the petition.

5 Now, I will note one thing about the court
6 of appeals' opinion. I think that there is some
7 language in that carryover paragraph that seems to
8 suggest that the question of whether or not an entity is
9 a debt collector focuses on the particular debts at
10 issue, and I think we would respectfully acknowledge
11 that that's not quite correct. Under either the
12 principal purpose definition, or the regularly collects
13 definition, you certainly have to look at the entity's
14 overall operations.

15 And as we explain in our brief, the question
16 of whether a certain type of activity is sufficient to
17 give rise to regular collection has been the subject of
18 some discussion in the lower courts. We think that the
19 better view that this relies largely on district court
20 opinions because there's very little circuit authority
21 on this, is that in assessing whether an entity
22 regularly collects debts owed or due another, you have
23 to look at those debts in relation to the entities'
24 overall collection activities and determine whether that
25 collection activity is a substantial part of the

1 entities' overall collection activities.

2 But that is an issue that would have to be
3 resolved if Petitioners had relied on this alternative
4 servicing theory below. And I would submit that this
5 Court, if it were to give Petitioners another
6 opportunity to pursue that theory, would probably have
7 to say something about that, or at a minimum, leave that
8 issue open for the lower courts. And of course, our
9 broader submission with regard to this alternative
10 theory is that it was not preserved before this Court at
11 the cert stage, nor was it preserved in the lower
12 courts.

13 I see that my yellow light is on, so I just
14 want to say one last thing on this issue of the policy
15 arguments, because I certainly don't want the Court to
16 be left with the impression that if Congress had focused
17 on this issue, it surely would have wanted to bring debt
18 purchasers within the scope of the statute.

19 Petitioners raise this suggestion of
20 horrors that there are various diversified financial
21 institutions that are moving into the secondary market
22 for distressed debt. I simply don't think that that's
23 true as a factual matter, and I would encourage the
24 Court to look at the secondary sources that Petitioners
25 cite for that proposition at page 9 of opening brief and

1 page 16 of their reply brief. There simply is no
2 evidence that the Goldman Sachs's and the Blackstones of
3 the world are suddenly engaging in the business of debt
4 collection.

5 But the problem with Petitioners'
6 interpretation is that it really would sweep in entities
7 like Santander. And again, if you take a look at the
8 transaction at issue here, what Santander was doing was
9 not buying distressed debt on some secondary market. It
10 was engaged in an arms-length, commercial transaction
11 where it essentially acquired the entirety of Citi's
12 auto lending business, both nondefaulted and defaulted
13 debts, and so in a very real sense, stepped into Citi's
14 shoes in that regard.

15 And so while this may not have been a
16 transaction of the sort that Justice Breyer posited
17 where you have an entity that's truly a successor in
18 interest, it's a pretty close cousin to that source --

19 JUSTICE SOTOMAYOR: Is Citi -- Citi out of
20 business? It's no longer writing debts?

21 MR. SHANMUGAM: My understanding is that
22 Citi in very much still in business, but it's not in the
23 auto lending business, and that Santander, in two
24 separate transactions, acquired somewhere in the
25 neighborhood of \$6.5 billion worth of auto loans.

1 Citi, like many other large lenders,
2 essentially got out of the auto lending business in the
3 wake of the last financial crisis, and Santander
4 acquired this entire portfolio. And so this case really
5 illustrates, I think, why Congress may not have wanted
6 to bring debt purchasers, or at least all debt
7 purchasers, within the ambit of the statute.

8 And again, if you take a look at the
9 secondary market for distressed debt, which is a very
10 large market, most of the purchasers on that market
11 would qualify as debt collectors under the principal
12 purpose definition.

13 CHIEF JUSTICE ROBERTS: Thank you, counsel.

14 Two minutes, Mr. Russell.

15 REBUTTAL ARGUMENT OF KEVIN K. RUSSELL

16 ON BEHALF OF THE PETITIONERS

17 MR. RUSSELL: Thank you. So let me end by
18 responding to Respondent's last point.

19 We know that Congress would have intended to
20 sweep these financial services companies into the
21 coverage under that because it did. That's our
22 alternative argument; explains why, so long as these
23 companies are also servicing debts for others, they are
24 subject to the Act. They are debt collectors subject to
25 the Clause (F) exception.

1 So when they acquire portfolio debt, the
2 Clause (F)(ii) exception -- (F)(iii) exception exempts
3 them with respect to all portfolio debts that were
4 current at the time that they obtained them.

5 Justice Kagan, we give examples on page 4 of
6 our reply brief of abuses, one of which is an applicant
7 who discloses every debt owed by a foreign creditor,
8 which I think would be ambiguous with respect to others
9 owed in the past or owed in the current time frame.

10 And I think it's important here to keep in
11 mind -- let me return to Clause (iv) just for a second.

12 Respondent's only argument, which is a new
13 one that they've thought of in the interim before filing
14 the brief and doing this oral argument, is that (iv) is
15 about a circumstance in which somebody is collecting a
16 debt based on collateral. These are sometimes called
17 notification and non-notification accounts receivable
18 financials, financial lending.

19 Justice Breyer, I'm afraid I'm going to ask
20 you to actually look at the UCC and to look at how these
21 things are -- are done, because they are always done
22 through an assignment. There is an assignment of the
23 debt up front, and as a consequence, the person, the
24 lender, is always collecting the debt on the basis of
25 assignment, on its own account, exactly like a debt

1 purchaser.

2 Their proposed solution to (F)(iv) simply
3 doesn't work. And nobody has been able to come up with
4 a circumstance in which (F)(iv) has any work to do or
5 makes any coherent sense on Respondent's definition of
6 owed or due another.

7 Last point I would like to make is their
8 interpretation allows quite easy evasion, even by
9 third-party debt collectors who we know Congress wanted
10 to get at. It allows, as I discussed with
11 Justice Alito, a third-party debt collector to evade the
12 statutes so long as it is hired to collect the debt
13 before the debt goes into default, even once it's
14 delinquent.

15 It allows a servicer, who would otherwise be
16 covered by the Act because they obtained the debt in
17 default, to avoid it so long as they simply receive an
18 assignment of the debt for collection purposes, because
19 somebody who is assigned the debt is collecting a debt
20 owed and due themselves, not owed and due another. And
21 we don't think that Congress could have intended that.

22 And even with respect to a small number -- a
23 smaller number of third-party debt collectors who are
24 not falling under the Principal Purpose Clause -- can I
25 finish?

1 CHIEF JUSTICE ROBERTS: Sure.

2 MR. RUSSELL: All they have to do is change
3 their contract with their customer to arrange for the --
4 a purchasing of the debt that they've been hired to
5 collect and arrange to give back 60 percent of what they
6 collect by virtue of that assignment, and they would
7 evade regulation as well.

8 CHIEF JUSTICE ROBERTS: Thank you, counsel.

9 The case is submitted.

10 (Whereupon, at 12:14 p.m., the case in the
11 above-entitled matter was submitted.)

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