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

BRIEF FOR THE PETITIONER

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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, 15 U.S.C. § 1692k(c).

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BRIEF FOR THE PETITIONER

Petitioner Karen L. Jerman respectfully requests that this Court reverse 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 App. 42a-43a) is unpublished. The district court's opinion (Pet. App. 19a-41a) is published at 502 F. Supp. 2d 686.

JURISDICTION

The 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 the petition to and including March 25, 2009. App. No. 08A710. On that date, petitioner filed a timely petition for a writ of certiorari, which this Court granted on June 29, 2009. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

1. 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 subchapter 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opinion of the Commission, notwithstanding that after such act or omission has occurred, such opinion is amended, rescinded, or determined by judicial or other authority to be invalid for any reason.

2. The appendix to this brief contains the entirety of 15 U.S.C. § 1692k and the relevant provisions of the Truth in Lending Act, 15 U.S.C. § 1640, as originally enacted and as amended in 1980; the Economic Stabilization Act Amendments of 1971, 12 U.S.C. § 1904 note; the Electronic Fund Transfer Act, 15 U.S.C. §§ 1693m(c), 1693h(c); the Real Estate Settlement Procedures Act, 12 U.S.C. § 2607(d)(3); the Expedited Funds Availability Act, 12 U.S.C. § 4010(c).

STATEMENT OF THE CASE

In 2006, respondents (a law firm and one of its attorneys) served petitioner Karen Jerman with a complaint seeking to recover a debt she had already paid. Under the Fair Debt Collection Practice Act (FDCPA), 15 U.S.C. § 1692 *et seq*., debt collectors must, as part of their initial contact, provide consumers with certain prescribed notices. Respondents attached to their complaint a form notice, but it failed to comply with the requirements of the Act. When petitioner sued respondents for not providing proper notice, they did not deny that the notice said exactly what they intended it to say. Nonetheless, they argued that they were immune from liability under the Act's so-called "bona fide error defense" because they misunderstood what the law required. The question in this case is whether such ignorance of the law excuses a debt collector's violation of the Act.

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 were cases in which "debt collectors [were] dunning the wrong person or attempting to collect debts which the consumer has already paid." S. Rep. 95-382, at 4, *as reprinted in* 1977 U.S.C.C.A.N. 1695, 1699. To address these problems, the FDCPA requires debt collectors to send consumers 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 and consumers subjected to collection abuses may bring civil suits against debt collectors for violations of the Act. *See* 15 U.S.C. § 1692*l* (authorizing suit by the FTC); *id.* § 1692k (authorizing suits by victimized consumers). Individual consumers may recover their actual damages plus a maximum of one thousand dollars in statutory damages; awards in class actions 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).

Debt collectors may nonetheless avoid liability if they can establish either of two defenses. First, a "safe harbor" defense carves out an exemption for "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). 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 home. Pet. App. 2a. In April 2006, they filed a complaint in state court to foreclose on the house. Pet. App. 2a. Three days later, respondents served

petitioner 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 Act, the validation notice must include "a statement that unless the consumer, within thirty days after receipt of the notice, disputes the validity of the debt, or any portion thereof, the debt will be assumed to be valid by the debt collector." 15 U.S.C. § 1692g(a)(3). By its terms, the provision does not require that the dispute be made in writing. And elsewhere in the same provision, where Congress required the consumer to communicate with the debt collector in writing, it said so expressly. *See id*. § 1692g(a)(2), (b).

In conflict with the statute, respondents' notice informed petitioner that her debt would be presumed valid unless disputed "in writing." Pet. App. 3a. After receiving the notice, petitioner hired an attorney, who wrote a letter for her, disputing the debt. Pet. App. 3a. In response, Countrywide checked its records and discovered that petitioner had fully repaid her mortgage. Respondents then dismissed the state-court complaint. Pet. App. 3a.

3. Petitioner subsequently filed this suit in federal court, alleging a violation of Section 1692g(a)(3) of the FDCPA. Pet. App. 3a. Her amended complaint sought actual and statutory damages, injunctive and declaratory relief, and class certification. *See* Amended Class Action Complaint: Unfair Debt Collection Practices § VII; Pet. App. 3a.

Respondents first moved to dismiss, arguing that the notice complied with the Act. Pet. App. 35a. The district court denied the motion, finding that the

notice violated the FDCPA because it required petitioner to dispute the alleged debt in writing even though the Act imposed no such restriction. Pet. App. 3a, 36a-37a.[1]

Respondents then moved for summary judgment, asserting among other things, the bona fide error defense. They argued that although they fully intended to notify petitioner that she was required to dispute the debt in writing, the resulting violation was not "intentional" within the meaning of the bona fide error defense because they honestly misunderstood what the Act required. Pet. App. 34a-35a. Moreover, they argued, their law firm maintained procedures reasonably adapted to avoid such legal errors, including among other things designating one of the firm's principals to take the lead in FDCPA compliance, sending him to continuing education classes on the Act, and subscribing to relevant legal periodicals. Pet. App. 35a. The district court agreed and entered summary judgment. Pet. App. 3a-4a.

4. On appeal, the Sixth Circuit affirmed. The court acknowledged that "the majority view" among the courts of appeals is that the FDCPA's bona fide

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[1] In support of their motion, respondents relied upon two district court decisions (one affirmed without discussion of the issue in an unpublished court of appeals opinion) that had upheld the practice of requiring disputes to be made in writing. The district court, however, found persuasive the only on-point court of appeals decision to address the question, *Camacho v. Bridgeport Fin., Inc.*, 430 F.3d 1078 (9th Cir. 2005). *See* Pet. App. 35a-37a.

error defense does not extend to mistakes of law. Pet. App. 8a. Those courts, the Sixth Circuit explained, relied in part on the fact that Congress borrowed the language of the FDCPA's defense from an earlier consumer protection statute, the Truth in Lending Act (TILA), 15 U.S.C. § 1640(c). Pet. App. 9a & n.3. When Congress enacted the FDCPA, the TILA's defense was "uniformly interpreted to apply only to clerical errors and not to legal errors." Pet. App. 8a (citation omitted).

The Sixth Circuit nonetheless found the majority position unpersuasive because in 1980 Congress amended the TILA to expressly provide that "an error of legal judgment with respect to a person's obligations under this subchapter is not a bona fide error." Pub. L. 96-221, § 615(a), 94 Stat. 180 (1980). The Sixth Circuit recognized that this amendment was enacted three years after the passage of the FDCPA; that as a result, when the FDCPA was passed the two statutes had identical language; and that at the time of the FDCPA's passage, this common language had been uniformly interpreted not to encompass legal errors. Pet. App. 13a. Even so, the Sixth Circuit concluded that the amendment indicated that "unlike the TILA, Congress did not intend to limit the [FDCPA's] defense to clerical errors." Pet. App. 14a.

The court further acknowledged that "it is more common to speak of procedures adapted to avoid clerical errors than to speak of procedures adapted to avoid mistakes of law." Pet. App. 13a (citation omitted). However, the court concluded that "there is nothing unusual about attorney collectors maintaining procedures, such as frequent education

and review of the FDCPA law, in order to avoid mistakes of law." Pet. App. 13a. Moreover, the court 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.

5. On November 24, 2008, the Sixth Circuit denied petitioner's timely petition for rehearing and for rehearing en banc. Pet. App. 42a-3a.

6. On June 29, 2009, this Court granted certiorari.

SUMMARY OF ARGUMENT

The court of appeals held that respondents' violation of the Fair Debt Collection Practices Act (FDCPA) was excused because it arose from a mistake about the meaning of the statute and therefore fell within the purview of the statute's bona fide error defense. It would be surprising if that holding were correct, for ignorance of the law is rarely a defense, even against criminal punishment. In fact, although Congress sometimes limits certain remedies (like punitive damages or civil penalties) to cases in which defendants knew their conduct was unlawful, petitioner is unaware of any instance in which Congress has made mistake of law a complete defense to civil liability altogether.

