No. 09-606

IN THE

# Supreme Court of the United States

JAVITCH, BLOCK & RATHBONE, LLP, AND GREAT SENECA FINANCIAL CORP.,

*Petitioners*,

v.

DELORES HARTMAN, DEBORAH L. RICE, AND UNITED STATES OF AMERICA,

*Respondents.*

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

## BRIEF IN OPPOSITION

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## QUESTIONS PRESENTED

1. Whether 15 U.S.C. §§ 1692e, 1692e(10), 1692f, and 1692k(c) of the Fair Debt Collection Practices Act (FDCPA) are unconstitutional as applied to literally true but potentially misleading representations in pleadings under the First Amendment, Fifth Amendment, and the Commerce Clause of Article I, Section 8, Clause 3 of the United States Constitution.

2. Whether evidence that a debt collector acted in good faith and reasonably under the circumstances qualifies for the bona fide error defense under the FDCPA, 15 U.S.C. § 1692k(c).

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## STATEMENT OF THE CASE

1. In 1977, Congress enacted the Fair Debt Collection Practices Act (FDCPA), 15 U.S.C. § 1692 *et seq.*, "to eliminate abusive debt collection practices by debt collectors." 15 U.S.C. § 1692(e). Among other things, the statute prohibits the use of "any false, deceptive or misleading representation or means in connection with the collection of any debt." *Id.* In addition, the Act provides that a "debt collector may not use unfair or unconscionable means to collect or attempt to collect any debt." *Id.* § 1692f. The Act applies to lay debt collectors and to "attorneys who 'regularly' engage in consumer-debt-collection activity, even when that activity consists of litigation." *Heintz v. Jenkins*, 514 U.S. 291, 299 (1995).

A substantial portion of debt collection activities is undertaken on behalf of companies that buy defaulted debts as an investment, paying pennies on the dollar and hoping to profit through the collection of a portion of the amount owed. *See* U.S. GOV'T ACCOUNTABILITY OFFICE, CREDIT CARDS: FAIR DEBT COLLECTION PRACTICES ACT COULD BETTER REFLECT THE EVOLVING DEBT COLLECTION MARKETPLACE AND USE OF TECHNOLOGY 18-19, 26-30, 35 (2009) (hereinafter EVOLVING DEBT); FEDERAL TRADE COMMISSION, COLLECTING CONSUMER DEBTS: THE CHALLENGES OF CHANGE, A WORKSHOP REPORT 3-4 (2009) (hereinafter COLLECTING CONSUMER DEBTS). Typically, debt buyers purchase thousands (sometimes hundreds of thousands) of debts and attempt to collect on them en masse through letters,

phone calls, and legal action. *See* COLLECTING CONSUMER DEBTS, *supra*, at 3-4.

The Federal Trade Commission and others have reported concerns that "in practice, many debt collectors and debt buyers do very little to verify debts that consumers dispute" and that "the verification provided by debt buyers sometimes consists of little more than a written statement that the amount being demanded is what the creditor claims is owed." EVOLVING DEBT, *supra*, at 46. That concern is heightened by the "prevalence of default judgments in debt collection litigation." *Id.* at 41; *see also* COLLECTING CONSUMER DEBTS, *supra*, at 57 (noting that nearly half of debt collection actions in Cook County, Illinois, result in default judgments).

2. In October 2003 petitioner Javitch, Block & Rathbone, LLP ("Javitch") filed suit against respondents Hartman and Rice to collect credit card debts that had been purchased by a large debt buyer, petitioner Great Seneca Financial Corporation ("Great Seneca"). Pet. App. 6. Great Seneca had purchased the debt from Unifund CCR Partners, which had in turn purchased the debt from respondents' credit card issuer, Providian National Bank. Pet. App. 4. "With each sale, certain electronic information was transmitted," including the consumer's name and address, as well as the account number and current balance. Pet. App. 5.

Ohio law requires that plaintiffs making a claim "founded on an account or other written instrument" must attach to the complaint "a copy of the account or written instrument." Ohio Civ. R. 10(D)(1). Ohio courts have construed this to require that "a plaintiff must set forth an actual copy of the recorded

account," which must include, among other things, "a beginning balance," "listed items . . . dated and identifiable by number or otherwise, representing charges," and "a running or developing balance, or an arrangement of beginning balance and items which permits the calculation of the amount claimed to be due." Pet. App. 11 (quoting *Arthur v. Parenteau*, 657 N.E.2d 284, 286 (Ohio App. 3d Dist. 1995)).

