IN THE UNITED STATES COURTS OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 19-14434

D.C. Docket No. 8:19-cv-00983-TPB-TGW

RICHARD HUNSTEIN,

Plaintiff - Appellant

versus

PREFERRED COLLECTION AND MANAGEMENT SERVICES, INC.,

Defendant – Appellee

THIRD PARTY PAYMENT PROCESSORS ASSOCIATION'S MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* IN SUPPORT OF APPELLEE'S PETITION FOR REHEARING EN BANC

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1 and 29(a)(4)(A) and Eleventh Circuit Rules 26.1-1 and 29.2, *Amicus Curiae* Third Party Payment Processors Association states that it is an IRS 501(c)(6) nonprofit corporation. It is not a subsidiary or affiliate of any other corporation. No publicly held corporation owns 10 percent or more of its stock.

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

By: */s/ Misha Tseytlin*

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Association

The Third Party Payment Processors Association (the "TPPPA) hereby moves this Court for leave to file as *amicus curiae* a proposed brief in support of Appellee's Petition for a Rehearing En Banc, which was filed on May 25, 2021. In support of its motion, and pursuant to Fed. R. App. P. 29(a)(3), the TPPPA states as follows:

INTEREST OF *AMICUS CURIAE*

The TPPPA is a national not-for-profit industry association that represents and promotes the interests of payment processors, banks, and merchants. Its basic mission is to support compliance efforts of third-party payment processors ("payment processors") and banks in third-party payment transactions. The panel's decision is of particular interest to the TPPPA because payment processors are vendors for merchants in every industry, including debt collection. Consumers authorize merchants to withdraw payments electronically by providing the merchants with their bank account information. The merchants then electronically provide payment processors with this information, and the payment processors properly format the payment instructions to ensure timely and accurate payments. The TPPPA files this brief as *amicus curiae* because, as explained below, the panel's decision threatens to

undermine the ability of debt collectors to leverage the technology and expertise of payment processors to facilitate compliant, efficient, and secure electronic payments.

Because of its specialized knowledge regarding the use of payment processors, the TPPPA believes that its brief—drawing from its experience managing electronic payments for a broad spectrum of merchants and banks—will aid in this Court's consideration of whether to grant a rehearing *en banc*.

AMICUS CURIAE'S BRIEF RAISES ARGUMENTS NOT RAISED BY ANY PARTY

The TPPPA's accompanying brief will assist this Court because it raises a significant concern not addressed by any other party. Specifically, the TPPPA urges this Court to grant rehearing *en banc* so that it can consider the full scope of the disastrous consequences that will flow from the panel's decision, including as to debt collectors' use of payment processors to make it easier for consumers to pay their debt obligations. Payment processors are essential in the payments ecosphere because most merchants do not have the technology or payments expertise to send the payment instructions directly to a

bank, as these instructions must be properly formatted, securely stored and transmitted, and the senders of the payment instructions must understand the different and underlying compliance requirements for different types of payments. The panel's decision in *Hunstein v. Preferred Collection and Management Services, Inc.*, 994 F.3d 1341 (11th Cir. 2021), jeopardizes the use payment processors even though they are essentially service providers for banks. Payment processors perform the training, compliance checks, and offloading that most merchants cannot perform unless they are a large sophisticated company. Depriving consumers and debt collectors alike of the expertise provided by payment processors will impose serious harms on all involved, frustrating consumer choice as to how make payments, increasing costs to consumers, and potentially putting their data at risk, all while benefiting no one.

CONCLUSION

For the foregoing reasons, the TPPPA requests leave to file the accompanying proposed brief in support of Appellee.

Date: June 1, 2021

By: */s/ Misha Tseytlin*

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CERTIFICATE OF SERVICE

I hereby certify that on this 1st Day of June, 2021, 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 CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

By: */s/ Misha Tseytlin*

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By: */s/ Misha Tseytlin*

Attorney of Record for *Amicus Curiae* the Third Party Payment Processors Association

RULE 35-5 CERTIFICATION

I express a belief, based on a reasoned and studied professional judgment, that this appeal involves one or more questions of exceptional importance, as stated by Petitioner: "The panel's opinion deviated from the precedent of the Supreme Court of the United States and this Circuit in holding that an alleged statutory violation of §1692c(b) of the Fair Debt Collection Practices Act, 15 U.S.C. §1692, et seq. ("FDCPA"), constituted a 'concrete injury' sufficient to confer Article III standing[.]"

