

SUPREME COURT OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

DENNIS OBDUSKEY,)
)
) Petitioner,)
)
) v.) No. 17-1307
)
) McCARTHY & HOLTHUS LLP,)
)
) Respondent.)
)

Pages: 1 through 73

Place: Washington, D.C.

Date: January 7, 2019

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DENNIS OBDUSKEY,)
 Petitioner,)
 v.) No. 17-1307
 McCARTHY & HOLTHUS LLP,)
 Respondent.)

- - - - -

Washington, D.C.

Monday, January 7, 2019

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:09 a.m.

APPEARANCES:

DANIEL L. GEYSER, ESQ., Dallas, Texas; on behalf of the Petitioner.

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

JONATHAN C. BOND, Assistant to the Solicitor General, Department of Justice, Washington, D.C.; for the United States, as amicus curiae, supporting the Respondent.

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

2 (11:09 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear
4 argument next in Case 17-1307, Obduskey versus
5 McCarthy & Holthus.

6 Mr. Geyser.

7 ORAL ARGUMENT OF DANIEL L. GEYSER

8 ON BEHALF OF THE PETITIONER

9 MR. GEYSER: Thank you, Mr. Chief
10 Justice, and may it please the Court:

11 Non-judicial foreclosures are covered
12 under the Fair Debt Collection Practices Act as
13 a direct or indirect attempt to collect a
14 consumer's debt. It is a direct attempt
15 because pre-foreclosure notices are
16 indistinguishable from traditional dunning
17 letters. It is an indirect attempt because the
18 foreclosure process is designed by law to
19 automatically sell the consumer's house to
20 obtain payment on the consumer's debt.

21 These conclusions follow directly from
22 the Act's plain text, structure, purpose, and
23 history. Respondent can only resist these
24 conclusions by rewriting the statutory text,
25 creating a huge loophole in the Act's scope,

1 and eliminating the safeguards that Congress
2 designed to protect consumers from debt
3 collector mistakes and abuse, which occur all
4 too often in the foreclosure context.

5 We think that the easiest way to
6 resolve this case is to focus directly on the
7 pre-foreclosure notices. Those notices are
8 quintessential FDCPA communications. They just
9 so happen to arise in the foreclosure context.

10 They state that there is a default on
11 the debt. They state the amount of the debt
12 owed. They state to whom the debt is owed.
13 And, critically, they state the consequence of
14 failing to satisfy that debt.

15 That message is unequivocal to any
16 consumer who receives it.

17 JUSTICE ALITO: I think you have a --
18 you have a pretty good argument if we look just
19 at 15 U.S.C. 1692a(6), which talks about
20 regularly collects or attempts to collect,
21 directly or indirectly, debts owed or due or
22 asserted to be owed or due to another. At
23 least you've got a -- you've got a reasonable
24 argument under that provision.

25 But the two provisions that seem to me

1 to create a lot of problems for your position
2 are 15 U.S.A. 15 U.S.C. 1692a(6), which
3 creates a special definition of "debt
4 collector" for a purpose that's not relevant
5 here, and that refers to any business the
6 principal purpose of which is the enforcement
7 of security interests.

8 So if a -- a business whose principal
9 purpose is the enforcement of security
10 interests fell within the prior definition, the
11 all-purpose definition, there wouldn't be a
12 reason for -- for that provision. So I -- I
13 think you've got a tough time explaining that
14 away.

15 And your -- your answer is that refers
16 to repo activities. But then there's another
17 provision that talks about what looks like repo
18 activities in a lot more specific language,
19 1692f(6), which talks about dispossession and
20 disablement. So what's your answer to that?

21 MR. GEYSER: Well, Your Honor, I -- I
22 think these provisions actually reinforce our
23 reading of the Act. What Congress did is it
24 started with the main definition for "debt
25 collector."

1 JUSTICE ALITO: Right.

2 MR. GEYSER: And then it proceeded and
3 it expanded that definition. If you look at
4 the language, it says this term "also
5 includes." That -- those are words of
6 expansion. They're collecting people who
7 otherwise don't fall within the main
8 definition.

9 So, when we talk about traditional
10 repo activity, we're talking about the type of
11 person who is enforcing a security interest
12 without directly or indirectly --

13 JUSTICE KAVANAUGH: But it's --

14 MR. GEYSER: -- collecting a debt.

15 JUSTICE KAVANAUGH: -- it's only
16 expanding it for purposes of 1692f(6).

17 MR. GEYSER: Well, exactly, Your
18 Honor, but -- but our point is that it --

19 JUSTICE KAVANAUGH: That's the -- that
20 means that it's something less than that, other
21 than 1692f(6). At least that's the most natural
22 or a natural way to read it.

23 MR. GEYSER: We -- we fully agree.
24 Our point is that for someone who's enforcing a
25 security interest but not also directly or

1 indirectly collecting a debt, those people are
2 only subject to that one subsection.

3 And it's very clear what Congress had
4 in mind, precisely because of 1692f(6). It
5 talks about dispossessing or disabling
6 property. That's talking about taking
7 possession of property. It's not talking about
8 demanding payment. It doesn't talk about
9 selling assets to -- to liquidate someone's
10 debt. It's specifically focused on exactly the
11 kind of activity that Congress would have had
12 in mind if it related to this.

13 JUSTICE ALITO: Yeah, but somebody
14 who's engaging in a non-judicial foreclosure is
15 enforcing a security interest, and if they
16 didn't -- so they appear to fall within that
17 provision. And if Congress didn't want them to
18 fall within that provision and only wanted to
19 capture the repo guys, why wouldn't it use the
20 more specific language that it used elsewhere
21 when it was referring to the repo guys?

22 MR. GEYSER: I think if Congress
23 wanted to exclude someone who's both enforcing
24 a security interest and collecting a debt, it
25 would have used one of the exclusions that

1 follow the definition in 1692a(6). There's six
2 express exclusions.

3 And if you look to the -- the second
4 sentence of a -- of a(6), it shows exactly how
5 Congress would have modeled that kind of
6 exclusion. It would have said at the end --
7 instead of ending at f, it would have ended at
8 g. It would have said this term does not
9 include anyone enforcing a security interest.
10 And then it would have said, notwithstanding
11 that exclusion, it does apply for purposes of
12 this one subsection.

13 That's exactly what Congress did in
14 the middle sentence that's sandwiched between
15 the -- the main definition and the additional
16 one when it wanted to exclude that type of
17 activity.

18 And to be absolutely clear, if you
19 look to the context of the statute, it
20 reinforces our reading. Congress included in
21 1692i a venue provision. This venue provision
22 talks about actions to enforce an interest in
23 real property securing a consumer's debt.
24 That's a foreclosure action. That's the only
25 way to read that language.

1 And Congress described it as a legal
2 action on a debt against a consumer. That
3 provision only applies to someone who fits
4 within the definition of a debt collector under
5 the main definition.

6 So it doesn't make any sense to read
7 that section -- it doesn't make any sense to
8 read that section as limited to security
9 enforcers when it only applies to people who
10 might enforce security interests, but they're
11 also collecting debts.

12 But, again, we think if you look just
13 to the initial -- the -- the first part of the
14 section, it talks about the main definition of
15 a debt collector. And if you read the security
16 enforcement provision to exclude people who
17 otherwise qualified directly within that main
18 definition, you're setting up these two
19 sentences to conflict with each other.

20 JUSTICE GORSUCH: Mr. Geysler, can -- I
21 -- I may be missing something here, so I -- I'd
22 appreciate your help.

23 As I understand it, you -- you think
24 that first sentence in a(6) is the main one and
25 captures most debt collectors, but for some

1 reason, it doesn't capture the -- the repo man
2 who in the dead of night goes and just grabs my
3 car. And for that, we need the last sentence,
4 right?

5 MR. GEYSER: That -- that's right.

6 JUSTICE GORSUCH: All right. I'm
7 following you so far, great. But then, when I
8 go over to f(6), which further illuminates that
9 last sentence and -- and talks about who's
10 covered, it talks about the fellow who takes --
11 now the dead-of-night repo man you're talking
12 about -- or threatens to take a security
13 interest.

14 So there's that fellow, he's not just
15 taking the stuff in the middle of the night;
16 he's -- he's threatening to do it. He's
17 talking to me. And I would have thought that
18 fellow would have been captured by your reading
19 of the first sentence of -- of a(6). So that's
20 rather convoluted and roundabout, but help me
21 out. Why -- why doesn't that disprove your --
22 your thesis?

