NO.

IN THE
Supreme Court of the United States

OLIVEA MARX,
Petitioner,

v.

GENERAL REVENUE CORPORATION,
Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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March 2012

QUESTIONS PRESENTED

1. The Fair Debt Collection Practices Act (FDCPA) provides that, "[o]n a finding by the court that an action under this section was brought in bad faith and for the purpose of harassment, the court may award to the defendant attorney's fees reasonable in relation to the work expended and costs." 15 U.S.C. § 1692k(a)(3). Federal Rule of Civil Procedure 54(d) provides that, "[u]nless a federal statute, these rules, or a court order provides otherwise, costs—other than attorney's fees—should be allowed to the prevailing party."

The first question presented is whether a prevailing defendant in an FDCPA case may be awarded costs where the lawsuit was not "brought in bad faith and for the purpose of harassment."

2. The FDCPA defines "communication" as "conveying of information concerning a debt directly or indirectly to any person through any medium." 15 U.S.C. § 1692a(2). The statute generally bars debt collectors from communicating "in connection with the collection of any debt, with any person other than the consumer." *Id.* § 1692c(b). An exception to this bar allows a debt collector to "communicat[e]" with a debtor's employer solely to acquire "location information" about the debtor, but provides that a location information inquiry shall "not state that [the] consumer owes any debt" and not "indicate[] . . . that the communication relates to the collection of a debt." *Id.* § 1692b.

The second question presented is whether the FDCPA's strict limits on communications with third parties cease to apply when a debt collector, contacting a third party in connection with the collection of a debt, does not indicate the reason for the communication.

PARTIES TO THE PROCEEDING

Petitioner is Olivea Marx.

Respondent is General Revenue Corporation.

Kevin Cobb was an additional defendant in the district court but was not a party to the appeal.

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INTRODUCTION

This case raises two significant questions about the Fair Debt Collection Practices Act (FDCPA). First, the Tenth Circuit below recognized that an award of costs to a prevailing defendant under the FDCPA is limited to cases "brought in bad faith and for the purpose of harassment." The court nonetheless held that the FDCPA does not preclude an award of costs under Rule 54(d), which provides for an award of costs to a prevailing party, "[u]nless a federal statute . . . provides otherwise." This holding directly conflicts with a holding of the Ninth Circuit in an FDCPA case and conflicts with a holding of the Seventh Circuit in an analogous case.

Second, the FDCPA protects consumers from abusive and deceptive debt collections practices, primarily by imposing requirements and restrictions on debt collectors' "communications" with consumers and third parties, such as neighbors and employers. Adopting a narrow reading of the word "communications," the court below held that a debt collector is not subject to the FDCPA's strict limitations on communicating with third parties if the debt collector, although contacting a third party "in connection with the collection of any debt," does not indicate the reason for making contact. The Tenth Circuit's holding contradicts the federal regulators' and district courts' settled understanding of the FDCPA, is contrary to the text, structure, and purpose of the Act, and undermines its important protections.

OPINIONS BELOW

The decision of the United States Court of Appeals for the Tenth Circuit is not yet reported in the Federal Reporter. It is available on Westlaw at 2011 WL 6396478, and reproduced in the appendix at 1a. The judgment of the

United States District Court for the District of Colorado is unreported and is reproduced in the appendix at 30a. The district court's order denying post-judgment motions of both parties is unreported. It is available at 2010 WL 2802550, and reproduced in the appendix at 28a.

JURISDICTION

The court of appeals entered its judgment on December 21, 2011. On December 30, 2011, the court of appeals granted a motion to extend the time to file a petition for rehearing until January 19, 2012. On January 30, 2102, the court denied petitioner's timely petition for rehearing. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 803 of the FDCPA, 15 U.S.C. § 1692a, entitled "Definitions," provides in relevant part:

> (2) The term "communication" means the conveying of information regarding a debt directly or indirectly to any person through any medium.
> . . . .
> (7) The term "location information" means a consumer's place of abode and his telephone number at such place, or his place of employment.

Section 804, 15 U.S.C. § 1692b, entitled "Acquisition of location information," provides:

> Any debt collector communicating with any person other than the consumer for the purpose of acquiring location information about the consumer shall—
>
> (1) identify himself, state that he is confirming or correcting location information concerning the

> consumer, and, only if expressly requested, identify his employer;
>
> (2) not state that such consumer owes any debt;
>
> (3) not communicate with any such person more than once unless requested to do so by such person or unless the debt collector reasonably believes that the earlier response of such person is erroneous or incomplete and that such person now has correct or complete location information;
>
> (4) not communicate by post card;
>
> (5) not use any language or symbol on any envelope or in the contents of any communication effected by the mails or telegram that indicates that the debt collector is in the debt collection business or that the communication relates to the collection of a debt; and
>
> (6) after the debt collector knows the consumer is represented by an attorney with regard to the subject debt and has knowledge of, or can readily ascertain, such attorney's name and address, not communicate with any person other than that attorney, unless the attorney fails to respond within a reasonable period of time to the communication from the debt collector.

