No. 08-___

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a debt collector's legal error qualifies for the bona fide error defense under the Fair Debt Collection Practices Act ("FDCPA"), 15 U.S.C. § 1692.

TABLE OF CONTENTS

QUESTION PRESENTED i

TABLE OF AUTHORITIES iv

PETITION FOR A WRIT OF CERTIORARI 1

OPINIONS BELOW 1

JURISDICTION 1

RELEVANT STATUTORY PROVISIONS 1

STATEMENT OF THE CASE 3

REASONS FOR GRANTING THE WRIT 7

I. Federal Courts Are Intractably Divided Over Whether The Fair Debt Collection Practices Act Excuses Violations That Result From Legal Mistakes. 7

II. The Sixth Circuit's Decision Is Wrong On The Merits 13

A. The Structure And Text Of The FDCPA Demonstrate That Congress Did Not Intend The Bona Fide Error Defense To Apply To Legal Errors. 14

1. Congress Enacted A Separate "Safe Harbor" Defense To Protect Debt-Collectors From Legal Mistakes. 14

2. The Bona Fide Error Defense In The FDCPA Is Identical To The Original Bona Fide Error Defense In The TILA, Which Courts Have Declined To Extend To Legal Errors. 17

B. The Narrow, Traditional Reading Of The Bona Fide Error Defense Is Consistent With The FDCPA's Purposes. 20

1. Expanding The Scope Of The Bona Fide Error Defense To Include Legal Mistakes Would Frustrate The Act's Purpose Of Eliminating Abusive Debt Collection Practices And Protecting Consumers. 20

2. Holding That The Bona Fide Error Defense Does Not Extend To Legal Errors Protects Consumers Without Putting Debt Collectors Who Refrain From Abusive Practices At A Competitive Disadvantage. 22

CONCLUSION 27

APPENDIX

Court of Appeals Decision 1a

District Court Decision 19a

Denial of Rehearing En Banc 42a

TABLE OF AUTHORITIES

Cases

Akalwadi v. Risk Mgmt. Alternatives, Inc., 336 F. Supp. 2d 492 (D. Md. 2004) 12

Atlas Realty Corp. v. House, 192 A. 564 (Conn. 1937) 17

Baker v. G. C. Services Corp., 677 F.2d 775 (9th Cir. 1982) 8, 9

Baruch v. Healthcare Receivable Mgmt., Inc., No. 05-CV-5392 CPS JMA, 2007 WL 3232090 (E.D.N.Y. Oct. 29, 2007) 23

Campbell v. Hall, No. 2:06-CV-127 JVB, 2009 U.S. Dist. LEXIS 21416 ((Mar. 17, 2009) 11

Caputo v. Prof'l Recovery Servs., 261 F. Supp. 2d 1249 (D. Kan. 2003) 12

Cohen v. Beachside Two-I Homeowners' Ass'n, No. 05-706 ADM/JSM, 2005 U.S. Dist. LEXIS 28536 (D. Minn. Nov. 17, 2005) 12

Collection Bureau Servs. v. Morrow, 87 P.3d 1024 (Mont. 2004) 9

Federal Crop Ins. Corp. v. Merrill, 332 U.S. 380 (1947) 16

FTC v. Colgate-Palmolive Co., 380 U.S. 374 (1965) 23

Gervais v. Riddle & Assocs., 479 F. Supp. 2d 270 (D. Conn. 2007) 12

Haynes v. Logan Furniture Mart, Inc., 503 F.2d 1161 (7th Cir. 1974) 18

Heintz v. Jenkins, 514 U.S. 291 (1995) 24, 25

Hibbs v. Winn, 542 U.S. 88 (2004) 15

Hughes v. Rowe, 449 U.S. 5 (1980) 24

Hulshizer v. Global Credit Servs., Inc., 728 F.2d 1037 (8th Cir. 1984) 9, 11

Hunt v. Check Recovery Sys., 178 F. Supp. 2d 1157 (N.D. Cal. 2007) 12

Ives v. W. T. Grant Co., 522 F.2d 749 (2d Cir. 1975) 18

Johnson v. Riddle, 305 F.3d 1107 (10th Cir. 2002) ..... passim

Langley v. Check Game Solutions, Inc., No. 05-CIV-2265 W AJB, 2007 WL 2701345 (S.D. Cal. Sept. 13, 2007) 23

Lowe v. Elite Recovery Solutions, L.P., No. CIV S-07-0627 RRB GGH, 2008 WL 324777 (E.D. Cal. Feb. 5, 2008) 23

Martsolf v. JBC Legal Group, P.C., No. 1:04-CV-1346, 2008 U.S. Dist. LEXIS 6876 (M.D. Pa. Jan. 30, 2008) 24