23 MR. GEYSER: Sure. Well, I -- I don't
24 think it disproves it for a few reasons. One
25 is that 1692f(6) also applies to people who are

1 debt collectors under the main definition. So
2 it's possible that when you're looking at
3 somebody who enforces a security interest
4 without collecting a debt, that those are the
5 people who typically are not communicating with
6 the debtor.

7 And there's certainly a large portion
8 of repo activity or people who are changing
9 locks on doors who want nothing to do with the
10 debtor at all. They hope to never see them.
11 The entire point is to show up in the dead of
12 night, take their car, and return it to the
13 creditor.

14 Now I think what's critical about f(6)
15 is, again, it does not talk about demanding
16 payment; it doesn't talk about liquidating
17 assets. And so, if you think of the type of
18 activity it's covering, it's not covering
19 people who fall within the main definition.

20 JUSTICE GORSUCH: Many elegant words
21 there, but what do we do about the word
22 "threatening"? That was my question.

23 MR. GEYSER: Yeah. Well, again, two
24 -- two -- two ways to handle it. One is that
25 they may not be threatening to collect a debt.

1 They may not be demanding payment. They may
2 not be liquidating the asset. The other is --

3 JUSTICE GORSUCH: Well, threaten to
4 take a non-judicial action to -- with respect
5 to a security interest. That's what the
6 statute says.

7 MR. GEYSER: Well, it --

8 JUSTICE GORSUCH: So -- so help me out
9 with that language. That's where I need your
10 -- I know you've got something for me here.

11 MR. GEYSER: Sure. Well, it could be
12 that they threatened to take the car when, in
13 fact, they don't intend to take it at that --
14 at that time, because they want to get paid.
15 They want to tow the car back to the creditor
16 and they're hoping to keep it there so they can
17 take it in time.

18 But, again, I think the most common
19 application of the security enforcer definition
20 will typically involve people who aren't
21 communicating with the debtor. And remember
22 f(6) also applies to someone who qualifies
23 under the main definition. It applies to both
24 security enforcers and to people who are
25 full-fledged debt collectors.

1 And so Congress --

2 JUSTICE BREYER: That's the point.
3 That's the point, I think. I mean, let's call
4 it part 1 and part 2. Part 1 says debt
5 collectors can't -- are so and so, and then
6 here are all the things they can't do. And
7 that's a lot of them.

8 And then we have part 2, and part 2
9 says the mortgage people are debt collectors
10 for purposes of f(6). And f(6) doesn't have
11 all of them. It just has a few pretty bad
12 ones.

13 And so why would Congress have put in
14 f(6) if it wanted all of them to apply?

15 MR. GEYSER: Well, again, Your Honor,
16 it put in f(6) to reach the group of people who
17 are not also full-fledged debt collectors, who
18 are not also obtaining a transfer of debt.

19 JUSTICE BREYER: Well, it doesn't say
20 that. It says a debt collector may not -- or
21 they put in part 2, which I'm calling part 2,
22 to be sure that these people who are not
23 full-fledged debt collectors have to do at
24 least f(6). Okay?

25 MR. GEYSER: Absolutely. But, again,

1 I --

2 JUSTICE BREYER: Right. And if we
3 have a person who fits within the definition of
4 part 2, that would seem to argue against his
5 fitting into the definition of part 1.

6 MR. GEYSER: Well, absolutely not,
7 Your Honor.

8 JUSTICE BREYER: No?

9 MR. GEYSER: Because you can have
10 someone who does both. Take -- take a repo man
11 who shows up, but instead of doing what -- what
12 they actually do, which is they wait for the
13 consumer to leave and then they take their car
14 --

15 JUSTICE BREYER: Yeah.

16 MR. GEYSER: -- they actually go to
17 the consumer and they say: You know what, I'm
18 going to give you three hours to pay the debt.

19 JUSTICE BREYER: And why isn't the
20 repo man like that in part 1?

21 MR. GEYSER: He is. And so that's
22 exactly right.

23 JUSTICE BREYER: Then who is in part 2
24 but not in part 1?

25 MR. GEYSER: The people in part 2 are

1 the -- it's sort of like a Venn diagram. There
2 are some people who collect debts without
3 enforcing a security interest. There are some
4 people who enforce security interests without
5 collecting debts.

6 JUSTICE BREYER: Isn't the repo man
7 doing that?

8 MR. GEYSER: Exactly. That's our
9 point. And then there's the middle category,
10 like the foreclosure agents, who are doing
11 both, because they're sending notices that are
12 absolutely indistinguishable from classic debt
13 collection activity.

14 They're demanding payment on the debt.
15 And if you don't pay -- and, by the way, in
16 Colorado in 2017, about 11 percent of people
17 did, in fact, pay in response to these notices.

18 JUSTICE BREYER: Okay. But that's my
19 other question, of course, is what do you want
20 to say in respect to the fact that Colorado has
21 a pretty good, in many respects stricter law
22 than there is here, and -- and that protects
23 the consumers more, and yet I guess, if we
24 accept what you say, we'd have to say that that
25 Colorado law is illegal.

1 MR. GEYSER: Absolutely not, Your
2 Honor.

3 JUSTICE BREYER: No? Because?

4 MR. GEYSER: Well --

5 JUSTICE BREYER: I mean, the reason I
6 thought it would be illegal is because it says
7 you can't communicate with a third person. You
8 couldn't tell the trustee about he's supposed
9 to send a letter. You couldn't communicate,
10 put anything in the newspaper. I mean, that
11 would seem to me contradictory, and I guess the
12 Colorado law would fall then.

13 MR. GEYSER: Your Honor, out of -- out
14 of all the eight amicus briefs, and incredibly
15 able counsel for Respondent and the Government,
16 they could cobble together, at best, three or
17 maybe four possible conflicts.

18 And when you actually dig into the
19 weeds of those conflicts, they're not conflicts
20 at all. They're very easy to accommodate. And
21 if you want to walk through them, if you look
22 at the notice on 1692g, that says that if the
23 --

24 JUSTICE BREYER: You don't have to
25 walk through them if you don't want to. Just

1 tell me where they are in your brief.

2 MR. GEYSER: Sure. Well, they're --
3 they're addressed at the end of our brief.
4 They're also addressed in the amicus brief.
5 But I think the -- I'll make a couple critical
6 points, though, because I think -- I think one
7 that is the easiest way to resolve those
8 conflicts.

9 You can first obtain advance consent
10 from the consumer to provide all necessary
11 consents in the event of a foreclosure.

12 And if the consumer decides not to
13 follow through, the creditor can send the
14 notice. The FDCPA does not apply to creditors.
15 We know this from Henson. It only applies to
16 professional debt collectors. And there is
17 absolutely nothing in the Colorado scheme that
18 says that a foreclosure has to be run by a
19 professional debt collector.

20 The consumer can -- the creditor can
21 take the notice, publish it themselves, and
22 there is absolutely no problem.

23 JUSTICE KAGAN: Mr. Geyser, I -- I
24 find this a difficult question. Going back to
25 something that Justice Alito said, the reason I

1 find it a difficult question is it seems to me
2 that judicial foreclosures, non-judicial
3 foreclosures, fall within both.

4 They -- you know, these people are
5 debt collectors under the language of the
6 statute, and these people are enforcing
7 security interests under the language of the
8 statute.

9 But that can't be right because the
10 grammar of the statute suggests that we now
11 have to kick them out of one or the other. All
12 right?

13 And so the question is, which do we
14 kick them out of? Do we say, notwithstanding
15 that they look like debt collectors, we're not
16 going to treat them like debt collectors, or do
17 we say that, notwithstanding that they enforce
18 security interests, we're going to pretend that
19 they don't?

20 So, when I think about it that way, I
21 kind of think: Well, I don't know,
22 foreclosures are paradigmatic enforcement of
23 security interests. There's nothing that gets
24 more enforcing a security interest than
25 foreclosing on a mortgage.

1 So kicking them out of that one seems
2 a little bit more odd than kicking them out of
3 a very broad definition of debt collectors.

4 MR. GEYSER: Well, a few points, Your
5 Honor. First is I don't think you have to kick
6 them out of the additional definition if they
7 fall in the main definition. If Congress had
8 said, if phrased as an exclusion, instead of an
9 addition, they're trying to capture more
10 people, then I think that that point would have
11 more force.

12 Even if Congress had said for purposes
13 of subsection 1692f(6) only, but they didn't
14 say that, and, again, this is a -- this is a
15 definitional section that's capturing people.

16 You start at the beginning. You're
17 seeing, is this person covered? If they don't
18 fall within any clause, they're not covered.

