IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ACA INTERNATIONAL, LLC; COLLECTION BUREAU SERVICES, INC. Plaintiffs, v. CONSUMER FINANCIAL PROTECTION BUREAU; and ROHIT CHOPRA, in his official capacity as Director of the Consumer Financial Protection Bureau, Defendants.	Case No. 1:24-cv-03118-DLF

MOTION ON APPLICATION FOR PRELIMINARY INJUNCTION AND TEMPORARY RESTRAINING ORDER

When a federal agency's "advisory opinion" issued weeks before a national election "interprets" the law targeting the medical debt collection business and forces collectors to spend $400,000.00 more per year to comply with brand new requirements, it is a rulemaking, not an interpretation. The new rule, under the guise of an "advisory opinion," issued by the Consumer Financial Protection Bureau ("CFPB") in early October, will impose novel restrictions and obligations that create massive costs and administrative burdens on over one thousand businesses attempting to collect "medical debt," *i.e.*, past-due accounts arising from healthcare services (the "Advisory Opinion"). *See* 89 Fed. Reg. 80715–24 (Oct. 4, 2024).

The men and women of the debt collection industry who ensure that merchants and service providers are fairly paid can be an easy target during an election year, as most of the population does not relish the idea of paying debts. Nevertheless, informal and out-of-court debt collection keeps our

American commercial systems functioning. When the debt at issue arises from healthcare services, timely payment on past due accounts directly supports our medical care providers – and thus ensures that patients throughout the country have options for care in their communities. But this care has come under attack from an agency that seems increasingly focused on partisan political wins.

The Advisory Opinion requires collectors to step into the shoes of healthcare providers and audit medical procedures to ensure the providers' compliance with various laws and regulations. These new requirements are uncompelled by statute. The Advisory Opinion also tells collectors to be intimately involved in the medical coding process (a special skill usually reserved for in-house specialists at a medical care facility, with over 74,000 codes to choose from) and to substitute their judgment for the judgment of their clients—the actual health care providers. It mandates that detailed patient medical records be handled by debt collectors, and turns medical billing firms that currently can offer less expensive services for healthcare providers into a new class of third-party collectors (notwithstanding that Congress and the CFPB already have very specific language about who are covered as "debt collectors" under the Fair Debt Collection Practices Act and Regulation F).

This motion for a preliminary injunction and temporary restraining order seeks to enjoin the rule from taking effect before its December 3, 2024 implementation date. An injunction here is warranted because the rule bypassed the mandatory federal Administrative Procedure Act ("APA") and exceeds the Bureau's authority. It also sets impossible standards that are contrary to the FDCPA's plain text, as well as the CFPB's previous determinations when the agency finalized the debt collection rule at Regulation F, 12 C.F.R. Part 1006. Further, the Advisory Opinion cites no evidentiary basis, no studies, and no input from the public while it simultaneously adopts standards in conflict with Centers for Medicare & Medicaid Services ("CMS") "bad debt" rules and contrary to the privacy goals of the Health Insurance Portability and Accountability Act, Pub. L. No. 104–191 (1996) ("HIPAA").

The complex problems inherent in the American healthcare payments system deserve a comprehensive analysis, Congressional directives, and the opportunity for public notice and comment. The CFPB deprived Plaintiffs and the American public of this right when it issued the Advisory Opinion.

Plaintiffs ACA International, LLC ("ACA") and Collection Bureau Services, Inc. ("CBS") (collectively, "Plaintiffs") bring this action against Defendants CFPB and Rohit Chopra, in his official capacity as Director of the CFPB. Plaintiffs seek a temporary restraining order and preliminary injunction on an emergency basis and expedited briefing schedule to enjoin the adoption of the Rule in contravention of current law under the FDCPA and Regulation F.

I. BACKGROUND

According to Defendant CFPB, about $88 billion of outstanding medical bills are currently due and owing to America's healthcare providers. These bills are generated from services ranging from emergency care, treatment of complex disease, dental and orthodontic care, or elective procedures. This debt exists for a myriad of reasons. First, America relies upon an opaque third-party payor system that complicates provider repayment. For example, one in three inpatient claims submitted by providers to commercial insurers in first quarter 2023 weren't paid for over three months and 15% of inpatient and outpatient claims were initially denied.[1] Second, hospitals and physicians have complex pricing systems—largely because the country's largest payor chronically underpays: Medicare paid a record-low 82 cents for every dollar spent by hospitals caring for Medicare patients in 2022. This resulted in about $100 billion in Medicare underpayments that year

[1] American Hospital Association, Report: Hospitals struggle to collect payments from commercial insurers (May 22, 2023) at https://www.aha.org/news/headline/2023-05-22-report-hospitals-struggle-collect-payments-commercial-insurers .

alone.[2] Thus, commercially insured patients often subsidize the 60 million patients who receive Medicare coverage.

America also has a physician availability problem. It's estimated that more than 83 million people in the U.S. currently live in areas without sufficient access to a primary care physician.[3] In large parts of Idaho and Mississippi, for example, pregnant women can't find OBGYNs to care for them. *Id*. Ninety percent of counties in the U.S. are without a pediatric ophthalmologist. Eighty percent are without an infectious disease specialist. More than one-third of Black Americans live in cardiology deserts. *Id*. Experts cite economic disincentives and bureaucratic health care systems as the primary causes for this problem. *Id.*

Congress empowered the U.S. Department of Health and Human Services ("HHS") to address these and other problems with American healthcare services. HHS has 13 operating divisions, including 10 agencies in the U.S. Public Health Service and three human services agencies.[4] Moreover, Congress establishes healthcare policy—including payments policy—through legislation that is typically codified in Title 42 of the U.S. Code. *See* 42 U.S.C. § 27 *et. seq*. Title 42 has 164 separate Chapters, which each set forth Congress' views on public health and welfare.

The CFPB Defendant in this matter, however, is not an HHS agency. Nor does the CFPB have any authorities granted under any chapter in Title 42. Rather, the CFPB is an independent agency under the Federal Reserve. 12 U.S.C. § 5491(a). Nevertheless, in the so-called "interpretive" rule at issue in this lawsuit, without any notice or comment, the CFPB made

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[2] American Hospital Association, Government Programs Don't Cover the Cost of Caring … Hospitals Need Support, Not More Payment Cuts That Would Jeopardize Access to Care and Services (Jan. 26, 2024) at https://www.aha.org/news/perspective/2024-01-26-government-programs-dont-cover-cost-caring-hospitals-need-support-not-more-payment-cuts-would.

[3] American Medical Association, AMA president sounds alarm on national physician shortage (Oct. 25, 2023) at https://www.ama-assn.org/press-center/press-releases/ama-president-sounds-alarm-national-physician-shortage.

[4] HHS, About HHS (visited Nov. 15, 2024) at https://www.hhs.gov/about/index.html.

healthcare payment policy that data shows will make it more difficult for healthcare providers to recoup $ 88 billion in revenue. This cannot be allowed.

A. The Advisory Opinion Adds New Requirements for FDCPA Compliance.

The CFPB has no authority under Title 42, but does implement the Fair Debt Collection Practices Act ("FDCPA"). *See* 15 U.S.C. §§ 1692–1692p. The FDCPA limits the actions of third party debt collectors, including ACA members and CBS, who collect debts on behalf of another entity or person. 15 U.S.C. § 1692f. One of the FDCPA's many provisions is the requirement in section 808(1) that prohibits, in relevant part, the collection of any amount "unless such amount is expressly authorized by the agreement creating the debt or permitted by law." 15 U.S.C. § 1692f(1). And section 807(2)(A) prohibits any false representation of "the character, amount, or legal status of any debt." 15 U.S.C. § 1692e(2)(A).

Although styled as a "reminder" to debt collectors of their legal obligations, the Advisory Opinion involves legislative rulemaking and establishes four new obligations for debt collectors attempting to collect on medical debt. One, the Advisory Opinion requires debt collectors to analyze for accuracy account-level documents like hospital bills and treatment plans before its first contact with a consumer. Two, the Advisory Opinion requires, prior to the first consumer contact, that debt collectors decide if the amount charged to the patient is "reasonable" or not "unconscionable" under state common law. Three, the Advisory Opinion requires debt collectors to audit how medical procedures are performed to ensure that patients were not "upcoded" or billed for items or care they did not actually receive. Lastly, the Advisory Opinion redefines when a payment for healthcare services is in "default" so that ordinary medical bills are suddenly considered "debts" in third-party collections. *See generally* 89 Fed. Reg. 80716 (executive summary).

B. The CFPB is Changing Healthcare Policy in the U.S.

The CFPB has previously interfered in healthcare policy. On June 11, 2024, the CFPB issued a proposed rulemaking concerning the suppression of medical debt on consumer credit reports. The rule would prohibit consumer reporting agencies from furnishing information about medical debts to potential creditors, and therefore prohibit parties such as debt collectors from furnishing medical debt information to consumer reporting agencies. *See* 89 Fed. Reg. 51682. This rule, if implemented, would decrease medical account collections referred to third-party debt collectors by eight-percent, thus reducing revenue for medical service providers.[5]

The CFPB's authority to regulate the medical industry is notably absent from regulations or the Dodd-Frank Act, 12 U.S.C. § 5512. In fact, in prior publications the CFPB has disclaimed authority over medical debt. The CFPB itself has stated that it has authority to regulate the debt collection market because that "is a market for financial products and services under the Act," but that debt arising from medical expenses should be excluded because it is "unrelated to consumer financial products or services." 77 Fed. Reg. 9597 (Feb. 17, 2012). Further, Congress explicitly stated its intent to delegate to the CFPB the authority to regulate reporting of medical debt only to the extent required to protect the privacy of consumers. *See* 15 U.S.C. § 1681b(g)(2), (5). The 2024 FCRA rulemaking attempt came after the CFPB's previous effort to convince credit reporting agencies to suppress accurate information about unpaid medical debts for debts less than $500.

The CFPB is attempting to regulate an area it knows nothing about. Congress delegated rulemaking authority over healthcare to HHS, 42 U.S.C. § 3501 *et seq.*, the Department of Labor, 29 U.S.C. § 551 *et seq.*, and the U.S. Treasury, 31 U.S.C. § 301 *et. seq.*, which are tasked with creating laws and regulations surrounding healthcare and health insurance. In fact, Congress

[5] Federal Register, *Comment from Economic Analysis [sic] Dr. Andrew Rodrigo Nigrinis*, Regulations.gov (Nov. 15, 2024, 6:22 PM), https://www.regulations.gov/comment/CFPB-2024-0023-1019.

recently passed the No Surprises Act to address some of these issues. *See* Consolidated Appropriations Act of 2021, Pub.L. 116–260 (2020). But Congress decidedly did not delegate any regulatory authority in this space to the CFPB. Further, the CFPB's attempts go well beyond its explicit authority to "regulate the offering and provision of consumer financial products or services under the Federal consumer financial laws." 12 U.S.C. § 5491(a). The Advisory Opinion goes well beyond that statutory authorization and impedes the direct statutory authority of HHS, Labor and the Treasury.

C. Plaintiffs Challenge the Advisory Opinion on Multiple Bases Under the APA.

Because the CFPB's Advisory Opinion constitutes several substantive and material changes in the law, Plaintiffs are likely to prevail on their action seeking declaratory judgment and permanent injunctive relief. Plaintiffs bring five counts under the Administrative Procedure Act and the U.S. Constitution against both the CFPB and Rohit Chopra, in his official capacity as Director of the CFPB:

- Plaintiffs' Count I is for violation of APA sections 553 and 706(2)(A), (D). (*See generally* Compl. ¶¶ 110–113, ECF No. 2-1.) APA section 553 requires that federal agencies provide general notice of proposed rulemaking, shall publish such notice in the Federal Register, and shall then provide opportunity for public comment on the proposed rulemaking. 5 U.S.C. § 553. The CFPB did not engage in full notice-and-comment rulemaking in this instance.

- Plaintiffs' Count II is for an APA violation under sections 553 and 706(2)(A), as the CFPB's actions were arbitrary and capricious. (*See* Compl. ¶¶ 114–120.) In issuing the Advisory Opinion, the CFPB acted arbitrarily and capriciously by failing to make available any studies or data underlying its rule, failing to consider (or even request) any commentary, failing to consider the factors required by its implementing statute, failing to explain its reasoning sufficiently, failing to support its conclusions with substantial evidence, and by changing its view from prior rulemaking. (*Id.*) Thus, the agency's actions were arbitrary and capricious in violation of APA sections 553 and 706(2)(A).

- Plaintiffs' Count III is for an APA violation under section 706(2)(D), without observance of procedure required by law. (*Id.* at ¶¶ 121–123.) In issuing the Advisory Opinion, the CFPB did not comply with the Regulatory Flexibility Act ("RFA") (5 U.S.C. §§ 601–612), Small Business Regulatory Enforcement Fairness Act ("SBREFA") (5 U.S.C. §601–612), or the Paperwork Reduction Act ("PRA")

(44 U.S.C. § 3501–3521). (*Id.* at ¶ 122.) As the Advisory Opinion was a legislative rule, *supra*, the CFPB failed to comply with these requirements and thus violated APA section 706(2)(D).

- Plaintiffs' Count IV is for an APA violation for the CFPB exceeding its statutory jurisdiction, authority, or limitations under section 706(2)(C). (*See* Compl. ¶¶ 124–129.) The Advisory Opinion interprets the FDCPA in a manner that is inconsistent with existing debt collection law, including the FDCPA and Regulation F, as well as HHS regulations concerning Medicare "bad debt" and HIPAA. (*Id.* at ¶¶ 126–127.) By interpreting the FDCPA in this manner, the Advisory Opinion exceeds the Bureau's statutory jurisdiction, authority, or limitations. (*Id.*) Further, the CFPB exceeded its statutory limitations when it failed to sufficiently consider the factors proscribed for CFPB rulemaking under the Dodd-Frank Act, 12 U.S.C. § 5512. (*Id.* at ¶ 128.) Thus, the agency's actions exceeded its statutory jurisdiction, authority, and limitations violating the APA under section 706(2)(C).

- Plaintiff's Count V is for a violation of the Appropriations Clause of the U.S. Constitution, 12 U.S.C. § 5497(a)(1), and sections 706(2)(A), (B) of the APA. (*Id.* at ¶¶ 130–136.) The CFPB is funded by the Federal Reserve's combined earnings, which have not existed since September 2022. (*Id.* at ¶¶ 133–134.) Therefore, the CFPB did not have constitutionally-authorized funding to issue the Advisory Opinion, violating the APA as "not in accordance with law" and "contrary to a constitutional right, power, privilege, or immunity." (*Id.* at ¶ 136.)

These violations will each substantially and materially harm ACA, CBS, and ACA members if the Advisory Opinion is allowed to take effect on December 3, 2024.

II. LEGAL STANDARDS

A. Procedural Posture

A preliminary injunction is "an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief." *Sherley v. Sebelius*, 644 F.3d 388, 392 (D.C. Cir. 2011) (quoting *Winter v. Nat. Res. Def. Council*, 555 U.S. 7, 22 (2008)). To prevail, a party seeking preliminary relief must make a "clear showing that four factors, taken together, warrant relief: likely success on the merits, likely irreparable harm in the absence of preliminary relief, a balance of the equities in its favor, and accord with the public interest." *League of Women Voters v. Newby*, 838 F.3d 1, 6 (D.C. Cir. 2016) (internal quotation marks omitted). The instant application for a preliminary injunction and temporary restraining order seeks to maintain the status quo.

If the plaintiff fails to establish a likelihood of success on the merits, the court "need not proceed to review the other three preliminary injunction factors." *Ark. Dairy Coop. Ass'n v. U.S. Dep't of Agric.*, 573 F.3d 815, 832 (D.C. Cir. 2009). The plaintiff cannot prevail without a "substantial indication of likely success on the merits." *Archdiocese of Wash. v. Wash. Metro. Area Transit Auth.*, 281 F.Supp.3d 88, 99 (D.D.C. 2017) ("[A]bsent a substantial indication of likely success on the merits, there would be no justification for the Court's intrusion into the ordinary processes of administration and judicial review." (internal quotation marks omitted)), *aff'd*, 897 F.3d 314 (D.C. Cir. 2018). As discussed below, and as is evident from the declarations accompanying this motion, Plaintiffs are highly likely to succeed on the merits. *See* Decl. of S. Purcell on behalf of ACA (**Ex. A**); Decl. of J. Whipple on behalf of CBS (**Ex. B**); Decl. of S. Ertischek on behalf of CRM (**Ex. C**); and Decl. of J. Gonsalves on behalf of Action Collection (**Ex. D**).

