No. 08-1200

IN THE

Supreme Court of the United States

KAREN L. JERMAN,

Petitioner,

v.

CARLISLE, MCNELLIE, RINI, KRAMER & ULRICH LPA
AND
ADRIENNE S. FOSTER,

Respondents.

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

REPLY BRIEF FOR THE PETITIONER

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REPLY BRIEF FOR THE PETITIONER

1. Notably, respondents do not even attempt to dispute that the circuits are divided on the question presented: the Eighth and Ninth Circuits have held that a debt collector's legal error does not qualify for the bona fide error defense under the Fair Debt Collection Practices Act ("FDCPA"), 15 U.S.C. § 1692 et seq., while the Sixth and Tenth Circuits have reached a contrary conclusion. Nor do they dispute that this case is an ideal candidate for certiorari in several other respects: the case is an excellent vehicle for this Court to resolve the question presented, which recurs frequently and is both squarely raised by and outcome determinative of this case. Instead, respondents quibble only about the depth of the circuit split – characterizing the Second Circuit's decision in *Pipiles v. Credit Bureau of Lockport, Inc.*, 886 F.2d 22 (1989), as "dicta" – and attempt to downplay the significance of the decisions of the Eighth and Ninth Circuit. Both arguments are unavailing.

First, respondents' attempt to dismiss the Second Circuit's decision in *Pipiles* as "dicta" is belied by the opinion, which devotes an entire section to its discussion of the appellee's "Section 1692k(c) Defense," *see* 886 F.2d at 27. The court of appeals found that the credit bureau in that case had violated three subsections of the FDCPA; by contrast, it noted, the district court had found just one violation but concluded that even that violation "'may be excused under the circumstances' because the Bureau had no intent to deceive." *Id.* However, the court of appeals explained, the district court had failed to "consider[] .

. . the specific requirements of section 1692k(c) that the violation 'result[] from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid any such error.'" *Id.* (second alteration in original). And in any event, the court of appeals continued, "it is likely that the violations which we have found resulted from a mistaken view of the law, *which section 1692k(c) does not excuse*" (citing *Hulshizer v. Global Credit Servs., Inc.*, 728 F.2d 1037, 1038 (8th Cir. 1984) (per curiam), and *Baker v. G.C. Servs. Corp.*, 677 F.2d 775, 779 (9th Cir. 1982); emphasis added). Thus, although the court of appeals remanded the case to the district court to allow that court to determine "whether to allow the Bureau to tender a section 1692k(c) defense," it made clear that a defense based on a legal error was foreclosed. *See id.* ("In the event of an affirmative decision [by the district court], the defense should be evaluated in accordance with the foregoing discussion.").

District courts within the Second Circuit have repeatedly indicated that they regard the Second Circuit's decision in *Pipiles* as binding precedent,[1] as

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[1] *See, e.g.*, *Register v. Reiner, Reiner & Bendett, PC*, 488 F. Supp. 2d 143, 147 (D. Conn. 2007) (rejecting debt collector's bona fide error defense; quoting *Pipiles*, court explained that Section 1692k(c) "does not excuse statutory violations that 'resulted from a mistaken view of the law'"); *Gervais v. Riddle & Assocs., P.C.*, 479 F. Supp. 2d 270, 279 (D. Conn. 2007) (citing *Pipiles*, including the Second Circuit "within th[e] majority" view that the bona fide error defense applies only to clerical and factual errors); *Dowling v. Kucker Kraus & Bruh, LLP*, No. 99 Civ. 11958 (RCC), 2005 U.S. Dist. LEXIS 11000, at *18 n.4

do other courts – including the Tenth Circuit – and commentators.[2]

Next, respondents attempt to downplay the significance of the decisions of the Eighth and Ninth Circuits holding that the bona fide error defense does not apply to legal errors. Their criticism is two-fold. First, they complain, "these decisions are over twenty-five years old." BIO 7. But that fact militates *in favor* of certiorari, as it merely underscores the extent to which the precedent is well-settled. [3]

(S.D.N.Y. June 6, 2005) (citing *Pipiles* for proposition that "§ 1692k(c) does not excuse a mistaken view of the law").

