

No. 11-1175

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IN THE  
**Supreme Court of the United States**

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OLIVEA MARX,  
*Petitioner,*

v.

GENERAL REVENUE CORPORATION,  
*Respondent.*

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On Writ of Certiorari to the  
United States Court of Appeals for the Tenth Circuit

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**BRIEF OF *AMICI CURIAE* AARP, CONSUMER  
FEDERATION OF AMERICA, EAST BAY  
COMMUNITY LAW CENTER, NATIONAL  
ASSOCIATION OF CONSUMER ADVOCATES, AND  
NATIONAL CONSUMER LAW CENTER  
IN SUPPORT OF PETITIONER**

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**STATEMENT OF INTEREST<sup>1</sup>**

*Amici curiae* are national, nonprofit consumer advocacy organizations that are committed to the enforcement of consumer protection laws. *Amici* have a keen interest in ensuring that federal statutes protecting consumers are not undermined by interpretations that are at odds with congressional intent. In particular, *amici* are concerned that shifting costs to unsuccessful Fair Debt Collection Practices Act (“FDCPA” or “Act”) plaintiffs who have brought their cases in good faith will chill enforcement of the Act and injure precisely the financially vulnerable consumers whom Congress sought to protect.

AARP is a nonpartisan, nonprofit organization. As the leading organization dedicated to addressing the needs and interests of people aged 50 and older, AARP is greatly concerned about abusive practices being used to collect the growing level of debt being incurred by older people, many of whom are especially vulnerable to debt collection abuses.

Consumer Federation of America is a nonprofit association of nearly 300 nonprofit consumer

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<sup>1</sup> No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae* or their counsel made a monetary contribution to its preparation or submission. Both parties have consented to the filing of this *amici curiae* brief. Letters reflecting the consent of the parties are being filed with this brief.

organizations. CFA was established in 1968 to advance the consumer interest through research, advocacy, and education. CFA works to advance consumer interests and pro-consumer policies by researching and reporting consumer issues and behavior, and by advocating about consumer concerns before the federal and state governments. CFA's members are national, state and local affiliates representing consumer, senior citizen, low-income, labor, farm, public power, and cooperative organizations. Debt collection problems are the cause of a large number and large percentage of consumer complaints. CFA's annual complaint survey of state and local consumer protection agencies ranks credit and debt collection problems as second only to auto-related complaints. CFA focuses its work on the high-cost small-dollar loan market, where a key feature of many loan products is the coercive debt collection that results from securing loans with borrowers' checks, electronic access to bank accounts, titles to vehicles, funds deposited to prepaid debit cards, or loans secured by expected tax refunds. Private enforcement is necessary to provide remedies for consumers injured by abusive collections.

The East Bay Community Law Center is a nationally recognized, community-based provider of legal assistance to low-income individuals and the largest provider of free legal services in Oakland and the rest of the East Bay. EBCLC's Neighborhood Justice Clinic operates a legal clinic serving more than a thousand clients every year—over a third of whom seek legal help because they are facing debt

collection lawsuits. Many clients have been victims of illegal, often outrageous, collection practices. Filing affirmative lawsuits under the Fair Debt Collection Practices Act is a powerful way to put a stop to these abusive practices. But since all of EBCLC's clients are indigent, the fear of having to pay costs if they were to lose their lawsuit would cause most clients to decide not to file. EBCLC joins this case as *amicus curiae* to prevent that chilling effect.

The National Association of Consumer Advocates is a nonprofit corporation whose members are private and public sector attorneys, legal services attorneys, law professors and law students whose primary focus involves the protection and representation of consumers. NACA's mission is to promote justice for all consumers by maintaining a forum for information sharing among consumer advocates across the country and serving as a voice for its members as well as consumers in the ongoing effort to curb unfair and abusive business practices. Enforcement and compliance with consumer protection laws has been a continuing concern of NACA since its inception.

The National Consumer Law Center, Inc., is a national nonprofit research and advocacy organization founded in 1969 that focuses on the legal needs of low-income, financially distressed, and elderly consumers. NCLC is a nationally recognized expert on consumer protection issues and has drawn on this expertise to provide information, legal research, policy analyses, and market insight to



Congress and state legislatures, administrative agencies, and courts for more than forty years. One of NCLC's primary objectives is to provide assistance to attorneys advancing the interests of their low-income and elderly clients in the area of consumer law. Accordingly NCLC has focused considerable attention on laws to prevent abusive debt collection. The Fair Debt Collection Practices Act has been a major focus of that work. NCLC publishes a comprehensive treatise, *Fair Debt Collection* (6th ed. 2008 & 2009 Supp.) to assist attorneys, creditors and debt collectors in complying with the law.

### **INTRODUCTION AND SUMMARY OF ARGUMENT**

The FDCPA, 15 U.S.C. § 1692 *et seq.*, is a carefully designed statute, enacted to protect a particularly vulnerable set of consumers from the practices of a necessary but abuse-ridden industry. The Act's cost and fee shifting provision is tailored to encourage enforcement by consumers through private lawsuits while discouraging lawsuits filed in bad faith. The Tenth Circuit's holding that FDCPA plaintiffs must pay costs whenever they do not prevail interferes with this careful statutory structure. The decision ignores two key features in the design of the FDCPA: the primacy of the private enforcement regime that the statute creates, and the financial vulnerability of the population that the statute is designed to protect.