Section 805, 15 U.S.C. § 1692c, entitled "Communication in Connection with Debt Collection," provides at subsection (b), entitled "Communication with Third Parties":

> Except as provided in section 804, without the prior consent of the consumer given directly to the debt collector, or the express permission of a court of competent jurisdiction, or as reasonably necessary

> to effectuate a postjudgment judicial remedy, a debt collector may not communicate, in connection with the collection of any debt, with any person other than a consumer, his attorney, a consumer reporting agency if otherwise permitted by law, the creditor, the attorney of the creditor, or the attorney of the debt collector.

Section 813, 15 U.S.C. § 1692k, entitled "Civil liability," provides in relevant part:

> (a) Except as otherwise provided by this section, any debt collector who fails to comply with any provision of this title with respect to any person is liable to such person in an amount equal to the sum of—
>
> (1) any actual damage sustained by such person as a result of such failure; [or]
>
> (2) (A) in the case of any action by an individual, such additional damages as the court may allow, but not exceeding $1,000[.]
>
> . . . and
>
> (3) in the case of any successful action to enforce the foregoing liability, the costs of the action, together with a reasonable attorney's fee as determined by the court. On a finding by the court that an action under this section was brought in bad faith and for the purpose of harassment, the court may award to the defendant attorney's fees reasonable in relation to the work expended and costs.

STATEMENT OF THE CASE

The Fair Debt Collection Practices Act

This petition arises from an action under the FDCPA brought by petitioner Olivea Marx against respondent General Revenue Corporation (GRC). Congress enacted the FDCPA in response to "abundant evidence of the use of abusive, deceptive, and unfair debt collection practices by many debt collectors," 15 U.S.C. § 1692(a), which had risen to the level of "a widespread and serious national problem." S. Rep. 95-382, at 2 (1977). The FDCPA's objective is carried out largely by restricting the ways in which debt collectors can communicate as part of their debt-collection activities.

The statute defines "communication" to mean "conveying of information regarding a debt directly or indirectly to any person through any medium." 15 U.S.C. § 1692a(2). It restricts when and how debt collectors may communicate with consumers themselves, *see id.* §§ 1692c(a), (c), 1692e(8), (9), (11), & 1692f(7), (8); and how debt collectors may communicate with third parties, *see id.* §§ 1692b & 1692c(b). It also affirmatively requires the communication of certain information to consumers, *see id.* § 1692g(a); and it prohibits false and misleading communications, *see id.* § 1692e. The scope of "communication" is thus the linchpin of the statute, as the FDCPA's effectiveness in curbing abusive debt collection practices depends on restricting "communications."

The FDCPA generally prohibits a debt collector from communicating with any person other than the consumer in connection with the collection of any debt. *Id.* § 1692c(b). An exception to the prohibition allows a debt collector to communicate with people other than the consumer "for the purpose of acquiring location information about the

consumer," *id.* § 1692b, and the statute defines "location information" as "a consumer's place of abode and his telephone number at such place, or his place of employment." *Id.* § 1692a(7). As both the federal regulators and debt collectors agree, a debt collector may not contact an employer to ask for location information if the collector already has it and may not use the excuse of requesting location information to ask for additional information.[1] If a debt collector makes contact to acquire location information, he may not state that the consumer owes any debt or indicate that he is in the debt collection business. *Id.* § 1692b(2), (5). Rather, he must "state that he is confirming or correcting location information concerning the consumer, and, only if expressly requested, identify his employer." *Id.* § 1692b(1).

In a civil case brought by a consumer alleging a violation of the FDCPA, the statute provides that a prevailing plaintiff may recover actual damages, statutory

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[1] *See* CFPB, *Supervision and Examination Manual* at FDCPA 2-3 (Oct. 2011), *available at* www.consumerfinance.gov/wp-content/themes/cfpb_theme/images/supervision_examination_manual_11211.pdf (stating that, with exceptions not pertinent here, debt collector may not "contact" third parties when trying to collect a debt, except that "a debt collector who is unable to locate a consumer may ask a third party for the consumer's" location information); OCC, *Other Consumer Protection Laws and Regulations (Comptroller's Handbook)* at 24 (Aug. 2009), *available at* www.occ.gov/publications/publications-by-type/comptrollers-handbook/other.pdf (same); Federal Reserve Board, *Consumer Compliance Handbook* at FDCPA 2 (Jan. 2006), *available at* www.federalreserve.gov/boarddocs/supmanual/cch/fairdebt.pdf (same); Ass'n of Credit and Collection Professionals, *Guide to the FDCPA* 62-63 (2009-10 ed.) ("only" information debt collector can request from third party is location information), *attached as* Exh. B to CFPB Tenth Cir. Amicus Br.

damages of up to $1,000, and "the costs of the action, together with a reasonable attorney's fee as determined by the court." *Id.* § 1692k(a). On the other hand, "[o]n a finding by the court that an action under this section was brought in bad faith and for the purpose of harassment, the court may award to the defendant attorney's fees reasonable in relation to the work expended and costs." *Id.* § 1692k(a)(3).

