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

REPLY BRIEF FOR THE PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES. ii
INTRODUCTION. 1
ARGUMENT.. 1
CONCLUSION. 9

TABLE OF AUTHORITIES

CASES **Pages**

Gwin v. American Rover Transportation Co.,
482 F.3d 969 (7th Cir. 2007). 2, 3, 4

Quan v. Computer Sciences Corp.,
623 F.3d 870 (9th Cir. 2010). 3

Ramirez v. Apex Finance Management,
567 F. Supp. 2d 1035 (N.D. Ill. 2008). 6

Rouse v. Law Offices of Rory Clark,
603 F.3d 699 (9th Cir. 2010). 2

West v. Nationwide Credit, Inc.,
998 F. Supp. 642 (W.D.N.C. 1998). 6

STATUTORY MATERIALS AND RULES

Fair Debt Collection Practices Act,
15 U.S.C. 1692 *et seq.*

§ 1692a(7). 7
§ 1692b. 6, 8
§ 1692c(b) 7, 8
§ 1692d. 7
§ 1692e.. 7
§ 1692k(a)(3). 1, 2, 3, 4, 5

46 U.S.C. § 2114(b)(4). 3

Federal Rule of Civil Procedure 54(d). 1, 2, 3, 4

MISCELLANEOUS

ACA Int'l, *Guide to the FDCPA* (2009-10 ed.). 8

CFPB, *Annual Report 2012, Fair Debt Collection Practices Act*, *available at* http://files.consumerfinance.gov/f/201203_cfpb_FDCPA_annual_report.pdf. 9

CFPB, *Supervision and Examination Manual* (Oct. 2011), *available at* www.consumerfinance.gov/wp-content/themes/cfpb_theme/images/supervision_examination_manual_11211.pdf. 8

Federal Reserve Board, *Consumer Compliance Handbook* (Jan. 2006), *available at* www.federalreserve.gov/boarddocs/supmanual/cch/fairdebt.pdf. 8

OCC, *Other Consumer Protection Laws and Regulations (Comptroller's Handbook)* (Aug. 2009), *available at* www.occ.gov/publications/publications-by-type/comptrollers-handbook/other.pdf 8

INTRODUCTION

Respondent General Revenue Corporation (GRC) acknowledges a conflict among the circuits as to whether a prevailing defendant in a case brought under the Fair Debt Collection Practices Act (FDCPA) may be awarded costs without a finding that the lawsuit was "brought in bad faith and for the purpose of harassment." 15 U.S.C. § 1692k(a)(3). GRC argues that the decision below was correct in holding that costs may be awarded under Federal Rule of Civil Procedure 54(d), even absent such a finding. GRC's textual theory, however, like the Tenth Circuit's, reads "and costs" out of § 1692k(a)(3).

As to whether the FDCPA's strict limits on communications with third parties cease to apply when a debt collector, contacting a third party in connection with the collection of a debt, does not indicate the reason for the communication, GRC relies on the mantra that the decision below was fact-based. GRC fails to appreciate that the appellate court's application of the facts reflected its particular interpretation of the FDCPA and that it is the meaning of that statute that is at issue here. In addition, GRC makes no attempt to explain how the Tenth Circuit's decision is consistent with the FDCPA's strict limitations on debt-collector communications with employers. Indeed, GRC's failure to contest the point highlights that the Tenth Circuit's reading effectively strips the "location information" restriction and other important FDCPA provisions from the statute.

ARGUMENT

1. As GRC recognizes, Rule 54(d) does not permit an award of costs to a prevailing party if a federal statute "provides otherwise." The FDCPA provides that, "[o]n 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). By conditioning the authority to award both fees and costs on a finding that an action was brought in bad faith and for the purpose of harassment, the FDCPA "provides otherwise" than Rule 54(d).

