No. 10-1417

In the Supreme Court of the United States

FEIN, SUCH, KAHN AND SHEPARD, PC, PETITIONER

v.

DOROTHY RHUE ALLEN

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Whether communications from debt collectors to consumers' attorneys are categorically excluded from the coverage of Section 808(1) of the Fair Debt Collection Practices Act, 15 U.S.C. 1692 *et seq.*, which prohibits debt collectors from engaging in "[t]he collection of any amount * * * unless such amount is expressly authorized by the agreement creating the debt or permitted by law," 15 U.S.C. 1692f(1).

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INTEREST OF THE UNITED STATES

This brief is submitted in response to the order of this Court inviting the Solicitor General to express the views of the United States. In the view of the United States, the petition for a writ of certiorari should be denied.

STATEMENT

1. The Fair Debt Collection Practices Act (FDCPA or Act), 15 U.S.C. 1692 *et seq.*, is a consumer-protection statute that was enacted in 1977, as Title VIII of the Consumer Credit Protection Act, 15 U.S.C. 1601 *et seq.* The Act regulates various practices pertaining to the collection of consumer debts by "debt collector[s]." The term "debt collector" is defined to include "any person * * * who regularly collects or attempts to collect, di-

rectly or indirectly, debts owed or due or asserted to be owed or due another." 15 U.S.C. 1692a(6); see *Heintz* v. *Jenkins*, 514 U.S. 291, 292 (1995) (holding that a lawyer who "'regularly,' *through litigation*, tries to collect consumer debts" is a "debt collector" within the meaning of the FDCPA).

The FDCPA prohibits debt collectors from, *inter alia*, engaging in harassing or deceptive practices. 15 U.S.C. 1692d-1692e. It also prohibits debt collectors from using "unfair or unconscionable means to collect or attempt to collect any debt." 15 U.S.C. 1692f. That prohibition encompasses "[t]he collection of any amount (including any interest, fee, charge, or expense incidental to the principal obligation) unless such amount is expressly authorized by the agreement creating the debt or permitted by law." 15 U.S.C. 1692f(1). The FDCPA significantly limits debt collectors' ability to communicate about consumer debts with anyone not legitimately involved in the debt-collection and reporting process. 15 U.S.C. 1692c(b). The Act permits debt collectors to communicate with consumers' attorneys regarding the collection of debts, however, see *ibid.*, and it generally prohibits debt collectors from communicating directly with consumers who are represented by counsel, 15 U.S.C. 1692c(a)(2); cf. 15 U.S.C. 1692b(6) (generally prohibiting debt collectors from communicating with third persons to acquire location information about consumers, when consumers are represented by counsel).

The FDCPA authorizes both private and governmental enforcement actions. In general, "any debt collector who fails to comply with any provision of [the FDCPA] with respect to any person is liable to such person." 15 U.S.C. 1692k(a). A debt collector may not be held liable under the FDCPA, however, if it "shows by a pre-

ponderance of evidence that the violation was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid any such error." 15 U.S.C. 1692k(c); see *Jerman* v. *Carlisle, McNellie, Rini, Kramer & Ulrich LPA*, 130 S. Ct. 1605, 1611-1624 (2010). Nor can a debt collector be held liable if it acts "in good faith in conformity with" an appropriate governmental advisory opinion. 15 U.S.C. 1692k(e) (2006 & Supp. IV 2010).

A prevailing plaintiff in a private FDCPA suit is entitled to recover actual damages and attorney's fees. 15 U.S.C. 1692k(a)(1) and (3). The district court may also award "additional damages" subject to statutory caps. 15 U.S.C. 1692k(a)(2). In deciding whether to award additional damages, the court considers "the extent to which the debt collector's noncompliance was intentional," "the nature of such noncompliance," and several other factors. 15 U.S.C. 1692k(b).

