Case No. 10-80234

UNITED STATE COURT OF APPEALS

FOR THE

NINTH CIRCUIT

MICHAEL P. KOBY, an individual; MICHAEL SIMMONS, an individual; JONATHAN W. SUPLER, an individual; on behalf of themselves and all others similarly situated, Respondents-Plaintiffs, vs. ARS NATIONAL SERVICES, INC., a California Corporation; Petitioner-Defendant, and JOHN AND JANE DOES 1 through 25 inclusive, Defendant.	On Petition for Permission to Appeal under 28 U.S.C. §1292(b) and Fed. R. App. P. 5 Order of the United States District Court for the Southern District of California entered in Case 09cv0780 on March 29, 2010 and amended on July 27, 2010 and December 23, 2010.

RESPONDENTS-PLAINTIFFS'
ANSWER IN OPPOSITION
TO PETITIONER-DEFENDANT'S PETITION FOR
PERMISSION TO APPEAL PURSUANT TO 28 U.S.C. §1292(b)

Attorneys for Respondents-Plaintiffs, Michael K. Koby, Michael Simmons, and Jonathan W. Supler

PHILIP D. STERN, ESQ.
On the Brief
PHILIP D. STERN & ASSOCIATES, LLC
697 Valley Street, Suite 2d
Maplewood, NJ 07040
Telephone: (973) 379-7500
Facsimile: (973) 532-0866
pstern@philipstern.com

ROBERT E. SCHROTH, SR, ESQ.
ROBERT E. SCHROTH, JR, ESQ.
SCHROTH & SCHROTH
2044 First Avenue, Suite 200
San Diego, CA 92101-2079
Telephone: (619) 233-7521
Facsimile: (619) 233-4516
robschrothesq@sbcglobal.net

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Respondents-Plaintiffs, Michael P. Koby, Michael Simmons, and Jonathan W. Supler, pursuant to Fed. R. App. P. 5(b)(2), oppose the Petition for Permission to Appeal and respectfully show:

SUMMARY OF THE ARGUMENT

There is nothing peculiar about this case which justifies an appeal now. There is no conflict amongst the circuits concerning the controlling law and virtually no disagreement among the districts. The issues are neither novel nor complex. Furthermore, there is little likelihood that an interlocutory appeal could materially advance the termination of this action. Thus, there is no jurisdiction for an interlocutory appeal. Indeed, if this case were appropriate for an interlocutory appeal, then every denial of a motion for judgment on the pleadings should be appealable.

The controlling law involves the application and interpretation of two sections in the Fair Debt Collection Practices Act ("FDCPA" or "Act"), 15 U.S.C. §1692 et seq. In particular, 15 U.S.C. §1692d(6) ("*D(6)*") and 15 U.S.C. §1692e(11) ("*E(11)*") as they relate to voice messages left by debt collectors when placing telephone calls regarding the collection of debts.

The lower court's ruling reflects the complete unanimity among all federal courts as to both the application of *D(6)* and what must be disclosed to satisfy that section. There is also complete unanimity rejecting Petitioner's arguments

concerning consumer privacy and constitutional commercial speech.

As to the *E(11)* claims, there are dozens of consistently decided cases and just one unreported decision from the Western District of Oklahoma which, while supporting Petitioner's argument, has been repeatedly rejected and never followed. Although that opinion represents the only aberration among a well-developed body of law, it did not address – let alone undermine – the universal interpretation and application of *D(6)* to voice messages which "impose[s] substantially the same requirements" as *E(11)*. *Beeders v. Gulf Coast Collection Bureau, Inc.*, 809-CV-00458-EAK-AEP, 2010 WL 2696404 (M.D. Fla. July 6, 2010). Because a single violation is sufficient to establish liability under the FDCPA, unless this Court rejects all existing precedents as to all issues, resolution of any individual issue would be largely an academic exercise since Respondents will still be able to continue to litigate the surviving claims and, consequently, there would be no judicial economy from an interlocutory appeal.

