No. 16-348

IN THE

Supreme Court of the United States

MIDLAND FUNDING, LLC,

Petitioner,

v.

ALEIDA JOHNSON,

Respondent.

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

BRIEF OF THE NATIONAL ASSOCIATION OF CONSUMER BANKRUPTCY ATTORNEYS AND THE NATIONAL CONSUMER BANKRUPTCY RIGHTS CENTER AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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QUESTIONS PRESENTED

1. Whether the filing of an accurate proof of claim for an unextinguished time-barred debt in a bankruptcy case violates the Fair Debt Collection Practices Act.

2. Whether the Bankruptcy Code, which governs the filing of proofs of claim in bankruptcy, precludes the application of the Fair Debt Collection Practices Act to the filing of an accurate proof of claim for an unextinguished time-barred debt.

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INTEREST OF *AMICI CURIAE*[1]

The National Association of Consumer Bankruptcy Attorneys (NACBA) is the leading nonprofit organization serving consumer bankruptcy attorneys and advocating for consumer debtors' rights. NACBA is nationally recognized for, among other things, filing *amicus curiae* briefs in this Court and the federal courts of appeals in systemically-important consumer bankruptcy cases. Many notable decisions explicitly rely on NACBA's briefs. *E.g.*, *In re Schwartz-Tallard*, 803 F.3d 1095, 1100 (9th Cir. 2015) (en banc).

The National Consumer Bankruptcy Rights Center (NCBRC) is a nonprofit organization dedicated to preserving the bankruptcy rights of consumer debtors and protecting the bankruptcy system's integrity. The Bankruptcy Code grants financially distressed debtors rights that are critical to the bankruptcy system's operation. Yet consumer debtors with limited financial resources and minimal exposure to that system often are ill-equipped to protect their rights in the appellate process. NCBRC files *amicus curiae* briefs in systemically-important cases to ensure that courts have a full understanding of the applicable bankruptcy law, the case, and its implications for consumer debtors.

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[1] No counsel for a party authored this brief in whole or in part. No person other than undersigned counsel made a monetary contribution intended to fund the preparation or submission of this brief. The parties' blanket consents to the filing of *amicus curiae* briefs are noted on the docket.

This case presents questions of systemic importance raised by a business model professional debt collectors use to collect time-barred debts in consumer bankruptcy cases. Pursuit of time-barred debts imposes costs on debtors, other creditors, professionals, and institutions operating in the consumer bankruptcy system. Lawsuits to collect these stale debts in court would violate the Fair Debt Collection Practices Act (FDCPA), and it makes no sense to allow debt collectors to evade this federal prohibition on litigating stale claims to collect the same debts through the federal bankruptcy courts.

The contrary position urged by petitioner and its *amici* ignores the realities of bankruptcy practice in consumer cases and disregards this Court's bankruptcy jurisprudence. NACBA and NCBRC therefore respectfully submit this *amici curiae* brief to focus the Court on key bankruptcy realities and principles germane to the resolution of this case.

STATEMENT

A. Overview of the Bankruptcy Claims Process

Claim administration in bankruptcy permits creditors with legitimate claims against an insolvent debtor to efficiently assert those claims and collect ratable payment consistent with their substantive entitlements under nonbankruptcy law except where Congress specifically alters that law to confer a priority on, disallow, or subordinate specific claims. See, *e.g.*, *Travelers Cas. & Sur. Co. of Am.* v. *Pac. Gas & Elec. Co.*, 549 U.S. 443, 449-451 (2007). This framework exists because bankruptcy is a specialized procedure operating against a background of generally applicable law to channel claims against the debtor into a collective forum and then distribute a common *res*. See *Tenn. Student Assistance Corp.* v. *Hood*, 541 U.S. 440, 447-448 (2004).

The process begins with the filing of a proof of claim, which may be filed by a creditor or by other parties if the creditor does not timely do so. See 11 U.S.C. § 501; 4 *Collier on Bankruptcy* ¶ 501.01[1], p. 501-4 (16th ed. 2016) ("[T]he filing of a proof of claim or interest is permissive, and no creditor or interest holder is ever required to file one."). A creditor choosing to participate must complete and execute a proof of claim conforming to the appropriate official form (currently Official Form B 410) within the deadline prescribed by the rules. See Fed. R. Bankr. Proc. 3001(a)-(b) & 3002(c). Proofs of claim based on most consumer credit agreements must include certain information, see *id.* 3001(c)(3)(A), but there is no requirement that such a proof of claim attach the underlying agreement or provide information sufficient to ascertain the governing state law (a copy of the agreement, which will ordinarily have an enforceable choice-of-law provision, must instead be provided on written request, see *id.* 3001(c)(3)(B)).

Every filed proof of claim "is deemed allowed, unless a party in interest . . . objects." 11 U.S.C. § 502(a). See also Fed. R. Bankr. Proc. 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."). The burden then falls on the bankruptcy trustee, the debtor, or another party in the bankruptcy case to show that the proof of claim should be disallowed on one of the bases in Bankruptcy Code § 502(b), including because of the statute of limitations. See 11 U.S.C. § 502(b)(1) (claim shall be disallowed when "such claim is unenforceable against the debtor and property of the debtor, under any agreement or applicable law for a reason other than because such claim is contingent or unmatured"); 4 *Collier on Bankruptcy* ¶ 502.03[2][b], p. 502-21 (under § 502(b)(1), a claim is subject to disallowance based on any defenses "the debtor could have interposed, absent bankruptcy, in a suit on the claim by the creditor" under applicable state or other nonbankruptcy law, such as "usury, fraud, lack of consideration, unconscionability or the expiration of a statute of limitations").

In contrast to the simplified process for filing proofs of claim, the claim objection process is not frictionless. Objectors must prepare a written claim objection, notice a hearing, and then serve those documents on multiple parties. Fed. R. Bankr. Proc. 3007(a). Filing an objection creates a "contested matter" governed by applicable rules of court. *Id.* 9014(c)-(e). The objector bears the burden of offering facts and legal theories sufficient to overcome the *prima facie* validity of the proof of claim. See 9 *Collier on Bankruptcy* ¶ 3007.01[3], p. 3007-7. The objecting party or its counsel must be prepared to attend a hearing before the bankruptcy court regarding the objection, and either the objector or the court must prepare and process an order formally disallowing the claim. See Fed. R. Bankr. Proc. 9022(a). Even the simplest claim objection requires several hours of party, professional, and court time. Accordingly, any potential claim objection must be subjected to a cost-benefit analysis; objections that will cost more to process than the anticipated distribution on the objectionable claim will rationally be forgone.[2]

