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 FOR LEAVE TO FILE BRIEF OF *AMICUS CURIAE* REVSPRING, INC. IN SUPPORT OF DEFENDANT-APPELLEE'S PETITION FOR REHEARING AND FOR REHEARING *EN BANC*

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Counsel for Amicus Curiae RevSpring, Inc.

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

In accordance with Fed. R. App. P. 26.1, *Amicus Curiae* RevSpring, Inc. ("RevSpring") discloses the following information. RevSpring has one corporate parent, Empower Payments Immediate Holding, LLC. RevSpring is privately held, and no publicly held corporation holds more than 10 percent of RevSpring's stock.

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. and makes the following additions to the list of persons and entities that have an interest in the outcome of this case:

1. Jackman, Stefanie H., of Ballard Spahr, LLP (Attorney for *Amicus Curiae*, RevSpring)
2. RevSpring, Inc., *Amicus Curiae*.

MOTION FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE*

Pursuant to Fed. R. App. P. 29(b) and 11th Cir. R. 29-3, RevSpring respectfully moves the Court for leave to file the attached brief as *amicus curiae* in support of Defendant-Appellee Preferred Collection and Management Services, Inc.'s Petition for Rehearing And For Rehearing *En Banc*. In support of this motion, RevSpring states as follows:

1. RevSpring offers market-leading communication technologies, print and mail services, and payment solutions to the healthcare and account receivables management industries.

2. As the panel recognized, its opinion may "require debt collectors . . . to in-source many of the services that they had previously outsourced" to service providers. *See Hunstein v. Preferred Collection & Mgmt. Servs.*, No. 19-14434, 2021 U.S. App. LEXIS 11648, at *23 (11th Cir. Apr. 21, 2021). RevSpring, as one such service provider, has a substantial interest in this case because it stands to lose significant business from the in-sourcing that the *Hunstein* opinion anticipates.

3. RevSpring's *amicus* brief is desirable because it identifies binding and persuasive authorities that the parties and the panel overlooked. In particular, RevSpring's brief identifies specific instances in which Regulation F – published during the pendency of this appeal – and other publications of the Consumer Financial Protection Bureau (the "Bureau") explicitly endorse debt collectors'

reliance on service providers. RevSpring details in its brief why Regulation F and other Bureau materials warrant deference under *Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837 (1984) and *Skidmore v. Swift & Co.*, 323 U.S. 134, 89 L. Ed. 124, 65 S. Ct. 161 (1944), respectively. When accorded the appropriate deference under *Chevron* and *Skidmore*, Regulation F – which the Bureau published in the Federal Register during the pendency of this appeal – and other Bureau publications demonstrate that the panel misconstrued 15 U.S.C. § 1692c(b).

4. RevSpring's brief details the careful study that the Bureau undertook during its seven-year-long rulemaking in connection with Regulation F. RevSpring also demonstrates why Regulation F and other Bureau materials offer an interpretation of 15 U.S.C. § 1692c(b) that best effectuates Congress's purpose of protecting consumers from a host of "unfair, harassing, and deceptive debt collection practices *without* imposing *unnecessary* restrictions on ethical debt collectors." S. Rep. No. 382, 95th Cong., 1st Sess. 1–2, reprinted in 1977 U.S. Code Cong. & Ad. News 1695, 1696 (emphasis added).

WHEREFORE, RevSpring respectfully requests leave of this Court to file the attached *amicus curiae* brief.

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 was filed electronically and served to all counsel through this Court's CM/ECF system. Counsel of record also were served this same day via Federal Express.

Dated: June 1, 2021

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INTEREST OF THE *AMICUS CURIAE*[1]

The panel recognized that its opinion may "require debt collectors . . . to in-source many of the services that they had previously outsourced" to service providers. *See Hunstein*, 2021 U.S. App. LEXIS 11648, at *23.

RevSpring offers communication technologies, print and mail services, and payment solutions to the healthcare and account receivables management industries. As a service provider, RevSpring stands to lose significant business from the in-sourcing that panel predicts will result from the opinion in *Hunstein*.

[1] No counsel for a party authorized this brief in whole or in part. No person other than *amici curiae* and no party's counsel contributed money that was intended to fund the preparation or submission of this brief. Fed. R. App. P. 29(a)(4)(E).

