No. 10-708

In The Supreme Court of the United States

FIRST AMERICAN FINANCIAL CORPORATION, Successor in Interest to the First American Corporation, and FIRST AMERICAN TITLE INSURANCE COMPANY,

Petitioners,

v.

DENISE P. EDWARDS, Individually and on Behalf of All Others Similarly Situated,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF ACA INTERNATIONAL AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE*

ACA International ("ACA") is a non-profit corporation founded in 1939 based in Minneapolis, Minnesota. ACA is an association of credit, collection and debt purchasing professionals who provide a variety of accounts receivable management services. ACA's interests in this matter are both public and private.[1]

ACA represents approximately 5,000 third-party collection agencies, asset buyers, attorneys, credit grantors, and their vendor affiliates. Members include sole proprietorships, partnerships, and corporations ranging from small businesses to firms employing thousands of workers. The membership includes 3,000 third-party debt collection companies, 650 credit grantors, 225 asset buyers, 200 vendor affiliates, and over 850 in-house, compliance, defense or collection attorneys.

Together, ACA members employ nearly 150,000 collectors. These members include the very smallest of businesses that operate within a limited geographic range of a single state, and the very largest of multinational corporations that operate in every state and non-U.S. jurisdictions. Approximately half

[1] No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *amicus curiae* or its counsel made a monetary contribution to the preparation or submission of this brief. Consent to the filing of this brief was filed on July 11, 2011.

of the debt collection company members of ACA have fewer than ten employees. Many are wholly or partially owned or operated by minorities or women. ACA helps its members serve their communities and meet the challenges created by changing markets through leadership, education, and service.

Through their attempts to recover outstanding accounts, ACA members act as an extension of every community's businesses. Members of ACA represent the local hardware store, the retailer down the street, and the family doctor. ACA members work with these businesses, large and small, to obtain payment for the goods and services received by consumers, and each year, the combined effort of ACA members results in the recovery of billions of dollars that are returned to business and reinvested in local communities. Without an effective collection process, the economic viability of these businesses, and by extension, the local and national economies in general are threatened. At the very least, absent effective collections, citizens would be forced to pay inflated prices to compensate for uncollected debts.

Finally, ACA members also assist governmental bodies in recovering unpaid obligations, a function that is increasingly important as many of our government clients face record budget deficits.

SUMMARY OF ARGUMENT

ACA writes separately to urge the Court to clarify an issue of vital importance to its members: namely, that Congress cannot create Article III standing for consumers simply by passing a law that allows them to pursue statutory damage claims. Rather, consumers must allege and prove they have suffered "injury in fact" to establish their standing. In the context of consumer protection statutes, this means consumers must plead and prove they have suffered "actual damages" resulting from the statutory violation in order to have standing.

ACA members are governed by several federal statutes, most notably the Fair Debt Collection Practices Act (the "FDCPA"), 15 U.S.C. §§ 1692, *et seq*. As written, the FDCPA prohibits a variety of collection abuses and allows aggrieved consumers to seek actual damages, statutory damages, attorneys' fees and costs. *See id.* at § 1692k. Although thousands of FDCPA lawsuits are filed in federal courts each year, many of the plaintiffs neither plead nor seek to prove that they have suffered any actual damages as a result of the alleged violation. Nonetheless, courts across the country have allowed consumers to pursue FDCPA claims that have caused no actual harm, helping give rise to what has been referred to as a "cottage industry" of litigation based on "technical violations of federal law" driven solely by the pursuit of attorneys' fees. *See Jerman v. Carlisle, McNellie, et al.*, ___ U.S. ___, 130 S. Ct. 1605, 1631 (2010) (Kennedy, J., dissenting).

ACA joins the Petitioners in urging the Court to reverse the decision of the Ninth Circuit. ACA requests that the Court clarify that consumers must plead and prove they have suffered actual damages resulting from a violation of a consumer protection statute in order to establish standing to sue under Article III of the Constitution.

ARGUMENT

I. Consumers Who Have Been Subjected To Collection Abuses Proscribed By The FDCPA May Recover Actual Damages, "Additional Damages" Allowed By The Court, And Costs And Reasonable Attorneys' Fees

Congress passed the FDCPA in 1977 to combat "abusive, deceptive and unfair collection practices" by debt collectors, and to insure that collectors who refrain from such improper practices were not placed at a competitive disadvantage. *See* 15 U.S.C. § 1692(a), e.

> Among other things, the Act prohibits debt collectors from making false representations as to a debt's character, amount, or legal status, § 1692e(2)(A); communicating with consumers at an unusual time or place likely to be inconvenient to the consumer, § 1692c(a)(1); or using obscene or profane

> language or violence or the threat thereof, §§ 1692d(1), (2).

