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 AMICI CURIAE PUBLIC CITIZEN, INC., LEGAL AID SOCIETY OF THE DISTRICT OF COLUMBIA, NATIONAL ASSOCIATION OF CONSUMER ADVOCATES, AND NATIONAL CONSUMER LAW CENTER IN SUPPORT OF RESPONDENT

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INTEREST OF AMICI CURIAE[1]

Public Citizen, Inc., a national consumer advocacy organization founded in 1971, appears on behalf of its members before Congress, executive agencies, and the courts on a wide range of issues. Public Citizen has long advocated for the effective enforcement of consumer-protection laws, including the Fair Debt Collection Practices Act (FDCPA). Its attorneys have served as counsel for parties in cases before this Court arising under titles of the Consumer Credit Protection Act, *e.g.*, *Marx v. Gen. Revenue Corp.*, 133 S. Ct. 1166 (2013) (FDCPA); *Safeco Ins. Co. of Am. v. Burr*, 551 U.S. 47 (2007) (Fair Credit Reporting Act); *Koons Buick v. Nigh*, 543 U.S. 50 (2004) (Truth in Lending Act), and have argued appeals in the lower courts in which consumers successfully defeated attempts by debt collectors to rely on novel defenses to FDCPA liability.

The Legal Aid Society of the District of Columbia (Legal Aid) was formed in 1932 to provide legal aid and counsel to indigent persons in civil law matters and to encourage measures by which the law may better protect and serve their needs. Today Legal Aid is the oldest and largest general civil legal services provider in the District of Columbia. Legal Aid advocates on behalf of its clients to preserve affordable housing, ensure access to critical safety net benefits, protect consumer rights, and keep families safe and stable. As part of its consumer law practice, Legal Aid represents consumers in debt collection matters filed in District of Columbia courts.

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[1] This brief was not authored in whole or part by counsel for a party. No one other than amici curiae or their counsel made a monetary contribution to preparation or submission of this brief. Letters of consent to filing from counsel for both parties are on file with the Clerk.

Through this on-the-ground work, Legal Aid attorneys regularly encounter consumers who have been subjected to a variety of abusive debt collection tactics, including unfair practices covered by the FDCPA, but who lack the means or sophistication necessary to recognize and enforce their rights.

The National Association of Consumer Advocates (NACA) is a non-profit corporation whose members are private and public sector attorneys, legal services attorneys, and law professors and students whose primary practice or area of study involves the protection and representation of consumers. NACA's mission is to promote justice for all consumers by maintaining a forum for information sharing among consumer advocates across the country and to serve as a voice for its members and consumers in the ongoing struggle to curb unfair and oppressive business practices. Compliance with the FDCPA and faithful application of this law as Congress wrote it have been a continuing focus of NACA since its inception. Protection of the consumers for whose benefit Congress adopted the FDCPA is one of NACA's goals, both within the consumer finance field as well as the larger arena of the consumer rights movement. NACA has appeared regularly as amicus curiae before federal courts of appeals and has appeared before this Court on several occasions.

The National Consumer Law Center (NCLC) is a national research and advocacy organization focused on the legal needs of consumers, especially low-income and elderly consumers. For more than 45 years, NCLC has been the consumer law resource center to which legal services and private lawyers, state and federal consumer protection officials, public policy makers, consumer and business reporters, and consumer and low-income community organizations across the nation have turned for legal answers, policy analysis, and technical and legal support. NCLC is author of the acclaimed twenty-volume Consumer Credit and Sales Legal Practice Series. The FDCPA has been a major focus of NCLC's work. NCLC publishes Fair Debt Collection (8th ed. 2014), a comprehensive treatise to assist attorneys and debt collectors in complying with the law. NCLC's Model Consumer Credit Code was the foundation for the FDCPA. NCLC has appeared regularly as amicus curiae before federal courts of appeals and has appeared before this Court on several occasions.

Amici are concerned that petitioner Midland Funding's reading of the FDCPA, if adopted, would not only harm consumers in bankruptcy, but could also upset decades of lower-court precedent with respect to the FDCPA's application to litigation filings and the appropriate standard under the FDCPA for determining whether a representation is deceptive or misleading. We submit this brief to address questions that may arise in the case involving the FDCPA's proper interpretation.

