No. 15-216

In the Supreme Court of the United States

UDREN LAW OFFICES, P.C.,

Petitioner,

v.

DALE KAYMARK, individually and on behalf of other similarly situated current and former homeowners in Pennsylvania,

Respondent.

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

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

(1) Was the court of appeals correct in holding that a debt collector may be held liable under the Fair Debt Collection Practices Act (FDCPA), 15 U.S.C. §§ 1692e(2), 1692e(10), and 1692f(1), for representations that the debt collector makes in a civil complaint, where those representations are false or misleading or amount to unfair or unconscionable means to collect a debt?

(2) Did the court of appeals err by not addressing petitioner's novel argument that the Tenth Amendment bars application of the FDCPA, 15 U.S.C. §§ 1692e(2), 1692e(10), and 1692f(1), to representations made in a state court civil complaint, where the debt collector did not make its argument in the district court or court of appeals?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Constitution and Statutes

Rules

Other Authorities

INTRODUCTION

The court of appeals held that a homeowner stated viable claims under the Fair Debt Collection Practices Act (FDCPA) when the homeowner alleged that a debt collector made false statements in a state foreclosure complaint regarding the amount and nature of the homeowner's debt. The debt collector, petitioner Udren Law Offices (Udren), contends that pleadings in a foreclosure action cannot give rise to FDCPA liability and that the FDCPA's application in this case violates the Tenth Amendment. Udren's petition for a writ of certiorari should be denied for four reasons.

First, although Udren asserts a split in appellate authority with respect to its first question presented, the cases it cites manifest no conflict among the circuits. In fact, the circuits broadly agree that pleadings can form the basis of an FDCPA claim under the sections at issue in this case.

Second, the court of appeals' decision is correct and poses no threat to state interests. The decision faithfully applies *Heintz v. Jenkins*, in which this Court unanimously held that the FDCPA covers attorneys "engage[d] in consumer-debt-collection activity, even when that activity consists of litigation." 514 U.S. 291, 299 (1995). The decision is consistent with the FDCPA's text and structure. And Udren's argument with respect to the Tenth Amendment, raised for the first time in its petition for certiorari, lacks all merit.

Third, the Consumer Financial Protection Bureau is in the process of adopting a rule that may address how the FDCPA applies to debt collectors' litigation activities. The pending rulemaking counsels in favor of denying the petition.

Fourth, this case is a poor vehicle for addressing the questions raised in the petition because it comes to this Court in an interlocutory posture.

STATEMENT

I. Statutory Background

Congress enacted the FDCPA "to eliminate abusive debt collection practices, to ensure that debt collectors who abstain from such practices are not competitively disadvantaged, and to promote consistent state action to protect consumers." *Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA*, 559 U.S. 573, 577 (2010) (citing 15 U.S.C. § 1692(e)). The FDCPA prohibits, among other things, abusive debt collection practices by debt collectors. 15 U.S.C. §§ 1692d-1692f. It is enforced through administrative mechanisms and a private right of action. *Id.* §§ 1692k, 1692*l*.

As relevant here, the FDCPA bars debt collectors from using "any false, deceptive, or misleading representation" in collecting a debt, *id.* § 1692e, including a "false representation of . . . the character, amount, or legal status of any debt," *id.* § 1692e(2)(A), and the "use of any false representation or deceptive means to collect or attempt to collect any debt," *id.* § 1692e(10). The FDCPA separately prohibits the use of "unfair or unconscionable means to collect or attempt to collect" a debt, including 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." *Id.* § 1692f(1).

II. Factual Background

In 2006, respondent Dale Kaymark refinanced his home in Pennsylvania by executing a promissory note for

$245,600 and entering into a mortgage agreement with Bank of America. Pet. App. 4a. The agreement stated that, in the event of default, Bank of America could charge Mr. Kaymark "fees for services performed in connection with [Mr. Kaymark's] default and for the purpose of protecting [Bank of America's] interest in the Property and rights under this Security Agreement, including, but not limited to, attorneys' fees, property inspection and valuation fees." *Id.* at 4a-5a (emphasis omitted). It also stated that if Mr. Kaymark did not cure a default, Bank of America would "be entitled to collect all expenses incurred in pursuing the [applicable] remedies, . . . including, but not limited to, attorneys' fees and costs of title evidence to the extent permitted by Applicable Law." *Id.* at 5a (emphasis omitted). The insurer of the mortgage, Fannie Mae, limited the amount of attorney's fees that Bank of America could collect to $1,650. *Id.* at 73a.