B. Administrative Procedure Act

The Court will "hold unlawful and set aside" agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," 5 U.S.C. § 706(2)(A), "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right," *id.* § 706(2)(C), or "without observance of procedure required by law," *id.* § 706(2)(D). In an arbitrary and capricious challenge, the core question is whether the agency's decision was "the product of reasoned decision making." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins.*, 463 U.S. 29, 52, 103 S.Ct. 2856, 77 L.Ed.2d 443 (1983); *see also Nat'l Telephone Co-Op. Ass'n v. FCC*, 563 F.3d 536, 540 (D.C. Cir. 2009) ("The APA's arbitrary-and-capricious standard requires that agency rules be reasonable and reasonably explained."). The court "is not to substitute its judgment for that of the agency." *State Farm*, 463 U.S. at 43, 103 S.Ct. 2856. "Nevertheless, the agency must examine the relevant data and articulate a satisfactory explanation for its action including a rational

connection between the facts found and the choice made." *Id.* (internal quotation marks omitted). When reviewing that explanation, the court "must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." *Id.* (internal quotation marks omitted).

For example, an agency action is arbitrary and capricious if the agency "entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before [it], or [the explanation] is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Id.* The party challenging an agency's action as arbitrary and capricious bears the burden of proof. *Pierce v. SEC*, 786 F.3d 1027, 1035 (D.C. Cir. 2015).

C. Review must be on Administrative Record, and the Administrative Record before this Court includes only the Federal Register Publication.

When reviewing final agency action, the court "should have before it neither more nor less information than did the agency when it made its decision, . . . so the APA requires review of 'the whole record.' " *Dist. Hosp. Partners, L.P. V. Sebelius*, 794 F.Supp.2d 162, 173 (D.D.C. 2011) (quoting 5 U.S.C. § 706 and *Walter O. Boswell Mem'l Hosp. v. Heckler*, 749 F.2d 788, 792 (D.C. Cir. 1984)). "A district court reviewing an agency action under the APA's arbitrary and capricious standard does not resolve factual issues." *Atl. Sea Island Grp. LLC v. Connaughton*, 592 F.Supp.2d 1, 12–13 (D.D.C. 2008). Instead, the "entire case on review is a question of law and can be resolved on the agency record in the context of a motion to dismiss under Rule 12(b)(6)." *Id.* (internal quotation marks omitted). Finally, "the party challenging an agency's action as arbitrary and capricious bears the burden of proof." *Bean*, 2017 WL 4005603, at *5 (quoting *San Luis Obispo Mothers For Peace v. U.S. Nuclear Reg. Comm'n*, 789 F.2d 26, 37 (D.C. Cir. 1986) (en banc)).

"No principle of administrative law is more firmly established than that a court must review discretionary actions in terms of the rationale on which the agency acted, rather than 'accept appellate counsel's post hoc rationalizations.' " *Ashland Oil, Inc. v. F.T.C.*, 548 F.2d 977, 981 (D.C. Cir. 1976) (quoting *Burlington Truck Lines v. United States*, 371 U.S. 156, 169, 83 S.Ct. 239, 9 L.Ed.2d 207 (1962)) (citing *SEC v. Chenery Corp.*, 318 U.S. 80, 88, 63 S.Ct. 454, 87 L.Ed. 626 (1943)). Because the Advisory Opinion was not opened for notice and comment, the only record before the court is that set forth in the Federal Register final publication. 89 Fed. Reg. 80715-80724 (Oct. 4, 2024).

To the extent that an agency action is based on the agency's interpretation of a statute it administers, the court's review is governed by *Loper Bright*. "[W]hen a particular statute delegates authority to an agency consistent with constitutional limits, courts must respect the delegation, while ensuring that the agency acts within it. But courts need not and under the APA may not defer to an agency interpretation of the law simply because a statute is ambiguous." *Loper Bright Enters. v. Raimondo*, 144 S.C. 2244, 2273 (2024). Thus, an issue with an agency's statutory interpretation is reviewed *de novo*. *U.S. Sugar Corp. v. EPA*, 113 F.4th 984, 992 (D.C. Cir. 2024) (citing *Loper Bright Enters. v. Raimondo*, 144 S.Ct. 2244, 2261 & n.4, 2273 (2024)). Instead of deferring to the agency's interpretation of the statute, the court must apply what it regards as the statute's "best" reading. *Id.*

III. ANALYSIS

ACA and CBS are the best parties to bring this action, as relief for them will solve the immediate problem. But relief in this matter will benefit society at large. Government agencies looking for political wins cannot be allowed to exceed their statutory authority and change complex systems without public engagement. Based on the arguments below, Plaintiffs seek temporary and/or preliminary injunctive relief.

A. ACA and CBS have Standing

Article III of the U.S. Constitution limits the "judicial Power" of federal courts to "Cases" and "Controversies." U.S. Const. art. III, § 2, cl. 1. "[T]here is no justiciable case or controversy unless the plaintiff has standing." *West v. Lynch*, 845 F.3d 1228, 1230 (D.C. Cir. 2017). As the Supreme Court has interpreted this requirement, "the irreducible constitutional minimum of standing contains three elements": (1) the plaintiff must have suffered an "injury in fact" that is "concrete and particularized" and "actual or imminent, not conjectural or hypothetical"; (2) there must exist "a causal connection between the injury and the conduct complained of"; and (3) it must be "likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992) (quotation marks omitted). "The burden of establishing these elements falls on the party invoking federal jurisdiction, and at the pleading stage, a plaintiff must allege facts demonstrating each element." *Friends of Animals v. Jewell*, 828 F.3d 989, 992 (D.C. Cir. 2016). The plaintiff "must demonstrate standing separately for each form of relief sought." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 185 (2000).

An organization like ACA can sue on its members' behalf through "associational standing" when (1) "its members would otherwise have standing to sue in their own right;" (2) "the interests it seeks to protect are germane to the organization's purpose;" and (3) "neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Hunt v. Wash. State Apple Advert. Comm'n*, 432 U.S. 333, 343 (1977). The organization's members would otherwise have standing to sue if they have "(1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Spokeo, Inc. v. Robins*, 578 U.S. 330, 338 (2016). So long as the plaintiff seeking review is personally "among the injured," *Sierra Club v. Morton*, 405 U.S. 727, 735

(1972), an "injury in fact" can be to "environmental" interests, including aesthetic, conservational and recreational ... interests." *Envtl. Def. Fund v. EPA*, 465 F.2d 528, 531 (D.C. Cir. 1972). To survive a summary judgment motion, the plaintiffs must submit affidavits or other evidence" to establish standing. *Lujan*, 504 U.S. at 563.

As to the first requirement, ACA and CBS alleged a sufficient injury-in-fact. ACA, CBS, and ACA members such as Cascade Receivables Management, Inc. and Action Collection Agencies, Inc. imminently face new substantial costs of compliance if the Advisory Opinion is allowed to go into effect. (Compl. ¶¶ 53, 78, 82–85; Ex. A. ¶¶ 13-14; Ex. B ¶¶ 11–15, 53–54; Ex. C ¶¶ 4–5, 13–15, 50–54; Ex. D ¶¶ 2, 23.) The Advisory Opinion poses an imminent threat to ACA members', including those listed above, revenues. (Compl. ¶ 87–88, Ex. A. ¶ 13) It also poses an imminent threat to ACA's membership levels and revenues from membership dues, harming ACA directly. (Compl. at ¶ 86, Ex. A. ¶ 13). Further, the members face increased legal costs to combat CFPB enforcement under this expanded version of the FDCPA and to deal with the uncertainty and new requirements that this new rulemaking has already caused. (Compl. ¶ 85; Ex. A ¶ 12; Ex. B ¶ 11, Ex. C ¶ 54.) Moreover, if ACA members are unable to collect on accounts they own, these accounts lose all value and become worthless. (Compl. ¶ 88; Ex. C ¶ 5.) These injuries to revenue and property interests are concrete, particular to ACA, ACA members, and CBS, and "actual or imminent, not conjectural or hypothetical." *Lujan*, 504 U.S. at 560–61. Indeed, evidence shows that friction in the collection process directly causes declined revenues. *Supra* Section I.B, fn.5.

The second standing requirement, traceability, is met. The substantial costs that CBS and ACA and its members face stem directly from the CFPB's new interpretations under the Advisory Opinion to review account-level documents before sending validation notices (*see* Compl. ¶¶ 32–39), meeting the new "reasonableness" standards (*see id.* at ¶¶ 40–54), the new definition of debt in "default" (*see id.* at ¶¶ 55–68), and the new requirement to perform medical procedure audits (*see*

id. at ¶¶ 69–80). Without these new requirements imposed by the Advisory Opinion, CBS, ACA, and its members would not face imminent harm from the substantial costs and threat to revenue levels. *Supra* 12.

Finally, the Plaintiff's claims are redressable. "Redressability examines whether the relief sought, assuming that the court chooses to grant it, will likely alleviate the particularized injury alleged by the plaintiff." *Fla. Audubon Soc'y v. Bentsen*, 94 F.3d 658, 663–64 (D.C. Cir. 1996) (footnote omitted). Plaintiffs seek one substantive form of relief: an order from this Court enjoining the CFPB from enacting and enforcing the Advisory Opinion in its entirety. (Compl. ¶ 107.) The requested relief, if granted, would redress ACA/CBS's alleged injury and preserve the status quo. ACA and CBS state that they face imminent threat to their revenues and costs directly attributable to attempting to comply with the Advisory Opinion; it follows that vacating the government's decision to engage in arbitrary and capricious rulemaking without public notice-and-comment would alleviate that harm.

B. Claim 1 – Failure to Engage in Notice-and-Comment Rulemaking in Violation of APA, 5 U.S.C. §§ 553, 706(2) (A), (D)

1. The Advisory Opinion is a Legislative Rule

Despite imposing substantial new regulations on debt collectors and imposing restrictions contrary to another CFPB rule, the CFPB attempted to skirt notice-and-comment rulemaking required by APA section 553 by styling the Advisory Opinion as an "interpretive rule" and a "general statement of policy" of the agency. 89 Fed. Reg. 80723–24. In fact, this rule is legislative and thus subject to notice-and-comment rulemaking under APA section 553.

A rule is interpretive if it "spells out a duty that is fairly encompassed within the [statute or] regulation that the interpretation purports to construe." *Air Transp. Ass'n of Am. v. FAA*, 291 F.3d 49, 55-56 (D.C. Cir. 2002). The inquiry of whether a rule is interpretive turns on four questions. "(1) whether in the absence of the rule there would not be an adequate legislative basis for

enforcement action or other agency action to confer benefits or ensure the performance of duties, (2) whether the agency has published the rule in the Code of Federal Regulations, (3) whether the agency has explicitly invoked its general legislative authority, or (4) whether the rule effectively amends a prior legislative rule." *Am. Mining Cong. v. MSHA*, 995 F.2d 1106, 1112 (D.C. Cir. 1993). "If the answer to any of these questions is affirmative, we have a legislative, not an interpretive rule." *Id.* at 1112.

Critically, D.C. Circuit precedent "does not defer to the agency's view that its regulations are a mere 'clarification of an existing rule' pursuant to the APA; instead, the court conducts its own inquiry into whether the new rules 'work substantive changes in prior regulations.'" *Stuttering Found. of America v. Springer*, 498 F. Supp. 2d 208, 211 (D.C. Cir. 2007) (quoting *Sprint Corp. v. FCC*, 315 F.3d 369, 374 (D.C. Cir. 2003)). "A rule is legislative if it supplements a statute, adopts a new position inconsistent with existing regulations, or otherwise effects a substantive change in existing law or policy." *Mendoza v. Perez*, 754 F.3d 1002, 1021 (D.C. Cir. 2014) (citation omitted).

Of the four questions for determining whether a rule is interpretive or not under *American Mining Congress*, (2) and (3) are not applicable here. The Advisory opinion was published in the Federal Register, not the Code of Federal Regulations. 89 Fed. Reg. 80715–24. The CFPB also did not explicitly invoke its general legislative authority. In fact, it tried to mask its legislative rulemaking under the guise of an "interpretive rule" and a "general statement of policy" of the agency. *Id.* at 80723–24.

a. The Advisory Opinion is a legislative rule under prong one of *American Mining Congress*

The Advisory Opinion is legislative because there would not be an adequate basis under the FDCPA or Regulation F for an enforcement action if the CFPB hadn't published the Advisory Opinion. Therefore, the CFPB's rulemaking under the Advisory Opinion fails under prong one of *American Mining Congress*. A rule will be deemed legislative when "in the absence of the rule

there would not be an adequate legislative basis for enforcement action or other agency action to confer benefits or ensure the performance of duties." *Am. Mining Cong.*, 995 F.2d at 1112.

(1) Requirement One: Pre-Contact Verification

First, the Advisory Opinion forces a new requirement on debt collectors to analyze account-level documents before sending a validation notice. (*See* Compl. ¶¶ 32–39.) After the rule is effective, a medical debt collector will violate the FDCPA if it fails to analyze account-level documents and agreements for each patient so the collector may make an independent legal determination that the debt is valid prior to collection–even if there is a services agreement and the balance is accurate. 89 Fed. Reg. 80721–22. This rule requires debt collectors to perform a unilateral verification of the debt before it is requested pursuant to FDCPA § 1692g(b).

The FDCPA § 1692g plainly allows debt collectors to contact consumers about their accounts before reviewing account-level documentation. (*See* Compl. ¶¶ 32–34, ¶¶ 37–39.) The process established by the FDCPA is that a debt collector may form a reasonable belief about the validity of the debt through any valid and proven method—which does not necessarily require review of documents for each consumer account. (*Id.* at ¶¶ 43–44; Ex. A ¶ 16; Ex. B ¶¶ 24, 29; Ex. C ¶¶ 21, 23, 41.) The Advisory Opinion departs from this reliable system, saying that debt collectors may satisfy legal requirements by reviewing account-level documentation before beginning collections:

> Debt collectors may be able to satisfy this requirement by obtaining appropriate information to substantiate those assertions, consistent with patients' privacy. This information could include payment records (including from insurance); records of a hospital's compliance with any applicable financial assistance policy; copies of executed contracts or, in the absence of express contracts, documentation that the creditor can make a prima facie claim for an alleged amount under State law (*e.g.*, "reasonable" or "market rates"). 89 Fed. Reg. 80716.

Id.

We acknowledge that this language is couched in "may be able to" language. But notably missing from this detailed list of practices that "satisfy" legal requirements is a description of the practices currently in use: policy and procedure review, sample sets, and reviewing document requested during an FDCPA's § 1692g validation process. (Ex. C ¶¶ 21-32.) The affirmative requirement-setting in this opinion is also demonstrated by the CFPB's closing warning: "[c]ollecting or attempting to collect medical debts without substantiation violates [FDCPA] section 807(2)(A)." 89 Fed. Reg. 80722.

Had the CFPB not intended to change the law, it could have noted the well-settled law that the FDCPA does not require a debt collector to independently investigate each account prior to collection.[6] It might also have cited the importance of the current process established by the FDCPA's plain text, that the FDCPA and Regulation F require a debt collector to provide debt verification to the consumer or cease collection if the consumer disputes the debt in writing within 30 days after receiving the debt collector's initial written notice. 15 U.S.C. § 1692g; (Ex. C ¶¶ 16, 18). Existing law under the FDCPA is clear that a debt collector has the option of either providing the consumer debt verification or ceasing collection. 15 U.S.C. § 1692g. Requiring pre-collection investigation conflicts with the FDCPA's plain language and would render the verification process provided by § 1692g(a) superfluous. S*ee, e.g., Azar v. Hayter*, 874 F. Supp. 1314 (N.D. Fla. 1995)

[6] *See, e.g., Owen v. I.C. Sys., Inc.*, 629 F.3d 1263, 1276-77 (11th Cir. 2011) ("the FDCPA does not require debt collectors to independently investigate and verify the validity of a debt to qualify for the bona fide error defense"); *Clark v. Capital Credit & Collection Servs., Inc.*, 460 F.3d 1162, 1173-74 (9th Cir. 2006) ("Within reasonable limits, [Defendants] were entitled to rely on their client's statements to verify the debt. Moreover, the FDCPA did not impose upon them any duty to investigate independently the claims presented") (internal citations omitted); *Jenkins v. Heintz*, 124 F.3d 824, 834 (7th Cir. 1997) (holding that a debt collector has no obligation to conduct an independent debt validity investigation); *Smith v. Transworld Systems, Inc*., 953 F.2d 1025, 1032 (6th Cir. 1992) (debt collectors are entitled to rely on the information they receive from the creditor); *Huebner v. Midland Credit Mgmt., Inc*., 2016 WL 3172789, *6 (E.D. N.Y. June 6, 2016), *aff'd*, 897 F.3d 42 (2d Cir. 2018) (debt collector "had no obligation to independently investigate the debt prior to beginning collection.).

("No provision of the FDCPA has been found which would require a debt collector independently to investigate the merit of the debt, *except to obtain verification*, or to investigate the accounting principles of the creditor, or to keep detailed files.") (emphasis added).

