NO. 17-736

In the Supreme Court of the United States

BLATT, HASENMILLER,
LEIBSKER & MOORE LLC,

Petitioner,

–v–

RONALD OLIVA,

Respondent.

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

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does *Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich, L.P.A.'s*, 559 U.S. 573, 130 S.Ct. 1605, 176 L.Ed.2d 519 (2010) exclusion of mistake of law from the *bona fide* error defense in 15 U.S.C. § 1692k(c) apply to reliance on overturned precedent?

2. Does a retroactive judicial determination of liability under the Fair Debt Collection Practices Act ("FDCPA") create a due process issue where the previous ruling was permissive and penalties are not compulsory?

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STATEMENT OF THE CASE

I. Factual Background

In December 2013, Ronald Oliva resided in Cook County's fifth municipal district. *Oliva v. Blatt, Hasenmiller, Leibsker & Moore, LLC*,, 185 F. Supp. 3d 1062, 1063-64 (N.D. Ill. 2015). Petitioner, however, opted to file a debt collection lawsuit against him in the Richard J. Daley Center in Cook County's first municipal district. *Id.* At the time Petitioner filed suit, the Seventh Circuit was considering *en banc* review in *Suesz v. Med-1 Solutions, LLC*, 734 F.3d 684 (7th Cir. 2013), which challenged the Circuit's previous definition of "judicial district" in 15 U.S.C. § 1692i(a)(2). Petitioner's suit remained pending in the first municipal district following the Seventh Circuit's grant of rehearing *en banc*. *Suesz v. Med-1 Solutions, LLC*, No. 13-1821, Dkt. 35 (7th Cir.). The Seventh Circuit issued its opinion while Petitioner's collection suit was active, holding that a "judicial district" under the Fair Debt Collection Practices Act ("FDCPA") should be defined as the smallest jurisdictional unit. *Suesz v. Med-1 Solutions, LLC*, 757 F.3d 636 (7th Cir. 2014) (*en banc*). The Court of Appeals explicitly applied its holding retroactively, encompassing Petitioner's decision to file in the first, rather than the fifth municipal district.

II. Procedural Background

Mr. Oliva filed suit alleging violation of the FDCPA, 15 U.S.C. § 1692i(a)(2), which provides that "[a]ny debt collector who brings any legal action on a debt against any consumer shall . . . bring such action only in the

judicial district or similar legal entity—(A) in which such consumer signed the contract sued upon;[1] or (B) in which such consumer resides at the commencement of the action."

The parties took oral and written discovery and filed cross-motions for summary judgment. *Oliva*, 185 F. Supp. 3d at 1063. Notwithstanding the Supreme Court's 2010 ruling in *Jerman* that mistakes of law were no defense to liability under the FDCPA, Petitioner claimed protection under the *bona fide* error defense. *Id.*; *Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich, L.P.A.*, 559 U.S. 573, 130 S.Ct. 1605, 176 L.Ed.2d 519 (2010). The district court granted Petitioner's motion for summary judgment and denied Mr. Oliva's. *Oliva*, 185 F. Supp. 3d at 1063. Mr. Oliva appealed to the Court of Appeals for the Seventh Circuit, which affirmed the District Court's ruling. *Oliva v. Blatt, Hasenmiller, Leibsker & Moore, LLC*, 825 F.3d 788, 789 (7th Cir. 2016). Mr. Oliva filed a petition for *en banc* review, and Petitioner filed a response. App. Dkt. 30, 33. The Seventh Circuit granted the petition but did not find it necessary to request oral argument or further briefing. *Id.* at 35, 36. The Court of Appeals, *en banc*, reversed the panel's ruling, citing the panel's failure to follow the Supreme Court's precedent. *Oliva v. Blatt, Hasenmiller, Leibsker & Moore*, *LLC*, 864 F.3d 492 (7th Cir. 2017) (*en banc*).

Petitioner filed its petition for *certiorari* . At the request of the Court, Mr. Oliva files this response.

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[1] In this case, there was no signed contract.