Factual Background and Proceedings Below

Ms. Marx sued GRC, "one of the largest collection agencies in the country," www.generalrevenue.com/about us.htm, alleging several violations of the FDCPA. Among other things, she alleged that GRC violated § 1692c(b) by seeking information other than permitted "location information" when it communicated with her employer in connection with the collection of a student-loan debt. The communication consisted of a fax to Ms. Marx's employer that included GRC's name, logo, and address, its internal identification number for Marx's account, and stated "Sallie Mae" in the fax information line at the top of the page. The fax requested the employer's address and corporate payroll address, Marx's date of hire, whether she was full or part time, and her position. *See* Tenth Cir. App. 113 (copy of fax).

The district court dismissed Ms. Marx's claim, holding that the fax did not violate § 1692c(b)'s bar on communicating with third parties "in connection with the collection of a debt" because it was not a "communication" at all. The court suggested that a debt collector can contact an employer to ask for information in addition to "location information," as long as the employer does not know that the request is coming from a debt collector. *See* Pet. App. 33a-34a. The court held that, absent evidence that the employer understood the fax to be from a debt collector,

the fax did not "convey information regarding a debt" and therefore was not a communication under the FDCPA. *See* Pet. App. 33a-34a. The judgment later entered by the court ordered Ms. Marx to pay GRC's costs under Federal Rule of Civil Procedure 54(d). *Id.* 31a. The court rejected Ms. Marx's argument that the FDCPA limited an award of costs to the defendant to cases brought in bad faith and for the purpose of harassment, holding that the statutory language applies only to an award of attorney's fees. *Id.* 28a-29a. The court further held that an award of costs would be appropriate under Rule 68. *Id.* 29a.

Ms. Marx appealed both the ruling that there was no "communication" and the award of costs. The Tenth Circuit affirmed on both issues, with Judge Lucero dissenting. First, the court held that the fax was not a "communication" within the meaning of the FDCPA because it did not "indicate" that it concerned a debt. The court held that GRC's name and the account number on the fax were insufficient to make the fax a "communication," absent evidence that Ms. Marx's employer understood the fax to be about a debt. Pet. App. 5a. Notwithstanding the concerns expressed by Congress in placing strict limits on debt collectors' third-party communications, the court characterized the fax as "innocuous, nondescript, and harmless." *Id.* at 16a.

The court "concede[d]" that its holding rendered § 1692b(5) "superfluous." *Id.* 17a. That section bars a debt collector seeking location information from using "any language or symbol on any envelope or in the contents of any communication effected by the mails or telegram that indicates that the debt collector is in the debt collection business or that the communication relates to the collection of a debt" when contacting a third party to obtain location information. *See supra* p. 3. Under the Tenth Circuit's

holding, a communication that complies with § 1692b(5) would, by definition, not be a communication at all and, thus, not be subject to § 1692b's limits on communications seeking location information in the first place. Nor would it be subject § 1692c(b)'s prohibition against third party communications.

Second, the court affirmed the award of costs under Rule 54(d) (but rejected GRC's Rule 68 theory). Rule 54(d) permits the prevailing party to recover costs "[u]nless a federal statute . . . provides otherwise." The FDCPA provides that, "[o]n a finding by the court that an action under this section was brought in bad faith and for the purpose of harassment, the court may award to the defendant attorney's fees reasonable in relation to the work expended and costs." 15 U.S.C. § 1692k(a)(3). The court of appeals rejected GRC's argument that the reference to "costs" was merely part of a standard for determining the amount of attorney's fees awarded to a defendant (that is, that they must be "reasonable in relation to fees and costs"). *See* Pet. App. 7a. Rather, the court read "the bad-faith-and-harassment provision of § 1692k(a)(3) to indicate two separate pecuniary awards for a defendant who prevails against a suit brought in bad faith and for the purpose of harassment: (1) 'attorney's fees reasonable in relation to the work expended' and (2) 'costs.'" *Id.*

Nonetheless, the court later contradicted itself by stating that "only" an award of attorney's fees "is linked to a finding that the action has been brought by the plaintiff in bad faith." *Id.* 18a. As to costs, the court held that the § 1692k(a)(3) "merely recognizes that the prevailing party is entitled to the costs of suit as a matter of course," *id.* 8a, and thus that the FDCPA does not supersede Rule 54(d). That is, although initially adopting a reading of the statute under which § 1692k(a)(3) does "provide otherwise" than

Rule 54(d), the court held that Rule 54(d) was an appropriate basis for awarding costs, primarily because the court did not agree that good faith should relieve a consumer from paying the defendant's costs. *See* Pet. App. 9a, 14a.

