**No. 23-1225**

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

Hernandez Carrasquillo,
Plaintiff-Appellant,

*v.*

CICA Collection Agency, Inc,
Defendant-Appellee.

On Appeal from the United States District Court
for the District of Puerto Rico

Case No. 3:21-cv-1506

Hon. Camille L. Velez-Rive

**Brief of *Amicus Curiae***
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**in Support of Plaintiff-Appellant**

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# TABLE OF CONTENTS

TABLE OF CONTENTS .......... i

TABLE OF AUTHORITIES .......... ii

INTEREST OF AMICUS .......... 1

STATEMENT .......... 1

A. Statutory and Regulatory Background .......... 1

B. Facts and Procedural History .......... 5

SUMMARY OF ARGUMENT .......... 7

ARGUMENT .......... 11

I. Section 1692e's prohibition on false, deceptive, or misleading representations is not limited to intentional or knowing representations. .......... 11

A. The text of the relevant provisions of Section 1692e plainly applies to any false, deceptive, or misleading representation and does not include a scienter requirement. .......... 12

B. Congress's selective inclusion of an express scienter requirement throughout the FDCPA shows that Congress did not intend for Section 1692e implicitly to include such a requirement. .......... 16

C. The FDCPA's civil liability provisions further confirm that Section 1692e does not contain an implicit scienter requirement. .......... 18

D. The district court's policy concern for including a scienter requirement for all Section 1692e claims is flawed. .......... 20

II. The Bankruptcy Code does not bar Plaintiff's Section 1692e claims. .......... 21

CONCLUSION .......... 27

CERTIFICATE OF COMPLIANCE

CERTIFICATE OF SERVICE

## TABLE OF AUTHORITIES

**Cases** **Page(s)**

*Allen ex rel. Martin v. LaSalle Bank, N.A.*,
629 F.3d 364 (3rd Cir. 2011) ........................................................ 13, 14, 15

*Blackstone Headwaters Coal., Inc. v. Gallo Builders, Inc.*,
32 F.4th 99 (1st Cir. 2022) ........................................................................15

*Brady v. Credit Recovery Co. Inc.*,
160 F.3d 64 (1st Cir. 1998) ........................................................................16

*Clark v. Capital Credit & Collection Servs., Inc.*,
460 F.3d 1162 (9th Cir. 2006) ....................................................................15

*Currier v. First Resolution Inv. Corp.*,
762 F.3d 529 (6th Cir. 2014) ......................................................................21

*Garfield v. Ocwen Loan Servicing, LLC*,
811 F.3d 86 (2d Cir. 2016) ................................................................. 24, 26

*Hamann v. Carpenter*,
937 F.3d 86 (1st Cir. 2019) ..........................................................................5

*Hubbard v. Nat'l Bond and Coll. Assocs., Inc.*,
126 B.R. 422 (D. Del.)....................................................................... 14, 15

*Kaiser v. Cascade Capital, LLC*,
989 F.3d 1127 (9th Cir. 2021) ....................................................................14

*LeBlanc v. Unifund CCR Partners*,
601 F.3d 1185 (11th Cir. 2010) ..................................................................21

*Lopez–Soto v. Hawayek*,
175 F.3d 170 (1st Cir. 1999) ......................................................................16

*Madden v. Midland Funding, LLC*,
786 F.3d 246 (2d Cir. 2015) .......................................................................21

*McLean v. Ray*,
488 F. App'x 677 (4th Cir. 2012).................................................................14

*Midland Funding LLC v. Johnson*,
581 U.S. 224 (2017) .......... 26, 27

*Owen v. I.C. Sys., Inc.*,
629 F.3d 1263 (11th Cir. 2011) .......... 14

*Picht v. Jon R. Hawks, Ltd.*,
236 F.3d 446 (8th Cir. 2001) .......... 14, 21

*POM Wonderful LLC v. Coca-Cola Co.*,
573 U.S. 102 (2014) .......... 22

*Randolph v. IMBS, Inc.*,
368 F.3d 726 (7th Cir. 2004) .......... 14, 24, 25

*Simmons v. Roundup Funding, LLC*,
622 F.3d 93 (2d Cir. 2010) .......... 25

*Simon v. FIA Card Servs., N.A.*,
732 F.3d 259 (3d Cir. 2013) .......... 24, 25

*Stratton v. Portfolio Recovery Assocs., LLC*,
770 F.3d 443 (6th Cir. 2014) .......... 14

*United States v. Ahlers*,
305 F.3d 54 (1st Cir. 2002) .......... 16

*United States v. Arif*,
897 F.3d 1 (1st Cir. 2018) .......... 10, 22, 23

*United States v. Chuong Van Duong*,
665 F.3d 364 (1st Cir. 2012) .......... 12

*United States v. Roberson*,
459 F.3d 39 (1st Cit. 2006) .......... 17

*Vangorden v. Second Round, Ltd. P'ship*,
897 F.3d 433 (2d Cir. 2018) .......... 13

