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IN THE SUPREME COURT OF THE UNITED STATES

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MIDLAND FUNDING, LLC, :

Petitioner : No. 16-348

v. :

ALEIDA JOHNSON, :

Respondent. :

- - - - - x

Washington, D.C.
Tuesday, January 17, 2017

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:04 a.m.

APPEARANCES:

KANNON K. SHANMUGAM, ESQ., Washington, D.C.; on behalf of the Petitioner.

DANIEL L. GEYSER, ESQ., Dallas, Tex.; on behalf of the Respondent.

SARAH E. HARRINGTON, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D.C.; for United States, as amicus curiae, supporting the Respondent.

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P R O C E E D I N G S

(11:04 a.m.)

CHIEF JUSTICE ROBERTS: We will hear argument next in Case 16-348, Midland Funding v. Johnson.

Mr. Shanmugam.

ORAL ARGUMENT OF KANNON K. SHANMUGAM
ON BEHALF OF THE PETITIONER

MR. SHANMUGAM: Thank you, Mr. Chief Justice, and may it please the Court:

The Bankruptcy Code sets up a process for evaluating claims that are subject to potential limitations defenses. Under that process, a creditor seeking to collect on a debt files a proof of claim. For certain types of consumer debt, the creditor also includes information to enable the trustee and other parties in interest to assess the claim's timeliness and where appropriate to object. A creditor is not required to go further and to certify that there is no valid limitations defense to its own claim. If that is exactly what Respondent and the government are asking this Court to do, under the guise of interpreting the Fair Debt Collection Practices Act. There is nothing --

JUSTICE GINSBURG: Under the Fair Debt Collection Practices Act, suppose there were a suit

1 brought in court to collect on a debt that is
2 time-barred. Would that violate the Fair Credit law if
3 you sued in court on a debt that was time-barred?

4 MR. SHANMUGAM: Justice Ginsburg, our view,
5 perhaps not surprisingly, is no. Our view is that there
6 would be nothing misleading or unfair about the suit in
7 that instance.

8 But this Court need not address that issue
9 in order to resolve the question presented here, and
10 indeed, the courts of appeals that have accepted our
11 view have largely assumed that the filing of a suit in
12 state court presents different considerations from the
13 filing of a proof of claim in bankruptcy. And that is
14 for the simple reason that there are distinctive
15 characteristics about the operation of the bankruptcy
16 system.

17 First, and perhaps most importantly, the
18 bankruptcy system defines the term "claim" quite broadly
19 to include any circumstance in which there is a right to
20 payment. And as this Court held in *Butner*, whether or
21 not there is a right to payment is defined under state
22 law, and Alabama law is clear that the running of a
23 limitations period does not extinguish the right; the
24 right remains. And so, for instance, if the debtor
25 takes some action to make repayment, the right springs

1 back into life, indeed, the right never disappears in
2 the first place, but the right, once again, becomes
3 judicially enforceable.

4 JUSTICE KENNEDY: Are there -- are there any
5 circumstances, just as a practical matter, where the
6 trustee decides that the trustee is going to pay the
7 time-barred debt, it's obviously prejudicial to the
8 other creditors. Are there any -- I was -- I was just
9 trying to think of that. I -- I can't think of any
10 instance in which a trustee would want to do that. I
11 was thinking suppose the debtor wanted to continue a
12 business relation with the -- with -- with the creditor
13 whose debt is time-barred, and -- and as for -- but I --
14 I just can't think of any instance. But perhaps --

15 MR. SHANMUGAM: No, and -- and -- and
16 Justice Kennedy, I can't think of any instance either,
17 and I think that that's precisely because the trustee
18 has the statutory duty to object, to preserve the assets
19 of the estate, and to do so for the creditors. And,
20 again, that is a critical feature of the bankruptcy
21 system.

22 JUSTICE SOTOMAYOR: I'm sorry. I'm having a
23 great deal of difficulty with this business model.
24 Completely. You buy old, old debts that you know for
25 certainty are not within any statute of limitations.

1 You buy them and you call up creditors and you say to
2 them, you don't have to pay me. But out of the goodness
3 of your heart, you should? Or do you just call them up
4 and say, you owe me money, and you hope that they'll pay
5 you.

6 And is it the same thing in bankruptcy
7 court? You filed a claim and you hope the trustee
8 doesn't see that it's out of time? And apparently, you
9 collect on millions of dollars of these debts. So is
10 that what you do?

11 MR. SHANMUGAM: So, Justice Sotomayor, I do
12 not think that that is a valid understanding of our
13 business model, and let me explain why.

14 First, this debt was not time-barred at the
15 time it was purchased. And indeed, Midland, my client,
16 makes every effort not to purchase time-barred debt.
17 Now, of course, they're not always correct in their
18 assessments, and debt that is not time-barred at the
19 time of purchase can come --

20 JUSTICE SOTOMAYOR: Did you have a
21 good-faith basis in this case to believe that the debt
22 was not time-barred --

23 MR. SHANMUGAM: Well --

24 JUSTICE SOTOMAYOR: -- when you filed this
25 claim? Forget about some of the others.

1 MR. SHANMUGAM: Just to be clear, there is
2 actually no allegation in this case that we knew that
3 there was a valid limitations defense. If you take a
4 look at the complaint in this case, and if you take a
5 look at page 25 of the Joint Appendix in particular, all
6 that the complaint alleges is that we were aware of the
7 very facts that we disclosed in the proof of claim.
8 Facts that, to be sure, indicated the existence of a
9 potential limitations defense. Because, after all --

10 JUSTICE SOTOMAYOR: Did you have a
11 good-faith basis to believe the statute of limitations
12 was not applicable?

13 MR. SHANMUGAM: Midland at the time would
14 file proofs of claim without conducting some sort of
15 exhaustive inquiry, and that's for the simple reason
16 that Midland did not believe that that was legally
17 required. And so, again, there is no record on this
18 issue --

19 JUSTICE SOTOMAYOR: So what do you do with
20 the committee notes that say that everyone who files a
21 proof of claim has an obligation to do a good-faith
22 inquiry as to whether it's an enforceable obligation or
23 not?

24 MR. SHANMUGAM: I don't think that that is
25 an accurate characterization of what the advisory

1 committee did. And let me first --

2 JUSTICE SOTOMAYOR: No, no. Not what they
3 did; what they said.

4 MR. SHANMUGAM: I don't think that that's an
5 accurate characterization of what they said, either.
6 And let me explain why that's true.

7 First of all, let me set out what the
8 advisory committee actually did, because that's a
9 critical part of our argument. In Rule 3001(c)(3),
10 which was adopted in 2012, the advisory committee
11 required certain disclosures, the whole point of which
12 was to put trustees and other parties in interest on
13 notice of the potential availability of a limitations
14 defense.

15 And the advisory committee thought about
16 going further. It thought about doing, again, exactly
17 what Respondent and the government are asking this Court
18 to do under the FDCPA; namely, to require a
19 certification that having investigated the existence of
20 a limitations defense, the creditor had made a
21 determination that there was no valid such defense.

22 Now, the advisory committee decided not to
23 do that, Justice Sotomayor, and it decided not to do
24 that for two critical reasons. The first was that the
25 advisory committee recognized that the question of

1 whether or not there is a valid limitations defense
2 as -- as opposed to the question of whether or not the
3 claim appears to be time-barred, could be complicated.
4 And it could be complicated even in the context of
5 consumer debts like these ones, because of the potential
6 for revival and tolling, choice-of-law issues, and the
7 like.

8 The second reason --

9 JUSTICE SOTOMAYOR: I agree with you. But
10 if -- if that is true that you investigated and you had
11 a good-faith basis for believing that it wasn't
12 time-barred, you wouldn't be liable either under the
13 bankruptcy rules or under these debtor rules. So -- but
14 the point is if you were unaware and didn't properly
15 investigate, have you fulfilled your obligations as a
16 lawyer to the bankruptcy court?

17 MR. SHANMUGAM: And our view, Justice
18 Sotomayor, just to be clear, is that you have done
19 exactly what the code itself contemplates.

20 And this goes to the second reason why the
21 advisory committee did not go further. The advisory
22 committee expressed a concern that if it had gone
23 further, it could be violating the Bankruptcy Rules
24 Enabling Act because it would be acting inconsistently
25 with the burden-shifting framework that the code itself

1 devised.

