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 FOR THE STATES OF NEW YORK, COLORADO, CONNECTICUT, FLORIDA, HAWAII, IDAHO, ILLINOIS, IOWA, MARYLAND, MINNESOTA, MISSISSIPPI, NEVADA, NEW HAMPSHIRE, NEW JERSEY, NEW MEXICO, NORTH DAKOTA, OHIO, TEXAS, UTAH, WEST VIRGINIA, AND WYOMING AS AMICI CURIAE IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

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

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INTEREST OF AMICI CURIAE

Amici States have a compelling interest in protecting consumers from unlawful debt-collection practices. Debt-collection abuse is the most frequent consumer complaint made to the state Attorneys General, and the number of complaints is skyrocketing. The FDCPA, enacted in 1977, deters and remedies this sort of abuse by holding debt collectors strictly liable for statutory violations, with only narrow defenses available. Preserving the FDCPA's civil-liability scheme is critical to protecting consumers and to preventing extensive social harm. As Congress recognized in enacting the FDCPA, abusive debt-collection practices contribute to "personal bankruptcies, to marital instability, [and] to the loss of jobs," inflicting irreparable injury not only on individual consumers but on their families and communities as well. 15 U.S.C. § 1692(a).

Proper interpretation of the FDCPA is also vital to the effective enforcement of state consumer-protection laws. Many States have enacted consumer-protection statutes that, like the FDCPA, include a defense for "bona fide error," which has long been understood to mean clerical errors and not errors of law. These state laws include general statutes that prohibit unfair or deceptive practices,[1] as well as specific statutes that address debt collection[2] and other fields.[3] State courts

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[1] *See, e.g.*, Fla. Stat. Ann. § 501.207(4) (Florida Deceptive and Unfair Trade Practices Act); Ga. Code Ann. § 10-1-400 (Georgia Fair Business Practices Act); Iowa Code § 714.H5(7) (West, WESTLAW through 2009 Reg. Sess.) (Iowa Private Right of Action for Consumer Frauds Act); Ind. Code § 24-5-0.5-3(c) (Indiana Deceptive Consumer Sales Act); Ohio (Cont'd)

frequently look to federal FDCPA decisions when

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Rev. Code. Ann. § 1345.11(A) (Ohio Consumer Sales Practices Act); Utah Code Ann. § 13-11-19(4)(c) (Utah Consumer Sales Practices Act); Va. Code Ann. § 59.1-207 (Virginia Consumer Protection Act).

[2] *See* Ark. Code Ann. § 17-24-512(c) (Arkansas Fair Debt Collection Practices Act); Cal. Civ. Code § 1788.30(e) (Rosenthal Fair Debt Collection Practices Act); Colo. Rev. Stat. § 12-14-113(3) (Colorado Fair Debt Collection Practices Act); Conn. Gen. Stat. § 36a-648(c) (Connecticut Creditors' Collection Practices Act); Fla. Stat. Ann. § 559.77(3) (Florida Consumer Collections Practices Act); Me. Rev. Stat. Ann. tit. 32, § 11054(3) (Maine Fair Debt Collection Practices Act); N.H. Rev. Stat. Ann. § 358-C:4(II)(b) (New Hampshire Unfair, Deceptive or Unreasonable Collection Practices Act); 73 Pa. Cons. Stat. § 2270.5(d)(1) (Pennsylvania Fair Credit Extension Uniformity Act); R.I. Gen. Laws § 19-14.9-13 (4)(a) (Rhode Island Fair Debt Collection Practices Act); W. Va. Code § 46A-5-101(8) (West Virginia Consumer Credit and Protection Act); Wis. Stat. Ann. § 425.301(3) (Wisconsin Consumer Act); Wyo. Stat. Ann. § 40-14-522(c) (Wyoming Uniform Consumer Credit Code).

[3] *See, e.g.*, Ariz. Rev. Stat. § 33-1058(B) (bona fide error defense for construction lender who fails to furnish claimant with copy of bonded stop notice within thirty days); Ga. Code Ann. § 44-7-35(c) (bona fide error defense for landlords who improperly retain tenant's security deposit); Ind. Code § 28-9-5-1(b) (bona fide error defense for depository institutions that fail to send required notices when a hold is placed on a depositor's account); Me. Rev. Stat. Ann. tit. 10 § 1149 (bona fide error defense for parties who print more than the last five digits of a credit card or debit card account number or the expiration date of the card on sales receipt); N.J. Stat. Ann. §§ 56:11-7 & 56:11-25 (bona fide error defense for violations of Consumer Credit Transactions Act); N.Y. Gen. Bus. Law § 89-v (bona fide error defense for process servers who fail to comply with record-keeping requirements); N.Y. Real Prop. Law § 265-a (bona fide error defense for violations of Home Equity Theft Protection Act); Tex. Ins. Code Ann. § 2652.004(b) (bona fide error defense for escrow agents who improperly disburse funds from a title
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applying comparable bona fide error defenses under state law. As a result, erroneous interpretation of the federal Act threatens to undermine the effective enforcement of state consumer-protection statutes, which regulate a wide range of consumer-directed activity beyond debt collection alone.

