No. 10-708

IN THE

# Supreme Court of the United States

FIRST AMERICAN FINANCIAL CORPORATION, SUCCESSOR IN INTEREST TO 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 FOR THE NATIONAL ASSOCIATION OF RETAIL COLLECTION ATTORNEYS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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## BRIEF FOR THE NATIONAL ASSOCIATION OF RETAIL COLLECTION ATTORNEYS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

### INTEREST OF *AMICUS CURIAE*

The National Association of Retail Collection Attorneys (NARCA) is a nationwide, not-for-profit trade association of debt-collection attorneys.[1] NARCA's members include more than 700 law firms.

[1] No counsel for a party authored any part of this brief – the filing of which has been consented to by all parties – and no person other than *amicus curiae*, its members, or its counsel made a monetary contribution to the preparation or submission of the brief.

NARCA members must meet association standards designed to ensure experience and professionalism. They are guided by NARCA's code of ethics, which imposes an obligation of self-discipline beyond the requirements of pertinent laws and regulations.

"[S]trict compliance with the jurisdictional standing requirement," *Raines v. Byrd*, 521 U.S. 811, 819 (1997), is a matter of great concern to NARCA and its members. The Real Estate Settlement Procedures Act of 1974, 12 U.S.C. § 2601-2617 ("RESPA"), is not the only federal statute under which courts have allowed awards of damages in the absence of injury-in-fact. NARCA members are regularly involved in the lawful collection of past-due consumer debts, and must therefore interpret and apply the requirements of applicable collection law, principally the Fair Debt Collection Practices Act, 15 U.S.C. § 1692 *et seq*. ("the FDCPA"). Not surprisingly, many of NARCA's members have been and are defendants in lawsuits brought under the FDCPA. In many of these lawsuits, and in many others brought against other types of debt-collector defendants, damages and attorney's fees have been awarded without the requirement of pleading or proof of any actual injury to the plaintiff or plaintiff class. NARCA thus has a keen interest in urging the Court to enforce the standing requirements of U.S. Const., Art. III, § 2, and to require proof of "injury in fact" before damages or fees may be awarded in an action brought under a federal statute.

NARCA has participated as *amicus curiae* in other cases before the Court involving issues of interest to its members. *See, e.g*., *Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA*, 559 U.S. ___, 130 S. Ct. 1605 (2010); *Heintz v. Jenkins*, 514 U.S. 291 (1995).

## SUMMARY OF ARGUMENT

The holding of the Ninth Circuit that a plaintiff suing under RESPA need not allege that the challenged conduct affected the price, quality or other characteristics of the services they paid for should be rejected for the ample reasons put forth by Petitioner. NARCA's purpose in submitting this brief is to advise the Court that this holding has broader implications. Its members, and others who collect consumer debts, are frequently subjected to lawsuits under the FDCPA that are governed by similar holdings—that is, in which courts award "statutory" damages, as well as attorney fees, without requiring any allegation or proof of actual injury at all, economic or otherwise.

NARCA would direct the Court's attention to two distinct and unfortunate consequences of the absence of an "injury-in-fact" requirement in FDCPA cases. First, a sampling of awards in FDCPA cases illustrates the perverse results that can occur when Article III's requirement that an injury be pled and proved before damages can be awarded is not enforced. Second, the availability of damages in the absence of injury not only supports "the 'cottage industry' of litigation that has arisen out of the FDCPA," *see Jerman*, 559 U.S. at ___, 130 S.Ct. at 1631 (Kennedy, J., joined by Alito, J., dissenting) (citation omitted); it has actually fueled the growth of that "industry" as plaintiff's lawyers openly advertise the availability to the uninjured of awards of money and a free lawyer. The standing requirements of Article III were designed to prevent just this sort of decoupling of legal claims from real harm.

## ARGUMENT

When a plaintiff has not sustained any actual injury, his or her only interest in the case is in the outcome of the suit, an interest that is insufficient to confer standing. *See Vermont Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765, 772 (2000). Like RESPA, the FDCPA operates in just such a fashion, permitting plaintiffs who have neither claimed nor proved that they suffered any injury to recover not only statutory damages in some amount, but also attorney fees. Standing requires injuries that are "concrete" and "not conjectural or hypothetical." *Vermont Agency*, 529 U.S. at 771 (citation and internal quotation marks omitted). By contrast, allowing undamaged plaintiffs to recover "damages" results in awards of money based on technical and harmless violations. It has also created a "cottage industry" of litigation for the sake of litigating, in which lawsuits are filed to generate artificial awards of damages and consequent awards of attorney fees rather than to remedy actual harm, which often is not, because it need not be, claimed at all.

