No. 14-858

Supreme Court of the United States

LVNV FUNDING, LLC; ET AL.,

Petitioners,

v.

STANLEY CRAWFORD,

Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Eleventh Circuit

BRIEF OF ACA INTERNATIONAL AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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BRIEF OF ACA INTERNATIONAL AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

Interest of the *Amicus Curiae*[1]

ACA International, the Association of Credit & Collection Professionals, is a Minnesota nonprofit corporation with offices in Washington, D.C., and Minneapolis, Minnesota. Founded in 1939, ACA represents nearly 3,700 members, including credit grantors, collection agencies, attorneys, asset buyers, and vendor affiliates. ACA produces a wide variety of products, services, and publications, including educational and compliance-related information; and articulates the value of the credit-and-collection industry to businesses, policymakers, and consumers.

ACA company members range in size from small businesses with a few employees to large, publicly held corporations. These members include the very smallest of businesses that operate within

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[1] No counsel for any Party authored this brief in whole or in part. Neither any such counsel nor any Party made a monetary contribution intended to fund this brief's preparation or submission. No person (other than Amicus Curiae ACA International, its members, and its counsel) made such a monetary contribution.

The counsel of record for all Parties received timely notice under Rule 37.2(a) of ACA International's intention to file an *amicus curiae* brief. All the Parties have granted consent.

a limited geographic range of a single town, city, or state, and the very largest of national corporations doing business in every state. But most ACA company members are small businesses, collecting rightfully owed debts on behalf of other small and local businesses. Approximately 75% of ACA's company members maintain fewer than twenty-five employees.

As part of the process of attempting to recover outstanding payments, ACA members are an extension of every community's businesses. ACA members work with these businesses, large and small, to obtain payment for the goods and services already received by consumers. In years past, the combined effort of ACA members has resulted in the annual recovery of billions of dollars — dollars that are returned to and reinvested by businesses, and that would otherwise constitute losses on those businesses' financial statements. Without an effective collection process, the economic viability of these businesses — and, by extension, the American economy in general — is threatened. Recovering rightfully owed consumer debt lets organizations survive; helps prevent job losses; keeps credit, goods, and services available; and reduces the need for tax increases to cover governmental budget shortfalls.

In 2013, Ernst &Young conducted a study to measure the various impacts of third-party debt collection on the national and state economies. In addition to recovering rightfully-owed consumer debt totaling $44.9 billion in 2013 alone, the study

found that third-party debt collectors directly provided over 136,000 jobs and $6.4 billion in payroll. When factoring in jobs created indirectly, those numbers doubled to 231,000 jobs and $12.4 billion in payroll. Third-party debt collectors paid $687 million in state and local taxes and $724 million in federal taxes. The total state and local tax impact of third-party debt collectors was $1.3 billion, and the total federal impact was $1.4 billion.[2]

Summary of Argument

The Eleventh Circuit has taken a different approach from the other circuit courts of appeals that have addressed whether filing a proof of claim in bankruptcy can support liability under the Fair Debt Collection Practices Act, and has caused confusion in the credit-and-collection industry. Under the Eleventh Circuit's holding, a debt collector or a debt buyer may run afoul of the Fair Debt Collection Practices Act by doing nothing more than presenting a time-barred debt to a bankruptcy court for administration as part of a bankruptcy estate. As a result, at least in the Eleventh Circuit, debt collectors and buyers are less

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[2] Ernst &Young, *The Impact of Third-Party Debt Collection on the National and State Economies in 2013*, July 2014, *online at* http://www.acainternational.org/economicimpact.aspx.

likely to present such debts in the bankruptcy process — with the result that the bankrupt debtor may not obtain the complete relief to which the debtor is otherwise entitled.

For the credit-and-collection industry to comply with the Fair Debt Collection Practices Act, the Act must be consistently and predictably applied — that is, an actor whose conduct falls within the Act's scope must know what the Act prohibits and what it allows. In a nationwide market, that outcome requires consistent and predictable nationwide direction on which a collector can rely. The Eleventh Circuit's holding has now deprived the industry of the consistent and predictable nationwide direction that a long and consistent series of judicial opinions had provided for many years. Only this Court can restore consistency and predictability to the law.