If the cost of objection exceeds the savings from disallowance, bankruptcy trustees properly will refrain from objecting. See 11 U.S.C. § 704(a)(5) (trustee should object only "if a purpose would be served"). If a trustee does prosecute a claim objection, the trustee's counsel is paid as an administrative expense with a priority right against the property of the debtor included within the bankruptcy estate. See 11 U.S.C. §§ 327(a), 330(a), 503(b)(2) & 507(a)(2). In a Chapter 7 case, these expenses are entitled to payment before almost every unsecured creditor. See 11 U.S.C. § 726(a)(1)-(2). In a Chapter 13 case, the debtor's plan must pay these expenses in full. See 11 U.S.C. § 1322(a)(2). Claim

[2] For example, assume that (i) Creditor X files a proof of claim based on a stale debt of $500, (ii) Creditor X paid $4 to buy the debt and spends another $1 preparing and filing the proof of claim, and (iii) the bankruptcy estate's assets will fund a 10% distribution to unsecured creditors. If it costs more than $50 to object, no one will object, the claim will be deemed allowed, and Creditor X will receive a distribution of $50 on an unenforceable debt for a 900% profit ($45) at others' expense. Standing up to the bully knowingly asserting a legally barred claim in bankruptcy is uneconomic in many if not most consumer cases, even if everyone knows the bully will not fight when an objection is made. This is the lucrative and exploitive business model at issue here. See Statement Part C, *infra*.

objections decrease other unsecured creditors' distributions or decrease the prospects of the debtor confirming and completing payments under a Chapter 13 plan to the extent that any incremental administrative costs exceed the savings from disallowance. Even when an objection is economically rational, the administrative cost of objecting to meritless claims is a deadweight loss that reduces legitimate creditors' recoveries from what they would have been if the knowing filing of stale claims were not permitted in the first place.

All allowed bankruptcy claims ultimately receive cash distributions in accordance with the Bankruptcy Code's priority scheme. In a Chapter 7 consumer case, nonexempt property is distributed to priority creditors, with any surplus given to the holders of allowed unsecured claims on a pro rata basis. See 11 U.S.C. §726(a)-(b).[3] In a Chapter 13 case, the debtor must either pay all allowed unsecured claims in full or devote all of his or her projected disposable income to making ratable payments to holders of allowed unsecured claims over a period of three to five years. See 11 U.S.C. §1325(b). In addition, the value of property to be distributed under the Chapter 13 plan on account of allowed unsecured claims must be at least as much as would be paid on such claims in a Chapter 7 liquidation. See 11 U.S.C. § 1325(a)(4).

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[3] Any further remaining surplus belongs to the consumer debtor. 11 U.S.C. §726(a)(6).

B. The Number of Consumer Bankruptcy Cases, Particularly *Pro Se* Cases, Has Increased Significantly Over Time

In the decades since Congress enacted the FDCPA, consumer debt collection activity has increasingly migrated into bankruptcy courts. Annual consumer filings have increased from 287,570 in 1980 (representing 86.81% of all bankruptcy filings that year) to 819,760 in 2015 (representing 97.07% of all bankruptcy filings that year). See American Bankruptcy Institute, *Annual Business and Non-business Filings by Year (1980-2015)*, http://tinyurl.com/filingdata.

A significant portion of these consumer bankruptcy cases are filed by *pro se* debtors. For example, in one of the nation's largest bankruptcy courts, *pro se* debtors filed 24.5% of all bankruptcy cases filed in 2015. See United States Bankruptcy Court for the Central District of California, *Annual Report 2015*, p. 17, http://tinyurl.com/CACBreport.

Unsurprisingly, *pro se* debtors rarely successfully object to claims filed against them, even when the claims are meritless. See*, e.g.*, *In re Edwards*, 539 B.R. 360, 366 (Bankr. N.D. Ill. 2015) (describing several aspects of the objection process that challenge *pro se* debtors and noting that the judge "cannot recall a single *pro se* debtor who has managed this feat in 16 years").

C. Debt Collectors Use Business Models Built on the Bulk Purchase and Assertion of Consumer Debt in Bankruptcy Cases

Consumer debt collection has evolved into its own industry. This industry is built on buying debt from consumer lenders in bulk at a steep discount. The Federal Trade Commission has reviewed "information about debts and debt buying practices from nine of the largest debt buyers that collectively bought 76.1% of the debt sold in 2008," which yielded "data on more than 5,000 portfolios, containing nearly 90 million consumer accounts, purchased during the three-year study period." Federal Trade Commission, *The Structures and Practices of the Debt Buying Industry* (January 2013) (FTC Report), pp. i-ii, http://tinyurl.com/2013FTCreport. Across the data analyzed by this study, "the average price was 4.0 cents per dollar of debt face value." *Id.* at p. ii.

The average price was significantly lower for older debts, particularly those likely to be time-barred. See FTC Report at pp. 23-24 (explaining how the "analysis suggests that 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 of debt for debts that were 6 to 15 years old compared to 7.9 cents per dollar for debts less than 3 years old"). A material portion of the purchased debt was likely beyond the statute of limitations at the time of sale, see *id.* at pp. 42-43, and the FTC Report concludes "that debt buyers usually are likely to know or be able to determine whether the debts on which they are collecting are beyond the statute of limitations," *id.* at p. 49. Indeed, debt collectors are required to make this determination not only to properly price the portfolio, but also to comply with the FDCPA's prohibition on asserting stale claims in courts.

Some debt buyers specialize in debts of consumers who have filed for bankruptcy. For example, the FTC Report describes several buyers for which "some or all of the portfolios they had purchased were comprised of debts of consumers who had filed for bankruptcy." FTC Report, Technical Appendix D, p. D-1. These portfolios represented millions of individual accounts and billions of dollars of consumer debt. See *id.* at p. D-3. Other data confirm the very active role of debt buyers in consumer bankruptcy cases. An industry report cited by petitioner (Cert. Pet. 17) reveals numerous debt buyers filing hundreds of thousands of proofs of claim asserting hundreds of millions of dollars of consumer indebtedness, all in a single year. See American InfoSource, *AIS Insight 2015 Year in Review*, pp. 14-15, http://tinyurl.com/2015AISreview.

Bankruptcy judges describe the flood of stale claims filed by professional debt collectors as a "plague" and "a new development that presents a challenge for the bankruptcy system." *E.g.*, *In re Jenkins*, 456 B.R. 236, 239 n.2 (Bankr. E.D.N.C. 2011); *In re Andrews*, 394 B.R. 384, 387 (Bankr. E.D.N.C. 2008).

SUMMARY OF ARGUMENT

A. The filing of proofs of claim for time-barred debts harms consumer debtors, thereby implicating interests the FDCPA exists to protect.