[2] *See Johnson v. Riddle*, 305 F.3d 1107, 1122 & n.14 (10th Cir. 2002) (citing Second Circuit's decision in *Pipiles* as one of the opinions "concluding that the defense is limited to clerical errors and cannot protect mistakes of law"); *Seeger v. AFNI, Inc.*, 548 F.3d 1107, 1114 (7th Cir. 2008) ("[T]he majority of our sister circuits, including the Second, Eighth, and Ninth, have limited the [bona fide error] defense to factual and clerical errors . . . ."); *Collection Bureau Servs., Inc. v. Morrow*, 87 P.3d 1024, 1030 (Mont. 2004) (noting "split of authority" regarding scope of bona fide error defense and following "majority view" – including, inter alia, *Pipiles* – "that the defense is only available for clerical and factual errors"); Elwin Griffith, *Identifying Some Trouble Spots in the Fair Debt Collection Practices Act: A Framework for Improvement*, 83 Neb. L. Rev. 762, 820 & n.397 (2005) (explaining that "[t]he trend of the cases is to deny the [bona fide] error defense for mistakes of law" and citing, inter alia, *Pipiles* as one of the cases following this trend).

[3] And, in any event, just last year this Court granted certiorari to consider a circuit split involving cases of similar vintage. *See* Pet. for Cert., No. 06-1505, *Meacham v. Knolls Atomic Power Lab.* 11-13 (describing circuit split involving 1983 Ninth Circuit decision (along with 1975 Sixth Circuit decision) on one side, with 2006 decisions of Second and Tenth Circuits on

Second, respondents dismiss the decisions of the Eighth and Ninth Circuits as relying on what they describe as a "faulty analogy between the bona fide error defenses contained in the FDCPA and TILA." *Id.* But the fact that respondents disagree with the merits of those courts' holdings does not make the circuit split any less compelling.

Respondents also posit that the Eighth Circuit's holding should not be considered "entrenched" because the court of appeals in *Picht v. John R. Hawks, Ltd.*, 236 F.3d 446 (8th Cir. 2001), simply cited back to *Hulshizer* and *Baker* without any additional analysis. BIO 8-9. But that is precisely the meaning of "entrenched"; because the Eighth Circuit regarded its decision in *Hulshizer* as settled precedent, it saw no need to re-analyze the issue in *Picht*.

Similarly, respondents' speculation that the Eighth and Ninth Circuits did not have the "benefit" of the Tenth Circuit's decision in *Johnson* and thus might change position if they were to re-consider the issue, BIO 9, borders on the implausible.[4] Nothing in the relevant provision has changed since the Eighth

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the other side), *cert. granted*, 128 S. Ct. 1118 (2008), *vacated and remanded*, 128 S. Ct. 2395 (2008).

[4] Because respondents characterize the Second Circuit's decision in *Pipiles* as "dicta," they do not speculate that it too would reverse course if given the opportunity. However, as petitioner has demonstrated, *see supra* at 1-3, that decision is not dicta, and it is equally implausible – for all of the reasons outlined here – that the Second Circuit would re-consider its position.

and Ninth Circuits issued their original decisions, and (as noted above) the Eighth Circuit subsequently applied its holding in *Picht*. Moreover, those circuits are likely to lack both the opportunity and incentive to re-consider their holdings: given the settled precedent, parties are unlikely even to litigate the question up to those courts, and neither circuit could unilaterally resolve the split by granting rehearing en banc. Finally, and in any event, such speculation cannot be reconciled with the Supreme Court of Montana's decision in *Collection Bureau Services*, which respondents do not address at all. In 2004 – that is, nearly two years after the Tenth Circuit's decision in *Johnson* – the court's opinion in *Collection Bureau Services* acknowledged *Johnson*'s holding "that mistakes of law can be considered bona fide errors," 87 P.3d at 1030, but nonetheless opted to follow the contrary decisions of Second, Eighth, and Ninth Circuits.

2. Turning to the merits of the case, respondents' arguments boil down to a single, largely circular proposition: the plain text of the statute does not exclude legal errors from the scope of the bona fide error defense; that interpretation cannot be absurd (and therefore must be enforced) because the Sixth and Tenth Circuits have so concluded. But petitioner's interpretation is perfectly consistent with – and in fact supported by – the plain text of the statute: as petitioner explains below, *see infra* at 7-8, Congress drafted the bona fide error provision of the FDCPA using language with a clear and well-settled legal meaning. Moreover, respondents' reasoning flies in the face of the overwhelming evidence, outlined in the petition, demonstrating that Congress

did not intend the bona fide error defense to apply to legal errors.

a. Respondents attempt to minimize the significance of the statutory scheme constructed by Congress, particularly with regard to the safe harbor provision. They contend that "[t]o require attorneys/debt collectors to forego a claim or to seek a formal opinion from the Federal Trade Commission . . . every time an ambiguity arises in connection with the FDCPA . . . would not only be impractical and cost prohibitive, but would also place ethical attorneys/debt collectors at substantial competitive disadvantage in contravention of the express purpose of the Act." BIO 14-15. But that argument relies on a false dichotomy: when faced with an ambiguity in the FDCPA, debt collectors are not limited to choosing only between "forego[ing] a claim or . . . seek[ing] a formal opinion from the FTC." Instead, they have a third choice, which is to err on the side of caution. For example, in this case, given the conflicting opinions in other circuits on the "in writing" requirement, the lack of any such requirement in the statute, and the lack of any published Sixth Circuit opinion, respondents could merely have included the exact same representation without the "in writing" requirement.