Finally, Petitioner's constitutional arguments triggered the application of Fed. R. Civ. P. 5.1, but Petitioner never complied. Furthermore, Petitioner has yet to comply with Fed. R. App. P. 44(a). Thus, both on the merits and as a result of Petitioner's failure to notify the Attorney General of its constitutional challenge, the Petition should be denied.

THE RELIEF SOUGHT

The Petition for permission to appeal should be denied. If, however, the Court grants permission, then Respondents should be deemed to cross-petition with respect to the district court's dismissal of Mr. Simmons' *E(11)* claim.

THE REASONS WHY THE APPEAL SHOULD NOT BE ALLOWED AND IS NOT AUTHORIZED BY A STATUTE OR RULE

A. Introduction

As to each substantive issue, the controlling law is so firmly established that there does not exist significant grounds to conclude that there is a difference of opinion. Furthermore, in light of the FDCPA's single-violation rule, there is no basis to conclude that there would be any judicial economy from an interlocutory appeal unless this Court were to reject all precedents as to all issues.

Nevertheless, under 28 U.S.C. §1292(b), Petitioner seeks permission to appeal the district court's decision on its Fed. R. Civ. P. 12(c) motion for judgment on the pleadings.

B. Standard of Review

"Section 1292(b) is meant to be used sparingly, and appeals under it are, accordingly, hen's-teeth rare." *Semeneck v. Ahlin*, 109-CV-00566-SMS(PC), 2010 WL 2510996 (E.D. Cal. June 17, 2010) quoting *Camacho v. P. R. Ports Auth.*, 369 F.3d 570, 573 (1st Cir. 2004). The two-stage process begins in the district court

which must "be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation." 28 U.S.C. §1292(b); *see*, *In re Cement Antitrust Litigation*, 673 F.2d 1020, 1026 (9th Cir. 1981) *aff'd sub nom. Arizona v. Ash Grove Cement Co.*, 459 U.S. 1190 (1983). Next, the Court of Appeals, in its discretion, must grant permission to appeal. 28 U.S.C. §1292(b).

This Court has recognized that "[f]ederal courts 'have only the power that is authorized by Article III of the Constitution and the statutes enacted by Congress pursuant thereto.'" *Couch v. Telescope Inc.*, 611 F.3d 629, 632 (9th Cir. 2010) quoting *Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 541 (1986). Thus, for there to be appellate jurisdiction,

> "we must determine whether the district court has properly found that the certification requirements of the statute have been met," *In re Cement Antitrust Litigation*, 673 F.2d 1020, 1026 (9th Cir. 1982), and the party pursuing the interlocutory appeal bears the burden of so demonstrating, *see McFarlin v. Conseco Servs., LLC,* 381 F.3d 1251, 1264 (11th Cir. 2004).

Couch, 611 F.3d at 633.

There are three circumstances when there exists a substantial ground for a difference of opinion as to the controlling law.

> To determine if a "substantial ground for difference of opinion" exists under §1292(b), courts must examine to what extent the controlling law is unclear. Courts traditionally will find that a

> substantial ground for difference of opinion exists where [**1**] "the circuits are in dispute on the question and the court of appeals of the circuit has not spoken on the point, [**2**] if complicated questions arise under foreign law, or [**3**] if novel and difficult questions of first impression are presented." 3 *Federal Procedure, Lawyers Edition* §3:212 (2010) (footnotes omitted). However, "just because a court is the first to rule on a particular question or just because counsel contends that one precedent rather than another is controlling does not mean there is such a substantial difference of opinion as will support an interlocutory appeal." *Id*. (footnotes omitted)

Couch, 611 F.3d at 633 (bracketed material added).

The decisions relevant here are so numerous and so one-sided that Petitioner cannot establish that there is any substantial ground for a difference of opinion as to the controlling law. There is no conflict among the circuits (in fact, only consistency between the district court opinions and the one Circuit that has addressed the issues), this case does not involve foreign law, and, given the dozens of court decisions, the questions are neither novel, difficult, nor ones of first impression. Consequently, there is no basis to exercise discretionary appellate jurisdiction for an interlocutory appeal.