19 And so, if you fall within the first
20 clause, you're covered. If you happen to also
21 do something that qualifies you under a
22 different sentence, that is not framed in
23 exclusionary terms, then that's fine, but you
24 still qualify under the main definition.

25 And, again, when Congress wanted to

1 exclude people, they did it expressly. And we
2 know exactly how they did it because it follows
3 the additional definition.

4 JUSTICE KAVANAUGH: Your -- your point
5 there, though, depends, right, on reading that
6 language as referring to the repo guy, right?

7 MR. GEYSER: We have to -- we fully
8 concede that we need to identify someone --

9 JUSTICE KAVANAUGH: But then, when you
10 turn to f(6), is that really just limited to
11 the repo situation?

12 MR. GEYSER: Well, not necessarily,
13 Your Honor. It could also be someone who goes
14 and changes locks on -- on an apartment to
15 evict someone.

16 JUSTICE KAVANAUGH: The point being
17 the language of f(6) seems a lot broader than
18 just the repo situation, so then, when you go
19 back to a, it seems odd to think that that's
20 just limited to the repo situation, if I
21 understand the interaction of the two
22 provisions correctly.

23 MR. GEYSER: Well, again, the -- the
24 additional definition will cover people who
25 aren't just repossessing cars. It can also

1 include someone who is separately collecting
2 debts, because, again, you can fit under both
3 -- under both sentences. There's nothing about
4 the statute that says, if you fall within an
5 additional category, that you're excluded from
6 the main category. And Congress, again, they
7 know how to write a statute that does that.
8 This is statutory overlap. We see it all the
9 time in the U.S. --

10 JUSTICE ALITO: Well, let me ask you
11 this about the repo situation: Suppose that
12 the repo guy is out there getting into a car,
13 and the owner of the car sees him out the
14 window and runs out with a gun and says, what
15 are you doing? And the repo guy says, well,
16 you didn't pay, you're in default on your
17 payments, so I'm taking your car.

18 Is he a -- is he a debt collector
19 because he's now told the -- the -- the car
20 owner that -- about the debt?

21 MR. GEYSER: In -- in that scenario, I
22 don't think so because he's not leveraging the
23 security interest. It would be different if he
24 said, if you want to pay now, I'll get out of
25 the car and go away.

1 But if he says, look, you've -- you've
2 run out of chances. You didn't pay your bill.
3 I'm towing the car. Take it up with the
4 creditor. And to be very clear, what happens
5 at that point, the repo man brings the car back
6 to the creditor.

7 At that point, the -- the debtor still
8 owes 100 percent of the same debt they owed
9 before the repossession. It's the creditor
10 then who takes the car, sends the notice under
11 the UCC, and says, if you want your car back,
12 pay us the money, or we'll auction off the car
13 and pay down your debt.

14 JUSTICE ALITO: So what is the
15 difference between that situation and the
16 non-judicial foreclosure situation where the --
17 the homeowner is simply notified that the --
18 the house that -- the mortgage is being
19 foreclosed?

20 MR. GEYSER: I -- I think -- I think
21 there is a stark difference, Your Honor.

22 JUSTICE ALITO: What is the
23 difference?

24 MR. GEYSER: Well, the difference is
25 that they're not just saying we're going to

1 foreclose on your house no matter what you do.
2 They're saying this is the amount you owe.
3 This is the consequence if you don't pay it by
4 this date. We've been instructed to take away
5 your home.

6 Adding an express statement at the end
7 of that that says will you please pay now is
8 absolutely superfluous to any ordinary, normal
9 person who receives that letter. They
10 understand exactly what it's saying. It's
11 saying pay us money. It would be more like the
12 repo agent who says I'm going to repossess the
13 car unless you pay the money now.

14 Then that person would be a debt
15 collector. But someone who just says that
16 we're -- we're going to take the car no matter
17 what, that's -- that's leagues away because
18 they're not leveraging the security interest.

19 And, again, if you look to the
20 structure of the Act, it's very hard to
21 understand how foreclosure activity does not
22 fall within the main definition when there is a
23 special section, 1692i, that talks directly
24 about foreclosures.

25 JUSTICE GORSUCH: I have another

1 question about your repo man example. You say
2 we need that last sentence to capture him in
3 a(6). But why wouldn't he be captured by the
4 first sentence in a(6) too? Why isn't repo man
5 a classic debt collector under any definition,
6 even the broad, the very broad ones you proffer
7 for a(6), first sentence?

8 MR. GEYSER: Well, first, I don't
9 think that's the most natural reading of it
10 because you're focusing specifically on what
11 each person in the process is doing. When the
12 repo man -- again, when he goes and takes a car
13 in the middle of the night and returns it to
14 the creditor, he --

15 JUSTICE GORSUCH: The principal
16 purpose of his business using interstate
17 commerce to collect a debt.

18 MR. GEYSER: Well, it -- it's --

19 JUSTICE GORSUCH: Whatever -- whatever
20 the first sentence says.

21 MR. GEYSER: The -- the principal
22 purpose is to enforce a security interest.
23 When -- when the repo man is done and he
24 delivers the car to the creditor's lot, he has
25 not obtained payment on the debt.

1 And that's even under Respondent's
2 definition. It's he --

3 JUSTICE GORSUCH: Why -- why don't you
4 lose then? Why isn't that just conceding away
5 the case?

6 MR. GEYSER: Well --

7 JUSTICE GORSUCH: If the repo man is
8 not collecting a debt, he's just executing a
9 security interest, why is that really
10 problematic for you, Mr. Geysler?

11 MR. GEYSER: No, no, no, Your Honor.
12 That -- that -- that proves that the additional
13 definition that -- for the -- fits the repo
14 man, the repo man does not fall within the main
15 definition. And, again, I'm not talking about
16 foreclosure agents because foreclosure agents
17 aren't engaged strictly in repo activity.
18 Again, they're sending notices, they're trying
19 to induce payment, and --

20 JUSTICE GORSUCH: I'm just talking
21 about the repo man. Just the repo man. First
22 of all, first question, why doesn't he fall
23 within the first sentence of -- of a? And --
24 and, second, if -- if he doesn't, then why
25 isn't he exactly like the foreclosure expert?

1 MR. GEYSER: Well, their -- their
2 conduct is completely different, which is also
3 why they don't fall within the first sentence
4 of a. If all they're doing is enforcing the
5 security interest, they take the -- the
6 property and they bring it back to the
7 creditor --

8 JUSTICE KAGAN: But the result of that
9 is to liquidate the debt. And I thought that
10 your principal argument as to non-judicial
11 foreclosures was that we should look to the
12 real economic effect of this, which is to
13 liquidate the debt.

14 And just like a non-judicial
15 foreclosure liquidates a debt, so too does
16 repossession of the collateral do the exact
17 same thing.

18 MR. GEYSER: The -- it eventually
19 might, Justice Kagan, but it doesn't when the
20 repo man's job is over.

21 And then -- this is a really critical
22 point -- when the repo man brings the car back
23 to the creditor, they have not yet sold the
24 car. It's then up to the creditor to directly
25 or indirectly receive payment.

1 JUSTICE KAGAN: It seems as though,
2 when you get to the repo man, you're indulging
3 in all these sort of hypertechnical
4 distinctions, the same kind that you criticize
5 Mr. Shanmugam for indulging in when it comes to
6 non-judicial foreclosures.

7 I mean, if you're going to get
8 non-technical about it, you should carry
9 through the non-technical, and then the repo
10 man is in the same position as the non-judicial
11 foreclosure person.

12 MR. GEYSER: Well, I -- I don't think
13 so, Your Honor. I don't think this is getting
14 very -- getting very technical. I think it's
15 actually looking at the cues in the text for
16 what Congress had in mind. We know from f(6),
17 1692f(6), what Congress had in mind for people
18 enforcing security interests, because that's
19 the only provision that applies to them.

20 And, again, it talks about disabling
21 property or dispossessing property, taking
22 possession of it. That describes traditional
23 repo activity to a T. Now it doesn't describe
24 separate activity of then taking that interest
25 now that you have it, you've got -- you have

1 the car back, and then sending out a notice to
2 the debtor and saying, if you don't pay, I'm
3 going to sell the car.

4 JUSTICE KAVANAUGH: f(6) also
5 describes non-judicial foreclosures.

6 MR. GEYSER: It -- well, it is
7 enforcing a security interest. That's
8 absolutely true, Your Honor, but --

9 JUSTICE KAVANAUGH: Right?

10 MR. GEYSER: But -- but it --

11 JUSTICE KAVANAUGH: f(6) does
12 describe, by its terms, non-judicial
13 foreclosures?

14 MR. GEYSER: It -- as part of what a
15 non-judicial foreclosure is, but it extends
16 beyond that because, unlike the repo man, the
17 foreclosure agent is -- is demanding payment.
18 They're sending a notice. They're leveraging
19 the security interest, trying to obtain
20 payment, and they're the ones that are
21 instructing the property to be sold.

