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No. 08-1200

In the Supreme Court of the United States

KAREN L. JERMAN, PETITIONER

v.

CARLISLE, MCNELLIE, RINI,
KRAMER & ULRICH LPA, ET AL.

*ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT*

**BRIEF FOR THE UNITED STATES
AS AMICUS CURIAE SUPPORTING PETITIONER**

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QUESTION PRESENTED

Section 813(c) of the Fair Debt Collection Practices Act (FDCPA), 15 U.S.C. 1692k(c), provides that a debt collector may not be held liable in a private civil action for any violation that "was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid any such error." The question presented in this case is as follows:

Whether the affirmative defense provided by 15 U.S.C. 1692k(c) applies to a violation of the FDCPA that results from a debt collector's incorrect interpretation of the statute.

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INTEREST OF THE UNITED STATES

This case concerns the interpretation of an affirmative defense to liability under the Fair Debt Collection Practices Act (FDCPA or Act), 15 U.S.C. 1692 *et seq.* The Federal Trade Commission (FTC) and other federal agencies enforce the Act administratively. 15 U.S.C. 1692*l*(a)-(b). Private civil actions under Section 813 of the FDCPA, 15 U.S.C. 1692k, supplement those administrative enforcement efforts. The FTC also has the exclusive authority to render advisory opinions that shield debt collectors who comply with them from civil liability under Section 1692k. The United States therefore has a substantial interest in the correct interpretation of the civil-liability provision.

STATEMENT

1. The FDCPA is one of a series of consumer-protection statutes enacted by Congress beginning in 1968 and collectively entitled the Consumer Credit Protection Act (CCPA), 15 U.S.C. 1601 *et seq.* The FDCPA was enacted in 1977 and is Title VIII of the larger statute.

The FDCPA prohibits debt collectors from engaging in harassing, deceptive, or unfair practices. 15 U.S.C. 1692d-1692f. It also requires debt collectors, within five days after first communicating with an individual debtor about a debt, to provide the debtor with a validation notice containing specific disclosures about what debt is being collected and how the debtor may dispute it. 15 U.S.C. 1692g. The Act regulates interactions between professional debt collectors and individual debtors; it does not apply to commercial debts or to creditors who collect their own debts.

Compliance with the FDCPA is enforced both by private civil actions and by federal agencies, chiefly the FTC. 15 U.S.C. 1692k, 1692*l*. Section 813 of the Act, the civil-action provision, generally provides for strict liability: "[A]ny debt collector who fails to comply with any provision of [the FDCPA] with respect to any person is liable to such person." 15 U.S.C. 1692k(a).[1]

The FDCPA establishes two exceptions to strict civil liability. First, any debt collector who acts "in good

[1] Some of the FDCPA's substantive provisions state that a violation of the Act occurs only if the debt collector knows certain information or acts with a particular intent. See, *e.g.*, 15 U.S.C. 1692d(5) (prohibiting "[c]ausing a telephone to ring * * * with intent to annoy, abuse, or harass"); 15 U.S.C. 1692c(a)(3) (prohibiting contact in the workplace when the debt collector "knows or has reason to know" that the employer forbids it). In most circumstances, however, a violation is established entirely by the debt collector's conduct.

faith in conformity with" an advisory opinion issued by the FTC is not subject to civil liability. 15 U.S.C. 1692k(e). The second exception to civil liability is the affirmative defense at issue in this case: a debt collector is not liable in a private civil action if it "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." 15 U.S.C. 1692k(c).

A prevailing plaintiff in an FDCPA suit is entitled to recover actual damages and attorney's fees. 15 U.S.C. 1692k(a)(1) and (3). The court may also award "additional damages" subject to statutory caps. In an individual action, those "additional damages" are limited to $1000; in a class action, they may not exceed $500,000 or 1% of the defendant's net worth, whichever is less. 15 U.S.C. 1692k(a)(2). In deciding whether to award additional damages, the district court considers "the extent to which the debt collector's noncompliance was intentional," "the nature of such noncompliance," and several other factors. 15 U.S.C. 1692k(b).

The FDCPA's administrative-enforcement scheme authorizes additional penalties for knowing violations of the Act. With certain exceptions,[2] violations of the

[2] Although the FTC is the primary enforcer of the FDCPA, other specialized Federal agencies, such as the Federal Reserve Board of Governors, are empowered to enforce the Act, as well as other consumer-protection statutes, against financial institutions, surface and air carriers, and livestock packers and stockyards. 15 U.S.C. 1692*l*(b); accord, *e.g.*, Federal Trade Commission Act § 5(a)(2), 15 U.S.C. 45(a)(2) (identical division of authority); Truth in Lending Act § 108(a), 15 U.S.C. 1607(a) (similar). In practice, because the FDCPA does not cover a creditor's own efforts to collect debts owed directly to that creditor, see 15 U.S.C. 1692a(6), these other agencies are rarely if ever called upon

FDCPA are treated for administrative purposes as violations of the Federal Trade Commission Act (FTC Act), 15 U.S.C. 41 *et seq.* See 15 U.S.C. 1692*l*(a). The FTC generally responds to such violations either by entering cease-and-desist orders or by seeking injunctive relief in court. See FTC Act §§ 5(b), 13(b), 15 U.S.C. 45(b), 53(b). But when the violator has acted with "actual knowledge or knowledge fairly implied on the basis of objective circumstances" that its action was "prohibited by [the FDCPA]," it is subject to civil penalties of up to $16,000 per day. See FTC Act § 5(m)(1)(A) and (C), 15 U.S.C. 45(m)(1)(A) and (C); 74 Fed. Reg. 858 (2009) (to be codified at 16 C.F.R. 1.98(d) and (e)).[3]

2. In April 2006, respondent Carlisle, McNellie, Rini, Kramer & Ulrich LPA, a law firm, and respondent Adrienne S. Foster, an associate in that firm, filed a foreclosure lawsuit against petitioner on behalf of her home mortgage lender. Pet. App. 2a, 19a-20a. Respondents treated the complaint as an "initial communication with a consumer" triggering the FDCPA's notice requirements, 15 U.S.C. 1692g, and they attached to the complaint the form "Notice Under the Fair Debt Collection Practices Act" that they routinely use in foreclosure actions. Pet. App. 20a; see Joint Answer to Am. Compl. ¶ 19.[4] When petitioner disputed the debt, respondents

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to enforce the FDCPA. See FTC, *Annual Report 2009: Fair Debt Collection Practices Act* 1 n.2 (2009).