C. There is no difference of opinion regarding Respondents' D(6) claims

When adopting the FDCPA, Congress acted with the "express purpose to eliminate abusive debt collection practices by debt collectors, and to insure that those debt collectors who refrain from using abusive debt collection practices are not competitively disadvantaged." *Jerman v. Carlisle, McNellie, Rini, Kramer &*

Ulrich LPA, __ U.S. __, __, 130 S. Ct. 1605, 1623, 176 L. Ed. 2d 519 (2010) (internal quotes and ellipsis omitted). Congress therefore explicitly required, among other things, that telephone calls from debt collectors to consumers include "meaningful" disclosure of the caller's identity. §1692d(6). Every court has held that, to be "meaningful" under §1692d(6), the disclosure must state the nature or purpose of the call.

The contents of *D(6)* disclosures have never been in dispute. Nearly thirty years ago, in *Wright v. Credit Bureau of Georgia, Inc.*, 548 F. Supp. 591, 597 (N.D. Ga. 1982), the court was faced with the use of pseudonyms, called "desk names," for the individual employees and concluded that, although desk names concealed the individual caller's real name, doing so did not violate *D(6)* so long as the caller accurately disclosed (a) the employer's name and (b) the nature of the call.

More recently in the current context, *Hosseinzadeh v. M.R.S. Assocs., Inc.*, 387 F. Supp. 2d 1104, 1112 (C.D. Cal. 2005), considered *D(6)* as applied to voice messages. Consistent with *Wright*, the court observed that "'meaningful disclosure' presumably requires that the caller must state his or her name and capacity, and disclose enough information so as not to mislead the recipient as to the purpose of the call…."

Along with *Hosseinzadeh* and *Wright*, counsel have identified sixteen

district court decisions in which courts "have uniformly held that it [i.e., *D(6)*] requires a debt collector to disclose the caller's name, the debt collection company's name, and the nature of the debt collector's business." *Baker v. Allstate Financial Srvs., Inc.*, 554 F. Supp. 2d 945, 949 (D. Minn. 2008) (footnote omitted). No circuit court decisions have been found.

The district court's decision below is entirely consistent with those decisions which are listed chronologically here. Petitioner cites no contrary authority.

1. *Wright*, 548 F. Supp. 591.
2. *Joseph v. J.J. Mac Intyre Cos., Inc.*, 281 F. Supp. 2d 1156 (N.D. Cal. 2003).
3. *Hosseinzadeh*, 387 F. Supp. 2d 1104.
4. *Leyse v. Corporate Collection Srvs., Inc.*, 03 CIV. 8491 (DAB), 2006 WL 2708451 (S.D.N.Y. Sept. 18, 2006).
5. *Knoll v. Allied Interstate, Inc.*, 502 F. Supp. 2d 943 (D. Minn. 2007).
6. *Glover v. Client Srvs., Inc.*, 1:07-CV-81, 2007 WL 2902209 (W.D. Mich. Oct. 2, 2007).
7. *Costa v. Nat'l Action Fin. Srvs.*, 634 F. Supp. 2d 1069 (E.D. Cal. 2007).
8. *Masciarelli v. Richard J. Boudreau & Assocs.*, LLC, 529 F. Supp. 2d 183 (D. Mass. 2007).
9. *Baker*, 554 F. Supp. 2d 945.
10. *Valencia v. Affiliated Group, Inc.*, 07-61381-CIV-MARRA, 2008 WL 4372895 (S.D. Fla. Sept. 24, 2008).
11. *Gilmore v. Account Mgmt., Inc.*, 2009 WL 2848278 (N.D. Ga. Apr. 27, 2009) *report and recommendation adopted as modified*, 2009 WL 2848249 (N.D. Ga. Aug. 31, 2009) *reconsideration denied*, 2009 WL

3158174 (N.D. Ga. Sept. 28, 2009) *aff'd in part, vacated in part on other grounds*, 357 F. App'x. 218 (11th Cir. 2009).

