No. 13-1151

In the United States Court of Appeals for the Fourth Circuit

DANA CLARK AND DAVID CLARK,
individually and on behalf of all others similarly situated,
Plaintiffs-Appellants,

v.

ABSOLUTE COLLECTION SERVICE INCORPORATED,
Defendant-Appellee.

On Appeal from the United States District Court
for the Eastern District of North Carolina

BRIEF FOR APPELLANTS

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INTRODUCTION

The Fair Debt Collection Practices Act (FDCPA) establishes basic consumer protections against overreaching by debt collectors. Among its core protections is the consumer's right to dispute a debt. Exercising that right triggers important obligations: The debt collector may no longer assume the debt is valid and must refrain from reporting it to credit bureaus without noting that it has been disputed.

This appeal presents a single question of statutory interpretation over which the courts have divided: By what methods may consumers communicate their disputes to debt collectors? The provision guaranteeing the right to "dispute the validity of the debt" does not say that such disputes must be in writing. The district court, however, read what it called an "inherent writing requirement" into the validity provision because *other* provisions of the Act require debt collectors to provide certain documentation only upon written notice by consumers.

That flawed reasoning is no basis to set aside the Act's plain language. To the contrary, the absence of an "in writing" requirement—especially given the presence of such language elsewhere in the Act—shows Congress wanted to allow oral disputes. Nor does the district court's approach make good policy. Allowing *some* debt collectors to blindly continue collecting debts they know to be disputed would effectively force *all* debt collectors to do so—setting off the very race to the bottom that Congress sought to prevent. The decision below should be reversed.

JURISDICTIONAL STATEMENT

The district court had subject-matter jurisdiction over the plaintiffs' FDCPA claims under 28 U.S.C. § 1331 and 15 U.S.C. § 1692k(d). The plaintiffs timely filed a notice of appeal on February 5, 2013 from the district court's final order of January 9, 2013. This court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUE

The FDCPA requires debt collectors to provide consumers with an initial notice of their rights and provides that "unless the consumer, within thirty days after receipt of the notice, disputes the validity of the debt, or any portion thereof, the debt will be assumed to be valid by the debt collector." 15 U.S.C. § 1692g(a)(3). Did the district court correctly conclude that the FDCPA imposes a writing requirement on consumers who seek to dispute the validity of their debts, or may consumers make such disputes orally?

STATEMENT OF THE CASE AND OF THE FACTS

A. Statutory and Regulatory Background[1]

Congress enacted the FDCPA in response to "abundant evidence of the use of abusive, deceptive, and unfair debt collection practices by many debt collectors," practices that Congress determined "contribute to the number of personal bankruptcies, to marital instability, to the loss of jobs, and to invasions of individual

[1] The relevant statutory provisions are set forth in an appendix to this brief.

privacy." 15 U.S.C. § 1692(a). The FDCPA seeks to remedy these problems, at once "protect[ing] consumers against debt collection abuses" and "insur[ing] that those debt collectors who refrain from using abusive debt collection practices are not competitively disadvantaged." *Id.* § 1692(e).

1. *Regulation of Oral and Written Communications.* To this end, the Act provides for detailed regulation of both written and oral communications between debt collectors and consumers, defining "communication" as "the conveying of information regarding a debt directly or indirectly to any person *through any medium*," *Id.* § 1692a(2) (emphasis added). For example, the Act prohibits "[t]he use of obscene or profane language or language the natural consequence of which is to abuse the *hearer or reader*," *id.* § 1692d(2) (emphasis added), and forbids debt collectors from "[c]ausing a telephone to ring or engaging any person in telephone conversation repeatedly or continuously with intent to annoy, abuse, or harass," *id.* § 1692d(5).

2. *Strict Liability and the Bona Fide Error Defense.* In designing this regulatory scheme, Congress recognized that debt collectors have a uniquely powerful incentive to engage in abusive practices. "[I]ndependent debt collectors," Congress concluded, were "the prime source of egregious collection practices." S. Rep. 95-382, at 2 (1977), *reprinted in* 1977 U.S.C.C.A.N. 1695, 1696. Congress was particularly sensitive to the fact that, absent federal regulation, these independent

collectors would continue to have a strong incentive to profit from unscrupulous collection practices. The invisible hand of the market was an insufficient check because independent debt collectors work for their creditor-clients, not consumers. Unlike other businesses that interact with consumers, debt collectors are not "restrained by the desire to protect [consumers'] good will" or "the consumer's opinion of them." *Id.* Moreover, "[c]ollection agencies generally operate on a 50-percent commission, and this has too often created the incentive to collect by any means." *Id.*

Consequently, the Act contains no general intent requirement. Instead, it imposes strict liability on debt collectors, while providing a complete defense—the "bona fide error" defense—to those debt collectors who "show[] by a preponderance of evidence that the violation was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid any such error." 15 U.S.C. § 1692k(c). Thus, while the Act prohibits debt collectors from attempting to collect any amount "not expressly authorized by the agreement creating the debt or permitted by law," *id.* § 1692f(1), a collector may avoid liability by maintaining procedures designed to avoid collecting invalid debts.

3. *Validation Procedures.* Given this "bona fide error" defense, it is crucial for debt collectors to know under what circumstances they can reasonably

assume that a debt is valid. The validation procedures in § 1692g perform that function. They provide that, either "in the initial communication" or "within five days after the initial communication with a consumer," a debt collector must "send the consumer a written notice" that contains "the amount of the debt" and "the name of the creditor to whom the debt is owed." *Id.* § 1692g(a)(1) & (2). The remaining provisions articulate a set of rights that the debt collector must disclose to the consumer. If acted upon, each of these rights gives rise to a corresponding duty in the debt collector:

- **The Validity Provision:** "unless the consumer, within thirty days after receipt of the notice, disputes the validity of the debt, or any portion thereof, the debt will be assumed to be valid by the debt collector." *Id.* § 1692g(a)(3).
- **The Verification Provision:** "if the consumer notifies the debt collector in writing within the thirty-day period that the debt, or any portion thereof, is disputed, the debt collector will obtain verification of the debt or a copy of a judgment against the consumer and a copy of such verification or judgment will be mailed to the consumer by the debt collector." *Id.* § 1692g(a)(4).
- **The Creditor-Information Provision:** "upon the consumer's written request within the thirty-day period, the debt collector will provide the

consumer with the name and address of the original creditor, if different from the current creditor." *Id.* § 1692g(a)(5).

