No. 19-14434

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 *AMICUS CURIAE* LIVEVOX, INC., IN SUPPORT OF APPELLEE'S PETITION FOR REHEARING *EN BANC*

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

In accordance with Fed. R. App. P. 26.1, *Amicus Curiae* LiveVox, Inc. does not have a corporate parent and no publicly held company holds an ownership interest in LiveVox, Inc.

Pursuant to 11th Cir. R. 26.1-1(a)(3), LiveVox, Inc., adopts the Certificate of Interested Persons and Corporate Disclosure Statement filed by Appellee Preferred Collection and Management Services, Inc., which statement is correct and complete.

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INTEREST OF THE *AMICUS CURIAE*

LiveVox, Inc. is a cloud-based software company that provides a full range of contact center services: outbound and inbound communication via voice, SMS, email, and chat. LiveVox's platform has a broad array of compliance features that enable its customers to comply with the law and effectively communicate with consumers. LiveVox's customers consist of third-party debt collection agencies, business process outsourcers (BPOs), financial institutions of all sizes, large retail enterprises, healthcare companies, and telecommunications companies, among others.

LiveVox's technology serves as both a service and platform for debt collectors to assure their consumer contact strategies comply with local, state, and federal laws. Among other things, the technical controls and resources in LiveVox's services and platform (collectively, "LiveVox Platform") fulfill a critical, if invisible to the consumer, consumer protection function: it helps assure debt collectors are contacting the right persons, for the right accounts, at frequencies and times and in the manner that accords with those consumers' communication preferences. The built-in controls of the LiveVox Platform provide assurances to debt collectors that they are compliant with the Fair Debt Collection Practices Act ("FDCPA").

As a trusted technology vendor for both debt collectors and the financial services industry, LiveVox has an interest in this litigation. If the panel's decision stands, and its logic extends not only to dunning vendors but to all outsourced

vendors, collection agencies will have to develop their own internal technology—an impractical endeavor—to manage the accounts placed by their creditor clients in order to communicate effectively with consumers. Collection agencies are not IT professionals. The ability of a collection agency to develop its own sophisticated software solution that would sufficiently ensure the applicable consumer protections under the FDCPA is remote at best.

LiveVox has a significant stake in ensuring that the FDCPA is interpreted in way that provides its collection agency customers with a clear method for fulfilling their statutory obligations in a compliant and consumer-centric manner. The panel decision creates industry confusion. Thus, LiveVox has a direct interest in this litigation and has authorized the filing of this brief.

No counsel for any party authored this brief in whole or in part.

No party or party's counsel contributed money that was intended to fund preparing or submitting this brief.

No person other than the *amicus curiae*, its customers, or its counsel contributed money that was intended to fund preparing or submitting this brief.

STATEMENT OF ISSUES

1. Whether the panel failed to consider the proper meaning of "persons" and "medium" when considering whether the transfer of information to or from a letter vendor violated Section1692c(b) of the FDCPA.

2. Whether the panel's decision overlooked long standing interpretation of the FDCPA by the FTC and now the CFPB, including the failure to consider the recently proposed Regulation F, 12 C.F.R. § 1006.1 et seq. which specifically permits the use of vendors, including mail vendors by debt collectors.

SUMMARY OF ARGUMENT

An *en banc* hearing or rehearing is warranted if "the proceeding involves a question of exceptional importance." Fed. R. App. P. 35(a)(2). This case involves a question of exceptional importance. *Hitchcock v. Wainwright*, 777 F.2d 628, 629 (11th Cir. 1985)

The panel emphasized that it must "interpret the law as written" and that its holding reflected a strict reading of the statute. But the panel failed to consider the statute as a whole and, in particular, the differences between "third parties" and "mediums." Those terms are not mutually exclusive especially in the context of communications with consumers under the FDCPA. Even by a strict reading of the statute, the panel's decision that transferring information to a letter vendor was a "third party communication," without further analysis, was incorrect.

In addition, as noted in the amicus briefs of other interested parties, the panel's decision was made without the benefit and context of either past commentaries on the FDCPA by the Federal Trade Commission or the Consumer Financial Protection Bureau's publication of the long-awaited debt-collection rule, Regulation F. 85 Fed. Reg. 76734; 86 Fed. Reg. 5766. Lacking the benefit of this agency interpretation of the FDCPA, the panel's interpretation contradicts the intent and purpose of the statute.

ARGUMENT

I. The panel's decision deviated from basic principles of statutory construction.

Several motions for leave to file amicus briefs and accompanying briefs argue forcefully that in its decision, the Court's statutory construction did not consider all the relevant provisions of the FDCPA. Courts are obligated to interpret statutes not in isolation but must "follow the cardinal rule that a statute is to be read as a whole since the meaning of statutory language, plain or not, depends on context." *King v. St. Vincent's Hosp.*, 502 U.S. 215, 221 (1991) (internal citations omitted).

