No. 17-736

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

BRIEF FOR NARCA - THE NATIONAL CREDITORS BAR ASSOCIATION™ AND CREDITOR ATTORNEY ASSOCIATION OF ALABAMA, ALASKA CREDITORS BAR ASSOCIATION, ARIZONA CREDITOR BAR ASSOCIATION, INC., CALIFORNIA CREDITORS BAR ASSOCIATION, CONNECTICUT CREDITOR BAR ASSOCIATION, DELAWARE CREDITORS BAR ASSOCIATION, FLORIDA CREDITORS BAR ASSOCIATION, ILLINOIS CREDITORS BAR ASSOCIATION, IOWA CREDITORS BAR ASSOCIATION, KANSAS CREDIT ATTORNEY ASSOCIATION, KENTUCKY CREDITORS' RIGHTS BAR ASSOCIATION, INC., MARYLAND-DC STATE CREDITORS BAR ASSOCIATION, MICHIGAN CREDITORS BAR ASSOCIATION, MINNESOTA CREDITORS RIGHTS ASSOCIATION, MISSOURI CREDITORS BAR, INC., NEW JERSEY CREDITORS BAR ASSOCIATION, COMMERCIAL LAWYERS CONFERENCE OF NEW YORK, CONSUMER CREDIT ASSOCIATION OF METROPOLITAN NEW YORK, NORTH CAROLINA CREDITORS BAR ASSOCIATION, OHIO CREDITOR'S ATTORNEYS ASSOCIATION, PENNSYLVANIA CREDITORS' BAR ASSOCIATION, TENNESSEE CREDITOR BAR ASSOCIATION, VIRGINIA CREDITORS BAR ASSOCIATION AND WISCONSIN CREDITORS' RIGHTS ASSOCIATION, INC. AS *AMICI CURIAE* IN SUPPORT OF PETITION

LAUREN M. BURNETTE
BARRON & NEWBURGER, PC
450-106 State Road 13 North
Suite 326
St. Johns, FL 32259
(904) 201-9120

MANUEL H. NEWBURGER
Counsel of Record
BARRON & NEWBURGER, PC
7320 North MoPac Expressway
Suite 400
Austin, TX 78731
(512) 476-9103
mnewburger@bn-lawyers.com

Counsel for Amici Curiae

277438

TABLE OF CONTENTS

TABLE OF CITED AUTHORITIES

Page

Cases

Table of Contents

STATUTES AND RULES

OTHER AUTHORITIES

IDENTITY AND INTEREST OF *AMICI CURIAE*[1]

NARCA – The National Creditors Bar Association™ is a nationwide, not-for-profit trade association of attorneys who represent creditors in debt collection matters. Its members include over 500 law firms, all of whom must meet association standards designed to ensure experience and professionalism. Members are also guided by NARCA's code of ethics, which imposes an obligation of self-discipline beyond the requirements of pertinent laws and regulations.

Creditor Attorney Association of Alabama, Alaska Creditors Bar Association, Arizona Creditor Bar Association, Inc., California Creditors Bar Association, Connecticut Creditor Bar Association, Delaware Creditors Bar Association, Florida Creditors Bar Association, Illinois Creditors Bar Association, Iowa Creditors Bar Association, Kansas Credit Attorney Association, Kentucky Creditors' Rights Bar Association, Inc., Maryland-DC State Creditors Bar Association, Michigan Creditors Bar Association, Minnesota Creditors Rights Association, Missouri Creditors Bar, Inc., New Jersey Creditors Bar Association, Commercial Lawyers Conference of New York, Consumer Credit Association Of Metropolitan New York, North Carolina Creditors Bar Association, Ohio Creditor's Attorneys Association,

1. As provided for in U.S. Sup. Ct R 37(6) the *Amici* state that: (a) no party's counsel authored this brief in whole or in part; (b) no party or its counsel made a monetary contribution intended to fund the preparation or submission of this brief; and (c) no person—other than the Amici Curiae, their members, and their counsel—contributed money to fund the preparation or submission of this brief. The parties have consented to the filing of this brief.

Pennsylvania Creditors' Bar Association, Tennessee Creditor Bar Association, Virginia Creditors Bar Association, and Wisconsin Creditors' Rights Association, Inc. are state-level, not-for-profit trade associations of attorneys and law firms also engaged in the practice of debt collection law. The members of these organizations must meet their associations' standards, which are designed to ensure professionalism and ethics. All are also governed by the ethical obligations of their respective state bars and attorney disciplinary programs.