*Walls v. Wells Fargo Bank, N.A.*,
276 F.3d 502 (9th Cir. 2002) .......... 25

**Statutes**

11 U.S.C. § 362(a)(6) .......... 12, 23

11 U.S.C. § 362(k) .......... 23

12 U.S.C. § 5491(a) .......... 1, 4

15 U.S.C. § 1692(e) .......... 1

15 U.S.C. § 1692c .......... 17

15 U.S.C. § 1692c(a) .......... 3

15 U.S.C. § 1692d(5) .......... 2, 17

15 U.S.C. § 1692e .......... *passim*

15 U.S.C. § 1692e(2)(A) .......... *passim*

15 U.S.C. § 1692e(5) .......... 2, 11, 13, 21

15 U.S.C. § 1692e(8) .......... 2, 8, 16

15 U.S.C. § 1692e(10) .......... 2, 11, 13

15 U.S.C. § 1692j .......... 17

15 U.S.C. § 1692j(a) .......... 3

15 U.S.C. § 1692k(a) .......... 3, 23

15 U.S.C. § 1692k(a)(2) .......... 19

15 U.S.C. § 1692k(a)(2)(A) .......... 4

15 U.S.C. § 1692k(b)(1) .......... 4, 9, 19

15 U.S.C. § 1692k(b)(2) .......... 4, 9, 19

15 U.S.C. § 1692k(c) .......... 4, 9, 18, 20

15 U.S.C. § 1692*l*(a)-(b) .......... 3

15 U.S.C. § 1692*l*(b)(6) .......... 1, 4

15 U.S.C. § 1692*l*(d) ........................................................................................1, 4

Dodd-Frank Wall Street Reform and Consumer Protection Act (2010),
Pub. L. No. 111-203, 124 Stat. 1376 ..........................................................1, 4

Fair Debt Collection Practices Act (1977),
Pub. L. No. 95-109, 91 Stat. 874 .....................................................................1

**Regulations**

12 C.F.R. § 1006.26 ...........................................................................................4

86 Fed. Reg. 5766 (Jan. 19, 2021) ................................................................4, 5

**Other Authorities**

1A & 2A Norman J. Singer, Sutherland: Statutes and Statutory Construction,
§ 46:05 (6th ed. 2000) ..................................................................................17

Black's Law Dictionary (4th ed. 1968) ........................................................ 12, 15

## INTEREST OF AMICUS

The Consumer Financial Protection Bureau files this brief pursuant to Fed. R. App. P. 29(a)(2).

In 2010, Congress established the CFPB and vested it with authority to enforce and promulgate rules under the Fair Debt Collection Practices Act (FDCPA). *See* Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376, 1964, 2093 (2010) (codified at 12 U.S.C. § 5491(a) and 15 U.S.C. § 1692*l*(b)(6), (d)). This case concerns a provision of the FDCPA, 15 U.S.C. § 1692e, that prohibits debt collectors from "us[ing] any false, deceptive, or misleading representation or means in connection with the collection of any debt." Given its authority over the FDCPA, the CFPB has a substantial interest in this Court's interpretation of this provision.

## STATEMENT

### A. Statutory and Regulatory Background

1. Congress enacted the FDCPA in 1977 to "eliminate abusive debt collection practices by debt collectors, to insure that those debt collectors who refrain from using abusive debt collection practices are not competitively disadvantaged, and to promote consistent State action to protect consumers against debt collection abuses." Pub. L. No. 95-109, § 802(e), 91 Stat. 874, 874 (codified at 15 U.S.C. § 1692(e)). To achieve those ends, the FDCPA imposes various

restrictions on debt collectors' debt collection activity. Relevant here is Section 1692e, which provides that a "debt collector may not use any false, deceptive, or misleading representation or means in connection with the collection of any debt." 15 U.S.C. § 1692e. The provision then states that "[w]ithout limiting the general application of the foregoing, the following conduct is a violation of this section" and enumerates 16 specifically prohibited practices, including: making "false representation[s] of . . . the character, amount, or legal status of any debt," *id.* § 1692e(2)(A); "threat[ening] to take any action that cannot legally be taken," *id.* § 1692e(5); and "us[ing] . . . any false representation . . . to collect or attempt to collect any debt," *id.* § 1692e(10).

Section 1692e's general prohibition does not include a scienter requirement, *i.e.*, Congress did not expressly require that the representation be knowingly or intentionally false, deceptive, or misleading to violate that prohibition. This is consistent with the majority of the FDCPA's provisions. Indeed, Congress expressly incorporated a scienter requirement for only a limited number of provisions. In particular, Section 1692e(8) prohibits "[c]ommunicating or threatening to communicate to any person credit information *which is known or which should be known* to be false." (Emphasis added.) Section 1692d(5) prohibits debt collectors from "causing a telephone to ring or engaging any person in telephone conversation repeatedly or continuously *with intent* to annoy, abuse, or

harass." (Emphasis added.) Section 1692c(a) bars debt collectors from communicating with a consumer in connection with the collection of a debt (1) at "a time or place *known or which should be known* to be inconvenient to the consumer," (2) "*if the debt collector knows* the consumer is represented by an attorney" and knows or can readily ascertain the attorney's name and address, and (3) "at the consumer's place of employment *if the debt collector knows or has reason to know* that the consumer's employer prohibits the consumer from receiving such communication." (Emphases added.) Finally, Section 1692j(a) makes it unlawful to "design, compile, and furnish any form *knowing* that such form would be used" to deceive consumers in a specified way. (Emphasis added.)

The FDCPA authorizes several federal agencies, including the CFPB, to enforce compliance with the Act and also makes debt collectors civilly liable to any person subject to a violation for actual and statutory damages, as well as attorney's fees and costs. 15 U.S.C. § 1692k(a), 1692*l*(a)-(b). The Act's provisions on civil liability differentiate between intentional and unintentional violations in two ways. First, the Act expressly provides debt collectors with a defense to civil liability for unintentional violations if they can show that other factors are met. Specifically, the FDCPA provides that a "debt collector may not be held liable in any action brought under [the Act] if the debt collector shows by a preponderance of evidence that the violation was not intentional and resulted from a bona fide

error notwithstanding the maintenance of procedures reasonably adapted to avoid any such error." *Id.* § 1692k(c). Second, the Act provides that in "determining the amount of liability" in an action for statutory damages the court should consider various factors, including "the extent to which [the debt collector's] noncompliance was intentional." *Id.* § 1692k(b)(1), (2); *see also id.* § 1692k(a)(2)(A).

