NO. 12-744

IN THE

Supreme Court of the United States

CONVERGENT OUTSOURCING, INC.,
Petitioner,

v.

ANTHONY W. ZINNI,
Respondent.

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

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Does a defendant's informal, unaccepted offer to settle a plaintiff's claims deprive a federal district court of jurisdiction to decide those claims, where the defendant has neither tendered the offered settlement amount nor agreed to entry of an enforceable judgment?

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INTRODUCTION

In this case, counsel for the defendant Convergent Outsourcing (then known as ER Services) emailed counsel for plaintiff Anthony W. Zinni an offer to settle Zinni's claims under the Fair Debt Collections Practices Act (FDCPA) for $1,001—an amount exceeding by $1 the maximum statutory damages available for an individual plaintiff—plus attorneys' fees in an amount to be determined by the court. Pet. App. 2a. The offer, however, included neither a tender of any settlement funds nor an offer of judgment that would have rendered the settlement enforceable by the federal courts. When Zinni did not accept the offer, the district court granted Convergent's motion to dismiss for lack of subject-matter jurisdiction, holding that the offer left Zinni with "no remaining stake" in the litigation. *Id.* at 3a. The court dismissed Zinni's claims with prejudice, leaving him with no recovery, no settlement agreement, no enforceable judgment or mechanism for obtaining the offered attorneys' fees, and thus no means to obtain any relief on his FDCPA claims.

The Eleventh Circuit reversed, holding that in the absence of an offer of an enforceable judgment, the offer—even if accepted—would not have provided Zinni with complete relief on his claims. As the court explained, Zinni's acceptance of the offer would have left him with nothing more than Convergent's "promise to pay," which at most would have allowed him to pursue a "breach of contract suit in state court." *Id.* at 19a. In concluding that such an unenforceable promise did not moot Zinni's claims, the Eleventh Circuit followed the only other decision by a federal court of appeals to address the issue. *Simmons v. United Mortgage & Loan Investment LLC*, 634 F.3d 754, 764-66 (4th Cir. 2011). Contrary to Convergent's claims, no circuit has held that a mere promise of payment—in the absence of a tender

or enforceable judgment—is sufficient to deprive a federal court of jurisdiction. Accordingly, there is no division among the circuits that warrants this Court's intervention, and no reason to disturb the Eleventh Circuit's correct rejection of Convergent's unusual claim of mootness.

STATEMENT

A. Statutory Background

In the FDCPA, Congress responded to "abundant evidence of the use of abusive, deceptive and unfair debt collection practices" by enacting a comprehensive, detailed remedial scheme that imposes civil liability on debt collectors who violate the Act. 15 U.S.C. § 1692(a). As relevant to this case, § 1692d of the FDCPA forbids a debt collector from "engag[ing] in any conduct the natural consequence of which is to harass, oppress, or abuse any person in connection with the collection of a debt." The statute provides a non-exclusive list of conduct that violates this section, including "[c]ausing a telephone to ring or engaging any person in telephone conversation repeatedly or continuously with intent to annoy, abuse, or harass any person at the called number." *Id.* § 1692d(5). The statute also requires that debt collectors, among other things, disclose "that the debt collector is attempting to collect a debt and that any information obtained will be used for that purpose," *id.* § 1692e(11), and make a "meaningful disclosure of the caller's identity" when communicating by telephone, *id.* § 1692d(6).

The FDCPA provides a civil cause of action against any debt collector who violates these requirements. Subject to affirmative defenses, a debt collector who violates the Act's provisions is liable for actual damages and statutory damages of up to $1,000. 15 U.S.C. § 1692k(a). In addition, the FDCPA requires that defendant debt

collectors pay attorneys' fees and costs to successful plaintiffs. 15 U.S.C. § 1692k(a)(3).

B. Proceedings Below

1. Respondent Anthony W. Zinni sued petitioner Convergent Outsourcing (formerly known as ER Services), claiming that the company violated the FDCPA when it left him more than fifty voicemail messages in the course of attempting to collect a debt. *See* Doc. 1 ¶¶ 10-11 (complaint).[1] Zinni's complaint alleged that the company had caused Zinni's phone to "ring repeatedly or continuously with the intent to annoy, abuse or harass" in violation of 15 U.S.C. § 1692d(5), and that the company failed to make the disclosures required by §§ 1692d(6) and 1692e(11). Doc. 1 ¶ 10. Zinni requested damages, attorneys' fees, and costs under the FDCPA. *Id.* at 21.

