No. 19-483

IN THE
Supreme Court of the United States

ELSIE MARINO, *CONSUMER*,
Petitioner,

v.

JEFFREY NADEL, DOING BUSINESS AS
LAW OFFICES OF JEFFREY NADEL;
SCOTT E. NADEL; DANIEL MENCHEL;
MICHAEL MCKEOWN; CALIBER HOME LOANS, INC.;
BANK OF NEW YORK MELLON, *AS TRUSTEE FOR*
CIT MORTGAGE LOAN TRUST 2007-1,
Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In *Heintz v. Jenkins*, 514 U.S. 291, 296, the Court observed that an apparent objective of the Fair Debt Collection Practices Act, 15 U.S.C. § 1692 *et seq.*, is preserving creditors' judicial remedies, "but the term ['creditor'] 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." § 1692a(4). Congress distinguishes and includes debts either owed *or due* another, § 1692a(6). Respondent Bank Of New York Mellon, *As Trustee For CIT Mortgage Loan Trust 2007-1*, is a self-proclaimed trustee.

The first question is whether a trustee such as respondent that receives assignment or transfer of a debt, as trustee for beneficial interest holders solely to bring a foreclosure action, can qualify as a person facilitating collection "for another" within the defined exclusion to the term "creditor" in § 1692a(4).

The second question is whether the lower court's rule that "the filing of an action to foreclose is a necessary precedent to reaching a postjudgment judicial remedy, so communications with a court that are necessary to maintain that foreclosure action do not violate § 1692c(b)" renders § 1692i(b) and § 1692c(b)'s exception "or as reasonably necessary to effectuate a postjudgment judicial remedy," and particularly the word "postjudgment" superfluous, void, or insignificant.

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PETITION FOR A WRIT OF CERTIORARI

Elsie Marino (herein "Petitioner" or "Plaintiff") petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS AND ORDERS BELOW

The May 13, 2019 order of the court of appeals (Appeal No. 18-2283) denying rehearing *en banc* is yet unpublished and is reproduced at Appendix A.

The April 3, 2019 judgment opinion of the court of appeals (Appeal No. 18-2283) is unpublished, but reported at 763 F. App'x 305 and reproduced at Appendix B.

The September 27, 2018 judgment of the district court for the District of Maryland (8:17-cv-02116-GJH) dismissing Petitioner's complaint is yet unpublished but reproduced at Appendix C.

JURISDICTION

The Court of Appeals for the Fourth Circuit denied a timely petition for rehearing *en banc* on May 13, 2019. Jurisdiction in this Court is therefore proper by writ of certiorari pursuant to 28 U.S.C. § 1254(1) because Petitioner is a "party to any civil or criminal case, before or after rendition of judgment or decree." The time for filing a petition seeking review in this Court is ninety days so the deadline was Sunday, August 11, 2019, but Application No. 19A121 was granted by The Chief Justice extending the time to file this petition until October 10, 2019.

APPLICABLE LAW

> This title may be cited as the 'Fair Debt Collection Practices Act'.

15 U.S.C. § 1601 note, 91 Stat. 874.

> It is the purpose of this title to eliminate abusive debt collection practices by debt collectors, to insure that those debt collectors who refrain from using abusive debt collection practices are not competitively disadvantaged, and to promote consistent State action to protect consumers against debt collection abuses.

15 U.S.C. § 1692(e), 91 Stat. 874.

> Nothing in this title shall be construed to authorize the bringing of legal actions by debt collectors.

15 U.S.C. § 1692i(b), 91 Stat. 880.

> 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.

15 U.S.C. § 1692c(b), 91 Stat. 877.

STATEMENT OF THE CASE

The respondent, Bank of New York Mellon, As Trustee For CIT Mortgage Loan Trust 2007-1 ("BNYM"), although asserted by Defendants to be the legal owner of Plaintiff's defaulted consumer debt and the entity to whom she owed money, was not a "creditor" under the FDCPA because it obtained her debt after she defaulted solely to facilitate collection as fiduciary trustee for "beneficial interest holders," and she requests damages for Defendants' failure to inform her of that fact in their communications with her when attempting to collect her debt. If Plaintiff prevails on that claim, the district court would have to find that BNYM is not a "creditor" under the FDCPA, but that decision would not bar or invalidate a State foreclosure action, or contradict a State court's conclusion that BNYM had standing to bring that action or was owed money by Plaintiff.

Without the judicial remedies of a "creditor," Defendants' communications relating to the legal action to foreclose were third-party contacts and communications in violation of § 1692c(b).