2. In 2010, Congress passed the Dodd-Frank Wall Street Reform and Consumer Protection Act, which created the CFPB and granted it authority to promulgate rules under the FDCPA as well as to enforce compliance with the Act's requirements. Pub. L. No. 111-203, § 1089, 124 Stat. 1376, 1964, 2093 (codified at 12 U.S.C. § 5491(a) and 15 U.S.C. § 1692*l*(b)(6), (d)). Pursuant to that authority, in 2021, the Bureau amended Regulation F, which implements the FDCPA, to prescribe rules governing the activities of debt collectors, as that term is defined in the Act. 86 Fed. Reg. 5766 (Jan. 19, 2021). Among other things, the regulation prohibits debt collectors from bringing or threatening to bring a legal action against a consumer to collect a time-barred debt. 12 C.F.R. § 1006.26. This provision adopts a strict liability standard—that is, it prohibits debt collectors from pursuing legal action on time-barred debt regardless of whether they know or should know that the action is time-barred. *See* 86 Fed. Reg. at 5781. In explaining this standard, the CFPB reasoned that imposing a "knows-or-should-know standard" would be

inconsistent with Section 1692e, "which does not include an exception or exclusion for debt collectors whose deceptive statements are unintentional." *Id.*

### B. Facts and Procedural History

In 2007, Plaintiff-Appellant Omar Hernández Carrasquillo contracted for telephone and communication services with Claro Puerto Rico.[1] App. at 69. In September 2019, Plaintiff filed for bankruptcy under the Bankruptcy Code. *Id*. Plaintiff listed the Claro debt in the bankruptcy proceeding, and in July 2020, the bankruptcy court notified Claro of the proceeding. *Id*. 70. Claro retained Defendant-Appellee CICA Collection Agency, Inc. (CICA) to collect the alleged debt. *Id*. In October 2020, while the bankruptcy proceeding was still pending, CICA mailed Plaintiff a collection letter that, among other things, stated that the Claro debt was "due and payable" and that Claro was "fully entitled to initiate a legal action" to collect it. *Id*. at 34. The letter did not reference the pending bankruptcy proceeding. *Id*.

Plaintiff sued CICA in October 2021, alleging the letter violated numerous provisions of the FDCPA. Most relevant to the issues the CFPB addresses in this amicus brief, Plaintiff alleged that CICA violated Section 1692e—in particular, Sections 1692e(2)(A), (5), and (10)—because CICA falsely stated that the Claro

[1] The facts are drawn from Plaintiff's complaint, as this is an appeal from the grant of a motion to dismiss. *See Hamann v. Carpenter*, 937 F.3d 86, 88 (1st Cir. 2019).

debt was due and payable and Claro could commence a lawsuit against Plaintiff. Plaintiff claimed these representations were false because at the time the letter was sent, Plaintiff was protected by the Bankruptcy Code's automatic stay. Plaintiff thus argued that, at the time of the letter, the Claro debt was not due and Claro could not commence a debt-collection lawsuit against Plaintiff. Plaintiff also asserted other claims for violations of other FDCPA provisions.

CICA moved to dismiss and argued first that the Bankruptcy Code precludes FDCPA claims premised on CICA's attempts to collect a debt notwithstanding Plaintiff's bankruptcy filing. Alternatively, CICA argued that Section 1692e prohibits only intentional violations and that because CICA did not know of the bankruptcy and the accompanying automatic stay, it did not intentionally make any false representations about the Claro debt. CICA also moved to dismiss Plaintiff's other claims on the merits.

The district court granted CICA's motion to dismiss. *Id*. at 209. First, the court declined to address whether the Bankruptcy Code precluded Plaintiff's FDCPA claims because it found that Plaintiff's FDCPA claims failed on the merits. *Id*. at 211. Relying almost exclusively on an out-of-circuit district court decision, the court agreed with CICA that Section 1692e "was intended to prohibit only knowing or intentional misrepresentations." *Id*. at 214-15. Taking judicial notice of the filings in Plaintiff's bankruptcy proceeding, the court found that

CICA had not been sent notice of the proceeding. *Id*. at 214 The court also seemingly credited CICA's assertion that it was unaware of the bankruptcy proceeding despite Plaintiff's allegations to the contrary. *Id*. As a result, the court held that CICA's statements in its letter did not violate Section 1692e. *Id*. at 215. The court also dismissed Plaintiff's other claims. *Id*. at 216, 219, 222.

Plaintiff then moved to amend the court's judgment. As relevant here, Plaintiff argued that the court's dismissal of his Section 1692e claim was based on a clearly erroneous conclusion of law—namely that Section 1692e applies only if a debt collector acted intentionally or knowingly. In support, Plaintiff highlighted that at least six courts of appeals have held otherwise. On January 27, 2023, in a two-sentence order that did not appear to address Plaintiff's argument, the court denied the motion to amend. *Id*. at 257. Plaintiff appealed.

## SUMMARY OF ARGUMENT

1. The Fair Debt Collection Practices Act prohibits debt collectors from "us[ing] any false, deceptive, or misleading representation or means in connection with the collection of any debt," full stop. 15 U.S.C. § 1692e. That provision does not implicitly make such misrepresentations unlawful only if the debt collector makes them knowingly or intentionally, and the district court erred in reading such a scienter requirement into the provision.