GRC concedes that the Tenth Circuit's holding that the FDCPA does not displace Rule 54(d) as to cost awards to defendants directly conflicts with a decision of the Ninth Circuit that came to the opposite conclusion on the same issue, *Rouse v. Law Offices of Rory Clark*, 603 F.3d 699 (9th Cir. 2010). GRC Resp. 10.[1] Although GRC suggests that the conflict between these two circuits is not "so significant of a split" as to warrant the Court's attention, these circuits cover 15 states (and two U.S. territories) and the issue arises in an area of frequent litigation, as evidenced by the sample of FDCPA cases cited in the petition and response. Thus, even putting aside the conflict with the Seventh Circuit's decision in *Gwin v. American Rover Transportation Co.*, 482 F.3d 969 (7th Cir. 2007), discussed in the petition (at 13) and below, the conflict warrants this Court's attention.

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[1] Focusing on a statement in *Rouse* addressing the Senate Report, GRC criticizes that opinion for focusing on the wrong point. GRC Resp. 14 n.6. That criticism is wholly unjustified, as, read in context, the statement in *Rouse* was plainly responding to the specific argument made by the defendant in that case—that the reference to "costs" in § 1692k(a)(3) was intended to mean only that the fee award must be "reasonable in relation to the work expended and to costs." Like the Ninth Circuit in *Rouse*, the Tenth Circuit here rejected that reading of the statute and acknowledged that the function of "and costs" in § 1692k(a)(3) is to authorize an award of costs. *See* Pet. App. 7a-8a.

GRC seeks to make Ninth Circuit precedent seem inconsistent by citing *Quan v. Computer Sciences Corp.*, 623 F.3d 870 (9th Cir. 2010), which held that a provision of ERISA did not "provide otherwise" than Rule 54(d). To begin with, even if GRC were correct that the reasoning in *Rouse* and *Quan* was inconsistent, that point would not alter the fact, acknowledged by GRC, that the binding precedent in the Ninth Circuit is that costs are not available to a defendant in an FDCPA case absent a finding that the case was brought in bad faith and for the purpose of harassment. Moreover, the ERISA provision at issue in *Quan* allows a court to award costs "in its discretion," which is effectively the same standard as that in Rule 54(d), which provides for an award of costs "[u]nless a federal statute, these rules, or *a court order* provides otherwise" (emphasis added). GRC omits "court order" when it quotes the Rule. The remainder of GRC's argument as to *Quan* is addressed in the petition (at n.2).

While conceding the direct conflict with the Ninth Circuit, GRC disputes in a footnote the conflict with the Seventh Circuit's decision in *Gwin*. GRC argues that the statute at issue in *Gwin* could be read to limit a cost award to cases brought in bad faith, but that § 1692k(a)(3) cannot be. GRC does not, however, explain how the two statutes could reasonably be read differently. In fact, as explained in the petition (at 13), the statutory language at issue in *Gwin* was strikingly similar to the language at issue here, and the argument rejected by the Seventh Circuit in that case is precisely the one accepted by the Tenth Circuit.[2]

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[2]The provision at issue in *Gwin*, 46 U.S.C. § 2114(b)(4), provided that, in an action brought by a seaman under subsection 2114(a), the court may award "costs and reasonable attorney's fees

(continued...)

Having acknowledged the circuit split, GRC spends the bulk of its response arguing that the decision below was correct. GRC (at 11-12) begins with the uncontested point that Rule 54(d) does not itself require a showing of bad faith, but the question here is whether the Rule applies at all. As GRC must agree, Rule 54(d), by its express terms, does not apply if a "federal statute . . . provides otherwise."

Turning to § 1692k(a)(3), GRC quotes the Tenth Circuit's statement that § 1692k(a)(3) "indicate[s] 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 word expended' and (2) 'costs.'" Pet. App. 7a, *quoted in* GRC Resp. 12. It argues that this provision does not limit costs "only" to cases brought in bad faith and for the purpose of harassment and that, if Congress had intended to do that, it would have "expressly so stated." GRC Resp. 13. But as GRC implicitly accepts, Congress need not use the word "only" to limit an award to the conditions stated in a statute. Thus, even GRC does not argue that § 1692k(a)(3) permits an attorney's fee award to a defendant in a case that was not brought in bad faith or for the purpose of harassment, notwithstanding the absence of the word "only."

