No.

In the Supreme Court of the United States

DNF ASSOCIATES, LLC, PETITIONER

v.

JILLIAN MCADORY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a passive debt buyer—an entity that purchases defaulted debts for its own account, refers the debts to third parties that perform collection, and does not itself communicate with the debtors—is a debt collector for purposes of the Fair Debt Collection Practices Act.

CORPORATE DISCLOSURE STATEMENT

Petitioner DNF Associates, LLC, is wholly owned by Diverse Funding Associates, LLC. Diverse Funding Associates, LLC, has no parent corporation, and no publicly held company owns 10% or more of its stock.

RELATED PROCEEDINGS

United States District Court (D. Or.):

McAdory v. *M.N.S. & Associates, LLC*, Civ. No. 17-777 (Nov. 3, 2017) (order on motion to dismiss)

McAdory v. *M.N.S. & Associates, LLC*, Civ. No. 17-777 (Mar. 11, 2018) (order on motion to amend, construed as motion for reconsideration)

United States Court of Appeals (9th Cir.):

McAdory v. *M.N.S. & Associates, LLC*, No. 18-35923 (Mar. 9, 2020)

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PETITION FOR A WRIT OF CERTIORARI

DNF Associates, LLC, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-33a) is reported at 952 F.3d 1089. The opinions of the district court (App., *infra*, 34a-45a, 46a-55a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 9, 2020. A petition for rehearing was denied on April 24, 2020 (App., *infra*, 56a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISION INVOLVED

Section 1692a of Title 15 of the United States Code provides in relevant part:

> (4) The term "creditor" means any person who offers or extends credit creating a debt or to whom a debt is owed, but such term does not include any person to the extent that he receives an assignment or transfer of a debt in default solely for the purpose of facilitating collection of such debt for another.
>
> * * *
>
> (6) The term "debt collector" means any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the collection of any debts, or who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another. Notwithstanding the exclusion provided by clause (F) of the last sentence of this paragraph, the term includes any creditor who, in the process of collecting his own debts, uses any name other than his own which would indicate that a third person is collecting or attempting to collect such debts. For the purpose of section 1692f(6) of this title, such term also includes any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the enforcement of security interests. The term does not include—
>
> (A) any officer or employee of a creditor while, in the name of the creditor, collecting debts for such creditor;

(B) any person while acting as a debt collector for another person, both of whom are related by common ownership or affiliated by corporate control, if the person acting as a debt collector does so only for persons to whom it is so related or affiliated and if the principal business of such person is not the collection of debts;

(C) any officer or employee of the United States or any State to the extent that collecting or attempting to collect any debt is in the performance of his official duties;

(D) any person while serving or attempting to serve legal process on any other person in connection with the judicial enforcement of any debt;

(E) any nonprofit organization which, at the request of consumers, performs bona fide consumer credit counseling and assists consumers in the liquidation of their debts by receiving payments from such consumers and distributing such amounts to creditors; and

(F) any person collecting or attempting to collect any debt owed or due or asserted to be owed or due another to the extent such activity (i) is incidental to a bona fide fiduciary obligation or a bona fide escrow arrangement; (ii) concerns a debt which was originated by such person; (iii) concerns a debt which was not in default at the time it was obtained by such person; or (iv) concerns a debt obtained by such person as a secured party in a commercial credit transaction involving the creditor.

STATEMENT

This case presents an important and recurring question of statutory interpretation under the Fair Debt Collection Practices Act (FDCPA), which regulates the actions of debt collectors in their interactions with consumers. The FDCPA defines a "debt collector," *inter alia*, as any entity engaged in "any business the principal purpose of which is the collection of any debts," or any entity that "regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another." 15 U.S.C. 1692a(6). In *Henson* v. *Santander Consumer USA Inc.*, 137 S. Ct. 1718 (2017), this Court held that an entity that buys debts for its own account and then attempts to collect those debts is not a "debt collector" under the "regularly collects" prong of that definition. See *id.* at 1721-1722. The question presented here is whether a passive debt buyer—an entity that purchases debts for its own account but then refers those debts to third parties that perform collection—nevertheless qualifies as a "debt collector" under the FDCPA.

Petitioner is a passive debt buyer that does not itself undertake any debt-collection activity. Consistent with its ordinary practice, petitioner purchased respondent's debt and subsequently referred it to a third party to perform collection. The third party communicated with respondent in an effort to collect the debt; petitioner did not itself communicate or otherwise interact with respondent.

Respondent sued petitioner and the third-party debt collector. She alleged that the third-party debt collector had violated the FDCPA by providing inadequate and misleading information in a voicemail message and by prematurely withdrawing funds from her account. Respondent further alleged that petitioner could be held vicariously liable for those violations as a "debt collector" under the FDCPA.

As is relevant here, the district court granted petitioner's motion to dismiss, reasoning that petitioner was not a "debt collector" under the FDCPA because it has no interaction with debtors and does not itself collect on the debts it purchases. But a divided panel of the Ninth Circuit reversed. Over a dissent from Judge Bea, the majority adopted the reasoning of a recent Third Circuit decision relying on abrogated pre-*Henson* circuit precedent to hold that an entity that purchases debts and refers them to a third party that performs collection satisfies the "principal purpose" prong of the "debt collector" definition simply because it profits from the collection of debts.