The Federal Trade Commission (FTC), the Consumer Financial Protection Bureau (Bureau), and other federal agencies enforce the Act. 15 U.S.C. 1692*l*(a)-(c) (2006 & Supp. IV 2010). As relevant here, the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act), Pub. L. No. 111-203, Tit. X, 124 Stat. 1955, amended the FDCPA and established the Bureau, vesting it with significant authority relating to the Act.[1] The Bureau now has the authority to issue advisory opinions interpreting the Act. See 15 U.S.C. 1692k(e) (2006 & Supp. IV 2010). Congress also granted the Bureau authority to "prescribe rules with respect to the collection of debts by debt collectors"—a power no

[1] Title X of the Dodd-Frank Act became effective on July 21, 2011. Dodd-Frank Act § 1062, 124 Stat. 2039 (12 U.S.C. 5582 (Supp. IV 2010)); 75 Fed. Reg. 57,252 (Sept. 10, 2010).

agency previously had. 15 U.S.C. 1692*l*(d) (Supp. IV 2010); see 12 U.S.C. 5512(b) (Supp. IV 2010) (granting Bureau rulemaking authority for "Federal consumer financial laws"); 12 U.S.C. 5481(12)(H) and (14) (Supp. IV 2010) (defining "Federal consumer financial law" to include the FDCPA).

2. In 1976, respondent Dorothy Rhue Allen purchased a home with a 30-year mortgage. Pet. App. 3. On May 7, 2007, after respondent missed the final payment on her mortgage, petitioner Fein, Such, Kahn & Shepard, PC, a law firm, filed a foreclosure action against respondent in New Jersey state court on behalf of respondent's mortgage lender. *Id.* at 3, 17-18, 36.

On June 7, 2007, petitioner sent a letter to respondent's counsel at counsel's request. Pet. App. 3. The letter purported to provide a "[p]ayoff quote subject to audit and verification" for respondent's loan consisting of (a) $3425.31 in principal, interest, and other charges, payable to the bank servicing the loan, and (b) $2372.14 for "[a]ttorneys fees and costs," payable directly to petitioner. *Id.* at 85-86; see *id.* at 3, 18. The letter stated that it was "an attempt to collect a debt," and that "[a]ny and all information obtained w[ould] be used for that purpose." *Id.* at 86. Later that day, petitioner sent a second letter to respondent's counsel itemizing the $2372.14 in fees and costs that petitioner claimed it was owed. *Id.* at 87-88; see *id.* at 3, 18.

On June 26, 2007, respondent's counsel filed an answer in the state foreclosure action, as well as a class-action counterclaim and third-party complaint against petitioner, respondent's lender, and the bank servicing the mortgage. Pet. App. 3-4, 18, 60-84. Respondent alleged, *inter alia*, that petitioner's two letters had violated the FDCPA. *Id.* at 3-4, 18, 66-68. Petitioner filed

a motion to dismiss. *Id.* at 18. Before the court ruled on the motion, respondent's lender agreed to release the mortgage and dismiss the foreclosure action. *Id.* at 4, 18-19. The state court dismissed respondent's counterclaim and third-party complaint without prejudice. *Ibid.*

Respondent then filed a putative class action in federal district court, again alleging, *inter alia*, that petitioner's two letters had violated the FDCPA. Pet. App. 4, 19, 34-59.[2] Respondent specifically alleged that petitioner had sought fees in excess of the amounts permitted by New Jersey court rules, and in excess of the costs actually incurred by petitioner, in violation of 15 U.S.C. 1692f and 1692f(1). Pet. App. 4, 38-40, 47-48. Respondent also alleged "more generally" that petitioner had "used 'unfair and unconscionable collection methods'" and had "engaged in unfair and/or deceptive acts and practices"—allegations that the district court construed as invoking the "'general application' provisions" of Sections 1692d, 1692e, and 1692f. *Id.* at 19-20 (citation omitted); see *id.* at 47-48.