22 JUSTICE KAVANAUGH: You're trying to
23 explain why this third sentence is in there --
24 and I understand that -- and then drawing the
25 distinction between repo and non-judicial

1 foreclosures. But correct me if I'm wrong
2 about this: The history of how this came about
3 was there was debate about whether those who
4 enforce security interests would be covered
5 under debt collection or -- debt collector or
6 not. There were two polar positions, yes and
7 no. And what Congress ended up with was
8 something in between. Is that correct?

9 MR. GEYSER: Well, it is correct, but
10 I -- I would draw a different inference from
11 that.

12 JUSTICE KAVANAUGH: And the something
13 in between, though, it's hard to just read that
14 in between language as repo and not
15 non-judicial foreclosure.

16 MR. GEYSER: Not at all, Your Honor.
17 I think that's exactly what Congress had in
18 mind.

19 JUSTICE KAVANAUGH: That's the heart
20 of it for me.

21 MR. GEYSER: Well, let -- let me try
22 to convince you then, because I think what
23 Congress did is -- the competing bill said
24 either security enforcers weren't included at
25 all or it said they're included for everything.

1 So a repo man also has to -- even though
2 they're not communicating with people normally,
3 they have to state the correct amount of the
4 debt and do everything else that the FDCPA
5 requires.

6 Now the compromise that Congress
7 struck is they recognized some people will
8 enforce security interests without also
9 collecting debts, and so they subjected them to
10 a single subsection that describes that
11 activity.

12 I think it's quite telling that f(6)
13 does not talk about demanding payment. It
14 doesn't talk about selling assets. And that is
15 very different if you look to the type of
16 regulations that apply in the foreclosure
17 setting.

18 And this is really key. When you have
19 someone who is threatening to sell someone's
20 house, and they're stating the wrong amount
21 that's owed or they're tacking on unauthorized
22 charges, they make it very difficult for the
23 homeowner to cure the debt, and they can make
24 it very difficult to actually pay the amount
25 they're owed.

1 All the other substantive provisions
2 apply to someone who's engaged in the
3 foreclosure setting because they're actually
4 sending letters that are leveraging the
5 security interests to try to collect. And if
6 they fail to collect, they're selling the house
7 to obtain payment on the debt.

8 And the guy with the tow truck is not
9 selling the car. Again, what --

10 JUSTICE SOTOMAYOR: Excuse me, I --
11 I've been having a huge problem with this
12 entire case, not on your position, but I was
13 going to ask this of your adversary. I'm
14 reading the language of the statute. It says,
15 for the purposes of Section 1692f, it includes
16 people who are enforcing.

17 And the statement that 1692f starts
18 with is "a debt collector, period, may not use
19 the unfair or unconscionable means to collect
20 or attempt to collect any debt." It seems to
21 say that a security person is a debt collector.

22 And it says, "without limiting the
23 general applicability of the foregoing, without
24 limiting that people who enforce debts,
25 security interests, the following conduct in

1 addition is a violation of this section".

2 I don't mean to help you, but I --

3 (Laughter.)

4 JUSTICE SOTOMAYOR: -- but I'm reading
5 f and it seems clearly to support your
6 position. It's basically saying these are two
7 additional bad ways that they can violate being
8 a debt collector. It's not limiting it to
9 those two ways.

10 MR. GEYSER: Your Honor, I --

11 JUSTICE SOTOMAYOR: I don't even know
12 what the repo argument was about in your brief.

13 MR. GEYSER: Well, the repo argument
14 in our brief -- and, Your Honor, just to be --

15 JUSTICE SOTOMAYOR: It's adding --
16 it's also including -- if there was ever any
17 doubt, it's also including those people.

18 MR. GEYSER: It -- it is, Your Honor,
19 but just to be candid, though, it is also
20 including them only for the one subsection of
21 1692.

22 JUSTICE SOTOMAYOR: But the one
23 subsection seems to say any of these people
24 can't do unfair practices.

25 MR. GEYSER: Exactly. And so -- but

1 the reason that we brought up the repo example
2 in our brief is to show that there -- there is
3 an entire industry that clearly qualifies under
4 the additional definition, without directly --

5 JUSTICE SOTOMAYOR: That -- that --

6 MR. GEYSER: -- or indirectly
7 collecting debts.

8 JUSTICE SOTOMAYOR: -- that's fine,
9 but what -- what's really -- what's really at
10 issue is the unfair practices. These people
11 who enforce security interests cannot collect
12 or attempt to collect any debt unfairly.
13 That's the first sentence.

14 And without limiting that general
15 sentence, these two additional things are
16 considered unfair practices.

17 MR. GEYSER: I -- I think that's
18 correct, Your Honor.

19 And if I could reserve the balance of
20 my time.

21 JUSTICE SOTOMAYOR: I -- I -- I -- so
22 tell me the counter.

23 MR. GEYSER: Sure.

24 JUSTICE SOTOMAYOR: Why -- why are
25 they arguing that other unfair practices are

1 not actionable when that sentence says it is to
2 my mind?

3 MR. GEYSER: Yeah. Well --

4 JUSTICE SOTOMAYOR: What am I missing
5 there?

6 MR. GEYSER: Well, yeah, I -- I don't
7 think you're -- you're missing anything. I
8 think the easiest way to read the statute is to
9 start at the beginning and to see that if you
10 qualify under the main definition, there's
11 nothing that excludes you from the Act.

12 And the fact that Congress used clear
13 words of inclusion to capture certain people
14 who don't fit within the main definition, it
15 doesn't justify excluding those people from
16 that first sentence.

17 If I could?

18 CHIEF JUSTICE ROBERTS: Thank you,
19 counsel.

20 Mr. Shanmugam.

21 ORAL ARGUMENT OF KANNON K. SHANMUGAM

22 ON BEHALF OF THE RESPONDENT

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

25 When a law firm sends a notice to a

1 state official initiating the state's
2 non-judicial foreclosure process, and when the
3 law firm is seeking only to enforce its
4 client's security interests, it does not engage
5 in debt collection within the meaning of --

6 JUSTICE SOTOMAYOR: I'm sorry. You --
7 you started that statement with when you send a
8 letter to a state official. The issue here is
9 not sending a letter to the state official.
10 The issue here is, did you do something wrong
11 in sending it to the customer first?

12 MR. SHANMUGAM: With respect, Justice
13 Sotomayor, if you take a look --

14 JUSTICE SOTOMAYOR: Or to the creditor
15 of --

16 MR. SHANMUGAM: -- if you take -- take
17 a look at the complaint in this case -- and,
18 after all, this case is before the court on a
19 motion to dismiss, the sole document that could
20 constitute the impermissible act of debt
21 collection is the notice of election and
22 demand, the notice that is found in the Joint
23 Appendix at pages 39 to 41. That is the notice
24 that, under Colorado law, is required to
25 initiate the non-judicial foreclosure process.

1 Now, to be sure, that notice requires
2 disclosure of the amount, the principal amount,
3 that is owed on the mortgage, and it also
4 requires disclosure of the identity of the
5 holder of the note. But, beyond that, that is
6 not a notice that is even directed at the
7 consumer.

8 Now, to be sure, there are in the
9 record in this case other documents that were
10 sent to the consumer, but even with regard to
11 those documents, those documents as well either
12 initiate the process or are incidental to the
13 initiation of the process, and, critically,
14 they contain no demand for payment.

15 And the very fact of the initiation of
16 a foreclosure process is that it ordinarily
17 represents a decision on the part of the
18 creditor to stop seeking payment and instead to
19 pursue an alternative remedy.

20 CHIEF JUSTICE ROBERTS: No, but in
21 most cases -- well, maybe I'm wrong, I'm just
22 assuming in most cases that if you start the
23 foreclosure process, and the debtor comes in
24 and says, okay, I see you're serious about
25 this, and, you know, either rearranges the

1 financing or pays the debt, that's the purpose,
2 right?

3 MR. SHANMUGAM: Well --

4 CHIEF JUSTICE ROBERTS: The banks
5 don't want to own houses. They want to be
6 paid. And the reason they go to foreclosure is
7 to get payment of the debt.

8 MR. SHANMUGAM: From the perspective
9 of a creditor, Mr. Chief Justice, it is
10 certainly true, and it also happens to accord
11 with common sense that the creditor would like
12 to be made whole.

