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

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PETITIONER'S REPLY BRIEF

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INTRODUCTION

Oliva argues that this is not an exceptional case, but a "one-off" decision whose reach and recoverable penalties are so limited that *certiorari* is unwarranted. But the public's ability to rely on controlling circuit precedent to avoid the imposition of statutory penalties, or worse, unquestionably implicates a problem of national importance. Indeed, in the short time since the Petition was filed, the Seventh Circuit has issued another decision that explicitly says *Oliva* makes the circuit's safe harbor precedent unreliable. This solidifies a conflict with the Second Circuit, which says its FDCPA safe harbor jurisprudence *can* be relied upon.

Oliva leans heavily on an argument that Blatt's "mistake" was relying on controlling circuit precedent that was challenged by a petition for rehearing *en banc*. Taken to its logical conclusion, this would mean that any time a petition for *en banc* rehearing or *certiorari* is filed, the controlling legal effect of the challenged precedent evaporates and it cannot be followed. That is untenable. No principled interpretation of the FDCPA can make Blatt's adherence to controlling circuit precedent a "mistake of law" merely because five days before it sued Oliva, the circuit's well-settled interpretation of the FDCPA was challenged by an *en banc* rehearing petition – which FRAP 35(a) says is "not favored" and "*ordinarily will not be granted*." (emphasis added) Moreover, no case, and least of all *Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich*, 559 U.S. 573 (2010), has ever held that *following* controlling circuit precedent is a mistake.

The lack of notice to Blatt that it could be punished for conduct that was unquestionably lawful when it occurred – following controlling precedent – is a clear

due process violation. Oliva fails to refute this after-the-fact, unconstitutional imposition of liability. In a scant due process argument, Oliva says only that this Court's lack-of-fair-notice jurisprudence is confined to changes in "administrative pronouncements" and "criminal statutes," and this case involves neither. Our country does not punish people without fair notice, no matter what the context.

Whether in the administrative, criminal, or civil context, it is an "elementary notion[ ] in our constitutional jurisprudence" that "a person of ordinary intelligence [must have] fair notice of what is prohibited." *BMW of North America v. Gore*, 517 U.S. 559, 574 (1995) ("a person [must] receive fair notice . . . of the conduct that will subject him to punishment."); *FCC v. Fox Television Stations, Inc.*, 567 U.S. 239, 253 (2012); *see also Davis v. United States*, 564 U.S. 229, 241 (2011) (we do not "penalize the officer for the appellate judges' error"). The Seventh Circuit's obligation was to construe the *bona fide* error defense to avoid a constitutional problem; instead, it created one.

Oliva retorts that the liability Blatt faces as a result of "overturned precedent" is "precisely what retroactivity does." (BIO, pp. 7, 11) But that is a myopic misreading of this Court's retroactivity jurisprudence. *Reynoldsville Casket v. Hyde*, 514 U.S. 749 (1995), distinguished retroactivity from remedy. A new rule does not necessarily determine liability in a case when the old rule "reflects both reliance interests and other significant policy justifications." *Id.* at 759. Justice Kennedy's concurrence emphasized that point: "[I]n some exceptional cases, courts may shape relief in light of disruption of important reliance interests or

the unfairness caused by unexpected judicial decisions." *Id.* at 761 (Kennedy, J., concurring).

This is the exceptional case to which Justice Kennedy referred. It discourages respect for established precedent. *Oliva* thus invites the very thing *Jerman* eschewed: a "race to the bottom" fueled by private interpretations of the law made necessary by the inability to rely on controlling circuit precedent. Congress could not have intended to protect debt collectors who rely on opinions from the Consumer Financial Protection Bureau (CFPB), even if they are later judicially overturned, but not debt collectors who rely on controlling circuit precedent before it is overturned. That is the absurd result *Oliva* has produced.

ARGUMENT

I. *OLIVA* CREATES A CIRCUIT SPLIT BY UNDERMINING SAFE HARBOR JURISPRUDENCE.

Like the Seventh Circuit, the Second Circuit has a long history of prescribing the steps debt collectors should follow if they wish to avoid FDCPA liability. *See e.g., 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). Oliva dismisses these cases on the basis that they concern the language of dunning letters, not the *bona fide* error defense. But what the FDCPA permits in a dunning letter is no different than where the FDCPA permits a suit to be filed. Both may depend on how the circuit construes the statutory language.