Petitioner's assertion that other creditors are the only parties harmed by its knowing filing of stale claims is false. Petitioner's business model does depend on transferring value away from other creditors, but that transfer directly and adversely affects consumer debtors whenever they do not receive a discharge (as in the majority of Chapter 13 cases) or, like millions of Americans, have nondischargeable debts such as educational loans, domestic support obligations, or certain tax debts. In these cases, all amounts paid on a time-barred debt reduce what gets paid on other debts, which in turn increases the obligations the consumer continues to owe after the bankruptcy case. This is tangible harm inflicted on consumer debtors, the prevention of which is within the FDCPA's scope. Because the triggering events occur after the bankruptcy filing, a consumer's FDCPA lawsuit belongs to the individual debtor, not to the bankruptcy estate. Redressing harm to the consumer remains squarely within the FDCPA's statutory text and purpose.

Petitioner's self-serving assertion that filing time-barred claims promotes a debtor's "fresh start" is spurious. For one thing, the premise is flawed—these debts can be discharged in Chapter 7 and Chapter 13 cases regardless whether any proof of claim is filed. See 11 U.S.C. §§ 523(a)(3)(A), 727(b) & 1328(a). In any event, even if these time-barred debts are not subject to a bankruptcy discharge, they remain unenforceable outside of bankruptcy, and thus their theoretical continued existence has little, if any, effect on any debtor's "fresh start."

B. Because a professional debt collector's filing a lawsuit to collect a plainly time-barred debt violates the FDCPA, so too does that debt collector violate the FDCPA by filing a proof of claim.

Filing a proof of claim for debt that is plainly time-barred is deceptive and misleading under 15 U.S.C. § 1692e even though there is no express misrepresentation in the proof of claim. By asserting the claim, the debt collector implicitly affirms the legal enforceability of debt it knows is legally barred, thereby preying on some consumers' unsophistication about their rights. The debt collector deceives and misleads others about the character and legal status of the debt, the acts that can legally be taken regarding the debt, and information that the collector knows or should know to be incorrect. By doing these things, the debt collector violates the FDCPA. See 15 U.S.C. § 1692e(2), (5) & (8).

Filing proofs of claim for plainly time-barred debt is also fundamentally unfair under 15 U.S.C. § 1692f because, even if no party is deceived, debt collectors exploit the inertia and allocation of costs in the bankruptcy system. Debt collectors shift expenses onto other parties throughout the bankruptcy system while seeking to manipulate that system to extract profits for themselves on unenforceable claims they bought for a tiny fraction of the face amount. This exploitation of the federal bankruptcy courts readily fits within Congress's broad prohibition of all "unfair" means of debt collection by professional debt collectors. Indeed, using the bankruptcy system in this way is even more unfair than seeking to collect through other courts because of bankruptcy's streamlined claim-filing process and presumptions about claim validity. Absent FDCPA relief, the dispersed parties harmed by this unfairness individually lack the economic means or incentives to stand up to the bully.

C. There is an established framework for analyzing the interplay between two federal statutes. Implicit repeal is disfavored and the Court endeavors to give full effect to both statutes when there is no clear indication that Congress intended to negate one of them. Nothing in the Bankruptcy Code's text, context, or purpose indicates it was intended to repeal or limit the FDCPA.

In truth, negating the FDCPA in bankruptcy cases would be contrary to fundamental principles that measure parties' rights in bankruptcy by otherwise applicable nonbankruptcy law. *Butner* v. *United States*, 440 U.S. 48 (1979), and other cases have long established nonbankruptcy substantive entitlements as the baseline against which the Bankruptcy Code operates. Unless Congress specifically provides otherwise, the Bankruptcy Code preserves and defers to nonbankruptcy entitlements in the claims process. If the FDCPA bars the filing of a time-barred claim in state court, then it should bar that same claim in bankruptcy, too, unless Congress has expressly legislated otherwise (which it has not).

Moreover, this Court has made clear that acts permitted by the Bankruptcy Code generally remain constrained by preexisting laws. See *Midlantic Nat'l Bank* v. *N.J. Dep't of Envtl. Prot.*, 474 U.S. 494, 500-504 (1986). If Congress intended to grant debt collectors the right to file proofs of claim notwithstanding the FDCPA or any other otherwise applicable nonbankruptcy law, then Congress would have said exactly that in Bankruptcy Code § 501(a), just as Congress did many times in the Bankruptcy Code. *E.g.*, 11 U.S.C. §§ 341(c), 526(c)(5), 544(b)(2), 1123(a), 1125(d) & 1142(a). But Congress said nothing of the sort, either in the initial statute or in repeated amendments, leaving no basis to conclude that the Bankruptcy Code precludes or limits relief under the FDCPA. See, *e.g.*, *POM Wonderful LLC* v. *Coca-Cola Co.*, 134 S. Ct. 2228, 2236-2241 (2014).

These foundational principles of bankruptcy law defeat petitioner's preclusion argument whether or not an unenforceable demand for payment is a "claim" under the Bankruptcy Code. Even assuming petitioner held a "claim" that potentially could be pursued in a bankruptcy case, nothing in the Bankruptcy Code allows petitioner to choose to file proof of that claim free of *all* consequences that normally attach to its debt collection activities under the FDCPA and other applicable nonbankruptcy law.

ARGUMENT

A. The Filing of Proofs of Claim for Time-Barred Debts Harms Consumer Debtors

Congress enacted the FDCPA in 1977 after receiving "abundant evidence of the use of abusive, deceptive, and unfair debt collection practices by many debt collectors" and the resulting harms. 15 U.S.C. § 1692(a). The law's express purposes include "*eliminat[ing]* abusive debt collection practices by debt collectors" and ensuring that "debt collectors who refrain from using abusive debt collection practices are not competitively disadvantaged." 15 U.S.C. § 1692(e) (emphasis added).

Petitioner and its *amici* contend that consumer debtors suffer no injury from the assertion of time-barred debts in bankruptcy cases, and hence have no FDCPA claim. As explained below, this contention is false, as is the suggestion that the filing of claims for such debts actually helps consumer debtors.

1. *Consumer Debtors Are Injured in Multiple Ways by the Flood of Claims for Time-Barred Debts*

Petitioner asserts that "the allowance of a claim for a time-barred debt will ordinarily have no impact on the debtor" because "an additional allowed claim decreases the amount available to pay other creditors, rather than increasing the amount paid by the debtor." Pet. Br. 14 & 35. This canard echoes throughout the *amicus curiae* briefs. *E.g.*, Resurgent Capital Amicus Br. 3 (asserting that "the total dollar value of allowed claims affects only the relative distributions of value among creditors and does not affect the debtor's obligations").

