No. 12-744

In the Supreme Court of the United States

CONVERGENT OUTSOURCING, INC., F/K/A ER SOLUTIONS, INC.,

Petitioner,

v.

ANTHONY W. ZINNI,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF OF ACA INTERNATIONAL, DBA INTERNATIONAL, AND THE NATIONAL ASSOCIATION OF RETAIL COLLECTION ATTORNEYS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether a settlement offer that provides a plaintiff with all the relief available, but not a formal judgment embodying the settlement, moots the underlying claim.

TABLE OF CONTENTS

Question Presented i
Table of Authorities iv
Interests of the *Amici Curiae* 1
Summary of Argument 2
Argument 4
A. This Case Cleanly Presents A Question That Has Produced A Clear Division Among The Lower Courts. 4
1. The courts of appeals are divided regarding the question presented. 4
2. There is no alternative justification for the court of appeals' holding in this case. 8
3. This case is an appropriate companion to *Symczyk*. 9
B. Whether The Offer Of A Full-Relief Settlement That Is Formalized In A Contract Rather Than A Judgment Moots A Claim Is A Question Of Substantial Importance. 10
1. Defendants face an onslaught of small-damages, high attorneys' fee claims. 11
2. There are substantial reasons that a defendant may prefer to resolve a claim though a contractual agreement rather than entry of a judgment. 15

TABLE OF CONTENTS—continued

3. An entry of judgment has no practical implications for a plaintiff beyond the settlement. 16

Conclusion 19

TABLE OF AUTHORITIES

CASES

Allen v. *Wright*,
468 U.S. 737 (1984) 3

Alpern v. *UtiliCorp. United, Inc.*,
84 F.3d 1525 (8th Cir. 1996) 7

Already, LLC, dba Yums v. *Nike, Inc.*,
No. 11-982, slip op. (U.S. Jan. 9, 2013) 3

Alvarado v. *Table Mountain Rancheria*,
509 F.3d 1008 (9th Cir. 2007) 17

Alvarez v. *Smith*,
558 U.S. 87 (2009) 3

Arizona v. *California*,
530 U.S. 392 (2000) 18

Armstrong v. *Rose Law Firm, P.A.*,
2002 WL 31050583 (D. Minn. 2002) 13

Berther v. *TSYS Total Debt Mgmt., Inc.*,
2007 WL 1795472 (E.D. Wis. 2007) 14

Bobby v. *Bies*,
556 U.S. 825 (2009) 17

Burns v. *Anderson, Crenshaw & Assocs.*,
2008 WL 8834614 (D. Colo. 2008) 12

Damasco v. *Clearwire Corp.*,
662 F.3d 891 (7th Cir. 2011) 4, 5

Danow v. *Law Office of David E. Borack, P.A.*,
367 F. App'x 22 (11th Cir. 2010) 13

Deposit Guar. Nat'l Bank v. *Roper*,
445 U.S. 326 (1980) 10

Fed. Home Loan Mortg. Corp. v. *Lamar*,
503 F.3d 504 (6th Cir. 2007) 11

Genesis HealthCare Corp. v. *Symczyk*,
No. 11-1059 ..... 4, 9, 10

TABLE OF AUTHORITIES—continued

Goins v. *JBC & Assocs., P.C.*,
2006 WL 540332 (D. Conn. 2006) 13-14
Gradisher v. *Check Enforcement Unit, Inc.*,
2003 WL 187416 (W.D. Mich. 2003) 13
Hartis v. *Chicago Title Ins. Co.*,
694 F.3d 935 (8th Cir. 2012) 7
Jerman v. *Carlisle, McNellie, Rini, Kramer & Ulrich LPA*,
130 S. Ct. 1605 (2010) 14
Kokkonen v. *Guardian Life Ins. Co.*,
511 U.S. 375 (1994) 17
Langley v. *Check Game Solutions, Inc.*,
2007 WL 2701345 (S.D. Cal. 2007) 14
Lee v. *Thomas & Thomas*,
109 F.3d 302 (6th Cir. 1997) 14, 15
McCauley v. *Trans Union, LLC*,
402 F.3d 340 (2d Cir. 2005) 8, 9
In re Martinez,
266 B.R. 523 (Bankr. S.D. Fla. 2001) 13
Murphy v. *Hunt*,
455 U.S. 478 (1982) 3
Nelson v. *Select Fin. Servs., Inc.*,
2006 WL 1672889 (E.D. Pa. 2006) 13
O'Brien v. *Ed Donnelly Enters., Inc.*,
575 F.3d 567 (6th Cir. 2009) 7, 8, 9
Rand v. *Monsanto Co.*,
926 F.2d 596 (7th Cir. 1991) 5, 8
Samsung Elecs. Co. v. *Rambus, Inc.*,
523 F.3d 1374 (Fed. Cir. 2008) 5, 6
Sanders v. *Jackson*,
209 F.3d 998 (7th Cir. 2000) 11

