16-863

No

IN THE

Supreme Court of the United States

TAWANDA JONES

Petitioner

v.

LAW OFFICE OF DAVID SEAN DUFEK

AND

CACH, LLC.

Respondents

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether application of the "least sophisticated" or "unsophisticated" consumer standards to a collection letter is a question of law or fact?

Whether the facsimile signature of an attorney on a mass-produced demand letter printed on law firm letterhead and sent to the least sophisticated or unsophisticated consumer is a false representation or implication that any individual is an attorney or that the communication is from an attorney or a false, deceptive, or misleading representation or means in connection with the collection or attempted collection of a debt?

Whether the language of the *Greco* disclaimer is sufficient to prevent violations of 15 U.S.C. §1692e, 15 U.S.C. §1692e(3) or 15 U.S.C. §1692e(10) of the Fair Debt Collections Practices Act when included in collection letters printed on law firm letterhead?

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INTRODUCTION

Petitioner, Tawanda Jones, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia. For twenty-three years the law of the land has been that mass-produced form collection letters printed on law firm letterhead containing facsimile signatures of an attorney violates 15 U.S.C. 1692e(3) as such letters falsely represent or falsely imply that an attorney is professionally involved in the debtors account.

Judges in the Second, Fifth and Seventh circuits have all thoughtfully considered the question in the context of attorney letterhead containing facsimile signatures of attorneys. Each has rejected the view by the District of Columbia Circuit finding that because the letter is literally from the attorney or law firm it is saved from violating the FDCPA. As recognized by then – Judge Sotomayor when she was sitting in the Second Circuit, even if there were no dispute that the collection letters are literally from the attorney in the literal sense, some degree of attorney involvement is required before a letter will be considered "from an attorney" within the meaning of the FDCPA.

The Second Circuit, (by Judge Cabranes, joined by Judge Kearse and Judge Winter), the Fifth Circuit (Judge Dennis, joined by Judge Garwood and Judge Garza) and the Seventh Circuit (by Judge Rovner, joined by Judge Cudahy and Judge Williams) have all considered attorney letterhead cases containing facsimile signatures of actual attorneys in a form collection letter. Each circuit thoughtfully considered the §1692e(3) question and concluded that such letters falsely imply or misrepresent that an attorney is meaningfully and

professionally involved in the debtors account. These opinions all recognize that the least sophisticated or unsophisticated consumer will be mislead, deceived or confused by such letters. The District of Columbia Circuit's contrary view is at odds with twenty-three years of settled FDCPA law and the established industry practice refrain of excluding attorney signatures from form collection letters. Ironically, for courts that found no violation in an attorney letterhead case, the absence of an attorney signature is typically the feature most cited as saving the letter from violating the FDCPA

As such, the opinion below represents a drastic left turn in FDCPA jurisprudence and creates an intractable divide in the circuits relating to attorney letterhead cases.

OPINIONS BELOW

The decision of the United States Court of Appeals for the District of Columbia is reproduced in the appendix at A-2. The decision of the United States District Court for the District of Columbia and is reproduced in the appendix at A-14.

JURISDICTION

The court of appeals entered its judgment on July 26, 2016. A petition for rehearing and rehearing *en banc* was denied on October 3, 2016. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS AND RULES INVOLVED

15 U.S.C. §1692e provides generally:

A debt collector may not use any false, deceptive, or misleading representation or means in connection with the collection of any debt. Without limiting the general application of the foregoing, the following conduct is a violation of this section:

15 U.S.C. §1692e(3):

The false representation or implication that any individual is an attorney or that any communication is from an attorney.

15 U.S.C. §1692e(5):

The threat to take any action that cannot legally be taken or that is not intended to be taken.

15 U.S.C. §1692e(10):

The use of any false representation or deceptive means to collect or attempt to collect any debt or to obtain information concerning a consumer

15 U.S.C. §1692k(a) provides, in relevant part:

Except as otherwise provided by this section, any debt collector who fails to comply with any provision of this subchapter with respect to any person is liable to such person....

Fed. R. Civ. P. 12(c) provides:

Motion for Judgment on the Pleadings. After the pleadings are closed—but early enough not to delay trial—a party may move for judgment on the pleadings.

STATEMENT

The Fair Debt Collections Practices Act (FDCPA) protects consumers against abusive debt collection practices. Congress enacted the FDCPA in 1977, 91 Stat. 874, 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. 15 U.S.C. § 1692(e).

In pertinent part, the Act prohibits debt collectors from using false, deceptive, or misleading representations or means in connection with the collection of any debt, §1692e; including, but not limited to, falsely implying that an individual is an attorney or that a communication is from an attorney, §1692e(3)threatening to take any action that cannot legally be taken or not intended to be taken, §1692e(5); the use of false misrepresentations or deceptive means to collect a debt, § 1692e(10); and using false or deceptive forms to create the false belief in consumer that a person other than the creditor is participating in the collection of the debt, § 1692j.

1. Prior to 1986, attorneys were excluded from the Act's definition of "debt collector." Fair Debt Collection Practices Act, 15 U.S.C. §1692a, 100 Stat. 768. During that time, attorneys advertised their exempt status to solicit business from creditors and used tactics in their collection activities, due to the

exemption, which lay debt collectors were barred from using.[1] In 1986, Congress amended the FDCPA repealing the exemption. The amendment closed the loophole that allowed attorneys to engage in the same unsavory debt collection activities as lay debt collectors but avoid liability based on a law degree.

2. Petitioner is a grandmother who matriculated through the eighth grade. Petitioner works as a cashier at a fast-food restaurant and for all intents and purposes is a typical consumer who manages and navigates through life as any ordinary person would. However, when receiving the instant collection letter she immediately sought help from a non-profit organization because she believed that she was about to be sued. The non-profit organization, arriving at the same conclusion, immediately referred her to counsel.

3. Respondents are the Law Office of David Sean Dufek ("DUFEK"), a debt collection law firm at all times relevant, and CACH, LLC ("CACH"), a nationwide debt buyer that purchases default consumer debt for pennies on the dollar and collects the alleged debts through agreements with its nationwide network of debt collection law firms. DUFEK was retained by CACH to collect the debt allegedly owed by Petitioner.

4. On February 23, 2013, DUFEK or CACH sent a collection letter to Petitioner on DUFEK letterhead containing the facsimile signature of Mr. David Sean Dufek, the namesake of the law firm. Beneath the signature, Mr. Dufek also included his title "Attorney David Sean Dufek." Petitioner filed suit against both CACH and DUFEK for violations of

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[1] See H.R. REP. NO. 99-405, at 4-5 (1985), reprinted in 1986 U.S.C.C.A.N. 1752, 1754-56.

the sections 1692e,1692e(3), 1692e(5),1692e(10) and 1692j of the FDCPA and other local consumer protection statutes. CACH filed a Fed. R. Civ. P. 12(c) motion that was granted by the district court. Petitioner appealed to the Court of Appeals for the District of Columbia Circuit and the Circuit affirmed and denied Petitioner' petition for rehearing and rehearing *en banc*.