2 JUSTICE SOTOMAYOR: I'm sorry. I don't
3 remember reading that in these. Could you give me a
4 record cite for that?

5 MR. SHANMUGAM: I --

6 JUSTICE SOTOMAYOR: Or you can do it in your
7 reply.

8 MR. SHANMUGAM: No. It's -- it's in our
9 brief --

10 JUSTICE SOTOMAYOR: Or --

11 MR. SHANMUGAM: It's in our brief at page --
12 I believe it's at page 86 of the Agenda Book where the
13 advisory committee working group discusses the proposal
14 to require creditors to, quote, "State whether the claim
15 is timely under the relevant statute of limitations."

16 But let me explain that point in a little
17 more detail, because I do think that this is really
18 important to understanding our argument here. The way
19 that the Bankruptcy Code operates is first, that a party
20 is entitled -- a creditor is entitled to file a proof of
21 claim where they have a right to payment. And at that
22 point, the burden shifts. The claim is presumptively
23 valid. And if there is an issue concerning the
24 enforceability of the claim, that is an issue that has
25 to be raised by the trustee or by another party in

1 interest or else the claim will be allowed.

2 Now, what I think Respondent and the
3 government are trying to do here is to really align two
4 separate concepts: The question of validity on the one
5 hand and the question of enforceability on the other.
6 And I think Respondent, in particular, is attempting to
7 somehow build the concept of enforceability into the
8 definition of a claim.

9 But how we know that that is not true is by
10 virtue of the fact that in Section 502(b), the
11 statute -- the code specifically provides that
12 enforceability is a basis for objecting and for
13 disallowing a claim. It doesn't go to the question of
14 whether or not you have a valid claim in the first
15 place.

16 So, once again, all of this really depends
17 critically --

18 JUSTICE SOTOMAYOR: I'm -- I'm -- I'm a
19 little bit confused. The fact that the code anticipates
20 that some people will file unenforceable claims even
21 though they shouldn't, that that somehow proves that the
22 code invites unenforceable claims?

23 MR. SHANMUGAM: Quite to the contrary,
24 Justice Sotomayor. The code specifically wants this to
25 happen because the code defines claims expansively. And

1 that is because in 1978, when Congress adopted the
2 Bankruptcy Code, it adopted this broad definition of
3 claim to bring claims into the bankruptcy estate. So
4 there is --

5 JUSTICE SOTOMAYOR: Contingent, unmatured,
6 these are all words that suggest an entitlement to
7 payment. Where in the definition any use of word -- of
8 words talk about a claim that's unenforceable? A
9 contingent claim may not be enforceable today, but it
10 might be in the future.

11 MR. SHANMUGAM: I agree with the first half
12 of your question, but not the second, Justice Sotomayor,
13 because you're right: The code talks about an
14 entitlement to payment. But that is precisely what we
15 have here. And to the extent that the code includes as
16 examples of types of rights to payment, contingent
17 claims or unmatured claims, that illustrates that the
18 definition of claim includes rights to payment that may
19 not be presently enforceable.

20 Again, the question of enforceability is a
21 question that arises with regard to objections. It does
22 not relate to the question of an entitlement to file a
23 claim. And this is critical to understanding how the
24 Bankruptcy Code works.

25 Now, how the Bankruptcy Code works in turn

1 informs the application of the actual language of the
2 FDCPA, which is, after all, the question before this
3 Court.

4 JUSTICE KAGAN: Before you get to that
5 language, Mr. Shanmugam. Could you just -- you know,
6 just from a commonsense basis, it seems hard to
7 understand why Congress would want all these
8 unenforceable proofs of claim to flow in, because only
9 two things can happen. One is that the trustee will
10 properly filter out those claims; and the other is that
11 the trustee will be swamped and won't have the time or
12 the energy or the inclination or he'll make mistakes,
13 and some of those claims will be deemed enforceable
14 when, in fact, they're not.

15 So why would anybody want these proofs of
16 claim to flood into the bankruptcy system?

17 MR. SHANMUGAM: So, Justice Kagan, two
18 responses to that. The first is that, again, you know,
19 we don't know that these claims are unenforceable. I
20 think what we know is that there is an apparent time bar
21 to these claims. The very facts that are disclosed in
22 the proof of claim illustrate that. And there is some
23 further work to be done before an ultimate legal
24 determination can be made about whether there is a valid
25 limitations defense.

1 And Congress very consciously put that
2 burden on the trustee and other parties in interest in
3 the Bankruptcy Code. The trustee or the debtor or any
4 other party in interest can come in and object and the
5 issue can be litigated.

6 JUSTICE KAGAN: But I -- but I -- the
7 understanding here is that this case involves not claims
8 which maybe they're barred by the statute of limitations
9 and maybe they're not, but the issue, as presented to
10 us, is as to claims where everybody knows, including the
11 person who's filing the proof of claim, that they're
12 barred by the statute of limitations.

13 And what sense could it make for Congress to
14 think, oh, that's a great idea for some -- for people
15 just to file those claims and -- and, you know, the --
16 on the -- on -- the best thing that can happen is that
17 those claims will be filtered out, and the worst thing
18 that can happen is that they won't be. People will make
19 mistakes and people will pay on things that they
20 shouldn't be paying on.

21 MR. SHANMUGAM: Yeah. And Justice Kagan,
22 just to be clear, I'm disputing the assumption that we
23 somehow acted with knowledge here. But I'm happy for
24 this Court to consider this case, as we said in footnote
25 1 of our brief, on the assumption that if there had been

1 an objection, the claim would have been disallowed.

2 I think that the answer, though, is still
3 the same. And I think that Congress, in adopting this
4 system in the Code, must have known that some number of
5 claims would be allowed that should otherwise be
6 disallowed if there is an objection. Because after all,
7 that is the unelectable consequence of imposing the
8 burden on responsive parties in deeming claims to be
9 valid, absent and objection.

10 But the reason -- the affirmative reason why
11 Congress would have wanted to do that is precisely
12 because of the fresh start principle that underlies the
13 entire bankruptcy system.

14 JUSTICE KENNEDY: Is part of that -- help
15 me, it's on basic bankruptcy law. Suppose I'm a debtor.
16 I know that the claim is time barred. Do I list that
17 claim with the trustee just to be sure that it can be a
18 part of the discharge that the claim is -- that -- that
19 the claim is extinguished and I can't later be sued?

20 MR. SHANMUGAM: I think it should be listed
21 for the simple reason that there is a valid claim and
22 there is, therefore, a valid right to payment.

23 JUSTICE KENNEDY: As a routine matter,
24 does -- does the discharge extinguish that claim?

25 MR. SHANMUGAM: Yes, that is correct. And

1 the virtue --

2 JUSTICE GINSBURG: But why would need -- if
3 a claim is time barred, you don't need a fresh start to
4 get rid of that claim. You say it's time barred,
5 therefore, no claim. You don't need a discharge in
6 bankruptcy to accomplish that.

7 MR. SHANMUGAM: Justice Ginsburg, I disagree
8 with that solely because of the virtue of a discharge.
9 And the virtue of a discharge is that in the language of
10 the Code and the language in particular of Section
11 523(a)(3), the discharge prevents the creditor from
12 taking any act to collect. And that includes efforts to
13 encourage the debtor, notwithstanding the absence of a
14 judicial remedy, to make any sort of payment, which I
15 think Respondent acknowledges that a debtor retains --
16 we have some ability to do even after --

17 JUSTICE KENNEDY: It would also foreclose
18 the possibility of the creditor arguing that there had
19 been a waiver.

20 MR. SHANMUGAM: Yes. I guess --

21 JUSTICE KENNEDY: In other words, if the
22 debt is discharged, then the debtor doesn't have to
23 worry about some claim that he had waived the statute of
24 limitations.

25 MR. SHANMUGAM: Yes. Well, that is correct

1 in the sense that, again, the creditor can take no
2 action to collect even a sort of voluntary request for
3 payment. And that has very real value. And in
4 addition, as we explained in our brief, discharge has
5 other collateral consequences in prohibiting certain
6 types of discrimination based on the existence of debts.
7 And those are the very principles that again underlie,
8 not just the Code more generally, but the very broad
9 definition of claim in particular. And that really was
10 an innovation of the 1978 Bankruptcy Code, namely,
11 replacing the old provability system with a very broad
12 definition of claim that was meant to bring claims
13 within the bankruptcy process.

14 JUSTICE GINSBURG: We are talking about the
15 effect of the FDCPA. And isn't it so that there would
16 be no point in making a claim for a debt that's clearly
17 time barred. No point in doing that except for the
18 chance that it will be overlooked, that it will be
19 skipped. And that you will get paid on the assumption
20 that it's a good claim when, in fact, it isn't.

