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
No. 8:19-cv-00983-TPB-TGW

MOTION OF THE NATIONAL ASSOCIATION OF PROFESSIONAL PROCESS SERVERS FOR LEAVE TO FILE A BRIEF AS *AMICUS CURIAE* IN SUPPORT OF THE PETITION FOR REHEARING AND FOR REHEARING *EN BANC* OF DEFENDANT-APPELLEE PREFERRED COLLECTION AND MANAGEMENT SERVICES, INC.

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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 National Association of Professional Process Servers ("NAPPS") is an organization that has no corporate parent, and in which no publicly held company has an ownership interest.[1]

Pursuant to 11th Cir. R. 26.1-1 through 11th Cir. R. 26.1-3, the aforesaid *Amicus Curiae* adopts the Certificate of Interested Persons and Corporate Disclosure Statement filed by Appellee Preferred Collection and Management Services, Inc. at Pages 2-3 of its Petition for Rehearing and for Rehearing *En Banc*.

/s/ Manuel H. Newburger
Manuel H. Newburger

[1] No counsel for any party authored NAPPS' brief in whole or in part. No party or party's counsel contributed money that was intended to fund preparing or submitting NAPPS' brief, and no person other than NAPPS, its members, or its counsel contributed money that was intended to fund preparing or submitting the brief.

MOTION

Pursuant to Rule 29(a)(3) of the Federal Rules of Appellate Procedure, The National Association of Professional Process Servers respectfully moves this Court for leave to file the attached brief as *amicus curiae* in support of the Petition for Rehearing and for Rehearing *En Banc* of Defendant-Appellee Preferred Collection and Management Services, Inc.

This motion should be granted because the opinion of the Panel in this case, if not vacated or clarified, has the potential to bring to a halt process service in debt collection cases throughout the United States. NAPPS is the largest organization of professional process servers in the United States, and it has a strong interest in protecting the ability of its members to effectuate service of process. NAPPS has a similar interest in ensuring that all litigants, regardless of the subject matter of their claims, have access to the courts and the ability to serve process in accordance with applicable laws.

The decision of the Panel in this case impacts NAPPS' members and the courts and litigants they serve, as many of the suits that its members serve involve consumer debts. The Panel's decision, if not clarified or vacated, could be interpreted to prohibit attorneys who are subject to the Fair Debt Collection Practices Act (specifically, 15 U.S.C. § 1692c(b)) from transmitting to process servers the summonses and complaints in consumer debt collection cases. Thus, the decision

has the potential to impact NAPPS' members throughout the United States. NAPPS notes that in the relatively short time since it was issued the decision in this case has generated over 100 suits, many class actions, across the United States. A number of those suits seek to make creative and expansive use of the decision to extend it beyond the use of letter vendors.

As a process service trade association, NAPPS has an interest in ensuring that its members are able to receive and serve summonses and complaints. As an association whose members serve the judicial system, it has an interest in protecting the constitutional right of access to the courts embodied in the First Amendment's Petition Clause.

The decision of the Panel in this case fails to address or even consider the potential impact on process service as a result of the Panel's interpretation of 15 U.S.C. § 1692c(b). NAPPS seeks leave to file its *amicus curiae* brief and to address the potential impact of the decision upon process service and access to the courts.

CONCLUSION

NAPPS respectfully requests that the Court grant this motion and accept its accompanying brief as *amicus curiae* in support of the Petition for Rehearing and for Rehearing *En Banc* of Defendant-Appellee Preferred Collection and Management Services, Inc.

Dated: June 1, 2021

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 1st day of June, 2021, a copy of the foregoing motion was filed electronically and served to all counsel through this Court's CM/ECF system.

Dated: June 1, 2021

Respectfully submitted,

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No. 19-14434

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Plaintiff-Appellant

v.

PREFERRED COLLECTION AND MANAGEMENT. SERVICES, INC.
Defendant Appellee

On Appeal from the United States District Court
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BRIEF OF *AMICUS CURIAE* THE NATIONAL ASSOCIATION OF PROFESSIONAL PROCESS SERVERS IN SUPPORT OF APPELLEE'S PETITION FOR REHEARING AND FOR REHEARING *EN BANC*

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/s/ Manuel H. Newburger
Manuel H. Newburger

RULE 35 STATEMENT OF COUNSEL

I 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 all persons who are not among the specifically listed exceptions set forth in 15 US.C. § 1692c(b) .