Jerman, 130 S. Ct. at 1608-09 (internal quotation marks omitted). The statute obligates collectors to provide consumers with notice of their right to dispute a debt or any portion thereof, and it restricts the permissible venues for legal actions on the debt. *See* 15 U.S.C. §§ 1692g, 1692i. The focus of the Act is to prevent deceptive and intimidating conduct by collectors that can seriously "disrupt a [consumer's] life":

> Congress was concerned with disruptive, threatening, and dishonest tactics. The Senate Report accompanying the Act cites practices such as 'threats of violence, telephone calls at unreasonable hours [and] misrepresentation of consumer's legal rights.' . . . **In other words, Congress seems to have contemplated the type of actions that would intimidate unsophisticated individuals and which, in the words of the Seventh Circuit, 'would likely disrupt a [consumer's] life.**' . . .

Guerrero v. RJM Acquisitions, LLC, 499 F.3d 926, 938-39 (9th Cir. 2007) (emphasis added; internal citations omitted).

The remedies provided by the Act include actual damages, additional damages, costs and attorneys' fees. Specifically, in the case of an individual action under the statute, the FDCPA provides as follows:

> (a) Amount of damages. Except as otherwise provided by this section, any debt collector

> who fails to comply with any provision of this subchapter with respect to any person is liable to such person in an amount equal to the sum of – (1) any actual damage sustained by such person as a result of such failure; (2)(A) in the case of any action by an individual, such additional damages as the court may allow, but not exceeding $1,000; . . . . and (3) in the case of any successful action to enforce the foregoing liability, the costs of the action, together with a reasonable attorney's fee as determined by the court. . . .

15 U.S.C. § 1692k. When a court considers whether to award "additional damages," the statute requires it to assess a series of factors:

> (b) Factors considered by court. In determining the amount of liability in any action under subsection (a) of this section, the court shall consider, among other relevant factors – (1) in any individual action under subsection (a)(2)(A) of this section, the frequency and persistence of noncompliance by the debt collector, the nature of such noncompliance, and the extent to which such noncompliance was intentional; . . . .

Id. at § 1692k(b).

II. Circuit Courts Have Consistently Permitted Consumers To Recover Statutory "Additional Damages" Under The FDCPA Even In The Absence Of Any Actual Damage

Numerous circuit courts have held that a plaintiff may recover statutory damages under the FDCPA even if the plaintiff fails to allege or prove any actual damages resulting from the violation. Most courts have reached this conclusion without addressing the decisions of this Court governing standing.

In *Baker v. G.C. Servs. Corp.*, 677 F.2d 775 (9th Cir. 1982), the plaintiff challenged the contents of a collection letter. The district court held that the letter violated sections 1692e and 1692g of the FDCPA, but determined that the plaintiff had suffered no actual damages. *See id.* at 777. Despite the lack of actual damages, the district court awarded the plaintiff $100 in statutory damages, plus attorneys' fees. *See id.* The Ninth Circuit affirmed, noting there is "no indication in the statute that [an] award of statutory damages must be based on proof of actual damages." *Id.* at 780. *Baker* never addressed whether a consumer who had neither alleged nor proved actual damages stemming from an FDCPA violation possessed standing under Article III.

Following *Baker*, numerous circuit courts have held that plaintiffs may pursue claims for statutory damages under the FDCPA without proving any actual damages, and they have reached this conclusion without addressing this Court's Article III

standing jurisprudence. *See, e.g., Keele v. Wexler*, 149 F.3d 589, 593-94 (7th Cir. 1998) ("The FDCPA does not require proof of actual damages as a precursor to the recovery of statutory damages. In other words, the Act is blind when it comes to distinguishing between plaintiffs who have suffered actual damages and those who have not.") (citations omitted); *Miller v. Wolpoff & Abramson, L.L.P.*, 321 F.3d 292, 307 (2d Cir. 2003) (fact that plaintiff did not pay attorneys' fees "does not necessarily suggest that he was not injured for purposes of his FDCPA claim, if he can show that [the law firm defendant] *attempted* to collect money in violation of the FDCPA"); *Carroll v. Wolpoff & Abramson*, 53 F.3d 626, 629 (4th Cir. 1995) (affirming award of $50 in statutory damages and $500 in fees; plaintiff abandoned actual damages claim); *Harper v. Better Bus. Servs, Inc.*, 961 F.2d 1561, 1563 (11th Cir. 1992) (affirming award of statutory damages and attorneys' fees where plaintiff "offered no proof of actual damages.").