13 There are, of course, two means by
14 which a creditor can be made whole. The first
15 is to obtain payment from the debtor; and the
16 second is the alternative, the last resort, to
17 enforce a security interest.

18 Now, if we were dealing with the first
19 sentence of the definition in isolation, I
20 would certainly be confident making the
21 argument that this is not debt collection in
22 the abstract because what is taking place here
23 is not an effort to obtain or demand payment
24 from the debtor, consistent with the ordinary
25 meaning of these terms.

1 It is, at most, an effort to initiate
2 a process that could lead to the elimination or
3 reduction of the debt, and not everything that
4 could lead to the elimination of a debt
5 constitutes debt collection. But, of course,
6 the --

7 JUSTICE KAGAN: Well, I don't really
8 understand that, Mr. Shanmugam. I mean, the
9 whole point of getting the security interest in
10 the first place is so that the creditor has
11 leverage in order to pressure the debtor to pay
12 his debt.

13 And -- and it's an alternative way to
14 collect the debt if the debtor fails to do so.
15 So how can it not be about payment of the debt?

16 MR. SHANMUGAM: Well, let me pick up
17 on that formulation, Justice Kagan.

18 I think it would be a different case
19 if what was going on was that a creditor was
20 using the threat of foreclosure to exact
21 payment.

22 In other words, if a creditor came in
23 and said, if you don't pay your overdue payment
24 by Friday, I'm going to initiate non-judicial
25 foreclosure.

1 And I -- I say that because I want to
2 underscore that we're not looking for some sort
3 of categorical exclusion. A party initiating
4 foreclosure --

5 JUSTICE KAGAN: Well, whether you say
6 that or not explicitly, isn't that how
7 everybody understands a foreclosure notice?
8 They're going to foreclosure on my house unless
9 I come up with my -- some money.

10 MR. SHANMUGAM: I think that everyone
11 would certainly understand that that is the
12 consequence of a foreclosure proceeding. I
13 think my submission is a more modest one.

14 And, again, of course, we're not
15 considering this issue in the abstract because
16 we have the limited purpose definition, but if
17 we were considering this issue in the abstract,
18 my point would simply be that not everything
19 that might, for instance, increase someone's
20 incentive to pay constitutes debt collection.

21 JUSTICE KAVANAUGH: Well, that's true,
22 but it's inherently communicating a message
23 that you need to repay the debt or you're going
24 to lose the house, as Justice Kagan says.

25 You -- you referred earlier to common

1 sense. Well, common sense tells you this is an
2 effort to have you repay the debt.

3 MR. SHANMUGAM: Well, I don't think
4 that that's true, and let me offer a sort of
5 slightly modified --

6 JUSTICE KAVANAUGH: Why not? Why not?

7 MR. SHANMUGAM: Well --

8 JUSTICE KAVANAUGH: Even if the
9 express words aren't there, everyone who gets
10 something like that, who has the money, and
11 wants to, will understand this is a -- this is
12 a letter seeking to get you to repay.

13 MR. SHANMUGAM: I think the common
14 sense is that anyone who receives that letter
15 would certainly have the incentive to pay if
16 they could, because, of course, no one wants to
17 lose their house.

18 Again, I think my submission is a more
19 modest one. And if you take a look at the case
20 law, there is actually a well developed body of
21 case law in the lower courts, not surprisingly,
22 on the question of what constitutes debt
23 collection outside the foreclosure context,
24 because you might imagine this issue has arisen
25 quite frequently in the four decades since the

1 enactment of the Act.

2 Those cases focus on whether, as an
3 objective matter, there is an intent to induce
4 payment. And those cases have looked in the
5 main at two factors: first, whether or not
6 there is a demand for payment and, second, they
7 look at the purpose and the context of the
8 communication, the animating purpose.

9 And here --

10 JUSTICE KAVANAUGH: Exactly. The
11 animating purpose is to tell you you need to
12 pay or you're going to lose your house.

13 MR. SHANMUGAM: The animating purpose
14 is to initiate the non-judicial foreclosure
15 process. That is why the bank at issue here
16 retained my client, the law firm.

17 JUSTICE KAVANAUGH: Is it an either/or
18 really? I mean, it can't be a both/and?

19 MR. SHANMUGAM: Well, I think that
20 leads me to the point about the limited purpose
21 definition, which you picked up on earlier in
22 your colloquy with Mr. Geyser. And that is
23 that if we know one thing from the history of
24 the Act, it is that Congress thought that the
25 collection of debts and the enforcement of

1 security interests were distinct concepts.

2 JUSTICE ALITO: But what do you --

3 MR. SHANMUGAM: And we know that not
4 just because of the language of the limited
5 purpose definition but because Congress really
6 struggled with the question of whether to bring
7 in entities whose principal purpose was the
8 enforcement of security interests for all
9 purposes, whether to exclude them entirely, or
10 instead to bring them in only for purposes of a
11 single provision --

12 CHIEF JUSTICE ROBERTS: Well, but you
13 have --

14 MR. SHANMUGAM: -- which wouldn't have
15 made sense.

16 CHIEF JUSTICE ROBERTS: You do have
17 the word "indirectly" in the first part. And
18 even if you think in a technical sense
19 initiating foreclosure is not collecting the
20 debt, it certainly is an indirect effort to
21 collect the debt.

22 MR. SHANMUGAM: Well, I think that
23 that makes it somewhat harder for me. And,
24 again, if we were arguing this case with a
25 statute that just contained the first sentence,

1 I would argue that indirect debt collection
2 refers, as the lower courts have held, to
3 situations in which you engage in preliminary
4 steps that facilitate the ultimate demand for
5 payment, for instance, collecting information
6 about the debtor.

7 But, again, what we know from the text
8 and from the history is that Congress, whatever
9 debt collection would mean in a platonic form,
10 Congress thought about debt collection in the
11 way that we think about it and in a way that is
12 consistent, of course, with the traditional
13 understanding at common law.

14 As we explain in our brief, debt
15 collection and enforcement of security
16 interests have, of course, been distinct
17 remedies. The former was an in personam
18 action, the latter an in rem action.

19 There are numerous places in federal
20 law where the two are treated as distinct. And
21 so Congress, when it used the phrase
22 "enforcement of security interests," was
23 certainly not writing on a blank slate. It
24 meant to capture --

25 JUSTICE KAVANAUGH: But you're --

1 MR. SHANMUGAM: -- that body of law.

2 JUSTICE KAVANAUGH: You are arguing, I
3 think, that even if I disagree with you, we
4 disagree with you on the first sentence, you
5 win because of the third sentence, right?

6 MR. SHANMUGAM: Yes, that is correct.
7 I think all -- I think I need --

8 JUSTICE KAVANAUGH: And on the third
9 sentence, I guess the -- the responsive
10 argument is that's an odd way for Congress to
11 have excluded those who enforce security
12 interests from the broad definition of debt
13 collectors and the repo example you heard. Can
14 you respond to that?

15 MR. SHANMUGAM: Sure. So, first of
16 all, let me talk about the limited purpose
17 definition and then I'll talk about f(6), the
18 substantive provision that it incorporates.

19 With regard to the limited purpose
20 definition, I think that this is exactly the
21 way that you would expect Congress to have
22 reached the Goldilocks outcome where parties
23 who enforce a security interest are subject
24 only to one substantive provision.

25 Let me give you an example. Let's say

1 that Congress passed a statute that said that
2 the Supreme Court shall have jurisdiction to
3 review decisions of federal courts of appeals,
4 and for purposes of reviewing capital cases,
5 the Supreme Court also has jurisdiction to
6 review decisions of the Court of Appeals for
7 the Armed Forces.

8 I think that the natural inference
9 from that would be that, if you have a
10 non-capital case from the CAAF, this Court
11 would lack jurisdiction. And that's --

12 CHIEF JUSTICE ROBERTS: Well, but
13 that's not the most natural reading. It's --
14 it's -- the "also includes," you would normally
15 say that it doesn't include; rather, the "also
16 include" is additive, and it's additive to a
17 pretty broad collection as well.

18 You would say even though, again,
19 arguendo, this would be included in the broad
20 language, it doesn't include this. But,
21 instead, it says it also includes this, and
22 then for the limited purpose.

23 It's -- it's not the way you would
24 have told Congress to write this statute, or
25 your -- or your friend on the other side. It's

1 a very circuitous way of getting to your
2 result.

3 MR. SHANMUGAM: Congress never asked
4 me how to write statutes, Mr. Chief Justice.

5 (Laughter.)

