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

BRIEF OF PUBLIC CITIZEN, INC., AARP, NATIONAL ASSOCIATION OF CONSUMER ADVOCATES, NATIONAL CONSUMER LAW CENTER, AND U.S. PIRG: THE FEDERATION OF STATE PIRGS AS AMICI CURIAE IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Under the Fair Debt Collection Practices Act, a debt collector may avoid liability by showing beyond a preponderance of the evidence that its violation of the Act "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). Does this defense extend to a debt collector's ignorance of the law?

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INTEREST OF AMICI CURIAE

Amici are national, non-profit advocacy organizations committed to the enforcement of consumer-protection laws. Amici thus have a strong interest in ensuring that the federal statutes protecting consumers from overreaching by lenders and debt collectors are not undermined by new defenses that are at odds with congressional intent. In particular, amici are concerned that the unprecedented and sweeping defense proposed by the respondents in this case—absolute immunity from civil liability for illegal collection practices, based on ignorance of the law—would deter enforcement, inhibit the development of precedent, and encourage the very collection abuses that Congress sought to prevent. Details about the individual amici are included in the Appendix.[1]

SUMMARY OF ARGUMENT

To prevail, respondents must convince this Court that at least two unlikely propositions are true.

First, they must demonstrate that, even though the Congress that enacted the Fair Debt Collection Practices Act (FDCPA) in 1977 borrowed verbatim the bona-fide-error defense enacted nine years earlier in the Truth in Lending Act (TILA), it nonetheless intended to dramatically depart from the uniform conclusion of the federal courts of appeals that TILA's bona-fide-error defense did not extend to mistakes of law.

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[1] No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae* or their counsel made a monetary contribution to its preparation or submission. Letters reflecting the blanket consent of the parties have been filed with the Clerk.

This Court, however, has explained that when a statutory provision has a settled judicial interpretation, the repetition of that same provision in a new statute indicates Congress's intent that the provision bear the same meaning in both statutes. That canon is especially appropriate here because respondents can offer no plausible explanation why Congress would have wanted to use the same language to excuse ignorance of the law under the FDCPA but not under TILA—a far more complex, highly technical statute that applies to a much broader universe of transactions and entities. In fact, both statutes adopted the same solution to problems of legal uncertainty: a safe-harbor defense for reliance on authoritative administrative interpretations. Respondents' interpretation, however, would render that defense superfluous.

Second, respondents must demonstrate that Congress intended to override the venerable rule, deeply enshrined in American law, that ignorance of the law is no excuse. But Congress knows how to require proof of actual knowledge of the law when it wants to, and it did not do so here.

In any event, complete departures from the common-law rule are exceedingly rare, even in criminal cases, and are limited to unusually complex regulatory schemes that impose severe criminal sanctions, extend broadly, and carry the risk of trapping innocents who would likely have had no notice. The FDPCA is none of those things: It is easy to follow, imposes only limited civil liability, and covers only those who are principally or regularly in the business of consumer debt collection and who should therefore be well aware of the Act and its requirements.

The traditional justifications for the presumption against excusing ignorance of the law apply with full force to the FDCPA: The defense respondents propose would encourage lawbreaking, inhibit the development of precedent, deter private enforcement, and overturn the carefully calibrated system of incentives designed by Congress.

Indeed, the danger of excusing ignorance of the law in the debt-collection context is uniquely troubling. Debt collectors—unlike virtually every other private business that regularly interacts with consumers—are unconcerned with consumer goodwill and, absent regulation, have every incentive to maximize collections at the expense of consumer protection. Allowing a mistake-of-law defense would competitively disadvantage collectors that employ scrupulous practices, contrary to Congress's express intent.

When the bona-fide error defense is appropriately limited to non-legal errors, as Congress intended, it creates a powerful incentive for debt collectors to know the law, maintain preventive procedures, and avoid harm to consumers. But, under respondents' approach, debt collectors would be encouraged to concentrate their efforts instead on justifying their own preferred legal rules, regardless of the impact on consumers.

ARGUMENT

I. There Is No Justification for Interpreting Identical Language in TILA and the FDCPA Differently.

A. When It Borrowed TILA's Language, Congress Incorporated Into the FDCPA the Settled Judicial Interpretation of That Language.

When Congress enacted the FDCPA's bona-fide-error defense in 1977, it did not legislate on a blank slate. Instead, Congress copied, word-for-word, the provision it had enacted just nine years earlier in TILA. *Compare* 15 U.S.C. § 1692k(c) (1982), *with* 15 U.S.C. § 1640 (1976). Both statutes provide that a defendant "may not be held liable" if the defendant "shows by a preponderance of the 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 must construe statutory language as Congress would have contemplated it at the time of enactment. *Dixon v. United States*, 548 U.S. 1, 12 (2006). At the time Congress enacted the FDCPA, the federal courts of appeals uniformly took the view that TILA's bona-fide-error defense did not extend to ignorance or mistakes of law.[2] The overwhelming majority of federal

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[2] *See Ives v. W.T. Grant Co.*, 522 F.2d 749, 757-58 (2d Cir. 1975); *Haynes v. Logan Furniture Mart, Inc.*, 503 F.2d 1161, 1166-67 (7th Cir. 1974); *Turner v. Firestone Tire & Rubber Co.*, 537 F.2d 1296, 1298 (5th Cir. 1976); *Palmer v. Wilson*, 502 F.2d 860, 861 (9th Cir. 1974); *see also McGowan v. King, Inc.*, 569 F.2d 845, 849-50 (5th Cir. 1978) (relying on pre-1977 cases).

district courts and state courts agreed.[3] *See* Annotation, *What constitutes truth-in-lending act violation which 'was not intentional and resulted from a bona fide error,' within meaning of § 130(c) of act (15 U.S.C.A. § 1640(c))*, 27 A.L.R. Fed. 602 (1976).