5. The Courts of Appeals are intractably divided on whether application of the least sophisticated/unsophisticated consumer standard to a collection letter is a question of law or fact, the panel followed the Second, Third, Eighth and Ninth Circuits rejecting the position adopted by the Fifth, Sixth, Seventh and Eleventh Circuit Secondly, the panel rejected the position of the Second, Fifth and Seventh Circuits on whether an attorney signature on a mass produced dunning letter printed on attorney letterhead is deceptive. Finally, the Circuit concluded, as a matter of law, that the *Greco* disclaimer effectively disclaims attorney involvement in a dunning letter printed on law firm letterhead in direct conflict with the Fifth and Third circuits that have ruled the disclaimer contradictory and ineffective.

6. The entrenched split among the circuits on this important question of civil procedure and the havoc created by the District of Columbia Court of Appeals decision to settled FDCPA jurisprudence and industry practice involving attorney letterhead cases is intolerable. The conflicts has sown confusion over fundamental civil procedure principles, generated needless appellate litigation, and frustrated Congress's goal of providing consumers a nationwide uniform solution to the problem of abusive debt collection. The conflicts presented will not resolve themselves without this Court's

intervention. This case presents the perfect vehicle to examine the conflicts. Therefore, Petitioner Tawanda Jones respectfully petitions for a writ of certiorari.

REASONS FOR GRANTING THE PETITION

This Court has never decided an "attorney letterhead" case. Congress enacted the FDCPA to prohibit abusive debt collection practices that economically destabilize consumers. The decision by the District of Columbia Court of Appeals undermines the FDCPA's calibrated scheme of statutory incentives to encourage self-enforcement. Cf. *FTC, Collecting Consumer Debts: The Challenge of Change* 67 (2009) ("Because the Commission receives more than 70,000 [in 2015 over 270,000] third-party debt collection complaints per year, it is not feasible for federal government law enforcement to be the exclusive or primary means of deterring all possible law violations"). The Consumer Financial Protection Bureau ("CFPB") receives more consumer complaints about debt collection practices than about any other issue.[2] The lower court's conclusion that as long as the debt collector includes the Greco-disclaimer on the front of the letter said collector is

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[2] Federal Trade Commission, Annual Report 2011: Fair Debt Collection Practices Act 4 (2011), http://www.ftc.gov/sites/default/files/documents/reports/federal-trade-commissionannual-report-2011-fair-debt-collection-practices-act/110321fairdebtcollectreport.pdf;

Consumer Financial Protection Bureau, *Fair Debt Collection Practices Act—CFPB Annual Report 2014* 9, 10 (2014), http://files.consumerfinance.gov/f/201403_cfpb_fair-debt-collection- practices-act.pdf.

immunized from multiple FDCPA violations will leave susceptible consumers at the mercy of the ingenuity and resourcefulness of industry.

The DC Circuit has addressed the impact of false threats on the financially vulnerable

> .....threats of seizure in themselves are uniquely harmful and disruptive to the consumer and the family....[]..Consumers threatened with the loss of their most basic possessions become desperate and peculiarly vulnerable to any suggested 'ways out.' As a result, 'creditors' are in a prime position to urge debtors to take steps which may worsen their financial circumstances.'

American Financial Services Association v. Federal Trade Commission, 767 F.2d 957, 974 (D.C. Cir. 1985). Threat of lawsuit to such consumers can be devastating. For example, fear of notification to employer, attachment of wages, loss of employment, adverse effects to employee-employer relationship, lost of employment prospects, inability to provide family necessities. These are just some of the fears going through the mind of a least sophisticated consumer when it receives a letter from a law firm signed by a lawyer. Unscrupulous debt collectors are aware of such fears and design and craft letters to exploit them.

The holding by the DC Circuit will make the problem worse and is unsustainable given the continued rise in consumer complaints against debt collectors each year. Moreover, the dramatic growth and transformation that the third-party debt collection industry has undergone in the last two decades, partially due to a growing consumer credit market, technological innovation, and debt buying will only intensify the problem. The Federal Trade

Commission (FTC) reports that "[t]he most significant change in the debt collection business in the past decade . . . has been the advent and growth of debt buying (i.e., the purchasing, collecting, and reselling of debts in default)." [3]

In 2013, the FTC released a study on the debt buying industry, examining more than 5,000 portfolios containing nearly 90 million consumer accounts. FTC, The Structure and Practices of the Debt Buying Industry ii (Jan. 2013) ("Debt Buying Industry"). The study found that debt buyers pay an average of four cents per dollar of debt. *Id.* The FTC concluded that debt buyers "rarely received dispute history," *id.*, or underlying supporting documents about debts, e.g., account statements, terms and conditions of credit. Debt buyers instead purchase portfolios "as is" – without representations and warranties as to accuracy of the information received. *Id.* at iii

As economic conditions change more and more consumers will find themselves unable to repay their debts and efforts to collect those debts will increase and become more aggressive if the past serves as prologue. FDCPA cases are likely to increase both in number and intensity and guidance from this Court on how to resolve such cases will establish uniformity amongst the Federal courts and enable the industry to set standards for avoiding liability.

As the circuits are irreconcilably divided on each question presented and the District of Columbia Circuit decision is wrong on the merits thereby frustrating the purpose of the FDCPA, this case

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3 FTC, Collecting Consumer Debts: The Challenges of Change; A Workshop Report iv (Feb. 2009). Available at http://www.ftc.gov/bcp/workshops/debtcollection/FTC_DebtCollect_071010.pdf.

presents the ideal opportunity for this Court to resolve the intractable circuit split, which was squarely raised below in the DC Circuit and the district court.

I. The Circuits Are Intractably Divided Over The Three Questions Presented.

The DC Circuit decision either causes a split or maintains an existing split in the circuit courts of appeals. The very serious policy consideration of uniformity of application of a federal statute is implicated by each of the three questions presented.

a. The Circuits Are Intractably Divided Over Whether Application Of The Least Sophisticated Or Unsophisticated Consumer Standards To A Collection Letter Is A Question Of Law Or Fact.

Four courts of appeals – the Fifth, Sixth, Seventh and Eleventh Circuits – have held that application of the least sophisticated or unsophisticated consumer standards to a collection letter to determine whether its is deceptive, misleading or confusing is a question of fact to be decided by a jury. The Second, Third, Eighth and Ninth Circuits have held that the question is one of law to be decided by the judge.