More generally, amici States have an interest in preserving the deterrent effect of the FDCPA, similar state laws, and other statutes that impose civil liability for statutory violations. The principle that "ignorance of the law or a mistake of law is no defense . . . is deeply rooted in the American legal system." *Cheek v. United States*, 498 U.S. 192, 199 (1991). As a result, a mistake-of-law defense should not be recognized in a civil statute like the FDCPA absent unequivocal statutory language expressly granting immunity for mistakes of law.

STATEMENT

The FDCPA imposes strict liability on debt collectors who engage in prohibited practices. Congress provided a limited bona fide error defense, shielding a debt collector from liability if the collector proves that its "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).

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insurance escrow account before funds related to the transaction have been received and deposited in the account); Wis. Stat. Ann. § 812.41(3) (bona fide error defense if garnishee fails to pay funds in required time).

Respondent debt collectors filed a complaint in state court seeking to foreclose on petitioner's house. As mandated by the FDCPA, respondents served petitioner with a debt-validation notice informing petitioner of her legal rights. (Pet. App. 2a-3a). The district court—as have most courts that have addressed the issue—found that respondents' notice violated the FDCPA by requiring consumers to dispute the validity of the claimed debt "in writing," a restriction not authorized by the Act. (Resp. App. 8-11).

Despite this statutory violation, the district court granted respondents' motion for summary judgment. The district court found that respondents' statutory violation was the result of a bona fide error of law, rejecting petitioner's argument that the defense was not available for errors of law. (Pet. App. 30a-34a). The court of appeals affirmed, applying the Act's bona fide error defense to shield respondents' mistake of law. (Pet. App. 5a-18a).

SUMMARY OF ARGUMENT

Petitioner's brief explains how the text and history of the FDCPA's bona fide error defense refute the contention that the defense covers mistakes of law. Instead of repeating those arguments, amici States emphasize here two points of particular concern to them. First, recognizing a mistake-of-law defense would undermine the development of the law under the FDCPA, especially with respect to novel debt-collection practices. Second, absent an explicit statutory provision to the contrary, private parties—unlike public officials—are not entitled to qualified-immunity-like protection against civil liability for mistakes of law.

1. Congress designed two mechanisms to clarify the FDCPA's application to particular facts: private enforcement actions, which result in judicial interpretations of the Act, and advisory opinions from the Federal Trade Commission ("FTC"). Extending the bona fide error defense to mistakes of law would undermine both of these. Consumers would have little incentive to challenge debt-collection practices in any case where the statutory violation was not blatant—precisely the areas where clarification of the law is most needed—because a successful mistake-of-law defense would deny the consumers any recovery. Nor would debt collectors have any incentive to bring questionable practices to the FTC's attention if they could escape liability whenever the law was unsettled. As a result, there would be few opportunities to clarify the law in this area. Public enforcement actions by the FTC and state Attorneys General could not bridge the massive enforcement gap that a mistake-of-law defense would create.

2. Recognizing a mistake-of-law defense under the FDCPA also would depart sharply from the way that other civil regulatory statutes are interpreted. Because they weaken the deterrent value of legal prohibitions, mistake-of-law defenses are rarely recognized—particularly when only civil liability is at stake. For example, although many state consumer-protection statutes, like the FDCPA, include a defense for bona fide errors, amici States are aware of no judicial opinions interpreting a parallel state provision to immunize mistakes of law. Similarly, decisions of this Court apply retroactively in civil cases even if defendants have reasonably relied on contrary lower-court precedent.

Debt collectors are not at all like public officers, who are entitled to qualified immunity when the law is unclear. The policies that animate qualified immunity do not apply to the conduct of private profit-seeking parties. A mistake-of-law defense would remove debt collectors' incentive to be careful in complying with the FDCPA. Because qualified immunity would not be appropriate in this context, this Court should not read a mistake-of-law defense into the FDCPA.