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INTEREST OF THE *AMICUS CURIAE*

The National Association of Professional Process Servers ("NAPPS" or "Association") is a worldwide organization of the largest community of professional process servers. Founded in 1982, NAPPS today has over 2,000 members representing all 50 states, the District of Columbia, seven Canadian provinces, and nearly two dozen foreign countries. It is headquartered in Portland, Oregon.

NAPPS members are required to commit to accountability and reliability to litigants and the courts, assuring the right of litigants to due process through the high standards set by the Association. Membership is on an individual basis, and each member is expected to adhere to high ethical standards and have a thorough understanding of the NAPPS code of conduct. It has an interest in ensuring that its members remain able to satisfy their ethical duty to stay abreast of current technology and use that technology for the benefit of their clients.

NAPPS members are regularly engaged to provide services to the legal community, particularly in suits involving consumer debts. The Panel decision in this case creates industry confusion as to the scope of the prohibition in 15 U.S.C. § 1692c(b). The decision could be read to prohibit law firms that regularly collect consumer debts from using the services of process servers. Thus, the *Amicus* has a

direct interest in this litigation and the organization 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:

(1) *en banc* consideration is necessary to secure or maintain uniformity of the court's decisions; or
(2) the proceeding involves a question of exceptional importance.

FED. R. APP. P. 35(a) . NAPPS asserts that this matter involves a question of exceptional importance.

Consumer debt collection is regulated by the Fair Debt Collection Practices Act ("FDCPA"), 15 U.S.C. § 1692, *et seq*. Law firms engaged in consumer debt collection are "debt collectors" as defined in that act. 15 U.S.C. § 1692a(6); *Heintz v. Jenkins*, 514 U.S. 291 (1995) .

In holding that the conveyance of information to Compumail was subject to 15 U.S.C. § 1692c(b), the Panel reasoned that "Preferred's communication to Compumail at least 'concerned,' was 'with reference to,' and bore a 'relationship [or] association' to its collection of Hunstein's debt." *Hunstein v. Preferred Collection & Mgmt. Servs.*, 994 F.3d 1341 at *15 (11th Cir. 2021). The Panel's decision makes no distinction between a collection agency's conveyance of information to a mail vendor and a law firm's delivery of a summons and complaint to a process server. Thus, the decision casts doubt on the ability of law firms to utilize process servers (public or private) to serve process in consumer debt

collection suits. While NAPPS does not believe that was the intent of the Panel, a failure to vacate and modify or clarify the holding could bring to a halt the litigation of consumer debts, denying creditors and their attorneys access to the courts.

Without modification or clarification, the decision of the Panel jeopardizes the guarantee of access to the courts that is inherent in the Petition Clause of the First Amendment to the Constitution. ("Congress shall make no law . . . abridging . . . the right of the people . . . to petition the Government for a redress of grievances." U.S. Const. amend. I.) Thus, this case "involves a question of exceptional importance" that warrants a rehearing *en banc* to clarify the scope of the ruling.

ARGUMENT

1. The Panel Decision Has the Potential to Impact Litigation.

The FDCPA contains a specific exemption for process servers:

> The term "debt collector" means any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the collection of any debts, or who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another. . . The term does not include—
>
> * * *
>
> (D) any person while serving or attempting to serve legal process on any other person in connection with the judicial enforcement of any debt;

15 U.S.C. § 1692a(6) (D). While the statute exempts process servers from the definition of "debt collector", it is otherwise silent as to their status.

Fundamentally, process servers must be disinterested persons. *See*, *e.g.*, FLA. R. CIV. P. 1.070(b). However, lawyers who collect consumer debts through litigation are "debt collectors." *Heintz*, *supra*. As such, a lawyer who is prosecuting a suit on a consumer debt is still subject to the FDCPA. *Id*.

The panel's decision now raises the question of whether process servers are third parties with whom communication is restricted under 15 U.S.C. § 1692c(b), *even when the alleged communication is nothing more than the delivery of a summons and complaint to the process server*. While NAPPS believes that Section 1692c(b) does not apply to the delivery of a summons and complaint to a process server, the Court should grant rehearing or rehearing *en banc* and eliminate any doubt as to that issue.

2. *Heintz* supports the exclusion of process servers from those who are third parties within the scope of 15 U.S.C. § 1692c(b).

