No. 17-___

IN THE

# Supreme Court of the United States

BLATT, HASENMILLER, LEIBSKER & MOORE, LLC,

*Petitioner,*

v.

RONALD OLIVA,

*Respondent.*

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

## PETITION FOR A WRIT OF CERTIORARI

JOSHUA G. VINCENT
*Counsel of Record*
DAVID M. SCHULTZ
JOHN P. RYAN
CARSON R. GRIFFIS
HINSHAW & CULBERTSON LLP
222 North LaSalle Street
Ste. 300
Chicago, Illinois 60601
(312) 704-3463
jvincent@hinshawlaw.com

*Counsel for Petitioner*
*Blatt, Hasenmiller,*
*Leibsker & Moore, LLC*

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## QUESTIONS PRESENTED

The Fair Debt Collection Practices Act contains a "bona fide error" defense, 15 U.S.C. § 1692k(c), which states that a debt collector "may not be held liable in any action brought under this subchapter if the debt collector shows by a preponderance of evidence that the violation was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid any such error." In *Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich, L.P.A.,* 559 U.S. 573 (2010), this Court decided that the bona fide error defense does not apply to a violation resulting from a debt collector's mistaken interpretation of the Act.

Justice Kennedy's dissent, joined by Justice Alito, predicted that *Jerman*'s holding would expose debt collectors to liability "where a particular practice is compelled by existing [court] precedent . . . if that precedent is later overturned," and result in punishment "for advocacy reasonably deemed to be in compliance with the law or even required by it." 559 U.S. at 621, 622 (Kennedy, J., dissenting). The dissent's prophesy has just come true.

The debt collector in this case chose the venue for a debt collection action based on an 18-year old controlling circuit precedent that expressly provided a "safe harbor" interpretation of the FDCPA's venue provision. In a sharply divided (7-4) *en banc* decision, the court of appeals, citing *Jerman*, held that the debt collector's reliance on the circuit's controlling precedent was a punishable "mistake of law" because, after the debt collection action was filed, the court overturned its interpretation of the venue provision and made the debt collector's choice of venue retroactively erroneous, exactly as Justice Kennedy predicted.

As a result of the decision in this case, a debt collector who chooses the wrong venue for a debt collection lawsuit because it made a good faith typographical error when recording the debtor's address is protected from liability, but a debt collector who chooses a correct venue in good faith reliance on controlling circuit precedent is not. This defeats the FDCPA's deterrent function by discouraging debt collectors from following, and the public from relying upon, controlling judicial precedent.

The questions presented are:

1. Is good faith reliance on controlling circuit precedent, prior to any retroactive change in that law, an unintentional "bona fide error" and a procedure "reasonably adapted to avoid error" within the meaning of § 1692k(c)?

2. Does the due process clause prohibit punishment for conduct that was lawful when committed, but later prohibited by a retroactive change of law?

## PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT

Petitioner Blatt, Hasenmiller, Leibsker & Moore, LLC, was the defendant-appellee in the court below. Ronald Oliva was the plaintiff-appellant in the court below. Petitioner is a privately-held law firm organized as an Illinois limited liability company. No publicly-held company owns 10% or more of petitioner's stock and petitioner has no corporate parent.

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## OPINIONS BELOW

The *en banc* opinion of the court of appeals is reported at *Oliva v. Blatt, Hasenmiller, Leibsker & Moore, LLC*, 864 F.3d 492 (7th Cir. 2017) (App. 1a-39a). The panel opinion is reported at 825 F.3d 788 (7th Cir. 2016) (App. 42a-51a). The district court's judgment is reported at 185 F.Supp.3d 1062 (N.D. Ill. 2015) (App. 53a-62a).

## JURISDICTION

Jurisdiction in the district court was based on 28 U.S.C. § 1331, as this was an original action arising under a federal statute. The district court entered final judgment against Respondent on July 14, 2015. (App. 62a). Respondent timely filed his notice of appeal on July 16, 2015. (Dkt. 1-1, pp. 1-2).[1]

A panel of the Seventh Circuit affirmed the judgment of the district court on June 14, 2016. (App. 51a). A petition for rehearing en banc was filed on June 30, 2016. (App. 40a) Rehearing en banc was granted on August 23, 2016, and decided on July 24, 2017. (App. 1a, 40a-41a). On petitioner's application, the time to file a petition for writ of *certiorari* was extended by 30 days to November 21, 2017. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(l).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

15 U.S.C. § 1692k(c):

> A debt collector may not be held liable in any action brought under this subchapter if the debt collector shows by a preponderance of

[1] Citations to the record refer to the docket of the Seventh Circuit Court of Appeals.

> evidence that the violation was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid any such error.

U.S. Const. amend. V:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

## STATEMENT OF THE CASE

Blatt, a law firm, filed a collection lawsuit against Oliva at the Richard J. Daley Center in downtown Chicago, in the first municipal district of the Circuit Court of Cook County. (Dkt. 14-2, pp. 52, 167, 175). The Circuit Court of Cook County is comprised of six municipal districts; Oliva resided in Orland Park, Illinois, a Chicago suburb which is in the Cook County Circuit Court's fifth municipal district. (Dkt. 14-2, pp. 51-53, 100).

At the time it decided where to file the lawsuit (December 2013), Blatt followed the Seventh Circuit's then-controlling precedent of *Newsom v. Friedman*, 76 F.3d 813 (7th Cir. 1996). (Dkt. 14-2, pp. 173, 175).

*Newsom* specifically held that the Circuit Court of Cook County is a single "judicial district" for purposes of the FDCPA's venue provision, 15 U.S.C. § 1692i, and that debt collectors could safely file suit in any of the Cook County Circuit Court's various municipal districts so long as the debtor resided in Cook County or signed the underlying contract there. (Dkt. 14-2, p. 173). It was undisputed that Oliva resided in Cook County, making Blatt's venue choice lawful when it occurred. (Dkt. 14-2, pp. 51, 53).