Members of the Amici are regularly involved in the lawful collection of past-due consumer debts and must therefore interpret and comply with the often-unsettled requirements of applicable collection law, principally the Fair Debt Collection Practices Act (FDCPA or Act), Pub. L. No. 95-109, 91 Stat. 874 (1977). The Amici have a strong interest in ensuring that the Act is interpreted and applied in a way that allows collection attorneys to execute their ethical duty to advance their clients' legitimate interests—within the bounds of existing law—without constantly exposing themselves to substantial personal liability. NARCA has participated as *amicus curiae* in other cases involving the interpretation or application of the Act. *See, e.g., Heintz v. Jenkins*, 514 U.S. 291 (1995); *Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA*, 559 US 573 (2010); *Marx v. General Revenue Corp.*, 568 U.S. 2 (2013); *Guerrero v. RJM Acquisitions LLC*, 499 F.3d 926 (9th Cir. 2007).

NARCA and the state creditors' bar associations share a common cause, as their members are regularly engaged by creditors to collect delinquent consumer debts. NARCA is the only national bar association dedicated

solely to the needs of consumer collection attorneys. As is addressed below, the decision of the Seventh Circuit Court of Appeals burdens the members of the Amici to a degree so great that the only outcome is the chilling of lawful and proper attorney advocacy.

The ruling underlying this appeal erroneously and unfairly exposes the attorney and law firm members of the *Amici*, and many clients of those members, to individual and class action claims under the FDCPA. The *Amici* have a direct interest in this litigation. Their organizations have authorized the filing of this brief

SUMMARY OF ARGUMENT

A society that kills its messengers will find few willing messengers. In our adversarial legal system, attorneys serve as the messengers for their clients. The decision of the Seventh Circuit Court of Appeals imposes upon Petitioner strict liability for statutory damages and attorney's fees because it filed a debt collection suit in an improper venue, notwithstanding the fact that at the time the collection suit was filed, the applicable jurisprudence of the circuit expressly held that venue was proper. Petitioner, a law firm that was representing its creditor client in a manner that was diligent, competent, and in accordance with the law at the time, is now subject to strict liability because of an *ex post facto* change in the Seventh Circuit's interpretation of a federal consumer protection statute.

Lower courts have held that collection attorneys may not invoke litigation immunity in defense of suits brought under the Fair Debt Collection Practices Act, 15 U.S.C.

§ 1692, *et seq.* ("FDCPA"). Lower courts have also held that the FDCPA is a "strict liability" statute. Now, in the present case, the Seventh Circuit Court of Appeals, sitting *en banc*, has held that Blatt, Hasenmiller, Leibsker & Moore, LLC ("Blatt") could not assert as a defense that it acted precisely in accordance with the that court's own jurisprudence that was in effect at the time of the conduct at issue.

The effect of these holdings is a massive chilling effect on the ability of attorneys to advocate and litigate for their clients. These doctrines have the combined effect of making creditors' attorneys the strictly liable insurers of the success of their clients' cases.

The *Amici* assert that the serious harm to the legal system created by the decision of the *en banc* court of appeals can be avoided by:

1. holding that reliance upon existing jurisprudence is not a "mistake of law" and is a *sui generis* situation that qualifies for the FDCPA's bona fide error defense; or

2. holding that lower courts have erred in concluding that the doctrine of litigation immunity does not apply in cases brought under the FDCPA; or

3. holding that the imposition of strict liability under a federal consumer statute, merely because a circuit court reverses earlier jurisprudence, violates constitutional due process, and the reliance on the prior case law operates as a defense to civil liability through the day that the earlier case law is disaffirmed.

Furthermore, the decision of the Seventh Circuit denies due process to debt collectors who legitimately rely not upon their own interpretations of the FDCPA but those of the courts that interpret it.

The *Amici* urge the Court to clarify its earlier holding in *Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA*, 559 U.S. 573 (2010) to recognize that the Petitioner's reliance on the existing case law in the Seventh Circuit at the time of the conduct at issue must be recognized as a defense to Oliva's FDCPA suit, whether as a *bona fide* error, as a function of litigation immunity, or because constitutional process demands no less.

ARGUMENT

I. THE DECISION OF THE COURT OF APPEALS CHILLS ADVOCACY AND ACCESS TO THE COURTS

The FDCPA was intended "to 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." 15 U.S.C. §1692(e). When enacted in 1977, the FDCPA expressly exempted attorneys from the definition of "debt collector." Pub. L. 95-109, § 803(6)(F), 91 Stat. 874, 875. When Congress repealed that exemption in 1986, Pub. L. 99-361, 100 Stat. 768, it did so to eliminate unfair competition between attorneys and collection agencies.

> In the eight years since the passage of the Fair Debt Collection Practices Act, attorneys have entered the debt collection industry in ever increasing numbers. There are now 5,000 attorneys engaged in debt collection activities. As a result of the attorney exemption, consumers are harmed and debt collectors who must comply with the Act are at a competitive disadvantage.