The Congress that enacted the FDCPA in 1977 presumably knew how TILA's identical language had been construed, and presumably intended the FDCPA provision to bear the same meaning. *See United States v. Hayes*, 129 S. Ct. 1079, 1086 (2009). This Court has repeatedly explained 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." *Rowe v. New Hampshire Motor Transport Ass'n*, 128 S. Ct. 989, 994 (2008); *see Lorillard v. Pons*, 434 U.S. 575 (1978).

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[3] *See, e.g., In re Dickson*, 432 F. Supp. 752 (W.D.N.C. 1977); *Ballew v. Assocs. Fin. Servs.*, 450 F. Supp. 253, 271 (D. Neb. 1976); *Sambolin v. Klein Sales Co.*, 422 F. Supp. 625 (S.D.N.Y. 1976); *Houston v. Atlanta Fed. Sav. and Loan Ass'n*, 414 F. Supp. 851, 857-58 (N.D. Ga. 1976); *Gerasta v. Hibernia Nat'l Bank*, 411 F. Supp. 176, 190 n.41 (E.D. La. 1976); *Wilson v. Shreveport Loan Corp.*, 404 F. Supp. 375 (W.D. La. 1975); *Powers v. Sims & Levin Realtors*, 396 F. Supp. 12, 20 n.7 (E.D. Va. 1975); *Starks v. Orleans Motors*, 372 F. Supp. 928, 931 (E.D. La. 1974), *aff'd*, 500 F.2d 1182 (5th Cir. 1974); *Johnson v. Assocs. Fin., Inc.*, 369 F. Supp. 1121, 1123-24 (S.D. Ill. 1974); *Buford v. Am. Fin. Co.*, 333 F. Supp. 1243 (N.D. Ga. 1971); *Douglas v. Beneficial Fin. Co.*, 334 F. Supp. 1166, 1178 (D. Alaska 1971); *Ratner v. Chem. Bank N.Y. Trust Co.*, 329 F. Supp. 270 (S.D.N.Y. 1971); *Lowery v. Fin. Am. Corp.*, 231 S.E.2d 904, 911 (N.C. App. 1977); *Jefferson v. Mitchell Select Furniture Co.*, 321 So. 2d 216, 222 (Ala. Civ. App. 1975). Only a single reported federal decision deviated from the consensus, *Welmaker v. W.T. Grant Co.*, 365 F. Supp. 531 (N.D. Ga. 1971), and that decision had been widely discredited by 1977.

That canon of construction is particularly appropriate here because the FDCPA and the TILA share a common statutory framework as subchapters of the Consumer Credit Protection Act, 15 U.S.C. §§ 1601-1693r. It would have been especially strange for the Congress that enacted the FDPCA to have used the same language to mean two very different things within the same "package of statutes." *Cannon v. University of Chicago*, 441 U.S. 677, 699 (1979); *cf.* 15 U.S.C. § 1601 note (defining common "grammatical usage" for entire CCPA). Respondents' position "would create a disjunction between these two provisions that Congress could not have intended." *Hayes*, 129 S. Ct. at 1086.

As of 1977, the federal courts interpreting the bona-fide-error defense had identified four principal reasons why the defense did not apply to mistakes of law, largely following the analysis of the first decision to carefully examine the question, *Ratner v. Chemical Bank New York Trust Co.*, 329 F. Supp. 270 (S.D.N.Y. 1971). *See Ives*, 522 F.2d at 757-58 ("expressly adopt[ing] the reasoning . . . in *Ratner*"). Each one of those four reasons applies with full force to the FDCPA. Because Congress is presumed to know the law, the federal courts' pre-1977 interpretation of the very same language provides the best evidence of what Congress intended the FDCPA's language to mean. *Cannon*, 441 U.S. at 697-98.

First, and most importantly, the federal circuits uniformly read the term "intentional" to refer to intent to carry out *the acts* constituting violations of the law, not specific intent to violate *the law* itself. As *Ratner* put it: "It is undisputed that defendant carefully, deliberately—intentionally—omitted the disclosure in question. That defendant, in this court's view, mistook the law does not make its action any less intentional." 329 F. Supp. at 281; *Haynes*, 503 F.2d at 1166 (rejecting the view that

"intent, as employed in § 1640(c), is directed to the violation of the law itself rather than to acts which constitute violations of the law"). That understanding is consistent with the word's ordinary legal usage. *See Black's Law Dictionary* (8th ed. 2004) (defining "intentional" as "Done with the aim of carrying out *the act*.") (emphasis added). A contrary interpretation would have run the risk of equating an "intentional" violation with a "knowing" and "willful" violation, TILA's standard for criminal liability, even though the bona-fide-error defense concerns only civil liability. *Haynes*, 503 F.2d at 1166; *compare* 15 U.S.C. § 1611 *with* § 1640(c).

Given this widely shared understanding of the key term—"intentional"—in TILA's bona-fide-error defense, Congress's use of the same language indicates an intent to incorporate that understanding. *Morissette v. United States*, 342 U.S. 246, 263 (1952) ("absence of contrary direction may be taken as satisfaction with widely accepted definitions, not as a departure from them").

Second, the pre-FDPCA courts' interpretation of the term "intentional" was in keeping not only with the ordinary legal meaning of that word, but also with the "normal rule," even in criminal cases, that ignorance of the law is no excuse. *Ratner*, 329 F. Supp. at 281 (citing this Court's cases, including *United States v. Int'l Minerals & Chem. Corp.*, 402 U.S. 558, 563 (1971)); *see also Powers*, 396 F. Supp. at 20 n.7 ("The disclosure and standardization policies of the Act would be vitiated should the Court construe § 1640(c) to excuse errors of law as well as mistakes."). Congress's formulation of the bona-fide error defense, in other words, signaled no intent to "carv[e] out an exception to the general rule that ignorance of the law is no excuse." *Int'l Minerals*, 402 U.S. at 563 (reading the phrase "knowingly violates any such regulation" as extending only to "acts or omissions which

violate the Act," not mistakes of law). As we discuss in the second part of this brief, that general rule applies with special force to the FDCPA.