Miller v. Javitch, Block & Rathbone, 534 F. Supp. 2d 772 (S.D. Ohio 2008) 12, 16

Palmer v. Wilson, 502 F.2d 860 (9th Cir. 1974) 18

Pescatrice v. Orovitz, 539 F. Supp. 2d 1375 (S.D. Fla. 2008) 11

Picht v. John R. Hawks, Ltd., 236 F.3d 446 (8th Cir. 2001) 9, 11

Pipiles v. Credit Bureau of Lockport, Inc., 886 F.2d 22 (2d Cir. 1989) 9

Ratner v. Chemical Bank N.Y. Trust Co., 329 F. Supp. 270 (S.D.N.Y. 1971) 18

Richardson v. McKnight, 521 U.S. 399 (1997) 17

Richburg v. Palisades Collection LLC, 247 F.R.D. 457 (E.D. Pa. 2008) 11

Rosado v. Taylor, 324 F. Supp. 2d 917 (N.D. Ind. 2004) 12

Rowe v. N.H. Motor Transp. Ass'n, 128 S. Ct. 989 (2008) 17

Russell v. Equifax A.R.S., 74 F.3d 30 (2d Cir. 1996) 23

Seeger v. AFNI, Inc., 548 F.3d 1107 (7th Cir. 2008) 8

Shapiro v. Haenn, 222 F. Supp. 2d 29 (D. Me. 2002) 12

Sibley v. Firstcollect, Inc., 913 F. Supp. 469 (M.D. La. 1995) 12

Smith v. City of Jackson, Miss., 544 U.S. 228 (2005) 20

Sweetland v. Stevens & James, Inc., 563 F. Supp. 2d 300 (D. Me. 2008) 23

Tallon v. Lloyd & McDaniel, 497 F. Supp. 2d 847 (W.D. Ky. 2007) 23

Thomas v. Law Firm of Simpson & Cybak, 392 F.3d 914 (7th Cir. 2004) (en banc) 21

Tolentino v. Friedman, 46 F.3d 645 (7th Cir.), *cert. denied*, 515 U.S. 1160 (1995) 4

Turner v. Firestone Tire & Rubber Co., 537 F.2d 1296 (5th Cir. 1976) 18

United Savings Ass'n of Tex. v. Timbers of Inwood Forest Assocs., Ltd., 484 U.S. 365 (1988) 15

Williams v. Taylor, 529 U.S. 362 (2000) 15

Wyatt v. Cole, 504 U.S. 158 (1992) 17

Statutes

15 U.S.C. § 1640 17
15 U.S.C. § 1640(c) 2, 6
15 U.S.C. § 1692(a) 3
15 U.S.C. § 1692(e) 12, 20, 22
15 U.S.C. § 1692e(5) 24
15 U.S.C. § 1692f(1) 10
15 U.S.C. § 1692g(a) 3, 5
15 U.S.C. § 1692g(a)(3) 5, 8
15 U.S.C. § 1692k 4, 9
15 U.S.C. § 1692k(a) 4, 22
15 U.S.C. § 1692k(c) ..... passim
15 U.S.C. § 1692k(e) 2, 4, 15
15 U.S.C. § 1692l 4
28 U.S.C. § 1254(1) 1
Pub. L. No. 96-221, 94 Stat. 164 (1980) 19

Other Authorities

131 Cong. Rec. H10534 (daily ed. Dec. 2, 1985) 14

Brief for Commercial Law League of America as *Amicus Curiae* Supporting Petitioners, *Heintz v. Jenkins*, 514 U.S. 291 (1995) (No. 94-367), 1995 WL 18239 25

FEDERAL TRADE COMMISSION, ANNUAL REPORT 2008: FAIR DEBT COLLECTION PRACTICES ACT, *available at* http://www.ftc.gov/os/2008/03/P084802fdcpare port. pdf. 11

Griffith, Elwin, *Identifying Some Trouble Spots in the Fair Debt Collection Practices Act: A Framework for Improvement*, 83 NEB. L. REV. 762 (2005) 8, 12, 25

S. REP. NO. 95-382 (1977), *as reprinted in* 1977 U.S.C.C.A.N. 1695 ..... passim

S. REP. NO. 96-368 (1979), *as reprinted in* 1980 U.S.C.C.A.N. 236 19

S. REP. NO. 96-73 (1979), *as reprinted in* 1980 U.S.C.C.A.N. 280 19

SINGER, NORMAN J., STATUTES AND STATUTORY CONSTRUCTION (rev. 6th ed. 2000) 15

Transcript of Oral Argument, *Heintz v. Jenkins*, 514 U.S. 291 (1995) (No. 94-367), 1995 WL 117619 25

Regulations

16 C.F.R. § 1.1(a)(1) 15

16 C.F.R. § 1.2(a) 4

PETITION FOR A WRIT OF CERTIORARI

Petitioner Karen L. Jerman respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The judgment of the United States Court of Appeals for the Sixth Circuit (Pet. App. 1a-18a) is published at 538 F.3d 469. The order denying the petition for rehearing and rehearing en banc (Pet. App. 42a) is unpublished. The district court's opinion (Pet. App. 19a-41a) is published at 502 F. Supp. 2d 686.

JURISDICTION

This judgment of the court of appeals was entered on August 18, 2008. The order denying rehearing and rehearing en banc was entered on November 24, 2008. Pet. App. 42a. On February 17, 2009, Justice Stevens extended the time to file this petition to and including March 25, 2009. App. No. 08A710. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

Section 1692k of Title 15 of the United States Code – a provision of the Fair Debt Collection Practices Act (FDCPA) – provides in relevant part:

> (c) Intent
>
> A debt collector may not be held liable in any action brought under this title 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.
>
> . . .
>
> (e) Advisory opinions of [the Federal Trade] Commission.
>
> No provision of this section imposing any liability shall apply to any act done or omitted in good faith in conformity with any advisory opinion of the Commission, notwithstanding that after such act or omission has occurred, such opinion is amended, rescinded, or determined by judicial or other authority to be invalid for any reason.

As originally enacted, Section 1640 of Title 15 of the United States Code – a provision of the Truth in Lending Act (TILA) – provided in relevant part:

> (c) Unintentional violations; bona fide errors
>
> A creditor or assignee may not be held liable in any action brought under this section or section 1635 of this title for a violation of this subchapter if the creditor or assignee 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.

In 1980, Congress amended the Truth in Lending Act to add the following sentence to the end of Section 1640(c):

> Examples of a bona fide error include, but are not limited to, clerical, calculation, computer malfunction and programming, and printing errors, except that an error of legal judgment with respect to a person's obligations under this subchapter is not a bona fide error.

STATEMENT OF THE CASE

The Fair Debt Collection Practices Act ("FDCPA") protects consumers by prohibiting abusive debt collection. This case presents an important question of law over which federal courts are irreconcilably divided: whether debt collectors can avoid liability on the basis that they violated the FDCPA as a result of a reasonable legal mistake. That question substantially affects the enforcement of a significant and frequently employed piece of federal consumer protection legislation.

