No. 17-255

IN THE
Supreme Court of the United States

PORTFOLIO RECOVERY ASSOCIATES, LLC,
Petitioner,

v.

MANUEL PANTOJA,
Respondent.

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

REPLY BRIEF FOR PETITIONER

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CORPORATE DISCLOSURE STATEMENT[1]

PRA Group, Inc., a publicly held company, is the parent corporation of Petitioner Portfolio Recovery Associates, LLC. No publicly-held company owns 10 percent or more of the stock of Petitioner Portfolio Recovery Associates, LLC because Petitioner does not have any stock.

[1] The Petition included the following disclosure: "PRA Group, Inc. is the parent corporation of Petitioner Portfolio Recovery Associates, LLC. No publicly-held company owns 10 percent or more of the stock of Portfolio Recovery Associates, LLC." There has been no material change to this information, but the statement has been revised to clarify that Petitioner has no stock but that its previously identified parent corporation is publicly-held.

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INTRODUCTION

Respondent principally disputes not whether the circuits disagree, but whether the split is an active one. He argues that after the Third and Eighth Circuits held that a debt collector does not violate the Fair Debt Collection Practices Act ("FDCPA"), 15 U.S.C. §§ 1692-1692p when it seeks to collect a time-barred debt so long as it does not threaten litigation, the relevant agencies took "action" in opposition to those decisions. Thereafter, the Fifth, Sixth, and Seventh Circuits followed the agencies' lead and, according to Respondent, the split disappeared into thin air.

Respondent's position would surely surprise the court below—and others such as the Fifth Circuit—which continue to recognize the division of authority. It would also be news to the district courts rendering a slew of decisions within the Third and Eighth Circuits which state that they are bound by prior circuit precedent and rendering decisions diametrically opposed to the one below and to those of the Fifth and Sixth Circuits. The split is entrenched and, in light of *Chevron*, unsurprisingly unaffected by the informal statements and individualized consent decrees Respondent relies on.

As to the merits, Respondent relies on inapposite advertising cases under the FTC Act, apparently because that statute and the FDCPA both use the word "deceptive." Advertising and debt collection are obviously very different contexts, and none of the courts of appeals on either side of the split have looked to these cases for guidance. Tellingly, Respondent provides almost no defense of the decision below, and

appears to seek to prevent a debt collector from ever seeking to collect a time-barred debt, despite this Court's recent affirmation of its right to do so in *Midland Funding, LLC* v. *Johnson*.

The decision below implicates a recurrent question of statutory interpretation on which the courts of appeals are divided. This Court should grant review to resolve this important and persistent issue.

ARGUMENT

A. Recent court decisions show that the split is entrenched and consequential.

Respondent's argument that no split exists would, if true, be a revelation to the circuits themselves that have repeatedly acknowledged the split. The decision below recognized "[t]he point of controversy" among the courts of appeals. Pet. App. 6a. Similarly, the Fifth Circuit stated just last year that "[t]here is an apparent conflict in the circuits as to whether a collection letter offering 'settlement' of a time-barred debt can violate the FDCPA if the debt collector does not disclose the debt's unenforceability or expressly threaten litigation." *Daugherty* v. *Convergent Outsourcing, Inc.*, 836 F.3d 507, 511 (5th Cir. 2016). And in an earlier case the Seventh Circuit "recognize[d] that [its] interpretation [of the FDCPA to be misleading even if no litigation is threatened] conflicts with that of the Eighth and Third Circuits." *McMahon* v. *LVNV Funding, LLC*, 744 F.3d 1010, 1020 (7th Cir. 2014). *See also, e.g.*, *Zuinga* v. *Jefferson Capital Sys., LLC*, No. 4:16-CV-526, 2016 WL 7242767,

at *2 (E.D. Tex. Dec. 15, 2016) (recognizing "circuit split").

Moreover, the Third and Eighth Circuit decisions remain good law in their respective circuits. District courts have very recently—years after the agency actions that Respondent points to—expressly relied on *Huertas* v. *Galaxy Asset Management*, 641 F.3d 28 (3d Cir. 2011), and *Freyermuth* v. *Credit Bureau Services, Inc.*, 248 F.3d 767 (8th Cir. 2001), to render decisions that are impossible to reconcile with the decision below and with the decisions of the Fifth and Sixth Circuits. These district court decisions are frequent and directly on point. Contrary to Respondent's contention, this split is very much an active one.