[3] The "bona fide error" defense at issue here has been held not to apply to civil-penalty actions brought by the government. *United States* v. *First Fed. Credit Control, Inc.*, No. C79-2274, 1982 U.S. Dist. LEXIS 17964, at *18-*19 (N.D. Ohio Mar. 11, 1982).

[4] Later that year, Congress amended the FDCPA to specify that a pleading in a civil action is not such an "initial communication," but that amendment applies only prospectively. See Pet. App. 26a-27a;

checked with their client and discovered that petitioner had paid her mortgage in full. Pet. App. 3a. Respondents then withdrew the foreclosure lawsuit. *Ibid.*

Petitioner subsequently filed this putative class action in federal district court, alleging that respondents had violated the FDCPA by providing her and the other class members with an inaccurate and misleading form validation notice. The notice to petitioner stated that the debt would be presumed valid unless petitioner disputed the debt "in writing" within 30 days. Petitioner contended that the FDCPA does not require a person in her position to provide *written* notice that she disputes a debt.

3. Based on the FDCPA's "bona fide error" defense, the district court granted summary judgment for respondents. Pet. App. 19a-41a.[5] The court noted that both parties agreed that respondents' alleged "bona fide error" was a mistake of law, *id.* at 31a & n.1, and that the courts of appeals were divided over whether a mistake of law could qualify for the defense, *id.* at 31a-32a. The court agreed with respondents that a mistake of law could qualify. *Id.* at 34a.

The district court further concluded that respondents had established the elements of the "bona fide error" defense on the facts of this case. The court held that respondents' inclusion of a written-dispute requirement in their notice reflected a "bona fide error" be-

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Financial Services Regulatory Relief Act of 2006, Pub. L. No. 109-351, § 802(a), 120 Stat. 2006 (15 U.S.C. 1692g(d)).

[5] Respondents initially contended that they had not violated the FDCPA at all and that, even before Congress amended the FDCPA (see note 4, *supra*), the service of a judicial complaint did not trigger the FDCPA's notice requirements. The district court rejected both contentions. Br. in Opp. App. 3-11; Pet. App. 24a-30a.

cause the circuits were divided as to the propriety of such a requirement and the Sixth Circuit had not addressed the issue. See Pet. App. 37a-39a. In considering the requirement that the defendant maintain "procedures reasonably adapted to avoid any such error," 15 U.S.C. 1692k(c), the court stated that "no procedure could have le[d] [respondents] to know that this Court would find an FDCPA violation in the validation notice sent to [petitioner]." Pet. App. 39a.

4. The court of appeals affirmed. Pet. App. 1a-18a.

a. In holding that the "bona fide error" defense under Section 1692k(c) encompasses errors of law, the court of appeals relied primarily on the Tenth Circuit's decision in *Johnson* v. *Riddle*, 305 F.3d 1107 (2002). Pet. App. 8a-11a. Petitioner had argued that the "maintenance of procedures reasonably adapted to avoid any such error," an element of the affirmative defense, could not sensibly be applied to errors of law. *Id.* at 12a. While acknowledging that it is "'more common to speak of procedures adapted to avoid clerical errors,'" the court concluded that "procedures * * * to avoid mistakes of law" do exist, such as "frequent education and review of the FDCPA law." *Id.* at 13a (quoting *Johnson*, 305 F.3d at 1123).

Petitioner had also argued that the FDCPA's "bona fide error" defense was borrowed from the Truth in Lending Act (TILA), 15 U.S.C. 1601 *et seq.* At the time of the FDCPA's enactment, TILA contained an identically worded affirmative defense, see 15 U.S.C. 1640(c) (1976), that had been construed not to cover legal errors. Pet. App. 13a. The court of appeals rejected the argument that the FDCPA should be identically construed, principally on the ground that, several years after the FDCPA's enactment, Congress had amended TILA, but

not the FDCPA, to exclude legal errors expressly. See *id.* at 13a-14a. The court also relied in part on a statement in the legislative history of the FDCPA that "a debt collector has no liability . . . if he violates the act in *any* manner . . . when such violation is unintentional and occurred despite procedures designed to avoid such violations." *Id.* at 14a (quoting S. Rep. No. 382, 95th Cong., 1st Sess. 5 (1977) (*Senate Report*)) (emphasis added by court of appeals).

Finally, the court of appeals found its interpretation to be supported by this Court's decision in *Heintz* v. *Jenkins*, 514 U.S. 291 (1995), which held that attorneys acting as debt collectors are covered by the FDCPA. Noting the existence of the Act's "bona fide error" defense, the Court in *Heintz* observed that not every unsuccessful debt-collection lawsuit would subject the creditor's attorney to FDCPA liability. See *id.* at 295. The court of appeals stated that "[t]his reasoning at least suggests that the defense is available for mistakes of law." Pet. App. 11a (quoting *Johnson*, 305 F.3d at 1123).

b. The court of appeals further held that respondents had successfully established the "bona fide error" defense. The court concluded that respondents had maintained procedures reasonably adapted to avoid any legal error by taking a variety of steps to maintain general expertise regarding the FDCPA. Pet. App. 15a-16a, 17a-18a. The court also concluded that "considerable time, effort and research were spent in evaluating the validity of the 'in writing' requirement." *Id.* at 17a.[6]

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[6] The "procedures" element of the defense was the only element on which petitioner contended that a factual dispute precluded summary judgment for respondents. The court of appeals observed, however, that it had previously construed the "unintentional violation" element to require only that "[t]he debt collector * * * show that the violation

SUMMARY OF ARGUMENT

A. A mistake of law does not fit the settled meaning of the statutory phrase "not intentional." In the context of statutes like the FDCPA, an act is "intentional" if the actor means to do it. Here, respondents intentionally added the written-dispute language to their validation notice, and they intentionally sent that notice to petitioner—whether or not they understood the law. Had Congress wanted to make the FDCPA one of the exceptional statutes in which reasonable ignorance of the law is a valid defense, it would have done so expressly, using an established term like "willful," as it did elsewhere in the CCPA. See *Safeco Ins. Co. of Am.* v. *Burr*, 551 U.S. 47, 57 (2007). Instead, Congress provided that ignorance of the law would shield a debt collector only from civil penalties.

