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No. 16-_____

Supreme Court, U.S.
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In the Supreme Court of the United States

FIRST RESOLUTION INVESTMENT CORP.,
FIRST RESOLUTION MANAGEMENT CORP.,
CHEEK LAW OFFICES, LLC,
and PARRI HOCKENBERRY,

Petitioners,

—v—

SANDRA TAYLOR-JARVIS,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Ohio

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Do the First Amendment to the Constitution and the *Noerr-Pennington* Doctrine permit a statute to create civil liability for the mere filing of a suit that is factually true and meritorious, but potentially subject to a retroactive application of a statute of limitations?

2. Does the FDCPA apply to communications with courts?

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court R. 29.6, no respective corporate Petitioner has a parent company and no publicly traded company owns 10% of more of its stock.

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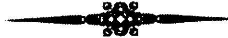
PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully petition for a writ of certiorari to review the judgment of the Supreme Court of Ohio in this case.



OPINIONS BELOW

The Decision of the Supreme Court of Ohio is reported as 2016-Ohio-3444. A copy of that order is reproduced in the appendix at App.1a. The decision of the Ninth District Court of Appeals is reported as 983 N.E.2d 380 and reproduced in the appendix at App.97a. The decision of the Summit County Court of Common Pleas is unreported but found on WestLaw at 2011 WL 3538655 and reproduced in the appendix at App.126a.

JURISDICTION

The Supreme Court of Ohio entered its judgment on June 16, 2016. This Petition is timely filed pursuant to Sup. Ct. R 13.3. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

- U.S. Const. Amend. I provides:

  Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

- U.S. Const. Amend. XIV, Sect. 1, provides in pertinent part:

  No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

- 15 U.S.C. § 1692e(2) and (10) provide, in pertinent part:

  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:

  (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.

* * *

(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.

- 15 U.S.C. § 1692f 1) provides, in pertinent part:

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.

The following additional pertinent provisions of the Fair Debt Collection Practices Act are reproduced in the Appendix at App.148a:

- 15 U.S.C. § 1692e
- 15 U.S.C. § 1692f
- 15 U.S.C. § 1692k

INTRODUCTION

The state of Ohio has recently been home to some expansive punitive readings of the federal Fair Debt Collection Practices Act (the "FDCPA"). On May 16, 2016, this Court in *Sheriff v. Gillie, et al.*, 578 U.S. __ (2016) unanimously overturned the Sixth Circuit's decision holding attorneys liable for providing legal services for the State of Ohio to assist in the State's debt collection.

This instant case, arising from the Ohio Supreme Court, continues the advancement of radical theories of liability under the FDCPA: Namely, that attorneys can be held <u>strictly</u> liable for filing, in good faith, a civil complaint on behalf of a client seeking to recover an unpaid debt, simply because the case was dismissed on statute of limitations grounds that the lower courts themselves were divided upon.

The key issues in this case revolve around whether a party and its attorney can be held liable under a consumer protection statute where the conduct complained of is the filing of a state court collection suit in which the party did not prevail due to the affirmative defense of limitations but where the suit was otherwise factually and legally well-grounded. The imposition of such liability violates the Petition Clause of the First Amendment to the Constitution and the *Noerr-Pennington* Doctrine.

Petitioners, a creditor and their attorney, sued Respondent on a defaulted credit card account. Respondent filed an Answer and Counterclaim alleging

that the Complaint had been filed beyond the statute of limitations and sought too much interest on the debt. The law of Ohio in effect at the time the cause of action accrued provided a six-year limitations period. However, Respondent argued, and the Supreme Court of Ohio agreed, that a recent amendment to Ohio's borrowing statute (the "Borrowing Statute") could be applied retroactively to make the law of Delaware control the limitations period, making the Complaint untimely. At the time of that decision federal courts in Ohio had already recognized that Ohio's Borrowing Statute could not be applied to causes of action, which accrued prior to its effective date.

The collection suit Complaint sought interest at 24% and pleaded that the claim was based upon a monthly account statement attached to the Complaint, which assessed interest at 24.99%. Respondent's Counterclaim alleges that despite the monthly statement, Petitioners would not be able introduce admissible evidence of a contract permitting 24% interest.