TABLE OF AUTHORITIES—continued

Simmons v. *United Mortg. & Loan Inv., LLC*,
634 F.3d 754 (4th Cir. 2011) 6
Smyth ex rel. Smyth v. *Rivero*,
282 F.3d 268 (4th Cir. 2002) 17
Thorogood v. *Sears, Roebuck & Co.*,
595 F.3d 750 (7th Cir. 2010) 5
United States Parole Comm'n v. *Geraghty*,
445 U.S. 388 (1980) 10
Vandzura v. *C&S Adjusters, Inc.*,
1997 WL 56927 (E.D. Pa. 1997) 13
Warren v. *Sessoms & Rogers, P.A.*,
676 F.3d 365 (4th Cir. 2012) 7
Wrightsell v. *Cook Cnty.*,
599 F.3d 781 (7th Cir. 2010) 5

STATUTES

15 U.S.C.
§ 1640(a)(2) 13
§ 1640(a)(3) 13
§ 1681n 13
§ 1681o 13
§ 1692k(a)(2)(A) 13
§ 1692k(a)(3) 13
Or. Rev. Stat. § 697.632(1)(f)(A) 16

OTHER AUTHORITIES

Restatement (Second) of Judgments (1982) 17, 18
Lynn A.S. Araki, Comment, *Rx for Abusive Debt Collection Practices: Amend the FDCPA*, 17 U. Haw. L. Rev. 69 (1995) 14

TABLE OF AUTHORITIES—continued

Branch Office Application Collection Agency, IL486-1528, http://tinyurl.com/bjmaaya.. 16

William P. Hoffman, *Recapturing the Congressional Intent Behind the Fair Debt Collection Practices Act*, 29 St. Louis U. Pub. L. Rev. 549 (2010)..... 12

Anne Rosso, *Does Your Reputation Precede You?*, Collector, May 1, 2011 15

State of Washington Business Licensing Service, Business License Application Supplement for Collection Agency, Branch Office, or Out-Of-State Office, http://tinyurl.com/as2anfr..... 16

WebRecon, FDCPA and Other Consumer Lawsuit Statistics, Dec 16-31 & Year-End Review, 2012 (Jan. 16, 2013), http://tinyurl.com/aewzkps 11

WebRecon, 2011 Litigation Statistics Revised Upward, FDCPA Suits Surpass 12,000 (Feb. 24, 2012), http://tinyurl.com/avtzsp6 12

BRIEF OF ACA INTERNATIONAL, DBA INTERNATIONAL, AND THE NATIONAL ASSOCIATION OF RETAIL COLLECTION ATTORNEYS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

INTERESTS OF THE *AMICI CURIAE*

ACA International (ACA) is a leading not-for-profit trade association of credit and collection professionals. Founded in 1939, and based in Minneapolis, Minnesota, ACA represents approximately 5,000 third-party collection agencies, asset buyers, attorneys, creditors, and vendor affiliates. ACA's members range 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. ACA regularly files *amicus* briefs in cases of interest to its membership.[1]

DBA International (DBA) is the nonprofit trade association that represents the interests of companies that purchase distressed asset portfolios on the secondary market from originating creditors. Founded in 1997 by a small group of companies to provide a forum to advance best practices within the industry,

[1] Pursuant to Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part and that no person other than *amici*, their members, or their counsel made a monetary contribution to its preparation or submission. Counsel of record for all parties received notice at least 10 days prior to the due date of the intention of *amici* to file this brief. Both parties consented to the filing of this brief.

today DBA has grown to represent over 625 companies across the nation. DBA provides its members with networking, educational, and legislative advocacy opportunities through an annual conference, an executive summit, regional seminars, state and regional committees, newsletters, webinars, teleconferences, and other media. DBA maintains a code of ethics with which member companies must comply and is launching a national certification program in February 2013 designed to promote uniform industry standards based on best practices. DBA is headquartered in Sacramento, California.