To satisfy this obligation, Javitch attached as Exhibit A to its complaint a document that it represented to be "said Account." Pet. App. 6. The document "resembles a typical credit-card statement," even to the point of containing a space for the consumer to enter a change of address. *Id.* However, the document was not, in fact, a statement of account from the credit card issuer. Instead, it was "prepared by Great Seneca's law firm" in an attempt to comply with the Ohio pleading rules. *Id.*

When respondents Hartman and Rice hired attorneys and answered the complaints, Great Seneca dismissed the collection suit without prejudice. Pet. App. 7.

3. Respondents Hartman and Rice subsequently filed suit against petitioners Great Seneca and Javitch in federal court, alleging violations of the FDCPA. In particular, they alleged (1) that the claim that Exhibit A was a copy of the debtor's account "was false in violation of 15 U.S.C. §§ 1692e and 1692e(10)"; (2) that Exhibit A's resemblance to a credit-card statement was "deceptive and misleading in violation of §§ 1692e and 1692e(10)"; and (3) that using the Exhibit therefore constituted "an unfair means of debt collection under § 1692f." Pet. App. 8.

Petitioners moved for summary judgment in both cases, arguing among other things that Exhibit A was not false or misleading, that they were entitled to protection under the FDCPA's "bona fide error" defense, and that the statute was unconstitutional. The United States intervened in each case to defend the constitutionality of the statute. Pet. App. 7.

The district court granted summary judgment to petitioners in both cases. The court concluded that the representation that Exhibit A was an "account" was not false or misleading, Pet. App. 41, 44-45, and that petitioners, in any event, qualified for the bona fide error defense. Pet. App. 45-48.

4. The Sixth Circuit reversed.

a. The court first held that there were genuine issues of fact regarding whether petitioners violated the Act. The court declined to decide whether petitioners falsely represented that Exhibit A was an "account" within the meaning of the Ohio rules. Pet. App. 13. It was enough, the court held, that "Hartman and Rice have raised a genuine issue of material fact as to whether Great Seneca's and Javitch's representations were misleading or deceptive." *Id.* "Given the fact that the document appears to be a recent credit-card bill, which it is not, and with few indications to the contrary," the court held, "there is a genuine issue of material fact as to whether this document would mislead the least sophisticated consumer." Pet. App. 14.

b. The court further held that disputed issues of fact also precluded judgment in petitioners' favor under the bona fide error provision. The defense requires a defendant to "show[] 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). The court noted that it had "recently held that this defense applies to mistakes of law as well as to clerical errors." Pet. App. 16 (citing *Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA*, 538 F.3d 469, 476 (6th Cir. 2008), *cert. granted*, 129 S. Ct. 2863 (2009)). But in this case, the court concluded, petitioners had not "shown that the violation was unintentional" because "Hartman and Rice assert that Great Seneca and Javitch made Exhibit A look like a credit-card statement in order to avoid Ohio law." Pet. App. 17. Further, petitioners had not "shown by a preponderance of evidence that they maintained procedures intended to avoid the type of error that occurred." *Id.* While petitioners had presented evidence relating to procedures intended to ensure that "the amount they alleged was actually the amount owed," they pointed to no procedures designed to avoid the specific violation alleged by respondents. *Id.* The court left open, however, the possibility that further factual development on remand could lead to a different result in the end. Pet. App. 18.

c. The Sixth Circuit also rejected petitioners' passing constitutional challenges to the statute as applied to their conduct.[1]

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[1] The court noted, but ultimately rejected, the United States' objection that petitioners waived their constitutional

The court of appeals first rejected petitioners' assertion that "they are immune from suit based on statements made during judicial proceedings," in light of "their constitutional right to petition granted in the First Amendment." Pet. App. 19. The court recognized that under the *Noerr-Pennington* doctrine, courts should construe statutes "to avoid burdening conduct that implicates the protections afforded by the Petition Clause." *Id.* (citation omitted). But, the Sixth Circuit held, this Court's decision in *Heintz v. Jenkins*, 514 U.S. 291 (1995), precluded any construction of the Act as inapplicable to litigation. *Id.*