The text of the FDCPA confirms this in three ways. First, Section 1692e's plain language applies to any false, deceptive, or misleading representation; it nowhere states that Section 1692 applies only to intentional or knowing misrepresentations. Consistent with this plain text, every federal court of appeals to have addressed this issue (8 in total) has held that Section 1692e does not include a scienter requirement.

Second, Congress knew how to add a scienter requirement and selectively did so in certain other provisions throughout the FDCPA. Most notably, in Section 1692e(8), which identifies one of the specific examples of a prohibited "false, deceptive, or misleading representation," Congress prohibited debt collectors from "[c]ommunicating or threatening to communicate to any person credit information which is *known or which should be known* to be false." (Emphasis added.) That Congress added an express scienter requirement in only one of the enumerated examples of a prohibited misrepresentation shows that Congress did not intend to include an implicit scienter requirement in Section 1692e more generally. The rest of the FDCPA further reinforces that Congress deliberately limited the instances in which a debt collector's violation of the Act had to be knowing or intentional. Only a select few provisions include a scienter requirement, while the majority of provisions (including Section 1692e) contain no such limitation.

Third, the FDCPA's civil liability section, 15 U.S.C. § 1692k, also makes clear that Congress intended Section 1692e to cover unintentional or unknowing violations. Specifically, Section 1692k's bona fide error provision indicates that a debt collector may avoid liability "if the debt collector shows by a preponderance of evidence that the violation was not intentional *and* resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid any such error." *Id*. § 1692k(c) (emphasis added). There would be no reason for Congress to include the language about "procedures reasonably adapted to avoid any such error" if showing that a violation was unintentional was sufficient to avoid liability. Accordingly, this provision shows that a debt collector will be liable for *unintentional* violations if the debt collector cannot show that its violations resulted from a bona fide error and that it maintained procedures reasonably adapted to avoid such errors. Similarly, in assessing the appropriate amount of statutory damages for FDCPA violations, the Act expressly directs courts to consider "the extent to which . . . noncompliance was intentional." *Id*. § 1692k(b)(1), (2). This necessarily recognizes that the Act covers unintentional violations as well as intentional ones.

The district court did not address this textual evidence at all—or the overwhelming weight of contrary authority. Instead, the district court seemed to base its conclusion on policy concerns that debt collectors should not be held liable

where they did not know that their statements were false. But that is a decision for Congress, not the district court. And in any event, the answer to that concern is not to read an atextual scienter requirement into Section 1692e. Rather, it is for the debt collector to avail itself of the protection that Congress expressly provided for in the FDCPA—namely, to assert a bona fide error defense.

2. Finally, if the Court addresses the issue, it should hold that the Bankruptcy Code does not bar Plaintiff's Section 1692e claims here. CICA's statement that Plaintiff could be sued on his debt was false and therefore violated the FDCPA—and the fact that the Bankruptcy Code is what made that statement false does not make it any less a violation. Indeed, it is well established that it violates the FDCPA to make a false statement about a debt where some other law is what makes the statement false.

Nothing in the text of the Bankruptcy Code or the FDCPA suggests that Congress intended for the Bankruptcy Code to preclude FDCPA claims where the two statutes overlap. Nor is there any other basis to infer such an intent from the statutes. As this Court has previously recognized, one federal statute will not preclude application of another overlapping federal statute unless "an irreconcilable conflict exists between the provisions of the two," such that one impliedly repeals the other. *United States v. Arif*, 897 F.3d 1, 6 (1st Cir. 2018) (internal quotations omitted). There is no "irreconcilable conflict" here between the

Bankruptcy Code's automatic stay provision and Section 1692e because a debt collector can comply with both by simply not stating that a debt is legally enforceable when, in fact, it is not because the automatic stay provision bars anyone from attempting to collect it. Nor is there any conflict between the remedies the two statutes afford; they are overlapping schemes that can coexist.

## ARGUMENT

### I. Section 1692e's prohibition on false, deceptive, or misleading representations is not limited to intentional or knowing representations.

The FDCPA prohibits debt collectors from "us[ing] any false, deceptive, or misleading representation or means in connection with the collection of any debt," 15 U.S.C. § 1692e, including, making "false representation[s] of . . . the character, amount, or legal status of any debt," *id*. § 1692e(2)(A); "threat[ening] to take any action that cannot legally be taken," *id*. § 1692e(5); and the "use of any false representation . . . to collect or attempt to collect any debt," *id*. § 1692e(10). These provisions prohibit all such representations, not just those that the debt collector makes intentionally or knowingly.

The district court's addition of a scienter requirement cannot be squared with the plain text of the relevant provisions of Section 1692e, with Congress's decision to include an express scienter requirement in certain *other* provisions (but not in the provisions at issue here), or with provisions expressly recognizing that debt collectors can face civil liability for unintentional violations. And the district

court's policy reason for reading a scienter requirement into Section 1692e is flawed. Accordingly, this Court should reverse the district court's decision to dismiss the Section 1692e claims based on CICA's lack of scienter.[2]

### A. The text of the relevant provisions of Section 1692e plainly applies to any false, deceptive, or misleading representation and does not include a scienter requirement.

