No. 17-1773

# In the United States Court of Appeals for the Seventh Circuit

KATHERINE EVANS,

*Plaintiff-Appellee,*

v.

PORTFOLIO RECOVERY ASSOCIATES, LLC,

*Defendant-Appellant.*

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Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division, No. 1:15-cv-04498.
The Honorable **Matthew F. Kennelly**, Judge Presiding.

## BRIEF OF ACA INTERNATIONAL AS AMICUS CURIAE IN SUPPORT OF APPELLANT AND REVERSAL

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Appellate Court No: 17-1773

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## Statement of Identity, Interest, and Source of Authority to File

Pursuant to Fed. R. App. P. 29(a)(4)(D), Amicus Curiae ACA International states:

ACA International, the Association of Credit and Collection Professionals, is a not-for-profit corporation based in Minneapolis, Minnesota.

Founded in 1939, ACA represents nearly 3,700 members, including credit grantors, collection agencies, attorneys, asset buyers, and vendor affiliates. ACA produces a wide variety of products, services, and publications, including educational and compliance-related information; and articulates the value of the credit-and-collection industry to businesses, policymakers, and consumers. Defendant-Appellant Portfolio Recovery Associates, LLC, is an ACA member.

ACA company members range in size from small businesses with a few employees to large, publicly held corporations. These members include the very smallest of businesses that operate within a limited geographic range of a single town, city, or state, and the very largest of national corporations doing business in every state. But most ACA company members are small businesses, collecting rightfully owed debts on behalf of other small and local businesses. Approximately 75% of ACA's company members maintain fewer than twenty-five employees.

As part of the process of attempting to recover outstanding payments, ACA members are an extension of every community's businesses. ACA members work with these businesses, large and small, to obtain payment for the goods and services already received by consumers. In years past, the combined effort of ACA members has resulted in the annual recovery of billions of dollars — dollars that are returned to and reinvested by businesses, and that would otherwise constitute losses on those businesses' financial statements. Without an effective collection process, the economic viability of these businesses — and, by extension, the American economy in general — is threatened. Recovering rightfully owed consumer debt lets organizations survive; helps prevent job losses; keeps credit, goods, and services available; and reduces the need for tax increases to cover governmental budget shortfalls.

All the Parties have not consented to ACA filing this brief, so ACA is filing a motion for leave to file this brief under Rule 29(a)(3).

## Statement Under Rule 29(a)(4)(E)

No Party's counsel authored this brief in whole or in part. No Party or Party's counsel contributed money that was intended to fund preparing or submitting this brief. No person — other than Amicus Curiae ACA International, its members, and its counsel — contributed money that was intended to fund preparing or submitting this brief.[1]

[1]"A party's or counsel's payment of general membership dues to an amicus need not be disclosed." Fed. R. Civ. P. 29(c)(5) advisory committee note (2010).

## Argument

### I. The Appellees' disputes did not trigger the Fair Debt Collection Practices Act's prohibition because the disputes were frivolous and immaterial.

PRA's brief already addresses the procedural issues specific to this case, and the Appellees'[2] standing in light of *Spokeo, Inc. v. Robins*.[3] ACA will therefore focus in this brief on the broader public-policy issues that this case raises, which directly and pervasively affect the credit-and-collections industry: the meaning of "disputed debt" in the Consumer Credit Protection Act, the due-process implication of expanding that definition beyond the statutory usage, and the economic impact of invalid disputes of collectible debt. That analysis must begin with the Act's history and evolution.

#### A. Congress enacted, and has frequently amended, the Consumer Credit Protection Act as a coherent, integrated scheme for consumer credit protection.

The Consumer Credit Protection Act in its current form, codified in the United States Code at title 15, chapter 41, consists of seven subchapters:

I Consumer Credit Cost Disclosure

II Restrictions on Garnishment

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[2]This brief treats the four Plaintiff-Appellees as similarly situated. *See* Def.-Appellant's Br. at 7–8.

[3]Def.-Appellant's Br. at 30–34 (citing *Spokeo, Inc. v. Robins*, ___ U.S. ___, 136 S. Ct. 1540 (2016)).