Several years after refinancing, Mr. Kaymark suffered a steep loss in income from his truck driving business. Dist. Ct. Doc. 23, Amended Compl. ¶ 5. As a result, in July 2011, he fell behind on his mortgage. Pet. App. 5a. The following month, Bank of America sent Mr. Kaymark a notice of pre-foreclosure delinquency, which is a prerequisite to a foreclosure suit under Pennsylvania law. *Id.*

The following year, petitioner Udren Law Offices filed a verified foreclosure complaint on behalf of Bank of America against Mr. Kaymark in Pennsylvania state court. *Id.* at 6a. Udren included with the complaint a notice informing Mr. Kaymark that Udren was "deemed to be a debt collector" and that the notice and "attached document" (that is, the complaint) were "an attempt to

collect a debt." Dist. Ct. Doc. 23-2, Foreclosure Compl. at 5.

The foreclosure complaint represented that the unpaid principal balance and certain other itemized charges, including $1,650 in attorney's fees (the maximum amount permitted by Fannie Mae), $325 for a title report, and $75 for a property inspection, were due as of July 12, 2012, roughly one month before Udren filed the foreclosure complaint. Pet. App. 6a. The complaint indicated that, by "failing or refusing to pay [the itemized] charges" upon demand, Mr. Kaymark had not "compl[ied] with the terms" of his mortgage, and that interest was accruing on the debt. Foreclosure Compl. at 7, ¶ 6. The last paragraph of the complaint sought a judgment in rem for the full amount of the itemized charges "plus ongoing interest, costs and attorney[']s fees." *Id.* at 8. The complaint thus distinguished between fees and costs due before the complaint was filed, and fees and costs that would accumulate during litigation.

The foreclosure suit remains pending in state court and is being held by agreement of the parties.

III. Proceedings Below

In February 2013, Mr. Kaymark filed suit in Pennsylvania state court against Udren and Bank of America, asserting that the defendants' collection attempts violated state law and, with respect to Udren, the FDCPA. Pet. App. 42a. He brought his claims on behalf of a class of Pennsylvania homeowners.

Defendants removed the case to federal court, asserting federal question jurisdiction and diversity jurisdiction under the Class Action Fairness Act. *See id.*; Dist. Ct. Doc. 1-5, Udren's Consent to Removal. They then moved to dismiss the case under Federal Rule of

Civil Procedure 12(b)(6), and Mr. Kaymark filed the amended complaint now at issue. Pet. App. 42a.

In the amended complaint, Mr. Kaymark reasserted that Udren's statements in the state-court foreclosure complaint violated the FDCPA. *Id.* at 43a. He contended that the foreclosure complaint, by seeking $1,650 in attorney's fees, $325 for a title report, and $75 for a property inspection, sought fixed-amount and not-yet-incurred fees and costs that Udren nevertheless described as due when it filed the foreclosure complaint. *Id.* at 48a; *see also* Amended Compl. ¶ 16. Mr. Kaymark contended that Udren's demand falsely represented "the character, amount, or legal status" of the debt, 15 U.S.C § 1692e(2), and constituted a "false representation or deceptive means to collect or attempt to collect [the] debt," *id.* § 1692e(10). Pet. App. 50a-51a. Mr. Kaymark also asserted that the mortgage agreement did not permit Bank of America to recover fees that had not yet been incurred. *Id.* at 50a. Accordingly, Udren had attempted to collect an amount not "expressly authorized by the agreement creating the debt or permitted by law," in violation of 15 U.S.C. § 1692f(1). *Id.* at 51a.[1]

The defendants again moved to dismiss for failure to state a claim. The magistrate judge recommended that the district court grant the motions to dismiss, and the district court adopted the magistrate judge's recommendation over Mr. Kaymark's objections. As relevant here, the court concluded that neither the FDCPA nor the mortgage agreement prohibited "listing attorneys' fees and other fixed costs in a foreclosure complaint even if they have not actually been incurred at

[1] Mr. Kaymark asserted a separate FDCPA claim against Udren under section 1692e(5). The court of appeals affirmed the dismissal of that claim, which is no longer at issue. *See* Pet. App. 14a.

the time of filing . . . , but are reasonably expected to be incurred." *Id.* at 37a. The court did not, as Udren contends (Pet. 6), hold that any error in the foreclosure complaint was not material. *See* Pet. App. 77a (magistrate judge stating that the court "need not predict" whether materiality is an element of Mr. Kaymark's claims).[2]

