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

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Respondents do not contest that they intentionally engaged in conduct that violated the FDCPA. Their sole defense is that they did not know that their conduct was proscribed by the Act. Neither respondents nor any of their nine amici has identified a single other federal statute that provides a complete defense to civil liability for such a misunderstanding of the law. They nonetheless insist that Congress intended the FDCPA to break new ground and create an apparently unprecedented defense for the debt collection industry. However, nothing in the language, history, or purposes of the statute supports that conclusion.

Contrary to respondents' principal textual contention, a defendant's ignorance of the law does not render its "violation" of a statute "not intentional." Indeed, this Court has repeatedly declined to view the parallel statutory phrase "knowing violation" as referring to a defendant's knowledge of the law or to create a mistake of law defense. And reaching a contrary conclusion here would render the Act's safe harbor defense superfluous, applicable only when the bona fide error defense already provided immunity from liability.

Giving the Act a conventional reading does not create any special unfairness to debt collectors. Federal law pervasively holds regulated businesses responsible for complying with the law, even when the law's requirements are not entirely clear. That defendants are sometimes held liable for reasonable, good faith mistakes of law is simply a consequence of

a legal system that generally declines to make ignorance of the law a defense.

Nor can there can be any argument that Congress intended to create a unique mistake of law defense to avoid creating a conflict of interests between attorney debt collectors and their clients – when the bona fide error defense was drafted, the statute specifically excluded attorneys from its coverage. And, in any event, it is well settled that an attorney's obligation of zealous advocacy is always subordinated to his duty to obey the law.

I. The Language of the FDCPA Does Not Signal An Intent To Depart From The Established Presumption That Mistakes Of Law Are No Defense.

While Congress sometimes limits criminal liability (or certain harsh civil sanctions, like civil penalties and punitive damages) to cases in which the defendant knew his conduct was unlawful, *see* Petr. Br. 15, it rarely makes the defendant's reasonable misunderstanding of the law a complete defense to civil liability. In fact, neither respondents nor any of their amici has been able to identify any other statute that does so.[1] There is no basis for

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[1] One of respondents' amici suggests that an analog can be found in the judge-made doctrine of qualified immunity. NARCA Br. 13-15. Respondents themselves call the analogy "specious," Resp. Br. 26 n.10, and as petitioner explained in her opening brief, the comparison is inapt for a number of reasons, including most prominently because the defense was estabished to protect the exercise of governmental discretion and, for that reason, neither this Court nor Congress has ever extended it to

believing that Congress intended the FDCPA to create an unusual (perhaps unprecedented) defense for debt collectors.

A. Respondents' Interpretation Is Inconsistent With The General Presumption That Ignorance Of The Law Is No Defense To Civil Or Criminal Liability.

1. Respondents do not dispute the general principle that courts should avoid construing statutes to allow ignorance of the law as a defense. Instead, they argue that the principle has no application here because their defense is based on a reasonable mistake of law, not ignorance of the law's existence. *See* Resp. Br. 25-26.

But from its earliest days, the presumption that ignorance of the law is no defense has applied to misunderstandings of a known law. *See* Edwin R. Keedy, *Ignorance and Mistake in the Criminal Law*, 22 HARV. L. REV. 75, 76 (1908). Accordingly, this

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a private party, *see* Petr. Br. 16-17. Amicus nonetheless argues that debt collectors are similarly situated to government officials because both need protection from "over enforcement" of legal limitations on their behavior. *See* NARCA Br. 13. But if Congress had shared that belief, it presumably would not have authorized private actions for violations of "*any* provision of this subchapter," 15 U.S.C. § 1692k(a), including those amicus finds trivial. Instead, Congress provided other mechanisms to protect against over-enforcement. *See infra* § III.B. Amicus fails to cite any statute in which Congress has gone further and responded to an alleged risk of "over enforcement" by providing a mistake of law defense to civil liability for non-governmental defendants.

Court has employed the phrases "ignorance of the law" and "mistake of law" interchangeably. *See, e.g.*, *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.") (emphasis added). And the Court has applied the presumption when a defendant claimed a reasonable misunderstanding of law. *See*, *e.g.*, *Armour Packing Co. v. United States*, 209 U.S. 56, 85 (1908) (invoking presumption to deny defense where the "petitioner believed itself to be within its legal rights . . . and that the statute had no application to a shipment of goods for exportation in the manner shown in this case"); *Harriman v. N. Sec. Co.*, 197 U.S. 244, 298 (1905) ("With knowledge of the facts and of the statute, the parties turned out to be mistaken in supposing that the statute would not be held applicable to the facts. Neither can plead ignorance of the law as against the other . . . ."); *Barlow v. United States*, 32 U.S. 404, 411 (1883) (applying rule where the "only mistake, if there has been any, is a mistake of law" because the defendant asserted he believed that his imports constituted "refined sugars" within the meaning of an import duty statute).[2]

The traditional rationales for the presumption apply whether the defendant is ignorant of the law's

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[2] Nor is the presumption limited to criminal cases. *Contra* Resp. Br. 25-26. *See*, *e.g.*, *Barlow*, 32 U.S. at 411 ("It is a common maxim, familiar to all minds, that ignorance of the law will not excuse any person, either *civilly or criminally*." (emphasis added).

existence or mistaken about its requirements. "Based on the notion that the law is definite and knowable, the common law presumed that every person knew the law." *Cheek*, 498 U.S. at 199. The presumption arises from "the extreme difficulty of ascertaining what is, *bona fide*, the interpretation of the party; and the extreme danger of allowing such excuses to be set up for illegal acts, to the detriment of the public." *Barlow*, 32 U.S. at 411. That risk arises no less when defendants claim they were aware of, but misunderstood, the law.