The need for robust enforcement of the FDCPA is acute. Abuses by debt collectors were

widespread when the FDCPA was enacted. *See* 15 U.S.C. § 1692(a) (citing “abundant evidence of the use of abusive, deceptive, and unfair debt collection practices by many debt collectors”). And abuses continue to plague consumers today. Indeed, the debt collection industry generates more complaints to the Federal Trade Commission than any other industry. CFPB, *Annual Report 2012: Fair Debt Collection Practices Act* 6 (2012) (noting FTC received 117,374 complaints about third-party debt collectors in 2011).<sup>2</sup>

The scarcity of public FDCPA enforcement actions confirms the continuing importance of private lawsuits to curb collection abuses. In 2011, though the FTC received more than 117,00 complaints, it brought or resolved only 7 actions against debt collectors—and that total constituted “the highest number of debt collection cases that it has brought or resolved in any single year.” CFPB, *Annual Report 2012* at 14.

This enormous enforcement gap illustrates precisely why Congress designed the Act to be enforced by consumers. *See* Sen. Comm. on Banking, Housing and Urban Aff., S. Rep. No. 95-382, 95th Cong 1st Sess., 5 (1977), *reprinted in* 1977 U.S.C.C.A.N. 1695, 1699 (“consumers who have been subjected to collection abuses will be enforcing compliance”). Only robust private enforcement can achieve the Act’s primary stated purpose: “to

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<sup>2</sup> Available at [http://files.consumerfinance.gov/f/201203\\_cfpb\\_FDCPA\\_annual\\_report.pdf](http://files.consumerfinance.gov/f/201203_cfpb_FDCPA_annual_report.pdf).

eliminate abusive debt collection practices by debt collectors.” 15 U.S.C. § 1692(e).

The enforcement regime Congress enacted struck a careful balance. On the one hand, the Act encourages private enforcement by providing fees and costs to prevailing plaintiffs and denying them to prevailing defendants in routine cases. *See* 15 U.S.C. § 1692k(a)(3). On the other hand, the Act protects scrupulous debt collectors from liability for *bona fide* errors, *see* 15 U.S.C. § 1692k(c), and provides fees and costs for defending suits brought in bad faith, *see* 15 U.S.C. § 1692k(a)(3). The provision limiting plaintiffs’ liability for costs makes particular sense in light of the *bona fide* error defense: were the statute interpreted otherwise, plaintiffs could be responsible for defendants’ costs in cases where the debt collector had in fact violated the FDCPA.

Moreover, limiting defendants’ cost recovery to suits brought in bad faith is consistent with the Act’s concern for the particular population it was designed to protect: debtors. By definition, debtors do not have the money to pay defendants’ costs if they do not prevail—costs which can amount, as they did in this case, to thousands of dollars. *See* Pet. App. 29a (showing \$4,543 in costs awarded). The FDCPA’s limitation on awards to prevailing defendants avoids the painful irony of vulnerable debtors routinely being saddled with additional debt through the operation of a statute designed to protect them.

Without that limitation, it is unlikely that many consumers would risk bringing suit—an outcome directly at odds with the structure and design of the FDCPA. The Tenth Circuit’s interpretation of the Act’s cost provision interferes with a carefully designed enforcement regime. *Amici* urge the Court to reverse that decision and to hold that costs may be shifted to the unsuccessful FDCPA plaintiff only if the lawsuit was filed in “bad faith and for the purpose of harassment.” 15 U.S.C. § 1692k(a)(3).

## ARGUMENT

### I. **ROBUST PRIVATE ENFORCEMENT OF THE FDCPA IS NECESSARY TO CURB WIDESPREAD AND INCREASING DEBT COLLECTION ABUSES.**

The FDCPA was designed to be readily enforceable by consumers who are victims of debt collection abuses. The need for effective enforcement of the Act may be even more pressing today than it was in 1977 when the FDCPA was enacted. Debt loads have increased exponentially and technological advances have transformed the collections industry, exposing more consumers to abuses. The wisdom of the congressional design, encouraging rather than chilling private enforcement, is more salient than ever.

**A. Market Changes And Technological Advances Have Increased Collection Abuses, Further Intensifying The Need To Encourage Private Enforcement.**

Private enforcement is vital especially in light of the dramatic changes in the financial markets in the years since the FDCPA was enacted. The increase in reported abuses corresponds to a period first of increased consumer debt and then of a sharp economic downturn. See Kathleen W. Johnson, *Recent Developments in the Credit Card Market and the Financial Obligations Ratio*, 91 Fed. Reserve Bulletin 473, 474 (2005).<sup>3</sup> These conditions have created an enormous amount of delinquent debt which has been and will continue to be subject to collection efforts. Clarifying the enforcement regime governing those actions, and retaining the safeguards inherent therein, becomes a matter of the utmost public importance.

