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SUPREME COURT, U.S.

No. 08-1200

In The
Supreme Court of the United States

KAREN L. JERMAN,

Petitioner,

v.

CARLISLE, MCNELLIE, RINI,
KRAMER & ULRICH, L.P.A.
AND
ADRIENNE S. FOSTER,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

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

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INTRODUCTION

The facts of this case are straightforward. A law firm/debt collector sent a "validation notice" to a debtor. The debtor sued for FDCPA violations. The district court determined that the "validation notice violate[d] the FDCPA in so far as it state[d] that disputes [of a debt] must be made in writing." Thereafter, the law firm/debt collector asserted the bona fide error defense. The district court granted summary judgment to the law firm, which was affirmed by the Sixth Circuit. Petitioner seeks further review claiming that there is a "circuit split" over the issue of whether the bona fide error defense applies to mistakes of law or merely clerical errors.

The Petition presents no sound basis for this Court to exercise jurisdiction. Contrary to Petitioner's argument, the federal courts are not "deeply divided" and "irreconcilably entrenched" over whether the bona fide error defense in the FDCPA applies to mistakes of law. Indeed, only two federal circuit courts (i.e., the Eighth and Ninth) have held that the bona fide error defense does not excuse good faith legal mistakes. Both of these decisions are, however, in excess of twenty-five years old and contain little to no analysis of the pertinent issues.

Meanwhile, in their recent decisions, the Sixth and Tenth Circuits have thoroughly examined the plain language of the statute, the legislative history of the Act and, unlike the Eighth and Ninth Circuits, have provided clear and rational bases for their

holdings. In fact, the decisions of the Sixth and Tenth Circuits are so persuasive that what was once a "growing minority" of federal courts is now becoming the "clear majority."

Accordingly, because the federal courts are already headed in the right direction on this issue, the question presented for review by Petitioner does not require this Court's time and attention, let alone the parties' resources.

STATEMENT OF THE CASE

1. While the purpose of the FDCPA is to stop abusive debt collection practices, it was not meant to punish ethical attorneys/debt collectors who refrained from abusive practices. Nor was it meant to punish attorneys/debt collectors who rely, in good faith, on case law that is later "independently examined" and ultimately rejected by another court. The fact that the FDCPA was not intended to be a strict liability statute is highlighted by its legislative history. As noted by the Tenth Circuit in *Johnson v. Riddle*, 305 F.3d 1107 (10th Cir. 2002), "[i]n describing the bona fide error exception, the Senate Report stated: 'A debt collector 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.'" *Id.* at 1123 (citing S.Rep. No. 95-382 at

5). Moreover, when the FDCPA was passed, Senator Donald Riegle of Michigan explained that its purpose was "to protect consumers from a host of unfair, harassing, and deceptive debt collection practices *without imposing unnecessary restrictions on ethical debt collectors*." *Pressley v. Capital Credit & Service, Inc.*, 760 F.2d 922, 925 (9th Cir. 1985) (citing 123 Cong. Rec. S. 27, 386 (daily ed. Aug. 5, 1977)) (emphasis added).

2. Consistent with this express purpose, Congress included a bona fide error defense. "Bona fide" is a Latin term literally meaning "in good faith," and is defined as an act made "without fraud and deceit." Black's Law Dictionary 168 (7th ed. 1999). Neither the express language of the FDCPA nor its legislative history suggest in any manner that the bona fide error defense is only limited to clerical errors.

3. On April 17, 2006, Respondents, on behalf of a lender, filed a state court foreclosure action against Petitioner. Petitioner was served with a summons, complaint and validation notice in accordance with § 1692g(a) of the FDCPA. The validation notice stated that the debt would be assumed valid unless the debtor, within 30 days, disputed "in writing" the validity of the debt. At the time the validation notice was sent, every court within the Sixth Circuit that had considered the requirements for a validation notice under § 1692g(a) had ruled that inclusion of the words "in writing" did not constitute a violation of the FDCPA. *See Diamond v. Corcoran*,

No. 5:92-CV-36, 1992 U.S. Dist. LEXIS 22793, 5-6 (W.D.Mich. 1992); *Savage v. Hatcher*, 109 Fed.Appx. 759, 762 (6th Cir. 2004), *affirming Savage v. Hatcher*, No. C-2-01-0089, 2002 WL 484986 (S.D.Ohio 2002).