2. Respondents nonetheless argue that it is "absurd[]" to suggest that Congress intended to hold debt collectors civilly liable for reasonable, good faith mistakes of law. Resp. Br. 26. As this case illustrates, they say, the requirements of the FDCPA are not always clear and unless defendants have a mistake of law defense, they may be held liable even when there is some legal authority for their position or a disagreement among the courts. Resp. Br. 26-27.[3]

All of that is true. But it is also unexceptional in a legal system that generally declines to make mistake of law a defense to civil liability. Many other regulated industries could make the same arguments and complaints about numerous other federal statutes that impose extensive, sometimes

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[3] As respondents note, Resp. Br. 4 n.3, petitioner wrongly stated in her opening brief that the Ninth Circuit's decision in *Camacho v. Bridgeport Fin. Inc.*, 430 F.3d 1078 (9th Cir. 2005), was the only "on-point" appellate decision regarding the lawfulness of an "in writing" requirement in a validation notice.

ambiguous, restrictions on their business practices, provide a civil private right of action, and afford defendants no mistake of law defense. For example, federal antitrust laws are complex, and their requirements are not always certain. *See*, *e.g.*, *Nash v. United States*, 229 U.S. 373, 376-77 (1913). Nonetheless, Congress has long provided a private right of action for treble damages, but no mistake of law defense. *See* 15 U.S.C. § 15. The same is true of many other statutes as well. *See*, *e.g.*, Fair Labor Standards Act, 29 U.S.C. § 216(b) (providing private right of action for double damages against "any employer who violates" the statute's minimum wage or overtime provisions, with no mistake of law defense); Copyright Act, 17 U.S.C. § 504(b) (authorizing actual damages for any violation); Family Medical Leave Act, 29 U.S.C. § 2617 (double damages and lost wages); Truth in Lending Act, 15 U.S.C. § 1640 (actual and statutory damages).

Likewise, in resolving circuit splits, this Court routinely decides cases in which a losing defendant can honestly claim that it acted on the basis of a reasonable misunderstanding of the law (adopted by at least one federal circuit), yet almost never declines to apply its decision to the pending case or otherwise protects the defendant from civil (and sometimes criminal) liability despite the good faith misunderstanding. *See, e.g.*, *Wyeth v. Levine*, 129 S.Ct. 1187 (2009) (upholding a $6 million verdict against a defendant who erroneously but in good faith believed that receiving FDA approval for product labeling would be a complete defense against state tort claims); *New York Times Co. v. Tasini*, 533 U.S. 483 (2001) (finding a cause of action under the

Copyright Act against defendants who in good faith believed they were lawfully entitled to include previously licensed works in an electronic database, thus exposing the defendants to what later became an $18 million liability); *Bates v. United States*, 522 U.S. 23 (1997) (resolving circuit split by holding that specific intent to injure or defraud is not an element of 20 U.S.C. § 1097(a), and applying result to pending criminal case).

The question in this case, thus, is whether Congress intended to provide debt collectors a special exception to the general rule that regulated entities are strictly liable for their legal mistakes. As discussed next, there is no sufficient reason to believe that it did.

B. The Language Of The Bona Fide Error Defense Does Not Demonstrate That Congress Intended To Provide Debt Collectors An Unprecedented Mistake Of Law Defense.

Respondents argue that a "plain text analysis of the bona fide error defense" shows that "it applies to all types of error," including mistakes of law. Resp. Br. 7. To the contrary, the plain text, read in light of common legal usage and its history, confirm that Congress did not intend to create an unusual mistake of law defense.

1. The Court Is Not Compelled To Give The Statutory Language The Broadest Reading Possible Simply Because The Language Standing Alone Would Bear That Construction.

1. Respondents' principal textual argument is that the statute's reference to a "violation" that "was not intentional" can – and therefore must – be read to encompass cases in which the defendant intended to engage in the conduct that violates the Act, but mistakenly believed his actions were lawful. They make much of the fact that Congress did not simply use the word "intentional" in the bona fide error defense, but paired it with the word "violation." An intentional *violation*, they argue, necessarily implies knowledge of unlawfulness even if the word "intentional" standing alone would not. Resp. Br. 14-17.