In actuality, "the relative distributions of value among creditors" adversely affect thousands of consumer debtors in multiple ways.

First, debtors are not agnostic about the allocation of value among creditors unless *all* their debts are discharged. Except in narrow circumstances, however, a Chapter 13 debtor who defaults under his or her plan will not receive a discharge of *any* debts. See 11 U.S.C. § 1328(a)-(b). The failure rate for Chapter 13 plans is very high. See, *e.g.*, *Till* v. *SCS Credit Corp.*, 541 U.S. 465, 493 & 493 n.1 (2004) (Scalia, J., dissenting) (discussing how "Chapter 13 plans often fail" and citing studies suggesting failure rates of nearly 60%, rates that have increased after Congress made substantial amendments to Chapter 13 in 2005); Katherine Porter, *The Pretend Solution: An Empirical Study of Bankruptcy Outcomes*, 90 Tex. L. Rev. 103, 111-112 (2011) (noting how "knowledge of outcomes of Chapter 13 can largely be reduced to one enduring fact: only one in three cases ends in a Chapter 13 discharge" and summarizing data that nearly 75% of the remaining cases result in no bankruptcy discharge under any chapter, leaving numerous debtors with no debt relief whatsoever and subject to renewed debt collection efforts).

For the millions of Chapter 13 debtors who ultimately obtain no bankruptcy discharge at all, allocations of value among debt collectors pursuing time-barred claims and legitimate creditors have direct financial consequences. Every dollar that is paid on an unenforceable time-barred debt is a dollar not paid on legitimate debts, and hence a dollar that the debtor still owes after the Chapter 13 case is dismissed. This increased continued liability is a tangible and concrete injury suffered by these debtors when debt collectors file claims, and receive recoveries, on account of debts that cannot be enforced outside of bankruptcy.

Second, even when a debtor successfully completes a Chapter 13 plan or files a Chapter 7 case, many kinds of debt are never subject to discharge. See 11 U.S.C. §§ 523(a) & 1328(a)(2). Among these nondischargeable debts are obligations owed by millions of Americans, and thus by thousands of debtors in bankruptcy cases, including debts for certain unpaid taxes or for domestic support obligations. See 11 U.S.C. § 523(a)(1) & (5). A particularly notable category of nondischargeable debt is student loan debt, at least when the high "undue hardship" bar cannot be satisfied. See 11 U.S.C. § 523(a)(8). Student loan debt is a major category of debt carried by many Americans, particularly younger Americans. See, *e.g.*, Federal Reserve Board, *G.19 Statistical Release* (Dec. 7, 2016), http://tinyurl.com/FRBdebtdata (reporting nearly $1.4 *trillion* of outstanding student loan debt as of September 2016, substantially more than the outstanding amounts of revolving consumer debt or motor vehicle debt). Accordingly, a significant and growing number of consumer bankruptcy cases will involve student loan debt that is not dischargeable.

For debtors with student loans or other nondischargeable debts, the harmful consequence of "the relative distributions of value among creditors" mirrors that described above: every dollar received by debt collectors pursuing time-barred debts is a dollar not paid to other creditors, including creditors holding nondischargeable debts. The end result for the debtor is that the obligations surviving the bankruptcy are larger than they would be without time-barred claims diluting all creditors' recoveries.

Third, although such cases are uncommon, the Bankruptcy Code contemplates Chapter 7 cases in which surplus amounts remain for the debtor. See 11 U.S.C. § 726(a)(6). Similarly, some Chapter 13 debtors, including those who want to keep their house and any associated nonexempt equity, may have no option but to propose and attempt to complete a plan that pays unsecured creditors in full. See 11 U.S.C. § 1325(a)(4) & (b)(1)(A). For both categories of debtors, payments on account of time-barred debts reduce, dollar-for-dollar, the value that would otherwise be retained by the debtor, thereby harming the debtor.

Fourth, as discussed at pages 26-28, *infra*, debt collectors' flooding of the bankruptcy system with claims for time-barred debts imposes a *de facto* tax on the entire system. That tax ultimately will increase the costs of the bankruptcy process generally, which in turn increases the fees paid by consumer debtors filing bankruptcy cases.

Because the filing and allowance of claims for time-barred debts harms consumer debtors in multiple respects, they appropriately have standing to pursue a FDCPA lawsuit. See 15 U.S.C. § 1692k(a). And because this lawsuit arises entirely from events occurring *after* the bankruptcy filing, the lawsuit is not among the "legal or equitable interests of the debtor in property as of the commencement of the case," 11 U.S.C. § 541(a)(1), that only a bankruptcy trustee may pursue. See, *e.g.*, *In re Witko*, 374 F.3d 1040, 1043-1044 (11th Cir. 2004) (holding that cause of action that did not exist on petition date is not estate property); *In re*

Rhinesmith, 450 B.R. 630, 636 (Bankr. W.D. Tex. 2011) (same, and specifically including individual debtors' FDCPA lawsuits). Although there is an expanded estate in Chapter 13 cases, debtors in those cases nevertheless remain in possession of causes of action or similar estate property, 11 U.S.C. § 1306(b), and can retain their causes of action as long as the plan confirmation requirements are otherwise met. There ultimately is no tension in bankruptcy law or the FDCPA itself if consumer debtors are permitted to sue to redress post-bankruptcy injuries from which the FDCPA is designed to protect them.[4]

2. *The Filing of Claims for Time-Barred Debt Does Not Advance a "Fresh Start"*

Petitioner and its *amici* maintain that permitting proofs of claim to be filed based on stale debts promotes the debtor's fresh start, and thus "will often be affirmatively beneficial" for consumer debtors. *E.g.*, Pet. Br. 35; ACA Int'l Amicus Br. 22-

[4] It may be that bankruptcy estates have separate claims under the FDCPA that trustees *also* may pursue to recover actual damages sustained by those estates (such as any incremental administrative expenses devoted to what should be unnecessary claim objections). The statute plainly does not restrict FDCPA actions to only "natural persons." See 1 U.S.C. § 1 (defining "person" to include various legal entities *and* individuals); 15 U.S.C. §§ 1692a(3) ("consumer" definition limited to "natural persons"), 1692a(6) ("debt collectors" defined as "persons" generally), 1692k(a)(1) (remedy available for "persons" generally). Cf. Chamber of Commerce Amicus Br. 23. This issue, however, is not before the Court.

26. It is unworthy of belief that professional debt collectors are acting for the protection of consumers by filing proofs of claim against them to ensure that their otherwise unenforceable debts are thereby discharged. In any event, this premise is false.