Furthermore, a debt collector cannot establish that it "maint[ains] * * * procedures reasonably adapted to avoid any" mistake of law. Legal errors cannot be eliminated by the implementation of any step-by-step algorithm. Rather, evaluating the legality of a debt-collection practice requires the application of legal judgment. Indeed, in a variety of circumstances, different lawyers may evaluate identical facts but reach different conclusions about their legality. The ordinary meaning of the term "procedures" does not encompass such a non-mechanical process.

The structure and legislative history of the FDCPA confirm that maintaining general awareness of the FDCPA and cases interpreting it does not constitute

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was unintentional, not that the communication itself was unintentional." Pet. App. 15a (brackets in original) (quoting *Lewis* v. *ACB Bus. Servs., Inc.*, 135 F.3d 389, 402 (6th Cir. 1998)).

an adequate "procedure." Congress provided that the FTC may authoritatively resolve interpretive questions through advisory opinions. 15 U.S.C. 1692k(e). But if legal ambiguity were a defense, debt collectors would have every incentive *not* to seek advisory opinions that would clarify the law. In effect, civil liability under the FDCPA would be limited to practices that have been clearly held to violate the statute. That is not the framework Congress established.

B. The FDCPA's "bona fide error" provision was based on a substantively identical provision of TILA and incorporated that provision's settled meaning, which excluded mistakes of law. Congress later amended TILA to *ratify* that settled construction, providing expressly that a mistake of law is not a "bona fide error" for purposes of the affirmative defense. Contrary to the holding below, by amending TILA's "bona fide error" defense to exclude legal errors and include (*inter alia*) computer errors, Congress did not implicitly direct courts to give the *opposite* interpretation to the various other statutes (including the FDCPA) that contain identical language. TILA's "bona fide error" defense did not extend to mistakes of law either before or after the clarifying amendment. It would be altogether incorrect to read that amendment as *creating* just such a mistake-of-law defense in statutes to which the amendment did not even refer. Indeed, substantively identical "bona fide error" defenses appear in other federal statutes and regulations, yet none of the responsible federal agencies has ever endorsed reading in a mistake-of-law defense, and some have expressly rejected such a reading. See, *e.g.*, 24 C.F.R. 3500.15(b)(1)(ii) ("An error of legal judgment * * * is not a *bona fide* error.").

C. This Court has held that attorneys may be debt collectors under the FDCPA. *Heintz* v. *Jenkins*, 514 U.S. 291 (1995). Some courts have misread *Heintz* as contemplating that these attorney debt collectors could use the "bona fide error" defense to excuse *legal* errors. But the Court in *Heintz* announced no such special rule for attorneys. Rather, when attorneys collect debts for clients, they are treated just like any other debt collector under the FDCPA. Thus, when attorney debt collectors make factual or clerical errors—such as the error respondents apparently made in believing petitioner's mortgage subject to foreclosure—they may rely on the "bona fide error" defense just as other debt collectors do. The notion that the defense must include mistakes of law or else be useless to attorneys is mistaken.

ARGUMENT

The elements of the FDCPA's affirmative defense; the structure of the Act's provisions for civil and administrative remedies; and the long history of the "bona fide error" language that Congress incorporated into the FDCPA all confirm that Congress did not create a safe harbor for incorrect legal judgments. The court below nonetheless construed the FDCPA's "bona fide error" defense in a way that Congress and administrative agencies have expressly rejected under other, identically-worded statutes. The court of appeals' judgment should be reversed.

A. The FDCPA's Text And Structure Demonstrate That The "Bona Fide Error" Defense Does Not Encompass Violations Resulting From A Debt Collector's Mistake Of Law

To invoke the FDCPA's affirmative defense, a debt collector must prove that its violation was "not inten-

tional" and that the violation "resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid any such error." 15 U.S.C. 1692k(c). A debt collector's deliberate and voluntary action is "intentional" even if the debt collector misunderstands the relevant law. Moreover, no procedure is properly viewed as "reasonably adapted to avoid any" error of law. The natural import of those statutory terms is reinforced by another FDCPA provision that authorizes the FTC to clarify the law by issuing authoritative public rulings, rather than leaving individual debt collectors alone to make legal judgments.

1. A debt collector's ignorance of the law is insufficient to make a violation "not intentional"

To establish the "bona fide error" defense, a debt collector must show that its violation of the FDCPA was "not intentional." A debt collector acts "intentionally," within the established meaning of that term, when it intends to take the action. Even if the debt collector believes its action to be lawful—whether through misinterpretation or ignorance of the law—its conduct remains "intentional." Congress rarely permits a defendant to escape liability based on ignorance of the law, and will only be found to do so—particularly in a civil consumer-protection statute that imposes strict regulation on an industry—when it expresses this intent clearly, using a term of art such as "willfully."

a. In the context of a civil-liability statute, the term "intentional" has an established meaning: an act is intentional when the actor means to do it. See, *e.g.*, *Black's Law Dictionary* 28 (9th ed. 2009) (explaining that "[a]n act is intentional when it is foreseen and desired by the doer"); *ibid.* (an act is unintentional when it

does "not result[] from the actor's will toward what actually takes place").[7] An unlawful action may be intentional, and therefore actionable, even if the actor lacked knowledge that her conduct would violate the law. See, *e.g.*, *Kolstad* v. *American Dental Ass'n*, 527 U.S. 526, 536-537 (1999) (explaining that an employer may commit "intentional discrimination" while either being "unaware of the relevant federal prohibition" or "distinct[ly] belie[ving] that its discrimination is lawful"). The same is true under the common law of torts, see, *e.g.*, Restatement (Second) of Torts § 164 & cmt. e (1965) (a person commits the intentional tort of trespass even when she mistakenly believes she has a legal right to enter the property), which this Court has found instructive in construing civil-liability provisions of the CCPA, see *Safeco Ins. Co. of Am.* v. *Burr*, 551 U.S. 47, 57 (2007) (construing the term "willfully").