12. *Hicks v. Client Srvs., Inc.*, 07-61822-CIV-DIMITRO, 2009 WL 2365637 (S.D. Fla. June 9, 2009).

13. *Savage v. NIC, Inc.*, CV08-1780-PHX-JAT, 2009 WL 2259726 (D. Ariz. July 28, 2009).

14. *Gryzbowski v. I.C. Systems Inc.*, 691 F. Supp. 2d 618 (M.D. Pa. 2010).

15. *Miller v. Faulkner*, CIV 309CV1024 PCD, 2009 WL 2883140 (D. Conn. Sept. 1, 2009).

16. *Koby v. ARS Nat'l Srvs., Inc.*, CIV. 09CV0780 JAH JMA, 2010 WL 1438763 (S.D. Cal. Mar. 29, 2010) *reconsideration denied*, 09CV0780 JAH JMA, 2010 WL 5249834 (S.D. Cal. Dec. 23, 2010) .

Petitioner cites a single unreported decision, *Langdon v. Credit Mgmt, LP*, C 09-3286 VRW, 2010 WL 3341860 (N.D. Cal. Feb. 24, 2010), which in fact is inapposite. *Langdon* concerned a debt collector who repeatedly called and hung up when either the consumer or his answering machine picked up. *Langdon* considered whether a message must be left. The issue here is not whether a message should be left but what must be said in the message. The controlling question of law – namely, what constitutes "meaningful disclosure" – was never presented, discussed or decided in *Langdon*. Thus, *Langdon* does not represent a difference of opinion as to the controlling law. Incidentally, other courts have not required leaving a message (although, like in *Langdon*, multiple calls with hang-ups implicated other FDCPA provisions). *See, Rucker v. Nationwide Credit, Inc.*, 2:09-CV-2420-GEB-EFB, 2011 WL 25300 (E.D. Cal. Jan. 5, 2011). Similarly, the

one Circuit Court to address these issues observed that a debt collector has no guaranteed right to leave voice messages. *Edwards v. Niagara Credit Solutions, Inc.*, 584 F.3d 1350, 1354 (11th Cir. 2009); *see, also, Berg v. Merchants Ass'n Collection Div., Inc.*, 586 F. Supp. 2d 1336, 1344 (S.D. Fla. 2008) (same).

The only difference of opinion exists between Petitioner and a host of judicial authorities – not the type of difference warranting the exercise of discretionary jurisdiction for interlocutory review.

D. There is no difference of opinion regarding Respondents' E(11) claims

E(11) mandates certain disclosures in a debt collector's "communication" with a consumer. There is no dispute here as to what *E(11)* requires. Instead, the controlling legal issue is whether a debt collector's voice message left for the debtor asking for a return telephone call regarding a debt is a "communication" as defined by the FDCPA at 15 U.S.C. §1692a(2).

Counsel have identified one circuit court and 32 district court decisions which address whether a voice message left by a debt collector for a consumer regarding the collection of a debt is a "communication."

In the only appellate ruling, *Edwards*, 584 F.3d 1350, the Court treated as axiomatic that a voice message which fails to state that the call was from a debt collector violates §1692e(11) and no one disputed the issue. *See*, *Winberry v. United Collection Bureau, Inc.*, 697 F. Supp. 2d 1279, 1291 (M.D. Ala. 2010).

Listed chronologically below are the 32 district court decisions originating from 24 different districts sitting in all regional circuits except the Fifth, Sixth and the District of Columbia and all decided within the past six years.

