No. 08-1200

IN THE

Supreme Court of the United States

KAREN L. JERMAN,

Petitioner,

v.

CARLISLE, MCNELLIE, RINI, KRAMER & ULRICH LPA AND ADRIENNE S. FOSTER,

Respondents.

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

BRIEF FOR THE NATIONAL ASSOCIATION OF RETAIL COLLECTION ATTORNEYS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICUS CURIAE*

The National Association of Retail Collection Attorneys (NARCA) is a nationwide, not-for-profit trade association of debt-collection attorneys. NARCA's members include over 700 law firms, all of whom must meet association standards designed to ensure experience and professionalism. Members are also guided by NARCA's code of ethics, which imposes an obligation of self-discipline beyond the requirements of pertinent laws and regulations.

NARCA members are regularly involved in the lawful collection of past-due consumer debts and must therefore interpret and apply the often-unsettled requirements of applicable collection law, principally the Fair Debt Collection Practices Act (FDCPA or Act), Pub. L. No. 95-109, 91 Stat. 874 (1977). NARCA has a strong interest in ensuring that the Act's bona fide error defense, 15 U.S.C. § 1692k(c), is interpreted in a way that allows collection attorneys to discharge their ethical duty to advance their clients' legitimate interests—within the bounds of existing law—without constantly exposing themselves to substantial personal liability. NARCA has participated as *amicus curiae* in other cases involving the interpretation or application of the Act. *See, e.g.*, *Heintz* v. *Jenkins*, 514 U.S. 291 (1995); *Guerrero* v. *RJM Acquisitions LLC*, 499 F.3d 926 (9th Cir. 2007).[1]

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[1] No counsel for a party authored any part of this brief—the filing of which has been consented to by all parties—and no person other than *amicus curiae*, its members, or its counsel made a monetary contribution to the preparation or submission of the brief.

SUMMARY OF ARGUMENT

Petitioner Karen Jerman's request that this Court amend the FDCPA's bona fide error provision, 15 U.S.C. § 1692k(c), by inserting an atextual limitation regarding the types of errors that the provision encompasses, should be rejected.

I. Excluding legal errors from the scope of § 1692k(c) would interfere with collection attorneys' discharge of their ethical duty to advance their clients' legitimate interests within the confines of existing law. Collection law is often unsettled, with questions about whether a particular practice violates the Act either unaddressed by courts or answered in different ways by different courts. Under Jerman's view, an attorney facing such uncertainty would—unless she was willing to expose herself to the risk of strict personal liability—have to resolve it contrary to her clients' legitimate interests, even if there was substantial authority (even binding in-circuit authority) holding that the relevant practice was permitted by the Act. Particularly given that FDCPA liability can be substantial, this Court should hesitate to conclude that Congress intended to force such an untenable choice, and to punish attorneys who act in good faith to discharge their professional obligation to their clients. Such hesitation is not only consistent with the Court's refusal to impose a similar choice under the judicially created qualified-immunity doctrine, but also appropriate given that establishment of attorneys' ethical duties is the traditional province of the judiciary rather than the legislature, and of the States rather than the federal government.

The countervailing policy arguments that Jerman and the government advance are without merit. For example, debt collectors would still have an incentive to

seek advisory opinions from the Federal Trade Commission (FTC or Commission), as that is the only path to categorical immunity from liability. And Jerman offers no empirical support for her claim that respondents' view would discourage private FDCPA lawsuits.

II. Jerman's proposed judicial gloss is also inconsistent with the Act's plain language. By its terms, § 1692k(c) applies to "error[s]," without any qualification regarding the particular type of error (legal, clerical, etc.). Moreover, Congress plainly knows how to express an intent to exclude legal errors from a bona fide error defense, because the bona fide error provision in the Truth-in-Lending Act (TILA), though otherwise identical to § 1692k(c), specifically excludes most legal errors. The historical argument that Jerman and the government advance in response to this point fails because there was in fact no judicial consensus regarding the meaning of the TILA provision that Congress could have intended to ratify in adopting the FDCPA.

Nor does the requirement in § 1692k(c) that a violation be "not intentional" indicate an intent to exclude legal errors. Congress sometimes uses "intentional" as a synonym for "willful"—a word that Jerman and the government concede would allow for excusal of legal errors—and doing so here would be entirely sensible given the Act's myriad requirements and the substantial liability imposed for violating them.

Finally, the "procedures reasonably adapted" requirement is completely consistent with the inclusion of legal errors in § 1692k(c). There are certainly procedures that can minimize the chance of such errors, and Jerman's suggestion that courts have encountered particular difficulty in applying § 1692k(c) to legal errors is both wrong and irrelevant.

ARGUMENT

I. EXCLUDING LEGAL ERRORS FROM THE SCOPE OF § 1692k(c) WOULD INTERFERE WITH ATTORNEYS' ABILITY TO DISCHARGE THEIR ETHICAL OBLIGATION TO THEIR CLIENTS

A. Collection Attorneys Should Be Able To Honor Their Professional Duty To Advance Their Clients' Legitimate Interests Within The Bounds Of Existing Law Without Exposing Themselves To Substantial Personal Liability

The Fair Debt Collection Practices Act imposes a multitude of requirements on those engaged in the lawful practice of collecting consumer debts from individuals who have voluntarily incurred those debts in exchange for goods or services. The Act also imposes civil liability for violations of these requirements, including actual and statutory damages, plus costs and reasonable attorney's fees. *See* 15 U.S.C. § 1692k.[2] To ensure that liability did not fall on those who sought in good faith to comply with the Act, Congress provided an affirmative defense for violations that are "not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid any such error." *Id.* § 1692k(c).

Petitioner Karen Jerman and her amici ask the Court to add an atextual limitation to this defense that would exclude from its scope bona fide legal errors, i.e., good-faith errors regarding what is required by the Act

[2] Because this liability can be imposed even when plaintiffs do not prove any *mens rea*, several circuits have described the Act as a strict-liability statute. *See, e.g.*, *Clark* v. *Capital Credit & Collection Servs., Inc.*, 460 F.3d 1162, 1175 (9th Cir. 2006).

(or by other laws that can trigger an FDCPA violation). Among the many reasons to reject that request is that Jerman's proposed judicial amendment to the Act would interfere with attorneys' ability to discharge their ethical obligation to advance their clients' legitimate interests.