The Third Circuit reversed the dismissal of Mr. Kaymark's FDCPA claims based on violations of sections 1692e(2), 1692e(10), and 1692f(1), and it affirmed the dismissal of the other claims. Pet. App. 29a. Based on Mr. Kaymark's allegation that the itemized list of unpaid charges included charges for "legal services not yet performed in the mortgage foreclosure," *id.* at 10a, the court of appeals concluded that the foreclosure complaint "conceivably misrepresented the amount of the debt owed, forming a basis for violations of [section] 1692e(2)(A) and (10)," *id.* at 13a. The court held "[b]y extension" that Mr. Kaymark had "sufficiently alleged that Udren's attempt to collect those misrepresented fees was not 'expressly authorized' by the mortgage contract or permitted by law." *Id.* (quoting § 1692f(1)). It emphasized that the mortgage contract permitted Bank of America to "charge for 'services *performed* in connection with' the default and [to] collect 'all expenses *incurred*' in pursuing authorized remedies," not fees or expenses for services yet to be performed. *Id.* The court stated in a footnote that, because the mortgage agreement included no language regarding fixed fees, it would "presume" that fixed fees "were not prohibited by

[2] The block of text on page 6 of Udren's petition for certiorari is not, as the format would suggest, a quote from the magistrate judge's Report and Recommendation. The language used there is Udren's own.

the mortgage contract (or, in any event, [were] intertwined with the argument that the fees be actually incurred)." *Id.* at 13a n.2.

Further, the court of appeals rejected Udren's argument "that pleadings—in particular, foreclosure complaints—cannot be the basis of FDCPA claims." *Id.* at 15a. It emphasized that in *Heintz v. Jenkins*, 514 U.S. 291 (1995), this Court established that the FDCPA covers attorneys "'engage[d] in consumer-debt-collection activity, even when that activity consists of litigation,'" Pet. App. 15a (quoting 514 U.S. at 299), and that *Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA*, 559 U.S. 573 (2010), proceeded on the assumption that statements attached to legal pleadings may give rise to FDCPA liability, Pet. App. 18a. The court also noted that, since *Heintz*, Congress had twice amended the FDCPA to exclude legal pleadings from the scope of two sections not at issue in this case. *Id.* at 16a. Udren's position, the court explained, would render superfluous those two later-enacted statutory amendments. *Id.* Accordingly, the court concluded that "a communication cannot be uniquely exempted from the FDCPA because it is a formal pleading or, in particular, a complaint." *Id.* at 17a. It noted that this principle is "widely accepted" by the courts of appeals. *Id.*

The Third Circuit also rejected Udren's argument that the complaint could not give rise to liability under sections 1692e and 1692f because the complaint was not a communication directed at Mr. Kaymark, but was instead directed to the court. The court explained that the foreclosure complaint "was served on [Mr.] Kaymark (directly or indirectly through his attorney)," and he was therefore "the intended recipient of the communication." *Id.* at 19a.

The court of appeals likewise rejected Udren's argument that foreclosure actions should be categorically exempt from the FDCPA's scope because Pennsylvania judicial rules regulate statements made in those actions. *See id.* at 20a. It emphasized that the FDCPA's broad language does not exclude foreclosure actions and determined that it must give effect to the FDCPA, even if there is some overlap with state-law remedies. *See id.*

The court of appeals denied Udren's petition for rehearing and rehearing en banc. *Id.* at 1a-2a.

REASONS FOR DENYING THE WRIT

I. The Courts of Appeals Agree That Statements Made in Legal Pleadings May Form the Basis of FDCPA Liability.

Udren's petition for certiorari asserts that the circuits are divided as to its first question presented: "[w]hether pleadings in a mortgage foreclosure action are 'communications' to a consumer subject to the" FDCPA. Pet. *i.* Udren elsewhere describes the circuit split—purportedly between the Third Circuit and the Second, Seventh, and Eighth Circuits—in different terms, stating that it is one over whether the FDCPA "appl[ies] to formal pleadings." *Id.* at 19; *see also id.* at 17 (heading). Under either of these formulations, the circuits are not split, and this Court's review is unwarranted.

A. As an initial matter, although Udren's first question presented suggests that this case hinges on the meaning of "communication" under the FDCPA, that question does not resolve whether Mr. Kaymark's claims are viable. The FDCPA defines "communication," *see* 15 U.S.C. § 1692a(2), and uses that word in numerous provisions of the statute, *see*, *e.g.*, *id.* § 1692g(a).

However, none of the statutory provisions under which Mr. Kaymark brings his FDCPA claims—section 1692e(2) and (10) and section 1692f(1)—uses the word "communication." Rather, these provisions prohibit the use of "false representation[s]" or "deceptive means" to collect a debt, *id.* § 1692e(2), (10), and the "collection" of any amount not authorized by an "agreement creating [a] debt or permitted by law," *id.* § 1629f(1). Udren implicitly recognizes that the meaning of "communication" in the FDCPA is not at issue, as it does not cite section 1692a(2) even once in its petition or include section 1692a(2) as one of the "statutory provisions involved." Pet. 1.

