No. 15-2984

In the United States Court of Appeals for the Eighth Circuit

DOMICK NELSON,
Plaintiff-Appellant,

v.

MIDLAND CREDIT MANAGEMENT, INC.,
Defendant-Appellee.

On Appeal from the United States District Court for the Eastern District of Missouri in No. 4:15-cv-00816-ERW, Hon. E. Richard Webber

BRIEF FOR THE NATIONAL ASSOCIATION OF CONSUMER BANKRUPTCY ATTORNEYS AS AMICUS CURIAE IN SUPPORT OF PLAINTIFF-APPELLANT AND URGING REVERSAL

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1, counsel for amicus curiae certifies that the National Association of Consumer Bankruptcy Attorneys is a nongovernmental corporate entity; it has no parent corporation, and no publicly held corporation owns 10 percent or more of its stock.

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INTEREST OF AMICUS CURIAE

The National Association of Consumer Bankruptcy Attorneys (NACBA) is a non-profit organization with a membership of approximately 3,000 consumer-bankruptcy attorneys nationwide. NACBA is the only national association of attorneys organized specifically to protect the rights of consumer-bankruptcy debtors—the very class distinctly affected by these proceedings. NACBA participates regularly as amicus in significant cases implicating the core rights of these debtors. *E.g.*, *Law* v. *Siegel*, 134 S. Ct. 1188 (2014); *Jones* v. *Bob Evans Farms, Inc.*, No. 15-2068 (8th Cir.) (pending); *Running* v. *Miller*, 778 F.3d 711 (8th Cir. 2015).[1]

NACBA's membership has a vital interest in the proper disposition of this case. This appeal presents fundamental questions concerning the Fair Debt Collection Practices Act (FDCPA), 15 U.S.C. 1692 *et seq.*, and its interaction with the Bankruptcy Code. Midland is a profes-

[1] Pursuant to Fed. R. App. P. 29(c)(5), amicus states that no counsel for any party authored this brief in whole or in part, and that no person or entity, other than amicus and its counsel, contributed money intended to fund the preparation or submission of this brief. Nelson consents to the filing of this brief; Midland withholds consent unless it is afforded an opportunity to respond.

sional debt collector. It acquires time-barred debts for pennies on the dollar, and then floods bankruptcy courts with proofs of claim seeking to recover on these knowingly time-barred debts. Midland is acutely aware that its claims are wholly unenforceable under the Bankruptcy Code, and will *always* be disallowed once anyone objects. But Midland also knows that, due to predictable shortcomings in the bankruptcy process, parties will often mistakenly *fail* to object. Because the Code automatically allows any claim—even *invalid* claims—absent an objection, this permits Midland to collect on meritless claims when the system *malfunctions*, diverting funds from vulnerable debtors and innocent creditors.

NACBA has a substantial interest in challenging this misuse of the claims-process. This issue is both important and recurring, and it has sharply divided the courts. It directly affects thousands of debtors, consumes countless hours of judicial and party time in bankruptcies nationwide, and imposes serious costs on creditors with legitimate claims (unlike those at issue here). There are compelling reasons to question the soundness of the district court's FDCPA holding, and NACBA has a critical interest in presenting those substantial questions.

STATEMENT

1. a. Congress enacted the FDCPA in 1977 to "eliminate abusive debt collection practices by debt collectors, to insure that those debt collectors who refrain from using abusive debt collection practices are not competitively disadvantaged, and to promote consistent State action to protect consumers against debt collection abuses." 15 U.S.C. 1692(e).

Among a broad range of prohibitions, the FDCPA forbids the use of "any false, deceptive, or misleading representation or means in connection with the collection of any debt." 15 U.S.C. 1692e. That section further enumerates a non-exhaustive list of prohibited practices, including making false representations of "the character, amount, or legal status of any debt," and "using any false or deceptive means to collect or attempt to collect any debt." 15 U.S.C. 1692e(2)(A), 1692e(10). The Act separately prohibits the use of "unfair or unconscionable means to collect or attempt to collect any debt." 15 U.S.C. 1692f. "[A]s remedial legislation, the FDCPA must be broadly construed in order to give full effect to these purposes." *Kaymark* v. *Bank of Am., N.A.*, 783 F.3d 168, 172 (3d Cir. 2015).

b. Once a debtor files for bankruptcy, a bankruptcy estate is created that consists of "all legal or equitable interests of the debtor in property as of the commencement of the case." 11 U.S.C. 541(a)(1). Creditors who wish to recover from the estate "may file a proof of claim" (11 U.S.C. 501(a))—"a written statement setting forth a creditor's claim." Fed. R. Bankr. P. 3001. The Code defines a "claim" as a "right to payment, whether or not such right is * * * fixed, contingent, matured, unmatured, disputed, [or] undisputed." 11 U.S.C. 101(5)(A). The filing of a proof of claim is "prima facie" evidence of its validity. Fed. R. Bankr. P. 3001(f).

A proof of claim is automatically "allowed" unless a party in interest objects and shows that "such claim is unenforceable against the debtor * * * under any agreement or applicable law." 11 U.S.C. 502(a), (b)(1). Congress specifically included "statutes of limitation" as one means of proving unenforceability (11 U.S.C. 558), and tasked bankruptcy trustees with "examin[ing] proofs of claims and object[ing] to the allowance of any claim that is improper." 11 U.S.C. 704(a)(5); see also 11 U.S.C. 1302(b)(1) (imposing the same duty on Chapter 13 trustees). While debtors are often represented by lawyers, not all debtors are represented, and the representation does not always extend to examining proofs of claim or filing objections.

