No. 16-1653

In the
United States Court of Appeals
for the First Circuit

IN RE: DAVID A. MARTEL; CHERYL A. MARTEL,
Debtors.

DAVID A. MARTEL; CHERYL A. MARTEL,
Plaintiffs-Appellants,

v.

LVNV FUNDING; RESURGENT CAPITAL SERVICES,
Defendants-Appellees.

On Appeal from the United States Bankruptcy Court for the District of Maine, Portland

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REPLY BRIEF FOR PLAINTIFFS-APPELLANTS DAVID A. MARTEL AND CHERYL A. MARTEL

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INTRODUCTION

Defendants are engaged in a flagrant misuse of the bankruptcy process. They have no legitimate basis for their time-barred claims. They effectively admit these claims should be rejected 100% of the time if the system functioned as Congress intended. Defendants' sole motivation is the knowledge that the process routinely breaks down and their time-barred claims will be accidentally allowed. If the process never malfunctioned, Defendants' abusive scheme would not exist.

Defendants' response is most telling for what it does *not* say. Defendants do not contest that they flood bankruptcy courts with frivolous claims in the hope of collecting unenforceable debts. They do not contend that they have *any* good-faith basis for these filings or *any* legitimate response once anyone objects. They do not deny that their claims are subject to an iron-clad dispositive defense (and would give rise to sanctions and FDCPA liability if filed in district court). Make no mistake: Defendants are perfectly aware that they will only collect if the process breaks down and fails. Yet they defend their abusive scheme because their claims leave sufficient hints for *others* to spot their misconduct (after wasting others' time and resources), and because, they posit, the Bankruptcy Code (for undiscernible reasons) *entitles* debt collectors to file baseless claims.

Defendants are mistaken. There is no absolute "right" (in *any* functioning legal system) to file frivolous claims. Defendants' position is at odds with the

Code's plain text, clear structure, and statutory purpose. Their abusive conduct burdens the bankruptcy process and harms innocent parties; it has no societal value or public benefit. The FDCPA forbids precisely this kind of misconduct, and the bankruptcy court erred in holding otherwise. The judgment should be reversed.[1]

ARGUMENT

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

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

1. As previously established, Defendants violate the FDCPA by misrepresenting the "character" and "legal status" of time-barred debts. *McMahon* v. *LVNV Funding, LLC*, 744 F.3d 1010, 1020 (7th Cir. 2014). The Supreme Court has repeatedly held that the claims-process is reserved for "enforceable obligation[s]" (*Johnson* v. *Home State Bank*, 501 U.S. 78, 83 (1991)), and time-barred debts are *not* "enforceable." *McMahon*, 744 F.3d at 1020; see also *Buchanan* v. *Northland*

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[1] On October 11, 2016, the U.S. Supreme Court granted review in *Midland Funding, LLC* v. *Johnson*, cert. granted, No. 16-348. The *Johnson* case raises the identical FDCPA questions presented here (https://www.supremecourt.gov/qp/16-00348qp.pdf), and it will likely dispose of the merits of Plaintiffs' FDCPA claims in this appeal. Unlike this case, however, *Johnson* does not present any claims for sanctions under 11 U.S.C. 105(a). Those claims accordingly may remain unresolved after *Johnson*. The panel thus may wish to proceed with oral argument without awaiting *Johnson*'s disposition.

Group, Inc., 776 F.3d 393, 396-399 (6th Cir. 2015); *Crawford* v. *LVNV Funding, LLC*, 758 F.3d 1254, 1261 (11th Cir. 2014); *Huertas* v. *Galaxy Asset Mgmt.*, 641 F.3d 28, 32 (3d Cir. 2011). By falsely claiming a "right to payment" when *no* "right to payment" exists, Defendants violate the FDCPA. 15 U.S.C. 1692e.