For example, in *Judah* v. *Total Card, Inc.*, decided earlier this year, the district court considered a letter very similar to the one here and granted the debt collector's motion to dismiss. No. 16-5881, 2017 WL 2345636 (D.N.J. May 30, 2017). The letter offered to settle the debt and stated that "[t]he law limits how long you can be sued on a debt. Because of the age of your debt, [we] will not sue you for it." *Id.* at *1. The court rejected the debtor's argument that *Huertas* was no longer good law in light of agency opinions and that the court should follow the Fifth, Sixth, and Seventh Circuits instead. *Id.* at *5. *Huertas* "remains binding precedent," the district court reasoned, and the letter "does not threaten to initiate legal action. In fact, it specifically states that due to the age of the debt, [Defendant] will not sue Plaintiff for the debt." *Id.*

Similarly, in *Lugo* v. *Firstsource Advantage, LLC*, No. 2:15-cv-06405, 2016 WL 3406230, at *2 (D.N.J. June 16, 2016), the court granted the debt collector's motion to dismiss where the letter "never states that the debt is time-barred." It stated, "Plaintiff's position that *Huertas* should not control and that this Court should instead follow out-of-circuit and district court opinions is unavailing." *Id.* In *Dittig* v. *Elevate Recoveries, LLC*, No. 16CV1155, 2016 WL 4447818, at *4 (W.D. Pa. Aug. 24, 2016), even though the letter contained no disclosures and used "settlement" language, the district court granted the debt collector's motion to dismiss. It reasoned that "[u]nder *Huertas*, our task is to consider whether a debt collection attempt threatens litigation in a manner that would deceive or mislead the least sophisticated debtor. The mere use of the word 'settlement' simply does not represent such a threat." *Id. See also Sullivan* v. *Allied Interstate, LLC*, No. 16-203, 2016 WL 7187507, at *7 (W.D. Pa. Oct. 18, 2016) (applying *Huertas* to a similar communication); *Tatis* v. *Allied Interstate, LLC*, No. 16-00109, 2016 WL 5660431 (D.N.J. Sept. 29, 2016) (similar), *appeal filed*, No. 16-4022 (3d Cir. Nov. 3 2016).

As in the Third Circuit, district courts in the Eighth Circuit continue to apply *Freyermuth* to reject debtors' FDCPA claims where debt collectors make no disclosures at all when they seek to collect a time-barred debt. *See, e.g.*, *Haynes* v. *Allied Interstate, LLC*, No. 4:14CV3130, 2015 WL 429800, at *4 (D. Neb. Feb. 2, 2015); *Caw* v. *Portfolio Recovery Assocs., LLC*, No. 11-06117, 2013 WL 30567, at *2 (W.D. Mo. Jan. 2, 2013).

Though Respondent does not rely on its arguments in this regard, in *Buchanan* v. *Northland Group, Inc.*, 776 F.3d 393, 399 (6th Cir. 2015), the Sixth Circuit asserted, over a dissent, that no conflict exists. It gave two reasons for this conclusion, neither of which is persuasive. First, it stated that both *Huertas* and *Freyermuth* only held "that an attempt to collect a time-barred debt is not a thinly veiled attempt to sue" and did not address the possibility that the debt collector's communication caused confusion. *Id.* at 399-400. But as discussed below, both courts considered the full scope of the debtor's communications and applied the FDCPA's false and misleading standard to those communications.

Second, the Sixth Circuit believed there was no conflict because neither case featured a letter offering a "settlement." *Id.* at 400. But as one court has explained, "[w]hile the collection letter in *Huertas* did not use the word 'settle' it did use the word 'resolve.' The definitions of the words 'settle' and 'resolve' are strikingly similar and the Court does not see a material difference between the two." *Tatis*, 2016 WL 5660431, at *9. The letter in this case used similar "settlement" language to that in *Buchanan*, yet the Seventh Circuit did not discuss or rely on that language as a ground for finding the letter misleading. Thus, this is no basis for distinguishing the decision below from *Huertas* and *Freyermuth*. Moreover, *Buchanan* preceded the Seventh Circuit's decision below, which still held that there was a conflict. Pet. App. 6a.

In sum, Respondent's assertion that this issue is no longer the subject of a live circuit split is belied

by the recent statements by the Fifth and Seventh Circuits and by the ongoing district court decisions in the Third and Eighth Circuits. That nearly identical communications subject a debt collector to liability in the Fifth, Sixth and Seventh Circuits, but not in the Third and Eighth Circuits, is a scenario that invites forum shopping, particularly in the class action context. The split is entrenched and merits this Court's review.