GRC (at 14) resorts to rewriting § 1692k(a)(3), suggesting 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." But Congress did not say "in addition to."

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[2](...continued)
to a prevailing employer not exceeding $1,000 if the court finds that a complaint filed under this section is frivolous or has been brought in bad faith." *See Gwin*, 482 F.3d at 974.

Rather, as the § 1692k(a)(3) states and the language GRC quotes from the Tenth Circuit recognizes, § 1692k(a)(3) addresses an award of costs to a defendant in precisely the same way it addresses an award of fees—in a single provision that imposes the same condition on both.

Finally, GRC (at 16) mentions that other statutory provisions in Title 15 of the U.S. Code address awards of costs, fees and costs, or fees alone. Although GRC's statement is true, several of those provisions are worded very differently from § 1692k(a)(3), and none has been the subject of a circuit court decision addressing the relationship between the provision and Rule 54(d). GRC does not argue otherwise.

2. Addressing the second question presented, GRC repeatedly states that the issue is merely a factual dispute. *See* GRC Resp. 18, 20, 21, 25, 28. GRC is incorrect. The Tenth Circuit decision addressed a legal question central to the functioning of the FDCPA: whether, as defined in the statute, a "communication" in connection with the collection of a debt must indicate that it concerns a debt to fall within the scope of the statutory prohibition on debt collectors' communications with third parties, such as employers. The facts relied upon by the Tenth Circuit, and stressed by GRC, are relevant only if the answer to that question of pure statutory interpretation is yes. And that answer, adopted by the Tenth Circuit in this case, departs from the view of the vast majority of district courts and the federal regulators and guts key provisions of the statute. Simply assuming that the Tenth Circuit correctly construed the statutory definition, GRC fails to address, or even recognize, the legal issue presented.

The petition (at 19-21) includes a long list of district court cases that read the FDCPA differently than the

Tenth Circuit, including some that expressly reject the theory adopted below and explain its threat to the functioning of the statute. The petition also acknowledges that a small minority of cases interpret "communication" differently. *See* Pet. 22 n.6. GRC discusses a handful of these cases, finding factual distinctions between them and this case. For example, GRC (at 22) discusses *West v. Nationwide Credit, Inc.*, 998 F. Supp. at 642, 644 (W.D.N.C. 1998), which held that a debt collector had "communicated" with a third-party within the meaning of the FDCPA by calling the plaintiff's neighbor to ask the neighbor to ask the plaintiff to return the call to discuss a "very important" matter, although the debt collector did not tell the neighbor that the matter concerned a debt. GRC uses *West* as an example to show that many cases cited in the petition involve telephone calls, not written documents. GRC does not explain why this distinction is pertinent here, and it is not. If a "communication" must indicate that it concerns a debt, *West*—like the others cited in the petition (at 20)—should have come out differently. *See also*, *e.g.*, *Ramirez v. Apex Fin. Mgmt.*, 567 F. Supp. 2d 1035, 1040-41 (N.D. Ill. 2008) (debt collector's 21 voicemail messages asking only for a return call were "communications").

GRC is correct that every case presents a different set of facts. But each decision applies the court's understanding of the law to those facts. It is beyond dispute that the Tenth Circuit's understanding of the FDCPA runs counter to the vast majority of prior decisions.