Nor do respondents satisfactorily explain why their reading of the bona fide error defense would not render the safe harbor defense effectively superfluous. They posit that the two defenses are "not mutually exclusive, but rather can and should work hand-in-hand," BIO 15, and that "aggressive attorneys/debt collectors can no more rely on the bona fide error defense for an intentional bad faith

legal mistake than they could for an intentional bad faith clerical error," BIO 17, but both of these contentions miss the point. As the petition explains (at 15-16), the safe harbor defense was intended to encourage debt collectors to seek FTC advice when the FDCPA is ambiguous. But if the bona fide error defense includes legal errors, debt collectors will have no incentive to seek an FTC opinion when their obligations under the FDCPA are unclear and there is no clear precedent prohibiting their actions; instead, they can rely on the ambiguity to shield them from liability.

b. Respondents next dismiss the history of the FDCPA, contending that "a review of the legislative history of the FDCPA does not show that Congress, in enacting the statute in 1977, was aware of the existing judicial interpretations of the bona fide error defense in TILA." BIO 19. But that argument turns ordinary canons of statutory construction on their head. As this Court has repeatedly made clear, Congress is *presumed* to be aware of the interpretations of the TILA bona fide error defense and to have adopted them when it employed the exact same defense in the FDCPA. *See, e.g.*, *Bragdon v. Abbott*, 524 U.S. 624, 644-45 (1998) (""Had Congress done nothing more than copy the Rehabilitation Act definition into the ADA, its action would indicate the new statute should be construed in light of this unwavering line of administrative and judicial interpretation. . . . When administrative and judicial interpretations have settled the meaning of an existing statutory provision, repetition of the same language in a new statute indicates, as a general matter, the intent to incorporate its administrative

and judicial interpretations as well."); *Rowe v. N.H. Motor Transp. Ass'n*, 128 S. Ct. 989, 994 (2008) ("We have said that 'when judicial interpretations have settled the meaning of an existing statutory provision, repetition of the same language in a new statute indicates, as a general matter, the intent to incorporate its judicial interpretations as well.'" (quoting *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit*, 547 U.S. 71, 85 (2006) (internal quotation marks and alterations omitted)).[5]

For their part, respondents seize on a single sentence in a Senate Report to support their contention that Congress – despite using language identical to the TILA bona fide error defense – nonetheless intended the defense "to be much broader than under TILA," BIO 20. That sentence provides that "[a] debt collector has no liability, however, if he violates the act *in any manner, including with regard to the act's coverage,* when such violation is unintentional and occurred despite procedures designed to avoid such violations." S. REP. NO. 95-382, at 5 (1977), *reprinted in* 1977 U.S.C.C.A.N. 1695. However, respondents omit the sentence that follows, which explains that "[a] debt collector also has no liability if he relied in good faith on an advisory opinion issued by the Federal Trade

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[5] Although respondents emphasize (at 18) a sentence in this Court's opinion in *Rowe* indicating that Congress was "fully aware of this Court's interpretation of" the language that it copied into another statute, nothing in *Rowe* indicates that this awareness was essential to the Court's holding.

Commission." *Id.* Taken together, these two sentences – which appear in a section entitled "Explanation of the Legislation" – simply reiterate the basic outlines of the statutory scheme – viz., the bona fide error defense and the safe harbor provision. Nothing suggests that Congress intended, *sub silentio*, to reject the settled interpretation of the TILA defense.

Nor should any significance be ascribed to Congress's failure to add language, as it did with the TILA, specifically indicating that the FDCPA bona fide error defense does not encompass legal errors. As the petition explained (at 19), Congress made clear that its 1980 addition to the TILA merely "*clarified* [the defense] to make clear that it applies to mechanical and computer errors, provided that they are not the result of erroneous legal judgments." S. REP. NO. 96-73, at 7-8 (1979), *reprinted in* 1980 U.S.C.C.A.N. 280, 285-86. The operative language of the TILA's bona fide error provision remained the same, as did the longstanding interpretation of that provision.

* * *

As the petition makes clear, the text, structure, history, and purpose of the FDCPA all indicate that Congress did not intend the statute's bona fide error provision to include legal errors. Respondents' argument to the contrary is unavailing.

CONCLUSION

For the foregoing reasons, as well as those set forth in the petition, certiorari should be granted.

Respectfully submitted,

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