1. Like all attorneys, collection attorneys have a professional duty to represent their clients zealously and advance the clients' legitimate interests to the extent the law allows. *See, e.g.*, ABA Model R. Prof'l Conduct, Preamble (2004) (noting "the lawyer's obligation zealously to protect and pursue a client's legitimate interests, within the bounds of the law"). In the area of collection law, however (as in many other areas), it is often unclear precisely what "the law allows," either because a particular question has not been answered or because different courts have answered it in different ways. Under Jerman's interpretation, an attorney facing such uncertainty would either have to expose herself to strict personal liability under the Act or else resolve the uncertainty contrary to her client's interests, even where there was substantial authority for the position that would advance those interests. That interpretation should be rejected. Congress provided protection from liability for those who err in good faith. The statute should not be judicially rewritten to remove that protection from attorneys who act to advance their clients' legitimate interests—as their professional duties require them to do—when they have a good-faith legal basis for doing so.

a. Collection law is characterized by a number of legal questions that are unresolved or the subject of conflicting judicial decisions. For example, the Ninth Circuit has held that the FDCPA does not apply to a debt collector's communications with a debtor's attor-

ney. *See Guerrero* v. *RJM Acquisitions LLC*, 499 F.3d 926, 936 (9th Cir. 2007) (per curiam) ("[W]e hold that communications directed only to a debtor's attorney, and unaccompanied by any threat to contact the debtor, are not actionable under the Act." (footnote omitted)). The court reasoned that "the Act's purpose is to protect unsophisticated debtors from abusive debt collectors, and once a consumer obtains this protection by procuring legal counsel, the Act's protections become superfluous and therefore its provisions no longer apply." *Id.* at 929. The Second Circuit has expressed a similar view, though without actually deciding the issue. *See Kropelnicki* v. *Siegel*, 290 F.3d 118, 128 (2d Cir. 2002). Two other circuits, however, have reached the opposite conclusion. *See Sayyed* v. *Wolpoff & Abramson*, 485 F.3d 226, 234 (4th Cir. 2007) ("[P]lainly, the FDCPA covers communications to a debtor's attorney."); *Evory* v. *RJM Acquisitions Funding L.L.C.*, 505 F.3d 769, 773-775 (7th Cir. 2007). Other lower courts are likewise divided. *Compare Duraney* v. *Washington Mut. Bank F.A.*, No. 2:07-cv-13, 2008 WL 4204821, at *14 (W.D. Pa. Sept. 11, 2008) (holding that communications with counsel are not covered by the Act), *with Capital Credit & Collection Serv., Inc.* v. *Armani*, 206 P.3d 1114, 1119-1120 (Or. Ct. App. 2009) (holding the opposite).

Under Jerman's crabbed reading of the Act, this deep division of authority would often pose a severe dilemma for collection attorneys. An attorney's client will frequently benefit from having the attorney contact the debtor's counsel, to discuss a settlement or otherwise to move the case closer to resolution. *See Campuzano-Burgos* v. *Midland Credit Mgmt., Inc.*, 550 F.3d 294, 299 (3d Cir. 2008) (citing and following other circuits in observing that settlement efforts can benefit both sides and are consistent with the purposes of the

Act). But collection attorneys would be deterred from pursuing their clients' interests in this sensible fashion if they knew that their settlement overtures might turn them into defendants in an FDCPA lawsuit.

The dilemma is most clearly presented for an attorney practicing in a circuit that has not addressed the issue. That attorney would not have the benefit of any binding precedent, but could point to substantial authority suggesting that her communications with a debtor's counsel are not covered by the Act. Yet the attorney would have to choose between: (1) disregarding her ethical obligation to advance her client's interest by acting in accordance with that substantial authority, and (2) accepting the risk of being held strictly liable if, in an ensuing FDCPA lawsuit against her regarding the content of her communications with debtor's counsel, the court ultimately chose the other side of the divide regarding the Act's coverage of such communications.[3]

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[3] It is no answer to say that this choice is not actually onerous because the attorney would need to refrain only from communicating with debtor's counsel in an abusive or misleading way. The FDCPA's broad and often vague requirements can be violated by engaging in conduct that, under normal circumstances, would not be considered remotely abusive or misleading. In *Guerrero*, for example, the communication consisted of a letter to the debtor's attorney stating that—per the attorney's request—the debt at issue was being verified. "Apparently taking every precaution to comply with the Act, [the author] included in its letter … the statement 'This is an attempt to collect a debt[,]' … language [that] is *required* by the Act in all initial communications[.]" *Guerrero*, 499 F.3d at 931 (emphasis added). Because the letter was not an initial communication, however, two of the four judges who heard the case (the district judge and the dissenter on the court of appeals) concluded that the letter violated 15 U.S.C. § 1692g(b).

Even an attorney in the Ninth Circuit could not, under Jerman's view, take comfort from the thought that *Guerrero* permits her to communicate with debtors' counsel, when doing so was in her clients' interests, without fear of exposing herself to FDCPA liability. A debtor, after all, could still bring suit against the attorney, pointing to out-of-circuit decisions and arguing that *Guerrero* is wrong and should be overruled. If the en banc Ninth Circuit accepted that argument, the attorney who had relied in good faith on binding in-circuit precedent would nonetheless face liability under the Act. Or, of course, this Court could at any point resolve the circuit conflict—and if the Court held that *Guerrero* and similar decisions were wrong, then attorneys in the Ninth Circuit (and perhaps elsewhere) who had followed *Guerrero* or similar in-circuit authority in good faith would suddenly find themselves exposed to liability, unless the Act's statute of limitations (15 U.S.C. § 1692k(d)) had already run. There is no basis to conclude that Congress intended such a harsh result.

b. This very case provides another example of how Jerman's position would force attorneys to choose between avoiding exposure to strict personal liability and discharging their professional obligation to advance their clients' legitimate interests within the limits of existing law. Jerman alleged that respondents violated the Act by stating in their validation notice that in order to dispute the validity of her debt, she had to do so in writing. Pet. App. 3a. The courts of appeals are divided—and were when respondents sent the validation notice to Jerman—over whether in fact 15 U.S.C. § 1692g(a)(3) requires disputes to be in writing. The Third Circuit, the first court of appeals to address the issue, held that there is such a requirement. *See Graziano* v. *Harrison*, 950 F.2d 107, 111-112 (3d Cir.

1991). Fourteen years later, the Ninth Circuit took the opposite position. *See Camacho* v. *Bridgeport Fin. Inc.*, 430 F.3d 1078, 1082 (9th Cir. 2005).[4] And here again, district courts in other circuits are divided on the question. *Compare*, *e.g.*, *Wallace* v. *Capital One Bank*, 168 F. Supp. 2d 526, 529 (D. Md. 2001) (finding an in-writing requirement), *with Baez* v. *Wagner & Hunt, P.A.*, 442 F. Supp. 2d 1273, 1276-1277 (S.D. Fla. 2006) (finding no such requirement).

In considering the issue, the Third Circuit explained that "there are strong reasons to prefer that a dispute of a debt collection be in writing: a writing creates a lasting record of the fact that the debt has been disputed, and thus avoids a source of potential conflicts." *Graziano*, 950 F.2d at 112. Such a "lasting record" benefits debt collectors by reducing the chance of later false claims by debtors (perhaps in the context of an FDCPA action) that they disputed a debt orally. Yet under Jerman's proposed judicial revision of the Act, attorneys could not secure this legitimate benefit for clients without risking personal liability. Again, this would be true for attorneys in circuits where the issue had not been resolved or even had been resolved in favor of an in-writing requirement. An attorney would simply have to explain to clients that despite her good-faith basis for believing that an in-writing requirement is lawful, the risk of a court concluding otherwise had deterred her from discharging her ethical obligation to advance those clients' legitimate interests.

