No. 11-1175

IN THE

Supreme Court of the United States

OLIVEA MARX,

Petitioner,

v.

GENERAL REVENUE CORPORATION,

Respondent.

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

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

ROY T. ENGLERT, JR.*
MARK T. STANCIL
DANIEL N. LERMAN
Robbins, Russell, Englert, Orseck, Untereiner & Sauber LLP
1801 K Street, N.W.
Washington, D.C. 20006
(202) 775-4500
renglert@robbinsrussell.com

**Counsel of Record*

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

INTEREST OF THE *AMICUS CURIAE*[1]

ACA International is the nation's leading association of credit and collection professionals. Founded in 1939, and based in Minneapolis, Minnesota, ACA represents approximately 5000 members (third-party collection agencies, asset buyers, attorneys, creditors, and vendor affiliates) ranging in size from small businesses to large, publicly held corporations. ACA establishes ethical standards, provides training and educational products and services, and offers compliance support regarding state and federal laws and regulations governing the industry, including the Fair Debt Collection Practices Act (FDCPA) and other statutes.

ACA has filed this *amicus curiae* brief because of the importance of this case to its membership. A debt collector that successfully defends against an FDCPA lawsuit often incurs significant costs in connection with that defense. And such lawsuits have been filed in alarming numbers, particularly in recent years—the vast majority by a small handful of lawyers whose explicit business model is to extract as many nuisance-value settlements as possible. Eliminating

[1] The parties' letters of consent to the filing of this *amicus* brief have been filed with the Clerk. No counsel for a party has written 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 or entity, other than the *amicus curiae*, its members, or its counsel, has made a monetary contribution to this brief's preparation or submission.

the normal award of costs when defendants prevail would encourage even more such meritless suits. ACA's members, therefore, have a substantial interest in whether district courts may award prevailing FDCPA defendants costs under Federal Rule of Civil Procedure 54(d).

SUMMARY OF ARGUMENT

Rule 54(d) provides that, "[u]nless a federal statute, these rules, or a court order provides otherwise, costs—other than attorney's fees—should be allowed to the prevailing party." The FDCPA authorizes courts to award defendants attorney's fees and costs "[o]n a finding by the court that an action under this section was brought in bad faith and for the purpose of harassment." 15 U.S.C. § 1692k(a)(3). The court of appeals correctly held that Section 1692k(a)(3) does not strip courts of their authority to award prevailing defendants costs pursuant to Rule 54(d) in cases that were not brought in bad faith and for the purpose of harassment.

I. Section 1692k(a)(3) supplements—but does not supplant—Rule 54(d)'s baseline presumption that prevailing parties should recover their costs. Petitioner's arguments to the contrary are without merit. First, she contends that the court of appeals' interpretation renders Section 1692k(a)(3)'s reference to "costs" superfluous. But Section 1692k(a)(3) does not grant courts the same power they already possess under Rule 54(d); rather, it grants courts *additional* authority. Specifically, Section 1692k(a)(3) permits courts to award costs to *all* defendants (not just to prevailing defendants) and to award *all* litigation costs (not just "taxable" costs) in cases brought in bad faith and for the purpose of harassment.

Second, petitioner asserts that, because Section 1692k(a)(3) describes one context in which defendants may recover costs, it necessarily describes the only context in which defendants can recover costs. But Section 1692k(a)(3) must be read in conjunction with Rule 54(d). Although the *expressio unius* canon suggests that Section 1692k(a)(3) does not *by itself* authorize costs to all prevailing defendants, it says nothing about whether another rule provides an independent source of authority for such costs. In this case, Rule 54(d) provides that independent source of authority.

Finally, petitioner urges an interpretation of "provides otherwise" that would encompass any statute that authorizes costs in "other circumstances than" those described in Rule 54(d). Pet. Br. 16. A statute "provides otherwise," however, only if it *contradicts* Rule 54(d)—complementing Rule 54 in "other circumstances" is not the same as providing otherwise. Because nothing in Section 1692k(a)(3) contradicts Rule 54(d), which grants courts discretion to award taxable costs to prevailing parties, that baseline principle remains intact.

II. Petitioner's flawed interpretation would promote meritless FDCPA lawsuits and undermine the purposes of the FDCPA. Lawyers already file a staggering number of FDCPA cases each year—more than 12,000 in 2011 alone. The vast majority of those cases are filed by a small handful of lawyers who file these cases (sometimes by the hundreds each year) in the hopes of extracting as many nuisance-value settlements as possible. Facing that onslaught of lawsuits, law-abiding debt collectors often settle even frivolous claims rather than incur crippling litigation expenses. It is usually far cheaper to settle a meritless lawsuit than to win it outright. The proliferation of FDCPA lawsuits has done little to help consumers, but it has undeniably had a harsh impact on law-abiding debt collectors.

Petitioner's rule would exacerbate the problem. The potential for cost-shifting to prevailing parties serves as a modest—but important—check on meritless lawsuits. Petitioner would remove even that limited disincentive, opening the floodgates to even more meritless FDCPA claims. Congress passed the FDCPA to ensure "that those debt collectors who refrain from using abusive debt collection practices are not competitively disadvantaged." 15 U.S.C. § 1692(e). Denying costs to prevailing FDCPA defendants would thwart that goal by punishing debt collectors whose only sin was that they chose to defend—and won—a lawsuit.