Third, the pre-FDPCA courts read the requirement that a defendant demonstrate the "maintenance of procedures reasonably adapted to avoid any such error" as reinforcing the conclusion that the defense could not sensibly extend to mistakes of law. *Ratner*, 329 F. Supp. at 281 ("The provision is wholly inapposite to deal with errors of law like defendant's, though made in entire 'good faith.' However much clients and others might wish it, nobody has devised . . . 'procedures' Congress could have envisaged to cover such errors of law."); *Haynes*, 503 F.2d at 1167 (concluding that the "procedures" requirement "plainly suggests that the scope of the section was intended to encompass basically only clerical errors"). The fit between the "procedures" requirement and respondents' proposed mistake-of-law defense is no less awkward under the FDCPA.

Fourth, TILA's legislative history supported the courts' reading of the text of the bona-fide-error defense. The House bill had originally required proof of a "knowing" violation to establish civil liability, but that requirement was omitted in response to the Justice Department's objection that "proof of 'specific knowledge' might 'frustrate prospective plaintiffs, and thereby weaken the enforcement provisions of the act.'" *Haynes*, 503 F.2d at 1166 n.6 (quoting legislative history). Moreover, the bona-fide-error defense was added to the Senate version of the bill in response to industry complaints that "mathematical and clerical errors would be inevitable because of the complexity" of the computations required by TILA, further suggesting that the defense was never intended to override the general rule that igno-

rance of the law is no excuse. *See Ratner*, 329 F. Supp. at 281 n.17 (quoting legislative history).

A parallel history played out during Congress's consideration of the FDCPA. Congress rejected a version of the Act sponsored by Senator Jake Garn of Utah (S. 1130), that would have required a showing of fault to establish liability and, in the final markup before the full Senate Banking Committee, rejected an amendment that would have imposed civil liability only for debt collectors who "willfully fail[] to comply" with the Act's requirements. Robert J. Hobbs, *Fair Debt Collection* § 3.2.2 (6th ed. 2008) (describing history). The Act's sponsor, Senator Riegel, explained that if a debt collector violated the act "by accident" and "didn't intend for the effect to be as it was," it could invoke the bona-fide error defense and "say, I didn't know that, or my computer malfunctioned." *Senate Comm. on Banking, Housing & Urban Affairs, Markup Session: S. 1130—Debt Collection Legislation* 60 (July 26, 1977). At the same time, Senator Riegel confirmed that willfulness was not intended to be a prerequisite to civil liability because "certain things ought not to happen, period": the prohibited practices are "illegal and wrong," and "whether somebody does it knowingly, willfully, you know, with a good heart, bad heart, is really quite incidental." *Id.*

Respondents, in effect, ask this Court to give debt collectors what they could not achieve through the legislative process.

B. There Is No Plausible Reason For Congress To Have Created A Mistake-of-Law Defense Under the FDCPA, But Not Under TILA.

Even setting aside the identical language in the two statutes and the judicial interpretation against which Congress legislated, respondents can offer no plausible

explanation for *why* Congress would have wanted the FDCPA, but not TILA, to include a mistake-of-law defense. If anything, it would have made more sense for Congress to have taken the opposite approach, excusing lenders' good-faith mistakes in the face of TILA's dense thicket of thorny disclosure rules, but not excusing independent debt collectors' ignorance of the FDCPA's straightforward prohibitions on abusive and deceptive conduct. In fact, Congress's solution to the problem of legal uncertainty under both statutes was the same: a safe-harbor defense for acts in conformity with authoritative administrative interpretations. *Compare* 15 U.S.C. § 1692k(e) (1982), *with* 15 U.S.C. § 1640(f) (1976).

TILA is, by any measure, far more complex and technical than the FDCPA, and extends to a far larger set of transactions and regulated entities. *See Cowen v. Bank United of Texas, FSB*, 70 F.3d 937, 941 (7th Cir. 1995) (Posner, J.) (observing that "hypertechnicality reigns" under TILA). TILA's already complicated statutory framework is also supplemented by an even more detailed and complicated set of regulations issued by the Federal Reserve Board, which Congress entrusted with wide discretion to interpret and supervise the Act. *See Mourning v. Family Pubs. Serv., Inc.*, 411 U.S. 356, 365 (1973). The entire FDCPA, by contrast, is available in the form of a 21-page, large-print pamphlet published by the Federal Trade Commission.[4]

Soon after TILA's enactment, Congress recognized that "creditors need sure guidance through the 'highly technical' Truth in Lending Act," *Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555, 566-67 (1980), but the solution Congress chose was not the general mistake-of-law de-

[4] http://www.ftc.gov/bcp/edu/pubs/consumer/credit/cre27.pdf.

fense that respondents seek here. Instead, Congress "acted to promote reliance upon Federal Reserve pronouncements," adding amendments in 1974 and again in 1976 that created a safe-harbor defense from liability for acts "done or omitted in good faith in conformity with any rule, regulation, or interpretation" by the Board, or the interpretation of an authorized employee. 15 U.S.C. § 1640(f). The purpose of the 1974 and 1976 amendments was to relieve the creditor of the burden of choosing "between the Board's construction of the Act and the creditor's own assessment of how a court may interpret the Act." S. Rep. 93-278, at 13 (1974); *see Milhollin*, 444 U.S. at 567 (citing 1974 and 1976 legislative history).

