ORIGINAL

20-1634

No. _____

IN THE
Supreme Court of the United States

NICOLE JOHNSON-GELLINEAU,
Petitioner,

v.

STIENE & ASSOCIATES, P.C.; CHRISTOPHER VIRGA, ESQ.; RONNI GINSBERG, ESQ.; JPMORGAN CHASE BANK, NATIONAL ASSOCIATION; WELLS FARGO BANK NATIONAL ASSOCIATION, *AS TRUSTEE FOR CARRINGTON MORTGAGE LOAN TRUST, SERIES 2007-FRE1, ASSET-BACKED PASS-THROUGH CERTIFICATES,*
Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

Nicole Johnson-Gellineau
Petitioner
149 Wilkes Street
Beacon, New York 12508
Phone: 646-456-1151
nikkigelly@gmail.com

QUESTIONS PRESENTED

The Fair Debt Collection Practices Act, 91 Stat. 874, 15 U.S.C. §§ 1692 *et seq.*, provides that "[n]othing in this title shall be construed to authorize the bringing of legal actions by debt collectors." 91 Stat. 880, § 1692i(b).

In *Heintz v. Jenkins*, 514 U.S. at 296, the Court observed that an apparent objective of the FDCPA 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." 15 U.S.C. § 1692a(4). 15 U.S.C. § 1692a(6) provides that debt collectors regularly attempt to collect debts "owed ***or due*** another."

Respondent, Wells Fargo Bank National Association, *As Trustee For Carrington Mortgage Loan Trust, Series 2007-FRE1, Asset-Backed Pass-Through Certificates*, is a trustee acting solely in a fiduciary capacity for beneficiaries.

The questions presented are:

1. Whether a fiduciary that obtains a defaulted debt, and is owed the debt, may qualify as a person facilitating collection "for another" within the exclusion to the term "creditor" in 15 U.S.C. § 1692a(4).

2. Whether, lacking a creditor, 15 U.S.C. § 1692c(b) may be construed to provide an exception for litigating attorneys communicating with a court clerk.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

PETITION FOR A WRIT OF CERTIORARI

Nicole Johnson-Gellineau (herein "Petitioner" or "Plaintiff") petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS AND ORDERS BELOW

The December 18, 2020 Order of the Court of Appeals (No. 19-2236) denying rehearing by the panel and *en banc* is unpublished, and reproduced at Appendix A.

The November 17, 2020 Summary Order of the Court of Appeals (No. 19-2236) is unpublished, and reproduced at Appendix B.

The June 27, 2019 judgment of the United States District Court for the Southern District of New York (7:16-cv-09945-KMK) dismissing Petitioner's complaint is unpublished, and reproduced at Appendix C.

JURISDICTION

The Court of Appeals for the Second Circuit denied a timely petition for rehearing on Dec. 18, 2020. 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 during the Covid-19 emergency was extended to 150 days, so the deadline is Tuesday, May 18, 2021.

APPLICABLE LAW

15 U.S.C. § 1601 note, 91 Stat. 874 provides:

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

15 U.S.C. § 1692(e), 91 Stat. 874 provides:

> 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. § 1692i(b), 91 Stat. 880 provides:

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

15 U.S.C. § 1692c(b), 91 Stat. 877 provides:

> 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.

STATEMENT OF THE CASE

15 U.S.C. § 1692a(4) denies "creditor" status to certain assignees and transferees of debt. In other words, the FDCPA announces that not every debt owed by a consumer necessarily has a current creditor. Yet, to avoid liability, a debt collector is required to send the consumer a written notice "containing . . . the name of the *creditor* to whom the debt is owed." 15 U.S.C. § 1692g(a)(2) (emphasis added).

Respondent Wells Fargo Bank National Association, *As Trustee For Carrington Mortgage Loan Trust, Series 2007-FRE1, Asset-Backed Pass-Through Certificates* ("Wells Fargo"), sought to obtain a Judgment of Foreclosure and Sale in a prejudgment action it brought against Johnson-Gellineau without her consent. Although the legal owner of Johnson-Gellineau's defaulted consumer debt and the entity to whom she owed money, Wells Fargo was not a "creditor" under the FDCPA because it obtained her debt after she defaulted solely to facilitate collection as fiduciary trustee for a third-party beneficiary-investor. Johnson-Gellineau requests damages, contending that if there is no *creditor* who may be named under § 1692g(a)(2) and who may "'invoke' a judicial remedy," a debt collector bringing or maintaining an action seeking a judgment is

(i) not to be construed as authorized under the purpose of the whole Act, § 1692i(b);

(ii) prohibited third party contact, § 1692c(b);

(iii) deceptive means to collect a debt, § 1692e.