About six months after Zinni filed his complaint, counsel for Convergent sent an email to Zinni's counsel stating that Convergent had "authorized me to offer Plaintiff the amount of $1,001, plus reasonable attorney's fees and costs as determined to be recoverable by the Court, to resolve all claims asserted by Plaintiff against Defendant for violations of the Fair Debt Collections Practices Act alleged in the Complaint." Doc. 13-2 at Page 2 of 2. When Zinni did not respond to the offer, Convergent moved to dismiss for lack of subject-matter jurisdiction, arguing that its offer of the maximum statutory damages available under the Act rendered his claims moot. Doc. 13-1.

Zinni opposed the motion on the grounds that he had not accepted Convergent's offer, that the offer would not have provided complete relief on his claims even if he had accepted it, and that Convergent had included in its

[1] References to Doc. refer to the district court docket.

proposal neither an offer of judgment nor any other mechanism to enforce compliance with the offer's terms. *See* Doc. 14. In his memorandum opposing the motion, Zinni's counsel explained that his clients in other FDCPA cases who accepted such agreements had not been paid as the agreements required, and that in several cases he had been forced to file separate lawsuits in state court to enforce the agreements' terms. *Id.* at 4. Zinni requested that the district court deny the motion to dismiss or, in the alternative, that the court enter judgment for the plaintiff on the terms offered by defendant. *Id.* at 6.

The district court agreed with Convergent and dismissed the case with prejudice, holding that "[o]nce the defendant offers to satisfy the plaintiff's entire demand, there is no dispute over which to litigate." Pet. App. 3a (internal quotation marks omitted). Although the court acknowledged that Zinni had never accepted the defendant's offer, it relied on decisions involving formal offers of judgment under Federal Rule of Civil Procedure 68 to hold that a plaintiff "who refuses to acknowledge" that a defendant's offer has resolved his claims "has no remaining stake" in the case, and thus "loses outright under Fed. R .Civ. P. 12(b)(1)." Pet. App. 3a (quoting *Greif v. Wilson, Elser, Moskowitz, Edelman & Dicker LLP*, 258 F. Supp. 2d 157, 160 (E.D.N.Y. 2003)).

The court rejected as "nonsensical" Zinni's argument that, had he accepted defendant's offer, he would have been left with nothing but an unenforceable promise. *Id.* at 5a. The court wrote that it was "Plaintiff's failure to accept the offer that creates these issues in the first place" because, "[i]f Plaintiff accepts the offer, it becomes a binding agreement that can be enforced through a motion to enforce settlement." *Id.*

2. Zinni appealed the dismissal, and the appeal was consolidated with two other appeals of cases in which FDCPA claims had been dismissed based on identical emailed settlement offers.[2] The Eleventh Circuit reversed, holding that the settlement offer "did not offer full relief" because it did not include an offer of judgment. *Id.* at 19a. "A judgment is important," the court explained, "because the district court can enforce it." *Id.* In the absence of a judgment, Zinni's acceptance of the offer would have left him with "a mere promise to pay," and if that promise were not fulfilled he would be "faced the prospect of filing a breach of contract suit in state court with its attendant filing fees—resulting in two lawsuits instead of just one." *Id.*

The court acknowledged decisions by the Seventh Circuit holding that "[o]ffers for the full relief requested … moot a claim." *Id.* at 16a-17a (citing *Greisz v. Household Bank (Ill.), N.A.*, 176 F.3d 1012, 1015 (7th Cir. 1999); *Rand v. Monsanto Co.*, 926 F.2d 596, 598 (7th Cir. 1991)). But the court found those cases inapposite "because the defendants there offered the full relief requested—the full amount of damages *plus* a judgment." *Id.* at 17a. The court followed the Fourth Circuit's decision in *Simmons v. United Mortgage & Loan Investment LLC*, which held that "the failure of the Defendants to make their attempted offer for full relief in the form of an offer of judgment prevented the mooting of the Plaintiffs' … claims." 634 F.3d 754, 764-66 (4th Cir. 2011). Agreeing with the Fourth Circuit's analysis, the court held that the defendant's offer—because it lacked

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[2] The defendants in the other two cases have not sought review by this Court of the Eleventh Circuit's reversal of the dismissal orders.

an offer of judgment—did not moot Zinni's claims. Pet. App. 17a-19a.

REASONS FOR DENYING THE PETITION

I. There is No Conflict Among the Circuits on the Question Presented.

A. In holding that a mere offer to pay does not moot a plaintiff's claims when the offer is not accompanied by payment or an offer of judgment, the Eleventh Circuit agreed with the only other circuit to have addressed that question. Like the Eleventh Circuit below, the Fourth Circuit in *Simmons* held that an "offer[] for the parties to enter into a settlement agreement" is not an offer of "full relief in th[e] case" because, if the plaintiffs had prevailed on their claims, "the district court would have entered a *judgment* against the Defendants." 634 F.3d at 764-65 (emphasis added).