1. *Hosseinzadeh*, 387 F. Supp. 2d 1104.
2. *Foti v. NCO Fin Sys, Inc.*, 424 F. Supp. 2d 643 (S.D.N.Y. 2006).
3. *Stinson v. Asset Acceptance, LLC*, 1:05cv1026 (JCC), 2006 U.S.Dist.LEXIS 42266 (E.D. Va. June 12, 2006), *vacated by settlement*, 2006 U.S.Dist.LEXIS 58865, 2006 WL 1647134 (July 17, 2006).
4. *Belin v. Litton Loan Servicing, LP*, 8:06CV760 T24EAJ, 2006 WL 1992410 (M.D. Fla. July 14, 2006).
5. *Leyse*, 2006 WL 2708451.
6. *Biggs v. Credit Collections, Inc.*, 2007 WL 4034997 (W.D. Okla. Nov. 15, 2007).
7. *Costa*, 634 F. Supp. 2d 1069.
8. *Baker*, 554 F. Supp. 2d 945.
9. *Ramirez v. Apex Fin. Mgmt., LLC*, 567 F. Supp. 2d 1035 (N.D. Ill. 2008).
10. *Thomas v. Consumer Adjustment Co., Inc.*, 579 F. Supp. 2d 1290 (E.D. Mo. 2008).
11. *Anchondo v. Anderson, Crenshaw & Assocs.*, 583 F. Supp. 2d 1278 (D.N.M. 2008).
12. *Edwards v. Niagara Credit Solutions, Inc.*, 586 F. Supp. 2d 1346 (N.D. Ga. 2008), *aff'd on other grounds*, 584 F.3d 1350 (11th Cir. 2009).
13. *Romano v. Williams & Fudge, Inc.*, 644 F. Supp. 2d 653 (W.D. Pa. 2008).
14. *Ostrander v. Accelerated Receivables*, 07-CV-827C, 2009 WL 909646 (W.D.N.Y. Mar. 31, 2009).
15. *Gilmore*, 2009 WL 2848278.

16. *Wideman v. Monterey Fin. Srvs., Inc.*, 2009 WL 1292830 (W.D. Pa. May 7, 2009).

17. *Hicks*, 2009 WL 2365637.

18. *Savage*, 2009 WL 2259726.

19. *Mark v. J.C. Christensen & Assocs., Inc.*, CIV 09-100 ADM/SRN, 2009 WL 2407700 (D. Minn. Aug. 4, 2009).

20. *Drossin v. Nat'l Action Fin. Srvs., Inc.*, 641 F. Supp. 2d 1314 (S.D. Fla. 2009).

21. *Inman v. NCO Fin. Sys., Inc.*, CIV.A. 08-5866, 2009 WL 3415281 (E.D. Pa. Oct. 21, 2009).

22. *Chalik v. Westport Recovery Corp.*, 677 F. Supp. 2d 1322 (S.D. Fla. 2009).

23. *Krapf v. Collectors Training Inst. of Ill., Inc.*, 09-CV-391S, 2010 WL 584020 (W.D.N.Y. Feb. 16, 2010).

24. *Gryzbowski*, 691 F. Supp. 2d 618.

25. *Nicholas v. CMRE Fin. Srvs., Inc.*, CIVA 08-CV-4857 (DMC, 2010 WL 1049935 (D.N.J. Mar. 16, 2010).

26. *Winberry v. United Collection Bureau, Inc.*, 697 F. Supp. 2d 1279 (M.D. Ala. 2010).

27. *Miller*, 2009 WL 2883140.

28. *Koby*, 2010 WL 1438763.

29. *Krug v. Focus Receivables Mgmt., LLC*, CIV.A.094310JEIAMD, 2010 WL 1875533 (D.N.J. May 11, 2010).

30. *Pifko v. CCB Credit Services, Inc.*, 09-CV-3057 (JS), 2010 WL 2771832 (E.D.N.Y. July 7, 2010).

31. *Hutton v. C.B. Accounts, Inc.*, 10-3052, 2010 WL 3021904 (C.D. Ill. Aug. 3, 2010).