The National Association of Retail Collection Attorneys (NARCA) is a nationwide, not-for-profit trade association comprised of over 700 law firms in all 50 states engaged in the practice of creditor's rights and debt collection law. NARCA members must meet association standards designed to ensure experience and professionalism. NARCA member attorneys are subject to the various Codes of Professional Ethics adopted in the jurisdictions where they are licensed to practice law. NARCA has also adopted a Code of Professional Conduct and Ethics that imposes professional standards beyond the requirements of state codes of ethics and regulations that govern attorneys. NARCA conducts semiannual conferences for its members. The educational component of each conference qualifies for continuing education credit with state bars. NARCA has participated as *amicus* in both Fair Debt Collect Practices Act cases brought against collection attorneys that were decided by this Court.

SUMMARY OF ARGUMENT

Article III of the Constitution limits federal jurisdiction to "Cases" and "Controversies," which "re-

quires those who invoke the power of a federal court to demonstrate standing—a 'personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief.'" *Already, LLC, dba Yums* v. *Nike, Inc.*, No. 11-982, slip op. at 3 (U.S. Jan. 9, 2013) (quoting *Allen* v. *Wright*, 468 U.S. 737, 751 (1984)). The Court has "repeatedly held that an 'actual controversy' must exist not only 'at the time the complaint is filed,' but through 'all stages' of the litigation." *Id.* at 3-4 (quoting *Alvarez* v. *Smith*, 558 U.S. 87, 92 (2009)). "A case becomes moot—and therefore no longer a 'Case' or 'Controversy' for purposes of Article III—'when the issues presented are no longer live or the parties lack a legally cognizable interest in the outcome.'" *Id.* at 4 (quoting *Murphy* v. *Hunt*, 455 U.S. 478, 481 (1982) (per curiam)).[2]

This case poses a fundamental question with respect to mootness: whether a defendant's offer of everything that a plaintiff could achieve via litigation, other than an entry of judgment, moots the underlying claim. That question has divided the federal courts of appeals and is ripe for this Court's resolution. And the question is important: with plaintiffs' attorneys across the country bringing statutory causes of action carrying small damages exposure but hefty attorney's fees, it is critical that defendants have the ability to quickly dispose of those claims by

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[2] *Already* demonstrates that a party to litigation may unilaterally moot a controversy. That case, however, turned on the standing inquiry with respect to *prospective* injury—that is, whether Nike sufficiently showed that its unilateral action mooted a controversy as to potential future misconduct. This case, by contrast, turns on whether a unilateral offer may moot a claim stemming from a *past* injury.

providing a plaintiff the full relief requested. While there are important practical and legal reasons why a defendant will resolve a claim by embodying the settlement in a contract rather than a judgment, the absence of a judgment has no practical importance for a plaintiff.

ARGUMENT

A. This Case Cleanly Presents A Question That Has Produced A Clear Division Among The Lower Courts.

The principal requirement for review by this Court is satisfied here. As the petition explains (at 8-19), the lower courts are divided as to whether an offer to provide a claimant with the full relief requested, and to document that settlement through a contract rather than a judicial judgment, moots the underlying claim.

Moreover, that question is squarely presented by this case. There is no other basis on which this case could be resolved, and this case is particularly worthy of review in light of the Court's grant of certiorari in *Genesis HealthCare Corp.* v. *Symczyk*, No. 11-1059.

1. The courts of appeals are divided regarding the question presented.

The Seventh Circuit holds that an offer to provide a claimant with the full relief he or she requests moots a claim, whether or not the defendant offers to embody the settlement in a judicial judgment. In *Damasco* v. *Clearwire Corp.*, 662 F.3d 891 (7th Cir. 2011), the court explained that "[o]nce the defendant offers to satisfy the plaintiff's entire demand, there is no dispute over which to litigate, and a plaintiff who

refuses to acknowledge this loses outright, under Fed. R. Civ. P. 12(b)(1), because he has no remaining stake." *Id.* at 895 (quoting *Rand* v. *Monsanto Co.*, 926 F.2d 596, 598 (7th Cir. 1991)). In that proceeding, the defendant did not offer to memorialize the settlement in a judicial judgment; the plaintiff specifically contended that the defendant "should not be allowed to circumvent Rule 68 by casting its offer in the form of a settlement." *Id.* at 894. In rejecting this argument, the Seventh Circuit found that what triggered mootness was the *offer* of a full relief settlement.