In this case, the DC Circuit followed the Second, Third, Eighth and Ninth Circuits concluding that the question is one of law that can be decided on a Fed. R. Civ. P. 12(c) motion. The Circuit posited that "[t]he district court properly resolved these questions as a matter of law on a motion under Rule 12(c). We agree that no reasonable juror could find the letter

deceptive." *Jones v. Dufek*, 830 F.3d 523, 528 (D.C. Cir. 2016)(citations and quotations omitted). As such, the holding reflects the existing split of authority on the question and was cleanly presented to the district court and the DC Circuit thus the question is ideally situated for certiorari by this Court.

Courts addressing this question agree on a few basic propositions. First, they agree that debt collectors are not liable for "bizarre or idiosyncratic" interpretations of collection notices by the least sophisticated. *Wilson v. Quadramed Corp.*, 225 F.3d 350, 354 (3d Cir. 2000). These courts also agree that the basic purpose of the FDCPA is to protect "all consumers, the gullible as well as the shrewd," "the trusting as well as the suspicious," from abusive debt collection practices. *Id.*

However, courts sharply disagree and are intractably split over whether the application of the least sophisticated consumer standards to the language of a collection letter is a question of fact or law. The following circuits have considered the question one of fact: *Kistner v. The Law Offices of Michael P. Margelefsky, LLC*, 518 F.3d 433, 441 (6th Cir. 2008) ("a jury should determine whether the letter is deceptive and misleading"); *Gonzalez v. Kay*, 577 F.3d 600, 607 (5th Cir. 2009) (jury question as reasonable minds may differ); *LeBlanc v. Unifund CCR Partners*, 601 F.3d 1185, 1193(11th Cir. 2010)(Whether debt collector's dunning letter purported to be from its "Legal Department" was a threat to take legal action under the least sophisticated consumer standard "presents a genuine issue of material fact that precludes judgment as a matter of law."); *Johnson v. Revenue Mgmt. Corp.*,169 F.3d 1057, 1060 (7th Cir.1999)(Likening it to trademark cases and concluding that "it is an issue of fact rather than law."); *Brazier v. Law*

Offices of Mitchell N. Kay, P.C., 2009 WL 764161 (M.D. Fla. Mar. 19, 2009)(It is a question of interpretation and fact whether a letter is self-contradictory and confusing, not pure legal question).

Other circuits consider the question one of law, *see* e.g., *Shapiro v. Dun & Bradstreet Receivable Mgmt. Servs., Inc.*, 59 Fed. Appx. 406, 407-08 (2d Cir. 2003) (citing *Russell v. Equifax A.R.S.*, 74 F.3d 30, 34 (2d Cir.1996)(the message "is open to an inaccurate yet reasonable interpretation by the consumer, and is therefore deceptive as a matter of law."); *Peters v. General Service Bureau, Inc.*, 277 F.3d 1051 (2002)(question of law); *Terran v. Kaplan*, 109 F.3d 1428, 1432 (9th Cir.1997)(Whether the least sophisticated debtor would be confused by a collection letter is a question of law);*Wilson v. Quadramed Corp.*, 225 F.3d 350, 353 n.2 (3d Cir. 2000)(Whether language in a collection letter is confusing or contradictory to the least sophisticated debtor is a question of law).

Though the DC Circuit did not explain its reasons for deciding the question as one of law, other circuits posit that the decision is reinforced by "the rationale behind the *de novo* review standard used for contracts and other written instruments, ..." *Terran v. Kaplan*, 109 F.3d 1428, 1433 (9th Cir.1997); see also *Gonzalez*, 577 F.3d at 611(Dissent)("interpreting contracts, documents, letters, and statutes, is the quintessential work of judges—not juries.")

On the other side, the Seventh Circuit in *Johnson v. Revenue Mgmt. Corp.*,169 F.3d 1057, 1060 (7th Cir.1999), concluded that the question is one of fact explaining that federal judges are not well-suited to determine how an unsophisticated reader will interpret a dunning letter. 169 F.3d at 160. Judge Easterbrook, analogizing FDCPA cases to trademark cases, opined that surveys are necessary to

determine whether the language of a collection letter is confusing or deceptive. *Id.*

Judge Posner reiterated the point in a more recent case:

> The intended recipients of dunning letters are not federal judges, and judges are not experts in the knowledge and understanding of unsophisticated consumers facing demands by debt collectors. We are no more entitled to rely on our intuitions in this context than we are in deciding issues of consumer confusion in trademark cases, where the use of survey evidence is routine.

Evory v. RJM Acquisitions Funding L.L.C., 505 F.3d 769, 776 (7th Cir. 2007). In the trademark context, a literally false advertising statement violates § 43 of the Lanham Act, 15 U.S.C. 1125, as a matter of law, but the question whether a statement is misleading or confusing is a matter of fact. *Avila v. Rubin*, 84 F.3d 222, 227 (7th Cir. 1996). Some courts have held that confusion is a fact-based question unsuitable for dismissal under Rule 12(b)(6).); *McMillan v. Collection Professionals, Incorporated.*, 455 F.3d 754,759 (7th Cir. 2006).

Courts of appeals and commentators have recognized this direct split in authority. *See* e.g., *Gonzalez v. Kay*, 577 F.3d 600, 609 (5th Cir. 2009)(Dissent)(acknowledging that "circuit courts are split on this issue" of whether a question of law or fact); *McMillan*, 455 F.3d at 766, n. 4 ("We recognize that other circuits have held that the question of how a least sophisticated debtor would interpret a letter is a 'question of law.'"); *Pollard v. Law Office of Mandy L. Spaulding*, 766 F.3d 98, 110, n. 3 (1st Cir. 2014)(The panel notes the split in authority). The question has also been explored by commentators in

a more practical way by asking whether the question is more appropriately decided by a judge or a jury. *See*, e.g., Henry P. Monaghan, *Constitutional Fact Review*, 85 Colum. L.Rev. 229, 237 ("The real issue is not analytic, but allocative: what decisionmaker should decide the issue?").

