Case No.: 19-14434-HH

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

RICHARD HUNTSTEIN,

Plaintiff-Appellant,

v.

PREFERRED COLLECTION AND MANGEMENT SERVICES, INC.,

Defendant-Appellee.

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

BRIEF OF AMICI CURIAE IN SUPPORT OF DEFENDANT-APPELLEE'S PETITION FOR REHEARING EN BANC BY:

TRANSWORLD SYSTEMS INC.; ALLTRAN FINANCIAL, LP; NATIONWIDE CREDIT, INC.; RADIUS GLOBAL SOLUTIONS, LLC; CREDENCE RESOURCE MANAGEMENT, LLC; PHOENIX FINANCIAL SERVICES, LLC; PENDRICK CAPITAL PARTNERS, LLC; PENDRICK CAPITAL PARTNERS II, LLC; AFFILIATE ASSET SOLUTIONS, LLC; THE LAW OFFICES OF MITCHELL D. BLUHM & ASSOCIATES, LLC; CAPIO PARTNERS, LLC; CF MEDICAL, LLC; AND ASSETCARE, LLC

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CERTIFICATE OF INTERESTED PERSONS & CORPORATE DISCLOSURE STATEMENT

Amici Curiae, through undersigned counsel and in accordance with Federal Rule of Appellate Procedure 26.1 and Circuit Rule 26.1-2(d), hereby certifies that, in addition to the persons and entities identified in Appellee's Petition for Rehearing *En Banc*, the following persons may have an interest in this appeal, including subsidiaries, conglomerates, affiliates, parent corporations, any publicly held corporation that owns 10% or more of a party's stock, and other identifiable legal entities related to a party. The undersigned certifies there is no publicly traded company or corporation with an interest in the outcome of this case.

1. Transworld Systems Inc. – *Amicus Curiae and parent company of Nationwide Credit Inc. and Alltran Financial, LP*
2. Alltran Financial, LP – *Amicus Curiae*
3. Nationwide Credit, Inc. – *Amicus Curiae*
4. Radius Global Solutions LLC – *Amicus Curiae*
5. NGI Acquisitions LLC – *Parent company of Radius Global Solutions LLC*
6. Credence Resource Management, LLC – *Amicus Curiae*
7. Phoenix Financial Services, LLC – *Amicus Curiae*
8. Pendrick Capital Partners II, LLC – *Amicus Curiae*
9. Pendrick Capital Partners, LLC – *Amicus Curiae*
10. Affiliate Asset Solutions, LLC – *Amicus Curiae*

11. The Law Offices of Mitchell D. Bluhm & Associates, LLC – *Amicus Curiae*

12. Capio Partners, LLC – *Amicus Curiae*

13. Capio Asset Servicing, LLC – *Parent company of Capio Partners, LLC*

14. CF Medical, LLC – *Amicus Curiae*

15. Capio Asset Holdings, LLC – *Parent company of CF Medical, LLC*

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IDENTITY AND INTEREST OF AMICI CURIAE

Amici curiae are among thirteen of the nation's largest collection and medical account purchasing companies. Amici each utilize various agents and vendors to ensure consumers are treated fairly, respectfully, and with dignity, in a manner that complies with the Fair Debt Collection Practices Act ("FDCPA"), 15 U.S.C. § 1692, *et seq*.

Amici's business operations have been significantly affected by the Panel's novel and erroneous interpretation of 15 U.S.C. § 1692c(b), and the resulting explosion of litigation that has followed. Indeed, as of the filing of this brief, *over 130 new FDCPA lawsuits have been filed across the country* advancing this novel theory of liability. Since the Panel's ruling, Amici have each had lawsuits threatened or filed against them advancing this novel theory of liability.