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[4] Jerman wrongly states (Br. 6 n.1) that *Camacho* is "the only on-point court of appeals decision to address the question." As both *Graziano* itself and extensive subsequent case law confirm, the Third Circuit squarely decided this issue.

c. Nor is this problem limited to conflicting interpretations of the FDCPA itself, because violations of the Act can turn on other laws, including state laws. For example, several courts have held that it is a violation of the Act to file a lawsuit to recover a debt (or even to suggest an intent to do so) if the applicable statute of limitations has expired. *See, e.g.*, *Freyermuth* v. *Credit Bureau Servs., Inc.*, 248 F.3d 767, 771 (8th Cir. 2001); *Gervais* v. *Riddle & Assocs., P.C.*, 479 F. Supp. 2d 270, 273 (D. Conn. 2007) (citing *Stepney* v. *Outsourcing Solutions, Inc.*, No. 97 C 5288, 1997 WL 722972, at *5 (N.D. Ill. Nov. 13, 1997), and *Kimber* v. *Federal Fin. Corp.*, 668 F. Supp. 1480, 1488-1490 (M.D. Ala. 1987)). It is often far from clear, however, whether a claim to recover a particular debt would be time-barred. For example, in *Simmons* v. *Miller*, 970 F. Supp. 661 (S.D. Ind. 1997), *abrogated on other grounds by Gearing* v. *Check Brokerage Corp.*, 233 F.3d 469, 472 (7th Cir. 2000), the court noted that Indiana law was unresolved regarding whether a particular type of claim for recovery of a debt had a two-year or a six-year statute of limitations, *see* 970 F. Supp. at 664. An attorney whose client wanted to take otherwise-lawful action to recover a four-year-old debt governed by Indiana law could advance her client's interests only by taking on the risk that if it was subsequently determined as a matter of state law that the shorter limitations period applied, she would be subject to liability under the FDCPA, and would have no viable defense.[5]

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[5] The *Simmons* court concluded that the bona fide error defense would normally protect attorneys from liability for seeking to recover a stale debt. *See* 970 F. Supp. at 664 (citing Indiana R. Prof'l Conduct 3.1); *accord, e.g.*, *Almand* v. *Reynolds & Robin, P.C.*, 485 F. Supp. 2d 1361, 1365 (M.D. Ga. 2007) (finding bona fide

d. A collection attorney's liability in these scenarios can be substantial. The Act provides for statutory and actual damages, including statutory damages in class actions up to the lesser of $500,000 or one percent of the collector's net worth. *See* 15 U.S.C. § 1692k(a)(2)(B). The Act also provides for costs and reasonable attorney's fees—recovery of which is mandatory when an FDCPA violation is proved. *Id.* § 1692k(a)(3). Those fees can be high, even if the actual and statutory damages are not. In *Guerrero*, for example, the district court awarded over $45,000 in fees and costs even though the plaintiff recovered only $2,545 in damages. *See* 499 F.3d at 932; *see also id.* at 941 (setting aside the fee award in light of the reversal as to the underlying FDCPA violation). Similarly, the court in *Norton* v. *Wilshire Credit Corp.*, 36 F. Supp. 2d 216, 221 (D.N.J. 1999), awarded almost $58,000 in fees and costs even though the plaintiff's net recovery was $4,150. These cases belie Jerman's cavalier assertion that the FDCPA imposes only "modest financial liability." Pet. Br. 9; *see also id.* at 35 (ignoring attorney's fees and actual damages in discussing FDCPA liability); *id.* at 4 (ignoring fees); *compare id.* at 31 (describing the acquisition of $250—one quarter of the maximum statutory damages in an individual FDCPA case—as "a very real financial benefit").

e. The fact that Jerman's interpretation of the Act would cause the interference described above with attorneys' ethical obligations to their clients makes it

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error defense satisfied where "there is no controlling or even persuasive authority from Georgia's highest courts regarding which statute of limitations applies to Plaintiff's debt"). Under Jerman's view, there would be no such protection.

particularly inappropriate to adopt that interpretation absent clear evidence that Congress intended it. Establishment of professional standards for the bar and oversight of lawyers' conduct are traditionally the all-but-exclusive province of the judiciary. *See Paul E. Iacono Structural Eng'r, Inc.* v. *Humphrey*, 722 F.2d 435, 439 (9th Cir. 1983) ("[T]he regulation of lawyer conduct is the province of the courts, not Congress."); *Smith County Educ. Ass'n* v. *Anderson*, 676 S.W.2d 328, 334 (Tenn. 1984) ("The Legislature … is without authority to enact laws which impair the attorney's ability to fulfill his ethical duties[.]"), *quoted in Dunn* v. *Alabama State Univ. Bd. of Trs.*, 628 So. 2d 519, 529 (Ala. 1993); *Minnesota Star & Tribune Co.* v. *Housing & Redev. Auth.*, 246 N.W.2d 448, 452 (Minn. 1976) (similar); *In re Advisory Comm. on Prof'l Ethics Opinion 621*, 608 A.2d 880, 886 (N.J. 1992) (similar). The Court therefore should not conclude that Congress intended to intrude in this area unless that conclusion is dictated by statutory text (which here it plainly is not). *Cf. Miller* v. *French*, 530 U.S. 327, 336 (2000) ("[T]he Government asserts that reading [18 U.S.C.] § 3626(e)(2) to remove [district courts' traditional] equitable power would raise serious separation of powers questions, and therefore should be avoided under the canon of constitutional doubt. … [W]e do not lightly assume that Congress meant to restrict the equitable powers of the federal courts, and we agree that constitutionally doubtful constructions should be avoided where fairly possible." (internal quotation marks omitted)).

As Jerman notes, oversight of attorneys is also traditionally the province of the States. Pet. Br. 27; *see also, e.g.*, *ABA* v. *FTC*, 430 F.3d 457, 471 (D.C. Cir. 2005). And this Court has stated that "Congress should make its intention clear and manifest if it intends to

pre-empt the historic powers of the States." *Will* v. *Michigan Dep't of State Police*, 491 U.S. 58, 65 (1989) (internal quotation marks omitted). Congress has not done so here.

2. As discussed, in situations like these attorneys would be subject to civil liability even when extant judicial precedent gave them a substantial good-faith basis to conclude that the relevant conduct was lawful. This Court has prohibited the imposition of monetary liability in closely analogous circumstances. Specifically, notwithstanding the absence of any statutory provision for the defense, the Court has held that qualified immunity protects government officials from liability for money damages when there are conflicting judicial decisions on the relevant issue: "If judges … disagree on a constitutional question, it is unfair to subject police to money damages for picking the losing side of the controversy." *Wilson* v. *Layne*, 526 U.S. 603, 618 (1999). The same should be true for purposes of the bona fide error defense.