2. "A deluge has swept through U.S. bankruptcy courts of late. Consumer debt buyers—armed with hundreds of delinquent accounts purchased from creditors—are filing proofs of claim on debts deemed unenforceable under state statutes of limitations." *Crawford* v. *LVNV Funding, LLC*, 758 F.3d 1254, 1256 (11th Cir. 2014). "Absent an objection from either the Chapter 13 debtor or the trustee, the time-barred claim is automatically allowed against the debtor"; "[a]s a result, the debtor must then pay the debt from his future wages as part of the Chapter 13 repayment plan, notwithstanding that the debt is time-barred and unenforceable in court." *Id.* at 1259. "Such a distribution of funds to debt collectors with time-barred claims then necessarily reduces the payments to other legitimate creditors with enforceable claims." *Id.* at 1261. And even when a proper objection is lodged, those objections "consume[] energy and resources in a debtor's bankruptcy case, just as filing a limitations defense does in state court." *Ibid.*

Debt buyers obtain debts at only a fraction of their face value. *McMahon* v. *LVNV Funding, LLC*, 744 F.3d 1010, 1022 (7th Cir. 2014)

(FTC study showing debt buyers paid on average "2.2 cents per dollar for debts that were 6 to 15 years old"). Due to this significant margin, debt collectors can generate a profit even if the majority of their time-barred claims are properly rejected as baseless.

Midland is part of this trend. "[T]he phenomena of bulk debt purchasing has proliferated and the uncontrolled practice of filing claims with minimal or no review is a new development that presents a challenge for the bankruptcy system." *In re Hess*, 404 B.R. 747, 751 (Bankr. S.D.N.Y. 2009). This appeal challenges that impermissible practice.

SUMMARY OF ARGUMENT

I. The FDCPA prohibits filing proofs of claim on knowingly time-barred debt, and the district court's contrary view was mistaken.

A. Midland represents that its time-barred claims are valid and enforceable when it knows exactly the opposite is true. A "claim" is a legally "enforceable" right, and time-barred claims are not *legally enforceable*. *Cohen* v. *de la Cruz*, 523 U.S. 213, 218 (1998). By falsely asserting a "right to payment" when *no* "right to payment" exists, Midland directly misrepresents the "legal status" and "character" of the debt.

B. Midland also exploits the claims-allowance process to collect when the system *malfunctions*. Midland engages in a systemic effort to "flood" bankruptcy proceedings with thousands of time-barred claims. Midland files these claims without any legitimate basis or useful purpose. There is *no* scenario in which these claims survive under proper review: Midland's claims are invalid and will be universally rejected if the process functions as Congress intended. Midland's entire scheme is premised on the hope that the system will break down and fail—as it predictably does when debtors fail to object and trustees fail to weed out invalid claims. This flagrant abuse is exactly the kind of false, deceptive, and unfair practice that the FDCPA was designed to avoid.

C. As the Eleventh Circuit held in *Crawford*, the same acts that violate the FDCPA outside bankruptcy also violate the FDCPA within it. Courts routinely hold that debt collectors violate the FDCPA by filing state-court litigation over time-barred debts. The same rationale applies in this context: there is no reason that debt collectors suddenly have more freedom to pursue stale claims once debtors enter bankruptcy. This is the same blatant attempt to collect debts that a creditor has no right to collect. Ironically, had Nelson not declared bankruptcy, Midland indisputably would have no right to demand payment from anyone. Midland's attempt to use bankruptcy to *add* debt flips the system on its head.

II. In the alternative, Midland argues that the Bankruptcy Code repealed the FDCPA *by implication*. Yet such repeals must be established through "clear text" or "irreconcilable conflict," and Midland fails that heavy burden.

A. Midland concedes that there is no *textual* preclusion. Nothing in the Code or the FDCPA possibly qualifies as a "clear statement" that one precludes the other.

B. Nor is there any irreconcilable conflict. Midland asserts that the two schemes conflict because the Code grants it an absolute "right" to file knowingly time-barred claims. But the Code (unremarkably) does not tolerate *frivolous* claims. Congress instructed trustees to *reject* the very claims that Midland insists are allowed, and courts routinely *sanction* parties for deliberately filing *stale* claims. There is no "right" to engage in *sanctionable* conduct. The FDCPA thus prohibits what the Code does not even allow, and its application would not undermine the Code, but *promote* it. Because nothing compels (or even *permits*) an act under one scheme that violates the other, there is no conceivable "conflict."

The FDCPA survives the Code even if parties had a "right" to file knowingly baseless claims. There is no conflict where a party can easily comply with each scheme by voluntarily refraining from targeted behavior. The Code creates a *permissive* right to file a claim; no one is compelled to take any act under the Code that is forbidden by the FDCPA. The fact that debt collectors are singled out for additional regulation does not create a conflict; it merely reflects Congress's considered judgment that this particular group imposes heightened risks of public harm, and its behavior must be restricted in ways that do not affect ordinary creditors.

Congress intended the FDCPA to fill the gaps of other laws, and it does that here. Professional debt collectors are purchasing huge portfolios of knowingly stale claims, and flooding bankruptcy courts with claims that are undeniably unenforceable. While individual claims may impose little harm, the aggregate effect of this practice is staggering. Congress had every reason to impose additional restrictions on groups that tend to abuse the system to collect debts. It was aware that existing remedies were not always adequate to deter wrongful collection practices, and it intended the FDCPA to overlap with those schemes to provide added protection. The remedies available under the Code for *ordinary* creditors are not calibrated to handle the business methods of debt collectors. The FDCPA performs that role, and the district court erred in refusing to apply this superimposed scheme as Congress intended.