First, the Chapter 7 discharge generally applies to all pre-bankruptcy debts, "whether or not a proof of claim based on any such debt or liability is filed under section 501." 11 U.S.C. § 727(b). Debts that the debtor does not schedule might nevertheless be excepted from discharge, but *not* when the creditor "had notice or actual knowledge of the case in time for [a] timely filing" of a proof of claim. 11 U.S.C. § 523(a)(3)(A). Thus, if a debt collector has knowledge of the bankruptcy case such that it *could* have filed a timely proof of claim (which knowledge is necessary for professional debt collectors' business practice of filing claims for stale debts in the first instance[5]), the underlying debt will be discharged *whether or not* the debt collector actually files a claim.

Second, the Chapter 13 discharge encompasses "all debts provided for by the plan," such as general

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[5] Absent a flaw in their computerized databases, professional debt collectors are always aware of the consumer's bankruptcy filing soon after a petition is filed. Several commercial services such as Banko® (currently offered by LexisNexis) and AACER® (Automated Access to Court Electronic Records) will notify their customers (creditors and professional debt collectors) of bankruptcy filings that match names or accounts provided to the services. See, *e.g.*, LexisNexis, *Banko® Solutions* (last visited Dec. 20, 2016), http://tinyurl.com/bankoLN.

unsecured claims generally. 11 U.S.C. § 1328(a). Chapter 13 plans can be drafted to accommodate an omission of creditors from the debtor's initial scheduled claims or notice lists. See*, e.g.*, *In re Moore*, 247 B.R. 677, 684-689 (Bankr. W.D. Mich. 2000). Accordingly, in scenarios where the debtor does not initially schedule a time-barred debt, steps may nevertheless be taken to include that debt within a Chapter 13 discharge.

Third, as a practical matter, "discharge" *vel non* of a time-barred debt is generally irrelevant. Even if the debt theoretically survives after bankruptcy, the creditor is unable to enforce that debt outside of bankruptcy, and hence the debt's survival does nothing to impair the debtor's fresh start. Moreover, like the bar of a statute of limitations, the bankruptcy discharge does not *extinguish* the underlying debt, but instead only limits the debtor's personal liability for that debt. See, *e.g.*, 11 U.S.C. § 524(a); *Johnson* v. *Home State Bank*, 501 U.S. 78, 82-85 (1991).

Accordingly, in most instances consumer debtors will obtain bankruptcy discharges of stale debts regardless whether those debts were scheduled or asserted in proofs of claim. In any event, these debtors still enjoy protections under the FDCPA and applicable state law after the bankruptcy case. It is untenable to suggest that the bankruptcy system and consumer debtors should embrace professional debt collectors filing unenforceable proofs of claim in order to protect the debtor's discharge.

B. Filing Proofs of Claim Based on Time-Barred Debts Violates Multiple Sections of the FDCPA

Filing a proof of claim in a bankruptcy case is a method of judicial debt collection. The proof of claim's basic function is to assert the debtor's liability on a claim—*i.e.*, a "debt," 11 U.S.C. § 101(12); accord 15 U.S.C. § 1692a(5)—and seek payment on that debt from the debtor's bankruptcy estate. Longstanding authority reflects that proofs of claim are the bankruptcy equivalent of civil complaints. See, *e.g.*, *In re Am. Anthracite & Bituminous Coal Corp.*, 22 F.R.D. 504, 507 (S.D.N.Y. 1958); 9 *Collier on Bankruptcy* ¶ 3007.01[3] & n.40, p. 3007-7 (noting the analogy and citing multiple supporting circuit court opinions). Indeed, decades before the FDCPA was drafted, this Court described the filing of a proof of claim as "a traditional method of collecting a debt," *Garner* v. *New Jersey*, 329 U.S. 565, 573 (1947), and any asserted "creditor" status necessarily invokes "a claim against the debtor," 11 U.S.C. § 101(10)(A).[6] A

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[6] The Chamber of Commerce is wrong when it suggests that a proof of claim's attempt to collect on a debt against the debtor invokes the automatic stay and puts the Bankruptcy Code "at war with itself." See Amicus Br. 22-23. "[T]he automatic stay serves to protect the bankruptcy estate from actions taken by creditors outside the bankruptcy court forum, not legal actions taken within the bankruptcy court." *In re Sammon*, 253 B.R. 672, 681 (Bankr. D.S.C. 2000). See also, *e.g.*, *In re Atreus Enters., Ltd.*, 120 B.R. 341, 346 (Bankr. S.D.N.Y. 1990) (explaining how the automatic stay is inapplicable to acts "in the bankruptcy court where the debtor's bankruptcy case is pending").

person who regularly files proofs of claim against consumer debtors thus readily falls within the FDCPA's broad definition of "debt collector." See 15 U.S.C. § 1692a(6); *Heintz* v. *Jenkins*, 514 U.S. 291, 294 (1995) (explaining how the definition's plain meaning encompasses someone "who regularly tries to obtain payment of consumer debts through legal proceedings"). Accordingly, such a person violates the FDCPA by engaging in any of the conduct described in § 1692e or § 1692f.

1. *Filing Claims Known to Be Time-Barred Is Deceptive and Misleading*

The FDCPA generally prohibits debt collectors from using "any false, deceptive, *or* misleading representation or means in connection with the collection of any debt" and includes a non-exclusive list of sixteen *per se* violations of this general prohibition. 15 U.S.C. § 1692e (emphasis added). This comprehensive statute deliberately "imposes open-ended prohibitions" on debt collectors' conduct. *Jerman* v. *Carlisle, McNellie, Rini, Kramer & Ulrich, L.P.A.*, 559 U.S. 573, 587 (2010). Indeed, the FDCPA uses very broad and general prohibitions specifically to "enable the courts, where appropriate, to proscribe other improper conduct which is not specifically addressed" by the *per se* examples. See S. Rep. No. 95-382, p. 4 (1977).

Because the FDCPA does not define the words "deceptive" or "misleading," it is appropriate to look to their ordinary dictionary meaning. See, *e.g.*, *Clark* v. *Rameker*, 134 S. Ct. 2242, 2246 (2014); *Jerman*, 559 U.S. at 587. The ordinary meaning of a "deceptive" act is one that makes a person believe what is not true or misleads. See Webster's Second New World Dictionary 365 (1972). Similarly, a "misleading" act is one that leads in a wrong direction, leads astray, or leads into wrongdoing. See *id.* at 909.