ARGUMENT

I. THE FDCPA DOES NOT DISPLACE RULE 54(d)'S PRESUMPTION THAT PREVAILING PARTIES SHOULD RECOVER TAXABLE COSTS

Rule 54(d) states that, "[u]nless a federal statute, these rules, or a court order provides otherwise, costs—other than attorney's fees—should be allowed to the prevailing party." Although courts have discretion whether to award costs under Rule 54(d), *Taniguchi* v. *Kan Pac. Saipan, Ltd.*, 132 S. Ct. 1997, 2001 (2012), "the Rule creates a strong presumption that the prevailing party will recover costs under the Rule," 10 JAMES WM. MOORE, MOORE'S FEDERAL PRACTICE § 54.101[1][a] (3d ed. 2012).

Petitioner contends that Rule 54(d)'s cost-shifting provision is displaced by Section 1692k(a)(3), which provides:

> [I]n the case of any successful action to enforce the foregoing liability, [the debt collector is liable for] the costs of the action, together with a reasonable attorney's fee as determined by the court. On a finding by the court that an action under this section was brought in bad faith and for the purpose of harassment, the court may award to the defendant attorney's fees reasonable in relation to the work expended and costs.

15 U.S.C. § 1692k(a)(3).

Respondent correctly explains that Section 1692k(a)(3) does not "provide otherwise." Resp. Br. 11-29. Rather, that provision simply confirms that a court may award costs, in addition to attorney's fees, when a plaintiff brings an FDCPA suit in bad faith and for the purpose of harassment. We focus here on three flawed arguments advanced by petitioner and the government.

1. Petitioner and the government contend that it would be superfluous to authorize costs in cases brought in bad faith if Congress had intended to leave Rule 54(d)'s cost presumption intact. See Pet. Br. 7; U.S. Br. 21. But Section 1692k(a)(3) does not merely confer upon courts the same authority they already possess under Rule 54(d). Rather, it grants

courts *additional* authority to award costs. It does so in at least two respects.

First, Rule 54(d) authorizes courts to award costs only to "prevailing part[ies]." Section 1692k(a)(3) is not so limited. It provides that *any* "defendant"—not just prevailing defendants—may recover costs if the court finds that the action was brought in bad faith and for the purpose of harassment. The statute therefore authorizes costs if, for example, a plaintiff voluntarily dismisses a bad-faith case. In that situation, the defendant would not qualify as a prevailing party under Rule 54(d) because there would not have been a "judicially sanctioned change in the legal relationship of the parties." *Buckhannon Bd. & Care Home, Inc.* v. W. *Va. Dep't of Health & Human Res.*, 532 U.S. 598, 605 (2001); see *Lorillard Tobacco Co.* v. *Engida*, 611 F.3d 1209, 1215 (10th Cir. 2010) ("Voluntary dismissal of an action ordinarily does not create a prevailing party."). Section 1692k(a)(3)'s cost-shifting provision therefore sets forth additional circumstances in which district courts may award costs. But it does not strip courts of their authority to award costs to prevailing parties under Rule 54(d).

Second, the surplusage argument advanced by petitioner and the government assumes that Section 1692k(a)(3) and Rule 54(d) provide for the exact same cost awards. But Section 1692k(a)(3) grants courts discretion to award costs over and above those authorized by Rule 54(d). Rule 54(d) authorizes only "taxable" costs—*i.e.*, those specifically enumerated in 28 U.S.C. § 1920. *Taniguchi*, 132 S. Ct. at 2001-02 (2012). "Taxable costs are a fraction of the non-taxable expenses borne by litigants for attorneys, experts, consultants, and investigators." *Id.* at 2006.

Statutes that authorize both attorney's fees and costs in cases of bad faith, however, permit courts to award *all* litigation expenses to the prevailing party—not just the taxable costs authorized by Rule 54(d).

The Electronic Funds Transfer Act (EFTA), for example, contains a cost-shifting provision that is nearly identical to Section 1692k(a)(3). It provides: "On a finding by the court that an unsuccessful action under this section was brought in bad faith or for purposes of harassment, the court shall award to the defendant attorney's fees reasonable in relation to the work expended and costs." 15 U.S.C. § 1693m(f). In *Moore* v. *Southtrust Corp.*, 392 F. Supp. 2d 724 (E.D. Va. 2005), the district court held that Section 1693m(f) authorized it to award both taxable and nontaxable costs. "The purpose of [S]ection 1693m(f), which provides for costs and reasonable attorney's fees when a suit is brought in bad faith," the court explained, "is to compensate the defendant for its litigation expenses, not just its taxable costs." *Id.* at 735. Courts have held that FDCPA Section 1692k(a)(3) similarly permits courts to award non-taxable costs in addition to those authorized by Rule 54(d). See *Giovannoni* v. *Bidna & Keys*, 255 F. App'x 124, 126 (9th Cir. 2007); *McNall* v. *Credit Bureau of Josephine County*, No. 07-3075, 2011 WL 711095, at *6 (D. Or. Feb. 22, 2011).