II-A Credit Repair Organizations
III Credit Reporting Agencies
IV Equal Credit Opportunity
V Debt Collection Practices
VI Electronic Fund Transfers

This structure results from more than two dozen amendments in the nearly half-century since the Act's original adoption in 1968.[4]

The Consumer Credit Protection Act in its original form contained only two of the seven current subchapters: the Truth in Lending Act,[5] which codified the subchapter titled "Consumer Credit Cost Disclosure"; and the subchapter titled "Restrictions on Garnishment."[6] The Act did not yet address credit reporting or debt collection.

The Consumer Credit Protection Act's modern form took shape through the 1970s, starting in 1970 with the Fair Credit Reporting Act,[7] which was added to the codified Consumer Credit Protection Act as subchapter III. Next, in 1974, came both the Equal Credit Opportunity Act,[8] which was added to the codified statute as subchapter IV; and the Fair Credit

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[4]Consumer Credit Protection Act, Pub. L. No. 90-321, 82 Stat. 176 (1968).

[5]Truth in Lending Act, Pub. L. No. 90-321, tit. I, 82 Stat. 176, in *id.*

[6]Consumer Credit Protection Act, Pub. L. No. 90-321, tit. III, 82 Stat. 176, 196 (1968).

[7]Fair Credit Reporting Act, Pub. L. No. 91-508, 84 Stat. 1127 (1970).

[8]Equal Credit Opportunity Act, Pub. L. No. 93-495, tit. V, 93 Stat. 1724, 1749 (1974).

Billing Act,[9] which was added as part of the same public law to the existing subchapter I as a new part D. In 1976, Congress adopted the Equal Credit Opportunity Act Amendments of 1976,[10] and added the Consumer Leasing Act[11] to the existing subpchapter I as a new part E. In 1977, Congress added the Fair Debt Collection Practices Act[12] to the codified statute as subchapter V, followed in 1978 by the Electronic Fund Transfer Act[13] as subchapter VI.

Congress amended the Consumer Credit Protection Act several times throughout the 1980s and 1990s,[14] but did not add the Act's seventh (and, so

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[9]Fair Credit Billing Act, Pub. L. No. 93-495, tit. III, 93 Stat. 1724, 1738 (1974).

[10]Equal Credit Opportunity Act Amendments of 1976, Pub. L. No. 94-239, 90 Stat. 251 (1976).

[11]Consumer Leasing Act of 1976, Pub. L. No. 94-240, 90 Stat. 257 (1976).

[12]Fair Debt Collection Practices Act, Pub. L. No. 95-109, 91 Stat. 874 (1977).

[13]Electronic Fund Transfer Act, Pub. L. No. 95-630, tit. XX, 92 Stat. 3641, 3728, in Financial Institutions Regulatory & Interest Rate Control Act of 1978.

[14]*See, e.g.*, Truth in Lending Simplification & Reform Act, Pub. L. No. 96-221, tit. VI, 94 Stat. 132, 168 (1980), in Depository Institutions Deregulation & Monetary Control Act of 1980; Cash Discount Act, Pub. L. No. 97-25, 95 Stat. 144 (1981); Fair Credit & Charge Card Disclosure Act of 1988, Pub. L. No. 100-583, 102 Stat. 2960 (1988); Home Equity Loan Consumer Protection Act of 1988, Pub. L. No. 100-709, 102 Stat. 4725 (1988); Ted Weiss Child Support Enforcement Act of 1992, Pub. L. No. 102-537, 106 Stat. 3531 (1992); Home Ownership & Equity Protection Act of 1994, Pub. L. No. 103-325, tit. I, subtit. B, § 151, 108 Stat. 2160, 2190 (1994), in Riegle Community Development & Regulatory Improvement Act of 1994; Truth in Lending Act Class Action Relief Act of 1995, Pub. L. No. 104-12, 109 Stat. 161

far, last) subchapter until 1997, when it added the Credit Repair Organizations Act[15] as subchapter II-A. By 1997, the Consumer Credit Protection Act's current structure was intact, although Congress frequently amended its provisions.[16]

### B. The only provision with respect to which the term "disputed debt" in 15 U.S.C. § 1692e(8) could have been interpreted at the time of its enactment in 1977 was 15 U.S.C. § 1692g(b).