The FDCPA permits a consumer to compel a debt collector to cease communications. The Act provides, in pertinent part:

> Ceasing communication. If a consumer notifies a debt collector in writing that the consumer refuses to pay a debt or that the consumer wishes the debt collector to cease further communication with the consumer, the debt collector shall not communicate further with the consumer with respect to such debt, except—
>
> (1) to advise the consumer that the debt collector's further efforts are being terminated;

> (2) to notify the consumer that the debt collector or creditor may invoke specified remedies which are ordinarily invoked by such debt collector or creditor; or
>
> (3) where applicable, to notify the consumer that the debt collector or creditor intends to invoke a specified remedy. If such notice from the consumer is made by mail, notification shall be complete upon receipt.

15 U.S.C. § 1692c(c).

In *Heintz*, *supra*, the Supreme Court held that lawyers, even those who merely litigate, are "debt collectors" under the FDCPA. Among the arguments made by Heintz was the assertion that application of the FDCPA to litigation would empower consumer debtors to frustrate the litigation process by invoking Section 1692c(c). In rejecting that concern, the Supreme Court concluded:

> We agree with Heintz that it would be odd if the Act empowered a debt-owing consumer to stop the "communications" inherent in an ordinary lawsuit and thereby cause an ordinary debt-collecting lawsuit to grind to a halt. But, it is not necessary to read § 1692c(c) in that way -- if only because that provision has exceptions that permit communications "to notify the consumer that the debt collector or creditor may invoke" or "intends to invoke" a "specified remedy" (of a kind "ordinarily invoked by [the] debt collector or creditor"). §§ 1692c(c)(2), (3). Courts can read these exceptions, plausibly, to imply that they authorize the actual invocation of the remedy that the collector "intends to invoke." The language permits such a reading, for an ordinary court-related document does, in fact, "notify" its recipient that the creditor may "invoke" a judicial remedy. Moreover, the interpretation is consistent with the statute's apparent objective of preserving creditors' judicial remedies. We need not authoritatively interpret the Act's conduct-regulating provisions now, however. Rather, we rest our conclusions upon the fact that it is easier to read § 1692c(c) as containing some such additional, implicit, exception than to believe that Congress intended,

> silently and implicitly, to create a far broader exception, for all litigating attorneys, from the Act itself.

Heintz, 514 U.S. at 296-97.

Heintz did not address the impact of Section 1692c(b) on litigation, but the Supreme Court certainly left room for flexibility in judicial interpretations of the FDCPA to ensure that it does not eliminate the ability of creditors, through their attorneys, to litigate consumer debts. The Supreme Court later demonstrated that flexibility in *Obduskey v. McCarthy & Holthus LLP*, 139 S.Ct. 1029, 203 L.Ed.2d 390 (2019). Discussing the potential application of 15 U.S.C. § 1692c(b) to the posting of a foreclosure notice, the Court stated:

> For example, the FDCPA broadly limits debt collectors from communicating with third parties "in connection with the collection of any debt." §1692c(b). If this rule were applied to nonjudicial foreclosure proceedings, then advertising a foreclosure sale—an essential element of such schemes—might run afoul of the FDCPA. Given that a core purpose of publicizing a sale is to attract bidders, ensure that the sale price is fair, and thereby protect the borrower from further liability, the result would hardly benefit debtors. To be sure, it may be possible to resolve these conflicts without great harm to either the Act or state foreclosure schemes. . . But it is also possible, in light of the language it employed, that Congress wanted to avoid the risk of such conflicts altogether.

Obduskey, 139 S. Ct. at 1037 (internal citations omitted).

Similarly, *Tardi-Osterhoudt v. McCabe, Weisburg & Conway LLC*, 2019 U.S. Dist. LEXIS 151988 at *27-29 (N.D. N.Y. Sept. 6, 2019), dealt with a claim that communicating a plaintiff's personal information with the court clerk in conjunction

with the filing of a foreclosure action violated § 1692c(b). Citing to *Heintz*, the *Tardi-Osterhoudt* court held that an implicit exception in the FDCPA permitted these communications to carry out foreclosure procedures. In fact, FDCPA litigation over foreclosure-related communications has resulted in a number of decisions employing the flexibility suggested by *Heintz* and *Obduskey*., *See*, *e.g.*, *Marino v. Nadel*, No. 17-CV-2116, 2018 U.S. Dist. LEXIS 166168, 2018 WL 4634150, at *3 (D. Md. Sept. 27, 2018), *aff'd*, 763 Fed. Appx. 305 (4th Cir. 2019); *Owoh v. Sena*, No. 16-CV-4581, 2018 U.S. Dist. LEXIS 37813, 2018 WL 1221164, at *5 (D.N.J. Mar. 8, 2018); *see*, *also*, *Cohen v. Wolpoff & Abramson, LLP*, No. 08-CV-1084, 2008 U.S. Dist. LEXIS 77052, 2008 WL 4513569, at *6 (D.N.J. Oct. 2, 2008) ("There is no cause of action under [§ 1692c(b)] for an attorney's communication with a forum in pursuit of a legal remedy.")