As with any matter of statutory interpretation, "[w]e begin with the language of the statute" itself. *United States v. Chuong Van Duong*, 665 F.3d 364, 366 (1st Cir. 2012). Section 1692e provides that a "debt collector may not use any false, deceptive, or misleading representation or means in connection with the collection of any debt." 15 U.S.C. § 1692e. On its face, Section 1692e applies to *any* false, deceptive, or misleading representation used by a debt collector, with no requirement that the debt collector know or intend to make a false representation before the representation becomes prohibited. Here, CICA "use[d a] false . . . representation . . . in connection with the collection" of the Claro debt. CICA's letter stated that the Claro debt is "due and payable[, and Claro] is fully entitled to initiate a legal action . . . for the collection of" the debt. App. at 34. This representation was false, i.e., "not true," *see* Black's Law Dictionary (4th ed. 1968) (defining "false"), regardless of CICA's intent or knowledge, because the

[2] The CFPB does not take a position on Plaintiff's other claims.

Bankruptcy Code's automatic stay prohibited any such legal action, *see* 11 U.S.C. § 362(a)(6).

Nothing in Section 1692e says that it applies only to representations that a debt collector knows to be false, deceptive, or misleading. The same is true of the specific subsections of Section1692e that Plaintiff alleges CICA violated: Section 1692e(2)(A) prohibits debt collectors from making a "false representation" concerning "the character, amount, or legal status of any debt"; Section 1692e(5) prohibits debt collectors from "threat[ening] to take any action that cannot legally be taken"[3]; and Section 1692e(10) prohibits debt collectors' "use of any false representation . . . to collect or attempt to collect any debt."

Indeed, every federal court of appeals to address this issue has held that Section 1692e does not include a scienter requirement and that the FDCPA generally is a strict liability statute. *See Vangorden v. Second Round, Ltd. P'ship*, 897 F.3d 433, 437-38 (2d Cir. 2018) ("The FDCPA is 'a strict liability statute' and, thus, there is no need for a plaintiff to plead or prove that a debt collector's misrepresentation . . . was intentional."); *Allen ex rel. Martin v. LaSalle Bank,*

[3] In full, Section 1692e(5) identifies as a violation "[t]he threat to take any action that cannot legally be taken or that is not intended to be taken." Plaintiff's claim is premised on the first half of 1692e(5) that bars threats to take action "that cannot legally be taken." Specifically, Plaintiff challenges CICA's representation that the owner of the debt could bring a debt-collection suit when it could not legally do so because of the Bankruptcy Code's automatic stay.

*N.A.*, 629 F.3d 364, 368 (3rd Cir. 2011) ("The FDCPA is a strict liability statute to the extent it imposes liability without proof of an intentional violation."); *Stratton v. Portfolio Recovery Assocs., LLC*, 770 F.3d 443, 448-49 (6th Cir. 2014) ("The FDCPA is a strict-liability statute: A plaintiff does not need to prove knowledge or intent."); *Randolph v. IMBS, Inc.*, 368 F.3d 726, 730 (7th Cir. 2004) ("[Section] 1692e(2)(A) creates a strict-liability rule."); *Picht v. Jon R. Hawks, Ltd.*, 236 F.3d 446, 451 (8th Cir. 2001) (recognizing "the strict liability imposed upon debt collectors by the FDCPA"); *Kaiser v. Cascade Capital, LLC*, 989 F.3d 1127, 1135 (9th Cir. 2021) ("The FDCPA makes debt collectors strictly liable for misleading and unfair debt collection practices."); *Owen v. I.C. Sys., Inc.*, 629 F.3d 1263, 1270-71 (11th Cir. 2011) ("The FDCPA typically subjects debt collectors to liability even when violations are not knowing or intentional."); *see also McLean v. Ray*, 488 F. App'x 677, 682 (4th Cir. 2012) ("The FDCPA is a strict liability statute that prohibits false or deceptive representations in collecting a debt.").

In holding otherwise, the district court did not even reference this overwhelming weight of authority, and instead relied almost exclusively on a 30-year-old decision from the District of Delaware that has since been superseded by that circuit's precedent. *See Hubbard v. Nat'l Bond and Coll. Assocs., Inc.*, 126 B.R. 422 (D. Del.) *aff'd*, 947 F.2d 935 (3d Cir. 1991) (nonprecedential summary

affirmance).[4] There, the court noted that the dictionary definition of "false representation" included a "representation which is untrue, wi[l]lfully made to deceive another." *Id.* at 427 (citing Black's Law Dictionary 750 (3d ed. 1933)). But as noted above, a false representation can also mean a representation that is simply "not true." Black's Law Dictionary (4th ed. 1968); *see also Clark v. Capital Credit & Collection Servs., Inc.*, 460 F.3d 1162, 1174 n.10 (9th Cir. 2006) (explaining that, "[o]f course, false, deceptive, and misleading each have innocent definitions as well," and noting that false can be defined "simply as 'not true' or 'inconsistent with the facts'" (citation omitted)).

Regardless, Section 1692e's reference to "false" or "misleading" must be considered "in the context of the statute as a whole and not in isolation." *Blackstone Headwaters Coal., Inc. v. Gallo Builders, Inc.*, 32 F.4th 99, 106 (1st Cir. 2022). As discussed in more detail below, examining the FDCPA as a whole reveals that Congress did not intend for there to be a broad scienter requirement in Section 1692e.

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[4] The Third Circuit has since held that the "FDCPA is a strict liability statute" in that "it imposes liability without proof of an intentional violation." *Allen ex rel. Martin*, 629 F.3d at 368; *see also id.* at 368 n.7 ("The characterization of the FDCPA as a strict liability statute is generally accepted.").

### B. Congress's selective inclusion of an express scienter requirement throughout the FDCPA shows that Congress did not intend for Section 1692e implicitly to include such a requirement.