1. Congress enacted the FDCPA in 1977 in light of "abundant evidence of the use of abusive, deceptive, and unfair debt collection practices by many debt collectors." 15 U.S.C. § 1692(a). Among the problems that Congress sought to address in the FDCPA were cases in which "debt collectors [were] dunning the wrong person or attempting to collect debts which the consumer has already paid." S. REP. NO. 95-382, at 4 (1977), *as reprinted in* 1977 U.S.C.C.A.N. 1695, 1699. Thus, the FDCPA requires debt collectors to send the consumer a written "validation notice" that specifies, among other things, the amount of the debt, the creditor's name, and an explanation of how the consumer can dispute the debt. 15 U.S.C. § 1692g(a).

Under the FDCPA, both the Federal Trade Commission (FTC), *see* 15 U.S.C. § 1692l, and "consumers who have been subjected to collection abuses," S. REP. NO. 95-382, at 5 (1977), *as reprinted in* 1977 U.S.C.C.A.N. 1695, 1699; *see* 15 U.S.C. § 1692k, may bring civil suits against debt collectors who are alleged to have violated the Act. When a violation is established, individual consumers may recover their actual damages plus a maximum of one thousand dollars in statutory damages; awards in a class action are limited to actual damages plus the lesser of either $500,000 or one percent of the debt collector's net worth. 15 U.S.C. § 1692k(a). Reflecting Congress's choice of "a 'private attorney general' approach to assume enforcement of the FDCPA," *see Tolentino v. Friedman*, 46 F.3d 645, 651 (7th Cir.), *cert. denied*, 515 U.S. 1160 (1995), a consumer is also entitled to a reasonable attorney's fee whenever a debt collector is found to have violated the FDCPA, *see* 15 U.S.C. § 1692k(a).

Debt collectors who are found to have violated the Act may nonetheless avoid liability if they can establish either of the two defenses provided by the FDCPA. First, a "safe harbor" defense carves out an exemption for debt collectors who relied in good faith on an advisory opinion issued by the Federal Trade Commission ("FTC"). 15 U.S.C. § 1692k(e). Debt collectors can seek such an opinion through a written request that provides the Commission with all of the material facts and outlines the unresolved legal issue. 16 C.F.R. § 1.2(a). Second, a "bona fide error" defense exempts debt collectors from liability if they prove that "the violation was not intentional and resulted from a bona fide error notwithstanding the

maintenance of procedures reasonably adapted to avoid any such error." 15 U.S.C. § 1692k(c).

2. Respondents were retained by Countrywide Home Loans, which held the mortgage on petitioner's house. Pet. App. 2a. In April 2006, respondents filed a complaint in state court to foreclose on the house, *id.*; three days later, petitioner was served with both the complaint and, as required by the FDCPA, a validation notice informing her of her legal rights, Pet. App. 2a-3a.

Under the FDCPA, the validation notice was required to indicate that the alleged debt would be presumed valid unless "within thirty days after receipt of the notice, [petitioner] dispute[d] the validity of the debt . . . ." 15 U.S.C. § 1692g(a)(3). However, the validation notice instead indicated that the debt would be presumed valid unless disputed "in writing." Pet. App. 3a. When petitioner disputed the debt, Countrywide checked its records and discovered that petitioner had fully repaid her mortgage. *Id.* Respondents then dismissed the complaint. *Id.*

3. Petitioner subsequently filed this suit in federal court, alleging that the validation notice violated Section 1692g(a)(3) of the FDCPA by requiring her to dispute her debt "in writing." Pet. App. 3a. She sought statutory damages and class certification. *Id.* The district court agreed that respondents had violated the FDCPA, but it nonetheless granted respondents' motion for summary judgment. In the court's view, the bona fide error defense extended to legal mistakes such as the one at issue in this case. Pet. App. 3a-4a. Moreover, the court concluded, respondents qualified for the defense because the violation was not

intentional, it was made in good faith, and the defendants maintained procedures reasonably adapted to avoid such errors: case law regarding the use of the "in writing" requirement was unsettled – with no published Sixth Circuit opinion on the question and conflicting decisions from two other courts of appeals – and the principal attorney in respondents' firm made efforts to comply with the FDCPA that included attending seminars and distributing cases to the firm's employees, Pet. App. 35a-40a.

4. On appeal, the Sixth Circuit affirmed. Pet. App. 18a. Recognizing that federal courts of appeals are "divided as to whether the bona fide error defense applies to mistakes of law or is limited . . . to procedural or clerical errors," the panel followed the Tenth Circuit in rejecting the majority position adopted by the Second, Eighth, and Ninth Circuits. Pet. App. 8a-12a. The panel deemed unpersuasive the majority rule that Section 1692k(c)'s bona fide error defense should be interpreted consistently with the parallel defense in the Truth in Lending Act ("TILA"), 15 U.S.C. § 1640(c), which courts at the time of the FDCPA's enactment had overwhelmingly interpreted to apply to clerical and computation errors, but had declined to extend to legal errors. The Sixth Circuit noted that Congress had later amended the TILA – but not the FDCPA – to make that limitation explicit. Pet. App. 13a-14a. The absence of a similar amendment to the FDCPA, the panel reasoned, "suggest[ed] that . . . Congress did not intend to limit the defense to clerical errors." Pet. App. 14a. Moreover, the panel posited, "protection for attorneys who make bona fide errors of law is

consistent with the FDCPA's purpose of eliminating abusive debt collection practices and ensuring that those debt collectors who refrain from abusive collection practices are not competitively disadvantaged." Pet. App. 14a.

On November 24, 2008, petitioner's timely petition for rehearing and for rehearing en banc was denied. Pet. App. 36a.