The principle applies where, as here, "the defendant makes an *offer* of settlement that equals or exceeds the maximum amount of money, including any attorneys' fee or court costs, that the law would entitle the plaintiff to recover if he prevailed in the suit." *Wrightsell* v. *Cook Cnty.*, 599 F.3d 781, 783 (7th Cir. 2010) (emphasis added). "If the plaintiff refused such an offer in a case that was *not* a class action, the court would lose jurisdiction because he would have nothing to gain by continuing to litigate." *Ibid.* Thus it is the offer alone that defeats jurisdiction. See also *Thorogood* v. *Sears, Roebuck & Co.*, 595 F.3d 750, 752 (7th Cir. 2010).

The Federal Circuit has reached the very same conclusion. In *Samsung Electronics Co.* v. *Rambus, Inc.*, 523 F.3d 1374, 1377 (Fed. Cir. 2008), Rambus offered "to compensate Samsung for the full amount of its requested attorney fees." Expressly adopting the Seventh Circuit's approach, the court concluded that "[a]fter Rambus offered the entire amount of attorney fees in dispute, the case became moot." *Id.* at 1380. The full-relief settlement offer left the district court with "no case or controversy to continue to con-

sider." *Ibid*. Because "the offer of the full amount in dispute brought an end to the case and controversy between Rambus and Samsung," the court remanded the matter "with the instruction that the court dismiss Samsung's complaint." *Id*. at 1381.[3] Thus the Federal Circuit, like the Seventh Circuit, holds that it is the *offer* of a full-relief settlement that moots a claim.

The court below, however, joined three other courts of appeals in holding that the plaintiff's claim is mooted only if the defendant—in addition to offering a full-relief settlement—offers to embody the settlement in a judicial judgment.

Here, the Eleventh Circuit concluded that an offer of settlement without an offer of judgment does not moot a claim because it fails to provide "the full relief requested." Pet. App. 19a. The court reasoned that an entry of judgment is "important" "because the district court can enforce it." *Ibid*.

The panel expressly agreed with the Fourth Circuit's decision in *Simmons* v. *United Mortgage & Loan Investment, LLC*, 634 F.3d 754, 765-766 (4th Cir. 2011). That court explained that "a judgment entered" in the plaintiff's "favor carries a substantial advantage over the same amount of recovery via a defendant's contractual promise to pay the same amount embodied in a settlement agreement." *Id*. at 765. Thus a "failure" to offer entry of a judgment

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[3] The Federal Circuit noted that Rambus followed its settlement offer with an offer of judgment pursuant to Rule 68. *Samsung Elecs.*, 523 F.3d at 1377. But the offer of judgment was not relevant to the court's analysis. In the face of a moot claim, the Federal Circuit agreed with the Seventh Circuit that the complaint must be dismissed. *Id*. at 1380-1381.

"prevented the mooting" of the claims. *Id*. at 766. See also *Warren* v. *Sessoms & Rogers, P.A.*, 676 F.3d 365, 370-371 (4th Cir. 2012).

The Sixth Circuit has reached the same result. In *O'Brien* v. *Ed Donnelly Enterprises, Inc.*, 575 F.3d 567, 574 (6th Cir. 2009), the court acknowledged that "an offer of judgment that satisfies a plaintiff's entire demand moots the case." But, "disagree[ing]" "with the Seventh Circuit's view that a plaintiff loses outright when he refuses an offer of judgment that would satisfy his entire demand," the Sixth Circuit held that "the better approach" when the plaintiff refuses to settle the case "is to enter judgment in favor of the plaintiffs in accordance with the defendants' Rule 68 offer of judgment." *Id*. at 575. This holding, accordingly, appears to require a defendant to offer an entry of judgment in order to moot a claim.

The Eighth Circuit takes the same approach, concluding that "[j]udgment should be entered against a putative class representative on a defendant's offer of payment where class certification has been properly denied and the offer satisfies the representative's entire demand for injuries and costs of the suit." *Hartis* v. *Chicago Title Ins. Co.*, 694 F.3d 935, 949 (8th Cir. 2012) (quoting *Alpern* v. *UtiliCorp. United, Inc.*, 84 F.3d 1525, 1539 (8th Cir. 1996)). Because it is the entry of judgment that functions to moot the claim in this court, an offer of judgment must accompany the settlement offer.