The statute at issue here, Fair Debt Collection Practices Act § 807(8) (codified at 15 U.S.C. § 1692e(8)), provides that

> A debt collector may not use any false, deceptive, or misleading representation or means in connection with the

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(1995); Truth in Lending Act Amendments of 1995, Pub. L. No. 104-29, 109 Stat. 271 (1995); Consumer Credit Reporting Reform Act of 1996, Pub. L. No. 104-208, subtit. D, ch. 1 (1996).

[15]Credit Repair Organizations Act, Pub. L. No. 104-208, div. A, tit. II, subtit. D, ch. 2, § 2451, 110 Stat. 3009 (1997), in Omnibus Consolidated Appropriations Act, 1997.

[16]*See, e.g.*, Consumer Reporting Employment Clarification Act of 1998, Pub. L. No. 105-347, 112 Stat. 3208 (1998); ATM Fee Reform Act of 1999, Pub. L. No. 106-102, tit. VII, subtit. A, 113 Stat. 1463 (1999), in Gramm-Leach-Bliley Act, 113 Stat. 1338; Fair & Accurate Credit Transactions Act of 2003, Pub. L. No. 108-159, 117 Stat. 1952 (2003); Credit & Debit Card Receipt & Clarification Act of 2007, Pub. L. No. 110-241 (2007); Private Student Loan Transparency & Improvement Act of 2008, Pub. L. No. 110-315, 122 Stat. 3478 (2008); Mortgage Disclosure Improvement Act of 2008, Pub. L. No. 111-289, 122 Stat. 2855 (2008); Credit Card Accountability Responsibility & Disclosure Act of 2009, Pub. L. No. 111-24, 123 Stat. 1734 (2009); Mortgage Reform & Anti-Predatory Lending Act, Pub. L. No. 111-203, 124 Stat. 2136 (2010), in Dodd–Frank Wall Street Reform & Consumer Protection Act; Red Flag Program Clarification Act of 2010, Pub. L. No. 111-319, 124 Stat. 3457 (2010).

> collection of any debt. Without limiting the general application of the foregoing, the following conduct is a violation of this section:
>
> . . . .
>
> (8) Communicating or threatening to communicate to any person credit information which is known or which should be known to be false, including the failure to communicate that a disputed debt is disputed.

That language appeared in the Fair Debt Collection Practices Act as it was originally adopted in 1977.[17] At that time, the only other provision in the Consumer Credit Protection Act that dealt with "disputed debts" appeared two sections later in the original 1977 version of the Fair Debt Collection Practices Act, titled "disputed debt":

> (b) **Disputed debts**
>
> If the consumer notifies the debt collector in writing within the thirty-day period described in subsection (a) that the debt, or any portion thereof, is disputed, or that the consumer requests the name and address of the original creditor, the debt collector shall cease collection of the debt, or any disputed portion thereof, until the debt collector obtains verification of the debt or a copy of a judgment, or the name and address of the original creditor, and a copy of such verification or judgment, or name and address of the original creditor, is mailed to the consumer by the debt collector.[18]

Thus, the only provision with respect to which the term "disputed debt" in 15 U.S.C. § 1692e(8) could have been interpreted at the time of its enactment in 1977 was 15 U.S.C. § 1692g(b), titled "Disputed debts." The term as used in 15 U.S.C. § 1692e(8) thus had a specific meaning in light of 15 U.S.C.

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[17] 91 Stat. at 877–78.

[18] *Id.* at 880.

§ 1692g(b). Both provisions survive in the current statute in the form in which Congress originally enacted them.[19]

### C. The Fair Credit Reporting Act's procedure for a consumer to dispute information provided by a furnisher must be, and consistently has been, interpreted to exclude frivolous or immaterial disputes.