In July 2014, while Blatt's lawsuit against Oliva was pending, a divided *en banc* panel of the Seventh Circuit overruled *Newsom* in *Suesz v. Med-1 Solutions, LLC*, 757 F.3d 636 (7th Cir. 2014). (Dkt. 14-2, p. 175). *Suesz* held that a "judicial district or similar legal entity" under § 1692i is "the smallest geographic area that is relevant for determining venue in the court system in which the case is filed." 757 F.3d at 638. Under *Suesz*, collection lawsuits could no longer be filed in any of the six municipal districts of the Circuit Court of Cook County, but had to be filed in the particular municipal district where the defendant resided or where the underlying contract was signed. (Dkt. 14-2, p. 175). *Suesz* further held that its decision applied retroactively. *Suesz*, 757 F.3d at 649-50.

Blatt promptly dismissed its action against Oliva to comply with the new rule announced by *Suesz* and refunded the appearance fee that Oliva's attorney had paid. (Dkt. 14-2, p. 227). But Oliva then brought a FDCPA claim against Blatt in federal court, alleging that Blatt was retroactively liable for having filed suit in the wrong venue under *Suesz*. (Dkt. 14-2, pp. 12-15).

In the district court, Oliva conceded at his deposition that he suffered no injury or prejudice as a result of Blatt's original choice of venue. In fact, he admitted

that "the Daley Center was a more convenient forum for him than the [fifth municipal district] courthouse." (App. 53a). He also "freely admit[ted] that his FDCPA suit [was] attorney driven." (App. 55a). Oliva testified that Blatt's choice of venue only mattered to his lawyer: "I would say it only matters to me because it matters to my lawyer." (App. 55a).

The district court granted summary judgment in favor of Blatt on the ground that its reliance on controlling circuit precedent protected it from liability under the FDCPA's bona fide error defense. (App. 60a). A unanimous three-judge panel of the Seventh Circuit affirmed. (App. 51a).

Following an *en banc* rehearing, however, a sharply divided (7-4) court reversed and held that Blatt could not avoid liability on the ground that its conduct was entirely lawful under what the court agreed was controlling circuit precedent (*Newsom*) at the time the collection action was filed. (App. 10a-16a, 40a-41a). Instead, saying the panel's interpretation of *Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich, L.P.A.,* 559 U.S. 573 (2010), was "too narrow," the majority ruled that once *Jerman* made the FDCPA's bona fide error defense inapplicable to "all mistaken interpretations of the Act," Blatt could be retroactively punished for its reliance on the court's own 18-year mistaken interpretation of the FDCPA's venue provision in *Newsom*. (App. 11a).

## INTRODUCTION AND SUMMARY OF ARGUMENT

As then-Judge Gorsuch aptly observed in *De Niz Robles v. Lynch*, 803 F.3d 1165, 1178 (10th Cir. 2015), "judicial decisions interpreting the law are not usually thought unworthy of reliance," and "the people may rely on the law as it is, so long as it is, including any

of its associated judicial interpretations." The Seventh Circuit has just made that impossible.

It is undisputed that Blatt followed controlling circuit precedent – a Seventh Circuit decision that had been the settled law in the circuit for 18 years – when it chose the Circuit Court of Cook County's first municipal district as the venue for a debt collection case against Oliva. Even though Blatt's choice of venue was unquestionably lawful when it occurred, the Seventh Circuit held that a subsequent change in the circuit's interpretation of the FDCPA's venue provision retroactively made Blatt's lawful conduct a punishable violation of the Act.

Blatt's completely faultless transgression should have been protected by § 1692k(c)'s proscription that debt collectors "may not be held liable in any action brought under this subchapter if . . . the violation was not intentional and resulted from a bona fide error." The en banc majority openly acknowledged that Blatt acted in good faith and that its conduct adhered to controlling law in the circuit when it filed the suit against Oliva. (App. 14a) However, based on its expansive reading of *Jerman v. v. Carlisle, McNellie, Rini, Kramer & Ulrich, L.P.A.*, 559 U.S. 573 (2010), the circuit court's majority characterized Blatt's error as an unprotected "mistake of law."

But as the four dissenters strongly pointed out, a "mistake" connotes error, and Blatt made no error. Blatt relied on the Seventh Circuit's then-extant, controlling interpretation of the statute's venue provision. That was not a "mistake" until the Seventh Circuit retroactively changed its interpretation of the venue provision *after* the lawsuit against Oliva was filed. *Jerman* surely could not have intended the legal fiction of retroactivity to make conduct authorized by

controlling precedent a punishable mistake of law. That case concerned a law firm's erroneous interpretation of conflicting district court decisions, not a completely fictional error like Blatt's, whose reliance on controlling circuit precedent was without doubt a procedure "reasonably adapted to avoid error," just as § 1692k(c) requires.

The Third Circuit readily identified the difference between *Jerman* and this case in *Daubert v. NRA Group, LLC*, 861 F.3d 382 (3rd Cir. 2017). *Daubert* explained that *Jerman* concerned the debt collector's erroneous interpretation of an *unsettled* legal question, whereas *Oliva* involved reliance on controlling circuit precedent. 861 F.3d at 395. That observation was entirely correct. There was no "unsettled" question over venue when Blatt filed suit against Oliva. Yet, under the Seventh Circuit's mechanical application of *Jerman*, Blatt is punished for choosing the correct venue under controlling circuit precedent, while a debt collector who chooses the wrong venue because of a typographical error in recording the debtor's address is not. That makes no sense.

*Jerman* recognized that the Act's "conduct regulating provisions . . . should not be assumed to compel absurd results when applied to debt collecting attorneys." 559 U.S. at 600. The Seventh Circuit's decision has produced the absurd result Justice Kennedy's dissent warned against: "that attorneys will face liability even when they have done nothing wrong – indeed, when they have acted in accordance with their professional responsibilities." 559 U.S. at 623 (Kennedy, J., dissenting.) The result in this case becomes doubly absurd when one considers the debtor's admission that the original venue chosen by Blatt was actually more convenient for him than the

venue the new law retroactively required. He brought suit only so his attorney could recover fees for Blatt's fictional legal error.