Filing a proof of claim for a time-barred debt can deceive consumers into believing that the stale debt remains legally enforceable notwithstanding the passage of time. Consumers are unlikely to know the length of the applicable statute of limitations in the jurisdiction in which they reside, much less under whatever contractual choice of law the original creditor imposed on the consumer.[7] Even when the objection is being pursued by debtor's counsel or a

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[7] The Chamber of Commerce suggests analysis regarding the applicable statute of limitations is extremely complicated and difficult even for professional debt collectors. See Amicus Br. 12-15. But cases requiring complex analysis are rare and debt collectors already have to do the *exact same* analysis outside of bankruptcy. If other *amici* are to be believed, debt collectors have procedures that make compliance straightforward. See, *e.g.*, DBA Int'l Amicus Br. 1-4 (describing how "the Program" prohibits debt collectors such as petitioner from bringing civil lawsuits on stale debts). Throughout its brief, the Chamber of Commerce conjures a parade of horribles, all of which are belied by the practices and realities of actual debt collectors. In any event, debt collectors with businesses built on collecting consumer debt are far better situated to absorb the costs of analyzing the applicable statute of limitations than individual consumers or bankruptcy trustees; indeed, already debt collectors must do this analysis to accurately price the portfolios they acquire.

bankruptcy trustee, the objector must obtain a copy of the underlying agreement from the debt collector, see Fed. R. Bankr. Proc. 3001(c)(3)(B), determine the applicable law governing the limitations period, obtain the underlying payment history, and otherwise confirm the proof of claim form's asserted facts with the debtor.

Until this deeper analysis is done, the proof of claim standing alone suggests that there is a valid debt entitling its holder to participate in ratable distributions from the bankruptcy estate, particularly since the proof of claim is filed under oath and subject to criminal prosecution for a false claim. 18 U.S.C. §§152 & 3571; Official Form B 410. Filed proofs of claim thus promote the mistaken belief that they present allowable claims, and, moreover, often result in payment of stale claims that properly should be disallowed. This is particularly likely in tens of thousands of bankruptcy cases involving *pro se* debtors. Because these time-barred proofs of claim have a tendency to mislead other parties into believing that an unenforceable debt remains legally enforceable, they are "deceptive" and "misleading" representations and means of debt collection as those words are commonly understood.

Any doubt about this conclusion is dispelled by the *per se* examples in §1692e. Subsection (2)(A) prohibits false representations about "the character, amount, or legal status of any debt." 15 U.S.C. §1692e(2)(A). A proof of claim based on a time-barred debt falsely represents the character and legal status of the underlying debt by suggesting the debt entitles the holder to an allowed claim in bankruptcy when the debt collector knows that debt is time-barred. Similarly, subsection (5) limits threats "to take any action that cannot legally be taken." 15 U.S.C. § 1692e(5). A debt collector cannot legally enforce a time-barred debt outside of bankruptcy, but threatens (and indeed demands) such enforcement by filing a proof of claim in bankruptcy. Finally, subsection (8) prevents the communication "to any person [of] credit information which is known or which should be known to be false," 15 U.S.C. § 1692e(8), but the proof of claim incorrectly communicates to everyone in the bankruptcy case that its filer has an enforceable claim. See also 15 U.S.C. § 1692a(2) (broadly defining the term "communication").

Each of these subsections illuminates the broader meaning of the FDCPA terms "deceptive" and "misleading." See, *e.g.*, *Bullock* v. *BankChampaign, N.A.*, 133 S. Ct. 1754, 1760 (2013) (applying *noscitur a sociis* canon to give meaning to a word by reference to its "statutory neighbors"); *Davis* v. *Mich. Dep't of Treasury*, 489 U.S. 803, 809 (1989) ("It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme."). Because the filing of a proof of claim based on a time-barred debt bears a striking similarity to acts subject to at least three of the *per se* examples in § 1692e, it is apparent that such conduct falls within the statute's more-generalized prohibitions on any "deceptive" or "misleading" representations or means of debt collection.

2. *Flooding the Bankruptcy System with Time-Barred Claims Is an Unfair Practice*

The FDCPA separately prohibits debt collectors from using any "unfair or unconscionable means to collect or attempt to collect any debt," including eight specific *per se* violations. 15 U.S.C. § 1692f. As explained above, the general prohibition intentionally uses flexible language.

Once again, the word "unfair" is not defined by the FDCPA. The word's ordinary meaning encompasses anything that is "not fair," including acts that are broadly "inequitable" or "unethical in business dealings." Webster's Second New World Dictionary 1550 (1972). Indeed, as this Court explained when considering the meaning of the same word in a different federal statute, "in measuring a practice against the elusive, but congressionally mandated standard of fairness," it is appropriate to consider public values and public policy generally. See *FTC* v. *Sperry & Hutchinson Co.*, 405 U.S. 233, 244 & 244 n.5 (1972).

The business model used by petitioner and similar firms of flooding bankruptcy courts with thousands of stale claims is a fundamentally unfair means of attempting to collect consumer debt in several respects.

First, even when the claim objection process works in a theoretically perfect fashion, the mass filing of time-barred claims imposes substantial costs on parties throughout the bankruptcy system but is virtually costless for the filing party. Once such claims are filed, the burden falls on the bankruptcy trustee, the debtor, or other creditors to devote resources to researching, drafting, filing, serving, and prosecuting a claim objection. This work is not costless or necessarily straightforward; parties or their attorneys must devote limited time, money, and other resources to the effort. These costs are incurred to eliminate proofs of claim that never should have been filed—other parties are effectively left to dispose of garbage strewn about by the debt collectors, and to do so at their own expense. When aggregated, these expenses amount to a tariff foisted on the entire bankruptcy system, one that ultimately will increase the cost of accessing that system for all consumer debtors.

A more formalized way of explaining what debt collectors do by flooding the system with stale proofs of claim is that they produce negative externalities for parties throughout the entire bankruptcy system and force consumer debtors, consumer bankruptcy attorneys, bankruptcy trustees, and other parties to absorb those negative externalities. The legal system checks similar negative externalities by imposing tort liability or regulatory charges that compensate third parties affected by the externality, thereby forcing the actor to internalize its externalities and regulate its conduct accordingly. See, *e.g.*, *Koontz* v. *St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586, 2595 (2013); *Boomer* v. *Atl. Cement Co.*, 26 N.Y.2d 219, 225-228 (1970); *People* v. *Rubenfeld*, 254 N.Y. 245, 248-249 (1930). The courts can eliminate the significant negative externalities imposed throughout the bankruptcy system when debt collectors pollute the system with stale, unenforceable claims by treating that conduct as "unfair" under § 1692f, thereby exposing the debt collectors to liability under § 1692k.