The government argues in response that the qualified-immunity analogy is inapt because the "'purpose of qualified immunity is to protect the State and its officials from overenforcement of federal rights,'" and "[t]he FDCPA … contains no indication that Congress regarded 'overenforcement' as a potential problem." U.S. Br. 18 (quoting *Johnson* v. *Frankel*, 520 U.S. 911, 919 (1997)). The government is right about the purpose of qualified immunity but wrong about whether Congress was concerned about "overenforcement" of the Act. Congress's inclusion in the Act of not one but two mechanisms by which debt collectors can avoid liability (*see* 15 U.S.C. § 1692k(c), (e)) strongly suggests that Congress was indeed concerned about "overenforcement." Moreover, in the same section imposing liability

for FDCPA violations, Congress provided for fee-shifting to *defendants* "[o]n a finding by the court that an action … was brought in bad faith and for the purpose of harassment." *Id.* § 1692k(a)(3). The purpose of such fee-shifting, too, is to prevent overenforcement. *See* S. Rep. No. 95-382, at 5 (1977) (noting that fee shifting was intended "to protect debt collectors from nuisance lawsuits"). The similarities between the qualified-immunity context and the context of this case thus counsel in favor of the same approach in both.

Jerman asserts, however (Br. 17), that qualified immunity "is premised on the special need to protect government officials' exercise of discretion in the conduct of their public responsibilities, and for that reason has no application to private conduct." Hence, Jerman reasons (*id.*), it "would be a very unexpected thing for Congress to" include legal errors in the bona fide error defense. But this overlooks the fact that the conduct and harm at issue in qualified-immunity cases are often much more severe than those in FDCPA cases. Qualified-immunity cases can involve conduct that "shocks the conscience," as well as harm such as physical injuries (even death) or deprivation of individuals' liberty. *See, e.g.*, *Porter* v. *Osborn*, 546 F.3d 1131, 1132 (9th Cir. 2008) (fatal police shooting alleged to shock the conscience). The conduct at issue in FDCPA cases—here, for example, stating that a debt could be disputed only in writing—is not in the same realm. Nor is the harm from most FDCPA violations remotely comparable to the harm inflicted in most qualified-immunity cases. Indeed, Congress's provision of statutory damages for FDCPA violations suggests a recognition that many such violations cause no actual harm. Given these respects in which FDCPA violations are generally orders of magnitude less severe than those at issue in quali-

fied-immunity cases, it would not be at all "unexpected" (Pet. Br. 17) for Congress to ameliorate the harshness of the Act's strict liability by providing protection for FDCPA violations similar to that which obtains in qualified-immunity cases, notwithstanding that the defendants are private individuals rather than government actors.[6]

Jerman also asserts (Br. 16 & n.3) that qualified immunity is distinguishable because it provides immunity only for money damages and because it is a judicial rather than statutory doctrine. Jerman does not explain, however, why either difference is meaningful. In particular, she provides no basis to conclude that declaratory or injunctive relief plays a role in more than a trivial percentage of FDCPA cases, such that Congress's provision of immunity from such relief would be of consequence. Indeed, "[m]ost courts have found equitable relief unavailable [in] … private [FDCPA] actions." *Weiss* v. *Regal Collections*, 385 F.3d 337, 341 (3d Cir. 2004). Nor does Jerman offer any reason to hold that the scope of congressionally provided immunity should be determined differently than that of judicially provided immunity (or even explain how any such

[6] As this discussion should make clear, the issue here is not whether the rationales for qualified immunity are "transferable to private parties," *Wyatt* v. *Cole*, 504 U.S. 158, 168 (1992), because respondents do not seek a judicial expansion of that doctrine. The question is whether Congress intended to provide protection similar to qualified immunity to those who violate the Act only because of a good-faith legal error. As this Court has recognized, there are sound reasons for Congress to have done so: "[P]rinciples of equality and fairness may suggest … that private citizens who rely unsuspectingly on state laws they … have no reason to believe are invalid should have some protection from liability." *Id.*

differences would support, rather than undermine, her preferred interpretation). These points thus provide no basis to meaningfully distinguish the qualified-immunity context from this one.

B. The Countervailing Policy Arguments Advanced By Jerman And The Government Are Without Merit

Though not directly addressing the problem discussed above regarding interference with attorneys' ethical obligations, Jerman and the government offer various countervailing policy arguments that they say support their position. None has merit.

First, Jerman argues that interpreting § 1692k(c) to encompass legal errors would put "law-abiding" debt collectors at a competitive disadvantage relative to "aggressive" ones, and create a "race to the bottom that will leave the field to collectors with the fewest scruples." Pet. Br. 32; *accord id.* at 11.[7] But as Jerman subtly concedes, this argument at best would be true *only* when the relevant unsettled question regarding the meaning of the Act—or of another statute that can trigger an FDCPA violation—is ultimately resolved in a way that favors debtors. *See id.* at 31 ("[T]he Sixth Circuit's decision provides a competitive advantage to the collectors who take the more aggressive, *but incorrect*, view of the law." (emphasis added)). As for any ques-

[7] Jerman's suggestion that collection attorneys can be divided into two groups, "aggressive" and "law-abiding," is wrong and offensive. Collection attorneys (like other attorneys) who "aggressive[ly]" advance their clients' legitimate interests within the bounds of existing law are entirely "law-abiding," and in no way lacking in "scruples."

tion that is instead resolved in a way that does not favor debtors, it is Jerman's interpretation of the Act, rather than respondents', that puts what Jerman refers to as "law-abiding" collectors at a competitive disadvantage. Those collectors will have refused, because of fear of substantial personal liability, to advance their clients' legitimate interests in a manner that the law actually permits, unlike other collectors (those Jerman refers to as "aggressive") who will have correctly interpreted the statute. Jerman's "race to the bottom" argument would thus have merit only if statutory questions were always resolved in debtors' favor. That is obviously not the reality.[8]

Jerman also contends (Br. 32-34) that the Sixth Circuit's construction of the Act would discourage private FDCPA lawsuits, in derogation of Congress's intent to enforce the statute in part through such actions. She provides no empirical evidence to support that contention, however, and specifically cites nothing indicating that private FDCPA actions have declined in any circuit that previously adopted the rule that the court of appeals adopted here. Moreover, several courts have suggested that some private FDCPA actions may well need discouragement: As these courts have noted, there has been "a proliferation of litigation" under the Act. *Federal Home Loan Mortgage Corp.* v. *Lamar*,

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[8] Although lower courts are divided over whether § 1692g(a)(3) requires debts to be disputed in writing, *see supra* pages 8-9, Jerman repeatedly suggests that the issue has been resolved in debtors' favor. *See* Pet. Br. 32 (referring to those who conclude that debts need not be disputed in writing as "correctly construing … the Act"); *id.* at 5 (describing inclusion of an in-writing requirement as "[i]n conflict with the statute"); *id.* at 3 (similar).