Date: June 1, 2021

By: */s/ Misha Tseytlin*

Attorney of Record for *Amicus Curiae* the Third Party Payment Processors Association

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INTEREST OF *AMICUS CURIAE*

The Third Party Payment Processors Association (the "TPPPA") is a national not-for-profit industry association that represents and promotes the interests of payment processors, banks, and merchants. Its basic mission is to support compliance efforts of third-party payment processors ("payment processors") and banks in third-party payment transactions.

The panel's decision is of particular interest to the TPPPA because payment processors are vendors for merchants in every industry, including debt collection. Consumers authorize merchants to withdraw payments by providing the merchants with their bank account information. The merchants then electronically provide payment processors with this information, and the payment processors properly format the payment instructions to ensure timely and accurate payments. The TPPPA files this brief as *amicus curiae* because, as explained below, the panel's decision threatens to undermine the ability of debt collectors to leverage the technology and expertise of payment processors to facilitate compliant, efficient, and secure electronic payments because the panel's focus on sharing private information with

third party vendors cuts at the heart of the services that payment processors provide for all industries.

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.

STATEMENT OF THE ISSUE WARRANTING EN BANC CONSIDERATION

As stated by Defendant-Appellee on page 1 of its Petition for Rehearing *En Banc*, "[t]he panel's opinion deviated from the precedent of the Supreme Court of the United States and this Circuit in holding that an alleged statutory violation of §1692c(b) of the [FDCPA], constituted a 'concrete injury' sufficient to confer Article III standing[.]"

SUMMARY OF ARGUMENT

In *Hunstein v. Preferred Collection and Management Services, Inc.*, 994 F.3d 1341 (11th Cir. 2021), a panel of this Court held that a debt collector's transmission of a consumer's personal information violated Section 1692c(b) of the FDCPA, and that same consumer has

Article III standing to bring a claim under the FDCPA based upon a debt collector sharing this consumer-specific information with a third-party letter vendor. While the panel acknowledged the risk that its ruling could well "upset[ ] the status quo in the debt-collection industry," 994 F.3d at 1352, the TPPPA respectfully submits that the panel failed to grapple fully with the complete scope of the disastrous consequences that may flow from its decision, including as to debt collectors' use of payment processors to make it easier for consumers to effectuate payments they desire to make on their debt obligations.[1]

When a consumer attempts to pay a merchant like a debt collector over the phone or online, the consumer authorizes the merchant to collect the payment electronically in a specific amount on a specific date by providing the merchant with his or her banking information. The merchant securely forwards this information to the payment processor. The payment processor will then generate the appropriate payment instructions to send to its bank. The payment processor's bank, as a

[1] A payment processor is not a "person" under 15 U.S.C. § 1692c(b) but, rather, a "medium" as contemplated under 15 U.S.C. § 1692a(2). Based on a plain reading of the FDCPA as a whole, communications through the use of a medium, such as a payment processor, are expressly permitted by the statute.

member of the various payment systems (ACH, debit card, etc.),[2] will then submit the files of payment instructions that it has received from all of its payment processors to the applicable payment system for withdrawal from each consumer's bank account. The funds must be settled by a member of the payment system, which is something that only a bank can perform. Data is transmitted electronically during this process—human eyes do not see bank account or other information belonging to the consumer.

Payment processors are essential in the payments ecosphere because most merchants, including debt collectors, do not have the technology or payments expertise to send the payment instructions directly to a bank, as these instructions must be properly formatted, securely stored and transmitted, and the senders of the payment instructions must understand the different and underlying compliance requirements for different types of payments. In addition to the reasons set forth above, it is more efficient for a bank to work with a payment processor because payment processors are essentially service providers

[2] Consumer Financial Protection Bureau, *What is an ACH?* WWW.CONSUMER FINANCE.GOV, https://www.consumerfinance.gov/ask-cfpb/what-is-an-ach-en-1065/ (last visited June 1, 2021).

for the banks to the extent that the payment processors perform the training, compliance checks, and offloading that most merchants cannot perform unless they are a large, sophisticated company.