Although the decision below addressed the FDCPA's definition of "communication," it did so in response to Udren's argument that a complaint, "because it is directed to the *court*, is not a communication to the *consumer* subject to [sections] 1692e and 1692f." Pet. App. 18a. The court of appeals rejected that argument on its own terms, stating that the FDCPA defines a "communication" as "'the conveying of information regarding a debt directly *or indirectly* to any person through any medium.'" *Id.* (quoting § 1692a(2)). And service on Mr. Kaymark "directly or indirectly through his attorney" was sufficient to show that he was the intended recipient of the complaint. *Id.* at 19a. The peripheral nature of this analysis makes this case a poor vehicle for considering the scope of section 1692a(2), even if Udren had explained how the purported circuit split relates to this provision—which it did not do.

B. In any event, none of the cases cited by Udren supports the existence of a circuit split with respect to whether the FDCPA "appl[ies] to formal pleadings," Pet. 19, much less with respect to whether the FDCPA

applies to false statements of fact made in a civil complaint that are alleged to violate sections 1692e(2) and (10) and 1692f(1). In fact, the courts of appeals are in broad agreement that statements made or actions taken in litigation may violate the FDCPA, including sections 1692e and 1692f.

1. Udren argues that *Gabriele v. American Home Mortgage Services, Inc.*, 503 Fed. App'x 89 (2d Cir. 2012), and *Simmons v. Roundup Funding, LLC*, 622 F.3d 93 (2d Cir. 2010), demonstrate a split of authority between the Second Circuit and the decision below. Udren is wrong, and Mr. Kaymark's FDCPA claims would be cognizable under Second Circuit precedent.

In *Gabriele*, the Second Circuit affirmed the dismissal of FDCPA claims, including alleged violations of sections 1692e(2) and (10) and 1692f, that were based on a debt collector's statements in state-court foreclosure filings. *See* 503 Fed. App'x at 93-95. The court held that the particular "false statements" about which the borrower complained did "not amount to the kind of misleading and deceptive practices that fall within the ambit of the FDCPA." *Id.* at 95. The statements were not, for example (and in contrast to Udren's demand for not-yet-incurred fees and costs), "misleading or deceptive as to the nature or legal status of [the borrower's] debt." *Id.* Consistent with the decision in this case, however, *Gabriele* recognized that "statements made and actions taken in furtherance of a legal action are not, in and of themselves, exempt from liability under the FDCPA." *Id.* Thus, far from conflicting with the decision below, *Gabriele* supports it.

Udren makes much of *Gabriele*'s statement that the FDCPA's protective purposes "typically are not implicated" when debtors are protected by the court

system. Pet. 19 (internal quotation marks omitted). But this statement, which appears in a footnote, does not contradict the court's earlier recognition that the FDCPA does not exempt statements made in legal proceedings. Moreover, in that same footnote, the court recognized that a court's disciplinary authority may be insufficient to prevent abusive or harassing litigation to collect a debt and cited a case applying the FDCPA to a law firm's actions in legal proceedings. *See* 503 Fed. App'x at 96 n.1 (citing *Sykes v. Mel Harris & Assocs., LLC*, 757 F. Supp. 2d 413 (S.D.N.Y. 2010), which denied a motion to dismiss an FDCPA claim against a law firm that fraudulently foreclosed on thousands of New York homeowners by filing false affidavits in litigation).

Udren also relies (Pet. 12 n.9) on *Simmons v. Roundup Funding, LLC*, 622 F.3d 93 (2d Cir. 2010), but that case is inapposite. *Simmons* held that the filing of an inflated proof of claim form in bankruptcy court cannot serve as the basis for an FDCPA claim. *Id.* at 95-96. It did so based on the unique nature of bankruptcy proceedings and the remedies available under the Bankruptcy Code for wrongfully filed proofs of claim. *Id.* at 96. The Second Circuit expressly limited the *Simmons* decision to that context, declining to consider a "broader rule" that would preclude any FDCPA claim where it was based on conduct that violated both the FDCPA and the Bankruptcy Code. *Id.* at 96 n.2.

Another decision confirms what *Gabriele* suggests, and what *Simmons* does not address: in the Second Circuit, a debt collector's statements in a civil complaint may give rise to FDCPA liability. In *Dimatteo v. Sweeney, Gallo, Reich & Bolz, L.L.P.*, the Second Circuit held that a plaintiff stated a viable FDCPA claim under section 1692f(1) based on a law firm's demand for

impermissible attorney's fees in a complaint. No. 14-3746, 2015 WL 4281508, at *3 (2d Cir. July 16, 2015). The court held that "[t]he fact that [the law firm] sought attorneys' fees only in the Housing Court complaint and not in the collection letter d[id] not defeat [the plaintiff's] claim, because actions taken in furtherance of a lawsuit are not exempt from liability under the FDCPA." *Id.* at *3 n.2. Thus, Second Circuit cases are wholly consistent with the Third Circuit decision below.