One year later, in 1977, Congress enacted the FDCPA. Just as it borrowed TILA's bona-fide-error defense, Congress also borrowed the language of the safe-harbor defense, permitting debt collectors to avoid liability for acts "done or omitted in good faith conformity with any advisory opinion" of the FTC. 15 U.S.C. § 1692k(e). The inclusion of this provision strongly suggests that Congress intended the safe-harbor defense, not respondents' expansive and awkward construction of the bona-fide-error defense, to be the Act's solution to problems of interpretive uncertainty. Indeed, the unavoidable consequence of respondents' position would be to render the FDCPA's safe-harbor defense superfluous: Anything covered by the safe-harbor defense would be covered by the bona-fide error defense anyway, and even reliance on informal staff opinions, which are not encompassed in the safe-harbor defense, would confer immunity.

The Sixth Circuit believed that a clarifying amendment to TILA enacted in 1980—three years *after* the FDCPA—indicated that, "unlike the TILA, Congress did not intend to limit the [FDCPA] defense to clerical

errors." Pet. App. 13a-14a. Actions of "a subsequent Congress form a hazardous basis for inferring the intent of an earlier one." *Mass. v. EPA*, 549 U.S. 497, 530 n.27 (2007). But to the extent that this post-enactment history is relevant, it confirms rather than undermines the conclusion that the FDCPA does not excuse mistakes of law. The 1980 amendment, part of a comprehensive "simplification" of the TILA, *ratified* the settled pre-1977 interpretation of the language shared by both statutes. And it did not alter the operative language of TILA's bona-fide error defense, but merely added examples clarifying what sorts of errors are and are not covered: "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 [TILA] is not a bona fide error." Truth in Lending Simplification and Reform Act, Pub. L. No. 96-221, Tit. VI, § 615(a)(3), 94 Stat. 168, 181 (1980) (codified at 15 U.S.C. § 1640(c)). The Senate Report explained that this amendment simply "clarified" the provision "to make clear that it applies to mechanical and computer errors" and not to "erroneous legal judgments as to the Act's requirements." S. Rep. 73, 96th Cong., 1st Sess. 7-8 (1979).

Because Congress legislated against the backdrop of a settled judicial interpretation, and because respondents cannot even identify a plausible explanation for why Congress would have used identical language to excuse mistakes of law under the FDCPA but not under TILA, their position defies common sense. And "there is no canon against using common sense in construing laws as saying what they obviously mean." *Koons Buick Pontiac GMC, Inc. v. Nigh*, 543 U.S. 50, 125 (2004) (quoting *Roschen v. Ward*, 279 U.S. 337, 339, (1929) (Holmes, J.)).

II. The Rule That Ignorance of the Law Is No Defense Applies With Special Force to the FDCPA.

Congress has long been presumed to legislate against "the general rule that ignorance of the law or a mistake of law is no defense," a presumption that is "deeply rooted in the American legal system." *Cheek v. United States*, 498 U.S. 192, 199 (1991); *see also* 4 William Blackstone, *Commentaries on the Laws of England* 27 (1769). Justice Story, refusing to allow a mistake-of-law defense under a federal statute in 1833, explained that "[t]he whole course of the jurisprudence, criminal as well as civil, of the common law, points to a different conclusion. It is a common maxim, familiar to all minds, that ignorance of the law will not excuse any person, either civilly or criminally." *Barlow v. United States*, 32 U.S. 404, 411 (1833). The question here is ultimately the same as it was in *Barlow*: whether "the legislature, in this enactment, had any intention to supersede the common principle." *Id.* at 411. The answer—as far as can be discerned from the text, structure, history, and purpose of the FDCPA—is no.

"When Congress wishes to create a mistake of law defense, it knows how to say so explicitly." Sharon L. Davies, *The Jurisprudence of Wilfulness: An Evolving Theory of Excusable Neglect*, 48 Duke L. J. 341, 406 (1998). Congress has done this, for example, in areas where the criminal law is highly complex. *See, e.g.*, 15 U.S.C. § 80a-48 ("[B]ut no person shall be convicted under this section for the violation of any rule, regulation, or order if he proves that he had no actual knowledge of such rule, regulation, or order.") (securities); *United States v. Murdock*, 290 U.S. 389, 396 (1933) (tax). Congress also sometimes requires "actual knowledge," not as a precondition for civil liability, but as a prerequisite

for certain civil remedies. Thus, the FTC may seek civil penalties against a debt collector who has "actual knowledge" that its "act is unfair or deceptive and is prohibited" by the FDCPA. 15 U.S.C. § 45(m)(1)(A) and (C); *see also* 15 U.S.C. § 1692*l* (incorporation of FTC Act by FDCPA). Congress could easily have added such language to the FDCPA's bona-fide error defense if it had wanted to create an absolute defense to all liability for mistakes of law; the absence of such language strongly suggests that Congress had no intention of doing so. *United States v. Turkette*, 452 U.S. 576, 581 (1981).

A. The FDCPA Presents None of the Concerns—Lack of Fair Notice, Unusual Complexity, or Onerous Criminal Liability—That Have Animated Occasional Departures From the Rule.

Apart from the lack of any textual signal that Congress intended to "carv[e] out an exception to the general rule that ignorance of the law is no excuse," *Int'l Minerals*, 402 U.S. at 563, the FDCPA also does not present any of the concerns that have motivated lawmakers to support such an exception.

An exception is sometimes thought necessary where a law could become a trap for innocent, unsophisticated people who may lack actual notice of complex criminal regulations. *See Liparota v. United States*, 471 U.S. 419, 426 (1985) (requiring proof of knowledge of regulations concerning food-stamp use because they might otherwise punish "a broad range of apparently innocent conduct"); *Lambert v. California*, 355 U.S. 225, 229 (1957) (requiring knowledge of city's registration requirement for newly arrived ex-felons where the "circumstances which might move one to inquire as to the necessity of registration [were] completely lacking").