While the Fair Credit Reporting Act was already on the books (since 1970) when the Fair Debt Collection Practices Act was adopted in 1977, the Fair Credit Reporting Act's provisions establishing duties for furnishers of information — and establishing a procedure for a consumer to dispute information provided by a furnisher — came later. Fair Credit Reporting Act § 623 (codified at 15 U.S.C. § 1681s-2), titled "responsibilities of furnishers of information to consumer reporting agencies," was not enacted until 1996, including two subsections: 15 U.S.C. § 1681s-2(a), titled "Duty of furnishers of

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[19]Section 1692g(b) was amended in 2006 by adding two new sentences at the paragraph's end, but leaving the first two sentences intact:

> Collection activities and communications that do not otherwise violate this subchapter may continue during the 30-day period referred to in subsection (a) unless the consumer has notified the debt collector in writing that the debt, or any portion of the debt, is disputed or that the consumer requests the name and address of the original creditor. Any collection activities and communication during the 30-day period may not overshadow or be inconsistent with the disclosure of the consumer's right to dispute the debt or request the name and address of the original creditor.

Financial Services Regulatory Relief Act of 2006, Pub. L. No. 109-351, § 802(c), 120 Stat. 1966, 2006–07 (2006) (amending Fair Debt Collection Practices Act § 809(b) (15 U.S.C. § 1692g(b)).

information to provide accurate information," and 15 U.S.C. § 1681s-2(b), titled "Duties of furnishers of information upon notice of dispute."[20] Subsection (a) was amended in 2006 by adding a paragraph providing for the "[a]bility of consumer to dispute information directly with furnisher"; with that amendment, Congress added explicit protection for furnishers against frivolous disputes and disputes submitted by credit repair organizations:

> (F) **Frivolous or irrelevant dispute**
>
> (i) **In general** This paragraph shall not apply if the person receiving a notice of a dispute from a consumer reasonably determines that the dispute is frivolous or irrelevant, including—
>
> (I) by reason of the failure of a consumer to provide sufficient information to investigate the disputed information; or
>
> (II) the submission by a consumer of a dispute that is substantially the same as a dispute previously submitted by or for the consumer, either directly to the person or through a consumer reporting agency under subsection (b), with respect to which the person has already performed the person's duties under this paragraph or subsection (b), as applicable.
>
> . . . .
>
> (G) **Exclusion of credit repair organizations**
>
> This paragraph shall not apply if the notice of the dispute is submitted by, is prepared on behalf of the consumer by, or is submitted on a form supplied to the consumer by, a credit repair organization, as defined in section 1679a(3) of this title, or an entity that would be a

[20]Consumer Credit Reporting Reform Act of 1996, Pub. L. No. 104-208, § 2413, 100 Stat. 3009, 3009-447 (1996).

> credit repair organization, but for section 1679a(3)(B)(i) of this title.[21]

By enacting similar provisions limiting a furnisher's duty with respect to a "frivolous or irrelevant dispute" and with respect to a "dispute . . . submitted by, . . . prepared . . . by, or . . . submitted on a form supplied . . . by, a credit repair organization," Congress evinced an intent to protect consumers against disputed debts only where the dispute was *material*.

The Federal Trade Commission, whose regulatory jurisdiction covers both the Fair Debt Collection Practices Act[22] and the Fair Credit Reporting Act[23] (and whose regulations and interpretations are therefore entitled to *Chevron* deference[24]), has adopted rules implementing the statute governing furnishers' responsibilities: "A furnisher is not required to investigate a direct dispute if the furnisher has reasonably determined that the dispute is

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[21]Fair & Accurate Credit Transactions Act of 2003, Pub. L. No. 108-159, § 312(c), 117 Stat. 1952, 1990 (2003) (amending Fair Credit Reporting Act § 623(a) (15 U.S.C. § 1681s-2(a)).

[22]*See* 15 U.S.C. § 1692*l* (administrative enforcement).

[23]*See* 15 U.S.C. § 1681s(a)(1) (enforcement by Federal Trade Commission).