A retroactive change in the law can unquestionably make previously lawful conduct unlawful, but it cannot change the faultless character of the conduct when it occurred. That is what makes the error a *bona fide* one, as the statutory language requires, rather than a "mistake of law" under *Jerman*. As this Court observed in *Davis v. United States*, 564 U.S. 229, 295 (2011), "The error in such a case rests with the issuing magistrate, not the police officer, and 'punishing the errors of judges' is not the office of the exclusionary rule."

The Seventh Circuit brushed off *Davis*, too, saying that punishing debt collectors for relying on controlling circuit precedent doesn't wreak the same societal havoc as use of the exclusionary rule when police officers rely on binding circuit precedent to conduct a search. (App. 15a-16a) But that ignores the rationale that motivated *Davis*. Just as use of the exclusionary rule to punish conduct that was lawful when it occurred does nothing to advance the exclusionary rule's deterrent purpose, punishing Blatt for conduct that was lawful when it occurred, and which the debtor admitted caused no harm, does nothing to advance the FDCPA's goal of protecting consumers.

Adherence to circuit precedent is critical to advancing the FDCPA's goals. Circuit courts frequently author "safe harbor" opinions whose function is ultimately to protect consumers. These safe harbor decisions promise debt collectors freedom from FDCPA liability if they follow the court's form language in their debt collection letters. *See e.g. Bartlett v. Heibl*, 128 F.3d 497, 502 (7th Cir. 1997) ("Debt collectors who want to avoid suits by disgruntled debtors standing on their

statutory rights would be well advised to stick close to the form that we have drafted. It will be a safe haven for them, at least in the Seventh Circuit."); *Avila v. Riexinger & Assocs., LLC*, 817 F.3d 72, 76-77 (2d Cir. 2016) (when used by debt collector "the following statement would satisfy a debt collector's duty to state the amount of debt in cases where the amount varies from day to day").

The administrative agencies tasked with enforcing the FDCPA and protecting consumers also regularly rely on circuit precedent when establishing standards in both enforcement actions and regulatory proceedings. *See*, *e.g.*, Brief of Amici Curiae FTC & CFPB Supporting Affirmance, *Delgado v. Capital Mgmt. Servs., Inc.*, No. 13-2030, Doc. 25, at 20-21 (7th Cir. Aug. 14, 2013); CFPB; Debt Collection (Regulation F), 78 Fed. Reg. 67,848, 67,857 (Nov. 12, 2013) (codified at 12 C.F.R. Pt. 1006). Even the CFPB Director has emphasized the important role of circuit court precedent in FDCPA compliance, stating, "[P]ublic enforcement actions have been marked by orders, whether entered by [the] agency *or by a court*, which specify the facts and the resulting legal conclusions. These orders *provide detailed guidance for compliance officers* across the marketplace about how they should regard similar practices at their own institutions."[2]

The logical extension of the result in this case – that a person can be punished for following what everyone agrees was controlling precedent – directly conflicts with the vast national body of safe harbor jurisprudence aimed at protecting consumers. It also completely

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[2] https://www.consumerfinance.gov/about-us/newsroom/prepared-remarks-of-cfpb-director-richard-cordray-at-the-consumer-bankers-association/ (Mar. 9, 2016) (emphases added).

undermines the rule of law and society's trust in, and dependence on, judicial precedent. As Judge Manion wrote in his dissent, "Think twice before following the controlling law of this circuit. For tomorrow we may change our mind. And you may wish you hadn't." (App. 39a)

The Seventh Circuit's decision also completely disregards the principle of constitutional avoidance. "[I]t is well-established that statutes should be construed to avoid constitutional questions if such a construction is fairly possible." *Boos v. Barry*, 485 U.S. 312, 333 (1988). Rather than interpreting the bona fide error defense so as to avoid any potential constitutional concerns, the court construed the bona fide error defense in a way that plainly violates the fair-warning requirement of the Due Process Clause.

This Court's 2012 decision in *FCC v. Fox Television Stations, Inc.*, 567 U.S. 239 (2012), expressly held that the retroactive imposition of liability for previously lawful conduct is constitutionally impermissible. 567 U.S. at 254. The Seventh Circuit made no attempt to explain how its ruling squared with *Fox Television*. Instead, it shrugged off the due process concerns strongly voiced by Judge Manion's dissent by saying that a person can never rely upon a circuit court's controlling interpretation of a statute because judges may be "mistaken about the meaning of the statute," which is "why overrulings of earlier statutory decisions . . . are retroactive." (App. 14a, 15a)

This case presents an urgent necessity for limiting relief despite the "technically correct" retroactive application of the law. As Justice Kennedy once recognized, "When a hard case presents the question of our authority to deny relief in a retroactivity case, that will be soon enough to resolve it; for the law in

this area is, and ought to be, shaped by the urgent necessities we confront when there is a strong case to be made for limiting relief despite the retroactive application of the law." *Reynoldsville Casket Co. v. Hyde*, 514 U.S. 749, 761–62 (1995) (Kennedy, J., concurring in judgment).

## I. *JERMAN* DID NOT MAKE RELIANCE ON CONTROLLING CIRCUIT PRECEDENT A MISTAKE OF LAW.

The question presented here is one that *Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich, L.P.A.,* 559 U.S. 573 (2010), left open, and which the Seventh Circuit answered incorrectly: is good faith reliance on controlling circuit court precedent an unprotected "mistake of law"? The Seventh Circuit held that it is a mistake to rely on controlling judicial precedent because judges err and the law may later change. (App. 2a). This is a complete misapplication of *Jerman* and gravely undermines an entire industry's ability to order its affairs around existing law.

### A. *Oliva* conflicts with every circuit's safe harbor jurisprudence, including its own.

In holding that debt collectors may be held liable for actions they take in good-faith reliance on established circuit precedent, the Seventh Circuit determined that debt collectors may not rely on circuit precedent because judicial decisions are not law; that "the controlling law is and always has been the statute itself." (App 14a). As Judge Manion highlighted, this conclusion ignores the fundamental role of the judiciary in interpreting the law; "that a

statute's controlling legal effect is determined, to a greater or lesser extent, by the relevant controlling interpretation of the Supreme Court and the federal courts of appeals." (App 32a).