REASONS FOR GRANTING THE WRIT

Congress enacted the FDCPA to protect consumers by prohibiting abusive debt collection practices. Federal courts are deeply divided over whether the law excuses violations that result from legal mistakes. This conflict is particularly untenable in light of current economic conditions: as more consumers find themselves unable to repay their debts, efforts to collect those debts are likely to increase in both number and intensity. This case presents an ideal opportunity for this Court to resolve the three-to-two circuit split, 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.

I. Federal Courts Are Intractably Divided Over Whether The Fair Debt Collection Practices Act Excuses Violations That Result From Legal Mistakes.

Three courts of appeals – the Second, Eighth, and Ninth Circuits – have held that the FDCPA's bona fide error defense does not apply to violations

that result from legal mistakes. In this case, the Sixth Circuit joined the Tenth Circuit in reaching a contrary conclusion that the defense extends to legal mistakes. Numerous courts of appeals and commentators have recognized this direct split in authority. *See, e.g.*, *Seeger v. AFNI, Inc.*, 548 F.3d 1107, 1114 (7th Cir. 2008) ("Recently, we noted that a split exists among the circuits on this question. We noted . . . that the majority of our sister circuits, including the Second, Eighth, and Ninth, have limited the defense to factual and clerical errors, while a growing minority have applied the defense to mistakes of law." (internal citation and quotations omitted)); *Johnson v. Riddle*, 305 F.3d 1107, 1121 (10th Cir. 2002) ("Outside this circuit, federal courts have split on the issue . . . ."); Elwin Griffith, *Identifying Some Trouble Spots in the Fair Debt Collection Practices Act: A Framework for Improvement*, 83 NEB. L. REV. 762, 814-18 (2005) [hereinafter *Trouble Spots*] (describing the circuit split).

1. Petitioner would have prevailed in the Ninth Circuit. In *Baker v. G. C. Services Corp.*, 677 F.2d 775 (9th Cir. 1982), a debt collector appealed the district court's decision holding that it had violated the FDCPA by, among other things, failing to inform the debtor that he could dispute a portion of the debt. The court of appeals affirmed. It reasoned that Congress, in Section 1692g(a)(3), "clearly required the notice to inform the debtor that he could dispute any portion of the debt," 677 F.2d at 778, and that the notice sent by the debt collector to the debtor was "simply not sufficient to put a debtor on notice" of that fact, *id.* Having found a violation of the FDCPA,

the Ninth Circuit then rejected the debt collector's argument that its conduct was shielded by the bona fide error defense, holding instead that, under the FDCPA, "a mistake about the law is insufficient by itself to raise the bona fide error defense." *Id.* at 779. The panel reasoned that Section 1692k(c)'s bona fide error defense was "nearly identical" to the same defense in the Truth in Lending Act. Courts had consistently construed the TILA defense, which – like the FDCPA – excuses violations that are "not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid any such error," as applying only to clerical errors. *Id.*

Two years after the Ninth Circuit decided *Baker*, the Eighth Circuit agreed that the FDCPA's bona fide error defense did not apply to legal mistakes. *Hulshizer v. Global Credit Servs., Inc.*, 728 F.2d 1037, 1038 (8th Cir. 1984) ("[W]e agree with the Ninth Circuit that reliance on the advice of counsel or a mistake about the law is not protected . . . ."); *see also Picht v. John R. Hawks, Ltd.*, 236 F.3d 446, 452 (8th Cir. 2001) (affirming that "*Hulshizer* remains the law of this Circuit"). The Second Circuit subsequently adopted the same interpretation, as did the Supreme Court of Montana. *See Pipiles v. Credit Bureau of Lockport, Inc.*, 886 F.2d 22, 27 (2d Cir. 1989) ("In any event, it is likely that the violations . . . resulted from a mistaken view of the law, which section 1692k(c) does not excuse.") (citing *Baker* and *Hulshizer*); *Collection Bureau Servs. v. Morrow*, 87 P.3d 1024, 1030-31 (Mont. 2004) (recognizing the "split of authority among the circuit courts on" the bona fide error defense question and following majority view").

2. This majority view conflicts not only with the decision below, but also with the Tenth Circuit's holding in *Johnson v. Riddle*, 305 F.3d 1107 (2002), that the FDCPA's bona fide error defense applies to legal mistakes. In *Johnson*, the Tenth Circuit agreed with the consumer – who had bounced a check for $2.64 – that the debt collector had violated the FDCPA by attempting to collect an amount not "permitted by law," 15 U.S.C. § 1692f(1): specifically, although state law authorized a service charge of up to fifteen dollars for bad checks, the debt collector sought to recover a $250 penalty under the state's shoplifting statute. However, like the Sixth Circuit, the Tenth Circuit declined to construe the FDCPA's bona fide error defense consistently with its TILA counterpart, citing the express exclusion of legal mistakes from the current version of the TILA's bona fide error defense. *Id.* at 1122-23.

In its opinion, the Tenth Circuit acknowledged that its interpretation of "bona fide error" was in some tension with the FDCPA's reference to "maintenance of procedures reasonably adapted to avoid any such error," and it conceded that "it is more common to speak of procedures adapted to avoid clerical errors than to speak of procedures adopted [sic] to avoid mistakes of law." 305 F.3d at 1123. However, the Tenth Circuit was ultimately persuaded by the absence of any language or legislative history reflecting Congress's intent to limit the bona fide error defense, as well as by a concern that a narrow reading of the defense would leave debt-collecting lawyers exposed to liability for any unsuccessful suit against a consumer. *Id.* at 1123-24.

3. Certiorari is warranted because the circuit split is considered and entrenched. In concluding that the bona fide error defense extends to legal errors, the Sixth and Tenth Circuits specifically considered and rejected not only the holdings but also the reasoning of the Second, Eighth, and Ninth Circuits. *See* Pet. App. 8a-14a; *Johnson*, 305 F.3d at 1121-23. Moreover, there is no reason to believe that any of the circuits will reconsider their positions: the Eighth Circuit in *Picht* has reaffirmed its holding in *Hulshizer*, and the Sixth Circuit denied rehearing en banc in this case. Pet. App. 42a. As a result, it is unlikely that this conflict will be resolved without this Court's intervention.