STATEMENT OF THE ISSUES ASSERTED TO MERIT EN BANC CONSIDERATION

1. Whether the panel erred in failing to consider and accord deference to Regulation F, 12 C.F.R. § 1006.1 *et seq.* and the CFPB's interpretation of the FDCPA to allow a debt collector's use of a third-party print and mail vendor without violating 15 U.S.C. § 1692c(b).

SUMMARY OF THE ARGUMENT

This case presents an exceptionally important issue of statutory interpretation: whether § 1692c(b) of the Fair Debt Collection Practices Act ("FDCPA") prohibits debt collectors from using third-party service providers, such as mail and letter vendors, to facilitate collection activities.

Reconsideration is necessary in light of Regulation F, the regulation that the Consumer Financial Protection Bureau (the "Bureau") issued in two parts in October 2020 and December 2020 after briefing in this appeal closed but before the panel rendered its opinion, and related Bureau publications.

Regulation F and related Bureau publications warrant deference under *Chevron, U.S.A., Inc.*, 467 U.S. 837 (1984) and *Skidmore*, 323 U.S. 134, 89 L. Ed. 124, 65 S. Ct. 161 (1944), respectively. When accorded appropriate deference, these authorities compel the conclusion that § 1692c(b) does not prohibit debt collectors from using service providers. Indeed, Regulation F recognizes that service providers help debt collectors comply with their consumer protection obligations.

Therefore, this Court should affirm the district court's order dismissing the Plaintiff-Appellant's Complaint for failing to state a claim. In the alternative, this Court should vacate the panel's opinion, vacate the district court's order, and remand this case to the district court with instructions to consider the sufficiency of the Complaint's allegations in light of Regulation F.

ARGUMENT AND CITATIONS OF AUTHORITY

This appeal asks whether § 1692c(b) of the Fair Debt Collection Practices Act ("FDCPA") prohibits debt collectors from communicating with consumers using third-party service providers, such as letter vendors. Regulation F resolves this question with a resounding "No."

In October 2020, the Consumer Financial Protection Bureau (the "Bureau" or the "CFPB") issued Regulation F, which implements the FDCPA. Regulation F recognizes that debt collectors rely on letter vendors and other service providers. Neither the parties nor the Court considered Regulation F, however, because briefing closed in June 2020, shortly before Regulation F issued.

Reconsideration is necessary to allow the Court and the parties to consider this appeal in light of Regulation F, which reflects Congress's intent that the Bureau administer and implement the FDCPA. *See* 12 U.S.C. § 5512 ("The Bureau is authorized to exercise its authorities under Federal consumer financial law to administer, enforce, and otherwise implement the provisions of Federal consumer financial law."). Carrying out its charge, the Bureau began the rulemaking process that culminated in Regulation F in November 2013 with the publication of an Advance Notice of Proposed Rulemaking regarding debt collection. 85 FR 76734 at 76738 (November 30, 2020). The Bureau "conducted a variety of consumer testing and surveys, beginning in 2014," including a nationwide survey of

consumers' experiences with debt collection, and published its findings in January 2017. *Id.* The Bureau also surveyed debt collection firms and vendors and published a study in July 2016 called the CFPB Debt Collection Operations Study or Operations Study.[2] Through the study, the Bureau examined "how debt collection firms obtain information about delinquent consumer accounts and attempt to collect on those accounts."[3] Throughout its seven-year rulemaking, the CFPB published numerous documents that took as axiomatic the collection industry's reliance on vendors, including letter vendors—indeed, the CFPB *endorsed* the industry's reliance on vendors *because* they help debt collectors *comply* with their FDCPA obligations.