As Judge Bea explained, however, that interpretation of the FDCPA is plainly incorrect. Refusing to recognize that this Court in *Henson* had rejected the framework on which the Third Circuit's earlier precedent was based, the Ninth Circuit adopted a tortured reading of the "principal purpose" definition that cannot be reconciled with the statute's plain text. As Judge Bea correctly noted, that reading rests on a "simple grammatical error," which "has now toppled two United States Courts of Appeals." App., *infra*, 22a. Numerous lower courts, including at least one state court of last resort, have reached a contrary conclusion, and the question presented is currently pending in at least one other federal court of appeals. The question presented also squarely implicates a broader circuit conflict concerning whether the terms "creditor" and "debt collector" are mutually exclusive under the FDCPA. Because the Ninth Circuit issued an erroneous decision on an important question of federal law that circumvents this Court's decision in *Henson*; because that question is plainly a recurring one; and because this case is an ideal vehicle in which to address the question presented, the petition for a writ of certiorari should be granted.

A. Background

1. Congress enacted the FDCPA in 1977 in response to the use of "abusive, deceptive, and unfair debt collection practices by many debt collectors." 15 U.S.C. 1692(a); see Pub. L. No. 95-109, 91 Stat. 874 (1977). At the time, Congress recognized that "debt collection abuse by third party debt collectors" had become a "widespread and serious national problem." S. Rep. No. 382, 95th Cong., 1st Sess. 2, 3 (1977). In enacting the FDCPA, Congress sought to protect consumers against wayward collection practices, such as the use of "obscene or profane language, threats of violence, telephone calls at unreasonable hours, * * * impersonating public officials and attorneys, and simulating legal process." *Id.* at 2; see *Henson*, 137 S. Ct. at 1720.

In the FDCPA, Congress proscribed certain practices by a targeted group of "debt collector[s]." 15 U.S.C. 1692(e). The FDCPA defines a "debt collector" as any person who falls into one of three categories. First, the FDCPA reaches any entity that is engaged in "any business the principal purpose of which is the collection of any debts." 15 U.S.C. 1692a(6). Second, the FDCPA reaches any person who "regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another." *Ibid.* And third, the FDCPA reaches "any creditor who, in the process of collecting his own debts, uses any name other than his own which would indicate that a third person is collecting or attempt to collect such debts." *Ibid.* A "creditor," in turn, is "any person who offers or extends credit creating a debt or to whom a debt is owed." 15 U.S.C. 1692a(4).

The FDCPA's substantive provisions regulate the conduct of "debt collectors" in their interactions with consumer debtors. For example, the FDCPA prohibits debt collectors from using "any false, deceptive, or misleading

representation or means in connection with the collection of any debt," 15 U.S.C. 1692e, and from using "unfair or unconscionable means to collect or attempt to collect any debt," 15 U.S.C. 1692f. Each of those provisions proscribes a host of specific practices. The FDCPA also prohibits debt collectors from communicating with consumers at particular times or places or in particular manners, see 15 U.S.C. 1692c, 1692d, and from more generally "engag[ing] in any conduct the natural consequence of which is to harass, oppress, or abuse any person in connection with the collection of a debt," 15 U.S.C. 1692d. The FDCPA also imposes specific requirements, including requiring a debt collector to notify a consumer that it will provide a verification of the debt upon written request from the consumer. See 15 U.S.C. 1692g(a)(4).

2. At the time of the FDCPA's enactment, a substantial market for defaulted debt did not exist. See *Henson*, 137 S. Ct. at 1724-1725. Over the last 40 years, however, that market has grown considerably. See CFPB, *Fair Debt Collection Practices Act: CFPB Annual Report 2014*, at 7 (Mar. 2014) <tinyurl.com/cfpbreport2014>. Some debt buyers are active, in that they take steps to collect the purchased debt themselves; others, such as petitioner, are passive, referring the debts to third parties to handle the actual collection. See *ibid.*

Questions have arisen as to the application of the FDCPA to the debt-buying industry. Before this Court's decision in *Henson*, several courts of appeals had held that a debt buyer that purchased debts for its own account was a "debt collector" under the FDCPA, regardless of whether it proceeded to collect the debts itself. See, *e.g.*, *Bridge* v. *Ocwen Federal Bank, FSB*, 681 F.3d 355, 359 (6th Cir. 2012); *Ruth* v. *Triumph Partnerships*, 577 F.3d 790, 796-797 (7th Cir. 2009); *Pollice* v. *National Tax Funding, L.P.*, 225 F.3d 379, 403 (3d Cir. 2000). Those

courts adopted a default-based test to assess "debt collector" status, holding that an entity that purchased a debt in default was only a "debt collector" under the FDCPA, whereas an entity that purchased a debt not yet in default was only a "creditor," based on a negative inference drawn from a statutory exclusion for those collecting debts "owed or due another" that were "not in default" when they were "obtained by such person." 15 U.S.C. 1692a(6)(F).

For example, in *Pollice*, *supra*, the Third Circuit applied the default-based test to hold that a passive debt buyer that had purchased defaulted debt was a "debt collector," not a "creditor," under the FDCPA. See 225 F.3d at 403-404. In concluding that the "principal purpose" prong of the definition was satisfied, the court presupposed the validity of the default-based test; it explained that an entity that "exists solely for the purpose" of holding defaulted debts is an entity whose "principal purpose" is "the 'collection of any debts,' namely, *defaulted obligations* which it purchases." *Id.* at 404 & n.27 (emphasis added).