As *Simmons* explained, "[f]rom the view of the Plaintiffs, a judgment in their favor is far preferable to a contractual promise by the Defendants in a settlement agreement to pay the same amount." *Id.* at 765. Although "district courts have inherent power to compel defendants to satisfy judgments entered against them," they "lack the power to enforce the terms of a settlement agreement absent jurisdiction over a breach of contract action for failure to comply with the settlement agreement." *Id.* Thus, "should a settlement not embodied in a judgment come unraveled, the court may be without jurisdiction to proceed in the case, which often becomes a breach of contract action for failure to comply with the settlement agreement." *Id.* (internal quotation omitted); *see also Kokkonen v. Guardian Life Ins. Co.*, 511 U.S. 375 (1994) (holding that federal courts lack jurisdiction to enforce private settlement agreements); Charles A. Wright, Arthur R. Miller & Edward H. Cooper, 12 *Fed. Prac. & Proc. Civ. 2d* § 3002 ("[F]rom the plaintiff's per-

spective the willingness of the defendant to allow judgment to be entered has substantial importance since judgments are enforceable under the power of the court.").

The possibility that defendants will not honor their agreements is not just a theoretical concern. As Zinni's counsel explained below, he has repeatedly been forced to bring collection actions against debt collectors who obtained dismissals in FDCPA cases based on settlements equivalent to the one proposed here. *See* Doc. 14 at 3-4. Moreover, in this case, accepting the offer without having it embodied in a judgment would have allowed no mechanism for the court determination of fees that the offer itself contemplated, as the federal court's lack of jurisdiction to enforce the contract would have deprived it of any power to carry out that term of the agreement. If Zinni had accepted the defendant's offer here and the defendant had refused to pay, he would have been in a worse position than if the offer had never been made—with no FDCPA claim, no determination of the amount of fees to which he was entitled, and nothing but a state-law claim for breach of contract. The Eleventh Circuit was correct to conclude that such a result would have been far from full satisfaction of Zinni's FDCPA claims.[3]

B. Both the Eleventh Circuit below and the Fourth Circuit in *Simmons* distinguished cases, such as those on which petitioner relies here, holding that a formal offer

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[3] Petitioner suggests that the district court could have retained jurisdiction to enforce the terms of the settlement. But as this Court held in *Kokkonon*, a district court *cannot* retain jurisdiction to enforce a private settlement unless it is embodied in a judgment or consent decree. 511 U.S. at 381. The basis for the Eleventh Circuit's decision below was that the defendant never offered such a judgment or consent decree.

of judgment under Federal Rule of Civil Procedure 68 is capable of mooting a plaintiff's claims even if the plaintiff rejects the offer. As the Eleventh Circuit explained, the defendants in those cases "offered the full relief requested—the full amount of damages *plus* a judgment." Pet. App. 17a (citing *Greisz*, 176 F.3d at 1015; *Rand*, 926 F.2d at 598). Those decisions thus cannot stand for the proposition that a mere promise to pay—in the absence of any means of enforcement—moots a plaintiff's claims.

Petitioner identifies two Seventh Circuit decisions that it claims did not involve offers of judgment and thus conflict with the decision below. Neither case, however, is relevant to the question presented here. In the first, *Holstein v. City of Chicago*, 29 F.3d 1145 (7th Cir. 1994), the court did not say whether the defendant's offer included an offer of judgment. *See Parker v. Risk Mgmt. Alternative, Inc.*, 204 F.R.D. 113, 115 n.3 (N.D. Ill. 2001) (concluding that it was "not clear whether the offer in [*Holstein*] was an offer of judgment").[4] The decision thus says nothing either way about the relevance of such an offer to the mootness of a plaintiff's claims. In any event, in *Holstein* the defendant *tendered* the settlement funds. 29 F.3d at 1146; *see also Holstein v. City of Chicago*, 803 F. Supp. 205, 208 (N.D. Ill. 1992) (noting that the defendant had "attempted to refund" the disputed fees, but the plaintiff had "refused to accept" the refund). The de-