Excluding the use of process servers from the scope of 15 U.S.C. § 1692c(b) is also consistent with another line of cases. Both the Sixth and Seventh Circuit Courts of Appeals have held that "for a communication to be in connection with the collection of a debt, an animating purpose of the communication must be to induce payment by the debtor." *Gruden v. Leikin Ingber & Winters PC*, 643 F.3d 169, 173 (6th Cir. 2011); *see also Gburek v. Litton Loan Serv. LP*, 614 F.3d 380, 385 (7th Cir. 2010). The animating purpose of delivering a summons and complaint to a process server is to initiate the litigation process, provide due process to the consumer, and

deliver to the consumer the command of the court (the summons) to appear and defend the case. The summons and complaint do not demand payment rather, they inform the defendant of how to contest the litigation. The Court should acknowledge that the Panel's reasoning does not disrupt the litigation process by barring delivery of the summons and complaint to the process server.

3. The Petition Clause compels exclusion of communications with process servers from the scope of 15 U.S.C. § 1692c.

One of the fundamental protections set forth in the Bill of Rights is the right to petition: "Congress shall make no law . . . abridging . . . the right of the people . . . to petition the Government for a redress of grievances." U.S. Const. amend. I.

> The right to petition is "among the most precious of the liberties guaranteed by the Bill of Rights," *Mine Workers v. Illinois Bar Assn.*, 389 U.S. 217, 222 (1967), and except in the most extreme circumstances citizens cannot be punished for exercising this right "without violating those fundamental principles of liberty and justice which lie at the base of all civil and political institutions," *De Jonge v. Oregon*, 299 U.S. 353, 364 (1937).

McDonald v. Smith, 472 U.S. 479, 486 (1985)

The *Noerr-Pennington* doctrine is derived from the Petition Clause. *Sosa v. DirecTV*, 437 F.3d 923, 929 (9th Cir. 2006). "Under the *Noerr-Pennington* doctrine, those who petition any department of the government for redress are generally immune from statutory liability for their petitioning conduct." *Id.; see also Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961); *United Mine Workers v. Pennington*, 381 U.S. 657 (1965); *Juster Assoc. v. Rutland*,

901 F.2d 266, 270-271 (2d Cir. 1990). This encompasses not only pleadings and other litigation papers, but also "conduct incidental to the prosecution of the suit." *Columbia Pictures Indus., Inc. v. Prof'l Real Estate Investors, Inc.*, 944 F.2d 1525, 1528–29 (9th Cir. 1991), *aff'd* 508 U.S. 49 (1993). *Noerr-Pennington* sets forth a rule of construction "applicable to any statutory interpretation that could implicate the rights protected by the Petition Clause." *Sosa*, 437 F.3d at 931. Pursuant to this rule, courts must construe statutes so as to avoid burdening conduct that implicates the protections afforded by the Petition Clause unless the statute clearly provides otherwise. *Id*.

To the extent that the Panel's decision could be construed to create liability under Section 1692c(b) for an attorney who delivers a summons and complaint to a process server, such a construction cannot stand. NAPPS urges the Court to acknowledge that the decision in this case gives rise to no such liability, because the *Noerr-Pennington* doctrine "immunizes protected First Amendment petitioning activity from collateral attack." *IGEN Int'l, Inc. v. Roche Diagnostics GmbH*. 335 F.3d 303, 310 (4th Cir. 2003).

CONCLUSION

The application of *Noerr-Pennington* is a question of law. *TEC Cogeneration Inc. v. Fla. Power & Light Co.*, 76 F.3d 1560, 1567 (11th Cir. 1996), modified on rehearing by 86 F.3d 1028 (11th Cir. 1996), making it appropriate in the current

posture of this case. For the reasons set forth above, NAPPS urges the Court to grant rehearing or rehearing *en banc* and acknowledge that any holding in this case does not extend 15 U.S.C. § 1692c(b) to the delivery of a summons and complaint to a process server.

Dated: June 1, 2021

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 *amicus* brief complies with the type-volume limitation of Rule 32(a)(7) because, excluding the parts of the document exempted by Rule 32(f), it contains 2,414 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.

Dated: June 1, 2021

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CERTIFICATE OF SERVICE

I certify that I electronically filed the foregoing **Brief of *Amicus Curiae* The National Association of Professional Process Servers 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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