**1. Recent Years Have Witnessed An Upsurge Of Unaffordable Consumer Debt And A Corresponding Increase In Collection Cases.**

At the beginning of 1977, consumers carried revolving debt worth approximately \$32 billion; by 2007 that number had increased more than 28 times to \$913 billion. *Statistical Release - Consumer Credit*

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<sup>3</sup> Available at [http://www.federalreserve.gov/pubs/bulletin/2005/autumn05\\_lead.pdf](http://www.federalreserve.gov/pubs/bulletin/2005/autumn05_lead.pdf).

*Historical Data (Revolving)*, Fed. Reserve Board.<sup>4</sup> Not only do Americans carry more credit card debt than ever before, but more people are being buried in what may be considered *unaffordable* debt, in which debt payments exceed 40% of their income. This increase is especially acute for older age groups. See Emp. Benefit Research Inst. Notes, *Debt of the Elderly and Near Elderly, 1992–2007*, Vol. 30, No. 10, 6 (2009) (finding that the proportion of near-elderly and elderly families with debt greater than 40% of income increased from 7.3 percent in 2004 to 9.9 percent in 2007).<sup>5</sup> Some of this debt has resulted from dubious credit practices. See *Examining The Billing, Marketing, And Disclosure Practices Of The Credit Card Industry And Their Impact On Consumers, Before the S. Comm. on Banking, Housing & Urban Affairs*, 110<sup>th</sup> Cong. 3 (Jan. 25, 2007) (statement of Prof. Elizabeth Warren) (“A debtor could pay nearly 100% of what she owed every year for the rest of her life, and thanks to the traps built in to her credit card, she would keep paying until she died—and still not pay off her card.”); U.S. Gov’t Accountability Office, GAO-06-929, *Credit Cards: Increased Complexity in Rates and Fees Heightens Need for More Effective Disclosures to Consumers* 16 (2006) (noting problems);<sup>6</sup> Credit Card Accountability

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<sup>4</sup> Available at [http://www.federalreserve.gov/releases/g19/HIST/cc\\_hist\\_r\\_levels.html](http://www.federalreserve.gov/releases/g19/HIST/cc_hist_r_levels.html) (last updated July 9, 2012).

<sup>5</sup> Available at [http://www.ebri.org/pdf/notespdf/EBRI\\_Notes\\_10-Oct09.DebtEldly.pdf](http://www.ebri.org/pdf/notespdf/EBRI_Notes_10-Oct09.DebtEldly.pdf).

<sup>6</sup> Available at <http://www.gao.gov/new.items/d06929.pdf>.

Responsibility and Disclosure Act of 2009, Pub. L. 111-24, Title I, § 108, 123 Stat. 1743 (May 22, 2009) (15 U.S.C. § 1602) (implementing reforms).

Whatever the reason for the upsurge, the enormous levels of unaffordable consumer debt have caused collections activity to increase sharply. *See 2011 Credit Card Debt Study*, Card Hub (noting banks charged off \$83.2 billion in credit card debt in 2009, and \$75.1 billion in 2010).<sup>7</sup> This massive debt will be subject to collection attempts—and the abuses that accompany such collections—for years to come.

## **2. Collection Abuses May Stem From Attempts To Collect Invalid Or Otherwise Uncollectible Debt.**

Significant collection abuses stem from attempts to collect invalid or otherwise uncollectible debt. FTC, *Annual Report 2011* at 7 (reporting this category of consumer complaint as the second most prevalent, after abusive contacts, for the third year in a row).<sup>8</sup> For example, collectors regularly pursue debts resulting from identity theft and other types of fraud, debts that were discharged in bankruptcy, and debts owed by decedents. *Id.* *See* Nat'l Consumer Law Ctr., *The Debt Machine: How the Collection*

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<sup>7</sup> Available at <http://education.cardhub.com/q1-2011-credit-card-debt-study/> (last visited July 25, 2012).

<sup>8</sup> Available at <http://www.ftc.gov/os/2011/03/110321fairdebtcollectreport.pdf>.

*Industry Hounds Consumers and Overwhelms Courts* 11 (2010).<sup>9</sup>

Though victims of identity theft and fraud are not legally liable for unauthorized charges, they may nevertheless be subject to collection efforts. FTC, *Annual Report 2011* at 7.

Similarly, debt that has been discharged in bankruptcy is regularly pursued by collectors. *Id.* See also Jessica Silver-Greenberg, *Debts Go Bad, Then It Gets Worse*, Wall St. J. (Dec. 23, 2011) (describing “court-appointed auditor’s conclu[sion] . . . that Capital One pursued 15,500 ‘erroneous claims’ seeking money previously erased by a bankruptcy-court judge”).<sup>10</sup>

Collection of decedents’ debts from families and survivors who are not legally obligated to pay also contributes to collection abuses. See Statement of Policy Regarding Communications in Connection With the Collection of Decedents’ Debts, 76 Fed. Reg. 44,915 (July 27, 2011); see also Press Release, FTC, FTC Issues Final Policy Statement on Collecting Debts of the Deceased (July 20, 2011).<sup>11</sup>

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<sup>9</sup> Available at <http://www.nclc.org/images/pdf/pr-reports/debt-machine.pdf>.