Amici also have a strong interest complying with in the Eleventh Circuit's interpretation of the FDCPA. The Panel's decision, however, has created significant industry confusion and upended Amici's ability to effectively and efficiently communicate with consumers. Amici have a compelling interest in the outcome of this litigation and respectfully submit this brief for the Court's consideration.[1]

[1] Pursuant to Fed. R. App. P. 29, amici curiae certifies no party or party's counsel 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; and no person, other than amici curiae and its counsel, contributed money intended to fund preparing or submitting this brief.

STATEMENT OF ISSUES

Does a debt collector communicate with a third party in connection with the collection of a debt as contemplated by 15 U.S.C. § 1692c(b) by transmitting data only to its letter vendor agent to facilitate sending a collection letter to a consumer?

SUMMARY OF THE ARGUMENT

The Fair Debt Collection Practices Act ("FDCPA"), 15 U.S.C. § 1692c(b), with certain exceptions, prohibits debt collectors from communicating with third parties in connection with the collection of a debt. Until recently, the courts, Federal Trade Commission ("FTC"), and Consumer Financial Protection Bureau ("CFPB"), all agreed a debt collector does not violate the FDPCA by utilizing a letter vendor agent to send collection letters to consumers on the debt collector's behalf.

But on April 21, 2021, a Panel of this Court rejected this sound reasoning and authority and concluded, for the first time, that a debt collector improperly communicates with a third party when it transmits data about the debt to its letter vendor agent to facilitate sending a collection letter to the consumer. *Hunstein v. Preferred Collection and Management Services, Inc.,* No. 19-11434 (11th Cir. 2021). The Panel is wrong.

A debt collector does not communicate with a third party under § 1692c(b) by transmitting data to a letter vendor agent to effectuate sending a collection letter. Moreover, unless overturned, the Panel's ruling places § 1692c(b) at risk of being

set aside as an unconstitutional restriction on commercial speech because it is not narrowly tailored to protect consumer privacy.

The Court should grant the Petition for Rehearing *En Banc* filed by Preferred Collection and Management Services, Inc. ("Preferred") and vacate the Panel's decision.

ARGUMENT AND AUTHORITIES

A. A Debt Collector is Not Communicating With a Third Party When it Transmits Data About a Debt to its Letter Vendor Agent to Facilitate Sending a Collection Letter

When Congress enacted the FDCPA, 15 U.S.C. § 1692, *et seq.*, in 1977, the debt collection business was "based on paper transactions . . . recipe cards, file boxes being handed from creditor to debt collector, a very informal, low-tech operation . . . . letters were typically typed one by one."[2] Even considering these privacy concerns, when enacting the FDCPA Congress "did not limit the methods debt collectors could use to contact consumers other than to prohibit contacting consumers by postcard [because] the risks were too high of improper disclosure to third parties that a debt was being collected." *Id.* at *29.

[2] FTC Workshop Report, *Collecting Consumer Debts: The Challenges of Change*, 2009 WL 1651501, at *16 (internal quotation omitted). Available at https://www.ftc.gov/reports/collecting-consumer-debts-challenges-change-federal-trade-commission-workshop-report (last downloaded May 25, 2021).

Prior to the Panel's decision, no debt collector believed that transmitted data to a letter vendor agent could be an FDCPA violation. Indeed, federal courts throughout the country have confirmed a debt collector utilizing a letter vendor agent remains responsible under the FDCPA for its agent's actions and have rejected attempts by consumers to join or assert FDPCA claims against such letter vendors. *See, e.g., White v. Goodman*, 200 F.3d 1016, 1019 (7th Cir. 2000) ("So far as the joinder of defendants other than North Shore and Book–of–the–Month Club is concerned, the suits are frivolous . . . . [the FDCPA] is not aimed at . . . . companies that perform ministerial duties for debt collectors, such as stuffing and printing the debt collector's letters."); *Laubach v. Arrow Service Bureau, Inc.*, 987 F. Supp. 625, 631-32 (N.D. Ill. 1997); *Powell v. Computer Credit, Inc.*, 975 F. Supp. 1034 (S.D. Ohio 1997); *Trull v. Lason Systems, Inc.*, 982 F. Supp. 600, 605-6 (N.D. Ill. 1997).