### I. ALLOWING AWARDS OF DAMAGES UNDER THE FDCPA WITHOUT REQUIRING PROOF OF INJURY HAS LEAD TO PERVERSE RESULTS IN WHICH DAMAGES AND ATTORNEY FEES ARE AWARDED BASED ON TECHNICAL AND HARMLESS VIOLATIONS.

The FDCPA allows plaintiffs to recover "actual damages sustained," 15 U.S.C. § 1692k(a)(1), as well as either "such additional damages as the court may allow, but not exceeding $1,000" for an individual, or, in the case of a class action, "such amount as the

court may allow for all other class members, without regard to a minimum individual recovery, not to exceed the lesser of $500,000 or 1 per centum of the net worth of" the defendant, § 1692k(a)(2)(A) and (B). Plaintiffs and plaintiff classes in cases brought under the FDCPA are routinely allowed to recover so-called "statutory damages" under § 1692k(a)(2) without regard to whether they have pled or proved any "actual damages sustained" under §1692k(a)(1). *See, e.g., Jacobson v. Healtcare Fin. Servs., Inc*., 516 F.3d 85, 96 (2d Cir. 2008); *Fed. Home Loan Mtge. Corp. v. Lamar*, 503 F.3d 504, 513 (6th Cir. 2007); *Keele v. Wexler*, 149 F.3d 589, 593 (7th Cir. 1998); *Baker v. G.C. Servs. Corp*., 677 F.2d 775, 781 (9th Cir. 1982). And prevailing plaintiffs, including those who only recover so-called "statutory damages" under § 1692k(a)(2), may also recover "the costs of the action, together with a reasonable attorney's fee as determined by the court" under §1692k(a)(3). *See Savino v. Computer Credit, Inc.*, 164 F.3d 81, 87 (2d Cir. 1998) ("Where a plaintiff prevails, whether or not he is entitled to an award of actual or statutory damages, he should be awarded costs and reasonable attorney fees in amounts to be fixed in the discretion of the court"); *Thornton v. Wolpoff & Abramson, LLP*, 2008 WL 185517, at *2-*3 (11th Cir. January 23, 2008) (plaintiff who recovered no actual damages but $1 in statutory damages entitled to attorney fees).

Cases decided under the FDCPA provide some illuminating examples of how far courts will stray from the notion that federal lawsuits should redress injuries that are concrete and not conjectural. In *Savino v. Computer Credit, Inc*., 990 F.Supp. 159 (E.D.N.Y. 1998), *aff'd in relevant part*, 164 F.3d 81 (2nd Cir. 1998), wherein no actual damages were claimed, the District Court awarded $500 in

statutory damages—and, of course, attorney fees—based on plaintiff's receipt of a single letter that contained no threat of action and "which the plaintiff may not have read." 990 F.Supp. at 162, 166. In *Richard v. Oak Tree Group, Inc*., 2008 WL 5060319, at *9 (W.D. Mich. November 21, 2008), a plaintiff whose actual damages claims had been rejected was awarded statutory damages of $50—and, of course, attorney fees—based on a single letter that failed to break down parts of a "balance owed" figure into the actual balance owed and a collection fee.[2] Plaintiffs were, in fact, contractually required to pay that fee and did owe the balance, and when they wrote back the defendant provided them with the correct breakdown "within days after the request." *Id*. at *9.

The *reductio ad absurdum* of the rule that a plaintiff can pursue an FDCPA claim despite having suffered no actual injury may be *Ehrich v. I.C. System, Inc.*, 681 F.Supp.2d 265 (E.D.N.Y. 2010). In that case the court ruled that the FDCPA was violated by a letter that properly explained in English how to dispute a debt in writing, as was required by law, but that also contained a sentence in Spanish that simply invited the recipient to call a toll-free number with any "questions" regarding the debt. *Id*. at 268 and n. 1. The court held that the plaintiffs had standing to claim that the Spanish sentence "overshadowed" the admittedly correct

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[2] The District Court ultimately awarded attorney fees, but reduced the requested fees by 85%. *Richard v. Oak Tree Group, Inc.*, 2009 WL 3234159 (W.D. Mich. September 30, 2009). Nonetheless, the defendant was also required to bear its own expenses to litigate class certification and summary judgment, to brief the issue of statutory damages (which was tried to the court) and to litigate the fee petition.