Consumer-Petitioner Elsie Marino seeks review of a judgment dismissing her complaint on the Defendants' pre-answer motions to dismiss.

REASONS FOR GRANTING THE WRIT

The Third Circuit noted, "[t]he landscape of debt collection has changed since the FDCPA's enactment in 1977, and not all those who collect debt look like the classic 'repo man.'" *Tepper v. Amos Financial, LLC*, 898 F. 3d 364 (3d Cir. 2018). "Since this shift, courts have had to find new ways to distinguish 'debt collectors' from 'creditors' to determine whether the FDCPA applies to a particular entity." *Id.*

I. The decision below erroneously eliminates a whole category of third parties for whom debt is commonly collected—beneficiaries—which conflicts with the broad term "another" in the exclusion to the term "creditor."

This case is largely about two words, "or due", omitted by the Court's ellipsis in *Henson v. Santander Consumer USA Inc.*, 137 S. Ct. 1718, 1719 (2017), and the distinction Congress draws by them. This Court held that a company, such as Santander, may collect debts that it purchased for its own account without triggering the statutory definition of "debt collector" in dispute:

> By defining debt collectors to include those who regularly seek to collect debts "owed . . . another," the statute's plain language seems to focus on third party collection agents regularly collecting for a debt owner—not on a debt owner seeking to collect debts for itself. "All that matters is whether the target of the lawsuit regularly seeks to collect debts for its own account or does so for "another."

Lower courts are not recognizing the distinction Congress makes by including debts "owed or due another." The defined term "creditor" contains an exclusion roughly parallel to the § 1692a(6)(F)(iii) exception to the definition of a "debt collector." The FDCPA defines "creditor" as "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." 15 U.S.C.

§ 1692a(4). By contrast, a "debt collector" is "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." Id. § 1692a(6).[1] Congress chose the words "owed or due another" in § 1692a(6), and simply "for another" in § 1692a(4).

Important to determining status as creditor, this Court, in *Henson*, 137 S. Ct. 1274, pointed out:

> For while the creditor definition excludes persons who "receive an assignment or transfer of a debt in default," it does so only (and yet again) when the debt is assigned or transferred "solely for the purpose of facilitating collection of such debt for another." . . . So a company collecting purchased defaulted debt for its own account—like Santander—would hardly seem to be barred from qualifying as a creditor under the statute's plain terms.

Here, BNYM is alleged to have obtained the defaulted debt as trustee for "beneficial interest holders" central to a fiduciary duty, where legal and equitable titles are split. So, even though the debt is "owed" to BNYM, the debt is alleged to be "due" or "for" "another"—the beneficial interest holders. Thus, unlike Santander, BNYM *does* seem to be barred

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[1] A "debt collector" also encompasses a "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." *Id.*

from qualifying as a creditor under the Act's plain terms. It follows that BNYM may therefore qualify as a debt collector under the complaint.

"Assignments for collection," under which the assignee receives legal title to a debt for the purpose of bringing suit or enforcing payment but someone else retains beneficial ownership, were recognized in many states long prior to the 1977 enactment of the FDCPA. *Sprint Communications Co. v. APCC Services, Inc.*, 554 U.S. 269 (2008) (discussing history and citing cases allowing practice going back to 19th Century). Even if the debt is owed to trustee/BNYM under the first part of § 1692a(4), the exclusion in the second part contemplates such person could be an assignee or transferee for collection purposes. Plaintiff alleged at ECF 1, ¶¶ 56, 57, 12 that BNYM is collecting as trustee for beneficial interest holders. See *National Credit Union Administration Board v. U.S. Bank National Association*, 898 F.3d 243 (2d Cir. 2018) (briefly discussing "the longstanding historical distinction between legal title and equitable title, recognizing that a trustee does not act on its own behalf but rather on behalf of trust beneficiaries.") The fiduciary relationship between the trustee and beneficial interest holders is alleged at ¶¶ 56–59 of the Complaint. The fiduciary relationship between the assignee BNYM and the beneficial interest holders—the trust—is not a "person." In those terms, Santander was different because it held both the legal and equitable title to the defaulted debt merged in itself.

The identity of a trust beneficiary is a matter of fact. Assuming, for argument's sake, that BNYM is the current legal owner of the note and has an interest in the deed of trust, that is not dispositive of

whether it owns free of the trust and, therefore, not facilitating collection of Plaintiff's debt "for another." Plaintiff should have the opportunity to pursue information in Defendants' control to support her claim that Defendants' identifying BNYM as the creditor under § 1692g(a)(2) is insufficient.