[24]*See Chevron, U.S.A., Inc. v. Natural Res. Defense Council, Inc.*, 467 U.S. 837, 842–43 (1984).

frivolous and irrelevant,"[25] and "[a] dispute qualifies as frivolous or irrelevant"[26] if—

- it lacks "[s]ufficient information to identify the account or other information that is in dispute" and "[t]he specific information that the consumer is disputing and an explanation of the basis for the dispute,"[27] or
- "[t]he furnisher has a reasonable belief that the direct dispute is submitted by, is prepared on behalf of the consumer by, or is submitted on a form supplied to the consumer by, a credit repair organization, as defined in 15 U.S.C. § 1679a(3)."[28]

The Appellees' disputes lacked "an explanation for the basis for the dispute." The disputes were thus "frivolous or irrelevant," and PRA was "not required to investigate" the disputes. (It is also possible that Debtors Legal Clinic, whose form letter all four Appellants used,[29] was "a credit repair organization, as defined in 15 U.S.C. § 1679a(3)," but that fact is not clear from the record.)

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[25] 16 C.F.R. § 660.4(f).

[26] *Id.*

[27] 16 C.F.R. § 660.4(d)(1)–(2).

[28] *Id.* (b).

[29] Def.-Appellant's Br. at 9–10 (Evans); *id.* at 12–13 (Paz); *id.* at 15–16 (Bowse); *id.* at 18 (Gomez).

The statute governing furnishers' responsibilities contains no requirement that a furnisher report to the consumer reporting agencies the fact that a consumer has disputed an item. There are circumstances in which such a duty may arise — that is, when a furnisher must report to the agencies that a consumer has disputed an item. But the duty does not arise automatically as a matter of law whenever a consumer has disputed an item. The duty arises only when a furnisher's report does not mention the item's disputed nature and, lacking that information, the resulting report is "misleading in such a way and to such an extent that [it] can be expected to have an adverse effect."[30] The duty arises only where "a consumer has presented a lender with a colorable argument against liability" for the disputed item.[31] So even though a furnisher must *sometimes* report that a consumer has disputed an item, that fact "does not mean that a furnisher could be held liable on the merits simply for a failure to report that a debt is disputed."[32] A consumer who complains of such a failure must go at least a

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[30] *Saunders v. Branch Banking & Trust Co. of Va.*, 526 F.3d 142, 151 (4th Cir. 2008) (quoting *Dalton v. Capital Assoc'd Indus., Inc.*, 257 F.3d 409, 415 (4th Cir. 2001)); *accord Gorman v. Wolpoff & Abramson, LLP*, 584 F.3d 1147, 1163 (9th Cir. 2009) (quoting *Saunders*).

[31] *Shames-Yeakel v. Citizens Fin. Bank*, 677 F. Supp. 2d 994, 1004 (N.D. Ill. 2009).

[32] *Gorman*, 584 F.3d at 1163; *accord Gamby v. Equifax Info. Servs.*, 2010 WL 46946, at *3 (E.D. Mich Jan. 7, 2010) ("a furnisher cannot be held liable on the merits for simply failing to report that a debt is disputed").

step further: "The consumer must still convince the finder of fact that the omission of the dispute was 'misleading in such a way and to such an extent that [it] can be expected to have an adverse effect.'"[33]

### D. The Consumer Credit Protection Act's provisions — including both the Fair Debt Collection Practices Act and the Fair Credit Reporting Act — must be read together as parts of a whole, in which case the Appellees' disputes were frivolous and immaterial.

"Statutes," Justice Frankfurter once wrote, "cannot be read intelligently if the eye is closed to considerations evidenced in affiliated statutes."[34] This Court has accordingly held that when "two sections share the same purpose, the parallel provisions can, as a matter of general statutory construction, be interpreted to be *in pari materia*."[35]

Congress has amended the Consumer Credit Protection Act more than two dozen times but, since the Act's original adoption in 1968, has organized the Act as a coherent, integrated scheme for consumer credit protection.[36]

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[33] *Gorman*, 584 F.3d at 1163 (quoting *Saunders*).

[34] Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 Colum. L. Rev. 527, 539 (1947), *quoted in* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 252 (2012).

[35] *United States v. Battista*, 575 F.3d 226, 234 (2d Cir. 2009) (quoting *United States v. Carr*, 880 F.2d 1550, 1553 (2d Cir. 1989)).