In *Henson*, this Court emphatically rejected that approach. The Court reasoned that, while the statutory definition of "debt collector" "excludes * * * certain persons who acquire a debt before default," it does not follow that the definition *includes* everyone who purchases debt *after* default. 137 S. Ct. at 1724. Interpreting the "regularly collects" prong of the definition, the Court ultimately held that an entity that purchases debts for its own account, and then itself collects those debts, does not qualify as a "debt collector." *Id.* at 1721-1722. "All that matters," the Court reasoned, "is whether the target of the lawsuit regularly seeks to collect debts for its own account or does so for 'another.'" *Id.* at 1721.

In so holding, the Court rejected as "speculat[ive]" the suggestion that, if Congress had foreseen the emergence of the debt-buying industry, it "would have judged defaulted debt purchasers" to be akin to third-party debt collectors in need of legal "incentives" to treat customers well. *Henson*, 137 S. Ct. at 1724-1725. Noting that Congress had "never faced" the question, the Court observed that Congress could have decided to view "defaulted debt purchasers" "more like loan originators than independent debt collection agencies." *Id.* at 1725. The Court stressed that it is the job of Congress to "reenter the field" and make judgments in response to emerging business models. *Id.* at 1725-1726.

The Court also "spott[ed]" the argument that, under the FDCPA, "a person cannot be both a creditor and a debt collector with respect to a particular debt." *Henson*, 137 S. Ct. at 1724. But the Court ultimately left that question unresolved. See *ibid.*

B. Facts And Procedural History

1. Petitioner is a passive debt buyer that purchases defaulted consumer debts—*i.e.*, accounts on which a consumer has stopped paying the debt owed. Petitioner does not itself engage in any debt-collection activity: after purchasing the debt, petitioner instead refers the debts to third-party servicers, which then take their own steps to collect the debts. App., *infra*, 51a.

Respondent is an individual who did not pay a debt owed to a jeweler for the purchase of jewelry. Petitioner purchased the unpaid debt from the jeweler, then referred the debt to third parties, including M.N.S. Associates, LLC, to perform collection. As is relevant here, M.N.S. Associates left respondent a voicemail in an effort to collect the debt. Respondent returned that call and

later agreed to pay the debt. M.N.S. Associates sent respondent a settlement agreement and withdrew the funds from respondent's bank account. Petitioner never communicated or otherwise interacted with respondent. App., *infra*, 2a-3a, 47a, 51a.

2. Respondent later filed suit in the United States District Court for the District of Oregon against M.N.S. Associates and petitioner. In her complaint, as amended, respondent alleged that M.N.S. Associates had violated the FDCPA by providing inadequate and misleading information in its voicemail message and by prematurely withdrawing funds from her account. Respondent did not allege that petitioner had itself violated the FDCPA, but instead asserted that petitioner was vicariously liable for M.N.S. Associates' FDCPA violations on the premise that petitioner was a debt collector under the "principal purpose" prong of the FDCPA's definition of "debt collector." App., *infra*, 3a, 47a.

Petitioner filed a motion to dismiss for failure to state a claim. Petitioner argued that it was not a "debt collector" under the "principal purpose" prong of the statutory definition because it had not taken any affirmative action to collect on the debt it owns. D. Ct. Dkt. 18, at 8-9; D. Ct. Dkt. 21, at 4-7. In response, respondent argued that it had adequately alleged that petitioner's principal purpose was debt collection because petitioner derives most of its income from hiring third parties to collect debt on its behalf. D. Ct. Dkt. 20, at 8-9, 21-24.

The district court granted petitioner's motion to dismiss, adopting petitioner's interpretation of the FDCPA's "principal purpose" definition of a "debt collector." App., *infra*, 46a-55a. It concluded that petitioner was not a "debt collector" because "[d]ebt purchasing companies like [petitioner] who have no interactions with debtors and merely contract with third parties to collect on the debts

they have purchased simply do not have the principal purpose of collecting debts." *Id.* at 52a. The court reasoned that, although petitioner "*benefits* from the collection of debt" it purchases, the collection could not be considered "the most important or influential purpose" of petitioner's business because it was completed by an "entirely separate third party." *Ibid.* The court also emphasized that the behavior Congress intended to regulate was "the *interaction* between a debt collector and a consumer," and that there was no such interaction between petitioner and respondent. *Id.* at 52a-53a.

Respondent then moved for leave to file an amended complaint, seeking to add allegations that petitioner held state "debt collector" licenses and had hired law firms to file debt-collection lawsuits. The district court denied the motion. App., *infra*, 34a-45a. The court clarified that it had already dismissed petitioner from the lawsuit with prejudice and thus construed the motion as a motion for reconsideration. *Id.* at 35a. In any event, the court explained that neither of the proposed additions would alter the court's reasoning in dismissing petitioner. *Id.* at 37a.

Respondent moved for entry of a separate final judgment as to petitioner pursuant to Federal Rule of Civil Procedure 54(b). The district court granted that motion, allowing respondent to seek immediate review of the court's dismissal of petitioner, on the ground that "[t]he legal issue of [petitioner's] debt collector status is a close one with courts around the country issuing conflicting decisions." D. Ct. Dkt. 43, at 9.