ARGUMENT

I. THE FDCPA PROHIBITS KNOWINGLY FILING A PROOF OF CLAIM ON TIME-BARRED DEBT IN A CHAPTER 13 BANKRUPTCY

Contrary to Midland's contentions, knowingly filing a proof of claim on time-barred debt violates the FDCPA. It is "false, deceptive, [and] misleading" under 15 U.S.C. 1692e, and it is "unfair [and] unconscionable" under 15 U.S.C. 1692f. The district court erred in holding otherwise, and its judgment should be reversed.

A. Midland Violates The FDCPA By Falsely Representing That Its Time-Barred Claims Are Valid And Enforceable When It Knows Exactly The Opposite Is True

The FDCPA "specifically prohibits the false representation of the character or legal status of any debt" (*McMahon*, 744 F.3d at 1020), which precisely describes Midland's conduct. Its claims are indisputably time-barred and unenforceable. Yet "[i]n the context of the Bankruptcy Code's automatic claims allowance process, the filing of a proof of claim amounts to an assertion that the underlying claim is enforceable and that the claimant is entitled to be paid out of the bankruptcy estate." *Feggins* v. *LVNV Funding LLC (In re Feggins)*, No. 13-11319-WRS, 2015 Bankr. LEXIS 2822, at *15-*16 (Bankr. M.D. Ala. Aug. 24, 2015). Midland has asserted a "right to payment" that does not exist, and it has taken advantage of default rules declaring its claims "prima facie" valid when it knows precisely the opposite is true. Its conduct squarely violates the FDCPA.

1. a. Midland misrepresents the "character" and "legal status" of time-barred debts. 15 U.S.C. 1692e, 1692e(2)(A), 1692e(10).

The Bankruptcy Code defines a "claim" as a "right to payment" (11 U.S.C. 101(5)(A)), and a "right to payment" (according to the Supreme Court) is "nothing more nor less than an *enforceable* obligation." *Johnson* v. *Home State Bank*, 501 U.S. 78, 83 (1991) (emphasis added); see also, *e.g.*, *FCC* v. *NextWave Pers. Commc'ns Inc.*, 537 U.S. 293, 303 (2003); *Pa. Dep't of Pub. Welfare* v. *Davenport*, 495 U.S. 552, 559 (1990). Parties voluntarily participating in the claims-process act against the backdrop of these settled rules. When a creditor files a "proof of claim," it is necessarily asserting "proof" of a "right to payment" on legally "enforceable" debt.

Here, however, Midland asserts "proofs" of claim without any conceivable "right to payment." It is axiomatic that time-barred debts are not "legally enforceable" (*McMahon*, 744 F.3d at 1020), and Midland is fully aware that it lacks any "corresponding 'right to payment'" (*Cohen*, 523 U.S. at 218). See also *Crawford*, 758 F.3d at 1261 (time-barred claims are "unenforceable"); *Huertas* v. *Galaxy Asset Mgmt.*, 641 F.3d 28, 32 (3d Cir. 2011) (time-barred debts are "unenforceable in a court of law"). Yet Midland acts anyway despite knowing that no such "right" exists. *Avalos* v. *LVNV Funding, LLC (In re Avalos)*, 531 B.R. 748, 754 (Bankr. N.D. Ill. 2015).

Midland's misrepresentations are unlawful. "Whether a debt is legally enforceable is a central fact about the character and legal status of that debt." *McMahon*, 744 F.3d at 1020. "[A] time-barred claim is unenforceable within the meaning of the Bankruptcy Code, so a debt collector who knowingly files such a claim in bankruptcy is falsely asserting that it is entitled to be paid." *Feggins*, 2015 Bankr. LEXIS 2822, at *16.

By asserting a "right to payment" when there is *no* "right to payment," Midland violates the FDCPA. *McMahon*, 744 F.3d at 1020.

b. In addition to prohibiting direct misrepresentations, the FDCPA also prohibits inappropriate "means" of collecting debts. 15 U.S.C. 1692e, 1692e(10). Midland's scheme *defines* unlawful means.

Under the Code's background rules, every claim is automatically deemed "prima facie" valid. *Gardner* v. *New Jersey*, 329 U.S. 565, 573 (1947); see also Fed. R. Bankr. P. 3001(f) ("A proof of claim executed and filed in accordance with these rules shall constitute prima facie evidence of the validity and amount of the claim."). Midland exploits that background rule. It is fully aware that its claims are not entitled to a presumption of validity. Yet Midland never discloses that its claims are "prima facie" *invalid* or makes any corrective statement to avoid deceiving the court and other parties. Cf. *McMahon*, 744 F.3d at 1021 ("Neither LVNV nor CMS gave a hint that the debts that they were trying to collect were vulnerable to an ironclad limitations defense."). Midland simply leverages "the misleading impression * * * that the debt collector can legally enforce [a] debt" that indisputably cannot be enforced. *Crawford*, 758 F.3d at 1261.

Nor does it matter that Midland never explicitly stated that its claims were timely or enforceable. That representation inheres in every claim. Cf. *McMahon*, 744 F.3d at 1022. The Code's claims-process is reserved for *enforceable* claims. When a party knowingly participates in that process, it necessarily represents that its claims are enforceable.