Here, the petitioner offered a settlement that provided everything respondent could obtain in litigation, except an entry of judgment. Pet. App. 4a-5a. Such an offer moots a claim in the Seventh and Federal Circuits, but not in the Fourth, Sixth, Eighth, or Eleventh Circuits. Such disagreement among the

courts of appeals regarding an elemental question should not be permitted to continue.

2. There is no alternative justification for the court of appeals' holding in this case.

The court below hinted—but did not hold—that even if petitioner had offered to embody the settlement in a judgment, petitioner's claim of mootness could properly be rejected on the theory that a party's decision to reject the settlement offer could be relevant to the mootness inquiry. Pet. App. 17a n.8. The lower court suggested that the Seventh Circuit holds "that a rejected offer of judgment for plaintiff's entire demand would be enough to moot a case" (*ibid.* (citing *Rand*, 926 F.2d at 598)), while the Second and Sixth Circuits find that an "offer of judgment for the full amount desired does not, in and of itself, moot the case" (*ibid.* (citing *McCauley* v. *Trans Union, LLC*, 402 F.3d 340, 340 (2d Cir. 2005); *O'Brien*, 575 F.3d at 575)).

This suggested alternative basis for decision is a red herring, as *no* court views a plaintiff's decision to reject a settlement offer as relevant to the mootness inquiry. Instead, the point of disagreement is the procedural housekeeping steps a court must take in resolving the lawsuit. In the Seventh Circuit, a rejected full-relief offer results in dismissal; there is no longer a "dispute over which to litigate, and a plaintiff who refuses to acknowledge this loses outright, under Fed. R. Civ. P. 12(b)(1), because he has no remaining stake." *Rand*, 926 F.2d at 895 (quotation omitted).

In the Second and the Sixth Circuits, on the other hand, the district court must enter judgment in favor of the plaintiff, even though the plaintiff has

rejected the settlement offer. *O'Brien*, 575 F.3d at 575 (the district court "is to enter judgment in favor of the plaintiffs in accordance with the defendants' Rule 68 offer of judgment"); *McCauley*, 402 F.3d at 342 (the "better resolution" is "entry of a default judgment" against the defendant).

Accordingly, the observation of the court does not relate to when a settlement offer moots a claim—the question presented here—but rather how a court should dispose of a claim that is moot, the issue that arises subsequent to the mootness determination. Not surprisingly, these courts' decisions regarding that subsequent issue are influenced by their views on the mootness issue presented here. In the Seventh Circuit, because an offer to settle a claim for maximum value is what triggers mootness, the court need not enter a judgment in the plaintiff's favor and thus no offer of judgment is necessary. But because mootness in the Second and Sixth Circuits turns on the entry of a judgment, a defendant offering a full-relief settlement must also offer an entry of judgment. Rather than an alternative basis for the decision here, therefore, this issue turns in large measure on how the Court resolves the question presented here.

3. This case is an appropriate companion to Symczyk.

This Court has granted review in *Genesis HealthCare Corp.* v. *Symczyk*, No. 11-1059, where the question is whether the offer of full relief to the representative plaintiff in a putative collective action moots the entire case. But the respondent in that case contends, as an alternative ground for affirmance, that "an unaccepted offer of judgment does not moot a case," because only an accepted offer may do so. Br. for Resp't at 8, *Genesis HealthCare Corp.* v.

Symczyk, No. 11-1059. The United States concurred that "this Court should * * * hold that an unaccepted offer of judgment does not moot a plaintiff's individual claim." Br. for United States as Amicus Curiae Supporting Affirmance, at 18, *Genesis HealthCare Corp.* v. *Symczyk* (No. 11-1059). See also *id.* at 10-15. As we just explained, this question is also relevant to the question presented here.