SUMMARY OF ARGUMENT

The FDCPA prohibits abusive debt collection practices by debt collectors. 15 U.S.C. §§ 1692c-1692j. It is enforced in part through a private right of action that may be asserted by injured "person[s]" seeking actual and statutory damages. *Id.* § 1692k(a). As relevant here, the FDCPA bars debt collectors from using "any false, deceptive, or misleading representation or means" in collecting a debt, *id.* § 1692e, including a false representation of the "character, amount, or legal status of any debt," *id.* § 1692e(2)(A). The FDCPA also prohibits the use of "unfair or unconscionable means to collect or attempt to collect" a debt. *Id.* § 1692f.

Midland Funding effectively concedes that under well-established lower-court precedent, a knowing attempt to collect respondent Aleida Johnson's time-barred debt through debt-collection litigation would violate the FDCPA. *See* Pet'r Br. 31-32, 34. Many courts considering the bankruptcy-related questions presented here have relied on the case law from the non-bankruptcy litigation context. In this case, to the extent this Court addresses the issue, it should adopt the uniform consensus of lower courts that litigation filings otherwise falling within the statute's prohibitions give rise to FDCPA liability, and that a knowing attempt to collect stale debt in consumer debt-collection litigation—a scenario often deemed analogous to the filing of time-barred proofs of claim in bankruptcy—violates the FDCPA.

In addition, this Court should reject Midland Funding's position that the proper standard for assessing whether a litigation filing—such as a proof of claim—is deceptive or misleading under section 1692e of the FDCPA is what a competent attorney or trustee would believe. Proofs of claim filed in bankruptcy may or may not be read by competent professionals; indeed, as respondent points out, Midland Funding's business model is built on the assumption that no competent attorney or trustee will review its proofs of claim. Importantly, a proof of claim is unquestionably directed not only at the estate and the debtor's attorney (if she has one), but also at the debtor herself. There is thus no basis for ratcheting up the standard for FDCPA liability, which is intended to protect unsophisticated consumers, as well as shrewd ones.

ARGUMENT

I. If This Court Addresses the Issue, It Should Confirm That Litigation Filings, Including Suits over Stale Claims, Can Violate the FDCPA.

Midland Funding effectively concedes that under established case law an attempt to collect Johnson's indisputably time-barred debt by filing a debt-collection suit against her would violate the FDCPA. Many courts holding that the filing of a time-barred proof of claim in bankruptcy violates the FDCPA have drawn support from FDCPA case law involving the filing of consumer debt-collection suits over stale claims. The parties in this case part ways only as to whether the distinctive statutory framework of bankruptcy justifies different treatment for proofs of claim than for non-bankruptcy litigation filings.

Although the parties do not dispute the case law involving non-bankruptcy litigation filings, and the correctness of that case law is not directly presented, an understanding of the reasons for the lower courts' decades-old consensus will be helpful to the Court in understanding why the same principles dictate a ruling for respondent here. Such liability is necessary in both non-bankruptcy and bankruptcy contexts to protect consumers and discourage debt collectors from abusing the legal process as an extension of their abusive debt collection tactics.

A. As an initial matter, it is well-established that FDCPA liability may attach to statements made in litigation filings.

In *Heintz v. Jenkins*, 514 U.S. 291 (1995), in the course of construing the FDCPA's definition of "debt collector," this Court held that the FDCPA covers attorneys "engage[d] in consumer-debt-collection activity, even when that activity consists of litigation." *Id.* at 299. Although *Heintz* involved a settlement-related letter written during litigation, *Heintz*'s rationale assumed that FDCPA liability may arise from statements in pleadings. The debt collector in *Heintz* argued that, were the FDCPA applied to lawyers engaged in litigation, attorneys who file an unsuccessful complaint to collect a debt would violate the statute's prohibition of "'threat[s] to take action that cannot legally be taken'" in collecting a debt. 514 U.S. at 295 (quoting 15 U.S.C. § 1692e(5)). Had the Court intended its opinion to reach only attorneys engaged in litigation activity *outside* of court, the obvious response to this hypothetical would have been that the filing of a complaint cannot form the basis for an FDCPA violation. Instead, the Court pointed out that the statute contains a defense for bona fide errors, and it stated that it could not "see how the fact that a lawsuit turns out ultimately to be unsuccessful could, by itself, make the bringing of it an 'action that cannot legally be taken.'" *Id.* at 295-96.