2. In response, Defendants argue there was nothing false or misleading about submitting a "right" to recover time-barred debt. Defendants are wrong.

a. Defendants assert that "enforceability" is not a component of a claim in bankruptcy. Br. 13-14. This is mystifying. The Bankruptcy Code defines "claim" as a "right to payment" (11 U.S.C. 101(5)(A)), and the Supreme Court has said *four times* that a "right to payment" is "nothing more nor less than an *enforceable* obligation." *Johnson*, 501 U.S. at 83 (emphasis added); accord *FCC* v. *NextWave Pers. Commc'ns Inc.*, 537 U.S. 293, 303 (2003); *Cohen* v. *de la Cruz*, 523 U.S. 213, 218 (1998); *Pa. Dep't of Pub. Welfare* v. *Davenport*, 495 U.S. 552, 559 (1990). When Defendants assert *proof* of a "right to payment," they are necessarily asserting *proof* of an "enforceable obligation," despite knowing perfectly well that their claims are unenforceable. That misrepresents the character and legal status of the debt.[2]

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[2] Defendants say that Plaintiffs offered a "tortured" reading of *Johnson*, but never challenge Plaintiffs' reading of the *three other relevant Supreme Court decisions* or even explain why *Johnson* did not mean what it plainly said. Defendants cannot

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Defendants apparently believe the Supreme Court did not mean what it plainly said in (repeatedly) limiting Section 101(5)(A)'s "right to payment" to an "enforceable obligation." While Defendants hope to distinguish these cases on their facts, they overlook that each case shares a critical common feature: all the claims at issue, unlike those here, were *legally enforceable*. See, *e.g.*, *NextWave*, 537 U.S. at 303 (discussing an *enforceable* regulatory condition); *Johnson*, 501 U.S. at 83-84 (discussing an *enforceable* mortgage interest). This commonality underscores precisely what Defendants' claims lack—and why their theory is indefensible under the Supreme Court's authoritative construction of the Code.

Defendants further insist that the Supreme Court never required all debts to be enforceable in *civil proceedings*. Br. 21-22. This is assuredly true, *and assuredly irrelevant*. Plaintiffs' point is not that all debts must be legally enforceable everywhere; their point is that all debts must be legally enforceable *somewhere*. In each case, the Supreme Court identified a legal "enforcement mechanism" that guaranteed a "right to payment," thus satisfying the Court's own standard. *Davenport*, 495 U.S. at 559-560. Defendants' problem is not simply that they cannot enforce their claims in any court (*e.g.*, Answering Br. 11), though they plainly can-

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simply wish away the Supreme Court's dispositive construction of the operative section of the Code.

not. See, *e.g.*, *Phillips* v. *Asset Acceptance, LLC*, 736 F.3d 1076, 1079 (7th Cir. 2013). Defendants' problem is that they cannot properly enforce their claims *anywhere*.

b. Defendants next maintain they have a "right to payment" because their debt is not extinguished under state law—only the "remedies" are extinguished. Br. 10-11. Plaintiffs already refuted this line of argument, and Defendants still have no response. The lack of any "remedy" *is* the lack of a "right to payment." Once the limitations period expires, Defendants cannot *enforce* the debt against anyone. "[S]ome people might consider full debt re-payment a moral obligation even though the legal remedy for the debt has been extinguished," but the claim itself is not "legally enforceable." *McMahon*, 744 F.3d at 1020; see also *Buchanan*, 776 F.3d at 396-397 (expired debts leave "moral" obligations, not "legal" ones); *Huertas*, 641 F.3d at 32 ("Huerta's debt obligation is not extinguished by the expiration of the statute of limitations, even though the debt is ultimately unenforceable in a court of law"). Even Defendants' own authority recognizes this conventional point: "'statute of limitations operates as a bar to *enforcement* of a debt (in state court), not to *extinguish* the debt.'" Br. 11 (emphasis in original).

The Code does not say that a debt can be merely "valid" or "still in existence"—it requires a "right to payment." Defendants insist they qualify, but they cannot identify that right by *ipse dixit*; they failed to identify a single, nonvoluntary, legal means of *enforcing* the time-barred debt. The most they can do is ask nicely to be repaid, but debtors can always refuse. The lack of remedy eliminates that "right to payment," and Defendants invite a square (and lopsided) circuit conflict in suggesting otherwise.

c. Defendants assert that Congress intended for "claim" to be defined in the "'broadest possible'" manner, so any definition that excludes stale claims is necessarily wrong. Br. 13. Yet "broadest possible" does not mean limitless or incoherent. Congress expanded the definition of "claim" in important respects, but those respects were *enumerated*: things like "liquidated," "unliquidated," "fixed," "contingent," "unmatured," and "disputed." See, *e.g.*, *In re Charter Co.*, 876 F.2d 866, 869 (11th Cir. 1989) (explaining how Congress expanded the definition by "using the following broad language"). Stale claims fall outside this statutory category. Language suggesting that "disputed" claims can be filed hardly suggests that *indisputably invalid* claims may be filed. Those claims are already resolved as a legal matter; they are not "contingent," "disputed," or "unmatured"—they are simply (and indisputably) *unenforceable*. While the Code's definition captures "all *legal* obligations of the debtor, no matter how remote or contingent" (*ibid.*) (emphasis added), Congress did not capture solely "moral" obligations, which is all Defendants now pursue.