The next two parts clarify the effects of these actions. The first prohibits debt collectors who have received written notifications under either the verification provision or the creditor-information provision from continuing to collect the debts until the required documentation has been mailed to the consumer. *Id.* § 1692g(b). The second part clarifies the effect of the validity provision, providing that "[t]he failure of a consumer to dispute the validity of a debt under this section may not be construed by any court as an admission of liability by the consumer." *Id.* § 1692g(c).

B. Facts and Proceedings Below

David and Dana Clark, husband and wife, incurred debt to provide medical treatment for their daughter, Shannon Clark, at WakeMed, a healthcare facility in Raleigh, North Carolina. JA-6. Like many Americans who have inadequate health insurance and incur medical expenses, they later found themselves struggling to pay this debt. *Id.*[2]

After the Clarks were unable to pay the debt, WakeMed referred the debt to Absolute Collection Service (ACS), a third-party debt collector. *Id.* ACS sent

[2] *See* Himmelstein et al, *Medical Bankruptcy in the United States*, 122 Am. J. Med. 741, 741, 744 (2009) (62.1% of all bankruptcies in the United States are related to medical debt); Centers for Disease Control, *Financial Burden of Medical Care: Early Release of Estimates from the National Health Interview Survey* at 1 (2012) (one in five American families struggle to pay medical debt; one in ten are unable to pay medical debt).

separate letters to both David and Dana Clark at their home in Raleigh. Both demand letters included a disclosure statement that read:

> ALL PORTIONS OF THIS CLAIM SHALL BE ASSUMED VALID UNLESS DISPUTED IN WRITING WITHIN THIRTY (30) DAYS; IN WHICH CASE, VERIFICATION OF THE DEBT OR A COPY OF THE JUDGMENT WILL BE PROVIDED TO YOU. IF THE ORIGINAL CREDITOR IS DIFFERENT FROM THE ABOVE NAMED CREDITOR, THE NAME OF THE ORIGINAL CREDITOR WILL BE PROVIDED UPON REQUEST.

JA-11; JA-12. The letters also invited Dana and David to "call our office at 919-755-3900 to charge your balance to either your check card, MasterCard or Visa account." *Id.*

The Clarks sued ACS. They alleged that, by stating that the debts would be "assumed valid unless disputed in writing," ACS violated their right to make an oral dispute under the FDCPA's validity provision and employed a "false representation or deceptive means to collect or attempt to collect any debt," in violation of 15 U.S.C. § 1692e(10). JA-9. (After this case was filed, ACS "underwent a corporate name change that was adopted as of June 29, 2012 and is now named FKAACS, Incorporated." JA-14. For simplicity's sake, this brief refers to the defendant as ACS throughout.)

ACS moved to dismiss the case, contending that "[t]here is an inherent requirement that the § 1692a(3) dispute be in writing." JA-13.

C. The District Court's Decision

The district court (Boyle, *J.*) granted ACS's motion to dismiss. JA-23. Despite the absence of any express writing requirement in the FDCPA's validity provision, the court concluded that the statute contains an "inherent writing requirement." JA-25. The court observed that there was no binding precedent on point in the Fourth Circuit, and that the two circuits that have confronted the issue are divided. In *Graziano v. Harrison*, the Third Circuit concluded that the validity provision "must be read to require that a dispute . . . be in writing," based on "strong reasons to prefer that a dispute of a debt collection be in writing." 950 F.2d 107, 112 (3d Cir. 1991). By contrast, in *Camacho v. Bridgeport Financial, Inc.*, the Ninth Circuit rejected *Graziano*, noting that the validity provision's plain language imposes no writing requirement and that oral disputes trigger several meaningful protections under the Act. 430 F.3d 1078, 1081-82 (9th Cir. 2005). The district court here sided with *Graziano*. It reasoned that a writing requirement "does not impose an additional burden on consumers," that "an oral dispute of a debt leaves the consumer with fewer protections" than a written dispute, and that consumers might be confused if informed that both means of dispute are available. JA-26.

SUMMARY OF ARGUMENT

I.A. Statutory construction begins with the plain language. Except in extraordinary circumstances, it ends there too. This case presents no extraordinary

circumstances. The FDCPA says that a debt collector may assume that a debt is valid "unless the consumer . . . disputes the validity of the debt." 15 U.S.C. § 1692g(a)(3). This validity provision in no way requires a written communication to dispute a debt, and debt collectors violate the Act when they take it upon themselves to impose such a requirement.

B. Context confirms this plain meaning. Provisions immediately following the validity provision require that a consumer dispute the debt "in writing" (to obtain verification of the debt or a copy of a judgment) and submit a "written request" (to obtain the name and address of the original creditor). *Id.* § 1692g(a)(4) & (5). Congress thus knew perfectly well how to include writing requirements when it wanted to and chose *not* to include such a limitation in the validity provision. Indeed, the FDCPA creates a detailed statutory regime directed specifically at oral and written communications between debt collectors and consumers, regulating everything from the times during which debt collectors can call to the information they may include on the outside of their envelopes. In such a regime, it is unlikely that Congress intended, but simply forgot, to include a writing requirement in the validity provision.

II.A. In *Graziano,* the Third Circuit acknowledged that the validity provision's plain meaning includes no writing requirement. 950 F.2d at 112. The court nevertheless concluded that such a requirement should be inferred because

the FDCPA would otherwise be "incoherent." *Id.* That conclusion depends upon reading the validity provision as empty language, providing no consumer protections beyond those already provided in the verification provision. But that reading is contrary to the firmly established rule that courts must read statutes, so far as possible, so that every provision has independent legal effect.