Under the FDCPA a debt collector remains responsible for the acts of its agents and service providers. *See, e.g., West v. Costen*, 558 F. Supp. 564, 588 (W.D. Va. 1983); *Pollice v. Nat'l Tax Funding, LP*, 225 F.3d 379, 405 (3d Cir. 2000) (debt collectors are vicariously liable for the acts of their agents and "bear the burden of monitoring the activities of those [they] enlist[] to collect debts on [their] behalf.").

A letter vendor is an agent of the debt collector rather than a "third party" under § 1692c(b). Because a letter vendor is not a third party pursuant to § 1692c(b),

a debt collector does not violate § 1692c(b) by transmitting data about the debt to its agent to facilitate sending collection letters to consumers.[3]

B. ***The CFPB and FTC Have Recognized Debt Collectors May and Routinely Do Use Letter Vendor Agents to Send Collection Letters***

Additionally, both the FTC and CFPB have recognized debt collectors may, and routinely do, utilize agents and service providers, including letter vendors, to send collection notices without violating the FDCPA.

The FTC opined debt collectors may use agents to send validation and collection notices to consumers in its 1988 Staff Commentary on the FDCPA:

> Who must provide notice [under § 1692g]. If the employer debt collection agency gives the required notice, employee debt collectors need not also provide it. **A debt collector's agent may give the notice,** as long as it is clear that the information is being provided on behalf of the debt collector.

53 FR 50097-02 (emphasis added).[4]

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[3] Moreover, the Panel erred by using the FDPCA definition of "communication" to determine Preferred's transmission of data to its agent violated §1692c(b). But § 1692c(b) does not cover "***communication***[s];" it covers "***communicating***" with third parties. While other parts of the FDCPA broadly use the word "communication" as a ***noun***, *e.g.*, a letter sent to a consumer, § 1692c(b) uses the word as a ***verb***, *i.e.*, an active exchange or attempted exchange between a debt collector and a third party. The use of the word as a verb rather than a noun in § 1692c(b) suggests § 1692c(b) only applies to a debt collector's ***active*** exchanges or attempted exchanges with third parties, rather than the passive transfer of data to a letter vendor agent in order to facilitate the sending of a collection letter.

[4] Similarly, in 1992, the FTC opined a debt collector does not violate the FDCPA when it uses a third party to translate collection notices from English to another language because the communication is an "incidental contact" rather than a

Expanding on this, the CFPB, in its Regulation F Notice of Rulemaking, implementing its forthcoming rules under the FDCPA, the CFPB noted:

> The Bureau understands from its outreach that many covered persons currently use vendors to provide validation notices. In the Operations Study, **over 85 percent of debt collectors surveyed** by the Bureau **reported using letter vendors**.

86 FR 5766-01 (emphasis added). Rather than expressing concern over these statistics, the CFPB confirmed debt collectors may include the letter vendor's return mail address on collection letters for returned mail, disputes, and payments:

> Section 1006.34(c)(2)(i) provides, in part, that validation information includes the mailing address at which the debt collector accepts disputes and requests for original-creditor information. A debt collector **may disclose a vendor's mailing address**, if that is an address at which the debt collector accepts disputes and requests for original-creditor information.

86 FR 5766-01 (emphasis added).

If the CFPB believed debt collectors' use of letter vendors to send collection letters is prohibited by § 1692c(b), it would have said so in its *more than 650 page* rulemaking notice. Instead, it expressly permitted debt collectors to use letter vendor return mail addresses on collection notices, suggesting debt collectors may continue to use letter vendors with the CFPB's full knowledge and approval. To be clear, **Regulation F proves the primary agency Congress tasked with enforcing the**

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communication with a third party in connection with an attempt to collect a debt. *See* FTC Opinion, LeFevre to Zbrzeznj (Sept. 21, 1992).

FDCPA acknowledges and approves of debt collectors' use of letter vendor agents.