B. Respondent's explanations for why there is no split fail to withstand scrutiny.

Respondent's principal argument is that the split has not remained active in light of recent agency "actions" regarding time barred debts. Opp'n 2-10. Specifically, he states that the agencies tasked with enforcing the FDCPA reacted negatively to the Third and Eighth Circuit decisions, and that the Fifth, Sixth, and Seventh Circuits subsequently followed the agencies' positions. The agency "action" that Respondent cites, however, consists not of notice and comment rulemaking,[2] but of: 1) a statement by a FTC official, Opp'n 3; 2) a 2012 FTC consent decree with an individual debt collector, *id.*; 3) three 2012 CFPB consent decrees with American Express related entities, *id.*; and 4) a 2013 FTC report entitled *The*

[2] In fact, the CFPB and FTC have not conducted any final notice and comment rulemaking under the FDCPA, undermining Respondent's assertion that the question presented should be resolved by "agency evaluation." Opp'n 9.

Structure and Practices of the Debt Buying Industry, Opp'n 4.[3]

While the Fifth, Sixth, and Seventh Circuits have referenced some of these or other agency materials, none have treated them as determinative of the question of statutory interpretation at issue here, or suggested that they eliminated the split. For good reason: None of these materials are entitled to judicial deference under *Chevron, U.S.A., Inc.* v. *Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984). "Interpretations such as those in opinion letters—like interpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law—do not warrant *Chevron*-style deference." *Christensen* v. *Harris County*, 529 U.S. 576, 587 (2000). *See also Local No. 93, Int'l Ass'n of Firefighters* v. *City of Cleveland*, 478 U.S. 501, 522 (1986) (consent decrees). And without *Chevron* deference, there is no basis for prior judicial holdings to "give way" to later agency interpretations. Opp'n 9 (citing *Nat'l Cable & Telecommunications Ass'n* v. *Brand X Internet Servs.*, 545 U.S. 967 (2005)).

Respondent also contends that the decisions of the courts of appeals on the other side of the split—the Third and the Eighth Circuits—are not "directly in point." Opp'n 8. As a preliminary matter, this argument is inconsistent with his primary argument. It is unclear why the agencies would have reacted to

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[3] In a policy document Respondent does not mention, the CFPB has rejected the Seventh Circuit's reasoning that a debt collector must disclose that the statute of limitations may be revived. Pet. 28.

Huertas and *Freyermuth* by "express[ing] their views on the precise issue before the Court," Opp'n 10, if those cases did not actually decide "the precise issue before the Court."

Respondent's argument appears to derive mainly from his review of the briefs in those cases. He contends that the debtors did not make the precise argument that is at the center of this split. Opp'n 1-2. Of course, what matters is whether the decisions of the courts of appeals, and not the briefs of the parties, are in conflict. Sup. Ct. R. 10(a) (a compelling reason warranting this Court's review is where "a United States court of appeals has entered a *decision* in conflict with the *decision* of another United States courts of appeals on the same important matter" (emphases added)).[4] The *decisions* of the Third and Eighth Circuits are in direct conflict with the *decisions* of the Fifth, Sixth, and Seventh Circuits. Respondent does not dispute that Petitioner's letter complies with the FDCPA as interpreted by the Third and Eighth Circuits.

Based only on a district court decision that actually upheld a letter using very language similar to the one here, Respondent claims that neither the Third nor the Eighth Circuit "squarely addressed" the issue in this case. Opp'n 9-10. In so arguing, Respondent advances an argument inconsistent with

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[4] The complaint in the Eighth Circuit case is not available, but the debtor in the Third Circuit case argued in that complaint that the debt collector violated 15 U.S.C. § 1692e, the provision at issue here. *Huertas* v. *Galaxy Asset Management*, No. 1:09cv2604 (D.N.J. May 26, 2009), ECF No. 1 at 6.

the Seventh Circuit's decision below that he otherwise seeks to defend. Both the Third and the Eighth Circuits directly spoke to the question presented, *as the Seventh Circuit recognized below*. Pet. App. 7a. In *Freyermuth*, the Eighth Circuit quoted from the statutory provision at issue in this case, 15 U.S.C. § 1692e, at the outset of its analysis. 248 F.3d at 770. It stated that the appropriate inquiry "focuses on the debt collector's actions, and whether an unsophisticated consumer would be harassed, misled or deceived by them." *Id.* at 771. And, though there had been no apparent disclosures by the debt collector regarding the statute of limitations, it held that "no violation of the FDCPA has occurred when a debt collector attempts to collect on a potentially time-barred debt that is otherwise valid." *Id.*

