No. 19-14434

In the United States Court of Appeals
for the Eleventh Circuit

RICHARD HUNSTEIN
Plaintiff-Appellant

v.

PREFERRED COLLECTION AND MANAGEMENT. SERVICES, INC.
Defendant Appellee

On Appeal from the United States District Court
for the Middle District of Florida
Case No. 8:19-cv-00983-TPB-TGW

Brief of Arizona Creditors Bar Association; Attorneys Association of Alabama, Inc.; California Creditors Bar Association; Colorado Creditor Bar Association, Inc.; Creditors Rights Attorney Association Nevada; Delaware Creditors Bar Association; Georgia Creditors Council; Illinois Creditors Bar Association; Kansas Creditor Attorney Association; Maryland-DC Creditors Bar Association, Inc.; Michigan Creditors Bar Association; Minnesota Creditors' Rights Bar Association; New Jersey Creditors Bar Association; New Mexico Creditors Bar Association; North Carolina Creditors Bar Association; Ohio Creditor's Attorneys Association; Pennsylvania Creditors Bar Association; Texas Creditors' Bar Association; and Virginia Creditors' Bar Association AS *AMICI CURIAE* IN SUPPORT OF REHEARING AND REHEARING *EN BANC*

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INTEREST OF *AMICUS CURIAE*

This *amicus* brief is submitted on behalf of 19 state creditors bar associations: Arizona Creditors Bar Association; Attorneys Association of Alabama, Inc.; California Creditors Bar Association; Colorado Creditor Bar Association, Inc.; Creditors Rights Attorney Association Nevada; Delaware Creditors Bar Association; Georgia Creditors Council; Illinois Creditors Bar Association; Kansas Creditor Attorney Association; Maryland-DC Creditors Bar Association, Inc.; Michigan Creditors Bar Association; Minnesota Creditors' Rights Bar Association; New Jersey Creditors Bar Association; New Mexico Creditors Bar Association; North Carolina Creditors Bar Association; Ohio Creditor's Attorneys Association; Pennsylvania Creditors Bar Association; Texas Creditors' Bar Association; and Virginia Creditors' Bar Association (hereinafter "SCBAs"). These are not-for-profit bar associations of attorneys who represent creditors in all areas of creditors' rights law.[1] These bar associations include over 715 law firm members, all of whom must meet association standards designed to ensure experience and professionalism. In

[1] No counsel for a party authored this brief in whole or in part or made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the amici curiae or their counsel made a monetary contribution to the preparation or submission of this brief. Fed. R. App. Proc. 29(a)(4)(E).

addition to these standards, the attorneys in these law firms are subject to rules and practice standards of their respective courts and state disciplinary boards.

Members of these 19 bar associations are regularly involved in the lawful collection of consumer debts, making them subject to the Fair Debt Collection Practices Act, 15 U.S.C. §1692, *et seq.* ("FDCPA") for debts that fall within the purview of the statute. These attorneys must interpret and comply with the laws and civil procedures necessary to litigate in their state courts, as well as the requirements of the FDCPA. Members of these SCBAs have a strong interest in ensuring interpretation and application of the FDCPA in a way that allows collection attorneys to fulfill their ethical duty to advance their clients' legitimate interests within the bounds of existing law, without exposing themselves to substantial liability.

These SCBAs are the only bar associations in each of the represented states that are dedicated solely to the needs of collection attorneys. If the *Hunstein* decision is left to stand, the Eleventh Circuit's ruling would erroneously expose members of these SCBAs and their clients to liability under the FDCPA for disclosing information to parties who play integral roles in the litigation process—disclosures that *Hunstein* rendered actionable under the FDCPA. Prohibiting such communication would impede the SCBA members' ability to represent their clients. These SCBAs thus have a direct interest in this litigation, and they

authorize the filing of this brief.

