No. 11-1175

In The
Supreme Court of the United States

OLIVEA MARX,

Petitioner,

v.

GENERAL REVENUE CORPORATION,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

This case involves allegations by Petitioner Olivea Marx that Respondent General Revenue Corporation (GRC) violated the Fair Debt Collection Practices Act, 15 U.S.C. § 1692, *et seq.* (the FDCPA). The questions presented are as follows:

1. Whether the court of appeals erred in affirming the district court's award of costs to GRC as a prevailing party pursuant to Fed.R.Civ.P. 54(d)(1), absent a finding that the lawsuit was brought in "bad faith and for the purpose of harassment" under 15 U.S.C. § 1692k(a)(3).

2. Whether the court of appeals erred in affirming the ruling of the district court that a facsimile document sent by GRC to Petitioner's place of employment did not violate 15 U.S.C. § 1692c(b) because it did not constitute a "communication" as expressly defined under 15 U.S.C. § 1692a(2).

PARTIES TO THE PROCEEDINGS AND RULE 29.6 STATEMENT

Petitioner here and appellant below is Olivea Marx. Respondent here and appellee below is General Revenue Corporation (GRC).

GRC is a wholly-owned subsidiary of SLM Corporation, commonly known as "Sallie Mae." Sallie Mae's business address is: 12061 Bluemont Way, Reston, Virginia, 20190.

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The decision of the United States Court of Appeals for the Tenth Circuit (Pet. App. 1a-18a)[1] is reported at 668 F. 3d 1174. The judgment entered by the United States District Court for the District of Colorado is unreported. Pet. App. 30a-31a. The district court's order denying post-judgment motions filed by the parties is unreported. Pet. App. 28a-29a.

JURISDICTION

The court of appeals affirmed judgment in favor of GRC on December 21, 2011. A petition for rehearing was denied on January 30, 2012. The petition for writ of certiorari was filed on March 23, 2012. Jurisdiction is proper pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS

Petitioner brought her claims under the Fair Debt Collection Practices Act, 15 U.S.C. §§ 1692, *et seq*.

With respect to Petitioner's argument that the court of appeals inappropriately affirmed an award of costs to GRC pursuant to Fed.R.Civ.P. 54(d)(1), the

[1] All references herein to "Pet." and "Pet. App." are to the Petition for Writ of Certiorari in case 11-1175, and the appendix attached thereto.

applicable provision at issue is set forth in 15 U.S.C. § 1692k(a)(3), which provides, in pertinent part:

> . . . any debt collector who fails to comply with any provisions of this subchapter with respect to any person is liable to such person in an amount equal to the sum of –
>
> (3) in the case of any successful action to enforce the foregoing liability, the costs of the action, together with a reasonable attorney's fee as determined by the court. On a finding by the court that an action under this section was brought in bad faith and for the purpose of harassment, the court may award to the defendant attorney's fees reasonable in relation to the work expended and costs.

15 U.S.C. § 1692k(a)(3).

The first applicable provision relating to Petitioner's second argument that the court of appeals inappropriately affirmed the district court's findings that a facsimile document did not violate the FDCPA's prohibition against third party communications is set forth in 15 U.S.C. § 1692c(b), which states:

> COMMUNICATION WITH THIRD PARTIES. Except as provided in section 804, without the prior consent of the consumer given directly to the debt collector, or the express permission of a court of competent jurisdiction, or as reasonably necessary to effectuate a postjudgment judicial remedy, a debt collector may not communicate, in connection with the collection of any debt, with

> any person other than a consumer, his attorney, a consumer reporting agency if otherwise permitted by law, the creditor, the attorney of the creditor, or the attorney of the debt collector.

15 U.S.C. § 1692c(b).

The second applicable provision relating to Petitioner's second argument is the FDCPA's express definition of the term "communication." The FDCPA defines a "communication" as " . . . the conveying of information regarding a debt directly or indirectly to any person through any medium." 15 U.S.C. § 1692a(2).

STATEMENT OF THE CASE

Petitioner defaulted on her student loan, which was assigned by the guarantor, EdFund, to GRC for collection. Pet. App. 2a. Petitioner filed her lawsuit in October of 2008, alleging various violations of the Fair Debt Collection Practices Act, 15 U.S.C. § 1692, *et seq*. *Id*. Petitioner amended her complaint in March of 2009 to add a claim that GRC violated § 1692c(b) of the FDCPA by sending a facsimile document to Petitioner's place of employment (the fax). *Id.*; *see* Tenth Cir. App. 113. The fax was a standard form utilized by GRC for the purpose of determining a consumer's eligibility for administrative wage garnishment, and states that the purpose of the document is to "verify [e]mployment." Pet. App.

3a. The fax was specifically designed by GRC to avoid any implication of a debt. *Id.* at 5a. The fax requested information regarding the Petitioner's employment status, date of hire, payroll address, position, and whether the Petitioner worked full or part time. *Id.* at 3a. The fax also contained GRC's corporate name and logo, its address, and phone number. *Id*. The fax included an "ID" number which corresponded to Petitioner's internal account number with GRC, with the use of the term "ID" rather than "account" being intentional so not to imply the existence of a debt. *Id.* at 5a.