That letter vendors fall outside the scope of § 1692c(b) does not thwart Congress' goal of protecting consumer privacy. Other laws and regulations ensure debt collectors, their agents, and service providers implement robust privacy and security safeguards to protect consumer information. For example, the FTC's Gramm-Leach-Bliley Act Safeguard Rule requires debt collectors safeguard consumer information. *See* 15 U.S.C. § 6809(3)(A); 16 C.F.R. § 314.1(b). To comply with the Safeguard Rule, debt collectors must oversee service providers by selecting and retaining service providers capable of maintaining appropriate safeguards for the consumer information at issue, requiring servicing providers to implement appropriate safeguards, and overseeing service providers to ensure continued maintenance. *Id.* at § 314.4(d)(1)-(2).

Similarly, CFPB acknowledges it is often appropriate for supervised nonbanks (including many debt collectors) to "outsource certain functions to service providers due to resource constraints" and "rely on [the] expertise from service providers that would not otherwise be available without significant involvement."[5]

[5] *See* CFPB Compliance Bulletin and Policy Guidance; 2016-02, *Service Providers.* Available at https://files.consumerfinance.gov/f/documents/102016_cfpb_OfficialGuidanceServiceProviderBulletin.pdf (last downloaded May 26, 2021).

The CFPB has performed hundreds of supervisory examinations of supervised debt collectors that consist of in-depth assessments of compliance with the FDCPA, management of service providers,[6] and safeguarding of consumer information and data. Many debt collectors supervised by the CFPB utilize letter vendors to send collection letters, *supra*; however, despite numerous supervisory examinations and enforcement actions, the CFPB has never taken action against a debt collector for violating § 1692c(b) (or any law) for using a letter vendor. Nor has the FTC. Why? Because the practice does not violate the FDPCA or any other law.

C. The Panel's Ruling, as Applied, Places § 1692c(b) at Risk of Being Ruled an Impermissible Restriction on Commercial Speech Because it Does Little, if Anything, to Protect Consumer Privacy

Finally, the Panel's decision, if not reversed, leaves § 1692c(b) susceptible to being set aside as an unconstitutional restriction on commercial speech because it is not narrowly tailored to protect consumer privacy. As the Panel acknowledged, restricting debt collectors from communicating with their own letter vendor agents, for the limited purpose of facilitating the issuance of collection letters, does little, if anything, to serve the government's interest in protecting consumer privacy.

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[6] *See* CFPB Debt Collection Supervision and Examination Manual (Oct. 2012), Module 3, available at https://files.consumerfinance.gov/f/documents/201210_cfpb_debt-collection-examination-procedures.pdf (last downloaded May 26, 2021).

"[I]f an otherwise acceptable construction of a statute would raise serious constitutional problems, and where an alternative interpretation of the statute is fairly possible, [courts] are obligated to construe the statute to avoid such problems." *See I.N.S. v. St. Cyr*, 533 U.S. 289, 299-300 (2001). Challenges to commercial speech are subject to intermediate scrutiny. *Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of New York*, 447 U.S. 557, 564-66 (1980). A restriction to commercial speech is constitutional only if it is "narrowly tailored to serve a significant governmental interest." *DA Mortg., Inc. v. City of Miami Beach*, 486 F.3d 1254, 1256 (11th Cir. 2007).

Under the *Central Hudson* test, "[a]t the outset, [a court] must determine whether the expression is protected by the First Amendment." *Id*. If the answer is "yes," there are three more questions to be answered: (1) is the asserted governmental interest substantial; (2) does the disputed regulation advance that governmental interest; and (3) is the regulation no more extensive than necessary to serve that interest. *Id*. The last step of the *Central Hudson* test requires that there be a "fit between the restriction and the government interest that is not necessarily perfect, but reasonable." *U.S. v. Edge Broad. Co.*, 509 U.S. 418, 429 (1993). The means need not be the least restrictive in the context of commercial speech, and courts are to examine whether "numerous and obvious less-burdensome alternatives" exist. *Florida Bar v. Went for It, Inc.*, 515 U.S. 618, 633 (1995).