(2) Requirement Two: Considering Legal Defenses

Second, the CFPB's new reasonableness-of-pricing standard is contrary to existing law and sets a new binding standard. The Advisory Opinion requires medical debt collectors, when attempting to collect a medical debt that is not created by an express contract between the consumer and healthcare provider setting forth the dollar amount of the services, to make a legal determination that a debt is reasonable and not unconscionable pursuant to state law. *See* 89 Fed. Reg. 80719–20. Essentially, the CFPB wants debt collectors to consider whether a consumer has a legal defense based on reasonableness or unconscionability prior to initial communication. The new standard will require debt collectors to substantially change their practices. (Compl. ¶¶ 45–49; Ex. B ¶¶ 30–35; Ex. C ¶¶ 33–37; Ex. D 13–14.) And this requirement will be outrageously expensive to implement—CBS estimates it will cost at least $ 400,000 annually in additional staffing. (Compl. ¶¶ 50–54; Ex. B ¶ 15.)

Under existing law, debt collectors are not required to make an independent legal determination as to whether the consumer has any potential legal defense to the debt prior to collection. *See Owen v. I.C. Sys., Inc.*, 629 F.3d 1263, 1276–77 (11th Cir. 2011); *supra* III.B.1.a.(1) fn. 6. Additionally, debt collectors collect debt on behalf of third-parties and do not own the accounts; they therefore do not have the contractual right to adjust the underlying obligation's contract value. (Compl. ¶ 42; Ex. B ¶ 28.) Rather, a consumer who disagrees with an amount charged may work directly with the healthcare provider to reduce charges. (Compl. ¶ 42; Ex. B ¶ 28.) Currently, debt collectors rely upon existing structures, such as audits from the Centers for Medicare & Medicaid Services ("CMS") and enforcement of federal price transparency law to

form a reasonable belief in the price accuracy charged to patients. (Compl. ¶ 43; Ex. B ¶ 29.) In addition, debt collectors like Plaintiff CBS take reasonable precautions like reviewing a client's policies and procedures and researching a provider's regulatory history to establish a reasonable belief in the accuracy of account balance information. (Compl. ¶ 43; Ex. B ¶ 29.)

The Advisory Opinion requires medical debt collectors, when attempting to collect a medical debt that is not created by an express contract between the consumer and healthcare provider setting forth the dollar amount of the services, to make a legal determination that a debt is reasonable and not unconscionable pursuant to state law:

> The CFPB reminds debt collectors that State law may determine or limit the amount that medical providers may charge to consumers, and that collection of or an attempt to collect an amount that exceeds the allowable amount under State law (including applicable State case law) may misrepresent the amount of the debt in violation of the FDCPA. *See* 89 Fed. Reg. 80719–20.

This additional obligation on debt collectors represents a new standard. The Advisory Opinion's new standard eviscerates debt collectors' reasonable reliance upon their client's policies and regulatory history and subjects debt collectors to enforcement and private litigation risk that did not exist prior to this Advisory Opinion. (Ex. B ¶¶ 28, 31; Ex. C ¶¶ 34–37.)

(3) Requirement Three: Reviews for Upcoding

The Advisory Opinion requires debt collectors to audit how medical procedures are performed to ensure that patient bills were not "upcoded," and billed for items or care they did not actually receive. 89 Fed. Reg. 80717. The Advisory Opinion explains that medical bills, especially those from visits to hospitals, are often calculated based on a standardized set of codes that correspond to the type and degree of medical attention a patient received. The more serious, urgent, or involved the care, the higher the charge as that fits the resources used to treat the patient. *Id.* The Advisory Opinion states that collecting on "upcoded" bills is an FDCPA violation, even if was

done pursuant to hospital billing policies and pricing, and even if it is consistent with the agreement between the consumer and the hospital. *Id.*

The Advisory Opinion says that it is an FDCPA violation to collect an account that has been "upcoded":

> A debt collector that collects or attempts to collect a debt that has been "upcoded" violates the FDCPA's prohibitions against unfair or unconscionable debt collection practices because the amount is not expressly authorized by the agreement for services actually rendered and also violates the FDCPA's prohibitions against deceptive or misleading debt collection practices because it would falsely represent the amount of the debt. *Id.* at 80720.

The concerning statement in this directive is that the Bureau is establishing a new FDCPA violation when there may be upcoding and "the amount is not expressly authorized by the agreement for services actually rendered." *Id.* In CBS's experience, for example, many agreements with hospitals provide that a patient will be billed for services in accordance with hospital policy. (*See* Compl. ¶ 71; Ex. B ¶ 45.) Moreover, debt collectors would have no reason to know that "upcoding" occurred unless they performed a detailed audit on each bill or invoice. (Ex. B ¶ 46; Ex. C ¶ 39; Ex. D ¶ 22.) ACA members—in order to ensure that they are not collecting on debts that are potentially "upcoded"—will need to conduct invasive and expensive audits of medical providers. (Ex. B ¶¶ 47–49; Ex. C ¶¶ 42–44; Ex. D ¶¶ 21–22.) It is asking collectors to be intimately involved in the coding process (over 74,000 codes to choose from) and to substitute their judgment for the judgment of their clients—the actual health care providers. (Ex. A. ¶ 19.) The new requirement would require an outrageous expansion of staff to review each bill and each procedure to determine if medical bill coding accurately captured the medical services and devices provided. (Ex. B ¶ 15; Ex. C ¶¶ 52–53; Ex. D ¶ 23.) Moreover, this type of detailed review would be a serious invasion of patient privacy and run contrary to the Health Insurance Portability and Accountability Act, Pub. L. No. 104–191 (1996) ("HIPAA"). (Compl. ¶ 84; (Ex. B ¶¶ 51–52.)

The FDCPA expressly allows debt collectors to seek payment for amounts authorized by agreement. 15 U.S.C. § 1692f(1). Yet the Advisory Opinion states that collecting on "upcoded" bills is an FDCPA violation, even if was done pursuant to hospital billing policies and pricing, and even if it is consistent with the agreement between the consumer and the hospital. 89 Fed. Reg. 80717.

(4) Requirement Four: Redefining Default

Finally, the new definition of a debt in "default" extends the FDCPA to the entire medical billing industry without a legal basis. The Advisory Opinion redefines "default" for medical debt where the consumer and healthcare provider have not otherwise defined the term by agreement, to occur when the consumer has failed to pay in full "at a given time," regardless of how the creditor treats the debt:

> To be sure, the terms of a given contract or the principles of applicable law may differentiate between one (or more) missed payments and contractual breach, in which case the debt may not be ''in default'' if a single payment is missed. But absent such terms or applicable legal principle, failure to make full payment by the given time constitutes a breach of the consumer's contractual obligation. If a person obtains that debt (or the right to collect it) after that failure to make full payment, that person has obtained a debt ''in default at the time it was obtained'' and therefore does not qualify for the section 803(6)(F)(iii) exemption. 89 Fed. Reg. 80723.

This new bright-line rule that all debts are in "default" if they are not paid in full "at a given time," regardless of how the creditor is treating the debt, is contrary to longstanding law interpreting the FDCPA and constitutes a substantive change of law, rather than a mere explanation or interpretation of existing law. (*See* Compl. ¶¶ 56–59.)

Under current law, The FDCPA only applies to debt that is in "default" when obtained by the debt collector. *See* 15 U.S.C. § 1692a(6)(F)(iii). "Default" is not defined in the FDCPA; however, where the agreement between the creditor and the debt collector does not define the term, courts interpreting the FDCPA generally consider the facts and circumstances surrounding the relationship between the consumer, creditor, and debt collector to determine if a debt is in "default"

under the FDCPA. *See, e.g., Mavris v. RSI Enterprise Inc*., 86 F. Supp. 3d 1079, 1086 (D. Ariz. 2015) (the question a court must answer to determine if a debt is in "default" under the FDCPA is whether, "at the time a third party obtains a debt for collection, would a reasonable person in the debtor's position believe that the creditor viewed the debt as being in default"). When neither an agreement between the consumer and creditor nor state law defines when a consumer defaults, courts make a factual determination on a case-by-case basis to determine whether a debt is in "default" under the FDCPA. *See, e.g., Echlin v. Dynamic Collectors, Inc*., 102 F. Supp. 3d 1179, 1185 (W.D. Wash. 2015).

The CFPB's interpretation of "default" would materially change debt collectors' practices, particularly those with medical billing services businesses in addition to their debt collection businesses. (*See* Compl. ¶¶ 60–68; Ex. B ¶¶ 40–43; Ex. D ¶¶ 17–20.) Practically, this would cause a medical account to go into "default" if the bill is not paid within 30 days of billing. (*See* Compl. ¶¶ 60–68; Ex. B ¶¶ 40–43; Ex. D ¶¶ 17–20.) This is problematic because it directly conflicts with rules promulgated by the Centers for Medicare & Medicaid Services ("CMS"), which provides that a debt may be deemed uncollectible only if it remains unpaid more than 120 days from the date the first bill is mailed to the beneficiary and after the other requirements of 42 U.S.C. § 413.89(e) have been met. 42 U.S.C. § 413.89(e)(2)(i)(3); (*see* Compl. ¶ 56).

The Advisory Opinion's directive that any account is in default that is not paid in full at the "due by" date is a substantive and material change of law that does substantial harm to healthcare providers and patients. (*See id.* at ¶¶ 55–56.) Indeed, the Advisory Opinion expressly acknowledges that this is a change in law when it states that the purpose of this interpretation is to set, "an objective standard for defining ''default'' [that] prevents debt collectors from attempting to expand the section 803(6)(F)(iii) exemption by reference to the subjective intent or belief of the

collector or creditor or by reference to agreements or policy documents that the consumer has no access to." 89 Fed. Reg. 80723.

In sum, after reviewing the old standards and comparing them to the new standards established by the Advisory Opinion, the CFPB clearly is attempting to establish requirements that if not met will allow it to assert new claims against debt collectors. The Advisory Opinion sets forth a factual scenario, explains how covered persons must act in those scenarios, and says that failure to act as proscribed is a law violation. In the four instances discussed above, the required actions are new and not previously dictated by statute. Absent these new rules, the FDCPA would not otherwise support action for failure to do as the CFPB directs in this rule. Therefore, it is a legislative rule under *American Mining Congress*. 995 F.2d at 1112.

b. The Advisory Opinion is a legislative rule under prong four of *American Mining Congress*

At least one aspect of the CFPB's rulemaking under the Advisory Opinion also fails under *American Mining Congress* prong four because the "rule effectively amends a prior legislative rule." *Am. Mining Cong.*, 995 F.2d at 1112.

The Advisory Opinion's new requirement to review account-level documents before sending a validation notice is contrary to a previous CFPB rulemaking. (*See* Compl. ¶¶ 35–36.) In enacting Regulation F, the CFPB explicitly declined to include a rule that debt collectors are obligated to substantiate a debt prior to collection, finding that such a rule was "not advisable" without the "benefit of public notice and comment." *See* 85 Fed. Reg. 76734, 76857 n.27 ("The Bureau received feedback asking the bureau to include in the final rule certain interventions that the Bureau did not pose; many such comments addressed debt collectors' obligation to substantiate debts. The Bureau concludes that it is not advisable to finalize such interventions without the benefit of public notice and comment and therefore does not address such comments further in the Notice.") (emphasis added). In the instant Advisory Opinion, however, the CFPB does just what it

determined not to do in a prior rule. This provision, therefore, is directly contrary to a prior agency position. The CFPB did not explain the necessity for this change or its rationale for this change.

2. The CFPB did not Provide Notice as Required under the APA

Once the Court has determined that the agency has promulgated a legislative rule, it must then determine if its legislative rulemaking violated the APA.

The APA requires that, before undertaking certain actions, federal agencies publish a "[g]eneral notice of proposed rulemaking" in the Federal Register and "give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments." 5 U.S.C. § 553(b)–(c). Section 553 exempts "interpretative rules" and "general statements of policy" from notice and comment procedures. 5 U.S.C. § 553(b)(3)(A). Nonetheless, an agency may not label a substantive change to a rule an interpretation simply to avoid the notice and comment requirements. *See Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1024 (D.C. Cir. 2000).

Notice need include only "(1) a statement of the time, place, and nature of public rule making proceedings; (2) reference to the legal authority under which the rule is proposed; and (3) either the terms or substance of the proposed rule or a description of the subjects and issues involved." 5 U.S.C. § 553(b); *see also U.S. Telecom Ass'n v. FCC*, 825 F.3d 674, 700 (D.C. Cir. 2016) (stating that the APA requires agencies to "provide sufficient factual detail and rationale for [a proposed] rule to permit interested parties to comment meaningfully" (quotation marks omitted)).

The D.C. Circuit's critical-material doctrine, which states that "[u]nder APA notice and comment requirements, among the information that must be revealed for public evaluation are the technical studies and data upon which the agency relies in its rulemaking." *Banner Health v. Price*, 867 F.3d 1323, 1336 (D.C. Cir. 2017) (internal quotation marks omitted). *But see* 5 U.S.C. §

553(b)(3) (requiring only that notice shall include "either the terms or substance of the proposed rule or a description of the subjects and issues involved"); *Vermont Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc.*, 435 U.S. 519, 524, (1978) ("[S]ection [553] of the Act established the maximum procedural requirements which Congress was willing to have the courts impose upon agencies in conducting rulemaking procedures."); *Allina Health Servs. v. Sebelius*, 746 F.3d 1102, 1110 (D.C. Cir. 2014) (observing a "tension between *Vermont Yankee* and our critical material doctrine"); *Am. Radio Relay League, Inc. v. FCC*, 524 F.3d 227, 246 (D.C. Cir. 2008) (Kavanaugh, J., dissenting) (writing that the D.C. Circuit's critical-material doctrine "cannot be squared with the text of § 553 of the APA" and that "the Supreme Court ... rejected this kind of freeform interpretation of the APA ... [in] its landmark *Vermont Yankee* decision"). However, the law of the D.C. Circuit "is not imposing new procedures but enforcing the agency's procedural choice by ensuring that it conforms to APA requirements." *Banner Health*, 867 F.3d at 1337.

The critical-material doctrine applies here because the CFPB has failed to put forth *any* data it relied on in reaching the conclusions within the Advisory Opinion.[7] In the Advisory Opinion's "Background" section, the CFPB cites to a few web articles to substantiate the US medical debt burden's size. 89 Fed. Reg. 80716. It cites some articles about how medical pricing is not very transparent or that it varies. *Id.* It cites some studies about the costs to the US healthcare system for "upcoding." *Id.* at 80716–17. However, never does the Advisory Opinion discuss *any* evidence or data that substantiates the effects that the new rule will have on the healthcare industry, debt collectors, or consumers.

Even if the critical-material doctrine does not apply here, the Advisory Opinion still runs afoul of notice-and-comment requirements under APA section 553. The CFPB did not provide

[7] The logical-outgrowth doctrine does not apply here because there was no proposed rule and final Rule.

notice of an intent to issue an opinion nor did it accept comments from the public when it promulgated the Advisory Opinion. There was no SBREFA panel related to this rule. The Advisory Opinion does not contain a cost-benefit analysis or any studies that measured the necessity, impact, paperwork, or expense of the rules in the Advisory Opinion. If ACA, ACA members, and CBS had been provided the opportunity to comment on a proposed Advisory Opinion, it would have provided documents and data informing the CFPB that its proposal would harm consumers, harm the healthcare industry, and cause the negative effects set forth in the Complaint. (*See generally* Compl. ¶¶ 25–80; Ex. B ¶ 18.)

3. The CFPB's lack of notice-and-comment rulemaking will harm Plaintiffs.

CFPB's failure to follow the APA and provide notice-and-comment rulemaking to its Advisory Opinion has already harmed ACA and its members and will in the future cause irreparable harm to ACA, its members, and CBS. First, ACA and its members have already incurred costs reviewing and considering the Advisory Opinion and taking initial steps to comply with the new rules.

These costs are unrecoverable. The harms are not compensable through monetary relief, as the principal violator here has sovereign immunity and no private right of action would aid recoupment.

ACA and its members have also suffered from the CFPB's silencing in violation of the APA. By not engaging in notice-and-comment rulemaking while making substantive changes to current law, the CFPB closed off important channels of communication between it and stakeholders. Had notice and comment happened, ACA, CBS, and ACA members would have pointed out significant costs, harms, and public policy mistakes in the proposed rule. (Compl. ¶ 25; Ex. B ¶ 18; Ex. C ¶ 20.) These stakeholders were deprived of important dialogue about the rule's

costs and benefits as well as how best to comply with the new standards. (Compl. ¶ 25; Ex. B ¶ 18; Ex. C ¶ 20.) The harm caused by curtailment of rights granted by legislation are not compensable.

Finally, should the rules be implemented, ACA members must spend the significant sums to comply, and face government enforcement and private plaintiff litigation if they do not comply. (Ex. B ¶ 15; Ex. C ¶¶ 52–54; Ex. D ¶ 23.) Again, no private right of action exists to allow these costs to be recovered.

C. Claim 2 – Arbitrary and Capricious in Violation of APA, 5 U.S.C. §§ 553, 706(2)(A)

Plaintiffs are likely to succeed on Count II because the CFPB's failure to provide evidence or data to show that it considered the rules' costs is a separate violation under 5 U.S.C. 706(2)(A).

