No.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether 15 U.S.C. §§ 1692e, 1692e(10), 1692f, 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).

PARTIES TO THE PROCEEDINGS & CORPORATE DISCLOSURE STATEMENT

Petitioners Javitch, Block & Rathbone, LLP and Great Seneca Financial Corp. were the Defendants and the Appellees below. Pursuant to Rule 29.6, there is no parent or publicly held company owning 10% or more of the corporation's stock, in Great Seneca Financial Corp., or Javitch, Block and Rathbone, LLP.

Respondents Delores Hartman and Deborah L. Rice were the Plaintiffs and Appellants below. The United States of America intervened below to defend the constitutionality of the FDCPA.

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PETITION FOR WRIT OF CERTIORARI

Javitch, Block & Rathbone, LLP ("JB&R") and Great Seneca Financial Corp. ("Great Seneca"), respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals (Pet. App. 2-29) is reported at 569 F.3d 606. The order of the court of appeals denying rehearing and rehearing en banc is reprinted at Pet. App. 62 and is not otherwise published. The opinion of the District Court in *Rice v. Great Seneca Financial Corp.*, Case No. 2:04-CV-00951 (Pet. App. 30-53), is reported at 556 F.Supp.2d 792. The opinion of the District Court in *Hartman v. Great Seneca Financial Corp.*, Case No. 2:04-CV-00972 (Pet. App. 54-61) is unreported, but available at 2008 Westlaw 2169051.

JURISDICTION

The Court of Appeals entered its judgment on June 30, 2009. A timely petition for rehearing and rehearing en banc was denied on September 22, 2009. Pet. App. 62. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article I, Section 8, Clause 3 of the United States Constitution provides: "The Congress shall have Power ... [t]o regulate Commerce ... among the several States...." U.S. Const. art. I, §8, cl. 3. The

First Amendment to the United States Constitution provides: "Congress shall make no law ... abridging the freedom of speech...; or the right of the people ... to petition the Government for a redress of grievances." U.S. Const. amend I. The Fifth Amendment to the United States Constitution provides: "No person shall be ... deprived of life, liberty, or property, without due process of law...." U.S. Const. amend V.

15 U.S.C. § 1692e of the Fair Debt Collection Practices Act (FDCPA) provides:

> A debt collector may not use any false, deceptive, or misleading representation or means in connection with the collection of any debt. Without limiting the general application of the foregoing, the following conduct is a violation of this section:
> (1) The false representation or implication that the debt collector is vouched for, bonded by, or affiliated with the United States or any State, including the use of any badge, uniform, or facsimile thereof.
> (2) The false representation of—
> (A) the character, amount, or legal status of any debt; or
> (B) any services rendered or compensation which may be lawfully received by any debt collector for the collection of a debt.
> (3) The false representation or implication that any individual is an attorney or that any communication is from an attorney.
> (4) The representation or implication that nonpayment of any debt will result in the arrest or imprisonment of any person or the

seizure, garnishment, attachment, or sale of any property or wages of any person unless such action is lawful and the debt collector or creditor intends to take such action.

(5) The threat to take any action that cannot legally be taken or that is not intended to be taken.

(6) The false representation or implication that a sale, referral, or other transfer of any interest in a debt shall cause the consumer to—

(A) lose any claim or defense to payment of the debt; or

(B) become subject to any practice prohibited by this subchapter.

(7) The false representation or implication that the consumer committed any crime or other conduct in order to disgrace the consumer.

(8) Communicating or threatening to communicate to any person credit information which is known or which should be known to be false, including the failure to communicate that a disputed debt is disputed.

(9) The use or distribution of any written communication which simulates or is falsely represented to be a document authorized, issued, or approved by any court, official, or agency of the United States or any State, or which creates a false impression as to its source, authorization, or approval.

(10) The use of any false representation or deceptive means to collect or attempt to collect any debt or to obtain information concerning a consumer.

(11) The failure to disclose in the initial written communication with the consumer and, in addition, if the initial communication with the

consumer is oral, in that initial oral communication, that the debt collector is attempting to collect a debt and that any information obtained will be used for that purpose, and the failure to disclose in subsequent communications that the communication is from a debt collector, except that this paragraph shall not apply to a formal pleading made in connection with a legal action.

(12) The false representation or implication that accounts have been turned over to innocent purchasers for value.

(13) The false representation or implication that documents are legal process.

(14) The use of any business, company, or organization name other than the true name of the debt collector's business, company, or organization.

(15) The false representation or implication that documents are not legal process forms or do not require action by the consumer.

(16) The false representation or implication that a debt collector operates or is employed by a consumer reporting agency as defined by section 1681a(f) of this title.

15 U.S.C. § 1692f of the FDCPA provides:

A debt collector may not use unfair or unconscionable means to collect or attempt to collect any debt. Without limiting the general application of the foregoing, the following conduct is a violation of this section:

(1) The collection of any amount (including any interest, fee, charge, or expense incidental to

the principal obligation) unless such amount is expressly authorized by the agreement creating the debt or permitted by law.

(2) The acceptance by a debt collector from any person of a check or other payment instrument postdated by more than five days unless such person is notified in writing of the debt collector's intent to deposit such check or instrument not more than ten nor less than three business days prior to such deposit.

(3) The solicitation by a debt collector of any postdated check or other postdated payment instrument for the purpose of threatening or instituting criminal prosecution.

(4) Depositing or threatening to deposit any postdated check or other postdated payment instrument prior to the date on such check or instrument.

(5) Causing charges to be made to any person for communications by concealment of the true purpose of the communication. Such charges include, but are not limited to, collect telephone calls and telegram fees.

(6) Taking or threatening to take any nonjudicial action to effect dispossession or disablement of property if—

(A) there is no present right to possession of the property claimed as collateral through an enforceable security interest;

(B) there is no present intention to take possession of the property; or

(C) the property is exempt by law from such dispossession or disablement.

(7) Communicating with a consumer regarding a debt by post card.

(8) Using any language or symbol, other than the debt collector's address, on any envelope when communicating with a consumer by use of the mails or by telegram, except that a debt collector may use his business name if such name does not indicate that he is in the debt collection business.

15 U.S.C. § 1692k(c) provides in pertinent part:

(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.

STATEMENT

In 1977, Congress enacted the Fair Debt Collection Practices Act (FDCPA) to regulate the debt collection industry. Fair Debt Collection Practices Act, Pub.L. 95-109, 91 Stat. 874, 875 (1977). When originally enacted, the definition of a "debt collector" excluded "any attorney-at-law collecting a debt as an attorney on behalf of and in the name of a client." Pub.L. 95-109, § 803(6)(F), 91 Stat. 874, 875. The FDCPA purported to regulate extra-judicial communications, acts and practices directed to consumers and third parties – late night telephone calls, threats of harm, harassing letters, disclosures of embarrassing debt information to employers,

neighbors and family. S. Rep. No. 382, 95th Cong., 1st Sess. 1977, 1977, U.S.C.C.A.N. 1695, 1696.