In *Gonzalez v. Kay*, though the Fifth Circuit had previously held that the application of the unsophisticated consumer standard to a collection letter is a question of law, the majority remanded the case for a jury trial explaining that based on the contradictory messages in the letter "the 'least sophisticated consumer' reading this letter might be deceived into thinking that a lawyer was involved in the debt collection." *Gonzalez*, 577 F.3d at 607. The *Gonzalez* court ended by stating that "reasonable minds may differ as to whether the letter is deceptive....." *Id.*

In *Kistner v. The Law Offices of Michael P. Margelefsky, LLC*, 518 F.3d 433 (6th Cir. 2008), the Sixth Circuit held that "a jury should determine whether a letter is deceptive or misleading—specifically, whether the letter gives the impression that it is from an attorney even though it is not." 518 F.3d at 441. Offering further support for the conclusion that Kistner's case presents a jury question, the Sixth Circuit, citing *Clomon*, explained that "courts have held that collection notices can be deceptive if they are open to more than one reasonable interpretation, at least one of which is inaccurate." *Id*(citations omitted).

This conflict will inevitably "increase disunity in standards and decisions in implementing the nationwide law. The possibility of conflicting decisions in different circuits is particularly onerous for debt collectors who tend to produce such letters

en masse sending them across the country. How the split plays out in federal court is critical to consumers bringing FDCPA claims and debt collectors defending against such claims. A clarifying decision from this Court will promote "evenhanded, predictable, and consistent development of legal principles, foster[ing] reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." See, e.g., *Hohn v. United States*, 524 U.S. 236, 118 S.Ct. 1969, 1977, 141 L.Ed.2d 242 (1998).

Absent intervention by this court, a consumer's success or failure of his/her FDCPA claim will turn on incidents of geography. Consumers and debt collectors in Illinois, Kentucky and Georgia will receive the benefit of a jury where the fate of consumers and debt collectors in the District of Columbia, Montana and Pennsylvania will be determined by a single judge typically at a very early stage of the litigation. Moreover, in the remaining circuits where the question has not been decided, needless satellite litigation will result. The procedural rules and the law governing the interpretation of such letters should be clear so as to provide consistent and uniform application of this very important federal law.

This case cleanly presents the question of whether application of the least sophisticated consumer standards to a debt collection letter is a question of fact or law. The case is an ideal vehicle to resolve the question because it is specifically raised by this case. Moreover, the pertinent facts are undisputed; the collection letter was printed on law firm letterhead and contained the signature of an attorney when "no one at the law office had reviewed the case." *Jones v. Dufek*, 830 F.3d 523, 526 (D.C. Cir. 2016). Is the application of the least

sophisticated standards to a collection letter a question of fact for the jury or a question of law for the judge; the district court and the circuit decision hinged on the question.

Certiorari is warranted because the division amongst the circuits over whether application of the least sophisticated/unsophisticated consumer standard to a collection letter when determining whether the letter is deceptive is a question of fact or law is entrenched. There is no reason to believe that these eight circuits will reconsider their position, to which they have adhered to for decades. As a result, it is unlikely that the conflict will be resolved absent this Court's intervention. Uniformity and predictability is needed for debt collectors as well as for consumers.

If the Court does not grant review in this case, it risks the inability to address the issue for lack of another good vehicle. Eight circuits have already decided the question and are unlikely to revisit it. This Court should grant certiorari to establish predictable procedural guidance to the lower courts for resolving attorney letterhead cases under the FDCPA.

b. The Opinion Below Causes An Intractable Divide Over Whether A Debt Collector's Use of Form Collection Letters Printed on Law Firm letterhead Containing the Signature Of An Attorney Violates §1692e, §1692e(3) or §1692e(10).

Even when there is no dispute that "the letters sent by [collection law] firms were 'from' attorneys in the literal sense of that word, some degree of attorney involvement is required before a letter will

be considered 'from an attorney' within the meaning of the FDCPA." *Miller v. Wolpoff & Abramson*, 321 F.3d 292, 302 (2nd Cir. 2003)(Sotomayor, J.). As recognized by — then Judge Sotomayor, some degree of attorney involvement is required to send a letter on law firm letterhead. Though the *Miller* letter did not contain a signature, the Second, Fifth and Seventh circuits have all held that mass-produced form collection letters printed on attorney letterhead containing an attorney signature violates §1692e(3) of the FDCPA. These circuits all recognize that such letters are a false overstatement of the degree of attorney involvement with the debtor's file. The decision below drastically departs from the settled law.

While every circuit that has addressed the issue has held that an attorney signature on a mass-produced form collection letter printed on law firm letterhead violates § 1692e(3)the DC Circuit, in contrast, having most recently confronted the question on a blank slate, conclusively rejected the majority view. The Circuit holds that mass-produced form letter on attorney letterhead containing attorney signatures do not falsely represent meaningful involvement by the attorney with the debtor's account. *Jones*, 830 F.3d at 526. The Second, Third and Fifth circuits disagree. Those circuits hold that mass-produced form letters printed on law firm letterhead containing attorney signatures gives the false impression that the letters are from an attorney in a meaningful and professional sense. The requirement of meaningful and professional involvement by attorneys with letters bearing their signature is often referred to as the "meaningful involvement doctrine" first developed by the Second Circuit in *Clomon v. Jackson*, 988 F.2d 1314 (2d Cir. 1993).

In *Clomon*, the Second Circuit held that the attorney "play[ing] virtually no day-to-day role in the debt collection process supports the conclusion that the collection letters were not 'from' [the attorney] in any meaningful sense of that word." *Id* at 1320. The Second Circuit further held that a lawyer violated §1692e(3) when he "authorized the sending of debt collection letters bearing his name and a facsimile of his signature without first reviewing the collection letters or the files of the persons to whom the letters were sent." *Id.* at 1316. Lastly, *Clomon* makes clear that "[t]here will be few, *if any*, cases in which a mass-produced collection letter bearing the facsimile of an attorney's signature will comply with the restrictions imposed by § 1692e." *Id* at 1321.

Moreover, the Fifth Circuit, in *Taylor v. Perrin, Landry, deLaunay & Durand*, 103 F.3d 1232 (5th Cir. 1997), held that "a debt collector, who uses a mass-produced collection letter using the letterhead and facsimile signature of a lawyer who is not actually participating in the collection process, violates § 1692e(3)." *Id* at 1238. Lastly, the Seventh Circuit in *Nielsen v. Dickerson, et al.*, 307 F.3d 623 (7th Cir. 2002), held that "an attorney must have some professional involvement with the debtor's file if a delinquency letter sent under his name is not to be considered false or misleading in violation of section 1692e(3) and (10)." *Id* at 638.

The National Consumer Law Center in a recent rulemaking comment to the Consumer Financial Protection Bureau ("CFPB") stressed the importance of clarity on the issue. In its comment, the NCLC along with several consumer advocate groups requested that 1692e(3) be clarified to make clear that "no collection letter can be signed by an attorney without a meaningful review by that attorney

supporting the demands in the letter."[4] The NCLC explained that the Second Circuit *Greco* decision has created confusion in the case law regarding the extent of protection granted by §1692e(3) to consumers.

