No. 16-5042

In the United States Court of Appeals for the Sixth Circuit

IN RE: PATRICIA ANN BROADRICK,
Debtor.

PATRICIA ANN BROADRICK,
Appellant,

v.

LVNV FUNDING, LLC; RESURGENT CAPITAL SERVICES, L.P.; PYOD, LLC,
Appellees.

On Appeal from the United States District Court for the Middle District of Tennessee

OPENING BRIEF FOR APPELLANT PATRICIA ANN BROADRICK

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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Disclosure of Corporate Affiliations and Financial Interest

Sixth Circuit
Case Number: 16-5042 Case Name: Broadrick v. LVNV Funding, LLC, et al.

Name of counsel: Daniel L. Geyser

Pursuant to 6th Cir. R. 26.1, Patricia Ann Broadrick
Name of Party
makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? If Yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

No.

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? If yes, list the identity of such corporation and the nature of the financial interest:

No.

CERTIFICATE OF SERVICE

I certify that on April 15, 2016 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by placing a true and correct copy in the United States mail, postage prepaid, to their address of record.

s/Daniel L. Geyser

This statement is filed twice: when the appeal is initially opened and later, in the principal briefs, immediately preceding the table of contents. See 6th Cir. R. 26.1 on page 2 of this form.

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STATEMENT REGARDING ORAL ARGUMENT

In accordance with Fed. R. App. P. 34(a) and 6 Cir. R. 34(a), Plaintiff respectfully submits that this appeal warrants oral argument. This case 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. Defendants are professional debt collectors. They acquire time-barred debts for pennies on the dollar, and then flood bankruptcy courts with proofs of claim seeking to recover on these knowingly time-barred debts. Defendants are acutely aware that their claims are wholly unenforceable under the Bankruptcy Code, and will *always* be disallowed once anyone objects. But Defendants also know 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 Defendants to collect on meritless claims when the system *malfunctions*, diverting funds from vulnerable debtors and innocent creditors.

This appeal challenges 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). In light of the importance and complexity of these issues, Plaintiff believes that oral argument will assist the Court in its review.

JURISDICTIONAL STATEMENT

1. Patricia Ann Broadrick filed a complaint asserting claims under the Fair Debt Collection Practices Act, 15 U.S.C. 1692 *et seq.* The bankruptcy court had jurisdiction under 15 U.S.C. 1692k(d), 28 U.S.C. 157(b), and 28 U.S.C. 1334. On June 19, 2015, the bankruptcy court dismissed Broadrick's claims in an adversary proceeding. Opinion, RE 1-2, Page ID # 8-34; Order, RE 1-3, Page ID # 35-37. Broadrick timely filed a notice of appeal on June 30, 2015 (RE 1-1, Page ID # 5-7), and an amended notice of appeal on July 1, 2015 (RE 1, Page ID # 1-4).

On June 30, 2015, after the original notice of appeal, but before the amended notice of appeal, all parties filed a joint certification in bankruptcy court seeking a direct appeal to this Court under 28 U.S.C. 158(d)(2)(A). RE 1-5, Page ID # 40-42. After jurisdiction vested in district court (see Fed. R. Bankr. P. 8006(b)), the parties filed a renewed joint certification on August 7, 2015. RE 6, Page ID # 2707-2709. Under Fed. R. Bankr. P. 8006(g), the parties timely filed a petition for direct appeal in this Court on September 8, 2015.

2. a. This Court provisionally granted that petition on January 14, 2016. In its order, the Court instructed the parties to discuss the timeliness of the petition for direct appeal: given the petition was "filed within thirty days of the August 7 certification, but more than thirty days after the June 30 certification," the Court asked

"whether parties can file successive joint certifications in order to restart the thirty-day filing deadline of Rule 8006(g)." RE 9, Page ID # 2727.

b. For multiple reasons, Broadrick respectfully submits that the joint petition was timely and the Court should resolve the vitally important issues presented on appeal.

First, as a purely textual matter, the petition satisfied both 28 U.S.C. 158(d)(2) and Fed. R. Bankr. P. 8006(g). Nothing in either provision expressly limits parties to a single certification. The controlling framework explicitly requires only that (i) the parties "jointly" make the necessary certification; (ii) the court of appeals "authorizes the direct appeal"; and (iii) the petition is filed "[w]ithin 30 days after the date the certification becomes effective." Each condition was met here. Although the parties (regrettably) abandoned the original certification filed in bankruptcy court, they shortly filed a new, independent certification in district court—and filed a timely petition in this Court from that renewed certification. Because that petition satisfied Rule 8006(g)'s operative deadline—it was filed "[w]ithin 30 days after the date the certification became effective"—it met every textual requirement in the controlling framework.