The court of appeals expressly recognized that its decision conflicts with the Ninth Circuit's decision in *Rouse v. Law Offices of Rory Clark*, 603 F.3d 699 (9th Cir. 2010). That case held that § 1692k(a)(3) allows the defendant in an FDCPA case to recover costs only "on a finding . . . that the action was brought in bad faith and for the purpose of harassment." *Id.* at 701, 706.

Judge Lucero dissented on both issues. Finding that the fax "plainly" conveyed "information regarding a debt" (whether or not the recipient knew that it did), he would have held that the fax met the FDCPA definition of a communication. He explained that the majority decision added a new requirement, not contained within the FDCPA itself, that the communication not only must convey information regarding a debt, but, in addition, the recipient must understand it to do so. Pet. App. 21a. "[T]his extra requirement is not contained in the statutory text, and its addition to the FDCPA's definition of 'communication' violates several rules of statutory construction," he wrote. *Id.* 21a-22a. For example, Judge Lucero explained that the majority's reading renders § 1692b(5)—which bars debt collectors seeking location information from third parties from indicating that the "communication relates to the collection of a debt"—superfluous. Pet. App. 23a.

As to the award of costs, Judge Lucero found the FDCPA to be "clear and unambiguous" that an award of costs to the defendant is permitted only on a finding that the case was brought in bad faith and for the purpose of

harassment. *Id.* at 24a. Because the district court made no such finding in this case, Judge Lucero would have reversed the award of costs.

Ms. Marx filed a petition for rehearing or rehearing en banc. Her petition was supported by the Consumer Financial Protection Bureau (CFPB), which filed an amicus brief explaining why the panel majority was wrong on both issues and how its holdings undermined the protections of the FDCPA. The petition was denied.

REASONS FOR GRANTING THE WRIT

I. The Tenth Circuit's Decision Regarding Awards Of Costs To Prevailing Defendants Conflicts With Authority From The Seventh And Ninth Circuits.

Federal Rule of Civil Procedure 54(d), on which the Tenth Circuit relied to impose costs, does not permit an award of costs to a prevailing party if a federal statute "provides otherwise." The FDCPA is such a statute: it provides that, "[o]n a finding by the court that an action under this section was brought in bad faith and for the purpose of harassment, the court may award to the defendant attorney's fees reasonable in relation to the work expended and costs." 15 U.S.C. § 1692k(a)(3).

Here, the Tenth Circuit held that § 1692k(a)(3) does not "provide otherwise" than Rule 54(d). Although the court acknowledged at one point that the text of § 1692k(a)(3) limits an award of costs under the FDCPA to cases in which the court makes a finding "that an action under this section was brought in bad faith and for the purpose of harassment," *see* Pet. App. 7a, it later stated that § 1692k(a)(3) "merely recognizes that the prevailing party is entitled to receive the costs of suit as a matter of

course." *Id.* at 8a; *see also id.* at 18a ("Only [an award of attorney's fees] is linked to a finding that the action has been brought by the plaintiff in bad faith."). The court held that an award of costs under Rule 54(d) was thus proper.

This holding conflicts with an FDCPA decision by the Ninth Circuit and with a decision of the Seventh Circuit considering an analogous statute. The Ninth Circuit, in *Rouse v. Law Offices of Rory Clark*, considered the relationship between § 1692k(a)(3) of the FDCPA and Rule 54(d), and a unanimous panel agreed that the FDCPA limits a court's authority to award costs to a prevailing defendant. Looking to rules of grammar, legislative history, and the purpose of the FDCPA, the court held that costs may not be awarded to a prevailing defendant in an FDCPA case "without a finding that plaintiff brought the action in bad faith and for the purpose of harassment." 603 F.3d at 706. *See also Emanuel v. Am. Credit Exch.*, 870 F.2d 805, 809 (2d Cir. 1989) (stating in dicta that "section 1692k(a)(3) permits a court to award reasonable attorney's fees and costs only upon a finding 'that an action under this section was brought in bad faith and for the purpose of harassment.'"). The Tenth Circuit expressly stated its disagreement with *Rouse*. Pet. App. 12a, 18a.[2]

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[2]The Tenth Circuit wrongly suggested that *Rouse* is inconsistent with a prior Ninth Circuit decision, *Quan v. Computer Sciences Corp.*, 623 F.3d 870 (9th Cir. 2010). Pet. App. 12a. *Quan* held that ERISA—providing that "the court in its discretion may allow a reasonable attorney's fee and costs of action to either party"—does not "plainly 'provide otherwise' than Rule 54(d)(1) for the award of costs to a prevailing party." 623 F.3d at 888. Because both the ERISA provision and Rule 54(d)(1) allow but do not require district courts to award costs, *Quan* is correct and not in tension with *Rouse*. And contrary to the Tenth Circuit's charac-

(continued...)