4. Current economic conditions, and in particular the growing number of foreclosures, also render this Court's intervention essential. Actions under the FDCPA are widespread, as are consumer complaints to the FTC about FDCPA violations: in 2007 alone, the FTC received more than 70,000 such complaints. FEDERAL TRADE COMMISSION, ANNUAL REPORT 2008: FAIR DEBT COLLECTION PRACTICES ACT 4 [hereinafter FTC ANNUAL REPORT], *available at* http://www.ftc.gov/os/2008/03/P084802fdcpareport.pdf. This number is all but certain to rise in the years to come as consumers find themselves increasingly unable to repay their debts.

Indeed, the question presented arises regularly across the country. *E.g.*, *Campbell v. Hall*, No. 2:06-CV-127 JVB, 2009 U.S. Dist. LEXIS 21416, at *23-*29 (Mar. 17, 2009); *Pescatrice v. Orovitz*, 539 F. Supp. 2d 1375, 1379 n.1 (S.D. Fla. 2008); *Richburg v. Palisades Collection LLC*, 247 F.R.D. 457, 466 (E.D. Pa. 2008); *Miller v. Javitch, Block & Rathbone*, 534 F.

Supp. 2d 772, 777 (S.D. Ohio 2008); *Gervais v. Riddle & Assocs.*, 479 F. Supp. 2d 270, 279 (D. Conn. 2007); *Hunt v. Check Recovery Sys.*, 178 F. Supp. 2d 1157, 1170 (N.D. Cal. 2007); *Cohen v. Beachside Two-I Homeowners' Ass'n*, No. 05-706 ADM/JSM, 2005 U.S. Dist. LEXIS 28536, at *22-*25 (D. Minn. Nov. 17, 2005); *Akalwadi v. Risk Mgmt. Alternatives, Inc.*, 336 F. Supp. 2d 492, 503 (D. Md. 2004); *Rosado v. Taylor*, 324 F. Supp. 2d 917, 932 (N.D. Ind. 2004); *Caputo v. Prof'l Recovery Servs.*, 261 F. Supp. 2d 1249, 1255 (D. Kan. 2003); *Shapiro v. Haenn*, 222 F. Supp. 2d 29, 43 (D. Me. 2002); *Sibley v. Firstcollect, Inc.*, 913 F. Supp. 469, 472 (M.D. La. 1995).

The ongoing and irreconcilable disagreement over the scope of the bona fide error defense undermines the FDCPA's purpose of promoting "consistent [government] action to protect consumers against debt collection abuses." 15 U.S.C. § 1692(e). Without a uniform interpretation, the protections provided by the FDCPA turn on accidents of geography. In the Second, Eighth, and Ninth Circuits, debt collectors are strictly liable for FDCPA violations unless they made a bona fide clerical error or relied on an FTC advisory opinion. Yet, in the Sixth and Tenth Circuits, where the bona fide error defense applies to legal mistakes, "[debt] collectors are not afraid to use aggressive tactics in the collection process. If they cross the line sometimes, they hope that the bona fide error defense will bail them out." *Trouble Spots*, *supra*, at 820-21. As the law stands, the rights of two consumers who receive identical validation notices from the same debt collector containing the same legal mistake may

depend on whether they live in Kansas City, Kansas or Kansas City, Missouri.

6. This case is an ideal vehicle for this Court to resolve the question presented, which is both squarely raised by, and outcome determinative of, this case. There is no dispute that respondent's inclusion of the "in writing" requirement in the validation notice sent to petitioner was a legal mistake. Pet. App. 26a n.1; Pet. App. 4a n1; Pet. App. 5a n.2. And the underlying facts of the case are not at issue: the district court held that respondents had violated the FDCPA, and respondents did not cross-appeal that determination. Pet. App. 5a n.2. Thus, the decision below hinged solely on whether the bona fide error defense extends to legal mistakes.

II. 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, as the FDCPA's bona fide error defense does *not* apply to legal mistakes. First, the language and structure of the FDCPA demonstrate that Congress did not intend the bona fide error defense to apply to legal errors: not only did Congress adopt the same language that it had used in the Truth in Lending Act ("TILA") – language which courts had declined to extend to legal mistakes – but it also enacted a separate "safe harbor" provision (not applicable here) to exempt debt collectors from liability for certain legal mistakes. Second, a narrow reading of the bona fide error defense is most consistent with the FDCPA's purpose of protecting consumers from abusive debt collection practices.

A. The Structure And Text Of The FDCPA Demonstrate That Congress Did Not Intend The Bona Fide Error Defense To Apply To Legal Errors.

1. Congress Enacted A Separate "Safe Harbor" Defense To Protect Debt-Collectors From Legal Mistakes.

The structure of the FDPCA confirms that the bona fide error defense applies to clerical errors, but does not extend to legal errors. In the rare circumstances in which the legal obligations imposed by the FDCPA are genuinely unclear, Congress provided a separate exemption to address any ambiguities in the law: the "safe harbor provision" provision, which allows debt collectors to rely on official advisory opinions issued by the FTC. Applying the bona fide error defense to legal errors would strip the safe harbor defense of any practical effect.

a. Compliance with the FDCPA is straightforward. It involves "a set of rules which debt collectors themselves have testified are easy to follow and do not restrict the business of ethical debt collectors." 131 Cong. Rec. H10534 (daily ed. Dec. 2, 1985) (remarks of Rep. Annunzio). In the relatively few cases in which the FDCPA is genuinely ambiguous, debt collectors have two options to avoid liability for violations arising from mistakes of law. First, they can err on the side of caution and opt not to engage in practices that may violate the Act. Second, the FDCPA specifically exempts from liability "any act done or omitted in good faith in conformity with any advisory opinion of the [Federal