Moreover, while the Code's definition of "claim" is indeed broad, Defendants misunderstand Congress's objective: it wanted a process that could afford complete relief, so that "all *legal obligations* * * * will be able to be dealt with in the bankruptcy case." *Epstein* v. *Official Comm. of Unsecured Creditors of Estate of Piper Aircraft Corp.*, 58 F.3d 1573, 1576 (11th Cir. 1995). In a world in which parties could not file contingent or unmatured claims, parties would be shut out of the bankruptcy proceeding. H.R. Rep. No. 95-595, at 180 (1977). They could not share in the bankruptcy estate, and the debtor could not obtain full relief or a fresh start. Once those unresolved claims ripen, the debtor could be thrown back into debt, threatening the viability of any Chapter 13 plan and frustrating bankruptcy's objective.

Congress eliminated those concerns by widening the scope of "claims" to capture all claims with a potential "right to payment"—*i.e.*, a *legally enforceable obligation*.[3] But nowhere did Congress suggest that this new definition of "claim" was intended to sweep in knowingly *invalid* claims. The goal was to bring all legitimate interests before the bankruptcy court. A party with a knowingly stale claim

[3] A party, for example, cannot freely breach an enforceable contact simply because a *contingency* has not yet occurred. Even though a conditional contract might not authorize immediate action, it most assuredly is binding on the parties and an "enforceable obligation." If one side to the contract declared that they would not honor the agreement, the other side would have recourse in court—unlike Defendants and their stale debt.

does not have any *legitimate* interest. It simply hopes to divert funds from the estate without any legal "right to payment." That behavior harms debtors and creditors alike, and there is no indication that Congress intended anyone to burden the process with such meritless claims.

In any event, the Supreme Court has construed the "claim" definition after the Code's amendment, and it has held that the "right to payment" must still be an *enforceable* right. See, *e.g.*, *NextWave*, 537 U.S. at 303. Defendants' contrary view—insisting that proofs of claim include permanently "unenforceable" obligations—is irreconcilable with the Supreme Court's binding construction.

d. Defendants argue that filing a proof of claim does not imply a debt is enforceable. Yet Defendants voluntarily participated in a process reserved for *enforceable* obligations, which (at a minimum) *implies* enforceability. And Defendants gladly take advantage of the background presumption deeming all claims "prima facie" valid and enforceable. *Gardner* v. *New Jersey*, 329 U.S. 565, 573 (1947); 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 know their claims are not "prima facie" valid. But they never disclose that to anyone or make any corrective statements. They simply lodge baseless claims in a formal process reserved for *enforceable* obligations. The fact that some will detect their claims as frivolous does not wipe clean the "misleading impression" that Defendants "can legally enforce [a] debt" that cannot be enforced. *Crawford*, 758 F.3d at 1261.

Defendants respond that their claims are "accurate" (Br. 16-17), but that is wrong. It makes no difference that Defendants' claims disclosed half-truths about the debt (*e.g.*, the debt's amount, the last-transaction date), because Plaintiffs are not challenging those half-truths; they are challenging the core assertion that Defendants have a "right to payment" when no such "right" exists. Defendants falsely assert "*proof*" of a "*right to payment*" to exploit the Code's presumption of validity. When the process (predictably) breaks down and fails, Defendants happily participate in the estate's distribution, despite having *unenforceable* claims that all agree should have been rejected. Defendants' half-truths hardly render these claims "accurate" or "truthful."

Defendants insist their claims disclose all details required by Fed. R. Bankr. P. 3001(c). Br. 17-18. But Rule 3001(c) operates together with Fed. R. Bankr. P. 9011, which requires a *good-faith basis* for all claims. *Young* v. *Young (In re Young)*, 789 F.3d 872, 879 (8th Cir. 2015) ("case law interpreting Rule 11 applies to Rule 9011 cases"). "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). 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.

"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), and Defendants' filings mispresent that central fact (*Crawford*, 758 F.3d at 1261). Defendants' claims are not "accurate" or "truthful" simply because their claims are so *clearly* baseless that some parties can ferret them out.

e. Defendants urge this Court to ignore the Circuit's "unsophisticated consumer" standard (Br. 25-27), but their theory fails on multiple levels.