It is a longstanding principle that, absent a clear expression of contrary congressional intent, "ignorance of the law is no defense," *United States* v. *International Minerals & Chem. Co.*, 402 U.S. 558, 563 (1971) (*International Minerals*). That is particularly so in the civil context, where the need to provide fair warning is not as great as in criminal cases, see, *e.g.*, *Ratzlaf* v. *United States*, 510 U.S. 135, 148-149 (1994). See also *Torres* v. *INS*, 144 F.3d 472, 474 (7th Cir. 1998) (Posner, J.) ("Ignorance of a statute is generally no defense even to a criminal prosecution, and it is never a defense in a civil case, no matter how recent, obscure, or opaque the stat-

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[7] On occasion, Congress has used the word "intentional" as one part of a term of art with a different meaning. See Privacy Act of 1974, 5 U.S.C. 552a(g)(4) ("intentional or willful"); *Doe* v. *Chao*, 540 U.S. 614, 642 (2004) (Breyer, J., dissenting) (citing "prevailing interpretation" of this term of art).

ute."). Thus, when Congress intends for a defendant's knowledge or reckless disregard of the law to be considered, it commonly uses the term "knowingly" or "willfully." See *Safeco*, 551 U.S. at 57 ("[W]here willfulness is a statutory condition of civil liability, we have generally taken it to cover not only knowing violations of a standard, but reckless ones as well."); *id.* at 59 (on that understanding, "knowing violations are sensibly understood as a more serious subcategory of willful ones"); accord, *e.g.*, *TWA* v. *Thurston*, 469 U.S. 111, 126 (1985).

b. In enacting the various titles of the CCPA, including the FDCPA, Congress generally adhered to the common law distinctions among "knowing," "willful," and "intentional" violations. When Congress intended to require proof that the defendant knew the law, it expressed that intent clearly. This Court recently recognized as much in considering the requisites of "willful[]" violations of the Fair Credit Reporting Act (FCRA), 15 U.S.C. 1681 *et seq.*, which is Title VI of the CCPA. See *Safeco*, 551 U.S. at 57-58. Congress presumptively intended those terms to have the same meaning throughout the CCPA. See, *e.g.*, *Commissioner* v. *Keystone Consol. Indus., Inc.*, 508 U.S. 152, 159 (1993); *Estate of Cowart* v. *Nicklos Drilling Co.*, 505 U.S. 469, 479 (1992).

Moreover, through its incorporation of the FTC Act, see 15 U.S.C. 1692*l*, the FDCPA itself distinguishes between ordinary violations and violations undertaken with knowledge of the law. As noted above, a debt collector that violates the FDCPA is subject to actual damages, statutory damages, and attorney's fees unless its violation is "not intentional" and satisfies the other requirements of the "bona fide error" defense. And the debt collector is subject to administrative-enforcement actions irrespective of its knowledge. FTC Act §§ 5(b),

13(b), 15 U.S.C. 45(b), 53(b). But if the debt collector has "actual knowledge" that its "act * * * is prohibited by [the FDCPA]," or if such knowledge is "fairly implied" by the "objective circumstances," then it is also subject to civil penalties of up to $16,000 per day. FTC Act § 5(m)(1)(A) and (C), 15 U.S.C. 45(m)(1)(A) and (C); see p. 4, *supra*.

Thus, in authorizing administrative enforcement under the FTC Act, Congress specified that FDCPA violations committed with actual knowledge of the law are punished more severely, but that ignorance of the law does not excuse a violation. And there is reason to believe that Congress incorporated the FTC Act's enforcement framework with full awareness of its categories of relief and penalties. The FTC Act is incorporated throughout the CCPA, and in some instances Congress has provided that aspects of the FTC Act's civil-penalty regime shall not apply, or shall apply differently. See FCRA § 621(a)(2) and (3), 15 U.S.C. 1681s(a)(2) and (3). Congress made no such change to the rule for "know[ing]" violations in the FDCPA. The natural inference is that Congress understood that "intentional" violations of the FDCPA would be subject to the general set of penalties and that the smaller set of "knowing" violations would be subject to additional penalties.

c. Some courts have suggested that the word "intentional" should not be given its commonly understood meaning in the FDCPA because the "bona fide error" defense requires defendants to prove "that *the violation* was not intentional." 15 U.S.C. 1692k(c) (emphasis added); see, *e.g.*, *Frye* v. *Bowman, Heintz, Boscia & Vician, P.C.*, 193 F. Supp. 2d 1070, 1088 (S.D. Ind. 2002). But that formulation does not show that Congress meant to refer to an intention to violate the law. Rather, Con-

gress simply used "the violation" as shorthand for "the conduct triggering liability under the statute." In *Bryan* v. *United States*, 524 U.S. 184 (1998), this Court rejected the contention that, in a criminal statute, "the statutory language—'willfully violates any other provision of this chapter'—indicates a congressional intent to attach liability only when a defendant possesses specific knowledge of the 'provision[s] of [the] chapter.'" *Id.* at 199 n.33 (quoting 18 U.S.C. 924(a)(1)(D)) (brackets in original).[8] Rather, the Court construed that phrasing as "a shorthand designation for specific acts or omissions which violate the [statute]," not as "an exception to the rule that ignorance of the law is no excuse." *Ibid.* (quoting *International Minerals*, 402 U.S. at 562).

d. Properly construed, the FDCPA's "bona fide error" defense thus requires the defendant to establish that it did not intend to engage in the prohibited conduct. A defendant cannot carry that burden by showing that it mistook the legal consequences of its volitional acts or that it did not intend to violate the law. In this case, respondents acted intentionally in drafting the validation notice and sending it to petitioner. Even if respondents believed based on legal research that the notice accurately stated the law, their conduct was "intentional" within the usual understanding of that term.

2. There are no "procedures reasonably adapted" to avoid legal error

Even if the phrase "not intentional" could be read to encompass legal errors, another aspect of the FDCPA's

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[8] The term "willfully" has a different meaning in criminal than in civil statutes, see *Safeco*, 551 U.S. at 57 n.9, but the *Bryan* Court's explanation of the intersection between the mental-state requirement and the term "violat[ion]" is equally applicable in the civil context.

text independently makes clear that mistakes of law do not shield a debt collector from liability. To invoke the "bona fide error" defense, a debt collector must establish both "that the violation was not intentional *and* [that it] resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid any such error." 15 U.S.C. 1692k(c) (emphasis added). The Act's damages provision specifies that "the extent to which [a debt collector's] noncompliance was intentional" is one factor to be considered in setting the statutory damages. 15 U.S.C. 1692k(b)(1) and (2). Congress thus clearly contemplated that, in some circumstances, a plaintiff could establish liability, and potentially receive statutory damages, for *unintentional* violations. By requiring as an element of the "bona fide error" defense that the defendant "maintain[] * * * procedures reasonably adapted to avoid any such error," Congress confirmed that legal errors, however inadvertent, cannot qualify for the defense. Both in common usage and in practical effect, there are no "procedures reasonably adapted" to preventing mistakes of law.

a. Legal reasoning is not a purely mechanical process, and no "procedure" can definitively avoid the misapplication or misinterpretation of a comprehensive federal statute. A procedure is "a series of steps followed in a regular orderly definite way." *Webster's Third New International Dictionary* 1807 (1986). Following the steps of legal research and analysis can answer some basic questions, because some specific conduct is unambiguously prohibited by the statute, and other conduct has been widely held by the courts to be prohibited. Under the FDCPA, however, a procedure qualifies for the "bona fide error" defense only if it is "reasonably adapted to avoid *any such* error." In the many instanc-

es in which neither the statutory text nor controlling judicial decisions unambiguously resolve a particular interpretive question, the application of legal analysis, however careful or precise, cannot yield a definitive answer. Although methods of legal research and analysis may assist debt collectors in reaching informed judgments as to the lawfulness of particular conduct, such methods are not naturally described as "procedures" for "avoid[ing]" legal error.