Trade] Commission." 15 U.S.C. § 1692k(e). The FTC provides such advisory opinions to resolve uncertainty in circumstances where "[t]he matter involves a substantial or novel question of fact or law and there is no clear Commission or court precedent." 16 C.F.R. § 1.1(a)(1). Having explicitly included a mechanism to encourage debt collectors to avoid liability for mistakes of law by going to the FTC to resolve any statutory ambiguities, Congress was unlikely to have intended that debt collectors could disregard that mechanism and rely instead on the bona fide error defense. *See United Savings Ass'n of Tex. v. Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365, 371 (1988) (ambiguous statutory provisions are "often clarified by the remainder of the statutory scheme").

b. In practice, extending the bona fide error defense to apply to legal mistakes would eviscerate the safe harbor defense, violating this Court's rule against superfluity. *See Hibbs v. Winn*, 542 U.S. 88, 101 (2004) ("A statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant . . . .") (quoting 2A NORMAN J. SINGER, STATUTES AND STATUTORY CONSTRUCTION § 46.06 (rev. 6th ed. 2000)); *see Williams v. Taylor*, 529 U.S. 362, 404 (2000) (giving effect to "every clause and word of a statute" is a "cardinal principle" of interpretation). If the bona fide defense does not extend to legal errors, debt collectors can avoid liability for such mistakes only if the FTC has approved those practices. If, however, the bona fide error defense also applies to legal mistakes, aggressive debt collectors would have no incentive to seek FTC advice when their

obligations under the FDCPA are unclear. Instead, they can escape liability simply by showing that there was no clear precedent prohibiting their actions. In effect, aggressive debt collectors can rely on a lack of guidance, rather than on having sought guidance, to immunize themselves. *See, e.g.*, *Miller v. Javitch, Block & Rathbone, LLP*, 534 F. Supp. 2d 772, 778 (S.D. Ohio 2008) (holding that bona fide error defense applied when defendants spent "considerable time, effort and research . . . evaluating the sufficiency of" the complaint "in light of the recent decisions in this district," notwithstanding that complaint was drafted to circumvent state procedural requirements).

c. Moreover, interpreting the FDCPA's bona fide error defense as applying to clerical errors is more consistent with the text of the statute itself, which requires debt collectors to demonstrate that the violation was unintentional, made in good faith, and occurred "notwithstanding procedures reasonably adapted to avoid any such error." 15 U.S.C. § 1692k(c). As even the Sixth and Tenth Circuits have acknowledged, "it is more common to speak of procedures adapted to avoid clerical errors than to speak of procedures adopted [sic] to avoid mistakes of law." Pet. App. 11a (quoting *Johnson*, 305 F.3d at 1123).

This interpretation is also more consistent with the general principle that a party is presumed to have knowledge of the law. *See, e.g.*, *Federal Crop Ins. Corp. v. Merrill*, 332 U.S. 380, 384 (1947). As one court has explained, a legal mistake "is no excuse for the violation of a statute. To hold otherwise would violate an established principle of law and

would furnish . . . a convenient excuse for an evasion of the law." *Atlas Realty Corp. v. House*, 192 A. 564, 567 (Conn. 1937). Indeed, respondents are essentially seeking to assert a form of qualified immunity here – that is, their violation of the FDCPA should be excused because they acted in good faith. But this Court has made clear that qualified immunity was developed for special reasons – viz., to protect the "government's ability to perform its traditional functions," *Wyatt v. Cole*, 504 U.S. 158, 167 (1992) – and has been reluctant to extend the doctrine beyond that context, *see, e.g.*, *Richardson v. McKnight*, 521 U.S. 399, 407-08 (1997) (declining to extend qualified immunity in Section 1983 cases to guards at private prisons).

2. The Bona Fide Error Defense In The FDCPA Is Identical To The Original Bona Fide Error Defense In The TILA, Which Courts Have Declined To Extend To Legal Errors.

Just last Term, this Court recognized that when courts "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." *Rowe v. N.H. Motor Transp. Ass'n*, 128 S. Ct. 989, 994 (2008) (internal citation omitted). When Congress enacted the FDCPA in 1977, it included a bona fide error defense that was identical to the one it had enacted nine years before in the TILA. *Compare* 15 U.S.C. § 1692k(c) (1982) *with* 15 U.S.C. § 1640 (1982). Debt collectors under the FDCPA, like creditors under the TILA, could avoid liability if they

showed "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."

Courts construing the TILA had consistently held that the defense applied only to clerical errors.[1] Those courts frequently relied on *Ratner v. Chemical Bank N.Y. Trust Co.*, 329 F. Supp. 270 (S.D.N.Y. 1971), in which the court concluded – based on an extensive review of the TILA's history – that Congress had added the bona fide error defense only to address complaints from businessmen and others that "mathematical and clerical errors" were "inevitable" in the lending process. *Id.* at 281-82 (discussing *Hearings on S. 5 Before the Subcomm. on Financial Institutions of the Senate Comm. on Banking and Currency*, 90th Cong. 64, 226, 374, 426-27, 529, 584, 698 (1967)). The court emphasized that the law's "paramount" aim was to protect consumers, and merely relying on a "reasonable" interpretation of the statute would not excuse violating consumer rights. *Id.* at 282.