An agency action must be set aside if a court finds it to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law." 5 U.S.C. 706(2)(A). "[A]n agency rule would be arbitrary and capricious if the agency has . . . entirely failed to consider an important aspect of the problem." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Automobile Ins. Co.*, 463 U.S. 29, 43 (1983). "Integral to these requirements is the agency's duty to identify and make available technical studies and data that it has employed in reaching the decisions to propose particular rules. An agency commits serious procedural error when it fails to reveal portions of the technical basis for a proposed rule in time to allow for meaningful commentary." *Owner-Operator Indep. Drivers Ass'n, Inc. v. Fed. Motor Carrier Safety Admin*., 494 F.3d 188, 199 (D.C. Cir. 2007). The arbitrary and capricious standard of § 706(2) (A) is a "catchall" that generally subsumes the "substantial evidence" standard of § 706(2)(E). *See Ass'n of Data Processing Serv. Orgs., Inc. v. Bd. of Governors of Fed. Rsrv. Sys.*, 745 F.2d 677, 683–84 (D.C. Cir. 1984) ("When the arbitrary or capricious standard is performing that function of assuring factual support, there is no substantive difference between what it requires and what would be required by the substantial evidence test, since it is impossible to conceive of a 'nonarbitrary' factual judgment supported only

by evidence that is not substantial in the APA sense ...."); *accord Safe Extensions, Inc. v. FAA*, 509 F.3d 593, 604 (D.C. Cir. 2007).

As a threshold matter, the Advisory Opinion is arbitrary and capricious because it did not provide any evidence in support of its rule changes, much less substantial evidence. No studies were cited regarding the costs of compliance, benefits to consumers, or any other impacts of these numerous changes to current regulation and law. *See generally* 89 Fed. Reg. 80715–24.

The Advisory Opinion's new requirements are not supported by substantial evidence. The Advisory Opinion did not provide any data or evidence from stakeholders of the costs of compliance with these new standards. Further, it did not provide any evidence of the benefit this change may have on consumers. While it attempts to substantiate the costs of "upcoding" nationally, (*see* 89 Fed. Reg. 80716–17), it does not attempt to apply these costs to debt collection, the only persons within the CFPB's purview here. Nor did it discuss the possible burdens on consumers, such as costs passed on by medical providers, or if physicians refuse services unless they are paid in advance.

As an example of the lack of evidence provided within the Advisory Opinion, it states that *often* there is no contract between patients and the provider, so debt collectors may need to collect documents sufficient to make prima facie cases for the demanded amount for *each* of these situations. 89 Fed. Reg. 80721. The CFPB's discussion notes that collecting this information is not a regular practice under current law. *Id.* at 80722 (noting that many debt buyers purchase portfolios of debts that may not be accompanied by underlying contracts or customer agreements. But the Advisory Opinion fails to substantiate the costs associated with these changes. The CFPB's failure to consider these costs and factors is arbitrary and capricious under APA section 706(2)(A).

Likewise, nowhere within the Advisory Opinion does the CFPB consider the data or evidence of stakeholders such as costs of compliance, let alone the actual benefit the margin cases

in this area might bring to consumers. Nor does it attempt to quantify the amount of debts that may be affected by this change. This new standard is simply unsubstantiated and thus arbitrary and capricious in violation of APA section 706(2)(A).

The Advisory Opinion's new definition of "default" is arbitrary and capricious because it was not supported by substantial evidence. The CFPB wholly fails to consider that its new definition of "default" brings within the definition of "debt collector" medical billing services businesses. (*See* Compl. ¶¶ 60–68.) Because of the expansion of the definition of "default" to include anything past its "due by" date, a whole new industry will be subject to the FDCPA. (*Id.*) The Advisory Opinion does not account for estimated costs of compliance for these firms with the FDCPA, which may incur costs of fifty-thousand dollars initially and an estimated twenty-thousand dollars annually per firm, or roughly seventy million dollars the first year and twenty-eight million dollars annually nationally. (*See id.* at ¶¶ 63, 66.) Additionally, it does not account for the increased costs to medical providers that lose the cost-savings of medical billing service companies, and therefore healthcare costs that get passed on to consumers. (Compl. ¶ 67.) The CFPB's failure to consider these costs and factors is arbitrary and capricious under APA section 706(2)(A).

CFPB's arbitrary and capricious implementation of the Advisory Opinion likely will cause irreparable harm to ACA, its members, and CBS. By not providing the data and evidence to substantiate the changes, the CFPB deprives stakeholders such as Plaintiffs the information necessary to reach informed decisions about how best to address these new standards. This will irreparably harm Plaintiffs and will cause them to incur significant costs to comply without justification of the new standards. *Supra* 26. The CFPB's arbitrary and capricious actions further deprive Plaintiffs of their rights under the APA, irreparably harming them.

D. Claim 3 – Without Observance of Procedure Required by Law, 5 U.S.C. § 706(2)(D)

In addition to failing to engage in notice-and-comment rulemaking in violation of APA sections 553 and 706(D), the CFPB in issuing its Advisory Opinion violated 706(D) by failing to follow other procedures required by law, namely: the Regulatory Flexibility Act ("RFA") (5 U.S.C. §§ 601–612), Small Business Regulatory Enforcement Fairness Act ("SBREFA") (5 U.S.C. §601–612), or the Paperwork Reduction Act ("PRA") (44 U.S.C. § 3501–3521). As the Advisory Opinion was legislative in nature, the CFPB was subject to the RFA, SBREFA, and the PRA, but it failed to consider all three.

The RFA, modified by the SBREFA, requires an agency subject to publishing general notice under 5 U.S.C. § 553 to publish an initial regulatory flexibility analysis ("IRFA"). 5 U.S.C. § 603(a). "Such an analysis shall describe the impact of the proposed rule on small entities." *Id.* Each IRFA must contain five specific, detailed items as described in section 603(b)(1)–(5), as well as "significant alternatives to the proposed rule." *Id.* at §§ 603(b), (c). The CFPB, as a "covered agency," is required to submit further details beyond those required by section 603(b). *See id.* §§ 603(d), 609(d)(2). Once a final rule is published, that rule is subject to a final regulatory flexibility analysis meeting the requirements of section 604. *Id.* at § 604. Because the CFPB failed to engage in notice-and-comment rulemaking, it did not complete an initial or final regulatory flexibility analysis, in violation of RFA and SBREFA, 5 U.S.C. §§ 603, 604. *See Lake Carriers' Ass'n v. EPA*, 652 F.3d 1, 5 (D.C. Cir. 2011) ("The standard of review for [RFA] challenges is governed by the Administrative Procedure Act (APA), pursuant to which we determine whether the agency's actions were 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law,' 5 U.S.C. § 706(2)(A), and whether the permit was promulgated 'without observance of procedure required by law,' *id*. § 706(2)(D)").

In particular, Under the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), the CFPB must convene and chair a Small Business Review Panel if it is considering a proposed rule that could have a significant economic impact on a substantial number of small entities. 5 U.S.C. 609(b). The Panel considers the impact of the proposals under consideration by the CFPB and obtains feedback from representatives of the small entities that would likely be subject to the rule. The Panel comprises a representative from the CFPB, the Chief Counsel for Advocacy of the Small Business Administration, and a representative from the Office of Information and Regulatory Affairs in the Office of Management and Budget (OMB). A SBREFA Panel would have been necessary for this rule. Plaintiff CBS is a "small business" under relevant definitions, and all of its similarly-situated business will be impacted by this rule. Indeed, the CFPB convened a Panel related to its FCRA rulemaking concerning medical debt.[8] But the CFPB did not convene such a panel here, although it should have.

Likewise, the PRA requires an agency subject to publishing general notice and gathering public comments under 5 U.S.C. § 553 to publish to adhere to the requirements of 44 U.S.C. §§ 3506, 3507. This requires that an agency get permission from the Office of Management and Budget prior to "collection of information" as defined in section 3502(3). Because the CFPB failed to engage in notice-and-comment rulemaking, it did not take the necessary steps under the PRA, in violation of 44 U.S.C. §§ 3506, 3507.

Because the CFPB failed to follow proper procedures under the RFA, SBREFA, and the PRA, its actions in issuing the Advisory Opinion as a final rule without engaging in these procedures violated the APA under section 706(2)(D). These violations will irreparably harm ACA, its members, and CBS. Many of ACA's members, including CBS, are afforded protections by the CFPB's compliance with the RFA, SBREFA, and the PRA. Without these protections, such

[8] https://www.federalregister.gov/d/2024-13208/p-134

as special consideration for small businesses under SBREFA, like many ACA members, or special consideration from information gathered from stakeholders under the PRA, Plaintiffs are likely to suffer irreparable harm from the Advisory Opinion.

E. Claim 4 – Excess of Statutory Jurisdiction, Authority, or Limitations, or Short of Statutory Right, 5 U.S.C. § 706(2)(C)

In issuing the Advisory Opinion, the CFPB has exceeded its statutory authority and limitations, violating the APA under section 706(2)(C). The Advisory Opinion interprets the FDCPA in a manner that is inconsistent with existing debt collection law, in excess of its statutory authority. Further, it interprets the FDCPA in a manner that is inconsistent with CMS rules and HIPAA, in excess of its statutory authority. Finally, it fails to meet the standards for rulemaking under the Dodd-Frank Act, 12 U.S.C. § 5512, in excess of its statutory limitations.

An administrative agency's power to promulgate legislative regulations is limited to the authority delegated to it by Congress. *VanDerStok v. Garland*, 86 F.4th 179, 187 (5th Cir. 2023) (quoting *Bowen v. Georgetown Univ. Hosp*., 488 U.S. 204, 208 (1988)). The "core inquiry" of Section 706(2)(C) asks whether the rule in question is a "lawful extension of the statute under which the agency purports to act, or whether the agency has indeed exceeded its 'statutory jurisdiction, authority, or limitations." *Id.* at 188 (quoting 5 U.S.C. § 706(2)(C)).

A court's "task is to construe what Congress has enacted. [A court] begin[s], as always, with the language of the statute." *Duncan v. Walker*, 533 U.S. 167, 172, 121 S.Ct. 2120, 150 L.Ed.2d 251 (2001). In some statutory interpretation cases, courts must make sense of vague terms, contradictory provisions, or "inartful drafting." *King v. Burwell*, 576 U.S. 473, 491 (2015). This is not one of those cases. This Court must apply the "ordinary tools of the judicial craft," *Mozilla Corp. v. Fed. Commc'ns Comm'n*, 940 F.3d 1, 20 (D.C. Cir. 2019), including canons of construction, *see ArQule, Inc. v. Kappos*, 793 F. Supp. 2d 214, 219–20 (D.D.C. 2011). These canons confirm what the plain text reveals.

1. The Pre-Contact Validation Requirements are Contrary to the FDCPA

The CFPB exceeds its FDCPA mandate in two places. First, the Advisory Opinion provisions that require pre-contact substantiation with account-level documents run contrary to the express language of FDCPA § 1692g(b):

> If the consumer notifies the debt collector in writing within the thirty-day period described in subsection (a) that the debt, or any portion thereof, is disputed, or that the consumer requests the name and address of the original creditor, the debt collector shall cease collection of the debt, or any disputed portion thereof, until the debt collector obtains verification of the debt or a copy of a judgment, or the name and address of the original creditor, and a copy of such verification or judgment, or name and address of the original creditor, is mailed to the consumer by the debt collector. Collection activities and communications that do not otherwise violate this subchapter may continue during the 30-day period referred to in subsection (a) unless the consumer has notified the debt collector in writing that the debt, or any portion of the debt, is disputed or that the consumer requests the name and address of the original creditor. Any collection activities and communication during the 30-day period may not overshadow or be inconsistent with the disclosure of the consumer's right to dispute the debt or request the name and address of the original creditor. 15 U.S. Code § 1692g.

The FDCPA establishes a procedure for the verification of debts that does not include account-level analysis prior to first contact with a patient. Rather, a validation letter pursuant to 1692g(a) is issued, then if a patient wants the debt substantiated, it may request it in writing pursuant to 1692g(b). The CFPB's directive that each account be substantiated prior to the period established in 1692g(b) would render the provision a nullity.

"The authority to issue regulations is not the power to make law, and a regulation contrary to a statute is void." *Orion Reserves Ltd. P'ship v. Salazar*, 553 F.3d 697, 703 (D.C. Cir. 2009). It is long-settled that "[a] regulation which ... operates to create a rule out of harmony with the statute, is a mere nullity." *Manhattan Gen. Equip. Co. v. Comm'r of Internal Revenue*, 297 U.S. 129, 134, 56 S.Ct. 397, 80 L.Ed. 528 (1936). Thus, the CFPB's Advisory Opinion, which conflicts with the unambiguous text of the statute, is void. *See* 5 U.S.C. § 706(2)(A), (C); *see Nat'l Min. Ass'n v. U.S. Army Corps of Engineers*, 145 F.3d 1399, 1409 (D.C. Cir. 1998) ("[W]hen a

reviewing court determines that agency regulations are unlawful, the ordinary result is that the rules are vacated—not that their application to the individual petitioners is proscribed."). The FDCPA § 1692g(b) "'unambiguously foreclose[s] the agency's statutory interpretation' ... by prescribing a precise course of conduct other than the one chosen by the agency." *Vill. Of Barrington v. Surface Transp. Bd.*, 636 F.3d 650, 659 (D.C. Cir. 2011) (quoting Catawba Cnty v. EPA, 571 F.3d 20, 35 (D.C. Cir. 2009)). Therefore, Advisory Opinion Requirements One, Two, and Three must be enjoined and set aside.

2. The New Definition of "Default" is Contrary to DHH Rules

The fourth legislative rule in the Advisory Opinion is also contrary to law. The FDCPA establishes that the term "debt collector" does not include "any person collecting or attempting to collect any debt owed or due another to the extent such activity . . . (iii) concerns a debt which was not in default at the time it was obtained by such person." 15 U.S.C. 1692a(6)(F)(iii). "Default" is not defined in the FDCPA; however, where the agreement between the creditor and the debt collector does not define the term, courts interpreting the FDCPA generally consider the facts and circumstances surrounding the relationship between the consumer, creditor, and debt collector to determine if a debt is in "default" under the FDCPA. *See, e.g., Mavris v. RSI Enterprise Inc.,* 86 F. Supp. 3d 1079, 1086 (D. Ariz. 2015) (the question a court must answer to determine if a debt is in "default" under the FDCPA is whether, "at the time a third party obtains a debt for collection, would a reasonable person in the debtor's position believe that the creditor viewed the debt as being in default"). Under existing law, when neither an agreement between the consumer and creditor nor state law defines when a consumer defaults, courts make a factual determination on a case-by-case basis to determine whether a reasonable person in the debtor's position believe that the creditor viewed the debt as being in default. *See, e.g., Echlin v. Dynamic Collectors, Inc*., 102 F. Supp. 3d 1179, 1185 (W.D. Wash. 2015).

The CFPB may have the authority to interpret a term in the statute it implements, but it may not do so contrary to other law. Here, its definition of default is contrary to the "bad debt" rules established by the Department of Health & Human Services' Centers for Medicare & Medicaid Services (CMS), an agency empowered under Title 42. CMS does not allow a provider to declare a Medicare patient bill as delinquent and subject to claim on a Medicare cost report until the debt is greater than 120 days old and has been billed multiple times:

> If after the provider applied reasonable and customary attempts to collect a bill, the debt remains unpaid more than 120 days from the date the first bill is mailed to the beneficiary, the debt may be deemed uncollectible. Medicare Provider Reimbursement Manual, CMS-Pub 15-2 at 11-11.[9]

The Bureau's new definition of "Default" would put medical billing companies in the position where they must use inaccurate accounting practices to simultaneously comply with both agency's rules.

The instant case is similar to the Department of Education's *ultra vires* rulemaking in *NAACP v. DeVos*, 485 F.Supp.3d 136 (D.D.C. 2020). In *NAACP*, the Department of Education issued a rule in reliance upon the CARES Act. The court observed that although Congress explicitly granted other agencies rulemaking authority in the text of the CARES Act, there was no question that Congress did not vest the Department with express rulemaking authority. *Id.*, 485 F.Supp.3d at 143. Thus the Department must have relied upon its general rulemaking authority. Of course, "[a]n agency's general rulemaking authority does not mean that the specific rule the agency promulgates is a valid exercise of that authority." *Colo. River Indian Tribes v. Nat'l Indian Gaming Comm'n*, 466 F.3d 134, 139 (D.C. Cir. 2006). "Agencies are ... bound, not only by the ultimate purposes Congress has selected, but by the means it has deemed appropriate, and prescribed, for

[9] https://www.cms.gov/regulations-and-guidance/guidance/transmittals/downloads/r5p211.pdf

the pursuit of those purposes." *Id.* And neither of the general rulemaking authority provisions provided support for the Department's actions there.