The collision between *Oliva* and the Second Circuit's safe harbor jurisprudence is shown by *Boucher v. Financial System of Green Bay*, No. 17-2308, 2018 U.S.

App. LEXIS 1094, at *15-16 (7th Cir. Jan. 18, 2018). There, the debt collector relied on Seventh Circuit safe harbor precedent for the language it used in a dunning letter. Citing *Oliva*, the Seventh Circuit concluded that the safe harbor did not apply and added: "In any event our interpretations cannot override the statute itself, which clearly prohibits debt collectors from making false and misleading misrepresentations." *Id.* at *16. Then the Seventh Circuit cited *Oliva* for the following proposition: "acknowledging debt collectors' good faith reliance on our precedent, but explaining that 'the controlling law is and always has been the statute itself' and 'the statute remains the law even if judges err.'" *Id.* (quoting *Oliva v. Blatt, Hasenmiller, Leibsker & Moore LLC*, 864 F.3d 492, 500 (7th Cir. 2017)).

Boucher thus highlights the conflict between *Oliva*, which says court-created safe harbors are not the law, and Second Circuit cases like *Avila* and *Greco*, which say they *are* the law. The message could scarcely be any clearer. With *Oliva* on the books, and *Boucher* emphasizing that only the statutory language itself is the law, Second Circuit debt collectors who rely on that circuit's safe harbor jurisprudence can no longer be assured that it really provides any safe harbor. This situation encourages debt collectors to privately interpret the Act, to the potential detriment of consumers, which is exactly what *Jerman* sought to avoid. The Third Circuit saw the conflict created by *Oliva* in *Daubert v. NRA Group, LLC*, 861 F.3d 382, 395 (3rd Cir. 2017), emphasizing that *Jerman* applies only to mistakes of law based on *unsettled* precedent.

Nor is the conflict solely confined to safe harbors designed for dunning letters. Circuit courts have also established safe harbors for the required content of

debt verifications that debt collectors must provide in response to consumer inquiries. *See*, *e.g.*, *Haddad v. Alexander, Zelmanski, Danner, Fioritto, PLLC*, 758 F.3d 777, 785 (6th Cir. 2014); *Clark v. Capital Credit & Collection Servs.*, 460 F.3d 1162, 1174 (9th Cir. 2006); *Chaudry v. Gallerizzo*, 174 F.3d 394, 406 (4th Cir. 1999); *Graziano v. Harrison*, 950 F.2d 107, 113 (3d Cir. 1991). The destabilizing effect of *Oliva* will not be confined to a discrete area of FDCPA case law; it is already being felt across the debt collection industry.

Certiorari is warranted here because the problem *Oliva* has created also transcends the FDCPA – it affects the binding effect of *all* circuit precedent. In fact, under *Oliva*, district courts could theoretically disregard binding circuit interpretations of *any* statute and craft their own interpretation based on the "the statute itself." *Boucher*, 2018 U.S. App. LEXIS 1094, at *16. The upshot of the Seventh Circuit's decision is that appellate precedent means nothing and that "the rule of law is a sham." (App. 26a). There is no reason for this Court to wait and let further injustice "percolate," as Oliva suggests.

II. THE PUNISHMENT OF CONDUCT THAT WAS LAWFUL WHEN IT OCCURRED VIOLATES DUE PROCESS.

This case presents the same question as *FCC v. Fox Television Stations*, 567 U.S. 239 (2012): what is the *consequence* of retroactivity, *i.e.*, whether due process allows Blatt to be held liable based on a retroactive change in the law. Oliva construes *Fox* as a case about retroactivity, but that is incorrect. The question was whether the FCC's application of its new indecency standard to already-aired broadcasts violated the fair notice requirement of the Due Process Clause. *Id.* at 253.

Fox definitively held that due process prohibits the imposition of civil liability for conduct that was lawful when it occurred. Blatt's reliance on controlling circuit precedent that permitted suit in its chosen venue is no different than the television network's reliance on FCC guidance that permitted a fleeting display of nudity. And just as the network could not be punished simply because the FCC later decided fleeting nudity was indecent, Blatt cannot be punished because the Seventh Circuit later decided its interpretation of the FDCPA's venue provision was wrong. Fair notice was the question, not retroactivity.