A court can't determine beneficiaries' identities at the motion to dismiss stage, whether the trustee/BNYM is also a beneficiary among others, whether the trustee/BNYM is collecting solely for its own account or among others, the terms of the trust, whether trustee/BNYM is also a beneficiary collecting for "its own account" among others' accounts, and whether the trust is revocable. These are matters left for the trier of fact after discovery. Cf. *Markham v. Fay*, 74 F.3d 1347 (1st Cir. 1996):

> When a trustee is also a beneficiary, she holds the legal title to the entire trust property in trust for all of the beneficiaries (including herself), has a duty to deal with it for the benefit of the beneficiaries, and does not hold legal title to any of the trust property free of trust to use as she pleases. There is no partial merger of the legal and equitable interests. Restatement (Second) of Trusts Section(s) 99 cmt. b; 2 Scott on Trusts Section(s) 99.3.

Debts owed to trustees are traditionally and reasonably *due* the beneficiaries, see *Bear Mountain Orchards, Inc. v. Mich-Kim, Inc.*, 623 F.3d 163 (3d Cir. 2010), citing to Austin Wakeman Scott, William Franklin Fratcher & Mark L. Ascher, Scott and Ascher on Trusts § 24.2.1 (2007) ("[I]f the trustee has misappropriated trust funds due to a beneficiary, the trustee is liable in an action at law."); cf. *State of*

Delaware v. State of New York, 507 U.S. 490 (1993). ("The Master thus erred in equating intermediary banks, brokers, and depositories with the issuers' paying agents, who owe no duty to beneficial owners . . . Intermediaries who hold securities in street name or nominee name . . . are legally obligated to deliver unclaimed securities distributions to the beneficial owners.") "Street name accounts also permit changes in beneficial ownership to be effected through book entries rather than the unwieldy physical transfer of securities certificates." *Id.* This may explain precisely why, instead of simply requiring the name of the creditor, § 1692g(a)(2) is doubly specific. It makes clear, in case of split title, it is "the creditor to whom the debt is owed," not the one or more beneficiaries to whom the financial benefit is *due*, which must be disclosed. Otherwise, the phrase "creditor to whom the debt is owed" would be redundant if the creditor is simply the *person* to whom the debt is owed. Thus, even though BNYM obtained an interest in the deed of trust and may be the legal owner of the note, it was obtained and held subject to the fiduciary duty for the third-party beneficial interest holders. These factual issues do not appear to be reached or comprehended by *Henson*.

The district court did not construe Plaintiff's allegations in the light most favorable to her at the motion to dismiss stage and erred where it concluded: "BNYM is the current holder of the note and has an interest in the deed of trust, and thus BNYM is owed a debt that it is collecting as the owner of the note—not for any other third party. . . . Because Plaintiff has made no plausible claim that the Substitute Trustees failed to identify the name of the creditor . . . the Court holds that Plaintiff has failed

to state a claim for a violation of § 1692g(a)." App. C at 32. Thus, Plaintiff was kicked out of federal court because the district court eliminated a whole category of third parties—beneficiaries—from the term "another." That erroneous view of the law should have been reversed by the court of appeals under the standard of review on a motion to dismiss.

The district judge's conclusion that BNYM is a creditor because it is not collecting for any third party was clearly induced by the application of an improperly stated rule of law and there is no evidence or affirmative defense at the motion to dismiss stage to support the court's conclusion.

> "If a district court's findings rest on an erroneous view of the law, they may be set aside on that basis." Pullman-Standard v. Swint, 456 U.S., supra, at 287. See also Icicle Seafoods, Inc. v. Worthington, 475 U.S. 709, 714 (1986) ("If [the Court of Appeals] believed that the District Court's factual findings were unassailable, but that the proper rule of law was misapplied to those findings, it could have reversed the District Court's judgment").

Cooter & Gell v. Hartmarx Corporation, 110 S. Ct. 2447, 496 U.S. 384 (1990).

Petitioner filed a notice of appeal and requested the Fourth Circuit to review the case. She raised these issues in the district court and in her opening brief on appeal. A panel decided to affirm the judgment of the district court without explaining and analysis, and no circuit judge wanted to consider the important questions (included in Petitioner's application No. 19A121). Thus, the only reason for dismissal of the case is the district judge's opinion.