By interpreting the FDCPA in a manner that is inconsistent with CMS Bad Debt rules, the Advisory Opinion exceeds the Bureau's statutory jurisdiction, authority, or limitations. The language in the CFPB's Enabling Act grants it the authority to "regulate the offering and provision of consumer financial products or services under the Federal consumer financial laws." The CFPB's jurisdiction is thus limited to "financial products" and "financial services." *See* Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111-203, 124 Stat. 1376 (2010); (Compl. ¶¶ 95–97). The Advisory Opinion attempts to expand the CFPB's regulation beyond "financial products" and "financial services" into healthcare billing practices.

3. The Entire Advisory Opinion Ignores Rulemaking Requirements under Dodd-Frank

The Advisory Opinion also failed to comply with the standards for rulemaking under the Dodd-Frank Act, 12 U.S.C. § 5512. This provision requires, among other things, that the CFPB consider "the potential benefits and costs to consumers and covered persons, including the potential reduction of access by consumers to consumer financial products or services resulting from such rule." *Id.* § 5512(b)(2)(A)(i). These requirements function to limit the CFPB's statutory authority to implement rules and regulations. Here, the CFPB did not consider any costs to consumers, and has not provided any evidence that it considered the costs to consumers or covered persons. Thus, the Advisory Opinion's failure to consider any of these factors violates the APA under section 706(2)(C).

First, "[i]t is ... a cardinal principle of statutory construction that [courts] must give effect, if possible, to every clause and word of a statute." *Williams v. Taylor*, 529 U.S. 362, 404, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000) (internal quotation marks omitted). The Consumer Financial Protection Act ("CFPA") enacted within the Dodd-Frank Act empowers the CFPB to enact

regulations only if these items are considered. Though the surplusage canon "is not absolute," *Lamie v. U.S. Tr.*, 540 U.S. 526, 536, 124 S.Ct. 1023, 157 L.Ed.2d 1024 (2004); *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, 299 n.1, 126 S.Ct. 2455, 165 L.Ed.2d 526 (2006), it is plain that Congress requires the CFPB to comply with § 5512 when making rules.

Second, the canon of constitutional avoidance instructs that a court shall construe a statute to avoid serious constitutional problems unless such a construction is contrary to the clear intent of Congress. *See Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575, 108 S.Ct. 1392, 99 L.Ed.2d 645 (1988). An overly expansive reading of the statute that extends a nearly unlimited grant of legislative power to the CFPB would raise serious constitutional concerns, as other courts have found. *See, e.g., Skyworks*, 524 F.Supp.3d at 757 (noting that such a reading would raise doubts as to "whether Congress violated the Constitution by granting such a broad delegation of power unbounded by clear limitations or principles."); *Tiger Lily*, 992 F.3d at 523 (same); *id.* ("[W]e cannot read the Public Health Service Act to grant the CDC power to insert itself into the landlord-tenant relationship without some clear, unequivocal textual evidence of Congress's intent to do so"); *Terkel*, 521 F.Supp.3d at 669–72 (holding that the CDC's eviction moratorium exceeds the federal government's power under the Commerce Clause). Congress did not express a clear intent to grant the CFPB such sweeping authority.

And third, the major questions doctrine is based on the same principle: courts "expect Congress to speak clearly if it wishes to assign to an agency decisions of vast 'economic and political significance.' " *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 324, 134 S.Ct. 2427, 189 L.Ed.2d 372 (2014) (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133, 120 S.Ct. 1291, 146 L.Ed.2d 121 (2000) (emphasis added)); *Am. Lung Ass'n v. EPA*, 985 F.3d 914, 959 (D.C. Cir. 2021) (collecting cases). There is no question that the decision to impose a nationwide forgiveness of billions of dollars of medical debt is one "of vast economic and political

significance." *Util. Air Regul. Grp.*, 573 U.S. at 324, 134 S.Ct. 2427 (internal quotation marks omitted). Not only does the Advisory Opinion have substantial economic effects, healthcare payments policy has been the subject of "earnest and profound debate across the country," *Gonzales v. Oregon*, 546 U.S. 243, 267, 126 S.Ct. 904, 163 L.Ed.2d 748 (2006) (internal quotation marks omitted).

The Patient Protection and Affordable Care Act (ACA)—the sweeping health care reform sometimes known as "Obamacare"—was enacted in 2010. The law aims to extend health coverage to uninsured Americans, estimated at the time the bill was passed to number around 47 million. Since the enactment of the ACA in 2010, more than 2,000 legal challenges have been filed in state and federal courts contesting part or all of the ACA. A recent challenge involves the ACA requirement that most private insurance plans cover recommended preventive care services without cost sharing. *See Braidwood Management v. Becerra*, 104 F.4th 930 (2024). Similarly, the U.S. Congress has considered multiple bills to amend the current law, *e.g.,* H.R.1628, H.R.1425, S.352, Better Care Reconciliation Act, Health Care Freedom Act, American Health Care Act, Obamacare Repeal Reconciliation Act of 2017, Restoring Americans' Healthcare Freedom, Empowering Patients First Act, Patient Freedom Act, and the Obamacare Replacement Act.

Accepting the CFPB's interpretation would mean that Congress delegated to the CFPB the authority to resolve not only the important question of shifting the burden of unreimbursed healthcare expenses, but endless others that are also subject to "earnest and profound debate across the country." *Gonzales*, 546 U.S. at 267, 126 S.Ct. 904 (internal quotation marks omitted). Under the CFPB's reading, so long as the CFPB can isolate a consumer expense that has marginally confusing aspects in its origination, it can establish unworkable and unreasonably expensive methods required before that expenses' collection. In these cases, there is no limit to the reach of CFPB authority. "Congress could not have intended to delegate" such extraordinary power "to an

agency in so cryptic a fashion." *Brown & Williamson Tobacco Corp.*, 529 U.S. at 159, 120 S.Ct. 1291. Sadly, medical expenses are rising and the insurance reimbursement process is confusing. But ACA and CBS are "confident that the enacting Congress did not intend to grow such a large elephant in such a small mousehole." *Loving*, 742 F.3d at 1021; *see also Brown & Williamson*, 529 U.S. at 160, 120 S.Ct. 1291. "When an agency claims to discover in a long-extant statute an unheralded power to regulate a significant portion of the American economy," the Court must "greet its announcement with a measure of skepticism." *Util. Air Regul. Grp.*, 573 U.S. at 324 (internal quotation marks omitted).

Although some might agree with the CFPB's position as a matter of policy, "[a]n agency has no power to 'tailor' legislation to bureaucratic policy goals by rewriting unambiguous statutory terms." *Util. Air Regulatory Grp. v. EPA*, 573 U.S. 302, 325 (2014).

F. Claim 5 – Violation of the U.S. Constitution, 12 U.S.C. § 5497, and APA, Article I, § 9, Clause 7; 12 U.S.C. § 5497(A)(1); 5 U.S.C. § 706(2)(A), (B)

Plaintiffs' final claim is Constitutional, and therefore may be avoided if it prevails on claims one through four.

On May 16, 2024, the Supreme Court issued its opinion in *CFPB v. Cmty. Fin. Servs. Ass'n of Am., Ltd., No. 22-448 (U.S. Nov. 14, 2022)*. The Supreme Court decided that the CFPB's funding mechanism complied with the Appropriations Clause. *Id*. at 420–21. The Supreme Court then held that only CFPB's funding from the Federal Reserve's "combined earnings" complied with the requirements of the Appropriations Clause because the "money [is] otherwise destined for the general fund of the Treasury." *Id*. at 425, 435.

As the Supreme Court made clear, the CFPB only has constitutional funding from the Federal Reserve's "combined earnings." 12 U.S.C. § 5497(a)(1). But the Federal Reserve has had no "earnings" since September 2022, when the Federal Reserve's costs and expenses first exceeded its income, as demonstrated in the chart below. *See generally,* Bd. of Governors of the Fed. Rsrv. Sys.,

Federal Reserve Banks Combined Quarterly Financial Report 2, 25 (Mar. 31, 2024).[10] Without "earnings," the Federal Reserve's transfers of funds to the CFPB after September 2022 were not in compliance with the statute governing the CFPB's funding. *See* 12 U.S.C. § 5497; *CFSA*, 601 U.S. at 435.

The CFPB lacked constitutionally appropriated funding when it published the Advisory Opinion in the Federal Register on October 1, 2024. As such, the Advisory Opinion and the CFPB's associated rulemaking violates the Appropriations Clause and must be vacated. *CFSA*, 51 F.4th at 642 (citation omitted), *rev'd and remanded on other grounds*, 601 U.S. 416; *Collins v. Yellen*, 594 U.S. 220, 258 (2021); *Seila Law LLC v. CFPB*, 591 U.S. 197, 233 (2020).

The CFPB's Appropriations Clause violation by using improper funds to issue the Advisory Opinion likely will irreparably harm ACA, its members, and CBS. *Supra* 26. The Advisory Opinion irreparably and substantially harms Plaintiffs in a multitude of ways under each of its section 553 and 706(2) APA violations. As these violations were funded with constitutionally-improper funds, the CFPB's violation of the Appropriations Clause therefore causes each of the irreparable harms associated with the individual APA violations.

IV. RELIEF REQUESTED

For the foregoing reasons, Plaintiffs are likely to prevail on its claims that the CFPB violated the APA under sections 553 and 706(2)(A)–(D) by failing to engage in notice-and-comment rulemaking, failing to provide evidence substantiate its findings, and therefore acting arbitrarily and capriciously, failing to remain within its statutory authority, failing to follow proper procedure under the APA, and by violating the Constitution due to the CFPB's funding. The harms caused by the enactment and implementation of the Advisory Opinion will be irreparable.

[10] Available at https://www.federalreserve.gov/aboutthefed/files/quarterly-report-20240517.pdf.

Therefore, Plaintiffs respectfully request this Court set aside the Advisory Opinion to avoid substantial and irreparable harm to Plaintiffs under the CFPB's improper rulemaking.

Because the CFPB violated the APA under sections 553 and 706(2)(A)–(D), its actions should be set aside. *See Fed. Election Comm'n v. Akins*, 524 U.S. 11, 25, 118 S.Ct. 1777, 141 L.Ed.2d 10 (1998) ("If a reviewing court agrees that the agency misinterpreted the law, it will set aside the agency's action and remand the case ...."); *Am. Bioscience, Inc.*, 269 F.3d at 1084 (holding that relief on an APA claim "normally will be a vacatur of the agency's order"). This Circuit has instructed that when "regulations are unlawful, the ordinary result is that the rules are vacated —not that their application to the individual petitioner is proscribed." *Nat'l Mining Ass'n v. U.S. Army Corps of Eng'rs*, 145 F.3d 1399, 1409 (D.C. Cir. 1998) (internal quotation marks omitted); *see also O.A.*, 404 F. Supp. 3d at 109. Accordingly, consistent with the Administrative Procedure Act, 5 U.S.C. § 706(2)(A), and this Circuit's precedent, *see Nat'l Mining Ass'n*, 145 F.3d at 1409, the Advisory Opinion must be set aside as to all affected parties.

Defendants Have Notice of this Action

Plaintiffs have properly served this request for relief upon the CFPB and Department of Justice. In addition, on Friday, November 15, Plaintiffs requested the CFPB by email to voluntarily retract the Advisory Opinion or consent to this application for injunctive relief. As of the time of this filing, the CFPB has not responded to either request.

Therefore, Plaintiffs respectfully request this Court immediately enjoin the Defendants from enforcing the Advisory Opinion and to set it aside in its entirety prior to its effective date on December 3, 2024, among any other relief that the Court deems just and equitable.

Dated: November 18, 2024

Respectfully submitted,

ACA INTERNATIONAL, LLC and COLLECTION BUREAU SERVICES, INC.

By its attorneys,

/s/ David B. Meschke
David B. Meschke, #CO0069
Sarah J. Auchterlonie, #489442 *(oath pending)*
Brownstein Hyatt Farber Schreck, LLP
675 Fifteenth Street, Suite 2900
Denver, CO 80202
Telephone: 303-223-1100
Email: dmeschke@bhfs.com;
sja@bhfs.com

and

Leah Dempsey, #1033593
Brownstein Hyatt Farber Schreck, LLP
1155 F Street, NW
Washington, DC, 20004
Telephone: 202.296.7353
Email: ldempsey@bhfs.com

Certification of Notice to Adverse Party

Undersigned counsel for ACA International, LLC and Collection Bureau Services, Inc. hereby certifies that it has complied with LCvR 65.1 by timely serving defendants notice of this lawsuit and motion for application for temporary restraining order and preliminary injunction. Further, counsel certifies that is has attempted to obtain voluntary acquiescence of this motion from CFPB's counsel, and CFPB's counsel opposes this motion.

- **CFPB Counsel**: Stephanie B. Garlock, stephanie.garlock@cfpb.gov

  cfpb_litigation@cfpb.gov

/s/ Sarah J. Auchterlonie
Sarah J. Auchterlonie #489442

EXHIBIT A

Sworn Declaration of Scott Purcell, CEO of Plaintiff ACA International, LLC

[attached hereto]

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

ACA INTERNATIONAL, LLC; COLLECTION BUREAU SERVICES, INC. Plaintiffs, v. CONSUMER FINANCIAL PROTECTION BUREAU; and ROHIT CHOPRA, in his official capacity as Director of the Consumer Financial Protection Bureau, Defendants.	Case No. 1:24-cv-03118-DLF

SWORN DECLARATION IN SUPPORT OF PLAINTIFFS' MOTION FOR INJUNCTIVE RELIEF

1. I, Scott Purcell, am the CEO ACA International ("ACA"). As CEO, I am responsible for ensuring that ACA serves the needs and interests of the membership pursuant to ACA's Bylaws and as directed by its Board of Directors, which is the primary policy-setting body of ACA. Additionally, I ensure that the programs, activities, and services of ACA directly benefit the members, the credit-and-collection industry, policymakers, and consumers.

2. I am over the age of 18 and have personal knowledge of the facts sworn to herein and if called to testify I could and would competently testify. I submit this Declaration in support of ACA International and CBS ("Plaintiffs") Motion for a Preliminary Injunction and Temporary Restraining Order.

3. If the advisory opinion released by the Consumer Financial Protection Bureau

("CFPB") on October 1, 2024 ("Advisory Opinion") becomes effective on December 3, 2024, ACA will suffer significant and substantial harm. The Advisory Opinion will impact our members' ability to obtain and collect on debt. In turn, this will directly—and negatively—impact ACA's membership levels and membership dues.

4. To begin, ACA is a Minnesota corporation with offices in Washington, D.C. and Minneapolis, Minnesota. Founded in 1939, ACA represents more than 1,600 members, including third-party collection agencies, law firms, creditors, asset-buying or debt-buying companies, and vendor affiliates. ACA provides a wide variety of products, services, and publications, including educational and compliance-related information; and articulates the values of the credit-and-collection industry to businesses, policymakers, and consumers.

5. ACA's primary purpose is to promote and maintain the highest standards of professionalism in the credit-and-collection industry. To that end, ACA represents its members' interests in the legislative and regulatory processes and addresses regulatory issues that are critical to members' success.

6. ACA, by and through its mission statement, extols the virtues of leadership, integrity, respect, responsibility, service, and education. With respect to professional responsibility, ACA asks each of its members to make the following pledge:

> I believe every person has worth as an individual. I believe every person should be treated with dignity and respect. I will make it my personal responsibility to help consumers find ways to pay their just debts. I will be professional and ethical. I commit to honoring this pledge.

7. To assist its members in maintaining professionally responsible and legally compliant business practices, ACA offers a range of educational compliance materials, including a library of more than 200 "SearchPoint" documents covering a range of industry-relevant topics, as well as stand-alone guidebooks that detail the requirements of the Fair Debt Collection Practices Act

("FDCPA") and the Telephone Consumer Protection Act ("TCPA"), and the Fair Credit Reporting Act ("FCRA"). We also provide our members the State Guide cohort, a resource to summarize the collection laws in all 50 states and select territories. These resources attempt to unscramble for ACA members the patchwork of state and federal statutes and regulations that govern the credit-and-collection industry as well as the often divergent bodies of decisional law in state and federal jurisdictions across the country. Moreover, ACA offers both live and recorded educational courses and at least eight ACA "designations" that were designed to encourage industry professionals to train for and acquire competency in—and ultimately to achieve excellence in—their fulfillment of their legal and ethical professional duties.

8. As the CEO of ACA, I frequently consult with members, and I am aware of federal and state laws and regulations that affect their credit-and-collection businesses, as well as the products and services, and publications, including educational and compliance-related information, that ACA provides to its members.

9. ACA members regularly seek to recover unpaid past due amounts for services rendered. including for medical and hospital care. ACA members acquire from healthcare providers a variety of data and documents to support the accounts that they collect. ACA members work with their healthcare clients to answer patients' questions, resolve disputes, and arrive at achievable settlements and payment plans. These members have performed these activities in the past but will also perform them after the Advisory Opinion's effective date, December 3, 2024.