Section 1692c(b) of Title 15 prohibits third-party communications "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." Section 1692a(2) defines a "communication" as the "conveying of information regarding a debt directly or indirectly to any person through any medium." *Id*. (emphasis added).

The mail vendor (and any similar technology vendor) is not a "person" under Section 1692c(b) but a "medium" under Section 1692a(2).

"Medium" is "something through or by which something is accomplished, conveyed, or carried on" as "an intermediate or direct instrumentality or means" especially "a channel, method, or system of communication, information, or entertainment." Connection, Webster's Third International Dictionary at 481 (1961). A

plain reading of the FDCPA suggests that Congress contemplated the use of "mediums" to act as an intermediary to convey information between the collector and consumer. As noted above, both the CFPB and the FTC anticipate and provide examples of situations in which the use and disclosure of information to vendors through a medium may be not only permitted but mission critical to assuring debt collection services are delivered in a compliant manner, respectful of consumers' FDCPA rights and communication preferences.

Based on this plain reading of the statute as a whole, communications through a medium, such as LiveVox or another vendor, are permitted.

II. Rehearing *en banc* is necessary to consider and provide appropriate deference to regulatory interpretations of the FDCPA by the FTC and the CFPB in Regulation F.

As noted in the amicus briefs of other interested parties, the panel's decision was made without the benefit and context of either past commentaries on the FDCPA by the FTC or the CFPB's publication of the long-awaited debt collection rule, Regulation F. 85 Fed. Reg. 76734; 86 Fed. Reg. 5766. Consideration of the regulations promulgated by these two agencies charged with the oversight of the FDPCA would have provided critical guidance.

When the FDCPA was enacted in 1977, the FTC was charged with its enforcement and interpretation, although it was never given rulemaking authority. Yet in several of the FTC's reports and interpretive comments, it has catalogued

enforcement actions when it found improper third-party disclosures under Section 1692c(b) of the FDCPA.[1] Despite rigorous enforcement of this FDCPA provision, at no time has the FTC characterized a debt collector's provision of information to one of its vendors as a violation of the FDCPA. And in reports dating back to 1988, the FTC clarifies, as technology evolves along with the complexity of matters related to debt collection, that not all transmissions of information about a debt fall within the definition of "communication" under the FDCPA.[2] For example, the FTC explains that sharing information for purposes of sending a telegram does not run afoul of the FDCPA nor does giving information to a process server or submitting it in some system related to legal action to collect a debt.[3]

The FTC also comments that incidental disclosures of information about a debt do not violate the prohibition against third-party disclosure such as "when an

[1] *See* FTC's 2019 Comments to the CFPB on Regulation F at 5, available at https://www.ftc.gov/system/files/documents/advocacy_documents/comment-staff-federal-trade-commissions-bureau-consumer-protection-matter-proposed-rule-request/final_-_cfpb_debt_coll_draft_comment_9-13_v2_1pm_ver_to_comm.pdf.

[2] *See* 53 Fed. Reg. 50097-50110 (Dec. 13, 1988) *FTC Statements of General Policy or Interpretation Staff Commentary on the Fair Debt Collection Practices Act.*

[3] *Id.* at 50101.

eavesdropper overhears a conversation with the consumer."[4] And the FTC noted that a legal collector could "use a computer service to send letters on its own behalf" and that it was "permissible to send a letter generated by a machine, such as a computer or other printing device."[5]

The CFPB was created in 2012 with the purpose of implementing and enforcing "federal consumer financial law consistently" and to ensure, among other things, "that markets for consumer financial products and services are fair, transparent, and competitive." 12 U.S.C. § 5511(a). As part of its mandate, the CFPB was afforded the power to promulgate rules implementing the FDCPA. *See* 15 U.S.C. § 1692l(b)(6). After over seven years of research, focus groups, public hearings, publications, and requests for comments and information, the CFPB published what