Second, this plain-text reading advances the scheme's statutory purpose. Imposing an atextual "one-certification-only" rule would undermine Congress's chief objective in authorizing direct appeals: providing immediate circuit-level guidance in important bankruptcy cases.[1] Everyone agrees that a direct appeal is appropriate for these issues, and an intermediate appeal (at the district court or Bankruptcy Appellate Panel) would only add time and expense for the judiciary and the parties without any clear offsetting gain. And the delay in obtaining a circuit-level decision will permit intolerable confusion to persist in regional bankruptcies, as both debtors and debt collectors remain uncertain of their rights. Without this Court's immediate guidance, these issues will continue to burden Chapter 13 proceedings.

The controlling question is accordingly whether the *operative* certification—at the time it was entered—was warranted. See, *e.g.*, *Marisol A. by Forbes* v. *Giuliani*, 104 F.3d 524, 528 (2d Cir. 1997). Rule 8006(g)'s deadline ensures that petitions for review are filed in close proximity to their underlying certification. This reduces the prospect of gamesmanship, and it ensures that the conditions warranting certification still exist when the court of appeals considers the petition. See *Aparicio* v. *Swan Lake*, 643 F.2d 1109, 1112 (5th Cir. 1981). If a "renewed" certification promotes Section 158(d)'s objectives, there is no reason to refuse a direct appeal simply because an earlier certification lapsed. To hold otherwise would

[1] Bankruptcy cases otherwise commonly fail to reach the circuit level, given the time and cost of multiple rounds of appellate review. See, *e.g.*, Troy A. McKenzie, *Judicial Independence, Autonomy, and the Bankruptcy Courts*, 62 Stan. L. Rev. 747, 782 (2010) ("The nature of bankruptcy cases tends to discourage further appellate review in the Article III courts because of the twin concerns of delay and cost associated with prolonged litigation.").

"preclude an * * * appeal under circumstances in which the criteria of the statute are satisfied and both the district court and this court have concluded that an * * * appeal is appropriate." *Aparicio*, 643 F.2d at 1112 (permitting recertification under 28 U.S.C. 1292(b)).[2]

Nor does this understanding interfere with this Court's gatekeeping function. The Court always has discretion to deny a direct appeal where successive certification is sought in bad faith, or where a direct appeal would unduly waste intervening efforts in the lower courts. See, *e.g.*, *Peterson* v. *Somers Dublin Ltd.*, 729 F.3d 741, 746 (7th Cir. 2013); *Marisol A.*, 104 F.3d at 529. But where, as here, there is no hint of any cost or prejudice from a renewed certification—and where the appeal's propriety would be indisputable had the parties filed only that renewed certification—Section 158(d) should not be construed to categorically foreclose a proper direct appeal. See, *e.g.*, *Benny v. England (In re Benny)*, 812 F.2d 1133, 1137 (9th

[2] Indeed, Congress's overriding objective is reflected in the scheme's flexibility. Section 158(d) imposes only a single statutory deadline for the entire process: a request for judicial certification must be made within "60 days" after the underlying decision. 28 U.S.C. 158(d)(2)(E). But aside from that single requirement, Congress did not impose *any* deadline for joint certifications by the parties or sua sponte certifications by lower courts. See, *e.g.*, *In re Schwartz*, 799 F.3d 760, 765 (7th Cir. 2015) ("But the appeal in this case was taken directly to the court of appeals, hence governed by 28 U.S.C. § 158(d)(2)(A), which has no time limit provided that all the parties have jointly certified that the case satisfies one of the three specific conditions."). This permits the judiciary and litigants to assess each case in its current posture to determine whether a direct appeal is presently warranted.

Cir. 1987) ("the critical inquiry is whether recertification advances the purposes of section 1292(b)"; "[i]f recertification will foster judicial efficiency and the district court recertifies the order, then the appellate court ought not to deny review solely because the petitioner failed to take advantage of the original certification"); *Aparicio*, 643 F.2d at 1113 ("the trial court exercised sound judgment in reentering the interlocutory order and thus recertifying the appeal"—"[t]he reasons for the earlier certification order continued to exist").

