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* THE NEW YORK STATE CREDITORS BAR ASSOCIATION IN SUPPORT OF APPELLEE'S PETITION FOR REHEARING AND FOR REHEARING *EN BANC*

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Richard Hunstein v. Preferred Collection and Management Services, Inc. –

Case No. 19-14434-HH

CERTIFICATE OF INTERESTED PERSONS
AND CORPORATE DISCLOSURE STATEMENT

In accordance with FED. R. APP. P. 26.1, the undersigned counsel states that *Amicus Curiae* The New York State Creditors Bar Association is an organization that has no corporate parent and in which no publicly held company has an ownership interest.

Pursuant to 11th Cir. R. 26.1-1 through 11th Cir. R. 26.1-3, the aforesaid *Amicus Curiae* adopt the Certificate of Interested Persons and Corporate Disclosure Statement filed by Appellee Preferred Collection and Management. Services, Inc.

RULE 35 STATEMENT OF COUNSEL

We express a belief, based on a reasoned and studied professional judgment, that this appeal involves one or more questions of exceptional importance:

1. Whether 15 U.S.C. § 1692c(b) applies to communications with vendors who provide the ministerial services of printing and mailing letters.

2. Whether the transmittal of data to by a debt collector to a back-office vendor is a third-party communication in connection with the collection of a debt that is prohibited by 15 U.S.C. § 1692c(b).

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INTEREST OF THE *AMICUS CURIAE*

The New York State Creditors Bar Association ("NYSCBA") is a non-profit association of attorneys licensed to practice law in New York State whose practices focus on, or substantially involves, creditors' rights. NYSCBA's membership includes more than 40 law firms, all of which must meet NYSCBA standards designed to ensure competence and professionalism. In addition to the ethical standards imposed by the New York State Bar Association and the New York State Rules of Professional Conduct, NYSCBA Members are also guided by its mission which includes the cooperation "with, aid and support [to] organizations and causes which advance fair and just application of the law to both creditors and debtors." The NYSCBA also works to "act upon ideas and opinions of members relating to all issues and actions of significance to its members." NYSCBA Members work diligently to abide by the requirements of the federal Fair Debt Collection Practices Act ("FDCPA"), 15 U.S.C. § 1692, *et seq.*, as well as debt collection regulations promulgated by the New York State Department of Financial Services and other local regulators such as the New York City Department of Consumer and Worker Protection.

Creditors regularly engage NYSCBA members to collect delinquent consumer debts. As part of representing their clients and in the course of lawful debt collection, NYSCBA members must interpret and comply with federal and state laws

governing debt collection, including the FDCPA. The NYSCBA has a significant interest in ensuring that the FDCPA is interpreted in a consistent manner that allows its member attorneys to discharge their ethical duties of competence and diligence in advancing their clients' legitimate interests. NYSCBA members often work with local courts and legislatures to protect the interests of NYSCBA members and their clients.

The panel decision that is the subject of the petition for rehearing *en banc* calls into question the ability of Congress to regulate speech by the NYSCBA and its members when lawfully collecting debt through non-abusive collection methods. As such, the NYSCBA 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 members, or its counsel contributed money that was intended to fund preparing or submitting this brief.

INTRODUCTION

An *en banc* hearing or rehearing may be ordered if "the proceeding involves a question of exceptional importance." FED. R. APP. P. 35(a)(2). The Panel's decision may jeopardize not only Section 1692c(b), but the entire FDCPA. Since the Panel recognized that its decision may not result in the protection of any "real" consumer privacy interests, the FDCPA could be interpreted as an impermissible prior restraint on commercial speech in violation of the First Amendment. The constitutional validity of an entire statute being called into question demonstrates that this case "involves a question of exceptional importance" that warrants a rehearing *en banc*.

ARGUMENT

I. Rehearing *En Banc* Should Be Granted Because the Panel Decision Renders the FDCPA Unconstitutional Under the First Amendment.

A. The Panel decision results in the FDCPA being a content-based restriction which cannot withstand strict scrutiny and, therefore, is rendered unconstitutional.

The First Amendment to the Constitution states, in pertinent part, that "Congress shall make no law . . . abridging the freedom of speech." U.S. Const., First Amend. "Above 'all else, the First Amendment means that government' generally 'has no power to restrict expression because of its message, its ideas, its subject matter, or its content.'" *Barr v. American Association of Political Consultants*, 140 S. Ct. 2355, 2346 (2020) (quoting *Police Dept. of Chicago v. Mosley*, 408 U.S. 92, 95, 92 S. Ct. 2286 (1972)).

> When laws, whether restrictive or compulsive, "target speech based on its communicative content," they generally "are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests."

EMW Women's Surgical Ctr., P.S.C. v. Beshear, 920 F.3d 421, 425 (6th Cir. 2019) (quoting *Nat'l Inst. of Fam. & Life Advocs. v. Becerra*, 138 S. Ct. 2361, 2371 (2018)).