Glaringly, GRC does not cite even once the FDCPA provision that restricts communications with a consumer's employer to requests for "location information," § 1692b. The petition explains, and GRC agrees, that GRC's fax to Ms. Marx's employer was sent in connection with collection

of a debt, *see* GRC Resp. 3 (stating that fax was sent to determine "eligibility for wage garnishment"), and asked for information *in addition to* permitted "location information," as that term is defined in the FDCPA, § 1692a(7); *see id.* at 4 (listing information sought). As explained at length in the petition, the Tenth Circuit's interpretation of "communication" effectively eliminates the limitations built into the location information provision and renders its subsections internally contradictory. Pet. 16-17. GRC's silence on the point concedes it.

Likewise, the petition describes some of the ways in which the decision below undermines other important protections of the FDCPA. Pet. 17-19. As to these provisions too, GRC is silent. The closest it comes to a response is to say that, in some situations, consumers may be protected by provisions that do not turn on the statutory definition of "communication." GRC Resp. 27. Those other provisions, however, are aimed at deterring different types of abusive conduct, such as harassment and deception. *See* 15 U.S.C. § 1692d (prohibiting harassment and abuse), § 1692e (prohibiting false and misleading representations). While important, those provisions do not address many of the specific harms that Congress sought to address in the FDCPA by imposing a variety of limitations on communications. (Moreover, several provisions within § 1692d and § 1692e turn on the definition of "communication.") In particular, these other provisions do not address the harm to a consumer when a debt collector communicates with the consumer's employer, neighbors, or other third parties in connection with the collection of a debt.

Finally, GRC questions the view that the FDCPA generally prohibits all "contact" with a third party in connection with the collection of a debt, except to the extent permitted by § 1692c(b)'s authorization of efforts to obtain

location information. *See* GRC Resp. 25. Yet that view, in contrast to the decision below, gives meaning to each provision of the statute, without creating the contradictions and inconsistencies that flow from the Tenth Circuit's decision. Moreover, that view reflects the understanding of the majority of courts and of the federal regulators—the Consumer Financial Protection Bureau (CFPB), the Office of the Comptroller of the Currency, and the Federal Reserve Board. All three regulators recognize that § 1692c(b) (barring third-party communications) generally limits "contacts" with third parties, "except as provided in" § 1692b (allowing communications to obtain location information).[3] Indeed, the debt collectors' trade association takes the same view. *See* ACA Int'l, *Guide to the FDCPA* 62-63 (2009-10 ed.) ("only" information debt collector can request from third party is location information), *attached as* Exh. B to CFPB Tenth Cir. Amicus Br.

As the CFPB recently stated in its Annual Report to Congress:

> [T]he [*Marx*] decision unduly limits the Act's general ban on contacting third parties in connec-

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[3] *See* CFPB, *Supervision and Examination Manual* at FDCPA 2-3 (Oct. 2011), *available at* www.consumerfinance.gov/wp-content/themes/cfpb_theme/images/supervision_examination_manual_11211.pdf (stating that, with exceptions not pertinent here, debt collector may not "contact" third parties when trying to collect a debt, except that "a debt collector who is unable to locate a consumer may ask a third party for the consumer's" location information); OCC, *Other Consumer Protection Laws and Regulations (Comptroller's Handbook)* at 24 (Aug. 2009), *available at* www.occ.gov/publications/publications-by-type/comptrollers-handbook/other.pdf (same); Federal Reserve Board, *Consumer Compliance Handbook* at FDCPA 2 (Jan. 2006), *available at* www.federalreserve.gov/boarddocs/supmanual/cch/fairdebt.pdf (same).

> tion with debt collection. The Act's structure reveals that, in balancing risks to consumers against debt collectors' interests, Congress chose generally to bar third-party contacts except those necessary to locate debtors.

CFPB, *Annual Report 2012, Fair Debt Collection Practices Act* 19, *available at* http://files.consumerfinance.gov/f/201203_cfpb_FDCPA_annual_report.pdf. GRC (at 19) dismisses the regulators' views as not worthy of deference. Again, GRC misses the point. The views of the federal regulators are significant because they further illustrate that the decision below not only cuts against the plain language and structure of the FDCPA, but also its accepted construction, thus threatening to undermine the protections of the Act.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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