This Court's opinion in *Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA*, 559 U.S. 573 (2010), further confirms that unfair or misleading attempts to collect a debt by filing a lawsuit can violate the FDCPA. The plaintiff in *Jerman* alleged that a law firm and one of its attorneys violated the FDCPA, 15 U.S.C. § 1692g, by stating in a notice attached to a foreclosure complaint that the borrower's debt would be assumed valid unless she disputed it in writing. 559 U.S. at 579. The law firm asserted that it was entitled to a bona fide error defense under section 1692k(c) because it had misunderstood the law with respect to the FDCPA's process for disputing a debt. This Court interpreted the proper scope of that defense without questioning whether a statement in a notice attached to a complaint could violate the FDCPA.

See id. at 581-90. And it rejected the contention that a narrow reading of the bona fide error defense would impose FDCPA liability on lawyers for advancing uncertain legal arguments, *see id.* at 596-97, on the ground that lawyers could still invoke the defense "where a violation results from a qualifying factual error," *id.* at 599.

Based in part on these decisions, the courts of appeals have consistently held that litigation filings may give rise to FDCPA liability. *See, e.g.*, *Kaymark v. Bank of Am., N.A.*, 783 F.3d 168, 176 (3d Cir. 2015) (rejecting argument "that pleadings—in particular, foreclosure complaints—cannot be the basis of FDCPA claims"); *Miljkovic v. Shafritz & Dinkin, P.A.*, 791 F.3d 1291, 1295 (11th Cir. 2015) (holding that "documents filed in court in the course of judicial proceedings to collect on a debt, like [a debt collector's] sworn reply, are subject to the FDCPA"); *Currier v. First Resolution Inv. Corp.*, 762 F.3d 529, 535 (6th Cir. 2014) (stating that "[c]ourt filings can be a threat under the FDCPA" within the meaning of section 1692e(5) and holding that the plaintiff stated claims under sections 1692e(5) and 1692f where the defendant improperly filed a judgment lien); *James v. Wadas*, 724 F.3d 1312, 1316 (10th Cir. 2013) (recognizing that "the FDCPA applies to the litigating activities of lawyers, which, as other circuits have held, may include the service upon a debtor of a complaint to facilitate debt collection efforts" (internal quotation marks and citation omitted)); *Donohue v. Quick Collect, Inc.*, 592 F.3d 1027, 1032 (9th Cir. 2010) (refusing, in a case involving claims under sections 1692e and 1692f, "[t]o limit the litigation activities that may form the basis of FDCPA liability to exclude complaints served personally on consumers to facilitate debt collection"); *Sayyed v. Wolpoff & Abramson*, 485 F.3d 226, 229-30 (4th Cir. 2007) (holding that statements in a motion for summary judgment could give rise to liability under sections 1692e and 1692f of the FDCPA).

B. For nearly three decades, courts have also "uniformly" recognized that the FDCPA bars a debt collector from knowingly filing or threatening to file a consumer debt-collection suit to collect a stale debt. *Crawford v. LVNV Funding, LLC*, 758 F.3d 1254, 1259-60 & n.6 (11th Cir. 2014); *see Daugherty v. Convergent Outsourcing, Inc.*, 836 F.3d 507, 513-14 (5th Cir. 2016); *Phillips v. Asset Acceptance, LLC*, 736 F.3d 1076, 1079 (7th Cir. 2013); *McCollough v. Johnson, Rodenburg & Lauinger, LLC*, 637 F.3d 939, 948-49 (9th Cir. 2011); *Huertas v. Galaxy Asset Mgmt.*, 641 F.3d 28, 32-33 (3d Cir. 2011) (per curiam); *Castro v. Collecto, Inc.*, 634 F.3d 779, 783 (5th Cir. 2011); *Freyermuth v. Credit Bureau Servs., Inc.*, 248 F.3d 767, 771 (8th Cir. 2001); *see also Harvey v. Great Seneca Fin. Corp.*, 453 F.3d 324, 332 (6th Cir. 2006) (noting the uniformity of other circuits' case law without addressing the question); *Mavilla v. Absolute Collection Serv., Inc.*, 539 F. App'x 202, 207 (4th Cir. 2013) (holding without elaboration that where a debt collector did not at least threaten to file a lawsuit to recover stale debts, a district court properly granted summary judgment to the collector).[2]

