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 AMICI CURIAE MORTGAGE BANKERS ASSOCIATION, AMERICAN BANKERS ASSOCIATION, AMERICAN FINANCIAL SERVICES ASSOCIATION, CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, CONSUMER BANKERS ASSOCIATION, CREDIT UNION NATIONAL ASSOCIATION, AND HOUSING POLICY COUNCIL IN SUPPORT OF APPELLEE'S PETITION FOR REHEARING AND FOR REHEARING EN BANC

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June 1, 2021

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Amici Curiae Mortgage Bankers Association ("MBA"), American Bankers Association ("ABA"), American Financial Services Association ("AFSA"), Chamber of Commerce of the United States ("the Chamber"), Consumer Bankers Association ("CBA"), Credit Union National Association ("CUNA"), and Housing Policy Council ("HPC") each states that it is a non-profit corporation that has no parent corporation. No publicly held corporation owns 10% or more of the stock of any of the amici.

Pursuant to Eleventh Circuit Rule 26.1-2, counsel for amici curiae certify that the following is a complete list of all trial judges, attorneys, persons, associations of persons, firms, partnerships, or corporations that have an interest in the outcome of this case, including subsidiaries, conglomerates, affiliates, parent corporations, any publicly held corporation that owns 10% or more of the party's stock, and other identifiable legal entities related to a party:

American Bankers Association – Amicus Curiae

American Financial Services Association – Amicus Curiae

Barber, the Honorable Thomas – United States District Judge

Bonan, Thomas M. – Counsel for Appellant

Bradley Arant Boult Cummings LLP – Firm representing Amici Curiae

Chamber of Commerce of the United States – Amicus Curiae

Consumer Bankers Association – Amicus Curiae

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Respectfully submitted,

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STATEMENT OF COUNSEL CONCERNING EN BANC REHEARING

I express a belief, based on a reasoned and studied professional judgment, that this appeal involves the following questions of exceptional importance:

1. Whether the panel erred under *Spokeo, Inc. v. Robins*, 136 S.Ct. 1540 (2016) and this Court's precedent in *Nicklaw v. CitiMortgage, Inc.*, 839 F.3d 998 (11th Cir. 2016) by determining that the plaintiff had suffered an injury for the purposes of Article III standing due to the connection between the claimed violation of 15 U.S.C. § 1692c(b) and common law torts relating to protection of privacy despite failing to show that he had suffered any sort of concrete harm.[1]

2. Whether the panel's expansive interpretation of 15 U.S.C. § 1692c(b)—as prohibiting anyone falling under the Fair Debt Collection Practices Act's ("FDCPA") definition of "debt collector" from transmitting information "with reference to" or "concern[ing]" a debt to a third party (subject to narrow exceptions)—renders the statute unconstitutional under the First Amendment because it renders debt collectors and loan servicers unable to interact with the service providers and vendors who perform critical operations, causing significant harm to consumers and the financial services industry, without providing any material benefit for consumer privacy.

[1] The undersigned amici agree with Preferred that the panel's determination that Hunstein had alleged the existence of an injury in fact sufficient for Article III standing cannot be reconciled with *Spokeo* and this Court's precedents. Because that argument has been addressed in other briefs, it will not be repeated here.

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STATEMENTS OF INTEREST[2]

MBA is a national association representing over 2,200 members of the real estate finance industry. For more information, please see https://www.mba.org/.

ABA is the principal national trade association of the financial services industry in the United States with members in all fifty states. For more information, visit https://www.aba.com/.

AFSA, founded in 1916, is the national trade association for the consumer credit industry, protecting access to credit and consumer choice. For more information, visit https://afsaonline.org/.

The Chamber is the world's largest business federation, representing approximately 300,000 direct members and indirectly representing the interests of more than 3 million companies and professional organizations. For more information, visit https://www.uschamber.com.

CBA is the only member-driven trade association focused exclusively on retail banking. CBA members operate in all 50 states, serve more than 150 million Americans, and hold two thirds of the country's total depository assets. For more information, visit https://www.consumerbankers.com/.

CUNA is the largest trade association in the United States serving America's credit unions. For more information, visit https://www.cuna.org/.

[2] For clarity, the listed amici curiae are collectively named the "Financial Industry Amici."

HPC is a trade association comprised of the leading national mortgage lenders and servicers, mortgage and title insurers, and technology and data companies. For more information, visit www.housingpolicycouncil.org.

No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution to fund preparation or submission of this brief. No person other than foregoing amici curiae and their counsel made a monetary contribution to this brief's preparation or submission.