Moreover, the court held, applying the Act to the conduct in this case would not violate the First Amendment. "[T]he Petition Clause protects legitimate petitioning but not sham petitions, baseless litigation, or petitions containing 'intentional and reckless falsehoods.'" Pet. App. 21 (quoting *McDonald v. Smith*, 472 U.S. 479, 484 (1985)). And in this case, the court explained, "Hartman and Rice assert that Great Seneca and Javitch intentionally misrepresented that Exhibit A was an 'account.'" Pet. App. 21-22.

The Sixth Circuit further rejected the claim that the FDCPA is unconstitutionally vague, finding that there was no allegation of arbitrary enforcement and that the FDCPA "provides adequate notice." Pet. App. 22. "[A]ny substantive-due-process argument

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arguments by failing to develop them in their brief before the Sixth Circuit. Pet. App. 18 n.7.

Great Seneca and Javitch have," the court continued, "is encompassed by their First Amendment claims." Pet. App. 23-24. And the statute did not violate the Commerce Clause by unduly interfering "with state rules of civil procedure." Pet. App. 24. "Holding Great Seneca and Javitch liable under the FDCPA has no effect on Ohio state law," the court observed. *Id.* "Instead, it punishes Great Seneca and Javitch for acting in a misleading and deceptive manner while using the Ohio court system." *Id.*

## REASONS FOR DENYING THE WRIT

For the second time in two years, petitioner Javitch asks this Court to review a constitutional challenge to the FDCPA as applied to "literally true" statements. *See Javitch, Block & Rathbone, LLP v. Gionis*, No. 07-805, 128 S. Ct. 1259 (2008) (denying prior petition raising First Amendment challenge). This petition is no more worthy of review than the first. No court has accepted petitioners' constitutional arguments. And, in fact, the first question presented by the petition does not even arise on the facts of this case in its present interlocutory posture – the court of appeals resolved petitioners' constitutional challenge on the assumption that a jury could find that petitioners' statements were knowingly false. As a result, it did not pass upon petitioners' constitutional challenge to the Act's application to "literally true" statements. And, in any event, petitioners' constitutional claims are baseless.

Nor is the second question presented by the petition worthy of the Court's attention. No court has accepted petitioners' apparent position that the

"reasonable procedures" element of the "bona fide error defense may be dispensed with when there is an absence of precedent on a particular legal question. That argument is foreclosed by the plain text of the statute and provides no basis either for granting certiorari or for holding this petition pending the outcome of the Court's resolution of the very different question posed in *Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA*, No. 08-1200.

## I. The Sixth Circuit's Rejection Of Petitioners' Constitutional Claims Does Not Merit Interlocutory Review.

Petitioners' various constitutional challenges to the FDCPA as applied to "literally true but potentially misleading representations in pleadings," Pet. i, do not warrant review by this Court and are meritless in any event.

### A. Petitioners' Constitutional Claims Are Not Certworthy.

Petitioners do not allege that there is any division in the courts of appeals over the constitutionality of the FDCPA, either as a whole or in any subset of its applications.[2] Indeed, it appears that the Sixth

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[2] As the Sixth Circuit noted, "[a]ll circuits to consider the issue, except for the Eleventh, have recognized the general principle that the FDCPA applies to the litigation activities of attorneys who qualify as debt collectors under the statutory definition." Pet. App. 21 (quoting *Sayyed v. Wolpoff & Abramson*, 485 F.3d 226, 232 (4th Cir. 2007)). That statement should not be understood to imply that the Eleventh Circuit has construed the Act not to apply to litigation conduct, nor that it