[4] *Id.* at 50104. Interestingly although the Court did not consider any of the medical privacy issues in the facts underlying this action, the laws and regulations known as the Health Insurance Portability and Accountability Act of 1996 ("HIPAA") expressly characterize the use and disclosure of information by or on behalf of a covered entity by a vendor or by a vendor's subvendor as permissible, subject to HIPAA's restrictions, and also does not interpret incidental disclosures as violative of a patient's or patient's guarantor's privacy rights. Here, the underlying debt is a healthcare debt and the published privacy practices of the creditor, required by HIPAA, expressly contemplate the use and disclosure of information, https://www.hopkinsmedicine.org/Privacy/patients.html#:~:text=Our%20Notice%20of%20Privacy%20Practices%20identifies%20that%20our%20Johns%20Hopkins,HIEs)%20as%20permitted%20by%20law. And the U.S. Department of Health and Human Services, the regulator with authority over HIPAA has since 2002 published a "frequently asked question" that states that the "Department is not aware of any conflict between [HIPAA's] Privacy Rule and the Fair Debt Collection Practices Act." *See* https://www.hhs.gov/hipaa/for-professionals/faq/268/does-the-hipaa-privacy-rule-prevent-health-care-providers-from-using-debt-collection-agencies/index.html. In short, three federal regulators—HHS, the FTC, and the CFPB—all have considered debt collectors' use of other vendors and none have found it to violate the FDCPA or even HIPAA.

[5] *Id.* at 50105-06.

is to be known as "Regulation F." The CFPB published the Final Rule in October 2020, with an effective date of November 30, 2021. 85 Fed. Reg. 76734. A Supplemental Final Rule was published in January 2021 with the same effective date. 86 Fed. Reg. 5766 (collectively, the "Final Rule" or "Regulation F").

Regulation F contemplates and expects debt collectors to use outside vendors, including letter vendors, and makes apparent that the CFPB, including various state regulators, support the use of third-party vendors to promote compliance with consumer protection laws. In fact, the CFPB, like other regulators, expressly evaluates the integrity of a debt collector's vendor management compliance program when conducting an examination or review.[6] Unfortunately, because of the timing of this case and publication of Regulation F, the panel did not have a chance to consider the regulation and give it appropriate deference.

Before the publication of Regulation F, the CFPB undertook considerable research of the vendors and service providers supporting the debt-collection industry and published a report summarizing its key findings in 2016.[7] To complete its research, the CFPB interviewed not only debt collectors but also many outside vendors who provide products, services, and technology in connection with debt collection.

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[6] *See CFPB Debt Collection Examination Procedures* at 5, https://files.consumerfinance.gov/f/documents/201210_cfpb_debt-collection-examination-procedures.pdf.

[7] *See Study of Third Party Debt Collectors*, July 2016, https://files.consumerfinance.gov/f/documents/20160727_cfpb_Third_Party_Debt_Collection_Operations_Study.pdf.

Because the CFPB is promulgating the first rules interpreting the FDCPA since its enactment, the Court should ensure that its own interpretation of Section 1692c(b) is consistent with that of the CFPB as expressed in the Final Rule and other official regulatory comments.[8] The CFPB has recognized the value and import of service providers or vendors and has directed its supervised industry to provide oversight to its service providers.[9] In unwavering language, the CFPB has written that "[t]he CFPB expects supervised banks and nonbanks to have an effective process for managing the risks of service provider relationships. The CFPB will apply these expectations consistently, regardless of whether it is a supervised bank or nonbank that has the relationship with a service provider."[10]

Furthermore, Congress specifically directed courts to apply deference to the CFPB's rule-making:

> [T]he deference that a court affords to the Bureau with respect to a determination by the Bureau regarding the meaning or interpretation of any provision of a Federal consumer financial law shall be applied as if the Bureau were the only agency authorized to apply, enforce, interpret, or administer the provisions of such Federal consumer financial law.

12 U.S.C. § 5512(b)(4)(B).

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[8] *See CFPB Bulletin on Service Providers under Dodd-Frank,* https://files.consumerfinance.gov/f/20120212_cfpb_ServiceProvidersBulletin.pdf.

[9] *Id.*

[10] *Id.*

LiveVox urges this Court to review the panel decision in light of the regulatory perspective of the FTC and the CFPB because the use of third-party vendors (such as mail vendors) by debt collectors is assumed, adopted, and referred to throughout the Final Rule.[11]

CONCLUSION

The panel's decision failed to follow basic statutory-construction rules. Similarly, the panel was not afforded the opportunity to determine the implications of the Consumer Financial Protection Bureau's Regulation F. Respectfully, the Court should grant rehearing *en banc* to fully consideration these ramifications.

[11] *See, e.g.*, 85 Fed. Reg. 76734-76736, 76738, 76842, 76858, 76883, 76885, 76907; 86 Fed. Reg. 5801, 5845, 5859.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

In accordance with Federal Rule of Appellate Procedure 32(g)(1), I certify that the foregoing document complies with the type-volume limitation of Rule 29(b)(4) because, excluding the parts of the document exempted by Rule 32(f), it contains 2,205 words.

This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionately spaced typeface using Microsoft Word in 14-point Times New Roman font.

/s/ Jadd F. Masso
Jadd F. Masso

CERTIFICATE OF SERVICE

I certify that I electronically filed the foregoing document 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.

/s/ Jadd F. Masso
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