English instructions on how to dispute a debt despite the fact that the plaintiffs "are English-speakers, not Spanish-speakers, and were therefore not affected by the Spanish sentence contained in the debt collection letter." *Id*. at 269. The court called the result "somewhat anomalous," but relied on *Linda R.S. v. Richard D.*, 410 U.S. 614 (1973), for the proposition that Congress was permitted to enact statutes that created legal rights that, if invaded, "create[d] constitutional standing." *Ehrich*, 681 F.Supp.2d at 269 n. 6 (citing *Linda R.S.*, 410 U.S. at 617 n. 3). But the court cited no invasion of *the plaintiffs'* legal rights based on a sentence they could not even read; instead it held that "the FDCPA. . . focus[es] on a debt collector's misconduct, and not on whether a plaintiff can demonstrate actual damages." *Ehrich*, 681 F.Supp.2d at 270 (citation omitted). The *Ehrich* court could not really be blamed for standing Article III's requirement of actual injury on its head in ruling that standing depended on what the defendant did rather than on how it affected the plaintiff; it had ample governing authority from the courts of appeals to cite to that effect, including *Jacobson* and *Keele*. *See Ehrich*, 681 F.Supp.2d at 270.

Even absent either actual or statutory damages, plaintiffs may be allowed to recover attorney fees if they "prevail" by establishing a violation of the FDCPA. Compare *Pipiles v. Credit Bureau of Lockport, Inc.*, 886 F.2d 22, 28 (2d Cir. 1989) (attorney fees awarded despite no award of actual or statutory damages "[b]ecause the FDCPA was violated"), with *Johnson v. Eaton*, 80 F.3d 148, 151-52 (5th Cir. 1996) (attorney fees not available under FDCPA to plaintiff who recovers neither actual nor statutory damages). This conflict is undoubtedly due in part to the absence of a proper standing requirement, as courts

struggle with the notion of awarding attorney fees to plaintiffs who have not proved (and often not even claimed) that they were harmed. Although attorney fee awards are legally distinct from damages awards, to NARCA's members that have been sued under the FDCPA the distinction means little, especially in cases where little or no damages have been awarded. In either case, a defendant is required to pay money as a result of claims made by a plaintiff who has not proved that the defendant harmed him or her, as Article III requires. For example, in *Fasten v. Zager*, 49 F.Supp.2d 144 (E.D.N.Y. 1999), the plaintiff had received a debt collection letter from an attorney about an unpaid medical bill. The District Court rejected several challenges to the contents of the letter under the FDCPA, but found one violation: while credit reporting agencies may retain adverse credit information on a debtor's credit report for *seven* years, *see* 15 U.S.C. § 1681c, the letter the defendant sent to the plaintiff said such information could be retained for *five* years. 49 F.Supp.2d at 150. The court called the violation "minor, if not *de minimus*," and thought there was "no reason to believe that the defendant's error would have any effect on [the plaintiff]." *Id* at 150-521. The court declined even to award statutory damages, but held that it was nonetheless required by governing Second Circuit law to invite an application for fees. *Id*. at 151.

Indeed, in a case the Court heard on another issue, the plaintiff is seeking just such a windfall—an award of attorney fees in the absence of either actual or statutory damages. After the Court decided *Jerman*, the District Court on remand granted summary judgment to the plaintiff on the underlying FDCPA claim but denied her request for statutory

damages. (She had not sought any actual damages.) Memorandum of Opinion and Order, *Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA*, Case No. 1:06-cv-01397-PAG, ECF Doc. # 59 (N.D. Oh. April 14, 2011). While Ms. Jerman has appealed that ruling, she claims regardless that her action was "successful" and is seeking more than $343,000 in attorney fees and costs, Plaintiff's Motion for an Award of Costs and Attorney Fees, *Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA*, Case No. 1:06-cv-01397-PAG, ECF Doc. # 62 (N.D. Oh., filed May 3, 2011), as well as a $3,000 "incentive award" for recovering neither actual nor statutory damages for the class of plaintiffs in her case, Plaintiff's Motion for an Incentive Award, *Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA*, Case No. 1:06-cv-01397-PAG, ECF Doc. # 61 (N.D. Oh., filed May 3, 2011).

Cases like these demonstrate that permitting damages claims to survive without requiring that there be any actual injuries results in the entry of judgments based on less than even the hypothesis or conjecture that the Court decried as inadequate in *Vermont Agency*. None of the plaintiffs in the cases cited above, or in other cases where damages or attorney fees were awarded in the absence of what the FDCPA itself, apparently without irony, calls "actual damages," suffered any real harm as a result of the conduct on which their claims were grounded. Indeed, because they are not required to do so, many plaintiffs in FDCPA cases do not even allege actual injury.