Whether a debt is time-barred is not always a simple question, and sometimes requires an analysis that goes far beyond any duty that Congress has imposed on debt collectors under the Fair Debt Collection Practices Act. But the answer to whether a debt is time-barred usually depends on simple facts. The Federal Rules of Bankruptcy Procedure already require the disclosure, in "a statement . . . filed with the proof of claim," of the relevant facts from which a debt's timeliness can be ascertained. When this Court adopted that rule in 2011, the advisory committee specifically noted that the required disclosure "will . . . provide a basis for assessing the timeliness of the claim." Compliance

with that requirement — that is, truthfully furnishing all the information from which the debtor, the trustee, and other creditors may "assess[] the timeliness of the claim" — should be enough to avoid liability for any alleged violation of the Fair Debt Collection Practices Act.

Discouraging the filing of potentially stale claims may keep those claims out of bankruptcy, and thus frustrate the Bankruptcy Code's purpose by preventing those claims from being discharged. That result can be unhealthy for the debtor, in that it will prevent the discharge of the unpaid debt that the debtor may have forgotten to include in his or her bankruptcy petition. If the stale debt is not discharged, then it may still be subject to collection, because it was not included in the bankruptcy discharge. And if the debt is not actually stale, then it may still result in litigation against the debtor — who therefore will not have gotten the "fresh start" that the Bankruptcy Code promises.

The Bankruptcy Code itself contains adequate remedies against proofs of claim that are stale or otherwise invalid. A bankruptcy court can disallow a claim if "such claim is unenforceable against the debtor and property of the debtor, under any . . . applicable law for a reason other than because such claim is contingent or unmatured," and "one reason a claim would be deemed unenforceable is because the underlying debt is time-barred." That protection against a stale claim is available within the bankruptcy case itself, and "[n]othing in either the Bankruptcy Code or the

FDCPA suggests that a debtor should be permitted to bypass the procedural safeguards in the Code in favor of asserting potentially more lucrative claims under the FDCPA."

ACA therefore joins the Petitioners in asking that this Court grant the petition for a writ of certiorari.

Argument

A famous question in trial advocacy, usually attributed to Abraham Lincoln, asks, "How many legs will a dog have if you call the tail a leg?" The answer, of course, is . . . four, because "calling a tail a leg don't make it so."[3]

This case raises a similar question: How many lawsuits will there be if you say that filing a proof of claim in bankruptcy amounts to a lawsuit? The answer is, none, because calling a proof of claim a lawsuit does not turn it into a lawsuit. But the United States Court of Appeals for the Eleventh Circuit has tried to obliterate the distinction,[4] with

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[3] *See, e.g.,* Anthony Gross, *The Wit and Wisdom of Abraham Lincoln* 116 (1992); James C. Humes, *The Wit & Wisdom of Abraham Lincoln* 194 (1996). The animal in these versions is a sheep rather than a dog.

[4] *Crawford v. LVNV Funding, LLC*, 758 F.3d 1254, 1262 (11th Cir. 2014) [App. 13a–14a] ("Just as LVNV would have violated the FDCPA by filing a lawsuit on stale claims in state court, LVNV violated the FDCPA by filing a stale claim in bankruptcy court.").

results that have confused the credit-and-collection industry, have created an unnecessary conflict between two federal statutes and among the circuit courts of appeals, will frustrate the Bankruptcy Code's purpose of giving debtors a fresh start, and will unfairly impose liability on debt collectors for following a longstanding and consistent rule that multiple federal appellate courts have articulated.

I. The Eleventh Circuit has taken a different approach from the other circuit courts of appeals that have addressed whether filing a proof of claim in bankruptcy can support liability under the Fair Debt Collection Practices Act, and has caused confusion in the credit-and-collection industry.