Third, Broadrick's understanding is consistent with the weight of authority in a highly analogous context. For interlocutory appeals under 28 U.S.C. 1292(b), a strong consensus permits successive certifications, even where an original certification lapses due to a party's inadvertence. See, *e.g.*, *Marisol A.*, 104 F.3d at 529 ("We reject the contention that an appellant's negligence completely strips the district court of discretion to recertify an interlocutory order."). While the circuits are debatably split over the issue, the majority view has been endorsed by the leading treatise in the area, multiple courts of appeals, and every member of the Supreme Court to have considered the question. See, *e.g.*, 16 *Federal Practice and Procedure, Jurisdiction* § 3929 (3d ed.) ("The better view is that the district court should have power to enter a new order, again certifying the matter for appeal, so long as it concludes that the statutory criteria continue to be satisfied. More courts have taken this view, ruling that the district court has power to renew its certification if it remains persuaded that appeal still would prove useful."); *Baldwin Cty. Welcome Ctr.* v. *Brown*, 466 U.S. 147, 160-162 (1984) (Stevens, J., dissenting) ("concur[ring] in the majority's holding that there is jurisdiction"; "I am presently persuaded by the view, supported by the commentators, that interlocutory appeals in these circumstances should be permitted").[3] While this Court has reserved judgment on the issue (*i.e.*, whether recertification is proper where a party inadvertently missed a first deadline), we submit that the Court's general practice is consistent with the majority view. See *In re City of Memphis*, 293 F.3d 345, 350 (6th Cir. 2002).[4]

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[3] See also, *e.g.*, *English* v. *Cody*, 146 F.3d 1257, 1259 n.1 (10th Cir. 1998) ("We reject English's argument that we lack jurisdiction in his case because Cody failed to timely appeal after the district court's first grant of the § 1292(b) motion. As acknowledged in English's brief, Cody requested and received from the district court an order reentering the § 1292(b) order, after which we granted Cody's motion for permission to appeal. We therefore hold that we have jurisdiction to hear the appeal."); *Nuclear Eng'g Co.* v. *Scott*, 660 F.2d 241, 247 (7th Cir. 1981) ("we find that as long as a timely appeal from a recertified order will further the purpose of section 1292(b), taking into consideration all events transpiring between the entry of certification orders that bear upon the utility of a section 1292(b) appeal, the appeal should not be dismissed for want of appellate jurisdiction"); *Benny*, 812 F.2d at 1137; *Aparicio*, 643 F.2d at 1113.

[4] Indeed, circuits have generally allowed successive certifications, despite complications arising from Section 1292(b)'s *jurisdictional* character. See *Woods* v. *Baltimore & Ohio R.R. Co.*, 441 F.2d 407, 408 (6th Cir. 1971) (focusing on the "jurisdictional" nature of the deadline in rejecting the district court's attempt to "merely vacat[e]" the order to "extend the jurisdictional period"). Rule 8006(g)'s deadline, by contrast, is imposed by rule, not statute; the time limit accordingly is not juris-

[Footnote continued on next page]

Fourth, even if the petition is nevertheless deemed untimely, the Court should still elect to hear the appeal. See, *e.g.*, *Peterson*, 729 F.3d at 745 (deciding to hear a Section 158(d) appeal despite its possible untimeliness). As described above, there is no jurisdictional bar: the deadline in Rule 8006(g) is not a "statutory time limit[]," and it accordingly can be waived or forgiven. *Bowles* v. *Russell*, 551 U.S. 205, 210-211 (2007); *Peterson*, 729 F.3d at 746. There is no conceivable prejudice to any party. All sides jointly sought direct review, and they acted immediately before the district court expended any effort on the case. Indeed, the parties even filed the renewed certification within the window for seeking certification from the district court. See 28 U.S.C. 158(d)(2)(E) (imposing 60-day deadline after "the entry of the judgment, order, or decree"); Renewed Certification, RE 6, Page ID # 2707-2709 (filing certification on August 7 for a direct appeal of the June 19 ruling). There was no hint of gamesmanship, and the parties' initial failure (which Broadrick regrets) did not cause any harm to any litigants or the district court.

Finally, the judiciary has nothing to gain by denying a direct appeal. Unlike refusing a permissive interlocutory appeal, a finding of untimeliness here would not eliminate any judicial work; it would merely postpone the same *de novo* appeal

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[Footnote continued from previous page]

dictional. *Kontrick* v. *Ryan*, 540 U.S. 443, 453-454 (2004) (deadlines in the Federal Rules of Bankruptcy Procedure are not jurisdictional).

after requiring an *additional* appeal in district court—one which all agree would unduly delay the case's disposition and consume unnecessary resources. In the meantime, litigants and lower courts will continue to disagree over the proper disposition of these frequently recurring questions. This appeal "present[s] legal issues not yet addressed in this circuit," and "no one wants [the Court] to dismiss the[] appeal[]." *Peterson*, 729 F.3d at 746. Given the importance and pressing nature of these issues, Broadrick respectfully submits that the Court should grant the petition and resolve the substantial questions under review.