STATEMENT OF THE ISSUE WARRANTING *EN BANC* REVIEW

In urging this Court to consider the question of exceptional importance involved here, the SCBAs ask that the Court consider the entirety of the FDCPA's statutory scheme when interpreting the language of §1692c(b) in the context of the necessary communications that occur during litigation. The *Hunstein* panel's narrow interpretation of §1692c(b) forgets that the FDCPA's statutory scheme contemplates the sharing of information with vendors and other third parties as part of the litigation process. The FDCPA acknowledges that information regarding debts and consumers must be shared with the court when litigation ensues. *See, e.g.,* 15 U.S.C. §1692i (setting forth the appropriate venue for collection litigation). The FDCPA recognizes that collection attorneys will communicate with courts when pleadings are filed and anticipates the further communication of such information with court staff and juries. The FDCPA allows certain disclosures to other parties and anticipates still others. *See, e.g.,* 15 U.S.C. §1692f(8), §1692b(5) (referencing permissible disclosures to a telegram service). But the Panel's narrow interpretation of §1692c(b) would make it virtually impossible to use courts to recover defaulted debts and follow other laws that require incidental disclosure to vendors, because the interpretation overlooks that the FDCPA's statutory scheme tacitly condones the use of such vendors as a

necessary component of the litigation process. As but one example, compliance with the Servicemembers' Civil Relief Act, 50 U.S.C. §3931, requires attorneys to communicate information about consumers to the Department of Defense to confirm that a consumer is not on active-duty status prior to obtaining default judgment. Under the Panel's narrow interpretation of the FDCPA, such communications—though necessary to comply with federal law—may expose collection attorneys to FDCPA liability.

The Panel recognizes that its decision risks upsetting the *status quo* without promoting consumer privacy. But the statutory text, legislative history, and judicial precedent all confirm that §1692c(b) can and should be interpreted to prohibit *impermissible* disclosures to non-essential third parties, and not disclosures to necessary parties who further collection efforts or to whom such disclosure is impossible to avoid. Such an interpretation will further the consumer privacy goals of §1692c(b) and harmonize with the totality of the FDCPA's statutory scheme.

ARGUMENT

§1692c(b) states:

> Except as provided in §1692b of this title, without the prior consent of the consumer given directly to the debt collector, or the express permission of a court of competent jurisdiction, or as reasonably necessary to effectuate a postjudgment judicial remedy, a debt collector

> may not communicate, in connection with the collection of any debt, with any person other than the consumer, his attorney, a consumer reporting agency if otherwise permitted by law, the creditor, the attorney of the creditor, or the attorney of the debt collector.

15 U.S.C. §1692c(b).

In *Hunstein*, the Panel held that a debt collector's transmission of information about the consumer and his debt was a "communication in connection with debt collection," and that the consumer had thus pled a colorable claim for violation of §1692c(b) sufficient to satisfy Fed. R. Civ. P. 8(a). The Panel's review of the language of §1692c(b) to determine whether Hunstein had pled a colorable claim did not consider the totality of the FDCPA statutory scheme to give force and effect to the entirety of the statutory scheme.

The cardinal canon of statutory interpretation is that courts must presume that a legislature says in a statute what it means and means in a statute what it says. *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 241-42 (1989). And thus, the starting point for all statutory interpretation is the language of the statute itself. *Harris v. Garner*, 216 F.3d 970, 972-73 (11th Cir. 2000) (*en banc*). Courts "do not look at one word or term in isolation, but instead [] look to the entire statutory context." *EEOC v. STME, LLC*, 938 F.3d 1305, 1314 (11th Cir. 2019). The Eleventh Circuit allows section headings to be used for interpretive purposes when "they shed some light on some ambiguous word or phrase." *Brotherhood of R. Trainmen v.*

Baltimore & O. R. Co., 331 U.S. 519, 528-29 (1947); *accord United States v. Ferreira*, 275 F.3d 1020, 1029 (11th Cir. 2001).

A. The Panel Did Not Consider That the FDCPA Permits Incidental Contacts.

The Panel's narrow interpretation of §1692c(b)'s prohibition against certain disclosures in connection with debt collection creates conflicts with other provisions of the FDCPA, and even within §1692c(b) itself. For instance, the Panel's interpretation would arguably prevent the unauthorized disclosure of debt-related information to a telegram company. However, 15 U.S.C. §§1692f(5), 1692f(8) and 1692b(5) specifically *permit* disclosures to telegram companies. The Federal Trade Commission ("FTC"), responsible for FDCPA oversight and interpretation for decades, confirmed that disclosures to telegram companies (and their employees) were permissible to the extent "necessary to enable the collector to transmit the message to, or make contact with, the consumer." *See* FTC, Statements of General Policy or Interpretation Staff Commentary on the FDCPA ("Staff Commentary"), 53 Fed. Reg. 50097, 50104 (Dec. 13, 1988); *see also Sanchez Fajardo v. United States AG*, 659 F.3d 1303, 1307 (11th Cir. 2011) ("an agency's interpretation of a statute which it administers is entitled to deference if the statute is silent or ambiguous and the interpretation is based on a reasonable construction of the statute"). Applying the canons of statutory interpretation, Congress clearly intended

to permit debt collectors to communicate information to telegram vendors—who are third parties—because otherwise, communication by telegram would be impossible. Any other interpretation would render 15 U.S.C. §§1692f(5), 1692f(8), and 1692b(5) superfluous. Clearly, Congress did not intend the limitations in 15 U.S.C. §1692c(b) to prohibit disclosures incidental to permissible communications, such as disclosures to letter vendors.

