No. 19-14434

In the United States Court of Appeals for the Eleventh Circuit

RICHARD HUNSTEIN,

Plaintiff-Appellant,

v.

PREFERRED COLLECTION AND MANAGEMENT SERVICES, INC.,

Defendant-Appellee.

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

BRIEF OF *AMICUS CURIAE* THE CONSUMER RELATIONS CONSORTIUM IN SUPPORT OF APPELLEE'S PETITION FOR REHEARING *EN BANC*

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

In accordance with FED. R. APP. P. 26.1, the undersigned counsel states that *Amicus Curiae* the Consumer Relations Consortium is an organization in partnership with insideARM LLC. Consumer Relations Consortium does not have a corporate parent nor is there any publicly held company with ownership interest.

Pursuant to 11th Cir. R. 26.1-1 through 11th Cir. R. 26.1-3, the aforesaid *Amicus Curiae* adopt the Certificate of Interested Persons and Corporate Disclosure Statement filed by Appellee Preferred Collection and Management Services, Inc.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Federal Cases

Federal Statutes

Federal Regulations

Federal Rules

INTEREST OF THE *AMICUS CURIAE*

The Consumer Relations Consortium ("CRC") is an organization comprised of more than 60 national companies representing creditors, data and technology providers, and compliance-oriented debt collectors whom the Consumer Financial Protection Bureau ("CFPB") considers "larger market participants." CRC is dedicated to a consumer-centric shift in the debt collection paradigm and focuses on real world solutions that seek to improve the consumer's experience during debt collection.

CRC members exert substantial positive impact in the consumer debt space, servicing the largest U.S. financial institutions and consumer lenders, major healthcare organizations, telecom providers, government entities, hospitality, utilities, and other creditors. CRC members engage in millions of compliant and consumer-centric interactions with consumers throughout the revenue cycle. All members genuinely follow the core principle: "Collect the Right Debt, from the Right Person, in the Right Way."

CRC has a significant stake in ensuring that the Fair Debt Collection Practices Act ("FDCPA"), 15 U.S.C. § 1692, *et seq.*, is interpreted in a way that provides members with a clear method to execute their statutory obligations in a compliant and consumer-centric manner. The subject Panel decision creates industry confusion and exposes CRC members to both individual and class action

claims under the FDCPA. Thus, CRC has a direct interest in this litigation and the organization has authorized the filing of this brief.

No counsel for any party authored this brief in whole or in part.

No party or party's counsel contributed money that was intended to fund preparing or submitting this brief.

No person other than the *amicus curiae*, its members, or its counsel contributed money that was intended to fund preparing or submitting this brief.

INTRODUCTION

An *en banc* hearing or rehearing is warranted if "the proceeding involves a question of exceptional importance." FED. R. APP. P. 35(a)(2). This case involves a question of exceptional importance.

The Panel emphasized that its holding regarding third party communications under the FDCPA was based on a strict reading of the statute and a commitment to "interpret the law as written." But a strict reading of the FDCPA warrants a different result. A letter vendor is not a "third party" under the FDCPA, but a "medium" by which communications with consumers are effectuated. For this reason, the Panel's decision to treat information submitted to letter vendors as a "third party communication" was incorrect.

In addition, the Panel's decision was made without the benefit and context of the CFPB's publication of the long-awaited debt collection rule, Regulation F. 85 Fed. Reg. 76734, 86 Fed. Reg. 5766. Regulation F endorses a debt collector's use of a letter vendor and makes apparent that the CFPB, including various state regulators, support the use of third party vendors to promote compliance with consumer protection laws, including the use of a letter vendor. Unfortunately, due to the timing of this case and publication of Regulation F, the Panel was not provided with the opportunity to consider the regulation and give it appropriate deference.

ARGUMENT

I. The Panel's decision does not comport with basic principles of statutory construction.

"When interpreting a statute, we always begin with its plain language." *Nguyen v. United States*, 556 F.3d 1244, 1250 (11th Cir. 2009) (citations omitted). "[I]n order to determine the plain meaning of the statute [the Court] must consider both the particular statutory language at issue and the language and design of the statute as a whole." *Wachovia Bank, N.A. v. United States*, 455 F.3d 1261, 1267–68 (11th Cir. 2006) (citations omitted). Courts cannot interpret language in isolation but must "follow the cardinal rule that a statute is to be read as a whole since the meaning of statutory language, plain or not, depends on context." *King v. St. Vincent's Hosp.*, 502 U.S. 215, 221, 112 S. Ct. 570, 574, 116 L. Ed. 2d 578 (1991) (internal citations omitted).

15 U.S.C. § 1692c(b) prohibits third party communications "with any person other than the consumer, his attorney, a consumer reporting agency if otherwise permitted by law, the creditor, the attorney of the creditor, or the attorney of the debt collector." 15 U.S.C. § 1692a(2) defines a "communication" as the "conveying of information regarding a debt directly or indirectly to any person through <u>any medium</u>." *Id*. (emphasis added).

