No. 14-858

IN THE

Supreme Court of the United States

LVNV FUNDING, LLC; RESURGENT CAPITAL SERVS., L.P.; and PRA RECEIVABLES MGMT., LLC,
Petitioners,

v.

STANLEY CRAWFORD,
Respondent.

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

RESPONDENT'S BRIEF IN OPPOSITION

NICHOLAS H. WOOTEN
NICK WOOTEN, LLC
1702 Catherine Court
Suite 2-D
Auburn, AL 36831
(334) 887-3000

SCOTT MICHELMAN
Counsel of Record
SCOTT L. NELSON
PUBLIC CITIZEN
LITIGATION GROUP
1600 20th Street NW
Washington, DC 20009
(202) 588-1000
smichelman@citizen.org

Counsel for Respondent

March 2015

QUESTION PRESENTED

In this case, the court of appeals held that an attempt to collect a time-barred consumer debt through the filing of a proof of claim in bankruptcy was "debt collection" within the literal terms of the Fair Debt Collection Practices Act (FDCPA). The court did not, however, reach the question whether the Bankruptcy Code nonetheless precludes imposition of liability under the FDCPA for the filing of a proof of claim, because the petitioners had specifically disavowed that argument. The court likewise did not consider whether the "least-sophisticated consumer standard" under the FDCPA is inapplicable to the filing of a proof of claim, because the petitioners also did not make that argument.

The questions presented are:

1. Whether petitioners waived their argument that the application of the FDCPA to the filing of a proof of claim in a bankruptcy proceeding is foreclosed by the Bankruptcy Code.
2. Whether petitioners waived their argument that the least-sophisticated consumer standard is inapplicable to FDCPA claims based on communications directed to a debtor's attorney.
3. Whether the court of appeals was correct to hold that, leaving aside the possibility that the Bankruptcy Code might preclude FDCPA claims in some circumstances, an effort to obtain payment on a debt through the filing of a proof of claim in a bankruptcy proceeding falls within the literal meaning of "debt collection" in the FDCPA.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iii

INTRODUCTION 1

STATEMENT OF THE CASE 1

REASONS FOR DENYING THE WRIT 3

I. This Case Is An Improper Vehicle For Resolving The Questions LVNV Raises 3

A. The court of appeals did not address the questions raised in the petition 3

B. LVNV waived the issues it raises here 4

C. Interlocutory review is unwarranted here 6

II. The Narrow Decision Below Does Not Conflict With The Decisions Cited By Petitioners And Is Correct 7

CONCLUSION 8

TABLE OF AUTHORITIES

CASES

Buckley v. Bass & Assocs.,
249 F.3d 678 (7th Cir. 2001) 7

City of Springfield v. Kibbe,
480 U.S. 257 (1987) 5, 6

Delta Air Lines, Inc. v. August,
450 U.S. 346 (1981) 4

Kokoszka v. Belford,
417 U.S. 642 (1974) 1, 3

Miljkovic v. Shafritz & Dinkin, P.A.,
No. 14-13715
(11th Cir., docketed Aug. 18, 2014). 4