SUMMARY OF ARGUMENT

The rules of this Court provide an enumerated list of "compelling reasons" for review of a case on *certiorari*. Sup. Ct. R. 10. Petitioner has not identified a single one of these reasons and has satisfied none of them. Instead, it seeks to reopen the question closed by this Court eight years ago in *Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich, L.P.A.*, 559 U.S. 573, 130 S.Ct. 1605, 176 L.Ed.2d 519 (2010), and applied by an *en banc* Court of Appeals for the Seventh Circuit. *Oliva*, 864 F.3d 492. In *Jerman*, following extensive discussion of both textual and practical considerations, the Court issued a bright line rule excluding mistakes of law from the application of the *bona fide* error defense in the FDCPA. *Jerman*, 559 U.S. at 604-05; 15 U.S.C. § 1692k(c). The facts of this case fall squarely within the mandate of *Jerman*.

It comes as no surprise, therefore, that the Seventh Circuit's ruling does not conflict with those of any other court of appeals. Indeed, no other court of appeals has even considered the questions presented here, further emphasizing, at minimum, the inappropriateness of review at this time.

Nor does this case present any important, unsettled issues of federal law. This Court has opined repeatedly on the issue of retroactivity and has already declined to do so in this context. *See Reynoldsville Casket Co. v. Hyde*, 514 U.S. 749, 752, 115 S.Ct. 1745, 1748 (1995); *Med-1 Solutions LLC v. Suesz*, 135 S.Ct. 756, 190 L.Ed.2d 628 (U.S. 2014) (denying *certiorari*). Likewise, the constitutional concerns raised are merely illusory.

This Court has already provided a means to avoid such questions by resort to the judicial discretion provided in §§ 1692k(a)(3) and (b). *Jerman* , 559 U.S. at 597-99. The district court can easily resolve this case without the need for this Court's intervention.

Finally, though Petitioner casts itself as a victim of injustice, it glosses over its own legal choices, made while *en banc* review of purportedly "settled" precedent was ongoing. At best, Petitioner's active legal determinations render this case an inappropriate vehicle for consideration of the questions it seeks to present. More significantly, however, it illustrates the clear applicability of *Jerman*'s rule to this case.

Nothing in this case merits the extraordinary step of review on *certiorari*. The petition should, accordingly, be denied.

ARGUMENT

I. THE SEVENTH CIRCUIT APPLIED SETTLED SUPREME COURT PRECEDENT

Certiorari in this case would reopen in its entirety an issue definitively closed by this Court eight years ago. In challenging the Seventh Circuit's application of the Court's clear rule, Petitioner put this Court's precedent squarely in its crosshairs. Rather than the flood of lawsuits predicted by Petitioner, courts would likely face a deluge of affirmative defenses seeking to test the re-expanded limits of the *bona fide* error defense. Discounting the plain language of the *Jerman* opinion and relying on the dissent, Petitioner asks not

that the Court determine an expansion of *Jerman* but that it revisit the holding altogether. Rulings of this Court should not be disturbed so easily.

A. This Court's Clear Rule in *Jerman* Does Not Have Exceptions

The Supreme Court in *Jerman* explicitly and broadly rejected the notion that the *bona fide* error defense "encompass[es] 'all types of error,' including mistakes of law." *Jerman*, 559 U.S. at 581. In a detailed textual analysis, the Supreme Court determined that "when Congress has intended to provide a mistake-of-law defense to civil liability, it has often done so more explicitly than here." *Id.* at 583. "Congress also did not confine liability under the FDCPA to 'willful' violations, a term more often understood in the civil context to excuse mistakes of law." *Id.* at 584.

Jerman leaves little doubt as to its scope, finding that "the broad statutory requirement of procedures reasonably designed to avoid 'any' *bona fide* error indicates that the relevant procedures are ones that help to avoid errors like clerical or factual mistakes," not mistakes of law. *Id.* at 587. Applying *Jerman*, the Seventh Circuit found "no indications that the Court intended to allow § 1692k(c) to protect some mistakes of law about the Act but not others." *Oliva v. Blatt, Hasenmiller, Leibsker & Moore*, *LLC*, 864 F.3d 492, 498 (7th Cir. 2017) (*en banc*).

