No. 11-1175

In The
Supreme Court of the United States

♦

OLIVEA MARX,

Petitioner,

v.

GENERAL REVENUE CORPORATION,

Respondent.

♦

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

♦

BRIEF OF NATIONAL CONSUMER LAW CENTER AS AMICUS CURIAE IN SUPPORT OF PETITIONER

♦

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

RULES

OTHER AUTHORITIES

STATEMENT OF INTEREST OF *AMICUS CURIAE*

The nonprofit National Consumer Law Center (NCLC) has been working for consumer justice and economic security on behalf of low-income, elderly, and disadvantaged Americans since 1969 through policy analysis and advocacy, publications, litigation, expert witness services, and training. The NCLC is recognized nationally as an authority on consumer credit issues, including fair debt collection, and has drawn on this expertise to provide legal research, analyses, and market insights to federal and state legislatures, administrative agencies, and the courts for over 40 years.[1]

The NCLC is, among other roles and accomplishments, author of the widely praised eighteen-volume *Consumer Credit and Sales Legal Practice Series*, which the American Bar Association Journal review described as "a monumental undertaking comparable to but more practical than the Restatement of Laws." Shoenberger, Book Review, 69 A.B.A. J. 1518, 1522 (1983). Among the treatises in the Series is the 1,279 page *Fair Debt Collection* (7th Ed. 2011), whose focus includes the Fair Debt Collection Practices Act (FDCPA). This treatise has become an FDCPA standard that has been cited as authoritative by numerous federal courts, including twice by the Court in its most

[1] Accompanying this brief *amicus curiae* are signed letters wherein the parties have consented to this filing. Pursuant to this Court's Rule 37.6, *amicus* states that this brief was not authored in whole or in part by counsel for a party and that no one other than *amicus* or its counsel made a monetary contribution to the preparation or submission of this brief.

recent FDCPA opinion, *Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA*, __ U.S. ___, 130 S. Ct. 1605, 1617, 1621 nn.12, 16 (2010). Undersigned counsel are co-editors of this volume, and NCLC's sole concern is compliance with the FDCPA, faithful application and enforcement of this law, and protection of the consumers for whose benefit Congress adopted it.

The NCLC respectfully presents its Brief *Amicus Curiae* to urge the Court to grant review of the opinion below to correct its deleterious effects on FDCPA compliance and enforcement.

SUMMARY OF ARGUMENT

Notwithstanding Congress's clearly stated intentions and efforts, non-compliance with the FDCPA unfortunately remains commonplace even now, 35 years after the FDCPA was enacted. Indeed, the Federal Trade Commission (FTC) "continues to receive more complaints about the debt collection industry than any other specific industry." Consumer Financial Protection Bureau (CFPB) Annual Report 2012, Fair Debt Collection Practices Act, p. 6, available at http://files.consumerfinance.gov/f/201203_cfpb_FDCPA_annual_report.pdf (hereinafter "CFPB 2012 Congressional Report").

Among the FDCPA's most significant protections are the privacy and employment security safeguards at issue here that set explicit controls and limitations on debt collector contacts with the consumer's employer and other third parties. A consensus among everyone concerned – federal regulators, commentators, treatises, and consumer advocates as well as the collection industry itself – has recognized that the precise type of employer contact that occurred here is subject to the FDCPA's specific and exacting regulation. The decision below has now thrown that consensus into chaos by holding that such third party contacts are often not subject to the FDCPA. The majority opinion's exclusion from the statutory definition of "communication" of a fax sent by a debt collector to the consumer's employer because it did not indicate to the recipient that it was related to debt collection not only ignores and nullifies the plain language of the FDCPA, but creates confusion and uncertainty in an area where clarity and precision are required to promote industry compliance with the FDCPA's otherwise straightforward privacy regimen.