3. A divided panel of the court of appeals reversed. App., *infra*, 1a-33a.

a. The court of appeals deemed this Court's reasoning in *Henson* to be irrelevant to its analysis of the "principal purpose" prong of the "debt collector" definition. App., *infra*, 13a. It instead adopted the rationale of the

Third Circuit's decision in *Barbato* v. *Greystone Alliance, LLC*, 916 F.3d 260, cert. denied, 140 S. Ct. 245 (2019), which had relied heavily on pre-*Henson* precedent employing the default-based test. App., *infra*, 9a-12a; see *Barbato*, 916 F.3d at 265-269. Following *Barbato*, the court of appeals construed the "collection" of debts to include not just overt acts of collection but also the broader category of "*what* is collected" (*i.e.*, the acquired debts). App., *infra*, 9a (quoting *Barbato*, 916 F.3d at 267). So understood, the court reasoned, the noun "collection" in the "principal purpose" prong has a broader reach than the verb "to collect" in the "regularly collects" prong. *Ibid.* (quoting *Barbato*, 916 F.3d at 267-268). Based on that more expansive understanding of the noun "collection," the court of appeals concluded that "indirect" debt collection by others is covered by the "principal purpose" prong of the definition of "debt collector"—even though, unlike the "regularly collects" prong, it does not expressly provide for collecting debts "indirectly." *Id.* at 9a-11a.

The court of appeals also rejected petitioner's argument, based on the legislative history, that Congress did not intend to cover passive debt buyers that do not interact with consumers. The court noted that Congress intended to regulate abusive practices by debt collectors who, unlike a "traditional creditor," lack "incentives" to "cultivate good will" with consumers. App., *infra*, 11a-12a (quoting *Barbato*, 916 F.3d at 268-269). The court viewed its interpretation of the "principal purpose" prong as consistent with that intent because passive debt buyers, who profit from debt collection by others, "lack market incentives that deter the sort of abusive debt collection practices Congress was motivated to regulate." *Ibid.*

The court of appeals also rejected petitioner's argument that it could not constitute a "debt collector" under the FDCPA because it is a "creditor" under the statute,

citing prior circuit precedent that had "rejected a per se rule" that the terms "creditor" and "debt collector" are mutually exclusive. App., *infra*, 14a. The court of appeals also noted that this Court in *Henson* had declined to adopt a mutual-exclusivity rule. *Ibid.*

The court of appeals expressed no view as to whether petitioner could be held vicariously liable for M.N.S. Associates' actions, other than that respondent had expressly waived the argument that petitioner could be held vicariously liable if it were *not* deemed a "debt collector" under the FDCPA. App., *infra*, 14a.

b. Judge Bea dissented. App., *infra*, 15a-33a. He criticized the majority's approach as resting on a "simple grammatical error," which "has now toppled two United States Courts of Appeals." *Id.* at 22a. That "flawed grammatical analysis," Judge Bea explained, was based on "a simple misunderstanding of the way words work"—namely, an erroneous assumption that a noun (here, "collection") cannot refer to an action. *Id.* at 21a-24a.

Judge Bea took the view that the use of the noun "collection" over the verb "collects" provides no insight into the proper interpretation of the "principal purpose" prong, because the noun "collection" can mean either "that which is collected" (a thing) or "the act or process of collection" (an action). App., *infra*, 24a. And in the context of the FDCPA, Judge Bea explained, "the most straightforward definition" of the noun "collection" was "the act or process of collecting." *Id.* at 24a-28a. Judge Bea thus concluded that the "principal purpose" prong refers to entities that, unlike petitioner, have as their "principal purpose" an "act or process of collecting" any debts. *Id.* at 27a-28a.

Judge Bea called the majority's contrary interpretation "absurd," because it entailed the conclusion that petitioner's principal purpose was to maintain a "collection"

of debts. App., *infra*, at 25a-26a. While the majority had acknowledged that a business that acquires a "collection" of debts without obtaining their payment "would soon go out of business," Judge Bea noted, it nevertheless "insist[ed] that the statute seeks to encompass these nonexistent business models." *Id.* at 26a.

Judge Bea also drew attention to the internal inconsistency within the majority's reasoning: although it defined "collection" as referring to "that which is collected," its subsequent analysis conceded that "it is ultimately a business's action or activity that brings the purported debt collectors into the realm of the statute." App., *infra*, at 27a. "Put differently," Judge Bea explained, "even while espousing the significance of Congress's employment of 'collection' as a noun," the majority and the *Barbato* court "acknowledge[d] that it is of course the *act* of *collecting* (used there in the present participle form of a verb) that the FDCPA's 'principal purpose' prong seeks to capture." *Id.* at 26a-27a.

Judge Bea further criticized the majority's interpretation as rendering superfluous the statute's clarification that the "regularly collects" prong applies to debt collection actions taken either "directly or indirectly" by effectively reading that same phrase into the "principal purpose" prong. App., *infra*, 28a-30a. Given Congress's intent to regulate "interactions" between consumers and debt collectors, Judge Bea reasoned, "we ought to expect an express statement from Congress when the FDCPA's restrictions apply to a business that merely collects debt 'indirectly' "—which is "exactly what we find in the 'regularly collects' prong, and exactly what is absent in the 'principal purpose' prong." *Id.* at 30a.

In addition, Judge Bea concluded that, regardless of how "collection" is construed, respondent had not adequately alleged facts showing that the collection of

debts—as opposed to buying debts at a discounted price—is petitioner's *principal* purpose. App., *infra*, 18a-20a. He further noted that, if respondent had not waived the argument that petitioner could be held vicariously liable regardless of whether it is a debt collector under the FDCPA, the majority could have simply addressed vicarious liability. *Id.* at 15a-17a, 31a-33a. Instead, the majority had "distort[ed] the statute with erroneous grammatical distinctions." *Id.* at 31a.