Circuit is the first court of appeals to decide any First Amendment or Commerce Clause challenge to the statute.[3] Moreover, as far as respondents can determine, every district court to have considered a constitutional challenge to the FDCPA has rejected it. *See, e.g.*, *Basile v. Blatt, Hasenmiller, Leibsker & Moore LLC*, 632 F. Supp. 2d 842, 845-46 (N.D. Ill. 2009) (rejecting First Amendment challenge); *Gerber v. Citigroup, Inc.*, No. CIV S-07-0785 WBS JFM PS, 2009 WL 248094, at *4 (E.D. Cal. Jan. 29, 2009) (same); *Sial v. Unifund CCR Partners*, No. 08 CV 0905 JM (CAB), 2008 WL 4079281, at *2-*4 (S.D. Cal. Aug. 28, 2008) (same); *Delawder v. Platinum Fin. Servs. Corp.*, 443 F. Supp. 2d 942, 951 (S.D. Ohio 2005) (rejecting Commerce Clause challenge); *Newman v. Checkrite Cal., Inc.*, 912 F. Supp. 1354, 1364-66 (E.D. Cal. 1995) (rejecting federalism challenge to the application of the FDCPA to attorney conduct).

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found that such application would be unconstitutional. Instead, the Eleventh Circuit decision to which *Sayyed* referred held only that "a legal action does not constitute an 'initial communication' within the meaning of the FDCPA," and therefore does not trigger the Act's validation notice requirement. *Vega v. McKay*, 351 F.3d 1334, 1337 (11th Cir. 2003).

[3] The only other court of appeals to consider a constitutional challenge to the Act also rejected it, in an unpublished opinion. *Hester v. Graham, Bright & Smith, P.C.*, 289 Fed. Appx. 35, 42-44 (5th Cir. 2008) (holding that the statute's definition of "debt collector" is not unconstitutionally vague).

That is reason enough to deny the petition. But in addition, petitioners' challenge to the Act as applied to "literally true but potentially misleading representations in pleadings," Pet. i, was not decided by the Sixth Circuit and does not arise on the facts of this case as it comes to this Court. The court of appeals declined to decide whether petitioners' representation that Exhibit A was an "account" was "literally true." Pet. App. 13. Deciding that question, the court explained, "would require us to decide what 'account' means under Ohio law," and was unnecessary given the court's independent conclusion that a trial was required to decide whether the statements were, at the very least, misleading or deceptive. *Id.* Consequently, in reviewing petitioners' First Amendment challenge, the court of appeals assumed that "Great Seneca and Javitch intentionally misrepresented that Exhibit A was an 'account.'" Pet. App. 22.

Petitioners insist that this assumption was counterfactual and unsupported as a matter of Ohio law. Pet. 20, 27-28. But that case-specific disagreement with the decision below does not present a certworthy question. Nonetheless, to reach the constitutional question presented by the petition, this Court would have to resolve the predicate question, delving into a disputed issue of state law without the benefit of any decision on that question from the court of appeals. And if the Court concluded that petitioners' statement was, in fact, false, it would not reach the constitutional question it had granted certiorari to resolve. On the other hand, if the Court took the case on the unfounded assumption that petitioners' representation was literally true,

any decision on the basis of that assumption would not resolve this case; respondents would still be entitled to a remand to prove that the statement was false.

This case thus illustrates the wisdom of the Court's general presumption against review of interlocutory judgments. *See, e.g., Bhd. of Locomotive Firemen & Enginemen v. Bangor & Aroostook R.R. Co.*, 389 U.S. 327, 328 (1967). The Court "generally await[s] final judgment in the lower courts before exercising [its] certiorari jurisdiction." *Va. Military Inst. v. United States*, 508 U.S. 946, 946 (1993) (Scalia, J., respecting denial of petition for writ of certiorari). "[E]xcept in extraordinary cases, the writ is not issued until final decree." *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916). Here, the interlocutory posture leaves unsettled factual questions that are critical not only to whether the case even presents the question that petitioners ask the Court to decide, but also to the underlying constitutional rules that petitioners ask the Court to employ. *See* Pet. App. 21-22 (explaining that even if the Petition Clause applies to good faith petitioning conduct, it does not protect "intentional and reckless falsehoods") (citation omitted). And it remains possible that proceedings on remand will obviate the need for any court to decide the constitutional challenge (as might happen here if, for example, petitioners were able to establish their bona fide error defense at trial, *see* Pet. App. 18). In such a case, the Court's preference for review upon final judgment is consistent with the Court's broader obligation to avoid unnecessary constitutional adjudication. *See, e.g., Ala. State Fed'n of Labor v.*

*McAdory*, 325 U.S. 450, 461 (1945) ("It has long been [the Court's] considered practice not to decide abstract, hypothetical or contingent questions . . . or to decide any constitutional question in advance of the necessity for its decision.") (citations omitted).[4]