But it is not clear that this Court's decision in *Symczyk* will resolve this contention. That issue was not argued in the court of appeals or in the opposition to certiorari. Reply Br. for Pet'rs at 15-17, *Genesis HealthCare Corp.* v. *Symczyk* (No. 11-1059). And, as Members of the Court suggested during argument (see, *e.g.*, Tr. at 6-7 (Roberts, C.J.); *id.* at 8 (Kagan, J.); *id.* at 38-39 (Breyer, J.)), that case may be decided on its status as a collective action. See *Deposit Guar. Nat'l Bank* v. *Roper*, 445 U.S. 326, 339 (1980); *United States Parole Comm'n* v. *Geraghty*, 445 U.S. 388, 397 (1980). This case, which is not a collective action, squarely presents the important issue of whether a full-relief settlement offer, regardless of whether it is accepted, serves to moot a claim.

B. Whether The Offer Of A Full-Relief Settlement That Is Formalized In A Contract Rather Than A Judgment Moots A Claim Is A Question Of Substantial Importance.

Given the cottage industry of litigation that has arisen in the context of the Fair Debt Collection Practices Act (FDCPA) and other statutory enactments that provide for attorney's fees, it is critical that defendants have guidance as to how they may expeditiously resolve claims brought against them. And in bringing closure to claims, there are several

reasons why a defendant may wish to avoid entry of a judgment. The collateral consequences of a judgment—even those obtained through consent and in the absence of any finding or admission of wrongdoing—include loss of goodwill, licensing complications, and increased insurance costs. But entry of judgment does not bestow any benefit on a plaintiff who has already obtained a full-relief settlement.

1. Defendants face an onslaught of small-damages, high attorneys' fee claims.

Courts have described the "cottage industry" of "professional plaintiffs" asserting claims under the FDCPA and other federal statutory causes of action. *Fed. Home Loan Mortg. Corp.* v. *Lamar*, 503 F.3d 504, 513-514 (6th Cir. 2007) (quotation omitted). The Seventh Circuit has explained that "[t]he history of FDCPA litigation shows that most cases have resulted in limited recoveries for plaintiffs and hefty fees for their attorneys." *Sanders* v. *Jackson*, 209 F.3d 998, 1004 (7th Cir. 2000). The economically rational way for defendants to address this tidal wave of claims, therefore, is often to quickly dispose of these actions by offering a plaintiff the full amount that he or she could receive in litigation in order to avoid exposure for the huge amounts of plaintiffs' attorneys' fees associated with litigation of these claims.

The numbers are telling: plaintiffs filed 11,495 FDCPA cases in 2012, 12,018 cases in 2011, and 10,859 in 2010. WebRecon, FDCPA and Other Consumer Lawsuit Statistics, Dec 16-31 & Year-End Review, 2012 (Jan. 16, 2013), http://tinyurl.com/-aewzkps. This constitutes a staggering increase from the 2,792 FDCPA suits brought in 2005. *Ibid.*

Filings of other statutory claims also continue to rise. Plaintiffs filed 2,249 cases under the Fair Credit Reporting Act (FCRA) in 2012, and 1,930 in 2011. *Ibid*. And they lodged 1,101 actions asserting a claim through the Truth in Lending Act (TILA) in 2012, and 825 in 2011. *Ibid*. This even underreports the impact of these statutes, as "attorneys 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).

A small number of specialized plaintiffs' attorneys are responsible for many of these filings. In 2011 alone, a single attorney from Colorado filed FDCPA suits on behalf of 357 different individuals; a Virginia attorney filed for 309, and a New Jersey lawyer for 299. WebRecon, 2011 Litigation Statistics Revised Upward, FDCPA Suits Surpass 12,000 (Feb. 24, 2012), http://tinyurl.com/avtzsp6.[4] In 2008, noting that the Colorado attorney had "filed 382 other cases under the FDCPA," the court found 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 & Assocs.*, 2008 WL 8834614, at *7 n.5 (D. Colo. 2008).

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[4] In 2012, 12,566 unique plaintiffs asserted claims under the FDCPA, FCRA, and the TCPA. WebRecon, FDCPA and Other Consumer Lawsuit Statistics, Dec 16-31 & Year-End Review, 2012. 2,196 of those plaintiffs—nearly 17.5% of the national total—were represented by just ten attorneys. *Ibid*.