If Plaintiff prevails on that claim, the district court would have to find that trustee/Wells Fargo is not a "creditor" under the FDCPA, but that decision would not bar or invalidate a State foreclosure action,

or contradict a court's conclusion that Wells Fargo had standing to bring that action or was owed money by Plaintiff.

The FDCPA provides that a debt collector generally "may not communicate, in connection with the collection of any debt, with any person other than the consumer" or other specified parties. 15 U.S.C. § 1692c(b). The statute provides specified exceptions, such as when a debt collector seeks "location information" about a consumer under § 1692b. The statute also permits contacts with the consumer's consent, a court's express permission, or as reasonably necessary to effectuate a postjudgment judicial remedy. See 15 U.S.C. § 1692c(b). Although Wells Fargo had the right under State law to sue Plaintiff, there were no rights of a "creditor" involved; in that context, by communicating information regarding Johnson-Gellineau's mortgage debt with the court clerk without "prior consent . . . given directly to the debt collector," the Defendants exposed her to a concrete injury: the risk of real harm to a privacy interest that Congress has identified, § 1692(a), violating § 1692c(b) in conjunction with § 1692i(b).

15 U.S.C. § 1692e provides that "[a] debt collector may not use any false, deceptive, or misleading representation or means in connection with the collection of any debt." Defendants' legal error in their view of the FDCPA—falsely implying a creditor's status, as if Wells Fargo were an innocent purchaser for value, by their communications with the State court and served upon the consumer—could deceptively lead the least-sophisticated consumer to waive or otherwise not properly vindicate her rights under the FDCPA. Because §§ 1692e and 1692g protect Plaintiff's concrete interests concerning the name of the creditor who may

invoke a judicial remedy, the alleged violations satisfy both the injury-in-fact requirement of Article III and materiality requirement for a successful § 1692e cause of action.

REASONS FOR GRANTING THE WRIT

This Court should review the dismissal of Johnson-Gellineau's amended complaint on Fed. R. Civ. P. 12 motions. The decisions below bring entrenched, false presuppositions of implied authorization to the text, disregarding the statutory findings, purpose, and text itself, effectively immunizing litigating debt collectors at the pleading stage, disregarding the Act's structure which places the burden on the debt collector to plead and prove affirmative defenses to strict liability, rendering important consumer protections inoperative.

Consumers owing defaulted mortgage debts cannot survive intact waiting for lower federal courts to realize that, *lacking a creditor*, a debt collector communicating "information regarding a debt" in bringing or maintaining a legal action is plausibly at risk of liability. As the Court began to elucidate in *Jerman*, infra., the FDCPA properly understood incentivizes a debt collector to settle with the non-consenting consumer than, for example, bring an action that the Act *expressly* does not authorize, § 1692i(b). This is the case to begin that realization process.

I. The lower courts' improperly stated rule of law eliminates a whole category of third parties for whom debt is commonly collected—beneficiaries—which conflicts with the broad term "another" in the defined exclusion to the term "creditor."

The district court erred where it concluded:

"because Wells Fargo is a 'person . . . to whom a debt is owed,' and did not acquire the debt in default 'solely for the purpose of facilitating collection of such debt *for another*,' Wells Fargo was Plaintiff's creditor under the FDCPA." App. 30. This was despite the district court's observation that "no Party has argued that the trust has no beneficiaries," App. 32, n.4.

Important in determining creditor legal status, this Court, in *Henson v. Santander Consumer USA Inc.*, 137 S. Ct. 1718, 1719 (2017), 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, however, Wells Fargo is alleged to have obtained the defaulted debt as trustee for a "beneficiary-investor" or "one or more beneficiaries" central to a fiduciary duty, where legal and equitable titles are split. So, even though the debt is "owed" to Wells Fargo, the debt is alleged to be "due" another and collected "for" "another"—the beneficiary-investors. Thus, unlike Santander, trustee/Wells Fargo *does* seem to be barred from qualifying as a creditor under the Act's plain terms. It follows that Wells Fargo plausibly qualifies as a debt collector because it does so *regularly* in the amended complaint.