### B. Petitioners' Constitutional Claims Are Meritless.

1. The First Amendment does not bar application of the FDCPA to petitioners' conduct. As petitioners themselves concede, the Petition Clause, like the First Amendment generally, does not protect intentional misrepresentations. Pet. 15; *see also Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340 (1974) ("[T]here is no constitutional value in false statements of fact"); *Cal. Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 513 (1972) ("Misrepresentations . . . are not immunized when

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[4] The Court also should await a case in which the constitutional questions were thoroughly briefed in the court of appeals. Here, the entirety of petitioners' constitutional challenge was set forth in a single sentence at the end of their brief: "If, notwithstanding the argument set forth above [regarding the statutory issues], this Court reverses on liability and bona fide error, Appellees pray this Court affirm based on the alternative grounds argued by Appellees below." Petrs. C.A. Br. 62. Although the court of appeals ultimately concluded that this reference encompassed the constitutional arguments made in the district court and eventually rejected those arguments on the merits, petitioners' halfhearted presentation of their claims below counsels against awarding plenary review in this Court. *Cf. City of Springfield v. Kibbe*, 480 U.S. 257, 259 (1987) ("We ordinarily will not decide questions not raised or litigated in the lower courts.").

used in the adjudicatory process."). Nor does the Petition Clause protect "intentional and reckless falsehoods." *McDonald v. Smith*, 472 U.S. 479, 484 (1985). "The first amendment interests involved in private litigation – compensation for violated rights and interests, the psychological benefits of vindication, public airing of disputed facts – are not advanced when the litigation is based on intentional falsehoods." *Bill Johnson's Rests., Inc. v. NLRB*, 461 U.S. 731, 743 (1983) (citation omitted); *see also, e.g.*, *Whelan v. Abell*, 48 F.3d 1247, 1254 (D.C. Cir. 1995) ("We see no reason to believe that the right to petition includes a right to file deliberately false complaints."). As noted above, the Sixth Circuit assumed for purposes of summary judgment that the attachments at issue here were false and intentionally misleading. Pet. App. 21-22. Petitioners do not dispute the court of appeals' legal conclusion that under that view of the facts, the First Amendment is not violated. Any constitutional challenge based on a different view of the facts must await final judgment.

2. Petitioners further argue that the FDCPA is unconstitutionally vague. *See* Pet. 16-17, 24-26. But the FDCPA is not so open-ended as to deprive "the person of ordinary intelligence [of] a reasonable opportunity to know what is prohibited, so that he may act accordingly." *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972). While some of the terms of the statute are broad, "economic regulation is subject to a less strict vagueness test" because of its narrow subject matter and the greater sophistication of regulated entities. *Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 498

(1982). And here, the FDCPA regulates the commercial conduct of businesses that can be expected to "consult relevant legislation in advance of action." *Id.* at 498.

This Court has rejected "void-for-vagueness" challenges to economic regulation more broadly worded than the FDCPA. *See, e.g.*, *United States v. Nat'l Dairy Prods. Corp.*, 372 U.S. 29 (1963) (rejecting challenge to Robinson-Patman Act's prohibition on fixing "unreasonably low prices for the purpose of destroying competition or eliminating a competitor"); *Nash v. United States*, 229 U.S. 373 (1913) (rejecting challenge to Sherman Act's prohibition on "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade"). And as applied in this case, there is nothing particularly difficult to understand about the Act's prohibition against using false, deceptive, or misleading representations in connection with the collection of a debt. *See Kay v. United States*, 303 U.S. 1, 7 (1938) (rejecting a vagueness challenge to a statute criminalizing certain knowingly false statements relating to a federal home loan program).

3. Petitioners' Commerce Clause challenge similarly lacks merit. The FDCPA falls comfortably within Congress's authority "to regulate those activities having a substantial relation to interstate commerce." *Lopez v. United States*, 514 U.S. 549, 558-59 (1995). Congress found, and petitioners concede, that consumer debt collection has such an effect on interstate commerce. *See* 15 U.S.C. § 1692(d); Pet. 26.