On April 25, 2006, Respondents received a letter from Petitioner's attorney disputing the validity of the debt. Upon further review, it was determined that the debt, in fact, had been paid in full. Respondents immediately dismissed the foreclosure complaint. The complaint was pending for a total of twenty-four days.

4. On June 7, 2006, Petitioner filed a class action complaint for "unlawful debt collection practices." The class action complaint was predicated on the "form validation notice" that had been sent to Petitioner as part of the foreclosure action. Petitioner's complaint alleged that Respondents violated her rights, as well as those of the class (i.e., all Ohio consumers who have received a form validation notice on or after June 6, 2005) by:

> Representing to consumers that the debt will be assumed valid unless a written dispute has been made in violation of 15 U.S.C. § 1692g. *Camacho v. Bridgeport Financial, Inc.*, 430 F.3d 1078 (9th Cir. 2005).

Petitioner sought by way of class action relief: (1) actual damages; (2) the lesser of either $500,000 or one percent of the debt collector's net worth; and (3) attorney fees.

On September 22, 2006, Respondents filed a motion to dismiss the complaint on the basis that

their inclusion of the two words, "in writing," in the notice did not violate the FDCPA pursuant to *Diamond* and *Savage*. Petitioner, relying on the recent Ninth Circuit decision in *Camacho*, argued the exact opposite. On November 21, 2006, the district court decided to "independently examine this issue" in light of the lack of a determinative ruling by the Sixth Circuit on the matter. Res. App. at 8. In its independent examination, the district court agreed with and adopted the reasoning in *Camacho,* finding that "the plain meaning of the statute is clear and unambiguous, subsection (a)(3) does not impose a writing requirement on consumers. Accordingly, this Court will not insert a writing requirement into the statute." Res. App. at 11. The district court ultimately determined that the law firm's form validation notice violated the FDCPA insofar as it stated that disputes must be made in writing. *Id.*

5. On March 1, 2007, Respondents filed a motion for summary judgment on the "bona fide error" defense under § 1692k(c) of the FDCPA. Petitioner opposed the motion on the basis that the bona fide error defense applied only to clerical errors and not to mistakes of law. On June 20, 2007, the district court granted Respondents' motion finding "that the bona fide error defense applies to mistakes of law," and that Respondents qualified for the defense by establishing all three elements under § 1692k(c). Pet. App. at 34a-40a.

On August 18, 2008, the Sixth Circuit affirmed the trial court's ruling. While acknowledging that the

circuit courts are "divided," the Sixth Circuit noted that courts taking a contrary position have failed to thoroughly examine the relevant issues but instead have "simply dispense[d] with the issue by citing earlier cases back to the Ninth Circuit's decision in *Baker v. G.C. Services*."[1] Pet. App. at 8a (citing *Johnson*, 305 F.3d at 1122). *Baker*, in turn, "rested its holding entirely upon" a faulty analogy between the bona fide error defenses contained in the FDCPA and the Truth in Lending Act ("TILA"). *Id.*

7. In summary, Petitioner first urged the district court to follow the growing minority of cases that refused to insert a writing requirement into the FDCPA. Once the district court adopted that position, Petitioner then urged the district court to disregard the growing minority of cases and insert the words "clerical errors only" into the bona fide error defense of the FDCPA.

REASONS FOR DENYING THE PETITION

I. Federal Courts Are Not "Deeply Divided" Or "Irreconcilably Entrenched" Over Whether The Bona Fide Error Defense In The FDCPA Applies To Mistakes Of Law.