In 1986 Congress deleted the attorney exemption to the Fair Debt Collection Practices Act (FDCPA), subjecting attorneys to potential liability under what has repeatedly been characterized as a strict liability statute. In 1995, this Court held in *Heintz v. Jenkins*, 514 U.S. 291, 296, 115 S. Ct. 1489, 1491, 131 L. Ed. 2d 395 (1995) that attorneys are "debt collectors" under the FDCPA, even when their activities consist solely of litigation. In issuing that decision this Court rejected concerns that the inclusion of attorneys who litigate as debt collectors was likely to destroy certain well-established legal doctrines such as litigation

immunity. Moreover, this Court noted, "we do not *see* how the fact that a lawsuit turns out ultimately to be unsuccessful could, by itself, make the bringing of it an 'action that cannot legally be taken'" as prohibited by § 1692e(5) of the FDCPA. *See Heintz v. Jenkins*, 514 U.S. 291, 296, 115 S. Ct. 1489, 1491, 131 L. Ed. 2d 395 (1995).

In the last two decades, the consequences of *Heintz* have included the elimination of litigation immunity, the erosion of witness immunity, and now, the decision elimination of Petitioners' First Amendment rights. The decision of the Supreme Court of Ohio exposes Petitioners to strict liability based solely upon the filing of a Complaint that was supported by facts and a reasonable interpretation of state law.

Here, the Supreme Court of Ohio's opinion creates the very situation where "the fact that a lawsuit turns out ultimately to be unsuccessful could, by itself, make the bringing of it an 'action that cannot legally be taken.'" The Supreme Court of Ohio recognized that Petitioners' Complaint would have been timely but for the retroactive application of Ohio's Borrowing Statute. Even though retroactive application is generally unconstitutional, the Supreme Court of Ohio thought it was not unreasonable in this case because it only reduced the time to file the Complaint from six years to three years. It concluded that the retroactive application could create liability for Petitioners under the FDCPA and the OCSPA. The Supreme Court of Ohio's retroactive application of the Borrowing Statute was so shocking that not even the Chief Justice of that court anticipated it.

By ignoring the First Amendment/*Noerr-Pennington* arguments (raised in the merits brief, but not mentioned by the Supreme Court of Ohio), the decision allows the FDCPA and the OCSPA to create an untenable burden on attorneys and their clients. An attorney who seeks to advance her client's case with a novel theory (or as here, a legal position already approved by state and federal courts) risks incurring strict liability if the claim is unsuccessful. This creates a conflict between attorneys and their clients and unduly burdens Constitutionally-protected petitioning conduct. The Supreme Court of Ohio's decision conflicts with decisions from this Court and the Ninth Circuit holding that the Petition Clause and *Noerr-Pennington* Doctrine provide defenses to statutory causes of action. It also conflicts with decisions of the Seventh and Eighth Circuit Courts of Appeal holding that communications with courts are not subject to the FDCPA.

This case potentially impacts every attorney in the United States who regularly files suits on behalf of creditors, particularly where (as is often the case) the law of limitations of actions is unsettled due to borrowing statutes that have not yet been interpreted by a state's highest court. This case also potentially impacts plaintiffs who file suits based on reasonable interpretations of state law. Petitioners seek a ruling by the Court as to the Constitutionally-protected nature of the conduct at issue and as to an issue not reached in *Heintz*: Whether the FDCPA regulates communications with courts.

STATEMENT

1. The First Amendment protects the right to petition the government for redress of grievances (the Petition Clause). US Const. Amend. I. This foundational principle of American jurisprudence was further clarified by the *Noerr-Pennington* doctrine, which provides that "those who petition any department of the government for redress are generally immune from statutory liability for their petitioning conduct." *See Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 81 S. Ct. 523, 5 L. Ed. 2d 464 (1961); Although this doctrine was initially applied to Sherman Act claims, *Noerr-Pennington* has been extended and applied to non-antitrust claims involving the National Labor Relations Act, RICO and the Fair Debt Collection Practices Act. *See, e.g., Giles v. Phelan, Hallinan & Schmieg, LLP*, __F.Supp.2d__, No. 11-6239, 2013 U.S. Dist. LEXIS 78161 *17-18 (D.N.J. June 4, 2013) (discussing and citing extensions of *Noerr-Pennington*); *Satre v. Wells Fargo Bank, NA*, 507 F. App'x 655 (9th Cir.Jan.2, 2013) (rejecting FDCPA claim pursuant to *Noerr-Pennington*); *Sosa v. DirecTV*, 437 F.3d 923, 929 (9th Cir. 2006) (*Noerr-Pennington* stands for a generic rule, applicable to any statutory construction that could implicate the rights protected by the Petition Clause.)