21 MR. SHANMUGAM: Well, again, I think that
22 that question, Justice Ginsburg, presupposes a state of
23 mind, which is simply not alleged and on which there is
24 simply no record in this case or in other cases. But I
25 don't want to fight that factual premise too hard

1 because I think that even if such a state of mind
2 exists, the operation of the Code is the same. Again,
3 the state of mind of the creditor is neither here nor
4 there for purposes of the operation of the Code. The
5 sole question for purposes of the operation of the Code
6 is whether or not there is a right to payment. And so
7 when these proofs of claim were filed, the -- there --
8 there is not an extensive further investigation at that
9 point, or at least I'm certainly not aware of one on the
10 part of in my client or on the part of debt collectors
11 more generally.

12 What the debt collector is obligated to do
13 under the Code and under the rules is to disclose the
14 information that essentially provides the world notice
15 of a prima facie limitation.

16 JUSTICE KAGAN: Well, Mr. -- I'm sorry.

17 MR. SHANMUGAM: Well, I was going to bring
18 this back to the language of the Code because I did want
19 to address that, but Justice Kagan.

20 JUSTICE KAGAN: Let's suppose that you are
21 right, that the Code allows this. I mean, it's hard for
22 me to believe that the Code actively invites it, but
23 let's suppose, as it's written, allows that. So then
24 you wouldn't violate the Code by filing these proofs of
25 claim. That's -- that's for sure. But why would that

1 also absolve you from liability under other statutes?
2 The codes does not obligate this. You don't have to do
3 this under the Code. It's a choice. And then another
4 statute can come along and say, you know what, for
5 certain actors, for certain creditors, for these debt
6 collectors, there's an independent rule and the Code
7 says nothing about that.

8 MR. SHANMUGAM: Yeah. So let me address,
9 first, the specific language of the FDCPA. And I want
10 to put down a marker because I want to address the
11 separate issue of how the FDCPA and the Bankruptcy Code
12 relate.

13 We think that the operation of the
14 Bankruptcy Code informs the analysis under the two
15 relevant provisions of the FDCPA. First, on the
16 question of whether or not we made false or misleading
17 representations and second, the question of whether or
18 not this is an unfair or unconscionable practice.

19 On the question of 1692e, our submission is
20 quite straightforward that there is nothing false or
21 misleading about the submission of a proof of claim that
22 is not only entirely accurate, but that affirmatively
23 puts the world on notice as to the existence of a
24 potential limitations defense.

25 And to go to the second prong of this, the

1 question of whether or not such a proof of claim is
2 misleading, our submission is that the filing of a proof
3 of claim implies only a good-faith basis that the
4 creditor has a claim. It doesn't imply anything about
5 the enforceability of the claim more generally or about
6 the availability of a limitations defense more
7 specifically other than providing affirmative notice
8 that such a potential defense exists.

9 JUSTICE SOTOMAYOR: I'm sorry. What do you
10 do with the language of Pennsylvania Public Welfare v.
11 Davenport where we explicitly said that a claim is a
12 right to payment and enforceable obligation? What do
13 you do with that language?

14 MR. SHANMUGAM: Well, I don't think that --
15 that that even rises to the level of, in the parlance of
16 the last argument, a drive-by holding. And that's for
17 the simple reason that neither Davenport nor the later
18 cases citing Davenport in any way purported to somehow
19 exclude unenforceable rights from the definition of a
20 claim. In Davenport, everyone agreed that the right in
21 question was enforceable in some respect. And the
22 question was whether the fact that the enforcement
23 mechanism was limited somehow affected whether or not it
24 came within the definition of claim, and the Court said
25 no.

1 But, again, if you thought that that rose to
2 the level of even a passing holding, I would return to
3 the language of the Bankruptcy Code and, in particular,
4 the definition of a claim which says nothing about
5 enforceability. To the contrary, Section 502 builds
6 enforceability into the objections that have to be
7 raised.

8 Now, I do want to say a bit about the other
9 provision of the FDCPA, the provision that prohibits
10 unfair or unconscionable practices. And I think that on
11 that provision, we would rely centrally on the
12 protections provided by the bankruptcy system. It bears
13 remembering that a proof of claim, unlike a civil
14 lawsuit, is not filed against the debtor. It is filed
15 against the estate. And as we've been discussing, the
16 trustee bears a statutory obligation to monitor proofs
17 of claim.

18 JUSTICE SOTOMAYOR: So it's a breach of the
19 trustee's duties if he or she lets the claim go through
20 without objecting?

21 MR. SHANMUGAM: If some purpose would be
22 served. And, Justice Sotomayor, to the extent that you
23 have concern --

24 JUSTICE SOTOMAYOR: Well, that was Justice
25 Kennedy's initial question. What would be the purpose

1 of a trustee permitting a stale claim to go forward?

2 MR. SHANMUGAM: The trustee should object
3 where, in the language of the statute, some purpose
4 would be served. And I think there are actually
5 contexts in which an objection might be futile because
6 it would have no effect on any of the other creditors or
7 certainly on the amount that the debtor pays. But
8 otherwise, the trustee should object. And I would say
9 that to the extent that you have concern about --

10 JUSTICE SOTOMAYOR: Where -- where would
11 that situation arise? The amount the creditor pays
12 might be -- the debtor pays might be true, but every
13 other creditor loses if an unenforceable debt is paid.

14 MR. SHANMUGAM: There -- there could be a
15 case in which the unsecured creditors get nothing. And
16 at that point, it doesn't make any difference because
17 none of the unsecured creditors are going to get paid
18 and there are other similar circumstances.

19 JUSTICE SOTOMAYOR: So those situations
20 don't account for the \$800 million you've collected on
21 these old claims.

22 MR. SHANMUGAM: Well, I don't -- I don't
23 think that there is a record on how much we've collected
24 with regard to this particular type of claim more
25 generally.

1 But leaving that aside, I want to make one
2 very important point about the interplay between the
3 Bankruptcy Code and the FDCPA here. I think that
4 Respondent's briefs sort of has this genus-like quality.
5 Because Respondents fight this to some extent on the
6 operation of the Bankruptcy Code. But I think, really,
7 the principal beef that Respondent has here is that the
8 bankruptcy system just isn't works as it should.

9 If you take a look at pages 29 to 30 of
10 Respondent's brief, Respondent really makes the broader
11 point that trustees and other parties in interest aren't
12 simply objecting as often as they should in bankruptcy
13 and that frustrates --

14 JUSTICE ALITO: Could I just ask you a
15 practical question? Would there be anything -- suppose
16 a trustee or the attorney for a debtor said, I am going
17 to -- let's say this case is in Alabama. The statute of
18 limitations for the collection of debt in Alabama is six
19 years. I am going to object to every -- any claim for a
20 debt that was incurred more than six years ago.
21 Would -- would that be inconsistent with the duties of
22 the trustee or the attorney?

23 MR. SHANMUGAM: I mean, no, not necessarily,
24 because at that point essentially what -- what would be
25 happening is that the trustee would say there's a prima

1 facie limitations defense here, we're going to raise an
2 objection, and at that point the issue would be
3 litigated. And if the creditor in that circumstance
4 didn't come back and request a hearing or otherwise
5 litigate the issue, it -- I think it's quite possible,
6 depending on the nature of the objection, that the
7 objection would be sustained and that the claim would be
8 disallowed.

9 Again --

10 JUSTICE ALITO: Well, I'll -- I'll ask
11 Mr. Geysler the same question, but it -- I can't
12 understand why a trustee or an attorney wouldn't take
13 that -- wouldn't take that approach --

14 MR. SHANMUGAM: Well --

15 JUSTICE ALITO: -- automatically object to
16 anything that is over the -- the statute of limitations.

17 MR. SHANMUGAM: Well -- and I think that
18 this illustrates the artificiality of taking the FDCPA
19 and injecting it into the bankruptcy regime.

20 To be sure, the FDCPA applies to debt
21 collectors specifically, but I think in this context,
22 what would either happen is that there will be an
23 objection and the claim will be disallowed -- that's
24 what took place in this case, albeit on somewhat
25 different grounds. And, of course, in that

1 circumstance, there is no harm to the actual debtor
2 because the claim has, in fact, been disallowed.