The majority's rationale in this case creates a serious conflict with other circuits'—and the Seventh Circuit's own—FDCPA precedent. Many circuits have published FDCPA decisions that spell out "safe harbors" – essentially scripts – that, if followed by debt collectors in their debt collection letters, promise protection from liability. *Avila v. Riexinger & Assocs., LLC,* 817 F.3d 72, 77 (2d Cir. 2016); *Greco v. Trauner, Cohen & Thomas, LLP*, 412 F.3d 360, 364-65 (2d Cir. 2005); *Miller v. McCalla, Raymer, Padrick, Cobb, Nichols, & Clark LLC,* 214 F.3d 872, 876 (7th Cir. 2000); *Bartlett v. Heibl*, 128 F.3d 497, 501-02 (7th Cir. 1997); *see also Riddle & Associates, P.C. v. Kelly*, 414 F.3d 832, 835 (7th Cir. 2005).

These circuit precedents not only implicitly encourage debt collectors to use language that the court has prescribed for their debt collection letters; they *expressly direct* debt collectors to do so. *See Avila*, 817 F.3d at 77 ("Using the language set forth in [the decision] will qualify for safe-harbor treatment . . . ."); *Bartlett*, 128 F.3d at 502 ("Debt collectors who want to avoid suits by disgruntled debtors standing on their statutory rights would be well advised to stick close to the form that we have drafted.").

But in *Oliva*, the Seventh Circuit held that a debt collector who follows a safe harbor decision that is later overturned makes a "mistake of law" and may be held retroactively liable because the safe harbor decisions do not actually constitute "the law." (App. 14a). In other words, the decisions that the courts themselves label as "safe harbors" and tell the

industry to follow *cannot* serve as safe harbors because (according to *Oliva*) courts may change their minds and, therefore, the safe harbor decisions cannot be relied upon to say what conduct will or will not violate the law. *Oliva* stands in direct conflict with numerous FDCPA decisions within the same and other circuits that say the opposite – that their decisions *can* be relied upon as the law and, if followed, will *not* result in liability.

*Oliva* also conflicts with the Third Circuit's reasoning in *Daubert v. NRA Group, LLC*, 861 F.3d 382 (3rd Cir. 2017). There, in comparing *Jerman* with *Oliva*, the Third Circuit drew a distinction between questions "unsettled by any relevant binding authority" (*Jerman*) and those that are subject to "binding authority" (*Oliva*). 861 F.3d at 395. It concluded that a debt collector makes a mistake of law unprotected by the bona fide error defense only "[w]here an issue of law under the FDCPA is unsettled by the Supreme Court or a precedential decision of the relevant court of appeals." *Id.*

*Oliva*'s (mis)treatment of controlling circuit precedent under *Jerman* not only conflicts with *Daubert*'s view of the role of circuit precedent, it conflicts with how the agencies tasked with the FDCPA's enforcement treat circuit court precedent. Both the Federal Trade Commission (FTC) and the Consumer Financial Protection Bureau (CFPB), which are responsible for enforcing the FDCPA (15 U.S.C. § 1692l(a)), regularly rely on circuit precedent to define their FDCPA enforcement policies. In numerous enforcement actions, the CFPB and FTC have relied on circuit court precedent for their interpretation of the FDCPA. *See*, *e.g.*, *CFPB v. Weltman, Weinberg & Reis Co., L.P.A.*, No. 1:17-cv-00817, Doc. 10, at 5-8 (N.D. Ohio July 12,

2017) (citing circuit court precedent for proposition that disclaimers in collection letter insufficient); Brief for the CFPB as Amicus Curiae Supporting Plaintiff-Appellant, *Arias v. Gutman, Mintz, Baker & Sonnenfeldt, P.C.*, No. 16-2165, Doc. 68, at 16-18 (2d Cir. Oct. 28, 2016) (relying on circuit precedent as establishing standards for whether communication is misleading); Brief of Amici Curiae FTC & CFPB Supporting Affirmance, *Delgado v. Capital Mgmt. Servs., Inc.*, No. 13-2030, Doc. 25, at 20-21 (7th Cir. Aug. 14, 2013) (relying on Seventh Circuit precedent for proposition that absence of disclaimer in collection letter contributed to letter being misleading).

Even the CFPB Director has emphasized the critical role of circuit court precedent in FDCPA compliance, stating, "[P]ublic enforcement actions have been marked by orders, whether entered by [the] agency *or by a court*, which specify the facts and the resulting legal conclusions. These orders *provide detailed guidance for compliance officers* across the marketplace about how they should regard similar practices at their own institutions."[3] The CFPB has also relied on circuit precedent to explain the purposes of the FDCPA. *See*, *e.g.*, CFPB; Debt Collection (Regulation F), 78 Fed. Reg. 67,848, 67,857 (Nov. 12, 2013) (codified at 12 C.F.R. Pt. 1006) (relying on circuit precedent to establish purpose of validation notices under CFPB). And while Congress shifted the responsibility for drafting advisory opinions under § 1692k(e) from the FTC to the CFPB in 2010 (Pub. L. 111-203 § 1089, July 21, 2010, 124 Stat. 2092), the FTC

[3] https://www.consumerfinance.gov/about-us/newsroom/prepared-remarks-of-cfpb-director-richard-cordray-at-the-consumer-bankers-association/ (Mar. 9, 2016) (emphases added).

previously relied on circuit precedent in issuing its opinion letters.[4]

By delegitimizing the legal effect of circuit precedent, and interpreting *Jerman* as saying that the only real safe harbor for legal ambiguities is to seek FTC or CFPB guidance under § 1692k(e), *Oliva* suggests that circuit precedent is somehow inferior to agency opinions; that judicial interpretations of the FDCPA gain legitimacy, if any, only through agency approval. That rationale raises significant constitutional concerns. It gives primacy to the agencies' interpretations of the FDCPA, even though the interpretation of federal statutes is a uniquely judicial function. *See Kucana v. Holder*, 558 U.S. 233, 237 (2010) ("Separation-of-powers concerns . . . caution us against reading legislation, absent clear statement, to place in executive hands authority to remove cases from the judiciary's domain.")

The conflicts thus created by the *Oliva* decision are widespread and manifest, and result directly from the Seventh Circuit's wildly wrong interpretation of *Jerman*.