As this Court has previously held, "[c]ourts have an obligation to refrain from embellishing statutes by inserting language that Congress opted to omit." *Lopez–Soto v. Hawayek*, 175 F.3d 170, 173 (1st Cir. 1999). But reading a scienter requirement into Section 1692e does precisely that. Congress knew how to add a scienter requirement—and did so selectively throughout the FDCPA—but did not include such language in the Section 1692e provisions at issue here.

Perhaps most tellingly, Section 1692e(8)—one of the specific examples of a prohibited "false, deceptive, or misleading representation"—prohibits debt collectors from "communicating or threatening to communicate to any person credit information which is *known or which should be known* to be false." (Emphasis added.) "It is accepted lore that when Congress uses certain words in one part of a statute, but omits them in another, an inquiring court should presume that this differential draftsmanship was deliberate." *United States v. Ahlers*, 305 F.3d 54, 59-60 (1st Cir. 2002). Indeed, this Court has previously applied this canon of statutory construction to the FDCPA. *See Brady v. Credit Recovery Co. Inc.*, 160 F.3d 64, 66-67 (1st Cir. 1998) ("[T]he fact that other sections of the FDCPA—like § 1692g(b)—explicitly impose a writing requirement suggests that Congress's omission of such a requirement in § 1692e(8) was not inadvertent."). Thus,

Congress's inclusion of a scienter requirement in only one of the sixteen examples of a false, deceptive, or misleading representation strongly evinces an intent not to adopt a scienter requirement elsewhere in Section 1692e where Congress did not specifically include one.

Moreover, Congress was similarly selective in including a scienter requirement in other FDCPA sections. Take Section 1692c, for instance, which prohibits debt collectors from communicating with a consumer in connection with the collection of any debt (1) at "a time or place *known or which should be known* to be inconvenient to the consumer"; (2) "if the debt collector *knows* the consumer is represented by an attorney"; or (3) "at the consumer's place of employment if the debt collector *knows or has reason to know* that the consumer's employer prohibits the consumer from receiving such communication" (emphases added). Or Section 1692d(5), which prohibits debt collectors from "causing a telephone to ring or engaging any person in telephone conversation repeatedly or continuously *with intent* to annoy, abuse, or harass" (emphasis added). Or Section 1692j, which makes it "unlawful to design, compile, and furnish any form *knowing* that such form would be used to create the false belief in a consumer that a person other than the creditor . . . is participating in the collection of . . . a debt . . . when in fact such person is not so participating" (emphasis added).

The FDCPA is replete with examples of Congress "carefully employ[ing]" a scienter requirement in certain provisions of the FDCPA and excluding it in others, and thus such a requirement "should not be implied where excluded." *United States v. Roberson*, 459 F.3d 39, 54 (1st Cit. 2006) (quoting 1A & 2A Norman J. Singer, Sutherland: Statutes and Statutory Construction, § 46:05 (6th ed. 2000)).

### C. The FDCPA's civil liability provisions further confirm that Section 1692e does not contain an implicit scienter requirement.

There is yet more evidence in the FDCPA that Congress did not intend to include an implicit scienter requirement in Section 1692e. In particular, two of the Act's civil liability provisions make clear that, as a general matter, the FDCPA's prohibitions are not limited to intentional or knowing conduct, but rather extend to unintentional conduct as well.

First, Section 1692k(c) provides debt collectors a defense for some—but not all—unintentional violations. In particular, the so-called "bona fide error" provision states that a "debt collector may not be held liable … if the debt collector shows by a preponderance of evidence that the violation was not intentional *and* resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid any such error." 15 U.S.C. § 1692k(c) (emphasis added). By the provision's own terms, it is not enough for a debt collector to merely show that its conduct was unintentional to avoid liability; rather, it must also show that the violation was the result of a "bona fide error" and that the

collector maintained "procedures reasonably adapted to avoid" that error. Therefore, the Act necessarily contemplates situations in which a debt collector can be held liable for unintentional conduct—where the debt collector cannot prove that its violation resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid any such error. The bona fide error provision thus strongly evinces Congress's intent for the FDCPA to apply to unintentional violations, unless Congress expressly stated otherwise. Congress did not state otherwise in Section 1692e, so there is every reason to think that that section covers unintentional violations just like most of the Act.

Reading an implicit scienter requirement into Section 1692e is similarly difficult to square with Section 1692k(b), which directs courts to consider whether a violation was "intentional" in assessing the appropriate amount of statutory damages. Specifically, the FDCPA makes debt collectors liable for statutory damages, 15 U.S.C. § 1692k(a)(2), and further provides that "[i]n determining the amount of liability" in any action seeking such statutory damages, "the court shall consider, among other relevant factors . . . the extent to which the debt collector's noncompliance was intentional." *Id.* § 1692k(b)(1), (2). This confirms that some violations may be intentional and others not. Thus, this provision, like the bona fide error provision, further shows that the FDCPA generally covers unintentional

violations as well as intentional ones, and that Congress did not intend to impose an implicit scienter requirement in Section 1692e.

### D. The district court's policy concern for including a scienter requirement for all Section 1692e claims is flawed.

In holding that Section 1692e applies only to knowing or intentional violations the district court appeared to be heavily influenced by the fact that the "error in question"—making false statements in a debt collection letter to a consumer notwithstanding the Bankruptcy Code's automatic stay—"was not caused by CICA, but rather by Claro[,]" the owner of the debt who hired CICA. *See* App. at 214-15 (reasoning that Section 1692e "was not intended to penalize debt collectors for failing to discover a debtor's bankruptcy filing."). But whether, and to what extent, debt collectors may be held liable for unintentional violations of the Act is a decision for Congress, not the district court.