Nothing in the language of the FDCPA demonstrates that Congress intended debt collectors to be the first to receive such favored treatment. The bona fide error defense is available only for violations that were "not intentional." 15 U.S.C. § 1692k(c). That respondents misunderstood the legal consequences of their conduct does not render the violation unintentional within the meaning of the statute. For example, this Court has repeatedly held that even in the criminal context, "the knowledge requisite to *knowing violation* of a statute is factual knowledge as distinguished from knowledge of the law." *Bryan v. United States*, 524 U.S. 184, 192 (1998) (emphasis added). There is no reason for a fundamentally different understanding of an *intentional* violation, especially when the consequence of withholding the defense is the imposition of modest financial liability rather than

imprisonment. Moreover, when Congress means to require that defendants both know what they are doing and know that they are violating the law, it typically uses the special term of art, "willful violation." For example, in the statutes from which the language of the FDCPA's bona fide error defense is drawn, Congress used the word "intentional" in the civil bona fide error defense and the word "willful" in parallel criminal enforcement provisions. This distinction was plainly considered and makes sense only in light of the traditional differences between intentional and willful conduct.

That Congress did not intend the bona fide error defense to protect legal mistakes draws further support from the Act's requirement that defendants prove that the error occurred despite the maintenance of "procedures reasonably adapted to avoid any such error." 15 U.S.C. § 1692k(c). It is not only linguistically awkward to refer to procedures reasonably adapted to avoiding legal errors, it is also quite difficult to develop standards for what constitutes reasonable procedures for avoiding mistakes of law. And doing so often would enmesh federal courts, and perhaps even lay juries, in the traditional state function of setting professional standards for the practice of law.

The court of appeals' opinion further conflicts with Congress's creation of a separate mechanism for resolving uncertainty about the Act's meaning. Congress allowed collectors who are in doubt about their obligations under the statute to seek an advisory opinion from the Federal Trade Commission. And if they follow the Commission's opinion, the Act's "safe harbor" defense protects them

from liability if that advice turns out to be unsound. The court of appeals' decision not only makes resort to that process unnecessary, but would in fact render the safe harbor defense entirely superfluous. That is, under the decision below, defendants who satisfy the elements of the safe harbor defense will always also satisfy the elements for the bona fide error defense. In particular, they will be able to claim that they did not believe they were violating the law (since they were following the Commission's advice) and that they had in place a procedure (seeking the advisory opinion) that is reasonably adapted to avoiding the violation.

Extending the bona fide error defense to legal errors would also undermine Congress's efforts to deter abusive collection practices. The defense would encourage debt collectors to take an aggressive view of the law when its requirements are not clear, knowing that there will be no liability if they cross the line into illegal conduct. Those who push the legal envelope will, in turn, enjoy a competitive advantage over those who correctly construe the law and limit their conduct accordingly. Moreover, the decision below will undermine the private enforcement efforts that Congress contemplated would be the principal means of deterring violations. Given the difficulty and uncertainty involved in rebutting a mistake of law defense, fewer plaintiffs are likely to be willing to undertake the risk and expense of litigation knowing that they may lose their case even if they prove a violation of their rights.

Nothing in Congress's 1980 amendment to the Truth in Lending Act (TILA) warrants a different

conclusion. When Congress amended the TILA to expressly provide that legal mistakes were not covered by that statute's bona fide error defense, it was not changing the law on legal errors, but simply making clear that its other amendments to the statute – which made it easier for lenders to avoid liability – should not be misconstrued as abrogating the pre-existing judicial consensus that the Act did not excuse mistakes of law. Because it was clarifying rather than changing the law, Congress made no alteration to the operative language of the TILA defense, which continues to have exactly the same elements as the FDCPA's. Accordingly, if anything, the TILA amendment reinforces the conclusion that Congress has long understood that neither provision establishes an exception to the presumption that ignorance of the law is no defense.

ARGUMENT

I. Interpreting the FDCPA To Provide A Defense For Mistakes Of Law Is Inconsistent With The Text Of The Statute.

The court of appeals' construction of the bona fide error defense of the Fair Debt Collection Practices Act (FDCPA), 15 U.S.C. § 1692k(c), is wrong first and foremost because it cannot be squared with the text of the statute.

To qualify for the defense, it is not enough that respondents acted in good faith (*i.e.*, that their error was "bona fide"). Instead, they must also show that "the violation was not intentional" and that they maintained "procedures reasonably adapted to avoiding any such error." 15 U.S.C. § 1692k(c). The first of these requirements precludes defenses based on a mistake of law, because misunderstanding what the Act demands does not render a violation of its requirements "not intentional" within the meaning of the statute.[2] The awkwardness of referring to "procedures reasonably adapted to avoiding" legal errors, and the practical difficulties involved in developing standards to implement such a requirement, reinforce that conclusion.

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[2] By "mistake of law" or "legal error," petitioner means a mistake as to the requirements of the FDCPA itself, which is the kind of legal error respondents allege in this case. Whether the statute provides a defense to violations arising from other kinds of the legal errors (*e.g.*, as to the meaning of a different federal statute or state law) is addressed in the final section of this brief.

A. "The Violation Was Not Intentional"

To say that a "violation" of the law "was not intentional" could mean one of two things. It could mean that the defendant did not intend to commit the act that violated the statute. For example, the FDCPA generally prohibits a debt collector from calling a consumer past 9 p.m. local time. 15 U.S.C. § 1692c(a)(1). If the collector loses track of time, or does not realize the consumer is in a different time zone, she may accidentally place a call past 9 p.m., thereby unintentionally violating the Act in this sense. Alternatively, an unintentional violation could refer to a defendant who knows exactly what she is doing but does not realize that her intentional act will violate the statute.

Mistakes of law could find shelter in the bona fide error defense only under this second, broader reading. In this case, for example, respondents do not contest that they intended to include in their letter the language that violates the Act. They argue only that this conduct, although intentional, did not constitute an intentional violation of the statute. While that interpretation is not linguistically impossible, it runs contrary both to deeply embedded legal presumptions and common legal usage.

1. The language of the bona fide error defense must be understood in light of the "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. (7 Pet.) 404, 411 (1833); *See also Cheek v. United States*, 498 U.S. 192, 199 (1991) ("The general rule that ignorance of the law or a mistake of law is no defense to criminal prosecution is deeply rooted in the American legal

system."). One may have sympathy for defendants who suffer the consequences of violating the law despite their good faith belief they were complying with it. But as Justice Holmes explained more than a century ago, "to admit the excuse at all would be to encourage ignorance where the law-maker has determined to make men know and obey, and justice to the individual is rightly outweighed by the larger interests on the other side of the scales." OLIVER WENDELL HOLMES, THE COMMON LAW 48 (1881). *See also Utermehle v. Norment*, 197 U.S. 40, 55 (1905) ("It would be impossible to administer the law if ignorance of its provisions were a defense thereto."); *Magniac v. Thomson*, 56 U.S. 281, 300 (1853) ("To permit . . . ignorance of the law, to be alleged as the foundation of rights, or in excuse for omissions of duty, or for the privation of rights in others, would lead to the most serious mischief, and would disturb the entire fabric of social order.")

Of course, Congress occasionally departs from this standard rule, but exceptions are rare. The most common examples are found in some criminal statutes that limit punishment to those who violate the law knowing its requirements. *See, e.g.*, *Ratzlaf v. United States*, 510 U.S. 135, 140-149 (1994); *Cheek*, 498 U.S. at 199-200. Congress also occasionally limits certain penalties or remedies to the most culpable defendants who violate a known legal duty or act with reckless disregard of the law's commands. *See, e.g.*, *Safeco Ins. Co. of Am. v. Burr*, 551 U.S. 47, 56-60 (2007) (construing 15 U.S.C. § 1681n(a)'s limitation on statutory and punitive damages); 15 U.S.C. § 45(m)(1) (limiting civil penalties); 29 U.S.C. § 260 (limiting liquidated damages).

But the bona fide error defense applies to civil, not criminal, claims. And it does not simply limit penalties and remedies; it provides a defense to any liability whatsoever. *See* 15 U.S.C. § 1692k(c) ("A debt collector *may not be held liable*. . . .") (emphasis added). It is exceedingly rare – indeed, as far as petitioner can tell, completely unprecedented – for Congress to make ignorance of the law a complete defense to all liability in the civil context.

The closest example of which petitioner is aware is the doctrine of qualified immunity. *See, e.g.*, *Harlow v. Fitzgerald*, 457 U.S. 800 (1982); *see also Sayyed v. Wolpoff & Abramson*, 485 F.3d 226, 232 (4th Cir. 2007) (referring to FDCPA's bona fide error defense as offering "a kind of qualified immunity to debt collectors"). But even that example is not on point. For one thing, the doctrine provides a defense against liability for money damages, not an immunity from liability altogether. *See Morse v. Frederick*, 551 U.S. 393, 400 n.1 (2007).[3] Moreover, the defense is not truly an example of ignorance of the law being a defense, as it turns not on the defendant's actual knowledge about the law, but on whether the defendant has violated a right that was, as an objective matter, clearly established at the time of the incident. *See Harlow*, 457 U.S. at 818-19. Perhaps most importantly, neither Congress nor this Court has ever extended qualified immunity to private defendants like respondents. Instead, the

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[3] In addition, the defense is judge-made, not explicitly set forth in a statute. *See Harlow*, 457 U.S. at 806-07.

