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.

C O N T E N T S

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

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

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

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

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

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

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

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

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

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

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

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

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

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

MR. SHANMUGAM: Well --

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

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

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

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

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

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

committee did. And let me first --

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

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

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

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

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

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

The second reason --

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

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

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

devised.

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

MR. SHANMUGAM: I --

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

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

JUSTICE SOTOMAYOR: Or --

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

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

interest or else the claim will be allowed.

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

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

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

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

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

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

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

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

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

Now, how the Bankruptcy Code works in turn

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

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

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

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

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

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

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

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

an objection, the claim would have been disallowed.

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

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

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

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

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

MR. SHANMUGAM: Yes, that is correct. And

the virtue --

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

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

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

MR. SHANMUGAM: Yes. I guess --

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

MR. SHANMUGAM: Yes. Well, that is correct

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

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

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

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

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

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

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

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

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

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

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

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

And to go to the second prong of this, the

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

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

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

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

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

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

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

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

of a trustee permitting a stale claim to go forward?

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

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

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

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

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

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

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

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

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

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

Again --

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

MR. SHANMUGAM: Well --

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

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

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

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

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

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

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

question, Justice Sotomayor.

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

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

CHIEF JUSTICE ROBERTS: Thank you, counsel.

Mr. Geyser.

ORAL ARGUMENT OF DANIEL L. GEYSER

ON BEHALF OF THE RESPONDENT

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

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

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

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

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

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

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

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

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

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

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

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

JUSTICE BREYER: Is that outside its purpose?

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

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

covers?

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

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

MR. GEYSER: Yeah --

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

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

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

MR. GEYSER: Yes --

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

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

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

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

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

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

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

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

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

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

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

MR. GEYSER: Your Honor --

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

MR. GEYSER: What -- what --

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

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

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

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

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

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

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

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

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

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

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

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

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

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

MR. GEYSER: It's clearly at least the

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

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

MR. GEYSER: Any affirmative defense --

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

MR. GEYSER: And -- and --

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

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

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

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

MR. GEYSER: Oh, I'm sorry.

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

MR. GEYSER: No. The --

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The other reason that the trustees --

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

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

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

The other reason that the trustees --

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

MR. GEYSER: Well, the government sometimes does.

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

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

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

MR. GEYSER: That's correct.

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

MR. GEYSER: That's correct.

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

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

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

resorts to inherent powers.

MR. GEYSER: That's exactly --

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

MR. GEYSER: That's correct.

JUSTICE SOTOMAYOR: And it just keeps on going.

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

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

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

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

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

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

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

CHIEF JUSTICE ROBERTS: You can finish your sentence.

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

CHIEF JUSTICE ROBERTS: Thank you, Counsel.

Ms. Harrington?

ORAL ARGUMENT OF SARAH E. HARRINGTON

FOR UNITED STATES, AS AMICUS CURIAE,

SUPPORTING THE RESPONDENT

MS. HARRINGTON: Thank you, Mr. Chief

Justice, and may it please the Court:

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

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

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

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

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

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

MS. HARRINGTON: Well, I think it may be

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

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

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

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

MS. HARRINGTON: I think it's --

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

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

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

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

MS. HARRINGTON: Exactly.

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

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

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

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

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

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

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

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

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

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

But the second is that there is even more

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

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

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

JUSTICE ALITO: It's objective?

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

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

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

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

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

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

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

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

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

even though the creditor knew for sure --

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

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

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

JUSTICE KENNEDY: The Rule applies to every affirmative defense.

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

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

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

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

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

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

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

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

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

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

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

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

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

JUSTICE BREYER: Why can't they consent?

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

(Laughter.)

MR. HARRINGTON: I believe that.

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

MS. HARRINGTON: Justice Breyer, I --

JUSTICE BREYER: Yeah.

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

JUSTICE SOTOMAYOR: Why --

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

MS. HARRINGTON: Because it --

JUSTICE BREYER: But regardless of that dispute.

MS. HARRINGTON: Okay. This --

JUSTICE BREYER: Is -- is -- is the

automatic stay applied to these actions or not?

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

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

MS. HARRINGTON: That's true, yes.

JUSTICE BREYER: Okay.

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

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

JUSTICE KAGAN: Is your argument --

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

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

MS. HARRINGTON: Yes. Yes.

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

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

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

CHIEF JUSTICE ROBERTS: Thank you, counsel.

Three minutes, Mr. Shanmugam.

REBUTTAL ARGUMENT OF KANNON K. SHANMUGAM

ON BEHALF OF THE PETITIONER

MR. SHANMUGAM: Thank you,

Mr. Chief Justice.

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

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

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

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

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

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

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

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

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

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

Thank you.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

The case is submitted.

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