In any event, to the extent the court's policy concern bears on the statutory interpretation question at all, the answer is not to read an atextual scienter requirement into Section 1692e. Rather, it is for the debt collector to avail itself of the remedies that Congress already provided for in the FDCPA—namely, the bona fide error provision. *See* 15 U.S.C. 1692k(c). If CICA can prove (1) that its false statements about Plaintiff's debt were not intentional and (2) that they resulted from a bona fide error that occurred even though CICA maintained procedures

reasonably adapted to avoid such errors, then the FDCPA provides that CICA will not be liable.

## II. The Bankruptcy Code does not bar Plaintiff's Section 1692e claims.

Contrary to CICA's assertion below, the Bankruptcy Code does not "preclude" Plaintiff's Section 1692e claims. Plaintiff's claims fall squarely within the terms of Section 1692e: Plaintiff claims that CICA sent Plaintiff a letter stating that the debt was due and the creditor could bring suit when, in fact, the Bankruptcy Code's automatic stay barred any such suit or other attempts to collect the debt. CICA's statements therefore violated the plain terms of Section 1692e by, among other things, "false[ly] represent[ing] … the character … or legal status of a[] debt" and falsely "threat[ening] to take an[] action that cannot legally be taken." 15 U.S.C. § 1692e(2)(A), (5).

The fact that the automatic stay provision was the *reason* that CICA's statements were false does not make them any less a violation of the FDCPA. Indeed, it is well established that it violates the FDCPA to make a false statement about a debt where some other law is what makes the statement false. For instance, a debt collector violates Section 1692e if it threatens to sue when state law makes it illegal to sue, *LeBlanc v. Unifund CCR Partners*, 601 F.3d 1185, 1190-92 (11th Cir. 2010); threatens to use a garnishment procedure when state law does not authorize that procedure, *Picht*, 236 F.3d at 451; threatens to enforce a judgment

lien that state law makes unenforceable, *Currier v. First Resolution Inv. Corp.*, 762 F.3d 529, 525-36 (6th Cir. 2014); or states that it can charge interest when state law prohibits that interest, *Madden v. Midland Funding, LLC*, 786 F.3d 246, 254 (2d Cir. 2015). It is no different when a statement is false because of the Bankruptcy Code.

In contending otherwise, CICA argued in the district court that the Bankruptcy Code "preclude[s]" the FDCPA claims. That is mistaken. How the FDCPA and Bankruptcy Code interact is at bottom a question of statutory interpretation. *See POM Wonderful LLC v. Coca-Cola Co.*, 573 U.S. 102, 112 (2014) (applying "traditional rules of statutory interpretation" to evaluate claim that one federal statute precluded claims under another federal statute). There is nothing in the text of either the Bankruptcy Code or the FDCPA that expressly makes the Code displace the FDCPA.

Nor is there any other basis to read either statute as reflecting an intent by Congress for the Bankruptcy Code to preclude FDCPA claims like the Section 1692e claim here. This Court has held that where, as here, a party claims that one federal statute displaces another federal statute, "[t]he proper mode of analysis" is "that of implied repeal." *United States v. Arif*, 897 F.3d 1, 5 (1st Cir. 2018) (internal quotations omitted). Repeals by implication "are not favored" and "may not be found unless Congress's intent to repeal is clear and manifest." *Id.* at 5-6

(quotations and brackets omitted). To establish such a clear congressional intent, a party must show that there is an "irreconcilable conflict … between the provisions of the two statutes." *Id.* at 6 (quotations omitted).[5]

No "irreconcilable conflict" between the Bankruptcy Code and the FDCPA exists in the circumstances here. The Code's automatic stay provision prohibits "all entities," once a bankruptcy petition is filed, from taking "any act to collect . . . a claim against the debtor that arose before the commencement" of the bankruptcy proceeding. 11 U.S.C. § 362(a)(6). Section 1692e of the FDCPA, meanwhile, provides that a "debt collector may not use any false, deceptive, or misleading representation or means in connection with the collection of any debt." 15 U.S.C. § 1692e. There is no tension—let alone "irreconcilable conflict"—between these two provisions. CICA can comply with both. Specifically, CICA can simply not send a letter saying that the creditor can sue on the debt when the automatic stay bars such a suit. And, if a debt collector makes such a statement, it may violate both the Bankruptcy Code and the FDCPA. But that means only that the statutes overlap, and the fact that two statutes "overlap in some situations … is not enough" to establish a conflict that will support an implied repeal. *Arif*, 897 F.3d at 7.

[5] Implied repeal also arises when "the later act covers the whole subject of the earlier one and is clearly intended as a substitute." *Id.* That is plainly not the case here, and CICA does not appear to suggest otherwise.