But the same could be said of the statutory phrase "knowing violation." In common usage, to say that a defendant *knowingly violated* a statute could well be understood to mean that the defendant had knowledge of his actions and of the law. Nonetheless, this Court has repeatedly refused to give federal statutes that construction. For example, in *Bryan v. United States*, 524 U.S. 184 (1998), this Court construed a statute that punished anyone who "knowingly violates" certain provisions of a federal firearm statute. *Id*. at 192 (construing, among other provisions, 18 U.S.C. § 924(a)(1)(B)). Under respondents' plain language argument, the use of the word "violates" should have compelled this Court to find that the statute applied only if the defendant knew that he was violating the act. But this Court

concluded otherwise. "[T]he knowledge requisite to a *knowing violation* of a statute," the Court held, "is factual knowledge as distinguished from knowledge of the law." *Id*. (emphasis added). That conclusion was no aberration. *See Babbitt v. Sweet Home Chapter of Cmties. for a Greater Or.*, 515 U.S. 687, 696 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); *United States v. Int'l Minerals & Chem. Co*., 402 U.S. 558, 563 (1971) (declining to attribute to Congress "the inaccurate view that the Act requires proof of knowledge of the law, as well as the facts, and that it intended to endorse that interpretation by retaining the word 'knowingly'"); *cf. also Reynolds v. United States*, 98 U.S. 145, 167 (1878) ("Every *act* necessary to constitute the crime was knowingly done, and the crime was therefore *knowingly committed*") (emphasis added).[4]

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[4] Respondents assert that this Court's decision in *Safeco Insurance Company of America v. Burr*, 551 U.S. 47 (2007), "is in direct contradiction to petitioner's argument that a 'knowingly violation' only requires 'factual knowledge as distinguished from knowledge of the law." Resp. Br. 29 (quoting Petr. Br. 18). The language quoted from petitioner's brief – which respondents say is contradicted by *Safeco* – is a direct quotation from this Court's opinion in *Bryan*. *See* Petr. Br. 18 (quoting *Bryan*, 524 U.S. at 192). As explained in petitioner's opening brief, *Safeco* is entirely consistent with cases like *Bryan* because the Court construed the word "knowing" in the context of a paragraph that applied only to "willful" violations. *See* 551 U.S. at 59. Respondent point to no similar special statutory context here. Moreover, even if "knowingly" sometimes encompassed a defendant's knowledge of the law, that would not

These decisions are irreconcilable with respondents' insistence that phrases like "knowing violation" can only be read to encompass a defendants' intent or knowledge with respect to the lawfulness of his actions. Likewise, they demonstrate that pairing a mens rea term like "knowingly" with the word "violation" is not enough, standing alone, to overcome the presumption against construing acts of Congress as establishing a mistake of law defense. *See Int'l Minerals*, 402 U.S. at 563 (rejecting conclusion that Congress's initial enactment, and subsequent retention, of the phrase "knowingly violates" was intended to abandon "the general rule that ignorance of the law is no excuse").

Of course, the FDCPA speaks of an *intentional*, rather than a *knowing*, violation. But respondents offer no reason why, as a matter of plain language, the word *intentional* when paired with *violation* would more clearly refer to the defendant's knowledge of the law. In fact, respondents have not identified any case construing the phrase "intentional violation" in any other statute to refer to a defendant's intention to violate a known legal duty.

2. Respondents point out that Congress could have more clearly conveyed its intent to *avoid* creating a mistake of law defense by referring to the "act constituting the violation." Resp. Br. 15; *see also* Resp. Br. 18 (noting that in the safe harbor provision, Congress referred to an "act or omission" rather than

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help respondents here, as nothing in *Safeco* suggests that the word "intentional" has the same meaning.

a "violation").[5] The same could have been said of the federal firearms statute this Court construed in *Bryan*, for example – Congress could have provided that "whoever . . . knowingly [*engages in an act that*] violates [certain subsections] of section 922 . . . shall be fined under this title, imprisoned not more than five years, or both." *Bryan*, 524 U.S. at 188 n.6 (quoting 18 U.S.C. § 924(a)(1)). But given the strong presumption against construing statutes as creating mistake of law defenses, the question is not whether Congress clearly excluded a mistake of law defense; it is whether Congress unmistakably created one.

Congress could have clearly expressed an intent to create a defense for legal errors in any number of ways. *See* Petr. Br. 24-25. It could have, for example, expanded the safe harbor defense to encompass acts "done or omitted in good faith in conformity with any advisory opinion of the Commission [*or any court*]." 15 U.S.C. § 1692k(e). The fact that it expressly limited the defense to acts done in good faith reliance on Commission opinions suggests that Congress did not intend to create a nearly identical protection encompassing reliance on judicial decisions through significantly less explicit language elsewhere.

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[5] The wording of the safe harbor defense was likely intended to avoid the awkwardness of referring to a "*violation* done in good faith conformity with any advisory opinion of the Commission," given that the point of the provision is to make clear that such actions are *not* violations of the Act. 15 U.S.C. § 1692k(e).