Oliva contends that any constitutional infirmity can be resolved by the district court's discretion in setting damages. (BIO, p. 19) *Fox* squarely rejected this argument, too, and held the FCC's discretion in assessing penalties did not remedy the due process violation. *Fox*, 567 U.S. at 255. Moreover, Oliva ignores that the jury, not the district judge, decides the amount of damages under the FDCPA. *Kobs v. Arrow Serv. Bureau, Inc.*, 134 F.3d 893, 897 (7th Cir. 1998); *Sibley v. Fulton DeKalb Collection Service*, 677 F.2d 830, 832-33 (11th Cir. 1982). No district judge would permit a jury to consider evidence of a debt collector's reliance on circuit precedent if such reliance is not a defense. *See*, *e.g.*, *Harden v. Autovest LLC*, No. 1:15-cv-34, 2016 U.S. Dist. LEXIS 164728, at *7 (W.D. Mich. Nov. 30, 2016) (excluding evidence related to *bona fide* error defense where it was unavailable under *Jerman*). Clearly, the factfinder will *not* be able to consider a debt collector's good-faith reliance when fixing damages.

And even if a judge decided the amount of damages, the FDCPA still permits an award of attorneys' fees even in the absence of any damages. 15 U.S.C.

§ 1692k(a)(3). The PRA Amicus Brief graphically demonstrates that even minimal-damage cases frequently result in magnitudes-greater attorneys' fees awards. *See* PRA Amicus Br., pp. 21-22. Oliva admits his suit was filed only at his lawyer's behest, but fails to address this point.

Oliva brushes off *Davis v. U.S.*, 564 U.S. 229 (2011), and *Bouie v. Columbia*, 378 U.S. 347 (1964), because those were criminal cases. That is a meaningless distinction. This Court has repeatedly emphasized that the fair notice required by the Due Process Clause applies with equal force in civil and criminal law. *U.S. v. Lanier*, 520 U.S. 259, 270-71 (1997); *Anderson v. Creighton*, 483 U.S. 635, 640 (1987).

The application of *Davis* and *Bouie* is also unaffected by *Jerman's* discussion of the criminal law principle that ignorance of the law is no excuse. 559 U.S. at 583. This case does not involve ignorance of the law. The defense is that Blatt relied on *settled* law. The only "error" here was the one committed by the "lawyers . . . with judicial commissions" (App. 15a), who suddenly decided their longstanding interpretation of the FDCPA's venue provision was wrong. This is precisely why the *bona fide* error defense should apply. Blatt's retroactively-created statutory violation arises not from its own mistake, but from the Seventh Circuit's, something entirely outside Blatt's control. This is no different than the police officer's illegal search in *Davis*, which resulted not from his own mistake, but from a similar judicial error.

The Seventh Circuit was obligated to construe the *bona fide* error defense to avoid a constitutional problem; instead, it needlessly created one.

III. THE *BONA FIDE* ERROR DEFENSE CANNOT TURN ON THE PENDENCY OF AN *EN BANC* REHEARING PETITION.

Oliva says *Jerman* applies here because Blatt's choice of venue was a calculated risk taken in the face of unsettled law. Oliva bases this argument on the petition for *en banc* rehearing that was filed in *Suesz v. Med-1 Solutions*, 734 F.3d 684 (7th Cir. 2013) (panel op.), five days before Blatt filed suit. According to Oliva, the mere possibility of *en banc* review meant Blatt was on notice that the law was unsettled. This argument fails for two reasons.

First, *Suesz* was not the decision on which Blatt relied for its choice of venue. Blatt relied on *Newsom v. Friedman*, 76 F.3d 813 (7th Cir. 1996), the 18-year old precedent that the *Suesz* panel had just *reaffirmed* six weeks before Blatt filed suit. The fact that *Suesz* had not been finally decided is irrelevant because *Newsom* was the law.