In 1980 – three years after enacting the FDCPA – Congress amended the TILA to "provide the consumer with clearer credit information [and]

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[1] *E.g.*, *Turner v. Firestone Tire & Rubber Co.*, 537 F.2d 1296, 1298 (5th Cir. 1976) (referring to this section as the "so-called clerical error defense"); *Ives v. W. T. Grant Co.*, 522 F.2d 749, 758 (2d Cir. 1975); *Palmer v. Wilson*, 502 F.2d 860, 861 (9th Cir. 1974); *Haynes v. Logan Furniture Mart, Inc.*, 503 F.2d 1161, 1167 (7th Cir. 1974).

make creditor compliance easier." S. REP. NO. 96-368, at 16 (1979), *as reprinted in* 1980 U.S.C.C.A.N. 236, 251. Among other things, the Truth in Lending Simplification and Reform Act added a sentence to the TILA to illustrate the intended scope of the bona fide error defense, providing that "[e]xamples of a bona fide error include, but are not limited to, clerical, calculation, computer malfunction and programming, and printing errors, except that an error of legal judgment with respect to a person's obligations under this subchapter is not a bona fide error." However, nothing about this addition to the TILA changed the meaning of the operative language of the statute, which continues to provide that a creditor can avoid liability for a violation of the TILA when "the violation was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid any such error." And by not changing the operative language, Congress made clear that it had 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), *as reprinted in* 1980 U.S.C.C.A.N. 280, 285-86; *see* Pub. L. No. 96-221, 94 Stat. 164 (1980).

Contrary to the view of the court of appeals in this case, nothing about that amendment changed the longstanding interpretation of the TILA bona fide error defense, which continues to share the same operative language as the FDCPA. Because it is clear that this operative language excludes legal mistakes, the decision below is erroneous. Moreover, when Congress enacts a statute using identical language to

a related statute, amending one does not affect the interpretation of the other. *See, e.g.*, *Smith v. City of Jackson, Miss.*, 544 U.S. 228, 240 (2005) (amendments to Title VII in 1991 "did not amend the ADEA" and the "pre-1991 interpretation of Title VII's identical language remains applicable to the ADEA").

B. The Narrow, Traditional Reading Of The Bona Fide Error Defense Is Consistent With The FDCPA's Purposes.

1. Expanding The Scope Of The Bona Fide Error Defense To Include Legal Mistakes Would Frustrate The Act's Purpose Of Eliminating Abusive Debt Collection Practices And Protecting Consumers.

Congress enacted the FDCPA "to eliminate abusive debt collection practices by debt collectors" and "to protect consumers against debt collection abuses." 15 U.S.C. § 1692(e). As Congress recognized, debt collectors have enormous incentives to pursue consumers aggressively: they work on commission and are not constrained by the same reputational concerns as the creditors for whom they work. S. REP. NO. 95-382, at 2 (1977), *as reprinted in* 1977 U.S.C.C.A.N. 1695, 1696. Congress thus sought to curtail abusive tactics that ranged from midnight telephone calls to false threats of legal proceedings to the misrepresentation of legal rights found in this case. *Id.* To this end, the FDCPA draws a clear line between proscribed and acceptable debt collection practices. Debt collectors know their obligations, and consumers know their rights.

Expanding the bona fide error defense to apply to legal mistakes would frustrate Congress's goal of protecting consumers from abuse. Under the interpretation adopted by the Sixth and Tenth Circuits, debt collectors could escape liability for violations whenever the law is unsettled, regardless whether the FTC has provided an applicable advisory opinion. As a result, rational debt collectors would have an incentive to be overly aggressive in pursuing consumers, avoiding only those tactics that are clearly illegal. By contrast, if the bona fide error defense is construed narrowly – that is, as applying to clerical errors, but not to legal errors – debt collectors will be limited to lawful collection tactics, as Congress intended.

The incentives created by the Sixth Circuit's expansive interpretation of the bona fide error defense also undermine Congress's intent that consumers protect their own rights under the FDCPA. S. REP. NO. 95-382, at 5 (1977), *as reprinted in* 1977 U.S.C.C.A.N. 1695, 1699 (FDCPA is "primarily self-enforcing"). Consumers can only enforce their rights if they are aware that the rights have been violated in the first place, and the typical consumer – who is frequently not represented by counsel, *see Thomas v. Law Firm of Simpson & Cybak*, 392 F.3d 914, 918 (7th Cir. 2004) (en banc) (noting that "many debtors cannot afford to hire attorneys to represent them in [FDCPA] collection actions") – is unlikely to detect a violation that occurs as a result of a legal error. For example, although consumers may be able to recognize a random clerical error (such as being charged an interest rate of one hundred, rather than ten, percent), the same consumers are unlikely to

recognize that, as in this case, they are not actually required to dispute a debt "in writing."

2. Holding That The Bona Fide Error Defense Does Not Extend To Legal Errors Protects Consumers Without Putting Debt Collectors Who Refrain From Abusive Practices At A Competitive Disadvantage.

a. In holding that the FDCPA's bona fide error defense applied to legal errors, the Sixth and Tenth Circuits reasoned that a contrary holding would place an undue burden on debt collectors, thereby conflicting with the Act's goal of "ensuring that those debt collectors who refrain from abusive collection practices are not competitively disadvantaged." Pet. App. 14a (discussing 15 U.S.C. § 1692(e)); *see Johnson*, 305 F.3d at 1123. This concern is unfounded for two reasons. First, the reasoning has it exactly backwards: expanding the defense would place debt collectors who comply with the law at a competitive disadvantage compared to more aggressive debt collectors who violate the law but nonetheless would not be held liable for FDCPA violations as long as their actions were not clearly illegal.

Second, the statutory cap on damages significantly limits a debt collector's exposure to liability when he violates the FDCPA as a result of a legal error. *See* 15 U.S.C. § 1692k(a). In a case brought by an individual, a debt collector would be liable for no more than a thousand dollars over the consumer's actual damages, while damages in a class action are limited to actual damages plus the lesser of $500,000 or one percent of the net worth of the

debt collector. Moreover, actual damages are rarely awarded; when they are, they are generally less than five thousand dollars unless aggravating circumstances are present.[2] As a result, victims of abusive collection practices generally receive little more than the reasonable attorney fees ordinarily awarded to successful plaintiffs under "primarily self-enforcing" statutes like the FDCPA. *See* S. REP. NO. 95-382, at 5 (1977), *as reprinted in* 1977 U.S.C.C.A.N. 1695, 1699.