B. Here, the court need not struggle to find the independent legal effect. Oral disputes trigger three important protections under the Act. *First*, when a consumer orally disputes a debt, the debt collector may not report the debt to credit bureaus or other third parties without indicating that the debt has been disputed. *Second*, a debt collector may not apply a payment received from a consumer to a debt that has been orally disputed. *Finally*, as the validity provision makes clear, a debt collector is no longer entitled to presume that a debt is valid if it has been disputed. This provision is important in light of the Act's strict-liability regime and "bona fide error" defense, which allows debt collectors to escape liability for errors if they maintain "procedures reasonably adapted to avoid any such error." 15 U.S.C. § 1692k(c). Although the validity provision imposes no affirmative obligation to verify the debt, a debt collector who does nothing in response to an oral dispute and continues collecting a debt may not rely on the bona fide error defense if the debt ultimately proves invalid.

C. The court below recognized that *Graziano* rests on a false premise, and that oral disputes trigger real protections. JA-26. It nevertheless followed *Graziano*'s holding, citing the danger of consumer confusion. *Id.* The absurdity doctrine, however, allows courts to move beyond the plain language only when necessary to avoid an outcome so shocking that no reasonable legislator could have wanted it. It does not authorize courts to tinker with legislation simply because they might consider it unwise or even unreasonable. As numerous district courts and the Ninth Circuit in *Camacho* have noted, once a court recognizes that oral disputes trigger substantive consumer protections under the Act, any basis for imposing a writing requirement evaporates. 430 F.3d at 1082.

III.A. Far from protecting consumers from confusion, imposing a writing requirement would undermine the Act's basic purposes. A writing requirement would impose a substantial burden on many consumers—especially for the least sophisticated consumers at whom the Act's protections are aimed.

B. The district court's decision would also undermine the Act's goal of protecting scrupulous debt collectors from competitive disadvantage. Allowing debt collectors to impose a writing requirement on consumers would set up a perverse economic incentive: Debt collectors would benefit from sticking their heads in the sand and doing nothing to investigate invalid debts disputed over the phone. This would set off a race to the bottom, resulting in a proliferation of the very practices

the Act was designed to stop. The policies underlying the Act, therefore, require that this Court give effect to the statute's plain language and reject the imposition of an extratextual "inherent writing requirement."

STANDARD OF REVIEW

The district court's decision to grant a motion to dismiss is reviewed *de novo*. *Giarratano v. Johnson*, 521 F.3d 298, 302 (4th Cir. 2008).

ARGUMENT

I. THE FDCPA PROHIBITS DEBT COLLECTORS FROM REQUIRING THAT CONSUMERS DISPUTE THE VALIDITY OF DEBTS IN WRITING.

A. The Validity Provision's Plain Language Allows Oral Disputes.

Here, as in all statutory-construction cases, "the beginning point must be the language of the statute, and when a statute speaks with clarity to an issue judicial inquiry into the statute's meaning, in all but the most extraordinary circumstance, is finished." *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 475 (1992). The FDCPA's validity provision states that a debt collector may assume that a debt is valid "unless the consumer . . . disputes the validity of the debt" within thirty days of receiving notice. 15 U.S.C. § 1692g(a)(3). The provision's plain language makes clear that any timely dispute—however it is conveyed—lifts the presumption of validity. It speaks only of "disputes"—a term whose "ordinary usage . . . does not contemplate a writing. " *Brady v. Credit Recovery Co.*, 160 F.3d 64, 66 (1st Cir. 1998).

Indeed, insofar as "dispute" means the back-and-forth of argument or debate, that meaning encompasses primarily *oral* communication. As an example of the term's usage, one dictionary offers "an issue that was disputed at the national convention." *American Heritage Dictionary of the English Language* (5th ed. 2011). Few would assume that this describes an angry exchange of letters among silent delegates. Because the validity provision contains no limitation on the medium of "disputes," and the term encompasses both oral and written communication, the provision imposes no writing requirement. *Compare Executive Fin. Servs., Inc. v. Garrison*, 722 F.2d 417, 419-20 (8th Cir. 1983) (language requiring that notice "shall be *sent*" suggested the legislature intended written rather than oral notice).

B. Because Other FDCPA Provisions Include Writing Requirements, the Absence of Such Language Shows that Congress Intended to Allow Oral Disputes.

To the extent that it relies on the actual language of the FDCPA, the Third Circuit's decision in *Graziano*, on which the district court relied, gets things exactly backwards. Its reasoning—that the validity provision has an *unexpressed* writing requirement because two neighboring provisions have *express* writing requirements, 950 F.2d at 112—upends a venerable rule of statutory interpretation. Under the "negative implication canon" or "*expressio unius*" principle, "[w]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally

and purposely in the disparate inclusion or exclusion." *Gozlon-Peretz v. United States*, 498 U.S. 395, 404-05 (1991). Because Congress included a writing requirement in the verification and creditor-information provisions but omitted such a requirement from the validity provision, there is a strong inference that Congress intended to allow oral disputes to lift the presumption of validity—precisely the opposite of the inference drawn by the Third Circuit.

The presumption that Congress said what it meant is even stronger where Congress has established a detailed statutory regime, as it has here. *See* Scalia & Garner, *Reading Law: The Interpretation of Legal Texts* 108 (2012). That is especially so because the FDCPA is directed at the *manner of communications* between debt collectors and consumers, and plainly encompasses oral communications. For example, the Act regulates the frequency of phone calls, *id.* § 1692d(5), the hours during which communications can occur, *id.* § 1692c(a)(2), and the places where a debt collector may contact a consumer, *id.* § 1692c(a)(3). And it provides a specific script for conversations with third parties, indicating that certain information can be provided only "if expressly requested." *Id.* § 1692b(1). These provisions never specifically indicate that they encompass oral communications, but they obviously do.

Indeed, the FDCPA establishes a default rule of interpretation on this very point: It defines "communication" as "the conveying of information regarding a

debt directly or indirectly to any person *through any medium*," 15 U.S.C. § 1692a(2) (emphasis added), making clear that the Act's provisions should be read to apply equally to oral communications unless otherwise specified.