1. Contrary to Petitioner's claims, only two circuit courts, the Eighth and Ninth, have held that

[1] *Baker v. G.C. Services Corp.*, 677 F.2d 775 (9th Cir. 1982).

the FDCPA's bona fide error defense does not apply to mistakes of law. *See Baker v. G.C. Services Corp.*, 677 F.2d 775 (9th Cir. 1982) and *Hulshizer v. Global Credit Servs., Inc.*, 728 F.2d 1037 (8th Cir. 1984). Although the Second Circuit in *Pipiles v. Credit Bureau of Lockport, Inc.*, 886 F.2d 22 (2nd Cir. 1989) cited to *Baker* and *Hulshizer* for the proposition that the bona fide error defense does not apply to mistakes of law, the statement is nothing more than *dicta*. *Id.* at 27. Indeed, the *Pipiles* Court raised the issue of the bona fide error defense *sua sponte*, noting that the defendant "did not plead a section 1692k(c) defense in its answer, or argue it on appeal." *Id.* Consequently, although the Second Circuit recognized the holdings in *Baker* and *Hulshizer* almost twenty years ago, it has never ruled on the issue.

Meanwhile, although the Eighth and Ninth Circuits have held that the bona fide error defense does not apply to mistakes of law, these decisions are over twenty-five years old, and fail to consider the plain language of the statute, its purpose and legislative history. Rather, as noted by both the Sixth and Tenth Circuits, while *Baker* "rested its holding entirely upon" a faulty analogy between the bona fide error defenses contained in the FDCPA and TILA, other courts following suit have "simply dispense[d] with the issue by citing earlier cases back to . . . *Baker*. . . ." Pet. App. at 8a (citing *Johnson*, 305 F.3d at 1122). Simply, with the Sixth Circuit's adoption of the Tenth Circuit's holding in *Johnson,* along with the numerous district courts that have followed suit,

Baker is no longer the "majority" view. In fact, no circuit court in almost twenty-five years has followed *Baker*.

Moreover, the Seventh Circuit has twice recognized in *dicta* that there is nothing limiting the FDCPA's bona fide error defense to clerical errors. *See Nielsen v. Dickerson*, 307 F.3d 623, 641 (7th Cir. 2002) (although the court held that the alleged error was clerical rather than legal, it nonetheless rejected the TILA analogy stating "that nothing in the language of the FDCPA's bona fide error provision limits the reach of the defense to clerical errors and other mistakes not involving the exercise of legal judgment."); *see also Jenkins v. Heintz*, 124 F.3d 824, 832 n.7 (7th Cir. 1997).

2. Petitioner argues that certiorari is warranted because the circuit split is "considered" and "entrenched." Respectfully, the circuit split is far short of entrenched at present. Indeed, given the movement of federal courts in the direction of the holdings of the Sixth and Tenth Circuits, reconsideration by the Eighth and Ninth Circuits is not out of the question.

Petitioner has suggested that the Eighth District is irreconcilably entrenched because *Picth v. John R. Hawks, Ltd.*, 236 F.3d 446 (8th Cir. 2001) reaffirmed its prior decision in *Hulshizer*. Such an assertion, however, is without merit for two reasons. First, the *Picht* Court, like the court in *Hulshizer*, "simply dispense[d] with the issue by citing earlier cases back to . . . *Baker*. . . ." Pet. App. at 8a (citing *Johnson*, 305

F.3d at 1122). In other words, the *Picht* Court, like the *Hulshizer* Court before it, completely failed to analyze the bona fide error defense or any of the relevant issues.

Second, the Eighth Circuit decided *Picht* in 2001 without the benefit of the Tenth Circuit's decision in *Johnson*, which was not decided until 2002. As a result, it is very likely that the Eighth and Ninth Circuits will ultimately follow the growing majority of federal courts on this issue. In that event, the overstated conflict between the circuits will be resolved without the necessity of this Court's intervention.