In this case, the panel limited its review to § 1692c(b)'s text. The panel saw no ambiguity requiring it to consider extrinsic materials, such as legislative history, as did a previous panel of this Court when asked to construe § 1692c(b). *See Acosta v. Campbell*, 309 F. App'x 315, 318–20 (11th Cir. 2009). And yet the panel acknowledged its interpretation threatened to impose "great costs" on an entire industry and may not secure "much in the way of 'real' consumer privacy." *Hunstein*, 2021 U.S. App. LEXIS 11648, at *23 ("Our reading of § 1692c(b) may

[2] *See generally* Bureau of Consumer Fin. Prot., Study of Third-Party Debt Collection Operations (July 2016), https://www.consumerfinance.gov/documents/755/20160727_cfpb_Third_Party_Debt_Collection_Operations_Study.pdf (CFPB Debt Collection Operations Study).
[3] *Id.*

well require debt collectors (at least in the short term) 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 . . . .") (emphasis added).

To be sure, statutory interpretation is distinct from cost-benefit analysis. But if the statute's text—if read in vacuum—fails to advance "much" in the way of statute's purpose *and* threatens the existence of an industry, courts must consider extrinsic sources. *Silva-Hernandez v. US Bureau of Citizenship & Immigration Servs.*, 701 F.3d 356, 363 (11th Cir. 2012) ("This Court's one recognized exception to the plain meaning rule is absurdity of results."). Enter Regulation F.

Regulation F best effectuates congressional intent by protecting consumer privacy without eschewing industry service providers—after all, eliminating service providers would only drive up the cost of credit for consumers and thereby limit access to credit.[4] When accorded the appropriate deference under *Chevron, U.S.A., Inc.*, 467 U.S. 837 and *Skidmore*, 323 U.S. 134, 89 L. Ed. 124, 65 S. Ct. 161, Regulation F and other agency publications require both reconsideration and

[4] *See* 86 FR 5766 at 5845 ("The Bureau expects that any one-time costs to debt collectors of reformatting the validation notice will be relatively small, particularly for debt collectors who rely on vendors, because the Bureau expects that most vendors will provide an updated notice at no additional cost. The Bureau understands from its outreach that many covered persons currently use vendors to provide validation notices.").

affirmance of the district court's order dismissing the Plaintiff-Appellant's Complaint for failing to state a claim. In the alternative, this Court should vacate the panel's opinion, vacate the district court's order, and remand this case to the district court with instructions to consider the sufficiency of the Complaint's allegations in light of Regulation F.

I. Regulation F Warrants *Chevron* Deference.

This Court should defer to Regulation F, which permits letter vendors, under *Chevron, U.S.A., Inc.*, 467 U.S. 837 and *Skidmore*, 323 U.S. 134, 89 L. Ed. 124, 65 S. Ct. 161, respectively.

A. 15 U.S.C. § 1692c(b) Is Ambiguous And Requires This Court To Look Beyond Its Text.

Consistent with other courts to consider this issue, this Court has recognized § 1692c(b) contains exceptions beyond those expressly set forth in its text.[5] Although unpublished and therefore not binding under this Court's prior precedent rule, *Acosta v. Campbell* held that a law firm representing a mortgage holder did not violate § 1692c(b) when it sent a letter to another law firm representing a junior lienholder. *Acosta*, 309 F. App'x at 318–20. This Court so held despite the letter's identification of the debtor, the debt, and a pending foreclosure action. *Id.*

[5] *See, e.g., Flood v. Mercantile Adjustment Bureau, L.L.C.*, 176 P.3d 769 (Colo. 2008) (holding Colorado's analog to § 1692c(b) did not prohibit use of third-party service providers).

To reach its conclusion, this Court analyzed whether the communication at issue was the sort of communication Congress intended to proscribe. *Id.* at 321. When evaluating the sorts of debt collection-related communications that § 1692c(b) bans, this Court reasoned:

> A debt collector may not engage in any conduct the natural consequence of which is to *harass, oppress, or abuse* any person in connection with the collection of a debt." 15 U.S.C. § 1692d. Additionally, the House Report on the FDCPA states: "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.

Id. at 320 (citing *S. Rep. No. 95-382, reprinted at 1977 U.S. Code Cong. & Admin. News 1695, 1699)* (emphasis added). Indeed, the purpose of the FDCPA is "to protect consumers from a host of *unfair, harassing, and deceptive* debt collection practices *without* imposing *unnecessary* restrictions on ethical debt collectors." S. Rep. No. 382, 95th Cong., 1st Sess. 1–2, reprinted in 1977 U.S. Code Cong. & Ad. News 1695, 1696 (emphasis added).