[36] Not every federal consumer-protection statute is a part of the Consumer Credit Protection Act. For example, the Telephone Consumer Protection Act is codified in United States Code title 47. Telephone Consumer

The Act, despite its detailed structure, is a single statute that must be read as a whole: "In ascertaining the plain meaning of the statute, the court must look to the particular statutory language at issue, as well as the language and design of the statute as a whole."[37]

The Appellees' debts were not "disputed debts" within the Fair Debt Collection Practices Act's meaning, and the inquiry ought to end there. But even if the meaning of "disputed debt" in 15 U.S.C. § 1692e(8) were somehow broader than its meaning under 15 U.S.C. § 1692g(b), then that meaning could not expand PRA's duties as a furnisher under the Fair Credit Reporting Act. And the Appellees' "disputes" were each a "frivolous or irrelevant" dispute under the Fair Credit Reporting Act, so PRA had no duty to investigate or report that dispute, in which case there is no basis for liability under the Fair Debt Collection Practices Act.

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Protection Act of 1991, Pub. L. No. 102-243, 105 Stat. 2394 (1991) (codified at 47 U.S.C. § 227).

[37] *K Mart Corp. v. Cartier*, 486 U.S. 281, 291 (1988) (citing *Bethesda Hospital Ass'n v. Bowen*, 485 U.S. 399, 403–05 (1988); *Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207, 220–21 (1986)).

## II. The credit-and-collection industry operates in a nationwide market, so both public policy and due process favor consistent and predictable application of the Fair Debt Collection Practices Act.

Congress recognized the effects upon interstate commerce of debt-collection practices in the Fair Debt Collection Practices Act,[38] and stated explicitly in that statute that one of its purposes was "to insure that those debt collectors who refrain from using abusive debt collection practices are not competitively disadvantaged."[39] Congress has thus evinced an intent not to weave a regulatory web so tangled that it snares legitimate, compliant, law-abiding actors along with the abusive actors at whose unfair and deceptive conduct the statute is aimed.

But for the credit-and-collection industry to comply with the Fair Debt Collection Practices Act, the Act must be consistently and predictably applied — that is, a debt collector must know what the Act prohibits and what it allows: "A fundamental principle in our legal system is that laws which regulate persons or entities must give fair notice of conduct that is forbidden or required."[40] In a nationwide market, that outcome requires consistent and predictable nationwide direction on which a debt collector can rely. And the

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[38]Fair Debt Collection Practices Act § 802(d), 15 U.S.C. § 1692(d) (Congressional findings and declaration of purpose — interstate commerce).

[39]Fair Debt Collection Practices Act § 802(e), 15 U.S.C. § 1692(e) (purposes).

[40]*FCC v. Fox Television Stations, Inc.*, 567 U.S. 239, 253 (2012) (quoting *United States v. Williams*, 553 U.S. 285, 304 (2008)).

only governmental body that can effectively provide that direction on a nationwide basis is the Federal Trade Commission, whose regulatory jurisdiction covers both the Fair Debt Collection Practices Act[41] and the Fair Credit Reporting Act.[42] Under the Commission's guidance, the Appellees' disputes were "frivolous or irrelevant" disputes under the Fair Credit Reporting Act, so PRA had no duty to investigate or report those disputes, in which case there is no basis for liability under the Fair Debt Collection Practices Act.

The Act's regulatory effectiveness disintegrates if a debt collector's present ability to comply with the Act's requirements depends on a future interpretation by a judge in one of the nation's 94 judicial districts — or, indeed, if the Act may be interpreted differently by different judges within the same district. The Act's textual commitment of regulatory authority to the Federal Trade Commission provides a sensible scheme that allows the necessary consistency and predictability. The District Court's approach in this case achieves the opposite result.

Not only does the District Court's approach run contrary to the statutory scheme, and result in bad (or at least inconsistent) public policy, but it also raises an issue of constitutional dimension because it deprives debt

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[41] *See* 15 U.S.C. § 1692*l* (administrative enforcement).

[42] *See* 15 U.S.C. § 1681s(a)(1) (enforcement by Federal Trade Commission).

collectors of fair notice of what the Fair Debt Collection Practices Act requires and what it prohibits. The Supreme Court of the United States, in the closing weeks of its 2011–12 Term, decided two cases relevant to the fair-notice issue: *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142 (2012), and *FCC v. Fox Television Stations, Inc.*, 567 U.S. 239 (2012).