H.R. 99-405 (99th Cong., 1st Sess.). The activities and conduct of concern to Congress, and the public policies at issue in repealing the attorney exemption, were all non-litigation, lay debt collection activities, *i.e.*, those in which attorneys and lay debt collectors competed with one another such as the sending of dunning letters and the placement of collection calls. Although repeal of the exemption brought attorneys within the scope of the Act as "debt collectors," Congress did *not* intend to bring all litigation activities within the scope of the Act as "debt collection". The goal of the 1986 amendment was merely to level the competitive playing field among debt collection attorneys and lay debt collectors with respect to their engagement in non-litigation debt collection activities.

In *Heintz v. Jenkins*, 514 U.S. 291 (1995), this court held that as a result of the 1986 amendment, the FDCPA applies to attorneys who regularly engage in consumer debt collection activity, even when that activity consists of litigation. Although courts may occasionally treat *Heintz* as holding that the Act regulates all litigation conduct, the sole issue in *Heintz* was whether the term "debt collector" in the FDCPA applies to a lawyer who "regularly," through litigation, tries to collect consumer debts. *Id.* at 514 U.S.

292. This court reserved judgment on the degree to which litigation activities may be subject to the Act, focusing its holding solely on the "debt collector" status of attorneys:

> We need not authoritatively interpret the Act's conduct-regulating provisions now, however. Rather, we rest our conclusions upon the fact that it is easier to read § 1692c(c) as containing some such additional, implicit, exception than to believe that Congress intended, silently and implicitly, to create a far broader exception, for all litigating attorneys, from the Act itself.

Id., 514 U.S. at 296-7.

In the intervening years since *Heintz,* two critical developments in FDCPA jurisprudence make it imperative for the Court to grant Blatt's petition for a writ of certiorari. First, the circuit courts of appeals have held that the long-standing doctrine of litigation immunity does not to apply in FDCPA cases. *See, e.g., Sayyed v. Wolpoff & Abramson*, 485 F.3d 226 (4th Cir. 2007); *Donohue v. Quick Collect, Inc.,* 592 F.3d 1027, 1032 (9th Cir. 2010); *James v. Wadas*, 724 F.3d 1312, 1316 (10th Cir. 2013); *Currier v. First Resolution Inv. Corp.*, 762 F.3d 529, 535 (6th Cir. 2014); *Kaymark v. Bank of Am., N.A.*, 783 F.3d 168, 177-79 (3d Cir. 2015). Second, in *Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA*, 559 U.S. 573 (2010) this court held that the FDCPA's bona fide error defense, 15 U.S.C. § 1692k(c) does not apply to a debt collector's mistaken interpretation of the FDCPA.

These two doctrines, standing alone, might not chill the advocacy of attorneys on behalf of their creditor

clients. However, a third doctrine adds the critical mass that starts a chain reaction lethal to the practice of law on behalf of creditors: the FDCPA has repeatedly been held to be a "strict liability" statute. See, e.g., *Russell v. Equifax ARS*, 74 F3d 30, 33 (2d Cir. 1996). ("Because the Act imposes strict liability, a consumer need not show intentional conduct by the debt collector to be entitled to damages.") *See, also, Taylor v. Perrin, Landry, deLaunay & Durand*, 103 F.3d 1232, 1238-39 (5th Cir. 1997); *Clark v. Capital Credit & Collection Servs., Inc.*, 460 F.3d 1162 (9th Cir. 2006).

The FDCPA's *bona fide* error provision states:

(c) Intent

> 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.

15 U.S.C. § 1692k(c). This provision is a "narrow carve-out to the general rule of strict liability." *Arnold v. Bayview Loan Servicing, LLC*, No. 16-10742, 659 F. App'x 568, 570, 2016 U.S. App. LEXIS 16751, **3 (11th Cir. 2016). This court has held that the carve-out does not apply to errors in interpreting the FDCPA. *Jerman*. Thus, an attorney whose mistake of law is a misinterpretation of the FDCPA will be strictly liable for any damages that may result, together with statutory damages and mandatory attorney's fees as provided for in 15 U.S.C. § 1692k(a), no

matter how thorough the attorney's (mistaken) analysis or good faith.

Attorneys play a crucial role in advancing their clients' requests to courts. *Legal Services Corporation v. Velazquez*, 531 U.S. 533, 545 (2001) (law restricting arguments available to attorneys "prohibits speech and expression upon which courts must depend for the proper exercise of the judicial power"). Unfortunately, the disastrous result of the above-cited cases is that attorneys who represent creditors in debt collection litigation have been made strictly liable under the FDCPA for carrying out their ethical duties of diligence and competence. (See ABA Model Rules of Prof. Cond. 1.1 and 1.3.)