Court has explained that the defense is premised on the special need to protect government officials' exercise of discretion in the conduct of their public responsibilities, and for that reason has no application to private conduct. *See, e.g.*, *Richardson v. McKnight*, 521 U.S. 399, 407-12 (1997); *Wyatt v. Cole*, 504 U.S. 158, 165-69 (1992).

Accordingly, providing debt collectors with a mistake of law defense under the FDCPA would be a very unexpected thing for Congress to do.

2. Because Congress so rarely makes ignorance of the law a defense, courts are rightly reluctant to conclude that Congress has done so, absent clear evidence of that intent. *See, e.g.*, *Staples v. United States*, 511 U.S. 600, 622 n.3 (1994). That presumption is not overcome in this case simply because the statute refers to an intentional *violation* rather than an intentional *act*, as the Tenth and Seventh Circuits have suggested. *See Johnson v. Riddle*, 443 F.3d 723, 728 (10th Cir. 2006) (*Riddle II*); *Kort v. Diversified Collection Servs., Inc.*, 394 F.3d 530, 537 (7th Cir. 2005). As noted above, at best this formulation is ambiguous. Moreover, this Court and others have refused to construe similar formulations as sufficient proof that Congress intended to create a mistake of law defense.

In *United States v. International Minerals & Chemical Corporation*, 402 U.S. 558 (1971), for example, this Court considered a statute that authorized criminal penalties against anyone who "knowingly violates" certain regulations relating to the transportation of corrosive liquids. *Id*. at 559 (quoting 18 U.S.C. § 834(f)). The defendant argued that his ignorance of the regulation precluded the

Government from proving a knowing violation. Even though the statute imposed criminal penalties rather than civil liability, and even though it referred to a knowing *violation* rather than a knowing *act*, this Court still concluded that the statute did "not signal an exception to the rule that ignorance of the law is no excuse." *Id*. at 562. Congress's decision to use the word "knowingly," the Court explained, did not demonstrate its intent to "require[] proof of knowledge of the law, as well as the facts." *Id*. at 563.

Indeed, this Court has stated that as a general matter, "the knowledge requisite to a *knowing violation* of a statute is factual knowledge as distinguished from knowledge of the law." *Bryan v. United States*, 524 U.S. 184, 192 (1998) (emphasis added) (citation omitted); *see also Dixon v. United States*, 548 U.S. 1, 5 (2006) (same); *Babbitt v. Sweet Home Chapter of Cmties. for Greater Or.*, 515 U.S. 687, 697 n.9 (1995) (stating that Congress's reference to a "knowing[]" violation of the Endangered Species Act was not meant to create a "specific intent" crime);[4] *id*. at 722 (Scalia, J., dissenting on other grounds) (noting that a "requirement that a violation be 'knowing' means that the defendant must 'know the facts that make his conduct illegal'" and that "knowledge of the law . . . is not a requirement").[5]

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[4] A "specific intent" crime is one "in which the defendant must not only intend the act charged, but also intend to violate law." BLACK'S LAW DICTIONARY 973 (6th ed.).

[5] In *Safeco Insurance Company*, this Court assumed that ignorance of the law would prevent liability under a provision

The courts of appeals have reached the same conclusion under other statutes as well.[6]

Although these cases concerned "knowing" violations, there is no reason for a fundamentally different construction of statutes referring to "intentional" ones.[7] For example, the Migrant and Seasonal Agricultural Worker Protection Act, 29 U.S.C. § 1801 *et seq.*, limits damages to cases in which the defendant "has intentionally violated" the

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that applied to one who "willfully" violated the Fair Credit Reporting Act, by "obtaining a consumer report . . . knowingly without a permissible purpose." 551 U.S. at 59-60 (quoting 15 U.S.C. § 1681n(a)(1)(B)). That conclusion made sense because of the pairing of "willfully" and "knowingly" and because defendants cannot know they lack a "permissible purpose" without knowing what purposes the law defines as permissible. The Court did not hold that the statutory phrase "knowing violation" by itself implies knowledge of the law, contrary to its construction of that phrase in cases like *Bryan* and *International Minerals*.

[6] *See, e.g.*, *United States v. Sinskey*, 119 F.3d 712, 715 (8th Cir. 1997) (giving same interpretation to a Clean Water Act provision, 33 U.S.C. § 1319(c)(2)(A), which applies to anyone who "knowingly violates" certain of its provisions); *United States v. Hopkins*, 53 F.3d 533, 537-41 (2d Cir. 1995) (same); *United States v. Weitzenhoff*, 35 F.3d 1275, 1283-85 (9th Cir. 1993) (same); *see further United States v. Farrell*, 69 F.3d 891, 893 (8th Cir. 1995) (same for 18 U.S.C. § 924(a)(2), which punishes anyone who "knowingly violates subsection (a)(6) … of section 922"); *United States v. Sherbondy*, 865 F.2d 996, 1002 (9th Cir. 1988) (same for 18 U.S.C. § 924(a)(1)(B), which punishes one who "knowingly violates subsection . . . (g) . . . of section 922").

[7] As far as petitioner can determine, this Court has never discussed whether knowledge of the law is required to commit an "intentional violation" of a statute.

Act. *Id.* § 1854(c)(1). The courts of appeals have uniformly construed this provision, and its predecessor, as applying even when defendants' ignorance of the law leads them to violate the statute.[8]

As these decisions indicate, statutory references to intentional conduct, or even intentional *violations*, are best understood to refer to defendants' intentions with respect to their actions, not to their intention to disobey a known legal duty. At the very least, they establish that the phrase does not unambiguously demonstrate Congress's intent to make an exception to the venerable principle that ignorance of the law is no defense.

3. Had Congress intended to provide a defense for mistakes of law, it would have used different language in Section 1692k(c). As Justice Stevens has explained, when Congress intends to refer to defendants who know their conduct is unlawful, it generally uses the word "willful" rather than "intentional":

> While a criminal defendant, like an employer, need not have knowledge of the law to act '*knowingly*' or *intentionally*, he must know that his acts violate the law or must "careless[ly] disregard whether or not one has

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[8] *See Bueno v. Mattner*, 829 F.2d 1380, 1383-86 (6th Cir. 1987); *Salazar-Calderon v. Presidio Valley Farmers Ass'n*, 765 F.2d 1334, 1346 (5th Cir. 1985) (same under predecessor statute, 7 U.S.C. § 2050a(b) (repealed 1982)); *Alvarez v. Longboy*, 697 F.2d 1333, 1338 (9th Cir. 1983) (same); *Alvarez v. Joan of Arc, Inc.*, 658 F.2d 1217, 1224 (7th Cir. 1981) (same).

> the right so to act" in order to act '*willfully*.' We have interpreted the word "willfully" the same way in the civil context.

Kolstad v. American Dental Ass'n, 527 U.S. 526, 549 (1999) (Stevens, J., concurring in part and dissenting in part) (emphasis added) (citations omitted). Thus, in *Trans World Airlines v. Thurston*, 469 U.S. 111, 125-27 (1985), the Court construed a provision of the Age Discrimination in Employment Act authorizing liquidated damages for "willful violations." 29 U.S.C. § 626(b). The Court concluded that a violation of the Act was "willful'" within the meaning of this provision if the employer "knew or showed reckless disregard for the matter of whether its conduct was prohibited by the ADEA.'" 469 U.S. at 126 (citation omitted); *see also Hazen Paper Co. v. Biggins*, 507 U.S. 604, 614 (1993) (same); *McLaughlin v. Richland Shoe Co.*, 486 U.S. 128, 133 (1988) (giving same construction to 29 U.S.C. § 255a, which provides a three-year limitations period for a "willful violation" of the Fair Labor Standards Act).