First, Defendants' communications were not *directed* at counsel. These are court filings in a busy process that *may or may not* be reviewed by attorneys. This common fact is an essential component of Defendants' scheme: If these communications *always* reached competent professionals, Defendants' claims would be rejected 100% of the time, and Defendants would stop misusing the claims-process.[4]

[4] The only exception: There are instances where competent professionals do review Defendants' meritless claims but simply acquiesce to avoid the cost of an objection. Those claims may not mislead or deceive anyone, but that hardly excuses De-

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Defendants' business model critically relies on claims slipping through the process without any educated review. Given that Defendants only collect when lawyers and trustees do *nothing*, it is a bit much for Defendants to insist that those groups always review these claims.[5]

Nor is it relevant that these Plaintiffs were represented by an attorney. This overlooks the FDCPA's private-attorney-general function. See, *e.g.*, *Tolentino* v. *Friedman*, 46 F.3d 645, 651-652 (7th Cir. 1995). The FDCPA is designed to avoid and deter abusive practices. Plaintiffs who are *not* deceived are permitted (and encouraged) to file suit in order to protect consumers who would otherwise fall victim to Defendants' misconduct. See *Pollard* v. *Law Office of Mandy L. Spaulding*, 766 F.3d 98, 103 (1st Cir. 2014) ("the FDCPA does not require that a plaintiff ac-

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fendants' misconduct: it is highly abusive to file frivolous claims knowing that the nuisance value will result in an illegitimate payout. Even if Defendants somehow escape liability under Section 1692e (due to the sheer obviousness of the defects in their filings), their misuse of the claims-process is still grossly unfair and unconscionable under Section 1692f.

[5] This accordingly is unlike a situation where a debt collector sends direct communications exclusively to attorneys. Compare, *e.g.*, Answering Br. 23, 26; *Guerrero* v. *RJM Acquisitions LLC*, 499 F.3d 926, 936 (9th Cir. 2007); *Kropelnicki* v. *Siegel*, 290 F.3d 118, 127 (2d Cir. 2002). Defendants' court filings can be viewed by anyone, including unrepresented debtors (as is often the case). Had Defendants somehow restricted their filings to a debtor's lawyer, they would at least have some basis for assessing liability under a heightened standard. But these filings were not *directed* at counsel; they were submitted to the court, in the hope that no one (most of all any competent lawyer) would ever review them.

tually be confused"); *Crawford*, 758 F.3d at 1258 ("[t]he inquiry is not whether the *particular* plaintiff-consumer was deceived or misled") (emphasis added). It is accordingly irrelevant that Plaintiffs were represented. That is not always the case for many consumers, which is precisely why Defendants continue exploiting the system. The FDCPA deters Defendants from wasting everyone's time and serves as a safeguard for those consumers who cannot otherwise protect themselves.[6]

f. Finally, Defendants are incorrect that the FDCPA categorically excludes any communications to attorneys. Br. 23-25. Under its plain language, the FDCPA applies to all attempts to collect a debt, even those directed to a debtor's attorney.

As Defendants concede (Br. 23), four courts of appeals have rejected their cramped view of the FDCPA. See *Bishop* v. *Ross Earle & Bonan, P.A.*, 817 F.3d 1268 (11th Cir. 2016); *Allen ex rel. Martin* v. *LaSalle Bank, N.A.*, 629 F.3d 364 (3d Cir. 2011); *Evory* v. *RJM Acquisitions Funding, LLC*, 505 F.3d 769 (7th Cir. 2007); *Sayyed* v. *Wolpoff & Abramson*, 485 F.3d 226 (4th Cir. 2007). And these decisions are correct: the FDCPA is a remedial statute, and its language is construed broadly. *Brown* v. *Card Serv. Ctr.*, 464 F.3d 450, 453 (3d Cir.2006). The term "communication" is defined expansively to include the "conveying of infor-

[6] Moreover, Defendants' scheme wastes time and resources—which imposes real costs on both represented *and* unrepresented parties—even where proper objections are lodged. Again, those costs give rise to FDCPA claims under Section 1692f, wholly apart from Defendants' liability under Section 1692e.

mation," both "directly or indirectly" to "any person" through "any medium"; and "debt collector" is defined to cover any person "who regularly collects or attempts to collect, directly or indirectly, debts." 15 U.S.C. 1692a(2), (6). At a minimum, proofs of claim are "indirect" communications to "any person" about a debt (see, *e.g.*, *Sayyed*, 485 F.3d at 232); the language is not susceptible to any limiting construction to carve out "attorneys." See, *e.g.*, *Heintz* v. *Jenkins*, 514 U.S. 291 (1995) (applying the FDCPA to lawyers who attempt to collect debts through litigation).

