

# SUPREME COURT OF THE UNITED STATES

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IN THE SUPREME COURT OF THE UNITED STATES

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DENNIS OBDUSKEY, )  
 )  
 ) Petitioner, )  
 )  
 ) v. ) No. 17-1307  
 )  
 ) McCARTHY & HOLTHUS LLP, )  
 )  
 ) Respondent. )  
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Pages: 1 through 73

Place: Washington, D.C.

Date: January 7, 2019

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IN THE SUPREME COURT OF THE UNITED STATES

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DENNIS OBDUSKEY, )

Petitioner, )

v. ) No. 17-1307

McCARTHY & HOLTHUS LLP, )

Respondent. )

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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. Geysler.

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  
22 natural 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 They worked pretty well.

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



1 Colorado law is illegal.

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

4 JUSTICE BREYER: No? Because?

5 MR. GEYSER: Well --

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

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

19 And when you actually dig into the  
20 weeds of those conflicts, they're not conflicts  
21 at all. They're very easy to accommodate. And  
22 if you want to walk through them, if you look  
23 at the notice on 1692g, that says that if the  
24 --

25 JUSTICE BREYER: You don't have to

1 walk through them if you don't want to. Just  
2 tell me where they are in your brief.

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

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

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

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

24 JUSTICE KAGAN: Mr. Geyser, I -- I  
25 find this a difficult question. Going back to

1 something that Justice Alito said, the reason I  
2 find it a difficult question is it seems to me  
3 that judicial foreclosures, non-judicial  
4 foreclosures, fall within both.

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

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

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

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

1 foreclosing on a mortgage.

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

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

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

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

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

1           And, again, when Congress wanted to  
2           exclude people, they did it expressly. And we  
3           know exactly how they did it because it follows  
4           the additional definition.

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

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

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

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

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

24          MR. GEYSER: Well, again, the -- the  
25          additional definition will cover people in it

1 who aren't just repossessing cars. It can also  
2 include someone who is separately collecting  
3 debts, because, again, you can fit under both  
4 -- under both sentences. There's nothing about  
5 the statute that says, if you fall within an  
6 additional category, that you're excluded from  
7 the main category. And Congress, again, they  
8 know how to write a statute that does that.  
9 This is statutory overlap. We see it all the  
10 time in the U.S. --

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

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

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

1 the car and go away.

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

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

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

21 MR. GEYSER: I -- I think -- I think  
22 there's a stark difference, Your Honor.

23 JUSTICE ALITO: What is the  
24 difference?

25 MR. GEYSER: Well, the difference is

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

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

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

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



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

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

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

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

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

22 MR. GEYSER: The -- the principal  
23 purpose is to enforce a security interest.  
24 When -- when the repo man is done and he  
25 delivers the car to the creditor's lot, he has

1 not obtained payment on the debt.

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

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

7 MR. GEYSER: Well --

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

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

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

1 isn't he exactly like the foreclosure expert?

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

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

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

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

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

1 indirectly seek payment.

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

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

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

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

1 now that you have it, you've got -- you have  
2 the car back, and then sending out a notice to  
3 the debtor and saying, if you don't pay, I'm  
4 going to sell the car.

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

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

10 JUSTICE KAVANAUGH: Right?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1 they're owed.

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

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

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

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

23 And it says, "without limiting the  
24 general applicability of the foregoing, without  
25 limiting that people who enforce debts,



1 security interests, the following conduct in  
2 addition is a violation of this section".

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

4 (Laughter.)

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

11 MR. GEYSER: Your Honor, I --

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

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

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

19 MR. GEYSER: It -- it is, Your Honor,  
20 but just to be candid, though, it is also  
21 including them only for the one subsection of  
22 1692.

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

1 MR. GEYSER: Exactly. And so -- but  
2 the reason that we brought up the repo example  
3 in our brief is to show that there -- there is  
4 an entire industry that clearly qualifies under  
5 the additional definition, without directly --

6 JUSTICE SOTOMAYOR: That -- that --

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

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

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

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

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

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

24 MR. GEYSER: Sure.

25 JUSTICE SOTOMAYOR: Why -- why are

1 they arguing that other unfair practices are  
2 not actionable when that sentence says it is to  
3 my mind?

4 MR. GEYSER: Yeah. Well --

5 JUSTICE SOTOMAYOR: What am I missing  
6 there?

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

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

18 If I could?

19 CHIEF JUSTICE ROBERTS: Thank you,  
20 counsel.

21 Mr. Shanmugam.

22 ORAL ARGUMENT OF KANNON K. SHANMUGAM

23 ON BEHALF OF THE RESPONDENT

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

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

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

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

15           JUSTICE SOTOMAYOR: Or to the creditor  
16 -- to the --

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

1 initiate the non-judicial foreclosure process.