Petitioner moved to dismiss the FDCPA claims, arguing that "the letters it sent are not actionable under the FDCPA because they were sent only to [respondent's] attorney and not to [respondent] herself." Pet. App. 23. The district court rejected that contention, concluding that "the language of §§ 1692d, 1692e and 1692f does not support per se immunity for statements made to attorneys." *Id.* at 27. The court also concluded,

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[2] Respondent's mortgage lender (LaSalle Bank, N.A.) and the servicer of the loan (Cenlar Federal Savings Bank) were also named as defendants in the district court. Pet. App. 3-4 & nn.1, 2. Both defendants moved to dismiss respondent's complaint on grounds not addressed by the district court, *id.* at 4 n.2, 18 n.1, 32, and neither has filed a brief in this Court.

however, that "where a consumer's attorney is interposed between the debt collector and the debtor," "statements made only to a debtor's attorney" should be evaluated "from the perspective of the competent attorney," and that the "competent attorney standard" should apply regardless of whether the claim is brought under Section 1692d, 1692e, or 1692f. *Id.* at 27-28 & n.6. The court found that "each of the[] alleged overcharges and deceptive statements would be readily recognized" as such "by a competent attorney representing a debtor in a foreclosure action"; that the overcharges and deceptive statements would not "in fact deceive" such a competent attorney; and that the actions of respondent's counsel in this case (filing a prompt counterclaim and third-party complaint detailing the overcharges and deceptive statements) confirmed the statements' lack of deceptive potential. *Id.* at 30-31. Accordingly, the court granted petitioner's motion to dismiss the FDCPA claims. *Id.* at 31. The district court declined to exercise supplemental jurisdiction over respondent's state-law claims, *id.* at 32, and it therefore dismissed respondent's complaint in its entirety, *id.* at 33.

3. The court of appeals vacated and remanded. Pet. App. 1-12. At oral argument, respondent "conceded * * * that her FDCPA claims were predicated only upon alleged violations of 15 U.S.C. § 1692f(1)." *Id.* at 4. In light of that concession, the court identified the question presented on appeal as "whether a communication from a debt collector to a consumer's attorney is actionable under the [FDCPA], 15 U.S.C. § 1692f(1)." *Id.* at 3; see *id.* at 9.

The court of appeals answered that question in the affirmative. The court explained that Section 1692f(1) "prohibits 'unfair or unconscionable means,' regardless

of the person to whom the communication was directed." Pet. App. 9. The court further explained that "the scope of the FDCPA is broad," and that the term "communication" is defined "expansively" to include "indirect communication[s] to the consumer," such as "[a] communication to a consumer's attorney." *Ibid.* (citing 15 U.S.C. 1692a(2)). The court concluded that "it would undermine the deterrent effect of" the FDCPA as a "strict liability statute * * * [i]f an otherwise improper communication" were to "escape FDCPA liability simply because that communication was directed to a consumer's attorney." *Id.* at 10.

The court of appeals also discussed the appropriate standard for reviewing a claim under Section 1692f(1). Pet. App. 10-11. The court noted that, in applying a "competent attorney" standard, the district court had not had the benefit of respondent's concession that she was relying solely on Section 1692f(1), under which the sole inquiry is "whether the amount collected was expressly authorized by the agreement creating the debt or permitted by law." *Ibid.* The court of appeals remanded the case for further proceedings in the district court, noting that it "express[ed] no opinion as to whether [respondent] has alleged a viable claim." *Id.* at 12.

DISCUSSION

The court of appeals' decision is correct, and there is no square conflict among the courts of appeals on the question presented here. Although the ruling below is in significant tension with a decision of the Ninth Circuit, that tension may be alleviated as the lower courts and the expert agencies further consider the FDCPA's application to communications to attorneys. The petition for a writ of certiorari therefore should be denied.

A. The Court Of Appeals' Decision Is Correct

Petitioner asks this Court to grant certiorari to decide "whether a communication from a debt collector to a debtor's attorney is actionable under the FDCPA." Pet. 5; see Pet. i, 9. Based on respondent's concession that she was relying solely on 15 U.S.C. 1692f(1), however, the court of appeals did not announce any rule governing the Act as a whole, but instead limited its holding to that specific FDCPA provision. See Pet. App. 9 (noting that "the issue here is whether § 1692f(1) governs communications from a debt collector to a consumer's attorney"); see also *id.* at 3, 4. The court of appeals correctly held that communications to a consumer's attorney can violate that provision.