In 1986, Congress repealed the attorney exemption. Fair Debt Collection Practices Act, Amendment, Pub.L. 99-361, 100 Stat. 768. H.R. Rep. No. 405, 99th Cong., 1st Sess. 1985, 1986 U.S.C.C.A.N. 1752 (November 26, 1985). The exemption was repealed because attorneys, who did not engage in litigation, had entered into direct competition with lay debt collectors and used the exemption "to evade compliance with the Act." H.R. Rep. No. 99-405, pp. 1-2, 99th Cong., 1st Sess. 1985, 1986 U.S.C.C.A.N. 1752, 1752. The amendment was intended to place these attorneys under the same standards as lay debt collectors. H.R. Rep. No. 405, p. 5; *Jenkins v. Heintz*, 124 F.3d 824, 833-834 (7th Cir.1997), cert. denied 523 U.S. 1022 (1998); *F.T.C. v. Shaffner*, 626 F.2d 32 (7th Cir. 1980); 131 Cong.Rec. H10534-02 (Remarks of Rep. Annunzio) (December 2, 1985).

In 1995, this Court decided *Heintz v. Jenkins*, 514 U.S. 291 (1995). *Heintz v Jenkins* assessed whether the Act's definition of a debt collector, 15 U.S.C § 1692a(6), contained an implied exception for attorneys engaged in litigation. *Heintz v. Jenkins*, 514 U.S. 291, 292. This Court held it did not. *Heintz* rested its holding on the plain language of the statute and the 1986 amendment eliminating the attorney exemption. *Heintz*, 514 U.S. 291, 294-95. *Heintz* observed that the anomalies suggested by applying the Act to attorneys engaged in litigation would be mitigated by the availability of the bona fide error defense and "depend for their persuasive force upon readings that courts seem unlikely to endorse," *Id.* at 295-96.

1. In October 2003, Great Seneca Financial Corp. (Great Seneca), by and through its attorney Javitch, Block & Rathbone (JB&R), filed a civil complaint against Delores Hartman in the County Court for Harrison County, Ohio, which sought to recover $2,551.30 owed Great Seneca. Pet. App. 55. Likewise, Petitioners filed suit against Deborah Rice in October, 2003 in the Jefferson County Court No. 2, Jefferson County, Ohio, which sought to recover $2,778.99. Pet. App. 31. The state court complaints in each case stated (varying only by the amount pled in each case):

> 1. There is due the Plaintiff from the Defendant upon an account, the sum of $2,551.30 [$2,778.99].
> 2. A copy of the said Account is attached hereto and marked as "Exhibit A."
> 3. Although due demand has been made, Defendant has failed to liquidate the balance due and owing.
> WHEREFORE, the Plaintiff prays for a Judgment against the Defendant in the amount of $2,551.30 [$2,778.99] with interest at the rate of 10% per annum from date of judgment, and costs of the within action.

Pet. App. 31, 55. An account statement prepared by Great Seneca for purposes of litigation was attached as Exhibit A to each complaint. Pet. App. 31-32, 56. The account statement listed the balance due and identified as a new transaction, the assignment of the debt for the original lender, Providian, and an intermediary debt buyer Unifund. Exhibit A varied in these two cases only by the Respondent's name and address, and the amounts listed. The account

statement in Respondent Rice's case is set out in the Appendix. Pet. App. 63.

2. In two separate actions commenced in the U.S. District Court for the Southern District of Ohio, Eastern Division, Respondents argued that Petitioners violated 15 U.S.C. §§ 1692e, 1692e(10), and 1692f because lawsuits filed against them in state court seeking to collect their unpaid debts were false or contained literally true but allegedly misleading statements. Pet. App. 35-36, 59-60. The jurisdiction of the district court was invoked under 15 U.S.C. § 1692k(d) and 28 U.S.C. § 1331.

3. On cross-motions for summary judgment, Respondents argued, without any supporting evidence, that the statement was intended to resemble a credit card statement for the ostensible purpose of fooling consumers into believing that Great Seneca had a originated a credit card obligation, that it was "bogus" and "fake" because the "true" account records of the original creditor were not attached to the complaint, and that it was used to avoid Ohio pleading requirements for suits on accounts. Pet. App. 43-45.

The District Court held that Petitioners demonstrated that the allegations made were not false; that Great Seneca, as assignee, had a valid claim for money owed on an account at the time suits were filed against Respondents for the exact amounts pled; that Exhibit A was a record generated Great Seneca that "accurately reflected the terms of that account;" and that the statement in paragraph two of the state court complaints did not violate 15 U.S.C. §§ 1692e or 1692e(10). Pet. App. 38-41, 59-60.

As to the contention that despite being literally true, Exhibit A was misleading, the district Court held, evaluating the statement from the

perspective of the least sophisticated consumer, that with a careful reading of the account statement, even the least sophisticated consumer would understand that Exhibit A was an account statement generated by the assignee of the account-Great Seneca, and related to the original credit obligation of Providian National Bank. Pet. App. 43-45. The district Court further noted that Respondents "presented no affidavits, no expert opinion, nothing to demonstrate that there is a genuine issue of fact as to the nature of the Exhibit A statement." Pet. App. 45.

As alternate grounds for its ruling, the District Court held that both Great Seneca and JB&R were entitled to judgment under the FDCPA's bona fide error defense. Pet. App. 45-48, 59-60. As to Great Seneca, the Court held the evidence showed the account statement was "intended to serve as evidence of Great Seneca's ownership of the debt, and it was not intended to mislead, deceive or misrepresent the character or nature of the debt[;]...that no person has ever claimed that they were misled, deceived, or that they misunderstood the Great Seneca account statement[;]...and that they followed existing case law, that they engaged a law firm specializing in debt collection to manage its portfolio, and that the law firm was responsible for compliance with the FDCPA." Pet. App. 46-47. As to Petitioner JB&R, the District Court held the evidence showed it "reasonably relied on its client's representations about Plaintiff's account[;]"...and that in the co-managing partner's view it was a permissible practice under Ohio law, and was not prohibited by the FDCPA, for a purchased debt creditor to be plead recovery of an assigned credit card debt as an account claim, using the "business record created by the purchased debt creditor reflecting the amount

owed on the credit card debt...." Pet. App. 47. The district court declined to reach the constitutional issues raised by Petitioners. Pet. App. 50-51, 59-60.

4. In a plurality decision, the Court of Appeals reversed on the issues of liability, bona fide error and rejected Petitioners constitutional challenge. Pet. App. 1-28. Under the rule laid down by the narrowest grounds for the majority,[1] the Court held Exhibit A was "potentially misleading to the least sophisticated consumer ... [because the least sophisticated consumer] could be misled into believing that it was a credit card statement for an account with Great Seneca that involved transactions that occurred on the date listed." Pet. App. 25-26.

The majority stated "whether and how much Rice and Hartman owe Great Seneca, are useful background but are ultimately irrelevant to the outcome of the cases." Pet. App. 3-6, 13. The court reversed "because we conclude 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...." Pet. App. 13.