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

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

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

21 CHIEF JUSTICE ROBERTS: Well, but in  
22 most cases -- well, maybe I'm wrong, I'm just  
23 assuming in most cases that if you start the  
24 foreclosure process, and the debtor comes in  
25 and says, okay, I see you're serious about

1 this, and, you know, either rearranges the  
2 financing or pays the debt, that's the purpose,  
3 right?

4 MR. SHANMUGAM: Well --

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

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

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

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

1 meaning of these terms.

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

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

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

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

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

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

1 foreclosure.

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

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

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

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

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



1           You -- you referred earlier to common  
2           sense. Well, common sense tells you this is an  
3           effort to have you repay the debt.

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

7           JUSTICE KAVANAUGH: Why not? Why not?

8           MR. SHANMUGAM: Well --

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

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

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

1 quite frequently in the four decades since the  
2 enactment of the Act.

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

10 And here --

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

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

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

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

1 collection of debts and the enforcement of  
2 security interests were distinct concepts.

3 JUSTICE ALITO: But what do you --

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

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

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

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

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

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

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

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

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

1 JUSTICE KAVANAUGH: But you're --

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

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

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

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

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

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

1           Let me give you an example. Let's say  
2           that Congress passed a statute that said that  
3           the Supreme Court shall have jurisdiction to  
4           review decisions of federal courts of appeals,  
5           and for purposes of reviewing capital cases,  
6           the Supreme Court also has jurisdiction to  
7           review decisions of the Court of Appeals for  
8           the Armed Forces.

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

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

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

24          It's -- it's not the way you would  
25          have told Congress to write this statute, or

1 your -- or your friend on the other side. It's  
2 a very circuitous way of getting to your  
3 result.

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

6 (Laughter.)

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

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

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

23 MR. SHANMUGAM: So I think, first, I  
24 would say that -- I don't think that you could  
25 say that debt collection is unambiguously so

1 expansive as to cover this situation.

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

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

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

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



1 within the limited purpose definition. And  
2 these are these repo agents who are  
3 non-communicative.

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

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

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

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

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

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

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

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

1 Act, you have to both be a debt collector and  
2 engaged in debt collection.

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

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

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

25 Now let me say just a word about f(6)

1 because I promised I was going to say something  
2 about that. That is the substantive provision  
3 that is incorporated and that applies to these  
4 limited purpose security interest enforcers.

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

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

22 And, Justice Sotomayor, in response to  
23 the concern that you raised at the end of  
24 Mr. Geysler's argument, I think what I would say  
25 is first that, again, the limited purpose

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

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

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

24 One of the characteristic features of  
25 a judicial foreclosure is the ability to seek a

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

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

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

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

24 JUSTICE SOTOMAYOR: -- more damage, I  
25 think, can be done in a non-judicial

1 foreclosure because there is no judge there to  
2 protect or review what's occurring. It -- I --  
3 I'm not sure.

4 MR. SHANMUGAM: Well, I --

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

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

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

23 JUSTICE SOTOMAYOR: Well, that --  
24 that's the problem with non-judicial  
25 foreclosure. There's no way to ignore that you

1 take the property to sell it to pay off a part  
2 or the whole of the debt.

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

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

10 JUSTICE SOTOMAYOR: So do foreclosure  
11 actions.

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

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

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



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

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

22           Instead, his submission is that, you  
23 know, there are other ways of dealing with  
24 this. A party could consent. A court could  
25 issue an order. And as we explain in our

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

7 CHIEF JUSTICE ROBERTS: Thank you.

8 MR. SHANMUGAM: And so --

9 CHIEF JUSTICE ROBERTS: Thank you,  
10 counsel.

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

13 CHIEF JUSTICE ROBERTS: Mr. Bond.

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

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

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

25 Petitioner's contrary position would

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

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

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

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

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

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

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

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

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

1 making?

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

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

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

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

24 CHIEF JUSTICE ROBERTS: It -- it -- it  
25 didn't use that language, though, and it -- it

1 seems significant language on the first step of  
2 Justice Kagan's question.

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

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

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

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

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

1 that.

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

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

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

18 MR. BOND: I think it --

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

1           MR. BOND: So we agree on the last  
2 point. We agree that if you engage in security  
3 interest enforcement but then go further and  
4 make threats or demand payment, then that's  
5 debt collection. We agree with that much.