In *Huertas*, 641 F.3d at 33, the Third Circuit undertook a similar analysis. It likewise set forth Section 1692e's prohibition of false, deceptive, or misleading representations as a provision governing the debtor's FDCPA claim. It also indicated that it was analyzing the full scope of the debt collector's communication, noting that under *Freyermuth*, the debtor's FDCPA claim "hinges on whether [the] letter threatened litigation." *Id.* It quoted the language of the letter and analyzed whether it implicitly or explicitly threatened litigation, and held that it did not. *Id.*

C. The outdated and inapposite FTC Act cases Respondent cites provide no support for the decision below.

Respondent's merits argument is built on a straw man and betrays a broader agenda to foreclose any effort to solicit payment of a time-barred debt. Opp'n 11-23. Respondent devotes the great bulk of his merits argument to opposing a claim that the FDCPA's prohibition of "deceptive" or misleading" representations means that the statute should be interpreted to prohibit only literal falsity and "cannot be used to require affirmative disclosures of material information." Opp'n 11. Petitioner does not make such an argument. Petitioner's contention is instead that the terms "deceptive" and "misleading" should be construed in accordance with their accepted definitions of causing a belief that is untrue. Pet. 21. A representation may cause a wrong belief by what it says or by what it does not say. In the context of a time-barred debt, the Third and Eighth Circuit's test appropriately focuses on whether the communication causes a debtor to believe that such a debt may be enforced through litigation even though it is outside the statute of limitations.

What is critical is that a communication has the capacity to cause a wrong belief, and Respondent offers no explanation for why the letter at issue in this case—a letter saying in simple terms, "we will not sue you"—satisfies that test. Respondent makes no effort to defend the Seventh Circuit's decision beyond making the general argument that the FDCPA can

require affirmative disclosures.[5] Opp'n 20-21. This glaring omission demonstrates that the decision below stretches the FDCPA's prohibition of deceptive and misleading communications beyond its breaking point. Here, the Seventh Circuit required a debt collector to disclose to a debtor the potential legal consequences of its actions—the revival of the statute of limitations—even though this is both uncertain as a matter of state law and untrue as a matter of fact in light of Petitioner's unconditional statement that it will not sue Respondent, period. Thus, the Seventh Circuit appears to require representations that are themselves potentially misleading and deceptive.

This Catch-22 is in tension with the FDCPA's express recognition that debt collectors are allowed to collect the debts they are owed as long as they do so in an ethical manner. 15 U.S.C. § 1692(e). This Court has further recognized in *Midland Funding, LLC* v. *Johnson* that time-barred debts are ones that remain owed, and thus may be collected without running afoul of the FDCPA. No. 16-348, 581 U.S. ___, ___ (2017) (slip op., at 3). The Seventh Circuit's decision violates these basic principles.

Not only is Respondent's extended discussion of decades-old cases involving another statute—the FTC Act, 15 U.S.C. §§ 41-58—an irrelevant non sequitur because it mischaracterizes Petitioner's argument, but it is also flawed. The crux of his argument is that Congress was aware of a D.C. Circuit decision under the FTC Act issued a mere three days before the

[5] Respondent also does not dispute that this case is a good vehicle for considering the question presented.

Senate passed a bill that would become the FDCPA. Opp'n 15-16. Respondent adduces no legislative history—and Petitioner has found none—that even suggests that the FDCPA was crafted, practically at the last legislative minute, with a view to a D.C. Circuit decision involving a different statute.

None of this is surprising as the case Respondent cites is of almost no relevance to the issue at hand. *Warner-Lambert Co.* v. *F.T.C.* involved advertising, not debt collection, and held that "under certain circumstances an advertiser may be required to make affirmative disclosure of unfavorable facts," but did not require disclosure of hypothetical legal consequences. 562 F.2d 749, 759 (D.C. Cir. 1977). Respondent cites no case that holds that Congress is presumed to legislate against the backdrop of a circuit court decision under a different statute issued shortly before passage of the act at hand. That rule of statutory interpretation does not exist, as it is inconsistent with reasonable assumptions of the legislative process and would encourage the type of opportunistic circuit trolling reflected in Respondent's arguments.

CONCLUSION

For these reasons and those stated previously, the petition for a writ of certiorari should be granted. In the alternative, the petition should be granted, the judgment below vacated, and the case remanded for further consideration in light of *Midland Funding, LLC* v. *Johnson*, No. 16-348, 581 U.S. ___ (May 15, 2017).

Respectfully submitted,

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December 22, 2017