**IN THE UNITED STATES COURTS OF APPEALS
FOR THE ELEVENTH CIRCUIT**

No. 19-14434

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

RICHARD HUNSTEIN,

Plaintiff-Appellant,

v.

PREFERRED COLLECTION AND MANAGEMENT SERVICES, INC.,

Defendant-Appellee.

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

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rules of Appellate Procedure 26.1 and 29(a)(4)(A) and Eleventh Circuit Rules 26.1-1 and 29-2, *Amicus Curiae* Third Party Payment Processors Association states that it is an IRS 501(c)(6) nonprofit corporation. It is not a subsidiary or affiliate of any other corporation. No publicly held corporation owns 10 percent or more of its stock.

Pursuant to Eleventh Circuit Rules 26.1-1 through 26.1-3, the aforesaid *Amicus Curiae* certifies that, in addition to the persons and entities named in the parties' certificates of interested persons, the following individuals may have an interest in the outcome of this case:

1. Third Party Payment Processors Association,
2. Troutman Pepper Hamilton Sanders, LLP,
3. Misha Tseytlin,
4. Keith J. Barnett,
5. Ethan G. Ostroff,

6. David N. Anthony, and

7. Jonathan P. Floyd.

By: */s/ Misha Tseytlin*

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The Third Party Payment Processors Association (the "TPPPA") hereby moves this Court for leave to file as *amicus curiae* a proposed brief in support of Appellee under Eleventh Circuit Rule 35-8. In support of its motion, and pursuant to Federal Rule of Appellate Procedure 29(a)(3), the TPPPA states as follows:

INTEREST OF *AMICUS CURIAE*

The TPPPA is a national not-for-profit industry association that represents and promotes the interests of payment processors, banks, and merchants. Its basic mission is to support compliance efforts of third-party payment processors ("payment processors") and banks in third-party payment transactions. The panel's now-vacated decision is of particular interest to the TPPPA because payment processors are vendors for merchants in every industry, including debt collection. To accept payments on consumer debts, a majority of debt collectors utilize payment processors to process payments by phone or online. Consumers wishing to make payments typically provide the debt collector with their personal banking information. The debt collector then utilizes a payment processor to properly format the payment instructions to ensure timely and accurate payments. The TPPPA files this brief as *amicus curiae* because the panel majority's Article III standing decision, if adopted by this Court en banc, threatens to undermine the ability of debt collectors to leverage the technology and expertise of payment processors to facilitate compliant, efficient, and secure electronic payments.

Because of its specialized knowledge regarding the use of payment processors, the TPPPA believes that its brief—drawing on its experience managing electronic payments for a broad spectrum of merchants and banks—will aid in this Court's consideration of this matter.

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

The TPPPA's accompanying brief raises a significant concern not addressed by any other party. Specifically, the TPPPA urges this Court to consider the full scope of disastrous consequences that will flow from the panel's decision, including as to debt collectors' use of payment processors, who play an important, but often unseen, role in consumers paying their debt obligations. Because most merchants, including most debt collectors, do not have the technology or expertise to send the payment instructions directly to a bank, payment processors are essential in facilitating the payments. The panel majority's decision in

Hunstein v. Preferred Collection and Management Services, Inc., 17 F.4th 1016, 1038 (11th Cir. 2021), jeopardizes the use of payment processors even though they are essentially service providers for banks. In this role, payment processors are performing the training, compliance checks, and offloading that most merchants, other than large, sophisticated companies, cannot perform.

Should this Court hold that Mr. Hunstein has Article III standing to bring a lawsuit against a debt collector for the mere use of a mail vendor, and a court later extends this logic to other vendors such as payment processors, the consequences would be unnecessarily harmful to consumers. Faced with potential liability, many debt collectors may choose to refrain from giving consumers electronic payment options or, in the alternative, attempt to bring in-house the sensitive, complicated functions that payment processors carry out, thereby depriving consumers of the additional expertise, security, and efficiency that payment processors provide. Depriving consumers and debt collectors of the expertise provided by payment processors will impose serious harms on all involved, frustrating consumer choice as to how to make payments, increasing costs to consumers, and potentially putting their data at risk, all while, as admitted by the panel majority, failing to benefit consumer privacy in any real way.

CONCLUSION

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

Date: January 18, 2022 By: <u>*/s/ Misha Tseytlin*</u>

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(9 of 33)

CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of January, 2022, I electronically filed the foregoing with the Clerk of the Court in the United States Court of Appeals for the Eleventh Circuit by using the CM/ECF system. I certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

By: *<u>/s/ Misha Tseytlin</u>*

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By: */s/ Misha Tseytlin*

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INTEREST OF AMICUS CURIAE

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

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

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No counsel for any party authored this brief in whole or in part. No party or party's counsel contributed money that was intended to fund preparing or submitting this brief. No person other than the *amicus curiae*, its members, or its counsel contributed money that was intended to fund preparing or submitting this brief.