STATEMENT OF THE ISSUES

In this Chapter 13 bankruptcy, Defendants filed proofs of claim on knowingly time-barred debts. There is no legitimate basis for these claims: the claims-process is limited to legally enforceable rights, and time-barred debts are not legally enforceable. If the system functions as Congress intended, these claims indisputably will be disallowed. But Defendants often collect anyway when the system (predictably) breaks down and fails, which is precisely why Defendants continue filing knowingly invalid claims. According to Defendants, the Code grants an absolute right to file even baseless claims, and the FDCPA cannot interfere with that "right."

The questions presented are:

1. Whether filing a proof of claim on a knowingly time-barred debt violates the FDCPA.

2. Whether any viable FDCPA claim is nevertheless impliedly repealed by the Bankruptcy Code.

STATEMENT OF THE CASE

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). Congress specifically determined that "[e]xisting laws and procedures for redressing these injuries are inadequate to protect consumers." 15 U.S.C. 1692(b).

"The Act regulates interactions between consumer debtors and 'debt collector[s],' defined to include any person who 'regularly collects * * * debts owed or due or asserted to be owed or due another." *Jerman* v. *Carlisle, McNellie, Rini, Kramer & Ulrich, L.P.A.*, 559 U.S. 573, 577 (2010) (quoting 15 U.S.C. 1692a(5), (6)). 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) (internal quotation marks omitted); see also, *e.g.*, *Stratton* v. *Portfolio Recovery Assocs., LLC*, 770 F.3d 443, 448 (6th Cir. 2014) ("'The Fair Debt Collection Practices Act is an extraordinarily broad statute' and must be construed accordingly.").

Congress authorized a private right of action to enforce the FDCPA's prohibitions. 15 U.S.C. 1692k.

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 3.1 cents per dollar of debt for debts that were 3 to 6 years old and 2.2 cents per dollar for debts that were 6 to 15 years old compared to 7.9 cents per dollar for debts less than 3 years old"); *Buchanan* v. *Northland Group, Inc.*, 776 F.3d 393, 395 (6th Cir. 2015) ("LVNV buys 'uncollectable' debts at a discount—the older the debts, the greater the discount"). 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. "[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." *Ibid.*

3. Defendants are a substantial part of this trend, representing some of the nation's biggest buyers of unpaid debt. See, *e.g.*, *In re Hess*, 404 B.R. 747, 751 (Bankr. S.D.N.Y. 2009) (describing LVNV). After Patricia Ann Broadrick sought protection in Chapter 13 bankruptcy, Defendants filed a proof of claim against her seeking $797.30. Proof of Claim, RE 2-1, Page ID # 102. The claim on its face was

barred by the statute of limitations: it had been obtained from Capital One Bank, which recorded the last transaction on August 30, 2002, over a decade earlier. Proof of Claim, RE 2-1, Page ID # 105. Broadrick objected to the claim and sought relief under the FDCPA, alleging that Defendants attempt to collect a knowingly time-barred debt violated 15 U.S.C. 1692e and 1692f as an "unfair," "unconscionable," "deceptive," and "misleading" practice. Adversary Complaint, RE 3-1, Page ID # 561-567; Joint Pretrial Statement, RE 2-1, Page ID # 262-264.

Both sides filed cross-motions for summary judgment, and the bankruptcy court granted summary judgment for Defendants.[5] The bankruptcy court rejected the view that the Code "displace[s] or preclude[s] the FDCPA in every instance when a prohibited debt collection practice happens in a bankruptcy case." Opinion, RE 1-2, Page ID # 9. But the court also refused to allow an FDCPA claim grounded "merely" on filing a knowingly time-barred proof of claim. *Ibid.* Unless the claim contains affirmative misstatements—such as falsely stating the last transaction's date—the court believed the FDCPA would unduly interfere with the Code. *Id.* at Page ID # 9-10. It further reasoned that debtors were protected by multiple safeguards in bankruptcy, eliminating the "justif[ication]" for applying the

[5] This case was consolidated with a series of adversary proceedings raising an identical set of issues. Pretrial Order, DE 2-1, Page ID # 269. All of those cases were disposed of by the same order. Order, DE 1-3, Page ID # 35-37.

FDCPA. *Id.* at Page ID # 14. The court, however, did not explain how Defendants still commonly recover on stale debt if those safeguards were effective.

The court accordingly dismissed the adversary proceeding. Opinion, RE 1-2, Page ID # 34; Order, RE 1-3, Page ID # 35-36.