It would also be strange to think that courts would need to invent an "inherent writing requirement" in the validity provision because Congress, elsewhere in the FDCPA, had no problem imposing explicit, detailed restrictions on written communications. Outside of § 1692g, four separate provisions refer to communications that are "written" or "in writing."[3]

Given the specificity with which the Act regulates both oral and written communication, it is doubtful that Congress simply forgot to include a writing requirement in the validity provision. Far more likely, Congress intended the validity provision to apply to disputes made "through any medium"—the FDCPA's default rule. *Id.* § 1692a(2). In this respect, it resembles other provisions in which liability turns on the debt collector's actual or constructive knowledge, without

[3] *See id.* § 1692c(c) (prohibiting communications where consumer notifies a "debt collector in writing that the consumer refuses to pay a debt or that the consumer wishes the debt collector to cease further communication with the consumer"); *id.* § 1692e(9) (prohibiting "written communications" that mislead consumers as to their source); *id.* § 1692e(11) (requiring disclosure that collector is attempting to collect a debt "in the initial written communication"); *id.* § 1692f(2) (prohibiting collectors from accepting postdated checks absent notifications "in writing"); *see also id.* § 1692b(4) & (5) (prohibiting "communicat[ing] by post card" or "us[ing] any language or symbol on any envelope or in the contents of any communication effected by the mails or telegram that indicates that the debt collector is in the debt collection business or that the communication relates to the collection of a debt.").

reference to the means by which the knowledge is acquired. For example debt collectors may not communicate with consumers at "a time or place *known or which should be known* to be inconvenient to the consumer." *Id.* § 1692c(a)(1) (emphasis added); *see also id.* § 1692c(a)(2) & (3). A debt collector who continues calling even though the consumer repeatedly informs the debt collector that the time or place is inconvenient cannot escape liability simply by insisting that the consumer put the request in writing. *See Fox v. Citicorp Credit Servs., Inc.*, 15 F.3d 1507, 1516 (9th Cir. 1994); *cf.* FTC Staff Commentary on the FDCPA, § 805(a)-3, 53 Fed. Reg. 50097, 50104 (Dec. 13, 1988) ("If a debt collector learns that a consumer is represented by an attorney in connection with the debt, even if not formally notified of this fact, the debt collector must contact only the attorney and must not contact the consumer."). By the same token, a debt collector cannot continue to assume a debt is valid—even though the consumer has disputed the debt—simply because the consumer has not done so in writing.

II. THE STATUTE'S PLAIN MEANING IS NOT ABSURD.

The Third Circuit in *Graziano* acknowledged that the validity provision imposes no writing requirement but rejected the statute's plain meaning on the ground that it would result in an "incoherent . . . system." 950 F.2d at 112. "[U]pon the debtor's non-written dispute," the court reasoned, "the debt collector would be without any statutory ground for assuming that the debt was valid, but

nevertheless would not be required to verify the debt or to advise the debtor of the identity of the original creditor and would be permitted to continue debt collection efforts." *Id.*

Elementary rules of statutory construction, however, cut against any reading that would reduce the validity provision to empty language, and the statute itself does not require this disfavored result. In fact, as the court below recognized, oral disputes trigger several consumer protections under the FDCPA. The incoherence that *Graziano* saw in the Act, therefore, was entirely of the court's own making and provides no basis for departing from the statute's plain language.

A. The Court Should Reject a Reading of the Validity Provision That Would Render it Meaningless.

It is "a cardinal principle of statutory construction that [courts] must give effect, if possible, to every clause and word of a statute." *Williams v. Taylor*, 529 U.S. 362, 404 (2000) (quotation marks omitted). If at all possible, courts should avoid an interpretation that renders any "clause, sentence, or word . . . superfluous, void, or insignificant." *Duncan v. Walker*, 533 U.S. 167, 174 (2001); Scalia & Garner, *Reading Law*, at 176.

Graziano twice violated this principle. It started from the assumption that the validity provision is effectively an ink smudge—that it imposes no substantive obligations on collectors, and confers no rights on consumers. *See* 950 F.2d at 112. To avoid this result, the court then read a writing requirement into the validity

provision so that the provision would at least have some effect—albeit an effect entirely redundant of the verification provision that follows it. *Id.*

There is no reason why this Court need wander down such a winding path. Subsections (a)(3) through (a)(5) provide a coherent structure, under which different actions by consumers trigger different obligations in debt collectors. Each of these sets of actions and obligations is distinct. A consumer could make a "written request" under the creditor-information provision without also making a written dispute under the verification provision, with the result that the debt collector would be required to supply the "name and address of the original creditor" but not a "verification of a debt or a copy of the judgment." Likewise, a consumer could make an oral dispute under the validity provision without also submitting a written request under the verification provision, with the result that the debt collector could no longer assume the debt's validity, but would not have to mail the consumer a verification. The provisions, in other words, have independent legal effect.

There is nothing absurd about the two-tiered framework of consumer protections created by the validity and verification provisions. Congress sensibly concluded "that some consumers who wish to dispute an alleged debt may lack the ability or wherewithal to do so in writing." *Ong v. Am. Collections Enter.*, 1999 WL 51816, at *3 (E.D.N.Y. 1999). Consequently, Congress "accord[ed] these oral

debt-disputers some, but not all, of the protections accorded those who dispute their debts in writing," *id.*, while requiring written notification before triggering the "formal" obligations to provide documentation contained in the verification provision, *see In re Sanchez*, 173 F. Supp. 2d 1029, 1034 (N.D. Cal. 2001). As one court has explained, oral disputes "provide an informal red flag to a debt collector so that it might quickly and inexpensively check the validity of the debt without triggering the formal requirements" of the verification and creditor-information provisions. *Id.*; *see also* Griffith, *The Plain Meaning of Language and the Element of Fairness in the Fair Debt Collection Practices Act*, 27 U. Tol. L. Rev. 13, 50 (1995) ("[T]he absence of the writing requirement may have been intended only to give the consumer the flexibility of raising a question about the debt immediately, without imposing any corresponding obligation on the collector to do anything.").

The contrast between the validity provision, on the one hand, and the verification and creditor-information provisions, on the other, reveals a parallelism between consumers' and debt collectors' obligations. A dispute by any means—oral or written—lifts the presumption of validity, requiring that the debt collector carry out some further investigation to invoke the bona fide error defense should the debt prove invalid. *See id.* Before imposing on debt collectors an affirmative obligation to provide documentation to consumers, however, the Act imposes a similar requirement on consumers, by mandating a written request.