STATEMENT OF THE ISSUE

Whether the Court should adopt an interpretation of Section 1692c(b) that avoids rendering it unconstitutional under the First Amendment by imposing overly broad restrictions on the free speech rights of FDCPA "debt collectors" that do not directly advance the interest of prohibiting abusive debt collection practices and are not narrowly tailored to protect consumer privacy?

STATEMENT OF FACTS

The Financial Industry Amici adopt the facts as stated in Appellee Preferred Collection and Management Services, Inc.'s ("Preferred") Petition for Rehearing and for Rehearing En Banc.

INTRODUCTION

The Financial Industry Amici submit this Brief in support of Preferred's petition for *en banc* review because this case is of exceptional importance to the financial services industry and American consumers.

En banc review is required because the Court's decision prohibits not only third-party debt collectors, but the entire financial services industry—including banks, credit unions, and finance and mortgage companies—from using third-party service providers that are vital to servicing of loans. These service providers make financial services more affordable and efficient for consumers and are particularly important now in reaching customers impacted by COVID-19. The decision also threatens to limit the ability to share information necessary for buying, selling, and securitizing loans, which is critical to the financial services market. None of this was intended by the drafters of a statute meant to curb abusive debt collection practices.

The panel's broad reading of Section 1692c(b) renders the statute in violation of the First Amendment. In fact, under the panel's interpretation, Section 1692c(b) may be the most burdensome restriction on commercial speech in the federal code. Yet this heavy restriction cannot be justified by the promise of advancing a substantial interest in a tailored manner. As the panel expressly acknowledged in its decision, its interpretation of the statute does "not purchase

much in the way of 'real' consumer privacy," and the consequences are not "particularly sensible or desirable." This Court should grant *en banc* review and construe the statute narrowly to avoid serious constitutional concerns.

ARGUMENT

I. The Interpretation of Section 1692c(b) Is a Question of Exceptional Importance Because of Dire Ramifications for Consumers and the Financial Services Industry.

The proper interpretation of Section 1692c(b) is a "question of exceptional importance" warranting *en banc* review because the panel's reading of the statute threatens dire consequences for consumers and the financial services industry. Fed. R. App. 35(a); *Cmty. State Bank v. Strong*, 565 F.3d 1305 (11th Cir. 2009).

The FDCPA does not just apply to third-party debt collection firms; the statute's broad definition of "debt collector" encompasses servicers of consumer and mortgage loans that do not acquire ownership of the underlying debt, but acquire servicing rights after the loan is in default. *See* 15 U.S.C. § 1692a(6)(F). Mortgage servicing companies acquire servicing rights to portfolios of loans without acquiring ownership—and defaulted debt comprises some fraction of those portfolios, making those servicing companies FDCPA "debt collectors" for those loans. Moreover, some state laws take the FDCPA's substantive requirements and apply them to first-party creditors, a group that is not covered by the FDCPA. The upshot is that a change in the interpretation of the FDCPA doesn't just affect third-

party debt collection businesses; ultimately, it applies to nearly every bank, credit union, finance company, and loan servicer.

The panel's interpretation of Section 1692c(b) promises huge negative consequences for consumers and communities. National loan servicers rely on vendors to perform difficult tasks associated with contacting consumers in delinquency or default. In large part, the vendor-performed tasks were designed with pro-consumer goals, such as preventing foreclosure, limiting property abandonment and blight, and preventing lapses in tax payments and property insurance coverage.

Vendors typically have levels of subject-matter expertise exceeding loan servicers. Through specialization in certain servicing-related tasks, vendors maximize compliance while minimizing costs, ultimately lowering the costs of credit for consumers.

The panel's reading of Section 1692c(b) throws all of these well-established and reasonable business practices into doubt. The loan servicing industry's reliance on third-party vendors to promote compliance with existing law might become unviable. Loan servicers cannot adjust their use of vendors on a loan-by-loan basis; instead, the FDCPA imposes a regulatory floor that applies to the loan servicers' entire servicing portfolio. Practically speaking, that means for all consumer and mortgage loans, loan servicers will have to reconsider whether they can engage

third parties such as housing counselors, tax-and-insurance monitoring services, and property maintenance companies without violating the FDCPA. In many cases, loan servicers will not be able to transfer servicing rights for acquired defaulted loans to servicers with specialized expertise for handling such loans, as "communications" about those accounts might violate Section 1692c(b).

The panel's reading of Section 1692c(b) also harms consumers by increasing credit costs for credit and restricting access to financing. Under the panel's interpretation, Section 1692c(b) severely restricts loan servicers and debt collectors' ability to service loans and collect debts by prohibiting them from employing business partners and vendors. As the Federal Reserve Bank of New York explained, such restrictions on debt collection practices harm creditors and consumers—particularly consumers who have the greatest need for credit. *See generally* Fed. Reserve Bank of N.Y., Staff Report No. 814 (May 2017).[3]

In short, consumers will suffer under the panel's decision. While the impacts to the loan servicing industry could be devastating to thousands of Americans employed in it, it will be just as devastating for consumers and their communities.