503 F.3d 504, 513 (6th Cir. 2007). This "cottage industry" of "professional plaintiffs," moreover, "does not bring suits to remedy the widespread and serious national problem of abuse that the Senate observed in adopting the legislation, nor to ferret out collection abuse in the form[s the Senate identified]." *Id.* at 513, 514 (citation and internal quotation marks omitted). Rather, these plaintiffs frequently bring "lawsuits based on frivolous misinterpretations or nonsensical assertions of being led astray." *Id.* at 514; *see also, e.g.*, *Turner* v. *Asset Acceptance, LLC*, 302 F. Supp. 2d 56, 59 (E.D.N.Y. 2004). While Jerman laments the possibility that such baseless lawsuits will diminish (though again without offering any supporting evidence), this Court should not similarly be concerned.

The government likewise goes astray in asserting (Br. 19-20) that under the Sixth Circuit's decision, "collectors will have little if any incentive to seek an advisory opinion from the FTC." In fact, debt collectors would continue to have a strong incentive, because under § 1692k(e)—the so-called safe-harbor provision—collectors who rely in good faith on an FTC advisory opinion are *categorically immune* from liability. By contrast, those who forego the advisory-opinion option are not; they instead run the risk that a court will conclude that their errors do not qualify for the bona fide error defense. A court might hold, for example, that the collector's procedures were not "reasonably adapted to prevent" the relevant error, or that, irrespective of procedures, the state of the law or the nature of the error was such that there could not have been a good-faith basis to do (or not to do) what the col-

lector did (or failed to do).[9] The advisory-opinion process would thus continue to have a role under respondents' interpretation of the Act.[10]

The government also contends (Br. 20) that interpreting § 1692k(c) to include legal errors would "undercut[] the FTC's clarification and elaboration of the FDCPA's requirements in a manner at odds with Congress's purpose." But the government cites nothing (either in the statute, its legislative history, or interpretive case law) to suggest that "Congress's purpose" in providing the safe-harbor defense was to benefit the public through FTC "clarification and elaboration." And Congress's placement of that defense in the section of the Act dealing with civil liability indicates that, to the contrary, the purpose of advisory opinions is precisely what the statute says, namely to provide an avenue by which debt collectors can immunize themselves from civil liability. The notion that Congress additionally envisioned a substantial "clarification and elaboration" objective for advisory opinions is particularly dubious given Congress's express bar on FTC rulemaking

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[9] As these possible bases for rejecting an assertion of the bona fide error defense show, the government is wrong in stating (Br. 9) that under respondents' interpretation, "civil liability under the FDCPA would [effectively] be limited to practices that have been clearly held to violate the statute."

[10] Jerman relatedly argues (Br. 29 n.15) that under respondents' view, debt collectors could "evade" the contours of the safe-harbor defense by relying on FTC staff opinions and then invoking the bona fide error defense. But again, such collectors would not enjoy the categorical immunity that comes with satisfying the safe-harbor requirements. In any event, Jerman does not explain why it would be undesirable to encourage debt collectors to look to staff opinions for guidance regarding compliance with the Act.

under the Act, *see* § 1692*l*(d); *see also* S. Rep. No. 95-382, at 6—which has led courts to suggest that Commission advisory opinions are not entitled to any particular weight, *see, e.g.*, *Rosenau* v. *Unifund Corp.*, 539 F.3d 218, 225 (3d Cir. 2008); *Lewis* v. *ACB Bus. Servs., Inc.*, 135 F.3d 389, 399 (6th Cir. 1998) (citing cases).

Finally, the picture that Jerman and the government attempt to paint of a Commission ready and willing to promptly answer questions regarding the Act's coverage is inconsistent with reality. To begin with, the Commission can take months or even longer to issue advisory opinions. For example, the Commission waited over 16 months to issue a short (two-page) opinion regarding the interplay between the FDCPA and another statute. *See* Letter to Rozanne Andersen and Andrew Beato (June 23, 2009), *available at* http://www.ftc.gov/os/statutes/andersonbeatoletter.pdf. Such lengthy delays render the process highly impractical, and cannot be squared with Jerman's characterizations of it as "simple" (Br. 28) and "easy" (Br. 34). More importantly, the Commission has no obligation to issue opinions when requested, and in fact refuses to do so when there is relevant extant case law. *See* Letter to Rozanne Andersen and Andrew Beato (July 28, 2006) (attached as Appendix A) (citing 16 C.F.R. § 1.1(a) (FTC may issue opinions only when "there is no clear Commission or court precedent")). This may explain why Commission opinions regarding the FDCPA are so rare: To NARCA's knowledge, the Commission has issued fewer than *half a dozen* such opinions in the 30-plus years since passage of the Act. In any event, the

FTC's position makes clear that for many collectors, securing an advisory opinion is simply not an option.[11]

II. A TEXTUAL ANALYSIS CONFIRMS THE SIXTH CIRCUIT'S INTERPRETATION OF THE ACT

A. The Plain Text Of § 1692k(c)—Unlike That Of Its Counterpart In The Truth-In-Lending Act—Includes No Exception For Legal Errors

The reasons outlined in Part I for refusing to exclude legal errors from the scope of the FDCPA's bona fide error defense would of course carry little or no weight if the statutory text commanded such exclusion. But that is not the case. To the contrary, the plain language of the Act all but requires that legal errors be *in*cluded. That language simply provides (in relevant part) that a person may not be held liable in a private civil action for a violation that "was not intentional and resulted from a bona fide error." § 1692k(c). There are no additional words that limit the nature of covered "error[s]" to clerical or similar errors, as Jerman would have it. The all-but-conclusive inference to be drawn from that omission is that Congress did not intend to limit application of the defense in the way that Jerman argues. *See, e.g.*, *Connecticut Nat'l Bank* v. *Germain*, 503 U.S. 249, 253-254 (1992) ("[A] legislature says in a statute what it means and means in a statute what it says there. When the words of a statute are unambiguous, then, … *judicial inquiry is complete*." (emphasis

[11] Moreover, the FTC of course cannot resolve questions that do not directly implicate the Act but that can trigger a violation of it, such as which state statute of limitations applies to a particular type of debt.

added) (citations and internal quotation marks omitted)).[12]