This very case illustrates the point. Respondents included in their validation notice a requirement that petitioner dispute her debt in writing—a requirement on which the courts of appeals are divided and which "[t]he majority of district courts" have rejected. Br. in Opp. App. 8-9 (citing precedential decisions of the Third and Ninth Circuits and seven district court opinions dating back to 1995). To the extent respondents analyzed the legality of their form validation notice, see Pet. App. 39a, their decision to include a written-dispute requirement rested neither on clear statutory language nor on a judicial consensus that such a requirement was lawful, but instead on their assessment that the minority view among the lower courts represented the sounder interpretation of the FDCPA. Particularly in circumstances of this kind, which are not uncommon in the context of a complex statutory scheme, legal research and education do not constitute the sort of "procedure" that is "reasonably adapted" to "avoid any * * * error."

b. The structure of the FDCPA reinforces the conclusion that a debt collector is not immune from civil liability under the Act simply because the legality of its conduct was subject to good-faith dispute at the time. In addition to enumerating more than two dozen examples of abusive, misleading, and unfair practices, see 15

U.S.C. 1692d-1692f, the FDCPA generally prohibits "any" harassing or abusive conduct, "any" deceptive or misleading representation, and all "unfair or unconscionable means" of collecting debts. *Ibid.* The Act provides that the enumerated examples do not "limit[] the general application" of those prohibitions. *Ibid.*; see *Senate Report* 4 (explaining that "[o]ther improper conduct which is not specifically addressed" will nonetheless be found unlawful by the courts).[9] In light of the breadth of the FDCPA's prohibitions, activities such as reviewing reported cases and taking continuing-education classes in debt-collection law cannot be thought sufficient to "avoid any" violation of the Act. And to immunize all conduct not previously (and unanimously) held unlawful would defeat Congress's purpose in extending the Act's coverage beyond the enumerated examples of unlawful debt-collection practices.

When conduct is unlawful but a reasonable person might think otherwise, Congress sometimes provides that a reasonable mistake of law is a defense to liability. Qualified immunity under 42 U.S.C. 1983 is one example. See, *e.g.*, *Johnson* v. *Fankell*, 520 U.S. 911, 919 (1997) ("[T]he ultimate purpose of qualified immunity is to protect the State and its officials from overenforcement of federal rights."). The FDCPA, however, contains no indication that Congress regarded "overenforcement" as a potential problem. To the contrary, the purpose of authorizing statutory damages, in addition to actual dam-

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[9] Senator Riegle, the FDCPA's chief sponsor, explained during the committee markup that "we want to have the courts available to deal with nuances that otherwise might escape here because they didn't fit the exact prescribed sort of letter of the specific abuse we have been able to outline." Senate Comm. on Banking, Housing & Urban Affairs, *Markup on Debt Collection Legislation* 71 (June 30, 1977).

ages, is to deter violations and ensure that consumers' rights under the Act do not go *under*enforced.

3. Extending the "bona fide error" defense to mistakes of law would subvert the FTC's statutory role in interpreting the FDCPA

Debt collectors can obtain clarification of ambiguous FDCPA requirements, and avoid civil liability, by seeking advisory opinions from the FTC. 15 U.S.C. 1692k(e). The significance of that mechanism would be greatly diminished if debt collectors could rely instead on their *own* "procedures" for avoiding legal errors. The important role that the FDCPA assigns to the FTC is a further contextual reason to reject the court of appeals' interpretation of the "bona fide error" defense.

In seeking the FTC's advice about the correct interpretation of a provision of the FDCPA, a debt collector informs the FTC that it is contemplating action that might violate the Act. And if the debt collector subsequently engages in conduct that is inconsistent with the FTC's response, the collector is potentially subject to the substantial civil penalties that apply to knowing violations. See FTC Act § 5(m)(1)(A) and (C), 15 U.S.C. 45(m)(1)(A) and (C); see also 15 U.S.C. 1692*l*(a). By contrast, under the court of appeals' interpretation of the "bona fide error" defense, a debt collector that engages in sufficient legal research and analysis to identify an ambiguity in the law can simply adopt its preferred reading and will be immune from civil liability so long as that reading is not clearly incorrect.

Thus, the court of appeals' interpretation of the "bona fide error" defense would seriously undermine the FDCPA's advisory-opinion procedure. If the "bona fide error" defense encompasses errors of law, debt collec-

tors will have little if any incentive to seek an advisory opinion from the FTC. To the contrary, because an advisory opinion finding a particular practice to be unlawful would resolve the ambiguity and thus eliminate the debtor's immunity from civil liability for continued violations, the court of appeals' approach would create a substantial disincentive to invocation of that clarifying mechanism.

Such a disincentive would be at odds with the statutory framework. An FTC advisory opinion is a public document that can further the overall administration of the Act, both by helping the party that requests the opinion to comply with its legal obligations, and by clarifying the law for the benefit of debt collectors and debtors generally. See 16 C.F.R. 1.4.[10] By contrast, a debt collector's own legal analysis often will not be made known to others unless the debt collector is sued and relies on the "bona fide error" defense. And if that affirmative defense is read to encompass mistakes of law, the court in such a suit may resolve the case without deciding the underlying question of FDCPA interpretation. See, *e.g.*, Pet. App. 5a n.2 (not reaching the question whether respondents' initial notice violated the FDCPA). The court of appeals' reading of the "bona fide error" defense thus undercuts the FTC's clarification and elaboration of the FDCPA's requirements in a manner at odds with Congress's purpose. See pp. 17-19, *supra*.