Indeed, the *Jerman* Court, placed no weight on the source of problematic legal determinations, referencing "debt collectors who adopt aggressive but mistaken interpretations of the law;" a debt collector need only "adopt" an erroneous interpretation, no matter

the origin. *Jerman*, 559 U.S. at 602. To emphasize this strict approach, the Court discounted any role for mental culpability for assessing liability: "Our law is therefore no stranger to the possibility that an act may be 'intentional' for purposes of civil liability, even if the actor lacked actual knowledge that her conduct violated the law." *Id.* at 582-83. In other words, whether from "settled" or "unsettled" law, whether Petitioner's concept of the law derived from independent analysis or reliance on *Newsom v. Friedman*, 76 F.3d 813 (7th Cir. 1996), only the conduct matters. The Court drew no distinctions in *Jerman* and should not seek to do so now.

B. The *Jerman* Rule Applies Directly to *Oliva*

The Seventh Circuit applied the *Jerman* rule to the legal judgments made by the Petitioner. Though Petitioner describes a blind adherence to then-existing court precedent, its choice of venue arose from its independent legal determinations. The *Oliva* Court specifically noted that it did not face "a situation[] in which a debt collector concluded in good faith that the FDCPA required it to act in such a way that a court later determined was prohibited." *Oliva*, 864 F.3d at 501 n.5 (emphasis in original). Rather, *Newsom* interpreted the FDCPA to allow debt collectors to choose a courthouse within the correct county.[2]

Moreover, Petitioner was on notice of the risk. At the time it filed and maintained the collection suit, *en*

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[2] Mr. Oliva's testimony on the convenience of the Daley Center has no bearing on liability under the statute, though it may to damages and, potentially, standing. Likewise, there is no indication that Petitioner was aware of the convenience to Mr. Oliva when it filed.

banc review of the divided panel decision in *Suesz v. Med-1 Solutions, LLC*, 734 F.3d 684 (7th Cir. 2013) was pending and, accordingly, the court had not yet entered a mandate on the panel opinion. Fed. R. App. P. 41(b). Even assuming, therefore, that *Jerman* had any ambiguity, Petitioner's actions would still fall under its auspices. Indeed, the Seventh Circuit found application of the Supreme Court's rule sufficiently straightforward that it requested neither briefing nor argument on the issue in its *en banc* review.

C. This Court Already Considered and Rejected the Concerns Raised by the Petitioner

Petitioner's arguments that the Seventh Circuit's actions fall outside the scope of *Jerman* would seem far more plausible had this Court not explicitly considered—and rejected—them. The interplay between the majority opinion and the dissent makes clear the limitations and pitfalls discussed and the broad rule that resulted in spite of any concerns.

1. The Court Specifically Debated the Impact of Overturned Precedent

Petitioner puts great emphasis on the dissent's concern in *Jerman* that "where a particular practice is compelled by existing precedent, the attorney may be sued if that precedent is later overturned." *Jerman*, 559 U.S. at 621. The parallels between the dissent's comment and *Oliva*, however, prove not that the dissent was correct but rather that the Court considered the factual scenario of this case and nonetheless applied a

bright line rule.[3] The issues before the Court are not, therefore an extension of *Jerman* run amok but rather a contemplated and accepted result of the bright-line holding.

2. The Court Rejected "Good Faith" Adherence to the Law as a Defense

The *Jerman* Court might have been referencing the facts of *Oliva* in determining that the *bona fide* error defense did not apply even where the debt collector "'acted reasonably at every step' and committed a 'technical violation' resulting in no 'actual harm' to the debtor." *Jerman*, 559 U.S. at 601-02 (quoting Kennedy, J., dissenting, at 622, 617, 618). Indeed, the Court pointed out that allowing the defense in the narrow circumstances described has the effect of allowing "nonlawyer debt collectors [to] obtain blanket immunity for mistaken interpretations of the FDCPA simply by seeking the advice of legal counsel." *Id.* at 602. However sympathetic the mistakes of the Petitioner here, "[i]t is far from obvious why immunizing debt collectors who adopt aggressive but mistaken interpretations of the law would be consistent with the statute's broadly worded prohibitions on debt collector misconduct." *Id.*

3. The Court Weighed the Incentives Created by the *Jerman* Holding

Similarly, the Supreme Court considered at length the dire outcomes suggested by the Petitioner here.

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[3] As discussed above, the rule in *Newsom* was permissive, not compulsory, rendering the concerns of both the *Jerman* dissenters and Petitioner significantly less acute.