That inference is stronger still when the language of § 1692k(c) is compared to that of its counterpart in the Truth-in-Lending Act, Pub. L. No. 90-321, tit. I, 82 Stat. 146 (1968). TILA and the FDCPA are subchapters of a single statute, the Consumer Credit Protection Act. As the court of appeals observed here (echoing similar observations by other circuits), the first subchapter, TILA, includes a bona fide error defense that contains the same language that appears in § 1692k(c). *See* Pet. App. 8a-10a (citing *Johnson* v. *Riddle*, 305 F.3d 1107, 1122-1123 (10th Cir. 2002), and *Jenkins* v. *Heintz*, 124 F.3d 824, 832 n.7 (7th Cir. 1997)). The TILA provision, however, also includes a second clause not found in the FDCPA—a clause specifically defining bona fide errors to exclude most legal errors. *See* 15 U.S.C. § 1640(c) ("[A]n error of legal judgment with respect to a person's obligations under this subchapter is not a bona fide error."). The absence of a similar clause in the FDCPA reinforces the conclusion drawn from the Act's plain language: § 1692k(c) *does* encompass legal errors. Jerman's contrary argument would render TILA's extra clause superfluous, giving the same

[12] The fact that the Act did not initially cover attorneys does not alter this conclusion, because non-lawyers can also make legal errors, i.e., errors regarding the Act's coverage. Indeed, the Act's legislative history makes clear that Congress *did* consider legal errors in 1977. *See* S. Rep. No. 95-382, at 5 (§ 1692k(c) can provide protection for violating the Act "in any manner, including with regard to the act's coverage"). If anything, the fact that Congress later removed the attorney exemption without saying that legal errors were excluded—as it since had with TILA, *see infra* pages 25-26—only bolsters the conclusion that they are not.

meaning to the two bona fide error provisions notwithstanding the additional defining language in § 1640(c). That position runs afoul of "one of the most basic interpretive canons, that '[a] statute is to be construed so that effect is given to all its provisions.'" *Corley* v. *United States*, 129 S. Ct. 1558, 1566 (2009) (alteration in original) (quoting *Hibbs* v. *Winn*, 542 U.S. 88, 101 (2004)) (internal quotation marks omitted).

Jerman and the government respond to this point with a historical argument. *See* Pet. Br. 7, 12, 22, 41; U.S. Br. 9, 24-25. When the FDCPA was enacted in 1977, they note, TILA's bona fide error provision did not contain the extra clause excluding legal errors. In adopting the FDCPA, Congress thus copied TILA's provision verbatim. And that provision, Jerman and the government assert, had at that time consistently been interpreted to exclude legal errors. Congress should be deemed to have known about this legal consensus, the argument runs, and to have intended the same construction to be applied to the identically worded provision in the FDCPA. This argument fails for several reasons.

First, the premise that there was a settled judicial construction of TILA's bona fide error provision when Congress adopted the FDCPA is wrong. To the contrary, "two different interpretations of § 1640(c) emerged in the 1970s—one view construing it to apply only to mistakes of a clerical or mathematical nature and the other construing § 1640(c) more broadly to encompass good faith efforts at compliance." *Herrera* v. *First N. Sav. & Loan Ass'n*, 805 F.2d 896, 900 (10th Cir. 1986); *accord Ives* v. *W.T. Grant Co.*, 522 F.2d 749, 757 (2d Cir. 1975) ("[TILA's] 'unintentional violation' provision has been the subject of substantial litigation, and two different analyses have emerged."). This stands in

stark contrast to the "settled interpretation" cases that Jerman and the government cite (Pet. Br. 44; U.S. Br. 24-25). In every one of those cases, either this Court itself had previously construed the relevant language or *every* lower court to address the issue had reached the same conclusion. *See Rowe* v. *New Hampshire Motor Transp. Ass'n*, 128 S. Ct. 989, 994 (2008) (prior interpretation by this Court); *Cannon* v. *University of Chi.*, 441 U.S. 677, 696 (1979) (uniform decisions by "a distinguished panel of the … Fifth Circuit" and "at least a dozen other federal courts"); *Bragdon* v. *Abbott*, 524 U.S. 624, 642, 644 (1998) (prior interpretation adopted by "[e]very agency to consider the issue" and "[e]very court which addressed the issue"); *Lorillard* v. *Pons*, 434 U.S. 575, 580 (1978) ("every court to consider the issue").

Nor was the view that TILA's bona fide error provision encompassed legal errors confined to district courts, as the government asserts (Br. 24 n.11). In *Thrift Funds of Baton Rouge, Inc.* v. *Jones*, 274 So. 2d 150 (La. 1973), *cert. denied*, 414 U.S. 820 (1973), which was decided four years before the FDCPA's enactment, the Louisiana Supreme Court squarely so held, stating that "we are unwilling to hold that a bona fide misinterpretation of law … amounts to an intentional violation of [TILA's] disclosure requirements," *id.* at 161 (citing § 1640(c)). When Congress enacted the FDCPA, therefore, there was no "appellate consensus" (U.S. Br. 24 n.11) that Congress could have intended to adopt. This alone eviscerates Jerman's historical attempt to avoid the plain language of the FDCPA.[13]

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[13] The fact that *Thrift Funds* was decided by a state high court rather than a federal court of appeals is irrelevant to the

Second, the historical argument effectively ignores Congress's 1980 addition to TILA of the clause defining "bona fide error" to exclude legal errors. *See* Truth-in-Lending Simplification and Reform Act of 1980, Pub. L. No. 96-221, tit. V, 94 Stat. 168. That addition demonstrates that in 1980 Congress recognized that the broad, unadorned bona fide error language that appeared in TILA and the FDCPA encompassed legal errors, and it reacted by making clear that in TILA it intended a different meaning. Because it did not similarly amend the FDCPA—and in fact has never done so despite amending the statute in other respects on numerous occasions over the last 32 years—the most plausible conclusion to be drawn is that Congress never intended to exclude legal errors from the scope of § 1692k(c).

Jerman's contrary argument rests partly on the notion (Br. 43) that "the 1980 legislation did not change the operative language of the defense." But that is simply irrelevant. While it is true that "Congress did not change the language describing the elements of the defense" (*id.*), it *did* restrict the scope of one of those elements—and in a way that (as anyone who put the two bona fide error provisions side by side would im-

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analysis, as this Court's cases analogously make clear: The Court often considers state-court decisions in considering whether a conflict among lower courts (i.e., the opposite of an "appellate consensus") warrants the Court's attention. *See Wharton* v. *Bockting*, 549 U.S. 406, 415 (2007) ("The panel's decision … conflicts with the decision of every other Court of Appeals and State Supreme Court that has addressed this issue. We granted certiorari to resolve this conflict." (footnote omitted)); *Bates* v. *Dow Agrosciences LLC*, 544 U.S. 431, 436-437 (2005) (similar); *Florida* v. *J.L.*, 529 U.S. 266, 269 (2000) (similar).

mediately realize) differentiates that element from its FDCPA counterpart. Jerman's argument, which as noted above would render the second clause of the TILA provision superfluous, *see supra* pages 22-23, is thus that only changes to the actual elements of a statutory defense, and not express congressional restrictions on the scope of one or more elements, should be given effect by this Court. Not surprisingly, she offers no authority (or reasoning) to support that highly counterintuitive claim.