It is important for the Court to establish uniformity in applying the FDCPA so that consumer-debtors and debt collection attorneys better understand how the Act applies. Moreover, because subsection 1692e(3) does no include the actual language "meaningful involvement," it is important for this Court to provide guidance to the lower courts as to the legitimacy or efficacy of the doctrine and to its uniform application. Otherwise, circuits like the District of Columbia are free to reject the doctrine as a matter of law resulting in a deepening disunity amongst the circuits in enforcing this important subsection of the statute.

The DC Circuit's holding that attorneys no longer need to be meaningfully involved in a debtor's account before allowing their letterhead and signature to be used in demand letters also abrogates §1692e(3) and clashes with §1692j. The Circuit decision explicitly permits attorneys to license out their letterhead and signature to lay debt collectors for profit without ever seeing or reviewing the letter or the debtor's file in direct conflict with §1692j. Subsection 1692j prohibits using false or deceptive forms to create the false belief in a consumer that a person other than the creditor is participating in the collection of the debt. Industry commentators have

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[4] *Advance Notice of Proposed Rulemaking Regarding Debt Collection*, National Consumer Law Center https://www.nclc.org/images/pdf/debt_collection/comments-cfpb-debt-collection-anprm-2-28-14.pdf

also opined on the DC Circuit's rejection of this important doctrine.[5]

Though the court below acknowledges that there was no professional involvement by Mr. Dufek with Petitioner's file it also holds that the mass-produced form collection letter printed on law firm letterhead containing an attorney signature does not violate § 1692e(3). The decision is in sharp contrast to settled precedent of the Second, Fifth and Seventh circuits and creates a dramatic split amongst the circuits.

c. The Circuits Are Intractably Divided Over Whether The Language Of The *Greco* Disclaimer Is Effective.

The DC Circuit opinion relies heavily on the controversial *Greco* disclaimer, so named based on its origin in *Greco v. Trauner, Cohen & Thomas, LLP.*, 412 F.3d 360 (2d Cir. 2005). The *Greco* disclaimer is intended by the Second Circuit as safe-harbor language that attorneys can use in collection letters printed on attorney letterhead while engaging in debt collection activities. The language is intended to prevent attorney debt collectors from running afoul of the FDCPA. The *Greco* court explains that "attorneys can participate in debt collection in any number of ways, without contravening the FDCPA, so long as their status as attorneys is not misleading." *Greco*, 412 F.3d at 364. Though the *Greco* court acknowledged an attorney collection

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[5]Allan Enriquez, *DC Circuit Rejects FDCPA 'Meaningful Involvement' and Related State-Law Claims*, https://www.insidearm.com/news/00042121-dc-circuit-rejects-fdcpa-meaningful-invol/

letter printed on attorney letterhead implies that an attorney, acting as an attorney, had been involved, the Court noted that the implication could be overcome. *Id.* at 364.

The *Greco* disclaimer reads, "[a]t this time, no attorney with this firm has personally reviewed the particular circumstances of your account." The disclaimer language was drafted by the debt collector defendant in the *Greco* case. The Third and Fifth Circuits found the disclaimer to be contradictory and ineffective. However, the Second and the District of Columbia Circuits hold that the disclaimer is effective to prevent violations of the FDCPA; seeming to ignore the contradiction posed by the law firm letterhead and the disclaimer of no attorney involvement.

There is no language in the FDCPA that permits a debt collector to disclaim away its obligations under § 1692e. The Act does provide that a debt collector may not be held liable if the violation is a result of bona fide error. 15 U.S.C. § 1692k(c). The statute also contains disclosure requirements one of which is that each communication must contain the statement that it is from a debt collector. 15 U.S.C. § 1692e(11).

Circuits and lower courts are intractably divided as to the effectiveness of the *Greco* disclaimer. See *Lesher v. Law Offices of Mitchell N. Kay, PC*, 650 F.3d 993, 1003(3d Cir. 2011) (rejecting disclaimer), *Gonzalez v. Kay*, 577 F.3d 600, 607 (5th Cir. 2009) (same), *Robertson v. Richard J. Boudreau & Assocs., LLC*, No. C09-1681 BZ, 2009 WL 5108479, at *2 (N.D. Cal. Dec. 18, 2009) (rejecting *Greco* as unpersuasive), and *Dunn v. Derrick E. McGavic, P.C.*, 653 F. Supp. 2d. 1109, 1114 (D. Or. 2009) (rejecting disclaimer as overshadowed and contradictory); *Brazier v. Law Offices of Mitchell N.*

Kay, P.C., 2009 WL 764161 (M.D. Fla. Mar. 19, 2009) (Rejecting *Greco* as potentially self-contradictory); *Smith v. Harrison*, 2008 WL 2704825 (D.N.J. July 7, 2008) (rejecting attorney debt collector's claim that *Greco* immunized him from 1692e claims relating to meaningful involvement even when using his letterhead and signature)

However, the Second Circuit recently reconfirmed *Greco* in *Avila v. Riexinger & Associates, LLC*, No. 15-1584-cv (L)(2d Cir. Mar. 22, 2016), though not without some skepticism as to the merits of the decision. The Second Circuit affirmed the decision in favor of the attorney debt collector who sent a dunning letter printed on law firm letterhead containing the signature of the attorney. However, the Second Circuit reconfirmed without analysis and its comment of "[w]hatever the merits of *Greco*, we are bound by that decision" seems to rely more on stare decisis than the soundness of the *Greco* decision. Based on the recent decision it does not appear that the circuit will be revisiting the issue anytime soon. See also *Eddis v. Midland Funding, L.L.C.*, No. 11-3923 (JBS/AMD), 2012 WL 664812, at *6-9 (D.N.J. Feb. 28, 2012) (finding that the disclaimer on the front of the dunning letter did not violate the FDCPA);

In *Lesher v. Law Offices of Mitchell N. Kay, PC*, 650 F.3d 993 (3d Cir. 2011), the Third Circuit found that the disclaimer "does little to clarify the Law Firm's role in collecting the debt because it completely contradicts the message sent on the front of the letters — that the creditor retained a law firm to collect the debt." *Id* at 1003. The majority in *Lesher* went on to explain that "the statement that the letters were 'from a debt collector' is a statutorily required notification that 'should not be viewed as

nullifying any implication that the letter is from an attorney.'" *Id.*

The Fifth Circuit in *Gonzalez v. Kay*, 577 F.3d 600 (5th Cir. 2009) also found the disclaimer ineffective. The circuit explained that the disclaimer does not make clear that the lawyer is wearing a "debt collector" hat and not a "lawyer" hat. *Id* at 604. Referring to the text of the *Greco* disclaimer as "legalese," the majority in *Gonzalez* explained that the "disclaimer on the back of the letter completely contradicted the message on the front of the letter—that the creditor had retained the [law firm] and its lawyers to collect the debt." *Id* at 607.