Like the Petitioner, the *Jerman* dissent raised the specter of debt collectors driven to lawlessness if they could not invoke the protection of a mistake of law defense. *Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich, L.P.A.*, 559 U.S. 573, 616 (2010) (Kennedy, J., dissenting). As the *Oliva* court noted, however, by excluding mistakes of law entirely from the *bona fide* error defense, the majority saw a greater risk in a "race to the bottom." *Oliva*, 864 F. 3d at 499 ("the Court read the Act as putting the risk of legal uncertainty on debt collectors, giving them incentives to stay well within legal boundaries"); *Jerman*, 559 U.S. at 602. The *Jerman* Court cautioned that allowing a mistake of law defense "would give a competitive advantage to debt collectors who press the boundaries of lawful conduct." *Jerman*, 559 U.S. at 602.

Here, Petitioner could easily have taken the more conservative path and filed its collection suit in the court closest to Mr. Oliva's house, particularly in light of the pending *en banc* review of *Suesz*. Instead, by filing elsewhere, it engaged in the very "race to the bottom" practices *Jerman* aimed to prevent.

II. THIS COURT DECLINED TO CONSIDER RETROACTIVITY OF THE RULE IN QUESTION

Petitioner focuses much of its rhetorical energy on the question of reliance on appellate precedent. As the Seventh Circuit noted, however, that issue was determined not in this case but in *Suesz*. *Suesz v. Med-1 Solutions, LLC*, 757 F.3d 636 (7th Cir. 2014) (*en banc*); *Oliva v. Blatt, Hasenmiller, Leibsker & Moore*, LLC, 864 F.3d 492, 494 (7th Cir. 2017) (*en banc*) ("We decided this question in *Suesz* when we overruled the circuit precedent in question and declined

the defendant debt collector's request to make that ruling effective only prospectively."); *Suesz*, 757 F.3d at 649-50 ("a prior decision of one intermediate appellate court does not create the degree of certainty concerning an issue of federal law that would justify reliance so complete as to justify applying a decision only prospectively in order to protect settled expectations.")

The Seventh Circuit considered reliance at length in the earlier case, ultimately determining that "reliance on prior law is insufficient in itself to justify making a new judicial ruling prospective." *Suesz*, 757 F.3d at 649. The Seventh Circuit found strong footing for that ruling in the holdings of this Court. *Reynoldsville Casket Co. v. Hyde*, 514 U.S. 749, 752, 115 S.Ct. 1745, 1748 (1995) ("when (1) the Court decides a case and applies the (new) legal rule of that case to the parties before it, then (2) it and other courts must treat that same (new) legal rule as 'retroactive,' applying it, for example, to all pending cases, whether or not those cases involve predecision events.) *See also Harper v. Va. Dep't of Taxation,* 509 U.S. 86, 97, 113 S.Ct. 2510, 2517 (1993) (presumptive retroactivity of judicial determinations).

Unsatisfied with the outcome in *Suesz*, the debt collector there sought *certiorari*. This Court denied the request there, and Petitioner now seeks a second bite at the apple. *Med-1 Solutions LLC v. Suesz*, 135 S.Ct. 756, 190 L.Ed.2d 628 (2014) (denying *certiorari*). Though *Suesz* did not consider the *bona fide* error defense, the question of reliance is predicate to any determination of *bona fide* error. As the Petitioner makes clear, this is nothing less than a front assault on the

Suesz ruling.[4] Petitioner claims that "the legal fiction of retroactivity did not alter the reality that Blatt's choice of venue was legally correct when made." Pet'n at 15. Yet that is precisely what retroactivity does. If the Circuit had wanted to allow defendants to rely on *Newsom v. Friedman*, 76 F.3d 813 (7th Cir. 1996) as a shield from FDCPA liability in the wake of *Suesz*, it could have done so simply by declining to make that decision retroactive. It did the opposite. Allowing a mistake of law defense based on just such reliance would render the *Suesz* court's determination of retroactivity meaningless. Indeed, if Petitioner were allowed to assert reliance on *Newsom* through a *bona fide* error defense, it would give that opinion continued effect.