3 If, in fact, the claim has been allowed, it
4 seems quite odd to say that you could still bring an
5 FDCPA action, because what you would effectively be
6 doing is collaterally challenging the bankruptcy court's
7 decision to allow the claim in the first place. And as
8 we explained in our brief -- and we make this point not
9 only specifically with regard to the standing of this
10 plaintiff, but really with regard to this whole category
11 of cases -- one of the reasons why this practice is not
12 unfair or unconscionable is that it is very hard to
13 posit a circumstance in which it will actually lead to
14 an injury to the debtor. And it's really for that
15 reason --

16 JUSTICE SOTOMAYOR: I'm sorry. You're
17 taking up trustee time, which gets paid by the debtor
18 ultimately and at administrative cost. You are taking
19 up the time of other creditors, because there has to be,
20 when an objection is raised, notice to all the
21 creditors, a hearing date set, all of these procedural
22 steps that are unnecessary because you have no basis to
23 believe that this debt is enforceable.

24 MR. SHANMUGAM: Speaking of time, I'd like
25 to reserve the balance of mine, but let me answer your

1 question, Justice Sotomayor.

2 It is simply not true that the amount that
3 the trustee gets paid is somehow dependent on the
4 objections that the trustee raises, and I would revert
5 to the fundamental principle underlying our argument.
6 This is exactly how Congress thought the system should
7 work. And if the system as an administrative matter is
8 not working as Congress intended, the solution is to fix
9 the bankruptcy system and not to extend the FDCPA into
10 the domain of bankruptcy.

11 I'll reserve the balance of my time. Thank
12 you.

13 CHIEF JUSTICE ROBERTS: Thank you, counsel.

14 Mr. Geysler.

15 ORAL ARGUMENT OF DANIEL L. GEYSER

16 ON BEHALF OF THE RESPONDENT

17 MR. GEYSER: Thank you, Mr. Chief Justice,
18 and may it please the Court:

19 Midland is, in fact, using a business model
20 that intentionally floods bankruptcy courts with
21 time-barred debts. And after the first half of the
22 argument, I think two propositions remain undisputed.

23 The first is that under the Bankruptcy Code,
24 these debts are unenforceable and will lose a hundred
25 percent of the time if anyone objects. The second is

1 there is literally no scenario where Midland collects
2 unless the system breaks down and fails. What --

3 CHIEF JUSTICE ROBERTS: Are there other
4 defenses to a debt that you would say are covered by
5 your theory other than the statute of limitations? For
6 example, that the -- the debt was incurred to a contract
7 of adhesion or, you know, the -- the normal list of
8 reasons that a debt might be unenforceable. Does your
9 theory apply to all of those?

10 MR. GEYSER: Our theory, I think, is exactly
11 what Justice Sotomayor said earlier in the argument. A
12 debt collector has to have a good faith belief that they
13 have a right to payment under the code and have a valid
14 and enforceable debt. If they have any reasonable basis
15 to think that -- that an affirmative defense might not
16 apply, then they don't violate the FDCPA.

17 JUSTICE BREYER: Well, then what that means
18 is that not just in this case, not just with statute of
19 limitations, that -- that there are a whole set of
20 claims that can be brought in bankruptcy where you would
21 say they don't. They don't have a reasonable good faith
22 belief. And, of course, what they say is we do. We do
23 have a good faith belief. Okay?

24 And now who's going to decide that? A
25 bankruptcy judge? No. An ordinary judge in a case

1 brought in an ordinary court where, in fact, if one side
2 wins, they get a thousand dollars per instance plus
3 attorney's fees, plus costs. Now, I thought the point
4 of the Bankruptcy Code was to have bankruptcy matters
5 decided in a bankruptcy court and not in an ordinary
6 Article III court. So how do you reconcile what you are
7 arguing with the basic point of bankruptcy?

8 MR. GEYSER: Your Honor, I think the point
9 of the Bankruptcy Code is to have legitimate genuine
10 disputes resolved in the Bankruptcy Code.

11 JUSTICE BREYER: Really? Really. How
12 interesting. Then what do they argue about? In --
13 in -- I mean, are there cases in bankruptcy court where
14 one side says, I have a legitimate dispute and the other
15 side says, no, you don't? Is that unheard of in
16 bankruptcy court?

17 MR. GEYSER: Not -- not at all --

18 JUSTICE BREYER: Is that outside its
19 purpose?

20 MR. GEYSER: Not at all. And to be very
21 clear, our theory doesn't cover that situation. If a
22 creditor can articulate --

23 JUSTICE BREYER: Oh. Only when the creditor
24 comes in and says, I admit I had no good-faith reason
25 for bringing this. That's the only thing your theory

1 covers?

2 MR. GEYSER: No. This is the situation it
3 covers, and this is all it covers. If the affirmative
4 defense, a complete defense, is obvious on the face of
5 the claim, and if there is not an articulable reason to
6 think that that complete defense may not apply, this is
7 exactly the same standard that applies, and all five
8 courts of appeals have looked at this. This is not
9 shifting the burden, this is not imposing an affirmative
10 certification requirement of all creditors to
11 investigate claims that have no defect on the face of
12 the -- the claim.

13 CHIEF JUSTICE ROBERTS: Well -- well, but
14 how do you know that's the case in the statute of
15 limitations with respect to a statute of limitations
16 defense? There are exceptions to the statutes of
17 limitations that -- that -- totally -- you know, the
18 whole list of -- so it's hard to say. I mean, but
19 the -- the argument on the other side is look, we've
20 spelled out -- we -- we have to have spelled out the
21 sort of basis. If you think there's a statute of
22 limitations defense, here are the dates of these things.
23 If it's obvious on the face, which was the standard
24 you've proposed, then it ought to be obvious to the
25 other side as well.

1 MR. GEYSER: Yeah --

2 CHIEF JUSTICE ROBERTS: How do we know? Do
3 we -- is there some way we know that there wasn't a
4 tolling argument that could be raised in this case?

5 MR. GEYSER: Your Honor, we -- first, we
6 have alleged that Midland did, in fact, know there was
7 no defense of limitations objection. So that -- that
8 is -- that's how this case comes to the Court.

9 CHIEF JUSTICE ROBERTS: There was a little
10 disputed footnote battle about that --

11 MR. GEYSER: Yes --

12 CHIEF JUSTICE ROBERTS: -- in terms of what
13 the record provided or not.

14 MR. GEYSER: So -- there was, Your Honor.
15 We -- we think that the original complaint should have
16 been clear in this. It's since been amended to
17 expressly allege that Midland acted with knowledge.

18 CHIEF JUSTICE ROBERTS: Okay. Let's take
19 the case where the dates, since you asked, it's six
20 years that was incurred, however many years beyond that,
21 and you say they -- they should just not raise it, or
22 you say that they should inquire somehow to make sure
23 that there wasn't a basis for tolling the -- the
24 statute? What -- what do they have to do?

25 MR. GEYSER: All -- all they have to do is

1 satisfy and discharge the obligation they have to
2 satisfy and discharge under Rule 9011. It's a basic --

3 CHIEF JUSTICE ROBERTS: Well, tell me what
4 that is.

5 MR. GEYSER: It's -- it is a reasonable
6 belief, after a reasonable inquiry, that they have a --
7 a ground for the complaint, that the evidentiary
8 allegations have some factual support, and that the
9 claim isn't filed for --

10 CHIEF JUSTICE ROBERTS: So it's -- it's not
11 enough for them to say there might be, it's -- you know,
12 there -- a tolling issue here. I mean, their argument
13 is that that's exactly how bankruptcy works. Here we
14 have a claim, and if there is an objection to it, it
15 shifts to the other side. It seems to me that you're
16 putting a burden on them to research the claim before
17 asserting it in bankruptcy.

18 MR. GEYSER: Only when the affirmative
19 defense is blindingly obvious on the face of the
20 complaint. And this, by the way, is the exact same rule
21 that applies in Alabama State court.

22 JUSTICE KENNEDY: Well, let -- let me -- let
23 me ask this. In -- in State courts generally, my
24 understanding is that there is a debt; it is just not
25 enforceable.

1 Forget bankruptcy. A civil practitioner
2 represents the creditors. They know the debt is time
3 barred. Is it unethical to sue because -- on -- on the
4 theory that the defense may not be waived?

5 MR. GEYSER: Your Honor --

6 JUSTICE KENNEDY: They may -- may not be
7 raised?

8 MR. GEYSER: What -- what --

9 JUSTICE KENNEDY: If the defense isn't
10 raised as an affirmative defense, as a matter of
11 pleading I assume in some jurisdictions, and it goes to
12 trial and you say, oh, judge, this is time barred, the
13 judge will say, too late, you didn't raise the defense.

14 MR. GEYSER: An affirmative defense can't
15 be -- can be waived, but I think what's important is
16 that all five courts of appeals that have looked at this
17 have said that if you bring the complaint knowing that
18 it's subject to a complete defense, you're imposing
19 unnecessary costs on a defendant to object.