Following the presentation of the evidence and closing arguments in a one day trial to the court, the district court issued its findings, and concluded that Petitioner failed to prove any violation of the FDCPA. *Id.* at 2a-3a. With respect to Petitioner's claim under § 1692c(b) of the FDCPA, the district court focused on whether the "ID" number contained on the fax conveyed to a reasonable person that the fax related to an attempt to collect a debt. *Id.* at 33a. Based upon the evidence presented at trial, the district court concluded that the fax did not convey to a reasonable person that the fax related to an account GRC was attempting to collect upon. *Id.*[2] Finding that GRC did

[2] The district court did not, as Petitioner suggests "dismiss" the § 1692c(b) claim (Pet. 7); nor did the district court hold that "a debt collector can contact an employer to ask for information in addition to 'location information' as long as the employer does not know that the request is coming from a debt collector." Pet. 7. Rather, after closing arguments, the district court simply

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not violate any provisions of the FDCPA, the district court entered judgment in favor of GRC and against Petitioner. *Id.* at 30a-31a. The district court subsequently awarded GRC its costs pursuant to Fed.R.Civ.P. 54(d)(1) in the amount of $4,543.03, and rejected Petitioner's post-trial argument that 15 U.S.C. § 1692k(a)(3) displaced the presumptive award of costs under Rule 54(d)(1) and required a finding of bad faith and harassment on the part of Petitioner in order to award costs. *Id.* at 28-29a.

Petitioner's appeal to the court of appeals focused on the district court's award of costs and its factual findings that GRC did not violate § 1692c(b) of the FDCPA. The court of appeals affirmed the district court with respect to both issues, with Judge Lucero dissenting. *Id.* at 1a-25a.

The court of appeals rejected Petitioner's argument that 15 U.S.C. § 1692k(a)(3) supersedes the presumptive award of costs to a prevailing party under Fed.R.Civ.P. 54(d)(1) and requires a finding that a lawsuit was brought in bad faith and for harassment purposes as a prerequisite to an award of costs. *Id.* at 7a. In doing so, the court of appeals noted that there is a strong presumption that a prevailing party is entitled to costs, stating:

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noted that there was no evidence from Petitioner as to what the employer interpreted the fax to relate to, which necessitated the court, as the fact finder, to interpret whether the fax conveyed information regarding a debt. Pet. App. 33a.

> [t]he presumption that a prevailing party is entitled to costs is, in our legal system, a venerable one. "Costs have usually been allowed to the prevailing party, as incident to the judgment, since the statute 6 Edw. I, c. 1, § 2, and the same rule was acknowledged in the courts of the States, at the time the judicial system of the United States was organized. . . ." *Buckhannon Bd. & Care Home, Inc., v. W.V. Dep't of Health & Human Res.,* 532 U.S. 598, 611 (2001) (quoting *The Baltimore*, 8 Wall. 377, 388 (1869)) (Scalia, J., concurring). A clear showing of legislative intent is needed before we find that Rule 54(d) is displaced by a statute.

Id. at 8a. The court of appeals concluded that no such clear showing of intent is evident in § 1692k(a)(3), stating:

> [w]e believe § 1692k(a)(3) • in both its prevailing-plaintiff and bad-faith provisions • merely recognizes that the prevailing party is entitled to receive the costs of a suit as a matter of course. Nothing in the language of the statute purports to exclude Rule 54(d) costs from being taxed and awarded in FDCPA suits.

Id. The court of appeals analyzed the legislative history on point, and concluded it was "neutral at best" with respect to Petitioner's argument. *Id.* at 10a-11a.

The court of appeals acknowledged that the Ninth Circuit reached a different result in *Rouse v.*

Law Offices of Rory Clark, 603 F. 3d 699 (9th Cir. 2010), but found the Ninth Circuit's reasoning in *Rouse* that § 1692k(a)(3) supplanted Rule 54(d)(1) unpersuasive. Pet. App. 12a-14a. The court of appeals also noted that the Ninth Circuit applied a different reasoning in *Quan v. Computer Sciences Corp.*, 623 F. 3d 870 (9th Cir. 2010). *Id.* at 12a-13a.

The court of appeals also affirmed the district court's factual findings that GRC did not violate § 1692c(b) of the FDCPA, finding that the fax at issue did not constitute a "communication" under the FDCPA because it did not expressly or implicitly, directly or indirectly, convey information regarding a debt, as required under the definition provided in § 1692a(2). *Id.* at 4a-6a. The court of appeals focused on the importance of the meaning of the word "convey" as contained in the definition of "communication" under § 1692a(2), stating:

> [t]o convey is to impart, to make known. If one drafts a letter full of unlawful collection threats, but never mails it, nothing is conveyed. So, too, if the "communication" is in Sanskrit. The fax here never used the words "debt," "collector," "money," "obligation," or "payment."

Id. at 15a. The court of appeals observed that verification of employment is common place and that "[a] party may seek to verify employment status (without hinting at a debt) for any number of reasons, including as part of processing a mortgage, conducting a

background check before hiring, or determining eligibility for an extension of credit." *Id.* at 5a.