It is unlikely that in enacting the FDCPA, Congress used the word "intentional" intending for courts to give it the meaning traditionally reserved for the word "willful." In fact, the origins of the bona fide error defense belie any such suggestion. The language of the defense originated in the Truth in Lending Act, Pub. L. 90-321, § 130, 82 Stat. 157 (1968); 15 U.S.C. § 1640(c) (1968) (reproduced at App. 4a). Unlike the FDCPA, the TILA contains both a civil private right of action and criminal penalties. *See* 15 U.S.C. §§ 1611, 1640. Whereas the bona fide error defense applies to those who do not violate the act *intentionally*, *id*. § 1640(c), the criminal provision

applies only to those who "*willfully and knowingly* . . . fail[] to comply with any requirement imposed under this subchapter," *id*. § 1611 (emphasis added).

This distinction between "intentional" violations on the one hand and "willful and knowing" violations on the other is consistent with the ordinary legal use of those terms. Willful violations, being the most culpable because undertaken with knowledge of the Act's requirements, are subject to the severe sanction of criminal penalties. On the other end of the spectrum, truly unintentional violations – *i.e.*, cases in which the lender did not intend to commit the act that violates the statute, say because it accidentally forgot to include a required disclosure form in a loan package – qualify for a complete defense to any liability at all. And defendants in the middle – like the lender who intentionally withheld information based on the mistaken belief that its disclosure was not required – are protected from criminal, but not civil, liability.

It should come as no surprise, therefore, that by the time Congress enacted the FDCPA, every court of appeals to have considered the question had rejected the view that the TILA's bona fide error defense excused mistakes of law. *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); *see also Turner v. Firestone Tire & Rubber Co.*, 537 F.2d 1296, 1298 (5th Cir. 1976) (defense applies only to "clerical errors"); *Palmer v. Wilson*, 502 F.2d 860, 861 (9th Cir. 1974) (same).

Congress again distinguished "intentional" from "willful" violations when it included a bona fide error defense in the Economic Stabilization Act

Amendments of 1971 (ESAA), Pub. L. 92-210, 85 Stat. 743 (Dec. 22, 1971), 12 U.S.C. § 1904 note (expired 1974). Like the TILA, that statute provided criminal penalties for those who "willfully violate[d]" its requirements. *Id*. § 208. In addition, Congress added a proviso to the Act's bona fide error defense, limiting remedies even when the defense did not apply, so long as the violation was not "*willful* within the meaning of" the criminal provision. *Id*. § 210 (reproduced at App. 5a) (emphasis added). Courts at the time interpreted "willful" in the traditional sense of conduct undertaken with knowledge that it was unlawful. *See Longview Refining Co. v. Shore*, 554 F.2d 1006, 1014 (Temp. Emer. Ct. App. 1977); *see also, e.g.*, *E. Air Lines, Inc. v. Atl. Richfield Co.*, 712 F.2d 1402, 1411 (Temp. Emer. Ct. App. 1983). But if that is what Congress meant by "willful," it clearly could not have meant "intentional" – used in the very same provision – to mean the same thing.

The inescapable conclusion is that under the TILA and the ESAA, a mistake of law was a defense to criminal charges but did not fall within the bona fide error defense to civil liability. By adopting the FDCPA's bona fide error defense *in haec verba* from these prior statutes, Congress is presumed to have intended the same limitation on the scope of the FDCPA's bona fide error defense as well. *See, e.g.*, *Oscar Mayer & Co. v. Evans*, 441 U.S. 750, 756 (1979).

4. In addition to the word "willful," Congress had at its disposal other ways to unambiguously signal a departure from the general rule that ignorance of the law is no defense.

One example is found in Federal Trade Commission Act, 15 U.S.C. §§ 41 *et seq*., which establishes the Federal Trade Commission's power to enforce, among other things, the FDCPA. *See* 15 U.S.C. § 1692*l*. The statute allows the Commission to obtain a civil penalty against any defendant who "violates any rule under this chapter respecting unfair or deceptive acts or practices . . . *with actual knowledge or knowledge fairly implied* . . . that such act is unfair or deceptive and *is prohibited by such rule*." 15 U.S.C. § 45(m)(1)(A) (emphasis added); *see also id*. § 45(m)(1)(B)(2) (referring to defendants' "actual knowledge that such act . . . is unlawful under subsection (a)(1) of this section").

Likewise, a provision of the Portal-to-Portal Act allows a district court to withhold statutory damages "if the employer shows to the satisfaction of the court that the act or omission giving rise to such action was in good faith and *that he had reasonable grounds for believing that his act or omission was not a violation* of the Fair Labor Standards Act of 1938, as amended . . . ." 29 U.S.C. § 260 (emphasis added). And in the Cable Communications Policy Act, 47 U.S.C. §§ 521 *et seq*., Congress allowed courts to reduce the amount of damages when the "violator was not aware and had no reason to believe that his acts constituted a violation of this section." *Id*. § 553.

None of these provisions breaks from the general rule that ignorance of the law is no defense to civil liability; each simply limits certain forms of relief once the defendant is found liable. But they do demonstrate that if Congress had intended the FDCPA to give debt collectors the unprecedented protection of complete immunity from all liability

based on their ignorance of the law, it would have known how to make that decision clear.

B. "Procedures Reasonably Adopted To Avoid Any Such Error"

In addition to requiring that the defendant's violation must have been unintentional, the Act provides a defense only if the defendant has maintained "procedures reasonably adapted to avoid any such error." 15 U.S.C. § 1692k(c). The Sixth Circuit acknowledged that "it is more common to speak of procedures adapted to avoid clerical errors than to speak of procedures adapted to avoid mistakes of law." Pet. App. 13a (citation omitted). Indeed, the difficulty of applying the Act's reasonable procedures requirement to legal errors provides significant reason to conclude Congress did not intend courts to attempt it.

There are any number of ways in which clerical and other non-legal errors may lead to unintended violations of the statute. For example, the Act provides that if a consumer instructs a debt collector in writing that she refuses to pay the debt, the debt collector must cease communications. 15 U.S.C. § 1692c(c). It is easy enough to imagine record-keeping systems designed to ensure compliance with that requirement. *See, e.g.*, *Smith v. Transworld Sys., Inc.*, 953 F.2d 1025, 1031 (6th Cir. 1992). Likewise, office procedures and policies are easily seen as methods to avoid calling consumers at times and places the Act forbids. *See* 15 U.S.C. §§ 1692c(a)(1), (3). And debt collectors can guard against violating the Act's prohibition against false representations about the amount of the debt, *id*.

§ 1692e(2), through procedures designed to double-check the accuracy of calculations.

On the other hand, courts that have extended the defense to legal errors have struggled to define just what constitutes a procedure reasonably adopted to avoid misinterpreting the law. Must lay collectors seek the advice of counsel in order to claim the defense?[9] If not, should attorney-collectors be held to a higher standard than non-attorneys? Must defendants show that they researched the specific legal question at issue, or will procedures that generally protect against legal error suffice?[10] Is it reasonable to delegate legal research responsibilities to subordinates, or must the "attorney in charge" personally "make a core legal decision as to whether a particular practice is permitted by law"?[11] Must a reasonable procedure include seeking an advisory opinion from the Federal Trade Commission or some

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[9] *See Ruth v. Triumph P'ships*, No. 08-3458, 2009 WL 2487092, at *12 (7th Cir. Aug. 17, 2009) (holding that debt collector must either seek "the legal opinion of an attorney who has conducted the appropriate legal research" or "the opinion of another person or organization with expertise in the relevant area of law – for example, the appropriate government agency").

[10] *Compare Johnson v. Riddle*, 443 F.3d 723, 729 (10th Cir. 2006) (*Riddle II*) (holding that the procedure must be reasonably adapted "to avoid the specific error at issue") *with* Pet. App. 15a-16a (seemingly finding that procedures directed at avoiding legal errors generally were sufficient).

[11] *Riddle II*, 443 F.3d at 730 (holding that attorney in charge must conduct research).

other expert body on uncertain questions?[12] Is filing a test case against the consumer a permissible, or required, reasonable procedure for avoiding legal error?[13] And are these questions for the court or a jury? [14]

Moreover, in many cases such as this, applying the reasonable procedures requirement to legal errors is not only difficult, but puts federal courts (or even lay juries) in the awkward position of having to establish standards for the professional conduct of attorneys, an area traditionally left to the states. *See Goldfarb v. Va. State Bar*, 421 U.S. 773, 792 (1975). This Court should not adopt a construction of the Act that would "alter[] the existing balance of federal and state powers" "absent a clear indication of Congress' intent" to do so. *Salinas v. United States*, 522 U.S. 52, 59 (1997).