Acosta thus stands for the proposition that § 1692c(b)'s exceptions are not limited only to those expressly set forth in the statute. Further, *Acosta* holds that courts must construe § 1692c(b) to protect consumers from communications of the unfair, harassing, or deceptive variety *without* unnecessarily restricting ethical debt collectors.

Regulation F strikes the balance Congress intended and *Acosta* recognized. As Regulation F confirms, nothing is unfair, harassing, or deceptive about the communication at issue here, and communications between a debt collector and a letter vendor are not among the types of communications that Congress sought to prohibit when it enacted § 1692c(b).

Because § 1692c(b) must be read to avoid absurd results such as imposing unnecessary restrictions on ethical debt collectors, this Court should defer to Regulation F and Bureau materials under *Chevron* and *Skidmore*, respectively.

B. *Chevron* Requires Deference to Regulation F.

When Congress has delegated rulemaking authority to an agency, and the regulation at issue was promulgated in the exercise of that authority, the regulation is binding in the courts unless procedurally defective, arbitrary or capricious in substance, or manifestly contrary to the statute. *United States v. Mead Corp.*, 533 U.S. 218, 226–27 (2001).

Congress empowered the Bureau to promulgate rules for consumer-protection laws when it passed the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank"), Pub. L. No. 111-203, 124 Stat. 1376–2223 (2010). *See* S. Rep. No. 111-76, at 2 (2010). Dodd-Frank states, "The Bureau is authorized to exercise its authorities under Federal consumer financial law to administer, enforce, and otherwise implement the provisions of Federal consumer financial law." 12 U.S.C.

§ 5512; Dodd-Frank tit. X, 124 Stat. 1980. Dodd-Frank defines "Federal consumer financial law" to include the enumerated consumer laws, including the Fair Debt Collection Practices Act. Dodd-Frank tit. X, 124 Stat. 1957 (defining "Federal consumer financial law" and "Enumerated consumer laws"). Dodd-Frank also amended FDCPA section 814(d) to authorize the CFPB to "proscribe rules with respect to the collection of debts by debt collectors," as defined in the FDCPA. 15 U.S.C. § 1692l(d).

The Bureau promulgated Regulation F in the exercise of its authority under Dodd-Frank. Section IV of Regulation F states, "The Bureau is issuing this final rule primarily pursuant to its authority under the FDCPA and the Dodd-Frank Act." 85 FR 76734 at 76739 (November 30, 2020). Section IV of Regulation F then describes the specific grants of authority under the FDCPA and Dodd-Frank. *Id.* Regulation F therefore binds this Court.

Regulation F expressly recognizes that debt collectors communicate with and rely on third party-vendors. For instance, Regulation F states as follows:

> [T]he Bureau is adopting new comment 34(c)(2)(i)–2 to clarify that *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*. As one commenter observed, some debt collectors may use a vendor to receive mail from consumers. The Bureau is finalizing comment 34(c)(2)(i)–2 *to accommodate this business practice*.

86 FR 5766 at 5801 (January 19, 2021) (emphasis added). Similarly, "15 U.S.C. § 1006.34(c)(2)(i) and comment 34(c)(2)(i)–2 permit debt collectors to 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 at 5801 (January 19, 2021)

Indeed, the Bureau explicitly referenced debt collectors' use of letter vendors in connection with the dissemination of debt validation notices, stating as follows:

> The provision will require debt collectors to reformat their validation notices to accommodate the validation information requirements. The Bureau expects that any one-time costs to debt collectors of reformatting the validation notice will be relatively small, *particularly for debt collectors who rely on vendors, because the Bureau expects that most vendors will provide an updated notice at no additional cost. The Bureau understands from its outreach that many covered persons currently use vendors to provide validation notices*. [. . .] Debt collectors and *vendors will bear costs to understand the requirements of the provision and to ensure that their systems generate notices that comply with the requirements*, although these costs will be mitigated somewhat by the availability of a model notice.