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[10] Under its rules, the FTC issues advisory opinions in response to substantial or novel legal questions of law, or to address issues of significant public interest. 16 C.F.R. 1.1-1.4. FTC advisory opinions with respect to the FDCPA are set forth at http://www.ftc.gov/os/statutes/fdcpajump.shtm.

4. The legislative history confirms that the FDCPA's "bona fide error" defense does not extend to mistakes of law

a. During the Senate Banking Committee's consideration of the FDCPA, some Senators proposed adding a requirement that a plaintiff prove that the violation was a knowing one. That amendment was withdrawn in the face of substantial opposition. The Act's chief sponsor, Senator Riegle, confirmed that willfulness was not intended to be a prerequisite to civil liability because "certain things ought not to happen, period": the prohibited practices are "illegal and wrong," and "whether somebody does it knowingly, willfully, you know, with a good heart, bad heart, is really quite incidental." Senate Comm. on Banking, Housing & Urban Affairs, *Markup Session: S. 1130—Debt Collection Legislation* 60 (July 26, 1977). By contrast, Senator Riegle confirmed that if a debt collector violated the Act truly "by accident" and "didn't intend for the effect to be as it was," it could invoke the affirmative defense, such as by "say[ing], I didn't know that, or my computer malfunctioned." *Ibid.*

The legislative history also indicates that Congress viewed the need to prove an offender's mental state as a problem with the pre-existing law and a reason the FDCPA was needed. For example, the FDCPA regulates the use of the mails for debt-collection purposes. See, *e.g.*, 15 U.S.C. 1692f(7) and (8). The House Committee Report explained that existing postal-regulation laws were inadequate for various reasons, including that they "frequently require specific intent which is difficult to prove." H.R. Rep. No. 131, 95th Cong., 1st Sess. 3 (1977) (*House Report*).

b. Respondents rely (Br. in Opp. 19-20) on the Senate Banking Committee's statement that "[a] debt col-

lector has no liability * * * 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." *Senate Report* 5. The Tenth Circuit viewed the Report's reference to "the act's coverage" as an indication that the "bona fide error" defense applies to mistakes of law. *Johnson* v. *Riddle*, 305 F.3d 1107, 1123 (10th Cir. 2002) (emphasis omitted). But the committee's reference to "coverage" is more naturally read to refer to *factual* mistakes bearing on the FDCPA's applicability to particular situations. For instance, a debt collector's factual mistake could lead the collector erroneously to conclude that a particular obligation arose out of a commercial rather than a consumer transaction and therefore was not covered by the FDCPA's definition of "debt," 15 U.S.C. 1692a(4). See *Edwards* v. *McCormick*, 136 F. Supp. 2d 795, 799-800 (S.D. Ohio 2001). Similarly, the FDCPA's definition of "debt collector" contains several exceptions that turn on facts about the nature of the debt being collected, see 15 U.S.C. 1692a(6)(F)(ii)-(iv), and those facts could be the subject of record-keeping errors.

The Sixth Circuit in this case focused on a different aspect of the Senate committee report quoted above—the statement that a debt collector can invoke the defense "if he violates the act in *any* manner." Pet. App. 14a (quoting *Senate Report* 5). The same sentence of the report makes clear, however, that the "bona fide error" defense applies only if the violation is "unintentional and occurred despite procedures designed to avoid such violations." *Senate Report* 5. As explained above, a legal error satisfies neither element of the defense. Even read in isolation, the committee's statement merely rec-

ognizes that any manner of violating the Act—whether communicating at an impermissible time, using an unfair collection practice, or sending an improper validation notice—could conceivably result from a bona fide error. It does not suggest that any manner of *error* qualifies for the "bona fide error" defense, let alone speak to the question whether a debt collector can establish each element of the defense by demonstrating that its violation resulted from a mistake of law.

B. The History Of The "Bona Fide Error" Defense And Its Use In Other Statutes Show That It Does Not Encompass Legal Error

The FDCPA's "bona fide error" defense is not unique. The defense was drawn directly from an identical provision that had been in the CCPA since its enactment, and other titles of the CCPA contain equivalent provisions. The consistent judicial and administrative interpretation of the language has been that the defense does not encompass mistakes of law. There is no sound basis for attributing a different meaning to the same language as it appears in the FDCPA.

1. The FDCPA incorporated the settled judicial construction of an identical text

a. TILA was the first title of the original CCPA. As enacted, TILA contained an affirmative defense that was identical in all respects to the FDCPA provision at issue here. See TILA, Pub. L. No. 90-321, Tit. I, § 130(c), 82 Stat. 157 (1968) ("A creditor may not be held liable in any action brought under this section for a violation of [TILA] if the creditor 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."); accord 15 U.S.C. 1640(c) (1976) (same at the time of the FDCPA's enactment).

During the nine years between TILA's enactment and the FDCPA's, that affirmative defense was consistently construed to exclude legal errors. At least three circuits had reached that conclusion by the time the FDCPA was enacted, and none had ruled to the contrary. See *McGowan* v. *King, Inc.*, 569 F.2d 845, 849 (5th Cir. 1978) (listing cases). Some of those courts reasoned that the term "intentional" does not turn on specific intent to violate the law. See, *e.g.*, *Haynes* v. *Logan Furniture Mart, Inc.*, 503 F.2d 1161, 1166-1167 (7th Cir. 1974); *Ratner* v. *Chemical Bank N.Y. Trust Co.*, 329 F. Supp. 270, 281 (S.D.N.Y. 1971) ("That defendant, in this Court's view, mistook the law does not make its action any less intentional."); accord *Ives* v. *W.T. Grant Co.*, 522 F.2d 749, 757-758 (2d Cir. 1975) (following *Ratner*). Others pointed out the infeasibility of devising "procedures reasonably adapted" to prevent legal errors. *Palmer* v. *Wilson*, 502 F.2d 860, 861 (9th Cir. 1974); *Haynes*, 503 F.2d at 1167. The strong consensus confirmed that the TILA "bona fide error" defense did not cover legal errors.[11]

Congress's verbatim inclusion in the FDCPA of preexisting language from TILA is naturally understood to incorporate the settled judicial construction of the

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[11] District courts within the Fifth Circuit were divided on the question at the time the FDCPA was enacted, with the Fifth Circuit resolving the issue a few months later. See *McGowan*, 569 F.2d at 849. A nonprecedential, widely rejected district court decision does not detract from the settled appellate consensus that Congress ratified. See *Herman & MacLean* v. *Huddleston*, 459 U.S. 375, 385-386 & n.21 (1983) (recognizing that Congress ratified a "well-established judicial interpretation" notwithstanding two contrary district court decisions).