To the extent that there is any tension between a debt collector's exposure to liability for unintentional legal errors and consumer protection under the FDCPA, the statute's remedial nature dictates that it should be resolved in the consumer's favor. As this Court has reasoned in the context of consumer protection, it is not "unfair to require that one who deliberately goes perilously close to an area of proscribed conduct shall take the risk that he may cross the line." *FTC v. Colgate-Palmolive Co.*, 380 U.S. 374, 393 (1965) (internal citations omitted); *accord Russell v. Equifax A.R.S.*, 74 F.3d 30, 35 (2d Cir. 1996). For precisely this reason, courts of appeals have concluded that "it is logical for debt

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[2] *See, e.g., Sweetland v. Stevens & James, Inc.*, 563 F. Supp. 2d 300 (D. Me. 2008) ($2500); *Lowe v. Elite Recovery Solutions, L.P.*, No. CIV S-07-0627 RRB GGH, 2008 WL 324777 (E.D. Cal. Feb. 5, 2008) ($2740); *Baruch v. Healthcare Receivable Mgmt., Inc.*, No. 05-CV-5392 CPS JMA, 2007 WL 3232090 (E.D.N.Y. Oct. 29, 2007) (unreported) ($5000); *Langley v. Check Game Solutions, Inc.*, No. 05-CIV-2265 W AJB, 2007 WL 2701345 (S.D. Cal. Sept. 13, 2007) ($91); *Tallon v. Lloyd & McDaniel*, 497 F. Supp. 2d 847 (W.D. Ky. 2007) ($55).

collectors – repeat players likely to be acquainted with the legal standards governing their industry – to bear the brunt of the risk." *Clark v. Capital Credit & Collection Servs., Inc.*, 460 F.3d 1162, 1171 (9th Cir. 2006).

b. Nor would holding that the bona fide error defense does not apply to legal errors create the "absurd result" prophesied by the Sixth Circuit in this case – *viz.*, that attorney debt-collectors will be subject to liability for a violation of the FDCPA merely because they brought a collection action that ultimately proved unsuccessful. *Contra* Pet. App. 10a-11a. As this Court has explained, although Section 1692e(5) of the FDCPA prohibits debt collectors from threatening "'to take action that cannot legally be taken' . . . the fact that a lawsuit turns out ultimately to be unsuccessful" does not dictate the conclusion that it was an "action that cannot legally be taken." *Heintz v. Jenkins*, 514 U.S. 291, 296 (1995) (quoting 15 U.S.C. § 1692e(5)); *cf. Hughes v. Rowe*, 449 U.S. 5, 14 (1980) ("[E]ven if the law or the facts are somewhat questionable or unfavorable at the outset of litigation, a party may have an entirely reasonable ground for bringing suit."). Instead, an attorney debt-collector who filed an unsuccessful suit would be liable under Section 1692e(5) only if the claim was so devoid of merit that it was illegal to bring it at all. *See, e.g.*, *Martsolf v. JBC Legal Group, P.C.*, No. 1:04-CV-1346, 2008 U.S. Dist. LEXIS 6876 (M.D. Pa. Jan. 30, 2008) (defendant violated FDCPA when it sent consumer a letter threatening litigation after statute of limitations expired). Indeed, this interpretation has been borne out in practice: petitioner has been unable to locate a

single case in which an attorney debt-collector has ever been liable under the FDCPA for merely bringing a claim that rested on a legally sound basis but was ultimately unsuccessful on the facts.

Nor does this Court's decision in *Heintz* support an extension of the bona fide error defense to legal mistakes, *see* Pet. App. 8a–9a, as the language on which the Tenth and Sixth Circuits relied was offered merely as a solution to a hypothetical problem. In *Heintz*, this Court explained that "even if we were to assume that the suggested reading of [Section] 1692e(5) is correct," it would not lead to a result "so absurd as to warrant implying an exception for litigating lawyers" from the FDCPA, because such attorneys could rely on the bona fide error defense. The Court did not squarely address whether – much less determine that – a legal mistake was covered by the bona fide error defense; to the contrary, to the extent that the issue was addressed at all either in briefs or at oral argument, the parties and *amici* operated on the assumption that the defense applied only to clerical errors.[3] *See Trouble Spots*, *supra*, at

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3 *See* Brief for Commercial Law League of America as *Amicus Curiae* Supporting Petitioners at 32, *Heintz v. Jenkins*, 514 U.S. 291 (1995) (No. 94-367), 1995 WL 18239 ("[T]he bona fide error defense . . . will not be available if the attorney commits an error of law . . . ."); Transcript of Oral Argument at 17-18, *Heintz v. Jenkins*, 514 U.S. 291 (1995) (No. 94-367), 1995 WL 117619 (petitioner's argument) ("Your honor, the good faith exception that you have just mentioned has been very narrowly construed by the lower courts. Consequently, it is basically, as they interpret it in any event, a defense that allows for clerical errors provided the business enterprise has sufficient safeguards . . . .").

817 ("In *Heintz*, the Supreme Court did not conclude that lawyers could use the bona fide error defense for legal mistakes. It merely observed that lawyers who mistakenly brought a lawsuit were not helpless in the face of the statutory defense, but the Court did not pause long enough to explain whether it was referring to both legal and nonlegal grounds.").

* * *

When it drafted legislation to protect consumers from abusive debt collectors, Congress included a bona fide error defense using language that had been uniformly interpreted to apply only to unintentional clerical errors and other random mistakes. That narrow construction reflects Congress's intent to protect consumers, as well as debt collectors who decline to test the boundaries of abusive practices. Absent explicit language from Congress, extending the FDCPA bona fide error defense to debt collectors who are wrong about the law would be both an unusual and unfair construction of a strict-liability consumer protection statute.

CONCLUSION

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

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