In the present case, Blatt, a law firm representing a creditor client, has incurred strict liability for doing exactly what the Court of Appeals told it to do. In *Newsom v. Friedman*, 76 F.3d 813 (7th Cir. 1996), the Court of Appeals expressly authorized the venue choice that Blatt employed in this case. After Blatt sued Oliva, the Seventh Circuit rejected the *Newsome* holding in *Suesz v. Med-1 Solutions, LLC*, 757 F.3d 636 (7th Cir. 2014) (*en banc*), holding that the FDCPA's venue provision prohibited that same venue choice. Oliva sued Blatt because Blatt followed *Newsome* – the applicable Seventh Circuit precedent at the time Blatt sued Oliva – and not *Suesz*, which did not exist until *after* Blatt sued Oliva. The Court of Appeals, sitting *en banc*, ultimately held that Blatt was liable to Oliva under the FDCPA for relying on *Newsome*. Citing to this court's decision in *Jerman*, the Seventh Circuit further held that Blatt could not avail itself of the FDCPA's *bona fide* error defense because its alleged mistake of law in relying upon *Newsome* could not be a *bona fide* error.

The Amici urge the Court to grant Blatt's petition for a writ of certiorari and hold that the conduct at issue falls outside of the holding of *Jerman*. Blatt did not make a mistake of law. When it sued Oliva, Blattt acted in accordance with the law as it existed at the time. That the law changed *after the fact* should be irrelevant. How could a lawyer's conduct in following case law that was directly on point be anything other than "*bona fide*"?

Any other outcome has the effect of chilling the advocacy of attorneys and the representation of their clients. The decision of the court below forces lawyers to go far beyond the accurate and correct legal analysis that Blatt used when it sued Oliva. Instead, the court below would require attorneys to gaze into a crystal ball and predict whether existing case law will be reversed with absolute accuracy, or else face strict liability for their lack of prescience.

This court suggested in *Jerman* that the problem at hand could be cured merely by awarding nominal damages when an error of law is at issue. *See Jerman* 559 U.S. at 594. Respectfully, this court was mistaken in that conclusion, as it failed to account for the mandatory fee-shifting provision of the FDCPA set forth in 15 U.S.C. § 1692k. Following the decision at issue in this case, in *Portalatin v. Blatt*, No. 14 C 8271, 2017 U.S. Dist. LEXIS 176979, at *12 (N.D. Ill. Oct. 25, 2017), the district court awarded $69,393.75 after a jury awarded only $200 for the same alleged FDCPA violation that was at issue in this case. The "nominal" award of statutory damages is small consolation to a law firm that must then face almost seventy thousand dollars in liability because it did exactly what the law permitted at the time of the conduct at issue.

The circumstances presented have the potential to arise again every time an appellate court reverses one of its prior decisions and any time this court resolves a split in circuit authority. The success of the adversarial legal system depends on the ability of attorneys to use their best advocacy and judgment in representing their clients. The decision of the Seventh Circuit fundamentally chills the advocacy and decision-making of attorneys who represent creditors.

CONCLUSION

The chilling impact of the lines of cases cited above can be mitigated in three ways, all of which are within the power of the court. Simplest would be to rule that Blatt's reliance upon existing jurisprudence is not a "mistake of law" and a change in the case law subsequent to a debt collector's conduct does not deprive it of the ability to invoke the FDCPA's bona fide error defense.

A second alternative is to hold that lower courts have erred in concluding that the doctrine of litigation immunity does not apply in cases brought under the FDCPA. Such an outcome would not tamper in any way with the congressional intent (in eliminating the FDCPA's attorney exemption) of leveling the competitive playing field between attorneys and lay debt collectors. Litigation immunity is an equal opportunity doctrine that protects both attorneys and litigants, and attorneys would not be dealt a competitive advantage with such a result.

A third alternative is to rule that the imposition of strict liability under a federal consumer statute, merely because a circuit court reverses earlier jurisprudence,

violates constitutional due process, and that reliance on the prior case law operates as a defense to civil liability through the day that the earlier case law is disaffirmed.

The Court should grant Blatt's petition for a writ of certiorari so that the judgment of the court of appeals can be reversed.

Respectfully submitted,

LAUREN M. BURNETTE
BARRON & NEWBURGER, PC
450-106 State Road 13 North
Suite 326
St. Johns, FL 32259
(904) 201-9120

MANUEL H. NEWBURGER
Counsel of Record
BARRON & NEWBURGER, PC
7320 North MoPac Expressway
Suite 400
Austin, TX 78731
(512) 476-9103
mnewburger@bn-lawyers.com

Counsel for Amici Curiae