4. The court of appeals denied petitioner's petition for rehearing. App., *infra*, 56a.

REASONS FOR GRANTING THE PETITION

In the decision below, the Ninth Circuit joined the Third Circuit in making an end run around this Court's decision in *Henson* v. *Santander Consumer USA Inc.*, 137 S. Ct. 1718 (2017), deeming a passive debt buyer a "debt collector" under the FDCPA. That decision cannot be reconciled with *Henson*; it conflicts with the decisions of numerous lower courts; and it is profoundly wrong as a matter of statutory interpretation. Because the question presented is exceptionally important and frequently recurring, and because this case presents an optimal vehicle for resolving it, the petition for writ of certiorari should be granted.

A. The Decision Below Cannot Be Reconciled With This Court's Decision In *Henson* v. *Santander Consumer USA* Or The Decisions Of Numerous Lower Courts

1. The decision below flouts this Court's recent decision in *Henson*, effectively reinstating the framework that the Court rejected there.

In the decision below, the Ninth Circuit expressly adopted the rationale of the Third Circuit's decision in *Barbato* v. *Greystone Alliance, LLC*, 916 F.3d 260, cert. denied, 140 S. Ct. 245 (2019), which had relied heavily on

pre-*Henson* circuit precedent. App., *infra*, 9a-10a; see *Barbato*, 916 F.3d at 266-267. That pre-*Henson* precedent had held that a passive debt buyer was a "debt collector" under the FDCPA because the debts at issue were in default when the debt buyer had purchased them. See, *e.g.*, *Pollice* v. *National Tax Funding, L.P.*, 225 F.3d 379, 403-404 (3d Cir. 2000). In *Henson*, however, this Court emphatically rejected the default-based test, reasoning that, while the statute "excludes from the debt collector definition certain persons who acquire a debt before default," it does not follow that the definition *includes* everyone who purchases debt *after* default. 137 S. Ct. at 1724.

Nevertheless, in the decision below, the Ninth Circuit deemed the Court's reasoning in *Henson* to be irrelevant to its analysis of the "principal purpose" prong of the "debt collector" definition. App., *infra*, 13a. And in adopting the Third Circuit's interpretation of that prong, the Ninth Circuit completely ignored the fact that the Third Circuit had arrived at that interpretation because it continued to find the "logic" of its pre-*Henson* precedent persuasive—even though that logic had been explicitly rejected by this Court in *Henson*. See *Barbato*, 916 F.3d at 266-267.

The Ninth Circuit threw more shade on *Henson* by relying on precisely the sort of policy-driven analysis that this Court there rejected. The Ninth Circuit engaged in "speculation" about how the 1977 Congress might have acted if it had considered a question it "never faced": namely, how to regulate a debt-buying industry that did not exist at the time of the FDCPA's enactment. *Henson*, 137 S. Ct. at 1725. Specifically, the Ninth Circuit reasoned that the 1977 Congress's intent would be advanced by recognizing passive debt buyers as "debt collectors," noting that passive debt buyers "lack market incentives that deter the sort of abusive debt collection practices Congress

was motivated to regulate." App., *infra*, 11a-12a. But that is precisely the sort of argument about a debt buyer's "incentives" that this Court refused to credit in *Henson*; the Court explained that "reasonable legislators" could have concluded that "defaulted debt purchasers should be treated more like loan originators than independent debt collection agencies," and it further noted that no statute "pursues its stated purpose at all costs." 137 S. Ct. at 1724-1725 (alterations and citation omitted).

Although the Ninth Circuit acknowledged the fact of this Court's decision in *Henson*, see App., *infra*, 13a, its reasoning is flatly inconsistent with it. Further review is warranted on that basis alone.

2. Beyond its inconsistency with this Court's decision in *Henson*, the decision below perpetuates a conflict among the lower courts.

a. In *Dorrian* v. *LVNV Funding, LLC*, 94 N.E.3d 370 (2018), the Massachusetts Supreme Judicial Court interpreted the FDCPA in way that is contrary to that of the Third Circuit and Ninth Circuit. That case concerned whether a passive debt buyer qualified as a "debt collector" under the Massachusetts Fair Debt Collection Practices Act, a statute modeled on the FDCPA that defines "debt collector" in "substantively the same" way. *Id.* at 372. Looking to the FDCPA, the court reasoned that Congress "did not consider passive debt buyers" and was instead focused on "the regulation of improper, high pressure, deceptive debt collection practices." *Id.* at 376-377 (citing *Henson*, 137 S. Ct. at 1720). Because a passive debt buyer has "no contact whatsoever with debtors," the court concluded that it was not a "debt collector" under the "principal purpose" prong of the definition of the FDCPA (and thus also under the corresponding state-law definition). *Id.* at 377-378.

b. Multiple federal district courts have held that a passive debt buyer does not qualify as a "debt collector" under the "principal purpose" prong of the FDCPA's definition. See, *e.g.*, *Schneider* v. *JTM Capital Management, LLC*, Civ. No. 16-2057, 2018 WL 2276238, at *5 (D. Or. Mar. 22, 2018); *Gold* v. *Midland Credit Management, Inc.*, 82 F. Supp. 3d 1064, 1072 (N.D. Cal. 2015); *Kasalo* v. *Trident Asset Management, LLC*, 53 F. Supp. 3d 1072, 1078-1079 (N.D. Ill. 2014).* In addition, an appeal from a district-court decision reaching the contrary conclusion is currently pending in the Eighth Circuit. See *Reygadas* v. *DNF Associates LLC*, No. 19-3167 (argued June 18, 2020).