Commercial speech is a special category of content-based speech and is "expression related solely to the economic interests of the speaker and its audience." *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 561

(1980) (citing *Virginia Pharmacy Bd. v. Virginia Citizens Consumer Council*, 425 U.S. 748, 762 (1976)). In other words, commercial speech's primary motivating factor is economic. *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 67 (1983). The speech here can only be classified as commercial.

Traditionally, courts have applied intermediate scrutiny to commercial speech, but the Supreme Court recently applied strict scrutiny when confronted with a question regarding commercial speech in another consumer protection statute, the Telephone Consumer Protection Act, 47 U.S.C. § 227. *See Barr, supra.* In *Barr*, a majority held that disparate treatment of communications based on whether the debt collector was collecting a debt owed to the government was unconstitutional. *Id.* The NYSCBA believes *Barr* opens the door for strict scrutiny analysis of Section 1692c(b).

Statutes that are subject to strict scrutiny are upheld only if Congress has narrowly tailored them to "promote a compelling interest" meaning they must be "the least restrictive means to further the articulated interest." *Sable Commc'ns of Cal. v. FCC*, 429 U.S. 115, 126 (1989). "No one questions that protecting consumer privacy qualifies as a legitimate and 'genuine' interest for the government to pursue. But before the government may censor . . . speech based on its content, it must point to a *compelling* interest." *Barr*, 140 S. Ct. at 2362 (Gorsuch, J., dissenting, in part, and concurring, in part). Stated differently, the question is whether the third-party

restriction in Section 1692c(b) is "necessary to serve a compelling state interest and is narrowly drawn to achieve that end." *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 231 (1987). The answer is no.

Section 1692c(b)'s third-party restrictions are content-based because the "communication" must occur "in connection with the collection of any debt." The penultimate paragraph of the Panel's decision admits that there does not appear to be any legitimate interest, let alone compelling interest, nor is the restriction "the least restrictive means to further the articulated interest" of the FDCPA. *Sable Commc'ns of Cal.*, 429 U.S. at 126. The Panel stated:

> One final (and related) point: It is not lost on us that our interpretation of § 1692c(b) runs the risk of upsetting the status quo in the debt-collection industry. We presume that, in the ordinary course of business, debt collectors share information about consumers not only with dunning vendors like Compumail, but also with other third-party entities. Our reading of § 1692c(b) may well require debt collectors (at least in the short term) to in-source many of the services they had previously outsourced, potentially at great cost. We recognize, as well, that those costs 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.

Hunstein v. Preferred Collection Mgmt. & Servs., 994 F.3d 1341, 2021 U.S. App. LEXIS 11648, at *23 (11th Cir. 2021).

The FDCPA's purpose is the elimination of "abusive," "deceptive," and "unfair" speech regarding consumer debt, but only if spoken by a debt collector. Yet

the Panel admits that the prior restraint on speech imposed by Section 1692c(b) does not further those interests. Put another way, the Panel states that the governmental interest and goal of the FDCPA is to restrain the speech of debt collectors, even when the restraint neither protects privacy interests nor eliminates abuse. This is not a compelling governmental interest, nor does it align with the FDCPA's purpose

> 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.

15 U.S.C. § 1692(e).

The FDCPA was intended to protect against deliberate disclosures to third parties as a **method of embarrassing the consumer.** *Joseph v. J.J. MacIntyre*, 281 F. Supp. 2d 1156, 1164 (N.D. Cal. 2003). (Emphasis by counsel). In fact, Congress' goal was that "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." 1977 U.S. Code Congr. & Admin. News 1695, 1699. None of these abuses are alleged in Appellant's Complaint. Therefore, the Panel's decision results in a reading of the FDCPA that abrogates any legitimate governmental interest. If the governmental interest is prohibiting practices that are "not legitimate collection practices," then there is no governmental interest in imposing speech restrictions that

"may not purchase much in the way of 'real' consumer privacy." *Hunstein*, *supra.* Since the Panel's decision results in an interpretation of Section 1692c(b) that does not withstand strict scrutiny, the Court should grant Appellee's petition to avoid such a result.

B. Even under intermediate scrutiny, the Panel's decision remains a content-based restriction, and therefore, is still rendered unconstitutional.

If the commercial speech involved here is not subject to strict scrutiny, the Court must then determine whether the restriction passes the lesser standard of intermediate scrutiny; to survive intermediate scrutiny, the FDCPA and, specifically, Section 1692c(b), must be "narrowly tailored to serve a significant governmental interest." *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (citations omitted). Content-neutral restrictions "are valid provided that they are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample channels for communication of information." *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984). The test for intermediate scrutiny of speech that concerns lawful activity and is not misleading (the exact type of speech at issue) requires the court to ask

> "whether the asserted governmental interest is substantial." If it is, then we "determine whether the regulation directly advances the governmental interest asserted," and finally, "whether it is not more extensive

> than necessary to serve that interest." Each of these . . . inquiries must be answered in the affirmative for the regulation to be found constitutional.