Thus, in authorizing both attorney's fees and costs in FDCPA cases brought in bad faith, Congress was not, as the government suggests, merely "confer[ring] upon district courts a subset of the authority they already possess" under Rule 54(d). U.S. Br. 21. Rather, Congress was conferring on district courts authority *beyond* that conferred by the Rule: the power to award costs to defendants irrespective of whether they are prevailing parties, and the authority to award total litigation costs, not just taxable costs. The fact that Section 1692k(a)(3) grants district courts that additional authority in a subset of cases—*i.e.*, those brought in bad faith and for the purpose of harassment—does nothing to displace Rule 54(d)'s baseline presumption that prevailing parties should recover taxable costs in cases that were not brought in bad faith and for the purpose of harassment.

In any event, Congress frequently creates overlapping rights, particularly when acting out of an abundance of caution. See Resp. Br. 23-24. As this Court has explained, "[r]edundancies across statutes are not unusual events in drafting," and courts should therefore give effect to redundant or overlapping provisions "so long as there is no positive repugnancy between" the provisions. *Conn. Nat'l Bank* v. *Germain*, 503 U.S. 249, 253 (1992) (internal quotation marks omitted); *Mallard* v. *U.S. Dist. Ct.*, 490 U.S. 296, 307 (1989) ("Statutory provisions may simply codify existing rights or powers."). That Section 1692k(a)(3) grants *some* rights that are also conferred by Rule 54(d) is no reason to read Section 1692k(a)(3) as tacitly displacing Rule 54(d) in its entirety.

2. The government relies on a faulty application of the *expressio unius* canon. According to the government, because Section 1692k(a)(3) describes *one* context in which defendants may recover costs—when the action was brought in bad faith and for the purpose of harassment—Section 1692k(a)(3) necessarily describes the *only* context in which prevailing

defendants may recover costs. U.S. Br. 18-19. Petitioner similarly argues that, because Section 1692k(a)(3) states that courts "may" award costs in cases brought in bad faith, it implicitly provides that courts "may not" award costs in other circumstances. Pet. Br. 9-11.

At most, however, the *expressio unius* canon simply suggests that Section 1692k(a)(3) does not *by itself* authorize costs outside the circumstances described in the statute. But Section 1692k(a)(3) does not exist in a vacuum. Rather, it must be read in conjunction with Rule 54(d), an independent source of authority that creates a baseline rule that prevailing parties—including defendants—recover costs. And nothing in Section 1692k(a)(3) purports to displace that rule.

The government also contends that, "given the specificity with which Congress addressed cost awards to prevailing FDCPA defendants," Section 1692k(a)(3) implicitly describes the exclusive circumstances under which courts could award costs to prevailing defendants—and therefore "provides otherwise." U.S. Br. 19. But it is not true that Rule 54(d) is "general" and Section 1692k(a)(3) is "specific" as that canon is typically used. Both provisions are "specific" in awarding costs to certain parties in specified circumstances. That Rule 54(d) makes explicit its lack of effect in the face of a conflicting policy does not make it "general"—it simply asks the question whether there is, in fact, conflict with another provision.

This Court's recent decision in *Bloate* v. *United States*, 130 S. Ct. 1345 (2010), helps illustrate how the specific-vs.-general canon really works. The question there was whether pretrial motion preparation time was automatically excluded from the Speedy Trial Act clock by 18 U.S.C. § 3161(h)(1), which directed exclusion of "delay resulting from * * * proceedings concerning the defendant." This Court held that preparation time was not automatically excluded under that provision because pretrial motions are one of "eight enumerated subcategories of proceedings" specifically addressed in subsection (h)(1)(D) of the Act, and that subsection directed exclusion of time from the motion's filing through disposition. *Bloate*, 130 S. Ct. at 1352. But the Court did *not* suggest that this specific provision signaled Congress's intent that motion-preparation time should *never* be excluded under any other provision. To the contrary, the Court held that such time "*is* excludable under subsection (h)(7)" of the Act, which authorizes case-by-case exclusions of "[a]ny period of delay" if certain findings are made on the record. 130 S. Ct. at 1352, 1354 (emphasis added). Subsections (h)(1) and (h)(7) both could be applied to pretrial motions, but that did not mean that the former necessarily trumped the latter. Similarly, Rule 54(d) and Section 1692k(a)(3) *both* authorize certain costs to certain defendants in specified circumstances. It does not follow that, just because one is specific, the other must be general.