<sup>10</sup> Available at <http://online.wsj.com/article/SB10001424052970203686204577114530815313376.html#printMode>.

<sup>11</sup> Available at [www.ftc.gov/opa/2011/07/fdcpa.shtm](http://www.ftc.gov/opa/2011/07/fdcpa.shtm).



### **3. The Economic Downturn Has Exposed Many Consumers To Abusive Debt Collection.**

The recent economic downturn has increased consumers' financial vulnerability and increasingly exposed them to abusive collections. See FTC, *Repairing A Broken System: Protecting Consumers In Debt Collection Litigation And Arbitration* i (2010) (linking the weakened economy to increased collection activity).<sup>12</sup> In 2009, late payments on credit card debt reached an all-time high of 6.6 percent, up from a relatively stable 4.4 percent rate of delinquency since 1991. GAO at 4-5; see also FTC, *Collecting Consumer Debts: The Challenges of Change* 12 (2009)<sup>13</sup> (citing Al Yoon, *US Credit Card Delinquencies at Record Highs—Fitch*, Reuters (Feb. 4, 2009)).<sup>14</sup>

### **4. Technological Advances Have Spurred Widespread And Systemic Debt Collection Abuses.**

The collections industry has thrived and evolved over the past few decades, spurred by

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<sup>12</sup> Available at [www.ftc.gov/os/2010/07/debtcollectionreport.pdf](http://www.ftc.gov/os/2010/07/debtcollectionreport.pdf); see also GAO at 28-29.

<sup>13</sup> Available at <http://www.ftc.gov/bcp/workshops/debtcollection/dcwr.pdf>.

<sup>14</sup> Available at <http://www.reuters.com/articlePrint?articleId=USN0428871920090204>.

financial and technological advances. These advances have also increased collection abuses.

Today's collection industry is markedly different from the industry contemplated by the FDCPA 35 years ago. Key new economic players—debt buyers and collection law firms—have entered the industry since its inception. Additionally, the industry has seen dramatic technological advances. Forty years ago, collection activities depended on typewritten collection notices and local phone calls. Collection firms may now use sophisticated analytics to identify the specific debtors to target. Predictive dialers and internet telephony have lowered the cost of contacting consumers so that a small collections firm economically can reach out to hundreds of thousands of consumers. Database improvements have facilitated the sale of debt and created a new sub-industry of debt buyers. But, even as the industry has changed, abuses remain an issue. The collection industry continues to be a top source of complaints to the FTC.

CFPB, *Annual Report 2012* at 4.

Debt buyers, companies that purchase (and often re-sell) large portfolios of delinquent debt for

pennies on the dollar, have become a particular source of collections abuse. See Rachel Terp & Lauren Bowne, *Past Due: Why Debt Collection Practices and the Debt Buying Industry Need Reform Now*, Consumers Union 2 (2011).<sup>15</sup> The value of a particular portfolio is based upon the likelihood that a debtor will succumb to the pressure exerted by the threat or entry of a judgment rather than the legitimacy of the debt. See FTC, *Challenges of Change* at 20. Multiple re-sales of the debt increases chances for recordkeeping errors and the likelihood that the collector will have misidentified the debtor or sued beyond the statute of limitations. FTC, *Repairing a Broken System* at 5, 21, 29.

Debt buyers have been particularly prone to practices that predictably result in FDCPA violations. For example, debt buyers generally purchase only an electronic spreadsheet with basic information about a debt: they do not purchase the actual accounts or any transaction history. See FTC, *Repairing A Broken System* at i. According to the FTC, “[w]hen accounts are transferred to debt collectors, the accompanying information often is so deficient that the collectors seek payment from the wrong consumer or demand the wrong amount from the correct consumer.” FTC, *Challenges of Change* at 22. The information necessary to verify disputed debts or prove a contested amount, especially for stale debt, is unavailable to a typical debt buyer from any source. *Id.* at 23.

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<sup>15</sup> Available at [http://www.ebclc.org/documents/Past\\_Due\\_Report\\_2011.pdf](http://www.ebclc.org/documents/Past_Due_Report_2011.pdf).

Debt buyers are also known to resell debt which is the result of identity theft, settled, discharged in bankruptcy, or which has been paid in full. *Id.* at 64. Each time such an invalid debt is resold, a debtor must re-engage in a frustrating and often futile process of disputing the debt or defending another lawsuit. This type of debt has been dubbed “zombie debt” for apt reasons; it is hard to defend against and it seemingly never dies. *See, e.g.*, Eileen Ambrose, *Zombie Debt*, Balt. Sun (May 6, 2007);<sup>16</sup> Liz Pulliam Weston, *The Basics: ‘Zombie Debt’ is Hard to Kill*, MSN Money (July 7, 2006).<sup>17</sup>