6 MR. SHANMUGAM: But I think what I
7 would say in response to that is the fact that
8 it's additive helps us because it reinforces
9 the sense that Congress thought that the
10 collection of debts was distinct from the
11 enforcement of security interests.

12 JUSTICE KAGAN: But -- but now you're
13 -- you're counting on your argument about
14 sentence one again. And I think that these
15 questions are really questions that assume that
16 you're wrong on sentence one.

17 Assume that these are debt collectors
18 under the definition that Congress has gave.
19 And the question is why we should then read an
20 additive provision to exclude people from that
21 general definition.

22 MR. SHANMUGAM: So I think, first, I
23 would say that -- I don't think that you could
24 say that debt collection is unambiguously so
25 expansive as to cover this situation.

1 JUSTICE KAGAN: Well, I guess I want
2 to make you assume that.

3 MR. SHANMUGAM: But if you think --
4 but if you do presume that for purposes of this
5 question, I think what I would say is that
6 Congress still viewed enforcement of security
7 interests as distinct. And what you -- what I
8 would say with regard to the fallback
9 definition is that it can't be narrowed to this
10 almost impossibly small category of security
11 interest enforcers to which my friend, Mr.
12 Geysler, refers.

13 First, I don't think he disputes the
14 proposition that what we were doing in this
15 case was the enforcement of a security
16 interest. In other words, I don't think he
17 takes a narrower view of the meaning of that
18 well-established concept.

19 Instead, his view, as I understand it,
20 is that to take his Venn diagram, there is at
21 least some sliver of security interest
22 enforcers who would be -- who would not be
23 covered by his expansive definition of debt
24 collector but who would nevertheless fall
25 within the limited purpose definition. And

1 these are these repo agents who are
2 non-communicative.

3 It's not even the entire category of
4 repo agents. It's the person who takes the car
5 in the dead of night.

6 And I think what I would say in
7 response to that is that that doesn't solve his
8 profound superfluity problem because I think
9 that, under his definition of "debt collector,"
10 even the uncommunicative repo agent would still
11 qualify.

12 Certainly, when your car is
13 repossessed, that creates every bit as much of
14 an incentive to pay as receiving a notice that
15 there might eventually be a foreclosure sale of
16 your house. And I think what is more, I think
17 it also potentially could lead in much the same
18 way to the creditor being made whole.

19 And so I think one thing about
20 Petitioner's submission here is that Petitioner
21 doesn't offer some alternative definition for
22 "debt collection". I think that their position
23 really is that anything that creates an
24 incentive to pay would qualify.

25 And I would respectfully submit that

1 that goes further than the well-established
2 body of case law to which I referred on the
3 subject of what constitutes debt collection.
4 And it would also sweep in a range of innocuous
5 communications, as we explain in our brief.

6 JUSTICE KAVANAUGH: On the third
7 sentence, I think what you're saying, but tell
8 me if I'm wrong, is that even if we disagree
9 with you on the first sentence, a necessary
10 premise of the third sentence is that Congress,
11 notwithstanding the broad language of the first
12 sentence, must have thought that enforcement of
13 security interests should be distinct from debt
14 collection?

15 MR. SHANMUGAM: I think that's right.
16 And let me point to one more textual cue that
17 hopefully will be helpful to the Court in that
18 regard.

19 When the -- when Congress is talking
20 about this issue in 1692a(6), it's talking
21 about it in terms of the definition of "debt
22 collector." And as we explain in our brief, in
23 order to be liable under the provision at issue
24 here and really most of the provisions in the
25 Act, you have to both be a debt collector and

1 engaged in debt collection.

2 And I think, in this definition of
3 "debt collector," Congress sets up a
4 contradistinction between, on the one hand, an
5 entity whose principal purpose, and it has to
6 be the principal purpose, is the collection of
7 debts, and an entity whose principal purpose,
8 again, the principal purpose, is the
9 enforcement of security interests.

10 And, again, that's another textual cue
11 that suggests that this is an either/or
12 proposition, that Congress thought -- again,
13 whatever the meaning of "debt collection" in
14 the abstract -- that these were distinct
15 concepts.

16 After all, if you take a look at the
17 earlier bills, which we quote, I think, at page
18 25 of our brief, Congress uses that distinction
19 throughout all of these bills. Congress is
20 thinking about bringing in entities whose
21 principal purpose is debt collection or the
22 enforcement of security interests into the full
23 ambit of the Act.

24 Now let me say just a word about f(6)
25 because I promised I was going to say something

1 about that. That is the substantive provision
2 that is incorporated and that applies to these
3 limited-purpose security interest enforcers.

4 I think it's frankly a little bit
5 unclear what that provision reaches exactly,
6 and I think it's frankly a little bit unclear
7 whether that provision reaches foreclosure
8 proceedings. I think that there is a pretty
9 good argument that it does in a fairly limited
10 way. And no one's arguing that it would apply
11 to the foreclosure proceedings at issue here.

12 But, if that provision were somehow,
13 again, read to apply only to the
14 uncommunicative repo agent, which, again, I
15 thought was Mr. Geysler's submission, then you
16 would have expected Congress to have used
17 narrower language in the limited-purpose
18 definition as well. But, instead, again,
19 Congress referred generically to the
20 enforcement of security interests.

21 And, Justice Sotomayor, in response to
22 the concern that you raised at the end of
23 Mr. Geysler's argument, I think what I would say
24 is first that, again, the limited-purpose
25 definition refers specifically to f(6). And to

1 the extent that that prefatory language speaks
2 about debt collection, I think that just
3 reflects the reality that f(6) applies not just
4 to entities that are subject to the
5 limited-purpose definition but also, of course,
6 to debt collectors who qualify under the
7 broader definition.

8 I think the other statutory provision
9 that I would just say a word about is the venue
10 provision because that's the provision that
11 Mr. Geysler cited during his argument. And with
12 regard to that provision, I think we would
13 recognize that that provision establishes a
14 federal venue for at least certain judicial
15 foreclosure actions.

16 We certainly don't dispute that
17 subsection (1) of that provision applies to
18 judicial foreclosure. But, of course, as we
19 note in our brief, judicial foreclosures are
20 different from non-judicial foreclosures. This
21 case only presents a question concerning
22 non-judicial foreclosures.

23 One of the characteristic features of
24 a judicial foreclosure is the ability to seek a
25 deficiency judgment. And where a party seeks a

1 deficiency judgment in the context of a
2 judicial foreclosure proceeding, we would
3 concede that it is essentially demanding
4 payment and therefore would qualify as a debt
5 collector, just as a party initiating a
6 non-judicial foreclosure would if they, in
7 fact, accompanied that with a demand for
8 payment.

9 And that just underscores the fact
10 that all we're asking this Court to do is
11 essentially to say that the general test for
12 debt collection would apply in this context
13 such that if there were a demand for payment,
14 there would be debt collection and the
15 provisions of the Act would apply.

16 JUSTICE SOTOMAYOR: It is a bit
17 strange to think that Congress intended to
18 cover judicial foreclosures where a judge is
19 supervising the process but not when it's a
20 non-judge supervised process. It's -- it's
21 counterintuitive, where more --

22 MR. SHANMUGAM: Well, I think that --

23 JUSTICE SOTOMAYOR: -- more damage, I
24 think, can be done in a non-judicial
25 foreclosure because there is no judge there to

1 protect or review what's occurring. It -- I --
2 I'm not sure.

3 MR. SHANMUGAM: Well, I --

4 JUSTICE SOTOMAYOR: You seem to argue
5 that because Congress knew that non-judicial
6 foreclosures were set forth in very particular
7 ways. But they also knew judicial foreclosures
8 are?

9 MR. SHANMUGAM: I think, Justice
10 Sotomayor, that what I would say about that is
11 that it wasn't so much that Congress was
12 seeking to cover judicial foreclosures as that
13 it was seeking to cover situations in which
14 you're seeking payment.

15 And a judicial foreclosure, as you
16 will be well aware, is more like a typical
17 lawsuit where a party is effectively bringing
18 an in personam action, as is ordinarily the
19 case or at least often the case, against the
20 debtor and, in the context of that, seeking
21 payment. That's really no different from --

22 JUSTICE SOTOMAYOR: Well, that --
23 that's the problem with non-judicial
24 foreclosure. There's no way to ignore that you
25 take the property to sell it to pay off a part

1 or the whole of the debt.

2 MR. SHANMUGAM: And I certainly am not
3 here to dispute that reality. I think I would
4 say two things about non-judicial foreclosures
5 in my short time left.