At least one circuit considered the Article III issue directly, and held that consumers who suffer no actual damages still have standing to sue under the FDCPA based upon their claim for statutory damages. *See Robey v. Shapiro, Marianos & Cejda, LLC*, 434 F.3d 1208, 1212 (10th Cir. 2006) (the FDCPA "permits the recovery of statutory damages up to $1,000 in the absence of actual damages" and plaintiff with no actual damages satisfied the "injury in fact" requirements of constitutional standing).

III. A Consumer Who Suffers No Actual Damage As A Result Of An FDCPA Violation Cannot Demonstrate "Injury In Fact" And Lacks Standing To Sue Under Article III

ACA respectfully submits that in the context of the FDCPA and other consumer protection statutes, a consumer cannot demonstrate "injury in fact" without alleging and proving that he has suffered actual damages resulting from the violation. Article III of the United States Constitution limits the judicial authority of the federal courts to "cases" and "controversies." *See* U.S. Const. art. III, § 2; *see also Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 471 (1982) (the existence of a "case" or "controversy" is a "bedrock requirement" of federal court jurisdiction); *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 37 (1976) ("No principle is more fundamental to the judiciary's proper role in our system of government than the constitutional limitation of federal court jurisdiction to actual cases or controversies.").

The "standing" doctrine ensures that only true "cases or controversies" can proceed in federal court. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). "In essence the question of standing is whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues." *Warth v. Seldin*, 422 U.S. 490, 498 (1975) (standing is "a threshold issue in every federal case, determining the power of the court to entertain the suit.").

The "irreducible constitutional minimum" requirements of standing include proof that the plaintiff has suffered "injury in fact" as a result of the unlawful conduct – meaning the plaintiff suffered "an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical." *Lujan*, 504 U.S. at 560.

The "injury in fact" test for standing "requires more than an injury to a cognizable interest. **It requires that the party seeking review be himself among the injured.**" *Id.* at 563 (emphasis added); *see also Raines v. Byrd*, 521 U.S. 811, 819 (1997) ("We have consistently stressed that a plaintiff's complaint must establish that he has a personal stake in the alleged dispute, **and that the alleged injury suffered is particularized as to him**.") (emphasis added); *Warth*, 422 U.S. at 498 ("The Art. III judicial power exists only to redress or otherwise to protect against injury to the complaining party, even though the court's judgment may benefit others collaterally. **A federal court's jurisdiction therefore can be invoked only when the plaintiff himself has suffered some threatened or actual injury resulting from the putatively illegal action**. . . .") (emphasis added); *Valley Forge*, 454 U.S. at 473 (Article III's standing requirements prevent "the conversion of courts of the United States into judicial versions of college debating forums.").

The party invoking federal jurisdiction bears the burden of establishing the standing requirements for

each type of relief he seeks. *See Lujan*, 504 U.S. at 561; *see also Summers v. Earth Island Inst.*, 555 U.S. 488, 129 S. Ct. 1142, 1149 (2009) (the plaintiff "bears the burden of showing that he has standing for each type of relief sought."); *City of Los Angeles v. Lyons*, 461 U.S. 95, 111-12 (1983) (plaintiff with standing to pursue damages based on police use of illegal chokehold lacked standing to seek injunction banning use of the same chokehold).

Congress can enact statutes that provide consumers with a new cause of action, but Congress does *not* have the power to eradicate Article III's minimum standing requirements. *See Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91, 100 (1979) ("In no event, however, may Congress abrogate the Art. III minima: A plaintiff must always have suffered a distinct and palpable injury to himself . . . that is likely to be redressed if the requested relief is granted.") (quotation marks omitted); *see also Summers*, 129 S. Ct. at 1151 ("Unlike redressability, however, **the requirement of injury in fact is a hard floor of Article III jurisdiction that cannot be removed by statute**.") (emphasis added); *Valley Forge*, 454 U.S. at 488, n.24 ("Neither the Administrative Procedure Act, nor any other congressional enactment, can lower the threshold requirements of standing under Art. III."); *Simon*, 426 U.S. at 39 ("broadening the categories of injury that may be alleged in support of standing is a different matter from abandoning the requirement that the party seeking review must himself have suffered an injury.") (citation omitted). To

the extent that decisions of the circuit courts have suggested that the FDCPA allows a plaintiff to pursue a claim without showing injury in fact, they should be expressly disapproved.

IV. By Ignoring Or Misconstruing This Court's Standing Requirements, Courts Have Reached Absurd Results In FDCPA Cases

The lax standing rules employed by courts in FDCPA cases have led to a tsunami of "no injury" lawsuits that have flooded federal courts across the country. These cases often have absurd endings, where the uninjured consumer recovers nominal statutory damages – or nothing at all – while the attorney is awarded tens of thousands of dollars in fees for "vindicating" a technicality. ACA submits that clarity from this Court is needed on the important standing issue raised here.