2. Sandra Taylor-Jarvis ("Jarvis") entered into a credit card agreement with Chase Bank. (Common Pleas Complaint, ¶ 1) That agreement granted Jarvis access to a credit card account, which she used to incur debt <u>in Ohio</u>. While residing <u>in Ohio</u>, Jarvis

failed to make payments on the account. The account was then sold to Petitioner First Resolution Investment Corp ("FRIC"). FRIC retained Petitioners Cheek Law Offices and attorney Parri Hockenberry to represent it.

3. Unable to reach an out-of-court resolution, Petitioners filed suit to collect on the account. Jarvis filed an Answer and Counterclaim. Her two basic theories of liability of the counterclaim are: (1) Even though Jarvis breached the agreement in Ohio and never lived in Delaware, Delaware's statute of limitations period applied and had expired prior to the filing of the Complaint, and (2) Even though the monthly statement attached to the Complaint showed that interest was accruing at 24.99%, Petitioners would not prevail on their request for interest at 24% (First Amended Counterclaim, ¶¶ 66-70, 84-101).

This entire counterclaim is based upon the allegation that Petitioners might not prevail on the Complaint at trial, and thus, will face liability under the FDCPA and the OCSPA <u>in the same action</u>.

4. Petitioners moved for summary judgment, and the trial court granted that motion, concluding that Ohio's statute of limitations applied, and the request for interest was not regulated by the FDCPA—even if it were, the request was supported by evidence (the monthly statement). (Judgment Entry at App.126a)

On appeal, the Ohio Ninth District Court of Appeals reversed, concluding that an issue of fact existed whether Ohio's or Delaware's statute of limitations applied. The Court of Appeals also held that there was an issue of fact as to whether the

request for 24% interest violated the FDCPA. (Opinion at App.97a.)

The Supreme Court of Ohio issued a fractured opinion affirming the court of appeals' opinion. The Supreme Court of Ohio held as follows:

> We further hold that the filing of a time-barred collection action may form the basis of a violation under both the FDCPA and the OCSPA. We also hold that that a consumer can bring actionable claims under the FDCPA and the OCSPA based upon debt collectors' representations made to courts in legal filings, specifically on a debt collector's claim for interest that is unavailable to the debt collector by law.

5. The Ohio Supreme Court's decision conflicts with decisions of this Court and the Ninth Circuit holding that the *Noerr-Pennington* Doctrine applies to statutory causes of action. *See BE & K Constr. Co. v. NLRB*, 536 U.S. 516, 122 S. Ct. 2390, 153 L. Ed. 2d 499 (2002); *Sosa v. DIRECTV, Inc.*, 437 F.3d 923 (9th Cir. 2006); *Kearney v. Foley & Lardner, LLP*, 590 F.3d 638 (9th Cir. 2009); *See, also, Satre v. Wells Fargo Bank, NA*, 507 F. App'x 655 (9th Cir.Jan.2, 2013) (applying *Noerr-Pennington* to dismiss an FDCPA case).

6. The Ohio Supreme Court's decision in this case conflicts with decisions of the United States Court of Appeals for the Seventh and Eighth Circuits holding that the FDCPA does not regulate the contents of communications with courts. *See O'Rourke v. Palisades Acquisition XVI, LLC*, 635 F.3d 938 (7th Cir. 2011), *cert. denied*, 132 S. Ct. 1141, 181 L. Ed.

2d 1017 (2012) and *Hemmingsen v. Messerli & Kramer, P.A.*, 674 F.3d 814 (8th Cir. 2012).

7. The Ohio Supreme Court's decision retroactively applied the Borrowing Statute, which was not enacted at the time the petitioners filed the state court collections complaint. The Borrowing Statute became effective on April 7, 2005 and the Ohio Supreme Court decision found that the cause of action accrued on January 1, 2005. *See* App.26a.

8. The Ohio Supreme Court did not address the Petitioners' arguments relating to the First Amendment as clarified in the *Noerr-Pennington* doctrine, despite the fact that such questions were raised in the merits brief to the Ohio Supreme Court. *See* App.155a. Additionally, the Ohio Supreme Court found that statements made to the trial court in the collections complaint were subject to the FDCPA. *See* App.41a-42a.