2. Likewise, the Seventh Circuit's precedent does not conflict with the decision below. In *O'Rourke v. Palisades Acquisitions XVI, LLC*, the plaintiff's sole argument on appeal was that the attorney debt collector filed an allegedly false exhibit that "would mislead the . . . judge handling [the plaintiff's] case," which the plaintiff argued violated sections 1692e(2)(A) and (10) of the FDCPA. 635 F.3d 938, 941 (7th Cir. 2011). "Unlike most cases filed under the [FDCPA]," the plaintiff did not argue that "the statement was materially deceptive to him or to the unsophisticated consumer." *Id.* at 939. Under these circumstances, the court affirmed summary judgment for the debt collector, holding that the FDCPA's protections apply to "consumers and those who have a special relationship with the consumer," such as a consumer's attorney, but do not apply to a judge presiding over a consumer's case. *Id.* at 943-44. The Seventh Circuit cautioned that "[n]othing in [its] opinion state[d] or should be read to address whether the [FDCPA] applies to the entire judicial process." 635 F.3d at 941 n.1. Further, the court expressly noted that this question was "left open" by *Beler v. Blatt, Hasenmiller, Leibsker & Moore, LLC*, 480 F.3d 470 (7th Cir. 2007)—another Seventh Circuit case on which Udren relies. 635 F.3d at 941 n.1.

Bentrud v. Bowman, Heintz, Boscia & Vician, P.C., 794 F.3d 871 (7th Cir. 2015), is also consistent with the decision below. That case affirmed dismissal of claims under sections 1692e and 1692f based on the filing of court pleadings because those claims were not supported by the record. *Id.* at 876-77. The opinion does not question the applicability of those FDCPA provisions to legal pleadings more generally.

3. Udren is incorrect that the Eighth Circuit's precedent is at odds with the opinion below. *Hemmingsen v. Messerli & Kramer, P.A.*, dealt with claims under sections 1692d through 1692f based on a law firm's statements in a summary judgment memorandum and affidavit. 674 F.3d 814 (8th Cir. 2012). The court of appeals rejected a broad rule adopted by the district court that would have precluded FDCPA liability for statements made in legal pleadings or in other contexts where such statements are made to third parties. *Id.* at 818. However, the court affirmed dismissal of the plaintiff's FDCPA claims on the ground that the debt collector's statements were "not false or misleading" and had "more than enough basis in fact to defeat as a matter of law" the borrower's claims. *Id.* at 819-20; *see also Powers v. Credit Mgmt. Servs., Inc.*, 776 F.3d 567, 568, 570 (8th Cir. 2015) (describing *Hemmingsen* as holding that a debt collector's fact allegations in a state court pleading were not false and misleading on the facts of the case).

4. Like the Third Circuit's decision below and case law in the Second, Seventh, and Eighth Circuits, other circuits have recognized that civil pleadings, including complaints, may form the basis of an FDCPA claim under sections 1692e and 1692f. *See, e.g.*, *Miljkovic v. Shafritz & Dinkin, P.A.*, 791 F.3d 1291, 1295 (11th Cir.

2015) (holding in a case that involved claims under 15 U.S.C. §§ 1692d-1692f that "documents filed in court in the course of judicial proceedings to collect on a debt, like [a debt collector's] sworn reply, are subject to the FDCPA"); *Currier v. First Resolution Inv. Corp.*, 762 F.3d 529, 535 (6th Cir. 2014) (stating that "[c]ourt filings can be a threat under the FDCPA" within the meaning of section 1692e(5) and holding that the plaintiff stated claims under sections 1692e(5) and 1692f where the defendant improperly filed a judgment lien); *James v. Wadas*, 724 F.3d 1312, 1316 (10th Cir. 2013) (recognizing that "the FDCPA applies to the litigating activities of lawyers, which, as other circuits have held, may include the service upon a debtor of a complaint to facilitate debt collection efforts" (internal quotation marks and citation omitted)); *Donohue v. Quick Collect, Inc.*, 592 F.3d 1027, 1032 (9th Cir. 2010) (refusing, in a case involving claims under sections 1692e and 1692f, "[t]o limit the litigation activities that may form the basis of FDCPA liability to exclude complaints served personally on consumers to facilitate debt collection"); *Sayyed v. Wolpoff & Abramson*, 485 F.3d 226, 229-30 (4th Cir. 2007) (holding that statements in a motion for summary judgment could give rise to liability under sections 1692e and 1692f of the FDCPA).

Given the widespread agreement among the circuits that the FDCPA applies to pleadings, Udren's petition should be denied.

II. The Third Circuit's Decision Is Correct and Does Not Impinge on State Interests.

This Court's review is also unwarranted because the decision below is correct. The decision follows smoothly from *Heintz v. Jenkins*, 514 U.S. 291 (1995), and is consistent with the FDCPA's text and structure.