*Christopher* was an action by pharmaceutical sales representatives (also known as "detailers") against a prescription-drug manufacturer for overtime compensation, to which the detailers' entitlement turned on whether they were "outside salesmen" within the applicable statute's meaning,[43] which turned on how the Department of Labor interpreted its own regulations: "Petitioners invoke the DOL's interpretation of ambiguous regulations to impose potentially massive liability on respondent for conduct that occurred well before that interpretation was announced."[44] The Supreme Court held that such liability would violate due process: "To defer to the agency's interpretation in this circumstance would seriously undermine the principle that agencies should provide regulated parties 'fair warning of the conduct [a regulation] prohibits or requires.' Indeed, it would result in precisely the kind of 'unfair surprise' against which our cases have long

[43] 567 U.S. at 153.

[44] *Id.* at 155.

warned."[45] The *Christopher* Court explained that, until the Department of Labor announced its interpretation in 2009, "the pharmaceutical industry had little reason to suspect that its longstanding practice of treating detailers as exempt outside salesmen transgressed the FLSA. The statute and regulations certainly do not provide clear notice of this."[46] The Court found it significant that "despite the industry's decades-long practice of classifying pharmaceutical detailers as exempt employees, the DOL never initiated any enforcement actions with respect to detailers or otherwise suggested that it thought the industry was acting unlawfully."[47] The Court concluded that "where, as here, an agency's announcement of its interpretation is preceded by a very lengthy period of conspicuous inaction, the potential for unfair surprise is acute": "It is one thing to expect regulated parties to conform their conduct to an agency's interpretations once the agency announces them; it is quite another to require regulated parties to divine the agency's interpretations in advance or else be held liable" down the road.[48]

*FCC v. Fox Television* was an enforcement action by the Commission where, "[e]ven though the incidents at issue took place before [the applicable order], the Commission applied its new policy regarding fleeting expletives

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[45] *Id.* at 156 (internal citations and footnote omitted).

[46] *Id.* at 157.

[47] *Id.*

[48] *Id.* at 158–59.

and fleeting nudity" and "found the broadcasts by respondents . . . to be in violation of this standard."[49] The Supreme Court rejected the liability that the agency had imposed because "[t]he Commission failed to give [the respondents] fair notice prior to the broadcasts in question that fleeting expletives and momentary nudity could be found actionably indecent."[50] The Court clearly articulated the applicable rule:

> A fundamental principle in our legal system is that laws which regulate persons or entities must give fair notice of conduct that is forbidden or required. . . . A conviction or punishment fails to comply with due process if the statute or regulation under which it is obtained "fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement."[51]

The principles of *Christopher* and *Fox Television* are squarely in play here, but in reverse: PRA is being subject to liability for *following* clear and explicit regulatory authority of which it has fair notice. To impose liability under these circumstances would violate due process.

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[49] 567 U.S. at 249.

[50] *Id.* at 258.

[51] *Id.* at 253 (quoting *United States v. Williams*, 553 U.S. 285, 304 (2008)).

## III. A recent study undertaken by ACA shows that invalid disputes of collectible debt impose a significant burden on the credit-and-collection industry and, in turn, on the national credit economy.

### A. The national credit economy depends on the credit-and-collection industry's efficient operation.

As part of the process of attempting to recover outstanding payments, debt collectors and debt buyers are an extension of every community's businesses. Debt collectors and debt buyers work with these businesses, large and small, to obtain payment for the goods and services already received by consumers. Their efforts have resulted in the annual recovery of billions of dollars — dollars that are returned to and reinvested by businesses, and that would otherwise constitute losses on those businesses' financial statements. Recovering rightfully owed consumer debt helps prevent job losses; keeps credit, goods, and services available; and reduces the need for tax increases to cover governmental budget shortfalls. And without effective collections, consumers would be forced to pay more for their purchases to compensate for uncollected debts.