II. The decision below disregards the FDCPA's text and structure, conflicts with the considered view of the agency Congress tasked with enforcing the FDCPA, and renders an important consumer protection inoperable; the literal application of § 1692c(b) in this case would not lead either to an absurd result or one plainly at odds with the policy of the whole FDCPA, or thwart its purpose.

By communicating information about Plaintiff's debt with the state court clerk, Plaintiff contends that the Defendants exposed her to the concrete risk of harm to a privacy interest Congress has identified, see e.g., §§ 1692(a), 1692b, 1692c(b), 1692e(8), 1692f(7), (8).

It might at first seem to be absurd because, how can a debt collector obtain a court judgment without communicating with a court? Significantly, the Act specifies that debt collectors obtain *copies* of judgments, not judgments. Debt collectors obtain "information", "verification", and "debt", §§ 1692e(10)–(11), 1692g(a)(4), 1692a(6)(F)(iii)–(iv), and obtain "a copy of a judgment against the consumer", §§ 1692g(a)(4), 1692g(b). The word "obtained" is not defined in the FDCPA, but it includes "the possession of the right and responsibility to collect a debt." See *e.g.*, *Wadlington v. Credit Acceptance Corp.*, 76 F.3d 103, 106-07 (6th Cir. 1996). The answer given by the whole FDCPA seems to be that "the creditor may 'invoke' a judicial remedy." *Heintz*, 514 U.S. at 296. The judgment would then be in favor of the creditor described in §§ 1692a(4) and 1692g(a)(2).

In construing § 1692c(b)'s exception "or as reasonably necessary to effectuate a postjudgment judicial remedy," the district court concluded "[t]he

filing of an action to foreclose is a necessary precedent to reaching a postjudgment judicial remedy, so communications with a court that are necessary to maintain that foreclosure action do not violate § 1692c(b)." App. C at 33-34.That seems to create a far broader exception, for all foreclosing entities and their attorneys without regard to whether the entity is a creditor or debt collector, which, in light of § 1692i(b), directly conflicts with *Heintz v. Jenkins*, 514 U.S. 291, 296 ("the interpretation is consistent with the statute's apparent objective of preserving creditors' judicial remedies") and *Jerman v. Carlisle, McNellie. Rini, Kramer & Ulrich LPA*, 559 U.S. 573, 600 (2010) (the Court rejected arguments that assume the FDCPA compels results that are "absurd" but not shown to be "so absurd as to warrant disregarding the weight of textual authority"). In the absence of judicial remedies of a creditor, or any prior judgment or other affirmative defense at the motion to dismiss stage, the district court plausibly renders § 1692i(b) and § 1692c(b)'s exception "or as reasonably necessary to effectuate a postjudgment judicial remedy," and particularly the words, "as reasonably necessary", "effectuate", "postjudgment", and "remedy" superfluous, void, or insignificant.

In *Green v. Hocking*, 9 F.3d 18 (6th Cir. 1993) (per curiam), the court of appeals candidly pointed out that, if read literally, "15 U.S.C. § 1692c(b) prevents an attorney from communicating with any third party pertaining to the consumer's debt. Under this portion of the Act, it would be unlawful for an attorney to communicate with the court or the clerk's office by filing suit." First, the panel concluded, at that time, that this was an example of an absurd outcome because "[a]n examination of the FDCPA in

context reveals that it was not intended to govern attorneys engaged solely in the practice of law," and further, "we are unwilling to impose a system of strict liability that conflicts with the current system of judicial regulation. We therefore hold that the actions of an attorney while conducting litigation are not covered by the FDCPA." *Ibid.* But in 1995, this Court ruled in *Heintz* that there is no such conflict. The Sixth Circuit acknowledged that its conclusion in *Green* had been abrogated.[2] Importantly, that leaves intact its observations as to the literal meaning of § 1692c(b). The CFPB similarly advised,[3] in an

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[2] "[T]he Supreme Court's reasoning in Heintz v. Jenkins, 514 U.S. 291 (1995), ... affirmed the Seventh Circuit's conclusion that the FDCPA applies to lawyers acting as debt collectors. We previously decided otherwise, based in part on our view that any other rule 'automatically would make liable any litigating lawyer who brought, and then lost, a claim, against a debtor.'" *Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA*, 538 F.3d 469 (6th Cir. 2008).