As to the bona fide error defense, the majority reversed, holding that "[t]he error made by Great Seneca and Javitch was a mistake of law; they represented that Exhibit A was an account in a manner that could be found to be misleading or deceptive." Pet. App. 17. Addressing each of the three elements of the defense, the court held that the "extensively detailed" evidence did not establish the violation was unintentional, resulting from an error which was bona fide, or sufficiently show the maintenance of procedures reasonably adapted to

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[1] *Marks v. United States,* 430 U.S. 188, 193 (1977).

avoid "any such error." 15 U.S.C. §1692k(c). Pet. App. 17.

As to the constitutional issues, the Court of Appeals rejected the constitutional challenge in its entirety. First, the Court of Appeals observed that *Heintz v. Jenkins*, 514 U.S. 291 (1995) reached the "clear conclusion that the FDCPA does apply to litigation-related activity. . . . The opposite conclusion, that the First Amendment prohibits FDCPA suits based on statements made during judicial proceedings, would negate the Supreme Court's holding that the FDCPA "does apply to lawyers engaged in litigation." *Heintz*, 514 U.S. at 294. Pet. App. 18-24.

Second, the Court observed that assuming the First Amendment did afford some protection to statements made during judicial proceedings, it would not protect the Petitioners for an "allegedly false statement." Pet. App. 22.

Third, the Court held that the bona fide error defense was constitutionally sufficient because literally true but "misleading [representations] would be protected from liability by the BFE defense if the collector could show that the mistake was unintentional, made in good faith, and that the collector had procedures to avoid such a mistake." Pet. App. 22-23.

The Court declined to address the Petitioners claim that substantive due process prohibited a finding of liability because "a provision of the Constitution directly addresses the type of illegal governmental conduct alleged . . . ." Pet. App. 23-24.

Finally, the Court rejected the Petitioners' argument that the commerce clause did not permit Congress to regulate state court judicial procedure. Pet. App. 24.

Judge White separately dissented. Applying the least sophisticated consumer standard, Judge White observed: "I cannot agree that the use of these statements of account would mislead the least sophisticated consumer into believing that he or she incurred a recent debt by use of a credit card issued by Great Seneca." Pet. App. 26-28.

REASONS FOR GRANTING THE WRIT

This case raises the issue of when litigation may be found to violate federal law, with respect to the FDCPA. According to the Sixth Circuit, the FDCPA permits the imposition of strict liability for representations in pleadings that are not objectively baseless, and contain no material false representation, irrespective of improper motive, whenever such pleadings have the potential to mislead. The First Amendment and federalism concerns prevent exposure to liability for filing a lawsuit having a reasonable basis in law and fact. The Sixth Circuit's decision fails to protect petitioning which is objectively and subjectively genuine or recognize the "chilling effect" on First Amendment petitioning caused by exposure to damages under the FDCPA for petitions having the mere potential to mislead. The decision is incompatible with the core principles and ideals in the First Amendment and this Court's precedent, and cannot be allowed to stand.

Further, the Court's holding creates an impossible standard to comply with. The undefined, ambulatory and standardless prohibitions contained in 15 U.S.C. § 1692e and § 1692f have vested the courts with unbridled discretion to decide what complies with the law and what doesn't. The

divergent views expressed by the district court and the plurality on what a consumer might think about Exhibit A (p. 9, supra), evidences the urgent need for this Court's guidance and supervisory powers. Whether evidence of consumer confusion is required in FDCPA cases involving literally true but potentially misleading representations is an issue that has divided the circuits. Review of this case would allow the court to determine what role evidence plays in assessing claims of consumer confusion and resolve the circuit conflict.

Whether the bona fide error defense under 15 U.S.C. § 1692k(c) includes legal errors at all is an open question, with the issue pending on review before this Court. *Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich, LPA*, S.Ct. Case No. 09-1200, reviewing 538 F.3d 469, 476 (6th Cir. 2008). Review of this case would permit the Court to consider the constitutional need for a robust, 'error in legal judgment' inclusive construction of the FDCPA's bona fide error defense, and whether evidence showing the Petitioners acted in good faith and reasonably under the circumstances, is sufficient to satisfy the requirements of the bona fide error defense, in light of the nature of the claims made here.

I. Review Is Required To Determine Whether The Application Of 15 U.S.C. §§ 1692e, 1692e(10) and 1692f Literally True But Potentially Misleading Representations In Pleadings Violates The Constitution.

A. The Pleadings Are Not Beyond First Amendment Protection.

Imposing strict liability on debt collectors for literally true but potentially misleading

representations in pleadings under the FDCPA is incompatible with this Court's First Amendment jurisprudence and the common law. Even if collecting a debt could be construed as synonymous with litigation, the First Amendment counsels against that construction. U.S. Const. amend. I. The character of a statement and whether it is beyond the protection of the First Amendment is a question of law over which this Court exercises de novo review. *Peel v. Attorney Registration and Disciplinary Com'n of Illinois*, 496 U.S. 91, 108 (1990).

1. Petition clause jurisprudence does not recognize an exception from qualified immunity for *every* potentially misleading statement. See e.g. *Freeman v. Lasky, Haas & Cohler*, 410 F.3d 1180, 1186 (9th Cir. 2005); *Sosa v. DIRECTV, Inc.*, 437 F.3d 923, 931-33 (9th Cir. 2006). Rather, "liability rests on deceits perpetrated with knowledge of their falsity." *United States v. Philip Morris USA Inc.*, 566 F.3d 1095, 1123-24 (D.C. Cir. 2009); *Kearney v. Foley & Lardner, LLP*, 582 F.3d 896, 906 (9th Cir. 2009). The pleadings at issue here enjoy protection under the First Amendment Right to Petition because they were not objectively baseless, nor motivated by an improper purpose, and contain no intentional misrepresentation. *BE & K Const. Co. v. N.L.R.B.*, 536 U.S. 516, 532 (2002); *Professional Real Estate Investors, Inc. v. Columbia Pictures Industries, Inc.*, 508 U.S. 49 (1993); *McDonald v. Smith*, 472 U.S. 479, 484 (1985); *Bill Johnson's Restaurants, Inc. v. N.L.R.B.*, 461 U.S. 731, 743 (1983); *California Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508 (1972). "[A]n objectively reasonable effort to litigate cannot be sham regardless of subjective intent." *Professional Real Estate Investors, Inc. v. Columbia Pictures Industries, Inc.*, 508 U.S. 49, 57.

One may be deprived of *Noerr-Pennington* immunity only when evidence shows that a "party's knowing fraud upon, or its intentional misrepresentations to, the court deprive the litigation of its legitimacy[;]" not when the litigation was commenced with an improper motive. *Liberty Lake Investments, Inc. v. Magnuson*, 12 F.3d 155, 158-59 (9th Cir. 1993); *Cheminor Drugs, Ltd. v. Ethyl Corp.*, 68 F.3d 119, 123-24, 27 (3d Cir. 1999); *Baltimore Scrap Corp. v. The David J. Joseph Co.*, 237 F.3d 394, 399-401 (4th Cir. 2001); *Freeman v. Lasky, Haas & Cohler*, 410 F.3d 1180, 1185, n. 2 (9th Cir. 2005). No such evidence was presented here.