10. ACA's members who meet the definition of "debt collector" under the FDCPA, 15 U.S.C. §§ 1692–1692, have been complying with the provisions of that overarching federal debt-collection law since its enactment in 1977. In addition, ACA's members have been complying with the provisions of Regulation F, codified at 12 C.F.R. Part 1006, which the federal CFPB began exploring in October 2012 via public field hearings before promulgating a final rule in October 2020.

11. Upon the Advisory Opinion's implementation date, ACA members must also comply with the Advisory Opinion. If they do not, they face the risk of regulatory enforcement and plaintiffs asserting a private right of action against them based on the CFPB's directions.

12. The Advisory Opinion exposes ACA's members—and by extension, ACA—to the potential of liability and sanctions, and it undermines ACA's mission and its members' missions; threatens to labels ACA's members as unlawful, unfair, and deceptive actors; and infringes upon ACA members' statutory rights guaranteeing protection and relief from procedurally deficient regulations.

13. The Advisory Opinion has inflicted upon ACA concrete, particularized, actual, and imminent harm in several ways. The harms include the need to divert from existing duties significant staff time and other resources to help members understand the Advisory Opinion and implement compliance materials. Additionally, many ACA members are concerned about the impact of this Advisory Opinion on their revenues and overall business health. By jeopardizing members in this manner, the Advisory Opinion poses an imminent threat to ACA's membership levels and revenues from membership dues. Many ACA members make medical debt collection a majority of their business. If these members cannot afford the significant expenses necessary to comply with the Advisory Opinion—which may be several hundreds of thousands of dollars annually—then these members will go out of business. If these members leave the industry, they will no longer pay their dues to ACA.

14. In addition to this declaration, ACA members are submitting three additional declarations.[1] These declarations demonstrate the kinds of harms the Advisory Opinion has already caused and will continue to cause to ACA members.

[1] Action Collection Agencies, Inc.; Collection Bureau Services, Inc.; Cascade Receivables Management, LLC.

15. From ACA's perspective, the Advisory Opinion's material and substantial changes in four areas of law—without adhering to proper procedural requirements—presents significant challenges to our individual members, ACA's mission, and the industry as a whole. Moreover, these changes were made without proper notice and comment procedures, meaning ACA and its members could not effectively communicate with CFPB staff and inform them of the impacts of the Advisory Opinion on the industry or consumers.

16. First, the Advisory Opinion's requirement that collectors review account-level documents before sending validation notices is completely contrary to prior guidance and contradicts the FDCPA § 1692g. Because of the drastic change from previous guidance, ACA's members must dedicate significant time and resources to developing compliance mechanisms. Likewise, ACA must invest its own time and resources into compliance guides to help our members understand the new requirements. This requirement both depletes ACA's valuable resources and increases the possibility that certain ACA members will not be able to remain as ACA members.

17. Second, the Advisory Opinion's new reasonableness of pricing standard is also contrary to existing law and implements a new binding standard on ACA members. ACA members must now make an independent legal determination that a debt is "reasonable" and not unconscionable pursuant to state law. This term—*reasonable*—is left undefined. Of course, existing law is clear that debt collectors are not required to make an independent legal determination prior to debt collection. Once again, the Advisory Opinion is implementing new binding legal standards for our members to follow. Compliance will require time and money. ACA, which relies on member dues to function, stands to suffer.

18. Third, the Advisory Opinion expands the definition of "default" under the FDCPA to the entire medical billing industry. The new bright-line rule that all debts are in "default" if they are not paid in full "at a given time," regardless of how the creditor is treating the debt, is contrary to

longstanding law interpreting the FDCPA and constitutes a substantive change of law. Many ACA members have medical billing entities that will now be subject to the FDCPA when they were not before. This increases compliance costs dramatically for our members.

19. Fourth, the Advisory Opinion requires collectors to audit medical procedures in order to ensure medical providers' compliance with various laws and regulations. This new requirement is completely uncompelled by the FDCPA. ACA members—in order to ensure that they are not collecting on debts that are potentially "upcoded"—will need to conduct invasive and expensive audits of medical providers. It is asking collectors to be intimately involved in the coding process (over 74,000 codes to choose from) and to substitute their judgment for the judgment of their clients—the actual health care providers. Once again, these audits will be a significant drain on resources. ACA membership dues will be at risk. At the same time, ACA will need to invest significant time and resources to help guide our members on compliance matters.

20. Ultimately, the Advisory Opinion is bad for consumers, bad for collectors, bad for healthcare providers, and bad for the economy. Taking a step back, numerous studies have shown that the debt collection industry, which is largely comprised of small businesses (most of which are "Mom and Pop" operations with under 25 employees) benefits other small businesses by returning to them billions of dollars by performing functions those small businesses are simply not equipped to do themselves. The Advisory Opinion will severely hamper that ability as well.

Pursuant to LCvR 11.2, I declare under penalty of perjury that the foregoing is true and correct.

Executed on November 15, 2024.

Signed by:
Scott Purcell
1F532CFFBFE04D4...

Scott Purcell, CEO
ACA International

EXHIBIT B

Sworn Declaration of Jennifer Whipple, CEO of Collection Bureau Services, Inc.

[attached hereto]

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

ACA INTERNATIONAL, LLC; COLLECTION BUREAU SERVICES, INC. Plaintiffs, v. CONSUMER FINANCIAL PROTECTION BUREAU; and ROHIT CHOPRA, in his official capacity as Director of the Consumer Financial Protection Bureau, Defendants.	Case No. 1:24-cv-03118-DLF

SWORN DECLARATION IN SUPPORT OF PLAINTIFFS' MOTION FOR INJUNCTIVE RELIEF

I. INTRODUCTION

1. I, Jennifer Whipple, am the President of Collection Bureau Services, Inc ("CBS"). I am also the President Elect of the Board of Directors of ACA International.

2. I am over the age of 18 and have personal knowledge of the facts sworn to herein and if called to testify I could and would competently so testify. I submit this Declaration in support of ACA International and CBS ("Plaintiffs") Motion for a Preliminary Injunction and Temporary Restraining Order.

3. If the advisory opinion released by the Consumer Financial Protection Bureau ("CFPB") on October 1, 2024 ("Advisory Opinion") becomes effective on December 3, 2024, my business and my personal financial situation will be irreversibly harmed with no opportunity for

recompense. I am not alone, similarly situated enterprises across the county will be similarly harmed.

4. Simply put, the Advisory Opinion creates and amends legal obligations and standards without abiding by the required rulemaking procedures. Compliance with the Advisory Opinion's improper rulemaking will fundamentally change the nature of my business and cost hundreds of thousands of dollars in compliance expenditures. The Advisory Opinion must be enjoined from taking effect or my business or I will face financial and asset losses that can never be recovered.

A. Collection Bureau Services, Inc.

5. CBS is a licensed third-party debt collector and woman-owned business located in Missoula, Montana. It is a small, family-owned business in its third generation of ownership with less than 30 employees.

6. CBS is a dues-paying member of ACA International, LLC.

7. CBS's principal purpose is the collection of debts owed or due, or asserted to be owed or due, to another. It is therefore a "debt collector" under the FDCPA, see 15 U.S.C. § 1692a(6), and a "covered person" under the Consumer Financial Protection Act, see 12 U.S.C. § 5481(6).

8. CBS regularly seeks to recover unpaid past due amounts for services rendered—including for medical and hospital care. CBS acquires from healthcare providers, a variety of data and documents to support the accounts that it collects. CBS works with its healthcare clients to answer consumers' questions, resolve disputes, and arrive at achievable resolutions, including settlements and payment plans.

9. I also own and manage a medical billing services business under the CBS corporate structure. This business services accounts on behalf of healthcare companies. These services are performed on accounts during the period before the healthcare provider deems the account to be in default. The services that it provides to the healthcare providers and consumers are far different from those provided by CBS because the accounts it services are in an earlier stage of the revenue

management cycle and are often still receiving reimbursements from third-party payors. Further, these owed amounts are not yet past due, and often never become past due.

10. Currently, the medical billing services business is not subject to the FDCPA under the currently-established meaning of "default" under the FDCPA statute and implementing regulation at 12 C.F.R. Part 1006 ("Regulation F" or "Reg. F").

11. Upon the Advisory Opinion's implementation date, my medical billing services business must comply with the FDCPA and Reg. F, despite the fact that the medical billing services business is not currently subject to FDCPA and Reg. F. If it does not, it faces the risk of regulatory enforcement by CFPB. Before the Advisory Opinion's implementation date, I must expend valuable money and staff time preparing for compliance. This is money and time that cannot be recovered. I expect the immediate cost of compliance to CBS with the new regulations to be approximately $50,000.

12. Further, there will be ongoing costs of compliance, and I expect annual expenditures by CBS of approximately $20,000 to comply with the expanded regulations imposed by the Advisory Opinion, in addition to the other costs incurred by my entire company to comply with the Advisory Opinion.

13. These sums will be a substantial hardship to my business, are unwarranted by the evidence before the agency, and will cause irreparable harm.

B. <u>Summary of the Advisory Opinion's Impact on CBS</u>

14. As a small business with less than thirty employees, CBS will incur substantial harm if the Advisory Opinion is implemented since its small staff must divert significant time and resources to an effort to become compliant with the Advisory Opinion by December 3, 2024.

15. This effort will require monumental changes to internal and external procedures and legal analyses and cause CBS to incur over $400,000 in additional costs annually to comply with the

Advisory Opinion. These costs are broken-down as follows:

a. Costs for new employees to review account-level documents and agreements for each patient prior to initial communication with consumers, even if we have no reason to believe that the creditor's summary of balance due is inaccurate;

b. Costs for new employees to review account-level documents and agreements for each patient to independently assess whether the charges imposed by the healthcare provider are "reasonable";

c. Costs for CBS to make its pre-default hospital billing service comply with the FDCPA and Reg F provisions historically reserved for accounts that are in default;

d. Cost for CBS to hire new medical billing professionals and physicians to audit hospital procedures and ask each patient and his or her doctors if the procedures performed were coded properly and/or performed in full.

16. These changes in the Advisory Opinion did not come as a result of a legislative rulemaking process. Instead, the CFPB decided these enormous changes were merely interpretive guidelines and general statements of policy.

C. Rulemaking and Public Comment

17. The Advisory Opinion at issue was published by the CFPB on October 1, 2024. The CFPB did not provide notice of an intent to issue an opinion, nor did it accept comments from the public when it promulgated the Advisory Opinion. There was no Small Business Regulatory Enforcement Fairness Act ("SBREFA") panel; nor does the Advisory opinion contain a cost-benefit analysis or any studies illustrating the necessity, impact or expense of the rule changes.

18. If CBS (and other collectors) had been offered the opportunity to comment on the

proposed Advisory Opinion, we would have provided data and documents informing the CFPB that the proposal would harm consumers, harm the healthcare industry, and cause significant negative market effects (as set forth in the Corrected Complaint).

19. Further, we would have provided data and estimates of CBS's cost of compliance for the CFPB to consider the impact of the rulemaking on the industry (as set forth in this declaration).

20. Currently, CBS—as required of all licensed debt collectors—adheres to the rules outlined in Regulation F and other federal and state regulations.

21. The Advisory Opinion significantly changes the legal obligations and requirements outlined in other regulations. The Advisory Opinion's changes go into effect on December 3, 2024.

II. THE ADVISORY OPINION IMPOSES NEW COMPLIANCE OBLIGATIONS ON CBS

A. New Requirement to Review Account-Level Documents

22. The Advisory Opinion requires that prior to beginning collections "[d]ebt collectors must have a reasonable basis for asserting that the debts they collect are valid and the amounts correct." 89 Fed. Reg. 80716. This requirement is not new or objectionable, rather, the Advisory Opinion implements an entirely new procedure by which CBS must establish this reasonable basis.

23. The Advisory Opinion requires CBS to review account-level documentation *before* beginning collections: "[c]ollecting or attempting to collect medical debts without substantiation violates [FDCPA] section 807(2)(A)." 89 Fed. Reg. 80722.

24. It is my understanding that the FDCPA (and Regulation F) does not currently require CBS, or any debt collector, to independently investigate each account prior to collection. Rather, so long as we have a reasonable basis to believe in the accuracy of account information provided by the original creditor we have complied with this requirement. Further, CBS would not currently violate the FDCPA by attempting to collect without first substantiating it specifically by reviewing account-

level documents and agreements for each and every account.

25. The Advisory Opinion that requires account-level document review changes CBS's obligations and requirements under the law.

B. New Reasonableness Standard

26. The Advisory Opinion requires medical debt collectors, when attempting to collect a medical debt that is not created by an express contract between the consumer and healthcare provider setting forth the dollar amount of the services, to make a legal determination that a debt is reasonable and not unconscionable pursuant to state law. *See* Fed. Reg. 80719–20.

27. This obligation in the Advisory Opinion creates a new legal standard for CBS.

28. Currently, CBS (and other debt collectors) need not make an independent legal determination as to whether the consumer has any potential legal defense prior to the debt collection. Under current law, debt collectors collect debt on behalf of third parties and do not own the accounts; they therefore do not have the contractual right to adjust the contract value of the underlying obligation. Rather, a consumer who disagrees with an amount charged may work directly with the healthcare provider to reduce charges.

29. CBS and other debt collectors currently rely upon existing structures, such as audits from the Centers for Medicare & Medicaid Services ("CMS") and enforcement of federal price transparency law to form a reasonable belief in the accuracy of the prices charged to patients. CMS's hospital price transparency requirements are authorized by section 2718(e) of the Public Health Service Act, which requires each hospital operating in the United States to make its standard charges public. 42 U.S.C. § 300gg-18(e). In addition, CBS takes reasonable precautions like reviewing a client's policies and procedures and researching a provider's regulatory history to establish a reasonable belief in the accuracy of account balance information.

30. My reading of the Advisory Opinion is that these procedures are no longer sufficient

and I must now conduct a far more in-depth investigation in order to make an independent, in-house determination that the debt is reasonable and not unconscionable.

31. To do so, CBS must make significant policy changes. Typically, hospitals and surgery centers establish their pricing based on a variety of factors that may include their own costs, market pressures, and the types and complexity of medical procedures offered.

32. CBS relies on bill and invoice amounts reported by healthcare clients in the ordinary course of business. The amounts charged to the consumer are provided to CBS in the form of summary data after the healthcare provider or medical billing service establishes the proper charges. CBS does not currently employ medical professionals, and we do not have the requisite expertise or experience to second-guess the prices our healthcare clients establish.

33. For example, should CBS decide whether the cost of a life-saving triple by-pass heart surgery is unreasonable? If so, how?

34. CBS does not routinely acquire sensitive health information about the consumers from whom they are attempting to collect. CBS does not know if a procedure is especially complex because of the consumer's health condition, or whether a procedure is even necessary. CBS does not know the prices of inputs such as medical devices or medications. CBS (or any collector) does not—and should not—be second-guessing the prices charged to consumers for healthcare. But that is exactly what the Advisory Opinion invites with its reasonableness standard.

35. To comply with this standard, CBS will need to audit the medical services provided and the medical billing codes that providers use to substantiate the bills we attempt to collect. We must determine for each patient whether there is a potential defense to the debt or potential reduction in the bill amount.

36. I do not know how CBS will be able to make those determinations without becoming intimately involved in the medical coding process and—at times—substituting our judgment in the

place of more experienced medical professionals.

37. These changes represent massive, material changes to the legal framework of medical debt collection, and will bring substantial harm to CBS if it is forced to comply with the Advisory Opinion.

C. New Definition of Default

38. The Advisory Opinion redefines "default" for medical debt where the consumer and healthcare provider have not otherwise defined the term by agreement, to occur when the consumer has failed to pay in full "at a given time," regardless of how the creditor treats the debt. 89 Fed. Reg. 80723.

39. This new bright-line rule that all debts are in "default" if they are not paid in full "at a given time," regardless of how the creditor is treating the debt, is contrary to longstanding law interpreting the FDCPA. Our interpretation and current processes support the idea that if there is not an agreement between the consumer and creditor, nor state law that defines when a consumer defaults, courts will make a factual determination on a case-by-case basis to determine whether a debt is in "default" under the FDCPA.

40. CBS operates a separate medical billing services business that provides medical billing services for healthcare accounts that are aging, but not considered in "default" by the healthcare providers. In CBS's experience, medical providers do not consider a bill to be in default (i.e., "written off" under Generally Accepted Accounting Principles) at 31 days just because a payment in full has not been made. Generally, hospitals and medical providers do not charge-off accounts but instead give consumers a flexible period to pay medical bills and process insurance coverage. This benefits consumers by providing time and opportunities for reasonable payment plan.

41. Medical billing companies, like CBS's, do not identify themselves as FDCPA "debt collectors" because they do not collect defaulted debt, and therefore are not required to comply with

FDCPA provisions like, for example, providing a "mini-Miranda" notice when communicating about an account.

42. The Advisory Opinion changes that. CBS's medical billing business that was not previously a "debt collector" under the FDCPA now is—meaning that CBS must develop an entirely new regulatory compliance program as a result of the Advisory Opinion. This is a material change.