2. The Language Of The Defense Must Be Read In Light Of Common Legal Usage.

Congress also could have conveyed its intent to excuse mistakes of law by extending the bona fide error defense to those whose "violation was not [*willful*]." *See* Petr. Br. 20. That Congress chose, instead, to use the word "intentional" strongly suggests that it intended no mistake of law defense.

Words like "intentional," "knowing," and "willful" are terms of art, which Congress presumably intends courts to interpret in light of their traditional legal meanings. *See*, *e.g.*, *Safeco*, 551 U.S. at 57-58. And of the words Congress typically uses to define states of mind, it is "willful," not "intentional," that most strongly connotes knowledge of unlawfulness. Petr. Br. 20-23.

To be sure, the word "willful" may have different shades of meaning depending on context. *See* Resp. Br. 28-29. Sometimes it refers to a defendant's actual knowledge of unlawfulness, and sometimes reckless disregard for the law will suffice.[6] That variation does not diminish petitioner's point that among the words describing mental states, "willful" is the word Congress usually uses to describe the state of mind respondents' ascribe to the bona fide error defense. By contrast, as far as petitioner has been able to discern, and respondents and its amici have shown,

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[6] *See Safeco*, 551 U.S. at 57 n.9. When used in some unusually complex criminal statutes, it may even require proof that the defendant is aware of the particular legal provision he is charged with violating. *See, e.g.*, *Cheek*, 498 U.S. at 192.

Congress has never before used the word "intentional" to create a mistake of law defense.

3. The History The Bona Fide Error Provision's Language Confirms That The Defense Does Not Extend To Legal Errors.

The language of the bona fide error defense must also be construed in its historical context. *See Oscar Mayer & Co. v. Evans*, 441 U.S. 750, 755-58 (1979); Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 537 (1947) ("[I]f a word is obviously transplanted from another legal source, whether the common law or other legislation, it brings the old soil with it.").

The language of the FDCPA's bona fide error defense is identical to the language of Section 1640(c) of the Truth in Lending Act (TILA) as it stood at the time of the FDCPA's passage. Pet. Br. 21. As petitioner has explained, the text and structure of the TILA provision made clear that it provided no mistake of law defense. *See* Petr. Br. 21-23. Moreover, respondents do not dispute that at the time the FDCPA was enacted, every federal court of appeals to have considered the question had held that the provision did not excuse mistakes of law. *See* Resp. Br. 51; Petr. Br. 22.

Respondents argue instead that the consensus among the circuits was narrower than petitioner recounts because the Fifth and Ninth Circuits had simply held that the defense was limited to "clerical errors," without directly ruling that mistakes of law did not qualify as clerical errors. Resp. Br. 51 n.28. But that much was obvious, and subsequent cases

had no difficulty understanding those decisions as precluding a mistake of law defense. *See, e.g.*, *Baker v. G. C. Servs. Corp.*, 677 F.2d 775, 779 (9th Cir. 1982) (relying on *Palmer v. Wilson*, 502 F.2d 860, 861 (9th Cir. 1974)); *McGowan v. King, Inc.*, 569 F.2d 845, 850-51 (5th Cir. 1978) (relying on *Turner v. Firestone Tire & Rubber Co.*, 537 F.2d 1296 (5th Cir. 1976)).

Respondents nonetheless point to other cases that, they say, recognized the "unsettled state of the law." Resp. Br. 51. But those cases identify, in total, three district court decisions from within the Fifth Circuit, and one early state supreme court opinion.[7] By the time Congress enacted the FDCPA, however, the district court decisions had been abrogated by Fifth Circuit precedent holding that the defense applied only to "clerical errors." *See Turner*, 537 F.2d at 1298. Moreover, the Louisiana Supreme Court decision – which was decided without the benefit of the later federal court of appeals' analysis and contained none of its own – did not address whether a mistake as to the meaning of the TILA fell within the bona fide error defense. Instead, it refused to find that a defendant's mistake of *state law* "amounts to

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[7] *Rolader v. Ga. Power Co.*, 4 CCH Consumer Credit Guide P 98,684 (N.D. Ga. 1974); *Thrift Funds of Baton Rouge, Inc. v. Jones*, 274 So.2d 150, 161 (La. 1973); *Welmaker v. W. T. Grant Co.*, 365 F. Supp. 531, 544 (N.D. Ga. 1972); *Richardson v. Time Premium Co.*, CCH Consumer Credit Guide P 99,272 (S.D. Fla. 1971).

an intentional violation of the [TILA] disclosure requirements." *Thrift Funds*, 274 So.2d at 161.[8]

Consequently, there is every reason to believe that at the time of the FDCPA's passage, Congress would have viewed the language of Section 1640(c) as having a settled judicial construction that precluded a bona fide error defense premised solely on the defendant's misunderstanding of the federal statute. And there is likewise every reason to presume that it intended that understanding to apply to the FDCPA as well.[9] *See Herman & MacLean v. Huddleston*, 459 U.S. 375, 385-86 & n.21 (1983).