The opinion below actually re-wrote the FDCPA's definition of "communication." Congress used this defined term at several critical points throughout the statute, not just as the linchpin of the third party contact rule. Thus, in addition to wreaking havoc on the third party communication section, the opinion below has the unintended consequence of undermining FDCPA compliance regarding several other related and unrelated additional provisions. *Amicus* asks that the Court grant the writ of certiorari to limit the extraordinary damage that the opinion below threatens and reinstate the uniformity that has been the hallmark of the FDCPA in this area for the past 35 years.

The second ruling below also warrants the Court's review. Creating a conflict with the Ninth Circuit, the lower court held that the FDCPA's private enforcement cost-shifting restriction that permits an award of costs against the losing plaintiff only if that consumer has initiated the litigation "in bad faith and for the purpose of harassment" does not displace the general standard of Rule 54(d). The Court should grant the writ of certiorari to resolve the resulting split with the opposite holding from the Ninth Circuit on this very issue.

ARGUMENT

I. The Opinion Below Ignores and Nullifies Multiple FDCPA Provisions to Allow the Collector to Contact the Consumer's Employer

The CFPB highlighted this case in its 2012 report to Congress. *See* CFPB 2012 Congressional Report, pp. 18-19. The CFPB confirmed that, contrary to the opinion below, "The Act's structure reveals that, in balancing risks to consumers against debt collectors' interests, Congress chose generally to bar third-party contacts except those necessary to locate debtors." The CFPB explained that the majority "adopt[ed] an interpretation that conflicts with the statute's text, purposes, and accepted understanding."[2] *Id.*

[2] The petition for certiorari collects at page 6, n.1, the unanimous and consistent positions of the entire federal enforcement community as well as of the collection industry itself that confirm the CFPB's assertion that the opinion below "conflicts with the statute's … accepted understanding."

Amicus joins the CFPB in its critique. Congress enacted the FDCPA because existing laws were not adequately protecting consumers against abusive practices of collection agencies. 15 U.S.C. § 1692b. Congress found that among the major detrimental consequences resulting from these abusive practices were "invasions of individual privacy" and "the loss of jobs." 15 U.S.C. § 1692a. Accordingly, Congress carefully stated in 15 U.S.C. § 1692c the following ban on all but its specifically enumerated contacts by debt collectors with all third parties:

> **(b) Communication with third parties**
>
> Except as provided in section 1692b of this title, without the prior consent of the consumer given directly to the debt collector, or the express permission of a court of competent jurisdiction, or as reasonably necessary to effectuate a postjudgment judicial remedy, a debt collector may not communicate, in connection with the collection of any debt, with any person other than the consumer, his attorney, a consumer reporting agency if otherwise permitted by law, the creditor, the attorney of the creditor, or the attorney of the debt collector. (Emphasis added).

Section 1692b in turn establishes the rules applicable here that permit a narrow category of third party contacts "for the purpose of acquiring location information about the consumer." Sections

1692a(2) and (7) contain the following two key definitions:

> **(2)** The term "communication" means the conveying of information regarding a debt directly or indirectly to any person through any medium.
>
> and
>
> **(7)** The term "location information" means a consumer's place of abode and his telephone number at such place, or his place of employment.

The essential holding below is that the fax here was not a "communication" because it did not "indicate to the recipient that the message relates to the collection of a debt." Pet. App. 4a. This holding is at odds with Congress's § 1692a(2) definition of "communication" which contains no such requirement regarding the impact on or the understanding of the recipient and instead focuses only on the type of information conveyed, "directly or indirectly." Here, the fax conveyed information about the debt both directly and indirectly, including core information identifying the debt collector, the creditor, and the account ID number. Nothing stated by Congress in the FDCPA supports the decision below to engraft the additional element that a qualifying "communication" must be recognized by the recipient as debt collection-related.

In fact, the opinion below also eviscerates 15 U.S.C. § 1692e(11), which insures that consumers –

in contrast to third parties[3] – are informed that a collection "communication" is from a debt collector in order to prevent the deceptive and abusive ruse of hiding that crucial fact. *Romine v. Diversified Collection Services, Inc.*, 155 F.3d 1142 (9th Cir. 1998); *Edwards v. Niagara Credit Solutions, Inc.*, 584 F.3d 1350 (11th Cir. 2009). A requirement that the recipient of a putative "communication" must be able to recognize it as debt collection-related renders § 1692e(11) useless. Application of the lower court's alteration of the § 1692a(2) definition of "communication" to § 1692e(11) confirms the CFPB's view that this holding "conflicts with the statute's text, purposes, and accepted understanding."