43. This change has real impacts on consumers as well. If CBS's medical billing service business is subject to the FDCPA under the Advisory Opinion, the cost-savings compared to traditional debt collection that this business provides to clients will disappear, thus increasing costs for all healthcare providers who formerly relied upon medical billing providers. These costs are passed on to consumers in the form of higher price points for goods and services. Furthermore, vastly larger numbers of patients would have the experience of being in collections—even if they received their first bill a mere 30 days earlier.

D. <u>New Requirement for Medical Procedure Audits</u>

44. The Advisory Opinion states that "[a] debt collector that collects or attempts to collect a debt that has been "upcoded" violates the FDCPA's prohibitions against unfair or unconscionable debt collection practices because the amount is not expressly authorized by the agreement for services actually rendered and also violates the FDCPA's prohibitions against deceptive or misleading debt collection practices because it would falsely represent the amount of the debt." 89 Fed. Reg. 80720.

45. In CBS's experience, many agreements with hospitals provide that a patient will be billed for services in accordance with hospital policy, for example, a standard authorization from a patient may read:

> "I understand that I am agreeing to pay for such services and/or procedures in the amount(s) consistent with [hospital] policies and pricing and I am responsible for complying with any insurance requirements, including but not limited to obtaining pre-authorization."

46. The problem with the Advisory Opinion provision is that CBS would have no reason to know that "upcoding" occurred unless we performed a detailed audit on each bill or invoice. From CBS's perspective—and historically speaking—the standard authorization provides a clear indication of the policy and agreement in place. The Advisory Opinion changes that.

47. If the Advisory Opinion goes into effect, CBS will be forced to make substantial changes to policies and procedures.

48. Medical coding is a profession that requires specialized training where those seeking employment receive a Certified Professional Coder certification. These coders translate the documentation of a patient's treatment into a standardized system that accounts for critical factors, a patient's specific diagnoses, the treatments and services offered, and any unusual circumstances. But without the help of a professional medical coder, CBS lacks the experience and knowledge necessary to identify whether a patient's bill has been "upcoded."

49. But even with the knowledge of a professional medical coder, CBS would *still* lack the knowledge needed to effectively comply with the Advisory Opinion. CBS would need knowledge about the patient's actual illness or disease, the specifics of the treatment plan, and details on the patient's experiences with his or her physician.

50. Properly interpreting this information would require CBS to hire at least two physicians to perform this function: a significant new cost borne by compliance with the Advisory Opinion.

51. As it stands now, CBS's policy is to comply with HIPAA and all U.S. privacy laws. This means CBS must limit the use of protected health information to the "minimum necessary" to accomplish the intended purpose of the use, disclosure, or request. Complying with the Advisory Opinion, though, would require CBS to adjust its HIPAA compliance program and invade the medical privacy of consumers from whom it would seek to collect, far beyond the minimum

necessary under current FDCPA and Reg. F rules.

52. For CBS, the "minimum necessary" to substantiate the debts from medical providers under the Advisory Opinion will include intrusive details about patient symptoms, treatments, reactions and outcomes, which largely defeats HIPAA's purpose.

III. COMPLIANCE WITH THE ADVISORY OPINION WILL BE EXPENSIVE AND CAUSE IRREPARABLE HARM

53. If the Advisory Opinion is not enjoined, CBS will face substantial and irreparable harm. Beginning now, and each day that passes, CBS must expend significant money and time to prepare for the Advisory Opinion's December 3, 2024 implementation date.

54. The Advisory Opinion's stark changes will mean CBS must develop entirely new policies and procedures to comply. These new policies and procedures include:

a. An independent, pre-collection investigation into each and every account, before the traditional verification period;

b. A process, beyond and different from what currently exists, to make an in-house legal determination that each debt is reasonable and not unconscionable under state law;

c. Procedures to reclassify debt as "defaulted" earlier in the credit lifecycle;

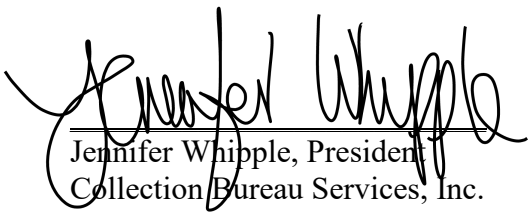
d. Reclassifications of medical billing companies as debt collectors under the Advisory Opinion's change;

e. Audits of medical procedures to ensure that debts are not "upcoded".

55. Each of the departures from existing standards creates significant hardship for CBS. They will both cost time and money when implemented, and to maintain. The Advisory Opinion will also cause a substantial invasion of health privacy for consumers. The Advisory Opinion provisions will drain the finite resource of CBS staff time and energy.

Pursuant to LCvR 11.2, I declare under penalty of perjury that the foregoing is true and correct.

Executed on November 18, 2024.



Jennifer Whipple, President
Collection Bureau Services, Inc.

EXHIBIT C

Sworn Declaration of Shaun Ertischek, Chief Compliance Officer and General Counsel of Cascade Receivables Management, LLC

[attached hereto]

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

ACA INTERNATIONAL, LLC; COLLECTION BUREAU SERVICES, INC. Plaintiffs, v. CONSUMER FINANCIAL PROTECTION BUREAU; and ROHIT CHOPRA, in his official capacity as Director of the Consumer Financial Protection Bureau, Defendants.	Case No. 1:24-cv-03118-DLF

SWORN DECLARATION IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION AND TEMPORARY RESTRAINING ORDER

I. INTRODUCTION

1. I, Shaun Ertischek, am the Chief Compliance Officer and General Counsel of Cascade Receivables Management, LLC ("CRM").

2. I am over the age of 18 and have personal knowledge of the facts sworn to herein and if called to testify I could and would competently so testify. I submit this Declaration in support of ACA International, LLC's and Collection Bureau Services, Inc.'s (collectively, "Plaintiffs") Motion for a Preliminary Injunction and Temporary Restraining Order.

3. CRM is an affiliated company of a debt buying entity: Cascade Capital Funding, LLC ("CCF"). CCF passively purchases consumer debt portfolios and CRM then acts as master servicer of the consumer accounts that comprise those portfolios.

4. If the advisory opinion released by the Consumer Financial Protection Bureau

("CFPB") on October 1, 2024 ("Advisory Opinion") becomes effective on December 3, 2024, CRM and CCF will be irreversibly harmed with no opportunity for recompense.

5. The Advisory Opinion institutes new legal obligations that make existing (and currently compliant) processes insufficient. In short: the previously acceptable due diligence procedures used prior to the Advisory Opinion are no longer acceptable under the Advisory Opinion's changes. CRM will need to revamp its procedures to become compliant. Additionally, some of the accounts CCF currently owns may become uncollectable, and therefore worthless. The Advisory Opinion must be enjoined from taking effect or our business will face financial and asset losses that can never be recovered.

A. Cascade Receivables Management, LLC and Cascade Capital Funding, LLC

6. CRM acts as a master servicer and collection agency for delinquent, past-due, consumer accounts. CRM is closely affiliated with a debt buying entity, CCF, which both share common ownership.

7. CRM is a dues-paying member of ACA International, LLC and would therefore benefit from the order requested by ACA in this matter.

8. CRM manages portfolios of charged-off accounts receivable that, in part, are comprised of accounts that derived from healthcare services. CRM employs staff who are responsible for the placement of accounts with third-party debt collectors who, along with CRM, are regulated by the Fair Debt Collection Practice Act ("FDCPA"). CRM manages the outsourcing of debt collection to collection agencies. CRM collects some debt in-house, but most is contracted out to agencies.

9. CRM is a "debt collector" under the FDCPA, *see* 15 U.S.C. § 1692a(6), and a "covered person" under the Consumer Financial Protection Act, *see* 12 U.S.C. § 5481(6).

10. CCF is a passive debt buyer. CRM acts as agent of CCF and as master servicer to

debts purchased by CCF, which includes medical debt. This means that CCF purchases debts from originators or other holders and then CRM manages the collection on that debt—either in-house or through contracted collection agencies. CCF does not itself collect on any of the debt it purchases.

11. CRM and CCF follow all federal, state, and local laws and regulations. CRM and CCF are licensed in various states. Additionally, I believe CRM actually goes above what is legally required in the development and implementation of its diligence and compliance procedures.

12. The Advisory Opinion will have drastic impacts both on how CRM and CCF conduct their operations, and on the overall health of the business. The increased compliance costs and impacts on future business will create a substantial hardship on CRM and CCF and will cause irreparable harm to both.

B. Summary of the Advisory Opinion's Impact on CRM and CCF

13. CRM and CCF have and will continue to incur substantial costs as they attempt to bring their previously-acceptable procedures into compliance with the new Advisory Opinion by December 3, 2024.

14. These changes will not be minor. CRM and CCF will need to expend significant resources in order to, among other things:

a. Conduct pre-collection medical provider audits of all medical accounts to determine their compliance with various state and federal regulations in accordance with the new standards set by the Advisory Opinion; and

b. Obtain and review account-level documents for all accounts at the time of purchase, prior to collecting on the debt.

15. Failure to implement these changes—changes that are required by the Advisory Opinion—will result in potential FDCPA violations and possibly the unconstitutional taking of otherwise valid assets (*i.e.*, the collection accounts).

16. CRM provides, either directly or through its outsourced collection agencies, significant information about the accounts in an initial written communication to consumers, as required by the FDCPA at 15 U.S.C. § 1692g (colloquially known as the "validation notice"). Under Regulation F, 12 C.F.R. 1006.34, debt collectors collecting on CCF accounts must provide in initial written notices detailed information about accounts, including accounts for medical debt, that include:

a. The debt collector's name and the mailing address at which the debt collector accepts disputes and requests for original-creditor information.

b. The consumer's name and mailing address.

c. If the debt collector is collecting a debt related to a consumer financial product or service as defined in § 1006.2(f), the name of the creditor to whom the debt was owed on the itemization date.

d. The account number, if any, associated with the debt on the itemization date, or a truncated version of that number.

e. The name of the creditor to whom the debt currently is owed.

f. The itemization date.

g. The amount of the debt on the itemization date.

h. An itemization of the current amount of the debt reflecting interest, fees, payments, and credits since the itemization date. A debt collector may disclose the itemization on a separate page provided in the same communication with a validation notice, if the debt collector includes on the validation notice, where the itemization would have appeared, a statement referring to that separate page.

i. The current amount of the debt.

17. Accordingly, only a small fraction of consumers who are obligated to repay our accounts request debt validation (under the FDCPA) or dispute the debt.

18. This means that procedures that require debt collectors to review account-level documentation are, in practice, unnecessary in most cases. The Advisory Opinion changes that. After December 3, every account will require an account-level review of documents, and accounts from medical providers will require comprehensive audits to determine compliance.

19. Notably, these changes in the Advisory Opinion did not come as a result of an act of Congress or notice-and-comment rulemaking process. Instead, the CFPB decided these enormous changes were merely interpretive guidelines and general statements of policy.

20. Had the CFPB sought public comment on this regulatory change, we would have provided comments outlining the drastic changes required by the Rule's provisions as set forth herein.

II. THE ADVISORY OPINION IMPOSES NEW COMPLIANCE OBLIGATIONS ON CRM AND CCF

A. New Requirement to Review Account-Level Documents

21. The Advisory Opinion requires that prior to beginning collections "[d]ebt collectors must have a reasonable basis for asserting that the debts they collect are valid and the amounts correct." 89 Fed. Reg. 80716. This requirement, alone, is not controversial. CRM already takes considerable effort to establish that it has a reasonable basis for asserting that the debts it collects are valid and the amounts correct. We know these measures are appropriate and effective because our dispute and complaint rates are low. Furthermore, few of those require us to review account-level information.

22. Nevertheless, the Advisory Opinion states that methods we know are currently working are insufficient. It now requires the massive and unnecessary change that CRM review account-level documentation for every account *before* it can begin outsourcing collections: "[c]ollecting or attempting to collect medical debts without substantiation violates [FDCPA] section

807(2)(A).” 89 Fed. Reg. 80722. By proxy, this means that CCF must also meet this new strict standard of review so that it is not purchasing debt contrary to the new standards.

23. Currently, neither CRM nor CCF independently investigate each individual account prior to collection. Instead, when CCF purchases new accounts, it undertakes an extensive diligence process to understand and determine that there is a “reasonable basis” that the debts it is purchasing are valid, which complies with the FDCPA in its current form.

24. For example, CCF reviews information about the selling entities and the debts it purchases, including reviewing account data, reviewing a sampling of account-level documents, obtaining a “seller survey” containing information about the accounts, and obtaining information about the seller’s policies, practices, and more. Further, CRM tracks, reviews, and conducts a root cause analysis related to the accounts that receive complaints, and would evaluate seller relationships if such review identified any potentially problematic portfolios of accounts.

25. CCF and CRM currently rely on medical providers to follow the laws that they are subject to, such as the No Suprises Act (26 U.S. Code § 9816), because these providers are the medical experts and medical coding experts.

26. CCF further relies on the seller warranties in the purchase and sale agreements, such as the seller’s warranty of lawful origination, the seller’s warranty that the debt is billed and collected in accordance with law, and others. CCF typically maintains a right to sell back (or “put back”) to the seller any debts that violate these warranties or fall into specified categories in the purchase agreements.

27. The Advisory Opinion changes that. Now, CRM and CCF must attempt to conduct pre-collection account-level reviews that will be costly and sometimes impossible to complete.

28. The first issue this raises is that if CCF purchases a portfolio of debt, CRM must now wait—when it did not have to wait prior to the Advisory Opinion—to begin the collections process

until every account has been independently reviewed.

29. The second issue it raises is expense. For example, CCF will purchase a portfolio of debt from a medical provider. For some purchases, CCF may get account-level documents up-front. Under the Advisory Opinion, CCF or CRM must employ staff to organize and review all this account level documentation. Compliance with the Advisory Opinion in those cases would be technically possible, though still expensive. For other purchases, CCF does not receive account-level documents up-front. For these purchases, CCF will often have the contractual right to obtain account-level documents for a set period of time, on an as-needed basis. Neither CCF nor CRM will have or review such documents for all accounts prior to collection. The Advisory Opinion's requirement is next to impossible in cases where the contractual period of time to obtain account-level documents has expired.

30. The Advisory Opinion thus raises significant questions. For example, imagine that CCF purchases a large portfolio of debt and that the contractual period to obtain documents has now come and gone. In that time, CRM began a compliant collection process, all without a timely validation request or dispute. Does the Advisory Opinion mean that collection would now be a FDCPA violation if we no longer have access to the account-level documents? CRM is likely compliant in every other way, but because of the Advisory Opinion's regulatory change, our collection would go from being compliant to being a violation. This does not indicate that the Advisory Opinion is merely interpretive.

31. Even if CRM had access to the documents, which, again, is no guarantee, CRM faces substantial costs in reviewing them for every account. We estimate we will need to employ many additional full-time staff members and invest in additional technology resources to comply with the Advisory Opinion.

32. The Advisory Opinion changes CRM and CCF's obligations under the law and

potentially deprives them of the value of their contracts by instituting impossible compliance procedures.

B. New Reasonableness Standard

33. The Advisory Opinion requires medical debt collectors to make a legal determination that a debt is reasonable and not unconscionable pursuant to state law when attempting to collect a medical debt that is not created by an express contract between the consumer and healthcare provider setting forth the dollar amount of the services. *See* Fed. Reg. 80719–20. This is an entirely new standard for CRM and CCF to follow.

34. Currently, CRM does not make an independent legal determination regarding any potential defenses prior to debt collection. The Advisory Opinion calls this a "reasonableness" standard.

35. CRM likely is not able to even get the necessary information to determine "reasonableness" in an economically-feasible amount of time, if at all.

36. The increased compliance costs and impacts on future business of dealing with this new "reasonableness" standard will create a substantial hardship on CRM and will cause irreparable harm.

37. CRM does not currently know how to determine if a medical debt is "reasonable." We do not want to be in the position of second-guessing medical charges, nor do we have the experience to do so. But to determine if any individual debt is "reasonable," CRM will need to conduct costly and invasive audits of medical practices and procedures. I will address our concerns regarding these audits in the subsequent section.

C. New Requirement for Medical Procedure Audits

38. The Advisory Opinion states that "[a] debt collector that collects or attempts to collect a debt that has been "upcoded" violates the FDCPA's prohibitions against unfair or unconscionable debt collection practices because the amount is not expressly authorized by the agreement for services

actually rendered and also violates the FDCPA's prohibitions against deceptive or misleading debt collection practices because it would falsely represent the amount of the debt." 89 Fed. Reg. 80720.

39. The challenge here is that when CCF purchases debt, it would have no reason to know that the debt is "upcoded" without an audit of all medical practices and procedures.

40. As it stands now, before CCF purchases debt, sellers provide CCF with information about their business, the debt portfolio, documentation, and account data so CCF can review and, potentially, offer an informed bid price.