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

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

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



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

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

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

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

1 MR. BOND: So I think --

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

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

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

14 JUSTICE BREYER: Yes.

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

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

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

5 MR. BOND: So it's not about what  
6 state law requires for its own sake. It's  
7 about identifying what's within the four  
8 corners of enforcement of a security interest,  
9 the text Congress used. And the best and at  
10 least the first place to look are the  
11 procedures state law 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 doesn't --

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

24 MR. BOND: Because, if the state law  
25 prescribes the procedure that you're going

1 through, it's relatively easy for courts to  
2 determine that what you are doing is enforcing  
3 a security interest.

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

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

13 JUSTICE KAGAN: What -- what -- what  
14 --

15 JUSTICE GORSUCH: Can I see if I under  
16 -- I'm sorry.

17 JUSTICE KAGAN: Go ahead.

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

23 Are you saying that the test of a  
24 bank's primary purpose is whether it's taking  
25 an action necessary under state law to collect

1 on a security interest or to enforce a security  
2 interest?

3 MR. BOND: So there are two separate  
4 things here. To be a debt collector, it has to  
5 be your primary purpose under the part 2  
6 definition.

7 JUSTICE GORSUCH: Right. But -- but  
8 -- but, in that third sentence, it also uses  
9 that language, primary purpose.

10 MR. BOND: Yes. Exactly right.

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

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

22 JUSTICE GORSUCH: All right. I  
23 understand. Thank you. I'm sorry for  
24 interrupting.

25 JUSTICE KAGAN: No, so if state law,

1 if a state's non-judicial foreclosure process  
2 also allows the creditor to get a deficiency  
3 judgment, what in your view follows from that?

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

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

13 CHIEF JUSTICE ROBERTS: Thank you,  
14 counsel.

15 Three minutes, Mr. Geysler.

16 REBUTTAL ARGUMENT OF DANIEL L. GEYSER

17 ON BEHALF OF THE PETITIONER

18 MR. GEYSER: Thank you, Mr. Chief  
19 Justice.

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

1 foreclosure.

2           And it says specifically that this  
3 applies to debt collectors under the main  
4 definition who bring a legal action on a debt  
5 against a consumer. It's a bit much to say  
6 this is regulating debt collectors but not debt  
7 collection when Congress is using that type of  
8 language.

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

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

21           My friend suggested that repo activity  
22 is just a sliver. This is an entire industry.  
23 And it's absolutely clear that a repossession  
24 agent does not want to make any contact with  
25 the consumer. That's their goal, because, if

1 there's a breach of the peace, they can't take  
2 the car and they don't get paid.

3 The government suggested that repo  
4 activity is exactly the same as liquidating the  
5 car. The problem with the government's  
6 argument is they're focusing on the wrong  
7 person.

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

17 For the conflicts issue with state  
18 law, the -- the conflicts here are not nearly  
19 -- and, first of all, there aren't actual  
20 conflicts. They're not nearly as jarring as  
21 this Court has adequately dealt with in Heinz  
22 versus Jenkins when you have an entire state  
23 court procedure and state court rules. When  
24 you look to the real conflicts with the  
25 publication notice, they're easily accounted



1 for by having the creditor send them or by  
2 getting advanced consent from the consumer to  
3 provide the necessary approval at the time of  
4 the foreclosure, which other courts have looked  
5 at.

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

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

18 If there are no further questions.

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

25 MR. GEYSER: Oh, absolutely, which is

1     why that it's -- it's very easy to accommodate  
2     these interests.  And, again, Congress  
3     understood that, in the foreclosure context,  
4     you could have someone enforcing a security  
5     interest and still qualify under the main  
6     definition, because it is additive language,  
7     not exclusive language.

8                   CHIEF JUSTICE ROBERTS:  Thank you,  
9     counsel.

10                   MR. GEYSER:  Thank you.

11                   CHIEF JUSTICE ROBERTS:  The case is  
12     submitted.

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

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## Official - Subject to Final Review

<b>\$</b>	<b>accompanied</b> <sup>[1]</sup> 53:8	<b>application</b> <sup>[1]</sup> 12:19	<b>69:4</b>
<b>\$100</b> <sup>[1]</sup> 63:12	<b>accord</b> <sup>[1]</sup> 37:11	<b>applies</b> <sup>[11]</sup> 9:3,9 <b>10:25 12:22,23</b> 17:16 27:20 51:3 52:4,18 70:3	<b>both</b> <sup>[9]</sup> 7:23 <b>12:23 14:10 15:11 18:</b> 4 21:3,4 50:1 59:24
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<b>1</b> <sup>[10]</sup> 13:4,4 <b>14:5,20,24 52:18 64:</b> 16 65:22 67:7,22	<b>Act</b> <sup>[14]</sup> 3:12 <b>5:23 23:21 34:12 35:</b> 21 41:2,25 50:1,24 53:16 57:22	<b>appreciate</b> <sup>[1]</sup> 9:22	<b>breach</b> <sup>[1]</sup> 71:1
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