For years, the credit-and-collection industry has relied on a long and consistent series of judicial opinions under which the Bankruptcy Code and the Fair Debt Collection Practices Act have coexisted in harmony: a debt collector or a debt buyer could participate in the bankruptcy process without running afoul of the Fair Debt Collection Practices Act,[5] and could submit a proof of claim as to a debt

[5] *See, e.g.*, *Simmons v. Roundup Funding, LLC*, 622 F.3d 93, 95 (2d Cir. 2010) ("Federal courts have consistently ruled that filing a proof of claim in bankruptcy court (even one that is somehow invalid) cannot constitute the sort of abusive debt collection practice proscribed by the FDCPA, and that such a filing therefore cannot serve as the basis for an FDCPA action."); *Walls v. Wells Fargo Bank, N.A.*, 276 F.3d 502, 510 (9th Cir. 2002) ("While the FDCPA's purpose is to avoid

— even a time-barred debt — in the bankruptcy process so that the bankruptcy estate could be administered in an orderly and complete manner and so that the debt could be discharged or otherwise disposed of under the bankruptcy law.

This case calls that longstanding and consistent interpretation into question, and has caused confusion in the credit-and-collection industry. Under the Eleventh Circuit's holding, a debt collector or a debt buyer may run afoul of the Fair Debt Collection Practices Act by doing nothing more than presenting a time-barred debt to a bankruptcy court for administration as part of a bankruptcy estate. As a result, at least in the Eleventh Circuit, debt collectors and buyers are less likely to present such debts in the bankruptcy process — with the result that the bankrupt debtor may not obtain the complete relief to which the debtor is otherwise entitled.

That result is unfair to the debt collectors and buyers — not only because it is substantively unfair, but because the law should not force those collectors and buyers (and their attorneys) into the Hobson's choice of either filing a proof of claim and facing liability under the Fair Debt Collection

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bankruptcy, if bankruptcy nevertheless occurs, the debtor's protection and remedy remain under the Bankruptcy Code."); *Buckley v. Bass & Assocs.*, 249 F.3d 678, 681 (7th Cir. 2001) ("such claims are outside the scope of the Fair Debt Collection Practices Act"); *Baldwin v. McCalla, Raymer, Padrick, Cobb, Nichols & Clark, L.L.C.*, No. 98 C 4280, 1999 U.S. Dist. LEXIS 6933, at *15–18 (N.D. Ill. Apr. 19, 1999).

Practices Act, or being excluded from the bankruptcy process in order to avoid such liability. But that result can also be unhealthy for the debtor, in that it will prevent the resolution of unpaid debt that the debtor may want discharged for any number of reasons (about which more below in argument IV[6]).

The Constitution requires "uniform Laws on the subject of Bankruptcies throughout the United States."[7] Congress recognized in the Fair Debt Collection Practices Act that debt-collection practices "directly affect interstate commerce," even where the practices "are purely intrastate in character."[8] The credit-and-collection industry operates in a nationwide market, so public policy favors consistent and predictable application of the Bankruptcy Code and the Fair Debt Collection Practices Act.

For the credit-and-collection industry to comply with the Fair Debt Collection Practices Act, the Act must be consistently and predictably applied — that is, an actor whose conduct falls within the Act's scope must know what the Act prohibits and what it allows. In a nationwide market, that outcome requires consistent and predictable nationwide direction on which a

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[6]See below at 17–19.

[7]U.S. Const. art. I, § 8, cl. 4.

[8]15 U.S.C. § 1692(d) (interstate commerce).

collector can rely. The Eleventh Circuit's holding has now deprived the industry of the consistent and predictable nationwide direction that a long and consistent series of judicial opinions had provided for many years. Now that the Eleventh Circuit "has entered a decision in conflict with the decision of another United States court of appeals on the same important matter"[9] — in fact, a decision in conflict with the decisions of several other federal courts of appeals — only this Court can restore consistency and predictability to the law. This Court should therefore grant the petition for a writ of certiorari.

II. Whether a debt is time-barred is not always a simple question, and sometimes requires an analysis that goes far beyond any duty that Congress has imposed on debt collectors under the Fair Debt Collection Practices Act.