But the FDCPA's requirements apply only to businesses that engage in debt collection "regularly" or as their "principal purpose." 15 U.S.C. § 1692a(6); *see Heintz v. Jenkins*, 514 U.S. 291, 292-93 (1995). As "members of a regulated industry," debt collectors, "and their officers, agents, and employees, are required to be conversant" with the FDCPA's requirements. *Int'l Minerals*, 402 U.S. at 569 (Stewart, J., dissenting). The concern identified by Justice Stewart's dissent—that a "casual shipper, who might be any man, woman, or child in the Nation," and "who had never heard" of the law, could be caught up in a complex set of shipping regulations, *id.* at 1704—is absent here. A mistake-of-law defense is unwarranted where "the community have it in their power to become acquainted with the [law] under which they live." *United States v. Smith*, 18 U.S. 153, 182 (1820) (Livingston, J., dissenting).

The sheer "complexity" that has led to "special treatment" in areas like the criminal tax laws is likewise absent. *Cheek*, 498 U.S. at 200. The FDCPA is far more straightforward than the criminal tax or securities laws, or, for that matter, the TILA. It embodies "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. H10544 (daily ed. Dec. 2, 1985) (statement of sponsor Rep. Annunzio). The FDCPA, in any event, imposes no criminal liability. A mistake-of-law defense that gives a private party absolute immunity from civil liability under a federal statute is apparently unprecedented. *See Torres v. INS*, 144 F.3d 472, 474 (7th Cir. 1998) (Posner, J.) ("Ignorance of a statute is generally no defense even to a criminal prosecution, and it is never a defense in a civil case, no matter how recent, obscure, or opaque the statute."). One would

think that Congress, before taking such an unusual and dramatic step, would at least say so.

B. Allowing a Mistake-of-Law Defense Would Encourage Lawbreaking, Inhibit the Development of Precedent, Deter Enforcement, and Distort the FDCPA's System of Incentives.

That Congress did not intend to disturb the general presumption against ignorance of the law is strongly supported by the traditional rationales for that presumption, which apply with special force to the FDCPA.

1. Encouraging Bad Conduct. Perhaps the most important justification for the rule is the threat that merely allowing a mistake-of-law defense to be raised will encourage bad conduct. Justice Story sounded this theme when he warned against the "extreme danger of allowing such excuses to be set up for illegal acts, to the detriment of the public. There is scarcely any law, which does not admit of some ingenious doubt; and there would be perpetual temptations to violations of the laws, if men were not put upon extreme vigilance to avoid them." *Barlow*, 32 U.S. at 411; *see* Oliver Wendell Holmes, *The Common Law* 48 (1881) ("[T]o admit the excuse at all would be to encourage ignorance where the law-maker has determined to make men know and obey.").

The danger identified by Justices Story and Holmes is especially great under the FDCPA, which was enacted in response to "abundant evidence of the use of abusive, deceptive, and unfair debt collection practices" that "contribute to the number of personal bankruptcies, to marital instability, to the loss of jobs, and to invasions of personal privacy." 15 U.S.C. § 1692(a). When it passed the Act, Congress emphasized that independent debt collectors, the "prime source of egregious debt collection

practices," are unlike the creditors subject to TILA in that debt collectors typically have little or no market incentive to treat consumers properly. S. Rep. 95-382, at 2, *reprinted in* 1977 U.S.C.C.A.N. 1695, 1696. "Unlike creditors, who generally are restrained by the desire to protect their good will," independent debt collectors "are likely to have no future contact with the consumer and are often unconcerned with the consumer's opinion of them." *Id.* This consideration makes the debt-collection industry unique from virtually every other industry that regularly interacts with consumers (and is yet another reason why it is implausible that Congress would have excused legal errors under the FDCPA but not under TILA). Moreover, "[c]ollection agencies generally operate on a 50-percent commission, and this has too often created the incentive to collect by any means." *Id.*

For these reasons, a debt collector faced with a choice between two legal interpretations—one profitable but abusive, and the other less profitable but more scrupulous—has every economic incentive to chose the former. In *Johnson v. Riddle*, for example, a debt collector demanded that the plaintiff pay a $250 "shoplifting charge" in addition to the $2.64 face value of her dishonored check, even though the applicable law was "unmistakably clear" that it "did not authorize an ordinary dishonored check claim to be recast as a shoplifting charge in order to claim the higher statutory penalties." 443 F.3d 723, 725 (10th Cir. 2006). The Tenth Circuit freely acknowledged that the debt collector in that case had "collected on 700,000 to 1.5 million checks per year and therefore had a strong self-interest in collecting the [$250] shoplifting penalty rather than the $15 bad-check penalty for each check." *Id.* at 732 n.6. Nonetheless, the court permitted the debt collector to invoke a mistake-of-law defense and remanded for factfinding concerning the

defense. *Id.* at 732. Under the Sixth Circuit's approach, such unconscionable conduct would always be completely immunized, so long as the debt collector could point to generalized attempts to monitor the case law, attend legal conferences, and the like. Pet. App. 15a-16a.

Allowing a mistake-of-law defense for conduct of the kind in *Johnson* will create a race to the bottom—it will reward illegality, allow creditors to hire the least scrupulous collectors, and drive ethical collectors out of business. That result is precisely the opposite of what Congress intended when it enacted a statute with the express purpose of not only "eliminat[ing] abusive debt collection practices by debt collectors," but also ensuring that "those debt collectors who refrain from using abusive debt collection practices are not competitively disadvantaged." 15 U.S.C. § 1692(e).