20 JUSTICE BREYER: It may not be. I mean it
21 depends on the circumstance. But that isn't what's
22 bothering me and I -- and I put it in a sort of -- you
23 have a very good argument. I'm not saying you don't.
24 I'm telling you what's worrying me.

25 What's worrying me is that we take a set of

1 cases, which now you've -- you've narrowed it to that
2 set which is sanctionable under Rule 9011, which is a
3 bankruptcy rule with sanctions. And you're saying in
4 addition to the sanctions, the person who -- the debtor
5 can go and bring a different case now under the word
6 "unfair" in the debt collection act.

7 And I'm saying what's worrying me, and I'd
8 like to hear what you say specifically, is that here we
9 have two sets of courts; one with the power to sanction;
10 the other the ordinary Article III court, which
11 presumably will automatically give \$1,000 per violation,
12 you know, plus attorneys' fees, plus costs. And that
13 seems what the bankruptcy court was trying to avoid. We
14 want bankruptcy matters decided in bankruptcy court.

15 Now, I don't think I have a convincing
16 argument against you. I have a point. And I'd like to
17 hear what you have to say in response.

18 MR. GEYSER: We appreciate that. I think
19 the -- the ultimate response is what Congress intended
20 with the Fair Debt Collection Practices Act, which it
21 specifically designed for remedies for professional debt
22 collectors, realizing that ordinary remedies like Rule
23 9011 sanctions that are calibrated for general creditors
24 aren't always enough. Professional debt collectors are
25 inventive, they impose heightened risks, and you often

1 need a heightened remedy to check their conduct, which I
2 think is exactly what we see here.

3 JUSTICE KENNEDY: But if -- if the States
4 were so worried about that, why don't all States do what
5 apparently two States do? They say if the statute of
6 limitation runs, the debt is barred forever. But,
7 apparently, many States don't say that. They say you
8 can still sue.

9 MR. GEYSER: They -- they do, Your Honor,
10 but I think that States have the option --

11 JUSTICE KENNEDY: And that's the trouble I'm
12 having in this case.

13 MR. GEYSER: Well -- well, to be perfectly
14 clear, even States that don't eliminate the debt,
15 there's still not a right to payment, it's not
16 enforceable in any way that's not purely voluntary. And
17 in Alabama -- and this is, I think, critical here -- it
18 actually gives rise not just to a sanctionable act, but
19 to a tort. It's malicious prosecution to file a lawsuit
20 in Alabama subject to the complete defense of a statute
21 of limitations.

22 JUSTICE BREYER: Is -- is it just the
23 statute of limitations you're talking about, or is it
24 all affirmative defenses?

25 MR. GEYSER: It's clearly at least the

1 statute of limitations. I think it's any complete
2 defense to the suit.

3 JUSTICE BREYER: Sorry. And is it just the
4 statute of limitations you're talking about, or is it
5 all affirmative defenses?

6 MR. GEYSER: Any affirmative defense --

7 JUSTICE BREYER: Okay. I'm sorry. Any
8 affirmative defense. Some of these, you know, are quite
9 complicated.

10 MR. GEYSER: And -- and --

11 JUSTICE BREYER: And, therefore, we're now
12 going to have the Article III judge -- maybe not in some
13 cases, but in many cases -- deciding pretty complicated
14 things as matters of bankruptcy law growing out of a
15 bankruptcy case.

16 Now, if that's wrong, why is it wrong?

17 MR. GEYSER: I think it's wrong for -- for
18 two reasons. The first is that what the -- the matter
19 that they'll be citing in the Fair Debt Collection
20 Practices cases will not be inherent in bankruptcy laws,
21 asking, did you allege a time-barred claim? And it's
22 very easy to --

23 JUSTICE BREYER: No, no. You missed my
24 whole point. You said it applies to all affirmative
25 defenses.

1 MR. GEYSER: Oh, I'm sorry.

2 JUSTICE BREYER: Is the only affirmative
3 defense statute of limitations?

4 MR. GEYSER: No. The --

5 JUSTICE BREYER: Then think of the most
6 complicated one you can think of and let's talk about
7 that one.

8 MR. GEYSER: Well, the most complicated one
9 I can think of we can dispose of very quickly, because
10 anytime there's a good-faith basis defense --
11 affirmative defense might not apply, we don't have an
12 FDCPA claim.

13 JUSTICE KAGAN: So what are the other
14 affirmative defenses that your argument might apply to?

15 MR. GEYSER: I think one example could be a
16 release. Let's say that you sign a release to a claim,
17 and then the debt collector the next day in the
18 bankruptcy files a proof of claim on exactly the same
19 debt they just released. In that case, they're imposing
20 an unnecessary cost on everyone in the process. They're
21 trying to collect a debt that they will only collect in
22 two circumstances. They either actually trick everyone
23 in the system who doesn't realize there's a complete
24 defense, or people do realize there's a complete defense
25 and they acquiesce. And --

1 JUSTICE KAGAN: Are there any affirmative
2 defenses that your argument might apply to that are
3 bankruptcy-related particularly? Or are these all kind
4 of the sort of defenses that are involved in any suit?

5 MR. GEYSER: I think logically, it's any
6 complete defense to the proof of claim. We've been
7 focusing on the complete defenses under applicable law.

8 JUSTICE KAGAN: Right. I was asking, are
9 any of those defenses only bankruptcy related? Do some
10 of them only arise in a bankruptcy proceeding?

11 MR. GEYSER: I can't think of one off the
12 top of my head, Justice Kagan. What we're looking at
13 are defenses that, again, you file the proof of claim
14 without a good-faith reason to believe it's actually
15 valid and enforceable. That it's -- it effectively is a
16 rule that says creditors can't act in bad faith.

17 CHIEF JUSTICE ROBERTS: And -- and where --
18 where does the -- where do you litigate the issue of
19 good faith?

20 MR. GEYSER: In good faith, you would
21 litigate it in the FDCPA lawsuit.

22 JUSTICE BREYER: So what you're saying is a
23 set of cases that would warrant a sanction under Rule
24 9011, if I said to the bankruptcy judge, who happens to
25 know something about it because he's heard the case, if

1 I were to ask him -- but who's going to bother to ask
2 him? Because I get my attorneys' fees and a thousand
3 dollars and et cetera. If I go into this other court
4 before a judge who doesn't know about it and just
5 issue -- have a litigate on an easy issue, an easy
6 issue, the state of mind of the individual creditor, ah,
7 yes. It's just state of mind. I grant you the easy
8 thing about state of mind is it's only three words, and
9 the difficult thing is, of course, proving what it was.

10 Now -- now do you see what is worrying me?

11 MR. GEYSER: I do, I do, Justice Breyer. I
12 think that in the bankruptcy setting, first of all,
13 given the speed of the proof of claim process, the odds
14 are the objection will be adjudicated before the FDCPA
15 suit is -- is far underway or underway at all, which is
16 actually what happened in this case.

17 I also think that in most circumstances, the
18 state of mind can be satisfied by the creditor by simply
19 articulating any reason they filed the -- the suit.
20 They simply have to explain, why did you -- why did you
21 think you were entitled to collect? Because every claim
22 in the bankruptcy process is automatically deemed prima
23 facie valid and enforceable. And when a debt collector
24 says by filing a proof of claim, I believe I have a
25 right to payment on an enforceable obligation, and they

1 know that's not true, then they are misstating the
2 character and the legal status of the debt.

3 JUSTICE ALITO: May I ask you the question
4 that I -- I asked your -- your adversary. Why -- why do
5 these time-barred claims slip through? I mean, that's a
6 big part of your argument. Why don't trustees and
7 attorneys for the debtor automatically object to any
8 claim that is beyond the number of years set out in the
9 statute of limitations?

10 MR. GEYSER: I think there are two reasons
11 that they don't. The first is that the cost of
12 objecting is sometimes more than the benefit of
13 excluding the claim. These are nuisance-value claims.
14 They often will acquiesce in a legitimate payout simply
15 to avoid the nuisance value of the objection, which I
16 think is unfair.

17 JUSTICE ALITO: Why is there a big cost
18 in -- in filing an objection?

19 MR. GEYSER: According to -- to the National
20 Association of Bankruptcy Attorneys, it often takes two
21 to three hours to do all the paperwork, serve the
22 parties. It might not seem like very much, but that --
23 that does impose a cost on the system.

24 The other reason that the trustees --

25 JUSTICE ALITO: I can't believe you couldn't

1 even have -- you could have a computer program that does
2 this automatically. I can't understand why it would be
3 very difficult.