2. Even assuming that the pleadings should be evaluated as commercial speech, this does not justify the exposure to liability and the loss of First Amendment protection for filing an accurate, literally true pleading that has the potential to mislead. *In re R.M.J.*, 455 U.S. 191, 203 (1982); *Ibanez v. Florida Dept. of Business and Professional Regulation, Bd. of Accountancy,* 512 U.S. 136, 144 (1994). The First Amendment interests at stake here should not be lost by the mere talismanic invocation of the word misleading.

3. Under the First Amendment, "speakers are protected from arbitrary and discriminatory enforcement of vague standards." *Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569, 588 (1998). A statute implicating the rights protected by the First Amendment will be invalidated under the void for vagueness doctrine "if its prohibitive terms are not clearly defined such that a person of ordinary intelligence can readily identify the applicable standard for inclusion and exclusion." *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972). Not only do "[v]ague laws ... trap the innocent by not providing

fair warning," but laws that fail to provide explicit standards guiding their enforcement "impermissibly delegate[ ] basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application." *Grayned v. City of Rockford,* 408 U.S. 104, 108-109.

Because the broad statutory text of 15 U.S.C. §§ 1692e, 1692e(10) and 1692f do not expressly apply to the content of state court pleadings, and the standard employed vests too much discretion in judges to decide what violates the law, applying the statutes to pleadings is arbitrary and capricious, and chills the exercise of the right to petition and access to the courts. *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 553 (1975); *City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 770 (1988).

4. Even if the Court of Appeals was correct in sending this case to the jury, "juries, not judges, decide disputed questions of fact even when First Amendment immunity is at issue", and the constitutional issue must also be submitted to the jury. *Personnel Dept., Inc. v. Professional Staff Leasing Corp.*, 297 Fed.Appx. 773, 779-781, 781, 2008 WL 4698479, 7, 6-10 (10th Cir. 2008); *Bill Johnson's Restaurants, Inc. v. N.L.R.B.*, 461 U.S. 731, 746 (1983); *Turner Broadcasting System, Inc. v. F.C.C.*, 512 U.S. 622, 668 (1994).

5. Common law recognized that lawyers and their clients could not be subject to suit for pertinent statements made in the course of judicial proceedings. *Burns v. Reed*, 500 U.S. 478, 490 (1991); *J & J Const. Co. v. Bricklayers and Allied Craftsmen, Local 1,* 468 Mich. 722, 735-55, 664 N.W.2d 728 (2003). The legislative history of the FDCPA does not reflect any consideration by Congress of the common

law litigation privilege. Therefore, no intent to abrogate the common law litigation privilege can be inferred. As such, "courts may take it as a given that Congress has legislated with an expectation that the [common law] principle will apply except 'when a statutory purpose to the contrary is evident.'" *United States v. Texas*, 507 U.S. 529, 534 (1993). No such purpose is present here. The underlying purpose of the common law immunity is to afford the participants "breathing room" to speak without fear of reprisal, so that the court can determine what the truth is. *Briscoe v. LaHue*, 460 U.S. 325, 335 (1983). The tripartite purposes of the FDCPA include, protecting consumers from abusive debt collection practices, establishing a level playing field for debt collectors, and promoting consistent state action. 15 U.S.C. § 1692(e).

Because the two have a consistent purpose, recognition of the litigation privilege for literally true pleadings would be consistent with the common law, the purpose of the legislation and the First Amendment.

B. The Circuits Are Divided Over Whether Least Sophisticated Consumer Standard Under The FDCPA For Literally True But Potentially Misleading Representations Requires Evidence Of Consumer Confusion To Create A Genuine Issue Of Material Fact Requiring A Jury Trial.

Federal courts are irreconcilably divided on whether least sophisticated consumer standard under the FDCPA for literally true but potentially misleading statements is always 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. This case presents an ideal opportunity for this Court to resolve the conflict, which was both squarely raised below and outcome-determinative in the Sixth Circuit's decision. Not only are the circuits irreconcilably divided, but the Sixth Circuit's decision is also wrong on the merits and frustrates the purpose and operation of the FDCPA.

1. The Second, Third and Ninth Circuits consider the issue a question of law because an objective assessment of the communication at issue is performed by the Court. See *Shapiro v. Dun & Bradstreet Receivable Mgmt. Servs., Inc.*, 59 F. App'x 406, 407-08 (2d Cir.2003); *Wilson v. Quadramed Corp.*, 225 F.3d 350, 353 n.2 (3d Cir.2000); *Terran v. Kaplan*, 109 F.3d 1428, 1432 (9th Cir.1997). The Fifth and Sixth Circuits require a jury to determine whether the communication violates the Act in any case where the document could be read in more than one way, at least one of which is inaccurate. *Kistner v. Law Offices of Michael P. Margelefsky, LLC*, 518 F.3d 433, 441 (6th Cir. 2008); *Gonzalez v. Kay*, 577 F.3d 600 (5th Cir.2009). The Seventh Circuit requires evidence of consumer confusion in all but the clearest cases, to demonstrate a genuine issue of material fact requiring a trial. *Johnson v. Revenue Mgmt. Corp.*, 169 F.3d 1057, 1060 (7th Cir.1999); *Ruth v. Triumph Partnerships,* 577 F.3d 790, 799-804 (7th Cir. 2009).

2. Petitioners submit that the Seventh Circuits approach is most consistent with the First Amendment interest in protecting speech that matters. Compare *Ruth v. Triumph Partnerships,* 577 F.3d 790, 804 with *Wilhelm v. Credico, Inc.* 519 F.3d 416, 421 (8th Cir. 2008); *Clark v. Capital Credit & Collection Services, Inc.*, 460 F.3d 1162, 1177 (9th

Cir. 2006); *Beck v. Maximus, Inc.*, 457 F.3d 291, 298-99 (3d Cir. 2006); *Russell v. Equifax A.R.S.*, 74 F.3d 30, 34-36 (2d Cir.1996).

3. The only evidence offered by Respondents to make out the claim of confusion were the state court complaints and their attachments. Respondents did not rebut Petitioners evidence that no one, including Respondents, ever claimed to be confused, deceived or misled by the use of the account statement. On summary judgment, where the Plaintiff bears the burden of proof, no genuine issue of material fact requiring trial is made out on the bare allegations contained in the pleadings. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986). If a party is unable to make a sufficient showing as to some essential element of its case, upon which it bears the ultimate burden of proof at trial, all other facts are necessarily immaterial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23. The non-moving party must, if he does respond, come forward with sufficient evidence to allow a reasonable trier of fact to find in his favor. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251. The presence of some metaphysical doubt about what consumers might think is insufficient to create a triable question of fact for a jury. *Scott v. Harris*, 550 U.S. 372, 380 (2007).