The government, meanwhile, asserts (without citing any authority) that "[a]n amendment to TILA enacted in 1980 does not directly shed light on the intent of the Congress that enacted the FDCPA in 1977." Br. 27. Although the inclusion of the adverb "directly" renders that statement true, this Court has observed that "while the views of subsequent Congresses cannot override the unmistakable intent of the enacting one, such views are entitled to *significant weight*, and particularly so when the precise intent of the enacting Congress is obscure." *Seatrain Shipbuilding Corp.* v. *Shell Oil Co.*, 444 U.S. 572, 596 (1980) (emphasis added) (citing *NLRB* v. *Bell Aerospace Co.*, 416 U.S. 267, 275 (1974)) (other citation omitted)). And in a more recent case, the Court refused to give weight to subsequent enactments because "[t]hey do not reflect any direct focus by Congress upon the meaning of the earlier enacted provisions." *Almendarez-Torres* v. *United States*, 523 U.S. 224, 237 (1998). Here, of course, the 1980 TILA amendment does reflect such "direct focus by Congress," and specifically reflects a desire to differentiate the scope of TILA's bona fide error defense from that of its FDCPA counterpart.

In short, the plain language of § 1692k(c), particularly in conjunction with its counterpart in TILA, make

unmistakably clear that § 1692k(c) encompasses legal as well as other types of errors.[14]

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[14] Perhaps recognizing this, Jerman argues at length about the requirement in § 1692k(c) that the pertinent violation be unintentional. *See* Pet. Br. 14-25; *see also* U.S. Br. 11-15. But as the government acknowledges (Br. 12 n.7), Congress sometimes uses "intentional" as synonymous with "willful"—a word that both Jerman and the government concede would allow for excusal of legal errors. Nor is the example that the government gives exhaustive. *See, e.g.*, *Kawaauhau* v. *Geiger*, 523 U.S. 57, 61 n.3 (1998) ("The word 'willful' is defined in Black's Law Dictionary as 'voluntary' or 'intentional.' Consistently, legislative reports note that the word 'willful' in [11 U.S.C.] § 523(a)(6) means 'deliberate or intentional.'" (citations omitted)); *see also McLaughlin* v. *Richland Shoe Co.*, 486 U.S. 128, 133 (1988) ("In common usage the word 'willful' is considered synonymous with such words as … 'intentional.'"). In fact, in at least one instance Congress treated "intentional" as a *higher* form of *mens rea* than "willful." *See Bartnicki* v. *Vopper*, 532 U.S. 514, 547 n.4 (2001) (Rehnquist, C.J., dissenting) ("[T]o ensure that only the most culpable could face liability for disclosure, Congress increased the scienter requirement [in 18 U.S.C. § 2511(1)(c)] from 'willful' to 'intentional.'" (citing S. Rep. No. 99-541, at 6 (1986))).

Using "intentional" as synonymous with "willful" in § 1692k(c) would not be at all "surprising" (Pet. Br. 9), because "[t]he general rule that … a mistake of law is no defense" is "[b]ased on the notion that the law is definite and knowable," *Cheek* v. *United States*, 498 U.S. 192, 199 (1991). With statutes that are "difficult for the average citizen to know and comprehend," however, "Congress has … softened the impact of the common-law presumption." *Id.* at 199-200. That is the situation here. Indeed, the contours of the Act's requirements are elusive not just for the "average citizen," *id.* at 199, but even for seasoned attorneys to discern. Under these circumstances, the only "surprising" thing (Pet. Br. 9) would be for Congress to have imposed strict liability *without* "soften[ing] the impact of the common-law presumption," *Cheek*, 498 U.S. at 200.

Finally, the government argues (Br. 14-15) that the reference in § 1692k(c) to an unintentional "violation" actually means the

B. The "Procedures Reasonably Adapted" Requirement Does Not Place Legal Errors Outside The Scope Of § 1692k(c)

Jerman and the government also point to the requirement in § 1692k(c) that an FDCPA defendant asserting a bona fide error defense have maintained "procedures reasonably adapted to prevent" errors. They argue that this language supports their reading of the Act, either because there are no such procedures in the context of legal errors (U.S. Br. 15) or because courts have "struggled to define just what constitutes a procedure reasonably ad[a]pted to avoid misinterpreting the law" (Pet. Br. 26). These arguments are meritless.

To begin with, there is nothing in the definition of "procedure" that precludes its application to legal errors. A procedure is "a particular way of doing or of going about the accomplishment of something," or "a particular course of action." *Webster's Third New Int'l Dictionary* 1807 (1971). That definition is easily satisfied with a series of steps that minimizes the chance of legal error by thoroughly educating an attorney about the relevant law. Such steps would principally include those involved in conducting adequate legal research, i.e., reviewing and analyzing applicable statutes, case law, agency decisions and regulations, and so on.[15] This, in fact, is essentially what courts addressing the

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conduct underlying the violation. This Court, however, has unanimously rejected a similar argument. *See Kawaauhau*, 523 U.S. at 61-62.

[15] Such steps could also include consulting colleagues or other knowledgeable entities and (as the Sixth Circuit found relevant here (*see* Pet. App. 15a-16a)) staying abreast of legal developments by attending conferences and reviewing relevant publications.

issue have held is required in cases like this. *See Ruth* v. *Triumph P'ships*, 577 F.3d 790, 803-804 (7th Cir. 2009) (concluding, after discussing decisions from other circuits, that the bona fide error defense can be maintained for legal errors by "collectors who … reasonably relied on either: (1) the legal opinion of an attorney who has conducted the appropriate legal research, or (2) the opinion of another person or organization with expertise in the relevant area of law"). There is thus no reason to conclude that the use of the term "procedures" in § 1692k(c) mandates exclusion of legal errors from the bona fide error defense.

In asserting the contrary, the government at times argues as though a procedure qualifies as "reasonably adapted" under the Act only if it eliminates the possibility of errors. *See* U.S. Br. 16 ("[N]o 'procedure' can *definitively avoid* the misapplication or misinterpretation of a comprehensive federal statute." (emphasis added)); *id.* at 8 ("Legal errors cannot be eliminated by … any step-by-step algorithm."); *id.* at 17 (similar). But that is not what the statute requires—for obvious reasons. Whether an error is legal or some other kind, *no* procedure can entirely eliminate the possibility that the error will ever occur. Indeed, the defense presupposes that some errors will occur despite the use of reasonable procedures. All the Act requires regarding procedures is that they be "reasonably adapted" to prevent the relevant error. In other words, the procedures must be such that, when followed, they render it reasonably unlikely that the error will occur. The procedures discussed above in regard to legal errors easily qualify.