4 MR. GEYSER: Your Honor, even if it took
5 only an hour, you're talking about hundreds of thousands
6 of claims filed each year, which, in the aggregate,
7 amounts to an awful lot of time.

8 The other reason that the trustees --

9 JUSTICE ALITO: But how many of these would
10 there be in the typical Chapter 13?

11 MR. GEYSER: What -- what we've seen in at
12 least the cases that have had a chance to go past the
13 pleading stage is that the trustee, for example, the
14 Middle District of Alabama processes between 6 and 7,000
15 claims a month. So to review the claims, they have to
16 review a claim every two minutes for 365 days a year --

17 CHIEF JUSTICE ROBERTS: But what kind of
18 claims are you talking about? These -- these kinds of
19 claims?

20 MR. GEYSER: Well, claims filed in the
21 bankruptcy. But the -- the point is Congress wanted to
22 limit the bankruptcy process to legitimate claims.

23 CHIEF JUSTICE ROBERTS: So then it's
24 logistically, it's every claim that they -- they look
25 at?

1 MR. GEYSER: That -- those are the claims
2 that they have to sort through. And I don't -- I --

3 CHIEF JUSTICE ROBERTS: That doesn't tell us
4 very much about how many of these claims there are.

5 MR. GEYSER: Well, sometimes we don't know
6 how many claims of these nature there are because
7 sometimes they slip through and no one notices them.

8 And the other reason that the trustees don't
9 always object, Justice Alito, and they've told us
10 this -- the -- the Chapter 13 trustees at page 15 of
11 their brief, there -- there's an information asymmetry.
12 Trustees assume that creditors act in good faith. So
13 they assume if there's a facially time-barred claim,
14 it's possible the creditor is aware of some basis for
15 tolling. And the trustee doesn't know what the creditor
16 is thinking, and so they might not object, which is a
17 way that these claims are, in fact, misleading, even to
18 sophisticated trustees.

19 So the real point is that Midland wouldn't
20 file these claims if the system actually functioned the
21 way that Congress intended. If -- if it did function
22 and everyone objected the way they were supposed to,
23 these claims would always lose.

24 JUSTICE ALITO: I find this is a very
25 difficult case because if -- if your description of

1 Midland's business model is correct, it doesn't seem to
2 me that it has much, if any, social utility.

3 On the other hand, I have real a problem
4 with your -- with fitting your argument into the concept
5 of an affirmative defense. I thought an affirmative
6 defense was a rule of law that may allow the defendant
7 to prevail if the defendant asserts the defense. But
8 you want to switch -- you're switching that over to the
9 side of the plaintiff or the person filing the claim.
10 It seems inconsistent with the whole idea of an
11 affirmative defense.

12 The idea of an affirmative defense -- let's
13 take statute of limitations. The idea is that the
14 defendant may escape liability based on the statute of
15 limitations, but only if a defendant asserts the defense
16 and, if necessary, proves it. And if a defendant
17 doesn't do that, then the law is perfectly content with
18 having a recovery on a claim that would have otherwise
19 been time barred.

20 MR. GEYSER: Well, I -- I think that, again,
21 we're -- we're not talking about affirmative defenses
22 that aren't obvious on the face of the -- of the claim.
23 Under Rule 9011 -- and -- and just thinking about the
24 way a creditor would normally approach this, if they
25 look and they realize there's a facially obvious time

1 bar -- this case is a great example. The debt's over a
2 decade old. They missed the limitations period by
3 almost five years on a six-year limitation period. They
4 almost doubled the -- the length of time they had to
5 file.

6 JUSTICE BREYER: In this case, is it -- is
7 there something in the record? I mean, it's rather
8 surprising to me that there is a company and their
9 business model, you say, is to go around buying up debts
10 that can't be enforced and are worthless, and then
11 filing cases hoping that no one will notice. Is that
12 shown in the record? I mean, is somebody -- they admit
13 that's their business model? Where does this come from?

14 MR. GEYSER: Your Honor, I think it comes
15 from -- first, this was dismissed on the pleadings, so
16 we can develop it in the case. But it comes from the
17 FTC report that analyzed the data of debt collectors
18 and --

19 JUSTICE BREYER: The FTC says that's what
20 they did.

21 MR. GEYSER: It says they buy debts for
22 pennies on the dollar. The amount of the debt --

23 JUSTICE BREYER: Why didn't the FTC then
24 bring an action against them if that's what they're
25 doing?

1 MR. GEYSER: Well, the government sometimes
2 does.

3 JUSTICE BREYER: We then have the FTC that
4 could do such a thing. We have the sanctions in the
5 Bankruptcy Code, and now you want this, too?

6 MR. GEYSER: Congress wanted this, too. The
7 entire purpose of the FDCPA is to use the private
8 attorney general function to police professional debt
9 collector misconduct.

10 JUSTICE SOTOMAYOR: Counsel, I have been
11 able to find only one judge who has been able to get
12 around 911's limitation. 911 is the sanctioning power,
13 right?

14 MR. GEYSER: That's correct.

15 JUSTICE SOTOMAYOR: You have to, like Rule
16 11, give notice to the other side that they're
17 violating, right?

18 MR. GEYSER: That's correct.

19 JUSTICE SOTOMAYOR: And if they withdraw the
20 claim at that point, there's no sanctions, right?

21 MR. GEYSER: That -- that's right.

22 Unless --

23 JUSTICE SOTOMAYOR: There's only one judge I
24 found in the bankruptcy context who has used his
25 inherent powers. But that's a rare action where a judge

1 resorts to inherent powers.

2 MR. GEYSER: That's exactly --

3 JUSTICE SOTOMAYOR: This model -- this model
4 is beautiful. You file a claim you know is old. If you
5 get paid, wonderful. If somebody objects, you withdraw
6 it. There's no sanction that's possible.

7 MR. GEYSER: That's correct.

8 JUSTICE SOTOMAYOR: And it just keeps on
9 going.

10 MR. GEYSER: It -- it does. And that's
11 exactly why you need the FDCPA as a backstop and why
12 Congress designed it as an overlay to existing remedies
13 calibrated for general creditors. And we know that
14 Midland in fact does do exactly what you've described.
15 They file a time-barred claim. They're caught. Someone
16 moves for sanctions. They withdraw the claim. And
17 it -- it's a great system, but it's not exactly what
18 Congress intended in the Code.

19 And just to respond, there is no benefit to
20 including these time-barred claims in the Code, as Chief
21 Judge Wood explained in her Seventh Circuit dissent.
22 The time bar is virtually exactly the same as a
23 discharge injunction in the broadest majority of cases.
24 Debtors often don't list time-barred debts on their
25 schedules because they don't care about them. No one

1 declares bankruptcy to escape a stale debt. They
2 declare bankruptcy to escape enforceable obligations.

3 JUSTICE KENNEDY: It's a little hard for --
4 to imagine how to write a opinion to say that the law is
5 a trap for the unwary. But that's -- that's in effect
6 what you want us to say.

7 MR. GEYSER: Oh, not at all, Your Honor.
8 Our law is actually -- our rule is exactly the opposite.

9 JUSTICE KENNEDY: The uncounseled person
10 gets a notice of -- of demand for payment. The
11 uncounseled person doesn't know about a statute of
12 limitations. So it's a trap for the unwary. But the
13 law makes that trap. That's my problem.

14 MR. GEYSER: Well, the FDCPA exists to
15 protect the uncounseled person to avoid -- I'm sorry.

16 CHIEF JUSTICE ROBERTS: You can finish your
17 sentence.

18 MR. GEYSER: -- to avoid the trap for the
19 unwary. That -- that's why the FDCPA exists.

20 CHIEF JUSTICE ROBERTS: Thank you, Counsel.

21 Ms. Harrington?

22 ORAL ARGUMENT OF SARAH E. HARRINGTON

23 FOR UNITED STATES, AS AMICUS CURIAE,

24 SUPPORTING THE RESPONDENT

25 MS. HARRINGTON: Thank you, Mr. Chief

1 Justice, and may it please the Court:

2 In our view, no creditor is entitled to file
3 a proof of claim in bankruptcy on a claim that the
4 creditor knows is time barred. When the bankruptcy
5 system works --

6 JUSTICE KENNEDY: Is that also true in a
7 civil action generally, forget bankruptcy?

8 MS. HARRINGTON: Yes. In our view, in all
9 five court of appeals that considered the issue have
10 held --

11 JUSTICE KENNEDY: So if a -- if a creditor
12 files suit on a debt that's time barred, the defendant
13 doesn't raise it. The judge said, I hereby grant an
14 award of \$10,000 for the debt and I sanction you for
15 Rule 11 -- under Rule 11.