With increasing frequency, debt collectors have made use of the courts to collect on time-barred or already paid-off debt, despite having insufficient evidence to prove their claims. FTC, *Challenges of Change* at 24, 55. *See* Judicial Council of Cal., *Trial Court Caseload Increases to Over 10 Million Filings, Data Points 1* (2010) (reporting “[a]n estimated 96,000 consumer debt-collection cases were filed in 2009 in Alameda, Contra Costa and San Francisco Counties alone, up from about 53,665 in 2007.”);<sup>18</sup> Urban Justice Ctr., *Debt Weight: The Consumer Credit Crisis in New York City and its Impact on the Working Poor 1* (2007) (annual filing of debt

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<sup>16</sup> Available at [http://articles.baltimoresun.com/2007-05-06/business/0705060084\\_1\\_zombie-debt-debt-buyers-consumer-debt](http://articles.baltimoresun.com/2007-05-06/business/0705060084_1_zombie-debt-debt-buyers-consumer-debt).

<sup>17</sup> Available at <http://articles.moneycentral.msn.com/SavingandDebt/ManageDebt/ZombieDebtCollectorsDigUpYourOldMistakes.aspx>.

<sup>18</sup> Available at <http://www.courts.ca.gov/datapoints10.pdf>.

collection cases in New York City increased by more than 60% between 2002 and 2007).<sup>19</sup> Lacking adequate documentation to prove their cases, debt buyers have supported their judicial collections efforts with false affidavits. *See Vassalle v. Midland Funding, LLC*, No. 3:11-CV-00096, 2011 WL 3557045 (N.D. Ohio Aug. 12, 2011) (settling class action with 1.4 million consumers involving allegations of “robo-signing” of affidavits falsely claiming personal knowledge concerning the underlying debt collection lawsuits); *see also Midland Funding, LLC v. Brent*, 644 F. Supp. 2d 961, 966-69 (N.D. Ohio 2009) (describing the challenged affidavit production practice); Tom Shean, *Debt Collection Industry's Methods Draw Scrutiny*, *Virginian-Pilot* (Jan. 30, 2011) (discussing use of affidavits ostensibly signed by employee who had been dead for over 10 years).<sup>20</sup>

Judicial collections have become increasingly prevalent because of the probability that the debtor will not defend the lawsuit. Claudia Wilner et al., *Debt Deception: How Debt Buyers Abuse The System To Prey On Lower-Income New Yorkers*, Neighborhood Econ. Dev. Advocacy Project 6 (2010) (noting that ninety-five percent of 457,322 lawsuits filed by twenty-six debt buyers against people residing in low- or moderate-income neighborhoods

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<sup>19</sup> Available at [http://www.urbanjustice.org/pdf/publications/CDP\\_Debt\\_Weight.pdf](http://www.urbanjustice.org/pdf/publications/CDP_Debt_Weight.pdf).

<sup>20</sup> Available at <http://hamptonroads.com/2011/01/debt-collection-industrys-methods-draw-scrutiny>.

ended in default judgments, and not a single person in the study was represented by counsel);<sup>21</sup> Jessica Silver-Greenberg, *Boom in Debt Buying Fuels Another Boom – In Lawsuits*, Wall St. J. (Nov. 28, 2010) (reporting that industry estimates 94% of collections end in default and that “[t]he majority of borrowers don’t have a lawyer, some don’t know they are even being sued, and others don’t appear in court, say judges.”).<sup>22</sup> The high default rate is due in part to widespread service of process abuses. See FTC, *Repairing a Broken System* at 10.

The collectors also benefit from the fact that the dollar amount at issue in a typical collection lawsuit is relatively small, permitting the cases to be filed, in many states, in small claims courts with less judicial oversight and relaxed pleading and evidentiary requirements. Peter A. Holland, *The One Billion Dollar Problem in Small Claims Court: Robo-Signing and Lack of Proof in Debt Buyer Cases*, 6 Md. J. of Bus. and Tech. L. 259, 263 (2011); Michael Rezendes et al., *Debtors’ Hell, Dignity Faces a Steamroller*, Bos. Globe (July 31, 2006) (noting courtroom where “collection lawyers appear to be in charge—with no oversight by judicial officials”).<sup>23</sup>

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<sup>21</sup> Available at [http://www.nedap.org/pressroom/documents/DEBT\\_DECEPTION\\_FINAL\\_WEB.pdf](http://www.nedap.org/pressroom/documents/DEBT_DECEPTION_FINAL_WEB.pdf).

<sup>22</sup> Available at <http://online.wsj.com/article/SB10001424052702304510704575562212919179410.html>.

<sup>23</sup> Available at [http://www.boston.com/news/special/spotlight\\_debt/part2/page1.html](http://www.boston.com/news/special/spotlight_debt/part2/page1.html).

**B. Limited Public Agency Enforcement of the FDCPA Has Not Supplanted The Need For Private Enforcement.**

Even with targeted public enforcement actions to combat misconduct by large debt collectors, private lawsuits under the FDCPA are vital to curb widespread abuses that continue to cause substantial harm. *See, e.g., McCollough v. Johnson, Rodenburg & Lauinger, LLC*, 637 F.3d 939 (9th Cir. 2010) (affirming judgment against debt collector for collecting time-barred debt and serving requests for admission containing false information on a *pro se* debtor with disabling head injuries).