1. Section 1692f sets forth a general prohibition, followed by a nonexclusive list of examples of conduct that would violate that general ban. As relevant here, Section 1692f states that

> [a] debt collector may not use unfair or unconscionable means to collect or attempt to collect any debt. Without limiting the general application of the foregoing, the following conduct is a violation of this section:
>
> (1) The collection of any amount (including any interest, fee, charge, or expense incidental to the principal obligation) unless such amount is expressly authorized by the agreement creating the debt or permitted by law.

15 U.S.C. 1692f.[3] There is no textual basis for limiting Section 1692f(1) to the collection of unauthorized fees directly from the consumer herself. Nor is there any textual basis for excluding from Section 1692f(1)'s coverage communications to a consumer's attorney. On its face, Section 1692f(1) broadly forbids the collection of unauthorized fees "regardless of the person to whom the communication was directed." Pet. App. 9.[4]

Other FDCPA provisions, by contrast, do exempt communications with a consumer's attorney. Section 1692c(b), for example, generally prohibits debt collectors from communicating with third parties "in connection with the collection of any debt." 15 U.S.C. 1692c(b). That provision, however, expressly exempts communications with the consumer's "attorney." See *ibid.* (prohibiting such communications "with any person other than the consumer, his attorney," and other enumerated persons). "[W]here Congress includes particular language

[3] The court of appeals held that "collection" in Section 1692f(1) "includes attempted collection as well as actual collection." Pet. App. 8 n.4. In a footnote in its reply brief, petitioner suggests that, contrary to the court of appeals' decision, "Section 1692f(1) is limited to the actual collection of prohibited amounts." Reply Br. 4 n.1. That issue, however, is outside the scope of the question presented in the petition. Accordingly, this brief assumes that the term "collection" in Section 1692f(1) encompasses attempts to collect unauthorized fees. Cf. 15 U.S.C. 1692a(6) (defining the term "debt collector" to include a person who "collects or attempts to collect" debts).

[4] As the court of appeals correctly observed, the FDCPA term "communication" is defined to include "the conveying of information regarding a debt directly *or indirectly* to any person through any medium." Pet. App. 9 (quoting 15 U.S.C. 1692a(2)). Unlike other provisions of the Act, Section 1692f does not require a "communication." See *Muir* v. *Navy Fed. Credit Union*, 529 F.3d 1100, 1106-1107 (D.C. Cir. 2008). There can be no dispute, however, that petitioner's letters to respondent's counsel constituted a "communication" under the Act.

in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello* v. *United States*, 464 U.S. 16, 23 (1983) (brackets in original; citation omitted). If Section 1692f(1) is given its "ordinary English" meaning, *Heintz* v. *Jenkins*, 514 U.S. 291, 294 (1995), it prohibits the collection of unauthorized fees regardless of whether the debt collector communicates directly with the consumer or instead communicates with her attorney.[5]

The plain meaning of Section 1692f(1) is consistent with the general structure of the FDCPA, which recognizes that a debt collector may communicate with a consumer through the consumer's lawyer. The Act defines the term "debt collector" to include a person who "collects or attempts to collect" debts "indirectly." 15 U.S.C. 1692a(6). It permits communications with a consumer's attorney in connection with the collection of a debt. 15 U.S.C. 1692c(b). And it instructs debt collectors that they can generally communicate only with the attorneys of consumers who are represented by counsel. 15 U.S.C. 1692c(a)(2); see 15 U.S.C. 1692b(6).

Congress thus clearly contemplated that the collection of consumer debts would often involve communications to consumers' attorneys. Against that backdrop, Congress's failure to exempt communications to attorneys from Section 1692f(1) is particularly significant. Indeed, the FDCPA would be substantially self-defeating if compliance with the requirement that represented consumers be contacted through counsel could

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[5] *Heintz* itself involved the same fact pattern at issue here, *i.e.*, the plaintiff alleged a violation of 15 U.S.C. 1692f(1) based on a letter that the debt collector had sent to the consumer's attorney. 514 U.S. at 293.

insulate debt collectors from all of the Act's other prohibitions.