The FDCPA's structure recognizes that, absent an attorney's-fee-shifting provision, it is uneconomic to pursue litigation over small amounts. See 15 U.S.C. § 1692k(a)(3). This fee-shifting provision exists to facilitate Congress's desire for the FDCPA to be "primarily self-enforcing." See S. Rep. No. 95-382, p. 5 (1977). The bankruptcy claim objection process does not usually involve such fee shifting, however, and hence does not require debt collectors to absorb the negative externalities they produce by filing meritless proofs of claim. Thus, continued application of the FDCPA in this context is necessary for that statute to serve one of its primary functions.

Second, as debt collectors are well aware, the claim objection process does not actually work in a theoretically perfect fashion. It often is economically irrational for anyone to object to certain proofs of claim, even when those claims are subject to ready disallowance. See note 2, *supra*. In other instances, including many cases involving *pro se* debtors, proofs of claim that should be disallowed will simply be missed or "fall through the cracks." In either scenario, the end result is that a debt collector holding an unenforceable debt receives some recovery on that debt, all at the expense of other, legitimate creditors and the debtor. This rent-seeking behavior comes at the expense of the very parties the FDCPA is intended to protect—

consumers *and* "those debt collectors who refrain from using abusive debt collection practices," 15 U.S.C. § 1692(e).

Third, debt collectors such as petitioner are abusing and degrading the federal judicial system itself. When bankruptcy courts are required to devote their limited time and resources to processing what should be unnecessary claim objections, they too are subjected to externalities imposed without consequence by debt buyers flooding the system with stale claims. What is worse, however, is that the judicial system is utilized as a mechanism to extract profits for debt collectors from legally unenforceable debts; a federal system designed to afford a fresh start for honest debtors is manipulated to collect money that would never be paid in the absence of a bankruptcy filing. It is unsurprising that judges find this conduct to be "an abuse of the claims allowance process and an affront to the integrity of the bankruptcy court." *In re Feggins*, 535 B.R. 862, 868 (Bankr. M.D. Ala. 2015).

Petitioner's business model of flooding bankruptcy courts with many thousands of stale claims is simply *wrong*. It (i) imposes significant economic and noneconomic costs on countless consumer debtors, their bankruptcy trustees, their bankruptcy attorneys, and their innocent creditors; (ii) extracts recoveries on unenforceable debts that should be disallowed by exploiting the basic fabric of the bankruptcy claims process; and (iii) needlessly wastes the limited time and resources of the federal judiciary and undermines the proper function and integrity of the court system. Such a business model is indeed a "plague" on the bankruptcy system itself. See *In re Jenkins*, 456 B.R. 236, 239 n.2 (Bankr. E.D.N.C. 2011). Once all these considerations are combined, it is beyond dispute that this entire business is deeply *unfair*. When it enacted the FDCPA, Congress gave the courts an extremely broad charge to eliminate all unfair means of debt collection, and the Court should hold that the practices of petitioner and similar firms are within that prohibited conduct.

C. Nothing in the Bankruptcy Code's Text, Structure, or Purpose Precludes or Otherwise Limits the FDCPA's Application in Bankruptcy Cases

When analyzing the interplay between two federal statutes, this Court starts from the premise "that repeals by implication are disfavored." *E.g.*, *Reg'l Rail Reorganization Act Cases*, 419 U.S. 102, 133 (1974) (citing several cases). Under this canon, "[t]he courts are not at liberty to pick and choose among congressional enactments, and when two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective." *Morton* v. *Mancari*, 417 U.S. 535, 551 (1974). The Court thus reviews the two federal statutes to determine whether they conflict or can complement each other. See, *e.g.*, *POM Wonderful LLC* v. *Coca-Cola Co.*, 134 S. Ct. 2228, 2236-2241 (2014); *J.E.M. Ag Supply, Inc.* v. *Pioneer Hi-Bred Int'l, Inc.*, 534 U.S. 124, 141-144 (2001).

The FDCPA's text makes no reference to the Bankruptcy Code and vice versa. As detailed below, the structure and purpose of both the claims-allowance process and the Bankruptcy Code more generally are entirely consistent with giving the FDCPA full effect as a co-equal federal statute governing consumer debt collection activities that happen to occur in bankruptcy.

1. *The Bankruptcy Code and Bankruptcy Policy Compel Symmetry Between the Claims Process and Nonbankruptcy Outcomes*

Petitioner's position that the FDCPA categorically does not apply to the bankruptcy claims process requires a deep asymmetry in the law—conduct that is prohibited outside of bankruptcy (pursuing consumers in court to collect time-barred debt) suddenly becomes permissible because of the happenstance of a bankruptcy filing. This construct is fundamentally at odds with how this Court has approached the bankruptcy claims process for decades.

Starting with *Butner* v. *United States*, 440 U.S. 48 (1979), the Court has made clear that creditors' entitlements in bankruptcy should mirror their nonbankruptcy entitlements unless the Bankruptcy Code expressly requires a different result. Thus, in *Butner*, the rights of a second mortgagee to rents collected during the period between the mortgagor's bankruptcy and a foreclosure sale of the property was determined by nonbankruptcy law. As the Court explained, "there is no reason why such interests should be analyzed differently simply because an interested party is involved in a bankruptcy proceeding." *Id.* at 55. A symmetrical approach "serves to reduce uncertainty, to discourage forum shopping, and to prevent a party from receiving 'a windfall merely by reason of the happenstance of bankruptcy.'" *Ibid.* (quoting *Lewis* v. *Manufacturers Nat'l Bank*, 364 U.S. 603, 609 (1961)).

The Court has reiterated this rule in the context of the burden of proof associated with a bankruptcy claim, *Raleigh* v. *Ill. Dep't of Revenue*, 530 U.S. 15, 20-22 (2000), the rights of a home mortgage lender, *Nobelman* v. *Am. Sav. Bank*, 508 U.S. 324, 329-330 (1993), and the bases on which bankruptcy claims may be disallowed, *Travelers Cas. & Sur. Co. of Am.* v. *Pac. Gas & Elec. Co.*, 549 U.S. 443, 449-451 (2007). The rule is a cornerstone of modern United States bankruptcy law. See, *e.g.*, Thomas H. Jackson, *The Logic and Limits of Bankruptcy Law* 21-27 (Harvard 1986); Douglas G. Baird, *Loss Distribution, Forum Shopping, and Bankruptcy: A Reply to Warren*, 54 U. Chi. L. Rev. 815, 818 n.3 (1987). The rule complements the longstanding principle that a bankruptcy estate consists of all property rights that the debtor holds under otherwise applicable nonbankruptcy law. See, *e.g.*, Kenneth N. Klee & Whitman L. Holt, *Bankruptcy and the Supreme Court: 1801-2014* 204-207 (West Academic 2015) (discussing this principle and numerous supporting authorities dating back to 1878).