STATEMENT OF THE ISSUE

Does Mr. Hunstein have Article III standing to bring this lawsuit?

INTRODUCTION AND SUMMARY OF ARGUMENT

In the vacated decision below, a divided panel of this Court held that Mr. Hunstein has Article III standing to bring a claim under the Fair Debt Collection Practices Act ("FDCPA") based upon a debt collector transmitting his "personal debt-related information" to a third-party commercial mail vendor. *Hunstein v. Preferred Collection & Mgmt. Servs., Inc.*, 17 F.4th 1016, 1038 (11th Cir. 2021). The panel majority noted the risk that its ruling "may well require debt collectors (at least in the short term) to in-source many of the services that they had previously outsourced, potentially at great cost," *id.*, but the TPPPA respectfully submits that the panel majority failed to grapple fully with the scope of the disastrous consequences that may well flow from its decision. While the panel majority acknowledged that the "great cost" of its decision would come at the expense of debt collectors and "may not purchase much in way of 'real' consumer privacy," *id.*, the costs to consumers will likely be greater than that. In particular, and as relevant to this amicus brief, depriving consumers of the practical ability to benefit from the services provided by third-party payment processors harms consumers' ability to make payments on their debt obligations in the modern, safe, and convenient manner that consumers have come to expect.[1]

Payment processors play an important, but often unseen, role in consumers paying their debt obligations. When making a debt-related payment over the phone or online, the consumer often authorizes the merchant to collect the payment electronically in a specific amount on a specific date by providing the merchant with his or her banking information. The merchant then securely transmits this information to a payment processor. Being skilled in the technical requirements of

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

electronic payments, the payment processor generates the appropriate payment instructions to transmit to its bank, which is a member of the various payment systems (ACH, debit card, etc.).[2] The payment processor's bank then submits, to the applicable payment system, the batches of payment instructions that it has received from all of its payment processors for withdrawal from each consumer's bank account. Due to the nature of the system, only a bank that is a member of the payment system may complete this step and settle the funds at issue. And given the nature of these transactions, and for purposes of security, all data is transmitted electronically during this process—humans do not see the consumer's name, payment amount, bank account or routing number, or any other relevant, personally identifying information.

Because most merchants, including most debt collectors, do not have the technology or expertise to send the payment instructions directly to a bank, payment processors are essential components of this convenient, secure, and consumer-friendly system. Due to the technical nature of electronic payments, payment instructions must be properly

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[2] CFPB, *What Is an ACH?*, available at https://www.consumerfinance .gov/ask-cfpb/what-is-an-ach-en-1065/ (last visited January 18, 2022).

formatted, securely stored and transmitted, and sent in compliance with the ever-changing regulatory requirements for different types of payments. It is thus more efficient and secure for a bank to work with payment processors because such processors are service providers for the banks, performing the training, compliance checks, and offloading that most merchants, other than large, sophisticated companies, cannot perform.

If this Court holds that Mr. Hunstein has Article III standing to bring a lawsuit against a debt collector for the mere use of a mail vendor, and a court later extends this logic to other vendors such as payment processors, the consequences would be broad and unnecessarily harmful to consumers. The use of payment processors provides consumers with the most convenient option to pay their debts. However, through an extension of the panel majority's decision, these debt collectors could be hauled into court for providing this option to consumers who prefer it. In the face of this potential liability, many debt collectors may choose to refrain from giving consumers electronic payment options in the future. Consumers would then have to pay their debts either in-person with cash or through inconvenient payment alternatives, such as money orders that require consumers to pay additional fees to get the payment to a debt collector. In the alternative, some debt collectors may attempt to bring in-house the sensitive, complicated functions that payment processors carry out, thereby depriving consumers of the additional expertise, security, and efficiency that payment processors provide.

ARGUMENT

I. The Panel Majority's Logic—If Adopted By This Court En Banc—Could Potentially Authorize Hauling Debt Collectors Into Federal Court Merely For Offering Consumers The Convenient Option Of Paying Their Debts Through Payment Processors

The panel majority's interpretation of Article III standing appears to have an extremely broad reach. The panel majority held that a plaintiff can drag a debt collector into federal court for merely communicating information about the plaintiff to a letter vendor. *Hunstein*, 17 F.4th at 1038. In reaching this conclusion, the panel majority erroneously concluded that "Hunstein has alleged a harm similar in kind to the common-law tort of public disclosure of private facts," *id.* at 1027, under which "[o]ne who gives publicity to a matter concerning the private life of another is subject to liability to the other for invasion of his privacy, if the matter publicized is of a kind that (a) would be highly offensive to a reasonable person, and (b) is not of legitimate concern to the public." *Id.* (citing Restatement (Second) of Torts § 652D (1977)). Notably, the panel majority admitted that the debt collector's "disclosure of Hunstein's private information to [the mail vendor's] employees might have been less widespread—less public—than the disclosures typical of actionable public-disclosure-of-private-facts claims," but, nonetheless, the court held that "publication of personal information to the employees of a single entity and more widespread dissemination of that same personal information remain similar in 'kind,'" and, therefore, sufficient to establish Article III standing for Mr. Hunstein. *Id.* at 1027–28.