2. Petitioner does not address the text of Section 1692f(1). In the court of appeals, petitioner conceded "that there is nothing in the FDCPA that explicitly exempts communications to an attorney." Pet. App. 9. Instead, petitioner contends that the Act includes an implied and categorical exemption for all communications between debt collectors and consumers' attorneys. That claim lacks merit.

a. Petitioner argues (Pet. 22-26) that the FDCPA distinguishes for various purposes between a consumer and her attorney. Petitioner cites two statutory definitions that make clear that a consumer's attorney is not a "consumer." See Pet. 23 (citing 15 U.S.C. 1692a(3), 1692c(d)).[6] There is no question, however, that petitioner was attempting to collect a debt from respondent when it sent two letters to her attorney; indeed, petitioner said as much in the first letter. Pet. App. 86 (stating that "[t]his communication is an attempt to collect a debt"); see *id.* at 85-86 (providing "[p]ayoff quote" for mortgage). The prohibition set forth in Section 1692f(1) is not limited to debt-collection methods that involve communications "to a consumer," let alone "directly to a consumer." Indeed, Section 1692f(1) does not contain the term "consumer" at all. If (as respondent alleges) the "amount[s]" that petitioner sought were neither "expressly authorized by the [mortgage] agreement" nor

[6] Section 1692a(3) provides that "[t]he term 'consumer' means any natural person obligated or allegedly obligated to pay any debt." 15 U.S.C. 1692a(3). Section 1692c(d) states that "[f]or the purpose of this section, the term 'consumer' includes the consumer's spouse, parent (if the consumer is a minor), guardian, executor, or administrator." 15 U.S.C. 1692c(d).

"permitted by law," 15 U.S.C. 1692f(1), the FDCPA's definitions of "consumer" do not cast doubt on Section 1692f(1)'s applicability here.

Petitioner also notes that the FDCPA permits debt collectors to communicate with consumers' attorneys about the collection of debts. Pet. 24-25 (citing 15 U.S.C. 1692b(6), 1692c(a)(2) and (b)). As discussed above, however, the fact that the FDCPA allows (and sometimes requires) debt collectors to communicate directly with consumers' attorneys does not suggest that, when a debt collector does so, the FDCPA provides no further protections. By sending the two letters to respondent's attorney rather than directly to respondent, petitioner satisfied the FDCPA requirement (15 U.S.C. 1692c(a)(2)) that debt collectors contact represented consumers through their counsel. Petitioner's compliance with that requirement, however, did not absolve it of its obligation to obey the Act's other substantive provisions. Neither the fact that petitioner communicated with respondent's counsel, nor the tenor of that communication, forms the basis for the asserted violation of Section 1692f(1).

b. Petitioner also argues (Pet. 26-31) that applying the FDCPA to communications with a consumer's attorney would not further Congress's purposes in enacting the statute. That argument is wrong for two reasons.

First, where (as here) the statutory language is clear, the Court will not "rewrite the statute so that it covers only what [it] think[s] * * * Congress really intended." *Lewis* v. *City of Chi.*, 130 S. Ct. 2191, 2200 (2010). "[S]tatutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we

are governed." *Oncale* v. *Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 79 (1998); see *Mertens* v. *Hewitt Assocs.*, 508 U.S. 248, 261 (1993) ("[V]ague notions of a statute's 'basic purpose' are * * * inadequate to overcome the words of its text regarding the *specific* issue under consideration."). Absent any textual basis for reading Section 1692f(1) to exclude communications to attorneys, petitioner's contention that such an approach would serve Congress's purposes is simply beside the point.

Second, the plain text of Section 1692f(1)—which unambiguously prohibits the collection of unauthorized fees through communications with a consumer's attorney—is entirely consistent with the overall purposes of the FDCPA. Contrary to petitioner's suggestion (Pet. 26-27), consumers are not the only intended beneficiaries of the Act's protections. For example, the FDCPA prohibits debt collectors from using or threatening to use "violence or other criminal means to harm the physical person, reputation, or property of *any person*," and from "[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." 15 U.S.C. 1692d(1) and (5) (emphases added). The Act also serves in part to level the playing field among debt collectors by "insur[ing] that those debt collectors who refrain from using abusive debt collection practices are not competitively disadvantaged." 15 U.S.C. 1692(e).