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[12] *Compare Ruth,* 2009 WL 2487092, at *12 (so requiring if an attorney is not consulted) *with* Pet. App. 16a-17a (rejecting requirement in this case).

[13] *See Riddle II*, 443 F.3d at 731 (holding that filing a test case can be a "sufficient procedure").

[14] *Compare Ruth*, 2009 WL 2487092, at *12 (establishing minimum required standards as a matter of law) *with Riddle II*, 443 F.3d at 730-31 (suggesting that reasonableness of legal procedures is a jury question).

II. Allowing A Mistake Of Law Defense Renders The Advisory Opinion Process Ineffective, And The Safe Harbor Defense Superfluous.

Interpreting the bona fide error defense to excuse legal errors is also incompatible with the provisions of the statute that encourage debt collectors to resolve legal uncertainty about the requirements of the Act by seeking advisory opinions from the Federal Trade Commission.

As part of its mandate to enforce compliance with the FDCPA, the Commission is authorized to issue advisory opinions on the Act's meaning and application. *See* 15 U.S.C. §§ 46, 1692*l*, 1692k(e); 16 C.F.R. § 1.1. Congress further provided a "safe harbor" defense, under which debt collectors are immune from liability for "any act done or omitted in good faith in conformity with any advisory opinion of the Commission." 15 U.S.C. § 1692k(e). Recognizing a defense for mistakes of law conflicts with these provisions in two ways.

First, it is unlikely that Congress would have intended courts to force an awkward fit between legal errors and the bona fide error defense when it had already provided a more direct solution to the same problem. Congress recognized that there may be times when legal uncertainty puts debt collectors at risk for liability. But it dealt with that problem by providing them with access to an advisory opinion process to obtain clarification about the law's requirements and an incentive (in the form of a defense) to seek that advice rather than persisting in practices of questionable legality. That simple, low-

cost solution is more consistent with the Act's central purpose of protecting consumers, as it focuses on *preventing* violations of consumers' rights, rather than *excusing* violations that often might have been avoided if the collector had taken advantage of the advisory opinion process.

Second, the court of appeals' decision renders the safe harbor defense superfluous. Under that decision, every application of the safe harbor defense is already covered by the bona fide error provision. That is, debt collectors who act in compliance with a Commission opinion will always be able to claim that they did not believe their conduct was unlawful. Consequently, any violation would be "not intentional," as the Sixth Circuit has construed the term. Moreover, there should be no question that following the Commission's advice would qualify as a "procedure[] reasonably adapted to avoid any such error." 15 U.S.C. § 1692k(c); *see Ruth v. Triumph Partnerships*, No. 08-3458, 2009 WL 2487092, at *12 (7th Cir. Aug. 17, 2009). As a result, under the court of appeals' interpretation, satisfying the conditions of the safe harbor defense will always establish an independent defense under the bona fide error provision.[15]

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[15] The Sixth Circuit's interpretation also would allow defendants to evade the limitations Congress wrote into the safe harbor defense. For example, that defense protects only reliance on an advisory opinion issued by the Commission itself; an informal staff opinion will not suffice. *See Hulshizer v. Global Credit Servs., Inc.*, 728 F.2d 1037, 1038 (8th Cir. 1984). Yet under the Sixth Circuit's decision, defendants could claim that in acting in accordance with a staff opinion, they honestly

This Court has long "express[ed] a deep reluctance to interpret a statutory provision so as to render superfluous other provisions in the same enactment." *Pa. Dep't of Pub. Welfare v. Davenport*, 495 U.S. 552, 562 (1990). Here, the bona fide error and safe harbor defenses may easily be harmonized, the former addressing non-legal errors and the latter addressing errors of legal judgment. That interpretation is consistent not only with the presumption against surplusage, but also with the best reading of the text of the bona fide error defense and, as discussed next, with the statute's underlying purposes.

III. A Mistake Of Law Defense Would Be Inconsistent With The Purposes Of The Act.

Applying the bona fide error defense to legal errors also would unnecessarily undermine Congress's effort to deter unfair collection practices and to protect honest debt collectors from suffering a competitive disadvantage when they act with the restraint the FDCPA requires.

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believed they were complying with the statute and had maintained reasonable procedures by looking to the staff opinion for guidance.

A. Excusing Legal Errors Would Undermine The Statute's Deterrent Effect.

Congress was well aware that the debt collection market – which generally compensates collectors by giving them a percentage of the money collected – establishes an economic incentive for aggressive, misleading, and even abusive practices. *See* S. Rep. 95-382, at 2, *as reprinted in* 1977 U.S.C.C.A.N. 1695, 1696. The decision below undermines the FDCPA's ability to play its intended countervailing role. Under that decision, so long as a debt collector maintains procedures reasonably adapted to avoiding legal error, there is no penalty for wrongly taking a restrictive view of the Act's prohibitions when the law is uncertain. And in many cases, there will be a very real financial benefit to taking certain actions even if they are ultimately found to be illegal. *Cf., e.g.*, *Johnson v. Riddle*, 305 F.3d 1107, 1111, 1121-24 (10th Cir. 2002) (*Riddle I*) (holding mistake of law defense available in case in which defendant unlawfully added a $250 bounced check fee to debt).

Relatedly, excusing mistakes of law conflicts with Congress's intent "to insure that those debt collectors who refrain from abusive debt collection practices are not competitively disadvantaged." 15 U.S.C. § 1692(e). As between similarly situated debt collectors, all having procedures reasonably designed to avoid legal errors, the Sixth Circuit's decision provides a competitive advantage to the collectors who take the more aggressive, but incorrect, view of the law. For example, debt collectors who construe the Act as allowing them to demand that all debt disputes be made in writing may avoid the expense

and inconvenience of accepting disputes over the telephone, while their law-abiding competitors must bear those costs as a consequence of correctly construing of the Act. That result is not only unfair to the law-abiding collectors, but creates a race to the bottom that will leave the field to collectors with the fewest scruples. This is exactly what Congress intended the FDCPA to prevent.

Finally, allowing ignorance of the law as a defense would undermine Congress's efforts to "eliminate abusive debt collection practices by debt collectors," 15 U.S.C. § 1692(e), through rigorous private enforcement of the Act. As the Federal Trade Commission recently explained, "Congress made clear that the FDCPA was intended to be a 'primarily self-enforcing' statute, with private individual and class actions providing collectors with a powerful incentive to comply with the statute." FEDERAL TRADE COMMISSION, COLLECTING CONSUMER DEBTS: THE CHALLENGE OF CHANGE 66 (2009)[16] (quoting S. Rep. 95-382, at 5, *as reprinted in* 1977 U.S.C.C.A.N. 1695, 1699). Although the Act gives enforcement authority to the Government as well, "[b]ecause the Commission receives more than 70,000 third-party debt collection complaints per year, it is not feasible for federal government law enforcement to be the exclusive or primary means of deterring all possible law violations." *Id*. at 67. Accordingly, the Commission has concluded, private actions "are

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[16] A*vailable at* http://www.ftc.gov/bcp/workshops/debt collection/dcwr.pdf.

critical in deterring those who would violate the FDCPA." *Id*.

However, there are substantial impediments to consumer enforcement. Although the aggregate injury to the nation from unlawful debt collection practices is high, the harm is diffuse and difficult to quantify in any individual action for damages. At the same time, litigation is time consuming and expensive. Congress took steps to counteract these disincentives by providing modest liquidated damages, allowing class actions, and authorizing attorney fee awards. *See* 15 U.S.C. § 1692k(a). Ordinarily, such measures strike an appropriate balance by encouraging suits by those who are confident that they can establish a violation of the statute, while discouraging marginal claims. But recognizing ignorance of the law as a complete defense to an otherwise meritorious claim would upset that balance. Responding to a mistake of law defense is especially difficult and costly – in this case, for example, the validation notice alone provided all the evidence necessary to prove a violation of the Act; attempting to rebut respondents' assertion of a bona fide mistake of law required depositions and document production. Perhaps even more importantly, the outcome of the defense is inherently uncertain in light of the difficulty in proving or disproving what another person knew and the imprecise standards for deciding what constitutes a procedure "reasonably adapted" to avoiding legal error. The prospect of spending significant amounts of time and money to prove a violation of the statute, only then to lose the case anyway, would be enough to deter even the most stalwart plaintiff and her

attorneys. As a result, accepting the court of appeals' construction of the Act could dramatically undermine the principal means Congress established for the statute's enforcement.