The *Gonzalez* dissent appropriately identifies the circuit split between the Fifth Circuit and the Second Circuit based on the decision. *Id* at 608 (Jolly, J., dissenting). In his dissent, Judge Jolly points out that the distinction the majority makes as to the difference in location of the disclaimer in *Greco* and the disclaimer in that case is one without a difference and in effect the majority creates a circuit split between the two circuits. *Id.* Regardless of where the disclaimer is placed whether on the front of the letter or on the back the *Gonzalez* majority found that the disclaimer contradicts the false messages represented by the attorney letterhead. Note the following from the *Gonzalez* majority:

> There are some letters that, as a matter of law, are not deceptive *based on the language* and placement of a disclaimer. At the other end of the spectrum, there are letters that are so deceptive and misleading as to violate the FDCPA as a matter of law, especially when they do not contain any disclaimer regarding the attorney's involvement. In the middle, there are *letters that*

> *include contradictory* messages and therefore present closer calls.

Id at 606. The *Greco* disclaimer cannot "contradict" the false messages of the attorney letterhead simply based on its location. Even if the disclaimer is on the front of the letter the contradiction it poses to the attorney letterhead remains; the law firm has been "retained to collect the debt," in the legal sense of the phrase. If the contradiction is not explained, it remains a contradiction. The Second Circuit found the *Greco* disclaimer effective and found no contradiction even though the language of the disclaimer in *Gonzalez* and *Greco* is identical. Based on *Lesher* and *Gonzalez*, the contradiction is a separate violation of 1692e generally based on the absolute and unexplained contradiction with the letterhead.[6]

The Third and the Fifth circuits held that the *Greco* disclaimer is ineffective at correcting the multiple false messages and impressions perceived by a least sophisticated consumer upon receipt of such letters. Commentators also have opined on the rejection of *Greco* by the Third Circuit.[7]

The Second and the DC Circuit held that the language of the *Greco* disclaimer is sufficient to

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[6] Though in this case the debt collector attorney also included his signature and title "Attorney David Sean Dufek," making his intention to mislead more egregious, for purposes of argument, uniformity and comparison this portion of the petition focuses on the commonalities with the Third and Fifth Circuit opinions.

[7] Andrew M. Schneiderman, *Lesher: One Step Too Far? Third Circuit Rejects the "Greco" Disclaimer in FDCPA Case* http://www.martindale.com/bankruptcy-law/article_Hinshaw-Culbertson-LLP_1310358.htm

correct the false impressions given by the attorney letterhead. Therefore, the DC Circuit holding solidifies the divide between the Second, Third, Fifth and District of Columbia circuits on the disclaimer's effectiveness.

Implicit in the need for a disclaimer is the acknowledgement by even the *Greco* court that a dunning letter printed on law firm letterhead implies false messages that need to be disclaimed. The language suggested by the *Gonzalez* majority however comes closer to the mark.

> [A]lthough the letter is from a lawyer, the lawyer is acting solely as a debt collector and not in any legal capacity when sending the letter.

Gonzalez, 577 F.3d at 606-607. Including the subordinating clause "although" comes closer to explaining the contradiction between the attorney letterhead and the disclaimer. Even the *Greco* panel mistakenly includes "although" in the recitation of the proffered disclaimer in its opinion. *Greco*, 412 F.3d at 351

In contrast to the opinion below, the Third and the Sixth circuit have also held that the statutorily required notice that a communication is from a debt collector does not nullify the implication that the letter is from an attorney. See *Rosenau v. Unifund Corp.*, 539 F.3d 218, 223 (3d Cir. 2008)("[b]oth common sense and case law confirm ... that the categories of 'debt collector' and 'attorney' are not mutually exclusive"). In *Kistner v. The Law Offices of Michael P. Margelefsky, LLC*, 518 F.3d 433 (6th Cir. 2008), an attorney letterhead case where the letter "explicitly state[d] that it is from a debt collector," the Sixth Circuit held that when a collection letter is susceptible to two different meanings by the least

sophisticated consumer one of which is inaccurate it is deceptive. *Id* at 441. As such, the DC circuit's reliance on the statutorily required §1692e(11) disclosure as saving a letter from violation of §1692e and its other subsections is also at odds with the holdings of the Third and Sixth circuits.

The Third and Fifth circuits have held that substantially similar letters involving attorney letterhead and the *Greco* disclaimer were contradictory, confusing, misleading or deceptive or at least potentially so by holding that the *Greco* disclaimer is ineffective. This is in sharp contrast to the *Greco* opinion itself and the holding by the DC Court of Appeals. [8] As such, the circuits are split as to whether the *Greco* disclaimer is sufficient at disclaiming the false messages and impressions sent to the least sophisticated consumer in letters printed on law firm letterhead by attorneys acting as debt collectors.

II. The Questions Presented Are Recurring and of National Importance, and This Case Is An Ideal Vehicle for Resolving Them.

The issues presented are of exceptional importance for several reasons one of which is that the Circuit holding involves issue conflicting with the authoritative decisions of other Courts of Appeals that have addressed the issue. Second, courts have recognized the importance of heightened scrutiny of

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[8] *See Lesher v. Law Offices of Mitchell N. Kay, PC*, 650 F.3d 993, 1002-03 (3d Cir. 2011); *Gonzalez v. Kay*, 577 F.3d 600, 606 (5th Cir. 2009); *Rosenau v. Unifund Corp.*, 539 F.3d 218 (3d Cir. 2008).

attorney debt collectors. Third, the issue regarding the effectiveness of the *Greco* disclaimer will continue to recur as more attorneys continue to enter the commercial debt collection business unless this Court provides clarification. Fourth, the lower court decision has severely weakened a § 1692e(3) and § 1692j.

Circuit courts acknowledge the heightened scrutiny required concerning attorney debt collectors. See *Pollard v. Law Office of Mandy L. Spaulding*, 766 F.3d 98, 106 (1st Cir. 2014)("attorney debt collectors warrant closer scrutiny because their abusive collection practices are more egregious than those of lay collectors.")(internal quotation marks and citations omitted); *Campuzano-Burgos v. Midland Credit Mgmt., Inc.*, 550 F.3d 294, 301 (3d Cir.2008)(abusive collection practices by attorney debt collectors require heightened scrutiny)(internal quotation marks and citations omitted); see also

As the Fifth Circuit in *Gonzalez* realistically explained "[a] letter from a lawyer implies that the lawyer has become involved in the debt collection process, and the fear of a lawsuit is likely to intimidate most consumers. 'Thus, if a debt collector (attorney or otherwise) wants to take advantage of the special connotation of the word 'attorney' in the minds of delinquent consumer debtors to better effect collection of the debt, the debt collector should at least ensure that an attorney has become professionally involved in the debtor's file." *Gonzalez*, 577 F.3d at 604. Though the court below acknowledged that no attorney was professionally involved with Petitioner's account it also concluded, in direct contradiction to *Nielsen, Taylor* and *Clomon,* that the signature of the attorney and the law firm's letterhead was not deceptive, confusing or

misleading to the least sophisticated consumer as a matter of law.