Petitioners argue instead that the Act exceeds Congress's powers as applied in this case, because the "content of state court pleadings and regulating the practice of law, are areas traditionally recognized as falling within the ambit of state concern." Pet. 26. Accordingly, they argue, it would be inconsistent with the division of state and federal authority implicit in the Commerce Clause for "adherence to state standards" of pleading in state court to "result[] in liability under federal standards." Pet. 27. "Contrary to the assessment of the panel," petitioners continue, their pleading in this case fully satisfied Ohio law. *Id.* As a result, they imply, holding their conduct to violate the FDCPA would "infring[e] on the state's traditional role of regulating attorneys." *Id.*

This Court has repeatedly rejected the assertion that the Constitution prohibits Congress from regulating activities otherwise falling within the Commerce Power simply because they touch upon matters of traditional state jurisdiction, including regulation of the legal profession. *See, e.g., Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 546-47 (1985) (rejecting "as unsound in principle and unworkable in practice, a rule of state immunity from federal regulation that turns on a judicial appraisal of whether a particular governmental function is 'integral' or 'traditional'"); *Goldfarb v. Va. State Bar*, 421 U.S. 773 (1975) (recognizing states' traditional role in regulating the legal profession, but declining to construe the Sherman Act to exclude coverage of state bar associations).

Nor does the FDCPA, as applied in this case, impose any intolerable interference with state prerogatives. The Sixth Circuit's interpretation of the FDCPA does not dictate pleading standards to state courts or otherwise interfere with states' control of their own judicial systems. Respondents allege that petitioners violated both the FDCPA and state pleading rules, and petitioners do not claim that the Commerce Clause prohibits Congress from imposing federal obligations that coincide with state pleading requirements. *Cf. United States v. Bongiorno*, 106 F.3d 1027, 1033-34 (1st Cir. 1997) (rejecting constitutional challenge to federal statute criminalizing failure to comply with out-of-state child support orders). Instead, petitioners' constitutional argument is premised on the assertion – not accepted by the court of appeals – that their pleading fully complied with Ohio law. In the unlikely event that petitioners succeed on remand in showing that their pleading complied with state law, but nonetheless are held liable, they will be free to reassert their Commerce Clause challenge on appeal from final judgment.

## II. Certiorari Is Not Warranted To Consider Whether Petitioners Can Avail Themselves Of The Bona Fide Error Defense.

1. With the second question presented, petitioners ask this Court to grant certiorari to review whether "evidence that a debt collector acted in good faith and reasonably under the circumstances qualifies for the bona fide error defense." Pet. i. They urge this Court to adopt an "objective test" that would essentially eliminate the FDCPA's

requirement that a defendant seeking to avail itself of the bona fide error defense show that it maintains "procedures reasonably adapted to avoid such error." 15 U.S.C. § 1692k(c). Instead, petitioners seek to broaden the scope of the defense to shield all errors that are unintentional and made in good faith, which would in turn hinge on "what was reasonable to believe at the time and under the circumstances." Pet. 30.

As an initial matter, petitioners have waived this argument by failing to challenge the "reasonable procedures" requirement in either the district court or the court of appeals. *See, e.g.*, *City of Springfield v. Kibbe*, 480 U.S. 257, 259 (1987) (noting that this Court "ordinarily will not decide questions not raised or litigated in the lower courts"). In both courts, petitioners affirmatively acknowledged that they could only prevail under the bona fide error defense if they could show that they maintained procedures reasonably adapted to avoid error. *See* Petrs. C.A. Br. 59-60; Memo. in Support of Motion for Summary Judgment of Defendant Javitch, Block & Rathbone at 17-19, *Rice v. Great Seneca Financial Corp.*, 556 F. Supp. 2d 792 (S.D. Ohio 2009) (No. 2:04-cv-00951); Memo. in Support of Motion for Summary Judgment of Defendant Great Seneca Financial Corp. at 12-14, *Rice*, 556 F. Supp. 2d 792 (No. 2:04-cv-00951).

Moreover, the interlocutory posture of this case, *see supra* at 11-12, renders it an extraordinarily poor vehicle through which to consider the second question presented. In the decision below, the Sixth Circuit merely reversed the district court's decision granting summary judgment to petitioners on their

bona fide error defense. Pet. App. 17-18. In so doing, the court of appeals specifically left open the possibility that, "as the litigation proceeds on remand," petitioners could still "establish the elements of the [bona fide error] defense by a preponderance of the evidence," Pet. App. 18, a possibility that would render this Court's disposition of the second question presented irrelevant.