This case regarding trustee/Wells Fargo's status comes under the two words, "or due", omitted by the Court's ellipsis in *Henson*, 137 S. Ct. 1724, and the

distinction Congress draws by the words "owed or due another." 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."

The decisions below acknowledged the essence of Plaintiff's claim, but ignored the distinction Congress drew regarding debts "owed *or due* another" and, improperly, only regarded that the debt was "owed" to trustee/Wells Fargo. See §§ 1692a(6) and 1692a(4) respectively.

"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/Wells Fargo 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. 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 alleged between the assignee Wells Fargo and the beneficial interest holders—the trust—is not a "person." In those terms, Santander was different because that company held both the legal and equitable title to the defaulted debt merged in itself. 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 superfluous if the creditor is simply the *person* to whom the debt is owed. Thus, even though Wells Fargo obtained the debt, it was obtained and held subject to the fiduciary duty for the third-party beneficial interest holders. These issues do not appear to be reached or comprehended in *Henson*.

If the district court has to find that trustee/Wells Fargo is not a "creditor" under the FDCPA, that decision would not bar or invalidate a State foreclosure action, or contradict a State court's conclusion that Wells Fargo had standing to bring that action or was owed money by Plaintiff. Therefore, the circuit court erred where it concluded that Plaintiff's liability claim for damages is "contradicted" by a judgment of foreclosure against her and barred by virtue of issue preclusion, App. 5. It is not.

Thus, Plaintiff was kicked out of federal court because the district court eliminated a whole category of third parties—beneficiaries—from the term "another" and ignored the distinction Congress made by the words "owed or due another" in order to conclude that Wells Fargo is the creditor. That error of law should have been reversed by the court of appeals under the

standard of review on Fed. R. Civ. P. 12 motions. The dismissal of the amended complaint at this pleading stage effectively grants immunity to the alleged debt collectors, which defeats the structure of the Act offering strict liability with scattered affirmative defenses.

II. The decision below wrote a new exception in between the lines regarding prohibited communication under § 1692c(b); as in *Heintz*, it "create[s] a far broader exception" for *all* litigating entities' attorneys by not distinguishing actions lacking a creditor.

Because trustee/Wells Fargo is not "the *creditor* to whom the debt is owed," by communicating information regarding Plaintiff's debt with the court clerk, non-consenting Plaintiff contends that the Defendants exposed her to a concrete injury: the risk of real harm to a privacy interest Congress has identified in statutory findings, § 1692(a).

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," §§ 1692e(10)-(11), "verification," 1692g(a)(4), 1692g(b), and "debt," 1692a(6)(F)(iii)–(iv), "whether or not such obligation has been reduced to judgment," 1692a(5), and obtain "a copy of a judgment against the consumer," 1692g(a)(4), 1692g(b). The word "obtain" 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 exceptions, the circuit court affirmed the district court's ruling that attorneys communicating with the court clerk in connection with foreclosure proceedings do not violate § 1692c(b):

> She first asserts that the Attorney Defendants violated 15 U.S.C. § 1692c(b) by communicating with the Dutchess County clerk in connection with foreclosure proceedings. We agree with the District Court that such communications do not violate § 1692c(b), which prohibits debt collectors from communicating with third parties in connection with collection of the debt without the prior consent of the debtor or the express permission of a court of competent jurisdiction.

App. 7. That rule creates a far broader exception for all foreclosing entities and their attorneys by not distinguishing actions allegedly brought by or on behalf of non-creditors from those brought by or on behalf of creditors. In light of § 1692i(b), this sort of quiet reincarnation of the repealed attorney exemption directly conflicts with the Act per *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*, 130 S. Ct. 1605, 1608, 1624 (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 lower courts render § 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." 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.[1] Importantly, that leaves intact its observations as to the literal

---

[1] "[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).

meaning of § 1692c(b). The CFPB[2] similarly advised, in an amicus brief (the "Marx Brief"),[3] 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.[4]

---

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

[3] 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.

[4] 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.").