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[2] *See also, e.g.*, *Basile v. Blatt, Hasenmiller, Leibsker & Moore LLC*, 632 F. Supp. 2d 842, 845 (N.D. Ill. 2009); *Herkert v. MRC Receivables Corp.*, 655 F. Supp. 2d 870, 875-76 (N.D. Ill. 2009); *Jenkins v. Gen. Collection Co.*, 538 F. Supp. 2d 1165, 1172 (D. Neb. 2008); *Larsen v. JBC Legal Grp., P.C.*, 533 F. Supp. 2d 290, 302 (E.D.N.Y. 2008); *Goins v. JBC & Assocs., P.C.*, 352 F. Supp. 2d 262, 272 (D. Conn. 2005); *Simmons v. Miller*, 970 F. Supp. 661, 664-65 (S.D. Ind. 1997); *Beattie v. D.M. Collections, Inc.*, 754 F. Supp. 383, 393-94 (D. Del. 1991); *Kimber v. Fed. Fin. Corp.*, 668 F. Supp. 1480, 1487 (M.D. Ala. 1987); *Baptist v. Global Holding & Inv. Co.*, No.

In *Phillips*, 736 F.3d 1076, for example, the Seventh Circuit concluded that the knowing filing of a time-barred claim against a debtor constitutes a false, deceptive, or misleading representation in violation of section 1692e of the FDCPA and use of an unfair or unconscionable debt collection method in violation of section 1692f. As *Phillips* explained, "'[t]he passage of time not only dulls the consumer's memory of the circumstances and validity of the debt, but heightens the probability that she will no longer have personal records detailing the status of the debt.'" *Id.* at 1079 (quoting *Kimber*, 668 F. Supp. at 1487). The court also explained that professional debt collectors easily trap vulnerable consumers by filing suit on stale debts, observing that "'few unsophisticated consumers would be aware that a statute of limitations could be used to defend against lawsuits based on stale debts,'" so they "'would unwittingly acquiesce to such lawsuits.'" *Id.* (quoting *Kimber*, 668 F. Supp. at 1487).

Kimber v. Federal Financial Corp., 668 F. Supp. 1480, the seminal district court decision cited by *Phillips* and numerous other courts, provides additional compelling justifications for the consensus view that the FDCPA bars the filing of indisputably stale claims in consumer debt-collection litigation. *Kimber* explained that attorneys and their clients have been sanctioned by courts for knowingly filing suit on claims subject to a time bar or other affirmative defenses, such as res judicata or a lack of personal jurisdiction. 668 F. Supp. at 1488 (collecting cases). The court viewed the fact that such conduct could be subject to sanctions in some

04CV2365, 2007 WL 1989450, at *3 (E.D.N.Y. July 9, 2007); *Stepney v. Outsourcing Solutions, Inc.*, No. 97 C 5288, 1997 WL 722972, at *5 (N.D. Ill. Nov. 13, 1997).

circumstances as a reliable indicator that the practice is unfair and misleading under the FDCPA when directed at unsophisticated consumers. *Id.*

Kimber also rejected an argument similar to Midland Funding's here: that the filing of litigation on a time-barred claim is not misleading because statutes of limitations generally "bar only the remedy, not the underlying right." *Id.* at 1489. The court called that distinction "immaterial," explaining that the "dispositive fact is that a debt collector could not legally prevail in such lawsuit, and for the debt collector to represent otherwise is fraudulent." *Id.*

C. Recognizing that statements made in litigation filings, including suits to collect time-barred debts, may give rise to FDCPA liability is critical to protecting consumers. Debt collectors have repeatedly demonstrated that they are willing to abuse the judicial process in furtherance of their abusive debt collection tactics, and the FDCPA provides an important check on that conduct.