In any event, as noted above, Section 1692k(a)(3) does not address "prevailing" defendants with any "specificity." Rather, the provision authorizes costs for any "defendant"—prevailing or otherwise—in cases brought in bad faith and for the purpose of harassment. A non-prevailing defendant (such as one benefiting from a voluntary dismissal) might receive attorney's fees and costs under Section 1692k(a)(3), and *most* prevailing defendants (including respondent) do not receive attorney's fees and costs under that section. Section 1692k(a)(3) cannot fairly be described as providing the "exclusive" basis for cost awards to "prevailing FDCPA defendants," U.S. Br. 18, 19, when it addresses a category of defendants both narrower and broader than those who prevail.[2]

3. Petitioner contends that, because Section 1692k(a)(3) "states other circumstances than" those described in Rule 54(d), it necessarily "provides otherwise." Pet. Br. 16. But "provides otherwise" means just that: The statute must be *contrary* to, or inconsistent with, Rule 54(d). Section 1692k(a)(3), however, just says something in *addition* to Rule 54(d)—*i.e.*, that a defendant may recover costs, as well as attorney's fees, if an FDCPA action was brought in bad faith and for the purpose of harassment. The mere fact that Section 1692k(a)(3) speaks, in part, to "other circumstances than" Rule 54(d) does not render it contrary to Rule 54(d). "May" does not mean "and otherwise may not." See Resp. Br. 17-18 (cookies-and-milk example).

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[2] The reliance by the government (at 18-19) and petitioner (at 10-11) on *Cooper Industries, Inc.* v. *Aviall Services, Inc.*, 543 U.S. 157 (2004), is misplaced. There, the Court held that a statute providing that a person "may" seek contribution under certain conditions set forth the sole conditions for contribution under that statute. But the Court noted that other causes of action for contribution could exist independently of the statute. *Id.* at 166-67 (explaining that the statute's saving clause simply "clarif[ied]" that other causes of action for contribution remained intact).

Indeed, petitioner's sweeping rule (Pet. Br. 16-17)—that any statute that "states other circumstances than" Rule 54(d) necessarily displaces Rule 54(d)—would have far-reaching consequences. Many cost-shifting statutes "state other circumstances than" Rule 54(d). For example, 28 U.S.C. § 1927 provides that "[a]ny attorney * * * who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorney's fees reasonably incurred because of such conduct." Does the statute's reference to "costs" in "other circumstances than" Rule 54(d) mean that it displaces Rule 54(d)'s authorization of costs to prevailing parties in the absence of vexatious litigation conduct? Of course not. Like Section 1692k(a)(3), Section 1927 simply provides an additional authorization of costs in certain circumstances. It does not displace Rule 54(d) by implication merely because it mentions the word "costs."

Congress knows how to "provide[] otherwise." If it wanted to provide that an FDCPA defendant could not recover costs "unless" the action was brought in bad faith and for the purpose of harassment, it would have said so—just as it has in other statutes. *E.g.*, 28 U.S.C. § 1928 (providing that "no costs shall be included in such judgment, unless the proper disclaimer has been filed"). See Resp. Br. 18-20. The fact that Congress did not do so here lends further support to the conclusion that Section 1692k(a)(3) merely supplements—and does not supplant—Rule 54(d).

II. DENYING COSTS TO PREVAILING DEFENDANTS WOULD UNDERMINE THE PURPOSES OF THE FDCPA AND FURTHER ENCOURAGE MERITLESS LAWSUITS

The FDCPA reflects a "calibrated scheme of statutory incentives to encourage self-enforcement." *Jerman* v. *Carlisle, McNellie, Rini, Kramer & Urlich LPA*, 130 S. Ct. 1605, 1624 (2010). At the same time, Congress sought to ensure "that those debt collectors who refrain from using abusive debt collection practices are not competitively disadvantaged." 15 U.S.C. § 1692(e). Consistent with that goal, the FDCPA contains "several provisions that expressly guard against abusive lawsuits" targeting law-abiding debt collectors. *Jerman*, 130 S. Ct. at 1620. The FDCPA therefore strikes a careful balance between two equally important policy objectives: encouraging legitimate lawsuits while discouraging meritless ones.

Petitioner's rule would undermine that careful balance. Plaintiffs' attorneys already file a staggering number of FDCPA cases each year. Foreclosing cost awards to prevailing defendants would exacerbate the problem by removing even that modest disincentive to the filing of still more meritless lawsuits against law-abiding debt collectors.

A. Law-Abiding Debt Collectors Face An Onslaught Of Meritless FDCPA Lawsuits, With High Costs For Small Businesses And Consumers

1. Petitioner warns that the mere prospect of cost awards for prevailing defendants would chill FDCPA lawsuits. Pet. Br. 15. The government likewise

intones that "[a]pplication of Rule 54(d)(1)'s default cost-shifting standard * * * would significantly alter the mix of incentives [supposedly] fashioned by Congress and could deter many meritorious private suits." U.S. Br. 24. The government's suggestion that *meritorious* lawsuits are chilled by the standard American system of presumptively requiring payment of costs to the *prevailing* party is dubious in theory, but the greater problem with the government's and petitioner's arguments is empirical, not theoretical. There is no shortage of FDCPA actions, and a rule of law that would encourage *even more* such lawsuits has nothing to recommend it.