[3] "[T]he Consumer Financial Protection Bureau, [] has delegated rulemaking authority under the FDCPA, and the Federal Trade Commission, which shares concurrent authority to enforce the FDCPA with the Bureau. See 15 U.S.C. § 1692l (setting forth administrative enforcement and rulemaking authority under the FDCPA)." *Hernandez v. Williams, Zinman & Parham, P.C.*, No. 14-15672 (9th Cir., 2016). "Congress vested authority for administering the FDCPA in the CFPB, which is empowered not only to enforce the Act, but also to promulgate regulations and to issue advisory opinions. 15 U.S.C. §§ 1692k(e), 1692l(b)(6), (d); see also 12 U.S.C. § 5512(b)(4)(B) (addressing deference due to CFPB interpretations of federal consumer financial law). Its interpretation of the Act is therefore entitled to deference." Brief of Amici Curiae Consumer Financial Protection Bureau and Federal Trade Commission, *Hernandez v. Williams,*

amicus brief ("Marx Brief"),[4] available at http://www.consumerfinance.gov/f/201202_cfpb_amicus-brief_marx-v-grc.pdf, that § 1692c(b) is properly interpreted as an absolute prohibition on third-party *contacts*, subject to narrow exceptions. Following are relevant excerpts:

"The Act's structure reveals that, in balancing risks to consumers against debt collectors' interests, Congress chose generally to bar third-party contacts except those necessary to locate debtors." Id. at 2.[5] "[T]he Act does not prohibit only contacts that cause proven harm—else it would not allow statutory damages absent proof of actual injury. See 15 U.S.C. § 1692k(a)(2). Instead, it bars contacts that pose a *risk* of harm." Id. at 5. "Specifically, any transmission of information regarding a debt qualifies as a 'communication.'" Id. at 9 (footnote omitted). "Most information held by debt collectors constitutes 'information regarding a debt'—e.g., the debtor's name, account number, and creditor. The collector would not have the information, or be able to transmit it to anyone, but for the debt. That information remains 'information regarding a debt' when the

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Zinman & Parham, P.C., 9th Cir., No. 14-15672, Dkt. No. 14, Page 28 of 42, filed 08/20/2014.

[4] Brief Of The Consumer Financial Protection Bureau As Amicus Curiae In Support Of Plaintiff-Appellant's Petition For Rehearing En Banc Or Rehearing By The Panel, *Marx v. General Revenue Corporation*, 668 F.3d 1174 (10th Cir. 2011) dated January 26, 2012.

[5] A court's understanding of the Act can be partially inferred through its treatment of § 1692b. See *Thomas v. Consumer Adjustment Co.*, 579 F. Supp. 2d 1290, 1298 (E.D. Mo. 2008) (the court stated "noncompliance with § 1692b is . . . a violation of § 1692c(b), and not an independent violation of the Act.").

collector transmits it to a third party, regardless of how the recipient interprets it." Id at 10 (footnote omitted). "[T]he FDCPA's definition of "communication" in § 1692a(2) does not necessarily apply to § 1692c(b), which provides that a debt collector 'may not communicate, in connection with the collection of a debt, with [third persons].' It is well established that a statute's definition of a noun—here, "communication"—does not necessarily control the meaning of a related verb or adverb. See *FCC v. AT&T, Inc.*, 131 S. Ct. 1177, 1182 (2011) (definition of 'person' did not limit ordinary meaning of 'personal'); *Indiana Michigan Power Co. v. Dep't of Energy*, 88 F.3d 1272, 1275 (D.C. Cir. 1996) (definition of 'disposal' did not apply to statute's use of verb 'dispose'). Whether it does in a particular case must be determined 'in light of the whole statutory scheme.' *Indiana Michigan Power*, 88 F.3d at 1275 Here, the statutory structure discussed above shows that the definition of "communication" is not meant to limit the ordinary meaning of "communicate" in § 1692c(b).[6] Without that qualification, § 1692c(b) is properly interpreted as an absolute prohibition on third-party contacts, subject to narrow exceptions." Id. at 11.

Lest the principal be applied that "effectuat[ing] a postjudgment judicial remedy" also authorizes filing the action as the means, bringing a prejudgment action should not be construed under § 1692i(b)

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6 "That § 1692c(b) is labeled 'Communication with third parties' is irrelevant. Congress specified that '[c]aptions ... are intended solely as aids to convenient reference, and no inference as to the legislative intent ... may be drawn from them.' Pub. L. 90-321 § 502, codified at 15 U.S.C. § 1601 note." Id. at 11-12.

to be "an ordinary remedy that debt collectors pursue." App. C at 34.