A letter vendor is not a "person" under 15 U.S.C. §1692c(b) but, rather, a "medium" as contemplated under 15 U.S.C. 1692a(2).

The plain meaning of "medium" as defined in Webster's Third defines "medium" as "something through or by which something is accomplished, conveyed, or carried on" as "an intermediate or direct instrumentality or means" especially "a channel, method, or system of communication, information, or entertainment." Connection, Webster's Third International Dictionary at 481 (1961). Based on this plain textual reading, Congress contemplated the use of "mediums" to act as an intermediary to convey information between the collector and the consumer.

When read as a whole, the statutory language supports this plain reading of the word "medium." For instance, the statute specifically references the use of various mediums to convey communications between the debt collector and the consumer, including telegram messengers (15 U.S.C. § 1692b(5); 1692f(5),(8)); telephone service providers (15 U.S.C. § 1692f(5); 1692d(5)), and mail carriers (15 U.S.C. § 1692b(5); 1692f(8); 1692g(a)(4),(b)).[1]

Based on this plain reading of the statute as a whole, communications through the use of a medium, such as a letter vendor, are expressly permitted.

[1] The individuals specifically identified under § 1692c(b) are not encompassed by the definition of "medium," and, thus, are expressly included as permitted third parties.

II. Rehearing *en banc* is necessary to consider and provide appropriate deference to Regulation F.

A. The Panel was not afforded the opportunity to consider Regulation due to the parallel timelines involved.

The CFPB was created in 2012 with the purpose of implementing and enforcing "federal consumer financial law consistently" and to ensure, among other things, "that markets for consumer financial products and services are fair, transparent, and competitive." 12 U.S.C. § 5511(a). As part of its mandate, the CFPB was afforded the power to promulgate rules implementing the FDCPA. *See* 15 U.S.C. § 1692l(b)(6).

Shortly after the creation of the CFPB, an Advanced Notice of Proposed Rulemaking was issued in the area of debt collection. 78 Fed. Reg. 67847. Following a notice and comment period, the CFPB began the arduous task of drafting. Pursuant to the Small Business Regulatory Enforcement Fairness Act of 1996 ("SBREFA"), 5 U.S.C. § 601, *et seq.*, the CFPB held a panel in August 2016 regarding a potential rule. It took another two-and-a-half years for the CFPB to publish its Notice of Proposed Rulemaking ("NPRM"). 84 Fed. Reg. 23274. After a comment period (yielding over 12,100 comments, from consumer advocates, industry advocates, consumers, small business owners, and trade groups), the Final Rule was published in October 2020, with an effective date of November 30, 2021, 85 Fed. Reg. 76734. A Supplemental Final Rule was published in January 2021,

with the same effective date. 86 Fed. Reg. 5766. (Collectively referred to as the "Final Rule" or "Regulation F"). This process encompassed three different presidential administrations, 2 fully confirmed directors (a third is pending confirmation), and 2 acting directors.

Meanwhile, on April 24, 2019, Appellant filed his Complaint – well before the CFPB's publication of Regulation F. The district court's order was also issued before Regulation F was published. Likewise, on appeal, the main briefs were filed prior to the publication of the Final Rule and the only supplemental briefing requested by the panel was for Article III jurisdiction. Thus, the Panel did not have the opportunity to consider the import of, nor afford the proper deference to, the Final Rule in reaching its decision.

CRC believes that the Court should have the opportunity to review the Final Rule as promulgated by the only federal agency with rule-making authority under the FDCPA to conform the case law to the agency's regulations. Furthermore, Congress specifically directed courts to apply deference to the CFPB's rulemaking:

> [T]he deference that a court affords to the Bureau with respect to a determination by the Bureau regarding the meaning or interpretation of any provision of a Federal consumer financial law shall be applied as if the Bureau were the only agency authorized to apply, enforce, interpret, or administer the provisions of such Federal consumer financial law.

12 U.S.C. § 5512(b)(4)(B).

The Court must consider the Panel decision in light of the Final Rule because the use of the third party vendors (such as letter vendors) by debt collectors is assumed, adopted, and referred to throughout the Final Rule.[2] One example is found in the Official Comment § 1006.34(c)(2)(i)-2:

> A debt collector may disclose a vendor's mailing address if that is an address at which the debt collector accepts disputes and requests for original-creditor information.

86 Fed. Reg. at 5859. The CFPB further explained that this comment was meant to:

> [C]larify that a debt collector may disclose a vendor's mailing address, if that is an address at which the debt collector accepts disputes and requests for original-creditor information. As one commenter observed, some debt collectors may use a vendor to receive mail from consumers. The Bureau is finalizing comment 34(c)(2)(i)-2 to accommodate this business practice.

86 Fed. Reg. at 5801.

Furthermore, when discussing implementation of a new form under the Final Rule, the CFPB noted that:

> The Bureau expects that any one-time costs to debt collectors of reformatting the validation notice will be relatively small, particularly for debt collectors who rely on vendors, because the Bureau expects that most vendors will provide an updated notice at no additional cost. The Bureau understands from its outreach that

[2] *See, e.g.*, 85 Fed. Reg. 76734 – 76736, 76738, 76842, 76858, 76883, 76885, and 76907; 86 Fed. Reg. at 5801, 5845, 5859.