Morrison v. Olson,
487 U.S. 654 (1988) 6

Pennsylvania Department of Corrections v. Yeskey,
524 U.S. 206 (1998) 4

Simmons v. Roundup Funding, LLC,
622 F.3d 93 (2d Cir. 2010) 7

Smith v. Secretary, Department of Corrections,
572 F.3d 1327 (11th Cir. 2009) 5

United States v. Dunkel,
927 F.2d 955 (7th Cir. 1991) 5

United States v. Levy,
416 F.3d 1273 (11th Cir. 2005) 5

Virginia Military Institute v. United States,
508 U.S. 946 (1993) 6

Walls v. Wells Fargo Bank, N.A.,
276 F.3d 502 (9th Cir. 2002) 7

Zivotofsky v. Clinton,
132 S. Ct. 1421 (2012) 4

STATUTES

15 U.S.C. § 1692e 2

15 U.S.C. § 1692f 2

MISCELLANEOUS

Shapiro, Geller, et al., *Supreme Court Practice*
§ 4.18 (10th ed. 2013) 6

INTRODUCTION

Two facts render this case unsuitable for review. First, petitioners did not raise below any of the issues they present to this Court. In fact, on their lead issue, their appellate briefing expressly contradicted the position they now espouse. Second, the court of appeals (taking its cue from the presentation below) did not rule on any of the questions petitioners raise here. Whether or not courts disagree regarding the interaction between the Fair Debt Collection Practices Act (FDCPA) and the Bankruptcy Code, regarding the implications of *Kokoszka v. Belford*, 417 U.S. 642 (1974), or regarding the limits of the FDCPA's "least sophisticated consumer" standard, these questions were neither raised nor decided below, so this case is an improper vehicle for addressing them.

STATEMENT OF THE CASE

Respondent Stanley Crawford once owed a debt of $2,037.99, which became unenforceable in 2004 under Alabama's statute of limitations. Pet. App. 3a. Nonetheless, when Crawford commenced bankruptcy proceedings in 2008, petitioner LVNV, the owner of the debt, filed a proof of claim to collect the debt. *Id.*[1]

Crawford filed a counterclaim alleging that LVNV's attempt to collect a time-barred debt violated the FDCPA. *Id.* at 3a-4a. The bankruptcy court dismissed the FDCPA claim, and the district

---

[1] LVNV acted "by and through" petitioner Resurgent Capital Services and later transferred the claim to petitioner PRA Receivables. *Id.* at 3a n.2. Crawford refers to petitioners collectively as "LVNV."

court affirmed, holding that the filing of a proof of claim in the bankruptcy court is not an attempt to collect a debt. *Id.* at 4a, 17a.

The court of appeals reversed. First, the court held that attempting to use judicial process to enforce a time-barred debt is unfair under the FDCPA. *Id.* at 8a-12a. The court began by noting that LVNV *conceded* that filing a lawsuit to enforce a time-barred debt is unfair. *Id.* at 8a-10a. The reasons for the unfairness — unsophisticated consumers are often unaware that they have a statute-of-limitations defense, and the passage of time dulls the consumer's memory and increases the chance that the consumer's own records will be lost, *id.* at 10a — are fully applicable to the bankruptcy context, the court held. *Id.* at 11a-12a. Second, the court held that filing a proof of claim in bankruptcy is debt collection within the meaning of the FDCPA, which prohibits using a "false, deceptive, or misleading representation or means in connection with the collection of any debt," 15 U.S.C. § 1692e, or "unfair or unconscionable means to collect or attempt to collect any debt," *id.* § 1692f. The court looked to the dictionary definition of "collection" — "to obtain payment" — and found that it applied to the filing of a proof of claim, which is an effort to obtain payment by legal proceeding. Pet. App. 12a-13a.

What the court of appeals did not decide is as important as what it did. LVNV did not argue that the Bankruptcy Code displaced the FDCPA, only that the FDCPA, by its own terms, did not apply. In rejecting LVNV's reading of the FDCPA, the court expressly declined to reach whether the Bankruptcy Code displaces the FDCPA when activity that would otherwise constitute "debt collection" under the

FDCPA occurs in bankruptcy filings. *Id.* at 14a n.7. The court also did not consider whether to forgo the FDCPA's usual "least sophisticated consumer" standard because LVNV did not send its claim directly to a consumer. And the court of appeals did not cite this Court's decision in *Kokoszka v. Belford*, 417 U.S. 642 (1974).

LVNV sought panel and en banc rehearing, both of which were denied, with no judge requesting a vote on the en banc petition. Pet. App. 23a-24a.

REASONS FOR DENYING THE WRIT

I. This Case Is An Improper Vehicle For Resolving The Questions LVNV Raises.

LVNV urges the Court to review this case in order to address (1) whether the Bankruptcy Code displaces the FDCPA, Pet. 12-15; (2) the applicability of *Kokoszka v. Belford*, *id.* at 16-18; and (3) whether the "least sophisticated consumer" standard applies to communications with attorneys for debtors, *id.* at 19-25. But none of these issues was raised or decided below. Additionally, interlocutory review is inappropriate here.