## II. THE ABSENCE OF A REQUIREMENT OF ACTUAL INJURY IN FDCPA CASES HAS SPAWNED A "COTTAGE INDUSTRY" OF LITIGATION DESIGNED TO GENERATE ATTORNEY FEES RATHER THAN REDRESS REAL HARM.

The dissenting Justices in *Jerman* lamented the ability of "certain actors in the system to spin even good-faith, technical violations of federal law into lucrative litigation, if not for themselves then for the attorneys who conceive of the suit." *Jerman*, 559 U.S. at ___, 130 S.Ct. at 1631 (Kennedy, J., joined by Alito, J., dissenting). They were hardly the first to make this observation. In the opinion they cited, *Lamar*, 503 F.3d at 513, the Sixth Circuit quoted at length from observations made by Judge Glasser of the Eastern District of New York regarding the requirement that courts in FDCPA cases apply the so-called "least sophisticated consumer" standard:

> Ironically, it appears that it is often the extremely sophisticated consumer who takes advantage of the civil liability scheme defined by this statute, not the individual who has been threatened or misled. The cottage industry that has emerged does not bring suits to remedy the "widespread and serious national problem" of abuse that the Senate observed in adopting [the FDCPA], . . . nor to ferret out collection abuse in the form of "obscene or profane language, threats of violence, telephone calls at unreasonable hours, misrepresentation of a consumer's legal rights, disclosing a consumer's personal affairs to friends, neighbors, or an employer, obtaining information about a consumer through false pretense, impersonating public officials and

> attorneys, and simulating legal process." Rather, the inescapable inference is that the judicially developed standards have enabled a class of professional plaintiffs. . . .

*Jacobson v. Healthcare Fin. Servs., Inc.*, 434 F.Supp.2d 133, 138-39 (E.D.N.Y 2006) (citations omitted), *aff'd in part and rev'd in part on other grounds*, 516 F.3d 85 (2d Cir. 2008).

As NARCA's members know all too well, statistics bear out these observations. In 2006, 3,710 lawsuits were filed under the FDCPA, but the number has grown steadily to 10,914 in 2010. *See Nearly 11,000 FDCPA Lawsuits Filed In 2010*, http://www.insidearm.com/daily/collection-laws-regulations/fdcpa/nearly-11000-fdcpa-lawsuits-filed-in-2010/ (last visited August 29, 2011). The tripling of case filings in just five years should come as no surprise given the incentives created by a claim that requires no proof of harm; when free money is made available, people will usually come around to try to get some. This is especially true if the free money is well advertised. Plaintiffs' lawyers actively solicit potential clients by trumpeting just how little the FDCPA asks of them in order to produce an award of money. One lawyer candidly tells potential clients that they may be entitled to "[p]roveable actual damages . . . [i]f a debt collector's abuse has caused you to cry or lose sleep . . ." but that they can get up to $1,000 without having to "prove that you suffered any actual harm," and adds that "[p]robably the most important remedy under the FDCPA" is "[a] free attorney." The Todd Murray Law Firm, *Five Reasons To Sue A Debt Collector That Violates The FDCPA*, http://toddmurraylaw.com/tag/fdcpa/ (last visited August 29, 2011). Another assures potential clients that "a

consumer does not have to prove actual damages in order to file a claim." Anderson & Associates, *Fair Debt Collection Practices Act*, http://www.atlawhelp.com/fair-debt-collection-practices-act.html (last visited August 29, 2011). In this way the lack of an Article III standing requirement in FDCPA cases has become more than simply an aspect of litigating under that statute; it is the driver of an explosion of litigation designed not to remedy "concrete" injuries, but instead to reward unharmed plaintiffs and their lucky lawyers. As this trend continues—6,348 new FDCPA cases have already been filed between January 1 and July 15 of this year (see *FDCPA And Other Consumer Lawsuit Statistics, July 1-15, 2011*, http://webrecon.com/b/news-and-stats/ (last visited August 29, 2011))—the distance between the legitimate goals of the FDCPA and the artificial damages and fee awards being handed out under it will continue to grow.

NARCA respectfully submits that enforcement of Article III's strict requirement of actual injury is the proper remedy for this problem. It will eliminate windfalls to the uninjured while allowing genuinely harmed plaintiffs to vindicate their rights under RESPA, the FDCPA and other statutes under which courts currently allow plaintiffs to recover damages without being damaged. And it will strike from the docket of the federal courts a host of lawsuits that invite remedies inconsistent with the case and controversy limits of the Constitution.

## CONCLUSION

For the reasons set forth above, the decision of the Ninth Circuit should be reversed.

Respectfully submitted,

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