The decision below also conflicts with a Seventh Circuit case concerning 46 U.S.C. § 2114, which protects seamen against discrimination. Subsection 2114(b) provides that, in an action brought by a seaman under subsection 2114(a), the court may award "costs and reasonable attorney's fees to a prevailing employer not exceeding $1,000 if the court finds that a complaint filed under this section is frivolous or has been brought in bad faith." In *Gwin v. American Rover Transportation Co.*, 482 F.3d 969, 974 (7th Cir. 2007), a prevailing employer argued that this language augmented the normal recovery of costs to a prevailing defendant with an award of attorney's fees, not recoverable under Rule 54(d), but did not affect eligibility for an award of costs under Rule 54(d)—essentially the same argument accepted by the Tenth Circuit here. Rejecting that argument, the Seventh Circuit stated that "[i]f the statute was merely supplementing Rule 54(d) by allowing attorney's fees, then it would not have included an express reference to costs." 482 F.3d at 974. The court thus held that the statute limited an award of costs to prevailing defendants to cases in which the lawsuit was frivolous or brought in bad faith.[3]

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[2](...continued)
terization, *Quan*'s statement that "[t]o 'provide otherwise' than Rule 54(d)(1), the statute or rule would have to bar an award of costs to the prevailing party," *id.*, does not "adhere[] to a different logic" than *Rouse*, Pet. App. 12a, because *Rouse* holds that § 1692k(a)(3) does bar an award of costs to a prevailing party in some circumstances where Rule 54(d) would permit an award.

[3]In addition to creating an appellate-court conflict, the decision below runs contrary to the great majority of district court decisions applying § 1692k(a)(3). *See*, *e.g.*, *Clark v. Brumbaugh & Quandahl, PC*, 731 F. Supp. 2d 915, 925-26 (D. Neb. 2010) (continued...)

The court's holding not only created a conflict among the federal courts of appeals; it is also incorrect. Under the court's reading, the words "and costs" are "mere surplusage," Pet. App. 24a (Lucero, J., dissenting), as they serve no function but to restate Rule 54(d). And if the sentence's introductory clause does not modify "and costs," those two words become untethered to the rest of the sentence and, grammatically, entirely inexplicable. Because § 1692k(a)(3) can be read otherwise, to give meaning and purpose to every word, the court below erred in reading "and costs" out of the sentence. *See Duncan v. Walker*, 533 U.S. 167, 174 (2001) ("It is our duty 'to give effect, if possible, to every clause and word of a statute.' " (citation omitted)).

The FDCPA is "primarily self-enforcing; consumers who have been subjected to collection abuses will be enforcing compliance." S. Rep. No. 95-382, at 5. Yet

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[3](...continued)
("[Defendant] has made no explicit argument that Clark initiated this suit in bad faith or for the purpose of harassment. Accordingly, the Court will not make such a finding, and will sustain Clark's objection to [defendant's] bill of costs."); *Bacelli v. MFP, Inc.*, 2010 WL 4054107, *1 (M.D. Fla. 2010) ("As the Court has already determined that a finding of bad faith is not warranted here, costs are not available to Defendant MFP." (record citation omitted)); *Pavone v. Citicorp Credit Servs.*, 60 F. Supp. 2d 1040, 1049 (S.D. Cal. 2007) ("Here, the Court finds no indication that [plainitff] has acted in bad faith or for the purpose of harassment in bringing this action. Accordingly, [defendant] is not entitled to its costs or attorneys' fees under either Rule 54(d) or the FDCPA."); *Wilson v. Transworld Sys.*, 2003 WL 21488206, at *1 (M.D. Fla. 2003); *Csugi v. Monterey Fin.* Servs., 2001 WL 1841444, *1 (D. Conn. 2001); *Latimer v. Transworld Sys.*, 842 F. Supp. 274, 275 (E.D. Mich. 1993); *but see Thomasson v. GC Servs. Ltd. P'ship*, 2007 WL 3203037, at *2-*3 (S.D. Cal. 2007) (overruled by *Rouse*).