[3] *Available at* https://www.newyorkfed.org/medialibrary/media/research/staff_reports/sr814.pdf (last accessed May 25, 2021).

II. The Panel's Construction of Section 1692c(b) Renders it an Unconstitutional Limitation on Speech.

A. Section 1692c(b) does not directly advance Congress's interest in preventing abusive debt collection practices and is not narrowly tailored to achieve that purpose.

Section 1692c(b) is a content-based speech restriction. A debt collector may "communicate" with a mailing and printing vendor about any number of subjects. It may discuss church, politics, family life, or college football—but, under the panel's interpretation, it may not broach any subject falling under the broad category of communications "with reference to" or "concern[ing]" a debt. Panel Op. at 14.

While debt collectors' communications with mail vendors may not be the classic form of speech given rigorous First Amendment protection, the Constitution still applies. *See ACA Int'l v. Healey*, 457 F. Supp. 3d 17, 26-27 (D. Mass. 2020) (plaintiff was likely to prevail on First Amendment challenge to law prohibiting debt collectors from making collection calls to consumers). Content-based restrictions on truthful commercial speech must, at the very least,[4] serve a "substantial" governmental interest, "directly advance" that asserted interest, and be "narrowly tailored" to those goals. *Central Hudson Gas & Electric Corp. v.*

[4] In *Barr v. Am. Ass'n of Political Consultants*, 140 S. Ct. 2335 (2020), the United States Supreme Court applied strict scrutiny to a content-based speech restriction in the Telephone Consumers Protection Act favoring the collection of government debt. Naturally, if the panel's interpretation of Section 1692c(b) cannot survive intermediate scrutiny, it fails under strict scrutiny review.

Public Service Commission of New York, 447 U.S. 557, 561 (1980). There must be "a fit between the restriction and the government interest that is not necessarily perfect, but reasonable." *United States v. Edge Broad. Co.*, 509 U.S. 418, 429 (1993).

The Financial Industry Amici recognize a governmental interest behind the enactment of Section 1692c(b). Congress enacted the FDCPA to "eliminate abusive debt collection practices by debt collectors." Congress believed Section 1692c(b) fulfilled this role by barring debt collectors from contacting "a consumer's friends, neighbors, relatives, or employer," because contacting these persons "are not legitimate collection practices and result in serious invasions of privacy, as well as the loss of jobs." S. Rep. No. 95-382, *reprinted at* 1977 U.S. Code Cong. & Admin. News 1695, 1699.

The panel's reading of Section 1692c(b) does not "directly advance" Congress's purpose in banning abusive third party "pressure contacts." The panel's interpretation of Section 1692c(b) extends far beyond prohibiting abusive practices of contacting bystanders such as the "consumer's friends, neighbors, relatives, or employer." Eliminating routine, confidential business communications is not the "substantial" interest behind Section 1692c(b), and prohibiting those communications does nothing to prohibit abusive debt collection practices.

For similar reasons, under the panel's reading, Section 1692c(b) is far "more extensive than necessary to serve," *Central Hudson*, 447 U.S. at 566, the congressional interest behind the FDCPA. Section 1692c(b) applies to all communications that, in any way, "concern[]" or are "with reference to" a debt, and prohibits such communications to *all* third parties, minus only six enumerated exceptions. By contrast, the Gramm-Leach-Bliley Act ("GLBA")—perhaps the broadest national privacy-focused law—only prohibits disclosing specific "nonpublic personal information," and does not permit consumers to opt out of disclosures between the financial institution and contractual partners with a confidentiality agreement. *See* 12 C.F.R. §§ 1016.10, 1016.13. Similarly, the Health Information Portability and Accountability Act ("HIPAA") generally prohibits sharing of protected health information, but contains numerous exceptions, including permitting communications with third parties for the purposes of treatment and payment. *See* 45 C.F.R. § 164.506. GLBA and HIPAA demonstrate that Congress and designated rulemaking agencies are capable of crafting speech restrictions that are not "more extensive than necessary to serve" Congress's goal of protecting privacy. Under the panel's interpretation, the expansive reach and limited exceptions to Section 1692c(b) fail to meet that standard.