The Consumer Financial Protection Bureau ("CFPB"), which is the federal agency to which Congress gave the authority to regulate, enforce, and interpret the FDCPA, has provided guidance that expressly allows the use of third-party service providers by covered persons like debt collectors. For example, the CFPB recognizes the role that third-party service providers[3] play in the delivery of consumer financial products and services in its guidance entitled *Compliance Bulletin and Policy Guidance; 2016-02, Service Providers*, stating: "Supervised banks and nonbanks may outsource certain functions to service providers due to resource constraints, use service providers to develop and market additional products or services, or rely on expertise from service providers that would not otherwise be available without significant investment."[4] Also, the CFPB's own Debt Collection

[3] Service provider is generally defined in section 1002(26) of the Dodd-Frank Wall Street Reform and Consumer Protection Act as "any person that provides a material service to a covered person in connection with the offering or provision by such covered person of a consumer financial product or service." 12 U.S.C. § 5481(26).

[4] *See* CFPB Compliance Bulletin and Policy Guidance; 2016-02, Service Providers, p. 2 available at https://files.consumerfinance.gov/f/documents/102016_cfpb_OfficialGuidance

Examination Manual contemplates using third parties for certain activity, including payment processors.[5]

If *Hunstein* applies to debt collectors' use of payment processors based upon the same logic that it applies to letter vendors—because debt collectors must send consumer information to payment processors in order to facilitate electronic payments of debts—the consequences would be drastic and uniformly harmful. The vast majority of debt collectors offer consumers their preferred option of paying their debts using this electronic format, but, under the panel's decision in *Hunstein*, these debt collectors could be subject to significant liability for previously providing this option to consumers who prefer it. Faced with the potential for such liability, some debt collectors may choose to refrain from giving consumers electronic payment options in the future, forcing consumers to pay their debts only in-person and with cash, or through inconvenient products such as money orders that require consumers to pay additional money to get the payment to a debt

ServiceProviderBulletin.pdf (last visited June 1, 2021).

[5] *See* CFPB Supervision and Examination Manual, pp. 300, 1708-1762, available at https://files.consumerfinance.gov/f/documents/cfpb_supervision-and-examination-manual.pdf (last visited June 1, 2021).

collector. Other debt collectors may attempt to bring in-house the sensitive, complicated functions that payment processors currently carry out, potentially putting customer information at risk and increasing the risk of errors.

ARGUMENT

I. *Hunstein* Could Possibly Be Read To Impose Liability On Any Debt Collector That Offers Its Customers The Convenient, Electronic Option Of Paying Their Debts Through Payment Processors

The *Hunstein* panel's interpretation of Article III standing appears to have an extremely broad reach. The panel interpreted Section 1692c(b) to prohibit a debt collector from communicating a consumer's information to a third party—without the consumer's explicit consent, court permission, or to effectuate a post-judgment judicial remedy—where the communication "concern[s]," "[is] with reference to," or "b[ears] a relationship or association to" the collection of the debt. 994 F.3d at 1349 (citation omitted). The panel then held that any consumer whose information is sent to a third party in violation of the panel's interpretation of Section 1692c(b) has Article III standing because sending the information to such a third party "bears a close relationship to [the] common-law tort" of invasion of privacy. *Id.* at 1346–48.

While *Hunstein* dealt only with the debt collector's use of a mail vendor—one that uses the consumer's "data to create, print, and mail a 'dunning' letter to the consumer"—the panel's ruling could be read to expose debt collectors to liability for the use of virtually any third-party vendor during the debt collection life cycle, including, perhaps, payment processors. *Id.* at 1344. After all, a debt collector sending consumer information to a third-party company for the performance of most any function relating to debt collection, no matter how ministerial or pro-consumer that function, would—at least arguably—also "concern," be in "with reference to," or "b[ear] a relationship or association to" the collection of the debt, and, under *Hunstein*, the consumer would also have Article III standing *Id.* at 1346–49 (citation omitted). Most relevant to the TPPPA, if the sending of consumer information to a third party for purposes of printing a letter is sufficient for Section 1692c(b) liability and, most relevant to the Petition, Article III standing, then the same could—at least arguably—be true of sending the consumer information to a payment processor for purposes of processing a payment that the consumer requests to make electronically. *Id.* at 1346–48.

A debt collector sending consumer information to a payment processor to effectuate a payment on the consumer's obligations, as part of the payment process, is—at least arguably— "concern[ing]" the collection of the debt. *Id.* at 1349 (citation omitted). Further, by the panel's same logic that sending consumer information to a letter vendor gives the consumer Article III standing by analogy "to [the] common-law tort" of invasion of privacy, *id.* at 1346–48, the same type of claimed invasion could perhaps be said to occur when a third-party payment processor receives the consumer's information from a debt collector during the electronic payment process.