And the careful inclusion of the term "indirectly" shows that Congress intended the FDCPA to sweep in collection efforts directed at anyone (including attorneys), thus placing the focus on the debt collector's misconduct: "If an otherwise improper communication would escape FDCPA liability simply because that communication was directed to a consumer's attorney, it would undermine the deterrent effect of strict liability." *Allen*, 629 F.3d at 368. Defendants cannot escape the FDCPA's substantive protections by supposedly directing their misleading, unfair, and unconscionable claims to a debtor's lawyer.

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

1. As previously established, Defendants exploit the claims-allowance process to collect when the system *malfunctions*. Their claims have no legitimate basis or useful purpose; there is a sum total of *zero* circumstances in which these claims

survive under proper review. The claims are invalid and will be rejected every time if the process functions as Congress intended. Yet Defendants deliberately "flood" bankruptcy proceedings with hundreds of thousands of time-barred claims, all in the hope of collecting when the process fails—and without any regard for the significant costs their scheme imposes on courts, debtors, and innocent creditors. This flagrant abuse is an "unfair" and "unconscionable" means of collecting a debt, and it violates the FDCPA. 15 U.S.C. 1692f.

2. a. In response, Defendants maintain that their scheme is a fair and legitimate use of the bankruptcy process. As Defendants understand it (*e.g.*, Br. 38), they have an *absolute right* to file indefensible, time-barred claims.

This is frivolous. The Code's structure and purpose confirm that debt collectors have no "right" to file time-barred claims. The entire point of the claims-process—as reflected by multiple Code provisions—is to efficiently and fairly process claims. That process is frustrated by attempts to bog down bankruptcy proceedings with knowingly invalid claims. Congress would not have tasked trustees with a statutory duty to object to stale claims (11 U.S.C. 704(a)(5), 1302(b)(1)), only so debt collectors could engage the pointless exercise of filing a claim that the trustee immediately rejects. Nor would Congress have declared time-barred claims unenforceable (11 U.S.C. 502(b)(1), 558) if it wished parties to *knowingly* file unenforceable claims: there is sufficient work in every bankruptcy without inviting claims that are doomed for failure. And Congress would not have deemed claims "prima facie valid"—and presumptively enforceable—if it intended parties to file knowingly *invalid and unenforceable* claims. Compare *Gardner*, 329 U.S. at 573; Fed. R. Bankr. P. 3001(f).

The process is designed to function when all parties act in good faith; it is not designed to tolerate parties who abuse the system by filing meritless claims, all in the hope that the system breaks down and no one notices. *Young*, 789 F.3d at 879. "[F]iling 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. Defendants' business practice wastes limited judicial and party resources, interferes with the efficient processing of claims, and (when successful) diverts funds from parties with legitimate claims. Defendants cannot explain how their understanding of a "right" to file frivolous claims is consistent with the clear structure and purpose of the Code.

b. Defendants say that Rule 3001 would not have required parties to include information about a claim's timeliness unless it contemplated time-barred claims. Defendants overlook that this information is useful in assessing both genuinely disputed claims and ferreting out frivolous claims that never should have been filed in the first place. It is not a bizarre "permission" to file a claim that everyone agrees is time-barred. See Fed. R. Bankr. P. 9011. And while the Rules Committee did not recommend imposing further disclosure obligations concerning timeliness, its logic is telling: The Committee realized that some claims are not obviously time-barred, and it would unfairly shift the burden to the creditor in those situations. That has nothing to do with the circumstances alleged here: Defendants are filing claims fully aware of their untimeliness; they simply hope to collect despite knowing they should not. That kind of claim is squarely barred by Rule 9011, and the Rules Committee never suggested otherwise.