2. Inhibiting Development of the Law. A second reason to adhere to the traditional presumption in this case is the danger that allowing a mistake-of-law defense will greatly inhibit the development of the law under the FDCPA, both by the FTC and the courts. If debt collectors can avoid liability simply by relying on their own preferred legal interpretations, they will have no incentive to seek authoritative interpretations from the FTC, because the protection of the safe-harbor defense, 15 U.S.C. § 1692k(e), will be superfluous. And if debt collectors can routinely invoke the bona-fide-error defense whenever legal issues are unsettled, there is substantial risk that those issues will stay unsettled longer than they otherwise would, creating further opportunities to invoke the defense.

The decision below—which held the defendants' conduct was completely immunized under the mistake-of-law defense, without ever addressing the legality of the underlying conduct—illustrates the problem. Pet.

App. 1a-18a. This Court's decision in *Heintz*, 514 U.S. 291, which held that attorneys are subject to the FDCPA, supplies another example. If the mistake-of-law defense had been available in the decade before *Heintz* was decided, high-volume collection law firms might have routinely escaped liability for a range of bad practices in the context of collection litigation—even though only one court of appeals had actually held such firms were exempt.[5] That result would have been directly at odds with Congress's intent that "all firms in the business of debt collection must abide by the same rules." H.R. Rep. 99-405, at 6 (1985) (noting that "[l]egitimate and law-abiding debt collection firms have business diverted unfairly as a result of the use of such tactics"). If courts in those cases followed the procedure employed by the decision below, the issue would have remained undecided in many jurisdictions.

A similar concern for development of the law is often raised about the qualified-immunity doctrine, which is perhaps the closest analogue to the defense that respondents propose here. Last term's decision in *Pearson v. Callahan*, 129 S.Ct. 808 (2009), which gave lower courts discretion to reach the qualified-immunity question first, before determining whether a constitutional violation has occurred, was sensitive to that concern. *Pearson* explained that this procedure would not unduly ossify the law because "the development of constitutional law is by no means entirely dependent on cases in which the defendant may seek qualified immunity." *Id.* at 821-

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[5] *Compare Paulemon v. Tobin*, 30 F.3d 307, 310 (2d Cir. 1994), *Fox v. Citicorp Credit Servs., Inc.*, 15 F.3d 1507, 1512 (9th Cir. 1994), *Scott v. Jones*, 964 F.2d 314, 318 (4th Cir. 1992), *and Shapiro & Meinhold v. Zartman*, 823 P.2d 120, 125 (Colo. 1992), *with Green v. Hocking*, 9 F.3d 18 (6th Cir. 1993).

22. Most constitutional issues presented in damages actions will also arise in criminal, municipal-defendant, or injunctive-relief cases—all cases in which qualified-immunity is unavailable. *Id.* But no similar alternatives are available under the FDCPA. When the bona-fide-error defense applies, a debt collector "may not be held liable," 15 U.S.C. § 1692k(c)—period.

3. Problems of Proof and Administration. A third justification for this Court's presumption that Congress does not lightly create a mistake-of-law defense is based on the considerable problems of proof and judicial administration that would follow, including what Justice Story called "the extreme difficulty of ascertaining" whether a party really held a certain view of the law. *Barlow*, 32 U.S. at 411; *see* 1 John Austin, *Lectures on Jurisprudence* 482 (5th ed., Robert Campbell, ed., 1885) ("[I]f ignorance of the law were admitted as a ground of exemption, the Courts would be involved in questions which it were scarcely possible to solve, and which would render the administration of justice next to impracticable.").

In FDCPA suits, that "extreme difficulty" would substantially interfere with Congress's intent that the Act be "primarily self-enforcing." S. Rep. 95-382, at 5, *reprinted in* 1977 U.S.C.C.A.N. 1695, 1699. Under the Sixth and Tenth Circuits' interpretation of the bona-fide-error defense, "the issue of intent becomes principally a credibility question as to the defendants' subjective intent to violate the [FDCPA]." *Johnson*, 443 F.3d at 728. But consumers have virtually no way of determining a debt collectors' subjective knowledge of the law in advance; proving their knowledge or intent would be either very costly or impossible as a practical matter. *Buford*, 333 F. Supp. at 1248 ("If consumers would be required to prove that creditors were determined to violate the Act

in order to prevail, the civil remedy would be a hollow one.") (discussing TILA). That hurdle alone is likely to deter many consumers and their attorneys from filing suit in the first place, particularly given the low monetary stakes in most FDCPA cases. *See* 15 U.S.C. § 1692k(a)(2)(A) (capping statutory damages in individual cases at $1,000).[6]

It is also quite unclear what sorts of mistakes would confer absolute immunity. Would the defense extend to any mistake of law, no matter how unreasonable? Or would it encompass only a reasonable mistake? *Compare* Pet. App. 15a-18a (allowing complete defense for mistake of law, without analyzing reasonableness), *with Seeger v. AFNI, Inc.*, 548 F.3d 1107, 1114 (7th Cir. 2008) (suggesting that the defense requires, at a minimum, reliance on an "informed, but mistaken, legal opinion"); *see* Austin, *Lectures on Jurisprudence*, at 483 ("1st, Was the party ignorant of the law at the time of the alleged wrong? 2ndly, Assuming that he was ignorant of the law at the time of the wrong alleged, was his ignorance of the law inevitable ignorance, or had been previously placed in such a position that he might have known the law, if he had duly tried?") (discussing the difficulty of such questions).