4. The parties subsequently filed a joint certification for a direct appeal (RE 6, Page ID # 2707-2709), which this Court provisionally granted.

SUMMARY OF ARGUMENT

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

A. Defendants represent that their time-barred claims are valid and enforceable when they know 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, Defendants directly misrepresent the "legal status" and "character" of the debt. This deceptive conduct fits comfortably within the FDCPA.

B. Defendants also exploit the claims-allowance process to collect when the system *malfunctions*. Defendants engage in a systemic effort to "flood" bankruptcy proceedings with thousands of time-barred claims. Defendants file these claims without any legitimate basis or useful purpose. There is *no* scenario in which these claims survive under proper review: Defendants' claims are invalid and will be universally rejected if the process functions as Congress intended. Defendants' 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 imposes needless costs on courts and innocent parties; it 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. See, *e.g.*, *Phillips* v. *Asset Acceptance*, *LLC*, 736 F.3d 1076, 1079 (7th Cir. 2013). 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 Broadrick not declared bankruptcy, Defendants indisputably would have no right to demand payment from anyone. Bankruptcy promises a fresh start by forgiving debt. Defendants' attempt to use bankruptcy to *add* debt flips the system on its head.

II. In the alternative, Defendants argue that the Bankruptcy Code repealed the FDCPA *by implication*. Yet such repeals must be established through "clear text" or "irreconcilable conflict" (*J.E.M. Ag Supply, Inc.* v. *Pioneer Hi-Bred Int'l*, *Inc.*, 534 U.S. 124, 143-144 (2001); *Morton* v. *Mancari*, 417 U.S. 535, 550 (1974)), and Defendants fail that heavy burden.

A. Defendants concede that there is no *textual* preclusion. Put simply, nothing in the Code or the FDCPA possibly qualifies as a “clear statement” that one scheme precludes the other.

B. 1. Nor is there any irreconcilable conflict. Defendants assert that the two schemes conflict because the Code grants professional debt collectors 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 Defendants insist 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.”

2. 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 professional debt collectors are sin-

gled 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 bankruptcy court erred in refusing to apply this superimposed scheme as Congress intended. Its judgment should be reversed.

STANDARD OF REVIEW

1. This Court reviews de novo a lower court's grant of summary judgment, "'view[ing] the evidence, all facts, and any inferences that may be drawn from the

facts in the light most favorable to the nonmoving party.'" *Fed. Home Loan Mortg. Corp.* v. *Lamar*, 503 F.3d 504, 507-508 (6th Cir. 2007).

2. This Court should use the "'least sophisticated consumer'" standard in assessing these claims. *Wallace* v. *Wash. Mut. Bank, F.A.*, 683 F.3d 323, 326 (6th Cir. 2012) (asking whether a "statement would tend to mislead or confuse the reasonable unsophisticated consumer"); *Lamar*, 503 F.3d at 509-510. Defendants' representations are designed to deceive unrepresented debtors or mislead busy attorneys and trustees who have neither the time nor the resources to review invalid proofs of claim. Because the process often relies on consumer debtors as the ultimate backstop, Defendants' representations should be reviewed on the assumption that the debtor herself (*not* her attorney) will review these claims. See *Evory* v. *RJM Acquisitions Funding L.L.C.*, 505 F.3d 769, 774 (7th Cir. 2007) (the FDCPA standard is "different when the conduct is aimed at a lawyer than when it is aimed at a consumer").

Nor does it matter that lawyers will *sometimes* review claims; the same is true in state-court litigation over stale debt, where it is certainly plausible that *some* debtors would hire attorneys to defend against time-barred debts. See *Phillips*, 736 F.3d at 1079; see also *Crawford*, 758 F.3d at 1258 ("[t]he inquiry is not whether the *particular* plaintiff-consumer was deceived or misled") (emphasis added); *Stratton*, 770 F.3d at 449. Defendants cannot invoke a higher standard simply because some lawyers or trustees will review claims that Defendants hope will be reviewed by consumers alone. See *Evory*, 505 F.3d at 776 (calibrating the FDCPA standard to the "intended recipient[]").

ARGUMENT

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

Contrary to Defendants' 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 bankruptcy court erred in holding otherwise, and its judgment should be reversed.

A. Defendants Violate The FDCPA By Falsely Representing That Their Time-Barred Claims Are Valid And Enforceable When They Know 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 Defendants' conduct. Their 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).

Defendants have asserted a "right to payment" that does not exist, and they have taken advantage of default rules declaring their claims "prima facie" valid when they know precisely the opposite is true. Their conduct squarely violates the FDCPA.