3. Petitioner also argues that current economic conditions make the existing conflict particularly untenable as consumer complaints are bound to increase. Even assuming Petitioner is correct (although no statistical data was presented to support her claim), the lower federal courts are already moving in the right direction based on the sound reasoning provided in *Johnson*. As to the potential for an increase in complaints under the FDCPA, Judge Barrett's recent observations in *Miller v. Javitch, Block & Rathbone*, 534 F.Supp.2d 772, 778-779 (S.D.Ohio 2008) are timely and instructive:

> As a district court in the Second Circuit recently noted "[t]he interaction of the least sophisticated consumer standard with the presumption that the FDCPA imposes strict liability has led to a proliferation of litigation." *Jacobson*, 434 F.Supp.2d at 138. The court in *Jacobson* continued:

Ironically, it appears that it is often the extremely sophisticated consumer who takes advantage of the civil liability scheme defined by this statute, not the individual who has been threatened or misled. The cottage industry that has emerged does not bring suits to remedy the "widespread and serious national problem" of abuse that the Senate observed in adopting the legislation, 1977 U.S.C.C.A.N. 1695, 1696, nor to ferret out collection abuse in the form of "obscene or profane language, threats of violence, telephone calls at unreasonable hours, misrepresentation of a consumer's legal rights, disclosing a consumer's personal affairs to friends, neighbors, or an employer, obtaining information about a consumer through false pretense, impersonating public officials and attorneys, and simulating legal process." *Id.* Rather, the inescapable inference is that the judicially developed standards have enabled a class of professional plaintiffs. . . .

It is interesting to contemplate the genesis of these suits. The hypothetical Mr. Least Sophisticated Consumer ("LSC") makes a $400 purchase. His debt remains unpaid and undisputed. He eventually receives a collection letter requesting payment of the debt which he rightfully owes. Mr. LSC, upon receiving a debt collection letter that contains some minute variation from the statute's requirements, immediately exclaims "This clearly runs afoul of the FDCPA!" and-rather than simply pay what he owes-repairs to his lawyer's office to vindicate a perceived

> "wrong." "[T]here comes a point where this Court should not be ignorant as judges of what we know as men." *Watts v. State of Ind.,* 338 U.S. 49, 52, 69 S.Ct. 1347, 1349, 93 L.Ed. 1801 (1949).
>
> *Id.* at 138-39 (emphasis added). We echo *Jacobson's* sentiments and concerns. [The plaintiff] fits the description of *Jacobson's* hypothetical consumer to a tee, and we will not "countenance lawsuits based on frivolous misinterpretations or nonsensical assertions of being led astray." *Id.* at 138.

Miller, 534 F.Supp.2d at 778-779 (quoting *Fed. Home Loan Mortg. Corp. v. Lamar*, 503 F.3d 504, 514 (6th Cir. 2007), in turn quoting *Jacobson v. Healthcare Fin. Servs.*, 434 F.Supp.2d 133, 138 (E.D.N.Y. 2006)).

Judge Barrett ultimately found that "[o]bviously, the Defendants (attorney-collectors) have a vested interest in not violating the FDCPA as counsel for Plaintiff has sued [them] at least ten times in this district alone for such violations. The Court finds that Defendants are entitled to the bona fide error defense under 15 U.S.C. § 1692k(c)."[2] *Miller,* 534 F.Supp.2d at 778.

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[2] The error in *Miller* was a mistake of law, not clerical.

II. The Sixth Circuit's Decision Is Correct On The Merits.

A. Congress Did Not Intend To Limit The Bona Fide Error Defense To Clerical Errors.

1. Nothing In The Plain Language Of § 1692k(c) Limits The Bona Fide Error Defense To Clerical Errors Only.

Section 1692k(c) of the FDCPA provides:

> A debt collector may not be held liable in any action brought under this subchapter if the debt collector shows by a preponderance of evidence that the violation was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid any such error.