Midland took advantage of the false impression that it deliberately helped foster. That deception violates the FDCPA.

2. The district court accepted Midland's position that it was not false or misleading to assert a "right" to recover time-barred debt. The court was mistaken.

a. Midland insists it has a "right to payment" because time-barred debts are not extinguished under Missouri law—only corresponding "remedies" are extinguished. See, *e.g.*, *Gatewood* v. *CP Med., LLC*, 533 B.R. 905, 910 (B.A.P. 8th Cir. 2015). That is exactly backwards: without a "remedy," *there is no right to payment*. Under the Code, the question is not whether a debt still exists, but whether that debt can be *legally enforced*—and there is no "right to payment" unless a debt is "legally enforceable." *NextWave*, 537 U.S. at 303. Debt collectors have no "right" to enforce time-barred debts in *any tribunal*. The underlying obligation may still exist, but it is at most a "moral obligation," not a "legal" one. *McMahon*, 744 F.3d at 1020; *Huertas*, 641 F.3d at 32. Midland can ask nicely to be repaid, but a debtor may simply refuse. That is not a "right" under any ordinary understanding of the term. See *Feggins*, 2015 Bankr. LEXIS 2822, at *25 ("a creditor barred by limitation has no more right to be paid than one barred by repose").[2]

Under the Code, debt collectors cannot share in an estate's limited assets—diverting funds from *legitimate* creditors—based on "moral" obligations alone. Midland has no basis for claiming a "right to payment."

b. Midland also resists liability because its time-barred claims are literally true: "a proof of claim submitted on a court-approved form, fully compliant with Rule 3001(c)(3), is a neutral statement that a debt existed at a certain time and is now owned by the claimant." *Robinson* v. *eCast Settlement Corp.*, No. 14-CV-8277, 2015 WL 494626, at *3 (N.D. Ill. Feb. 3, 2015). Midland is factually and legally wrong.

[2] Nor is there any doubt that filing a proof of claim is akin to initiating civil litigation. *Gardner* v. *State of N.J.*, 329 U.S. 565, 573 (1947); *Smith* v. *Dowden*, 47 F.3d 940, 943 (8th Cir. 1995).

As a factual matter, Midland's claims were *not* literally true. To be clear: these claims were not "neutral statement[s] that a debt existed at a certain time." *Ibid.* These were knowingly false assertions of "*proof*" that Midland had a "*right to payment*" designed to exploit the Code's presumption of validity (and collect at the expense of everyone else). Indeed, even Midland's own authority acknowledges that a claim reflects "an implicit representation of legal enforceability." *Ibid.* The fact that Midland managed not to distort *other* aspects of a frivolous claim is entirely beside the point.

As a legal matter, the FDCPA is not limited to *literal* misstatements, prohibiting statements that are *deceptive or misleading* and targeting improper *means* of collecting debts. See, *e.g.*, *Gammon* v. *GC Servs. Ltd. P'ship*, 27 F.3d 1254, 1258 (7th Cir. 1994) (Easterbrook, J., concurring) ("literal truth may convey a misleading impression"). Even were Midland's filings literally true, they still used deceptive *means* to foster the misleading impression that time-barred debts were enforceable. Midland cannot excuse itself by including half-truths about a debt's amount or age—it still wrongly included stale debts in a process reserved for *enforceable* claims. Its abusive scheme fits comfortably within the FDCPA.

B. Midland Violates The FDCPA By Exploiting The Claims-Allowance Process To Collect When The System *Malfunctions*, Not When It Operates As Congress Intended

Midland also violates the FDCPA by using "unfair or unconscionable means to collect or attempt to collect" time-barred debts. 15 U.S.C. 1692f. Midland succeeds only when the bankruptcy process breaks down and fails—as it routinely does. Its claims have no legitimate purpose: there are *zero* circumstances where Congress intended time-barred claims to divert funds from the estate. Midland simply exploits unintended flaws in the process, at the expense of vulnerable debtors and innocent creditors. Its scheme is "'unfair,' 'unconscionable,' 'deceptive,' and 'misleading' within the broad scope of § 1692e and § 1692f." *Crawford*, 758 F.3d at 1260.

1. Midland engages in a flagrant misuse of the bankruptcy process. As described above, proofs of claim are automatically "allowed" unless someone objects. 11 U.S.C. 502(a). Under this automatic-allowance procedure, all unchallenged claims—even patently *invalid* claims—are included by default in distributions. This permits the system to function

efficiently. But it also creates opportunities for abuse: creditors with defective claims can "unfairly game[] the system by taking advantage of the automatic claims allowance process," "camouflaging [their claims] among the inundation of other claims filed," and hoping to "slip past the bankruptcy court's supervision unnoticed." *Feggins*, 2015 Bankr. LEXIS 2822, at *16. These bad-faith actors know that if the process breaks down, they will illegitimately collect on unenforceable claims, flouting Congress's intent.

Most legitimate collection efforts work within the system's intended operation; Midland's business model is predicated entirely on system failure. Midland knowingly floods bankruptcy courts with time-barred claims in the hope of collecting unenforceable debts. These claims have no legal justification. *Avalos*, 531 B.R. at 757. Midland does not (and *cannot*) contend that it has any good-faith basis for these filings. Midland's only hope is that the system *malfunctions*: the debtor may unwittingly "fail to object" and the trustee may "fail[] to fulfill its statutory duty to object to improper claims." *Crawford*, 758 F.3d at 1259 n.5, 1261. When that happens, Midland can force debtors to "pay the debt from [their] future wages as part of the Chapter 13 repayment plan, notwithstanding that the debt is time-barred and unenforceable in court." *Id.* at 1259.