Nor should this Court put any stock in Petitioner's attempts to posit the *bona fide* error defense as a remedy. In *Davis v. U.S.*, 564 U.S. 229, 131 S.Ct. 2419, 180 L.Ed.2d 285 (2011), the Court did not even consider the question of liability. Rather, it determined the applicability of the exclusionary rule, a discretionary remedy akin to damages. In *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 543-44, 111 S.Ct. 2439, 2448 (1991), the Court explicitly stated that it was not opining on appropriate remedies but indicated that "nothing we say here precludes consideration of individual equities when deciding remedial issues in particular cases." The *bona fide* error defense goes to liability. By its terms, the *bona fide* error defense is a defense to liability. To the extent remedy, rather than liability, is at issue here, as discussed below, the statute

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[4] Though Petitioner puts great stock in the dissent in the *en banc* panel, two of those dissenters disagreed with the ruling in *Suesz*, as well.

provides ample means to consider Petitioner's intent. *See* Section V, *infra.*

III. THE SEVENTH CIRCUIT'S OPINION DOES NOT CONFLICT WITH PRECEDENT FROM OTHER CIRCUITS OR ADMINISTRATIVE AGENCIES

A. The Seventh Circuit Opinion Does Not Conflict with "Safe Harbor" Rulings

Petitioner sets up a purported "conflict" between this case and the "safe harbor" jurisprudence of the Seventh and Second Circuits. As an initial matter, any conflict within Seventh Circuit precedent was a matter for the *en banc* panel, not this Court. Fed. R. App. Proc. 35(a)(1) (providing for *en banc* review where it is "necessary to secure or maintain uniformity of the court's decisions"); *Textile Mills Sec. Corp. v. Commissioner*, 314 U.S. 326, 334-35, 62 S.Ct. 272, 277-78 (1941) (*en banc* review "makes for more effective judicial administration. Conflicts within a circuit will be avoided."); *EEOC v. Ind. Bell Tel. Co.*, 256 F.3d 516, 529 (7th Cir. 2001) ("We take cases *en banc . . .* to resolve intracircuit conflicts, or . . . perhaps even to curb a 'runaway' panel).

Petitioner's efforts to find any conflict at all require significant mental acrobatics. Not a single case cited by Petitioner for this supposed "conflict" even mentions, let alone considers, the *bona fide* error provision of the FDCPA. Rather, each discusses an explicit "safe harbor" for the language set forth in dunning letters. *Avila v. Riexinger & Assocs., LLC*, 817 F.3d 72, 76-77 (2d Cir. 2016) (providing safe harbor language for dunning letters); *Greco v. Trauner, Cohen & Thomas, L.L.P.*, 412 F.3d 360, 365 (2d Cir. 2005) (finding language in dunning letter sufficient under the FDCPA); *Riddle &*

Assocs., P.C. v. Kelly, 414 F.3d 832, 836-37 (7th Cir. 2005) (FDCPA suit inappropriate where collector had followed safe harbor language in dunning letter); *Miller v. McCalla, Raymer, Padrick, Cobb, Nichols, & Clark, L.L.C.*, 214 F.3d 872, 876 (7th Cir. 2000) (providing safe harbor language for dunning letters); *Bartlett v. Heibl*, 128 F.3d 497 (7th Cir. 1997) (same). Simply put, no conflict can result where the cases do not discuss the issue in question.

B. The Seventh Circuit Opinion Does Not Conflict with the Ruling in *Daubert v. NRA Group LLC*

Petitioner's attempt to create a conflict with the Third Circuit's ruling in *Daubert v. NRA Group LLC*, 861 F.3d 382 (3d Cir. 2017) is equally unavailing and runs contrary to the explicit language of the case. In *Daubert*, the Third Circuit considered—and rejected—applicability of the *bona fide* error defense to a debt collector's reliance on district court precedent. That court specifically distinguished the facts in *Oliva*, "leav[ing] for another day whether the defense 'protects a debt collector from liability for engaging in conduct that was expressly permitted under the controlling law in effect at the time, but that is later prohibited after a retroactive change of law.'" *Id. at* 395 (quoting *Oliva v. Blatt, Hasenmiller, Leibsker & Moore, LLC*, 825 F.3d 788, 789 (7th Cir. 2016). As the Third Circuit flatly stated, "[t]hat's not this case." *Id.*

C. *Oliva* Neither Conflicts with nor Undermines Agency Opinions

Similarly, Petitioner's liberal assignation of "conflict" does not apply to any agency action. Under *Jerman*, the only interpretation relevant to defense under the