The majority approach cannot be reconciled with the plain language of the statute. The FDCPA prohibits "the false representation or implication that any individual is an attorney or that any communication is from an attorney." 15 U.S.C. §1692e(3), As the FDCPA is a remedial consumer protection statute that is to be construed broadly, a precise and unyielding definition of "from" was not provided by Congress when drafting § 1692e(3). However, several circuit courts have framed the definition within the FDCPA context. The seminal case on the definition is *Clomon v. Jackson.* In *Clomon*, the Second Circuit attributed two meanings to the word "from" in the context of §1692e and its pertinent subsections. First, it found that "the use of an attorney's signature on a collection letter implies that the letter is 'from' the attorney who signed it; it implies, in other words, that the attorney directly controlled or supervised the process through which the letter was sent." *Clomon*, 988 F.2d at 1321.

The *Clomon* court secondly found,

> [T]he use of an attorney's signature [also] implies — at least in the absence of language to the contrary — that the attorney signing the letter formed an opinion about how to manage the case of the debtor to whom the letter was sent. In a mass mailing, these implications are frequently false: the attorney whose signature is used might play no role either in sending the letters or in determining who should receive them. For this reason, there will be few, *if any*, cases in which a mass-produced collection letter bearing the

> facsimile of an attorney's signature will comply with the restrictions imposed by § 1692e.

Id. Until the DC Circuit opinion, neither the *Clomon* decision nor the definition contained therein has been seriously challenged in the twenty-three years since it was announced. For twenty-three years *Clomon* has been the law of the land regarding attorney letterhead cases. The case has been cited with approval in each circuit that has considered the issue. The Circuit decision below opens the floodgates to the debt collection industry including lay debt collectors. The insupportable consequence of the Panel's decision is that lay debt collectors can now license the attorney's letterhead, signature and title without any review of the letter to which their signature is affixed or the debtor's account. The holding sanctions the widespread commercialization of the letterhead, signature and title of attorneys and is the first step towards race to the bottom for the industry.

As the holding conflicts with the authoritative decisions of three other United States Courts of Appeals that have addressed the issue including the case on which it primarily relies the appeal is if exceptional importance. With the exception of the recent decision by the Second Circuit reaffirming *Greco*,[9] every circuit that has decided this issue has ruled that an attorney signature on a mechanically-produced mass form attorney dunning letter is misleading to the least sophisticated consumer as a matter of law.[10] The holding also conflicts with those

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[9] *Avila v. Riexinger & Associates, LLC*, No. 15-1584-cv (L)(2d Cir. Mar. 22, 2016),

[10] *See Rosenau v. Unifund Corp.*, 539 F.3d 218 (3d Cir. 2008); *Nielsen v. Dickerson*, 307 F.3d 623, 635-38 (7th Cir. 2002) *Greco v. Trauner, Cohen, & Thomas, L.L.P.*, 412 F.3d 360, 362, 365

cases holding the attorney dunning letter misleading or potentially misleading to the least sophisticated consumer as to attorney involvement where no signature was present. [11] The decision abrogates § 1692j(a) in relation to attorneys. The section makes it "unlawful to design, compile, and furnish any form knowing it would be used to create a false belief in the debtor that someone other than the creditor is participating in an effort to collect his debt, when in fact such person is not participating." The decision below permits attorneys to engage in such conduct with impunity.

Moreover, the Circuit holding drastically weakens the protections afforded to the least sophisticated and unsophisticated consumers against abusive attorney debt collection letters that go too far. In essence, under this holding, attorney debt collection letters can be chalked full of false and contradictory statements relating to attorney involvement with the debtor's file so long as the letter also includes the magic words of the *Greco* disclaimer on the front page. According to the Panel, as a matter of law the least sophisticated consumer cannot be misled, confused or deceived. The ruling essentially swallows up 1692e(3) and 15 U.S.C. 1692j(a) thereby extinguishing the protections under the provision. Even the most substantively outrageous contradictions in such letters would pass muster under this holding.

As such, because the holding is contrary to over twenty years of settled FDCPA law, severely weakens two subsections of a federal statute and

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(2d Cir.2005); *Avila v. Rubin*, 84 F.3d 222, 229 (7th Cir.1996); *Clomon v. Jackson*, 988 F.2d 1314, 1321(2d Cir.1993).

[11] *See Lesher v. Law Offices of Mitchell N. Kay, PC*, 650 F.3d 993, 1002-03 (3d Cir. 2011); *Gonzalez v. Kay*, 577 F.3d 600, 606 (5th Cir. 2009).

drastically upsets the established industry practice of eliminating attorney signatures from dunning letters based on *Clomon*, *Nielsen* and *Taylor*. Guidance by this Court is critical.

III. The Decision Is Wrong And Cannot Be Reconciled With The FDCPA And Twenty-Three Years Of FDCPA Jurisprudence

Certiorari is warranted because the approach of the DC Circuit applied by the decision below is wrong on the merits and is at odds with the federal statute and settled precedent of the majority of circuits that have addressed the issue. A mass-produced form collection letter printed on law firm letterhead containing the facsimile signature of an attorney who admits to no meaningful involvement violates §1692e, §1692e(3) and §1692e(10). The decision below upends decades of settled FDCPA jurisprudence. Moreover, application of the least sophisticated consumer standards is a question of fact and the *Greco* disclaimer is insufficient to disclaim attorney involvement in a demand letter printed on attorney letterhead.

First, the law of the land for twenty-three years has been "a debt collector, who uses a mass-produced collection letter using the letterhead and facsimile signature of a lawyer who is not actually participating in the collection process, violates § 1692e(3)" or the "meaningful involvement doctrine. *Clomon*, 988 F.2d at 1238. The Second, Fifth and Seventh circuits have all held that an attorney signature on a mass-produced form collection letter violates §1692e, §1692e(3) and §1692e(10). Surely

"reasonable minds may differ" if three other circuits ruled the other way on a substantially similar letter. As nine other judges ruling opposite to the DC Circuit on the very same issue are just as reasonable as the DC panel. Given the difference of opinion between the circuits, the case presents a jury question.