Furthermore, the opinion below permits collectors to contact third party employers to ask for information separate from and in addition to the "location information" as defined in § 1692a(7) and without regard to the restrictions contained in §§ 1692b, 1692c(b), and 1692c(d). By limiting the § 1692(a)(2) definition of "communication" and thereby eliminating the applicability of §§ 1692a(7), 1692b, 1692c(b), and 1692c(d) in many circumstances, the court below necessarily reached an incorrect conclusion. The opinion below effectively nullifies all or part of each of these five provisions.

Tampering with such a key statutory definition can only have the ripple effect to change the meaning and utility of other FDCPA applications triggered by this defined term: §§ 1692c(a), 1692c(c), 1692d(6), 1692e(3), 1692e(8), 1692e(9), 1692e(11),

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[3] *See* 15 U.S.C. §§ 1692(b)(2) and 1692(d)(6)

1692f(5), 1692f(7), 1692f(8), 1692g(a), 1692g(b), 1692g(d), 1692g(e), and 1692p(a)(2)(v). For example, a letter from a debt collector to the consumer stating simply, "Please call Mr. Smith at 1-800-123-4567," is not a "communication" under the majority opinion's misreading of the definition since the consumer would not know that the letter is debt collection-related – even though debt collection was its sole purpose. Therefore, that letter could never be "the initial communication in connection with the collection of any debt" that requires collectors to comply with the debt validation procedures of § 1692g that Congress highlighted as a "significant feature" of the FDCPA. S. Rep. 95-382, at 4 (1977), reprinted at 1977 U.S.C.C.A.N. 1695, 1699; *see, e.g., Jacobson v. Healthcare Financial Services, Inc.*, 516 F.3d 85, 89-90 (2d Cir. 2008). Similarly, that same collection letter could be sent without consequence to a consumer known to be represented by counsel notwithstanding the explicit prohibition of § 1692c(a)(2). Just as such a letter or a telephone message with the same content renders § 1692e(11) useless under the opinion below, as discussed above, the lower court's narrow reading of the definition eliminates or compromises each of the FDCPA sections listed above that rely on a "communication" as its activating element.

The opinion below contradicts a large number of district court opinions and the views of the responsible regulatory agencies. The Court has long admonished that "judges are not accredited to supersede Congress or the appropriate agency by embellishing upon the regulatory scheme…. At the very least, …caution requires attentiveness to the views of the administrative entity appointed to apply and enforce a statute." *Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555, 565 (1980) (Truth in Lending Act). *Amicus* urges the Court to grant review to restore the prevailing uniform understanding and application of these provisions necessary to foster orderly and comprehensive FDCPA compliance practices.

II. The Lower Court's Allowance of the Assessment of Costs Against Unsuccessful FDCPA Plaintiffs Other Than as a Sanction Creates a Split Within the Circuits and Conflicts With Congress's Contrary Determination to Encourage Private Attorneys General Litigation

Congress recognized the crucial role that consumers play in enforcing the FDCPA when it adopted the private attorney general model as its primary enforcement mechanism.[4] No one has more of a stake in their own privacy and peace of mind or is as motivated to combat abusive debt collection practices as the individual consumers who are the objects of offending collection activities. While the CFPB, FTC, and other public enforcement bodies deal as best they can with systemic issues (§ 1692*l*), Congress has not funded the army of regulators that would be necessary to scrutinize the collection efforts that currently target the "30 million individuals, or

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[4] *See* S. Rep. 95-382, *supra*, at 5, 1977 U.S.C.C.A.N. at 1699 ("The Committee views this legislation as primarily self-enforcing; consumers who have been subjected to collection abuses will be enforcing compliance").