There is an unfortunate discrepancy between the original enactment of § 1692i(b), where Congress chose the word "title", and the substituted word "subchapter" in the U.S. Code used by the federal courts. Congress' chosen word "title" sounds like it controls how even the statements of Congress' findings and the Act's purpose are to be construed, whereas the lesser-sounding word "subchapter" has not; it plausibly induced the lower courts to consider and misconstrue § 1692i(b) which was then used as a basis to dismiss Plaintiff's claims under § 1692c(b) which she brought "in conjunction with § 1692i(b)" in her complaint. For example, see *Rice v. Palisades Acquisition XVI, LLC*, No. 07C4759, 2007 WL 4522617, at *3 (N.D. Ill. Dec. 18, 2007):

> Section 1692i(b) discusses the authorization of debt collection suits: "Nothing in this subchapter shall be construed to authorize the bringing of legal actions by debt collectors." As Blatt points out, this vague clause does not stand for the proposition that debt collectors can never bring lawsuits. Rather, a careful reading of § 1692i makes it clear that § 1692i(b) only acts to limit the venues in which debt collectors can bring lawsuits to those mentioned in § 1692i(a).

Recognizing that § 1692i(b) affects how the Act's purpose is construed, it would be incorrect to conclude, as the *Rice* court did, that "a careful reading of § 1692i makes it clear that § 1692i(b) only acts to limit the venues in which debt collectors can bring lawsuits to those mentioned in § 1692i(a)." Construing § 1692i(b) that way reinforces a false presupposi-

tion that debt collectors are authorized elsewhere in the FDCPA, *i.e.*, without liability, to bring legal actions against consumers, else it would not be viewed as applying to something less than the whole FDCPA. This is perfectly demonstrated in the case upon which the district court relied here, *Cohen v. Wolpoff & Abramson*, LLP, 2008 WL 4513569 at *6 (D.N.J. 2008) (reading into § 1692c(c) "an exception to the restrictions of the FDCPA to allow the pursuit of the ordinary remedies that debt collectors pursue"). "It would be foolish indeed to construe the statutory language of the FDCPA to find that it prohibits in one provision *what it implies authorization for in another.*" *Id.* (emphasis added).[7] This so-called "authorization" is a sword seized from this Court's dicta in *Heintz v. Jenkins*, 514 U.S. at 296, but the lower courts' presumption conflates communicating with the consumer under § 1692c(c) *with* contacting the court clerk under § 1692c(b), and concludes that Plaintiff's position is not in harmony with what this Court said and didn't say, when actually the reverse is true.

> We agree with Heintz that it would be odd if the Act empowered a debt-owing consumer to stop the "communications" inherent in an ordinary lawsuit and thereby cause an ordinary debt-collecting lawsuit to grind to a halt. But, it is not necessary to read § 1692c(c) in that way—if only because

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[7] The *Cohen* court attributed the idea to this Court: "as the Supreme Court notes, such an interpretation conflicts with the language of § 1692c, which implies an exception to the restrictions of the FDCPA to allow the pursuit of the ordinary remedies that debt collectors pursue."

> that provision has exceptions that permit communications "to notify the consumer that the debt collector or creditor may invoke" or "intends to invoke" a "specified remedy" (of a kind "ordinarily invoked by [the] debt collector or creditor"). §§ 1692c(c)(2), (3). Courts can read these exceptions, plausibly, to imply that they authorize the actual invocation of the remedy that the collector "intends to invoke." The language permits such a reading, for an ordinary court-related document does, in fact, "notify" its recipient that the creditor may "invoke" a judicial remedy. Moreover, the interpretation is consistent with the statute's apparent objective of preserving creditors' judicial remedies. We need not authoritatively interpret the Act's conduct regulating provisions now, however. Rather, we rest our conclusions upon the fact that it is easier to read § 1692c(c) as containing some such additional, implicit, exception than to believe that Congress intended, silently and implicitly, to create a far broader exception, for all litigating attorneys, from the Act itself.