The undersigned *amicus* is deeply concerned that future courts could extend this reasoning to permit plaintiffs to drag debt collectors into federal court merely for communicating consumer information to *any* third-party vendor, including payment processors. Much like utilizing a mail vendor, payment processing requires debt collectors to transmit certain information to a third-party payment processor. This information could include, among other things, the consumer's personal identifying information, financial information, the status of the debt, the creditor and/or debt collector to whom the debt is owed, the nature of the debt, and whether payments are to be made in one lump sum or over a schedule. Under the panel majority's reasoning, such transmissions could—at least arguably—constitute a disclosure of private information to the payment processor's employees akin, at least in kind if not degree, to the public disclosure of private facts, thereby bestowing the consumer with Article III standing. *See id.* at 1038. Put another way, if the sending of consumer information to a third party for purposes of printing a letter is sufficient for a plaintiff to establish Article III standing, then the same logic could potentially be true of sending similar or analogous consumer information to a payment processor for purposes of processing a payment that the consumer prefers to make electronically. *See id.* at 1027, 1038.

As Judge Tjoflat correctly explained in his dissenting opinion at the panel stage, the panel majority's logic is contrary to *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190 (2021), and the flaws in that logic apply to debt collectors' use of both mail vendors and payment processors. After all, the "simple transmission of information along a chain that involves one

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extra link because a company uses a mail vendor to send out the letters about debt is not a harm at which Congress was aiming," or which Article III recognizes. *Hunstein,* 17 F.4th at 1046 (Tjoflat, J., dissenting). This is true as to payment processors where debt collectors use a payment processor as a vendor to help consumers make voluntary electronic payments in amounts and on a schedule selected by consumers.

This conclusion also follows from Footnote 6 in *TransUnion*. There, the Supreme Court explained (citing this Court's decision in *Mack v. Delta Air Lines, Inc.*, 639 F. App'x 582 (11th Cir. 2016)) that American courts had not "necessarily recognized disclosures to printing vendors as actionable publications" and suggested that the plaintiff would need to present evidence that the defendant had not only "brought an idea to the perception of another" but that "the document was actually read and not merely processed." 141 S. Ct. at 2210 n.6 (citations omitted). This logic applies to payment processors just as it does for printing vendors because, as described above, the electronic payment systems operate on automated transmissions of data that are not viewed by individual employees but rather are processed electronically in batches by payment processors and banks. *See Hunstein,* 17 F.4th at 1038.

II. Allowing Plaintiffs To Drag Debt Collectors Into Court Merely For Using Payment Processors Would Have Severely Negative Impacts With No Consumer Benefit

Permitting plaintiffs to drag debt collectors into federal court merely for offering consumers the convenient option of electronically paying their debts would harm consumers and their ability to pay down debt. Given the widespread use of payment processors in the debt collection industry—a 2016 study conducted by the Consumer Financial Protection Bureau ("CFPB") found that 86% of the responding debt collectors use a third-party online payment portal to accept consumer payments via the ACH network—accepting the panel majority's position could place four out of five debt collectors in the path of costly lawsuits.[3]

There are several ways in which debt collectors could respond to this new legal threat, all of which hold the potential to damage consumers. The most obvious response is that many debt collectors will no longer offer consumers the option to pay their debt

[3] *See* CFPB, *Study of Third-Party Debt Collection Operations*, 32–34 (July 2016), available at https://files.consumerfinance.gov/f/documents/20160727_cfpb_Third_Party_Debt_Collection_Operations_Study.pdf (last visited January 18, 2022).

electronically in the future. In that circumstance, consumers would be required to pay their debt obligations by cash, cashier's check, or money order. These payment alternatives each create unique hurdles for consumers and debt collectors. Cash payments require a local presence by the debt collector or travel by the consumer, which may not be possible. In turn, payments by cashier's check and money order require the consumer to go in person to purchase a cashier's check or money order, and pay a fee to do so, and then pay to mail or deliver the payment by hand. *See, e.g.*, 5A Forms & Procedures Under the UCC II (2021). Unlike electronic payments which can be completed by phone, computer, or mobile device, these options increase costs and are significantly less convenient methods for consumers to pay their debts.