ARGUMENT

I. A Mistake-of-Law Defense Would Undermine the FDCPA's Mechanisms for Clarifying and Enforcing the Act.

The FDCPA bars the FTC (and other federal agencies) from issuing rules or regulations prohibiting specific debt-collection practices. *See* 15 U.S.C. § 1692*l*(d). Instead, it provides two mechanisms for determining the legality of a disputed practice.

First, disputes can be resolved by court rulings. Congress intended private consumer suits to be the primary means for enforcing the Act. S. Rep. No. 95-382, at 5 (1977), *reprinted in* 1977 U.S.C.C.A.N. 1696, 1699 (1977). The FDCPA facilitates private enforcement actions by allowing consumers who successfully challenge unlawful debt-collection practices to recover actual damages, statutory damages, and reasonable attorney's fees. 15 U.S.C. § 1692k(a). Private enforcement suits play a critical role in developing authoritative and binding interpretations of the FDCPA and in establishing prohibited practices under the Act.

Second, the FDCPA allows debt collectors to obtain administrative guidance before engaging in potentially unlawful conduct. Debt collectors can seek advisory opinions from the FTC if their legal obligations are unclear, and the FDCPA incorporates a safe-harbor provision that shields debt collectors from liability if they rely in good faith on the agency's advisory opinions, even if the opinion is later overturned or rescinded. 15 U.S.C. § 1692k(e).

Recognizing a mistake-of-law defense would undermine both of these mechanisms for clarifying and enforcing the FDCPA. Consumers would have little incentive to bring enforcement actions where the law was at all unsettled, because in such circumstances a debt collector could easily claim bona fide error of law and thereby deny the consumer any recovery. And because of the reduced likelihood of recovering an award of attorney's fees, attorneys would be less likely to agree to represent consumers when the debt collector's conduct was legally questionable, but potentially subject to a claim of bona fide error. *See* Nat'l Consumer Law Ctr., *Fair Debt Collection* § 7.2.3, at 413 (6th ed. 2008).

If debt collectors could escape liability for mistakes of law, consumers would be likely to challege only blatant or obvious violations of the FDCPA. In particular, consumers would have little incentive to bring lawsuits contesting new forms of debt-collection abuse. This would undermine the Act's reliance on private enforcement as the principal way to clarify the law in new and untested areas.

Applying the Act's bona fide error defense to legal errors also would undermine the advisory-opinion process. Debt collectors would have no incentive to seek formal guidance from the FTC if they could claim complete immunity based on their own, informal interpretations of the FDCPA's requirements. Nor would they have any incentive to bring questionable practices to the FTC's attention if they could escape liability whenever the law was unsettled.

The result would be to ossify the FDCPA. Debt collectors would claim immunity when there was no court decision or advisory opinion specifically prohibiting a particular debt-collection practice, or if there was a split among the courts about a particular question. But if mistake of law were a defense, nobody would have an adequate incentive to seek judicial or administrative opinions clarifying how the FDCPA applies to new or disputed debt-collection practices.

This is not merely a hypothetical problem. The debt-collection industry has radically expanded and transformed since the FDCPA was enacted. Debt collectors continually push the envelope, testing the boundaries of the Act and developing new strategies and tactics for collecting debts. There are many practices whose legality is currently disputed or unsettled, such as attempts to collect time-barred consumer debt and the use of pre-recorded messages and other new communications technologies to contact consumers.[4]

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[4] *See, e.g.*, Nat'l Consumer Law Ctr. & Nat'l Ass'n of Consumer Advocates, *Comments to the Federal Trade Commission Regarding the Fair Debt Collection Practices Act—Collecting Consumer Debts: The* (Cont'd)

If debt collectors could rely on the absence of applicable precedent or the presence of a few conflicting decisions to assert a mistake-of-law defense, it would freeze the law in place, preventing application of the FDCPA to evolving practices, new technologies, and changing circumstances.

Here, for example, the court of appeals credited respondents' claim of bona fide legal error because of a split among the courts regarding use of the disputed in-writing requirement. The Third Circuit upheld use of an in-writing restriction in 1991, but the Ninth Circuit like most district courts to address the issue reached the opposite conclusion in 2005. (Pet. App. 36a-37a). It is quite possible that the Third Circuit was wrong in 1991. But the plaintiffs who prevailed in later cases would not have brought those suits if debt collectors could bar recovery by claiming mistakes of law. As a result, debt collectors could continue to engage in illegal debt-collection practices, shielded by a mistake-of-law defense that undermines the very mechanisms that Congress intended for continuing clarification and application of the FDCPA.