This scheme is "an abuse of the claims allowance process and an affront to the integrity of the bankruptcy court." *Feggins*, 2015 Bankr. LEXIS 2822, at *12. Midland imposes pointless costs on courts and innocent parties without any offsetting societal value or public benefit. In the best-case scenario, the debtor or trustee is burdened with the hassle and expense of filing needless objections, and the court is forced to waste its time and resources rejecting baseless claims; in the worst-case scenario, the process breaks down and allows invalid claims, diverting limited funds from those who deserve them. The process is sufficiently taxed without the deliberate filing of baseless claims. Midland's attempt to profit from system-error is unfair and unconscionable, and it violates the FDCPA.

2. Midland insists that its scheme is a fair and legitimate use of the bankruptcy process, but it is mistaken.

a. According to Midland, Congress *invited* parties to file knowingly time-barred claims: "The Bankruptcy Code implicitly recognizes that proofs of claim regarding time-barred debts may be filed *by providing* *debtors with an affirmative defense to such claims*." *Birtchman* v. *LVNV Funding, LLC*, No. 1:14-CV-00713, 2015 WL 1825970, at *6 (S.D. Ind. Apr. 22, 2015) (emphasis added).

This logic is mystifying. The claims-process permits *genuinely disputed* claims; it does not tolerate (much less permit) frivolous claims *indisputably* subject to an iron-clad defense. Midland's claims are not "disputed" at all; indeed, it is *undisputed* that they are invalid and unenforceable (*e.g.*, *McMahon*, 744 F.3d at 1020). The Code authorizes a defense to time-barred claims because *there otherwise would be no mechanism for discarding untimely claims mistakenly filed in good faith*. That hardly suggests Congress intended parties to file *knowingly* defective claims—any more than Rule 11 invites parties to file frivolous lawsuits or Title 18 of the U.S. Code invites parties to commit felonies.

b. Nor is Midland's practice somehow "fair" because its claims "clearly state[] information that can be used to determine if the debt is time barred." *Birtchman*, 2015 WL 1825970, at *6. This same information is available to *Midland*, who knew its claims were time-barred but filed anyway. It is hardly an excuse that others—absent system failure—might figure out what Midland already knew before "burden[ing]" the system with frivolous claims. *In re Sekema*, 523 B.R. 651, 655 (Bankr. N.D. Ind. 2015).

The bankruptcy process relies on parties acting in good faith; it cannot function when parties abuse the system hoping that the process breaks down and no one notices. *Young* v. *Young (In re Young)*, 789 F.3d 872, 879 (8th Cir. 2015). Midland's practice is an inexcusable attempt to subvert the Code. It plainly violates the FDCPA.

C. The Same Baseless Filings That Would Violate The FDCPA In State Court Also Violate The FDCPA In Bankruptcy

As even Midland admits, it could not file time-barred claims in state court without violating the FDCPA. *Phillips* v. *Asset Acceptance, LLC*, 736 F.3d 1076, 1079 (7th Cir. 2013); see also *Freyermuth* v. *Credit Bureau Servs., Inc.*, 248 F.3d 767, 771 (8th Cir. 2001). Midland, however, insists that it can sidestep the FDCPA by pursuing the same stale debt in bankruptcy, because bankruptcy is "different" and Chapter 13's "safeguards" protect debtors. See also *Gatewood*, 533 B.R. at 909. Midland is wrong.

1. In every relevant respect, the reasons "for outlawing stale suits to collect consumer debts" (*Phillips*, 736 F.3d at 1079) are "[t]he same

* * * in the bankruptcy context." *Crawford*, 758 F.3d at 1260. Here, as in ordinary litigation, knowingly time-barred claims take unfair advantage of debtors, deliberately "creat[ing] the misleading impression" that debts can be enforced. *Id.* at 1261. Indeed, the entire point of Midland's scheme is to deceive debtors into "unwittingly" accepting stale debt. *Phillips*, 736 F.3d at 1079. Likewise, debtors will often give up rather than fight a frivolous claim: "filing objections to time-barred claims consumes energy and resources in a debtor's bankruptcy case, just as filing a limitations defense does in state court." *Crawford*, 758 F.3d at 1261. Here, as in state court, frivolous claims may survive simply because no one has sufficient incentive to oppose them.

"In bankruptcy," as in ordinary litigation, "the limitations period provides a bright line for debt collectors and consumer debtors, signifying a time when the debtor's right to be free of stale claims comes to prevail over a creditor's right to legally enforce the debt." *Crawford*, 758 F.3d at 1260-1261. The FDCPA "outlaw[s]" time-barred claims in state court (*Phillips*, 736 F.3d at 1079); there is no reason that Congress intended to provide *less* protection once debtors enter bankruptcy.

2. Midland rejects *Crawford* on the ground that Chapter 13 debtors are protected by attorneys and trustees. But these "safeguards" are ineffective—which is precisely why Midland continues flooding bankruptcies with frivolous claims. Put bluntly: if these safeguards worked, Midland's business model would collapse.

Midland may believe it is fine to waste the court's time and burden trustees, debtors, and innocent creditors with the pointless task of objecting to frivolous claims. But Midland's conduct is just as improper in this context as any other. *Crawford* was correct, and Midland's contrary contention is meritless.

a. According to Midland, Chapter 13 debtors are typically represented by lawyers aware of limitations defenses. But not all consumer debtors have lawyers, and not all lawyers are retained to review claims or file objections. It is wrong to presume that attorneys retained for the overall bankruptcy have also been paid to review proofs of claim. And every time debtors are unrepresented (or a representation's scope is limited), debtors alone are forced to review claims and identify defenses. Those debtors are materially indistinguishable from debtors in state-court litigation.