Heintz, 514 U.S. at 296. It seems the Court said it would be "odd" because the FDCPA does not empower the consumer to stop a lawsuit, and it is perhaps a misperception that the effect of the prohibition in § 1692c(b) is a "bar" when the Act makes the debt collector liable to the consumer for damages as a

deterrent.[8] Crucially, there are no "creditor's judicial remedies" identified to be preserved. The Court was careful to non-authoritatively interpret § 1692c(c) and has made subtle distinctions to preserve litigation rights of creditors. In *Jerman*, 559 U.S. at 600, the Court presupposes that, on a case-by-case basis, all clients [debt holders] are not creditors, and some are debt collectors ("Some courts have held clients vicariously liable for their lawyers' violations of the FDCPA.") The Court rejected the argument foreseeing "a flood of lawsuits against creditors' lawyers by plaintiffs (and their attorneys) seeking damages and attorney's fees. The threat of such liability, in the dissent's view, creates an irreconcilable conflict between an attorney's personal financial interest and her ethical obligation of zealous advocacy on behalf of a client: An attorney uncertain about what the FDCPA requires must choose between, on the one hand, exposing herself to liability and, on the other, resolving the legal ambiguity against her client's interest or advising the client to settle—even where there is substantial legal authority for a position favoring the client" because "a lawyer's interest in avoiding FDCPA liability may not always be adverse to her client. Without present judicial remedies of an identified creditor, according to the FDCPA's definition of "creditor," the plaintiff and its attorneys

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[8] See *Jacobson v. Healthcare Fin. Servs., Inc.*, 516 F.3d 85, 91 (2d Cir. 2008) ("The FDCPA enlists the efforts of sophisticated consumers . . . as 'private attorneys general' to aid their less sophisticated counterparts, who are unlikely themselves to bring suit under the Act, but who are assumed by the Act to benefit from the deterrent effect of civil actions brought by others.")

should not be automatically immunized for the abusive use of their imprimatur against a consumer.

In a nutshell, this case brings into sharp contrast two competing presuppositions (the "first" and "second" presuppositions):

(1) that § 1692i(b) is a venue rule that "does not affirmatively prohibit debt collectors from bringing legal actions, but merely declines to extend the circumstances under which debt collectors may do so"[9] (i.e., without liability), versus

(2) that the Act's structure reflects Congress's judgment that debt collectors' interests generally outweigh the risks to consumers only when collectors need to determine the whereabouts of missing debtors,[10] *balanced with* "the statute's apparent objective of preserving creditors' judicial remedies." [11]

The lower courts' misconstruing § 1692c(b) in conjunction with § 1692i(b) reinforces a false, unarticulated presupposition that debt collectors' interests in collecting debts asserted to be owed or due another outweigh consumers' privacy interests and

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[9] *Middlebrooks v. Sacor Fin., Inc.*, No. 1:17-CV-0679-SCJ-JSA, 2018 WL 4850122, at *20 (N.D. Ga. July 25, 2018); *Deitemyer v. Ryback et al*, ELH-18-2002, (D. Md. September 13, 2019).

[10] "The Act carefully balances the need to protect consumers' privacy against debt collectors' interests in collecting debts. S. Rep. No. 95-383, at 3, *reprinted in* 1977 U.S.C.C.A.N. 1695, 1698. The Act's structure reflects Congress's judgment that debt collectors' interests generally outweigh the risks to consumers only when collectors need to determine 'the whereabouts of missing debtors.' *Id.*" Marx Brief, p. 6.

[11] *Heintz,* 514 U.S. at 296.

are therefore "authorized"[12] to bring legal actions against consumers. The lower courts' commitment to the first presupposition is hostile to "Congress' judgment" in the second. Looking to the Senate Report, it clearly expressed agreement under "the strong presumption that Congress expresses its intent through the language it chooses." *INS v. Cardoza-Fonseca*, 480 U.S. 421, 432 n. 12, 107 S.Ct. 1207, 1214 n. 12, 94 L.Ed.2d 434 (1987)."

The first presupposition does not further the Act's purpose to promote consistent state action, but the second does. The issue under the FDCPA's structure seems to be whether debt collectors have affirmative defenses to strict liability. See *Evankavitch v. Green Tree Serv., LLC*, 793 F.3d 355, 361-63 (3d Cir. 2015) quoting *Meacham v. Knolls Atomic Power Lab.*, 554 U.S. 84, 91 (2008) ("repeating 'the familiar principle that "[w]hen a proviso ... carves an exception out of the body of a statute or contract those who set up such exception must prove it"') (quoting *Javierre v. Cent. Altagracia*, 217 U.S. 502, 508, 30 S.Ct. 598, 54 L.Ed. 859 (1910)). Is communicating with a court clerk authorized under State laws? Perhaps, but a stated purpose of the FDCPA is to promote consistent State action, § 1692(e). As alleged in the Complaint at ¶ 80, there is no indication that Maryland has applied for and received an exemption under §§ 1692n–o, or requires a § 1692a(4) creditor to be a party in interest, as long as debt collecting

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[12] Similar language in 38 Stat. 731-732, 15 U.S.C. (1946 ed.) § 18 reads "nothing in this section shall be held or construed to authorize or *make lawful* anything heretofore prohibited . . ." (Emphasis added.)

attorneys are motivated to strictly transmit pleadings as an "initial communication" supposedly relieved under § 1692g(d) of the necessity to disclose a current creditor, if that is even a correct view of § 1692g. The district court's judgment conflicts with "Congress' judgment," in the second presupposition above, and the FDCPA's purpose to promote consistent State action, because it immunizes alleged debt collectors on a motion to dismiss instead of enforcing § 1692c(b) broadly according to its terms.