Petitioner argues that the language and structure of the FDCPA's bona fide error defense demonstrates that Congress did not intend for it to apply to mistakes of law. In other words, ignoring both the legislative history and elementary canons of statutory interpretation, Petitioner wants to have her proverbial cake and eat it too. On the one hand, at Petitioner's urging, the district court denied Respondents' motion to dismiss finding that it would be improper to insert the words "in writing" into the plain and unambiguous language of § 1692g(a)(3). Res. App. at 11. On the other hand, limiting the application of the bona fide error defense in the

manner urged by Petitioner would require inserting the words "clerical errors only" into the plain and unambiguous language of § 1692k(c).

Nevertheless, it is a well established principle of statutory interpretation that "[w]hen the statute's language is plain, the sole function of the courts-at least where the disposition required by the text is not absurd-is to enforce it according to its terms." *Lamie v. United States Trustee*, 540 U.S. 526, 534 (2004) (quoting *Hartford Underwriters Ins. Co. v. Union Planters Bank, N. A.*, 530 U.S. 1, 6 (2000), in turn quoting *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 241 (1989), in turn quoting *Caminetti v. United States*, 242 U.S. 470, 485 (1917)). *Simply, given the number of federal courts that have specifically determined that the FDCPA's bona fide error defense applies to mistakes of law, it cannot be reasonably argued that the result of such an interpretation is "absurd."* Further, had Congress intended to restrict the bona fide error defense to clerical errors, it could have done so by amending the statute at some point over the past thirty years, just as it amended the bona fide error defense in TILA in 1980.

2. The Bona Fide Error And Safe Harbor Defenses Are Not Mutually Exclusive.

1. Petitioner contends that given the safe harbor provision in the FDCPA, it is "unlikely" Congress intended to permit the bona fide error defense to

apply to mistakes of law. Petitioner's argument, however, is based on the premise that there are relatively few cases in which the FDCPA is genuinely ambiguous. This premise is false. For example, in this case alone there were several provisions of the FDCPA that required clarification by the courts, namely: (1) whether a complaint is an initial communication under § 1692g(a); (2) whether the words "in writing" violate § 1692g(a)(3); and (3) whether the bona fide error defense applies to mistakes of law under § 1692k(c). Moreover, in Petitioner's initial complaint, she also raised the issue of whether the validation notice violated § 1692g because it "overshadowed" the summons, i.e., the validation notice allegedly failed to make clear that the thirty day timeframe for disputing the debt provided for by the FDCPA did not alter the twenty-eight day state court deadline to file an answer to the complaint.[3]

To require attorneys/debt collectors to forego a claim or to seek a formal opinion from the Federal Trade Commission ("FTC") every time an ambiguity arises in connection with the FDCPA, even if several courts may have already addressed a particular issue, would not only be impractical and cost prohibitive, but would also place ethical attorneys/debt collectors

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[3] The "overshadowing" claim was voluntarily withdrawn upon Petitioner's closer examination of the language of the validation notice.

at a substantial competitive disadvantage in contravention of the express purpose of the Act.

Here, for example, Respondents would have been required to seek as many as four separate formal opinions from the FTC prior to enforcing the lender's mortgage rights. Meanwhile, during the time it took to obtain an FTC opinion, the debt collector would have absolutely no ability to protect its interest in the mortgaged property. This is particularly troublesome in foreclosure actions where time is of the essence and any delay can result in the value of the asset being substantially diminished.

2. Petitioner also asserts that permitting the bona fide error defense to apply to mistakes of law would eviscerate the safe harbor provision. Again, this argument is not well taken. Common sense alone dictates that the two provisions are not mutually exclusive, but rather can and should work hand-in-hand. While attorneys/debt collectors can seek to insulate themselves under the safe harbor provision when there is little or no case law guidance, or where they have failed to maintain reasonable procedures adapted to avoid errors, the bona fide error provision provides a more practical and cost effective safeguard. The defense allows ethical attorneys/debt collectors to defend against liability when their debt collection practices are not abusive and an unintentional mistake was made in the face of reasonable procedures in place to avoid the error. The safe harbor provision notwithstanding, finding that the

bona fide error defense applies to mistakes of law is not an "absurd" result. *Lamie*, 540 U.S. at 534.