C. The 1980 Amendment To The TILA Did Not Change The Meaning Of The FDCPA's Bona Fide Error Defense.

Respondents also point out that in 1980, Congress amended the TILA's bona fide error defense to explicitly provide that "an error of legal judgment with respect to a person's obligations under [the TILA] is not a bona fide error," 15 U.S.C. § 1640(c), but did not make a comparable amendment to the

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[8] The Court need not decide in this case whether violations of the FDCPA arising from mistakes of state law fall within the Act's bona fide error defense. *See* Petr. Br. 47.

[9] It does not matter that this Court had not passed on the question or that Congress did not specifically mention the lower court consensus in the legislative history. *See*, *e.g.*, *Bragdon v. Abbott*, 524 U.S. 624, 644-45 (1998) (applying presumption in absence of any Supreme Court decision); *Merrill Lynch v. Dabit*, 547 U.S. 71, 85 (2006) (citing no legislative history, but concluding that "Congress can hardly have been unaware" of the judicial and administrative consensus).

FDCPA. The inference, respondents argue, is that Congress intended to exclude a mistake of law defense under the TILA, but not the FDCPA. *See* Resp. Br. 56-59. But as petitioner has explained, *see* Petr. Br. 40-46, that argument fails for a number of reasons.

Most prominently, it wrongly assumes that the 1980 amendment was intended to change, rather than codify or clarify, the defense's original meaning. But not every amendment changes a statute's substance. *See*, *e.g.*, *Bates v. United States*, 522 U.S. 23, 32 (1997). And in this case, it is obvious that the 1980 Amendment was clarifying, rather than revising, in at least some respects. Most of the proviso it added to the end of Section 1640(c) gives examples of what the defense *does* cover: "clerical, calculation, computer malfunction and programming, and printing errors." 15 U.S.C. § 1640(c). But there is no reason to think that these kinds of errors were not covered by the original statute, or that they are not covered by the FDCPA now just because they are expressly mentioned in the TILA but not the FDCPA.

The question, then, is whether the express exclusion of legal errors should be viewed any differently. Nothing in the text of the amendment suggests that Congress switched gears halfway through the proviso to stop codifying and start modifying. Nor have respondents pointed to anything in the legislative history to support that conclusion. *See* Petr. Br. 41-43. Moreover, respondents' interpretation requires concluding that as originally enacted, the TILA's language was intended to encompass a mistake of law defense, which for all the reasons already discussed would

require an unconventional reading of the statutory language and would run against the long-standing assumption that Congress does not intend to create such defense without making that intention clear.

II. The Structure Of The Statute Is Incompatible With Respondents' Interpretation Of The Bona Fide Error Defense.

Respondents' interpretation of the FDCPA is also incompatible with other provisions of the statute and its structure as a whole.

A. Respondents' Interpretation Renders The Safe Harbor Defense Superfluous.

Under respondents' interpretation, satisfying the elements of the safe harbor provision will, in every instance, also satisfy the elements of the bona fide error defense, rendering the safe harbor provision superfluous. Petr. Br. 28-30. In particular, by acting "in good faith in conformity with any advisory opinion of the Commission," 15 U.S.C. § 1692k(e), the defendant will have demonstrated that any violation was not intentional (because the defendant honestly believed that in following the advisory opinion he was complying with the law),[10] that the error was bona fide (*i.e.*, in "good faith," *id.*), and that he had in place procedures reasonably adapted to avoid any such

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[10] If the defendant did not believe that the advisory opinion was correct, his actions would not be in "good faith" and therefore would not qualify for a defense under the safe harbor provision. *See* 15 U.S.C. § 1692k(e).

error (namely, acting in conformity with Commission opinion). *See id*. § 1692k(c); *see also Ruth v. Triumph P'ships*, 577 F.3d 790, 804 (7th Cir. 2009) (holding that reliance on advisory opinion would satisfy requirements for any mistake of law defense under the bona fide error provision).

Consequently, under respondents' interpretation, the safe harbor defense is left with no independent work to do, having been eclipsed by a bona fide error defense that protects defendants' reliance not only on advisory opinions, but also judicial decisions, advice of counsel, or the debt collector's own independent legal research.

Respondents do not refute this reasoning, or identify any instance in which a defendant would be entitled to the safe harbor defense but not the bona fide error defense if the Court accepts their interpretation. Instead, respondents argue that in a number of respects, the advisory opinion process is not always available, or particularly useful, to debt collectors. *See* Resp. Br. 32-36. But that misses the point of petitioner's surplusage argument, which turns the superfluity of the *safe harbor defense* not on the usefulness of the *advisory opinion process*. Regardless of how useful (or useless) the advisory opinion process has become in practice, there is simply no reason to think that Congress would create a safe harbor defense if it intended to afford the same protection under a different provision (particularly if it intended, as respondents argue, to allow a bona fide error defense even if the defendant acted *in conflict* with an advisory opinion, *see* Resp. Br. 34-35).

B. Respondents' Complaints About The Advisory Opinion Process Do Not Demonstrate That Congress Intended The Bona Fide Error Defense To Supplant The Safe Harbor Defense.