REASONS FOR GRANTING THE PETITION

This case raises the important issue of whether a plaintiff and its attorney may be held liable under the FDCPA for making a good faith complaint, supported by fact and law (or at least a good-faith argument for same), in a state court suit. According to the Supreme Court of Ohio, the FDCPA allows for the imposition of liability when an attorney simply asks a court for relief, despite the fact that such a request for relief was in good faith and founded on concrete facts, and where the Ohio trial court has

held that the claims has been made within the applicable Ohio statute of limitation. The First Amendment, as clarified under the *Noerr-Pennington* doctrine, bars the imposition of liability for filing a suit that has a reasonable basis in law and fact. Petitioners face a claim under a strict liability statute for having engaged in Constitutionally protected conduct by making a plausible, good-faith Complaint, that was determined, on appeal, to be under Delaware's statute of limitations regime.

By ruling that the FDCPA can trump the First Amendment in this case, the Supreme Court of Ohio has disregarded the warning of this Court that the FDCPA should not be assumed to compel absurd results when applied to debt collecting attorneys. *Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA*, 559 U.S. 573, 600, 130 S.Ct. 1605, 1622, 176 L.Ed.2d 519, 539 (2010). The consequence is an additional problem that this Court has warned against–lawyers will face liability merely for filing what ultimately is an unsuccessful suit. *See Heintz v. Jenkins*, 514 U.S. 291, 296, 115 S. Ct. 1489, 1491, 131 L. Ed. 2d 395 (1995); *Jerman*, 130 S.Ct. at 1622; *see also*, *Stratton v. Portfolio Recovery Associates*, 770 F.3d 443, 454 (6th Cir. 2014) (Batchelder, J., dissenting). In fact, by permitting potential FDCPA liability under the facts of this case the Ohio Supreme Court's decision chills the likelihood that any creditor's lawyers will ever be willing in the future to help their clients secure a judicial determination of a judicially unresolved contract issue such as the statute of limitations issue in the underlying suit.

I. THE DECISION OF THE SUPREME COURT OF OHIO UNCONSTITUTIONALLY BURDENS PETITIONING CONDUCT AND CUTS AGAINST THE DECISIONS OF FEDERAL CIRCUITS.

There are few rights more important than those protected by the First Amendment to the United States Constitution.

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

U.S. Const. Amend. 1. In the words of Judge Cudahy of the Seventh Circuit Court of Appeals:

> This right has deep common law roots and is the foundation of our republican (although not necessarily Republican) form of government. *See McDonald v. Smith,* 472 U.S. 479 (1985); *United States v. Cruikshank,* 92 U.S. 542, 552, 23 L. Ed. 588 (1875); *see also Stern v. United States Gypsum, Inc.,* 547 F.2d 1329, 1342 (7th Cir. 1977). Thus, parties may petition the government for official action favorable to their interests without fear of suit, even if the result of the petition, if granted, might harm the interests of others. *See United Mine Workers of America v. Pennington,* 381 U.S. 657, 670, 14 L. Ed. 2d 626, 85 S. Ct. 1585 (1965); *Eastern R.R. Presidents Conference v. Noerr Motor Freight,*

Inc., 365 U.S. 127, 137-44, 5 L. Ed. 2d 464, 81 S. Ct. 523 (1961).

Tarpley v. Keistler, 188 F.3d 788, 794 (7th Cir. 1999).

Private attorneys have both the privilege and duty to petition the government on behalf of their clients, most particularly when seeking relief through a court complaint. Attorneys play a crucial role in advancing their clients' requests to state courts. *Legal Services Corporation v. Velazquez*, 531 U.S. 533, 545, 121 S.Ct. 1043, 149 L.Ed.2d 63 (2001) (law restricting arguments available to attorneys "prohibits speech and expression upon which courts must depend for the proper exercise of the judicial power"), cited in *Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA*, 559 U.S. 573, 623, 130 S.Ct. 1605, 1635, 176 L.Ed.2d 519, 553 (2010) (Kennedy, J., dissenting). That petitioning conduct includes requests to courts and communications incidental to a court action.

Here, Petitioners respectfully assert that the Ohio Supreme Court erred on this issue of Constitutional importance. In fact, the Ohio Supreme Court failed to even address this issue, even though it was raised in the briefing. App.155a.