4. There were no genuine issues of material fact in dispute here; thus, there is nothing to try before a jury. Evidence of consumer confusion should be required in all but the clearest cases, to demonstrate a genuine issue of material fact requiring a trial. *Ruth v. Triumph Partnerships,* 577 F.3d 790, 799-804. Because there was no such evidence in this case, summary judgment should have been rendered in favor of Petitioners.

In light of the First Amendment interests at stake, Petitioners urge the Court to review this case to determine whether evidence of consumer confusion is constitutionally required under the FDCPA for literally true but potentially misleading representations.

C. The Decision Below Reflects Widespread Uncertainty Over the Meaning of *Heintz v. Jenkins*, Which This Court Alone Can Dispel.

This case also concerns the continuing vitality of this Court's decision in *Heintz v. Jenkins*, 514 U.S. 291 (1995). As a consequence of a pervasive misreading of this Court's holding in *Heintz v. Jenkins*, significant "anomalies" have developed in the application of the FDCPA to litigation which this Court in *Heintz* predicted lower courts were unlikely to endorse. The time is ripe for the Court to clarify that *Heintz* did not establish the caustic proposition that strict liability is constitutionally permitted under the FDCPA whenever a pleading has the potential of being misread by a hypothetical consumer.

1. Courts have reasoned that since *Heintz v. Jenkins* found the Act contained no implied exception for litigation, by necessity, all litigation is regulated by the FDCPA, subject only to the bona fide error defense. *Sayyed v. Wolpoff & Abramson*, 485 F.3d 226, 230-31 (4th Cir. 2007); *Medialdea v. Law Office of Evan L. Loeffler PLLC*, Unreported Case No. No. C09-55RSL, 2009 WL 1767185, 6, n. 4. (W.D.Wash. June 19, 2009). In other words, by suggesting that debt collection was synonymous with litigation, Courts have consistently read *Heintz* to mean Courts

were required to apply the FDCPA to all litigation engaged in by debt collectors.

2. There is however, substantial evidence in the legislative history supporting the view that Congress did not intend the FDCPA to apply to litigation at all and that it understood that debt collection was not synonymous with litigation. The first draft of Congressional legislation regulating false and misleading debt collector representations, prohibited among other things "falsely representing or falsely implying any facts about the character, extent or amount of an alleged debt of a consumer or of its status ***in any legal proceeding***." H.R. 10191 § 804(6), 94th Cong. 1st Sess. (1975)(emphasis added). As enacted, the FDCPA prohibition extends only to the false representation of "the character, amount, or legal status of any debt." 15 U.S.C. §1692e(2)(A). If Congress intended 15 U.S.C. §1692e to apply to legal proceedings, it could have left this clause in the statute, or defined the term "debt collection" to include litigation. Its omission compels the opposite conclusion. *TRW Inc. v. Andrews,* 534 U.S. 19, 28 (2001).

The 1986 amendment to the Act was prompted by concerns that non-litigating attorneys were unfairly competing with lay debt collectors. H.R. Rep. No 99-405, 1986 U.S.C.C.A.N. 1752; Hearings on H.R. 237, to Amend the Fair Debt Collection Practices Act, Before the Subcommittee on Consumer Affairs and Coinage of the Committee on Banking, Finance & Urban Affairs pp 1-3, 6, (October 22, 1985), pp. 1-3 (comments of Chairman Annunzio); pp. 11-22 (statement of Ann Fortney, FTC); pp.30-44 (statement of American Collectors Assn.); pp. 162-72 (comments of committee members John Hiler, Bruce Morrison). The 1986 amendment was to remedy the

problem of attorneys entering "the debt collection business" claiming to be exempt from the restrictions imposed on non-lawyer debt collectors. H.R. Rep. No 99-405, 1986 U.S.C.C.A.N. 1752, 1752-54. See *Dutton v. Wolpoff & Abramson,* 5 F.3d 649, 655 (3d Cir.1993).

3. Amendments to the Act after *Heintz* was decided supports the view that the FDCPA was not intended to apply to litigation. The only two affirmative disclosure requirements in the Act appeared in 15 U.S.C. § 1692e(11) and § 1692g; yet, both sections were amended to make clear that the Act does not apply to pleadings in litigation. An amendment was made in 1996 to § 1692e(11) to exempt pleadings from the subsequent disclosure requirements under that section. Economic Growth and Regulatory Paperwork Reduction Act of 1996, Pub.L. 104-208, Title II, § 2305(a), 110 Stat. 3009-425 (1996). In 2006, Congress again amended the Act to expressly provide that pleadings were not communications under § 1692g, to resolve a circuit conflict. Financial Services Regulatory Relief Act of 2006, Pub.L. 109-351, Title VIII, § 802, 120 Stat. 2006 (2006)(amending 15 U.S.C. § 1692g(d)(2006)). *Goldman v. Cohen,* 445 F.3d 152, 157 (2d Cir. 2006); *Thomas v. Law Firm of Simpson & Cybak*, 392 F.3d 914 (7th Cir. 2004); *Vega v. McKay*, 351 F.3d 1334, 1337 (11th Cir. 2003). The Amendment was intended to make clear that "a formal pleading in any civil action will not be considered communications now as defined by the FDCPA." 152 Cong. Rec. H7573-01, H7588 (Remarks of Rep. Garrett) (9-27-06) (consideration of Financial Services Regulatory Relief Act of 2006, PL 109-351, 120 Stat. 1966, § 802, effective October 13, 2006). In light of the 2006 amendment, "it is far from clear that the FDCPA

controls the contents of pleadings filed in state court." *Beler v. Blatt, Hasenmiller, Leibsker & Moore, LLC*, 480 F.3d 470, 473 (7th Cir. 2007).

Thus, even if litigation could be construed to fit within the plain language of the Act, it cannot be regulated by the Act because doing so is "not within its spirit nor within the intention of its makers.'" *Muniz v. Hoffman*, 422 U.S. 454, 469 (1975) (quoting *Holy Trinity Church v. United States*, 143 U.S. 457, 459 (1892)).

4. *Heintz v. Jenkins* cannot be read as a *sub silentio* constitutional holding endorsing the position taken by the Sixth Circuit. Pet. App. 19-21. Plainly, the constitutionality of the FDCPA as applied to litigation is not foreclosed by *Heintz v. Jenkins*. See *F.C.C. v. Fox Television Stations, Inc.*, __ U.S. __, 129 S.Ct. 1800, 1812, 1819 (2009); *Clark v. Martinez*, 543 U.S. 371, 381-82 (2005); *United States v. L. A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 38 (1952); *Webster v. Fall*, 266 U.S. 507, 511 (1924).

Petitioners suggest this Court adopt a limiting construction of 15 U.S.C. § 1692e and § 1692f Act to avoid the constitutional questions raised here. *SKF USA, Inc. v. U.S. Customs and Border Protection*, 556 F.3d 1337, 1352-60 (Fed. Cir. 2009).