The resulting enforcement gap would be extensive. It is unclear whether the bona fide error defense applies

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Challenges of Change at 13-14, 31-32 (June 6, 2007), *available at* http://www.ftc.gov/os/comments/debtcollectionworkshop/529233-00018.pdf (collection of time-barred debt); John P. Holahan, *Emerging Issues in Debt Collection Law*, 62 Consumer Fin. L.Q. Rep. 267, 270 (Fall-Winter 2008) (pre-recorded messages and new communications technologies).

in FTC enforcement actions,[5] but even if it does not, FTC enforcement is no substitute for private consumer suits. The FTC has recently reaffirmed that "[p]rivate actions, not FTC actions, were intended to be and should be the main means for promoting industry compliance with the FDCPA" and that the threat of liability is the main deterrent of unlawful conduct. Fed. Trade Comm'n, *Collecting Consumer Debts: The Challenges of Change: A Workshop Report* ii (Feb. 2009), *available at* http://www.ftc.gov/bcp/workshops/debtcollection/dcwr.pdf. The FTC lacks the resources to be the exclusive or even the primary enforcer of the FDCPA. The FTC currently receives more than 70,000 complaints annually about third-party debt collectors, yet it has brought only sixty FDCPA enforcement suits during the past thirty years. *Id.* at 67. As the agency has acknowledged, it is simply "not feasible" to rely on government enforcement alone. *Id.*

The same is true for enforcement on the state level. The state Attorneys General and other state agencies play a critical role in protecting consumers. But States would have to divert critical—and limited—resources from other consumer-protection efforts if private enforcement of the FDCPA ceased to be the effective tool that Congress intended.

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[5] The FDCPA lists bona fide error as a defense to civil liability in a consumer enforcement action. 15 U.S.C. § 1692k(c). The Act contains a separate provision outlining the FTC's administrative enforcement powers, *id.* § 1692*l*, suggesting that the defense may not be available in an FTC enforcement suit seeking injunctive relief, restitution, or disgorgement.

II. Allowing a Qualified-Immunity-Like Defense Here Would Be Inconsistent with the Way Other Statutes Are Interpreted.

Because immunity for legal errors undermines the deterrent value of the law, failure to know the law is rarely recognized as a defense even when criminal liability is at stake. *See, e.g.*, *Cheek*, 498 U.S. at 199; *Utermehle v. Norment*, 197 U.S. 40, 55 (1905). A mistake-of-law defense is virtually unknown in the civil regulatory context. There are dozens of civil regulatory statutes that, like the FDCPA, contain defenses for bona fide errors. *See, e.g.*, *supra* 1-3, nn. 1-3. But except when the statute expressly provides to the contrary,[6] those defenses do not cover mistakes of law. Amici States are aware of no decisions interpreting a parallel state bona fide error provision to immunize a defendant's mistake of law. In the few instances where defendants have even raised that claim, it has been rejected as directly contrary to the goal of ensuring statutory compliance. *See LaPetina v. Metro Ford Truck Sales, Inc.*, 648 F.2d 283, 286-88 (5th Cir. Unit A June 1981); *First Wis. Nat'l Bank v. Nicolaou*, 113 Wis. 2d 524, 532-35, 335 N.W.2d 390, 393-95 (1983). Even defendants who reasonably rely on judicial decisions assume the risk that those decisions will be overturned and a different rule applied to their conduct. *See Reynoldsville Casket Co. v. Hyde*, 514 U.S. 749, 759 (1995); *Harper v. Va. Dep't of Taxation*, 509 U.S. 86, 97 (1993).

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[6] *See, e.g.*, Kan. Stat. Ann. § 16a-5-201(7) (provision of the Kansas Consumer Credit Code providing a defense for a "bona fide error of law or fact"); Ind. Code § 24-9-5-5 (same in the Indiana Home Loan Practices Act).