3. The decision below also implicates a broader circuit conflict on whether the terms "creditor" and "debt collector" are mutually exclusive under the FDCPA. In *Henson*, the Court "spott[ed]" the argument that, under the FDCPA, "a person cannot be both a creditor and a debt collector with respect to a particular debt." *Henson*, 137 S. Ct. at 1724. But the Court ultimately left that question unresolved. See *ibid.* A passive debt buyer is plainly a "creditor" inasmuch as it is an entity "to whom a debt is owed." 15 U.S.C. 1692a(4). The only question, then, is

* While other district courts have reached the contrary conclusion, most of those courts have relied on the Third Circuit's decision in *Barbato*. See, *e.g.*, *Wright* v. *AR Resources, Inc.*, Civ. No. 20-985, 2020 WL 4428477, at *4 (M.D. Fla. July 31, 2020); *Rivas* v. *Midland Funding LLC*, 398 F. Supp. 3d. 1294, 1302-1303 (S.D. Fla. July 31, 2019), appeal pending, No. 19-13383 (11th Cir.); *Reygadas* v. *DNF Associates LLC*, Civ. No. 18-2184, 2019 WL 2146603, at *2 (W.D. Ark. May 16, 2019), appeal pending, No. 19-3167 (8th Cir.); *Arango* v. *GMA Investments, LLC*, Civ. No. 18-9813, 2019 WL 1916202, at *2 (D.N.J. Apr. 30, 2019); *Long* v. *Pendrick Capital Partners II, LLC*, Civ. No. 17-1955, 2019 WL 1255300, at *13-*14 (D. Md. Mar. 18, 2019); *Mullery* v. *JTM Capital Management, LLC*, Civ. Nos. 18-549 & 18-566, 2019 WL 2135484, at *3 (W.D.N.Y. May 16, 2019).

whether a passive debt buyer *also* qualifies as a "debt collector." It cannot so qualify if the terms "creditor" and "debt collector" are mutually exclusive.

The Third Circuit and Ninth Circuit have held that the terms "creditor" and "debt collector" are not mutually exclusive. See *Tepper* v. *Amos Financial, LLC*, 898 F.3d 364, 371 (3d Cir. 2018); *Schlegel* v. *Wells Fargo Bank, NA*, 720 F.3d 1204, 1208 n.2 (9th Cir. 2013). Indeed, those precedents formed an essential premise of the Third Circuit's decision in *Barbato* and the decision below, respectively. See 916 F.3d at 266; App., *infra*, 13a-14a.

The D.C. Circuit, the Sixth Circuit, and the Seventh Circuit, by contrast, have held that the terms "creditor" and "debt collector" are mutually exclusive. See *Bank of New York Mellon Trust Co.* v. *Henderson*, 862 F.3d 29, 34 (D.C. Cir. 2017); *Bridge* v. *Ocwen Federal Bank, FSB*, 681 F.3d 355, 359 (6th Cir. 2012); *McKinney* v. *Cadleway Properties, Inc.*, 548 F.3d 496, 498 (7th Cir. 2008). If this case had been litigated in one of those circuits, petitioner would not have been deemed a "debt collector" for the simple reason that it is indisputably a "creditor." See, *e.g.*, *Washington* v. *Weinberg Mediation Group, LLC*, ___ F. Supp. 3d ___, Civ. No. 18-2208, 2020 WL 4462867, at *2 (N.D. Ohio June 22, 2020). This case presents the Court with an opportunity to resolve that broader conflict as well.

* * * * *

In short, the decision below cannot be reconciled with *Henson* and conflicts with the decisions of numerous lower courts. This Court's review is urgently needed.

B. The Decision Below Is Erroneous

The Ninth Circuit's decision—and the approach to statutory interpretation that it reflects—is deeply flawed. The Ninth Circuit plainly erred in concluding that a passive debt buyer qualifies as a "debt collector" under the FDCPA. The court construed the "principal purpose" prong of the "debt collector" definition in a way that is utterly divorced from the natural meaning of the statutory text. In fact, the FDCPA's text, express purpose, and legislative history all point to the same conclusion: a passive debt buyer is not a "debt collector." Further review is warranted to correct that profoundly wrong interpretation.

1. The plain text of the "principal purpose" prong of the definition does not encompass a passive debt buyer that never interacts with debtors.

The FDCPA defines "debt collector" to include any entity that "regularly collects," "directly or indirectly," debts owed to another, and any entity that engages in a business "the principal purpose of which is the collection of any debts." 15 U.S.C. 1692a(6). In *Henson*, this Court unanimously held that an entity that purchases debts is not a debt collector under the "regularly collects" prong of the definition, even if it proceeds to collect those debts itself. See 137 S. Ct. at 1721-1722.

The correct application of the "principal purpose" prong of the definition is even more straightforward. The principal purpose of a passive debt buyer is not "the collection of any debts," for the simple reason that such an entity does not engage in any debt collection. Although the FDCPA does not define the term "collect," the natural meaning of the term is to "demand and obtain payment." *Webster's Second New International Dictionary* 525 (1959); see *American Heritage Dictionary* 261 (1976).

And as Judge Bea recognized in his dissent, the noun "collection," in turn, is defined as the "[a]ct or process of collecting." *Webster's Second New International Dictionary* 525 (1959); see *Random House Dictionary* 290 (1971); App., *infra*, 24a. A passive debt buyer does not engage in debt collection because it does not demand or obtain payment from the consumer—in fact, it does not undertake the act or process of collecting at all. As the district court noted in this case, while a passive debt buyer "benefits" from others' debt-collection activities, the same is true of any entity, whether a loan originator or other creditor, that hires a third-party debt collector. See App., *infra*, 52a. Yet no one has ever thought that sufficient to render an originator or other creditor a "debt collector" itself.