The continuing need for robust private enforcement is brought into sharp relief by the fact that, despite the debt collection industry's status as the most complained-about industry in the nation for nearly 15 consecutive years,<sup>24</sup> the FTC has never

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<sup>24</sup> Complaints about debt collectors to the FTC about third-party debt collectors ranked second only to complaints about credit bureaus in 1997 and 1998. FTC did not report complaints by industry. *See* FTC, *Annual Report 1998*, 2, available at <http://www.ftc.gov/os/1998/03/fdcp98se.pdf>; FTC, *Annual Report 1999*, 2, available at <http://www.ftc.gov/os/statutes/fdcpa/senate99.pdf>. Since 2000, the FTC consistently has reported that it receives more complaints about debt collection than any other industry. *See* FTC, *Annual Report 2000*, available at <http://www.ftc.gov/os/statutes/fdcpa/fdcpa2000rpt.shtm>; FTC, *Annual Report 2001*, available at <http://www.ftc.gov/os/2001/03/fdcpaar2000.htm>; FTC, *Annual Report 2002*, available at <http://www.ftc.gov/os/2002/06/fdcpaar2002.htm>; FTC, *Annual Report 2003*, 3, available at <http://www.ftc.gov/os/statutes/fdcpa/fdcpa2003rpt.htm>; FTC,

initiated or resolved more than 7 actions against debt collectors in a given year. CFPB, *Annual Report 2012*, at 14. Indeed, in typical years, the Commission has begun or concluded only 2 or 3 actions. *See, e.g.*, FTC, *Annual Report 2004* at 8; FTC, *Annual Report 2005* at 8-9; FTC, *Annual Report 2006* at 8; FTC, *Annual Report 2007* at 8-9. In contrast, 12,018 private FDCPA lawsuits were filed during 2011. *Year-End Lawsuit Numbers Revised Upward, Reach 12,000*, Collections & Credit Risk (Feb. 24, 2012).<sup>25</sup>

In 2010, Congress conferred the Consumer Financial Protection Bureau with authority to enforce and implement the FDCPA. *See* Consumer Financial Protection Act of 2010, Title X, Dodd-

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*Annual Report 2004*, 2, available at <http://www.ftc.gov/os/2004/03/2004fdcpareport.pdf>; FTC, *Annual Report 2005*, 2-3, available at <http://www.ftc.gov/reports/fdcpa05/050729fdcpaprpt.pdf>; FTC, *Annual Report 2006*, 2-3 available at <http://www.ftc.gov/os/2006/04/P0648042006FDCPARReport.pdf>; FTC, *Annual Report 2007*, 2-3, available at <http://www.ftc.gov/reports/fdcpa07/P0748032007FDCPARReport.pdf>; FTC, *Annual Report 2008*, 4, available at <http://www.ftc.gov/os/2008/03/P084802fdcpareport.pdf>; FTC, *Annual Report 2009*, 4, available at <http://www.ftc.gov/os/2009/02/P094804fdcpareport.pdf>; FTC, *Annual Report 2010*, 3, available at <http://www.ftc.gov/os/2010/04/P104802fdcpa2010annrpt.pdf>; FTC, *Annual Report 2011* at 4; The FTC in 2012, *Stats & Data*, available at [http://www.ftc.gov/os/highlights/2012/img/FTCStatsData\\_2012.pdf](http://www.ftc.gov/os/highlights/2012/img/FTCStatsData_2012.pdf). *See also* News Release, Nat'l Ass'n of Attorneys General, Top 10 List of Consumer Complaints for 2008 (Aug. 31, 2009), available at <http://www.naag.org/top-10-list-of-consumer-complaints-for-2008-aug.-31-2009.php>.

<sup>25</sup> Available at <https://collectionscreditrisk.com+year-end-lawsuits-revised-upward-reach-3009740-1.html>.



Frank Wall Street Reform and Consumer Protection Act of 2010, Pub. L. 111–203 (12 U.S.C. 5301). In one of its first assertions of supervisory authority over non-bank entities, the CFPB published notice of its intent to supervise the debt collection industry. *See* Defining Larger Participants in Certain Consumer Financial Product and Service Markets, 77 Fed. Reg. 9592, 9597 (Feb. 17, 2012) (“In 2011, approximately 30 million individuals, or 14 percent of American adults, had debt that was subject to the collections process.”). This new regulatory authority over debt collectors will not, however, obviate the need for vigorous private enforcement of the FDCPA. The CFPB has proposed supervising only collection agencies with more than \$10 million in annual receipts. 77 Fed. Reg. at 9599. The great majority—more than 95%—of the nation’s estimated 4,700 collection agencies fall below that threshold. *Id.* Moreover, the Bureau has delayed finalizing its rule as it considers the collection industry’s proposal to raise the monetary threshold even higher, with concomitantly narrower coverage. *Id.*; *see Large Market Participation Definition Delayed*, Collections & Credit Risk (July 19, 2012) (noting industry recommendation of \$250 million threshold).<sup>26</sup> The need for private enforcement remains acute.