Applying the FDCPA to the misrepresentations alleged in this case does not, as Udren contends, impinge on state interests, and Udren's Tenth Amendment and abstention arguments are both waived and meritless.

A. The Third Circuit's decision faithfully applies this Court's decision in *Heintz*. There, in the course of construing the FDCPA's definition of "debt collector," this Court held that the FDCPA covers attorneys "engage[d] in consumer-debt-collection activity, even when that activity consists of litigation." 514 U.S. at 299. Although *Heintz* involved a settlement-related letter written during litigation, rather than a complaint filed in court, nothing in this Court's reasoning suggests that the opinion was limited to those facts. To the contrary, this Court in *Heintz* "granted certiorari to resolve [a] conflict" with *Green v. Hocking*, 9 F.3d 18 (6th Cir. 1994) (per curiam), *Heintz*, 514 U.S. at 294, which addressed the question whether an attorney, "by filing a complaint, qualifies as a debt collector within the meaning of the FDCPA," 9 F.3d at 20.

In addition, *Heintz*'s rationale assumed that FDCPA liability may arise from statements in pleadings. The debt collector in *Heintz* argued that, were the FDCPA applied to lawyers engaged in litigation, attorneys who file an unsuccessful complaint to collect a debt would violate the statute's prohibition of "'threat[s] to take action that cannot legally be taken'" in collecting a debt. 514 U.S. at 295 (quoting § 1692e(5)). Had the Court intended its opinion to reach only attorneys engaged in litigation activity *outside* of court, the obvious response to this hypothetical would have been that the filing of a complaint cannot form the basis for an FDCPA violation. Instead, the Court pointed out that the statute contains a defense for bona fide errors, and it stated that it could

not "see how the fact that a lawsuit turns out ultimately to be unsuccessful could, by itself, make the bringing of it an 'action that cannot legally be taken.'" *Id.* at 295-96.

In resolving the split of authority, *Heintz* refused to imply a litigation exception to the FDCPA's broad coverage. Rather, the Court concluded that Congress, by repealing an exemption for attorneys from the FDCPA's definition of "debt collector," "intended that lawyers be subject to the Act whenever they meet the general 'debt collector' definition" and that the statute should be enforced consistent with its terms. *Id.* at 295. The same is true here. The provisions under which Mr. Kaymark's claims arise do not except legal pleadings from their scope. Because Udren is concededly a "debt collector," Pet. App. 16a, the FDCPA prohibitions invoked by Mr. Kaymark apply.

This Court's opinion in *Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA*, 559 U.S. 573 (2010), further confirms that the Third Circuit's decision is correct. The plaintiff in *Jerman* alleged that a law firm and one of its attorneys violated the FDCPA, 15 U.S.C. § 1692g, by stating in a notice attached to a foreclosure complaint that the borrower's debt would be assumed valid unless she disputed it in writing. 559 U.S. at 579. The law firm asserted that it was entitled to a bona fide error defense under section 1692k(c) because it had misunderstood the law with respect to the FDCPA's process for disputing a debt. This Court interpreted the proper scope of that defense without questioning whether a statement in a notice attached to a complaint could violate the FDCPA. *See id.* at 581-90. And it rejected the contention that a narrow reading of the bona fide error defense would impose FDCPA liability on lawyers for advancing uncertain legal arguments, *see id.*

at 596-97, on the ground that lawyers could still invoke the defense "where a violation results from a qualifying factual error," *id.* at 599.

B. Udren argues that two amendments to the FDCPA exempting legal pleadings from the coverage of particular provisions would "have little or no meaning if pleadings are subject to the FDCPA." Pet. 18. In reality, the opposite is true—the narrow amendments would have been unnecessary if pleadings were broadly excluded from the statute's coverage.

Specifically, Congress amended section 1692e(11) in 1996, shortly after this Court decided *Heintz*. *See* Omnibus Consolidated Appropriations Act, Pub. L. No. 104-208, § 2305(a), 110 Stat. 3009 (1996). That section prohibits debt collectors from failing to make certain disclosures in "initial" and "subsequent communications" to collect a debt. The 1996 amendment provided that "this paragraph shall not apply to a formal pleading made in connection with a legal action." 15 U.S.C. § 1692e(11). In 2006, Congress again amended the FDCPA, this time to provide that under section 1692g(a), a "communication in the form of a formal pleading in a civil action shall not be treated as an initial communication" subject to the FDCPA's requirements for notice to consumers regarding the process for disputing debts. *Id.* § 1692g(d), *as amended by* Financial Services Regulatory Relief Act of 2006, Pub. L. No. 109-351, § 802(a), 120 Stat. 1966.