B. The Panel's Holding Would Functionally Prohibit Collection Litigation.

The Panel's narrow interpretation of §1692c(b) would result in the practical cessation of collection litigation, where incidental disclosures are necessary to the commencement and litigation of consumer collection lawsuits. The FDCPA clearly contemplates the use of collection lawsuits as a means of debt collection. *See, e.g.*, 15 U.S.C. §1692i. Indeed, 15 U.S.C. §1692c(b) expressly exempts communications necessary to enforce postjudgment remedies from the prohibition against third-party disclosures. Other provisions emphasize the FDCPA's recognition of the role litigation plays in the debt collection process: §1692e(13) prohibits falsely representing that a document is legal process, thus acknowledging the acceptable utilization of *true* legal process in connection with debt collection. And by excluding process servers from the definition of "debt collector," Congress contemplated disclosure of information to court-adjacent personnel in recognition of the role they play in the litigation process. *See* 15 U.S.C. §1692a(6)(D).

To file and prosecute a lawsuit, attorneys must disclose consumer- and debt-related information to numerous court-adjacent parties. The collection attorney must disclose the consumer's name and other identifying information to the Department of Defense to determine if the consumer is on active-duty status pursuant to the Servicemembers' Civil Relief Act, 50 U.S.C. §3931. Filing pleadings with the court discloses information about the consumer and her debt to court staff that processes the pleading, as well as to the couriers and process servers who deliver the pleadings. Many states utilize electronic filing platforms, administered by third-party vendors, through which pleadings and other court-related documents are submitted. Many state laws permit publication service or substitute service, where a complaint can be served on any adult residing in the consumer's house or located at a consumer's place of employment—all necessarily disclosing information about the consumer and her debt to third parties. Many courts require arbitration, mediation, or settlement conferences, requiring disclosure of information about the consumer and her debt. Both before and during the litigation process, attorneys routinely transmit information to third parties in connection with their representation of clients, as a necessary component of the pre-litigation and litigation processes.

Yet the Panel treats §1692c(b) as including only its explicitly stated exceptions, which would functionally grind collection litigation to a halt. Section 1692c(b) includes no exception for communicating information to a court clerk

when a lawsuit is filed. It does not expressly permit the disclosure of information to a jury. It does not explicitly allow for the communication of information to entities necessary to ensure compliance with the Servicemembers' Civil Relief Act, or with vendors tasked with confirming a consumer's residence for venue determination purposes. Under the Panel's literal interpretation of §1692c(b) because such entities are not *specifically* identified as exceptions to the prohibition against third-party disclosures, *all* such disclosures put collection attorneys at risk of suit for alleged violations of federal law. But these exceptions *must* exist, because the FDCPA both expressly permits debt collection litigation and clearly contemplates disclosure of debt collection-related information to third parties not explicitly identified in §1692c(b). Indeed, without such exceptions, collection litigation would be functionally impossible.

These disclosures are not the improper third-party disclosures Congress contemplated when it drafted §1692c(b); rather, the recipients of these incidental disclosures are the "mediums," as referenced in 15 U.S.C. §1692a(2), through which debt collection communications occur. Taken to its logical conclusion, the Panel's literal interpretation of §1692c(b) would yield the absurd result of putting collection attorneys at risk of liability simply for litigating on behalf of their clients—which, in turn, has the chilling effect of abridging creditors' rights to petition the courts for redress of their grievances. Since the FDCPA as a whole specifically contemplates

both debt collection litigation and the disclosure of information to incidental third parties necessary to pursue such litigation, the Panel's conclusion is in clear conflict with both the statutory text and Congressional intent.