Further, in granting summary judgment, Judge Gaughan implicitly found that application of the bona fide error defense to mistakes of law and the safe harbor provision are not mutually exclusive:

> [Petitioner] claims that [Respondents] could have requested an advisory opinion from the Federal Trade Commission, thereby ensuring that they acted in good faith. However, *[Respondents] were not obligated to do so* and the issue herein is not whether [Respondents] should have insulated themselves from liability but whether they acted in good faith.

Pet. App. at 38a-39a (emphasis added).

3. Next, Petitioner argues that if the bona fide error defense applies to legal mistakes, then aggressive debt collectors will be permitted to escape liability whenever there is no clear precedent. Petitioner's argument, however, ignores the fact that § 1692k(c) is an affirmative defense, and does not excuse mistakes, whether clerical or legal, unless the attorney/debt collector can prove by a preponderance of the evidence: "(1) that the presumed FDCPA violation was not intentional; (2) that the presumed FDCPA violation resulted from a bona fide error; and (3) that it maintained procedures reasonably adapted to avoid any such error." Pet. App. at 34a (citing *Kort v. Diversified Collecion Services, Inc.*, 394 F.3d 530,

537 (7th Cir. 2005). Accordingly, aggressive attorneys/ debt collectors can no more rely on the bona fide error defense for an intentional bad faith legal mistake than they could for an intentional bad faith clerical error.

4. Finally, Petitioner contends that the bona fide error defense should not apply to mistakes of law because it is more "common" to speak of procedures adapted to avoid clerical rather than legal errors. More common or not, the Tenth Circuit properly rejected this argument stating that "absent a clearer indication that Congress meant to limit the defense to clerical errors, we instead adhere to the unambiguous language of the statute as supported by the available history." *Johnson,* 305 F.3d at 1123. Again, it is a fundamental principle of statutory interpretation that "[w]hen the statute's language is plain, the sole function of the courts-at least where the disposition required by the text is not absurd-is to enforce it according to its terms." *Lamie*, 540 U.S. at 534.

Moreover, in addressing this same argument, the Sixth Circuit pointed out that "there is nothing unusual about attorney collectors maintaining procedures, such as frequent education and review of the FDCPA law, in order to avoid mistakes of law." Pet. App. at 13a. In other words, although it may be more common to speak in terms of procedures adapted to avoid clerical errors in connection with non-attorney debt collectors, there is absolutely nothing illogical about attorney collectors maintaining procedures reasonably adapted to avoid legal mistakes.

3. The Legislative History Of The FDCPA Shows That When Congress Enacted The Statute, It Did Not Intend To Adopt The Existing Judicial Interpretations Of TILA's Bona Fide Error Defense.

Petitioner claims that because the bona fide error defense in the FDCPA is identical to the one Congress originally enacted in TILA, Congress intend to incorporate the existing judicial interpretations of TILA's bona fide error provision into the FDCPA. In making this argument, Petitioner relies on the recent case of *Rowe v. N.H. Motor Transp. Ass'n*, 128 S. Ct. 989 (2008), wherein the Court stated that "when judicial interpretations have settled the meaning of an existing statutory provision, repetition of the same language in a new statute indicates, as a general matter, the intent to incorporate its judicial interpretations as well." *Id.* at 994. The problem with Petitioner's argument, however, is that it completely overlooks the intent of Congress as expressed in the legislative history of the FDCPA.