In 2014, ACA commissioned a study to measure the various impacts of third-party debt collection on the national and state economies. The study included both debt sold to a debt buyer, which acquired the issuer's interest in the debt; and debt assigned to a third-party debt collector, who acted as the issuer's (or the issuer's successor's) agent but did not acquire the issuer's interest in the debt. The study found that, in calendar year 2013:

- Third-party debt collectors recovered $55.2 billion from consumers on behalf of creditor and government clients.
- The third-party collection of consumer debt returned an average savings of $389 per household by keeping the cost of goods and services lower.[52]

The credit-and-collection industry keeps bad debt from being a total loss for the original creditor. A creditor loans out money with the expectation of being repaid according to the loan's terms, and its resources and operations are geared toward that expectation. But sometimes the expectation is disappointed and, in those cases, a debt collector or a debt buyer is a more attractive option for a creditor than continued collection activity by the creditor itself. Without debt collectors and debt buyers, the creditor would simply charge off the loan, which would be a total loss — and would drive up the interest that the creditor must charge in order to recoup that loss. The national credit economy depends on the credit-and-collection industry, which maximizes recovery from debt and thereby keeps interest rates down.

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[52]ACA International, *The Impact of Third-Party Debt Collection on the U.S. National and State Economies in 2013* (2014), cited in Josh Adams, ACA International White Paper, *The Role of Third-Party Debt Collection in the U.S. Economy* 2 (Jan. 2016), *online at* http://www.acainternational.org/assets/research-statistics/aca-wp-role3rdparty.pdf (accessed Oct. 25, 2017).

### B. A recent study undertaken by ACA shows that invalid disputes of collectible debt impose a significant burden on the credit-and-collection industry.

ACA has long been aware anecdotally that many "disputes" of collectible debt originate not with the debtor, but with a credit-repair organization or with a consumer law firm, some of whom mail out (or post online to be copied and pasted) generic and uninformative form letters that purport to come from the consumer directly. One common tactic in the last decade was bogus "billing error" letters, asserting so-called errors under the Fair Credit Billing Act, but not involving any actual "billing errors" as that Act defines them.[53]

Another, more recent tactic is to "dispute" a debt in collection, often in connection with the reporting of that debt to the consumer reporting agencies. That tactic's goal is to induce the collection agency to delete the negatively (but accurately) reporting tradeline, or to mark it as "disputed"; or to inundate the collection agency with "disputes" to which it cannot timely or appropriately respond, after which the agency can be targeted with a claim under the Fair Debt Collection Practices Act.

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[53] *See, e.g.*, *Esquibel v. Chase Manhattan Bank USA, N.A.*, 276 F. App'x 393, 396 (5th Cir. 2008) ("The district court held that Esquibel's correspondence did not complain of a billing error as a matter of law because Esquibel complained only of finance charges that, according to the FCBA's statutory definition, do not constitute billing errors. We agree; thus we affirm the district court's holding for essentially the reasons stated by the district court.").

ACA is currently undertaking a study to document these practices, and to measure their cost on the economy. That study is in an early phase — only a pilot study has been completed so far, with a smaller sample size than the full study will include — but even the preliminary results have yielded data showing the burden that invalid disputes impose:

- The respondents estimated that the proportion of invalid disputes was at least 70 percent to as high as 95 percent, with the smallest business reporting the highest proportion of invalid disputes.
- The proportion of form-letter disputes received ranged from 18 percent to 96 percent.
- The overwhelming majority of disputes are indirect disputes, submitted through the e-OSCAR platform for credit-reporting disputes — often characterized as "robo-disputes" because a consumer law firm or credit-repair organization can easily automate such disputes and submit them in large numbers at a time.
- The cost of responding to an invalid dispute ranged from 40 cents to 6 dollars per dispute, with the two largest businesses

spending six-figure amounts annually responding to invalid disputes.[54]

Invalid disputes of collectible debt impose a significant burden on the credit-and-collection industry. To affirm the District Court will exacerbate that burden.

## Conclusion

Therefore, Amicus Curiae ACA International respectfully asks that this Court reverse the District Court's order.

October 27, 2017.

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[54]ACA International, Research Note, "An Exploratory Analysis of the Costs of Invalid Disputes" (2017), *online at* https://www.acainternational.org/assets/industry-research-statistics/p4-invalid-disputes.pdf (accessed Oct. 26, 2017).

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October 27, 2017.

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## Certificate of Service

I hereby certify that on October 27, 2017, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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