Nor can Defendants justify their view that the Code permits parties to file frivolous claims. Bankruptcy courts operate under difficult circumstances, and the system is sound but imperfect. Defendants effectively concede that the only earthly scenario in which they collect is where the process affirmatively breaks down. They have no lawful grounds for collecting or good-faith belief that they have a "right"—as that term is traditionally understood—to collect on their stale claims. Defendants' entire business practice turns on the predictability of system failure—and their ability to collect unenforceable debts (at the expense of debtors and innocent creditors) whenever that happens. Defendants tellingly could not offer a single reason that Congress would authorize baseless claims to divert limited funds from rightful claimants. Congress, unsurprisingly, does not grant a "right" to undermine its own system. See, *e.g.*, *Feggins*, 2015 Bankr. LEXIS 2822, at *12.

c. Defendants also insist that their frivolous claims must be allowed in order to accomplish the goals of bankruptcy: Without their filings, frivolous claims could not be discharged, and debtors would lose their "fresh start." Br. 15-16. This is preposterous. Debtors do not declare bankruptcy to escape *stale* debt; they declare bankruptcy to avoid *enforceable* obligations. The fresh start is achieved by addressing those enforceable burdens, not time-barred, "moral" obligations that can be freely ignored with or without a bankruptcy discharge.

Nor are stale claims necessary for an equitable distribution of estate assets. The "equitable distribution" on time-barred debt is *always* zero. Defendants should *never* collect under a proper Chapter 13 plan, and their debts are unnecessary to any functioning Chapter 13 bankruptcy. They are submitted only to take unfair advantage of the process in the hope of collecting when the system malfunctions. Their attempt to defraud the system is not countenanced by the Code.

d. Defendants suggest that, unlike ordinary legal systems, the Code tolerates defective claims, and Congress never said otherwise. Br. 22. This is puzzling. Congress does not have to state the obvious to ban claims subject to a known ironclad defense; such claims are "frivolous" and sanctionable (Opening Br. 39-40 (citing circuit authority in the Fourth, Fifth, Seventh, and Tenth Circuits)), and they are disallowed under the *existing* bankruptcy scheme. The point is that all claims must be filed *in good-faith*: the "bankruptcy process" is controlled by Fed. R.

Bankr. P. 9011, which requires "'a reasonable inquiry into whether there is a factual and legal basis for a claim *before* filing.'" *Young*, 789 F.3d at 879.

Congress did not have to explicitly say that baseless claims are forbidden in order to forbid baseless claims. The system *requires* good-faith for every submission, and Defendants admit they have no good-faith basis here—which is why they throw in the towel once anyone objects. The *default*—without saying anything more—is that there is no "right" to file frivolous claims. See, *e.g.*, *Feggins*, 2015 Bankr. LEXIS 2822, at *15-*16. If Defendants wish to invent a "right" so foreign to any known legal system, they must identify language far clearer than this.[7]

Moreover, it is telling that Defendants cannot offer a single reason that their participation actually benefits anyone—other than themselves. It does not benefit the debtor, who is already protected from enforcement (time-barred debts are only "moral" obligations, not legal ones). It does not benefit the trustee, who already has enough on her plate without wasting time and resources objecting to frivolous claims. It does not benefit legitimate creditors, whose proper share is diminished

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[7] Defendants make no effort to square their position with the uniform legal principles articulated in Plaintiffs' brief: parties are not permitted to knowingly file claims subject to unavoidable dispositive defenses. That principle squarely applies in this setting. If Defendants felt that sanctions were unwarranted, they could at least explain why the uniform rules from multiple circuits are somehow inapplicable. Defendants' exact logic fails under Rule 11, and Rule 9011 and Rule 11 are cut from the same cloth; there is no reason the practice survives under one but not the other.

when the system wrongly permits recovery on time-barred debts. If the system operates without error, those debts will be categorically excluded. There is no universe in which the process is frustrated when debt collectors refrain from filing frivolous claims.[8]

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

1. As previously explained, the same acts that violate the FDCPA outside bankruptcy also violate the FDCPA within it. Debt collectors (unsurprisingly) do not have more freedom to pursue time-barred claims once debtors enter bankruptcy. See, *e.g.*, *Crawford*, 758 F.3d at 1260.

2. Defendants resist this conclusion, but they are mistaken.

According to Defendants, debtors have protection in bankruptcy that does not exist outside bankruptcy, eliminating risks the FDCPA is designed to avoid. Defendants insist these safeguards operative effectively (Br. 30-32), yet have no answer for this simple question: If bankruptcy's safeguards always functioned,

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[8] Defendants are likewise wrong (Br. 5-6) that only the discharge injunction can protect debtors from future harassment: any debtor concerned about cutting off requests for *voluntary* repayment can always invoke 15 U.S.C. 1692c(c)—"[i]f a consumer notifies a debt collector in writing that the consumer refuses to pay a debt or that the consumer wishes the debt collector to cease further communication with the consumer, the debt collector shall not communicate further with the consumer." This FDCPA provision replicates the core effect of the discharge injunction.

why are Defendants' time-barred claims ever allowed? Defendants failed to cite a *single* reason that their claims would ever survive a proper objection. So why do they recover with sufficient frequency to make this a viable business model?