The Ninth Circuit deemed the "principal purpose" prong satisfied on the ground that the noun "collection" in that prong sweeps more broadly than the verb "collect" in the "regularly collects" prong of the definition. App., *infra*, 9a (quoting *Barbato*, 916 F.3d at 267-268). But that defies the ordinary operation of the English language. This Court has often recognized the principle that a "term bears a consistent meaning" when it is used "in multiple places within a single statute." *Azar* v. *Allina Health Services*, 139 S. Ct. 1804, 1812 (2019) (citing *Law* v. *Siegel*, 571 U.S. 415, 422 (2014)). Where, as here, one instance of a term is in the form of a verb and the other in that of a noun, the terms should be given a "similar" construction—not the disparate construction adopted by the Ninth Circuit. See *United States* v. *Granderson*, 511 U.S. 39, 46 (1994); *Reves* v. *Ernst & Young*, 507 U.S. 170, 177 (1993).

In order to reach that incongruous result, the Ninth Circuit declined to use the primary definition of the noun "collection"—the "[a]ct or process of collecting." Instead, it adopted that term's secondary definition—"that which is collected." *Random House Dictionary* 290 (1971); see

App., *infra*, 9a-10a. But that definition is inapposite here. As Judge Bea correctly observed, the FDCPA is plainly not using the term "collection" in the sense of a "stockpil[ing]" or grouping of objects, such as a church collection, a collection of stamps, or a collection of baseball cards; rather, it is referring to (and regulating) the *act* of collection. See App., *infra*, 24a-27a. Nor would such a use make any sense in this context; as Judge Bea observed, a business that acquires a "collection" of debts without obtaining their payment "would soon go out of business." *Id.* at 26a. The Ninth Circuit's approach thus violates the familiar principle that the words of a statute should be read "in their context and with a view to their place in the overall statutory scheme." *Parker Drilling Management Services, Ltd.* v. *Newton*, 139 S. Ct. 1881, 1888 (2019).

Tacitly acknowledging that petitioner had not engaged in *direct* debt "collection" (at least as that term is ordinarily understood), the Ninth Circuit alternatively took the view that petitioner had engaged in *indirect* collection. App., *infra*, 11a. Even if that were true, it would not be enough. The "regularly collects" prong of the definition expressly applies to any entity that collects debts "directly or indirectly." 15 U.S.C. 1692a(6). But as Judge Bea pointed out, the "principal purpose" prong says nothing about indirect collection. App., *infra*, 29a-30a. When Congress includes particular language in one portion of a statute but omits it in another, it is "generally presumed" that Congress is acting "intentionally and purposely." *Russello* v. *United States*, 464 U.S. 16, 23 (1983). By deeming indirect debt collection sufficient under the "principal purpose" prong, the Ninth Circuit failed "to give effect to Congress' express inclusion[]" of the term "indirect[]" in the "regularly collects" prong. *National Association of Manufacturers* v. *Department of Defense*, 138 S. Ct. 617, 631 (2018). As Judge Bea put it, "we ought

to expect an express statement from Congress when the FDCPA's restrictions apply to a business that merely collects debt 'indirectly'"—which "is exactly what we find in the 'regularly collects' prong, and exactly what is absent in the 'principal purpose' prong." *Id.* at 30a.

2. The FDCPA's express purpose and legislative history support the conclusion that the definition of "debt collector" does not reach passive debt buyers.

The FDCPA was intended to govern the "interactions between consumer debtors and 'debt collector[s].'" *Jerman* v. *Carlisle, McNellie, Rini, Kramer & Ulrich LPA*, 559 U.S. 573, 577 (2010). For that reason, the FDCPA is expressly aimed at "abusive, deceptive, and unfair debt collection practices." 15 U.S.C. 1692(a). And its substantive provisions effectuate the statutory purpose: not one regulates the conduct of passive debt buyers that do not interact with consumers. See 15 U.S.C. 1692-1692p.

The legislative history confirms that the FDCPA was enacted to address "debt collection abuse by third party debt collectors," which had become a "widespread and serious national problem." S. Rep. No. 382, 95th Cong., 1st Sess. 2, 3 (1977). Congress sought to establish safeguards for consumers in their interactions with independent, third-party debt collectors, prohibiting egregious behavior that had become prevalent. See p. 6, *supra*. As this Court recognized in *Henson*, Congress could not possibly have meant to regulate entities "in the business of purchasing defaulted debt," because the debt-buying industry had not yet emerged. 137 S. Ct. at 1724.

Changes to the consumer-debt industry since the FDCPA's enactment do not justify stretching the definition of "debt collector" to cover entities beyond its intended reach. As this Court has already made clear, any such expansion is for Congress in the first instance. See

Henson, 137 S. Ct. at 1724-1726. In fact, some state legislatures have taken action themselves, either by amending their corresponding state-law debt-collection statutes to cover debt buyers or by enacting new legislation altogether that is specifically focused on the debt-buying industry. See, *e.g.*, Cal. Civ. Code §§ 1788.50-1788.64; Colo. Rev. Stat. Ann. § 5-16-103(8.5); N.C. Gen. Stat. Ann. § 58-70-15(b)(4). But Congress has not done the same, despite making other revisions to the definition of "debt collector" in the decades since the FDCPA's enactment. See *Heintz* v. *Jenkins*, 514 U.S. 291, 294-295 (1995).

As it currently stands, the plain text of the FDCPA makes clear that the definition of "debt collector" does not cover passive debt buyers. The Ninth Circuit's contrary interpretation cannot be defended. This Court should grant review and reject that interpretation.