Second, in *Miller v. Wolpoff & Abramson*, then Judge Sotomayor confirmed the meaningful involvement doctrine explaining that "[t]he undisputed facts make clear that [attorney debt collector] neither made a 'considered, professional judgment' that [debtor] or any other class member was delinquent on her debt and a candidate for legal action nor meaningfully involved himself in the decision to send the dunning letter to any individual debtor. Consequently, the letters he sent to class members were not truly 'from' him. [Attorney debt collector] is therefore liable under 1692e(3) and (10) for the misleading nature of the letters." *Miller*, 321 F.3d at 307 (Sotomayor, J.). Judge Sotomayor in further elaborated that a determination of whether an attorney had conducted meaningful review is a *fact intensive analysis*, turning on such questions as "precisely what information the affiants reviewed, how much time was spent reviewing plaintiff's file, and whether any legal judgment was involved with the decision to send the letters." *Miller*, 321 F.3d at 307(Sotomayor, J.).

Third, as appropriately found by the Third and Fifth Circuits, the language of the disclaimer contradicts the attorney letterhead making the ineffective. Moreover, as to the procedural question of whether interpretation of such letters is a question of law or fact, the *Greco* decision is illustrative. The Second Circuit proffers that the *Greco* disclaimer which again reads "[a]t this time, no attorney with

this firm has personally reviewed the particular circumstances of your account" is interpreted by the *least sophisticated consumer* to mean "while this was a letter from a law firm, no attorney had specifically examined the recipient's account information, and hence no attorney had yet recommended filing a lawsuit against the [debtor]." See *Greco*, 412 F.3d at 362-363. However, it is one-hundred percent certain that the *least sophisticated consumer* does not take away that meaning from such language in a demand letter from a law firm. It is a thousand-percent certainty that the least sophisticated consumer does not take away such meaning if the letter also contains the signature of an actual attorney describing himself as such as is the case here.

Though the meaning attributed to the least sophisticated consumer by the *Greco* majority and the panel here may be arrived at if the consumer happens to also be a lawyer or a judge, it is certainly not the meaning arrived at by a grandmother who only completed the eighth grade and works the counter at a fast-food restaurant. It is this difference in perception that bolsters the importance of a determination by this Court of the appropriate procedural method for interpreting such letters. Such determination is critical to the enforcement of the FDCPA and its overall purpose. One court stressed the point:

> An attorney advising the least sophisticated debtor that he should not imply that an attorney reviewed his account is like asking someone not to think about pink elephants. From the least sophisticated debtor's perspective, a debt collection letter from an attorney would imply that an attorney has reviewed the debtor's account at some level.

Smith v. Harrison, 2008 WL 2704825 (D.N.J. July 7, 2008).

Fourth, the majority approach incorrectly concludes that the *Greco* decision stands on all fours with the present case. However, the signature of the attorney here distinguishes this case from *Greco* and makes it more like *Clomon*. Moreover, based on the passage in *Clomon* that "[t]here will be few, *if any*, cases in which a mass-produced collection letter bearing the facsimile of an attorney's signature will comply with the restrictions imposed by § 1692e," the DC Circuit's reliance on the *Greco* disclaimer is error. *Clomon*, 988 F.2d at 1321. The *Greco* decision does not involve the signature of an attorney and the absence of an attorney signature is noted in *Greco* as a basis for distinction from *Clomon*. *Greco,* 412 F.3d 36 (2d Cir. 2005). "An attorney's imprimatur conveys authority and induces a consumer to act more quickly." *Pollard v. Law Office of Mandy L. Spaulding*, 766 F.3d 98, 106 (1st Cir. 2014). *Greco* involved attorney letterhead only making this case meaningfully distinguishable. The signature of an attorney implies and explicitly expresses a very high level of involvement similar to an attorney signature in court filings.

The *Greco* disclaimer is ineffective even pertaining to letters without an attorney signature. The decision has caused considerable confusion in this area of the law, has been challenged multiple times since being announced in 2005 and has been the subject of skepticism as to its merits by even the Second Circuit. Further, courts that have followed *Greco* often note the absence of an attorney signature from the collection letter as a way of distinguishing *Greco* from *Clomon*. The absence of an attorney signature in *Greco* and the reliance by subsequent

courts on such absence when holding in favor of the attorney debt collector should end the matter. Including an attorney signature in a form collection letter printed on law firm letterhead violates §1692e and its subsections.

Fifth, application of the least sophisticated consumer standards is a question of fact. This Court has held that when evaluating the tendency of language to deceive, the Commission should look *not* to the most sophisticated readers but rather to the least. *F. T. C. v. Standard Educ. Soc'y*, 1937, 302 U.S. 112, 116, 58 S.Ct. 113, 82 L.Ed. 141. A federal judge is one of the most sophisticated consumers and is not particularly "well-suited" to determine how a least-sophisticated consumer will interpret a collection letter sent by a law firm.

Sixth, the majority approach inappropriately relies on the isolated disclaimer in a vacuum and does not consider the impression on the least sophisticated consumer when viewing the letter as a whole. In doing so, similar to the *Greco* panel, the Majority ignores the unexplained contradiction presented by the attorney letterhead and the disclaimer. *Bartlett v. Heibl*, 128 F.3d 497 (7th 1997)(failure to explain a contradiction in a dunning letter is a violation)(Posner, J.)

Seventh, the holding misstates and misapplies 15 U.S.C. §1692e(5) which prohibits false, deceptive or misleading "threats to take *any action* that cannot legally be taken or that is not intended to be taken." The Panel incorrectly stated and applied the subsection positing that "the federal act *prohibits only threats to take legal action*; merely leaving open the possibility of attorney review that could lead to legal action does not fit the bill." *Jones v. Dufek*, 830 F.3d 523, 526 (D.C. Cir. 2016). The subsection prohibits threats to take *any action* not just legal

action. See *Gonzales v. Arrow Fin. Servs., LLC*, 660 F.3d 1055, 1064 (9th Cir. 2011)(false threat to report obsolete debts to credit bureaus violates §1692e(5)).

The decision below thus incorrectly decided the questions of whether application of the least sophisticated consumer standard is a question on law or fact; and whether a an attorney signature on a collection letter printed on law firm letterhead whereby the attorney admits to no meaningful involvement violates §1692e, § 1692e(3) or § 1692e(10); and whether the *Greco* disclaimer is sufficient to prevent violation of §1692e or any of its subsections when included in an attorney collection letter. Because the circuits are hopelessly divided over these important questions, this Court should grant certiorari to resolve the conflict and correct the decision below.

CONCLUSION

The petition for writ of certiorari should be granted.

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