FDCPA plaintiffs are, by and large, people in debt who might be deterred from challenging abusive and deceptive collection practices by the possibility of being held liable for the defendants' costs in non-frivolous cases. Section 1693k(a)(3) minimizes that deterrent, while "protect[ing] debt collectors from nuisance lawsuits, if the court finds that an action was brought by the consumer in bad faith and for harassment," by allowing for an award of fees and costs to the debt collector in that circumstance. S. Rep. No. 95-382, at 5. The Tenth Circuit's holding is thus inconsistent with the purpose and background of the FDCPA, as well as its text. *See Rouse*, 603 F.3d at 705 (§ 1693k(a)'s limitation on award of costs to defendants is "consistent with the stated intent of Congress").

This Court should grant the petition to resolve the conflict among the circuit courts and confirm a reading of § 1692k(a) that is consistent with its plain meaning and the purpose of the FDCPA.

II. The Decision Below With Respect To The Scope Of "Communications" Runs Counter To The Accepted Understanding Of The FDCPA And Eliminates Critical Protections Of The Act.

The scope of the term "communication" under the FDCPA is critical to the functioning of the statute, which protects consumers from "abusive, deceptive, and unfair debt collection practices," 15 U.S.C. § 1692(a), by, among other things, restricting debt collectors' communications with third parties. Because many of the prohibitions in the statute relate to "communications," the question whether an action is a communication arises often in cases brought by consumers under the FDCPA.

Below, the Tenth Circuit held that whether the fax was a "communicat[ion] in connection with the collection of any

debt" turns on whether it "indicate[s] to the recipient that the message relates to the collection of a debt." Pet. App. 4a. Thus, the undisputed facts that GRC's fax was "in connection with the collection of any debt," said "Sallie Mae" at the top, and included Ms. Marx's account number were of no moment, absent evidence that the fax "indicated" that there was a debt. As Judge Lucero explained in his dissent, the Tenth Circuit's decision "engrafts an additional element onto [the statutory] definition" by holding that a "communication" under the FDCPA "must convey information regarding a debt *and* indicate to the recipient of the correspondence that the message relates to the collection of a debt." Pet. App. 21a.

The decision below renders important provisions of the FDCPA inoperative, undermining the substantive protections of the Act. For instance, § 1692b creates an exception to § 1692c(b)'s general prohibition against "communicat[ing]" with third parties in connection with a consumer's debt by allowing a debt collector to "communicat[e]" with a third party "for the purpose of acquiring location information about the consumer." In so communicating, however, the debt collector "shall . . . not state that [the] consumer owes any debt" (§ 1692b(2)) and "not use any language or symbol" on any written communication that "indicates . . . that the communication relates to the collection of a debt" (§ 1692b(5)). *See supra* pp. 3-4 (quoting § 1692b in full). Under the Tenth Circuit's reading, the narrow location-information exception to the general rule against "communicat[ing]" with third parties would be meaningless because the general rule would allow a broader range of contacts than the exception.

For example, the Tenth Circuit would permit telephone calls, letters, faxes, postcards, or emails by a debt collector to an employer, neighbor, or other third party, making a

broad range of intrusive inquiries about the consumer—not only inquiries regarding location information—as long as the debt collector does not indicate that its call, letter, or fax relates to a debt. Such inquiries, in the Tenth Circuit's view, are not "communications" and thus not prohibited by § 1692c(b). Indeed, under the Tenth Circuit's reading, § 1692b(5) is nonsense, because if a "communication" by definition must "indicate" to the third party that it regards a debt (Pet. App. 4a), it cannot at the same time *not* "indicate" that it relates to a debt. The CFPB made this same point as amicus curiae in support of the petition for rehearing below.[4]

Similarly, § 1692d(6) prohibits any call to a third party (or a consumer) without "meaningful disclosure" of the caller's identity, "[e]xcept as provided in section 1692b"—that is, unless the debt collector is communicating with a third party for the purpose of acquiring location

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[4]The CFPB explained that "the majority's interpretation would render several other of § 1692b's risks-minimizing restrictions nugatory." CFPB Tenth Cir. Br. 8, *available at* 2011 WL 7144818. Under the Tenth Circuit's interpretation,

> if a debt collector complies with § 1692b's content restriction—most notably § 1692b(5)'s bar on indicat[ing] . . . that the communication relates to the collection of a debt"—it is not "communicating" and thus need not comply with the rest of § 1692b. This effectively nullifies § 1692b's other restrictions. Under the majority's interpretation, therefore, debt collectors seeking location information will be able to send postcards, contact third parties more than once, and contact third parties when they could contact the consumer's attorney instead—all in contravention of any reasonable understanding of § 1692b.

CFPB Tenth Cir. Br. 8-9.

information. "Meaningful disclosure" includes the disclosure that the caller is a debt collector.[5] Yet the Tenth Circuit effectively held that, without a meaningful disclosure, a debt collector is not "communicating" at all. That holding creates a paradox: the statute forbids conduct (calls without meaningful disclosure, except communications with third parties to acquire location information) that, according to the Tenth Circuit, it expressly allows (calls to third parties, not limited to calls seeking location information, as long as there is no meaningful disclosure).