II. Possibly Imposing FDCPA Liability On Debt Collectors For Using Payment Processors Would Have Devastating Impacts, With No Consumer Benefit

Possibly imposing liability under the FDCPA on debt collectors for offering consumers the pro-consumer option of electronically paying their debts could create massive liability for debt collectors. The FDCPA provides for statutory damages of up to $1,000 per violation, 15 U.S.C. § 1692k(a)(1), (2)(A), allows successful plaintiffs to collect attorneys' fees, *id.* § 1692k(a)(3), and permits class actions, *id.* § 1692k(a)(2)(B). This potential liability could arguably attach to many

millions of transactions by a majority of debt collectors in the United States given that, in a 2016 study conducted by the CFPB, 86% of the responding debt collectors acknowledged the use of third-party online payment portals wherein consumers could make payments via the ACH network.[6] Simply put, if *Hunstein* is read to cover the standard use by debt collectors of payment processors to allow consumers to pay their debt in the manner they choose, most debt collectors could possibly be subject to a multiplicity of potentially costly lawsuits immediately.

Debt collectors may well respond to such possible exposure by no longer offering consumers the option to pay their debt electronically in the future. In that circumstance, consumers would need to pay their debt obligations by only cash, cashier's check, or money order. Cash payments require a local presence by the debt collector or travel by the consumer, which may not be possible. Payments by cashier's check and money orders, in turn, require the consumer to go in person to purchase a cashier's check or money order, and pay a fee to do so, and then pay to mail or deliver the payment by hand. *See, e.g.,* 5A Forms &

[6] *See Study of Third-Party Debt Collection Operations*, July 2016, at 32-34, available at https://files.consumerfinance.gov/f/documents/20160727_cfpb_Third_Party_Debt_Collection_Operations_Study.pdf (last visited June 1, 2021).

Procedures Under the UCC II (2021). For consumers, these options increase costs and are significantly less convenient than online payment of their debts.

Other debt collectors may choose to try to bring online payment processing in-house, but, as stated above, most merchants do not have the technical and compliance wherewithal to do so in a manner that would be acceptable to the banks. A debt collector cannot, for example, simply initiate entry into the ACH network on its own as the Nacha rules and regulations require that an ACH member bank enter into a written agreement with any entity who seeks to initiate credits and debts electronically. *See* 2021 Nacha Operating Guidelines, § 6.50.

Further, payment processors have specific policies and procedures designed to protect consumer privacy and prevent fraud during the third-party payment process, which debt collectors are unlikely to be able to fully replicate. Third-party payment transactions are highly technical, occur in multiple steps, and the Nacha rules permit rejection of entries at any point if they fail to comply with the Nacha rules or any other applicable provisions of the law. *Id.* at § 4.34. If there is a problem with the payment, such as insufficient funds or possible fraud,

payment processors have sophisticated policies and procedures for resolving these issues quickly.

There are also other important security and risk-management services that payment processors have access to that debt collectors do not. For example, the TPPPA has created a Compliance Management System designed to support payment processors in creating and maintaining risk-based, documented compliance management programs that adjust as internal changes occur, such as new products or systems, or new industries are supported, and as external changes occur, such as the nature of payments, laws and regulations and changes in public policy. The controls are agnostic as to payment type and industry or product type. It is a systematic discipline that works for all types of organizations and it is incorporated around each organization's distinct programs and requirements. Debt collectors are unlikely to create compliance systems that rival those of payment processors, given that debt collectors' expertise is the collection of debt, not electronic payment intermediation.

* * *

In all, the possibility of imposing liability on debt collectors for using payment processors to help consumers pay their obligations using the method that consumers prefer will impose serious harms on all involved, frustrating consumer choice as to how make payments and increasing costs to consumers and potentially putting their data at risk, while benefiting no one. If such a drastic, unexpected result is to be contemplated in this Circuit, it should, with all respect, come only after the consideration of the *en banc* court.

CONCLUSION

For the foregoing reasons, the TPPPA urges this Court to grant rehearing *en banc*.

Date: June 1, 2021

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CERTIFICATE OF COMPLIANCE

The undersigned, counsel for *amicus curiae*, certifies that this brief complies with the world limit of Fed. R. App. P. 29(b)(4) and 11th Cir. R. 29-3 and contains 2,423 words according to the word processing program used to prepare it, excluding the items exempted by Fed. R. App. P. 32(f). The brief's type size and typeface comply with Fed. R. App. P. 32(a)(5) and (6).

Date: June 1, 2021

By: */s/ Misha Tseytlin*

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