"[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 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).[5] 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) to be "an ordinary remedy that debt collectors pursue." Plaintiff invoked § 1692i(b) and argued it at length in her Oppositions, ECF 86, pp. 12, 16, 18, 25, n.4; ECF 87 at 24 and in her principal brief on appeal. There is a 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 subtly induces lower courts to consider and misconstrue § 1692i(b), which was then used as a basis to dismiss Plaintiff's claims under § 1692c(b). 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

---

[5] "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.

> 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).

Assuming, arguendo, 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 presupposition 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 cited by the District Court at App. 39, *Cohen v. Wolpoff & Abramson*, LLP, 2008 WL 4513569 at *6 (D.N.J. 2008) ("There is no cause of action under [§ 1692c(b)] for an attorney's communication with a forum in pursuit of a legal remedy" and 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.*") (emphasis added). The *Wolpoff* court attributed to *this* Court the idea of an implied authorization leading to an implied exception: "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." This so-called "authorization" is a sword seized from the Court's dicta in *Heintz v. Jenkins*, 514 U.S. at 296, but the lower courts conflate communicating with the consumer under § 1692c(c) *with* contacting the foreclosure court clerk under § 1692c(b), and concludes, App. 39–41, 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 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 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.[6] Crucially, in this case, there are no "creditor's judicial remedies" to be preserved. The Court was careful to non-authoritatively interpret § 1692c(c) but has made subtle distinctions to preserve litigation rights of creditors. In *Jerman,* 130 S. Ct. at 1622, the Court presupposes that, on a case-by-case basis, all clients are not creditors, and some are debt collectors or else they would not be liable. ("Some courts have held clients vicariously liable for their lawyers' violations of the FDCPA.") The Court rejected the arguments 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

---

[6] Congress intended the FDCPA to be "primarily self-enforcing" by private attorneys general. S. Rep. 95-382, at 5. 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.")

> 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.

Id. at 1620. "Moreover, a lawyer's interest in avoiding FDCPA liability may not always be adverse to her client." *Id.* at 1622.

Lacking the judicial remedies of a "creditor," Wells Fargo and its attorneys should not be automatically immunized for the abusive use of their imprimatur against a consumer.

The decisions below reveal two competing presuppositions concerning the meaning of 15 U.S.C. §§ 1692c(b) and 1692i(b), but "only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law." *King v. Burwell*, 135 S.Ct. 2480, 2492 (2015) (quoting *United Sav. Ass'n of Tex. v. Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365, 371 (1988):

The "first" presupposition is that "communications made in the context of foreclosure proceedings that would otherwise violate § 1692c if made to a third party do not run afoul of the FDCPA"[7] and that

---

[7] App. 39 ("Courts in this and other circuits, relying on *Heintz*, have similarly found that communications made in the context of foreclosure proceedings that would otherwise violate § 1692c if made to a third party do not run afoul of the FDCPA.") (Collecting cases.)

§ 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"[8] (i.e., without liability).

The "second" presupposition is 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,[9] *balanced with* "the statute's apparent objective of preserving creditors' judicial remedies." [10]

The district court was misled by improper analysis in numerous cited cases, App. 39–41, uncorrected by the court of appeals, which evince that the lower courts' misconstruing § 1692c(b) in conjunction with § 1692i(b) reinforces a false presupposition that debt collectors' interests in collecting debts outweigh consumers' privacy interests and are therefore "authorized"[11] to bring legal actions against consumers. The

---

[8] *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. August 6, 2019).

[9] "The Act carefully balances the need to protect consumers' privacy against debt collectors' interests in collecting debts. S. Rep. No. 95-38[2], 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.*" CFPB Marx Brief, p. 6.

[10] *Heintz,* 514 U.S. at 296, discussing particularly § 1692c(c).

[11] 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.)

presupposition that, with respect to a specific debt, there must be a current creditor conflicts with the very definition of "creditor." And if there is no current creditor, then the debt cannot be validated according to § 1692g(a)(2) which requires disclosure of "the name of the creditor to whom the debt is owed." Under § 1692g(d),[12] litigating attorneys supposedly are able to avoid any "initial" communication with the consumer which would trigger this disclosure requirement by confining their communications with the consumer to formal pleadings and attachments.[13] But see *Hernandez v. Williams, Zinman & Parham PC*, 829 F.3d 1068 (9th Cir. 2016) for a complete contextual analysis.[14] Either way, how the information is interpreted doesn't make the lack of a creditor irrelevant as it still runs afoul of § 1692c(b) as a prohibited contact with the court clerk.