In addition, the FDCPA prohibits "communicating or threatening to communicate to any person" false credit information. 15 U.S.C. § 1692e(8). Under the Tenth Circuit's reading, a debt collector would not violate this provision if it gave someone false credit information, as long as it did so without indicating that the consumer owed a debt.

The FDCPA also prohibits the use of a written "communication" that "is falsely represented to be a document authorized, issued, or approved by a court, official, or [government] agency." *Id.* § 1692e(9). Again, under the Tenth Circuit's reading, a debt collector would not violate this provision if it sent a document with such a false representation to a consumer or third-party in an effort to collect a debt, as long as the document did not mention a debt.

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[5] *See, e.g.*, *Sparks v. Philips & Cohen Assocs.*, 641 F. Supp. 2d 1234, 1247 (S.D. Ala. 2008); *Costa v. Nat'l Action Fin. Servs.*, 634 F. Supp. 2d 1069, 1075 (E.D. Cal. 2007); *Masciarelli v. Richard J. Boudreau & Assocs., LLC*, 529 F. Supp. 2d 183, 185 (D. Mass. 2007); *Hosseinzadeh v. M.R.S. Assocs., Inc.*, 387 F. Supp. 2d 1104, 1112 (C.D. Cal. 2005).

As one district court, rejecting the precise argument adopted below, explained: "[A] narrow reading of the term 'communication' to exclude instances . . . where no specific information about a debt is explicitly conveyed could create a significant loophole in the FDCPA, allowing debtors to circumvent the § 1692e(11) disclosure requirement, and other provisions of the FDCPA that have a threshold 'communication' requirement, merely by not conveying specific information about the debt." *Foti v. NCO Fin. Sys.*, 424 F. Supp. 2d 643, 657 (S.D.N.Y. 2006). "Such a reading is inconsistent with Congress's intent to protect consumers from 'serious and widespread' debt collection abuses." *Id.* at 657-58. *See also Lensch v. Armada Corp.*, 795 F. Supp. 2d 1180, 1189 (W.D. Wash. 2011*)* ("Affirming the narrow interpretation [of 'communication'] would provide a loophole for debt collectors and allow them to tailor their voicemail messages in order to circumvent the disclosure requirement under section 1692e(11).").

The Tenth Circuit's view also contradicts the view of the federal banking regulators, including the CFPB, the Office of the Comptroller of the Currency, and the Federal Reserve Board. Each of these agencies has advised that the FDCPA generally prohibits communications with a third party concerning a debt, regardless of whether the debt collector actually indicates to the third party the reason for the communication (that is, because the debt collector is pursuing a debt). *See* CFPB, *Supervision and Examination Manual*, *supra* page 6, at FDCPA 2-3 (stating that debt collector may not "contact" third parties except to request location information when debt collector is unable to locate the consumer); OCC, *Other Consumer Protection Laws and Regulations*, *supra* page 6, at 24 (same); Federal Reserve Board, *Consumer Compliance Handbook*, *supra* page 6, at FDCPA 2 (same).

The decision below also runs counter to decisions of more than twenty district courts spread throughout fifteen federal judicial districts. The overwhelming majority of courts to consider whether a particular activity (usually, a telephone call) violated § 1692c(b)'s prohibition on "communicat[ing]" with a third party "in connection with the collection of any debt" have read the provision to state an objective test that looks to the content of the information sent to determine whether it "convey[ed] information regarding a debt directly or indirectly," § 1692a(2), not to whether that information indicates to the recipient that it relates to a debt. *See Lensch*, 795 F. Supp. 2d at 1188-89; *Yarbrough v. FMS, Inc.*, 2010 WL 4826247, at *2 (S.D. Fla. 2010); *Shand-Pistilli v. Prof'l Account Servs.*, 2010 WL 2978029, *3-*4 (E.D. Pa. 2010); *Hutton v. C.B. Accounts, Inc.*, 2010 WL 3021904, at *2-3 (C.D. Ill. 2010); *Krug v. Focus Receivables Mgmt., LLC*, 2010 WL 1875533, at *1-3 (D.N.J. 2010); *Nicholas v. CMRE Fin. Servs.*, 2010 WL 1049935 at *3-5 (D.N.J. 2010); *Inman v. NCO Fin. Sys.*, 2009 WL 3415281, at *3-4 (E.D. Pa. 2009); *Mark v. J.C. Christensen & Assocs.*, 2009 WL 2407700, at *2-3 (D. Minn. 2009); *Savage v. NIC, Inc.*, 2009 WL 2259726, at *1, *5 (D. Ariz. 2009); *Wideman v. Monterey Fin. Servs.*, 2009 WL 1292830, at *2 (W.D. Pa. 2009); *Edwards v. Niagra Credit Solutions, Inc.*, 586 F. Supp. 2d 1346, 1350-51 (N.D. Ga. 2008); *Berg v. Merchants Ass'n Collection Div'n, Inc.*, 586 F. Supp. 2d 1336, 1340-41 (S.D. Fla. 2008); *Thomas v. Consumer Adjustment Co.*, 579 F. Supp. 2d 1290, 1296-97 (E.D. Mo. 2008); *Ramirez v. Apex Fin. Mgmt.*, 567 F. Supp. 2d 1035, 1041-42 (N.D. Ill. 2008); *Costa*, 634 F. Supp. 2d at 1075-76; *Foti*, 424 F. Supp. 2d at 654-59; *Leyse v. Corporate Collection Servs.*, 2006 WL 2708451, at *6 (S.D.N.Y. 2006); *Belin v. Litton Loan Serv., LP*, 2006 WL 1992410, at *4-5 (M.D. Fla. 2006); *Hosseinzadeh*, 387 F. Supp. 2d at 1116; *Henderson v.*