The Eleventh Circuit's holding forces a debt collector or buyer who files a proof of claim in bankruptcy to assess and determine whether the underlying debt is barred by an applicable statute of limitations. That holding requires an analysis that goes far beyond any duty that Congress has imposed on debt collectors under the Fair Debt Collection Practices Act.

Whether a debt is time-barred is not a simple question that can always be easily answered. Even

[9] S. Ct. R. 10(a) (considerations governing review on certiorari).

in the simplest cases, determining whether a debt is time-barred involves these basic questions:

- **What law applies?** Does the applicable agreement provide a choice of law? Or does the law of the place where the debtor entered into the agreement govern? Or the law of the forum where a lawsuit would be brought (for example, if the debtor has moved since the debt arose)?[10]
- **Under the governing law, what is the applicable statute of limitations?** There is more than one available answer in some jurisdictions: "a state may have a number of different statutes of limitations of different lengths, such as for written contracts, non-written contracts, sales of goods, leases, dishonored checks, and promissory notes. It is often critical to determine which limitations period applies to each of the collection causes of action."[11] For example, Illinois has different limitations periods for "written" and "unwritten" agreements (and

[10] *See generally* Jonathan Sheldon, Carolyn L. Carter & Chi Chi Wu, *Collection Actions: Defending Consumers and Their Assets* § 3.6.3 (NCLC 3d ed. 2014) ("Questions often arise . . . as to which state's law applies to the determination of the limitations period. Because limitations periods vary significantly by state, it matters whether the limitations period is determined by the law of the forum state or by some other state's law.").

[11] *Id.* § 3.6.6.1 at 45.

"written" and "unwritten" don't necessarily mean what they sound like — an "unwritten" agreement can mean an agreement that, while it exists in writing, is not exhibited to the complaint in an action for collection.)[12]

- **Has the statute of limitations been tolled?**[13]
- **Has the statute of limitations been restarted?**[14]

One could teach an entire law-school course on the statute of limitations. Even in a simple case, there are often questions over which reasonable minds can differ in good faith, hence the not-infrequent litigation over the statute of limitations.

Some debt-collection firms are law firms, but many are not. And some debt collectors are licensed lawyers, but many are not. While a non-lawyer debt collector may be able to reach an informed view about whether a debt is time-barred, that view may be mistaken in the absence of a more sophisticated legal analysis — and as this Court recently reminded all debt collectors, a mistaken view of the law is not an excuse and may result in significant

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[12] *Ramirez v. Palisades Collection LLC*, No. 07 C 3840, 2008 U.S. Dist. LEXIS 48722, at *6–8 (N.D. Ill. June 23, 2008).

[13] *See generally* Sheldon et al., *Collection Actions* § 3.6.8.2.

[14] *See generally id.* § 3.6.8.3 ("Certain actions by the consumer can revive the statute of limitations — that is start the statute running again from the beginning.").

civil liability.[15] To impose that burden, and the concomitant risk of liability, on debt collectors acting in good faith goes far beyond any duty that Congress imposed on debt collectors under the Fair Debt Collection Practices Act.

III. The Bankruptcy Rules already require that a claimant provide information to determine whether a debt is stale, and compliance with that requirement should be enough.

The Eleventh Circuit's holding forces a debt collector or buyer who files a proof of claim in bankruptcy to assess and determine whether the underlying debt is barred by an applicable statute of limitations. But the Federal Rules of Bankruptcy Procedure already require the disclosure of information from which that question can be answered. The Eleventh Circuit's holding not only imposes a new duty that no statute or rule spells out, but its holding also subjects the claimant to potential liability for filing the claim, even if the debt collector or buyer truthfully furnishes all the information that the Bankruptcy Rules require.

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[15] *See Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich, L.P.A.*, 559 U.S. 573, 527–36 (2010) ("Our law is no stranger to the possibility that an act may be 'intentional' for purposes of civil liability, even if the actor lacked actual knowledge that her conduct violated the law. . . . Congress . . . did not confine liability under the FDCPA to 'willful' violations, a term more often understood in the civil context to excuse mistakes of law.").