2. Finally, certiorari is not warranted because petitioners cannot identify even a single decision supporting their proposed "objective test," much less any division among the courts of appeals on the question presented.[5] This dearth of authority is hardly surprising, however, insofar as the text of the FDCPA explicitly requires a showing that the debt collector maintains procedures reasonably adapted to avoid errors. *See* 15 U.S.C. § 1692k(c).

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[5] Although petitioners cite three district court decisions as ostensibly supporting their argument, Pet. 30, those cases are inapposite, as all three courts indicated that the bona fide error defense will apply only if the defendant can show that it maintained procedures reasonably adapted to avoid the error. *See Charbonneau v. Mary Jane Elliott, P.C.*, 611 F. Supp. 2d 736, 743 (E.D. Mich. 2009) (a defendant needs to show only "reasonable precautions" were taken, rather than "every conceivable" precaution); *Kirk v. Gobel*, 622 F. Supp. 2d 1039, 1049 (E.D. Wash. 2009) (finding FDCPA violation but allowing debt collector to pursue bona fide error defense and indicating that "discovery regarding [the defendant's] preventative procedures is necessary"); *Castro v. Collecto, Inc.*, No. EP-09-CA-215-FM, 2009 WL 3617557, at *23 (W.D. Tex. Oct. 27, 2009) (finding that the defendants had employed reasonable procedures to avoid the legal error at issue).

At bottom, petitioners' bona fide error argument boils down to a complaint that the Sixth Circuit should have concluded, based on the facts before it, that petitioners did indeed maintain reasonable procedures to avoid errors. But such a fact-bound determination is hardly an appropriate question for this Court's review.

Nor is there any reason to follow petitioners' alternative suggestion to hold this case pending this Court's decision in *Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA*, No. 08-1200. That case presents the question whether the bona fide error defense extends to legal errors. *See* Pet. Cert., *Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA*, No. 08-1200. But the Sixth Circuit's decision in this case rested on the assumption that the bona fide error defense *does* apply to mistakes of law. *See* Pet. App. 16-17. The Sixth Circuit nonetheless held that summary judgment was inappropriate with regard to the bona fide error defense because petitioners had not shown either that the violation was unintentional or that they maintained reasonable procedures to avoid the error. *Id.* 17-18. As such, this Court's resolution of the question in *Jerman* cannot improve petitioners' position, and the case should accordingly be permitted to proceed without delay before the district court. And in any event, because this case comes to the Court in an interlocutory posture, the Sixth Circuit and the district court can always consider any possible ramifications arising from this Court's opinion in *Jerman* on remand.

## III. None Of The Remaining Issues Raised In The Petition Fall Within The Scope Of The Questions Presented Or Otherwise Warrant This Court's Review.

Petitioners raise a variety of other issues that, in their view, justify a grant of certiorari. But none of those issues are encompassed by the questions presented, much less worthy of this Court's review.

1. Petitioners first attempt to conjure up a division among the circuits on the question "whether [the] least sophisticated consumer standard under the FDCPA for literally true but potentially misleading statements is always [a] question of law, always a jury question, or requires evidence of consumer confusion to create a genuine issue of material fact requiring a jury trial." Pet. 18-19. However, the question of who decides whether a statement is misleading has no bearing on the specific constitutional claims raised by petitioners and falls well outside the scope of the questions presented. *See* Pet. i; *Izumi Seimitsu Kogyo Kabushiki Kaisha v. U.S. Philips Corp.*, 510 U.S. 27, 31-32, 31 n.5 (1993) (holding that discussion of issue in text of petition did not bring the issue within the questions presented).

Moreover, the decision in this case did not address whether the "least sophisticated consumer" standard presents a question for the jury or the judge. The court of appeals simply held that summary judgment was impermissible because of disputed issues of material fact. *See* Pet. App. 14, 18. Whether those

factual disputes should be resolved by judge or jury, the court of appeals did not say.