For example, in *Sykes v. Mel Harris & Associates, LLC*, 757 F. Supp. 2d 413 (S.D.N.Y. 2010), plaintiffs brought an FDCPA claim against a law firm and other defendants that entered into a scheme to fraudulently foreclose on thousands of New York homeowners by filing false affidavits in litigation. The court noted that the defendants in the case filed more than 104,000 debt-collection actions in New York City Civil Court alone between 2006 and 2008. *Id.* at 419. Ninety percent of the debtors defaulted, a result driven largely by the fact that defendants did not serve most of the debtors with notice of the suits. *Id.*; *see also Sykes v. Mel S. Harris & Assocs. LLC*, 780 F.3d 70, 75-78 (2d Cir. 2015). The parties settled the FDCPA and other claims this year, with defendants agreeing to pay $60 million into a settlement fund toward "damages to class members who suffered losses because they had judgments entered against them and were subjected to wage garnishments, bank levies, and other means of collection." *Sykes v. Harris*, No. 09 CIV. 8486, 2016 WL 3030156, at *1 (S.D.N.Y. May 24, 2016). Class members with the strongest claims received roughly 96 to 98 percent of their money back. *Id.* And as part of the settlement, some of the defendants were forced out of the debt collection and debt-buying industries altogether. *Id.*

The need for strong accountability under the FDCPA with respect to the more specific practice of debt collector suits to collect on time-barred debts is likewise well supported. Despite decades of case law indicating that suits to collect stale debts are unlawful under the statute, one legal service provider, analyzing a sample of the debt collection cases in its office over an eighteen-month period, "found that over fifty percent of the cases for which sufficient information was available were filed after the statute of limitations period had expired." Federal Trade Commission, Repairing a Broken System: Protecting Consumers in Debt Collection Litigation and Arbitration 29 (2010), *available at* goo.gl/vBXnPD. The rampant misuse of the legal process in this manner helps to explain why thirty-one state attorneys general recently urged the Consumer Financial Protection Bureau (CFPB) to adopt strong debt collection rules reining in debt collectors who "are increasingly using litigation to collect time-barred debts in an attempt to revive such debts." Comment of 31 State Attorneys General 26 (Feb. 28, 2014), *on* Debt Collection (Regulation F): Advance Notice of Proposed Rulemaking, 78 Fed. Reg. 67,848 (Nov. 12, 2013), *available at* http://1.usa.gov/20PFt0z.[3]

D. The Chamber of Commerce, as amicus curiae supporting Midland Funding, argues that determining whether a debt is time-barred is too complex an analysis to expect of debt collectors before they resort to collection through the bankruptcy process. Chamber Br. 12-18. This argument would, of course, apply equally to bankruptcy and non-bankruptcy litigation. And as discussed above, courts have recognized for nearly three decades that a debt collector violates the FDCPA when it knowingly brings a debt-collection suit on a time-barred claim. Law-abiding debt collectors have therefore long been under an obligation to comply with this prohibition and to make a good-faith inquiry with respect to a debt's legal enforceability.

Moreover, the legal obligation to avoid bringing time-barred claims to collect a debt goes beyond the FDCPA's prohibitions. For example, North Carolina has made it unlawful for certain debt collectors to bring suit against a debtor or to attempt to collect a debt in any other way if they know or reasonably should know that collection of the underlying debt is barred by the statute of limitations. N.C. Gen. Stat. § 58-70-115(4); *see also, e.g.*, Proposed Mass. R. Civ. P. 8.1, *available at* goo.gl/wbmXUV (proposing to require plaintiffs suing to collect credit-card debt to certify, "based on a reasonable inquiry, [that] the applicable limitations period has not

[3] The CFPB, which has authority to prescribe rules on debt collection, *see* 15 U.S.C. § 1692*l*(d), is in the process of developing a regulation that addresses the interplay of the FDCPA and attempts to collect time-barred debt, including in consumer debt-collection litigation. *See* CFPB, Debt Collection (Regulation F): Advance Notice of Proposed Rulemaking, 78 Fed. Reg. at 67,875-78.

expired”). Similarly, in Wisconsin, the rule since at least 1944 has been that the state statute of limitations extinguishes the debt, which cannot be revived. *See* 12 Wis. Stat. Ann. § 893.05. As a result, an attempt to enforce a right on a time-barred debt violates the Wisconsin Consumer Act. *See Klewer v. Cavalry Invs., LLC*, No. 01-C-541, 2002 WL 2018830, at *4 (W.D. Wis. Jan. 30, 2002); *see also* 13 Miss. Code Ann. § 15-1-3 (providing that the expiration of the state statute of limitations extinguishes both the right and remedy).