The lower court's unflagging commitment to the first presupposition leads to arbitrariness. The district court construed the Defendants' filing and maintaining of an action to foreclose as "necessary" and changed the statutory word "effectuate" a postjudgment judicial remedy into "reaching" a postjudgment judicial remedy. "The use of the word 'reasonably' in § 1692c(b) indicates that this is an objective standard that the debt collector must meet to avoid liability under the FDCPA." *Worsham v. Accounts Receivable Management, Inc.*, 497 F.App'x 274, 277 (4th Cir. 2012) (per curiam). The question is whether a reasonable person would believe that bringing a pre-judgment legal action effectuates a postjudgment judicial remedy. It is not objectively reasonable to effectuate a postjudgment judicial remedy without a prior judgment or copy of a prior judgment. Congress could have simply chosen language closer to what the district judge said, or added "courts" to the list of persons § 1692c(b) excepts, but it didn't. Judge Hazel announces a conflicting, incoherent rule, whether affirmed or not, because the court held to the first presupposition and the Court's dicta in *Heintz* without making the proper distinctions. The district court's conclusion plausibly ren-

ders § 1692i(b) and the word "postjudgment" superfluous, void, or insignificant whether read in isolation or in context.

> For another thing, when Congress considered the Act, other Congressmen expressed fear that repeal would limit lawyers' "ability to contact third parties in order to facilitate settlements" and "could very easily interfere with a client's right to pursue judicial remedies." H. R. Rep. No. 99-405, p. 11 (1985) (dissenting views of Rep. Hiler). They proposed alternative language designed to keep litigation activities outside the Act's scope, but that language was not enacted. Ibid.

Heintz, at 297. As in *Heintz*, the Court should find nothing either in the Act or elsewhere indicating that Congress intended to create an exception from § 1692c(b)'s coverage for "communications with a court that are necessary to maintain [a] foreclosure action[,]" an exception that, for the reasons set forth above, falls outside the range of reasonable interpretations of the FDCPA's express language. See, *e. g.*, *Brown v. Gardner*, 513 U. S. 115, 120-122 (1994).

Although § 1692i(b) does not affirmatively prohibit legal actions by debt collectors, § 1692c(b) establishes that Defendants "communicating" information about Plaintiff's debt with the State court clerk may qualify as a prohibited contact regardless of (i) whether State rules of procedure may generally permit it and (ii) whether such is "debt collection" in itself or a "communication" under § 1692a(2). See *Romea v. Heiberger*, 163 F.3d 111, **10, 11 (2d Cir. 1998) (discussing Maryland in rem eviction process) ("If the statutes did conflict, moreover, it would be

[State law], and not the FDCPA, that would have to yield. . . . The record contains no indication that [Maryland] has made any such claim as to the sufficiency of the [foreclosure] process to achieve the objectives of the FDCPA.")

For the foregoing reasons, in light of § 1692i(b), § 1692c(b)'s literal application would not lead either to an absurd or futile result or one plainly at odds with the policy of the whole legislation or thwart its stated purpose as limited by § 1692i(b). Cf. *United States v. American Trucking Ass'ns*, 310 US 534, 60 S.Ct. 1059, 1064 (1940); *Salute v. Stratford Greens Garden Apartments*, 136 F.3d 293 (2d Cir.1998) (citation omitted). Therefore, Plaintiff respectfully asserts that the district court announces a conflicting, incoherent rule, and impermissibly narrows, and renders the consumer protections in § 1692c(b) inoperable. The court of appeals, by the panel and en banc, affirmed the district court and sanctioned such a departure by a lower court as to call for an exercise of this Court's supervisory power. If this judgment immunizing non-creditors and their agents and attorneys is not reversed or remanded for further proceedings, other judges may follow it and consumers will not be able to hold foreclosing debt collectors liable if a district judge ignores the law by discretion.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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