Nor is it fair to ask debtors to hire attorneys to object to Midland's frivolous filings. See *Birtchman*, 2015 WL 1825970, at *9 (suggesting debtors would incur only "minimal" expense for "the additional legal work required" to challenge time-barred claims). The cost of even a few hundred dollars is a meaningful expense to Chapter 13 debtors—it can mean the difference in a debtor's ability to meet basic needs for herself and her family. And even if frivolous claims prompt only "straightforward" objections (*ibid.*), someone must still review the claim, confirm the limitations period, prepare the objection, and file that objection with the court, which must then review and adjudicate the issue. Even if that entire process consumes only an hour of everyone's time—an exceedingly low estimate—the aggregate cost of filing hundreds of thousands of claims quickly reaches staggering proportions. See, *e.g.*, *Jenkins* v. *Genesis Fin. Solutions, LLC (In re Jenkins)*, 456 B.R. 236, 241 (Bankr. E.D.N.C. 2011) ("The issue is a real one, the problem is widespread, and it burdens both debtors and the courts."). Given the lack of any redeeming value in Midland's practice, this significant expense is especially unwarranted.

b. Midland further insists that debtors are adequately protected by trustees: even with "unrepresented" debtors, trustees have an independent "statutory obligation to object to improper claims," including "those barred by the statute of limitations." *Birtchman*, 2015 WL 1825970, at *9 (citing 11 U.S.C. 704(a)(5)). Because trustees must object to stale claims, debtors are "protected" from time-barred debts. *Ibid.*

This logic flips the statutory scheme on its head. The FDCPA bans "abusive, deceptive, and unfair" practices. 15 U.S.C. 1692(a). Debt collectors cannot possibly avoid the FDCPA by suggesting that their practice is so egregious that Congress *compelled* trustees to ferret out and attack it. If these claims had any legitimate purpose, Congress would not have charged trustees with automatically objecting the moment the claims are filed. The trustees' "statutory obligation" only underscores precisely why this conduct violates the FDCPA; it hardly excuses it.

In any event, as a practical matter, trustees do *not* adequately protect debtors. Midland knows that trustees cannot feasibly object to every baseless claim. Trustees are charged with multiple duties and obligations, and they operate under difficult circumstances with limited time and resources. In light of these practical constraints, trustees simply cannot wade through each and every proof of claim filed in all Chapter 13 proceedings. See *Feggins* v. *LVNV Funding LLC*, No. 13-11319-WRS, 2015 WL 7424339, at *3 n.5 (Bankr. M.D. Ala. Nov. 20, 2015) (*Feggins II*) (trustee "testified that his office processes between 6,000 and 7,000 claims each month, and that there are between 18,000 and 19,000 pending Chapter 13 cases in this district"). Midland deliberately exploits this dynamic.

3. The best proof that bankruptcy's "safeguards" are inadequate is Midland's own existence. If Midland failed to deceive or exploit debtors, its entire scheme would disappear. *Avalos*, 531 B.R. at 756-757. Midland has no good-faith basis for its filings, which is precisely why it throws in the towel when anyone objects. Midland is playing the odds: it knows the process will break down, and attorneys and trustees will not catch every invalid claim. Midland cannot avoid the FDCPA merely because its bad-faith scheme does not always succeed.

II. MIDLAND CANNOT MEET ITS HEAVY BURDEN OF ESTABLISHING THAT THE BANKRUPTCY CODE IMPLIEDLY REPEALS THESE FDCPA CLAIMS

Midland alternatively argues that the Bankruptcy Code precludes any viable claim under the FDCPA. According to Midland, the Code grants creditors an absolute "right" to file proofs of claim, and the FDCPA (by prohibiting frivolous claims) is irreconcilable with that "right." This theory is meritless.[3]

"When two federal statutes address the same subject in different ways, the right question is whether one implicitly repeals the other * * * ." *Randolph*, 368 F.3d at 730. This standard is demanding, and Congress's intent to displace one of its own laws must be "clear and manifest" (*Morton* v. *Mancari*, 417 U.S. 535, 551 (1974)): "Courts should

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[3] Contrary to Midland's contention, multiple courts have already rejected the sweeping theory that the FDCPA is precluded in its entirety in the bankruptcy setting. Compare *Randolph* v. *IMBS, Inc.*, 368 F.3d 726, 730-733 (7th Cir. 2004) ("[t]he Bankruptcy Code of 1986 does not work an implied repeal of the FDCPA"), and *Simon* v. *FIA Card Servs., N.A.*, 732 F.3d 259, 273-274 (3d Cir. 2013) ("follow[ing] the Seventh Circuit's approach"), with *Walls* v. *Wells Fargo Bank, N.A.*, 276 F.3d 502, 510-511 (9th Cir. 2002) (holding the FDCPA categorically "precluded"), and *Simmons* v. *Roundup Funding LLC*, 622 F.3d 93, 96 (2d Cir. 2010) (holding that the Code precluded an FDCPA claim over an "inflated" proof of claim). *Walls* is an outlier, and the Second Circuit recently cut back *Simmons*, refusing to find the FDCPA precluded where a debt collector alleged a violation of the Code's discharge injunction. See *Garfield* v. *Ocwen Loan Servicing, LLC*, No. 15-527, slip op. 12 (2d Cir. Jan. 4, 2016) (adopting *Randolph*, rejecting *Walls*, and acknowledging that *Randolph*'s logic "lead[s]" to "a result that differs from our *Simmons* decision"). To prevail notwithstanding *Randolph*, *Simon*, and *Garfield*, Midland must show a true "irreconcilable conflict" between the FDCPA and Midland's asserted right to file time-barred claims. Midland flunks that showing.