### B. *Oliva* misinterprets *Jerman*.

*Jerman* held that § 1692k(c), which exempts debt collectors from FDCPA liability for "bona fide" errors, did not protect a debt collector that mistakenly interpreted a split of authority among district courts

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[4] *See*, *e.g.*, FTC Staff Opinion Letter (October 5, 2007), *available at* https://www.ftc.gov/sites/default/files/ documents/public_statements/debt-collector-informing-consumer-who-has-disputed-debt-its-collection-efforts-have-ceased-would-not./p064803fairdebt.pdf (relying on circuit precedent in determining that a debt collector who informs the debtor that collection efforts have ceased does not violate FDCPA).

in the Sixth Circuit over whether a debtor was required to dispute his or her debt in writing. *Id.* at 579, n.2. Citing the principle that "'ignorance of the law will not excuse any person,'" this Court held that the bona fide error defense did not excuse the debtor collector's mistaken interpretation of the law. *Id.* at 581, 604-05. The Seventh Circuit's application of *Jerman* to this case is rife with error.

First, following controlling precedent until that precedent is overruled is not a mistake. (App 26a). ("[O]ne can correctly interpret persuasive authority and still be mistaken about the relevant controlling authority; but one can't be mistaken about the relevant controlling authority when he correctly interprets the relevant controlling authority."). Blatt correctly interpreted the relevant controlling authority. When Blatt filed suit in 2013, *Newsom v. Friedman*, 76 F.3d 813, 819 (7th Cir. 1996), provided that a debt collector could safely file suit in any municipal district located in Cook County. The law on this point was well-settled elsewhere in the country, as well. *See Hess v. Cohen & Slamowitz LLP*, 637 F.3d 117, 126-27 (2d Cir. 2011) (noting that its decision was "consistent" with *Newsom*).

In 2014, the Seventh Circuit overruled *Newsom* and applied that holding retroactively. *Suesz v. Med-1 Solutions*, *LLC*, 757 F.3d 636, 638 (7th Cir. 2014). But the legal fiction of retroactivity did not alter the reality that Blatt's choice of venue was legally correct when made, and that its reliance on *Newsom* was reasonably adapted to avoid any error. The inability to predict the future reversal of 18 years of settled law cannot be what *Jerman* contemplated when it found the bona fide error defense inapplicable to mistakes of law. Blatt's conduct did not display the ignorance of the law

that this Court declined to excuse in *Jerman*. To the contrary, Blatt simply followed the controlling interpretation of the FDCPA that was in effect at the time it filed suit. Permitting a suit against Blatt under these circumstances "encourages costly and time-consuming litigation over harmless violations committed in good faith despite reasonable safeguards." *Jerman*, 559 U.S. at 618 (Kennedy, J., dissenting).

Second, the debt collector's reliance on a single district court decision in *Jerman* is critically different from Blatt's reliance on binding appellate precedent. "A decision of a federal district court judge is not binding precedent in either a different judicial district, the same judicial district, or even upon the same judge in a different case." *Camreta v. Greene*, 563 U.S. 692, 709 n.7 (2011). Thus, because district court decisions are not precedential, a debt collector's incorrect reliance on one as opposed to another is not a procedure "reasonably adapted to avoid error." Such an ambiguity is properly the subject of § 1692k(e), which provides a safe harbor for debt collectors who rely on opinions by the Consumer Financial Protection Bureau. *Jerman*, 559 U.S. at 588.

By contrast, Blatt relied on the established precedent of the Seventh Circuit Court of Appeals, which was binding in the Seventh Circuit, where the underlying debt collection suit was filed. *See Davis v. U.S.*, 564 U.S. 229, 235 (2011) (circuit court of appeals decisions are precedent). Blatt therefore relied on a *higher* authority than the CFPB, as "the 'judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent[.]'" *Sullivan v. Everhart*, 494 U.S. 83, 103 (1990), quoting *Chevron*

*U.S.A., Inc. v. Natural Resources Defense Concil, Inc.*, 467 U.S. 837, 843 n.9 (1984).

Third, the Seventh Circuit's decision actually subverts the purpose of this Court's decision in *Jerman*. *Jerman* declined to interpret bona fide error to include mistakes of law in order to discourage debt collectors from relying on their own (or their lawyer's) interpretation of the law versus what the law actually says. *See Jerman*, 559 U.S. at 602. But under the Seventh Circuit's interpretation of § 1692k(c), debt collectors have no incentive to determine what the law says or to follow binding judicial interpretations of the FDCPA. That is because the Seventh Circuit's decision treats debt collectors who correctly follow circuit court precedent the same as it treats those who guess at the law. This is bad for consumers. It discourages debt collectors from following controlling precedent and defeats the FDCPA's deterrent purpose.

Fundamentally, Blatt's lack of culpable fault is no different than the police officers' good faith reliance on then-binding circuit law in *Davis v. U.S.*, 564 U.S. 229 (2011). In finding that "objectively reasonable reliance on binding judicial precedent" eliminated any culpable fault, *Davis* effectively defined the meaning of a "bona fide error." There is no good reason that a district court cannot make the same determination of "objectively reasonable reliance on binding judicial precedent" under § 1692k(c) to determine whether a bona fide error has occurred notwithstanding a procedure "reasonably adapted to avoid error." *Jerman* certainly did not preclude such a test; it dealt with *unsettled* legal questions, not settled ones, as here.

### C. *Oliva* fuels costly and needless litigation.

The Seventh Circuit's decision fuels needless litigation in an already overburdened federal court system. As Oliva "freely admit[ted]" in the district court, this case was encouraged by his lawyer, not because Oliva suffered any real harm: "I would say it only matters to me because it matters to my lawyer." (App. 55a). And there is good reason for this case to matter to Oliva's counsel—even if he suffered no damages, Oliva can still collect his attorney's fees. 15 U.S.C. § 1692k(a)(3). In fact, Oliva's counsel filed 28 similar lawsuits against Blatt alone between August 2014 and July 2015. (App. 55a, 61a)

Nor does the Seventh Circuit's decision right any wrong. As Oliva readily admitted, he suffered no detriment because of Blatt's filing suit in downtown Chicago; that forum was actually *more convenient* for him. (App. 53a). As Justice Kennedy pointed out in *Jerman*, "[i]t seems unlikely that Congress sought to create a system that encourages costly and time-consuming litigation over harmless violations committed in good faith despite reasonable safeguards." 559 U.S. at 618 (Kennedy, J., dissenting). Yet, the Seventh Circuit has directly promoted just such a system—a system that subverts the purpose of the FDCPA and promotes the notion that "the rule of law is a sham." (App 26a).