But in any event, the cases on which petitioners rely do not establish a square conflict warranting review by this Court. First, the decisions of the Second, Third, and Ninth Circuits do not address the question posed by petitioners at all, instead considering whether language in a debt collection letter "overshadows or contradicts" the validation notice disclosures required by Section 1692g. *See Terran v. Kaplan*, 109 F.3d 1428, 1432 (9th Cir. 1997) (explaining that "the question whether language in a collection letter overshadows or contradicts the validation notice so as to confuse a least sophisticated debtor is a question of law" because the determination "does not turn on the credibility of extrinsic evidence"); *see also Shapiro v. Dun & Bradstreet Receivable Mgmt. Servs., Inc.*, 59 Fed. Appx. 406, 407-08 (2d Cir. 2003) ("The question of whether language in a debt-collection letter overshadows or contradicts other language in an impermissible fashion is a question of law we review *de novo*."); *Wilson v. Quadramed Corp.*, 225 F.3d 350, 353 n.2 (3d Cir. 2000) (same).

Although the remaining circuits cited in the petition have actually addressed the application of the least sophisticated consumer standard in the context of Section 1692e, here too petitioners' purported circuit split proves illusory. To be sure, the Sixth Circuit has held that a debt collection notice may be misleading if it is "open to more than one reasonable interpretation, at least one of which is inaccurate"; in those situations, a jury must decide

whether the letter is "susceptible to [such] a reading by the least sophisticated consumer." *Kistner v. Law Offices of Michael P. Margelefsky, LLC*, 518 F.3d 433, 441 (6th Cir. 2008) (citation omitted). However, the court in *Kistner* took care to describe that standard as merely "a useful tool in analyzing the 'least-sophisticated-consumer' test," *id.*, without any suggestion that such a standard was the *only* acceptable approach.

In *Gonzalez v. Kay*, 577 F.3d 600 (5th Cir. 2009), the Fifth Circuit made clear that the inquiry into whether a debt collection letter is deceptive, as well as the question whether that determination is made by a court or a jury, hinges on the nature of the letter itself. At one end of the spectrum, the court explained, are letters that are, as a matter of law, not deceptive "based on the language and placement of a disclaimer," *Gonzalez*, 577 F.3d at 606; at the other end of the spectrum are letters that "are so deceptive and misleading as to violate the FDCPA as a matter of law," *id.* The letters in the middle of the spectrum, the Fifth Circuit continued, "present closer calls" and thus are a question for the jury. *Id.*; *see also Kistner*, 518 F.3d at 441 (explaining that a "jury should determine whether the letter is deceptive and misleading" based on conflicting aspects of the letter).

This case-by-case approach is on all fours with the approach employed by the Seventh Circuit, which also places "suits alleging deceptive or misleading statements . . . into three distinct categories," *Ruth v. Triumph P'ships*, 577 F.3d 790, 800 (7th Cir. 2009): (1) "cases involving statements that plainly, on their face, are not misleading or deceptive," *id.*; (2) cases

involving "collection notices [that] are clearly misleading on their face," *id.* at 801; and (3) cases "involv[ing] statements that are not plainly misleading or deceptive but might possibly mislead or deceive the unsophisticated consumer," *id.* at 800. In the first two categories, the Seventh Circuit has held, extrinsic evidence is not required "to determine whether consumers were confused." *Id.* Thus, a court may dismiss the case or grant summary judgment "based on [its] own determination that the statement complied [or did not comply] with the law." *Id.* In the third category, however, a plaintiff "may prevail only by producing extrinsic evidence, such as consumer surveys, to prove that unsophisticated consumers do in fact find the challenged statements misleading or deceptive." *Id.*

2. Petitioners' remaining arguments, made largely in passing, also fall short. *See, e.g.*, Pet. 20 (disputing the court of appeals' view of the summary judgment evidence); Pet. 17-18 (asserting that Congress did not intend the FDCPA to "abrogate the common law litigation privilege"); Pet. 21-24 (arguing that despite the Court's decision in *Heintz v. Jenkins*, 514 U.S. 291 (1995), the FDCPA does not apply to litigation conduct); Pet. 33-35 (arguing that Sections 1692e, 1692e(10) and 1692f do not apply to potentially misleading statements in litigation). None of these arguments is encompassed within the scope of either of the questions presented. Nor do petitioners allege a conflict among the circuits with regard to any of these issues.

## CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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