These problems are bad enough, but they are compounded by the need to fit the square peg of legal error into the round hole of the FDCPA's preventive "proce-

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[6] Actual damages often are not sought under the FDPCA and, when they are, the awards are typically less than $5,000. *See, e.g., Sweetland v. Stevens*, 563 F. Supp. 2d 300 (D. Me. 2008) ($2,500); *Tallon v. Llloyd & McDaniel*, 497 F. Supp. 2d 847 (W.D. Ky. 2007) ($55). Even in class actions, statutory damages are capped at the lesser of $500,000 or 1% of the defendant's net worth. 15 U.S.C. § 1692k(a)(2)(B).

dures" requirement. The circuits have taken divergent and incoherent approaches to this problem, while acknowledging, as did the pre-1977 TILA cases, that Congress's "procedures" requirement is an odd fit in this context. Pet. App. 13a. The fundamental problem is that the process of forming a legal judgment, unlike the avoidance of clerical errors, cannot be reduced to a fixed algorithm or step-by-step, mechanical process. *See Oxford English Dictionary* (2nd ed., 1989) (defining "procedure" as "A set of instructions for performing a specific task.").

Thus, the courts allowing a mistake-of-law defense have differed over such fundamental questions as whether the adequacy of the "procedures" is a matter of law or a matter for the jury, and whether the "procedures" invoked must even have been directed at the specific legal error. The Sixth Circuit, for example, has suggested that a debt collector can gain immunity solely through generalized compliance efforts—it may "perform ongoing FDCPA training, procure the most recent case law, or have an individual responsible for continuing compliance with the FDCPA." *Hartman v. Great Seneca Fin. Corp.*, 569 F.2d 606, 614 (6th Cir. 2009); Pet. App. 15a-16a, 17a-18a (finding requirements of the defense satisfied based only on such generalized efforts). That approach is difficult to reconcile with the text of the statute, which requires that the procedures be "reasonably adapted to avoid *any such* error," 15 U.S.C. § 1692k(c), *i.e.* the specific error at issue. *See Johnson*, 443 F.3d at 729. The Tenth Circuit's approach is more demanding (suggesting, for example, that the filing of a test case and reliance on a researched legal opinion will not necessarily be sufficient), but ultimately leaves the issue to an amorphous, case-by-case weighing of facts—leading to the unseemly prospect of a jury trial assessing the rea-

sonableness of a lawyer's efforts to comply with the law. *Id.* at 730-31.[7]

4. Distortion of Incentives. Whatever their differences, the Sixth and Tenth Circuits' formulations both fundamentally distort the function of the FDCPA's "procedures" requirement. When the bona-fide error defense is appropriately limited to non-legal errors, as Congress intended, it creates a powerful incentive for debt collectors to know the law, maintain scrupulous practices, and avoid acts that will cause harm to consumers. If debt collectors maintain such procedures, they can avoid liability for unintentional acts, such as accidentally misstating the amount owed, or calling a consumer in a different time zone after hours, or mistakenly sending a dunning letter to a consumer who has requested no further contact.

But if debt collectors fail to employ proper preventive procedures—if, for example, they take no precautions to ensure that consumers from whom they seek to collect are not in bankruptcy, or that the amounts stated are not inflated, or that their initial collection demands

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[7]The Seventh Circuit has suggested that reliance on a legal opinion is necessary. *Seeger*, 548 F.3d at 1114 (Wood, J.) ("In the end, AFNI is not arguing that it relied on an informed, but mistaken, legal opinion. It is saying that its ignorance of the law should be excused because it attempted to keep itself informed about the law through the various trade association communications. This is not enough, in our view, to support the bona fide error defense."); *but see Johnson*, 443 F.3d at 729 ("guidance from an independent third party, who might not have had the same self-interest" is "not necessary in every case"). A categorical rule of this sort would at least avoid the Sixth Circuit's anything-goes approach, but a regime permitting debt collectors to shield themselves from liability so long as they can purchase a favorable third-party legal opinion has considerable problems of its own. *See* William H. Simon, *The Market for Bad Legal Advice*, 60 Stan. L. Rev. 1555 (2008).

properly inform consumers of their rights—then they risk liability. 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). Debt collectors, not consumers, are in the best position to absorb the costs of that risk or implement preventive procedures and pass the costs of compliance onto their creditor-clients. *See* Richard A. Posner, *The Economics of Justice* 200 (1983); *First Wisconsin Nat'l Bank v. Nicolaou*, 335 N.W. 2d 390, 395-96 (Wis. 1983).

In short, Congress's carrot-and-stick approach to liability creates incentives for debt collectors to ensure accuracy and good care. Respondents' approach would scrap that system of incentives, encouraging "procedures" aimed at justifying debt collectors' preferred legal rules, instead of true preventive procedures designed to protect consumers.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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APPENDIX

Description of Individual *Amici Curiae*

Public Citizen, Inc., is a national, non-profit consumer advocacy organization founded in 1971. On behalf of its members, Public Citizen appears before Congress, administrative agencies, and the courts on a wide range of issues, and works toward the enactment and effective enforcement of laws protecting consumers.

Public Citizen's attorneys have served as counsel for parties in this Court's most recent cases arising under titles of the Consumer Credit Protection Act, *Safeco Ins. Co. of America v. Burr*, 551 U.S. 47 (2007) (Fair Credit Reporting Act); *Koons Buick v. Nigh*, 543 U.S. 50 (2004) (TILA), and have argued several appeals in the lower courts in which consumers successfully defeated debt collectors' attempts to introduce novel defenses to liability under the FDCPA.[1]

Public Citizen has also advocated for policies to protect consumers from debt-collection abuses. For example, the organization released influential reports in 2007 and 2008 concerning the abuse of mandatory binding arbitration in consumer debt-collection cases,[2] and played a

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[1] *See*, *e.g.*, *Reichert v. National Credit Sys., Inc.*, 531 F.3d 1002 (9th Cir. 2008) (construing FDCPA's bona-fide error defense and rejecting defense based on debt collector's reliance on its creditor-client); *Del Campo v. Kennedy*, 517 F.3d 1070 (9th Cir. 2008) (rejecting debt collector's sovereign-immunity defense); *Rosario v. Am. Corrective Counseling Servs., Inc.*, 506 F.3d 1039 (11th Cir. 2007) (same).