As numerous authorities have recognized, law-abiding debt collectors currently face an onslaught of FDCPA suits. See *Fed. Home Loan Mortg. Corp.* v. *Lamar*, 503 F.3d 504, 513 (6th Cir. 2007) (noting the "proliferation of litigation" under the Act) (internal quotation marks omitted); *Jacobson* v. *Healthcare Fin. Servs., Inc.*, 434 F. Supp. 2d 133, 138 (E.D.N.Y. 2006) (observing the "exponential growth in litigation under the statute"). Although many of those lawsuits are entirely devoid of merit, plaintiffs' attorneys can often extract settlements from law-abiding debt collectors who face greater expense from litigating such nuisance suits than from settling them.

The sheer number of FDCPA suits brought each year is staggering—and has increased at an alarming rate. In 2011 alone, plaintiffs filed more than 12,000 FDCPA cases in the district courts—up from 3215 in 2005.[3] And filed cases are just the tip of the iceberg:

[3] Collections Recon, 2011 Litigation Statistics Revised Upward, FDCPA Suits Surpass 12,000, Feb. 24, 2012, available at

"[A]ttorneys often threaten to sue if they are not paid a quick settlement, knowing the cost of defending an FDCPA claim can easily reach $10,000 or more." William P. Hoffman, *Recapturing the Congressional Intent Behind the Fair Debt Collection Practices Act*, 29 ST. LOUIS U. PUB. L. REV. 549, 562 (2010). The government openly acknowledges that in the context of the FDCPA "even successful suits may produce recoveries that are small in relation to the defendants' costs" (U.S. Br. 26)—which is, of course, the exact problem that creates the incentive to bring meritless suits just to extract quick settlements—yet somehow concludes that applying Rule 54 therefore has great potential "to deter *meritorious* claims" (*ibid.* (emphasis added)). Experience shows that the ability to bring FDCPA lawsuits seeking recoveries small in relation to defense costs creates tremendous incentives *to bring* lawsuits (often without regard to merit), not the disincentives the government suggests.

A disproportionate number of those lawsuits are brought (and threats to sue made) by just a handful of attorneys. Indeed, in recent years a "cottage industry" of high-volume FDCPA lawyers has taken root. *Murphy* v. *Equifax Check Services, Inc.*, 35 F. Supp. 2d 200, 204 (D. Conn. 1999). Petitioner's trial attorney, for example, filed more than 350 FDCPA complaints in 2011—nearly 3% of all FDCPA

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http://www.collectionsrecon.com/latestnews/collection_news/2011-litigation-statistics-revised-upward-fdcpa-suits-surpass-12000/; Collections Recon, FDCPA and Other Consumer Lawsuit Statistics, Full Year 2011 Recap, Jan. 12, 2012, available at http://www.collectionsrecon.com/press-releases/fdcpa-and-other-consumer-lawsuit-statistics-full-year-2011-recap/.

lawsuits nationwide that year.[4] It is difficult to imagine how an individual attorney who files 350 federal lawsuits annually—many more lawsuits than there are workdays in a year—could thoroughly investigate each plaintiff's claims to ensure their merit. Indeed, the U.S. District Court for the District of Colorado recently rebuked petitioner's trial attorney for filing hundreds of FDCPA complaints that simply recycle the same language:

> Plaintiffs' counsel filed 382 other cases under the FDCPA in this Court. In each case, as here, counsel alleged that the plaintiff(s) suffered from "economic loss, loss of self-esteem and peace of mind, and has suffered emotional distress, humiliation, and embarrassment." * * * I do find it troubling that counsel used the same language in every case to describe an injury that is very individualized and will differ from plaintiff to plaintiff.

Burns v. *Anderson, Crenshaw & Associates, L.L.C.*, No. 07-cv-01192, 2008 WL 8834614, at *7 n.5 (D. Colo. Aug. 15, 2008) (granting defendant's motion for summary judgment).[5]

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[4] See Resp. Br. 41 (citing PACER records); see also Collections Recon, FDCPA and Other Consumer Lawsuit Statistics, Full Year 2011 Recap.

[5] The U.S. District Court for the District of Colorado, where petitioner filed her lawsuit, is a particularly fertile ground for FDCPA lawsuits. In 2011, plaintiffs' attorneys filed nearly 650 FDCPA complaints there—more than in any other district. See Resp. Br. 41 (citing PACER records); see also Collections Recon, FDCPA and Other Consumer Lawsuit Statistics, Full Year 2011 Recap.

What is more, petitioner's trial counsel has adopted a strategy designed to maximize the difficulty and expense of responding to these lawsuits. Mr. Larson has filed more than 1600 FDCPA lawsuits for Colorado consumers since 2005. To our knowledge, *not one* of those lawsuits was filed against a Colorado collection agency. The explanation is simple: Colorado agencies often have established relationships with local attorneys or employ an in-house lawyer who can appear on the agency's behalf. Mr. Larson's out-of-state targets, however, must bear the additional distraction and expense of finding and hiring local counsel to appear in Colorado courts. Not surprisingly, those defendants are that much more motivated to offer him a quick settlement.

Mr. Larson is not alone in employing such tactics. It is not uncommon for an individual attorney to file hundreds of FDCPA cases in a single year—or for a small law firm to file nearly a thousand. At the same time, "judicially developed standards have enabled a class of professional plaintiffs" who team up with FDCPA attorneys to mount multiple law suits—often class actions—against debt collectors. *Fed. Home Loan Mortg. Corp.* v. *Lamar*, 503 F.3d at 514 (internal quotation marks omitted).