B. Debt Collectors Can Be Protected From Unfair Liability Without Excusing Their Mistakes Of Law.

Respondents have no ground to complain that petitioner's construction of the Act fails to afford debt collectors the protection from unfair liability Congress intended to provide them.

To be sure, under petitioner's interpretation, some defendants will be held liable for good-faith misunderstandings of the law. But as noted in the beginning of this brief, that hardly distinguishes debt collectors from any other member of society in a legal system that generally declines to allow ignorance of the law as a defense. Indeed, as Justice Frankfurter once observed, the laws "are thick with provisions that command that some things not be done and others be done, although persons convicted under such provisions may have had no awareness of what the law required or that what they did was wrongdoing." *Lambert v. California*, 355 U.S. 225, 230 (1958) (Frankfurter, J., dissenting).

In fact, Congress has already provided debt collectors with special protections in the form of a defense for violations based on non-legal errors, 15 U.S.C. § 1692k(c), and an easy and cost-effective way to obtain expert advice on the meaning of the Act that will shield them from liability so long as they follow it, *id*. § 1692k(e); *see supra* 28. Moreover, like all others expected to comply with the sometimes

uncertain requirements of the law, debt collectors can mitigate the risk of liability through careful study of the law, reliance on forms and procedures developed by expert bodies,[17] and by forgoing practices of questionable lawfulness. *See FTC v. Colgate-Palmolive Co.*, 380 U.S. 374, 393 (1965) ("[I]t does not seem 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.") (citation and quotation marks omitted).

In addition, Congress limited the extent of debt collectors' financial exposure when they do violate the Act. It capped statutory damages at $1,000 in individual actions, 15 U.S.C. § 1692k(a)(2)(A), and at the lesser of $500,000 or one percent of the debt collector's net worth in class actions, *id.* § 1692k(a)(2)(B). And it made the amount of the statutory damages award discretionary, to be set based upon a number of factors such as "the frequency and persistence of noncompliance by the debt collector," "the nature of such noncompliance," and "the extent to which such noncompliance was intentional." *Id.* §§ 1692k(a)(2)(B), (b)(2).

Accordingly, the statute already provides debt collectors with considerably more protection than other businesses subject to federal regulation enjoy. If more is required, it must be sought from Congress rather than this Court.

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[17] *See* Pet. App. 16a (discussing the model validation notice form created by the American Collector's Association).

C. The FDCPA's Legislative History Does Not Reveal A Contrary Purpose.

Respondents and the court of appeals nonetheless assert that the legislative history demonstrates Congress's intent to provide debt collectors broad protection for any kind of good faith mistake, including legal errors. *See* Pet. App. 13a-14a; BIO 19-20. For this conclusion, they rely on a single sentence in a Senate report, which states that a "debt collector has no liability, however, if he violates the act in *any* manner, including *with regard to the act's coverage*, when such violation is unintentional and occurred despite procedures designed to avoid such violations." S. Rep. 95-382, at 5, *as reprinted in* 1977 U.S.C.C.A.N. 1695, 1700 (emphasis added).

Because the report stated that the defense protected those who violate the Act in "any" manner, the court of appeals assumed that the report must have envisioned legal as well as non-legal errors. *See* Pet. App. 14a. But the quotation makes clear that the defense excludes liability only so long as the violation is "unintentional." And as shown above, a violation arising from a mistake of law is not "unintentional."

Nor does the sentence's reference to violations relating to the "act's coverage," necessarily imply that the authors of the report were contemplating mistakes of law. For example, the statute covers only efforts to collect consumer, not commercial, debts. *See* 15 U.S.C. § 1692a(5)-(6). Debt collectors who mistakenly believe that a debt was incurred in a professional, rather than a personal, capacity could wrongly conclude that they were attempting to

recover a commercial debt falling outside the scope of the Act's coverage. *See, e.g.*, *Slenk v. Transworld Sys., Inc.*, 236 F.3d 1072, 1074-76 (9th Cir. 2001) (holding summary judgment precluded in light of disputed questions of fact regarding whether a particular debt was a consumer or commercial debt).

In any event, even if the writers of this single sentence in the report of one house of Congress believed that the legislation they were drafting would cover legal errors, the language that they proposed, the Congress as a whole adopted, and the President signed, does not comport with that expectation. As a result, even if respondents and the court of appeals correctly construed the report, this one indicia of legislative intent would be insufficient to overcome the presumption that ignorance of the law is no defense. *See, e.g.*, *Int'l Minerals & Chem. Corp.*, 402 U.S. at 562-63.

D. This Court Did Not Assume In *Heintz v. Jenkins* That Congress Intended To Provide A Mistake Of Law Defense For Attorney Debt Collectors.

Nor did this Court's decision in *Heintz v. Jenkins*, 514 U.S. 291 (1995), suggest that Congress intended to protect debt collectors from liability for legal errors, as the court of appeals wrongly believed. *See* Pet. App. 10a-11a, 13a.

In *Heintz*, the Court held that the FDCPA applied to attorney debt collectors, notwithstanding the defendant's claim that this would "automatically . . . make liable any litigating lawyer who brought, and then lost, a claim against a debtor." 514 U.S. at 295. That worry was unfounded, the

Court explained, pointing out that "the Act says explicitly that a 'debt collector' may not be held liable if he '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.'" *Id*. (quoting 15 U.S.C. § 1692k(c)). The Court further noted that "[i]n any event," there was no reason to think that "the fact that a lawsuit turns out ultimately to be unsuccessful could, by itself, making the bringing of it an 'action that cannot legally be taken,'" within the meaning of the FDCPA's prohibitions. *Id*. at 295-96 (quoting 15 U.S.C. § 1692(e)(5)).

Nothing in this passage is inconsistent with petitioner's interpretation. The Sixth Circuit assumed that in suggesting that the bona fide error defense could protect a defendant from liability for filing an unsuccessful lawsuit, the Court must have contemplated that the defense would apply to legal errors. The unspoken premise of that assumption is that lawsuits generally fail because the lawyers who bring them misunderstood the governing law. But the facts of this case demonstrate that this premise is false – respondents' collection lawsuit against petitioner failed (or would have failed if they had not dismissed it) not because they misunderstood the law but because they mistakenly believed petitioner was in arrears on her mortgage when, in fact, she had paid it off. Pet. App. 3a.

In any event, the Court's passing reference to the bona fide error defense was not intended to predetermine the question presented here, which did not arise in *Heintz* and was not briefed in that case.

IV. Congress's Amendment To The Truth In Lending Act Did Not Change The Meaning Of The FDCPA's Bona Fide Error Defense.

For the foregoing reasons, there is every reason to believe that when Congress enacted the FDCPA, it did not intend the Act to excuse violations arising from mistakes of law. Contrary to the Sixth Circuit's decision, Congress's amendment of the Truth in Lending Act three years later does not warrant a different conclusion.

The Sixth Circuit placed significant weight on the fact that in 1980 Congress amended the TILA to declare expressly that legal mistakes do not qualify as bona fide errors under that statute's defense, but made no such amendment to the FDCPA.[18] The court concluded that "the fact that the TILA's bona fide error provision expressly excludes errors of legal judgment while the analogous provision in the FDCPA does not have such limitation suggests that, unlike the TILA, Congress did not intend" to preclude legal mistakes from protection under the FDCPA. Pet. App. 13a-14a. The court drew the wrong inference from the amendment. If anything, the 1980

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[18] The amendment added the following sentence to the end of 15 U.S.C. § 1640(c): "Examples of a bona fide error include, but are not limited to, clerical, calculation, computer malfunction and programing, 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." Pub. L. 96-221, § 615(a); *see also* App. 4a (reproducing amended Section 1640 in full).

revision to the TILA confirms that neither statute provides immunity for mistakes of law.

A. The Sixth Circuit Misconstrued The Intent And Effect Of The 1980 Amendment To The TILA.

The Sixth Circuit apparently reasoned that: (1) the 1980 amendment provided that legal errors are not covered by the TILA's defense; (2) this must mean that before the amendment, the TILA *did* provide a defense for legal errors; (3) because the FDCPA has the same language as the original TILA defense, the FDCPA's provision must also apply to legal mistakes; and (4) because Congress did not amend the FDCPA, this must mean that Congress intended that statute to continue providing a mistake of law defense, although the TILA no longer does.

This syllogism fails for at least four reasons.