TILA "bona fide error" defense. See, *e.g.*, *Rowe* v. *New Hampshire Motor Transp. Ass'n*, 128 S. Ct. 989, 994 (2008); accord *Bragdon* v. *Abbott*, 524 U.S. 624, 644-645 (1998) (concluding that Congress had ratified the consensus view of the federal appellate and district courts); *Lorillard* v. *Pons*, 434 U.S. 575, 580 & n.7 (1978) (same). That presumption is reinforced by the legislative history, which confirms that the sponsors consciously modeled the FDCPA's remedial provisions on TILA's remedial scheme. See, *e.g.*, 123 Cong. Rec. 10,242 (1977) (remarks of Rep. Annunzio) (noting that the House bill provided for civil penalties "consistent with those in the Consumer Credit Protection Act");[12] *Fair Debt Collection Practices Act: Hearings on S. 656, S. 918, S. 1130 and H.R. 5294 Before the Subcomm. on Consumer Affairs of the Senate Comm. on Banking, Housing & Urban Affairs*, 95th Cong., 1st Sess. 51, 54 (1977) (statement of Rep. Wylie) (describing the FDCPA's civil-liability provisions as "the standard provisions that attach to all the titles of the Consumer Credit Protection Act"); see also *id.* at 3, 5 (statements of Sens. Schmitt and Garn) (opposing the FDCPA because it was modeled on TILA, which those Senators regarded as having proved problematic). The FDCPA's "bona fide error" defense therefore should be construed as Congress would have understood it in 1978: as incorporating the consensus interpretation of the identical words in the model statute.

b. The court below declined to rely on the interpretation of TILA's "bona fide error" defense that prevailed

[12] The House bill was amended substantially in the Senate, but throughout the bill's consideration in both chambers, the language of the "bona fide error" defense remained identical to the language of its counterpart in TILA. See, *e.g.*, *House Report* 23.

at the time of the FDCPA's enactment. Pet. App. 13a-14a. Instead, the court focused on another statute, enacted three years after the FDCPA, in which Congress amended TILA to ratify that prevailing interpretation. The court of appeals inferred that Congress, by expressly ratifying the settled construction of TILA, had implicitly signaled that the FDCPA should be read differently. That reasoning is erroneous.

Three years after enacting the FDCPA, Congress enacted the Truth in Lending Simplification and Reform Act (TILA Simplification Act), Pub. L. No. 96-221, Tit. VI, 94 Stat. 168 (1980). In that statute, Congress added an explanatory sentence to TILA's "bona fide error" defense: "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 [TILA] is not a bona fide error." § 615(a)(3), 94 Stat. 181. The Senate committee report explained that the legislation "clarified" the defense "to make clear that it applies to mechanical and computer errors" and not to "erroneous legal judgments as to the Act's requirements." S. Rep. No. 73, 96th Cong., 1st Sess. 7-8 (1979). The legislation did not amend any other provision of the CCPA. Thus, Congress codified the prevailing interpretation of TILA's "bona fide error" defense as excluding mistakes of law, while making clear that the defense encompassed four other enumerated types of errors.[13]

[13] Explaining the need for the TILA Simplification Act, a leading trade association of banks regulated by TILA had told the Senate committee that "it has always been open to question what exactly constitutes a bona fide error." *Truth in Lending Simplification & Reform Act: Hearings on S. 108 and S. 37 Before the Senate Comm. on Bank-*

The court of appeals viewed the 1980 amendment to TILA, together with Congress's failure to amend the FDCPA in a like manner, as "suggest[ing] that, unlike the TILA, Congress did not intend to limit the [FDCPA] defense to clerical errors." Pet. App. 13a-14a. That reasoning is misconceived. An amendment to TILA enacted in 1980 does not directly shed light on the intent of the Congress that enacted the FDCPA in 1977. But to the extent that the 1980 TILA amendment bears on the interpretive question presented here, it supports petitioner's understanding of the FDCPA's "bona fide error" defense rather than the interpretation of the court of appeals. The TILA amendment is phrased as an explanation of what the term "bona fide error" *means*, see § 615(a)(3), 94 Stat. 180-181 ("[A]n error of legal judgment with respect to a person's obligations under [TILA] is not a bona fide error."), and the legislative history describes the amendment as "clarif[ying]" rather than altering the scope of the defense, p. 26, *supra*. Those features of the amendment strongly suggest that the 1980 Congress would have understood the FDCPA's "bona fide error" defense, like the identically-worded defense contained in TILA, to be inapplicable to mistakes of law.[14]

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ing, Housing & Urban Affairs, 94th Cong., 1st Sess. 87 (1979) (statement of David S. Smith, Jr., of the American Bankers Assocation).

[14] On two further occasions after the 1980 TILA amendment, Congress enacted language similarly specifying that "bona fide error" defenses in other statutes may not be premised on mistakes of law. See Expedited Funds Availability Act § 611(c)(2), 12 U.S.C. 4010(c)(2) ("[A]n error of legal judgment with respect to a depository institution's obligation under [the statute] is not a bona fide error."); Truth in Savings Act, Pub. L. No. 102-242, § 271(c), 105 Stat. 2340-2341 (1991) (same) (repealed 1996).

In addition to confirming the defense's inapplicability to mistakes of law, the 1980 TILA amendment identified four categories of mistakes ("clerical, calculation, computer malfunction and programing, and printing errors") as "[e]xamples of a bona fide error" on which the TILA defense may be premised. § 615(a)(3), 94 Stat. 180-181. Because Congress did not add any similar provision to the FDCPA, the court of appeals' analysis logically suggests that such mistakes do not constitute "bona fide errors" within the meaning of that Act. But neither the Sixth Circuit nor (so far as we are aware) any other court has adopted that truncated view of the FDCPA's "bona fide error" defense. The implausibility of that construction underscores the impropriety of treating Congress's effort to clarify one statute as changing the meaning of another.