Courts have recognized, moreover, that "[t]he cottage industry that has emerged does not bring suits to remedy" the abusive debt-collection practices that were the impetus for the Act's passage. *Id.* at 513 (internal quotation marks omitted). Rather, plaintiffs' lawyers routinely bring "lawsuits based on frivolous misinterpretations or nonsensical assertions of being led astray." *Id.* at 514 (internal quotation marks omitted).

Indeed, FDCPA attorneys make no bones about their business model. For example, one well-known FDCPA lawyer has had great success selling admission to "FDCPA Boot Camp," a training program for lawyers seeking to build a business based on suing debt collectors. That course instructs aspiring FDCPA lawyers that "*[e]very* collection account is destined to become an FDCPA claim"—apparently with little regard to whether the debt collector has actually violated the Act.[6] Under joint marketing agreements, firms specializing in FDCPA lawsuits attract clients through a variety of websites that funnel potential clients to particular law firms based on geographic region.[7] Often, individuals are directed to these client-recruitment sites simply by typing a debt collection firm's name into an internet search engine. Those marketing efforts appear to be highly effective. One plaintiff, for example, filed 10 FDCPA complaints in the U.S. District Court for the Southern District of Florida in a span of less than 3 months.[8]

But meritless cases are often nonetheless successful ones. That is because the endgame is

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[6] Peter F. Barry, The FDCPA Boot Camp, at 2, available at http://www.lawpoint.com/images/lawpoint/brochure.pdf (emphasis added).

[7] *E.g.*, http://www.fairdebtforconsumers.com/; http://www.attorneysforconsumers.com/fair-credit-process.html.

[8] See 10-cv-61300 (July 26, 2010); 10-cv-61307 (July 27, 2010); 10-cv-61312 (July 27, 2010); 10-cv-61316 (July 27, 2010); 10-cv-61354 (July 30, 2010); 10-cv-61358 (July 30, 2010); 10-cv-61359 (July 30, 2010); 10-cv-61469 (Aug. 15, 2010); 10-cv-61696 (Sept. 14, 2010); 10-cv-62003 (Oct. 19, 2010).

almost always a quick settlement, not a verdict. As noted above, the cost of successfully defending a nuisance lawsuit—tens of thousands of dollars in legal fees—far exceeds the cost of settlement (typically between $2,500 and $7,500). Law-abiding debt collectors therefore have a strong economic incentive to settle even meritless claims. See *Berther* v. *TSYS Total Debt Mgmt., Inc.*, No. 06-C-293, 2007 WL 1795472, at *4 (E.D. Wis. Jun 19, 2007) ("[I]t is the avoidance of attorney[']s fees that undoubtedly serves as the primary motivating factor in pushing defendants into settlements."); Hoffman, 29 ST. LOUIS U. PUB. L. REV. at 562 ("for a collection agency, it is more cost effective to pay a settlement"); Lynn A.S. Araki, *Rx For Abusive Debt Collection Practices: Amend The FDCPA*, 17 U. HAWAII L. REV. 69, 105-06 (1995). Indeed, web sites designed to attract FDCPA plaintiffs tout that "[l]ess than 1% of all cases go to trial."[9] As the Seventh Circuit observed, moreover, plaintiffs' attorneys are particularly adept at using "the class action as a device for forcing the settlement of meritless claims"—a practice the court described as the "mirror image of the abusive tactics of debt collectors at which the statute is aimed." *White* v. *Goodman*, 200 F.3d 1016, 1019 (7th Cir. 2000).

Courts have repeatedly recognized, moreover, that even those cases that do not yield an immediate settlement serve primarily to benefit plaintiffs' lawyers—not consumers. Plaintiffs' lawyers "have a strong incentive to litigate these cases * * * in the

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[9] http://www.attorneysforconsumers.com/fair-credit-process.html; http://www.fairdebtforconsumers.com/ask-questions-form.html.

form of attorneys' fees and costs they hope to recover." *Sanders* v. *Jackson*, 209 F.3d 998, 1003 (7th Cir. 2000); see Araki, 17 U. HAWAII L. REV. 69, 105-06 (noting that "it often is cost free for their clients to try a case for a nominal verdict" while "it costs the defendant his own attorney's fees"). Unfortunately, the "history of FDCPA litigation shows that most cases have resulted in limited recoveries for plaintiffs and hefty fees for their attorneys." *Sanders*, 209 F.3d at 1004; see *Berther*, 2007 WL 1795472, at *4 ("FDCPA cases appear to be much more about attorney[']s fees than the prosecution of consumer rights."). In *Crawford* v. *Equifax Payment Servs., Inc.*, 201 F.3d 877, 880 (7th Cir. 2000), for example, a negotiated settlement provided $2000 to the class representative; $78,000 to the plaintiffs' attorneys; and nothing for the other class members. What is more, "the underlying debt—the reason the consumer is being called in the first place—nearly always remains intact."[10]

2. While the benefits to consumers are often illusory, the harm to law-abiding debt collectors, small businesses, and their customers is all too real. Petitioner and her *amici* portray debt collectors as unscrupulous actors who serve no purpose but to harm struggling consumers. See, *e.g.*, AARP Br. 14. That misleading caricature overlooks the critical role responsible third-party debt collectors play in our

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[10] David Migoya, *Consumers Dealing with Debt Collectors Become Stuck in a Vicious Cycle of Lawsuits*, DENVER POST, Feb. 27, 2011, available at http://www.denverpost.com/business/ci_17488098.

economy—and the wider costs of meritless FDCPA lawsuits.