"'[W]here Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of evidence of a contrary legislative intent.'" *Hillman v. Maretta*, 133 S. Ct. 1943, 1953 (2013) (quoting *Andrus v. Glover Constr. Co.*, 446 U.S. 608, 616-17 (1980)). Udren cites no such

evidence, instead contending that these amendments are "illogical" under the Third Circuit's rationale. Pet. 25. It asserts that a pleading cannot simultaneously be "a 'communication' subjecting its author to the duties and penalties of the FDCPA" and be "excluded from the definition of an 'initial communication'" under § 1692g(a). *Id.* As discussed above (at pp. 8-9), however, a plaintiff need not show that a defendant's behavior constitutes a communication, much less an initial communication, to state claims under sections 1692e(2) and (10) and 1692f(1), which do not use the statutorily defined term "communication."

C. The Third Circuit's decision does not mark an intolerable intrusion into state-court procedures, Pet. 16, nor was Udren forced to choose between complying with the FDCPA or with state-court pleading rules.

1. Udren argues that it had to identify in the foreclosure complaint the amount of attorney's fees that it expected to recover, even for services not yet performed, because Pennsylvania Rule of Civil Procedure 1019(f) requires that plaintiffs plead "special damages" with specificity. *See* Pet. 26-27, 29. The courts below did not address this argument, which Udren did not raise it until its petition for rehearing en banc in the Third Circuit. And Udren's argument is contradicted by its own foreclosure complaint, which sought itemized attorney's fees and damages purportedly calculated before the filing of the complaint, "plus *ongoing* interest, costs and attorney[']s fees." Foreclosure Compl. at 8 (emphasis added).

Neither of the cases relied on by Udren supports its position that it was required by Pennsylvania law to plead a specific amount of attorney's fees for not-yet-performed services. The plaintiff in *Kephart Trucking*

Co. v. Jackson Florentino, LLC, sought as damages attorney's fees that had been incurred in a previous action, and the court stated that, "[t]o the extent that this claim for fees is ongoing, that may be alleged and those later fees determined by discovery." Nos. 1400-2007, 10315-2008, 2010 WL 3491492, at *108 (Pa. Ct. Common Pleas, Monroe Co. Apr. 9, 2010). And although it is unclear from *Premium Assignment Corp. v. City Cab Co.* which "calculations" had to be included with the pleading, the court assumed that the plaintiff had already suffered the damages corresponding to those calculations. No. 1135-2005, 2005 WL 1706976, at *1 (Pa. Ct. Common Pleas, Phila. Co. July 15, 2005).

In any event, whatever the state pleading rules are for attorney's fees and costs incurred *during* litigation, the rules surely do not require a litigant to characterize fees and costs as due on a particular date that precedes the filing of the complaint, where such fees and costs have not, in fact, been incurred. *Cf.* Pa. R. Prof. Conduct 3.1 (prohibiting attorneys from asserting a claim in a complaint that lacks a basis in fact). Because state rules did not require Udren to describe not-yet-incurred fees and costs as due by the time the complaint was filed, the FDCPA's requirement that Udren truthfully state the debt owed by Mr. Kaymark did not interfere with state-court pleading rules.

2. Udren waived its novel contention that applying the FDCPA to legal pleadings violates the Tenth Amendment. In fact, Udren's papers in this case never uttered the words "Tenth Amendment" until the petition for certiorari.

Regardless, this argument fails on the merits. The FDCPA is a valid exercise of Congress's power to regulate interstate commerce. *See* 15 U.S.C. § 1692(d). It

regulates the conduct of private debt collectors, and it does not enlist states in that regulation. *See Reno v. Condon*, 528 U.S. 141, 149-51 (2000). Nor does the FDCPA's application here interfere with state court procedural rules or limit Pennsylvania's ability to regulate bar members. *See supra*, pp. 18-19. Accordingly, the Tenth Amendment is no bar to Mr. Kaymark's FDCPA claims.

3. Udren's contention that *Younger* or *Colorado River* abstention should apply is similarly unavailing. Udren failed even to mention this argument until its petition for rehearing en banc, and it misrepresents the holdings of the two unpublished district court cases it cites. *See* Pet. 28. Even so, by consenting to removal of the FDCPA claim from state court, *see* Dist. Ct. Doc. 1-5, Udren's Consent to Removal, Udren "voluntarily submit[ted] to federal jurisdiction," *Ohio Civil Rights Comm'n v. Dayton Christian Sch., Inc.*, 477 U.S. 619, 626 (1986). Moreover, *Younger* abstention does not apply because this case neither is "akin to a criminal prosecution," nor "touch[es] on a state court's ability to perform its judicial function." *Sprint Commc'ns, Inc. v. Jacobs*, 134 S. Ct. 584, 592 (2013) (internal quotation marks omitted). And the case is not "duplicative of a pending state proceeding," *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 717 (1996), in contrast to the circumstances in *Colorado River Water Conservation District v. United States*, 424 U.S. 800 (1976). Indeed, Udren is not even a party to the state-court foreclosure action, which is currently held by agreement of the parties. For these and other reasons, neither *Younger* nor *Colorado River* abstention is appropriate.