Due to these legal obligations, debt collectors have a strong economic incentive to determine accurately whether a debt is time-barred, and experience indicates they know how to do it. For example, the price that mass debt buyers like Midland Funding are willing to pay for consumer debt drops dramatically based on the debt’s age, which is generally known to the debt buyer and taken into account in purchases. *See* Federal Trade Commission, The Structures and Practices of the Debt Buying Industry v, 23-24 (2013), *available at* goo.gl/tuEquU. Even DBA International, a trade association for debt buyers (including Midland Funding), acknowledges that it prohibits debt-buying companies that it certifies from knowingly bringing or implying that they have “the ability to bring a lawsuit on a debt that is beyond the applicable statute of limitations.” DBA Int’l Amicus Br. 2-4. The association would not impose this prohibition on companies if determining whether a consumer debt is time-barred were beyond the capability of debt collectors.

Thus, debt collectors around the country have been legally obligated to assess concerns about suit over stale claims for years. In many instances, regardless of the outcome in this case, they still will be, and they will have an economic incentive to make those statute-of-limitations determinations accurately. The Chamber's claim that such determinations are too difficult for debt collectors and their lawyers to make is belied by this real-world experience.

In any event, whatever the challenges facing debt collectors in assessing whether a debt is time-barred, they are unquestionably less serious than those facing a debtor in bankruptcy against whom a time-barred proof of claim has been filed. For example, a debtor often does not know at the time a proof of claim is filed whether a debt buyer like Midland Funding has retained or even received the original contract documents. *See* Fed. R. Bankr. P. 3001(c)(3)(B). And in some states, the statute of limitations is shortened if a creditor does not have or cannot produce a written contract. *See, e.g.*, *Portfolio Acquisitions, L.L.C. v. Feltman*, 909 N.E.2d 876, 884 (Ill. App. Ct. 2009). As a result, it is far easier for a debt collector—as the party with clear knowledge whether it can produce a contract in litigation—to determine whether a debt is time-barred.

II. This Court Should Decline To Adopt a "Competent Attorney or Trustee" Standard.

Every court of appeals to consider the issue has determined that the general rule for assessing whether a statement or practice is misleading or deceptive under section 1692e is based on the understanding of the "least-sophisticated" or "unsophisticated" consumer. *See, e.g.*, *Brown v. Card Serv. Ctr.*, 464 F.3d 450, 453-54 (3d Cir. 2006); *Gammon v. GC Servs. Ltd. P'ship*, 27 F.3d 1254, 1257 (7th Cir. 1994); *Clomon v. Jackson*, 988 F.2d 1314, 1318 (2d Cir. 1993); *Jeter v. Credit Bureau, Inc.*, 760 F.2d

1168, 1175 (11th Cir. 1985).[4] This standard protects "all consumers, the gullible as well as the shrewd, the trusting as well as the suspicious, from abusive debt collection practices." *Brown*, 464 F.3d at 454 (internal quotation marks omitted). At the same time, the standard incorporates an objective element of "reasonableness" to protect against "liability for bizarre or idiosyncratic interpretations of collection notices" or other debt-collector representations. *Clomon*, 988 F.2d at 1319-20.

The least-sophisticated consumer standard is central to the FDCPA's protections under section 1692e. The FDCPA was enacted against the backdrop of Congress's conclusion that existing consumer protection laws, including the Federal Trade Commission Act, were "inadequate to protect consumers" from "abusive, deceptive, and unfair debt collection practices." 15 U.S.C. § 1692(a), (b). When Congress enacted the FDCPA, the Federal Trade Commission already "looked not to the 'reasonable consumer,' but to a less sophisticated consumer," in assessing whether debt collectors engaged in unfair and deceptive practices. *Jeter*, 760 F.2d at 1173. As the Eleventh Circuit has observed, it "would be anomalous for the Congress, in light of its belief that existing state and federal law was inadequate to protect consumers, to have intended that the legal standard under the FDCPA be *less* protective of consumers than under the existing 'inadequate' legislation." *Id.* at 1173-74.