Other debt collectors who want to continue to accept electronic payments may, in the panel majority's words, attempt to "in-source" payment processing. *Hunstein*, 17 F.4th at 1038. But most merchants, including the vast majority of debt collectors, lack the technical wherewithal to bring payment processing in-house in a manner that would be acceptable to the banks and in compliance with the bevy of regulations designed to protect consumers and prevent fraud. Further,

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a merchant or debt collector cannot simply initiate entry into the ACH network on its own because the rules and regulations promulgated by Nacha, which manages the development, administration, and governance of the ACH Network, require that an ACH member bank enter into a written agreement with any entity who seeks to initiate credits and debts electronically. *See* 2021 Nacha Operating Guidelines, § 6.50.

Further, payment processors have their own unique policies and procedures designed to protect consumer privacy and prevent fraud during the third-party payment process, which debt collectors lack. Third-party payment transactions are highly technical, occur in multiple steps, and may be rejected at any point if they fail to comply with the Nacha rules or any other applicable provisions of the law. *Id.*, § 4.34. It is unlikely that debt collectors will be able to replicate fully these procedures and safeguards. Thus, if there is a problem with the payment, such as insufficient funds or potential fraud, payment processors are likely better stewards of the ACH system due to their sophisticated policies and procedures for resolving these issues quickly.

Forcing in-sourcing also deprives debt collectors, as identified by the CFPB, of the expertise available from service providers such as payment processors.[4] For example, the TPPPA has created a Compliance Management System designed to support payment processors in creating and maintaining risk-based, documented compliance management programs that adjust as internal changes occur, such as new products or systems, and as new industries are supported. The Compliance Management System is designed to work with all payment types regardless of the industry or product type. Consumers would presumably benefit from this systematic discipline inherent in the TPPPA's membership. These important security and risk-management services—which payment processors have access to, and debt collectors do not—further demonstrate the benefits of payment processors in the debt collection industry. Given that debt collectors' expertise is the collection of debt, not electronic payment intermediation, debt collectors

[4] *See* CFPB Compliance Bulletin and Policy Guidance; 2016-02, Service Providers, 2–3 (Oct. 19, 2016), available at https://files.consumerfinance.gov/f/documents/102016_cfpb_OfficialGuidanceServiceProviderBulletin.pdf (last visited January 18, 2022).

are simply unlikely to create compliance systems that rival those of payment processors.

Notably, under former Director Richard Cordray, the CFPB provided guidance that expressly allows the use of third-party service providers by covered persons like debt collectors.[5] The guidance's permissive approach to the use of payment processors is consistent with the terms of the Consumer Financial Protection Act of 2010, 12 U.S.C. § 5481, *et. seq.*, under which debt collectors are considered "covered persons," *id.*, § 5481(12)(H), and "service providers" are defined as "any person that provides a material service to a covered person in connection with the offer or provision by such covered person of a consumer financial product or service." *Id.*, § 5481(26). The CFPB has explained that "[s]upervised banks and nonbanks may outsource certain functions to service providers due to resource constraints, use service providers to develop and market additional products or services, or rely on expertise from service providers that would not otherwise be available without

[5] *See* CFPB Compliance Bulletin and Policy Guidance; 2016-02, Service Providers, 2–3 (Oct. 19, 2016), available at https://files.Consumerfinance .gov/f/documents/102016_cfpb_OfficialGuidanceServiceProviderBulletin. pdf (last visited January 18, 2022).

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significant investment." *Id.* Payment processors provide this very expertise to banks and debt collectors, and the CFPB's own Debt Collection Examination Manual contemplates using third party payment processors in such fashion.[6] Any holding by this Court that suggests debt collectors can be hauled into court for taking part in this standard practice would undermine the Consumer Financial Protection Act and CFPB guidance.

[6] *See* CFPB Examination Procedures Debt Collection, 6–7, available at https://files.consumerfinance.gov/f/201210_cfpb_debt-collection-examination-procedures.pdf (last visited January 18, 2022).

CONCLUSION

For the foregoing reasons, this Court should hold that Mr. Hunstein lacks Article III standing.

Date: January 18, 2022

By: <u>*/s/ Misha Tseytlin*</u>

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CERTIFICATE OF COMPLIANCE

The undersigned, counsel for *amicus curiae*, certifies that this brief complies with the word limit requirements of Federal Rule of Appellate Procedure 29(a)(5) and Eleventh Circuit Rule 29-2 and contains 2,779 words according to the word processing program used to prepare it, excluding the items exempted by Federal Rule of Appellate Procedure 32(f). The brief's type size and typeface comply with Federal Rule of Appellate Procedure 32(a)(5) and (6).

Date: January 18, 2022

By: */s/ Misha Tseytlin*

Counsel for *Amicus Curiae*
the Third Party Payment
Processors Association

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