Nor is there any "irreconcilable conflict" between the Bankruptcy Code's remedies for violations of the automatic stay and the FDCPA's remedies when debt collectors use false or deceptive means to collect a debt. Under the Bankruptcy Code, a person "injured by any willful violation" of the automatic stay can recover actual damages (and costs, attorney's fees, and punitive damages in some cases not involving a specified good faith mistake). 11 U.S.C. § 362(k). And under the FDCPA, a person subjected to deceptive debt collection efforts can recover actual and statutory damages, costs, and fees. 15 U.S.C. § 1692k(a). There is no conflict between these provisions. If a party violates the bankruptcy stay by attempting to collect a debt from a debtor in bankruptcy, the debtor may seek to recover the remedies provided for by the Bankruptcy Code. And, if the party that violated the bankruptcy stay is a "debt collector" subject to the FDCPA who falsely tells the debtor that the debt is legally enforceable, the debtor may also seek to recover the remedies provided for by the FDCPA. The fact that the Code and the FDCPA provide for "overlapping and not entirely congruent remedial systems" does not provide a basis for finding "irreconcilable conflict." *Randolph v. IMBS, Inc.*, 368 F.3d 726, 731 (7th Cir. 2004). In short, because the automatic stay and Section 1692e can co-exist, the Bankruptcy Code does not preclude Plaintiff's Section 1692e claim.

The majority of courts to have addressed this issue agree that the Bankruptcy Code does not displace FDCPA claims where, as here, there is no "irreconcilable conflict." *See Garfield v. Ocwen Loan Servicing, LLC*, 811 F.3d 86, 93 (2d Cir. 2016) (stating that a debt collector that tries to collect a debt that the Bankruptcy Code makes uncollectible "risks violation of both the [FDCPA] and the Bankruptcy Code"); *Simon v. FIA Card Servs., N.A.*, 732 F.3d 259, 274 (3d Cir. 2013) (holding that the Bankruptcy Code does not preclude FDCPA claims where there is no "direct conflict" between the two); *Randolph*, 368 F.3d at 730 (holding that the Bankruptcy Code did not bar a plaintiff's Section 1692e claim because "any debt collector can comply with both [the Code's automatic stay and Section 1692] simultaneously"); *but see Walls v. Wells Fargo Bank, N.A.*, 276 F.3d 502, 510 (9th Cir. 2002) (holding that an FDCPA action could not be based on a violation of a bankruptcy discharge order).[6] As the Seventh Circuit put it, addressing a nearly identical situation, the Bankruptcy Code does not displace the

[6] The Ninth Circuit's outlier decision in *Walls* is unpersuasive. As the Third and Seventh Circuits pointed out, *Walls* relies on "precedent involving federal statutory preemption of a state-law claim," which is irrelevant to "whether a federal statute precludes a federal-law claim." *Simon*, 732 F.3d at 275 (citing *Randolph*, 368 F.3d at 733). While state-law "[p]reemption is more readily inferred," it is "rare" for one federal statute to implicitly displace another. *Randolph*, 368 F.3d at 730. *Walls* does not identify any conflict between the Bankruptcy Code and the FDCPA or provide a convincing reason why the Code should be read to implicitly displace the FDCPA where there is no "irreconcilable conflict."

FDCPA where there is no "irreconcilable conflict; instead the two statutes" merely "overlap." *Randolph*, 368 F.3d at 730.

Contrary to CICA's contentions in the district court, *Simmons v. Roundup Funding, LLC*, 622 F.3d 93 (2d Cir. 2010), does not suggest that Plaintiff's Section 1692e claim here should be precluded. In *Simmons*, the Second Circuit held only that an FDCPA claim could not be based on "the filing of a proof of claim" in bankruptcy. *Id.* at 96. It declined to consider a broader argument that "no FDCPA action can be based on an act that violates any provision of the Bankruptcy Code." *Id.* at 96 n.2. And, later, the Second Circuit rejected that broader argument and held that a debt collector *could* violate both the Bankruptcy Code and the FDCPA for trying to collect a debt that the Bankruptcy Code made uncollectible. *Garfield*, 811 F.3d at 93.

Likewise, the Supreme Court's decision in *Midland Funding LLC v. Johnson*, 581 U.S. 224 (2017), does not suggest that the Bankruptcy Code precludes FDCPA claims like those here. There, the Court held that filing a time-barred proof of claim in a bankruptcy proceeding did not violate the FDCPA. But in so holding, the Court did not suggest that the Bankruptcy Code displaced the FDCPA. Rather, the Court held that the conduct did not violate the FDCPA in the first place as a matter of statutory interpretation. *Id*. at 228. Specifically, filing a proof of claim saying a consumer owed a time-barred debt was not "false,"

"deceptive," or "misleading," the Court reasoned, because the debt was still owed even though the limitations period had expired, and nothing in the proof of claim misleadingly implied that the debt was "enforceable" (or not subject to a statute of limitations defense). *Id.* at 228-30. Likewise, the Court concluded that filing a time-barred proof of claim was not unfair or unconscionable based on a variety of "circumstances, taken together," including that protections in bankruptcy proceedings "minimize the risk" that a debtor might repay a time-barred debt "unwittingly" or simply "to avoid the cost and embarrassment of suit" and that filing a time-barred proof of claim could sometimes even "benefit a debtor." *Id.* at 231-35. Here, by contrast, CICA's statements squarely violate the FDCPA.

## CONCLUSION

For the foregoing reasons, the Court should hold that the FDCPA's prohibition on false, deceptive, or misleading representations, 15 U.S.C. § 1692e, applies even if such representations are made unintentionally and unknowingly. Further, if the Court reaches the issue, it should hold that the Bankruptcy Code does not bar the Section 1692e claim here.

Respectfully submitted,

January 2, 2024

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**CERTIFICATE OF COMPLIANCE**

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because, excluding the parts of the brief exempted by Fed. R. App. P. Rule 32(f), this brief contains 6463 words.

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**CERTIFICATE OF SERVICE**

I hereby certify that on January 2, 2024, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the First Circuit by using the appellate CM/ECF system. The participants in the case are registered CM/ECF users and service will be accomplished by the appellate CM/ECF system.

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