The court of appeals rejected the argument advanced by Petitioner and the dissent that the document conveyed or implied the existence of the debt because the fax contained an identification number that corresponded with Petitioner's account number with GRC, stating: "[t]he dissent instead relies on the account number, but what does this convey? It is a jumble of numbers, designed for internal identification purposes, the functional equivalent of a bar code." *Id.* at 15a.

While the court of appeals noted that Petitioner did not present any evidence relating to what Petitioner's employer "either knew or inferred" regarding the fax (Pet. App. 5a, 16a), the court did not, contrary to Petitioner's argument, create a subjective standard which would *require* such evidence in order to create a violation of § 1692c(b). The court of appeals simply applied the definition of "communication" to the four corners of the document at issue, and affirmed the district court's factual findings that the document did not violate § 1692c(b)'s prohibition against "communications" with third parties. Pet. App. 4a-6a.

REASONS FOR DENYING THE PETITION

The decision below is correct with respect to both issues that are the subject of Petitioner's appeal. The court of appeals' finding that § 1692k(a)(3) does not

supplant presumptive costs under Rule 54(d)(1) conflicts only with a single decision issued by the Ninth Circuit in 2010, a decision the court of appeals discussed in detail, and rejected based upon the application of the plain meaning of the statutory language at issue, the legislative history, and case law which almost uniformly rejects the notion that "good faith" exempts a non-prevailing party from the application of Rule 54(d)(1). Pet. App. 6a-14a. Neither issue bears on any legal issue of broad importance. Moreover, the court of appeals' affirmance of the district court's factual findings relating to the alleged violation of § 1692c(b) does not conflict with any decision of this Court or any other court of appeals, and applied the express statutory definition to the specific factual issues presented in this case. Accordingly, GRC submits that further review is not warranted.

I. The Finding of the Court of Appeals that 15 U.S.C. § 1692k(a)(3) does not Displace Presumptive Costs Allowed Under Rule 54(d)(1) does not Conflict with any Decisions of this Court and Only Conflicts with one Other Court of Appeals

Petitioner argues that the court of appeals' finding that § 1692k(a)(3) does not supplant the presumptive award of costs under Fed.R.Civ.P. 54(d)(1) conflicts with both the Ninth and Seventh Circuits. Pet. 13. Petitioner correctly states that the Ninth Circuit reached a different result interpreting

the same provision of the FDCPA in *Rouse v. Law Office of Rory Clark*, 603 F. 3d 699 (9th Cir. 2010) (Pet. 12), but incorrectly states that the opinion conflicts with a decision in the Seventh Circuit in *Gwin v. American Rover Transportation Co.*, 482 F. 3d 969, 974 (7th Cir. 2007). Pet. 13.[3] While the decision of the court of appeals did depart from the findings of the Ninth Circuit in *Rouse*, GRC submits that the fact that two circuits have recently come to different conclusions as to whether a prevailing defendant should be awarded costs under the FDCPA is not so significant of a circuit split that this Court needs to resolve the conflict. Moreover, the analysis and

[3] In *Gwin*, the Seventh Circuit addressed language contained in 46 U.S.C. § 2114(b), rejecting an argument that the applicable provision of that Act did not supersede the award of costs set forth in Rule 54(d). *Gwin*, 482 F. 3d at 974. The statutory provision at issue in the Seaman's Protection Act is not similar in structure or in substance to the applicable provision contained in the FDCPA, and is not in conflict with the opinion of the court of appeals. In contrast to the language at issue under the FDCPA, the language at issue in the Seaman's Protection Act can fairly be read to expressly limit an award of *either* costs or attorney's fees only to cases where there has been a finding that the case is frivolous or brought in bad faith. As discussed in this Brief in Opposition, this is simply not the case with the language at issue under the FDCPA. This is the same distinction reached by the court in *Thomasson v. GC Servs. Ltd. P'ship,* 2007 U.S. Dist. LEXIS 79855, at * 5-6 (S.D. Cal. October 27, 2007) (While *Thomasson* was not directly referred to or overruled by the Ninth Circuit in *Rouse,* 603 F. 3d 699 (9th Cir. 2010), GRC recognizes that its conclusion that § 1692k(a)(3) does not displace Rule 54(d)(1) is presumably no longer instructive in the Ninth Circuit).

conclusion of the Tenth Circuit adhered to the statutory framework at issue and is consistent with the presumptive rule that a prevailing party should recover its costs under Rule 54(d)(1).

The court of appeals appropriately recognized that there is a strong presumption that a prevailing party is entitled to costs. Pet. App. 8a. This finding is consistent with the statement by this Court that "[b]ecause costs are usually assessed against the losing party, liability for costs is a normal incident of defeat." *Delta Airlines, Inc. v. August*, 450 U.S. 346, 352, 101 S. Ct. 1146, 1150, 67 L. Ed. 2d 287 (1981). As recognized by the court of appeals, the denial of costs "'is in the nature of a severe penalty,' such that there 'must be some apparent reason to penalize the prevailing party if costs are to be denied.'" Pet. App. 14 (quoting *Klein v. Grynberg*, 44 F. 3d 1497, 1507 (10th Cir. 1995)), which is consistent with the finding of other courts of appeals.[4] The notion that the denial of