C. A Strict Interpretation of §1692c(b) Does Not Further Consumer Privacy Protections.

The Panel recognized that invasion of privacy is "a core concern animating the FDCPA." *See Douglass v. Convergent Outsourcing*, 765 F.3d 299, 303 (3d Cir. 2014); *accord* 15 U.S.C. §1692(a) (stating that unfair debt collection practices lead to, among other things, "invasions of individual privacy"). Congress addressed this concern through §1692c(b) by prohibiting debt collectors from communicating with third parties ("persons") about consumers' debts. Senate Report 95-382 noted the specific purpose of §1692c(b), "an extremely important provision":

> In addition, this legislation adopts an extremely important protection recommended by the National Commission on Consumer Finance and already the law in 15 States: it prohibits disclosing the consumer's personal affairs to third persons. Other than to obtain location information, a debt collector may not contact third persons such as a consumer's friends, neighbors, relatives, or employer. Such contacts are not legitimate collection practices and result in serious invasions of privacy, as well as the loss of jobs.

S. Rep. 95-382, at 4 (1977), *reprinted in* 1977 U.S.C.C.A.N. 1695, 1699.

The FTC has further explained the purpose underlying §1692c(b):

> The restriction imposed by [§1692c(b)] on communicating with third parties is intended to prevent unscrupulous debt

> collectors from embarrassing consumers and invading their privacy by revealing the existence of their debt to friends, neighbors or other third parties who do not already know of the debt.

FTC Staff Opinion Letter to Borowski (Nov. 6, 1992), available at http://www.cardreport.com/laws/fdcpa/ftc-opinion/borowski.html.

This purpose appears to drive the FTC's opinion that disclosure of information to a translator, who could be a court-adjacent party, is an incidental contact outside of the prohibition against third-party disclosure found in §1692c(b). FTC Staff Opinion Letter to Zbrzeznj (Sept. 21, 1992), available at http://www.cardreport.com/laws/fdcpa/ftc-opinion/zbrzeznj.html.

Based on the legislative history and the pronouncements of the FTC, the Court should harmonize §1692c(b) with the entire statute by interpreting "persons" in §1692c(b) to be third parties not reasonably necessary to communicate with consumers or pursue judicial remedies. This definition comports with the heading of §1692c(b), "Communications with Third Parties." This definition would allow incidental communications with parties related to the debt collector, just as the FDCPA contemplates.

This interpretation would also allow for incidental communications with process servers, even when process is substitute served or served by a sheriff. The FTC Staff Commentary, *supra*, 53 Fed. Reg. at 50104, supports this conclusion,

explaining that §1692c(b)'s third-party disclosure prohibition "was not intended to prohibit communications by attorneys that are necessary to conduct lawsuits on behalf of their creditor clients." *Id.* This Commentary contradicts the Panel's narrow interpretation of §1692c(b) limited to the express language of the statute.

This proposed interpretation of "persons" would maintain the prohibition against impermissibly contacting third parties as a means of pressuring, coercing, or embarrassing consumers into paying their debts—the true purpose behind §1692c(b)'s inclusion in the statute—while simultaneously recognizing that "communicating" with "third parties" is a necessary part of the debt collection process.

CONCLUSION

For the foregoing reasons, the SCBAs respectfully submit that the Eleventh Circuit should review this case *en banc* to interpret §1692c(b) in the context of the entire FDCPA. This issue of exceptional consequences not only impacts the collection attorney members of the SCBAs but their clients as well. If the Panel's narrow interpretation stands, the SCBA member attorneys' ability to litigate consumer collection matters on behalf of their clients will be thwarted.

Dated: June 1, 2021

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the typeface requirements of Rule 32(a)(5) and the typestyle requirements of Rule 32(a)(6) because this brief was prepared in 14-point Times New Roman, a proportionally spaced typeface, using Microsoft Word for Microsoft 365. *See* Fed. R. App. P. 29(a)(4), 32(g)(1). This brief complies with the type-volume limitation of Eleventh Circuit Rule 29-3 because it contains 2,593 words, excluding the parts excluded by Eleventh Circuit Rule 29-3. *See* Fed. R. App. 29(b)(4).

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CERTIFICATE OF SERVICE

I certify that I electronically filed the foregoing Brief of *Amicus Curiae* Nineteen State Creditors Bar Associations in Support of Appellee's Petition for Rehearing and for Rehearing *En Banc* with the Clerk of the Court for the United States Court of Appeals for the Eleventh Circuit by using the appellate CM/ECF system on June 1, 2021.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Dated: June 1, 2021

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