'not infer a statutory repeal unless the later statute *expressly contradicts* the original act or unless such a construction is *absolutely necessary* in order that the words of the later statute shall have any meaning at all." *Simon*, 732 F.3d at 274 (quoting *Nat'l Ass'n of Home Builders* v. *Defenders of Wildlife*, 551 U.S. 644, 662 (2007)) (emphases added).

There is no preclusion under this controlling standard. Congress did not textually foreclose the FDCPA in bankruptcy, and there is no serious (much less "irreconcilable") conflict between the Code and the FDCPA. These statutory schemes can readily co-exist, and it is "easy to enforce each one." *Randolph*, 368 F.3d at 730. Midland's preclusion theory is mistaken.

A. There Is No Textual Support For Preclusion Because There Is No Clearly Expressed Statement Of Preclusion In Either Scheme

There is no "clearly expressed legislative decision" that the Code supplant the FDCPA in this context. *Randolph*, 368 F.3d at 730. No court examining this question—in *any* setting—has suggested that Congress textually displaced the FDCPA. Congress addressed proofs of claim and provided general contempt remedies in the Code. But Congress did not include any special or exclusive mechanism for handling patently invalid claims, and it never declared the Code's remedies the *exclusive* means for redressing unfair, misleading, or unlawful conduct. See *Wagner* v. *Ocwen Fed. Bank*, No. 99-C-5404, 2000 U.S. Dist. LEXIS 12463, at *3-*4 (N.D. Ill. Aug. 28, 2000).

Nor is there any preclusive language in the FDCPA: Congress framed its open-ended prohibitions with broad language (*e.g.*, forbidding "any" improper representations or means, 15 U.S.C. 1692e), and Congress underscored the "inadequa[cy]" of "[e]xisting" remedies for curbing abusive practices (15 U.S.C. 1692(b)). That suggests the *opposite* intent of deferring to other schemes to regulate "debt collectors."

Congress was aware of the obvious connection between abusive debt-collection and "personal bankruptcies." 15 U.S.C. 1692(a). If it wished to set aside the FDCPA in this context, it would have said so.

B. There Is No Conflict ("Irreconcilable" Or Otherwise) Between The FDCPA And The Code

Midland asserts that the Code and the FDCPA "irreconcilabl[y] conflict": the Code "authorizes" debt collectors to pursue time-barred debts, while the FDCPA "prohibits" the same practice. *Johnson* v. *Midland Funding, LLC*, 528 B.R. 462, 473 (S.D. Ala. 2015); see also *B-Real, LLC* v. *Chaussee (In re Chaussee)*, 399 B.R. 225, 236-237, 240 (B.A.P.

9th Cir. 2008). According to Midland, the FDCPA and the Code thus cannot coexist. Midland is wrong.

1. There is no preclusion because there is no "right" to file a time-barred proof of claim

There is simply no "right" (under the Code *or* the FDCPA) to file a proof of claim knowing that a debt is unenforceable. This eliminates any conceivable conflict: It is easy to comply with both statutes because the conduct *violates* both statutes. Nothing compels (or even *permits*) an act under one scheme that violates the other. This is simply a matter of refusing to pursue claims that lack any conceivable good-faith basis. Because Midland cannot establish a "right" under the Code to file baseless claims, its preclusion defense fails.

a. First, Midland's asserted "right" is incompatible with the Code's plain text. Again, a claim is a "right to payment" (11 U.S.C. 101(5)(A)), and "a 'right to payment' is nothing more nor less than an *enforceable obligation*" (*Davenport*, 495 U.S. at 559 (emphasis added)). Only "enforceable" claims are authorized under 11 U.S.C. 101(5)(A) (*NextWave*, 537 U.S. at 303), and stale claims are *not* "enforceable" (*McMahon*, 744

F.3d at 1020). Because Midland has no "right to payment," it has no "right" to file a proof of claim.[4]

Second, any such "right" is directly at odds with the trustee's duty to "object" to stale claims. See 11 U.S.C. 704(a)(5), 1302(b)(1). No rational legislative body simultaneously grants an absolute "right" for one party to file a claim that another party has an absolute duty to reject. Bankruptcies are sufficiently busy without make-work. Midland's time-barred claims will fail, by design, unless trustees fail to discharge their legal obligations. That statutory design is incompatible with a purported "right" to file unenforceable claims.

Third, Midland's understanding is inconsistent with the routine award of sanctions for filing knowingly time-barred claims: "Where an attorney knows that a claim is time-barred and has no intention of seeking reversal of existing precedent, as here, he makes a claim

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[4] It is true that Congress expanded the term "claim" with the "broadest possible definition." H.R. Rep. No. 95-595, at 180 (1977). But Congress only expanded the term in certain respects, and those respects were *enumerated*: things like "contingent," "unmatured," and "disputed." That satisfied the purpose of bringing all *enforceable* obligations before the court to provide comprehensive relief. *Ibid.* But nowhere did Congress hint that this definition sweeps in knowingly *invalid* claims.

groundless in law and is subject to Rule 11 sanctions." *Brubaker* v. *City of Richmond*, 943 F.2d 1363, 1385 (4th Cir. 1991); see also *FDIC* v. *Calhoun*, 34 F.3d 1291, 1299 (5th Cir. 1994).