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<sup>26</sup> Available at <http://www.collectionscreditrisk.com/news/large-market-participant-definition-delayed-3011333-1.html>.

**II. THE FDCPA'S COST-SHIFTING PROVISION IS CAREFULLY DESIGNED TO PROTECT BOTH VULNERABLE CONSUMERS AND CONSCIENTIOUS DEBT COLLECTORS.**

The FDCPA's cost-shifting provision, 15 U.S.C. § 1692k(a)(3), works to ensure both that the Act's consumer protection provisions will be enforced and that scrupulous debt collectors will be free from lawsuits brought in bad faith or liability based on inadvertent errors.

First, by shielding unsuccessful but good-faith plaintiffs from the potential burden of paying defendants' fees and costs, the provision protects against the risk that consumers will be deterred from enforcing the Act by the prospect of sinking further into debt if they lose their case. Congress acted to protect debtors against an industry that it viewed as having little or no market incentive to treat them properly, and a strong "incentive to collect by any means." S. Rep. No. 95-382, at 2, reprinted in 1977 U.S.C.C.A.N. 1695, 1696 (noting that "[u]nlike creditors, who generally are restrained by the desire to protect their good will," third-party debt collectors "are likely to have no future contact with the consumer and are often unconcerned with the consumer's opinion of them.").

**A. The Cost-Shifting Provision Enhances Enforcement While Discouraging Suits Brought In Bad Faith.**

Congress and this Court have long recognized the power of cost-shifting statutes both to encourage and to discourage lawsuits. Just as shifting costs and fees to prevailing plaintiffs in the ordinary case will encourage suits to vindicate the public interest, so will awarding costs and fees to defendants have a chilling effect on the initiation of such suits. Further, shifting costs and fees to defendants in frivolous cases can discourage bad-faith and harassing lawsuits. *See Christiansburg Garment Co. v. Equal Emp't Opportunity Comm'n*, 434 U.S. 412, 418 (1978).

This Court has acknowledged the importance Congress placed on encouraging vulnerable consumers to bring private lawsuits to enforce compliance with the Act. *See Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich, LPA*, 130 S. Ct. 1605, 1624 (2011) (noting “the FDCPA's calibrated scheme of statutory incentives to encourage self-enforcement”). Congress’ departure from the more common “prevailing party” standard of Rule 54(d) protects FDCPA plaintiffs from bearing the costs of suit in the event their good-faith claims are unsuccessful, while at the same time discouraging suits brought in bad faith.

**B. The Limitation on Cost Awards To Prevailing Defendants Advances The Goal of Protecting Financially Vulnerable Consumers.**

Section 1692k(a)(3)'s limitation on cost awards to prevailing defendants flows naturally from the goals of the FDCPA. It avoids the risk that debtors who file in good faith will be saddled with additional debt.

If consumers in debt were required to bear defendants' costs of suit for unsuccessfully seeking to enforce the FDCPA, they would likely choose not to file suit in the first place. *Cf. Fleischmann v. Maier Brewing Co.*, 386 U.S. 714, 718 (1967) (acknowledging "the poor might be unjustly discouraged from instituting actions to vindicate their rights if the penalty for losing included the fees of their opponents' counsel.")

This caution is particularly sensible in light of the FDCPA's *bona fide* error provision. 15 U.S.C. § 1692k(c) (providing defense from liability if a collector can show "the violation was not intentional and resulted from a *bona fide* error notwithstanding the maintenance of procedures reasonably adapted to avoid any such error"). If debt collectors maintain such procedures, they can avoid liability for unintentional acts, such as accidentally calling a consumer in a different time zone after hours, or mistakenly sending a dunning letter to a consumer who has requested no further contact.

For the consumer, though, the provision may be a sizable deterrent. Given the fact that a consumer can sue in good faith, prove a violation, and nonetheless lose the case because the violation turns out to have been a *bona fide* error, the FDCPA limitation on cost awards to bad faith suits carries real significance. The facts supporting the *bona fide* error defense will rarely if ever be available to the plaintiff in advance of suit. Without the limitation on cost awards, the potential risk of incurring more debt through a cost award would surely discourage a great many indebted consumers with legitimate FDCPA claims from bringing suit.

### **C. The FDCPA Protects A Particularly Vulnerable Set Of Consumers.**

Congress understood that the consumers protected by the FDCPA are particularly vulnerable. See S. Rep. No. 95-382, at 3 (noting consumers often are subject to collections due to an “unforeseen event such as unemployment, overextension, serious illness, or marital difficulties or divorce.”). See Robert M. Hunt, *Collecting Consumer Debt in America*, Fed. Reserve Bank, Phila. Bus. Rev. 13 (Q2 2007) (reporting 28% of debt collection revenue comes from healthcare related debts);<sup>27</sup> Jose Garcia & Tamara Draut, Demos, *The Plastic Safety Net: How Households are Coping in a Fragile Economy* (2009) (finding that medical debt and unemployment