[4] *See, e.g., Zenith Insur. Co. v. Breslaw*, 108 F. 3d 205, 207 (9th Cir. 1997) (finding that the denial of costs under Rule 54(d) " . . . operates to punish the prevailing party for some impropriety during the course of the litigation.") (citing *National Info. Servs. v. TRW, Inc.*, 51 F. 3d 1470, 472 (9th Cir. 1995)), *overruled on other grounds in Mexican-American Educators v. State of California*, 231 F. 3d 572, 593 (9th Cir. 2000); *White & White, Inc. v. American Hosp. Supply Corp.*, 786 F. 2d 728, 730 (6th Cir. 1986) (stating that the district court may exercise its discretion to deny costs "where the prevailing party should be penalized for unnecessarily prolonging trial or for injecting unmeritorious issues"); *Popeil Bros., Inc. v. Schick Elec., Inc.*, 516 F. 2d 772, 775 (7th Cir. 1975) (stating " . . . the penalty of denial or

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costs is penalizing in nature is also consistent with this Court's statement that assumes that costs will be denied to a prevailing party "only when there would be an element of injustice in a cost award." *Delta Air Lines, Inc.*, 450 U.S. 346, 101 S. Ct. 1146, 1151 n. 14, 67 L. Ed. 2d 287 (1981). Similarly, the court of appeals appropriately noted that most circuits have rejected the notion that a non-prevailing party's "good faith," standing alone, is insufficient to deny the application of Rule 54(d)(1). Pet. App. 10a. (citing *Pacheco v. Mineta*, 448 F. 3d 783, 794 (5th Cir. 2006) (collecting cases)).

The court of appeals' analysis of the language at issue (§ 1692k(a)(3)) is correct. The court of appeals appropriately concluded that "[n]othing in the language of the statute purports to exclude Rule 54(d) costs from being taxed and awarded in FDCPA suits." Pet. App. 8a. Instead, the language of § 1692k(a)(3) indicates "two separate pecuniary awards for a defendant who prevails against a suit brought in bad faith and for the purpose of harassment: (1) 'attorney's fees reasonable in relation to the work expended' and (2) 'costs.' Attorney's fees and costs are legally distinct categories of monetary allowances made to successful litigants. . . ." *Id.* at 7a.[5]

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apportionment of costs under Rule 54(d) should be imposed only for acts or omissions on the part of the prevailing party in the actual course of litigation. . . .").

[5] Contrary to Petitioner's assertion, the court of appeals did not "contradict itself" in its analysis of the statutory provision at

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Despite the presumption that costs should be awarded to a prevailing party, Petitioner appears to urge that the mere mention of costs in § 1692k(a)(3) equates to "provid[ing] otherwise" within the meaning of Rule 54(d)(1), and thereby displaces the application of costs to a prevailing defendant. There is nothing contained in the plain language of 15 U.S.C. § 1692k(a)(3) which provides that a defendant in an FDCPA case may recover costs *only* upon a finding that a plaintiff brought the case in bad faith and for the purpose of harassment. Moreover, there is nothing whatsoever contained in the plain language of this provision which purports to override Rule 54(d)(1) and the general presumption that a prevailing party may recover its costs. Had Congress intended to limit an award of costs "only" upon a finding of bad faith, it could have expressly so stated. The applicable provision can reasonably be read, as the court of appeals agreed, that when an action is brought in bad faith and for the purpose of harassment, *in addition to the costs that every prevailing party is entitled to*, a prevailing defendant is also

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issue. Pet. 9. Petitioner argues that the court of appeals initially stated that § 1692k(a)(3) "provide[s] otherwise" than Rule 54(d) by ruling that the bad faith clause is only linked to the attorney's fee provision, and as to costs, the statute "merely recognizes that the prevailing party is entitled to costs as a matter of course." *Id.* (citing Pet. App. 8a). The court of appeals did *not* hold that § 1692k(a)(3) "provides otherwise" than Rule 54(d) in any respect and, central to its ruling, consistently stated that the statute did not so displace the presumptive award of costs under Rule 54(d). Pet. App. 7a, 8a, 11a.

entitled to recover reasonable attorney's fees. The court of appeals recognized the clear intent of the statutory provision to state that in the event of a case filed in bad faith or for harassment, the aggrieved party is to receive reasonable attorney's fees in addition to costs, not as an exclusive remedy.

As recognized by the court of appeals, the legislative history relating to § 1692k(a)(3) does not support Petitioner's argument. The applicable Senate Report in one portion mentions "costs" as part of an award upon a finding of bad faith and harassment on the part of the consumer, but in its summary of the applicable provisions of the FDCPA, it omits costs altogether and explains that a court may award attorney's fees upon a finding of bad faith and harassment. Pet. App. 11a (quoting applicable provisions of S. Rep. No. 95-382, *reprinted in* 1977 U.S.C.C.A.N. 1695, 1700, 1702). The court of appeals concluded that, read together, "[t]he Report nowhere indicates that the FDCPA's cost provision was intended to displace this long-standing rule of civil procedure. The fact that the FDCPA post-dates Rule 54, or that the FDCPA should be construed 'liberally,' does not change this result." Pet. App. 11a.[6]