As the Consumer Financial Protection Bureau has explained elsewhere, "[c]onsumer debt collection is critical to the functioning of the consumer credit market." CFPB Annual Report 2012, Fair Debt Collection Practices Act at 4, available at http://files.consumerfinance.gov/f/201203_cfpb_FDCPA_annual_report.pdf. By collecting delinquent debt, debt collectors help make credit more affordable to consumers, enabling them "to purchase goods and services that they could not afford if they had to pay the entire cost at the time of purchase." *Ibid.*

Small businesses in particular rely on the debt-collection industry. Smaller businesses often lack the resources to collect outstanding debts. They therefore rely on third-party debt collectors—providing cash flow that is critical for the health of those businesses and for the workers they employ. Hoffman, 29 ST. LOUIS U. PUB. L. REV. at 556-57. Consumers, too, benefit—not just from more available and affordable credit, but also from lower prices. By allowing businesses to keep the costs of their goods and services lower, third-party debt collection results in an annual savings of nearly $400 per household.[11] Of course, "collection agencies are forced to charge businesses more in order to offset the risk of an FDCPA lawsuit"—costs that are ultimately passed on to consumers. *Id.* at 562.

[11] ACA International, Value of Third-Party Debt Collection to the U.S. Economy in 2007: Survey and Analysis, June 12, 2008, available at http://www.acainternational.org/images/12546/pwc2007-final.pdf.

Debt-collection businesses directly provide 150,000 American jobs—and indirectly provide another 150,000.[12] Although ACA International's 5000 member agencies range in size from small businesses to large corporations, the average debt-collection agency employs just 25 workers. The cost of defending just one or two meritless lawsuits can therefore have a severe impact on such a small business. It is scarcely surprising that plaintiffs' attorneys are often successful at coercing law-abiding debt collectors to settle.

But Congress enacted the FDCPA to curtail abusive debt-collection practices, not to punish law-abiding debt collectors or burden a critical industry with a flood of meritless nuisance suits. Congress expressly declared "that those debt collectors who refrain from using abusive debt collection practices" should not be "competitively disadvantaged" by the FDCPA. 15 U.S.C. § 1692(e). As discussed below, however, petitioner's flawed interpretation of Section 1692k(a)(3) would eliminate even the possibility of a cost award to prevailing defendants—exacerbating what are already significant incentives for plaintiffs' attorneys to bring meritless FDCPA claims.

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[12] See ACA International, The Impact of Third-Party Debt Collection on the National and State Economies, available at http://www.acainternational.org/images/21594/2012acaeyhandout.pdf.

B. Rule 54(d) Cost Awards For Prevailing Defendants Are Necessary To Deter Frivolous FDCPA Lawsuits—And Would Not Chill Meritorious Suits

Petitioner contends that awarding costs to prevailing defendants would thwart congressional intent by chilling legitimate FDCPA suits. Pet. Br. 15. But even if that policy argument could trump the plain language of Rule 54(d) and Section 1692k(a)(3)—and it cannot—it rests on a faulty premise. The only lawsuits that would be deterred by cost awards to prevailing defendants are those *least* likely to be meritorious—precisely the types of suits Congress sought to deter.

The government's brief illustrates the point. It argues that, if unsuccessful plaintiffs faced the prospect of paying defendants' costs, "private FDCPA enforcement actions would be economically rational only if the perceived likelihood of success was very high." U.S. Br. 25. But that is precisely the point: It *shouldn't* be economically rational for plaintiffs to bring lawsuits that have little or no chance of succeeding. Such suits serve only to clog the courts with meritless cases, competitively harm law-abiding debt collectors in direct contravention of a declared purpose of the Act, and enrich lawyers—all with little impact on the abusive debt-collection practices Congress sought to stem.

Section 1692k(a)(3) already reflects an asymmetry in the treatment of prevailing plaintiffs and defendants. Prevailing plaintiffs receive statutory damages as a matter of course (even in the absence of actual injury), and attorney's fees as a matter of course. By contrast, defendants receive attorney's fees only upon showing that the plaintiff acted in bad faith *and* for the purpose of harassment. Petitioner, however, would tip the scale even further—and well beyond the carefully "calibrated scheme" crafted by Congress. *Jerman*, 130 S. Ct. at 1624. As petitioner acknowledges, "cost awards 'almost always amount to less than the successful litigant's total expenses.'" Pet. Br. 15 (quoting *Taniguchi*, 132 S. Ct at 2006). By foreclosing cost awards to prevailing defendants, petitioner would remove what is, by her own account, the most modest check on meritless lawsuits.