### D. *Oliva* discourages FDCPA compliance.

Debt collection is an $11.4 billion industry employing more than 130,000 people in the United States. *See*

CFPB FDCPA Annual Report 2017 at 9 (Mar. 2017).[5] The CFPB estimates that there are 8,500 debt collection firms in the U.S. and that, in 2016 alone, 70 million Americans were contacted by a creditor or debt collector in an attempt to collect a debt. *Id.* at 9, 11. Although these firms must adhere "to a variety of laws and regulations," the "primary law that governs the conduct of debt collectors is the FDCPA." *Id.* at 9.

These thousands of firms ensure that the content of literally millions of daily communications with debtors complies with the FDCPA by looking to circuit court precedent. The circuit precedent on which debt collectors and regulators rely are designed "to minimize litigation" (*Miller v. McCalla, Raymer, Padrick, Cobb, Nichols, & Clark LLC,* 214 F.3d 872, 876 (7th Cir. 2000)), "to provide some guidance to how to comply with [the FDCPA]" (*Bartlett v. Heibl*, 128 F.3d 497, 501-02 (7th Cir. 1997)), and to encourage good debt collection practices (*Avila v. Riexinger & Assocs., LLC,* 817 F.3d 72, 77 (2d Cir. 2016)). The Seventh Circuit's decision that circuit precedent cannot be relied upon undermines an entire system intended to foster FDCPA compliance. This can only increase litigation, create confusion over how to comply with the FDCPA, and discourage debt collectors from consulting case law that identifies the "good" debt collection practices—effects that directly contradict the purpose of safe harbor decisions and the Act itself.

The express purpose of the FDCPA is the deterrence of abusive debt collection practices. *See* 15 U.S.C. § 1692(e) ("It is the purpose of this subchapter to

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[5] Available at https://s3.amazonaws.com/files.consumerfinance.gov/f/documents/201703_cfpb_Fair-Debt-Collection-Practices-Act-Annual-Report.pdf.

eliminate abusive debt collection practices by debt collectors, to insure that those debt collectors who refrain from using abusive debt collection practices are not competitively disadvantaged, and to promote consistent State action to protect consumers against debt collection abuses."). As this Court recognized in *Davis*, punishing good-faith reliance on established appellate precedent serves no deterrent function. *Davis*, 564 U.S. at 239-41. To the contrary, punishing such reliance has the opposite effect:

> About all that exclusion would deter in this case is conscientious police work. Responsible law-enforcement officers will take care to learn what is required of them under Fourth Amendment precedent and will conform their conduct to these rules . . . . An officer who conducts a search in reliance on binding appellate precedent does no more than act as a reasonable officer would and should act under the circumstances. The deterrent effect of exclusion in such a case can only be to discourage the officer from doing his duty.

*Id.* at 241 (internal citations omitted).

The same can be said here. The FDCPA will have no deterrent effect if debt collectors cannot be certain what it says. When debt collectors may be held liable for acts that are prohibited only by virtue of retroactive judicial interpretation, they have no incentive or ability to conform their conduct to the requirements of established precedent. Nor do debt collectors have incentive to learn the law when they may face liability for a failure to anticipate a future change in it. This can only discourage debt collectors from being aware of their obligations under the FDCPA. By contrast, an interpretation of § 1692k(c) that protects debt

collectors who conscientiously determine what the law says and follow it will further Congress's goal of deterring abusive debt practices.

### E. This case is a good vehicle to define the scope of § 1692k(c).

The district court resolved this case on cross-motions for summary judgment (App. 53a), and the Seventh Circuit recognized that "[t]he relevant facts [in this case] are not disputed." (App. 3a). Nor is there any question that Blatt's reliance on the circuit precedent at the time it filed suit was in good faith—the Seventh Circuit stated, "We must . . . acknowledge, of course, that if any mistaken interpretations of the [FDCPA] were made in good faith, it was in cases like this." (App. 14a).

This case therefore presents the Court with a straightforward question of statutory construction that affects millions of consumers, the entire debt collection industry, and every circuit that has interpreted the Act for their benefit: whether reliance on controlling circuit precedent is a "procedure reasonably adapted to avoid error" and becomes a "bona fide error" if that precedent is later overturned.

## II. THE SEVENTH CIRCUIT'S DECISION PUNISHES CONDUCT THAT WAS LAWFUL WHEN IT OCCURRED, IN VIOLATION OF THE FIFTH AMENDMENT'S DUE PROCESS CLAUSE.

Courts are obligated to construe a statute to avoid constitutional problems whenever possible. *Boudmediene v. Bush*, 553 U.S. 723, 787 (2008). By interpreting § 1692k(c) to permit the retroactive imposition of liability for conduct that was lawful when it occurred,

the Seventh Circuit has created a system that fails to afford fair notice of what conduct violates the FDCPA.

This due process problem could have been avoided. Section 1692k(c) can be reasonably construed to protect a debt collector's good faith reliance on controlling circuit or Supreme Court precedent. A standard based on objectively reasonable reliance on binding circuit precedent creates no risk that debt collectors will claim immunity for advice from private counsel to resolve ambiguities in the law – because reliance on controlling judicial precedent means there is no ambiguity. Further, reliance on controlling precedent is plainly a procedure "reasonably adapted to avoid error" within the meaning of § 1692k(c), and serves the Act's deterrent function.

If § 1692k(c)'s bona fide error defense does not protect a debt collector's good-faith reliance on controlling precedent, then debt collectors have no fair notice of how to conform their conduct to the requirements of the law. The Seventh Circuit's interpretation implicates fundamental notions of fair warning and justice, "gravely undermines the rule of law" (App 17a), and violates the Fifth Amendment's Due Process Clause.