86 FR 5766 at 5845 (January 19, 2021) (emphasis added). Furthermore, the Bureau noted in its Operations Study that "over 85 percent of debt collectors surveyed by the Bureau reported using letter vendors." *See id.* The Bureau yet again recognized debt collectors' use of letter vendors, stating, "15 U.S.C. § 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 at 5889 (January 19, 2021) (emphasis added).

Because vendors help debt collectors *comply* with their consumer protection obligations, Regulation F expressly recognizes and endorses debt collectors' use of letter vendors. This Court should reconsider and reverse the panel's opinion in light of Regulation F.

C. The Court Also Should Defer Under *Skidmore*.

Even if the Court does not afford *Chevron* deference, at a minimum, the Court should accord the above excerpts of Regulation F and the below Bureau materials deference under *Skidmore*. *See, e.g.*, *Mead Corp.*, 533 U.S. at 234 ("An agency interpretation may merit some deference whatever its form, given the specialized experience and broader investigations and information available to the agency and given the value of uniformity in its administrative and judicial understandings of what a national law requires.") (internal citations omitted); *Skidmore*, 323 U.S. at 140, 89 L. Ed. 124, 65 S. Ct. 161.

The CFPB Supervision and Examination Manual repeatedly acknowledges use of collection vendors. The manual states, "This module assesses whether the entity is a 'debt collector' under the FDCPA and therefore subject to that Act. In addition, this module addresses other aspects of the entity's business model, *including affiliate and vendor relationships*, internal controls, and related account

management issues." CFPB Supervision and Exam Manual at 299 (Sept. 2020), *available at* https://files.consumerfinance.gov/f/documents/cfpb_supervision-and-examination-manual.pdf (emphasis added). Similarly, the Examination Manual provides as follows:

> AFFILIATES AND THIRD-PARTY RELATIONSHIPS . . . *Determine whether the entity uses any service providers in conducting its debt collection activities*. If so: (a) Identify who the service providers are, whether they are affiliated with the entity, and what services they perform, and (b) Assess whether the entity: (i) Requests and reviews the service providers' policies, procedures, internal controls, and training materials to ensure that the service providers conduct appropriate training and oversight of employees or agents that have consumer contact or compliance responsibilities; (ii) *Includes in its contracts with its service providers* clear expectations about compliance with Federal consumer financial laws . . . .

Id. at 300 (citing *CFPB Bulletin* 2012-03 (April 13, 2012)).

Critically, the Examination Manual also recognizes that third parties facilitate communications between debt collectors and consumers, stating, "Based on the results of the risk assessment of the entity, examiners should review for potential unfair, deceptive, or abusive acts or practices . . . Document Review . . . *Agreements with affiliates and third parties that interact with consumers on behalf of the entity*." *Id.* at 1708–62 (emphasis added); *see also id.* at 1713 ("Evaluate how the entity monitors the activities of employees and third-party contractors . . . .") (emphasis added).

In light of the foregoing excerpts from the Bureau's Examination Manual, it would be incongruous to interpret § 1692c(b) to eliminate communications with such service providers. When accorded *Skidmore* deference, these materials require reconsideration and reversal of the panel's opinion.

CONCLUSION

Construing § 1692c(b) to prohibit communications between debt collectors and service providers will hurt the consumers Congress sought to protect. Such a prohibition will result in non-FDCPA-compliant letters, increased collection costs, and a higher cost or decreased availability of credit to less credit-worthy borrowers.

Regulation F recognizes that third-party service providers, such as print and mail vendors, help debt collectors *comply* with their consumer protection obligations. Regulation F therefore effectuates § 1692c(b) "without imposing unnecessary restrictions on ethical debt collectors." S. Rep. No. 382, 95th Cong., 1st Sess. 1–2, reprinted in 1977 U.S. Code Cong. & Ad. News 1695, 1696.

For all of the foregoing reasons, this Court should reconsider the panel's opinion, defer to Regulation F and other agency materials under *Chevron* and *Skidmore*, respectively, and affirm the district court's order dismissing the Plaintiff's Complaint for failure to state a claim. In the alternative, this Court should vacate the panel's opinion, vacate the district court's order, and remand to the district court

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CERTIFICATE OF COMPLIANCE

This document complies with the type-volume limit of Fed. R. App. P. 29(b)(4) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f), it contains 2,565 words.

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

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