> many covered persons currently use vendors to provide validation notices.

86 Fed. Reg. at 5845. As part of the process of creating the Final Rule, the CFPB conducted an Operations Study which expressly pointed out that "over 85 percent of debt collectors surveyed by the Bureau reported using letter vendors." *Id.*, n.446.

In addition, the CFPB's own Supervision and Examination Manual contemplates using third parties for certain activity, including letter vendors. *See* CFPB Supervision and Examination Manual (Updated September 2020), pp. 299-300, 1708 – 62.[3]

Thus, it is clear that the CFPB is aware of and, indeed, contemplated the use of letter vendors by debt collectors. More importantly, the CFPB appears unconcerned, if not encouraged, by a debt collector's use of letter vendors as evidenced by the absence of any derogatory commentary or rulemaking on the matter.

In light of this, there is no question that the Final Rule deserves some deference from the Court when evaluating whether the use of a third party letter vendor is appropriate in light of Section 1692c(b).

[3]https://files.consumerfinance.gov/f/documents/cfpb_supervision-and-examination-manual.pdf

B. Regulation F may be subject to two levels of deference, the heightened *Chevron* deference, or the lesser *Skidmore* deference.

Chevron deference is based on the United States Supreme Court case of *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984). The Court instructed this higher level to be given "when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority." *United States v. Mead Corp.*, 533 U.S. 218, 226-27, 121 S. Ct. 2164, 150 L. Ed. 2d 292 (2001). *See also Gonzales v. Oregon*, 546 U.S. 243, 355-56, 126 S. Ct. 904, 163 L. Ed. 2d 748 (2006).

The Dodd-Frank Act did not just give birth to the CFPB, but also empowered the CFPB to promulgate rules interpreting the FDCPA; an important grant of power Congress withheld from the Federal Trade Commission when the FDCPA was originally enacted. *See* 15 U.S.C. § 1692l(d); 12 U.S.C. § 5511(b)(4)(B).

The first step in analyzing whether *Chevron* deference applies requires a determination of whether the underlying statutory scheme (*i.e.*, § 1692c(b)) is ambiguous. "If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed

intent of Congress." *Chevron*, 467 U.S. at 843. According to the Panel, Congressional intent was clear.

CRC submits there may be a question of clarity and ambiguity due to the sheer volume of proposed textualist interpretations contained in the various briefs filed by the many amici, including this one. And, if that is the case, "the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Chevron*, at 843.

But even if *Chevron* deference does not apply, the persuasiveness of an agency's pronouncements may nevertheless entitle it to a different level of respect and deference. *Fed. Trade Comm'n v. Garvey*, 383 F.3d 891, 903 (9th Cir. 2004) (*citing Christensen v. Harris County*, 529 U.S. 576, 587, 120 S. Ct. 1655, 146 L. Ed. 2d 621 (2000)).

> [A]n agency's interpretation may merit some deference whatever its form, given the specialized experience and broader investigations and information available to the agency, and given the value of uniformity in its administrative and judicial understandings of what a national law requires.

Mead Corp., 553 U.S. at 234.

This lower level of deference is commonly referred to as *Skidmore* deference. *Skidmore* deference applies where there exists "thoroughness evident in [the agency's] consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to

persuade." *Skidmore*, 323 U.S. at 140. (Notably, one section of the Dodd-Frank Act actually incorporated this level of deference into the law. *See* 12 U.S.C. § 25b(b)(5)(A)).

Under either deference application, the Final Rule and the CFPB's regulatory power warrants some level of consideration and deference. *See* 12 U.S.C. 5511(b)(4)(B). Due to timing, the Panel did not have the opportunity and benefit to consider and apply the appropriate level of deference to the CFPB's rule-making authority and Regulation F. As such, rehearing should be granted to do so here.

CONCLUSION

The Panel's decision failed to follow basic statutory construction rules. Similarly, the Panel was not afforded the opportunity to determine the implications of the Consumer Financial Protection Bureau's Regulation F. Respectfully, the Court should grant rehearing *en banc* to fully consideration these ramifications.

Dated: June 1, 2021

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

In accordance with Federal Rule of Appellate Procedure 32(g)(1), I certify that the foregoing *amicus* brief complies with the type-volume limitations of Rule 29(a)(4) because, excluding the parts of the document exempted by Rule 32(f), it contains 2,383 words.

This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionately spaced typeface using Microsoft Word in 14-point Times New Roman font.

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CERTIFICATE OF SERVICE

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

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CERTIFICATE OF SERVICE

I certify that I electronically filed the foregoing Brief of *Amicus Curiae* The Consumer Relations Consortium in Support of Appellee's Petition for Rehearing *En Banc* with the Clerk of the Court for the United States Court of Appeals for the Eleventh Circuit by using the appellate CM/ECF system on June 1, 2021.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Dated: June 1, 2021

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