32. *Silva v. Jason Head, PLC*, 09-CV-05768-LHK, 2010 WL 4593704 (N.D. Cal. Nov. 4, 2010).

With the exception of *Biggs* and the district court's decision below regarding the Simmons' message, the remaining thirty decisions consistently held that a voice message left by a debt collector for a consumer regarding the collection of a debt is a "communication."

The unreported *Biggs* decision stated, "The transcript of the voice mail messages demonstrates that the voice mails 'convey[ed]' no 'information regarding a debt.'" *Biggs*, 2007 WL 4034997 at *8 (editing in original). The decision did not include the transcript and its analysis was limited to the judge's own reading of the statute.

Biggs has never been followed; instead, it has been expressly rejected by four courts in *Ramirez*, *Hicks*, *Mark*, and *Krug*.

Excluding *Biggs*, the district courts' rationales have varied but all reach the same conclusion: a voice message left by a debt collector for a consumer regarding a debt is a "communication" triggering the *E(11)* disclosures.

Some courts reason that the message is the first step in a process designed to communicate with the consumer about the debt. *See, e.g., Foti,* 424 F. Supp. 2d at 656, and *Hosseinzadeh,* 387 F. Supp. 2d at 1116. Others concluded that there is an "indirect" communication when the message indicates there is a matter which the consumer needs to attend to. *See, e.g., Ramirez,* 567 F. Supp. 2d at 1041. Still others decide that including a return phone number or a reference number is

sufficient "information regarding a debt." 15 U.S.C. §1692a(2); *see, e.g., Anchondo,* 583 F. Supp. 2d at 1282, and *Stinson,* 2006 U.S.Dist.LEXIS 42266 at *7. Most courts relied on or mentioned the fact that the messages, like the ones involved here, were left regarding the collection of a debt. *See, e.g., Chalik,* 677 F. Supp. 2d at 1327, and *Costa*, 634 F. Supp. 2d at 1076.

On their motion to modify, Respondents argued that this Court's approach in *Romine v. Diversified Collection Srvs., Inc.,* 155 F.3d 1142 (9th Cir. 1998), dictated that the voice-messages-as-communications issue be resolved by looking at whether the messages were left in the debt collector's attempt to collect a debt and that the application of the *Romine* analysis was persuasively demonstrated by two recent decisions from the Seventh Circuit. The first case, like *Romine,* was not a voice message case. In *Gburek v. Litton Loan Servicing LP,* 614 F.3d 380 (7th Cir. 2010), the appellate court articulated the same purpose and context analysis which this Court applied in *Romine*. A week later, the Central District of Illinois applied the *Gburek* analysis to a voice message case. *Hutton,* 2010 WL 3021904. As the *Gburek* analysis dictated the result in *Hutton*, so the *Romine* analysis dictates the result here. Indeed, *Hutton* expressly discussed how the application of that analysis could not be reconciled with the district court's treatment of the Simmons message. *Hutton,* 2010 WL 3021904 at *3. (Petitoner's arguments centered on the fact that Respondents' motion was tardy in raising with the district

court the controlling opinion from this Court in *Romine* are of no consequence now since the lower court in any event ultimately addressed *Romine* and its impact on the issues here. See December 23, 2010 Order, pp. 3 (line 18) to 4 (line 27).)

For present purposes, however, how each court resolved the "communication" argument does not change the fact that they consistently held the voice message to be a "communication" triggering the *E(11)* disclosures when left regarding a debt.

Similarly, Petitioner's argument that relief is necessary to avoid invading consumer's privacy "has been repeatedly rejected in the context of debt collector messages left on a consumer's home voicemail." *Baker*, 554 F. Supp. 2d at 950. Again, Petitioner cites no authority sustaining that argument.

Likewise, there is no difference of opinion regarding Petitioner's failed commercial speech argument. All three courts considering the argument have rejected it. *See, Koby*, *supra* (this action), *Mark*, and *Berg*, 586 F. Supp. 2d at 1344-5. Petitioner offers nothing to the contrary.