The provisions that follow are consistent with this parallel structure. Section 1692g(b) requires debt collectors who have received documentation requests from consumers to stop collection efforts until the collector has sent the required documents. That subsection clarifies the collectors' obligations under the verification and creditor-information provisions, and like those provisions it expressly applies only when "the consumer notifies the debt collector in writing." 15 U.S.C. § 1692g(b). Section 1692g(c) provides that "[t]he failure of a consumer to dispute the validity of a debt under this section may not be construed by any court as an admission of liability by the consumer." That subsection clarifies the effect of a dispute under the validity provision, and like the validity provision it makes no mention of a writing requirement. The fact that the Act consistently refers to a writing requirement in connection with the documentation provisions, and consistently omits any such requirement in connection with the validity provision, supports a strong inference that Congress intended this omission.

Far from curing the Act of any "incoherence," *Graziano*'s reading produces an incoherence of its own. Although *Graziano* found that the validity provision contains an implicit writing requirement, so that debt collectors do not violate the Act when they make this requirement explicit, the Third Circuit has not held that debt collectors are required to do so. A notice that merely tracks the statutory language, without mentioning a writing requirement, satisfies the debt collector's

disclosure obligations. *Caprio v. Healthcare Revenue Recovery Group, LLC*, 709 F.3d 142, 149 (3d Cir. 2013); *Wilson v. Quadramed Corp.*, 225 F.3d 350, 352 (3d Cir. 2000); *Edwards v. Powell, Rogers & Speaks, Inc.*, 2007 WL 2119214, at *4 (W.D. Pa. 2007). *Graziano* has thus led the Third Circuit to produce a strange regime under which consumers are required to dispute their debts in writing, but debt collectors are never required to *tell* consumers that they are required to dispute their debts in writing. Faced with a disclosure that merely indicates that the debt will be assumed valid unless the consumer disputes it within thirty days, it is hard to imagine how *any* consumer who is not a lawyer well-versed in Third Circuit FDCPA case law—much less the "least sophisticated consumer" that the Act is designed to protect—would realize that any dispute must be in writing.

B. Oral Disputes Trigger Important Protections under the Act.

Principles of statutory construction compel this Court to read the validity provision, so far as possible, so that it has legal effect. The Court need not strain to do so. Two other provisions of the Act provide obligations that arise whenever a debt is "disputed." Like the validity provision, these provisions say nothing about a writing requirement and are thus triggered whenever a consumer makes an oral dispute under the validity provision. *Camacho*, 430 F.3d at 1082. Additionally, the validity provision by its own terms regulates when a debt collector can assume that a debt is valid. This, in turn, affects the availability of the Act's bona fide error

defense and thus the extent to which debt collectors will be held liable for violating the Act's core prohibition on collecting invalid debts.

1. *Communications with third parties.* The FDCPA prohibits debt collectors from "[c]ommunicating or threatening to communicate to any person credit information which is known or which should be known to be false, including the failure to communicate that a disputed debt is disputed." 15 U.S.C. § 1692e(8). Given the role that information held by credit-reporting bureaus has in determining consumers' access to housing, financing, and employment, this protection is crucial. Like the validity provision, moreover, this provision does not specify the means by which the consumer disputes the debt, and courts have rejected the proposition that disputes must be in writing.

In *Brady v. Credit Recovery Co., Inc.*, the defendant argued that it did not violate this provision, despite its failure to note that the debt was disputed, because the consumer failed to dispute the debt in writing. 160 F. 3d 64, 66 (1st Cir. 1998). The First Circuit rejected this argument. *Id.* at 67. It concluded that the "knows or should know" standard imposes no limitation on the means by which the debt collector acquires knowledge. *Id.* It further found that it was "logical" to create a statutory system in which oral disputes produce the "limited effect" of preventing debt collectors from communicating the debt without noting that it was disputed,

while requiring written disputes to trigger the debt collector's obligation to provide documentation. *Id.* at 66, 67; *see also Camacho*, 430 F.3d at 1082.

The Act's provision regarding communications with third parties also works in concert with a similar provision in the Fair Credit Reporting Act (which, like the FDCPA, is a subchapter of the Consumer Credit Protection Act, 15 U.S.C. §§ 1601-1693r). Under that provision, if a debt collector "is notified that any information relating to a debt . . . may be fraudulent or may be the result of identity theft," the debt collector must inform its creditor clients of the dispute. *Id.* § 1681m(g). This provision—like the FDCPA's provision regarding communication with third parties about "disputed" debts—has no writing requirement, and imposes real obligations on debt collectors that are triggered by a consumer's oral dispute.

2. *Multiple debts*. The Act again refers to "disputed" debts—again without any mention of a writing requirement—in a provision dealing with multiple debts. The provision states: "If any consumer owes multiple debts and makes any single payment to any debt collector with respect to such debts, such debt collector may not apply such payment to any debt which is disputed by the consumer . . . ." *Id.* § 1692h. An oral dispute, therefore, prevents a debt collector from using a payment to satisfy a disputed debt. *Camacho*, 430 F.3d at 1082. It

thereby protects consumers against having their money siphoned off to pay off invalid debts.

3. Bona fide error defense. The FDCPA imposes strict liability on debt collectors that attempt to collect invalid debts. 15 U.S.C. § 1692f(1). The Act shields them from liability, however, if they can establish that "the violation was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid any such error," 15 U.S.C. § 1692k(c); *see Randolph v. IMBS, Inc.*, 368 F.3d 726, 730 (7th Cir. 2004). By allowing debt collectors to escape liability if they can show that their "mistake [was] objectively reasonable," *Edwards v. Niagara Credit Solutions, Inc.*, 584 F.3d 1350, 1353 (11th Cir. 2009), the defense provides an incentive for collectors to "maintain procedures reasonably adapted to avoid readily discoverable errors," *Owen v. I.C. Sys., Inc.*, 629 F.3d 1263, 1276-77 (11th Cir. 2011).