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[6] It should be noted that, despite the fact that the section-by-section analysis provided in the Senate Report does not mention "costs" as being tied to the bad faith and harassment purposes clause, the Ninth Circuit in *Rouse* glosses over this important point by simply stating, "[h]owever, nowhere does the Report state an intention that costs be a factor in determining

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While the decision of the court of appeals did depart from the findings of the Ninth Circuit in *Rouse*, the court of appeals appropriately recognized that the logic applied in *Rouse* departed from the Ninth Circuit's own decision in *Quan v. Computer Sciences Corp.*, 623 F. 3d 870 (9th Cir. 2010) when it determined that ERISA's costs and attorneys' fees provision (29 U.S.C. § 1132(g)(1)) did not supplant Rule 54(d)'s presumption of costs because " . . . 'the statute or rule would have to bar an award of costs to a prevailing party,'" and held that the applicable ERISA provision did not so preclude costs. *Id.* at 12a-13a (quoting *Quan*, 603 F. 3d at 88).[7] As pointed out

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the reasonableness of attorney's fees." *Rouse*, 603 F. 3d at 705. Therefore, rather than address whether the applicable provision obviates the presumption that a prevailing party is to be awarded costs under Rule 54(d)(1), the Ninth Circuit appeared to be primarily focused on how courts traditionally calculate the award of attorney's fees.

[7] Petitioner states that the court of appeals "wrongly suggested" the inconsistency of the Ninth Circuit on this point, arguing that " . . . both the ERISA provision and Rule 54(d)(1) allow, but do not require district courts to award costs . . . ," and that *Rouse* found that the FDCPA "barred" an award of costs in "some circumstances." Pet. 12-13, n. 2. Petitioner obfuscates the presumptive language of Rule 54(d)(1)'s cost provision and incorrectly suggests that the ERISA provision stating "the court in its discretion may allow attorney's fees and costs" is the functional equivalent of Rule 54(d)(1)'s language. Rule 54(d)(1) expressly states that costs "should be allowed" unless a statute or rule "provides otherwise." Moreover, the point missed by the Petitioner is that the court in *Quan* held that a statute or rule must "bar" an award of costs. *Quan*, 623 F. 3d at 888. Nothing in the language contained in § 1692k(a)(3) can fairly be read to "bar" an award of costs.

by the court of appeals, Title 15 of the U.S. Code contains varying languages relating to fees and costs, noting that "[s]ome provisions mention 'costs'; some do not; some mention attorney's fees as part of the costs." Pet. App. 12a. The Ninth Circuit in *Rouse* is the only circuit to have found that any of these provisions displaced Rule 54(d). *Id*.

In rendering its decision in *Rouse*, the Ninth Circuit relied heavily on the general proposition that the FDCPA should be construed "liberally." *Rouse*, 603 F. 3d at 705-06. Petitioner also relies upon a similar notion and argues that " . . . FDCPA plaintiffs are, by and large, people in debt who might be deterred from challenging abusive and deceptive collection practices by the possibility of being held liable for the defendant's costs in non-frivolous cases." Pet. 15. The problem with such a reliance on the presumption that the FDCPA is to be construed "liberally" in favor of a consumer is that it inappropriately concludes that the "liberal" construction with respect to the regulation of debt collection activities necessitates the usurpation of long-standing principles such as the award of costs to a prevailing party under Rule 54(d)(1), despite the fact that no express intent to negate Rule 54(d)(1) is found anywhere in the FDCPA. It also ignores an equally-important stated purpose of the FDCPA "to insure that those debt collectors who refrain from using abusive debt collection practices are not competitively disadvantaged."

15 U.S.C. § 1692. To deny a debt collector defendant the right to recover what is presumptively recoverable for a prevailing party under Rule 54(d)(1) would unfairly disadvantage an FDCPA defendant who, as in this case, has not been found to have violated any provision of the Act. This is not only contrary to the stated purpose of the FDCPA, it is tantamount to an unsupported penalty against a prevailing FDCPA defendant. Such a result cannot reasonably be read from the express language contained in 15 U.S.C. § 1692k(a)(3); nor can it fairly be read as an intended result based upon the FDCPA's stated purpose or its legislative history.

II. The Fact-Based Ruling that the Document at Issue did not Constitute a "Communication" under the FDCPA does not Conflict with any Decisions of this Court or any Other Appellate Courts; nor does it Raise any Issue of Broad Importance which would Warrant this Court's Review

The court of appeals' affirmance of the district court's factual findings that GRC did not violate § 1692c(b) of the FDCPA does not conflict with any decision issued by this Court, or any other courts of appeals, and is an entirely reasonable application of the statutory definition at issue based upon the facts presented during trial. Review by this Court is not warranted.