Respondents' interpretation would also substantially reduce any incentive for debt collectors to seek the Commission's opinion on uncertain questions under the FDCPA. *See*, *e.g.*, Resp. Br. 32-36 (explaining why debt collectors would prefer to rely on a bona fide error defense rather than seeking advisory opinions); DRI Br. 11-18 (same).

Respondents and their amici counter that the Commission itself has eliminated any incentive to seek advisory opinions by refusing to issue them in most cases. But the Commission's inadequate implementation of its advisory opinion authority tells us little about how Congress intended the Act to operate when it enacted the statute. And in the end, it is simply implausible to suggest that Congress created an advisory opinion process to address ambiguities in the FDCPA, and provided a safe harbor defense for acting in compliance with those opinions, but nonetheless intended to create a mistake of law defense to address the same problem in a way that eliminates any incentive for debt collectors to ask for, or follow, the Commission's advice. The Commission's failure to offer that advice as freely as it should is cause to criticize the Commission, not reason to judicially revise the statute to compensate for that failure.

Moreover, respondents' complaints about the advisory opinion process must be kept in perspective.

Most federal statutes do not provide regulated parties a means of requesting legal advice from the Government, or a defense from liability if they follow that advice. Accordingly, the fact that the FDCPA's advisory opinion process may not completely shield debt collectors from the risk of liability from legal error – or that it has turned out to be rather unhelpful as implemented – does not mean that Congress must, therefore, have intended to provide debt collectors a more comprehensive defense elsewhere.

C. Respondents' Structural Arguments Are Unconvincing.

Respondents offer two structural arguments of their own, but neither is persuasive.

First, respondents claim that petitioner's reading renders the "bona fide error" defense unavailable for a number of violations for which intentional conduct is an element. *See* Resp. Br. 19-22 (giving example of Section 1692d(5), which prohibits repeatedly calling a debtor "with intent to annoy, abuse, or harass"). But there is no reason to assume that Congress intended the defense to be available with respect to every type of violation. It may well be, for example, that under petitioner's construction, the bona fide error defense provides no shelter to a debt collector who "use[s] . . . violence or other criminal means to harm the physical person of a debtor." 15 U.S.C. § 1692d(1). But that is hardly troublesome. Moreover, it seems unlikely that someone who uses violence as a means of debt collection would qualify under respondents' view of the bona fide error defense, either – believing that the Act permitted breaking kneecaps as a

method of debt collection would not, presumably, count as a "bona fide" error. But that then demonstrates that respondents' purported anomaly arises even under their own interpretation.

Second, respondents suggest that petitioner's understanding of the word "intentional" in the bona fide error defense is inconsistent with the word's use in Section 1692k(b). Resp. Br. 22-24. That provision directs the court to take into account "the extent to which such noncompliance was unintentional" when setting the amount of any statutory damages. 15 U.S.C. § 1692k(b). Because proving a violation sometimes will establish that the defendant intended to commit the act that violates the statute, respondents argue, the "debt collector's intent to commit the 'act' constituting a violation of the statute cannot logically be viewed as a factor justifying the assessment of additional damages under § 1692k(b)." Resp. Br. 24.

This argument is unconvincing because respondents' construction of "intentional" has the same effect. In many cases, prior to assessing damages, a court will have already rejected the defendant's bona fide error defense because the defendant failed to show that the violation was "not intentional" as respondents construe the term (*i.e.*, because the defendant intended to commit the act and knew his conduct was unlawful). Yet despite having already found the violation intentional, the court will be called upon to set statutory damages in consideration of, among other things, "the extent to which the noncompliance was intentional." 15 U.S.C. § 1692k(b). To the extent this result is awkward, the

difficulty arises from the way the statute was written and not from petitioner's construction of its terms.

III. Respondents' Policy Arguments Do Not Overcome The Clear Import Of The Statute's Text And Structure.

Respondents are also wrong in arguing that the underlying purposes of the statute cannot be served without recognition of a mistake of law defense.

A. Attorneys' Obligations To Their Clients Do Not Entitle Them To Mistake Of Law Immunity.

Respondents and their amici argue at length that Congress must have intended to allow a mistake of law defense for attorney debt collectors because otherwise they will be put in an untenable position, faced with the obligation to zealously advocate for their clients on the one hand, and the desire to avoid personal liability on the other. This argument – which echoes those rejected by the Court in *Heintz v. Jenkins*, 514 U.S. 291 (1995) – fails for a number of reasons.

First, Congress could not have crafted the "bona fide error" defense with these concerns in mind because at the time the defense was created, the statute expressly exempted attorneys. *See* Pub. L. No. 95-109, § 803(6)(F), 91 Stat. 874 (1977) (providing that the term "debt collector" did not include "any attorney-at-law collecting a debt as an attorney on behalf of and in the name of a client"). As enacted, the attorney exemption, not the bona fide error defense, was the solution to the alleged problems of applying the Act's requirements to attorneys.