16 MS. HARRINGTON: Well, that's not -- there
17 are lots of situations where a prevailing party can be
18 sanctioned for litigation conduct. Under Rule 11, a --
19 a district court judge has great discretion about
20 whether to award sanctions, and there might be reason
21 not to do so.

22 JUSTICE KENNEDY: Is that a plausible
23 scenario? In other words, the -- the law allows
24 recovery, but you sanction the attorney for getting it?

25 MS. HARRINGTON: Well, I think it may be

1 that most district courts would not -- would choose not
2 to exercise their discretion by awarding sanctions.

3 JUSTICE KENNEDY: Do you think that that is
4 -- that that is a plausible exercise of Rule 11 power?

5 MS. HARRINGTON: Well, let me -- let me put
6 it this way. You can imagine --

7 JUSTICE KENNEDY: To sanction someone
8 because they prevailed in a case.

9 MS. HARRINGTON: I think it's --

10 JUSTICE KENNEDY: That's without any
11 misleading. All they've done is file a suit.

12 MS. HARRINGTON: I think it is plausible,
13 but unlikely to happen. But if -- but if you can think
14 about it more broadly. If you can imagine a system
15 where a plaintiff was permitted and entitled, in
16 Petitioner's words, to come in and throw up any possible
17 legal argument no matter how frivolous, and the burden
18 was on the defendant to shoot all of those arguments
19 down, that is not the system that we have adopted. Rule
20 11, every court of appeals to consider the issue has
21 suggested -- has held that Rule 11 requires a party to
22 certify that it has done a reasonable investigation and
23 has a good faith-basis for believing that its claims are
24 warranted by law. Every court of appeals that has
25 considered it has said that that includes forbearing

1 from filing a lawsuit when it is obvious that it is --
2 that there's a landscape of defense.

3 JUSTICE BREYER: It's bankruptcy and that's
4 what worries me. Of course there will be a set of
5 claims where the person is behaving pretty badly. But
6 there's a remedy right in the Code. It's called a
7 sanction. Moreover, if they really go around doing
8 this, I don't know why the FTC wouldn't bring a claim
9 saying this is an unfair business practice. So if in
10 fact you say they also have a remedy under this other
11 act, it's quite possible, given the remedies that they
12 have under the other act, that lawyers won't move for
13 sanctions. They won't bother with it.

14 MS. HARRINGTON: Exactly.

15 JUSTICE BREYER: They will go right into
16 court and then we'll have two sets of courts and other
17 people trying to decide the same question. The same
18 problem that was bothering me 15 minutes ago and I'd
19 like to -- I'd like to know what you think of that.

20 MS. HARRINGTON: I'd love to tell you. The
21 exact same thing is true in the general civil litigation
22 context, that there is the possibility of Rule 11
23 sanctions just like there's a possibility of Rule 9011
24 sanctions. In the very statutory findings in the FDCPA,
25 Congress said in our view, existing legal remedies are

1 not sufficient to deter this kind of conduct from debt
2 collectors.

3 CHIEF JUSTICE ROBERTS: Well, bankruptcy is
4 very different. The whole idea is let's get everything
5 here in one place and -- and deal with it, you know, and
6 different priorities and all of that. I think it's much
7 more significant if you have things spinning out of the
8 bankruptcy estate being adjudicated elsewhere than the
9 fact that you might have it as a general matter in -- in
10 district courts.

11 MS. HARRINGTON: Well, Mr. Chief Justice,
12 it's a bedrock principle of bankruptcy that a creditor's
13 rights with respect to a debt are defined by State law.
14 When a debt is time barred, State law has determined
15 that that debt is not judicially enforceable. Nothing
16 in the bankruptcy gives a creditor an extra right to
17 judicially enforce the debt. That's --

18 JUSTICE GINSBURG: Do you place any weight
19 on this Fair Debt Collection Act being limited to
20 particular kinds of creditors; that is, this is not for
21 your everyday creditor. It is only for these debt
22 collectors.

23 MS. HARRINGTON: That's right, Justice
24 Ginsburg. I want to just emphasize, though, that in the
25 government's view, this case is as much about abuse of

1 bankruptcy as it is about a violation of the FDCPA. The
2 way we think --

3 JUSTICE BREYER: If that's so, then why
4 not -- what about this. It's a little complicated as a
5 solution and so I'm pretty nervous. I don't know that
6 I'd really do this. But you'd say okay. The word in
7 the debt collection act is unfair and where it's in
8 bankruptcy, there's a whole system to decide if it's
9 unfair by people who know about it. So where a
10 bankruptcy court does in fact say that it's unfair and
11 sanctions a party for this unfair behavior. In that
12 case, it's unfair within the meaning of the debt
13 collection act and in that case, you can go and bring
14 your extra remedy.

15 MS. HARRINGTON: So there are two reasons, I
16 think, why that would not work. The first is, as
17 Justice Sotomayor pointed out, there's a safe haven in
18 Rule 9011, just like there is in Rule 11 since 1993 that
19 allows a creditor to withdraw in offending a proof of
20 claim when it's objected to. Now, I just want to point
21 out, if a -- if a creditor really has a basis for -- a
22 good-faith basis for believing that its claim is
23 enforceable, it will presumably assert that in response
24 to an objection. That's not what happened here.

25 But the second is that there is even more

1 reason to be cautious about this in bankruptcy than
2 there is in general civil litigation. Because by
3 operation of Rule 3001 of the bankruptcy rules and
4 Section 502 of the Code, a proof of claim, when it's
5 failed, makes the underlying claim presumptively valid.

6 JUSTICE ALITO: Do you think this good faith
7 defense is objective or subjective?

8 MS. HARRINGTON: We think it's objective --
9 or it's the same -- it's basically the same.

10 JUSTICE ALITO: It's objective?

11 MS. HARRINGTON: It's objective. All we are
12 doing is saying the same standard that would be applied
13 under Rule 9011 or Rule 11 should be applied here.

14 JUSTICE ALITO: And you said -- take the
15 case of -- this was the third debt collection act.
16 You're just talking about debt collectors. So -- but
17 let's under bankruptcy, you have a single creditor, a
18 person who owns a sandwich shop has a claim. It's -- it
19 turns out that it's clearly barred by the statute of
20 limitations, files that claim. That's sanctionable
21 conduct?

22 MS. HARRINGTON: As a practical matter, it
23 probably wouldn't be because they would withdraw.

24 JUSTICE ALITO: As legal matter, it would be
25 under your interpretation.

1 MS. HARRINGTON: If they didn't have a
2 good-faith basis for believing that the limitations
3 period didn't apply in that case because of tolling or
4 some other equitable principle --

5 JUSTICE ALITO: Subjective. They were
6 acting in perfect good faith subjectively, but not
7 objectively.

8 MS. HARRINGTON: Well, Rule 9011 requires a
9 lawyer or another party to certify they have done a
10 reasonable investigation and have a good-faith basis for
11 believing that their claims are warranted by existing
12 law. And so if they haven't done that reasonable
13 investigation or if they have ignored the results of
14 that investigation, which must have been happened here,
15 then they violated Rule 9011 and engaged in unfair and
16 misleading practices.

17 CHIEF JUSTICE ROBERTS: What other
18 affirmative defenses does your theory apply to?

19 MS. HARRINGTON: Well, think about freedom
20 from the defense of res judicata. If a creditor had
21 sued in state claim on a timely -- a timely debt, and
22 the state court had said: This is not a valid claim.
23 We wouldn't want a system where that creditor could then
24 file a proof of claim in bankruptcy, hoping that the
25 claim would just slip through the cracks and get paid

1 even though the creditor knew for sure --

2 CHIEF JUSTICE ROBERTS: A lot of these
3 affirmative defenses though in -- aren't presented as
4 abstractly as that. They may involve nuances.

5 We have cases about the scope of res
6 judicata and when it applies. What other -- I assume
7 your argument applies to every affirmative defense.

8 MS. HARRINGTON: Only if it's obvious, and
9 if the creditor doesn't -- is able to access all the
10 information without discovery. That's the rule that's
11 been applied in the Rule 11 context --

12 JUSTICE KENNEDY: The Rule applies to every
13 affirmative defense.

14 MS. HARRINGTON: Every obvious affirmative
15 defense where the creditor or the plaintiff --

16 JUSTICE KENNEDY: Are there any nonobvious
17 affirmative defenses to which it wouldn't apply?

18 MS. HARRINGTON: I mean, I think something
19 like contributory negligence may be kind of a classic
20 affirmative defense that would be -- it would be hard
21 to -- to say that the plaintiff in the civil litigation
22 had an --

23 JUSTICE KENNEDY: How about a lack -- lack
24 of personal jurisdiction?

25 MS. HARRINGTON: Lack -- I mean, I guess it

1 depends on the circumstances. If there's -- if the
2 creditor --

3 JUSTICE KENNEDY: You know -- you know there
4 is no personal jurisdiction, but you filed a -- filed a
5 suit anyway, and the Rule says that -- that it has --
6 you have to make an objection.