14 percent of American adults," who annually are "subject to the collection process." CFPB 2012 Congressional Report, p. 4. Congress gave that role to each of these individuals whose tranquility and well-being hang in the balance.

In *Jerman* the Court reaffirmed this role that Congress assigned to ordinary consumers when it acknowledged "the FDCPA's calibrated scheme of statutory incentives to encourage self-enforcement." *Jerman*, 130 S. Ct. at 1624. Congress expressed its preference for private enforcement in at least two provisions of the FDCPA. First, it established a system of "strict liability"[5] that imposes § 1692k(a)(2) statutory damages for any violation[6] subject only to the three-prong bona fide error defense applicable to clerical errors and the like. *Jerman*, 130 S. Ct. at 1611-15. Second, § 1692k(a)(3), the FDCPA's cost-shifting provision, creates the dual system that mandates an award of reasonable attorney's fees and costs to the prevailing consumer, *see, e.g., Tolentino v. Friedman*, 46 F.3d 645, 651-52 (7th Cir. 1995), while permitting such an award to the prevailing debt collector only upon a

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[5] *LeBlanc v. Unifund CCR Partners*, 601 F.3d 1185, 1190 (11th Cir. 2010); *McCollough v. Johnson, Rodenburg & Lauinger, LLC*, 637 F.3d 939, 948 (9th Cir. 2011); *Ellis v. Solomon and Solomon, P.C.*, 591 F.3d 130, 135 (2d Cir. 2010); *Ruth v. Triumph Partnerships*, 577 F.3d 790, 805 (7th Cir. 2009); *Kistner v. Law Offices of Michael P. Margelefsky, LLC*, 518 F.3d 433, 438 (6th Cir. 2008); *Picht v. John R. Hawks, Ltd.*, 236 F.3d 446, 451 (8th Cir. 2001).

[6] *See, e.g., Scrimgeour v. Internal Revenue*, 149 F.3d 318, 328 n.11 (4th Cir. 1998) ("In order to encourage…'private attorneys general'…Congress enacted the statutory damages provision to ensure that … meritorious cases…would not walk away from the courthouse empty-handed for failure of proving damages.")

finding that "the action…was brought in bad faith and for the purpose of harassment."

As fully addressed in the petition for certiorari and by the dissent below, the lower court's allowance of an award of costs to the prevailing debt collector unrestricted by the "bad faith and for the purpose of harassment" standard is contrary to the plain language of the FDCPA, as held by the Ninth Circuit in *Rouse v. Law Offices of Rory Clark*, 603 F.3d 699 (9th Cir. 2010), the Circuit opinion with which the decision below conflicts. The statutory limitation on an award of costs to the prevailing defendant reassures the consumer, already vulnerable by reason of being in debt and unable to afford to retain an attorney without the FDCPA's fee-shifting feature, that the risk lies not with losing, but solely with bringing an action in bad faith and for purpose of harassment. In addition, it is significant that any such sanction pursuant to this "bad faith and for the purpose of harassment" standard is available only against the consumer herself and not her attorney. *Hyde v. Midland Credit Management, Inc.*, 567 F.3d 1137 (9th Cir. 2009). Thus, the imposition here of costs on Ms. Marx is not simply contrary to the FDCPA, but can only "chill private suits under the statutory right of action," just as the Court cautioned against in *Jerman*. 130 S. Ct. at 1624.

Year after year, debt collectors are the industry that generates the most consumer complaints to the FTC. In addition, complaints about debt collectors have skyrocketed from 13,962 in 2000[7] to 142,743 in 2011,[8] an astounding increase of over 1,000%. These statistics emphasize that this is not the time to chill private FDCPA enforcement, yet the opinion below does exactly that.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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[7] *See* FTC Annual Report: Fair Debt Collection Practices Act, March 2001, p. 4 and footnote 4, available at http://www.ftc.gov/os/2001/03/fdcpaar2000.htm#N_4_.
[8] *See* CFPB 2012 Congressional Report, p. 6.