The opinion below stands for the rather unremarkable proposition that in order for Petitioner to have proven a violation of § 1692c(b), the third party contact at issue must meet the express definition of "communication" set forth in the FDCPA. This is clear by the express language of the provision. The court of appeals did not, as Petitioner and dissent urge "engraft" any additional requirements under the FDCPA; rather, the court simply applied the definition of "communication" to the particular contact at issue in this case. Pet. App. 4a-6a. Petitioner portends that the court of appeals' decision will result in a "broad range of intrusive inquiries about the consumer." Pet. 17. However, no such outcome can reasonably be foreseen from the decision below as the court simply affirmed the district court's factual findings that the document sent to Petitioner's place of employment "cannot be construed as 'conveying' information 'regarding a debt.'" Pet. App. 4a. Whether a particular contact meets the definition of a "communication" as specifically defined under the FDCPA necessitates a factual inquiry applied on a case-by-case basis. As stated by this Court:

> [i]f the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence different. Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous.

Anderson v. City of Bessemer, 470 U.S. 564, 573-74, 105 S. Ct. 1504, 84 L. Ed. 2d 518 (1985). In affirming the district court's factual findings in this case, the court of appeals adhered to this standard. Pet. App. 4a. While Petitioner argues that the finder of fact in this case should have determined that GRC violated § 1692c(b), the district court's factual determinations in this regard are entitled to deference. *Brown v. Plata,* 131 S. Ct. 1910, 1929, 179 L. Ed. 2d 969, 988 (2011) ("Deference to trial court factfinding reflects an understanding that '[t]he trial judge's major role is the determination of fact, and with experience in fulfilling that role comes expertise.' ") (quoting *Anderson*, 470 U.S. at 574, 105 S. Ct. 1504, 84 L. Ed. 2d 518)).

Unable to cite any contrary ruling by either this Court or any other courts of appeal, Petitioner relies upon the flawed argument that the court of appeals' decision "contradicts the view of the federal banking regulators, including the [Consumer Financial Protection Bureau], the Office of the Comptroller of the Currency, and the Federal Reserve Board." Pet. 19. As an initial matter, the manuals and handbooks cited by Petitioner are not entitled to deference. *Christensen v. Harris County*, 529 U.S. 576, 587, 120 S. Ct. 1655, 1663, 146 L. Ed. 2d 621, 631 (2000) ("Interpretations such as those in opinion letter – 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.") (citations omitted). Moreover, the statements contained in the non-binding materials cited by Petitioner are unpersuasive, as they only broadly discuss the provisions of the FDCPA, without any analysis of the term "communication" as specifically defined under § 1692a(2), and without any discussion as to whether the type of document that was presented to the fact-finder in this case constitutes a *per se* "communication" under the FDCPA.

Petitioner further urges that the decision below "runs counter to the decisions of more than twenty district courts spread throughout fifteen federal judicial districts," in which these district court decisions "have read the provision to state an objective test that looks to the content of the information sent to determine whether it 'convey[ed] information regarding a debt directly or indirectly. . . .'" Pet. 20. Petitioner then provides a string citation of district court cases applying an "objective" test. *Id*.

However, the fact-finder in this case (the district court judge) applied precisely the objective test Petitioner promotes. With respect to whether the "ID" number on the document "conveyed information regarding a debt," the district court evaluated whether that account number included on the document would " . . . say to a reasonable person in the employer's position that this in an account we're trying to collect," and determined it did not. Pet. App. 33a. The court of appeals agreed. It is on this point that Petitioner mischaracterizes the court's holding. While the court of appeals found it curious that Petitioner

elected not to put on any evidence regarding how the recipient of the fax interpreted the fax (Pet. App. 5a, 16a), its reference to this fact was not a part of its holding. Nowhere in the opinion did the court of appeals state that such testimony is *required* in order to prove a violation of § 1692c(b). Accordingly, both the district court and court of appeals evaluated the document at issue objectively and determined that it simply did not satisfy the express definition of a "communication" under the FDCPA. Pet. App. 4a-6a; 15a-16a; 33a.

The vast majority of the district court decisions string cited by Petitioner in support of an "objective test" under § 1692a(2) (Pet. 20-21) evaluated the definition of "communication" in the context of alleged violations of provisions of the FDCPA other than § 1692c(b).[8] Of those few district court decisions

[8] *See, e.g., Lensch v. Armada Corp.*, 795 F. Supp. 2d 1180, 88-89 (W.D. Wash. 2011); *Yarbrough v. FMS, Inc.*, 2010 U.S. Dist. LEXIS 123459, at * 4-5 (S.D. Fla. 2010); *Hutton v. C.B. Accounts, Inc.*, 2010 U.S. Dist. LEXIS 77881, at * 4-7 (C.D. Ill. 2010); *Krug v. Focus Receivables Mgmt., LLC,* 2010 U.S. Dist. LEXIS 45850, at * 4-9 (D.N.J. 2010); *Nichols v. CMRE Fin. Servs.*, 2010 U.S. Dist. LEXIS 25373, at * 8 (D.N.J. 2010); *Inman v. NCO Fin. Sys.*, 2009 U.S. Dist. LEXIS 98215, at * 6-11 (E.D.Pa. 2009); *Mark v. J.C. Christensen & Associates, Inc.*, 2009 U.S. Dist. LEXIS 67724, at * 4-9 (D. Minn. 2009); *Savage v. NIC, Inc.*, 2009 U.S. Dist. LEXIS 65071, at * 13-14 (D. Ariz. 2009); *Edwards v. Niagra Credit Solutions, Inc.*, 586 F. Supp. 2d 1346, 1358-59 (N.D. Ga. 2008); *Ramirez v. Apex Fin. Mgmt.*, 567 F. Supp. 2d 1035, 1040-42 (N.D. Ill. 2009); *Costa v. Nat'l Action Fin. Serv.*, 634 F. Supp. 2d 1069, 1076-77 (E.D. Cal. 2007); *Leyse v. Corp. Coll. Servs.*, 2006 U.S. Dist. LEXIS 67719, at * 15-18