It is easy to see why plaintiffs' attorneys bring these statutory claims in large numbers. Although the FDCPA, FCRA, and TILA contain caps on the amount of damages a plaintiff may recover,[5] there are no statutory limits on the attorney's fees that may be awarded to prevailing plaintiffs.[6] In practice, the award of fees and costs often dwarfs the plaintiff's recovery. To take just a few examples:

- In cases where the plaintiff received the FDCPA statutory maximum of $1,000, courts have issued fee and cost awards for far more—including for $63,610.60, $43,180, $24,693.80, $29,037.50, and $77,680.44.[7]
- In a Pennsylvania action, a plaintiff won a $500 FDCPA judgment, but his attorney obtained fees and costs of $14,753.02. *Vandzura* v. *C&S Adjusters, Inc.*, 1997 WL 56927, at *4 (E.D. Pa. 1997).
- In Connecticut, a $1,500 FDCPA settlement generated $24,316.19 in fees and costs. *Goins*

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[5] The limitation for an individual FDCPA action is $1,000. 15 U.S.C. § 1692k(a)(2)(A). An FCRA claim, subject to some exceptions, is also $1,000. *Id*. § 1681n. Different TILA claims are capped at $1,000, $4,000, and $5,000. *Id*. § 1640(a)(2).

[6] See 15 U.S.C. § 1692k(a)(3) (FDCPA); *id*. §§ 1681n, 1681o (FCRA); *id*. § 1640(a)(3) (TILA).

[7] Respectively: *Danow* v. *Law Office of David E. Borack, P.A.*, 367 F. App'x 22, 23 (11th Cir. 2010) (per curiam) ($63,610.60); *Armstrong* v. *Rose Law Firm, P.A.*, 2002 WL 31050583, at *1 (D. Minn. 2002) ($43,180); *Nelson* v. *Select Fin. Servs., Inc.*, 2006 WL 1672889, at *4 (E.D. Pa. 2006) ($24,693.80); *In re Martinez*, 266 B.R. 523, 544 (Bankr. S.D. Fla. 2001) ($29,037.50); *Gradisher* v. *Check Enforcement Unit, Inc.*, 2003 WL 187416, at *9 (W.D. Mich. 2003) ($77,680.44).

v. *JBC & Assocs., P.C.*, 2006 WL 540332, at *1 (D. Conn. 2006).

- And in California, a $1,091 settlement was followed by a fee and cost award of $46,124.77. *Langley* v. *Check Game Solutions, Inc.*, 2007 WL 2701345, at *8 (S.D. Cal. 2007).

One attorney admits that he asserts "technical violations of the law to bring cases, makes arbitrary settlement demands irrespective of damages, and earns far more in attorneys' fees than his clients are entitled to collect." Lynn A.S. Araki, Comment, *Rx for Abusive Debt Collection Practices: Amend the FDCPA*, 17 U. Haw. L. Rev. 69, 106 (1995).

"For the most part, FDCPA cases appear to be much more about attorneys fees than the prosecution of consumer rights." *Berther* v. *TSYS Total Debt Mgmt., Inc.*, 2007 WL 1795472, at *4 (E.D. Wis. 2007). This is precisely the "troubling dynamic" cited by Justice Kennedy "of allowing certain actors in the system to spin even good-faith, technical violations of federal law into lucrative litigation, if not for themselves then for the attorneys who conceive of the suit." *Jerman* v. *Carlisle, McNellie, Rini, Kramer & Ulrich LPA*, 130 S. Ct. 1605, 1631 (2010) (Kennedy, J., dissenting).

In view of these economic realities, plaintiffs' attorneys have a clear incentive to allow litigation to linger, accumulating fees all the while. But once a defendant offers a full-relief settlement, any subsequent legal work constitutes "economic waste." *Lee* v. *Thomas & Thomas*, 109 F.3d 302, 306 (6th Cir. 1997). "Waste is not in the public interest." *Ibid*. In adopting the FDCPA, Congress "could hardly have

wished to reward lawyers for doing nonproductive work and wasting their adversaries' time and the time of the courts as well." *Ibid.* Defendants therefore should be able to dispose of an action by offering a plaintiff the most he or she could recover, and thereby truncate subsequent attorney's fees and costs—even if the self-interest of plaintiffs' lawyers might motivate a different outcome. The mootness doctrine provides precisely the mechanism for accomplishing that result.

2. There are substantial reasons that a defendant may prefer to resolve a claim though a contractual agreement rather than entry of a judgment.

An entry of a judgment against a defendant may impose several costs beyond the money at stake in the litigation.