FDCPA is that of the Consumer Financial Protection Bureau ("CFPB"). *Jerman*, 559 U.S. at 588 ("In our view, the Court of Appeals' reading is at odds with the role Congress evidently contemplated for the [CFPB] in resolving ambiguities in the Act."); 15 U.S.C. § 1692k(e). Indeed, a debt collector may rely on its opinions notwithstanding a subsequent negative judicial ruling. 15 U.S.C. § 1692k(e) (safe harbor for acts "in good faith in conformity with any advisory opinion of the Bureau" even if later "determined by judicial or other authority to be invalid for any reason"). The statute specifically contemplates such reliance for CFPB opinions; it makes no such provision for judicial interpretation.

The advisory opinion defense does not suggest the superiority of agency determinations over circuit rulings. It simply limits the method by which a debt collector can formally immunize its actions. As Petitioner points out, the Federal Trade Commission and CFPB "regularly rely on circuit precedent to define their FDCPA enforcement policies." Pet'n at 12. Advisory opinions would invariably incorporate circuit rulings, as well. In that instance, however, per clear statutory directive, the onus of any legal determinations would fall on the agency and not the debt collection attorney. As this Court noted, the advisory opinion provision of the FDCPA would become a nullity if debt collectors could protect themselves with their own attorneys' legal advice without the need to seek a formal legal opinion in the manner set forth in the statute. *Jerman*, 559 U.S. at 588. Notably, the CFPB provided no opinion here.

IV. REVIEW OF THE CASE WOULD HAVE LIMITED IMPACT OR, ALTERNATIVELY, WOULD BE PREMATURE

Petitioner's failure to find any conflict results from the paucity of circuit law on the issues presented. This Court decided *Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich, L.P.A.*, 559 U.S. 573, 130 S.Ct. 1605, 176 L.Ed.2d 519 (2010) nearly eight years ago. Since that time, and notwithstanding the ominous predictions of the dissent in *Jerman*, only a single case has reached any Court of Appeals raising the applicability of the *bona fide* error doctrine to reliance on overturned precedent. The paucity of case law suggests either that the issue has not had sufficient time to percolate through the lower courts, or that the impact of the issues raised is limited. Under either option, *certiorari* is inappropriate.[5]

V. ANY PURPORTED INEQUITIES MAY BE RESOLVED BY THE DISTRICT COURT

As this Court made clear in *Jerman*, Petitioner need not rely on the *bona fide* error defense to get relief in this case. Notwithstanding Petitioner's assertions, the FDCPA provides no automatic "punishment." Though liability arises from the retroactive applicability of *Suesz v. Med-1 Solutions, LLC*, 757 F.3d 636 (7th Cir. 2014) (*en banc*), the practical impact on Petitioner is minimal: "[w]hen an alleged violation is trivial, the 'actual damage[s]' sustained, § 1692k(a)(1), will likely be *de minimis* or even zero." *Jerman*, 559 U.S. at 597. The *Jerman* Court, citing 15 U.S.C. § 1692k(b), emphasized the discretion of the trial court to "adjust

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[5] The universe of potential cases is limited by the FDCPA's one-year statute of limitations. 15 U.S.C. § 1692k(d).

such damages where a violation is based on a good-faith error." *Id.* at 598; *see also James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 543-44, 111 S.Ct. 2439, 2448 (1991) (directing examination of the equities in applying a remedy to a retroactive change in the law). The Court noted similar trial court discretion to determine the amount of "reasonable attorney's fees" allowed under § 1692k(a)(3). *Jerman*, 559 U.S. at 598-99. As in *Jerman*, this Court should be "unpersuaded . . . that the *bona fide* error defense is a debt collector's sole recourse to avoid potential liability. *Jerman*, 559 U.S. at 599.[6]

VI. THIS CASE DOES NOT INVOLVE ANY CONSTITUTIONAL QUESTIONS

In alleging due process violations, Petitioner puts significant stake in a purported conflict between *Oliva* and this Court's rulings in *FCC v. Fox TV Stations, Inc.*, 567 U.S. 239, 132 S.Ct. 2307 (2012), *Davis v. U.S.*, 564 U.S. 229, 131 S.Ct. 2419, 180 L.Ed.2d 285 (2011), and *Bouie v. Columbia*, 378 U.S. 347, 84 S.Ct. 1697 (1964) to suggest constitutional issues. Its reliance on that precedent, however, is misplaced: no parallels exist to either the administrative or criminal context. Even assuming congruity with prior case law, Petitioner cannot force a constitutional conflict where one may be avoided.