Jerman contends, however (Br. 26), that courts have "struggled" to apply § 1692k(c) to legal errors. Her only support for that assertion is a series of ques-

tions that have arisen in applying the defense to legal errors. That such questions have arisen does nothing to demonstrate that Congress intended to exclude legal errors from the scope of § 1692k(c). Indeed, several of the questions Jerman poses would apply equally to non-legal errors, such as whether the "reasonably adapted" issue is one for the court or the jury and whether the procedures must be adapted to avoid the specific error at issue or merely the category of error (legal, clerical, etc.) in general. This obviously does not mean those non-legal errors should also be excluded. That the nature of legal errors may create more such questions than other types is simply irrelevant to whether Congress meant to include them in the bona fide error defense. If anything, legal errors are particularly *suited* for inclusion in the defense: Judges themselves are of course constantly faced with the challenge of avoiding legal errors in conducting their work. They are thus well situated to evaluate whether a legal error was made in good faith and whether an attorney's procedures were reasonably adapted to avoid it.

Jerman relatedly suggests (Br. 26-27 nn.10, 12, 14) that courts confronting claims of bona fide legal error have reached conflicting conclusions regarding some of these questions. For reasons similar to those just discussed, however, even if such conflicts existed they would not provide a valid basis to conclude that Congress intended to exclude legal errors from § 1692k(c). Courts do not decide the scope of a federal statute based on how many circuits splits one interpretation may lead to in future cases, nor presume more generally that Congress wants courts to steer clear of difficult legal issues whenever possible.

In any event, none of the purported conflicts that Jerman discusses is genuine. Jerman first states (Br.

26 n.10) that the court of appeals here "seemingly" found "that procedures directed at avoiding legal errors generally were sufficient" under the Act, in supposed conflict with the Tenth Circuit's view that procedures must be adapted to avoid the specific error at issue in a case. In fact, the Sixth Circuit took the same position as the Tenth Circuit, rejecting Jerman's argument "that there is a genuine issue of material fact regarding … whether Defendants maintained procedures reasonably adapted to avoid any legal error *as to the written-dispute requirement*" and "conclud[ing] that Defendants … maintained procedures reasonably adapted to avoid legal error *relating to the written-dispute requirement*." Pet. App. 15a (emphases added).[16] Similarly, Jerman suggests a conflict (Br. 27 n.12) over whether a reasonable procedure must include seeking an opinion from the FTC or another expert body. But in both of the cases she cites, the court found *no* such absolute requirement. As for Jerman's third alleged conflict, regarding whether reasonable procedures is a jury question, neither of the cases she cites (Br. 27 n.14) squarely confronted the issue.

Finally, Jerman asserts (Br. 10, 27) that the Sixth Circuit's decision here would lead to federal courts or juries setting professional standards for attorneys. That is incorrect. Interpreting § 1692k(c) to encompass legal errors would mean only that courts or juries would establish standards for avoiding liability under that provision. There is no reason to conclude (cer-

[16] This is the same approach taken by other circuits in regard to non-legal errors. *See, e.g.*, *Reichert* v. *National Credit Sys., Inc.*, 531 F.3d 1002, 1006 (9th Cir. 2008); *Wilhelm* v. *Credico, Inc.*, 519 F.3d 416, 421 (8th Cir. 2008).

tainly Jerman offers none) that attorneys who did not meet those standards would be subject to any type of professional discipline.[17]

In sum, nothing about the "procedures reasonably adapted" language provides grounds to write a judicial limitation into the plain language of § 1692k(c), which by its terms applies to all types of errors.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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NOVEMBER 2009

[17] Indeed, as explained in Part I, it is Jerman's position that would lead to federal interference with attorneys' obligations under (often state-promulgated) professional standards.

APPENDIX

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

Office of the Secretary

July 28, 2006

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Re: Petition of ACA International for Advisory Opinion

Dear Ms. Andersen and Mr. Beato:

The Federal Trade Commission has received the petition of ACA International ("ACA") for an advisory opinion pursuant to Sections 1.1-1.4 of the Commission's Rules of Practice, 16 C.F.R. §§ 1.1-1.4 ("Rules"). I apologize for the delay in responding to your request. In the petition, you present the following questions:

> Under section 806(6) of the FDCPA, must a debt collector identify a corporate name in order to meaningfully disclose the caller's identity in a telephone call that results in an electronic voice mail message for the debtor? If a corporate name must be disclosed, what specifically must be disclosed when the corporate name implies the collection of a debt, thereby potentially violating the third-party disclosure prohibition of section 805(b)? If the voice mail message is the initial oral communication with the debtor, must the debt collector deliver a "mini-Miranda" disclosure under section 807(11) to notify the debtor that he or she is attempting to collect a debt and that any information obtained will be used for that purpose?

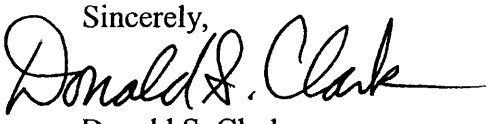
Section 1.1(a) of the Rules provides that the Commission will consider requests for advisory opinions and inform the requesting party of the Commission's views, where practicable, under the following circumstances: "(1) The matter involves a substantial or novel question of fact or law and there is no clear Commission or court precedent; or (2) The subject matter of the request and consequent publication of Commission advice is of significant public interest."

Section 1.1(b) of the Rules further provides that the Commission has authorized the staff to consider all requests for advice, and pursuant to that provision, I have reviewed your request for an advisory opinion.

A number of federal district courts have ruled consistently on the questions you raised in the petition. Based on these decisions, there is clear court precedent for the proposition that a debt collector leaving a voice mail message must reveal the name of his employer, even if the name indicates that the message involves a debt. *Hosseinzadeh v. M.R.S. Associates, Inc.*, 387 F. Supp. 2d 1104 (C.D. Calif. 2005); *Joseph v. J.J. Mac Intyre Cos, L.L.C.*, 281 F. Supp. 2d 1156 (N.D. Calif. 2003); *Wright v. Credit Bureau of Georgia, Inc.*, 548 F. Supp. 591, *on reconsideration on other grounds*, 555 F. Supp. 1005 (N.D. Ga. 1982). Courts also have addressed the issue of whether a debt collector leaving a voice mail message must convey the mini-Miranda disclosure. The decisions are uniform in concluding that a collector failing to do so violates Section 807(11). *Stinson v. Asset Acceptance, LLC*, 2006 U.S. Dist. Lexis 42266 (E.D. Va. June 12, 2006); *Foti v. NCO Financial Systems, Inc.*, 424 F. Supp. 2d 643 (S.D.N.Y. 2006); *Hosseinzadeh,* 387 F. Supp. 2d at 1116. *See also Chlanda v. Wymard*, 1995 U.S. Dist. Lexis 14394, *32 n.16 (S.D. Ohio 1995) (voice mail message requesting that the consumer pay a credit card debt violated Section 807(11) because it did not include that provision's notice).

For the foregoing reasons, your request for an advisory opinion does not satisfy either of the prerequisites prescribed by the Commission Rules of Practice, and accordingly cannot be granted.

Sincerely,



Donald S. Clark
Secretary