"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." *FCC v. Fox Television Stations, Inc.*, 567 U.S. 239, 252 (2012); *see also BMW of North America v. Gore*, 517 U.S. 559, 574 (1995) ("Elementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose."). This principle applies with equal force in both civil and

criminal law. *U.S. v. Lanier*, 520 U.S. 259, 270-71 (1997); *Anderson v. Creighton*, 483 U.S. 635, 640 (1987). And "[t]here can be no doubt that a deprivation of the right of fair warning can result not only from vague statutory language but also from an unforeseeable and retroactive judicial expansion of narrow and precise statutory language." *Bouie v. Columbia*, 378 U.S. 347, 352 (1964).

Here, Blatt acted in good-faith reliance on the Seventh Circuit's interpretation of the FDCPA's venue provision in effect at the time it filed its debt collection action in 2013. In 2014, the Seventh Circuit overruled the precedent on which Blatt relied, which had the effect of making Blatt's venue choice retroactively erroneous. Recognizing the effect of that retroactive change in precedent, Blatt immediately followed the *new* law – it voluntarily dismissed its debt collection suit against Oliva and refunded Oliva's appearance fee.

Notwithstanding the completely faultless nature of Blatt's error, which sprang not from its own conduct but from the retroactive change wrought by the Seventh Circuit's new interpretation of the FDCPA's venue provision, the Seventh Circuit held that Blatt could not assert the bona fide error defense under § 1692k(c) when Oliva sued Blatt for a retroactive violation of the Act's venue provision. In other words, the Seventh Circuit held that Blatt could be held civilly liable for its failure to anticipate that settled precedent would be overruled. This holding does violence to the foundational element of the Due Process Clause – that an individual must be given notice of what the law says before he or she may be punished for violating it. Section 1692k(c), as interpreted and

applied by the Seventh Circuit in this case, denied Blatt its due process right to fair warning.

*Fox Television* mandates reversal under these circumstances. There, the question was whether due process prohibited the application of an FCC decision reinterpreting its indecency standard to already-aired broadcasts that, under the previous interpretation of the standard, were not indecent. *Fox Television*, 567 U.S. at 248, 254. This Court found a due process violation. *Id.* at 253-54. The Court emphasized that, independent of any first amendment concerns raised by the FCC regulations, "regulated parties should know what is required of them so they may act accordingly." *Id.* at 253. Because the FCC "policy in place at the time of the broadcasts gave no notice to the broadcasters that their broadcasts would be considered indecent," the indecency standard "as interpreted and enforced by the agency 'fail[ed] to provide a person of ordinary intelligence fair notice of what is prohibited." *Id.* at 254 (quoting *U.S. v. Williams*, 553 U.S. 285, 304 (2008)).

This principle holds true with respect to civil penalties, as well. The statutory damages in FDCPA cases are construed as civil penalties rather than remedial relief. *Gonzales v. Arrow Financial Services, LLC,* 660 F.3d 1055, 1067 (9th Cir. 2011) ("Statutory damages under the FDCPA are intended to 'deter violations by imposing a cost on the defendant even if his misconduct imposed no cost on the plaintiff.") (quoting *Crabill v. Trans Union, LLC,* 259 F.3d 662, 666 (7th Cir. 2001). This Court expressly recognized in *BMW of North America v. Gore* that "the basic protection against 'judgments without notice' afforded by the Due Process Clause, *Shaffer v. Heitner*, 433 U.S.

186, 217 (1977) (Stevens, J., concurring), is implicated by civil *penalties*." 517 U.S. 559, 575 n. 22 (1996).

The Seventh Circuit's interpretation of § 1692k(c) suffers from the same constitutional infirmity. Like the broadcasters in *Fox Television*, Blatt relied on settled law interpreting the FDCPA's venue provision in effect at the time it filed suit against Oliva in 2013. By holding that this reliance was a mistake of law rather than a "bona fide error" under § 1692k(c), the Seventh Circuit made Blatt liable for conduct that was unquestionably lawful at the time it was performed. But just as in *Fox Television*, it was impossible for Blatt to know that *Newsom* would be overruled. And just as in *BMW*, Blatt had no fair notice that its choice of venue would retroactively expose it to civil penalties.

Without actually identifying the severe due-process implications of its holding, the Seventh Circuit's majority opinion itself expressed some trepidation, noting that, "if any mistaken interpretations of the Act were made in good faith, it was in cases like this." (App 14a). Leaving aside the fact that Blatt did not mistakenly interpret the FDCPA—the Seventh Circuit recognized that "[d]ebt collectors in Cook County *relied on circuit precedent* in believing they could choose freely among the districts within the county in filing debt collection suits"—the Seventh Circuit failed to recognize that Blatt had no fair warning that it could face liability. *Id.* (emphasis added). Instead, it attempted to *justify* the due process violation in four ways, none of which comport with this Court's longstanding Fifth Amendment jurisprudence.

First, the Seventh Circuit noted that judicial interpretations of a statute are not "the law"; that "the controlling law is and always has been the statute itself." *Id.* But this bit of mechanical jurisprudence

fails to recognize that individuals must be able to rely on judicial or administrative interpretations of a statute just as much as the language of a statute itself. *See*, *e.g.*, *Fox Television*, 567 U.S. at 254 (FCC reinterpretation of regulation failed to give broadcasters fair notice); *Lanier*, 520 U.S. at 266 ("[D]ue process bars courts from applying a novel construction of a criminal statute to conduct that neither the statute nor any prior judicial decision has fairly disclosed to be within its scope."); *Bouie*, 378 U.S. at 354-55 ("When a similarly unforeseeable state-court construction of a criminal statute is applied retroactively to subject a person to criminal liability for past conduct, the effect is to deprive him of due process of law in the sense of fair warning that his contemplated conduct constitutes a crime."); *Brinkerhoff-Faris Trust & Savings Co. v. Hill*, 281 U.S. 673, 679-80 (1930) ("If the result above stated were attained by an exercise of the State's legislative power, the transgression of the due process clause . . . would be obvious. The violation is none the less clear when that result is accomplished by the state judiciary in the course of construing an otherwise valid state statute.") (internal citations omitted).