6 The first is that even non-judicial
7 foreclosures provide considerable protections
8 to debtors and I think --

9 JUSTICE SOTOMAYOR: So do foreclosure
10 actions.

11 MR. SHANMUGAM: Well, that is -- that
12 is correct, but I -- I do think that
13 non-judicial foreclosures, and -- and
14 Colorado's scheme is distinct in some ways but
15 characteristic in others, do require notice to
16 be provided to debtors.

17 They do often provide at least some
18 judicial mechanism for, for instance, a
19 determination of whether or not a party is in
20 default or a review after a sale. And there's
21 certainly opportunities to void sales.

22 JUSTICE SOTOMAYOR: It doesn't help
23 you review after sales if you've lost your
24 home.

25 MR. SHANMUGAM: Well, but there is the

1 ability actually to unwind the sale where there
2 is -- there is fraud or misrepresentations or
3 other misconduct. But I think that that brings
4 me to the other point that I wanted to spend at
5 least a couple of minutes on, and that is this
6 issue of conflicts with state law.

7 We point in our brief to a number of
8 very specific conflicts that would arise if
9 Petitioner's interpretation were adopted. And
10 with respect to my friend, Mr. Geysler, while he
11 suggested that you should look at his briefs,
12 if you take a look at the relevant section of
13 his reply brief, pages 20 to 21, he doesn't
14 deny any of the specific conflicts, the
15 conflicts between the notice provisions and the
16 limitations on communications, the fact that
17 Colorado law provides a mechanism for
18 verification, whereas, in fact, the FDCPA
19 provides a quite different mechanism for
20 verification.

21 Instead, his submission is that, you
22 know, there are other ways of dealing with
23 this. A party could consent. A court could
24 issue an order. And as we explain in our
25 brief, those are not sufficient remedies for

1 the situation because consent cannot be
2 provided ex ante to a debt collector and
3 because most of the requirements at issue come
4 from state statutes and not from judicial
5 actions.

6 CHIEF JUSTICE ROBERTS: Thank you.

7 MR. SHANMUGAM: And so --

8 CHIEF JUSTICE ROBERTS: Thank you,
9 counsel.

10 MR. SHANMUGAM: -- we would ask that
11 the judgment be affirmed.

12 CHIEF JUSTICE ROBERTS: Mr. Bond.

13 ORAL ARGUMENT OF JONATHAN C. BOND
14 FOR THE UNITED STATES, AS AMICUS CURIAE,
15 SUPPORTING THE RESPONDENT

16 MR. BOND: Mr. Chief Justice, and may
17 it please the Court:

18 In the FDCPA, Congress made a
19 considered compromise judgment between security
20 interest enforcers as debt collectors for a
21 single subsection of the Act, and not for the
22 remainder, including the provisions at issue
23 here.

24 Petitioner's contrary position would
25 nullify that congressional judgment by

1 extending all of the Act's provisions to all
2 security interest enforcers, and his answer to
3 that is this increasingly narrowed category
4 that seems reverse-engineered to pick up only a
5 subset of repossession agents, which he says
6 saves the provision from superfluity. That
7 argument fails for two fundamental reasons.

8 First and foremost, it's not what the
9 statute says, and it's a highly unnatural way
10 to read the text if that's what Congress is
11 trying to do.

12 Congress used a well-understood,
13 familiar term, "enforcement of security
14 interests," which I think Petitioner concedes
15 in his reply brief and this morning that that
16 text does not naturally track this subset of
17 repossession agents. So, if Congress were
18 really trying to do what Petitioner suggests,
19 of just tacking on this small sliver of
20 repossession agents, it's a highly unnatural
21 way to go about it.

22 If instead, as we submit, Congress was
23 trying to preserve the existing distinction
24 between enforcing security interests and debt
25 collection and the practical difference between

1 those two -- because when you enforce a
2 security interest, you're not asking the debtor
3 to do anything -- if Congress was trying to
4 treat those two things separately, you would
5 expect it to write a statute along these lines.
6 The first --

7 JUSTICE KAVANAUGH: Not really. I
8 mean, this is a pretty unnatural way to do
9 that, too.

10 MR. BOND: So the language undoubtedly
11 could be clearer but what's, I think, comes
12 from the text is that Congress referred to
13 enforcement of security interests as a distinct
14 concept.

15 JUSTICE KAGAN: But just so I
16 understand the nature of your argument, I mean,
17 you could be saying, look, foreclosure
18 proceedings don't fall within the general
19 purpose definition. They only fall within the
20 limited purpose definition.

21 Or you could be saying, oh, gosh, we
22 have a funny statute here, they fit within
23 both, and now we have to figure out what to
24 make of that. So which argument are you
25 making?

1 MR. BOND: So I think -- the argument
2 that we're making is that Congress chose to
3 treat these two things separately.

4 JUSTICE KAGAN: No, but you're not
5 answering my question. Take just if you have
6 the general purpose provision itself, do you --
7 only, that's the only thing that the statute
8 says -- would foreclosure proceedings fit or
9 not?

10 MR. BOND: I think that's a -- it's a
11 very difficult question because you wouldn't
12 have text that speaks directly to it. And what
13 you would look at with just that definition is
14 the context, including the historical
15 definition -- or the historical distinction and
16 the practical difference between them.

17 So the question you would ask is, when
18 Congress used the phrase debt collection or
19 collection of any debt, did it mean to preserve
20 that distinction or sweep it aside and bring in
21 all of Article 9 of the UCC and state
22 foreclosure law.

23 CHIEF JUSTICE ROBERTS: It -- it -- it
24 didn't use that language, though, and it -- it
25 seems significant language on the first step of

1 Justice Kagan's question.

2 It said indirectly. And when you are
3 talking about collecting a debt indirectly,
4 well, what are other examples of collecting the
5 debt indirectly that would be better examples
6 than foreclosing on the -- on the mortgage?

7 MR. BOND: So I think fore -- indirect
8 debt collection would encompass things like
9 publishing notice that's not directed to the
10 debtor but intended to shame the debtor into
11 paying or trying to garnish his wages
12 informally by going to the employer.

13 There are other things in that
14 category. But at the end of the day we're not
15 here to argue about which reading of that first
16 sentence is better. We think each side has a
17 plausible reading of that first sentence.

18 But at the end of the day the second
19 sentence tells you how Congress viewed these.
20 And it chose to regulate security interest
21 enforcers separately.

22 And I think the second fundamental
23 problem with using repo to save this from
24 superfluity is that it doesn't actually do
25 that.

1 As Mr. Shanmugam was explaining and
2 some of the questions pointed out, repossession
3 or even this narrowed subset of repossession,
4 would constitute debt collection under
5 Petitioner's own broad reading of that indirect
6 clause. The whole point of repossession is to
7 take property to satisfy a debt. And when you
8 take someone's property --

9 JUSTICE SOTOMAYOR: I'm sorry, he --
10 he doesn't, because he says the creditor
11 doesn't care -- the repo man doesn't care about
12 the debt. He gets paid for taking the car.

13 And if the creditor gets the car, the
14 creditor exempted -- is exempted from the act
15 because he can -- he's legally entitled for his
16 debt not covered by the act to sell it.

17 MR. BOND: I think it --

18 JUSTICE SOTOMAYOR: And so I'm not
19 sure how you're right. The repo man is not
20 looking for the guy to sell. And I think even
21 Mr. Shanmugam said that if the repo guy said I
22 will wait to three hours, if you pay your debt
23 I won't take your car, that he could, in fact,
24 be a debt collector.

25 MR. BOND: So we agree on the last

1 point. We agree that if you engage in security
2 interest enforcement but then go further and
3 make threats or demand payment, then that's
4 debt collection. We agree with that much.

5 But what I think is not correct is the
6 idea that repossession is fundamentally
7 different. If you are taking property to be
8 used to satisfy a debt, it doesn't matter
9 whether you sell it or, indeed, whether anyone
10 sells it.

11 If Jones lends Smith 100 dollars and
12 then Smith can't pay and then Jones says, well,
13 I'll take your watch, that's debt collection
14 whether Jones keeps the watch for 80 years or
15 sells it the next day. The sale doesn't make a
16 difference.

17 And more importantly to the other
18 aspect of debt collection that Petitioner
19 highlights, the incentives that are created or
20 the message that's sent, surely with
21 repossession, that -- that would fall within
22 his general definition as well. The tow trucks
23 sends a powerful message that if you don't pay
24 you're not getting your car back.

25 So I think the consumer or the debtor

1 in Petitioner's view would equally get that
2 message that we must repay if I want my
3 property back. So on Petitioner's view, there
4 is no purpose at all for this second
5 definition.