(Continued on following page)

which evaluated the term "communication" in the context of an alleged § 1692c(b) violation, the majority of those cases related to a telephone call, rather than a document as relevant here. For example, Petitioner specifically refers to *West v. Nationwide Credit,* 998 F. Supp. 642 (W.D.N.C. 1998). Pet. 21. In *West*, the plaintiff alleged that the defendant's representative called plaintiff's neighbor regarding a "very important" matter. *West*, 998 F. Supp. at 643. In denying the defendant's motion to dismiss, a U.S. Magistrate Judge determined that the telephone call constituted a "communication" and, therefore, the plaintiff's allegations were sufficient to state a claim. *Id*. at 645. While the court in *West* determined that a broader interpretation of the term "communication" was appropriate, the factual circumstances in that case are distinguishable from this case, both in form and in substance. In *West* it appears to have been undisputed that the telephone call at issue was made in order to make contact with the plaintiff in an attempt to collect the debt. That is simply not the case in the present action.

None of the cases relied upon by Petitioner addressed factual determinations made at trial, as occurred in the case at bar. In addition, very few of the cases relied upon by Petitioner even address a factual situation similar to the present action. For example,

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(S.D.N.Y. 2006); *Hosseinzadeh v. M.R.S. Assocs., Inc.*, 387 F. Supp. 2d 1104, 1115-16 (C.D. Cal. 2005).

in *Shand-Pistilli v. Prof'l Account Servs.*, 2010 U.S. Dist. LEXIS 75056, at * 10 (E.D. Pa. 2010), the district court denied the defendant's motion to dismiss pursuant to Rule 12(b)(6), finding that the plaintiff sufficiently alleged a violation of § 1692c(b) relating to a letter sent to the plaintiff's employer. However, later, the court granted the defendant's motion for summary judgment as to that claim, finding that the plaintiff failed to raise a genuine issue of material fact on that claim. *Shand-Pistilli v. Prof'l Account Servs.*, 2011 U.S. Dist. LEXIS 64446, at * 9-10 (E.D. Pa. 2011).

The cases cited by Petitioner do not address the situation the district court and court of appeals evaluated in this case, that is, a finding after a full trial on the merits relating to "a single fax, innocuous, nondescript, and harmless, which GRC sent only to gather information to weigh the statutory right of garnishment." Pet. App. 16a. The court of appeals appropriately rejected the dissent's reliance on the same cases cited by Petitioner, noting: "every one of the dissent's cases is a ruling on a 12(b)(6) or summary judgment motion, which means that those courts lacked what we have: a trial at which plaintiff conceded on the stand that she has no evidence that her employer suspected that the fax concerned a debt." *Id*. Moreover, as Petitioner recognizes, there are district courts which have found, based upon the factual circumstances presented in those cases, that certain contacts under the FDCPA do not amount to a "communication." Pet. 22, n. 6 (collecting cases). For

example, in *Biggs v. Credit Collections, Inc.*, 2007 U.S. Dist. LEXIS 84793 (W.D. Okla. Nov. 15, 2007), the district court for the Western District of Oklahoma found that certain voicemail messages did not constitute "communications" under the FDCPA. In denying summary judgment in favor of the plaintiff with respect to certain voice mails, the court stated:

> Words matter – in this instance, the words of the voice mails and the words of the statutory definition of a "communication." The transcript of the voice mail messages demonstrates that the voice mails "convey[ed] no information regarding a debt." No amount of liberal construction can broaden the statutory language to encompass the words recorded in these voice mails.

Biggs, 2007 U.S. Dist. LEXIS at * 12-13.

In *Fava v. RRI, Inc.,* 1997 U.S. Dist. LEXIS 5630 (N.D.N.Y. 1997), a district court in the Northern District of New York found that a facsimile document sent to a third party by a debt collector did not violate 15 U.S.C. § 1692c(b) because it did not convey any information regarding a debt, and therefore did not meet the definition of "communication" under 15 U.S.C. § 1692a(2). In *Padilla v. Payco Gen. Am. Credits, Inc.*, 161 F. Supp. 2d 264 (S.D.N.Y. 2001), the plaintiff alleged, *inter alia*, that a debt collector violated § 1692c(b) of the FDCPA by contacting a secretary at plaintiff's place of employment and inquiring about her salary, pay schedule, and employment status. *Padilla*, 161 F. Supp. 2d at 267. The

court stated that the allegations, " . . . if true, could be a violation of 15 U.S.C. § 1692c(b), *if the receptionist became aware that Payco was seeking to collect a debt*." *Id.*, at 274 (emphasis added) (citation omitted). The court concluded that if the collector simply verified employment during the conversation with the receptionist, this would not amount to an improper communication in connection with the collection of a debt. *Id.*

In sum, while some district courts have found certain contacts (mostly telephone calls) to be "communications" under various provisions of the FDCPA, others have not. The determination of whether a particular contact is or is not a "communication" is a fact-driven inquiry which is inevitably tied to the particular contact at issue.