41. CRM and CCF also conduct a pre-purchase due diligence review of a sample of the accounts, their documents, and certain policies and procedures of the seller. CCF relies on representations and warranties in purchase agreements, such as assertions that the debt seller complies with applicable law (for example, the No Suprises Act, charity care requirements, financial assistance programs, etc.). These procedures, and the assertions from sellers, form the "reasonable basis" for us to believe the debts are valid. Prior to the Advisory Opinion, this "reasonable basis" would be enough to comply under the FDCPA.

42. No longer. Now, the Advisory Opinion creates FDCPA violations where they previously did not exist. CRM must adjust to this new reality by independently auditing sellers (medical providers) to determine if they are compliant with laws and regulations, and to determine if they are charging consumers the appropriate amount.

43. The warranties and assertions included in debt buying contracts are no longer enough to form a reasonable basis of valid debt. Now, we—the debt purchaser and collector—must learn a new proficiency in the profession of medical billing, auditing, and coding.

44. That also means that we must learn a new proficiency in the profession of patient illnesses, symptoms, and treatments. The Advisory Opinion suggests CRM, and other agencies like it, must comb through individual patient files, learn the details of diseases and medical care, and

make determinations regarding the "reasonability" of costs. In practical terms, the threat of a FDCPA violation means that prior to purchasing debt, CCF is incentivized to ensure—by way of audits and other invasive review processes—that medical practices are billing consumers in the way that we at CRM feel is appropriate.

45. The necessity of this expensive process and invasion of patient privacy is unproven and not established by the Advisory Opinion. Indeed, it appears as if it was not considered at all.

46. The current due diligence regime can already ascertain systemic issues with debt sellers. We discover these issues through our normal due diligence process, internal reviews, consumer disputes and complaints, and reviews of regulatory actions. If we were to discover a material issue, CCF would likely cease to purchase debt from that seller and remediate the issue. CRM staff is trained and qualified to handle billing issues on the *back end,* meaning we are well-equipped to respond to any potential systemic or individual issues that come up in the course of debt collection. We have no experience or expertise in handling pre-collection, medical billing related issues, and medical coding substantiation.

47. Neither CRM nor CCF have anyone on staff that is qualified to conduct medical audits. Compliance with the Advisory Opinion will likely require staff with such experience. In our market of Petaluma, California, a medical billing specialist with 3 or more years of experience can be hired for $21.99 - $41.98 per hour (according to the Indeed.com hiring website).

48. Further, many of our portfolio purchases are from medical holding companies that have debts from multiple providers in multiple locations, which would potentially require employees in each of these locations just to be able to audit the medical coding to meet the stringent standards created by the Advisory Opinion.

49. We estimate we will need to employ many additional full-time staff members and invest in additional technology resources to comply with the Advisory Opinion's new standards to

conduct medical audits pre-collection.

III. COMPLIANCE WITH THE ADVISORY OPINION WILL BE EXPENSIVE AND CAUSE IRREPARABLE HARM

50. If the Advisory Opinion is allowed to go into effect on December 3, 2024, CRM and CCF will face substantial and irreparable harm. The departure from existing regulations means CRM and CCF will need to invest resources into additional compliance well before the December 3 effective date.

51. CRM must expend both money and valuable staff time to come into compliance with the Rule. This will involve developing, establishing, and implementing entirely new procedures.

52. CRM may need to hire approximately twenty-six (26) additional full-time staff members whose only task is to ensure compliance with the added procedural requirements. Furthermore, CRM may need to acquire and develop new technology solutions to assist in ensuring compliance with the added procedural requirements. The Advisory Opinion has real, material impacts on CRM's staffing decisions.

53. CRM estimates it may spend as much as one and a half million dollars ($1,500,000.00) per year (at current account levels) to implement the new procedures required under the Advisory Opinion.

54. The Advisory Opinion will also (as described above) impact the ability to purchase debt as well. This is because the price of collecting on such debt will go up as more procedural requirements mean more costs. Smaller deals may no longer be a decent value proposition for CCF. This will have an effect both up and down stream: medical providers may not have their debts purchased or collected, and consumers may face the prospect of increased litigation as a result. For CRM, the result will be the same: fewer accounts to collect and less revenue to support our businesses. The Advisory Opinion will have substantial negative impacts on CRM and CCF's business.

Pursuant to LCvR 11.2, I declare under penalty of perjury that the foregoing is true and correct.

Executed on November 18, 2024

Shaun Ertischek

Digitally signed by Shaun Ertischek
Date: 2024.11.18 15:41:06 -08'00'

Shaun Ertischek

Chief Compliance Officer & General Counsel
Cascade Receivables Management, LLC

Authorized Agent
Cascade Capital Funding, LLC

EXHIBIT D

Sworn Declaration of Jay Gonslaves, President and CEO of Action Collection Agencies, Inc.

[attached hereto]

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

ACA INTERNATIONAL, LLC; COLLECTION BUREAU SERVICES, INC. Plaintiffs, v. CONSUMER FINANCIAL PROTECTION BUREAU; and ROHIT CHOPRA, in his official capacity as Director of the Consumer Financial Protection Bureau, Defendants.	Case No. 1:24-cv-03118-DLF

SWORN DECLARATION IN SUPPORT OF PLAINTIFFS' MOTION FOR INJUNCTIVE RELIEF

1. I, Jay Gonsalves, am the President and owner of Action Collection Agencies, Inc. d/b/a Action Collection Agency of Boston ("Action Collection"). Action Collection Agencies, Inc. is a member of ACA International ("ACA"). As President, I am responsible for ensuring that Action Collection's consumer debt collection programs are in compliance with federal and sate laws and regulations.

2. If the advisory opinion released by the Consumer Financial Protection Bureau ("CFPB") on October 1, 2024 ("Advisory Opinion") becomes effective on December 3, 2024, my business will suffer significant and substantial harm. The additional legal requirements and standards will be expensive to implement and require significant staff time and resources. In some cases, our routine work conducted *before* the Advisory Opinion will now be impracticably expensive *after* the

Advisory Opinion, which indicates the legislative and substantive nature of the Opinion.

3. I am over the age of 18 and have personal knowledge of the facts sworn to herein and if called to testify I could and would competently testify as set forth in this document. I submit this Declaration in support of ACA's and Collection Bureau Services, Inc.'s (collectively, "Plaintiffs") Motion for a Preliminary Injunction and Temporary Restraining Order.

4. Action Collection Agency of Boston was founded in Boston in April of 1967 by partners John F. "Jack" Lacey and the late Raymond L. Hill, providing collection services to Massachusetts' hospitals, healthcare providers, and utility companies. It was among the very first collection agencies licensed by the Massachusetts Division of Banks, and has been continuously operating since that time. Action Collection is now licensed by and operates in several other states in addition to Massachusetts.

5. I acquired the company in 1991 and formed Action Collection Agencies, Inc. as a sub S corporation to both facilitate the acquisition and also provide a corporate structure for other accounts-receivable management entities, such as ACA Revenue Systems, a first-party healthcare follow-up and insurance re-billing entity. Action Collection is a Professional Practices Management System (PPMS®)-certified agency by ACA International, Inc.

6. Prior to my acquisition of the companies, I was a senior executive at Osborne Associates, Inc., which was a large, Boston-based healthcare collection agency. Prior to that I held various management positions at St. Luke's Hospital in New Bedford. I hold a Masters in Healthcare Administration from Salve Regina College. I am a past president and board member of ACA International, Inc., and also an ACA Certified Instructor, teaching numerous compliance training programs to agency members nationally. I am also a past president of the New England Collectors Association.

7. Action Collection is an equal opportunity employer with a diverse workforce and

leadership, not unlike the industry in general. Our employees are mostly women and people of color. Many of them have achieved financial independence and other benefits through their employment that they would not have elsewhere, based on their education and skills. They perform highly-skilled, highly regulated, and exceedingly necessary functions for which they have been well trained and are well compensated. Many of them have been with the company for decades.

8. Action Collection has a long history of working professionally with Massachusetts consumers since its inception in 1967. Over the company's tenure, it has come to specialize in medical collections, and it provides third-party collection services to a significant number of Massachusetts' healthcare systems, including some of its largest.

9. Massachusetts healthcare providers make up a significant percentage of our business. To be clear, the consumer accounts Action Collection collects on are not purchased, but are assigned to Action Collection by its clients for follow up on average at 120 days or more past due, with many being delinquent for close to a year. Action Collection does not own the accounts it seeks to collect. After the placement with Action Collection, it sends letters informing the consumers that their accounts have been placed with Action Collection for collections, apprising them of their rights under state and federal debt collection laws.

10. The Advisory Opinion makes our work more difficult, more expensive, and more complicated. The Advisory Opinion imposes four new substantive rules on us and all debt collectors: (1) a new requirement to review account-level documents, (2) a new "reasonableness" standard, (3) a new definition of "default," and (4) a new requirement to conduct medical provider audits. Each of these new rule changes will create substantial harm on our finances and business outlook.

11. First, the Advisory Opinion requires us to review account-level documents prior to beginning collections. 89 Fed. Reg. 80722. This is new; currently, Action Collection does not review account-level documents for every account prior to collections. Often times, it does not have access

to account-level documents. Even when it does, it is no guarantee that its access will provide the information needed.

12. Even when Action Collection has access to account-level documents, it is no guarantee that the information provided will aid in making the now-required independent legal determination. For example, Action Collection recently settled a lawsuit where it attempted to collect on a debt when the consumer had workers' compensation coverage that should have applied, but the medical provider did not properly account for. Action Collection actually had received account-level documentation, but this documentation *still* did not contain the information Action Collection needed to avoid liability. The CFPB's new regulations would not have addressed the actual problem with medical providers, instead continuing to shift the burden unlawfully towards debt collectors.

13. Second, the Advisory Opinion requires medical debt collectors to make a legal determination that a debt is "reasonable" and not unconscionable under state law when attempting to collect a medical debt that is not created by an express contract between the consumer and healthcare provider setting forth the dollar amount of the services. *See* Fed. Reg. 80719–20. This, again, is a new obligation. Currently, Action Collection does not make an independent legal determination as to whether the consumer has any potential legal defense prior to the debt collection.

14. Action Collection relies on the hospitals and other medical providers it collects for to make assertions about the debt they pass on to Action Collection for collections. This has been the practice for many years. Only now—with the Advisory Opinion—does that change.

15. Third, the Advisory Opinion redefines "default" to occur when the consumer has failed to pay in full "at a given time," regardless of how the creditor treats the debt. 89 Fed. Reg. 80723.

16. This new bright-line rule that all debts are in "default" if they are not paid in full "at a given time," regardless of how the creditor is treating the debt, is contrary to longstanding law

interpreting the FDCPA. Action Collection's interpretation and current processes support the idea that if there is not an agreement between the consumer and creditor, nor state law that defines when a consumer defaults, courts will make a factual determination on a case-by-case basis to determine whether a debt is in "default" under the FDCPA.

17. This particularly affects Action Collection's first-party healthcare follow-up and insurance re-billing business that operates under the name ACA Revenue Systems. This separate medical billing services business provides medical billing services for healthcare accounts that are aging, but not considered in "default" by the healthcare providers. In Action Collection's experience, medical providers do not consider a bill to be in default (i.e., "written off" under Generally Accepted Accounting Principles) at 31 days just because a payment in full has not been made. Generally, hospitals and medical providers do not charge-off accounts but instead give consumers a flexible period to pay medical bills and process insurance coverage. This benefits consumers by providing time and opportunities for a reasonable payment plan.

18. Medical billing companies, like ACA Revenue Systems, do not identify themselves as FDCPA "debt collectors" because they do not collect defaulted debt, and therefore are not required to comply with FDCPA provisions like, for example, providing a "mini-Miranda" notice when communicating about an account.

19. The Advisory Opinion changes that. Action Collection's medical billing business that was not previously a "debt collector" under the FDCPA now is—meaning that ACA Revenue Systems must develop an entirely new regulatory compliance program as a result of the Advisory Opinion. This is a material change.

20. This change has real impacts on consumers as well. If ACA Revenue Systems is subject to the FDCPA under the Advisory Opinion, the cost-savings compared to traditional debt collection that this business provides to clients will disappear, thus increasing costs for all healthcare

providers who formerly relied upon medical billing providers. These costs are passed on to consumers in the form of higher price points for goods and services. Furthermore, vastly larger numbers of patients would have the experience of being in collections—even if they received their first bill a mere 30 days earlier.

21. Finally, the Advisory Opinion requires us to ensure that the debts Action Collection collects upon are not "upcoded." 89 Fed. Reg. 80720. The only way to ensure that they are not is through comprehensive medical audits of providers. Thus, the Advisory Opinion effectively requires an entirely new regime that will involve Action Collection, and other collectors, to invade previously private medical records to determine appropriate billing practices.

22. Similar to the example above, even the medical audit may not result in all of the information needed to remain compliant. If any one provider's individual billing practices are arguably "upcoding," and they slip by our new audit, Action Collection may be liable under the FDCPA despite (1) not being involved in the coding and (2) auditing the provider to attempt to eliminate that "upcoding" on the back-end.

23. These new regulatory changes will require staff time and significant investment. I expect that these costs could exceed $362,000 per year.

24. If the Advisory Opinion is not enjoined, Action Collection will face substantial and irreparable harm. Each departure from existing regulations creates significant hardship. Action Collection must re-train staff and develop entirely new procedures. The money and time spent on this cannot be recovered. The lasting impact on our business would be irreparable.

Pursuant to LCvR 11.2, I declare under penalty of perjury that the foregoing is true and correct.

Executed on November 18, 2024

Jay E. Gonsalves
President & CEO
Action Collection Agencies, Inc.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ACA INTERNATIONAL, LLC; COLLECTION BUREAU SERVICES, INC. Plaintiffs, v. CONSUMER FINANCIAL PROTECTION BUREAU; and ROHIT CHOPRA, in his official capacity as Director of the Consumer Financial Protection Bureau, Defendants.	Case No. 1:24-cv-03118-DLF

TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

THIS MATTER comes before the Court on the Motion on Application for Preliminary Injunction and Temporary Restraining Order ("Motion") filed by Plaintiffs ACA International, LLC ("ACA") and Collection Bureau Services, Inc. ("CBS") (collectively, "Plaintiffs"). The Motion seeks an Order from the Court enjoining Consumer Financial Protection Bureau ("CFPB") and its Director, Mr. Rohit Chopra (combined "Defendants") from enacting and enforcing the Advisory Opinion issued by Defendants on October 1, 2024 (*see* 89 Fed. Reg. 80715–24) prior to its effective date on December 3, 2024.

After consideration of the Motion and the Complaint, the Court determines that:

1. Pursuant to Fed. R. Civ. P. Rule 65(b), Plaintiffs have the express right to seek temporary injunctive relief from a court of competent jurisdiction pending hearing before a Judge;

2. Plaintiffs have alleged that immediate and irreparable injury, loss, and damage is threatened by the actions of Defendants, and Plaintiffs will suffer irreparable injury if the injunction is not granted;

3. The threatened injury to Plaintiffs outweighs any damage the injunction may cause Defendants;

4. The issuance of the injunction will not be adverse to the public's interest;

5. There is a substantial likelihood that Plaintiffs will prevail on the merits of their claims against Defendants;

6. Plaintiffs are prepared and capable of providing security for the requested relief. However, no such security is required;

7. Plaintiffs have notified Defendants of their request for a temporary restraining order and permanent injunction by personally serving Defendants and Defendants' counsel with a copy of Plaintiffs' Motion for Temporary Restraining Order and Preliminary Injunction Hearing; and

8. The order sought seeks to maintain the status quo between the parties by enjoining the enactment and enforcement of the rule published on October 4, 2024 styled as an "Advisory Opinion" and not engage in any enforcement conduct under the Advisory Opinion standards until the Court may hear the matter more fully on a hearing for permanent injunction. Because the temporary restraining order only maintains the status quo and because Plaintiffs will suffer irreparable harm if Defendants continue the actions herein proscribed and prohibited, the order should issue immediately, without notice to Defendants or to Defendants' counsel.

Plaintiffs are therefore entitled to a temporary restraining order and preliminary injunction against Defendants until such time as this Court orders otherwise.

IT IS HEREBY ORDERED, ADJUDGED AND DECREED THAT:

1. A Temporary Restraining Order issue immediately.

2. A Preliminary Injunction issue immediately.

3. Defendants, their officers, agents, heirs, servants, employees, successors and assigns, and those persons in active concert, participation, or privity with them, or any of them, are enjoined from bringing any action under the standards proscribed by the Advisory Opinion;

4. This Temporary Restraining Order shall expire on _____, 2024 unless within such time the Order, for good cause, is extended by this Court.

5. The Preliminary Injunction shall remain in place until an order dissolving such injunction is issued by this Court.

6. Plaintiffs are granted leave to commence discovery in aid of permanent injunction proceedings before the Court.

7. Defendant shall show cause before this Court on _____ day of _____, 2024 at _____ o'clock __a.m., or as soon thereafter as counsel may be heard, why a Permanent Injunction should not be ordered according to the terms and conditions set forth above.

DATED:_____, 2024

BY THE COURT:

_____

United States District Court Judge