That describes Midland's conduct exactly. Midland purchased time-barred debts at pennies on the dollar precisely because those debts are unenforceable. The affirmative defense is "blindingly obvious": "coming to the conclusion that the claims might be time-barred did not require either claimant to look beyond the information it already possessed." *Sekema*, 523 B.R. at 654. Nor does it matter that "the statute of limitations is an affirmative defense which must be pled or waived" (*Steinle* v. *Warren*, 765 F.2d 95, 101 (7th Cir. 1985)): "Rule 11 does not permit a plaintiff to avoid sanctions merely because the opposing party or the judge might not immediately recognize that the assertion is groundless." *Brubaker*, 943 F.2d at 1385.

Sanctions, in short, are "appropriate if any attorney knowingly file[s] suit on an undisputedly time-barred claim." *Goins* v. *JBC & Assocs., P.C.*, 352 F. Supp. 2d 262, 272 (D. Conn. 2005). That proposition is impossible to square with Midland's alleged "right" to file time-barred claims. The entire point of a sanction is that conduct is not merely prohibited, but so egregious to warrant *punishment*. There is no such thing as a "right" to engage in *sanctionable* conduct. See *Feggins*, 2015 Bankr. LEXIS 2822, at *18.

Congress legislates against the backdrop of established principles like Rule 11 authority and inherent judicial power to sanction frivolous behavior. See *Fogerty* v. *Fantasy, Inc.*, 510 U.S. 517, 534 (1994). It follows that whatever "right" Congress conferred in the Code presumptively does not extend to frivolous filings. If Congress intended to create a "right" for debt collectors to file time-barred claims (without any discernible justification), Congress surely would have done so with clearer language than this.

b. Because Midland's practice is not even *tolerated* under the Code, but *forbidden*, there is no plausible "conflict" between the Code and the FDCPA: a debt collector "can easily satisfy both mandates" (*Dep't of Transp.* v. *Pub. Citizen*, 541 U.S. 752, 767 (2004)), because the challenged conduct is forbidden under both schemes. If Midland simply refuses to file baseless claims, it will automatically comply with the FDCPA. Midland's assertion of a "'positive repugnancy'" is incorrect, and it should be rejected. *Simon*, 732 F.3d at 274.

2. There is no preclusion even if there somehow *is* a "right" to file a time-barred proof of claim

Even if there were a "right" to file knowingly time-barred claims, the Code and the FDCPA would still easily co-exist. Midland's contrary assertion fundamentally misunderstands the implied-repeal analysis.

a. There is no "irreconcilable conflict" when one scheme allows what the other forbids; one must *compel* what the other forbids. The standard is one of impossibility. *J.E.M. Ag Supply, Inc.* v. *Pioneer Hi-Bred Int'l, Inc.*, 534 U.S. 124, 142 (2001); *Randolph*, 368 F.3d at 730. Midland cannot find a single controlling case suggesting that a true "conflict" exists where one statute merely permits what another disallows. Mere tension may be relevant in a *preemption* analysis, but not a *preclusion* analysis. *POM Wonderful LLC* v. *Coca-Cola Co.*, 134 S. Ct. 2228, 2236 (2014); *Simon*, 732 F.3d at 275-276. Each law operates within its proper sphere to regulate its targeted behavior. *POM Wonderful*, 134 S. Ct. at 2239-2240; *Conn. Nat'l Bank* v. *Germain*, 503 U.S. 249, 253 (1992). If Congress bans conduct under one law, a court cannot excuse it under another. *J.E.M.*, 534 U.S. at 141-142.

Here, the FDCPA works against the Code's backdrop to regulate professional debt collectors. *Randolph*, 368 F.3d at 730-731. Even if

Midland is somehow permitted to file time-barred claims, no one suggests Midland is *compelled* to file such claims. That ends the matter: the judiciary is not entitled to "pick and choose" between competing enactments when it is possible to enforce both. *Morton*, 417 U.S. at 551. It is easily possible to enforce both here: Once Midland elects not to file baseless claims, it will comply with both laws. *Conn. Nat'l Bank*, 503 U.S. at 253. The fact that debt collectors must forgo certain claims in Title 11 is a direct consequence of Congress's political judgment—it is a reason to *enforce* the FDCPA, not preclude it.

* * *

Midland hints that authorizing these FDCPA claims will flood courts will unnecessary litigation. Yet exactly the opposite is true: it is *Midland*, not debtors, who is creating needless work for innocent parties and busy courts. Once it is clear that courts will enforce the FDCPA as Congress intended, Midland will have no choice but to respect the process and end its abusive tactics. The entire point of the FDCPA is to stop unfair practices before they begin. Without the FDCPA's deterrent, Midland has no reason to stop a practice that exacts significant costs without any redeeming benefit. These suits will deter that future misconduct, eliminating the need to expend *any* further effort grappling with baseless claims.

CONCLUSION

The judgment should be reversed, and the case should be remanded for further proceedings.

Respectfully submitted.

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I hereby certify that on January 25, 2016, an electronic copy of the foregoing Amicus Brief was filed with the Clerk of Court for the U.S. Court of Appeals for the Eighth Circuit, using the appellate CM/ECF system. I further certify that all parties in these consolidated cases are represented by lead counsel who are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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