The answer is obvious: Bankruptcy's "safeguards" are *not* adequate. Defendants are well aware of the deficiencies in the process, because their entire practice turns on exploiting those deficiencies. If the process functioned as Congress intended, their claims would be rejected 100% of the time, and they would stop "flooding" the courts with frivolous claims. Their offensive misuse of the process violates the FDCPA.

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

A. "'[W]hen two statutes are capable of coexistence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective.'" *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). Defendants effectively concede there is not a single line of text in the Code or the FDCPA that expressly precludes the claims at issue. Defendants thus can prevail only by showing this is one of the "rare" occasions where one independent federal enactment precludes another. *Randolph* v. *IMBS, Inc.*, 368 F.3d 726, 730 (7th Cir. 2004). It most certainly is not.

First, as established above, a debt collector "can easily satisfy both mandates" (*Dep't of Trans.* v. *Pub. Citizen*, 541 U.S. 752, 767 (2004)), because the challenged conduct is forbidden under both schemes. Any debt collector who refuses to violate the Code will automatically comply with the FDCPA. There is no "positive[] repugnan[cy]" between these laws, and thus no preclusion.

Second, even if the Code somehow tolerated Defendants' conduct, there is still no "irreconcilable conflict": The claims-process is wholly permissive; no one is compelled to file a claim. Put another way: even if the Code permits Defendants' abusive conduct, it certainly does not *require* it. Thus, it cannot effect a repeal of the FDCPA by implication. "When two statutes complement each other, it would show disregard for the congressional design to hold that Congress nonetheless intended one federal statute to preclude the operation of the other." *POM Wonderful*, 134 S. Ct. at 2238. Defendants' contrary view reflects a fundamental misunderstanding of well-settled doctrine. See, *e.g.*, *Johnson*, 2016 WL 2996372, at *5 ("The FDCPA and the Code are not in irreconcilable conflict," as the "regimes together * * * provid[e] different tiers of sanctions for creditor misbehavior in bankruptcy.").

B. Defendants' contrary position is wholly insubstantial. They refuse to acknowledge that their theory has been flatly rejected by *Randolph*, *Johnson* v. *Midland Funding, LLC*, 823 F.3d 1334 (11th Cir. 2016), *Simon* v. *FIA Card Servs.*, *N.A.*, 732 F.3d 239, 273-274 (3d Cir. 2013), and *Garfield* v. *Ocwen Loan Servicing, LLC*, 811 F.3d 86, 91-92 (2d Cir. 2016), all of which adopted *Randolph* while repudiating *Walls* v. *Wells Fargo Bank, N.A.*, 276 F.3d 502 (9th Cir. 2002). They repeat effectively a *preemption* analysis, which is irrelevant to a *preclusion* analysis. *POM Wonderful*, 134 S. Ct. at 2236; *Simon*, 732 F.3d at 275; *Randolph*, 368 F.3d at 730.

Defendants may think that the Code's existing "protections" and "remedies" render the FDCPA unnecessary in this context. Answering Br. 30-31 (relying on *Simmons* v. *Roundup Funding, LLC*, 622 F.3d 93 (2d Cir. 2010)). But Congress made a contrary determination in the FDCPA. It decided that heightened remedies were necessary to counteract the abusive practices of professional debt collectors; the Code's remedies for ordinary creditors were inadequate. The Code and the FDCPA can thus readily co-exist, and it is "easy to enforce each one." *Randolph*, 368 F.3d at 730; accord *Simon*, 732 F.3d at 274. It is not up to Defendants, or the courts, to "pick and choose among congressional enactments." *Morton*, 417 U.S. at 551.

* * *

In the end, Defendants suggest dismissing actionable FDCPA claims on the ground that the FDCPA was impliedly repealed one year later by Congress in passing bankruptcy legislation. With no apparent irony, Defendants contend that their flagrant misuse of the bankruptcy process was not only sanctioned by Congress but also intended to repeal *by implication* the express prohibition of such conduct by Congress (one year earlier) in the FDCPA.