The validity provision buttresses this defense and gives meaning to the "procedures reasonably adapted to avoid . . . error." *Id.* If the consumer does not dispute the debt, then the debt collector may assume it valid. But if the consumer disputes the debt, the presumption disappears and the debt collector must find "some evidence, beyond a mere assumption, that the debt is valid" to avail itself of the bona fide error defense, even though it need not actually supply a verification to the consumer. *See In re Sanchez*, 173 F. Supp. 2d at 1034.

C. Because Oral Disputes Trigger Real Protections, the Validity Provision Does Not Produce Absurd Results, and Courts Have No Basis for Adding a Writing Requirement.

The court below acknowledged that an oral dispute triggers protections under the Act but nevertheless concluded that the statute should be read to include an "inherent writing requirement" because "permit[ting] an oral dispute of a debt" would "leav[e] the consumer with fewer protections and in a potentially far more confusing station than if a writing is required as they navigate the interplay between the provisions of § 1692g." JA-26. In other words, the court was concerned that § 1692g's two-tiered structure, by allowing consumers to choose between written and oral disputes, might lead some consumers to make the wrong choice.

But courts shouldn't rewrite statutes simply because they object on policy grounds. Instead, under the absurdity doctrine, courts must follow the plain language unless doing so would lead to a result "so gross as to shock the general moral or common sense." *Ignacio v. United States*, 674 F.3d 252, 257-58 (4th Cir. 2012). True absurdity is "exceptionally rare." *Id.* at 257. The absurdity, in the classic formulation, must be "so monstrous, that all mankind would, without hesitation, unite in rejecting the application." *Sturges v. Crowninshield*, 17 U.S. 122, 203 (1819). The absurdity doctrine does *not* encompass apparent inconsistencies in the statutory text that result from legislative compromises among competing

interests groups. Manning, *The Absurdity Doctrine*, 116 Harv. L. Rev. 2387, 2423 (2003). Nor does the doctrine encompass legislative omissions that might strike courts as "odd," or as having resulted from an "unintentional drafting gap[s]." *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 565 (2005). When faced with mere oddities or gaps, courts must enforce the statute as written, leaving it "up to Congress . . . to fix it." *Id.*

The absence of a writing requirement in the FDCPA's validity provision is not even odd—let alone absurd. At bottom, Judge Boyle's concerns—that consumers might be confused or make bad choices in the face of the statutory scheme as written—are policy disagreements that have no place in statutory construction. Indeed, the district court offered no factual support for its assumption that allowing oral disputes would result in consumer confusion. Confirming this factual proposition would "require[] exactly the type of inquiry that Congress through empirical investigation and public hearings is empowered to conduct," but that lies far outside the realm of "judicial competence." *In re Forfeiture Hearing as to Caplin & Drysdale, Chartered*, 837 F.2d 637, 648-49 (4th Cir. 1988). And even if one assumed that the court's empirical premise were correct, that would still leave an additional determination: that some consumers, if given the opportunity to make an oral dispute, would unwisely give up the added protections they would have received had they made a written dispute. But it is at least as likely that some

consumers, if deprived of the opportunity to make an oral dispute, would make no dispute at all, thus abandoning *all* of the protections they otherwise would have received. What matters here is that it is *Congress*—not the courts—that has the "prerogative to balance [such] opposing interests," and it is Congress's unique "institutional competence" to do so that requires courts to give "deference to its policy determinations." *Salazar v. Buono*, 130 S. Ct. 1803, 1817 (2010).

The same point applies to *Graziano*'s argument that there are "strong reasons to prefer that a dispute of a debt collection be in writing" because written disputes create "a lasting record of the fact that the debt has been disputed." 950 F.2d at 112. To begin with, "call recording is routinely used" in the debt-collection industry, both to monitor the performance of agents and to protect debt collectors against claims of abusive conduct. *See* FTC, *Collecting Consumer Debts: The Challenges of Change, A Workshop Report* 46 (2009); *see also* ACA Int'l, *2010 Agency Benchmarking Survey* 33 (2010) (report by leading collection-industry trade group, documenting prevalence of call recording technology). *Graziano*'s evidentiary argument, moreover, proves too much. It is easy to imagine disagreements over whether a consumer has told a collector not to call at a certain time, for example, but that provision imposes no writing requirement. *See* 15 U.S.C. § 1692c(a)(1); *Fox*, 15 F.3d at 1516. And while writing requirements might provide a benefit in reducing a source of future conflicts, they also impose a burden, which falls disproportionately

on the least sophisticated consumers. *United States v. National Financial Services, Inc.*, 98 F.3d 131, 136 (4th Cir. 1996). Balancing these benefits and burdens is distinctly within the legislature's competence, and the courts should not disturb that legislative judgment simply because they believe that Congress has undervalued the benefits of written disputes or overestimated the burden on consumers. *See* Scalia, *A Matter of Interpretation: Federal Courts and the Law* 21 (1997) ("[T]o say that the legislature obviously misspoke is worlds away from saying that the legislature obviously overlegislated.").

Graziano's implicit appeal to the absurdity doctrine depends on its false premise that the validity provision does nothing. Once a court acknowledges that the provision triggers real rights for consumers and real obligations for debt collectors, the court has no basis for adding its own writing requirement. *See Camacho*, 430 F.3d at 1082. It is for this reason that district courts have repeatedly rejected *Graziano*—even during the approximately fifteen years when it was the only court of appeals case on the issue—and that "the weight of the authority from district courts" is against *Graziano*. *See Campbell v. Hall*, 624 F. Supp. 2d 991, 1000 (N.D. Ind. 2009) (citing cases).[4]

[4] *See, e.g., Vega v. Credit Bureau Enters.*, 2005 WL 711657, at *7 (E.D.N.Y. 2005); *In re Risk Mgmt. Alternatives, Inc.,*, 208 F.R.D. 493, 502 (S.D.N.Y. 2002); *Sambor v. Omnia Credit Servs., Inc.*, 183 F. Supp. 2d 1234, 1240 (D. Haw. 2002); *In re Sanchez*, 173 F. Supp. 2d at 1033; *Ong v. Am. Collections Enter.*, 1999 WL 51816; *Young v. Credit Bureau of Lockport, Inc.*, 1989 WL 79054 (W.D.N.Y. 1989).