Petitioner is essentially asking this Court to make a determination that any and all "contact" with a third party that does not qualify as one of the expressly stated exceptions is a *per se* violation of the FDCPA. "When a statute's text is plain and unambiguous . . . the statute must be applied according to its terms." *Carcieri v. Salazar,* 555 U.S. 379, 380, 129 S. Ct. 1058, 1059, 172 L. Ed. 2d 791, 795 (2009) (citing *United States v. Gonzales*, 520 U.S. 1, 4, 117 S. Ct. 1032, 137 L. Ed. 2d 132 (1997) and *Dodd v. United States*, 545 U.S. 353, 359, 125 S. Ct. 2478, 162 L. Ed. 2d 343 (2005)). If Congress meant for Petitioner's interpretation of § 1692c(b) to apply, it certainly could have simply left out the term "communicate" and "in connection with the collection of a debt" and

stated plainly that no "contact" may be made to a third party unless it met one of the expressly stated exceptions. The court of appeals appropriately recognized that the definition of "communication" is unambiguous (Pet. App. 16a-17a), and appropriately determined that the third party contact at issue in this case did not "convey" information regarding a debt. Pet. App. 4a-6a.

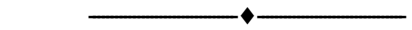
As summarized by the court of appeals: "[t]he substance of the supposed infraction here is manifestly not the sort of conduct the FDCPA is meant to quell" (Pet. App. 16a), recognizing that § 1692c(b) " . . . is meant to protect debtors from harassment, embarrassment, loss of job, denial of promotion." Pet. App. 16a. Petitioner's fears that the decision below will undermine other provisions of the FDCPA is unwarranted. In this regard, Petitioner suggests that if courts were to apply the court of appeals' interpretation of "communication" in this case, it may render §§ 1692d(6), e(8), e(9), or e(11) "inoperable." Pet. 16-18. Petitioner reads into the opinion below a more restrictive interpretation of "communication" than the court actually stated. For example, the court of appeals did not, as Petitioner suggests, find that the definition would not apply as a matter of law to a document that "did not mention a debt" or to situations in which the information that was transmitted did not "indicat[e] that the consumer owed a debt." Pet. 18. Instead, the court of appeals applied the plain and unambiguous language set forth in § 1692(a)(2) to determine that the specific contact in

this case did not meet the definition of "communication" under the Act. Moreover, Petitioner overlooks the fact that even if a certain contact is deemed not to be a communication for purposes of § 1692c(b), other provisions of the FDCPA offer protection. For example, sections 1692d, 1692e, and 1692f prohibit harassment, abuse, false or misleading representations, and "unfair practices," all of which provide protection for a consumer, with very few of those sections requiring that there be a "communication" in order to deem certain conduct to be a violation.[9] Accordingly, even if a contact is not determined to be a "communication"

[9] Section 1692d provides: "[a] debt collector may not engage in any conduct the natural consequence of which is to harass, oppress, or abuse any person in connection with the collection of a debt." This provision provides a non-exclusive list of the type of conduct which amounts to a violation of this provision. The list of prohibited conduct does not refer to a "communication" at all, and instead refers to such conduct as "causing a telephone to ring. . . ." *See* 15 U.S.C. § 1692d(1)-(6). Under § 1692e of the FDCPA: "[a] debt collector may not use any false, deceptive, or misleading representation or means in connection with the collection of any debt." This section of the FDCPA also provides various non-exclusive examples of what amounts to a violation of this provision, and only refers to a "communication" in subsections (8), (9), and (11). *See* 15 U.S.C. § 1692e (1)-(16). Section 1692f prohibits the " . . . unfair or unconscionable means to collect or attempt to collect any debt." As with §§ 1692d and 1692e, § 1692f provides a non-exclusive list of what constitutes a violation under this provision, and only subparts (7) and (8) relate to a "communication." *See* 15 U.S.C. § 1692f(1)-(8).

for purposes of § 1692c(b), it certainly does not preclude other potential violations of the FDCPA.[10]

In sum, the opinion of the court of appeals is not contrary to any decision of this Court or any other courts of appeals. Moreover, there is no support in either the express language of the statute or interpreting case law which supports Petitioner's one-size-fits-all approach to the definition of "communication" as applied to § 1692c(b). In this case, the district court and court of appeals appropriately applied the definition to the facts presented at trial. As such, the decision below will not foster confusion amongst the lower courts, as they are sufficiently equipped to apply the express language of the statute to the specific factual circumstances presented in a case-by-case basis.



[10] For example in *Horkey v. J.D.B. Associates*, 179 F. Supp. 2d 861 (N.D. Ill. 2002), the district court found that the defendant's contact with the plaintiff's co-worker did not violate § 1692c(b) because "it was merely limited to inquiring as to Plaintiff's whereabouts . . . " but determined the use of profane language violated § 1692d(2) of the FDCPA) *Id.* at 868.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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