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[4] The distinction between the "unsophisticated" and "least sophisticated" consumer labels is one "without much of a practical difference in application." *Avila v. Rubin*, 84 F.3d 222, 227 (7th Cir. 1996).

Midland Funding urges the Court, if it reaches the question, to view FDCPA liability under section 1692e through the perspective of a "competent trustee or attorney," not through the lens of the least-sophisticated consumer. Pet'r Br. 30. In Midland Funding's view, this heightened standard is appropriate because the proof of claim is directed not to the debtor, but to the bankruptcy trustee or, perhaps, to the debtor's attorney. *Id.* Midland Funding's standard should be rejected.

To state the obvious, it is the *debtor*'s estate that is at issue in a bankruptcy proceeding. To say that a filing in that proceeding is not directed at the debtor because it is routed through a court docket elevates form over substance. *Cf.* 15 U.S.C. § 1692a (defining a "communication" under the FDCPA as the conveyance "of information regarding a debt directly or *indirectly* to any person through any medium" (emphasis added)); *Kaymark*, 783 F.3d at 174 (applying the least-sophisticated consumer standard to a section 1692e claim based on representations in a complaint); *accord Donohue*, 592 F.3d at 1033. In addition, a debtor may object to proofs of claim, as Johnson did here. *See* Fed. R. Bankr. P. 3007(a); *see also* Fed. R. Bankr. P. 4002(a)(4) (identifying a debtor's duty to "cooperate with the trustee in . . . the examination of proofs of claim"). A creditor who files a proof of claim therefore necessarily does so with the understanding that it may be read and relied on by the debtor. The fact that a debtor is under no legal obligation to object, *see* Pet'r Br. 30, is irrelevant.

The standard Midland Funding advocates with respect to the perspective of a competent attorney is flawed for other reasons as well. As petitioner concedes, many debtors do not have counsel in bankruptcy. *Id.* And when filing a proof of claim that has not been scheduled by a debtor, creditors may not know whether a debtor has counsel. The claim form asks for the bankruptcy case number and debtor's name, but a creditor does not need to identify the debtor's attorney. *See* Official Form 410, Proof of Claim (2016), *available at* http://www.uscourts.gov/forms/bankruptcy-forms/proof-claim-0. The filing of a proof of claim can also often be done electronically without using CM/ECF. *See*, *e.g.*, David D. Bird, *Bankruptcy Courts Strive to Contain Costs in Tight Budget Environment*, 32-APR Am. Bankr. Inst. J. 32 (2013) (describing ePOC, an electronic proof-of-claim filing system used by some bankruptcy courts). Moreover, even if a debt collector knows that a debtor is represented in bankruptcy, it does not know whether the scope of the agreed-upon representation extends to reviewing proofs of claim and objecting to them.

As a result, the filing of a proof of claim is much like the filing of a typical debt-collection complaint. In either case, a debtor may have the resources to retain counsel to review the filing, but the fact remains that the filing is directed, first and foremost, at the debtor.[5] Accordingly, the general standard under the FDCPA focusing on the least-sophisticated consumer should apply to determine whether a representation is false, misleading, or deceptive for the purpose of section 1692e.

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[5] This case presents no occasion to determine whether a letter or other document sent directly to a debtor's attorney, instead of filed in court, creates an exception to the general rule that section 1692e claims are assessed using the least-sophisticated consumer's perspective. *Compare*, *e.g.*, *Bravo v. Midland Credit Mgmt., Inc.*, 812 F.3d 599, 601, 603 (7th Cir. 2016); *Powers v. Credit Mgmt. Servs., Inc.*, 776 F.3d 567, 574 (8th Cir. 2015).

CONCLUSION

For the foregoing reasons, the Eleventh Circuit's judgment should be affirmed.

Respectfully submitted,

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