D. Review Is Required To Assess Whether 15 U.S.C. § 1692e And § 1692f Violate Substantive Due Process.

This case also epitomizes the arbitrary, capricious and unreasonable application of the FDCPA. Of the four judges reviewing the documents at issue, two concluded they were not misleading at all, one expressed the view that they were potentially misleading and the fourth, that it was for a jury to determine. If the Courts and judges can't agree on

what violates the law, how are debt collectors expected to comply with it?

1. The standard used by the majority to assess the pleading's attachment was arbitrarily applied, by ignoring the term "assignee" appearing on the form, which the Court characterized as "a legal term that would not necessarily help the least sophisticated consumer understand the relationships between the parties listed." Pet. App. 14. Compare with *Sprint Communications Co., L.P. v. APCC Services, Inc.*, __ U.S. __, 128 S.Ct. 2531, 2541-42 (2008). Both the dissent and the district court found the presence of that term on the form dispositive, and construed it in accordance with its ordinary meaning. Pet. App. 27, 44-45. The document was entitled to be construed as a whole, in accordance with the ordinary meaning of terms used. *Wahl v. Midland Credit Management, Inc.*, 556 F.3d 643, 646 (7th Cir. 2009); *Miller v. Javitch, Block & Rathbone*, 561 F.3d 588, 594 (6th Cir. 2009); Cf. *Old Dominion Branch No. 496, Nat. Ass'n of Letter Carriers, AFL-CIO v. Austin*, 418 U.S. 264, 283 (1974). Turning a blind eye to the language employed was arbitrary, capricious and unreasonable.

2. The FDCPA "fails to meet the requirements of the Due Process Clause ... [because] it is so vague and standardless that it leaves the public uncertain as to the conduct it prohibits...." *City of Chicago v. Morales*, 527 U.S. 41, 56 (1999)(quoting *Giaccio v. Pennsylvania*, 382 U.S. 399, 402-403 (1966)); U.S. Const. amend. V.

Where cases involving identical facts can be decided in two different courts and the outcome is not the same, the explanation for the different outcome can only be attributed to capriciousness. Compare e.g. *Greco v. Trauner, Cohen & Thomas, L.L.P.*, 412

F.3d 360 (2d Cir. 2005) with *Gonzalez v. Kay*, 577 F.3d 600, 607-12 (5th Cir. 2009) (Jolly, J. dissenting).

E. Review Is Required To Assess Whether 15 U.S.C. § 1692e And § 1692f Violate The Commerce Clause.

The decision also upsets the balance of power between the federal government and the states over their courts and regulation of the practice of law in an area of traditional state concern, where adherence to state pleading and practice rules is no longer sufficient to avoid liability under federal law. Although there is no question that debt collection affects interstate commerce, the application of the FDCPA to police state court judicial proceedings represents an unheralded departure from the history and tradition of allowing states to manage their own courts and the practice of law.

1. The content of state court pleadings and regulating the practice of law, are areas traditionally recognized as falling within the ambit of state concern. *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 792 (1975); *Gade v. National Solid Wastes Management Ass'n*, 505 U.S. 88, 98 (1992). Throughout the history of the Nation, the states and not the federal government, have regulated the practice of law and have their own court rules and procedures for adjudicating suits and rendering judgment. Nothing appears in the legislative history of the FDCPA supporting the view that Congress intended the FDCPA to regulate the content of state court pleadings or state court litigation and to convert Ohio Civ. Rule 11 into a strict liability standard.

2. The Sixth Circuit held the limit of Congressional authority under the Commerce clause

is not implicated in this case. Pet. App. 24; U.S. Const. art. I, § 8, cl. 3 If adherence to state standards results in liability under federal standards, there can't be any serious disagreement that the application of the FDCPA in this case has a substantial effect on state law. Congress does not have the power "to effect [a] serious and fundamental restriction on advocacy of attorneys." *Legal Services Corp. v. Velazquez*, 531 U.S. 533, 534 (2001). Further, Congress has not taken upon itself the authority to determine the how lawyers must plead suits to protect consumers, thereby infringing on the state's traditional role of regulating attorneys. See *Leis v. Flynt*, 439 U.S. 438, 442 (1979).

3. In this case, the Ohio Supreme Court defined the form and content of pleading an action on an account, which was adhered to by Petitioner JB&R. See Ohio Civ.R. 84 & Ohio Civ.R. Form 3. The standard to which a lawyer must comply with when filing suit is set forth in Ohio Civ.R. 11, not the FDCPA. Ohio law provides consumers with the ability to challenge claims made against them in court; indeed, "[t]he right to sue and defend in the courts is the alternative of force." *Chambers v. Baltimore & O.R. Co.*, 207 U.S. 142, 148 (1907).

4. Contrary to the assessment of the panel, the Ohio Supreme Court has held, "there is no language in Ohio Civ.R. 10(D)(1) that the account or written instrument is required to establish the adequacy of the complaint." *Fletcher v Univ Hosp.*, 120 Ohio St.3d 167, 170 (2008). Likewise, Ohio Appellate Courts have ruled that "[Ohio Civ.] Rule 10(D)(1) does not require a plaintiff to attach "a complete copy of the account" ..., nor does it require a creditor to attach a copy of every statement issued to the

borrower." *Capital One Bank v. Nolan*, 2008-Ohio-1850, 2008 WL 1758892, 3 (4th Dist. App. 2008).

II. Review Is Required Because The Availability Of The FDCPA's Bona Fide Error Defense In This Case Depends On The Outcome Of *Jerman v. Carlisle, Mcnellie, Rini, Kramer & Ulrich, LPA*, Case No. 08-1200.

In *Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich, LPA*, 538 F.3d 469 (6th Cir. 2008), the Sixth Circuit followed the Seventh and Tenth Circuits, holding that the FDCPA's bona fide error defense, 15 U.S.C. §1692k(c), includes errors of law a debt collector makes which fail to comply with the FDCPA. *Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich, LPA*, 538 F.3d 469, 473-74 (citing *Johnson v. Riddle*, 305 F.3d 1107 (10th Cir. 2002); *Nielsen v. Dickerson*, 307 F.3d 623, 641 (7th Cir. 2002)). See also *Ruth v. Triumph Partnerships,* 577 F.3d 790, 804 (7th Cir. 2009). The Court also cited holdings from the Second, Eighth, and Ninth Circuits holding that the bona fide error defense does not apply to legal errors. *Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich, LPA*, 538 F.3d 469, 474-76 (citing *Picht v. Jon R. Hawks, Ltd.*, 236 F.3d 446, 451 (8th Cir.2001); *Hulshizer v. Global Credit Servs., Inc.,* 728 F.2d 1037, 1038 (8th Cir.1984); *Pipiles v. Credit Bureau of Lockport, Inc.*, 886 F.2d 22, 27 (2d Cir.1989); *Baker v. G.C. Servs. Corp.*, 677 F.2d 775, 779 (9th Cir.1982). This Court granted certiorari to resolve the circuit conflict. *Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich, LPA,* 129 S.Ct. 2863, 174 L.Ed.2d 575, Case No. 08-1200.