In any event, reading Section 1692f(1) as written to encompass communications to consumers' attorneys *does* protect the consumer, and does so more effectively than the reading petitioner proposes. Petitioner asserts that "[w]hen a debtor is represented by counsel, con-

cerns about abusive debt collection practices * * * 'quickly evaporate.'" Pet. 27 (quoting *Guerrero* v. *RJM Acquisitions LLC*, 499 F.3d 926, 939 (9th Cir. 2007)). But while an attorney may be better equipped than his client to see through a debt collector's unscrupulous actions, and may be more impervious to certain abusive practices, the attorney is an imperfect filter, particularly with respect to falsehoods and misstatements that may not be immediately apparent. Cf. *Evory* v. *RJM Acquisitions Funding L.L.C.*, 505 F.3d 769, 775 (7th Cir. 2007) (noting that "[a] false claim of fact in a dunning letter may be as difficult for a lawyer to see through as a consumer"). And even when an attorney successfully thwarts a debt collector's efforts to collect unauthorized amounts, the attorney's services typically will take time and cost the consumer money. See *Guerrero*, 499 F.3d at 945 (W. Fletcher, J., concurring in part and dissenting in part). The categorical rule that petitioner advocates, to the effect that a debt collector's communications to a consumer's attorney can *never* violate the FDCPA, therefore would disserve the Act's consumer-protection purposes.

Petitioner contends (Pet. 29) that the court of appeals' decision will deter good-faith settlement negotiations between debt collectors and attorneys for consumers. But the blanket exemption that petitioner advocates would extend well beyond such good-faith efforts and would encompass intentional wrongdoing and even violent acts. Under petitioner's approach, for example, a debt collector could physically attack (or threaten to attack) a consumer's lawyer, or threaten to harm the lawyer's reputation, without violating the FDCPA. See 15 U.S.C. 1692d(1). And, in petitioner's view, a debt collector would be insulated from liability under Section

1692f(1) even if it demanded fees that it knew to be unauthorized, so long as it presented its demand to the consumer's attorney rather than to the consumer herself.

Acceptance of that theory would not simply hinder consumers' own efforts to obtain redress through private civil actions. Under the FDCPA, the enforcement authority of the FTC, the Bureau, and other federal agencies depends on the existence of a violation of the Act. See 15 U.S.C. 1692*l*(a)-(c) (2006 & Supp. IV 2010). If communications with consumers' attorneys were categorically outside the Act's purview, no matter how egregious the conduct, the FDCPA would not authorize governmental enforcement measures.

B. There Is No Square Conflict Among The Courts Of Appeals On The Question Decided By The Third Circuit

Petitioner asserts that a "three-way circuit conflict" exists on the question whether "a communication from a debt collector to a debtor's attorney [is] actionable under the FDCPA." Pet. 9. That argument rests on a misunderstanding of the court of appeals' decision. The court did not announce a rule that governs all provisions of the FDCPA, but instead confined its analysis to Section 1692f(1). With respect to the question whether a communication to an attorney can violate that provision, no square circuit conflict exists.

1. No court of appeals has held that the collection of unauthorized fees through communications to consumers' attorneys is categorically outside Section 1692f(1)'s purview. And every court of appeals to decide the question has held that communications to attorneys can violate Section 1692f.[7] In *Sayyed* v. *Wolpoff & Abramson*,

[7] In *Kropelnicki* v. *Siegel*, 290 F.3d 118 (2d Cir. 2002), the court of appeals suggested in dicta "that alleged misrepresentations to *attor-*

485 F.3d 226 (2007), the Fourth Circuit rejected the argument that "FDCPA liability cannot attach to communications made by a debt collection attorney to a debtor's counsel, rather than to the debtor." *Id.* at 232-233. Although the court did not engage in any substantive analysis of the particular FDCPA provisions at issue, the plaintiffs in that case had alleged violations of Sections 1692e and 1692f, including Section 1692f(1). *Id.* at 228-229, 234, 235 n.2. And in *Evory*, the Seventh Circuit concluded that "communications to lawyers are subject to sections 1692d through 1692f." 505 F.3d at 772-774. As the court explained, none of those sections "designate any class of persons, such as lawyers, who can be abused, misled, etc., by debt collectors with impunity." *Id.* at 773.[8]