7 MS. HARRINGTON: I don't think that would
8 arise in a bankruptcy context, but in a civil litigation
9 context --

10 JUSTICE KENNEDY: I'm talking about just --
11 as ordinary civil litigation.

12 MS. HARRINGTON: I think if -- what I would
13 say is if the Court could sanction that under Rule 11,
14 then we think --

15 JUSTICE GINSBURG: In the ordinary civil
16 litigation, the defendant can always consent to personal
17 jurisdiction. So it's -- it's --

18 JUSTICE KENNEDY: And he can always consent
19 to the waiving of the statute of limitations by not
20 raising it.

21 MS. HARRINGTON: But -- but not in
22 bankruptcy because it's -- if it -- the debtor cannot
23 consent to the -- to the payment of a time-barred claim
24 because that takes money away from other creditors --

25 JUSTICE BREYER: Why can't they consent?

1 Suppose it's Chapter 11? Suppose they're trying to get
2 a plan? Suppose the plan is a company that does
3 business in countries -- I know you don't believe there
4 are such countries, but there are, there are countries
5 where it's a matter of honor to pay a debt. And people
6 actually do pay debts.

7 (Laughter.)

8 MR. HARRINGTON: I believe that.

9 JUSTICE BREYER: All right. So you could --
10 it's easy to think of cases.

11 MS. HARRINGTON: Justice Breyer, I --

12 JUSTICE BREYER: Yeah.

13 MS. HARRINGTON: -- I -- I think the one
14 thing everyone agrees on in this case is that if the
15 bankruptcy system works as Congress intended,
16 100 percent of time-barred claims will be disallowed.
17 That is what Congress intended, but --

18 JUSTICE SOTOMAYOR: Why --

19 JUSTICE BREYER: Well, in Chapter 11 I'm not
20 sure they did --

21 MS. HARRINGTON: Because it --

22 JUSTICE BREYER: But regardless of that
23 dispute.

24 MS. HARRINGTON: Okay. This --

25 JUSTICE BREYER: Is -- is -- is the

1 automatic stay applied to these actions or not?

2 MS. HARRINGTON: Yes. In our view these are
3 claims within the meaning of the Bankruptcy Code.

4 JUSTICE BREYER: So -- so they can't proceed
5 in the -- the -- under the ^ cap? debt act until the
6 bankruptcy is over.

7 MS. HARRINGTON: That's true, yes.

8 JUSTICE BREYER: Okay.

9 MS. HARRINGTON: And -- and also, you know,
10 in terms of the discharge, the FDCPA gives the debtor
11 the right to ask not to be contacted any more by a debt
12 collector, which is basically the functional equivalent
13 of a discharge, and the anti-discrimination provisions
14 apply to any dischargeable debt, not just debt that has
15 been discharged, and so that would apply to these -- to
16 these types of debts.

17 And so I just think it -- there is nothing
18 in the code that gives a creditor the right to try to
19 sneak one through when the creditor knows that if it's
20 objected to, it should be disallowed --

21 JUSTICE KAGAN: Is your argument --

22 MS. HARRINGTON: -- 100 percent of the time.

23 JUSTICE KAGAN: -- dependent on a view of
24 the code that precludes these kinds of claims?

25 MS. HARRINGTON: Yes. Yes.

1 JUSTICE KAGAN: So if -- if one looked at
2 the code and said, well, it seems as though these kinds
3 of claims, although unenforceable, can be filed, if that
4 was your view of the code, what do you think follows
5 from that?

6 MS. HARRINGTON: So then I think it would
7 not be unfair and it would not misleading, and if I'd
8 like -- if I could, I'd like to tell you why. It's --
9 the reason it's unfair here is because the creditor does
10 not have a right to get paid in bankruptcy on this type
11 of claim and so it's unfair to try to do that and to put
12 the other participants to the burden of making sure that
13 it doesn't happen.

14 It's misleading because when you file a
15 proof of claim under Rule 9011 you're making an implicit
16 representation -- may I finish my sentence? That you
17 have done a reasonable investigation and have a good
18 faith basis for believing that the claim is warranted.
19 If it is warranted under the Bankruptcy Code then that's
20 not misleading.

21 CHIEF JUSTICE ROBERTS: Thank you, counsel.

22 Three minutes, Mr. Shanmugam.

23 REBUTTAL ARGUMENT OF KANNON K. SHANMUGAM

24 ON BEHALF OF THE PETITIONER

25 MR. SHANMUGAM: Thank you,

1 Mr. Chief Justice.

2 Just two points on rebuttal. First, I
3 think, with all due respect, the Court should be
4 concerned about the breadth of Respondent's position,
5 and let me lay out circumstances that I think would be
6 covered by Respondent's rule.

7 A circumstance in which a claim has been
8 discharged in a previous bankruptcy, a circumstance, in
9 which a claim has in fact actually been paid off. A
10 circumstance in which the claim is subject to a setoff,
11 or a circumstance in which the creditor simply gets the
12 wrong amount or the wrong person. These circumstances,
13 I'm reliably informed, recur with some frequency in
14 bankruptcy proceedings, and yet, in all of those
15 circumstances, after an objection is raised and the
16 claim is disallowed. There could be a claim that the
17 claim itself was false or misleading under the FDCPA,
18 and a holding in Respondent's favor would really be a
19 recipe for clogging the courts with these sorts of FDCPA
20 claims.

21 And I would note, parenthetically, that to
22 the extent the Respondent and the government's argument
23 presupposes some absence of a good faith basis for
24 believing that some of these objections are invalid.
25 That's very hard to reconcile with the language of the

1 FDCPA because if there is one established principle
2 about the operation of the FDCPA, it is that there is no
3 affirmative state of mind requirement. And so what
4 Respondent and the government would be asking you to do
5 is to say, sure, there could be a prima facie claim
6 under the FDCPA, but the only way in which a creditor
7 could escape liability would be to invoke the
8 affirmative defense in Section 1692k paragraph c, where
9 the violation is not intentional and results from a bona
10 fide error which requires the maintenance of procedures
11 reasonably calculated to avoid that error.

12 And so, again, this is going to be a recipe
13 for bringing these FDCPA actions into play, and many,
14 many bankruptcies.

15 And that leads me to my second point, which
16 is that this Court has never applied the FDCPA within
17 the four corners of a bankruptcy proceeding, and I think
18 that the problem with doing so here is that it really
19 doesn't address the principle concern that Respondent
20 and the government raises, and let me give you an
21 example as to why that's true.

22 Suppose you have a bank that holds credit
23 card debt, and that bank actually doesn't sell that debt
24 on to a debt collector. Well, that bank could do the
25 very same thing. It could file a proof of claim, it

1 would be required to disclose that there is a prima
2 facie limitations defense, and yet, if that bank does
3 not qualify as a debt collector under the definition of
4 the FDCPA. FDCPA liability would not be available, and
5 that simply illustrates the fact that this is really a
6 problem, if it is, in fact, a problem, with the
7 operation of bankruptcy, and it's a problem that
8 Congress or the advisory committee are -- are best
9 situated to remedy, and so, for instance, if there is
10 concern about the limitations defense, one solution is
11 to eliminate the fact that that's a defense, and for
12 Congress to shift the burden back on to the creditor.
13 But, again, that's a remedy in the particular context of
14 bankruptcy.

15 And just to address, finally, the
16 government's broader argument about the sanctionability
17 of conduct outside bankruptcy. This Court has never
18 held that it would be a violation of Rule 11 for a
19 plaintiff to file a complaint in the face of an obvious
20 defense, whether it's a limitations defense or some
21 other type of defense. And notwithstanding the rather
22 cursory analysis in the court of appeals' cases that
23 Respondent and the government cites, I would
24 respectfully submit that that would be an astonishing
25 proposition for civil litigants if this Court were to

1 adopt it and it would have very broad consequences
2 against -- across the full range of litigation.

3 Thank you.

4 CHIEF JUSTICE ROBERTS: Thank you, counsel.

5 The case is submitted.

6 (Whereupon, at 12:04 p.m., the case in the
7 above-entitled matter was submitted.)

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