Defendants are unquestionably mistaken. An implied repeal is unnecessary to give both statutes "meaning." *Simon*, 732 F.3d at 274. Defendants' interpretation of the Code is indefensible. But even were it *reasonable*, it could not support affirmance because it falls far short of "the overwhelming evidence needed to establish repeal by implication." *J.E.M.*, 534 U.S. at 137. Reversal is warranted.

III. DEFENDANTS CANNOT MEET THEIR HEAVY BURDEN OF ESTABLISHING THAT THE BANKRUPTCY CODE PREEMPTS THE MAINE FDCPA

As Plaintiffs previously explained, the Code does not preempt the Maine FDCPA, and Defendants have no direct answer to Plaintiffs' arguments. They apparently concede that this state-law issue rises or falls with their preclusion attack on Maine's FDCPA counterpart. Because Defendants have failed to meet their heavy burden of establishing preemption *or* preclusion, the judgment below should be reversed.

IV. DEFENDANTS' DELIBERATE ABUSE OF THE CLAIMS-PROCESS FALLS SQUARELY WITHIN THE BANKRUPTCY COURT'S SANCTIONS AUTHORITY UNDER 11 U.S.C. 105(a)

A. Defendants' bad-faith misuse of the claims-process also warrants sanctions under 11 U.S.C. 105(a). As explained before, Defendants' scheme deliberately abuses the claims-process. Their frivolous claims will only succeed when the system malfunctions, frustrating Congress's objectives. Whenever Defendants are caught—as they were here—they simply abandon the claim and walk away, seeking to avoid any responsibility for their misconduct. Yet walking away is not enough: Defendants' scheme, if tolerated, would permit a pointless practice that imposes real costs without any legitimate basis. Defendants either waste everyone's time or collect when they indisputably should not—"banking on * * * no one spot[ting] the stale claim." *Owens*, 2016 WL 4207965, at *9 (Wood, C.J., dissenting). That flagrant abuse violates the Code (and the FDCPA), and Defendants' contrary view is mistaken.

B. In response, Defendants argue that Plaintiffs' claims "actually sound in Bankruptcy Rule 9011," and they object that they never had a chance to use Rule 9011's "safe harbor." Br. 36. This is baseless.

The bankruptcy court's power under Section 105 is *independent* of its sanctions authority under Rule 9011. Indeed, this is clear from the statute's plain text (which Defendants ignore): the court is allowed to issue "any" order "necessary or appropriate to carry out the provisions of this title," and "[n]o provision * * * providing for the raising of an issue by a party in interest shall be construed to preclude the court from, sua sponte, taking any action or making any determination necessary or appropriate * * * to prevent an abuse of process." 11 U.S.C.

105(a); see also *In re Kristan*, 395 B.R. 500, 511 (B.A.P. 1st Cir. 2008). While Rule 9011 is always an option to curb debt-collector misconduct, it is assuredly not the only option—and Section 105 stands as affirmative authority to address exactly this kind of systematic "abuse." See, *e.g.*, *In re Hann*, 711 F.3d 235 (1st Cir. 2013) (affirming bankruptcy court's award of damages incurred by debtor, including attorney's fees, as a sanction under Section 105 for creditor's abuse of process, and finding that filing of adversary complaint and opportunity to brief sanctions issue afforded "minimal procedures" necessary for contempt award).[9]

Moreover, Defendants' insistence on invoking a "safe harbor" only underscores the truly offensive nature of their misconduct. A "safe harbor" is typically designed so that a party who *mistakenly* files a baseless claim can revoke it. It is not designed so that parties can deliberately abuse the system by filing (repeat) frivolous claims, only to see if other parties tolerate the nuisance value of their misconduct. Unless Defendants are punished for their scheme, they will continue to flood the bankruptcy courts with meritless claims, knowing they can always withdraw those claims (whenever they are caught) and walk away without losing

[9] Defendants have no basis for saying that a court's power under Section 105 is coterminous with its independent authority under Rule 9011. The two sources of sanction authority are distinct and appropriate in different circumstances. In any event, it would be odd to say that Rule 9011—a *rule*, not a *statute*—implicitly repeals the express authority Congress granted in the statute itself (Section 105).

anything. That shifts the cost of gross misconduct to courts and parties who can often least afford it. This is a quintessential fact-pattern for invoking the court's sanctions authority, and Defendants' contrary contention is mistaken.

CONCLUSION

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

Respectfully submitted.

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I hereby certify that on October 17, 2016, an electronic copy of the foregoing Reply Brief was filed with the Clerk of Court for the U.S. Court of Appeals for the First 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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