2. *The court of appeals' decision is at odds with agency interpretations of identical language*

Although no agency is authorized to issue interpretive regulations under the FDCPA, see 15 U.S.C. 1692*l*(d), federal agencies interpreting other statutes—including other titles of the CCPA—have interpreted "bona fide error" provisions that use language identical to that at issue here. No federal agency has construed such a provision to encompass mistakes of law, and one agency has expressly rejected that interpretation.

a. Under the Real Estate Settlement Procedures Act of 1974 (RESPA), 12 U.S.C. 2601 *et seq.*, real estate settlement businesses that maintain affiliated business arrangements must make certain disclosures to consumers in order to be exempt from RESPA's anti-kickback and unearned-fee provisions. 12 U.S.C. 2607(c)(4)(A). A violation gives rise to a private civil action for treble

damages, 12 U.S.C. 2607(d)(2), and defendants may defeat liability by proving "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." 12 U.S.C. 2607(d)(3). The Secretary of Housing and Urban Development (HUD) is charged with implementing RESPA through interpretive regulations. 12 U.S.C. 2617(a). Following notice and comment, the Secretary has adopted a regulation specifying that "[a]n 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).

b. In addition to playing a role under the FDCPA, see note 2, *supra*, the Federal Reserve Board of Governors (Board) has principal authority to interpret several other titles of the CCPA through rulemaking. The Board has used that authority under two of those titles—the Equal Credit Opportunity Act (ECOA), 15 U.S.C. 1691 *et seq.* (Title VII of the CCPA), and the Electronic Fund Transfer Act (EFTA), 15 U.S.C. 1693 *et seq.* (Title IX of the CCPA)—to define similar defenses as limited to clerical and technical errors.

The EFTA contains "bona fide error" defenses worded identically to those in TILA and the FDCPA. See EFTA §§ 910(c), 915(c), 15 U.S.C. 1693h(c), 1693m(c). The officials to whom the Board has delegated authority to interpret the EFTA (see EFTA § 915(d)(1), 15 U.S.C. 1693m(d)(1); 12 C.F.R. Pt. 205, App. C) have promulgated interpretive guidance, pursuant to notice and comment, in which the examples of "bona fide errors" are limited to the sort of mechanical, clerical, and other nonvolitional errors discussed above. See, *e.g.*, 12 C.F.R. Pt. 205 Supp. (comment 1 to 12 C.F.R. 205.3(b)(2))

("when a terminal printing mechanism jams"); *ibid.* (comment 5 to 12 C.F.R. 205.9(a)) (similar); *ibid.* (comment 7 to 12 C.F.R. 205.10(b)) (mistaken reliance on a customer's representation about whether he is using a credit or debit card).

Similarly, exercising its regulatory authority under the ECOA, the Board has long rejected the notion that a mistake of law should be sufficient to excuse a rule violation. The Board has provided that a creditor's failure to comply with certain regulations promulgated under the ECOA "is not a violation if it results from an inadvertent error." 12 C.F.R. 202.16(c). Since before the FDCPA was enacted, the Board has defined "inadvertent error" much as Congress framed the "bona fide error" defense in the other titles of the CCPA: as "a mechanical, electronic, or clerical error that a creditor demonstrates was not intentional and occurred notwithstanding the maintenance of procedures reasonably adapted to avoid such errors." 12 C.F.R. 202.2(s); see 42 Fed. Reg. 1243 (1977). And the interpretive guidance, issued after notice and comment pursuant to authority delegated by the Board (see ECOA § 706(e), 15 U.S.C. 1691e(e); 12 C.F.R. Pt. 202, App. D), explains that "[a]n error of legal judgment is not an inadvertent error under the [ECOA] regulation." 12 C.F.R. Pt. 202 Supp. (comment 1 to 12 C.F.R. 202.16).

The consistent administrative practice of these federal agencies, including one with a substantial regulatory role under the CCPA, is further evidence that the court of appeals in this case misinterpreted the "bona fide error" defense. Indeed, affirming the decision below would introduce a notable disuniformity into federal

consumer-protection statutes that all use the same language.[15]

C. This Court's Decision In *Heintz* Does Not Support The Ruling Below

Lower courts that have adopted respondents' view of the FDCPA's "bona fide error" defense have also relied in part on *Heintz* v. *Jenkins*, 514 U.S. 291 (1995), in which this Court held that attorneys may be "debt collectors" subject to the Act. In *Heintz*, the attorney petitioners argued that such a construction would lead to absurd consequences, such as imposing liability on "any litigating lawyer who brought, and then lost, a claim against a debtor." *Id.* at 295. The Court explained that bringing an unsuccessful legal action would not, by itself, violate the FDCPA's substantive prohibitions. *Id.* at 295-296. The Court also observed that even a debt collector who violates the FDCPA can still invoke the "bona fide error" defense. *Id.* at 295. The Court therefore found the possibility of civil liability for unsuccessful debt-collection suits to provide an inadequate basis for treating attorneys as beyond the FDCPA's purview.

The Court in *Heintz* did not address the scope of the FDCPA's "bona fide error" defense and had no occasion to decide whether it encompasses mistakes of law. The defense remains available to attorneys, moreover, even if it does not extend to erroneous legal analyses. In *Heintz*, for example, the attorneys had attempted to collect from the plaintiff an amount that was not autho-

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[15] Even if this Court were to agree with the Sixth Circuit in this case, contrary agency interpretations of RESPA or the EFTA presumably would remain entitled to deference under the rule of *National Cable & Telecommunications Ass'n* v. *Brand X Internet Services*, 545 U.S. 967 (2005).

rized by law because their client had told them it was due and owing. On remand after this Court's decision, the court of appeals held that the attorneys had established the "bona fide error" defense because they had not known that unauthorized charges were included in the amount they were seeking to collect, and because they had adhered to the procedure of "insist[ing] that their client verify under oath that each of the charges was true and correct." *Jenkins* v. *Heintz*, 124 F.3d 824, 834 (7th Cir. 1997), cert. denied, 523 U.S. 1022 (1998).

Similarly in this case, the foreclosure action filed by respondents was premised on a mistake of fact. See Pet. App. 2a-3a. But respondents are alleged to have violated the FDCPA not by mistakenly filing that action, but instead by sending petitioner (and numerous unnamed class members) an incorrect and unlawful validation notice. Unlike the filing of the lawsuit, respondents' creation and provision of that notice was not attributable to any factual mistake (or to inadvertence). Rather, it reflected respondents' allegedly incorrect view that the written-dispute requirement comports with the FDCPA. See Opp. to Mot. for Summ. J. Exh. A at 39 (McNellie Dep. 84-85). That the "bona fide error" defense is available to lawyers acting as debt collectors does not mean it covers errors of that nature.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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