A stated purpose of the FDCPA is to promote consistent State action, § 1692(e). As alleged, there is no indication that New York either requires a § 1692a(4)

---

[12] "A communication in the form of a formal pleading in a civil action shall not be treated as an initial communication for purposes of subsection (a)." 15 U.S.C. § 1692g(d).

[13] "We conclude that the Certificate falls within § 1692g(d)'s pleading exclusion, and is therefore not an initial communication, because the defendants were legally obligated to file this document with the foreclosure complaint." *Cohen v. Rosicki, Rosicki & Assocs., P.C.*, 897 F.3d 75 (2d Cir. 2018).

[14] In *Hernandez*, 829 F.3d at 1070, the meaning of § 1692g(a) was before the court on summary judgment, and, in order to reach its decision, the Court engaged in a lengthy analysis of both the statutory text and the legislative history of the validation notice provision. The panel concluded that "the text of § 1692g(a) is ambiguous when read alone" and "h[e]ld that the phrase 'the initial communication' refers to the first communication sent by any debt collector[.]"

creditor to be a party in interest consistent with the FDCPA or has applied for and received an exemption under §§ 1692n–o. The first presupposition does not further the Act's purpose to promote consistent State action, but the second does.

The lower courts' commitment to the first presupposition is hostile to "Congress' judgment" in the second (that debt collectors' interests generally outweigh the risks to consumers only when collectors need to determine 'the whereabouts of missing debtors'). The lower courts' unflagging commitment to the first presupposition leads to arbitrariness. In *Marino v. Nadel*, No. 17-CV-2116, 2018 WL 4634150, at *3 (D. Md. 2018), aff'd, *cert. denied*, cited at App. 39, Judge Hazel construed the defendants' filing and maintaining of an action to foreclose as "necessary" and altered the statutory words "effectuate" a postjudgment judicial remedy into "reaching" a postjudgment judicial remedy. The *Marino* court announces a conflicting, incoherent rule because the court held to the first presupposition and the Court's dicta in *Heintz* without making the proper distinctions. "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. The district court's conclusion plausibly renders § 1692i(b) and the word "postjudgment" superfluous, void, or insignificant

whether read in isolation or in context. "First, and most decisive, is the text of the Act itself." *Obduskey v. McCarthy & Holthus LLP*, 139 S. Ct. 1029, 1036 (2019). The Court went on to specially acknowledge the broad application of 15 U.S.C. 1692c(b) in the dicta of that case. *Id.* at 1037. ("For example, the FDCPA broadly limits debt collectors from communicating with third parties 'in connection with the collection of any debt.' §1692c(b).") This Court previously held that a court can opt to not enforce a statute as written only "where the result of applying the plain language would be, in a genuine sense, absurd, i.e., where it is quite impossible that Congress could have intended the result," *Public Citizen v. Department of Justice*, 491 U.S. 440, 470-471 (1989). Congress could have simply chosen language closer to what the district judges said, or added "courts" to the list of persons § 1692c(b) excepts, but it didn't.

> For another thing, when Congress considered the Act, other Congressmen expressed fear that repeal [of the attorney exemption] 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 indicates that Congress intended to create an exception from § 1692c(b)'s coverage for "Attorney Defendants . . . communicating with the Dutchess County clerk in connection with foreclosure proceedings," 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 regarding Plaintiff's debt with the court clerk may qualify as a prohibited contact regardless of (i) whether rules of procedure may generally permit it and (ii) whether such is a "communication" under § 1692a(2) or "debt collection" in itself.[15]

For the foregoing reasons, in light of the Act's purpose as controlled by § 1692i(b), literal application of § 1692c(b) 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, Petitioner respectfully asserts that the lower federal courts' stated rule of law impermissibly narrows, and renders the consumer protections in § 1692c(b) inoperable. The court of appeals sanctioned such a departure by a lower court as to call for an exercise of this Court's supervisory power, to "authoritatively interpret the Act's conduct-regulating provisions now." *Heintz,* 514 U.S. at 296. The decision below immunizes alleged debt collectors on a motion