1. a. Defendants misrepresent 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, Defendants assert "proofs" of claim without any conceivable "right to payment." It is axiomatic that time-barred debts are not "legally enforceable" (*Buchanan*, 776 F.3d at 396-399; *McMahon*, 744 F.3d at 1020), and Defendants are fully aware that they lack 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 Defendants act anyway despite knowing that no such "right" exists. *E.g.*, *Avalos* v. *LVNV Funding, LLC (In re Avalos)*, 531 B.R. 748, 754 (Bankr. N.D. Ill. 2015).

Defendants' 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," Defendants violate 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). Defendants' 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."). Defendants exploit that background rule. They are fully aware that their claims are not entitled to a presumption of validity. Yet Defendants never disclose that their claims are "prima facie" *invalid* or make 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."). Defendants simply leverage "the misleading impression * * * that the debt collector can legally enforce [a] debt" that indisputably cannot be enforced. *Crawford*, 758 F.3d at 1261; see also *Buchanan*, 776 F.3d at 396.

Nor does it matter that Defendants never explicitly stated that their 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.

Defendants took advantage of the false impression that they deliberately helped foster. That deception violates the FDCPA.

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

a. Defendants insist they have a "right to payment" because time-barred debts are not extinguished under Tennessee law—only corresponding "remedies" are extinguished. See, *e.g.*, Opinion, RE 1-2, Page ID # 27-28; *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; *Johnson*, 501 U.S. at 83-84; *Davenport*, 495 U.S. at 559. 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; see also *Buchanan*, 776 F.3d at 396-397; *Crawford*, 758 F.3d at 1261; *Huertas*, 641 F.3d at 32. Defendants 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, and it has no more right to be paid in bankruptcy than it does in state court").[6]

Under the Code, debt collectors cannot share in an estate's limited assets—diverting funds from *legitimate* creditors—based on "moral" obligations alone. Defendants have no basis for claiming a "right to payment."[7]

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[6] Nor is there any genuine dispute that filing a proof of claim is akin to initiating civil litigation. See *Gardner*, 329 U.S. at 573.

[7] According to the bankruptcy court, it is not automatically improper to seek repayment of "even a stale debt." RE 1-2, Page ID # 22-23. That is assuredly true,

[Footnote continued on next page]

b. Defendants also resist liability because their 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); see also Opinion, RE 1-2, Page ID # 30. Defendants are factually and legally wrong.

As a factual matter, Defendants' 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 Defendants had a "*right to payment*" designed to exploit the Code's presumption of validity (and collect at the expense of everyone else). Indeed, even Defendants' own authority acknowledges that a claim reflects "an implicit representation of legal enforceability." *Ibid.* The fact that Defendants managed not to distort *other* aspects of a frivolous claim is entirely beside the point.

[Footnote continued from previous page]

and assuredly *irrelevant*. There is a stark difference between seeking *voluntary* repayment (as in *McMahon*) and filing formal claims asserting a non-existent "right to payment." Cf. *Buchanan*, 776 F.3d at 399-400. Defendants' court filings are not truthful, accurate, upfront requests for voluntary repayment that a debtor may freely ignore. Cf. *O'Neill* v. *Continental Airlines, Inc. (In re Continental Airlines, Inc.)*, 928 F.2d 127, 129 (5th Cir. 1991) ("the filing of a proof of claim is analogous to the filing of a complaint in a civil action"). It is an attempt to use judicial process to force payment on time-barred debt.

As a legal matter, the FDCPA is not limited to *literal* misstatements. It prohibits statements that are *deceptive or misleading* and targets improper *means* of collecting debts. See, *e.g.*, *Buchanan*, 776 F.3d at 396 ("the statute outlaws more than just falsehoods"; "even a true statement may be banned for creating a misleading impression"); *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 Defendants' filings literally true, they still used deceptive *means* to foster the misleading impression that time-barred debts were enforceable. A professional debt collector cannot excuse itself by including half-truths about a debt's amount or age—Defendants still wrongly included stale debts in a process reserved for *enforceable* claims. Their abusive scheme fits comfortably within the FDCPA.

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

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

1. Defendants engage 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; Defendants' business model is predicated entirely on system failure.[8] Defendants knowingly flood bankruptcy courts with time-barred claims in the hope of col-

[8] System failure is also all too predictable. Consumer debtors may review claims without an attorney, and many unrepresented debtors are unaware of limitations defenses. While trustees are likely aware of limitations defenses, they may not devote their limited time and resources to inspecting claims. Defendants, by design, take improper advantage of these predictable deficiencies. See Part I.C.2, *infra*.

lecting unenforceable debts. These claims have no legal justification. *Avalos*, 531 B.R. at 757. Defendants do not (and *cannot*) contend that they have any good-faith basis for these filings. Defendants' 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, Defendants 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. Defendants impose 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 vulnerable debtors and honest creditors. The process is sufficiently taxed without the deliberate filing of baseless claims. Defendants' attempt to profit from system-error is unfair and unconscionable, and it violates the FDCPA.