This case does not involve "sham petitions, baseless litigation, or petitions containing 'intentional and reckless falsehoods" that would fall outside of *Noerr-Pennington* protections. The analysis of the Ohio Supreme Court demonstrates that there is a *bona fide* dispute over which state's law applies to the contract dispute between Jarvis and Petitioners, and it had to retroactively apply Ohio's Borrowing Statute to conclude that Delaware law applied. Even then, it chose to adopt only part of the Delaware statute, imposing on

Petitioners the time restriction but not imposing on Jarvis the tolling provision that would have rendered this suit timely even under Delaware law. Del Code Ann tit 10, § 8117.

The decision unnecessarily burdens conduct that is protected by the First Amendment. In fact, the Ohio Supreme Court's contorted rationale demonstrates the need for attorneys to be able to advocate positions and issues not yet determined in existing case law. All of the prior case law refused to give retroactive application of Ohio's Borrowing Statute so as to destroy vested rights. As it stands, the Ohio Supreme Court's decision equates the mere request[1] for relief (and for a determination of state law) with "sham" and fraudulent pleadings.

The Ohio Supreme Court also ignored the *Noerr-Pennington* issue raised in the brief below, effectively allowing the FDCPA and OCSPA to trump the First Amendment. An act of Congress does not take precedence over the Constitution. *Marbury v. Madison*, 5 U.S. 137, 177-178, 2 L.Ed. 60, 73-74 (1803). *See, also, Citizens United v. FEC*, 558 U.S. 310, 130 S. Ct. 876; 175 L. Ed. 2d 753 (2010) (recognizing that a statute cannot override the protections of the First Amendment). In the words of Justice John Marshall, "That which is not supreme must yield to that which is

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[1] Ohio Civ. R. 8(A)(2) calls a "request for relief" or "prayer" a "demand for judgment". Therefore, the Complaint "demanded" judgment of the principal, interest claimed, and costs claimed. The Supreme Court of Ohio seemed to be offended by the use of the term "demand" in the original Complaint when its own rules required a "demand for judgment"–not a "request for relief" or "prayer for relief".

supreme." *Brown v. Maryland*, 25 U.S. 419, 448 (1827). As this Court has long noted, "if the enforcement of any act of congress sacrifices the constitutional rights of the citizen, the act must yield to the higher law of the constitution." *Brown v. Walker*, 70 F. 46, 48 (C.C.D. Pa. 1895).

Allowing this suit to proceed does not merely chill petitioning speech, but freezes it altogether. Courts have repeatedly held that the FDCPA is a strict liability statute, imposing liability even for unintentional violations. *Russell v. Equifax ARS*, 74 F.3d 30, 33 (2d Cir. 1996); *Taylor v. Perrin, Landry, deLaunay & Durand*, 103 F.3d 1232, 1238-39 (5th Cir. 1997); *Gearing v. Check Brokerage Corp.*, 233 F.3d 469, 472 (7th Cir. 2000); *Clark v. Capital Credit & Collection Servs., Inc.*, 460 F.3d 1162, 1175 (9th Cir. 2006); *Reichert v. Nat'l Credit Sys., Inc.*, 531 F.3d 1002, 1005 (9th Cir. 2008). Furthermore, lawyers have been denied the defense of litigation immunity in FDCPA cases. *Sayyed v. Wolpoff & Abramson, LLP*, 485 F.3d 226, 229-30 (4th Cir. 2007). The First Amendment is possibly the last refuge for parties and their lawyers who wish to advocate to courts positions taken in good faith.

If a plaintiff and its lawyer incur strict liability merely for asking a court for relief, then attorneys cannot carry out their ethical duties of competence, diligence, and advocacy when clients need them to advance, clarify, or, extend the law or make a good-faith argument to reverse existing law. This case is the poster child for such a problem. Petitioners face a class action claim under a strict liability statute for having made not a sham or fraudulent prayer for

relief but one so plausible that the trial court found it to be proper.