Petitioner and her *amici* counter that meritless suits are adequately deterred by Section 1692k(a)(3)'s authorization of costs in actions that were "brought in bad faith and for the purpose of harassment." But that double-subjective standard "is a particularly difficult standard to meet." *Branco* v. *Credit Collection Servs., Inc.*, No. 10-cv-03490 at * 1, 2012 WL 1143562 (E.D. Cal. Apr. 4, 2012). That is because it is not enough for a defendant to show that the lawsuit was meritless (or even frivolous). Rather, he must show (1) that the claim was without merit; (2) that the plaintiff knew or should have known that it was without merit (*i.e.*, that it was brought in bad faith); *and* (3) that the plaintiff brought the action specifically to harass the defendant. See *Sanchez* v. *United Collection Bureau, Inc.*, 649 F. Supp. 2d 1374, 1382 (N.D. Ga. 2009) ("The standard for bad faith [under the FDCPA] is higher than the standard for mere frivolousness."); see also *Christiansburg Garment Co.* v. *EEOC*, 434 U.S. 412, 421 (1978) (explaining that an action can be "frivolous, unreasonable, or without foundation, even though not brought in subjective bad faith").

In other words, there is a huge category of claims that are frivolous but that nevertheless fail to satisfy the bad faith-plus-harassment standard. *E.g.*, *Guerrero* v. *RJM Acquisitions LLC*, 499 F.3d 926, 940-41 (9th Cir. 2007) (holding that, even though the court was "skeptical" of lawyer's claims and found his "aggressive use of the Act unworthy of commendation," insufficient evidence existed "to support a finding that [plaintiff's] claims were necessarily brought in bad faith"). The remaining modest deterrent to such meritless lawsuits is the possibility of cost awards to prevailing defendants—a deterrent that petitioner would remove by rewriting 1692k(a)(3) to displace Rule 54(d).

Although the government repeatedly touts (U.S. Br. 2, 28) the FDCPA's "good faith" and "bona fide error" defenses, that is scant comfort to law-abiding debt collectors. First of all, petitioner's and the government's rule would apply to defendants—like respondent GRC—that prevail on the ground that they did nothing illegal at all, not on defenses of "good faith" or "bona fide error." Moreover, a good-faith defendant has—by definition—acted in good faith, yet it would still need to endure costly litigation. And, to recover attorney's fees, the defendant would need to show that the plaintiff's allegation that the defendant was not acting in good faith was itself brought in bad faith and for the purpose of harassment—a nearly impossible standard to satisfy.

For her part, petitioner suggests that it would be unjust to award costs to a defendant who successfully asserts the "bona fide error" defense "based on facts known only to the defendant prior to suit." Pet. Br. 15. But Section 1692k(a)(3), properly construed, does not *compel* courts to award costs to prevailing defendants. Rather, Section 1692k(a)(3) simply leaves intact Rule 54(d), which creates a presumption of—but does not mandate—cost-shifting to prevailing parties. Courts therefore retain discretion to deny costs if "there would be an element of injustice in a cost award"—though petitioner did not seek such discretionary relief in this case. *Delta Air Lines, Inc.* v. *August*, 450 U.S. 346, 355 n.14 (1981); see *Taniguchi*, 132 S. Ct. at 2001 (noting that Rule 54(d) "gives courts the discretion to award costs to prevailing parties"). In light of that discretion, the mere possibility that a defendant in a particular case will benefit from the "bona fide error" defense is little reason to penalize all prevailing defendants by denying them costs.

And denial of costs is unquestionably a penalty. "[B]y the long established practice and universally recognized rule of the common law, in actions at law, the prevailing party is entitled to recover a judgment for costs." *Mansfield, C. & L.M. Ry. Co.* v. *Swan*, 111 U.S. 379, 387 (1884). Rule 54(d) codifies that principle, establishing a presumption in favor of awarding costs to prevailing parties. Such costs are awarded "'as incident to the judgment.'" *Buckhannon*, 532 U.S. at 611 (Scalia, J., concurring) (quoting *The Baltimore*, 75 U.S. (8 Wall.) 377, 390 (1869)). As the court of appeals recognized here, the denial of that "incident to the judgment" therefore constitutes "'a severe penalty'" to the prevailing party. Pet. App. 14a (quoting *Klein* v. *Grynberg*, 44 F.3d 1497, 1507 (10th Cir. 1995)).

It is difficult to imagine why Congress would want to impose such a "severe penalty" on debt collectors whose sole offense was that they *won* a judgment clearing them of wrongdoing. As noted, foreclosing cost awards to prevailing parties will incentivize plaintiffs' attorneys to bring still more meritless FDCPA cases. Such cases will, by definition, disproportionately be filed against law-abiding, rather than law-breaking, debt collectors.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

ROY T. ENGLERT, JR.*
MARK T. STANCIL
DANIEL N. LERMAN
Robbins, Russell, Englert, Orseck, Untereiner & Sauber LLP
1801 K Street, N.W.
Washington, D.C. 20006
(202) 775-4500
renglert@robbinsrussell.com

**Counsel of Record*

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