The only area of law where civil defendants have the type of immunity that respondents claim is the qualified-immunity doctrine shielding government officers from damages liability when their "conduct does not violate clearly established statutory or constitutional rights." *Pearson v. Callahan*, 129 S. Ct. 808, 815 (2009) (quotation marks omitted). But the reasons for providing qualified immunity to government officers "are not transferable to private parties." *Wyatt v. Cole*, 504 U.S. 158, 168 (1992).[7]

Public officers are shielded from liability when acting in uncertain or unclear legal territory because denying immunity would result in "unwarranted timidity" in the administration of public programs and the pursuit of legislative goals. *Richardson v. McKnight*, 521 U.S. 399, 408 (1997). The duties of government officers make timidity especially undesirable: government officers confront situations that demand "principled and fearless decision-making." *Id.* at 408 (quotation marks omitted). An officer's failure to act or delay in taking action may result in dereliction of the officer's public duty, harming the public good. When government action is at stake, erring "on the side of caution" is not always desirable. *Davis v. Scherer*, 468 U.S. 183, 196 (1984) (citing police officers and prison wardens as examples); *see also Scheuer v. Rhodes*, 416 U.S. 232, 246 (1974) ("[O]fficials

[7] Qualified immunity is also narrower than the mistake-of-law defense upheld by the courts below. Immunity rests on the "*objective* reasonableness of an official's conduct as measured by reference to clearly established law;" a claim of *subjective* ignorance of what the law requires is not enough to shield a public officer from damages liability. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982) (emphasis added).

. . . must often act swiftly and firmly at the risk that action deferred will be futile or constitute virtual abdication of office.").

And at the same time the incentives of government officers tend to promote timidity in the absence of qualified immunity: because officers are not rewarded financially for taking bold action when it is needed, the threat of monetary liability will tend to make them too timid in the face of legal uncertainty.

There is no comparable concern when private commercial activity is at issue. Debt collectors, for example, have a direct financial incentive to engage in aggressive debt-collection practices that may result in higher rates of collection. Because of these potential rewards, the threat of liability will not result in "unwarranted timidity," *Richardson*, 521 U.S. at 408, by debt collectors. Quite the opposite: Congress enacted the FDCPA because debt collectors—when allowed to act without fear of liability—engaged in widespread abuse, resulting in extensive consumer harm. S. Rep. No. 95-382, at 2, 1997 U.S.C.C.A.N. at 1696-97. A mistake-of-law defense would cause debt collectors to regress to that era by eliminating their incentive to be careful in complying with the FDCPA. *Cf. Carlson v. Green*, 446 U.S. 14, 21 (1980) (recognizing that the threat of civil liability deters unlawful conduct).

Moreover, the burdens of complying with the FDCPA are not comparable to the burdens faced by public officers entitled to qualified immunity. Public officers must comply with a wide range of fact-specific and potentially conflicting constitutional and statutory

requirements. *See Davis*, 468 U.S. at 196. Debt collectors, by contrast, are responsible for a much narrower body of statutory law. Parties who operate in highly regulated fields—like consumer debt collection—have fair notice that their conduct may be subject to statutory restrictions. *Cf. Boyce Motor Lines v. United States*, 342 U.S. 337, 340-42 (1952). When routine economic legislation is at issue, defendants are ordinarily expected "to consult relevant legislation in advance of action" and to clarify the meaning of a statute, if ambiguous, "by [their] own inquiry, or by resort to an administrative process." *Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 498 (1982).

Here, for example, debt collectors can seek advisory opinions from the FTC, a protective option generally not available to government officers. Because the federal courts lack "the power to render advisory opinions," *Preiser v. Newkirk*, 422 U.S. 395, 401 (1975), government officers have no means to seek binding advisory rulings on unsettled questions of law. Debt collectors, by contrast, deliberately "take the risk of being wrong" when they do not ask for an FTC advisory opinion, "the mechanism[] provided by Congress" for testing the legality of disputed conduct. *Cheek*, 498 U.S. at 206. As between a defendant debt collector who consciously incurs the risk of statutory violation—by "go[ing] perilously close to an area of proscribed conduct"—and an injured consumer, who has no choice in the matter, the risk of illegality is better placed on the debt collector. *FTC v. Colgate-Palmolive Co.*, 380 U.S. 374, 393 (1965); *Russell v. Equifax A.R.S.*, 74 F.3d 30, 35 (2d Cir. 1996).

Other than qualified immunity, a doctrine unique to government activity and more limited than the mistake-of-law defense recognized here, see *supra* 12 n.7 & Pet. Br. at 16, there is no comparable common-law tradition of immunizing mistakes of law. Neither respondents nor the courts below identified any comparable federal statute where Congress shielded a private party's mistake of law. The defense is so rare because it directly undermines the purpose of imposing civil liability to deter unlawful conduct. Legislative silence cannot support an inference that Congress intended to depart from such a well-established norm, when such a departure would undermine the core purpose of the Act. *See United States v. Texas*, 507 U.S. 529, 534 (1993).

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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