A. The court of appeals did not address the questions raised in the petition.

LVNV argues here that the Bankruptcy Code displaces the FDCPA. The decision below noted the existence of this question but declined to decide it, because LVNV did not raise it. *See* Pet. App. 14a n.7.

Regarding *Kokoszka*, the court of appeals did not even cite it, much less opine on its meaning.

The applicability of the "least sophisticated consumer" standard to communications to attorneys is yet another issue that the court of appeals did not

address. Though the court did apply that standard, Pet. App. 6a-7a, 11a-12a, it did not consider whether the standard should be modified for a communication directed to a debtor's attorney. That question remains open in the Eleventh Circuit, as reflected in the briefing of the recent post-*Crawford* appeal *Miljkovic v. Shafritz & Dinkin, P.A.*, No. 14-13715 (11th Cir., docketed Aug. 18, 2014), where the question is being debated without an argument by either side that *Crawford* has already answered it.[2]

Because this Court is "a court of final review and not first view," it ordinarily "do[es] not decide in the first instance issues not decided below." *Zivotofsky v. Clinton*, 132 S. Ct. 1421, 1430 (2012) (citations and internal quotation marks omitted); *accord Pa. Dep't of Corr. v. Yeskey*, 524 U.S. 206, 212-13 (1998); *Delta Air Lines, Inc. v. August*, 450 U.S. 346, 362 (1981). The decision below did not address any of the questions LVNV raises in this Court, so this case is a wholly inappropriate vehicle for considering them.

B. LVNV waived the issues it raises here.

Equally devastating to LVNV's petition is its failure to raise below the arguments it now presses.

As the court of appeals explained, "LVNV argues only that its conduct does not fall under the FDCPA or, alternatively, did not offend the FDCPA's prohibitions. LVNV does not contend that the Bankruptcy Code displaces or 'preempts' §§ 1692e and 1692f of the FDCPA." Pet. App. 14a n.7. In fact,

---

[2] *See* Appellant's Initial Br., *Miljkovic*, at 20-21, 38-41 (Sept. 29, 2014); Appellee's Answ. Br., *Miljkovic*, at 23, 26-28 (Nov. 19, 2014); Appellant's Reply Br., *Miljkovic*, at 9-10 (Dec. 4, 2014).

LVNV affirmatively argued the contrary position — i.e., that the Bankruptcy Code and the FDCPA coexist harmoniously. *See* Br. of Appellees 3 (11th Cir. filed Aug. 1, 2013) ("A debtor must contest a proof of claim through the bankruptcy code. This is no way limits any co-existing rights under the FDCPA."); *id.* at 14 ("This does not mean the code somehow repeals the FDCPA, or vice versa." (footnote omitted)); *id.* at 22 ("The Bankruptcy Code does not limit the relief under the FDCPA[.]").

As for *Kokoszka v. Belford*, LVNV's brief below does not cite it, even once.

The closest LVNV came to challenging application of the "least sophisticated consumer" standard was to state that the proof of claim "was provided to the trustee and the bankruptcy court, neither of which will ever be confused for the least sophisticated consumer." Br. of Appellees 12. But LVNV made that point in arguing that the *FDCPA* did not apply, not in arguing that the *least-sophisticated-consumer standard* did not apply. LVNV never made the latter argument. *Cf. United States v. Dunkel,* 927 F.2d 955, 956 (7th Cir. 1991) ("Judges are not like pigs, hunting for truffles buried in briefs."), *cited with approval, Smith v. Sec'y, Dep't of Corr.*, 572 F.3d 1327, 1352 (11th Cir. 2009). LVNV may contend that it raised these points in seeking en banc or panel rehearing, but rehearing is too late to raise new arguments. *See United States v. Levy*, 416 F.3d 1273, 1275-76 (11th Cir. 2005) ("[W]e repeatedly have declined to consider issues raised for the first time *in a petition for rehearing*.").

This Court does not decide questions "not raised or litigated in the lower courts." *City of Springfield v.*

Kibbe, 480 U.S. 257, 259 (1987) (per curiam); *accord Morrison v. Olson*, 487 U.S. 654, 669-70 (1988). In particular, the Court has found waiver where a party takes one position in the lower courts then reverses itself before this Court. *See Kibbe*, 480 U.S. at 258.