In fact, this Court has recognized that a retroactive judicial interpretation of a statute that expands the scope of liability under that statute may create "a potentially greater deprivation of the right to fair notice" than a vaguely-worded statute. *Bouie*, 378 U.S. at 352.

Second, the Seventh Circuit attempted to defend its interpretation of § 1692k(c) by noting that, if this Court had overruled *Newsom*, it likewise would have had retroactive effect. (App. 14a). But the retroactivity of its decision to overrule *Newsom* has no relevance.

The Seventh Circuit failed to acknowledge that, no matter if *Suesz* applied retroactively, the question of the *remedy* for its retroactive application still had to be addressed. *See Davis v. U.S.*, 564 U.S. 229, 243 (2011) ("Retroactive application does not, however, determine what 'appropriate remedy' (if any) the defendant should obtain. Remedy is a separate, analytically distinct issue.") (internal citations omitted); *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 535 (1991) ("Once a rule is found to apply 'backward,' there may then be a further issue of remedies, *i.e.*, whether the party prevailing under a new rule should obtain the same relief that would have been awarded if the rule had been an old one.") (opinion of Souter, J.).

The constitutional limitations on the remedy that is available when the law is given retroactive effect is exactly what Justice Kennedy described as an urgent necessity for relief in *Reynoldsville Casket Co. v. Hyde*, 514 U.S. 749 (1995):

> When a hard case presents the question of our authority to deny relief in a retroactivity case, that will be soon enough to resolve it; for the law in this area is, and ought to be, shaped by the urgent necessities we confront when there is a strong case to be made for limiting relief despite the retroactive application of the law.

*Id.* at 761-62 (Kennedy, J., concurring). This is the "hard case" in which retroactivity requires this Court to exercise its authority to deny relief.

Third, rather than deny relief under these circumstances, as it should have, the Seventh Circuit noted that, under § 1692k(b)(1), judges have discretion to consider a party's intent when determining damages. (App. 15a). But this Court rejected a virtually identical

rationale for excusing the due process violation in *Fox Television*. There, the FCC argued that its change to the indecency standard did not violate the broadcasters' due process rights because it imposed no sanction and would not consider the broadcasters' violations in setting any future penalties. *Fox Television*, 567 U.S. at 255. This Court disagreed, emphasizing that "the due process protection against vague regulations 'does not leave [regulated parties] . . . at the mercy of *noblesse oblige*." *Id.* (quoting *U.S. v. Stevens*, 559 U.S. 460, 480 (2010)). This Court stated that the government's assurance that it would not increase future penalties was "insufficient to remedy the constitutional violation." *Fox Television*, 567 U.S. at 255.

The same is true here. The mere possibility that a judge may elect to deal Blatt a softer blow does not remedy the fact that Blatt is still being held liable for conduct that was lawful at the time it was committed. The possible beneficence of a future judge makes the Seventh Circuit's construction of § 1692k(c) no less unconstitutional. And this rationale completely overlooks the fact that a judge's decision to decrease a debtor's damages does nothing to decrease a debt collector's liability for attorney's fees. 15 U.S.C. § 1692k(a)(3). This fact is brought into sharp relief in this case, where the debtor "freely admit[ted] that his FDCPA suit [was] attorney driven." (App. 55a).

Fourth, the Seventh Circuit claimed that there was only "one area in the law where reliance on controlling circuit precedent has been given special treatment: an exception from the exclusionary rule under the *Fourth Amendment*." (App. 15a). Citing *Davis v. U.S.*, 564 U.S. 229 (2011), the Seventh Circuit noted that this Court had precluded application of the exclusionary

rule where police officers rely on existing precedent in conducting a search or seizure. *Id.* But the Seventh Circuit distinguished *Davis* on the basis that "protecting debt collectors' choices of venue is not at all comparable to the stakes under the exclusionary rule." *Id.*

The Seventh Circuit's premise that the Fourth Amendment is the only area of the law where this Court has recognized an individual's right to rely on existing precedent is simply inaccurate. This Court has repeatedly emphasized, in various civil and criminal contexts, the importance of an individual's ability to rely on existing precedent. *See Fox Television*, 567 U.S. at 253-54 (administrative regulations); *Anderson*, 483 U.S. at 640 (qualified immunity); *Bouie*, 281 U.S. at 354-55 (criminal law); *Brinkerhoff-Faris*, 281 U.S. at 679-80 (taxation). And the Seventh Circuit's attempt to distinguish *Davis* misses the point. The concern is not protection of debt collectors' choice of venue—there is no question that the choice of venue was restricted by *Suesz*. The point is to determine whether debt collectors should *face liability* when their choice of venue, which was once correct under the law, becomes incorrect due to an unforeseeable retroactive reinterpretation of the FDCPA's venue provision.

Once the issue is correctly identified, it becomes clear that the due-process rights at stake here are no less important than the Fourth Amendment rights at stake in *Davis*. In both criminal and civil law, individuals must have fair warning of what conduct does and does not violate the law. That right to fair warning is fundamental to the Due Process Clause. Without fair notice, individuals may be exposed to liability despite their best efforts to conform their

conduct to the law, based solely on how courts choose to interpret the law in the future.

A legal system that punishes a person "for breaking a law he knew nothing about" strikes at the very heart of Due Process Clause. (App. 39a). This Court should grant *certiorari* both to decide the important question of whether § 1692k(c), as interpreted by the Seventh Circuit, violates Petitioner's right to due process of law, and to exercise its supervisory power to correct the Seventh Circuit's departure from settled principles of due process.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

JOSHUA G. VINCENT
*Counsel of Record*
DAVID M. SCHULTZ
JOHN P. RYAN
CARSON R. GRIFFIS
HINSHAW & CULBERTSON LLP
222 North LaSalle Street
Ste. 300
Chicago, Illinois 60601
(312) 704-3463
jvincent@hinshawlaw.com

*Counsel for Petitioner*
*Blatt, Hasenmiller,*
*Leibsker & Moore, LLC*

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