For example, for the past five years, the parties in *Jerman* have been litigating whether the words "in writing" should be included in a collector's section 1692g letter. After this Court remanded the case, the parties filed cross-motions for summary judgment, and the district court held that the plaintiff and the class were entitled to zero actual damages and zero statutory damages. *See Jerman v. Carlisle, McNellie, et al.*, No. 1:06-cv-1397-PAG, 2011 WL 1434679, at *10 (N.D. Ohio Apr. 14, 2011). Undeterred by this result, counsel for plaintiff filed a motion seeking a whopping $343,411.79 in attorneys' fees and costs,

arguing that the action was successful because plaintiff "obtained judgment" on the claim. *See Jerman v. Carlisle, McNellie, et al.*, No. 1:06-cv-1397-PAG (N.D. Ohio) (Docket No. 62-1).

Incredibly, under current law, counsel in *Jerman* theoretically could recover some fees. One circuit court has held that even if an FDCPA plaintiff proves *zero* actual damages and *zero* statutory damages, he may still recover fees and costs. *See Emanuel v. American Credit Exchange*, 870 F.2d 805, 809 (2d Cir. 1989) (plaintiff entitled to fees and costs even though he was "not deserving of actual damages" and "should not receive any 'additional damages'").

Unfortunately, the *Jerman* case is hardly an anomaly. FDCPA plaintiffs who have failed to prove any actual damages are routinely awarded significant attorneys' fees to compensate their efforts. *See, e.g., Danow v. Law Office of David E. Borback, P.A.*, 634 F. Supp. 2d 1337, 1345 (S.D. Fla. 2009) (jury awarded zero actual damages and $1,000 in statutory damages; court awarded fees of $62,895.00); *Nelson v. Select Fin. Servs., Inc.*, No. Civ. A. 05-3473, 2006 WL 1672889, at *1, 4 (E.D. Pa. June 6, 2006) (where a single phrase in one letter violated FDCPA, plaintiff recovered zero actual damages, $1,000 in statutory damages and $24,693.80 in fees); *Gardisher v. Check Enforcement Unit, Inc.*, No. 1:00-cv-401, 2003 WL 187416, at *7 (W.D. Mich. Jan. 22, 2003) (zero actual damages, $1,000 in statutory damages, and $69,872.00 in fees); *Rockwell v. Talbott, Adams & Moore, Inc.*, No. 8:04cv24, 2006 WL 436041, at *1-3 (D. Neb. Feb.

21, 2006) (jury awarded zero actual damages and $250 in statutory damages; court awarded fees of $5,075).

Additionally, uninjured plaintiffs often serve as class representatives in FDCPA class actions. Indeed, even where there is no evidence that the class representative or class members ever read or received the collection letters they are challenging, courts have held that "actual receipt" of the letter is "irrelevant to liability" under the FDCPA. *See, e.g., Tourgeman v. Collins Fin. Servs., Inc.*, No. 08-cv-1392 JLS (NLS), 2011 WL 3176453, at *3-5 (S.D. Cal. July 26, 2011) (denying motion to dismiss class representative's claim: "if a consumer's claim is based on misstatements or micharacterizations in a letter from a debt collector, whether the consumer received the letter is irrelevant."); *Herrera v. LCS Fin. Servs. Corp.*, ___ F.R.D. ___, 2011 WL 2149084, at *7 (N.D. Cal. June 1, 2011) (certifying FDCPA class: "the simple act of mailing letters with allegedly misleading information constitutes a use of such prohibited language, and actual receipt is irrelevant to liability under the FDCPA.") (citation and quotation marks omitted); *Irwin v. Mascott*, 96 F. Supp. 2d 968, 976 (N.D. Cal. 1999) ("A debt collector violates the FDCPA by sending a notice containing unlawful provisions. Whether the notice is received is irrelevant to the issue of liability."); *see also Kuhn v. Account Control Tech., Inc.*, 865 F. Supp. 1443, 1450 (D. Nev. 1994) (granting summary judgment for consumer on section 1692g claim: "ACT's argument that Kuhn never received the

letter or did not read it is of no moment on the issue of whether a violation has occurred.").

In order to reverse this onslaught of "no injury" lawsuits that are clogging the nation's courts and draining the resources of collection professionals, ACA respectfully urges the Court to clarify that a consumer must plead and prove actual damages to establish standing under consumer protection statutes like the FDCPA.

CONCLUSION

For all of the foregoing reasons, ACA respectfully submits that the decision of the Ninth Circuit should be reversed.

Dated: August 26, 2011

Respectfully submitted,

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