[2] Public Citizen, *The Arbitration Trap: How Credit Card Companies Ensnare Consumers* (2007), and *The Arbitration Debate Trap: How Opponents of Corporate Accountability Distort the Debate on Arbitration* (2008), both available at http://www.citizen.org/congress/civjus/arbitration/.

key role in opposing industry efforts to curtail the FDCPA's protections in the 2006 amendments to the Act.[3]

AARP is a non-profit, non-partisan membership organization with nearly 40 million members, dedicated to protecting the financial security of its members. AARP has a significant interest in this case because older people are particularly vulnerable to the abuses of debt collectors.

Advocates representing older consumers in debt-collection cases report that many older people believe that they will go to jail if they receive a court summons. Debt buyers increasingly seek to collect old debt. Older people may not remember or have documentation to show such debt has been paid, and may not recognize the name of the debt if it has been sold to a new creditor. Some people believe they must pay a demand even if they believe they do not owe the debt. Collectors tell people "everyone has to pay something" even if the person's only source of income is Social Security or SSI, and is exempt from collection. The protections provided by the FDCPA are vital to protect the financial security of such vulnerable older people.

Current economic conditions, growing debt burdens, and the rising rate of home foreclosures, make the interpretation of the FDCPA particularly important to older people. An AARP report notes that over 684,000 home-

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[3] Financial Services Regulatory Relief Act of 2006, Pub. Law No. 109-351, Tit. VIII, 120 Stat. 1966 (2006).

owners over the age of 50 were either delinquent or in foreclosure in December 2007.[4]

The age group experiencing the sharpest increase in bankruptcy filings in the period between 1991 and 2007 is the 50-and-older group.[5] Seven million older adults reported problems with medical debt in 2007, even though most of them were covered by Medicare.[6] Between 2005 and 2008, the average amount of credit-card debt for older adults increased by 26%.[7]

The **National Association of Consumer Advocates** (NACA) is a non-profit corporation whose members are private and public sector attorneys, legal services attorneys, law professors, and law students whose primary focus involves the protection and representation of consumers. NACA's mission is to promote justice for all consumers by maintaining a forum for information sharing among consumer advocates across the country and serving as a voice for its members as well as consumers in the ongoing effort to curb unfair and abusive business practices.

Preserving and strengthening the federal consumer-protection laws in general, and the FDCPA in particular,

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[4] Allison Shelton, *AARP Public Policy Institute, A First Look at Older Americans and the Mortgage Crisis* 2 2009), http://assets.aarp.org/rgcenter/econ/i9_mortgage.pdf.

[5] Deborah Thorne, Elizabeth Warren, & Teresa A. Sullivan, *Generation of Struggle* 1 (2008), http://assets.aarp.org/rgcenter/consume/2008_11_debt.pdf.

[6] Michelle M. Doty et al., The Commonwealth Fund, *Seeing Red: The Growing Burden of Medical Bills and Debt Faced By U.S. Families* 2 (2008), http://www.commonwealthfund.org/usr_doc/Doty_seeingred_1164_ib.pdf?section=4039.

[7] Jose Garcia & Tamara Draut, Demos, *The Plastic Safety Net* 4 (2009), http://www.demos.org/pubs/psn_7_28_09.pdf.

has been a top priority of NACA since its inception. NACA supports federal action that would improve the consumer protections provided by the FDCPA for consumers abused and harassed by debt collectors, and opposes any attempts to weaken or diminish the effect of this important law.

The **National Consumer Law Center** (NCLC) is a non-profit corporation organized in 1969 to conduct research, education and litigation to promote consumer justice. One of the NCLC's primary objectives is to provide assistance to attorneys advancing the interests of their low-income and elderly clients in the area of consumer law. Accordingly NCLC has focused considerable attention on laws to prevent abusive debt collection and unreliable disclosure of the terms of consumer credit transactions.

NCLC also has provided research and analysis regarding a wide variety of consumer laws for legal services attorneys, Congress, state legislatures, as well as state and local offices charged with the enforcement of consumer-protection acts. It has participated as counsel, co-counsel, and amicus curiae in litigation at every level throughout the country. NCLC has organized, sponsored and participated in thousands of trainings and conferences designed to provide continuing education for legal services and private attorneys.

The FDCPA and TILA have been a major focus of the work of NCLC. NCLC publishes *Fair Debt Collection* (6th ed. 2008 & 2009 Supp.) and *Truth in Lending* (6th ed. 2007 & 2008), comprehensive treatises, to assist attorneys, creditors and debt collectors in complying with the law. In addition, the NCLC has directly assisted attorneys in thousands of cases arising under the FDCPA and TILA. The FDCPA bears great similarity

to the debt collection provisions of the *Model Consumer Credit Code* published by NCLC in 1974. NCLC was active in legislative process leading to the passage of the FDCPA in 1977 and the amendments to the Truth in Lending Act, testifying at most of the hearings involving those Acts and frequently conferring with counsel to the Subcommittee on Consumer Affairs of the Senate Committee on Banking, Housing and Urban Affairs prior to the FDCPA's passage as well the subsequent passage of the amendments to the Truth in Lending Act that lead to the mistaken interpretation of the FDCPA by the court below.

U.S. PIRG: The Federation of State PIRGs, serves as the federation of, and the national advocacy office for, the state Public Interest Research Groups (PIRGs). PIRGs are non-profit, non-partisan consumer, environmental, and government research and advocacy organizations with one million members around the country.

The mission of U.S. PIRG is to protect consumers and the public by using the tools of investigative research, grassroots organizing, advocacy, and litigation.