Of course, with time and experience, Congress concluded that attorney debt collectors were not entitled to special treatment and withdrew the exemption in 1986. *See* Pub. L. No. 99-361, 100 Stat. 768 (1986). At the time, opponents argued that extending the Act to attorneys "would create practical problems for attorneys collecting debts as attorneys-at-law." H.R. Rep. No. 99-405, at 11 (1985) (dissenting views of Rep. Hiler). Proponents disagreed, but they did not seek to reassure their colleagues by asserting that the bona fide error defense would shield attorneys from liability for reasonable mistakes of law. Nor did Congress respond to the concern raised on lawyers' behalves by altering the bona fide error defense in any way. *See Heintz*, 514 U.S. at 295 (noting that "when Congress later repealed the attorney exemption, it did not revisit the wording of these substantive provisions").

Second, respondents' insistence that no responsible legislature could have contemplated exposing attorneys to liability without providing them a mistake of law defense is undermined by the fact that many states have enacted FDCPA equivalents applicable to attorneys without providing a mistake of law defense.[11]

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[11] Some state statutes with no exemption for attorney debt collectors do not provide any bona fide error defense at all. *See*, *e.g.*, Mass. Gen. Laws Ann. ch. 93, § 49; Md. Code Ann., Com. Law § 14-203; Or. Rev. Stat. § 646.641; Wis. Stat. Ann. § 427.105. Other state statutes do contain a bona fide error defense. *See*, *e.g.*, Ark. Code Ann. § 17-24-512(c); Fla. Stat. Ann. § 559.77(3); Me. Rev. Stat. Ann. tit. 32, § 11054(3); N.H. Rev. Stat. Ann. § 358-C:4(II)(b). But the amici States have informed

Third, the professional duties of lawyers – who above all others are most reasonably expected to know and obey the law – do not justify special claims to immunity for their legal errors. "[A]n attorney's ethical duty to advance the interests of his client is limited by an equally solemn duty to comply with the law and standards of professional conduct." *Nix v. Whiteside*, 475 U.S. 157, 164 (1986). Indeed, the Model Rules of Professional Conduct themselves place limitations on the means lawyers may use in the pursuit of their client's interests.[12] When the boundary between permissible and impermissible measures is unclear, attorneys may have to balance their desire to avoid personal liability (for bar or criminal sanctions, or civil liability to third parties injured by their illegal conduct) with their obligation to zealously promote their client's interests within the bounds of the law. *See id*. at 168 n.5 (noting that ethics rules recognize "the difficult choices that may confront an attorney who is sensitive to his

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this Court that they "are aware of no decisions interpreting a parallel state bona fide error provision to immunize a defendant's mistake of law." States Br. 11.

[12] *See, e.g.*, MODEL RULES OF PROF'L CONDUCT R. 3.4 (requiring no obstruction or falsification); Rule 4.1 (prohibiting lawyers from making materially false statement to third parties, or failing to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client); Rule 4.4(a) ("In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person . . . .").

concurrent duties to his client and to the legal system").[13]

But that dilemma is not limited to lawyers – other professionals, including non-lawyer debt collectors, have ethical obligations to their clients, too. And the tension between a professional duty to one's client and an obligation to obey the law is hardly unique to the FDCPA. For example, attorney debt-collectors have long been subject to civil or even criminal liability at state law for some abusive collection practices.[14] And although not as common, it is not unprecedented for Congress subject attorneys to liability for unlawful conduct undertaken during the representation of a client.[15]

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[13] In fact, attorneys and their clients' interests often will be closely aligned because in some cases clients may be held vicariously liable for their attorneys' violations of the FDCPA. *See* Br. Com. Law League of Am. 11-12 (collecting cases).

[14] *See*, *e.g.*, Br. OCAA 8 n.12 (discussing tort remedies); Ohio Rev. Code Ann. § 2917.21 (criminalizing telephone harassment); *id*. § 2917.11 ("No person shall recklessly cause inconvenience, annoyance, or alarm to another by . . . threatening harm to persons or property" or "communicating unwarranted and grossly abusive language to any person . . . ."); 47 U.S.C. § 223 (providing fines and possible imprisonment for a variety of telephone crimes, including making a phone call "without disclosing [one's] identity and with intent to annoy, abuse, threaten, or harass any person at the called number or who receives the communications").

[15] For example, attorneys may be liable to third parties under Section 10(b) the Securities Exchange Act, 15 U.S.C. § 78j(b). *See*, *e.g.*, *Central Bank of Denver, N.A. v. First Interstate Bank of Denver*, 511 U.S. 164, 191 (1994); *Rubin v.*

Respondents have identified no common law doctrine or provision of state or federal law allowing attorneys a special mistake of law defense under generally applicable statutes that apply to their professional conduct.