C. The Question Presented Is An Exceptionally Important And Recurring One That Warrants The Court's Review In This Case

The question presented in this case is one of enormous legal and practical importance. If allowed to stand, the Ninth Circuit's interpretation of the "principal purpose" prong of the definition of "debt collector" will expand the FDCPA's reach well beyond what Congress contemplated. Because the decision below is plainly inconsistent with *Henson* and will have sweeping consequences, and because this case is an ideal vehicle for resolution of the question presented, the Court should grant review.

1. In light of the significant implications arising from questions about the scope of the FDCPA, this Court has repeatedly granted review in cases presenting such questions. See, *e.g.*, *Obduskey* v. *McCarthy & Holthus LLP*, 139 S. Ct. 1029, 1038 (2019); *Henson*, 137 S. Ct. at 1724. The question presented here is at least as practically important as the questions in those cases. It has enormous

implications for the multibillion-dollar debt-buying industry, because nearly a third of all purchased debt is referred to third-party collectors. See CFPB, *Fair Debt Collection Practices Act: CFPB Annual Report 2020*, at 8-9 (Mar. 2020) <tinyurl.com/cfpbreport2020>; FTC, *The Structure and Practices of the Debt Buying Industry*, at T-12 (Jan. 2013) <tinyurl.com/structureandpractices>.

The Ninth Circuit's approach sweeps any entity into the definition of "debt collector" as long as a sufficiently large portion of its profits arise from defaulted debts, even if the entity is a "creditor" under the FDCPA and even if it does not itself collect from consumers on those debts. The breathtaking reach of that approach is only exacerbated by the potential for vicarious liability under the FDCPA, which could cause a passive debt buyer to be liable for the actions of a third-party collector even if the third party did not itself qualify as a "debt collector." *Barbato*, 916 F.3d at 269-270.

The FDCPA does not generally expose creditors to liability—vicarious or otherwise. Yet the approach adopted in the decision below risks doing just that for the large group of passive debt buyers and other creditors that it pulls into the definition of "debt collector." That is a windfall for the plaintiffs' bar, which will now be able to target entities with pockets deeper than those actually engaged in debt collection—as the procedural history of this case well illustrates. See pp. 9-15, *supra*.

The Ninth Circuit's sweeping interpretation of "debt collector" thus eviscerates Congress's targeted approach in the FDCPA and exposes passive debt buyers and other entities to a significant risk of liability for the acts of others. For passive debt buyers, that risk cannot easily be mitigated and will be passed along to loan originators in the form of lower negotiated prices for purchased debt.

Loan originators, in turn, will increase the cost of lending—ultimately harming consumers through increased rates and fees that reduce access to credit. See Todd J. Zywicki, *The Law and Economics of Consumer Debt Collection and Its Regulation*, 28 Loy. Consumer L. Rev. 167, 183-184 (2016). That result is antithetical to the FDCPA's purpose of consumer protection, yet it is certain to follow if the Ninth Circuit's approach is allowed to stand.

2. This case is an excellent vehicle in which to resolve the question presented. The relevant facts are undisputed and representative, and the decision below turned entirely on its resolution of that question. There is no impediment to the Court's reaching and resolving the question in this case.

The question presented, moreover, warrants resolution without delay. Since this Court denied review in *Barbato*, the flawed analysis of the "debt collector" definition first espoused by the Third Circuit in that decision has gained significant traction. Just as commentators predicted, courts around the country have "follow[ed] the Third Circuit's lead in sidestepping *Henson*," holding passive debt buyers liable under the FDCPA for the acts of third-party collectors. Melanie H. Brody & Francis L. Doorley, *Third Circuit FDCPA Opinion a Rude Awakening for Debt Buyers*, Law360 (Mar. 15, 2019) <tinyurl.com/law360rudeawakening>; see p. 18 n.*, *supra*. In this case, the Ninth Circuit "unit[ed] with the Third Circuit," reflecting the "trend among courts of broadening the scope and applicability of the FDCPA." Charles Tatelbaum & Brittany Hynes, *New Ruling Ratified a Far-Reaching Definition of 'Debt Collector' Under the FDCPA*, Daily Business Review (Apr. 14, 2020) <tinyurl.com/farreachingFDCPA>. This Court's intervention is thus urgently needed, as it was in *Henson* itself, to stop

lower courts from distorting the "debt collector" definition in a policy-driven effort to capture debt buyers.

The decision below is so plainly inconsistent with *Henson* and basic principles of statutory interpretation that there would be no material benefit from additional percolation in the lower courts. In light of Judge Bea's dissent, the arguments on both sides of the question presented have now been fully ventilated in the opinions of federal appellate judges. There would be a very real cost to awaiting additional percolation: passive debt buyers and consumers alike need clarity in light of the enormous practical consequences of the Ninth Circuit's decision. See pp. 13-15, *supra*. Because the question presented is a frequently recurring and increasingly pressing one, and because this case is an ideal vehicle in which to consider it, the Court should grant the petition.

* * * * *

In sum, the Ninth Circuit's decision is inconsistent with the decisions of numerous other lower courts on the question whether a passive debt buyer is a "debt collector" under the FDCPA. It rests on a body of law that is no longer valid in the wake of this Court's decision in *Henson*. And its reasoning cannot seriously be defended under basic principles of statutory interpretation. The question presented here is an exceptionally important one with considerable legal and practical implications, and this case is an excellent vehicle for resolving it. Further review is therefore warranted.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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SEPTEMBER 2020