Whether a debt is time-barred is not always a simple question — but the answer usually depends on simple facts. The Federal Rules of Bankruptcy Procedure already require the disclosure, in "a statement . . . filed with the proof of claim," of the relevant facts from which a debt's timeliness can be ascertained:

> When a claim is based on an open-end or revolving consumer credit agreement — except one for which a security interest is claimed in the debtor's real property — a statement shall be filed with the proof of claim, including all of the following information that applies to the account:
>
> (i) the name of the entity from whom the creditor purchased the account;
>
> (ii) the name of the entity to whom the debt was owed at the time of an account holder's last transaction on the account;
>
> (iii) the date of an account holder's last transaction;
>
> (iv) the date of the last payment on the account; and

> (v) the date on which the account was charged to profit and loss.[16]

When this Court adopted that rule in 2011, the advisory committee specifically noted that "[d]isclosure of the information required by paragraph (3) will . . . provide a basis for assessing the timeliness of the claim."[17] Thus, the Bankruptcy Rules already require that a claimant provide information to determine whether a debt is stale. Compliance with that requirement — that is, truthfully furnishing all the information from which the debtor, the trustee, and other creditors may "assess[] the timeliness of the claim" — should be enough to avoid liability for any alleged violation of the Fair Debt Collection Practices Act.[18]

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[16] Fed. R. Bankr. P. 3001(b)(3)(A).

[17] *Id.* committees notes (2011 amend. II).

[18] *See B-Real, LLC v. Rogers*, 405 B.R. 428, 431 (M.D. La. 2009) ("It is difficult for this Court to understand how a procedure outlined by the Bankruptcy Code could possibly form the basis of a violation under the FDCPA.").

IV. Discouraging the filing of potentially stale claims may keep those claims out of bankruptcy, and thus frustrate the Bankruptcy Code's purpose by preventing those claims from being discharged.

If a debt collector cannot file a proof of claim as to a stale debt without violating the Fair Debt Collection Practices Act, then fewer proofs of claim will be filed as to such debts.[19] The rule that the Eleventh Circuit has adopted will, if allowed to stand, have certain foreseeable effects:

- A proof of claim will not be filed as to some debts because they are stale.
- Some debts that are stale will be kept out of bankruptcy.
- A proof of claim will not be filed as to some debts that are potentially but not actually stale, but where the debt collector decides that the risk of defending against a claim under the

[19] *See MSR Exploration, Ltd. v. Meridian Oil, Inc.*, 74 F.3d 910, 916 (9th Cir. 1996) ("The threat of later state litigation may well interfere with the filings of claims by creditors and with other necessary actions that they, and others, must or might take within the confines of the bankruptcy process. Whether creditors should be deterred, and when, is a matter unique to the flow of the bankruptcy process itself . . . ."); *Baldwin v. McCalla, Raymer, Padrick, Cobb, Nichols & Clark, L.L.C.*, No. 98 C 4280, 1999 U.S. Dist. LEXIS 6933, at *17 (N.D. Ill. Apr. 19, 1999) ("creditors may be deterred from filing claims").

Fair Debt Collection Practices Act outweighs the benefit of presenting the claim in the bankruptcy.

- Some debts that are potentially but not actually stale will be kept out of bankruptcy.

These effects are especially problematic where the potentially time-barred debt is not, in fact, time-barred — that is, where the debt collector decides that the risk of taking a mistaken view of the law outweighs the risk of forgoing collection of a legitimate and fully collectible debt. That result is unfair to the debt collectors and to creditors.