2. Defendants insist that their scheme is a fair and legitimate use of the bankruptcy process, but they are mistaken.

a. According to Defendants, 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); Opinion, RE 1-2, Page ID # 9, 18.

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. Defendants' 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. See, *e.g.*, *Trevino* v. *HSBC Mortgage Servs., Inc. (In re Trevino)*, No. 10-70594, 2015 WL 3883180, at *15 (S.D. Tex. June 19, 2015).

b. Nor is Defendants' practice somehow "fair" because their 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 *Defendants*, who thus knew their claims were time-barred but filed anyway. It is hardly an excuse that others—absent system failure—might figure out what Defendants already knew before "burden[ing]" the system with frivolous claims. *In re Sekema*, 523 B.R. 651, 655 (Bankr. N.D. Ind. 2015) (sanctioning debt collectors with a fine "reflect[ing] an appreciation of the system-wide burdens created by this type of misconduct").

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). Defendants' 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 Defendants admit, they could not file time-barred claims in state court without violating the FDCPA. *Phillips*, 736 F.3d at 1079 (invoking 15 U.S.C. 1692e, 1692f); see also *Freyermuth* v. *Credit Bureau Servs., Inc.*, 248 F.3d 767, 771 (8th Cir. 2001). Defendants, however, insist that they 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 Opinion, RE 1-2, Page ID # 12-13; *Gatewood*, 533 B.R. at 909. Defendants are wrong.

1. As the Eleventh Circuit held in *Crawford*, 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 Defendants' 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. Defendants reject *Crawford* on the ground that Chapter 13 debtors are protected by attorneys and trustees. But these "safeguards" are ineffective—which is precisely why Defendants continue flooding bankruptcies with frivolous claims. Put bluntly: if these safeguards worked, Defendants' business model would collapse.

Defendants 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 Defendants' conduct is just as improper in this context as any other. *Crawford* was correct, and Defendants' contrary contention is meritless.

a. According to Defendants, 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 Defendants' 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 Defendants' practice, this significant expense is especially unwarranted.[9]

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[9] In many situations, the cost of objecting to the time-barred debt quickly approaches the amount of the debt itself. See *Suesz* v. *Med-1 Solutions, LLC*, 757 F.3d 636, 639 (7th Cir. 2014) (en banc). In one proceeding below, for example, the time-barred debt was only $411.87, an amount lower than the hourly rate of many attorneys. Opinion, RE 1-2, Page ID # 33 n.10. Debt collectors are very aware of

[Footnote continued on next page]

b. Defendants further insist 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.*; see also Opinion, RE 1-2, Page ID # 27; *LaGrone* v. *LVNV Funding LLC (In re LaGrone)*, 525 B.R. 419, 426 (Bankr. N.D. Ill. 2015).

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. Defendants know that trustees cannot feasibly object to every baseless claim. Trustees are charged with multiple duties and obligations, and they operate under diffi-

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this dynamic, and it explains why many parties simply acquiesce in baseless filings rather than invest time and resources filing an objection.

cult 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"). Defendants deliberately exploit this dynamic.[10]

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

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[10] While it is true that debtors initiated the Chapter 13 proceeding and were not haled into Court (Opinion, RE 1-2, Page ID # 26), that hardly means debtors invited bad-faith claims that unfairly consume everyone's limited time and resources. Nor is it at all apparent how the automatic stay or the discharge injunction address the FDCPA's core concerns. Contra *id.* at Page ID # 21-23. Defendants' scheme is not any less abusive simply because it targets the claims-process alone.