First, it assumes that the 1980 amendment was meant to change, rather than codify, existing law as it pertained to legal mistakes. There is no basis for that assumption. No one thinks, for example, that the FDCPA's bona fide error defense excludes clerical errors simply because the TILA now expressly mentions them but the FDCPA does not. *Compare* 15 U.S.C. § 1640(c) (stating that "[e]xamples of a bona fide error include . . . clerical . . . errors") *with* 15 U.S.C. § 1692k(c) (including no examples). Instead, everyone accepts that in expressly providing that the TILA defense extends to clerical errors, Congress was simply codifying existing law that applies equally to the FDCPA as well. The same is true with respect to legal errors. Congress included its reference to legal errors not to change the law, but rather to make clear

that although other portions of the 1980 amendment may have expanded the scope of the defense, Congress did not intend to go so far as to make ignorance of the law an excuse.

In 1980, there was no need to change the meaning of the TILA to exclude legal mistakes – at that time, every court of appeals to have construed the defense had already held that mistakes of law were not covered. *See supra* at 22. Moreover, for the reasons set forth above, Congress would have had every reason to believe that those decisions were correct, and that as enacted, the statute already excluded mistakes of law. Accordingly, the more plausible inference is that Congress intended its reference to legal mistakes to codify the existing consensus. *See, e.g.*, James Lockhart, *What Constitutes Truth In Lending Act Violation Which "Was Not Intentional And Resulted From Bona Fide Error Notwithstanding Maintenance Of Procedures Reasonably Adapted To Avoid Any Such Error" Within Meaning Of § 130(c) Of Act (15 U.S.C.A. § 1640(c))*, 153 A.L.R. FED. 193, § 2[a] (1999) (noting that "this amendment was intended merely to clarify what was then the prevailing view, that the bona fide error defense applies to clerical errors, not including errors of legal judgment").

The amendment's purposes and history are consistent with that view. Although the Sixth Circuit assumes that the point of the 1980 legislation was to make it *harder* for lenders to avoid liability (*i.e.*, by changing the law to deprive them of a mistake of law defense), other provisions of the amendment and the legislative history show that Congress had precisely the opposite intention. A Senate report explained

that the legislation was prompted in part by "evidence that many creditors have sincerely tried to comply with the Act but, due to its increasing complexity and frequent changes, have nonetheless found themselves in violation and subject to litigation." S. Rep. 96-368, at 16, *as reprinted in* 1980 U.S.C.C.A.N. 236, 252. Congress responded by "mak[ing] compliance easier for creditors" and "limit[ing] civil liability for statutory penalties to only significant violations." *Id*. at 17; 1980 U.S.C.C.A.N. 236, 252; *see* Pub. L. 96-221, §§ 605-606, 610, 611, 613-14 (simplifying requirements); *id*. § 615(b) (limiting statutory damages remedy).

In the same vein, Congress amended "the defense for bona fide errors . . . to provide that a bona fide error may include calculation and clerical errors *as well as* computer errors and faulty programing. . . ." S. Rep. 96-368, at 32, *as reprinted in* 1980 U.S.C.C.A.N. 236, 268 (emphasis added); *see* Pub. L. 96-221, § 615(a) (adding statement that "[e]xamples of a bona fide error include, but are not limited to, clerical, calculation, computer malfunction and programing, and printing errors. . . ."). Thus, consistent with other provisions easing lenders' burdens, it appears that Congress intended the new language to make clear that the bona fide error defense was *broader* than some might have thought, in that it covered not simply calculation and clerical errors but also errors caused by the increasing use of computers in the late 1970s and early 1980s.

The reference to legal errors that immediately followed simply made clear that while the defense applied broadly to all kinds of non-legal errors, including those arising from new forms of technology,

the amendment should not be read as going so far as to overturn the established rule that ignorance of the law is not protected (even if, for example, a legal error affected how a computer was programmed). *See* Pub. L. 96-221, § 615(a) (". . . *except* that an error of legal judgment with respect to a person's obligations under this subchapter is not a bona fide error.") (emphasis added). A Senate report thus stated that the bona fide error provision "has been *clarified* to make clear that it applies to mechanical and computer errors, *provided* they are not the result of erroneous legal judgments as to the Act's requirements." S. Rep. 96-73 at 7-8, *as reprinted in* 1980 U.S.C.C.A.N. 280, 285-86 (emphasis added).

Second, the 1980 legislation did not change the operative language of the defense. Both before and after the amendment, defendants were required to prove that the error was "not intentional," that it was the result of a "bona fide error," and that they maintained procedures "reasonably adapted to avoid such errors." *Compare* 15 U.S.C. § 1640(c) (1968) *with* 15 U.S.C. § 1640(c). That Congress did not change the language describing the elements of the defense strongly indicates that it intended the legislation to clarify its original meaning and codify existing interpretations, not to effect a wholesale revision of its application to legal errors.

Third, Congress's failure to add similar language to the FDCPA does not demonstrate that it intended the same operative language in the two statutes to mean two very different things.

It may be that in an ideal world, Congress would have amended the FDCPA to include the TILA's clarifying language. In all likelihood, the issue never

occurred to Congress, which was then focused on the statute before it and the problems in the lending industry. But even if it had, Congress would have realized that it did not need to amend the FDCPA to ensure that its bona fide error defense would continue to exclude legal errors. Congress would have understood that even after the 1980 amendment to the TILA, courts construing the FDCPA would look to the meaning its language had at the time of its enactment. *See, e.g.*, *United States v. United Mine Workers of Am.*, 330 U.S. 258, 282 (1947). In doing so, those courts would see that when the FDCPA was written, the TILA's bona fide error defense was uniformly held to exclude legal errors. *See supra* at 22. They would have assumed that in using the same language as in the TILA, Congress intended to exclude mistakes of law under the FDCPA as well. *See, e.g.*, *Rowe v. N.H. Motor Transp. Ass'n*, 128 S. Ct. 989, 994 (2008) (explaining 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"); *Cannon v. Univ. of Chicago*, 441 U.S. 677, 696-97 (1979) (same). As a result, Congress would have expected that even if it did not amend the FDCPA in 1980, courts would nonetheless conclude that the language as enacted did not encompass legal errors.

Fourth, neither the Sixth Circuit nor respondents have suggested any reason why Congress would have wanted ignorance of the law to be a defense under the FDCPA, but not the TILA. One would think that, if anything, it would be the other way around. After all, the TILA's requirements are far more

complicated and therefore more likely to lead to good faith violations. *See, e.g.*, *Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555, 566 (1980) (noting that the TILA is "highly technical"). And, frankly, as between lenders and debt collectors, it seems unlikely that Congress would be more sympathetic to the debt collection industry.

But even if respondents could come up with an explanation for the difference between these two statutes, their work would be just beginning. For Congress has included a similarly worded bona fide error defense in five provisions of four other statutes (including the now-repealed ESAA). Two of those provisions are part of the Electronic Fund Transfer Act, which – like the FDCPA – was on the books when Congress amended the TILA. *See* 15 U.S.C. §§ 1693m(c), 1693h(c) (reproduced at App. 6a). Yet Congress did not change the language of those provisions either. Nor did Congress include the TILA's 1980 language in the bona fide error defense of the Real Estate Settlement Procedures Act (RESPA), 12 U.S.C. § 2607(d)(3) (reproduced at App. 7a), passed in 1983.[19] But it *did* include the language

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[19] Congress delegated RESPA rulemaking authority to the Secretary of the Department of Housing and Urban Development. 12 U.S.C. § 2607(d)(4). The resulting notice-and-comment regulations provide that an "error of legal judgment with respect to a person's obligations under RESPA is not a bona fide error." 24 C.F.R. § 3500.15(b)(1)(ii). For the reasons stated above, that construction of the language of the Act is entirely reasonable and therefore binding with respect to the meaning of RESPA. *See Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843-44 (1984). While it obviously is not authoritative with respect to the FDCPA, this

from the TILA's amendment in the Expedited Funds Availability Act, 12 U.S.C. § 4010(c) (reproduced at App. 8a).

Developing a unifying theory of why Congress would want to exclude mistake of law defenses under two of these six statutes, but not the others, would be a truly daunting task. The far more likely conclusion is that Congress has intended all along that the nearly identical operative language in all six statutes would be given the same interpretation, whether it remembered to include the TILA's clarifying language or not.