Fourth, the extent to which the FDCPA governs a lawyer's uniquely representative duties is unsettled. Here, respondents were held liable for failing to make proper disclosures in a validation notice, not for anything they did in a courtroom or by advising a client. To the extent *other* applications of the Act might impose an intolerable interference with client relationships or the practice of law, there is no reason to believe that Congress intended to respond to that particular problem (which arises for only a small subset of debt collectors) by enacting a sweeping mistake of law defense that would apply to *any* mistake of law (even those having no effect on client representation) by *any* debt collector (including non-lawyers). It is far more likely that Congress intended courts to consider carefully claims that an attorney's conduct in representing a client violated the Act. *Cf. Heintz*, 514 U.S. at 296 ("[W]e do not see how the fact that a lawsuit turns out ultimately to be unsuccessful could, by itself, make the bringing of it an 'action that cannot legally be taken.'").[16]

Schottenstein, Zox & Dunn, 143 F.3d 263 (6th Cir. 1998) (holding attorney liable for omissions and misrepresentations to non-client).

[16] *See also* Com. Law League of Am. 16-17 (noting ongoing litigation in the lower courts over the availability of other limits on the Act's application to litigation conduct, including witness

B. Congress's Desire To Protect Law-Abiding Debt Collectors From Competitive Disadvantage Did Not Lead It To Create A Mistake Of Law Defense.

Respondents further argue that a mistake of law defense is consistent with Congress's desire "to insure that those debt collectors who refrain from abusive debt collection practices are not competitively disadvantaged . . . ." Resp. Br. 13 (quoting 15 U.S.C. § 1692(e)). This purpose, respondents insist, led Congress to protect not only those debt collectors who actually comply with the law, but also those who violate it, so long as their violation was not "abusive." And, the argument continues, a violation is not "abusive" unless the defendant knew he was violating the Act.

Respondents ignore that Congress defined in the text of the statute the practices it deemed sufficiently abusive to warrant prohibition and subjected debt collectors to liability for violating *any* of the statute's prohibitions, not simply those that a court might consider "abusive." *See* 15 U.S.C. §§ 1692b-1692k (defining unlawful practices); *id*. 1692k(a) (providing that "any debt collector who fails to comply with *any provision of this subchapter* with respect to any person is liable to such person . . . .") (emphasis added). Moreover, the civil liability provisions are not intended solely to punish culpable behavior, but also to provide compensation to those injured by

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immunity, litigation immunity, and the *Noerr-Pennington* doctrine).

unlawful acts, as well as a financial incentive for debt collectors to inform themselves of the law's requirements and bring themselves into compliance with the statute's commands. Those purposes are served by imposing liability even when a defendant acts on the basis of a good faith misunderstanding of the law.

Respondents' interpretation, on the other hand, effectively prevents liability whenever there are any reasonable grounds for disputing the law's meaning, a common situation according to respondents. *See* Resp. Br. 35 (stating that "the complexity of the FDCPA has led to litigation on virtually every aspect of the Act"). In the absence of binding on-point authority, debt collectors would be immune from liability for engaging in conduct that a broad majority of courts has held illegal, so long as some court, somewhere, has held a practice lawful. And so long as the practice is perceived to be effective, debt collectors will have an incentive to follow the least restrictive view of their obligations under the Act, knowing that even if they are sued, and their view of the law rejected, they will have absolute immunity from any liability. At the same time, those debt collectors who take the correct view of a disputable question of law, and constrain their activities accordingly, will suffer a competitive disadvantage vis-à-vis their law-breaking (but immunized) competitors.

Respondents nonetheless insist that the real risk to honest debt collectors comes not from their

competitors, but from debtors and their lawyers "suing ethical debt collectors for trivial violations." Resp. Br. 40.[17] But the potential for meritless or trivial litigation is not unique to this statute. It arises whenever Congress creates a private right of action and encourages citizens to act as private attorneys general by authorizing statutory damages and attorneys fees for prevailing parties. In this case, Congress addressed that common risk with conventional protections. It authorized courts to award attorneys' fees and costs against plaintiffs who bring suit in bad faith. 15 U.S.C. § 1692k(a)(3). And it limited the incentive to pursue meritorious, but trivial, claims by allowing courts discretion to set the amount of statutory damages (the only damages likely available for truly trivial violations), in light of a variety of factors including "the nature of such

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[17] There is no basis to suggest that the litigation in this case meets that description. Although respondents attempt to minimize the violation here, the Act's requirements for validation notices form a core prophylactic against the kinds of serious harms the Act was designed to prevent. Moreover, refusing to accept oral debt disputes has significant consequences for consumers. Although the statute provides additional rights for those who dispute debts in writing, 15 U.S.C. § 1692g(b), it also provides important rights to those who dispute debts orally. *See Camacho*, 430 F.3d at 1081-82. Among other things, the statute protects a debtor's credit rating by prohibiting the debt collector from "communicat[ing] to any person credit information which is known or which should be known to be false, including [by] fail[ing] to communicate that a disputed debt is disputed," 15 U.S.C. § 1692e(8), whether the dispute is written or oral. *See Camacho*, 430 F.3d at 1082.

noncompliance" and, in class actions, "the number of persons adversely affected." *Id*. § 1692k(b). There is no reason to think that Congress went further and established a unprecedented mistake of law defense for debt collectors.

CONCLUSION

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

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