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

Defendants alternatively argue that the Bankruptcy Code precludes any viable claim under the FDCPA. According to Defendants, 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.[11]

"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*, 417 U.S. at 551): "Courts

[11] Contrary to Defendants' 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*, 811 F.3d 86, 91-92 (2d Cir. 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*, Defendants must show a true "irreconcilable conflict" between the FDCPA and Defendants' asserted right to file time-barred claims. Defendants flunk that showing.

should '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. Defendants' 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 well 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

Following certain lower courts, Defendants assert 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 Defendants, the FDCPA and the Code thus cannot coexist. Defendants are 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 Defendants cannot establish a "right" under the Code to file baseless claims, their preclusion defense fails.

a. First, Defendants' 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" (*Crawford*, 758 F.3d at 1261; *McMahon*, 744 F.3d at 1020; *Huertas*, 641 F.3d at 32). Because Defendants have no "right to payment," they have no "right" to file a proof of claim.[12]

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[12] 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 *en-*

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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. Defendants' 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, Defendants' 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 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, *e.g.*, *FDIC* v. *Calhoun*, 34 F.3d 1291, 1299 (5th Cir. 1994); *White* v. *GM Corp.*, 908 F.2d 675, 682 (10th Cir. 1990).[13]

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forceable obligations before the court to provide comprehensive relief. *Ibid.* But nowhere did Congress hint that this definition sweeps in knowingly *invalid* claims.

[13] To the extent the bankruptcy court found nothing wrong with deliberately filing suit on knowingly stale claims (Opinion, RE 1-2, Page ID # 13), it is inviting this Court to create a lopsided circuit split.

That describes Defendants' conduct exactly. Defendants 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; *Leeds Bldg. Prods.* v. *Moore-Handley, Inc. (In re Leeds Bldg. Prods.)*, 181 B.R. 1006, 1010 (Bankr. N.D. Ga. 1995); see also *In re Excello Press, Inc.*, 967 F.2d 1109, 1112-1113 (7th Cir. 1992).

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 Defendants' 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; *Smith* v. *Asset Acceptance, LLC*, 510 B.R. 225, 226 (S.D. Ind. 2013).

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. Defendants' practice is not even *tolerated* under the Code, but *forbidden*. This eliminates any 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 Defendants simply refuse to file baseless claims, they will automatically comply with the FDCPA. Defendants' assertion of a "'positive repugnancy'" is incorrect, and it should be rejected. *Simon*, 732 F.3d at 274; see also *Randolph*, 368 F.3d at 730; *Brimmage* v. *Quantum3 Group LLC (In re Brimmage)*, 523 B.R. 134, 140 (Bankr. N.D. Ill. 2015).

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. Defendants' 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.*, 534 U.S. at 142; *Randolph*, 368 F.3d at 730. Defendants 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. See *POM Wonderful LLC* v. *Coca-Cola Co.*, 134 S. Ct. 2228, 2236 (2014); *Simon*, 732 F.3d at 275-276; *Randolph*, 368 F.3d at 730-732; *Feggins*, 2015 Bankr. LEXIS 2822, at *27-*29; contra Opinion, RE 1-2, Page ID # 21 (declaring Broadrick's FDCPA claim impliedly repealed due to perceived "tension" with the "bankruptcy system"). Each law operates within its proper sphere to regulate its targeted behavior. See *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; *Feggins*, 2015 Bankr. LEXIS, at *18-*19. Even if Defendants are somehow permitted to file time-barred claims, no one suggests Defendants are *compelled* to file such claims.[14] 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 Defendants elect not to file baseless claims, they will comply with both laws. See *Conn. Nat'l Bank*, 503 U.S. at 253. The fact that professional 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.

* * *

Defendants hint that authorizing these FDCPA claims will flood courts with unnecessary litigation. Yet exactly the opposite is true: it is *Defendants*, not debtors, who are creating needless work for innocent parties and busy courts. Once it is clear that courts will enforce the FDCPA as Congress intended, Defendants will have no choice but to respect the process and end their abusive tactics. The entire

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[14] Indeed, by its own terms, the Code's allowance is wholly *permissive*: "A creditor * * * *may* file a proof of claim." 11 U.S.C. 501(a) (emphasis added). "Thus, it is within the creditor's discretion whether or not to file the claim * * * ." *Grandidier* v. *Quantum3 Group LLC*, No. 1:14-cv-00138, 2014 U.S. Dist. LEXIS 169279, at *4 (S.D. Ind. Dec. 8, 2014) (concluding that courts consequently can "apply both the Bankruptcy Code and the FDCPA"); see also *Trevino*, 2015 WL 3883180, at *14 ("If the Code *required* holders of a debt on which the statute of limitations had run to file proofs of claim, this might conflict with the FDCPA. * * * However, there is no such requirement.").

point of the FDCPA is to stop unfair practices before they begin. Without the FDCPA's deterrent, Defendants have 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 below should be reversed, and the case should be remanded for further proceedings.

Respectfully submitted.

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CERTIFICATE OF SERVICE

I hereby certify that on April 15, 2016, an electronic copy of the foregoing Opening Brief was filed with the Clerk of Court for the U.S. Court of Appeals for the Sixth 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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ADDENDUM

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