1. In contrast to the legal uncertainty resulting in a bona fide error at issue in *Jerman*, this case

involves the complete absence of federal precedent and regulatory guidance defining the proper format and information required to be set forth in a purchased debt creditor's account record and pleading. Moreover, while the validation notice in issue in *Jerman* involved a form of commercial speech, *Jerman* did not address any of the constitutional issues raised here. The framework for assessing whether a good faith unintentional error should excuse in *Jerman*, must be consistent with the constitutional interest in protecting speech that matters. *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557 (1980); *Edenfield v. Fane*, 507 U.S. 761, 770-771 (1993); *Peel v. Attorney Disciplinary Comm'n of Ill.*, 496 U.S. 91, 111 (1990); *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985).

2. As noted by the District Court, in 2003, there was no "FDCPA case law supporting [the] contention that ... a procedural challenge to a state court pleading-i.e., the failure to attach all of the original creditor's documents-violates 15 U.S.C. §§ 1692e, 1692e(10) or 1692f." Pet. App. 39-40. The bona fide error defense is available when a debt collector "violates the act in any manner, including with regard to the act's coverage" when the violation was "unintentional and occurred despite procedures designed to avoid such violations." S.Rep. 95-382, p. 5. The District Court held Petitioners offered unrebutted evidence that they did not intend to violate the FDCPA; that Great Seneca followed existing case law, engaged a specialized law firm responsible for maintaining compliance with the FDCPA; that JB&R was entitled to rely on its client's representation and had no duty under the FDCPA to independently investigate the claims presented for

collection and acted reasonably under the circumstances. Pet. App. 46-48.

3. Reversing, the Court of appeals held Petitioners had not shown what procedures were used to avoid violating the FDCPA for literally true but potentially misleading business records used to support lawsuits; had not shown what procedures were used to ensure that mistakes of law did not occur; had not shown ongoing FDCPA training, procuring and reviewing the most recent case law, or continuing compliance with the FDCPA. Pet. App. 15-18. The Court of Appeals implicitly found that the absence of any precedent was insufficient to qualify for the bona fide error defense in this case, because Petitioners were required to show that "they employ procedures meant to avoid mistakes of law that could cause FDCPA violations." Pet. App. 18.

4. Petitioners propose that an objective test, considering what was reasonable to believe at the time and under the circumstances, would be a proper test for demonstrating the existence of a good faith unintentional error in any case involving a factual or legal error. See e.g., *Charbonneau v. Mary Jane Elliott, P.C.*, 611 F.Supp.2d 736, 743 (E.D. Mich. 2009); *Kirk v. Gobel*, 622 F.Supp.2d 1039, 1049 (E.D.Wash. 2009); *Castro v. Collecto, Inc.*, Unreported Case. No. EP-08-CA-215-FM, 2009 WL 3617557 *23-24 (W.D.Tex. Oct. 27, 2009).

In making the determination in this case, a reasonable person in Petitioners' position would not have known or have been able to predict how the Sixth Circuit would rule in this case, and had no reason in 2003 to employ specific procedures used to avoid violating the FDCPA for literally true but potentially misleading business records used to support lawsuits. It would be improper to expose

Petitioners to money damages for failing to predict the outcome of this case. *Pearson v. Callahan*, 129 S.Ct. 808, 822 (2009); compare with *Hope v. Pelzer*, 536 U.S. 730, 741 (2002).

A. 15 U.S.C. § 1692k(c) Is Unconstitutional As Applied To Literally True But Potentially Misleading Representations In Pleadings.

Filing a suit supported by probable cause, that is not objectively baseless, contains no materially false representations, and brought in good faith based on a client's representation that a debt is owed, is protected under the First Amendment. *McDonald v. Smith*, 472 U.S. 479, 484 (1985); *Professional Real Estate Investors, Inc. v. Columbia Pictures Industries, Inc.*, 508 U.S. 49 (1993); *Bill Johnson's Restaurants, Inc. v. N.L.R.B.*, 461 U.S. 731, 743 (1983); *BE & K Const. Co. v. N.L.R.B.*, 536 U.S. 516, 532 (2002). These types of expression retain protection under the First Amendment until there is a heightened showing of intent, falsity or recklessness, before liability can be imposed, to prevent a chilling effect on protected, truthful, speech. See e.g., *Hustler Magazine v. Falwell,* 485 U.S. 46, 52 (1988); *Gertz v. Robert Welch, Inc.,* 418 U.S. 323, 341 (1974); *Herbert v. Lando,* 441 U.S. 153, 156-57 (1979); *New York Times Co. v. Sullivan,* 376 U.S. 254, 279-80 (1964).

1. Even when the speech at issue involves private parties and a matter of purely private concern, liability cannot be presumed; a showing of intent, falsity or recklessness, must be proven by the Respondents. *Gertz v. Robert Welch, Inc.,* 418 U.S. 323, 339-47 See also e.g., *J & J Const. Co. v.*

Bricklayers and Allied Craftsmen, Local 1, 468 Mich. 722, 735-55, 664 N.W.2d 728, 735-45 (2003).

2. Exposing Petitioners to strict liability for engaging in protected petitioning activity cannot be avoided by affording petitioners a bona fide error defense limited to clerical errors. Further, if the bona fide error defense does not protect a "lawyer who commits an unintentional violation of the FDCPA by asserting in good faith a claim that is later rejected by a court, it would undermine the holding in *Heintz v. Jenkins*." *Taylor v. Luper, Sheriff & Niedenthal Co., L.P.A.*, 74 F.Supp.2d 761, 765 (S.D.Ohio 1999). Likewise, placing the burden of proof on the Petitioners to demonstrate why strict liability should not attach, reduces the First Amendment and the Right to Petition to a meaningless platitude.

As construed by the Court of Appeals, 15 U.S.C. § 1692k(c) does not afford any breathing room for protected petitioning activity and inadequately addresses the competing values at stake. *BE & K Const. Co. v. N.L.R.B., supra.* Measured against the requirements of the First Amendment, the FDCPA's bona fide error defense is constitutionally infirm when applied to protected communications and conduct, because the burden of proof is placed on the debt collector and because there is no requisite heightened showing of falsity or intent. *Gertz v. Robert Welch, Inc.*, supra; *Bill Johnson's Restaurants, Inc. v. N.L.R.B.*, 461 U .S. 731, 742-44.

3. Even if the Court concludes in *Jerman* that the bona fide error defense applies to legal errors, review in this case would permit the Court to define the constitutional requirements when the FDCPA is applied to litigation, and to address the competing interests at stake for claims premised on literally true but potentially misleading statements made in

pleadings. Compare *Taylor v. Luper, Sheriff & Niedenthal Co., L.P.A.*, 74 F.Supp.2d 761, 765, with *Ruth v. Triumph Partnerships,* 577 F.3d 790, 804-5 (7th Cir. 2009).