In *Rowe*, the Supreme Court, in interpreting the pre-emption provision in Federal Aviation Administration Authorization Act of 1994, adopted its previous judicial interpretation of a similar provision in the Airline Deregulation Act of 1978. *Id.* at 994. In doing so, however, the Court noted that when Congress copied the language of the pre-emption provision, it did so fully aware of the Supreme Court's prior interpretation of that language. *Id.* Indeed,

according to the *Rowe* Court, the legislative history showed that Congress specifically expressed its agreement with "the broad preemption interpretation adopted by the United States Supreme Court" relative to the Airline Deregulation Act of 1978. *Id.* at 995.

In this case, a review of the legislative history of the FDCPA does not show that Congress, in enacting the statute in 1977, was aware of the existing judicial interpretations of the bona fide error defense in TILA, or that it intended for the two provisions to be interpreted in the same manner. In fact, the legislative histories of the FDCPA and TILA show just the opposite.

Relative to the bona fide error defense in TILA, a review of the statute's legislative history, as noted by Petitioner, shows that "Congress . . . added the bona fide error defense only to address complaints from businessmen and others that 'mathematical and clerical errors' were 'inevitable' in the lending process." Petition at p. 18 (citing *Ratner v. Chemical Bank N.Y. Trust Co.,* 329 F.Supp. 270 (S.D.N.Y. 1971)). On the other hand, the legislative history of the FDCPA, which Petitioner completely ignores, shows that Congress did not intend to adopt the narrow judicial interpretations of the bona fide error defense in TILA. As the Tenth Circuit found in *Johnson*:

> Unlike TILA, the plain language of the FDCPA suggests no intent to limit the bona fide error defense to clerical errors. To the

> contrary, § 1692k(c) refers by its terms to any "error" that is "bona fide." We find no indication in the legislative history that Congress intended this broad language to mean anything other than what it says. Indeed, to the extent that the legislative history speaks to this issue, it suggests that the narrow reading advocated by [the plaintiff] is incorrect. In describing the bona fide error exception, the Senate Report stated: "A debt collector has no liability, however, if he violates the act *in any manner, including with regard to the act's coverage,* when such violation is unintentional and occurred despite procedures designed to avoid such violations" S.Rep. No. 95-382, at 5.

Johnson, 305 F.3d at 1123.

Although § 1692k(c) does not specifically state that the bona fide error defense applies to mistakes of law, the legislative history of the FDCPA clearly shows that Congress intended its application to be much broader than under TILA.

Further, if it was the intent of Congress that mistakes of law be excluded from the FDCPA, then it has had over thirty years to amend the FDCPA accordingly, just as it amended TILA in 1980. Indeed, just like TILA, the FDCPA has undergone numerous amendments since it was first enacted in 1977, yet Congress has not changed the language to specifically exclude legal mistakes.

B. The Issue Is Not Whether A Narrow Reading Of The Bona Fide Error Defense Is Consistent With The Purpose Of The FDCPA.

1. The attempts by Petitioner to construe the intent of Congress and the purpose of the FDCPA are entirely irrelevant. The issue is not whether a narrow reading of the bona fide error defense is consistent with the purpose of the FDCPA, nor whether a broad reading is inconsistent. Rather, the only issue is whether a reading of the plain language of § 1692k(c) produces "absurd" results when legal mistakes are applied to the bona fide error defense. *Lamie*, 540 U.S. at 534. As indicated, given the number of federal courts that have already found that the FDCPA's bona fide error defense applies to mistakes of law, it cannot be reasonably argued that the results of such an interpretation are "absurd."[4] Accordingly, contrary to Petitioner's assertions, it is of absolutely no consequence whether a narrow reading of the bona fide error defense is consistent with the FDCPA's purposes.