There is also a procedural justification to reject consideration of Petitioner's constitutional arguments because it failed to invoke notice to the United States Attorney General under Fed. R. Civ. P. 5.1. Even in the instant proceeding, the Petitioner asserts that the district court's application of the FDCPA offends its commercial speech rights yet it nevertheless fails to invoke this Court's notice

process. *Cf.*, Fed. R. App. P. 44(a). Those rules apply when the constitutionality of a statute is drawn into question – a circumstance which includes Petitioner's argument that when a statute is capable of more than one interpretation, the one offending constitutional rights should be avoided. *See, Boumediene v. Bush*, 553 U.S. 723, 806 (2008), quoting *Ashwander v. TVA*, 297 U.S. 288, 348 (1936) (Brandeis, J. concurring):

> When the validity of an act of the Congress is drawn in question . . . it is a cardinal principle that this Court will . . . ascertain whether a construction of the statute is fairly possible by which the [constitutional] question may be avoided (internal quotation marks omitted).

The lone discredited and unreported decision from the Western District of Oklahoma compared to the "substantial weight of authority" does not establish a sufficient ground for difference of opinion to justify an interlocutory appeal. *Krug*, 2010 WL 1875533 at *2. Consequently, Petitioner has failed to demonstrate that any of the circumstances under *Couch* exist as to any issue regarding the *E(11)* claims.

E. It is unlikely that an immediate appeal will materially advance this action's ultimate termination.

Absent the unlikely event that this Court will repudiate the dozens of existing decisions as to every issue raised, an interlocutory appeal will not materially advance the proceedings here.

"A single violation of any provision of the Act is sufficient to establish civil liability under the FDCPA." *Taylor v. Perrin, Landry, deLaunay & Durand*, 103 F.3d 1232, 1238 (5th Cir. 1997); *cf., Edwards*, 584 F.3d at 1352 n2 (last sentence). Thus, the only scenario under which an appeal will advance the case's termination is for this Court to reject all of the existing authority and conclude that debt collectors can hide their identities and reasons for calling when they leave voice messages for a consumer.

Here, the district court followed what every other court has decided with respect to the *D(6)* claims, the First Amendment argument, and the consumer privacy argument. The district court also followed the authorities regarding all *E(11)* claims except for the Simmons message however, under the FDCPA's single violation rule, Mr. Simmons will continue to pursue his *D(6)* claim.

Thus, for an interlocutory appeal to "materially advance the ultimate termination of the litigation," this Court would have to repudiate all existing authorities except *Biggs*. 28 U.S.C. §1292(b). In the absence of such a far-reaching result, however, there will be no judicial economy from an interlocutory appeal.

F. Petitioner has failed to demonstrate that the district court properly found grounds for an interlocutory appeal.

Couch places the burden of demonstrating that there was a sufficient basis for the district court's certification on Petitioner in order to establish the Court's

appellate jurisdiction. The developed law regarding Respondents' *D(6)* and *E(11)* claims, including Petitioner's constitutional and privacy arguments, has been repeatedly addressed and resolved in a consistent manner. With the singular exception of the ill-regarded *Biggs* decision, there is unanimity amongst the numerous decisions. Thus, Petitioner has not carried its burden under *Couch*. In addition, there is no reasonable expectation of judicial economy from an interlocutory appeal.

CONCLUSION

For these reasons, Respondents-Plaintiffs respectfully request that the Petition for Permission to Appeal be denied.

Respectfully submitted,

SCHROTH & SCHROTH
and
PHILIP D. STERN & ASSOCIATES, LLC
Attorneys for Respondents-Plaintiffs, Michael P. Koby, Michael Simmons, Jonathan W. Supler, and all others similarly situated
s/Philip D. Stern
Philip D. Stern

Dated: January 11, 2011

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on January 11, 2011.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

s/Philip D. Stern

Dated: January 11, 2011 Philip D. Stern