---

[15] The Second Circuit joined those of its sister circuits that have concluded that "a foreclosure action is an 'attempt to collect a debt' as defined by the FDCPA." *Cohen v. Rosicki, Rosicki & Assocs., P.C.*, 897 F.3d 75, 82 (2d Cir. 2018).

to dismiss instead of strictly enforcing § 1692c(b)'s affirmative defenses according to the Act's terms. If this judgment immunizing non-creditors and their agents and attorneys is not reversed or remanded for further proceedings, consumers will not be able to hold litigating debt collectors liable if lower courts ignore the law based on conflated dicta.

III. A § 1692a(6)(F)(iii) affirmative defense to Wells Fargo's servicer, Chase, being considered a "debt collector" depends not on pre-default assumption of servicing rights across a portfolio of loans, but rather on what the term "obtains" means, including when and from whom "possession of the *right* and *responsibility* to *collect* a debt" arises.

15 U.S.C. § 1692a(6)(F)(iii) provides any person an affirmative defense in the form of an exception to the definition of "debt collector," to the extent that debt collection activity "concerns a debt which was not in default at the time it was obtained by such person[.]"

Chase mailed Johnson-Gellineau monthly statements indicating that her loan was in default as of 9/1/2009, that it is an attempt to collect a debt, the Amount Due, that "payment must be received by certified funds," and that she was "at risk of foreclosure." Am. Compl. ¶ 43. The Court of Appeals "agree[d] with the District Court's conclusion that Chase was not a debt collector because the loan was not in default when Chase became a servicer to the mortgage" and that "Chase therefore stood in [the previous servicer]'s shoes as the pre-default loan servicer." App. 6.

The Court of Appeals improperly stated a rule of

law: the statutory term in § 1692a(6)(F)(iii) is actually "obtained," and not "acquired" as quoted in the cited precedent at *Roth*, 756 F.3d at 183. The distinct difference between this appeal and others like *Roth* is the raised argument that Chase's status depends not on acquisition or assumption of servicing rights across a portfolio of loans, but rather on what "obtains" means, including when and from whom "possession of the *right* and *responsibility* to collect a debt" arises, in this case from a non-creditor after default. See *Wadlington*, above. Plaintiff alleged the means by which Chase—subsequent to assuming EMC's servicing rights—came into possession of both the right and responsibility to collect from Wells Fargo, for Wells Fargo. Those *particular* means were alleged to be by (1) a 2010 Assignment of Mortgage in default to trustee/Wells Fargo, and (2) a 2013 Limited Power of Attorney in default from Wells Fargo to Chase. This arguable difference, between possessing *servicing* rights of an agent of the creditor versus *collection* rights of a debt collector obtained in default, disputes both the conclusion and the relevance of whether Chase "stood in EMC's shoes," which conflicts with FDCPA language.

Johnson-Gellineau argued that Chase has not proven at this stage that her Note—held by an intermediate trustee other than the person who offered or extended credit creating the debt—was included in a consent order establishing the assumption of servicing rights for the holder.[16] Plaintiff's allegations

---

[16] Contrary to the panel at App. 6, Johnson-Gellineau did allege in her amended complaint that Chase obtained the debt after it was in default (¶51) and that Chase is a debt collector in the first place (¶39).

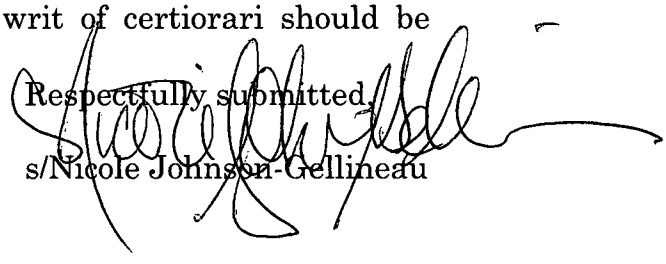
demonstrate that an affirmative defense—that she "failed to plausibly allege that [JPMorgan Chase] qualifies as a debt collector under FDCPA"—does not apply and dismissal as to Chase should be reversed.

The Court should find that the amended complaint stated a claim and remand the matter for further proceedings.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,



s/Nicole Johnson-Gellineau