B. If Anything, The Amendment To The TILA Confirms That The FDCPA Provides No Defense For Legal Errors.

In the end, "the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one," *United States v. Price*, 361 U.S. 304, 313 (1960), particularly when the subsequent Congress expresses that view through an amendment to an entirely different statute. But to the extent the 1980 amendment to the TILA sheds any relevant light on the question presented here, it undermines rather than supports the court of appeals' decision. It is now beyond dispute that the TILA's bona fide error defense does not apply to mistakes as to that statute's meaning. And by expressing this view

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Court should avoid a decision in this case that would result in the two identically worded provisions being given different meanings.

through a clarifying and confirming amendment, rather than by changing the operative language of the defense, Congress demonstrated its understanding that mistakes of law have been excluded all along under the terms of the defense as originally enacted. And if that language has always excluded legal errors, so has the identical language in the FDCPA. *See, e.g.*, *Rowe,* 128 S. Ct. at 994.

V. The Bona Fide Error Defense Does Not Apply To Legal Mistakes, Regardless Of The Source Of Law.

The mistake of law at issue in this case is a misunderstanding of the FDCPA's own requirements. As a result, petitioner has focused thus far on the question whether a mistake about the meaning of the FDCPA itself can be excused under the bona fide error defense. But in other cases, defendants have sought refuge under the bona fide error defense when mistakes as to the meaning of other law led them to violate the FDCPA. For example, in *Johnson v. Riddle*, 305 F.3d 1107 (10th Cir. 2002) (*Riddle I*), the defendant alleged that its misconstruction of Utah's dishonored check statute led it to attempt to collect an amount not permitted by law, in violation of Section 1692f(1) of the FDCPA. *See* 305 F.3d at 1110-11. While this Court need not resolve the Act's application to such cases here, if it does address the question, the Court should conclude that the bona fide error defense is categorically unavailable for any mistake of law.

Admittedly, some of petitioner's arguments for declining to apply the bona fide error defense to mistakes about the FDCPA's meaning do not apply

with the same force to mistakes about other state and federal statutes. Allowing a "mistake of state law" defense, for example, would not render the safe harbor defense superfluous. *See supra* Part II. And to the extent the Court looks to the amended version of the TILA to construe the meaning of the FDCPA, that statute provides only that its bona fide error defense does not include errors regarding a "person's obligations under this subchapter," 15 U.S.C. § 1640(c), although it does not appear that this language was intended to overturn the prior judicial consensus that the defense is unavailable for legal mistakes generally. *See supra* at 22.

In any event, petitioner's remaining arguments are sufficient. Most prominently, the presumption that ignorance of the law is no defense applies without regard to the source of the law the defendant misunderstood. There was no suggestion in *Riddle*, for example, that a good faith misunderstanding of Utah's dishonored check statute would excuse a violation of that statute as a matter of state law. 305 F.3d at 1119-21. And it would be odd for Congress to excuse mistakes of state law that states themselves ordinarily would not forgive. Nor is there any reason to believe that Congress would have intended to preclude a defense based on a misunderstanding of the FDCPA, yet allow a defense when the defendant violates the Act based on a misunderstanding of state law.

If Congress had intended otherwise, it presumably would have expressed that intent in clear language. Instead, the statute speaks in terms of violations that are "not intentional," language best understood to refer to defendants' intentions with

respect to their conduct, rather than the legality of their actions. *See supra* at 17-22. Moreover, asking whether debt collectors have maintained procedures reasonably adapted to avoid mistakes a state law would invade even further the traditional responsibility of states to set standards for the professional conduct of their lawyers.

Finally, the basic purposes of the FDCPA would be undermined if defendants could evade responsibility for their violations by adverting to mistakes of state law or a misconstruction of another federal statute. *See supra* at 31-34. The harm to consumers does not depend on the source of the collector's legal mistake. And extending the bona fide error defense to mistakes of law of any sort risks encouraging debt collectors to err on the side of aggressive practices whenever there is any genuine dispute about the scope of consumers' rights.

CONCLUSION

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

Respectfully submitted,

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APPENDIX

Fair Debt Collection Practices Act

15 U.S.C. § 1692k

1692k. Civil liability

(a) Amount of damages

Except as otherwise provided by this section, any debt collector who fails to comply with any provision of this subchapter with respect to any person is liable to such person in an amount equal to the sum of--

(1) any actual damage sustained by such person as a result of such failure;

(2)(A) in the case of any action by an individual, such additional damages as the court may allow, but not exceeding $1,000; or

(B) in the case of a class action, (i) such amount for each named plaintiff as could be recovered under subparagraph (A), and (ii) such amount as the court may allow for all other class members, without regard to a minimum individual recovery, not to exceed the lesser of $500,000 or 1 per centum of the net worth of the debt collector; and

(3) in the case of any successful action to enforce the foregoing liability, the costs of the action, together with a reasonable attorney's fee as determined by the court. On a finding by the court that an action under this section was brought in bad faith and for the purpose of harassment, the court may award to the defendant attorney's fees reasonable in relation to the work expended and costs.

(b) Factors considered by court

In determining the amount of liability in any action under subsection (a) of this section, the court shall consider, among other relevant factors--

(1) in any individual action under subsection (a)(2)(A) of this section, the frequency and persistence of noncompliance by the debt collector, the nature of such noncompliance, and the extent to which such noncompliance was intentional; or

(2) in any class action under subsection (a)(2)(B) of this section, the frequency and persistence of noncompliance by the debt collector, the nature of such noncompliance, the resources of the debt collector, the number of persons adversely affected, and the extent to which the debt collector's noncompliance was intentional.

(c) Intent

A debt collector may not be held liable in any action brought under this subchapter 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.

(d) Jurisdiction

An action to enforce any liability created by this subchapter may be brought in any appropriate United States district court without regard to the amount in controversy, or in any other court of competent jurisdiction, within one year from the date on which the violation occurs.

(e) Advisory opinions of 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.

Truth in Lending Act

15 U.S.C. § 1640(c) (1968)

(As originally enacted)

(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.

Truth in Lending Act

15 U.S.C. § 1640(c)

(As amended)

(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. Examples of a bona fide error include, but are not limited to, clerical, calculation, computer malfunction and programing, 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.

Economic Stabilization Act Amendments of 1971

Pub. L. 92-210, 85 Stat. 748, § 210

In any action brought under subsection (a) against any person renting property or selling goods or services who is found to have overcharged the plaintiff, the court may, in its discretion, award the plaintiff reasonable attorney's fees and costs, plus whichever of the following sums is greater:

(1) an amount not more than three times the amount of the overcharge upon which the action is based, or

(2) not less than $100 or more than $1000;

except that in any case where the defendant establishes that the overcharge was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to the avoidance of such error the liability of the defendant shall be limited to the amount of the overcharge; Provided, That where the overcharge is not willful within the meaning of section 208(a) of this title, no action for an overcharge may be brought by or on behalf of any person unless such person has first presented to the seller or renter a bona fide claim for refund of the overcharge and has not received repayment of such overcharge within ninety days from the date of the presentation of such claim.

Electronic Fund Transfer Act

15 U.S.C. §§ 1693m, 1693h

§ 1693m. Civil Liability

* * *

(c) Unintentional violations; bona fide error

Except as provided in section 1693h of this title, a person may not be held liable in any action brought under this section for a violation of this subchapter if the person 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.

* * *

§ 1693h. Liability of financial institutions

* * *

(c) Intent

In the case of a failure described in subsection (a) of this section which was not intentional and which resulted from a bona fide error, notwithstanding the maintenance of procedures reasonably adapted to avoid any such error, the financial institution shall be liable for actual damages proved.

Real Estate Settlement Procedures Act

12 U.S.C. § 2607(d)(3)

(d) Penalties for violations; joint and several liability; treble damages; actions for injunction by Secretary and by State officials; costs and attorney fees; construction of State laws

* * *

No person or persons shall be liable for a violation of the provisions of subsection (c)(4)(A) of this section if such person or persons proves by a preponderance of the evidence that such violation was not intentional and resulted from a bona fide error notwithstanding maintenance of procedures that are reasonably adapted to avoid such error.

Expedited Funds Availability Act

12 U.S.C. § 4010(c)

(c) Bona fide errors

(1) General rule

A depository institution may not be held liable in any action brought under this section for a violation of this chapter if the depository institution demonstrates 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.

(2) Examples

Examples of a bona fide error include clerical, calculation, computer malfunction and programming, and printing errors, except that an error of legal judgment with respect to a depository institution's obligation under this chapter is not a bona fide error.