6 I would like to touch on a few --

7 JUSTICE BREYER: Can I ask you one
8 question on what you mean? Imagine we have a
9 person just like this one, he's trying to
10 enforce a securities interest and he doesn't
11 ask for any deficiency payment.

12 All right. You say that falls within
13 the f(6) exclusion or that's part 2 that falls
14 in the -- all right. But if he goes further
15 and he says something more and he gets into 1,
16 but you're also worried about the state law.

17 And you don't want to create a
18 situation where the state law says go through
19 this procedure and they can't do it because of
20 this Act. What happens if the person is
21 exactly like this one, doesn't ask for a
22 deficiency payment, and then that does violate
23 some sections of this outside of f(6) and there
24 is no state law requiring it?

25 MR. BOND: So I think --

1 JUSTICE BREYER: So he -- there --
2 there is a state law for -- I guess here
3 requiring you to go to newspapers. There is a
4 state law requiring you to communicate.

5 Well, what happens in the government's
6 view, if it's just the same as here, but that
7 last mentioned state law requiring you to
8 advertise in newspapers, for example, doesn't
9 exist?

10 MR. BOND: So in that circumstance if
11 you're going beyond the procedures set forth in
12 state law to enforce a security interest --

13 JUSTICE BREYER: Yes.

14 MR. BOND: -- then you're not within
15 this part 2 definition. You are engaged in
16 debt collection.

17 JUSTICE BREYER: Well, that's the part
18 that puzzles me, because -- exactly what I
19 thought you would say, and can I -- can you
20 explain it a little, because if you're outside
21 of the main thing, part 1, and only covered by
22 f(6), because you did certain things, I want
23 the house, and I'm not saying anything about
24 deficiency, just what happened here, if you're
25 outside it for the instance where you get a

1 conflict with state law, why wouldn't you be
2 outside it for the instance where you don't get
3 a conflict with state law?

4 MR. BOND: So it's not about what
5 state law requires for its own sake. It's
6 about identifying what's within the four
7 corners of enforcement of a security interest,
8 the text Congress used.

9 And the best and at least the first
10 place to look are the procedures state law
11 outlines to do that.

12 JUSTICE BREYER: No, in other words,
13 you're saying if the state were exactly the
14 same, but it just didn't say anything about
15 newspapers, then his client would win?

16 MR. BOND: So I think that does
17 present a trickier question where --

18 JUSTICE BREYER: Why?

19 MR. BOND: -- where the state law --

20 JUSTICE BREYER: If they're out,
21 they're out. They're in, they're in. Their
22 behavior is identical.

23 MR. BOND: Because if the state law
24 proscribes the procedure that you're going
25 through, it's relatively easy for courts to

1 determine that what you are doing is enforcing
2 a security interest.

3 If you're doing something that state
4 law doesn't require then you have the more
5 difficult question of, under the general
6 definition, the first part 1 definition, does
7 this conduct constitute debt collection?

8 So if you engage in repossession or
9 any other enforcement of a security interest
10 but you also send a demand letter, that demand
11 letter is --

12 JUSTICE GORSUCH: Can I see if I under
13 -- I'm sorry.

14 JUSTICE KAGAN: Go ahead.

15 JUSTICE GORSUCH: I just want to make
16 sure I understand the answer. The -- the
17 statute uses the language primary purpose debt
18 collection, primary purpose security interest;
19 the sentences 1 and 3.

20 Are you saying that the test of a
21 bank's primary purpose is whether it's taking
22 an action necessary under state law to collect
23 on a security interest or to enforce a security
24 interest?

25 MR. BOND: So there are two separate

1 things here. To be a debt collector it has to
2 be your primary purpose under the part 2
3 definition.

4 JUSTICE GORSUCH: Right. But -- but
5 -- but in that third sentence it also uses that
6 language, primary purpose.

7 MR. BOND: Exactly right.

8 JUSTICE GORSUCH: Is your answer that
9 we determine that by reference to state law,
10 and what is mandated in order to collect on a
11 security interest or to enforce a security
12 interest?

13 MR. BOND: We -- we determine whether
14 what you're doing is security interest
15 enforcement by looking at state law, that's
16 right, to determine whether your steps, the
17 actions you've taken, are the things that are
18 set forth in state law.

19 JUSTICE GORSUCH: All right. I
20 understand. Thank you. I'm sorry for
21 interrupting.

22 JUSTICE KAGAN: Now, so if state law,
23 if a state's non-judicial foreclosure process
24 also allows the creditor to get a deficiency
25 judgment, what in your view follows from that?

1 MR. BOND: So I think you look to what
2 the creditor does. If the creditor brings a
3 judicial foreclosure action and seeks a
4 deficiency judgment -- if I may finish -- then
5 that conduct would be debt collection.

6 If the -- if the debt -- or the
7 creditor does not seek a deficiency judgment,
8 that's not debt collection. It's purely the
9 enforcement of a security interest.

10 CHIEF JUSTICE ROBERTS: Thank you,
11 counsel.

12 Three minutes, Mr. Geysler.

13 REBUTTAL ARGUMENT OF DANIEL L. GEYSER

14 ON BEHALF OF THE PETITIONER

15 MR. GEYSER: Thank you, Mr. Chief
16 Justice.

17 I'd like to start with 1692i because
18 we heard very little about it from the other
19 side. 1692i does not mention deficiency
20 judgments. Its plain text is targeting an
21 action to enforce an interest in real property
22 securing the consumer's obligation. That's a
23 foreclosure.

24 And it says specifically that this
25 applies to debt collectors under the main

1 definition who bring a legal action on a debt
2 against a consumer. It's a bit much to say
3 this is regulating debt collectors but not debt
4 collection when Congress is using that type of
5 language.

6 That's such a key point for us because
7 it shows that Congress understood that these
8 two categories from these two sentences are not
9 mutually exclusive. And the Court is right
10 that it is very odd to say that Congress would
11 have read language that clearly is an expansion
12 as an exclusion. That's not how Congress
13 drafts exclusions.

14 And they don't draft it in this
15 statute that way, which we know because they
16 have a series of exclusions that does not
17 include security enforcement.

18 My friend suggested that repo activity
19 is just a sliver. This is an entire industry.
20 And it's absolutely clear that a repossession
21 agent does not want to make any contact with
22 the consumer. That's their goal, because if
23 there's a breach of the piece, they can't take
24 the car and they don't get paid.

25 The government suggested that repo

1 activity is exactly the same as liquidating the
2 car. The problem with the government's
3 argument is they're focusing on the wrong
4 person.

5 1692a(6) has a specific focus on the
6 person and their individual activity. The repo
7 agent's role is limited in the process.
8 Chronologically, it comes before there is any
9 debt collection on the repossessed item because
10 it's a secured creditor after the fact that is
11 sending the notice and a secured creditor after
12 the fact that's selling the car, which makes it
13 different.

14 For the conflicts issue with state
15 law, the -- the conflicts here are not nearly
16 -- and first of all, there aren't actual
17 conflicts. They're not nearly as jarring as
18 this Court has adequately dealt in in Heinz
19 versus Jenkins when you have an entire state
20 court procedure and state court rules. When
21 you look to the real conflicts with the
22 publication notice, they're easily accounted
23 for by having the creditor send them or by
24 getting advanced consent from the consumer to
25 provide the necessary approval at the time of

1 the foreclosure, which other courts have looked
2 at.

3 And the position that we're taking has
4 been the rule in multiple jurisdictions now,
5 some for decades, including in Colorado for
6 half a -- for a quarter century. There has
7 been no demonstrated effect on any state law
8 foreclosure scheme.

9 Foreclosures are taking place
10 regularly. There's no actual proven injury to
11 the state's interest, which is probably why not
12 a single state showed up today with an amicus
13 brief, suggesting that this was somehow
14 offensive to their personal schemes.

15 If there are no further questions.

16 JUSTICE SOTOMAYOR: I'm assuming that
17 to the extent judicial foreclosures have been
18 viewed as debt collection, that whatever
19 conflicts have worked out there have also been
20 -- that have happened there have also been
21 worked out?

22 MR. GEYSER: Oh, absolutely, which is
23 why that it's -- it's very easy to accommodate
24 these interests. And, again, Congress
25 understood that in the foreclosure context, you

1 could have someone enforcing a security
2 interest and still qualify under the main
3 definition. Because it is additive language,
4 not exclusive language.

5 CHIEF JUSTICE ROBERTS: Thank you,
6 counsel.

7 MR. GEYSER: Thank you.

8 CHIEF JUSTICE ROBERTS: The case is
9 submitted.

10 (Whereupon, at 12:11 p.m., the case
11 was submitted.)

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Official - Subject to Final Review

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