But that result can also be unhealthy for the debtor, in that it will prevent the discharge of the unpaid debt that the debtor may have forgotten to include in his or her bankruptcy petition. Stale debt is, after all, *old* debt, and thus more likely to be overlooked or forgotten simply by virtue of that fact.[20] If the stale debt is not discharged, then it may still be subject to collection, because it was not included in the bankruptcy discharge. And if the

[20] *See Crawford v. LVNV Funding, LLC*, 758 F.3d 1254, 1261 [App. 11a] (11th Cir. 2014) (the "debtor's memory of a stale debt may have faded and personal records documenting the debt may have vanished"); *Phillips v. Asset Acceptance, LLC*, 736 F.3d 1076, 1079 (7th Cir. Ill. 2013) (quoting *Kimber v. Fed. Fin. Corp.*, 668 F. Supp. 1480, 1487 (M.D. Ala. 1987) ("the passage of time not only dulls the consumer's memory of the circumstances and validity of the debt, but heightens the probability that she will no longer have personal records detailing the status of the debt"))).

debt is not actually stale, then it may still result in litigation against the debtor — who therefore will not have gotten the "fresh start" that the Bankruptcy Code promises:

> . . . application of the FDCPA to bankruptcy proofs of claim would undermine the central purpose of the Bankruptcy Code, namely, to adjudicate and conciliate all competing claims to a debtor's property in one forum and one proceeding. . . . Permitting debtors to premise FDCPA actions on proofs of claim filed in bankruptcy proceedings would give rise to two definite risks. The first is that creditors may be deterred from filing claims, thus defeating the point of bringing all claims together in one proceeding[]. . . . The second risk is that the possibility of an FDCPA claim, with its provisions permitting statutory and actual damages and attorney's fees, could prompt debtors to ignore the procedural safeguards within the Bankruptcy Code, such as the right to object to proofs of claim and to seek sanctions against creditors who violate provisions within the Bankruptcy Code, in favor of the FDCPA. . . . The practice of debtors deliberately bypassing the Bankruptcy Code's objection process in favor of

> alternative litigation would undermine the entire bankruptcy system.[21]

The Bankruptcy Code itself contains adequate remedies against proofs of claim that are stale or otherwise invalid. A bankruptcy court can disallow a claim if "such claim is unenforceable against the debtor and property of the debtor, under any . . . applicable law for a reason other than because such claim is contingent or unmatured,"[22] and "one reason a claim would be deemed unenforceable is because the underlying debt is time-barred."[23] That protection against a stale claim is available within the bankruptcy case itself, and "[n]othing in either the Bankruptcy Code

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[21] *Baldwin v. McCalla, Raymer, Padrick, Cobb, Nichols & Clark, L.L.C.*, No. 98 C 4280, 1999 U.S. Dist. LEXIS 6933, at *15-18 (N.D. Ill. Apr. 19, 1999).

[22] 11 U.S.C. § 502(b)(1).

[23] *B-Real, LLC v. Rogers*, 405 B.R. 428, 430 (M.D. La. 2009); *see also, e.g.*, *In re McGregor*, 398 B.R. 561 (Bankr. N.D. Miss. 2008) (time-barred claim disallowed); *In re Andrews*, 394 B.R. 384, 388 (Bankr. E.D.N.C. 2008) ("Section 502(b)(1) provides that one of the grounds for disallowing a claim is that the claim is unenforceable under applicable law. A statute of limitations . . . is the type of applicable law referred to in § 502(b)(1) that is grounds for disallowing a claim."); *Wilferth v. Faulkner*, Civ. No. 3:06-CV-510-K, 2006 U.S. Dist. LEXIS 75823, at *9 (N.D. Tex. Oct. 11, 2006) ("The language 'any applicable law' includes applicable statute of limitations. Therefore, a claim that is barred by a statute of limitations is not allowed under § 502(b)(1) of the Bankruptcy Code.").

or the FDCPA suggests that a debtor should be permitted to bypass the procedural safeguards in the Code in favor of asserting potentially more lucrative claims under the FDCPA."[24]

Conclusion

This Court should grant the petition for a writ of certiorari.

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[24] *Simmons v. Roundup Funding, LLC*, 622 F.3d 93, 96 (2d Cir. 2010) (quoting *Gray-Mapp v. Sherman*, 100 F. Supp. 2d 810, 814 (N.D. Ill. 1999)).