Second, Oliva fails to explain why a rehearing petition should have put Blatt on notice that long-standing precedent was about to be reversed. *En banc* rehearing is "not favored and *ordinarily will not be ordered*." Fed. R. App. P. 35(a) (emphasis added). And *en banc* rehearing of a panel decision based on such well-settled precedent is even *more* extraordinary.

The consequences of Oliva's argument are absurd. Debt collectors without the gift of clairvoyance would have to: (1) monitor every rehearing petition in all thirteen circuit courts of appeal, as well as every *certiorari* petition filed in this Court; (2) determine which cases might lead to the retroactive reversal of established FDCPA precedent; and (3) correctly guess whether the challenged precedent will be overturned

or modified. *Jerman* surely did not intend such a result when it held the *bona fide* error defense was inapplicable to mistakes of law.

Oliva says Blatt could have just filed suit in a venue closer to where Oliva resided. But Blatt does not contend it was prohibited from filing suit in its venue of choice. If that were Blatt's argument, *Reynoldsville Casket*, 514 U.S. at 752, which held courts must apply a new legal rule to the parties before it, would be dispositive. Rather, Blatt contends it cannot be held liable for a completely lawful choice to file suit in its chosen venue. Blatt's conduct bears no resemblance whatsoever to the choice between conflicting circuit court decisions made by the debt collector in *Jerman*.

This is why the instant case is the right vehicle to determine the scope of the *bona fide* error defense. Procedurally, the case on which Blatt relied (*Newsom*) was upheld as good law by the *Suesz* panel decision on October 31, 2013; the *Suesz* rehearing petition was filed December 5, 2013; and Blatt's suit against Oliva was filed December 10, 2013. What better case to establish the boundaries of *bona fide* error than one where the debt collector made *no* choice among competing authorities, but instead relied on a nearly two decade-old precedent that was just reaffirmed by a panel of the court of appeals, only to be overturned by the *rara avis* of *en banc* review?

IV. THE FDCPA SHOULD NOT BE INTERPRETED TO CREATE A SEPARATION-OF-POWERS PROBLEM.

Oliva says the agency-advice safe harbor found in § 1692k(e) is "the method by which a debt collector can formally immunize its actions" and does not conflict with *Oliva*'s holding that circuit precedent is not the

law. (BIO, p. 14) The notion that the CFPB can rely on controlling circuit precedent to provide debt collectors with a safe harbor even if that precedent is later overruled, but a debt collector cannot rely on the same precedent on which the CFPB relies, could not be what Congress (or *Jerman*) intended.

First, Oliva's construction elevates agency decisions over Article III courts. This upsets the judiciary's role as sole arbiter of the law's meaning and creates significant—and unnecessary—separation–of-powers concerns. *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."). Second, this interpretation conflicts with the FDCPA itself, which recognizes that court decisions trump the agency's decisions. *See* 15 U.S.C. § 1692k(e) (providing that debt collector may rely on agency advisory opinions even when "determined by *judicial* . . . authority to be invalid") (emphasis added).

Oliva attempts to dodge the constitutional pitfall by saying that agency advisory opinions can simply incorporate circuit precedent and thus make that precedent worthy of reliance. But that is precisely the problem: *Oliva*'s interpretation of the *bona fide* error defense gives primacy to agency interpretations of the FDCPA and provides that judicial interpretations of the FDCPA gain legitimacy, if any, only through agency approval.

Even if this construction of the FDCPA did not raise such significant constitutional concerns, it is unlikely that the CFPB would actually issue advisory opinions on which debt collectors could rely. Oliva ignores the PRA Amicus Brief, which shows that since the CFPB

received the authority to issue advisory opinions in 2011, it has issued only *one* advisory opinion. PRA Amicus Brief, p. 18. This problem is only likely to get much worse with the recent changes at the CFPB.

Significantly, the Federal Trade Commission (FTC) will not issue advisory opinions simply to codify settled circuit precedent like *Newsom*. *See Jerman* 559 U.S. at 606 (Breyer, J., concurring) (recognizing that FTC issues advisory opinions only when the matter involves a novel question of fact or law and "there is no clear . . . court precedent"). The advisory opinion defense would therefore be of no benefit to debt collectors like Blatt, which relied on settled circuit precedent. Oliva's brief in opposition ignores all of this.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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