Eaton, 2001 WL 969105, at *2-3 (E.D. La. 2001); *West v. Nationwide Credit, Inc.*, 998 F. Supp. 642, 644-45 (W.D.N.C. 1998).

While these cases recognize that a communication, such as "a phone call by a debt collector that in no way regards, or relates to an outstanding debt would not violate the Act," *Foti*, 424 F. Supp. 2d at 429, the cases overwhelmingly reject a narrow interpretation of "communication" that requires that specific information that there is a debt be conveyed or understood. For instance, in the widely-cited case *West v. Nationwide Credit*, the court held that a debt collector had "communicated" with a third-party within the meaning of the FDCPA by calling the plaintiff's neighbor to ask the neighbor to ask the plaintiff to return the call to discuss a "very important" matter, although the debt collector did not tell the neighbor that the matter concerned a debt. *See* 998 F. Supp. at 644. The court explained that, if it "were to adopt Defendant's interpretation of section 1692c(b) and construe the provision as only prohibiting third party communications in which some information about a debt is actually disclosed, section 1692b would be superfluous." *Id.* at 645. And "[u]nder Defendants' narrow interpretation, debt collectors would be free under section 1692c(b) to . . . communicate with third parties so long as the debt collectors do not reveal any information about a debt. If Congress had intended for the statute to be interpreted in this manner, it would not have drafted section 1692b." *Id.* Likewise, *Krug* explicitly rejected a debt collector's argument that the court needed "context" before it could determine whether voicemail messages referring to a

"personal business matter" were "communications" under the FDCPA. *See* 2010 WL 1875533, at *1, *3.[6]

In sum, the term "communication" is central to the functioning of the FDCPA, and the Tenth Circuit's decision limiting the scope of that term is inconsistent with the language and structure of the Act as a whole, as well as the views of an overwhelming majority of courts and federal regulators. This Court should grant the petition to cure the distortion of the statute and the likelihood of confusion among the lower courts created by the Tenth

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[6]In *Horkey v. J.D.B. Associates,* the debt collector called the consumer at work and, when a co-worker answered, told the co-worker to tell the consumer "to stop being such a [expletive]." The district court held that the call was not a third-party communication in violation of § 1692c(b) because the conversation "was merely limited to inquiring as to Plaintiff's whereabouts," 179 F. Supp. 2d 861, 868 (N.D. Ill. 2002), but that the call violated the FDCPA's prohibition against abusive conduct.

A handful of unpublished district court cases hold that a voicemail message containing only a name and a request for a return call from someone whom the debtor does not know is a debt collector are not "communications" that trigger the FDCPA's protections against anonymous communciations. *See Makreas v. Moore Law Group, A.P.C.*, 2011 WL 4803005, at *3 (N.D. Cal. 2011); *Koby v. ARS Nat'l Servs.*, 2010 WL 1438763, at *4 (S.D. Cal. 2010); *Biggs v. Credit Collections, Inc.*, 2007 WL 4034997, at *4 (W.D. Okla. 2007); *see also Fava v. RRI, Inc.*, 1997 WL 205336, at *6 (N.D.N.Y. 1997) (fax to debtor's father that had no information about debt was not a "communication"). Each of these cases addresses alleged violations of § 1692e(11), which requires a debt collector to identify himself as such in communications with the consumer as a means of preventing "false and misleading representations." The majority of courts, however, have held such messages to be indirect communications that trigger the protections of the Act. *See, e.g., Lensch*, 795 F. Supp. 2d at 1188-89 (discussing cases).

Circuit's decision about the meaning of the term "communication" in § 1692a(2) and the scope of the prohibition on third-party communications contained in § 1692c(b).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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March 2012