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neys for putative debtors cannot constitute violations of the FDCPA." *Id.* at 127; see Pet. 10 n.2. The court stated that "[w]here an attorney is interposed as an intermediary between a debt collector and a consumer," the attorney "will protect the consumer from a debt collector's fraudulent or harassing behavior." *Kropelnicki*, 290 F.3d at 128. The Second Circuit expressly declined, however, to "rule" on the issue. *Ibid.*

[8] Petitioner contends that it would have prevailed in the Seventh Circuit "because [r]espondent's counsel was not deceived by the alleged inaccuracies in the Payoff Letters." Pet. 15; see Pet. 14-15. In discussing Section 1692e, the Seventh Circuit in *Evory* distinguished between "deceptive" and "misleading" representations, on the one hand, and "false" representations, on the other. 505 F.3d at 772, 774-775; see 15 U.S.C. 1692e (prohibiting "false, deceptive, or misleading representation[s]"). With respect to the former, the court concluded that, when a communication to an attorney is alleged to violate the FDCPA, "a representation by a debt collector that would be unlikely to deceive a competent lawyer * * * should not be actionable." *Evory*, 505 F.3d at 775. With respect to the latter, the court suggested that a lawyer might be as unable as his client to "see through" false representations, and it concluded that such misrepresentations "would be actionable whether made to the consumer directly, or indirectly through his lawyer." *Ibid.*

Petitioner also contends (Pet. 11-14) that the decision below conflicts with the Ninth Circuit's ruling in *Guerrero*. In *Guerrero*, the court considered FDCPA claims brought under Sections 1692e and 1692g(b). 499 F.3d at 935-936 (describing "the provisions at issue here"); cf. *id.* at 934 (suggesting that district court construed plaintiff's claim to include a violation of Section 1692f). The court concluded that the debt collector in that case "did not violate [Sections] 1692g(b) or 1692e" because "communications directed solely to a debtor's attorney are not actionable under the Act." *Id.* at 934.

Because *Guerrero* did not involve a claim under Section 1692f(1), and the court of appeals in this case limited its holding to that provision, no square conflict between the two decisions exists. Nevertheless, the Ninth Circuit's analysis in *Guerrero* is in significant tension with the decision below. In concluding that communications directed solely at a consumer's attorney are not actionable under Sections 1692e and 1692g(b), the Ninth Circuit used broad language that literally encompassed the entire FDCPA. *E.g.*, *Guerrero*, 499 F.3d at 936 ("[W]e hold that communications directed only to a debtor's attorney, and unaccompanied by any threat to contact the debtor, are not actionable under the Act.")

Because the Seventh Circuit did not discuss the application of its "competent lawyer" standard to claims brought under Section 1692f(1), the Third Circuit's refusal to apply that standard to respondent's Section 1692f(1) claim (see Pet. App. 10-11) did not create a circuit conflict. In any event, the only question presented in the certiorari petition is whether communications to attorneys are actionable under the FDCPA *at all*. See Pet. i. The pertinent Seventh Circuit decisions have clearly answered that question in the affirmative. Any dispute concerning the precise standard to be used in determining *which* communications to attorneys violate the FDCPA generally, or Section 1692f(1) in particular, is outside the question presented.

(footnote omitted); *id.* at 939 (holding "that when the debt collector * * * communicates exclusively with an attorney hired to represent the debtor in the matter, the Act's strictures no longer apply to those communications"); accord *Donohue* v. *Quick Collect, Inc.*, 592 F.3d 1027, 1032 (9th Cir. 2010) (stating that the court in *Guerrero* "concluded that communications sent only to a debtor's attorney are not actionable under the FDCPA").