Courts have found § 1692c(b) passes constitutional muster as applied to prohibiting a debt collector from leaving a voice message on a shared answering machine. *See, e.g.*, *Berg v. Merchants Ass'n Collection Div., Inc.*, 586 F. Supp. 2d 1336, 1344-45 (S.D. Fla. 2008); *see also Mark v. J.C. Christensen & Assocs., Inc.*, 2009 WL 2407700, *6-8 (D. Minn. Aug. 4, 2009). These courts confirm § 1692c(b) covers First Amendment expression, is subject to intermediate scrutiny under the *Central Hudson* test, and the government's interest in restricting a debt collector from communicating with third parties to protect consumer privacy is substantial. As applied to a debt collector leaving a message on a shared answering machine where a consumer's friends or family can overhear the message, the prohibition is narrowly tailored to serve the consumer privacy interest privacy § 1692c(b) was designed to protect. "Debt collectors have several channels of communications available to them, including live conversation via telephone, in person communication, and postal mail." *Berg*, 586 F. Supp. 2d at 1344-45.

In contrast, the District of Massachusetts struck down a Massachusetts regulation prohibiting certain debt collectors from contacting Massachusetts consumers by telephone at the beginning of the COVID crisis. The court, applying *Central Hudson*, found the law prohibiting calls but not letters was not narrowly tailored to serve a significant government interest:

> The Regulation . . . **singles out one group of debt collectors and imposes a blanket suppression order on their ability to use what**

> **they believe is their most effective means of communication, the telephone.** If what the Attorney General meant to accomplish by way of the Regulation was a strict-liability ban on all deceptive and misleading debt collection calls, the Regulation is redundant as that is already the law, both state and federally.

ACA Int'l v. Healey, 457 F. Supp. 3d 17, 28 (D. Mass. 2020) (emphasis added).

Here, applying the Panel's erroneous reasoning, § 1692c(b)'s restriction on the debt collector's speech to its letter vendor agent cannot withstand the *Central Hudson* test. As in *Berg*, the restriction relates to commercial speech (the debt collector sharing data with its letter vendor agent), and the government's interest in consumer privacy is substantial. However, applying § 1692c(b) to prohibit debt collectors from transmitting data to their letter vendor agents, the restriction is not narrowly tailored to serve that consumer privacy interest. Indeed, the Panel even acknowledges its interpretation does little, if anything, to protect consumer privacy:

> 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 . . . to in-source many of the services that 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**. Even so, our obligation is to interpret the law as written, whether or not we think the resulting consequences are particularly sensible or desirable.

Hunstein, 994 F.3d at 1352 (emphasis added).

Finally, there are obvious alternatives available allowing debt collectors to share data with their letter vendor agents while serving consumer privacy interests. For example, under the FTC's Safeguard rule, debt collectors are *already* obligated to maintain privacy and security safeguards over consumer information and ensure their agents and service providers do the same. Debt collectors supervised by the CFPB are subject to examination and enforcement regarding their own and service providers' protection of consumer information.

In short, the Panel's interpretation leaves § 1692c(b) vulnerable of being set aside as an unconstitutional restriction on commercial speech that violates the First Amendment. This would harm consumers and put ethical debt collectors at a competitive disadvantage–both of which Congress enacted the FDCPA to avoid.

CONCLUSION

The Panel erred in determining Preferred communicated with a third party by transmitting data to its letter vendor agent to facilitate sending a collection letter to Hunstein. The Court should vacate the Panel's decision and grant Preferred's Petition for Rehearing *en banc*.

Dated: June 1, 2021

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This brief complies with the type-volume limitation of Federal R. App. P. 29(b)(4) because, excluding the parts of the documents exempted by Fed. R. App. P. 32(f), it contains 2,577 words.

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing 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. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

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