Because LVNV failed to present (and on one issue, affirmatively contradicted) the arguments it now raises, it has waived these arguments. Accordingly, this case does not properly present any issue on which the petition seeks review.

C. Interlocutory review is unwarranted here.

The decision below did not end the case, but rather remanded it to the district court for further proceedings. Although this Court has jurisdiction to review interlocutory decisions of federal courts of appeals, the Court "generally await[s] final judgment in the lower courts before exercising [its] certiorari jurisdiction," *Va. Military Inst. v. United States*, 508 U.S. 946 (1993) (Scalia, J., concurring), and does not review interlocutory decisions "unless it is necessary to prevent extraordinary inconvenience." Shapiro, Geller, et al., *Supreme Court Practice* § 4.18, at 282 (10th ed. 2013) (citation and internal quotation marks omitted).

The posture of this case is far from extraordinary: the court of appeals vacated the dismissal of a claim and remanded for further proceedings. Those proceedings are ongoing in the bankruptcy court, where all three counterclaim defendants (petitioners here) have filed answers. In keeping with its standard procedure, this Court should not become involved before a final decision — particularly where, as here, the issues have not been properly preserved.

II. The Narrow Decision Below Does Not Conflict With The Decisions Cited By Petitioners And Is Correct.

Because the court of appeals did not address the issues that LVNV characterizes as dividing other courts, the decision below does not conflict with any of them. The court of appeals held that filing a proof of claim in bankruptcy is an attempt to collect a debt under the language of the FDCPA.[3] LVNV's assertion that the Second, Seventh, and Ninth Circuits disagree with this holding is incorrect. The Second and Ninth Circuit decisions LVNV cites did not address whether the filing of a proof of claim is an attempt to collect a debt within the meaning of the FDCPA. Rather, they held that the Bankruptcy Code displaces the FDCPA because the Code provides separate and adequate protections that are intended to be comprehensive. *See Simmons v. Roundup Funding, LLC*, 622 F.3d 93, 95-96 (2d Cir. 2010); *Walls v. Wells Fargo Bank, N.A.*, 276 F.3d 502, 510-11 (9th Cir. 2002). Because the decision below left that question open, it is impossible to say that the law in the Eleventh Circuit contradicts that of the Second and Ninth. The Eleventh Circuit might agree with those courts if the issue were properly raised. The Seventh Circuit decision that LVNV cites is inapposite. *Buckley v. Bass & Assocs.*, 249 F.3d 678 (7th Cir. 2001), held only that a letter from a debt collector asking for information about a debtor's bankruptcy filing was not an "initial communication" under the FDCPA. *Id.* at 679, 682. The sentence from

---

[3] The court also held that attempting to collect a time-barred debt is unfair. LVNV does not challenge that holding here.

Buckley on which LVNV relies, Pet. 14, is dicta discussing a hypothetical "possibilit[y]" whose truth was not relevant to the resolution of that case, *see* 249 F.3d at 681.

Finally, the decision below is self-evidently correct in its interpretation of the FDCPA standing alone. LVNV offers no alternative to the dictionary meaning of "debt collection" applied by the court of appeals, and it defies common sense to suggest that seeking "to obtain payment" of a debt through the bankruptcy process is not debt collection. As the court of appeals recognized, the issue whether and to what extent the Bankruptcy Code may displace the FDCPA should be decided only in a case in which the issue is properly raised and preserved.

CONCLUSION

The petition for certiorari should be denied.

Respectfully submitted,

NICHOLAS H. WOOTEN
NICK WOOTEN, LLC
1702 Catherine Court
Suite 2-D
Auburn, AL 36831
(334) 887-3000

SCOTT MICHELMAN
Counsel of Record
SCOTT L. NELSON
PUBLIC CITIZEN
LITIGATION GROUP
1600 20th Street NW
Washington, DC 20009
(202) 588-1000
smichelman@citizen.org

Counsel for Respondent

March 2015