More significantly, much of the *Guerrero* court's reasoning would appear to apply equally to alleged violations of Section 1692f.[9] For example, the court did not identify any language specific to Section 1692e that would exempt communications to attorneys from that prohibition. *Guerrero*, 499 F.3d at 936. And while the *Guerrero* court's textual analysis was largely limited to Section 1692g(b)'s repeated references to a "consumer" —a term that is not present in Section 1692f(1)—the court extended its reasoning to include Section 1692e. See *id.* at 936, 937 n.6 (rejecting dissent's argument that its reasoning is limited to Section 1692g(b) and should not extend to Section 1692e). The Ninth Circuit's reference to the inferences to be drawn from "[t]he statute as a whole" (*id.* at 935), and its assertion that "Congress did not view attorneys as susceptible to the abuses that spurred the need for the legislation" (*ibid.*), likewise

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[9] At least one district court in the Ninth Circuit has expressly applied the holding in *Guerrero* to an alleged violation of Section 1692f. See *Stover* v. *Bishop, White, Marshall & Weibel, P.S.*, No. CV-11-0110, 2011 WL 4434919, at *3 (E.D. Wash. Sept. 22, 2011). And at least one district court in the Third Circuit has expressly applied the holding in this case to an alleged violation of Section 1692g(b). See *Panto* v. *Professional Bureau of Collections*, No. 10-4340, 2011 WL 843899, at *6 (D.N.J. Mar. 7, 2011).

suggest that the court's analysis was not limited to the specific FDCPA provisions at issue in the case.

There is consequently significant tension between the Ninth Circuit's decision in *Guerrero* and the decision below. That tension, however, is relatively recent and shallow. Many courts of appeals have not yet addressed the FDCPA's application to communications to attorneys. Cf. *Hemmingsen* v. *Messerli & Kramer, P.A.*, No. 11-2029 (8th Cir. argued Dec. 15, 2011). And since the Ninth Circuit's decision in *Guerrero*, two other courts of appeals have held that communications to consumers' attorneys can violate the FDCPA. See *Evory*, 505 F.3d at 773-774; Pet. App. 7-10. Seven of the nine district court decisions on which the *Guerrero* court relied, moreover, were issued by district courts within the Seventh Circuit, and those rulings have since been superseded by *Evory*. Compare *Evory*, 505 F.3d at 772, 777-778, with *Guerrero*, 499 F.3d at 936 & n.5. In light of those facts, and because no square circuit conflict exists regarding the proper application of Section 1692f(1), this Court's review would be premature at the present time.

2. Two other considerations reinforce the conclusion that this Court's review is currently unwarranted. First, the Bureau now has statutory authority to prescribe rules under the FDCPA, see 15 U.S.C. 1692*l*(d) (Supp. IV 2010); see also 12 U.S.C. 5512(b) and 5481(12)(H) and (14) (Supp. IV 2010), and the Bureau has informed us that it regards the promulgation of such rules as a regulatory priority. If the Bureau issues a rule that addresses the question presented here, its interpretation of Section 1692f(1) will be entitled to deference under the principles set forth in *Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837, 842-845 (1984). Such regu-

lations, moreover, would provide a basis for the courts of appeals to revisit any contrary holdings in their own prior decisions. See *National Cable & Telecomms. Ass'n* v. *Brand X Internet Servs.*, 545 U.S. 967, 982-985 (2005).

Second, this case is currently in an interlocutory posture, and this Court "generally await[s] final judgment in the lower courts before exercising [its] certiorari jurisdiction." *VMI* v. *United States*, 508 U.S. 946, 946 (1993) (Scalia, J., respecting denial of certiorari). The court of appeals remanded this case to the district court to consider, *inter alia*, "alternative grounds for dismissal set forth in the motions to dismiss" filed by petitioner and the other defendants. Pet. App. 12. The court emphasized that it "express[ed] no opinion as to whether [respondent] has alleged a viable claim." *Ibid.* If petitioner prevails on those alternative grounds, this Court's resolution of the question presented will be unnecessary. If respondent ultimately prevails in her suit, petitioner will be able to raise its current claim, together with any other claims that may arise on remand, in a single petition for a writ of certiorari. See *Major League Baseball Players Ass'n* v. *Garvey*, 532 U.S. 504, 508 n.1 (2001) (per curiam).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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