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[6] To the extent no actual harm in fact occurred, it might raise questions of standing, though the plaintiff would contest that here. It does not, however, allow a defendant to involve the shield of the bona fide error defense.

A. Administrative Law Precedent Does Not Apply

In *Fox*, the Court addressed not the applicability of any mistake of law safe harbor but the appropriateness of retroactivity to a change in agency rules. 567 U.S. 239. *Fox*, therefore, may have been suitable for a discussion of *Suesz v. Med-1 Solutions, LLC*, 757 F.3d 636 (7th Cir. 2014) (*en banc*) but has no relevance to the case at bar. Even assuming the relevance of determining retroactivity, however, the administrative context of *Fox* renders it entirely inapposite. In contrast to the presumptive retroactivity of judicial rulings, this Court has explicitly distinguished administrative pronouncements, holding that "congressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result." *Landgraf v. Usi Film Prods.*, 511 U.S. 244, 264, 114 S.Ct. 1483, 1496 (1994) (quoting *Bowen*, 488 U.S. at 208) (quotation marks omitted).

B. Criminal Precedent Does Not Apply

The criminal context of *Davis*[7] and *Bouie*[8] make parallels similarly difficult to see. The *Jerman* Court stated, "[d]ifferent considerations apply, of course, in interpreting criminal statutes. But even in that con-

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[7] The *Davis* Court commented that the exclusionary rule at issue there was a prudential one, and need not apply where there was no deterrent effect. *Davis v. U.S.*, 564 U.S. at 236. Leaving aside the *Jerman* Court's analysis of incentives here, the statutory mandate of the FDCPA makes the application of liability—though not remedy—clear.

[8] In *Bouie*, the conduct at issue was a mistake of fact, rather than a mistake of law, where no sign identified the public premises in question as subject to criminal trespass. *Bouie*, 378 U.S. 347.

text, we have not consistently required knowledge that the offending conduct is unlawful." *Jerman*, 559 U.S. 529 n. 6 (internal citation omitted). The Seventh Circuit also noted that "[t]he interest in protecting debt collectors' choices of venue is not at all comparable to the stakes under the exclusionary rule. We see no reason to create a similar rule under the FDCPA, especially in the face of *Jerman*'s rejection of mistakes of law as grounds for the safe harbor under 15 U.S.C. § 1692k(c)." *Oliva*, 864 F.3d at 500.

C. The FDCPA Provides a Means of Avoiding Constitutional Concerns

"[W]here an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress." *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575, 108 S.Ct. 1392, 1397 (1988). The *Jerman* Court has already considered a means of balancing constitutional concerns. *Jerman* specifically highlighted courts' discretion on damages and fees where a debt collector has shown no intent to violate the law. 15 U.S.C. §§ 1692k(a)(3) and (b).

Petitioner's attempts to classify the damages in the FDCPA as "civil penalties" is directly at odds with the statute, which provides separately for administrative enforcement[9] and, at issue here, private enforcement for damages. *Compare* 15 U.S.C. § 1692k with § 1692l. Unlike the civil or criminal penalties imposed

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[9] Section 1692l does not include a *bona fide* error defense and is not at issue here.

by agencies, the damages here arise between private parties and may be limited by the impartial trier of fact.

VII. This Case Is a Poor Vehicle to Consider Reliance on "Settled Law"

As noted above, Petitioner filed its collection case in this matter while *en banc* review of *Suesz* was pending in the Seventh Circuit and no mandate had yet issued. Even assuming it could rely on "settled law" for purposes of the *bona fide* error defense, a case in the midst of review by the full circuit hardly fits that description. Moreover, even relying on then-existing circuit precedent in this case, nothing prevented Petitioners from taking a more conservative approach and filing in the fifth municipal district. *Oliva*, therefore, lacks the clear factual basis that would allow for adequate review by this Court.

CONCLUSION

For the foregoing reasons, Respondent respectively requests that the Petition for Certiorari be denied.

Respectfully submitted,

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