[4] In interpreting *Holstein*, most district courts in the Seventh Circuit have assumed that the defendant's settlement offer was an offer of judgment under Rule 68. *See. e.g., Giblin v. Revenue Prod. Mgmt., Inc.*, 2008 WL 780627 (N.D. Ill. Mar. 24, 2008); *Wilson v. Collecto, Inc.*, 2003 WL 22299022 (N.D. Ill. Oct. 6, 2003); *Letellier v. First Credit Services, Inc.*, 2001 WL 826873 (N.D. Ill. July 20, 2001); *Asch v. Teller, Levit & Silvertrust, P.C.*, 200 F.R.D. 399, 400 (N.D. Ill. 2000). Others have found it unclear whether such an offer was made. *See, e.g.*, *Parker*, 204 F.R.D. at 115 n.3.

fendant in *Holstein* thus provided the plaintiff with the complete relief lacking here. *See California v. San Pablo & Tulare R.R. Co.*, 149 U.S. 308, 313-14 (1893) (holding that the state had "obtained everything that it could recover … by a judgment" where the defendant had deposited the disputed funds in a bank for distribution to the state); *Hernandez v. PeopleScout, Inc.*, 2012 WL 3069495, at *3 (N.D. Ill. July 24, 2012) (concluding that the tender in *Holstein* rendered an offer of judgment unnecessary).[5]

Petitioner is correct that the second case on which it relies, *Damasco v. Clearwire Corp.*, 662 F.3d 891 (7th Cir. 2011), did not involve a *Rule 68* offer of judgment. That case could not possibly have involved such an offer because the defendant made the offer while the case was pending in Illinois state court, which lacks an offer of judgment rule comparable to Rule 68. *See Damasco v. Clearwire Corp.*, 2010 WL 3522950, at *8 n.10 (N.D. Ill. Sept. 2, 2010). But it is nevertheless clear that the settlement offer in *Damasco* contemplated entry of an enforceable judgment. The offer included *consent to the plaintiff's requested injunctive relief*—relief that could only have been granted by a court. *Id.* at *1, *3. It is thus not surprising that the plaintiff never argued that the settlement offer failed to include an offer of judgment, or that the Seventh Circuit's decision includes no discussion

[5] Petitioner states that it tendered a check for $1,001, which was never deposited. That tender—which is not in the record and was not made until *after* the district court dismissed the case as moot—was in any event not in the *full amount* of the offer because the offer was for $1,001 *plus* reasonable attorneys' fees, and the defendant did not tender any attorneys' fees. Nor did the dismissal of the case even allow for the possibility that the unliquidated offer of fees could be transformed into a definite amount through determination by the court.

on the relevance of a judgment offer to the mootness of an individual plaintiff's claims.

Neither case on which the petitioner relies holds that a mere promise to pay—in the absence of a tender or enforceable judgment—is sufficient to deprive a federal court of jurisdiction. Rather, as the Seventh Circuit itself has recognized, a defendant's promise of future payment is not the same as obtaining full relief. *See Selcke v. New England Ins. Co.*, 2 F.3d 790, 792 (7th Cir. 1993) (holding that, even where a promised payment is "highly likely," it is "not certain until made, and a case does not become moot merely because it is highly likely to become moot shortly"). There is thus no disagreement among the circuits on the question presented here.

II. The Decision Below Does Not Turn on the Question Presented in *Genesis HealthCare Corp. v. Symczyk*.

Zinni contended in the alternative below that the defendant's offer of settlement, even if it had included an offer of judgment, could not have mooted his claims because he never accepted the offer. As Zinni pointed out, the district court's dismissal of the case based on an unaccepted settlement offer left him with neither a judgment nor a settlement agreement on which to obtain relief for his claims. The district court's decision was thus self-defeating—by holding that the defendant's offer provided Zinni with full relief, the court eliminated any possibility that Zinni could recover the relief on which the court's determination was based.

The question raised by Zinni's alternative argument—whether an offer of complete relief moots a plaintiff's claims even when the plaintiff has rejected the offer—is at issue in another case currently pending in this Court, *Genesis HealthCare Corp. v. Symczyk*, No. 11-1059. That question, however, was not reached by the

Eleventh Circuit below. Because the defendant "never offered full relief" (i.e., made an offer of judgment) the Eleventh Circuit found it unnecessary to decide "whether an offer for full relief, even if rejected, would be enough to moot a plaintiff's claims." Pet. App. 17a n.8.

Unlike the offer in this case, the settlement offer in *Symczyk* was a formal offer of judgment under Rule 68. This Court's decision in *Symczyk* is thus unlikely to bear on the correctness of the Eleventh Circuit's decision below, and there is accordingly no reason to hold this case pending a decision in *Symczyk*.

CONCLUSION

The petition for certiorari should be denied.

Respectfully submitted,

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