III. A JUDICIALLY CREATED WRITING REQUIREMENT WOULD HARM BOTH CONSUMERS AND DEBT COLLECTORS.

ACS argued below that it had consumers' interests at heart when it imposed a writing requirement on consumers who seek to exercise their right to dispute the validity of a debt. Doc. No. 21, at 18-19. When the fox argues that it is looking out for the hens' best interests, a court should be wary. But here, it is both the hens *and* the foxes that would be harmed. Allowing debt collectors to impose a writing requirement would not only burden consumers (and particularly the least sophisticated consumers), but would also harm the collection industry itself. It would create an economic incentive for debt collectors to turn a blind eye to customer disputes and throw up hurdles for consumers to jump through, leaving scrupulous debt collectors at a competitive disadvantage—directly contrary to the FDCPA's express purpose. 15 U.S.C. § 1692(e).

A. A Writing Requirement Would Burden Consumers.

The court below speculated that reading an "inherent writing requirement" into the Act "does not impose an additional burden on consumers." JA-25. This proposition contradicts both common sense and empirical fact. Countless companies with which consumers interact maintain phone numbers—often toll-free and available 24 hours a day—specifically for billing inquiries. It would be incredible to contend that these companies incur significant costs to maintain these lines when the companies could instead require all inquiries be submitted in

writing, without any loss of convenience for consumers. Rather, companies provide such lines because they are responsive to consumer preferences and realize that many consumers prefer to communicate orally and would avoid doing business with companies that failed to provide this service.

In FDCPA cases, courts have consistently recognized that writing requirements impose a burden on consumers. For instance, courts have found debt collectors violate the Act when they include language implying that consumers wishing to verify their debts should call the collector. Because many consumers will take the opportunity to communicate orally if offered to them, this language tricks consumers into giving up their right to obtain verification documents. *See Ehrich v. I.C. Sys., Inc.*, 681 F. Supp. 2d 265, 273 (E.D.N.Y. 2010); *Withers v. Eveland*, 988 F. Supp. 942, 947 (E.D. Va. 1997). Similarly, courts have found that debt collectors violate the Act when they provide a lengthy list of "suitable documentation" that consumers may submit to request verification. Since consumers need not submit any documentation to trigger the debt collector's duty to provide verification, these lists overshadow the required disclosure, potentially dissuading consumers from exercising their rights under the verification provision by making the process appear far more burdensome than it is. *See, e.g.*, *Castro v. ARS Nat'l Servs., Inc.*, 2000 WL 264310, at *3 (S.D.N.Y. 2000). In both contexts, courts start from the presumption that providing written documentation is a burden for consumers.

Indeed, ACS itself appears to recognize that consumers value the convenience of oral communication. Although ACS's form collection letter requires that disputes be in writing, it concludes by inviting consumers to "call our office at 919-755-3900 to charge your balance to either your check card, MasterCard or Visa account." JA-11; JA-12. The defendant makes it easy for consumers to pay it by accepting payment orally, while imposing the more burdensome writing requirement to discourage disputes.

For the significant minority of Americans who lack the literacy and language skills required to draft a basic letter, this burden is not a mere inconvenience, but an impassable barrier. *See* Nat'l Institute for Literacy, *The State of Literacy in America: Estimates at the Local, State and National Levels* (1998). Additionally, the most recent data shows that nearly seven million Americans hold multiple jobs, with a majority of these people holding at least one full-time job in addition to another full or part-time job. U.S. Dept. of Labor, *Bureau of Labor Statistics, The Employment Situation—March 2013*, Table A-16 (April 4, 2013). Even if they have the capability, then, many people simply lack the time required to draft a formal dispute letter and carefully monitor the mail for a response.

These concerns have a special importance in the context of the FDCPA. In evaluating debt-collection practices, courts, including this one, typically apply the "least sophisticated-consumer standard." *Nat'l Fin. Servs.*, 98 F.3d at 136. This well-

established standard serves "to ensure that the FDCPA protects all consumers, the gullible as well as the shrewd." *Id.* Even if the writing requirement imposed a burden on only a relatively small percentage of consumers, therefore, it would still subvert the Act.

B. Allowing Debt Collectors to Impose a Writing Requirement Would Disadvantage Scrupulous Debt Collectors.

The FDCPA responds to a basic economic problem of misaligned incentives. In enacting the FDCPA, Congress recognized that, where market forces push most consumer businesses to be responsive to consumers' concerns, debt collectors' incentives run the other way. Since consumers play no role in selecting debt collectors, a debt collector has an incentive to employ abusive and harassing tactics if they will compel the consumer to pay—even if the underlying debt is ultimately invalid. *See* S. Rep. 95-382, at 2 (1977), *reprinted in* 1977 U.S.C.C.A.N. 1695, 1696.

These economic incentives drive some debt collectors to "press the boundaries of lawful conduct" to gain a "competitive advantage." *Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA*, 130 S. Ct. 1605, 1623 (2010). For instance, even in cases where debt collectors accurately state consumers' statutory rights under § 1692g, a debt collector may violate the Act by including additional language that "contradicts" or "overshadows" the required disclosures. *See, e.g.*, *Bartlett v. Heibl*, 128 F.3d 497, 500 (7th Cir. 1997). This Court has noted that "[s]creaming headlines, bright colors and huge lettering all point to a deliberate

policy on the part of the collector to evade the spirit of the notice statute, and mislead the debtor into disregarding the notice." *Miller v. Payco-General Am. Credits, Inc.*, 943 F.2d 482, 484 (4th Cir. 1991) (internal citations omitted).

ACS's actions here also point to a deliberate policy to push the limits of lawful conduct. In 2011, a federal district court in Georgia found that ACS violated its obligations under the FDCPA as a result of the same form letter at issue here. *Guerrero v. Absolute Collection Serv., Inc.*, 2011 WL 8183860, at *1-2 (N.D. Ga. 2011). There, as here, the court considered the argument that ACS's letter did not violate the FDCPA because the Act imposes an unexpressed writing requirement on consumers. *Id* at *3-4. The court, however, rejected this argument, and imposed a total award of statutory damages, attorney's fees, and costs in excess of $2,500. *Id.* at *5-6.