Because the decision below was correct, this Court should deny review.

III. An Agency Rulemaking May Obviate Any Need for This Court to Consider the FDCPA's Application to Legal Pleadings.

From 1977 until 2010, the Federal Trade Commission, which was primarily responsible for agency enforcement of the FDCPA, was prohibited from adopting binding rules that interpreted the statute.[3] Consumer Financial Protection Bureau (CFPB), Debt Collection (Regulation F): Advance Notice of Proposed Rulemaking, 78 Fed. Reg. 67,848, 67,852 (Nov. 12, 2013). In 2010, however, Congress granted authority to the newly created CFPB to "prescribe rules with respect to the collection of debts by debt collectors, as defined in [the FDCPA]." 15 U.S.C. § 1692*l*(d).

The CFPB has since issued an Advance Notice of Proposed Rulemaking in anticipation of exercising this authority. *See generally* Debt Collection, 78 Fed. Reg. 67,848. In the notice, the CFPB asked for comment on, among other things, whether to address the FDCPA's application to legal pleadings and for information to ensure that "proposed debt collection rules complement and avoid interfering with State rules of procedure and evidence." *Id.* at 67,877-78. The CFPB received hundreds of comments, some of which addressed abusive debt collection practices in litigation and the need for FDCPA enforcement in that context. *See* Rulemaking Docket, Debt Collection (Regulation F), *available at* http://1.usa.gov/1S4xZ3D; *see also*, *e.g.*, Comment of State Attorneys General at 3-11 (Feb. 28, 2014), *on* Debt Collection

[3] For that reason and others, Udren's citation to the Federal Trade Commission's Staff Commentary—which predates *Heintz* and *Jerman*—is irrelevant. *See Heintz*, 514 U.S. at 298 (recognizing that the Staff Commentary is "not binding" and rejecting as unreasonable the Commentary's interpretation of "debt collector" to exclude attorneys engaged in debt collection through litigation).

(Regulation F): Advance Notice of Proposed Rulemaking, *available at* http://1.usa.gov/20PFt0z (describing, in a comment signed by Pennsylvania's Attorney General and attorneys general of thirty other states, a surge in state debt collection litigation and common problems, such as debt collectors that "robo-sign" affidavits in litigation). These comments echo themes in the CFPB's own enforcement activity. *See, e.g.*, *CFPB v. Frederick J. Hanna & Assoc., P.C.*, No. 14-2211, 2015 WL 4282252, at *21, *24 (N.D. Ga. July 14, 2015) (describing the CFPB's FDCPA enforcement action against a law firm based on the firm's service, alongside complaints, of affidavits for which affiants lacked personal knowledge of material facts). The CFPB is now conducting consumer survey testing in advance of issuing a proposed rule interpreting the FDCPA. *See* CFPB Regulatory Agenda, Debt Collection Rule (Spring 2015), *available at* http://1.usa.gov/1GYuvzl.

A rule adopted by the CFPB may address the FDCPA's application to legal pleadings and be accompanied by a comprehensive body of evidence describing issues that arise in this context. As a result, the rule might obviate any need for this Court's review of the questions presented. At a minimum, the CFPB's rule could help inform this Court's interpretation of the FDCPA by setting forth the agency's considered views, to which deference may be owed. These considerations support denial of Udren's petition.

IV. The Interlocutory Nature of the Third Circuit's Decision Warrants Denial of the Petition.

Even if Udren had petitioned for review of issues properly presented and on which there exists a circuit split, this case would be a poor vehicle to address the questions presented because it reaches this Court in an

interlocutory posture. This 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, 946 (1993) (Scalia, J., opinion respecting the denial of the petition for writ of certiorari); *accord* R. Stern, E. Gressman, & S. Shapiro, Supreme Court Practice § 4.18, p. 284 (10th ed. 2013). Indeed, it has cautioned that its jurisdiction to review interlocutory decisions should "be exercised sparingly" and is reserved for "extraordinary cases." *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916).

This case does not warrant deviation from the Court's ordinary practice of deferring review until final judgment. The court of appeals remanded the case for further proceedings, and as Udren agrees (Pet. 6 n.3), did not address the question whether, for example, Udren's representations were material. Nor did the lower courts consider Udren's argument that "a debt collector is insulated from liability where the debtor fails to avail himself" of the FDCPA's non-litigation procedures for disputing a debt. Pet. App. 78a n.6. It thus remains possible that Udren could prevail on the FDCPA claims on grounds separate from those presented in the petition. This possibility counsels in favor of denying the petition.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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