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<sup>27</sup> Available at [http://www.phil.frb.org/research-and-data/publications/business-review/2007/q2/hunt\\_collecting-consumer-debt.pdf](http://www.phil.frb.org/research-and-data/publications/business-review/2007/q2/hunt_collecting-consumer-debt.pdf).

are significant contributors to household credit card debt loads);<sup>28</sup> David U. Himmelstein et al., *Medical Bankruptcy in the United States, 2007*, 122 Am. J. Med. 741, 743 (2009) (finding a majority (62.1%) of all bankruptcies in 2007 had a medical cause).<sup>29</sup> Bankruptcy filings among people age 55 and older have risen sharply in recent years, with the greatest increases among those 75 and older (up 566.7% between 1991 and 2007) and those ages 65 to 74 (up 177.8%); Deborah Thorne et al., *Generations of Struggle*, AARP Pub. Policy Inst. 1 (2008).<sup>30</sup> These difficult circumstances limit their ability to enforce compliance with the FDCPA.

Debtors' fears, lack of sophistication and limited knowledge of the law further weaken their ability to enforce compliance with the FDCPA. See FTC, *Challenges of Change* at 17. Most consumers, and particularly those who are financially vulnerable, fear encounters with the legal system, and may pay debts they dispute simply to avoid the consequences—both real and imagined—of going to court. See *Zimmerman v. Portfolio Recovery Assocs., LLC*, 276 F.R.D. 174 (S.D.N.Y. 2011) (debt collection company sent “Pre-Suit Package” containing pseudo-legal documents misleading consumers about the imminence of suit). For example, many older debtors

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<sup>28</sup> Available at [http://www.demos.org/sites/default/files/publications/PlasticSafetyNet\\_Demos.pdf](http://www.demos.org/sites/default/files/publications/PlasticSafetyNet_Demos.pdf).

<sup>29</sup> Available at [http://pnhp.org/new\\_bankruptcy\\_study/Bankruptcy-2009.pdf](http://pnhp.org/new_bankruptcy_study/Bankruptcy-2009.pdf).

<sup>30</sup> Available at [http://assets.aarp.org/rgcenter/consumer/2008\\_11\\_debt.pdf](http://assets.aarp.org/rgcenter/consumer/2008_11_debt.pdf).

believe they will go to jail if summoned to court. See Donna S. Harkness, *When Over-The-Limit is Over The Top: Addressing The Adverse Impact of Unconscionable Consumer-Credit Practices on the Elderly*, 16 Elder L.J. 1, 3-4 (2008); Matthew W. Ludwig, *Abuse, Harassment, and Deception: How the FDCPA is Failing America's Elderly Debtors*, 1 Elder L.J. 135, 135-37, 151-56 (2008).

Because of the dire consequences of having a judgment entered, a debtor may easily be bullied into paying even an invalid debt. As explained by one commentator,

[T]he judgment will impose costs on the consumer by damaging the consumer's credit rating. . . [which] does more than merely raise the consumer's cost of credit. A damaged credit score can make it difficult to rent an apartment, find a job, or even purchase automobile insurance. . . . credit reports typically do not record the filing of the lawsuit, but they do record judgments. Therefore, a civil filing serves as a credible threat to inflict harm on the defendant and may induce the defendant to pay.

Richard Hynes, *Broke But Not Bankrupt: Consumer Debt Collection In State Courts*, 60 Fla. L. Rev. 1, 20 (2008).

Moreover, collectors know that older people, 80 percent of whom are homeowners, are susceptible to threats that they may lose their homes. Older consumers living alone are often targets of abusive tactics because they may be socially isolated; in addition, because they are at home during daytime hours, they are more accessible to collectors. *See* Charles Duhigg, *Bilking the Elderly with a Corporate Assist*, N.Y. Times, May 20, 2007, at A1.<sup>31</sup> Additionally, the ability of some older people to make financial decisions or to remember the details of stale debts may be impaired by cognitive decline. *See* Naomi Karp et al., *Protecting Older Investors: The Challenge of Diminished Capacity*, AARP Pub. Policy Inst. 11 (2011).<sup>32</sup> As a result, older people sometimes agree to pay on debts they had already paid in full or never owed in the first place, such as debts of a deceased spouse.

Bullying a person into paying an invalid or discharged debt does not make an abusive collection practice valid or defensible. Congress knew collectors could exploit the financial, educational, and circumstantial vulnerabilities of debtors. The limitation on cost awards to prevailing defendants encourages consumers to enforce the FDCPA without fear that the costs of that effort will add to their debt.

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<sup>31</sup> Available at <http://www.nytimes.com/2007/05/20/business/20tele.html?pagewanted=all>.

<sup>32</sup> Available at [http://www.aarp.org/content/dam/aarp/research/public\\_policy\\_institute/cons\\_prot/2011/rr2011-04.pdf](http://www.aarp.org/content/dam/aarp/research/public_policy_institute/cons_prot/2011/rr2011-04.pdf).



**CONCLUSION**

The Tenth Circuit's interpretation of the FDCPA's cost shifting provision runs counter to both the structure and the purpose of the Act. Because it would upset the carefully articulated enforcement regime of the FDCPA, that decision should be reversed.

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