2. There is also no merit to Petitioner's claim that a reading of the plain language of the bona fide error defense to include mistakes of law frustrates

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[4] Indeed, an absurd result would be to subject the attorneys/debt collectors here to class action damages and attorney fee exposure because they made a judgment based upon existing law that turned out to be incorrect in retrospect after Judge Gaughan's decision on the motion to dismiss.

the purpose of the FDCPA. While Petitioner is correct that the purpose of the FDCPA is to protect consumers against debt collection abuses, Petitioner ignores the fact that in so doing, Congress did not intend to punish ethical attorneys/debt collectors who pursue collections in good faith. Congress expressly stated in the FDCPA that in addition to protecting consumers, it also intended "to insure that those debt collectors who refrain from using abusive debt collection practices are not competitively disadvantaged. . . ." 15 U.S.C. § 1692(e); *see also Pressley*, 760 F.2d at 925 (according to the legislative history, the FDCPA's purpose is "to protect consumers . . . without imposing unnecessary restrictions on ethical debt collectors.").

Petitioner argues that the bona fide error defense was not intended to apply to legal mistakes because "the FDCPA draws a clear line between proscribed and acceptable debt collection practices," and because "[d]ebt collectors know their obligation, and consumers know their rights." Petition at p. 20. Petitioner asserts that applying the bona fide error defense to mistakes of law will encourage attorneys/debt collectors to be "overly aggressive" because they can escape liability whenever the law is unsettled.

Once again the problem with Petitioner's argument is that attorneys/debt collectors, whether overly aggressive or not, cannot simply escape liability because the law is unsettled. Rather, as already discussed *supra* in Section II.A.3, the bona fide error provision in the FDCPA is an affirmative defense,

requiring proof, by a preponderance of the evidence, that the mistake was unintentional and made in good faith notwithstanding the maintenance of reasonable procedures to avoid the error. Pet. App. at 34a (citing *Kort*, 394 F.3d at 537). Thus, just as an attorney/debt collector cannot employ "overly aggressive" tactics and escape liability for clerical errors, an attorney/debt collector cannot escape liability simply by showing that the law is unsettled. Certainly, in this context, there is nothing illogical, inconsistent or absurd about the bona fide error defense including mistakes of law.

3. Petitioner also contends that holding attorneys/debt collectors strictly liable for violations of the FDCPA will not unduly burden them because there is a statutory cap on damages. This argument is simply disingenuous, as shown by the facts of this case alone. Petitioner, who incurred no actual damage as a result of the filing of the foreclosure action, filed a class action complaint subjecting Respondents to significant exposure of up to $500,000 or one percent of their net worth, plus attorney fees. The statutory cap on damages in the context of a class action is hardly a light burden or solace to ethical attorneys/debt collectors.

4. Next, Petitioner advances the position that eliminating mistakes of law from the bona fide error defense will not "create the 'absurd result' prophesied by the Sixth Circuit in this case – *viz.*, that attorney debt-collectors will be subject to liability for a violation of the FDCPA merely because they brought

a collection action that ultimately proved unsuccessful." Petition at p. 24. Again, Petitioner has missed the point. The issue is not whether eliminating mistakes of law from the bona fide error defense will produce "absurd" results, but instead whether a reading of the plain language of the statute as not limiting the bona fide error defense to clerical errors will produce "absurd" results.

Finally, Respondents will not be so presumptuous as to tell this Court what its intent was in *Heintz v. Jenkins*, 514 U.S. 291 (1995). Instead, Respondents would simply note that, at the very least, the Court hinted at the fact that the bona fide error defense applies to mistakes of law when it found that a litigating lawyer who brings, and then loses, a claim against a debtor is not automatically liable under the FDCPA because:

> [T]he Act says explicitly that a "debt collector" may not be held liable if he "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." § 1692k(c).

Id. at 295.

Debating this Court's intent in *Heintz,* however, is not necessary because a reading of the plain language of § 1692k(c) to include legal mistakes does not produce "absurd" results.

* * *

In summary, the Petition presents no sound basis for this Court to exercise jurisdiction. Contrary to Petitioner's argument, the federal courts are not "deeply divided" or "irreconcilably entrenched" over whether the bona fide error defense in the FDCPA applies to mistakes of law. Further, the plain language of the FDCPA and legislative history of the Act suggest no intent to limit the bona fide error defense to clerical errors.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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