The *Butner* rule also fits with the broader function of the bankruptcy system. "Bankruptcy is basically a procedural forum designed to provide a collective proceeding for the sorting out of non-bankruptcy entitlements." *In re Worcester*, 811 F.2d 1224, 1228 (9th Cir. 1987). With limited exceptions, federal bankruptcy law does not reorder or invent new legal rights; instead it channels debtors and creditors into a single court to efficiently administer assets and liabilities created by nonbankruptcy law.

Petitioner's position flies in the face of these foundational principles. Debt collectors who otherwise are constrained by the FDCPA obtain unique rights solely by reason of the happenstance of bankruptcy. In many cases, those parties will receive payments they otherwise could not obtain—"windfalls"—only because the debtor filed a bankruptcy petition.

Nothing in the Bankruptcy Code's text, context, or purpose indicates that Congress desired this radical asymmetry between bankruptcy outcomes and nonbankruptcy outcomes. Nor is there any logical reason—let alone some compelling federal interest—why Congress would have created such an asymmetry. Allowing debt collectors to file time-barred proofs of claim does not advance any bankruptcy purpose; it does not centralize or expedite the collection of the debtor's assets, facilitate equal distributions to similarly-situated creditors, or advance the debtor's fresh start. Indeed, if any "federal interest" is implicated, it is only the interest expressed in the FDCPA—*eliminating* abusive debt collection practices, regardless the context in which they occur, see 15 U.S.C. § 1692(e).

2. *The Bankruptcy Code Operates Against a Backdrop of Preexisting Laws, Which Remain Effective Unless Expressly Negated*

Congress did not draft the Bankruptcy Code in a vacuum. Instead, Congress enacted the 1978 Bankruptcy Code against a backdrop of preexisting laws—including the FDCPA, which was enacted only a year earlier—and has subsequently amended the Bankruptcy Code in the face of updated and additional laws.

Absent a contrary statement by Congress, these other laws may impose limitations on options available under the Bankruptcy Code. For example, in *Midlantic National Bank* v. *New Jersey Department of Environmental Protection*, 474 U.S. 494 (1986), the Court analyzed whether the Bankruptcy Code permits a trustee to abandon property in contravention of state environmental laws. Despite unqualified text stating that the trustee "may" abandon certain property of the estate, 11 U.S.C. § 554(a), the Court concluded that the trustee's abandonment power remains "limited by a judicially developed doctrine intended to protect legitimate state or federal interests." See 474 U.S. at 500-504. Crucial to this conclusion was the fact that Congress would have been aware of the preexisting law (in *Midlantic*, principles developed through case law, rather than a co-equal federal statute), and thus Congress would have clearly expressed any intent to create "an extraordinary exemption from nonbankruptcy law" when drafting the statute. *Id.* at 501. See also, *e.g.*, *Miles* v. *Apex Marine Corp.*, 498

U.S. 19, 32 (1990) ("We assume that Congress is aware of existing law when it passes legislation.").

In fact, the Bankruptcy Code is filled with examples of Congress expressly precluding or displacing other laws. Several sections of the Bankruptcy Code pointedly operate notwithstanding "any otherwise applicable nonbankruptcy law." See 11 U.S.C. §§ 341(c), 1123(a), 1125(d) & 1142(a).[8] Other sections explicitly negate contrary "Federal law." See 11 U.S.C. §§ 526(c)(5) & 544(b)(2). Still other sections supplant the provisions of "applicable law" or even "law" generally. See 11 U.S.C. §§ 365(e)(1), 365(f)(1) & (3), 704(c)(2)(B), 1106(c)(2)(B), 1202(c)(2)(B) & 1302(d)(2)(B).

If Congress intended to give debt collectors *carte blanche* when filing proofs of claim, Congress easily could have used any of the preceding formulations in Bankruptcy Code § 501(a). But the text says nothing of the sort. Instead, as in *Midlantic*, § 501(a) merely states what a party "may" do in the bankruptcy case and says nothing at all about precluding or superseding the FDCPA or any other law. The fact that Congress knows how to displace other laws via the Bankruptcy Code—and in fact did so repeatedly—indicates that Congress intended *not* to give § 501(a) such effect. See, *e.g.*, *Marx* v. *Gen. Revenue Corp.*, 133 S. Ct. 1166, 1177 (2013); *Russello* v. *United States*, 464 U.S. 16, 23 (1983). It will sow

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[8] This phrase encompasses any applicable federal statutes—such as the FDCPA—as well as state laws. See *Patterson* v. *Shumate*, 504 U.S. 753, 758-759 (1992).

uncertainty to find the FDCPA (or potentially any number of other federal statutes) inapplicable in the bankruptcy context absent textual support for that result in the operative parts of the Bankruptcy Code.

The conclusion that Congress never intended the Bankruptcy Code to limit the FDCPA's reach is made stronger by the fact that both statutes have been amended repeatedly since their respective enactment in the late 1970s. Congress has had numerous opportunities to amend the FDCPA to categorically except bankruptcy proofs of claim from that statute or to modify the Bankruptcy Code to let debt collectors file proofs of claim without liability under otherwise applicable nonbankruptcy law. Congress never added such a provision to either statute notwithstanding Congress's consideration and enactment of many other provisions limiting consumers' rights under the Bankruptcy Code in various other respects.[9] Given these repeated amendment opportunities, the absence of any "textual provision in either statute" revealing an intent to limit the FDCPA's application in the bankruptcy context has "special significance" and

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[9] For example, in the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Congress added language to Bankruptcy Code §341(c) allowing creditors holding consumer debt to appear and participate in the initial meeting of creditors without an attorney notwithstanding "any otherwise applicable nonbankruptcy law" that would require representation of those creditors by an attorney. See Pub. L. No. 109-8, §413, 119 Stat. 23, 107 (2005). It would have been simple to add a similar sentence to Bankruptcy Code §501(a).

provides "powerful evidence" that there is nothing precluding full application of the FDCPA when a debt collector files a proof of claim for a time-barred debt. See *POM Wonderful*, 134 S. Ct. at 2237-2238.

In sum, nothing in either statute suggests Congress intended that the Bankruptcy Code would render the FDCPA inapplicable in the bankruptcy context. If Congress had intended to negate the FDCPA's operation, it would have been easy for Congress to do so. In the absence of such a provision, the mere fact that debt collectors "may" file proofs of claim in bankruptcy cases does not give them a right to do so with impunity and in disregard of other law. Rather, just as with trustees who "may" abandon property under § 554(a), debt collectors remain subject to preexisting law, including a federal statute that sits in a co-equal position with the Bankruptcy Code. See *Midlantic*, 474 U.S. at 500-504.

CONCLUSION

The decision of the court of appeals should be affirmed.

Respectfully submitted.

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