The Supreme Court of Ohio's retroactive application of Ohio's borrowing statute, Ohio Rev. Code § 2305.03(B), violated due process. "The Court has upheld retroactive adjustments to a limitations period only when the legislature has provided a grace period during which the potential plaintiff could reasonably be expected to learn of the change in the law and then initiate his action." *Texaco, Inc. v. Short*, 454 U.S. 516, 549 (1982) (emphasis added). Here, as admitted by the court below, there was no legislative grace period: "It is true that Article II, Section 28 of the Ohio Constitution prohibits the General Assembly from enacting retroactive laws. But there is no indication that the General Assembly intended R.C. 2305.03(B) to be retroactive—it is written to apply prospectively to all cases commenced after its effective date." *See* App.26a. The court even cited its own precedent that the legislature may shorten the operation of a statute of limitations "as long as 'a period sufficiently long to allow a reasonable time to begin suit' is allowed." *State ex rel. Nickoli v. Erie MetroParks*, 923 N.E.2d 588, 594 (Ohio 2010), quoting 1A Sackman, Nichols on Eminent Domain, Section 4.102[3], at 4-74 (3d Ed.2006)." *See* App.29a.

While paying lip service to the Ohio Constitution, legislature and its own prior decisions, the court, in the absence of a legislative grace period, terminated FRIC's property interest and unilaterally declared the General Assembly's amendment applied retroactively in this case–shortening the six-year statute in effect when FRIC's claim accrued, *see*

App.20a-21a (citing Ohio Rev. Code § 2305.07), to three years, *see* App.26a. Without notice and in conflict with the Ohio Constitution and General Assembly, the Ohio Supreme Court dismissed FRIC's rights by judicial fiat.

This Court has warned that the FDCPA should not be assumed to compel absurd results when applied to debt collecting attorneys. *Jerman*, 559 U.S. at 600, 130 S.Ct. 1605, 1622, 176 L.Ed.2d 519, 539. By ruling that the FDCPA and OCSPA can trump the First Amendment in this case the Supreme Court of Ohio has disregarded that warning. The consequence is an additional problem that this Court has warned against–lawyers will face liability for an unsuccessful suit, even when the suit makes no factual representations that are false. *See Heintz v. Jenkins*, 514 U.S. 291, 296, 115 S. Ct. 1489, 1491, 131 L. Ed. 2d 395 (1995); *Jerman*, 130 S.Ct. at 1622; *see also*, *Stratton v. Portfolio Recovery Associates*, 770 F.3d 443 (6th Cir. 2014) (Batchelder, J., dissenting). Respectfully, we are now within the realm of 'absurd" results.

II. THE SUPREME COURT OF OHIO'S APPLICATION OF THE FDCPA TO COMMUNICATIONS WITH COURTS IS AT ODDS WITH DECISIONS OF THE 7TH AND 8TH CIRCUITS

In *O'Rourke v. Palisades Acquisition XVI, LLC*, 635 F.3d 938 (7th Cir. 2011), *cert. denied*, 132 S. Ct. 1141, 181 L. Ed. 2d 1017 (2012) the Court of Appeals held that the FDCPA does not apply to communications to judges, such as pleadings. In *Hemmingsen v. Messerli & Kramer, P.A.*, 674 F.3d 814 (8th Cir. 2012), the Court of Appeals held that the FDCPA rejected the concept of FDCPA liability based solely upon an

unsuccessful state court Claim. "If judicial proceedings are to accurately resolve factual disputes, a lawyer 'must be permitted to call witnesses without fear of being sued if the witness is disbelieved and it is alleged that the lawyer knew or should have known that the witness' testimony was false.'" *Id.* at 819-20, *citing Imbler v. Pachtman*, 424 U.S. 409, 439, 96 S. Ct. 984, 47 L. Ed. 2d 128 (1976) (White, J., concurring).

The decision of the Supreme Court of Ohio conflicts with *O'Rourke* and *Hemingsen*. The majority of Supreme Court of Ohio would permit Petitioners to face potential liability under the FDCPA based upon a communication with the trial court.

The dissent found that the prayer for relief should not be the basis for an FDCPA claim because it is merely "a prayer of request directed to the court." *Id.* at ¶ 167-68. This is because the interest was not barred as a matter of law, but rather because an original agreement was never produced in discovery. *Id.* at ¶ 177. Finally, the dissent recognized that because Ohio is a notice pleading state, FRIC was required only to include the request for interest as part of its prayer for relief if in fact it intended on pursuing the opportunity to recover that interest. It did not, however, need to plead operative facts beyond these general allegations in order to give adequate notice of its claims. *Id.* at ¶ 180.

CONCLUSION

The petition for writ of certiorari should be granted, and the decision of the Supreme Court of Ohio should be reversed.

Respectfully submitted,

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