To begin, all businesses have an interest in their goodwill. Entry of judgment against a company doubtless has the effect—however incremental—of diminishing a company's goodwill in the community. Maintaining a positive public image is of particular concern to the debt collection industry. See Anne Rosso, *Does Your Reputation Precede You?*, Collector, May 1, 2011, at 33. In addition to damaging a business's reputation with the public, adverse judgments discourage outside investment. Prospective investors frequently inquire as to an entity's adverse judgment history—not distinguishing between consent judgments and judgments on the merits—making businesses reluctant to concede to a judgment in the course of resolving litigation.

Moreover, state licensing requirements for debt collection entities generally mandate the reporting of

adverse judgments, including consent judgments. For example, Oregon law requires that a person who "performs a debt management service" must report during license registration or renewal all "judgment[s] in favor of another person in a circuit court of this state or in an equivalent court in another state." Or. Rev. Stat. § 697.632(1)(f)(A). Washington's "Business License Application Supplement for Collection Agency, Branch Office, or Out-Of-State Office," http://tinyurl.com/as2anfr, inquires whether a civil judgment has been entered against any principal of a collection entity. In Illinois, when registering as a collection agency, an entity must list all outstanding unsatisfied judgments. Branch Office Application Collection Agency, IL486-1528, at *2, http://tinyurl.com/bjmaaya. In sum, states often require a collection agency to provide its judgment history in determining whether to issue a collection license. Significant regulatory cost may thereby result from entry of a judgment in settlement of litigation.

Judgments may also increase the cost of insuring an entity involved in debt collection. Insurers frequently inquire as to an entity's judgment history. Even a consent judgment offered voluntarily may have an adverse effect with respect to insurability. A defendant accordingly may be reluctant to offer a settlement if doing so could increase its price of doing business in the future.

3. An entry of judgment has no practical implications for a plaintiff beyond the settlement.

Although an entry of judgment has significant consequences for defendants, memorializing a settlement through a judgment, rather than a contract, has no practical benefit to a plaintiff.

First, whether a defendant's full-relief settlement is embodied in a judgment has no practical bearing on the plaintiff's ability to receive the benefit of his or her bargain over the settlement offer. The court below was thus wrong to reason that a judgment "is important" to plaintiffs "because the district court can enforce it." Pet. App. 19a. It is not the case that, absent entry of a judgment, a plaintiff "face[s] the prospect of filing a breach of contract suit in state court with its attendant filing fees—resulting in two lawsuits instead of just one." *Ibid.*

Instead, even when a court dismisses an action, it may incorporate terms of a settlement and retain jurisdiction over that matter. See *Kokkonen* v. *Guardian Life Ins. Co.*, 511 U.S. 375, 381 (1994). The "continuing jurisdiction involved in the court's inherent power to protect and effectuate its decrees entails judicial oversight of the agreement" that "is made part of an order with judicial imprimatur." *Smyth ex rel. Smyth* v. *Rivero*, 282 F.3d 268, 282 (4th Cir. 2002). See also *Alvarado* v. *Table Mountain Rancheria*, 509 F.3d 1008, 1017 (9th Cir. 2007) ("[A] federal court has jurisdiction to enforce a settlement agreement in a dismissed case when the dismissal order incorporates the settlement terms, or the court has retained jurisdiction over the settlement contract.").

Second, use of a contract rather than a judgment will not have any impact on the collateral consequences of the settlement. The preclusion doctrine only "bars successive litigation of 'an issue of fact or law' that 'is actually litigated and determined by a valid and final judgment, and is essential to the judgment.'" *Bobby* v. *Bies*, 556 U.S. 825, 834 (2009) (quoting Restatement (Second) of Judgments § 27

(1982)). "In the case of a judgment entered by confession, consent, or default, none of the issues is actually litigated." *Arizona* v. *California*, 530 U.S. 392, 414 (2000) (quoting Restatement (Second) of Judgments § 27 cmt. e). A judgment entered pursuant to a voluntary settlement offer would not have subsequent preclusive effect and accordingly does not provide a plaintiff collateral benefits.

For these reasons, a rule that requires entry of a judgment in order to moot a claim imposes a cost on a defendant with no resulting benefit to the plaintiff. The predictable result of such increased cost is to reduce the number of full-relief settlements that are offered as a means to resolve litigation. That inefficiency would be a bad result for plaintiffs; because a full-relief settlement represents the *most* that a plaintiff can possibly recover in the course of litigation, it is in the plaintiff's interest to encourage a defendant to offer this kind of settlement.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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