Despite the broad scope of Section 1692c(b)'s speech restrictions under the panel's interpretation, the panel's reading of the statute does almost nothing to protect consumers' privacy. Indeed, the panel conceded that its interpretation "may not purchase much in the way of 'real' consumer privacy, as we doubt that the Compumails of the world routinely read, care about, or abuse the information that debt collectors transmit to them." Panel Op. at 22. It also noted that the "resulting consequences" of its interpretation might not be "particularly sensible or desirable." *Id*. These observations reinforce that prohibiting a debt collector from communicating with vendors does not "directly" advance the interests behind Section 1692c(b) and is not "narrowly tailored" to those purposes, as *Central Hudson* requires.

B. The Court should employ the constitutional doubt canon and adopt an interpretation of Section 1692c(b) that avoids rendering it unconstitutional.

The panel's construction of Section 1692c(b) fails under both the second and third elements of *Central Hudson*'s intermediate scrutiny test. Therefore, this Court should employ the constitutional doubt canon and adopt the reading of Section 1692c(b) that avoids rendering it unconstitutional. *Gomez v. United States*, 490 U.S. 858, 864 (1989) ("It is our settled policy to avoid an interpretation of a federal statute that engenders constitutional issues if a reasonable alternative interpretation poses no constitutional question.").

From a practical standpoint, this is the last opportunity for the Court to employ the constitutional doubt canon. Going forward, the prior-panel-precedent rule will require district courts and other panels of this Court to follow the panel's interpretation. Any court concerned about First Amendment implications from the panel's reading of Section 1692c(b) will be forced to grapple with the possibility of declaring the statute unconstitutional, instead of merely adopting a reasonable alternative interpretation.

In its merits briefing, Preferred advocated for a "reasonable alternative interpretation" of the phrase "in connection with the collection of a debt": the same meaning this Court gave those words in Section 1692e of the FDCPA, a communication made "for the purpose of collecting a debt," *Caceres v. McCalla Raymer, LLC*, 755 F.3d 1299, 1303 (11th Cir. 2014), or containing a "demand for payment." *Reese v. Ellis, Painter, Ratterree & Adams, LLP*, 678 F.3d 1211, 1217 (11th Cir. 2012). After all, "identical words used in different parts of the same statute are . . . presumed to have the same meaning." *IBP, Inc. v. Alvarez*, 546 U.S. 21, 34 (2005). Regardless of whether that is the "best" interpretation, it is unquestionably a "reasonable alternative interpretation [that] poses no constitutional question[.]" Given the glaring First Amendment problems with the panel's interpretation, the *en banc* Court should follow the "settled" constitutional doubt canon and adopt that reading. *Gomez*, 490 U.S. at 864.

The Court may have other options to mitigate the panel's interpretation of Section 1692c(b) to avoid constitutional problems, including adopting a limited reading of the statute that does not cause it to violate the First Amendment. *See Reno v. Am. Civil Liberties Union*, 521 U.S. 844, 883 (1997). Possibilities include adopting a reading that accounts for common-law principles of agency and business relationships, as well as the common-law understanding of the required elements of the tort of public disclosure of private facts. Those considerations likely informed state legislatures that adopted parallel laws, but crafted exceptions for disclosures to third parties reasonably believed to have a "legitimate business need" for the information.[5]

If the statute cannot be saved, the *en banc* Court should now consider the constitutional implications. The impact of the panel's decision is obvious; since April 21, plaintiffs have filed roughly 150 new FDCPA cases claiming debt collectors violated Section 1692c(b) through routine data transmittals with third parties. Waiting for the next case may be too late to prevent dire consequences awaiting consumers and the financial services industry.

[5] *See* CAL. CIV. CODE § 1788.12(e) (providing a safe-harbor for a debt collectors' communications with "any other person reasonably believed to have a legitimate business need for such information"); *accord, e.g.*, FLA. STAT. § 559.7(5); IOWA CODE § 537.7103(3)(a)(2); MD. CODE, Commercial Law, § 14-202; VT. CODE R. 3-2-103:CP 104.3(e); WIS. STAT. § 427.104.

CONCLUSION

For the reasons stated above, the Financial Industry Amici request that the Court grant Preferred's Petition for Rehearing and for Rehearing En Banc.

Respectfully submitted this 1st day of June, 2021.

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Federal Rules of Appellate Procedure 29(b)(4) and 32(a)(7)(B) because it contains 2,514 words, excluding the parts of the brief exempted by 11th Cir. R. 29-3.

2. This brief complies with the typeface requirements of 11th Cir. Rule 32-4 and Federal Rules of Appellate Procedure 32(a)(5) and 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman font.

s/ R. Aaron Chastain
Of Counsel

CERTIFICATE OF SERVICE

I hereby certify that on June 1, 2021, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Eleventh Circuit using the Appellate Electronic Filing system, which will provide electronic notice of such filing to all parties.

s/ R. Aaron Chastain
Of Counsel