Thompson v. W. States Med. Ctr., 535 U.S. 357, 367 (2002) (quoting *Central Hudson*, 447 U.S. at 566-65) (internal citations omitted).

> A proper inquiry should examine the seriousness of the speech-related harm, the importance of the countervailing objectives, the likelihood that the restriction will achieve those objectives, and whether there are other, less restrictive ways of doing so.

Barr, 140 S. Ct. at 2362 (Breyer, J., concurring, in part, and dissenting, in part).

First, consumer privacy is, arguably, a substantial governmental interest. Congress found that "[a]busive debt collection practices contribute to . . . invasions of individual privacy." 15 U.S.C. § 1692(a). But the stated purpose in Section 1692(e) relates only to "abusive debt collection practices," not "non-abusive collection methods" which do not contribute to invasions of individual privacy. "Non-abusive collection methods" are defined as "means other than misrepresentations or other abusive debt collection practices [that] are available for the effective collection of debts." 15 U.S.C. § 1692(c). If the "substantial governmental interest" only involves "abusive" or "misleading or deceptive" debt collection practices, the Court must conclude that a prior restraint on speech that is not "abusive" or "misleading or deceptive," *i.e.*, "non-abusive debt collection methods," is not a "substantial governmental interest." If there is no "substantial

governmental interest" in regulating a debt collector's non-abusive, truthful collection methods – such as a debt collector's transmittal of information to a letter vendor – then the Panel's reading of Section 1692c(b) leads to an interpretation of the FDCPA that fails intermediate scrutiny.

Assuming, *arguendo*, that the regulation of non-abusive debt collection practices is a substantial governmental interest, the Court must then decide whether the regulation directly advances the governmental interest in individual privacy. The Panel already answered that question in the negative. Similar to the first prong of the intermediate scrutiny test, if the government does have a substantial interest in regulating non-abusive debt collection methods, it is unclear how regulating the transmittal of information to a print-and-mail vendor (that is not alleged to have mishandled or misused the information) advances the interest in protecting individual privacy.

As discussed above, Section 1692c(b) was aimed directly at abusive debt collectors who would actively engage with a consumer's neighbors, employer, family, or friends as a means to embarrass and harass the consumer into paying. *See Joseph, supra.*; 1977 U.S. Code Cong. & Admin. News 1695, 1699. These types of activities and "communications" are a far cry from the facilitation of lawful debt collection methods employed by Appellee and the FDCPA's restrictions, as interpreted by the Panel, does not advance the governmental interest.

The final inquiry for intermediate scrutiny is whether the Panel's interpretation of the FDPCA leaves open ample alternative channels for communication by debt collectors. The Panel's own opinion leads to a negative answer. According to the Panel, *any* communication with a party not specifically exempted by Section 1692c(b) would result in an FDCPA violation. For example, a debt collector who leaves a voicemail message on a consumer's cell phone could violate Section 1692c(b) because the message would actually be stored on the servers on the consumer's cell phone provider and accessible to the provider. A similar analysis would occur for e-mails and text messaging. This would substantially curtail alternative channels of communication which, in turn, does not satisfy the final prong for intermediate scrutiny.

II. The Court Should Avoid Interpreting the FDCPA in a Way to Render it Unconstitutional

"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." *Gomez v. United States*, 490 U.S. 858, 864 (1989). "[W]here a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter." *United States ex rel. Attorney General v. Delaware & Hudson Co.*, 213 U.S. 366, 408 (1989). Justice Brandeis stated that "it is a cardinal principle that this Court will first ascertain whether a construction of

the statute is fairly possible by which the question could be avoided." *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 348 (1936) (Brandeis, J., concurring), (quoting *Crowell v. Benson*, 285 U.S. 22, 62 (1932).

Based on the foregoing arguments, the Panel's penultimate paragraph leads directly to a question regarding the constitutional validity, not only of Section 1692c(b), but the entire FDCPA. As such, the NYSCBA urges the Court of Appeals to grant the petition for rehearing *en banc* to avoid this result. It is clear from Appellee's petition and brief and the briefs of the various *amici* that alternative interpretations abound. Those interpretations include statutory construction analyses that entirely avoid the First Amendment issues. Therefore, the Court of Appeal should permit a rehearing *en banc* to avoid the constitutional question now resulting from the Panel decision.

CONCLUSION

The Panel failed to consider the First Amendment implications in its ruling and should have avoided an interpretation that leads to the constitutional validity of the FDCPA being called into question. Respectfully, the Court should grant rehearing *en banc* to fully consider the free speech ramifications.

Dated: May 28, 2021 Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

In accordance with FED. R. APP. P. 32(g)(1), I certify that the foregoing *amicus* brief complies with the type-volume limitation of FED. R. APP. P. 32(a)(7) because, excluding the parts of the document exempted by FED. R. APP. R. 32(f), it contains 2,600 words.

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

Dated: May 28, 2021

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CERTIFICATE OF SERVICE

I certify that on May 28, 2021, I electronically filed the foregoing Brief of Amicus Curiae The New York State Creditors Bar Association 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.

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: May 28, 2021

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