Given that a district court has already found that the very language at issue here violated the Act, ACS cannot claim that it did not realize that its disclosure would raise an issue. If ACS wished to avoid the liability imposed on it just a few years ago, it could have simply reproduced the language of the statute, which courts and the Federal Trade Commission have acknowledged would be sufficient to comply with the Act. *Camacho*, 430 F.3d at 1082; *Jang v. A.M. Miller & Assoc.*, 122 F.3d 480, 484 (7th Cir. 1997); *Nasca v. GC Servs. Ltd. P'ship*, 2002 WL 31040647, at *7 (S.D.N.Y. 2002). Similarly, ACS could have followed the advice of the

American Collectors Association, which recommends that its members provide a notice that tracks the language of the statute, with no writing requirement. *See McCabe v. Crawford & Co.*, 272 F. Supp. 2d 736, 749-50 (N.D. Ill. 2003). Alternatively, ACS could have copied a sample disclosure letter helpfully offered by Judge Posner, which likewise imposes no writing requirement on validity disputes. *Bartlett*, 128 F.3d at 503. Or ACS could have asked the FTC whether its letter complies with the Act, since the FTC, and now the Consumer Financial Protection Bureau, had authority to issue advisory opinions, and compliance with such opinions frees debt collectors of liability. 15 U.S.C. § 1692k(e). But over three decades, the FTC never suggested that debt collectors could impose a writing requirement on consumer disputes under the validity provision. Requesting an advisory opinion, moreover, would have eliminated the competitive advantage that ACS derives from disregarding industry practice and imposing a dispute-discouraging writing requirement on consumers.

This case, then, does not concern ACS's conduct alone. ACS's continued use of the same form letter indicates that ACS has determined that the benefit it receives from imposing a writing requirement—in discouraging consumers from exercising their rights under the statute—outweighs the known risk of liability under the FDCPA. In the face of continued uncertainty, other debt collectors will be compelled to follow suit, resulting in a "race to the bottom" that "driv[es]

ethical collectors"—those that fairly respond to consumer disputes and do not impose burdensome hurdles—"out of business." *Jerman*, 130 S. Ct. at 1623 (internal quotations omitted). This Court, therefore, should give effect to the plain language of the FDCPA by holding that the Act imposes no writing requirement on consumer disputes.

CONCLUSION

The district court's judgment should be reversed.

REQUEST FOR ORAL ARGUMENT

Because the case presents an important question of first impression in the Fourth Circuit, because two other circuits have reached divergent answers to that question, and because the district court's approach would have significant undesirable consequences for consumers and debt collectors alike, we believe that the Court's decisional process would be aided by oral argument.

Respectfully submitted,

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APPENDIX OF RELEVANT STATUTORY PROVISIONS

The Fair Debt Collection Practices Act, 15 U.S.C. § 1692 et seq., provides:

§ 1692g. Validation of debts

(a) Notice of debt; contents
Within five days after the initial communication with a consumer in connection with the collection of any debt, a debt collector shall, unless the following information is contained in the initial communication or the consumer has paid the debt, send the consumer a written notice containing--

(1) the amount of the debt;

(2) the name of the creditor to whom the debt is owed;

(3) a statement that unless the consumer, within thirty days after receipt of the notice, disputes the validity of the debt, or any portion thereof, the debt will be assumed to be valid by the debt collector;

(4) a statement that if the consumer notifies the debt collector in writing within the thirty-day period that the debt, or any portion thereof, is disputed, the debt collector will obtain verification of the debt or a copy of a judgment against the consumer and a copy of such verification or judgment will be mailed to the consumer by the debt collector; and

(5) a statement that, upon the consumer's written request within the thirty-day period, the debt collector will provide the consumer with the name and address of the original creditor, if different from the current creditor.

(b) Disputed debts
If the consumer notifies the debt collector in writing within the thirty-day period described in subsection (a) of this section that the debt, or any portion thereof, is disputed, or that the consumer requests the name and address of the original creditor, the debt collector shall cease collection of the debt, or any disputed portion thereof, until the debt collector obtains verification of the debt or a copy of a judgment, or the name and address of the original creditor, and a copy of such verification or judgment, or name and address of the original creditor, is mailed to the consumer by the debt collector. Collection activities and communications that do not otherwise violate this subchapter may continue during the 30-day period

referred to in subsection (a) of this section unless the consumer has notified the debt collector in writing that the debt, or any portion of the debt, is disputed or that the consumer requests the name and address of the original creditor. Any collection activities and communication during the 30-day period may not overshadow or be inconsistent with the disclosure of the consumer's right to dispute the debt or request the name and address of the original creditor.

(c) Admission of liability
The failure of a consumer to dispute the validity of a debt under this section may not be construed by any court as an admission of liability by the consumer.

* * *

§ 1692e. False or misleading representations

(8) Communicating or threatening to communicate to any person credit information which is known or which should be known to be false, including the failure to communicate that a disputed debt is disputed.

* * *

§ 1692h. Multiple debts

If any consumer owes multiple debts and makes any single payment to any debt collector with respect to such debts, such debt collector may not apply such payment to any debt which is disputed by the consumer and, where applicable, shall apply such payment in accordance with the consumer's directions.

* * *

§ 1692k. Civil liability

(c) Intent
A debt collector may not be held liable in any action brought under this subchapter if the debt collector shows by a preponderance of evidence that the violation was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid any such error

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitations of Federal Rule of Appellate Procedure 32(a)(7)(B) because the brief (as indicated by word processing program, Microsoft Word) contains 8,329 words, exclusive of the portions excluded by Rule 32(a)(7)(B)(iii). I further certify that this brief complies with the typeface requirements of Rule 32(a)(5) and type style requirements of Rule 32(a)(6) because this brief has been prepared in the proportionally spaced typeface of 14-point Baskerville.

/s/ Deepak Gupta

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April 17, 2013

CERTIFICATE OF SERVICE

I hereby certify that on this date I am causing this brief to be filed electronically via this Court's CM/ECF system, which will automatically serve the following counsel of record:

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