III. The Sixth Circuit's Decision Is Wrong On The Merits.

This Court also should grant certiorari because the Sixth Circuit's decision is wrong on the merits. The Court of Appeals read the prohibitions against false or misleading representations and unfair practices in 15 U.S.C. §§ 1692e, 1692e(10) and 1692f as applicable to litigation. However, the words "in litigation" do not appear in the statutory text. Further, the word "misleading" only appears in the general prohibition contained in 15 U.S.C. § 1692e.

A. A Potentially Misleading Statement In Litigation By A Debt Collector Is Not Actionable Under 15 U.S.C. §§ 1692e, 1692e(10) Or 1692f.

The only view that debt collection, and as pertinent here, the phrases "collection of any debt" as used in § 1692e, and "to collect or attempt to collect any debt" used in § 1692e(10) and § 1692f include litigation, appears in *Heintz v. Jenkins*, dicta, discussed *supra*.

1. The rule of *ejusdem generis* applicable to statutes containing a series of enumerations followed by a general enumeration, is equally applicable to a statute containing a general prohibition followed by specific enumerations. 2A Sutherland Statutory Construction § 47:17 (7th ed. 2008). 15 U.S.C. §§ 1692e and 1692f share a similar structure in that they both contain a general prohibition followed by enumerated examples of prohibited conduct; Section

1692e contains sixteen enumerated examples and Section 1692f contains eight examples. Read this way, the phrase "[w]ithout limiting the general application of the foregoing" must be informed by the specific examples of conduct delineated in the examples. *Beler v. Blatt, Hasenmiller, Leibsker & Moore, LLC*, 480 F.3d 470, 474-75 (7th Cir. 2007); *Clark v. Capital Credit & Collection Services, Inc.*, 460 F.3d 1162, 1175 (9th Cir. 2006). None of the enumerated examples in 15 U.S.C. §§ 1692e(1)-(16) or 1692f(1)-(8) expressly or impliedly include a potentially misleading account statement attachment to a pleading.

2. Among the sixteen subsections of 1692e, the word "misleading" appears in none of the subsections. Eleven subsections refer to false representations – 1692e(1), (2), (3), (6), (7), (9), (10), (12), (13), (15) and (16). These subsections should be construed to provide examples of the conduct or communications amounting to a "false representation." Sutherland, *supra*; H.R.95-131, p. 13; S.R. 95-382, p. 8. "'Misleading' is similar to 'deceptive,' except that it can be innocent; one intends to deceive, but one can mislead through inadvertence." *Evory v. RJM Acquisitions Funding L.L.C.*, 505 F.3d 769, 775 (7th Cir. 2007). Of the remaining subsections, three subdivisions relate to deceptive representations (1692e(4), 1692e(5), 1692e(8)) because they denote a degree of intent, and two relate to misleading representations (1692e(11) and 1692e(14)) because they relate to omissions.

3. 15 U.S.C. § 1692e(10) was intended to prohibit debt collectors from using false pretenses to obtain information concerning a consumer. *Bernstein v. F.T.C.*, 200 F.2d 404, 405 (9th Cir. 1953); *Floersheim v. F.T.C.*, 411 F.2d 874, 877 (9th Cir.

1969); 16 C.F.R. § 237.1 (1973), repealed 60 Fed.Reg. 40263-01 (1995); .S. REP. 95-382, 1977 U.S.C.C.A.N. 1695, 1696, 1698. Some courts have erroneously read subsection 1692e(10) as a catchall clause by truncating the sentence, inserting a period after the word "debt" and ignoring the last clause which refers to obtaining "information concerning a consumer", to support the conclusion that § 1692e(10) is "particularly broad and encompasses virtually every violation, including those not covered by the other subsections." Statements of General Policy or Interpretation Staff Commentary on the Fair Debt Collection Practices Act, 53 Fed.Reg. 50097, 50105 (December 13, 1988). See e.g. *Rosenau v. Unifund Corp.*, 539 F.3d 218, 224 (3d Cir. 2008).

As there was no false representation or deceptive means "to obtain information concerning a consumer" under § 1692e(10), the Court of Appeals erred in reversing on these claims.

4. Among the eight subsections of 1692f, there is neither any reference to statements made in pleadings or to potentially misleading statements made during the course of litigation. *Beler*, 480 F.3d 470, 473. As such, the Court of Appeals erred in reversing these claims.

5. Read as a whole and attributing the ordinary meaning to the term assignee appearing on the account statement, there is no potential to mislead. Pet. App. 26-28, 42-45.

IV. The Issues Presented are Recurring and of Great Practical Importance.

The importance of this case to the U.S. economy, banking industry, debt buying market, and lawyers engaged in litigation is substantial. According to the Federal Reserve, outstanding

consumer credit on revolving accounts exceeded 911 billion dollars at the close of the second quarter, 2009.[2] The charge-off rate for credit card debts, that is, the percentage of accounts charged to bad debt, is currently at 9.55%.[3] As recently noted by the General Accountability Office:

> "To recover delinquent debt, credit card issuers use a combination of methods, including ... collection attorneys, and the sale of debt to a debt buyer. The debt collection industry recovers and returns to card issuers and other creditors billions of dollars in delinquent debt each year that would otherwise go uncollected. These efforts increase the availability of consumer credit and reduce its cost."

United States Government Accountability Office, Credit Card Debt Collection Report #GAO-09-748 (9-09).[4] The sale of bad debts to debt buyers has a multi-billion dollar effect on the U.S. economy. Id. at p. 7 (p. 11/66). With over 100 U.S. banks failing this year,[5] the ability of banks to sell these debts will be diminished as a result of the substantial risk posed to debt buyers who attempt collection through litigation, if the decision is allowed to stand. Every debt that is sold to a debt buyer who attempts to collect through litigation would have the same potential to mislead as presented in this case.

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[2] See http://www.federalreserve.gov/releases/g19/Current/ (visited on 11-4-09).

[3] See http://www.federalreserve.gov/releases/chargeoff/chgallsa.htm (visited on 11-4-09).

[4] Reprinted online at http://www.gao.gov/new.items/d09748.pdf (visited 11-4-09)

[5] http://www.fdic.gov/bank/individual/failed/banklist.html (visited 11-4-09).

Because the FDCPA does not expressly address what account information should be provided when litigation is commenced, and the FTC has no regulatory authority under the Act, the task of defining what is deceptive, misleading or unfair has fallen on the Courts. Id. at pp. 26-30, 44-47.

How debt buyers and their lawyers can collect these debts in litigation in compliance with the FDCPA is of national importance.

CONCLUSION

For all the foregoing reasons, the petition for a writ of certiorari should be granted. In the alternative, Petitioners request the Court defer action on this petition pending a decision in *Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich, LPA*, S.Ct. Case No. 09-1200.

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