Case Nos. 26-1037, 26-1039, 26-1054

THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Benjamin Prigge,
Plaintiff-Appellant,
vs.
Landlord Resource Network, LLC
Defendant-Appellee.

Joyce Johnson,
Plaintiff-Appellant,
vs.
Landlord Resource Network, LLC
Defendant-Appellee.

Kimberly Heins,
Plaintiff-Appellant,
vs.
Landlord Resource Network, LLC
Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA,
Nos. 24-cv-2602, 24-cv-3328, 24-cv-4105 (KMM/EMB)

NATIONAL CREDITORS BAR ASSOCIATION'S BRIEF AS *AMICUS CURIAE* IN SUPPORT OF APPELLEE AND AFFIRMANCE

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, National Creditors Bar Association is a 501(c)(6) nonprofit trade association that has no parent companies, subsidiaries, or affiliates that have issued shares to the public.

/s/ Peter C. Nanov
Peter C. Nanov

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Federal Statutes

Federal Rules

State Statutes

RULE 29(A)(2) STATEMENT

All parties have consented to the filing of this brief.

STATEMENT OF INTEREST OF *AMICUS CURIAE*

Amicus Curiae National Creditors Bar Association ("NCBA") is the only nationwide not-for-profit bar association for attorneys dedicated to practicing all areas of creditors' rights law. Its members include over 400 law firms and individual members totaling over 2,500 attorneys licensed to practice across the United States and subject to their state bars' respective rules of professional conduct. NCBA's Code of Ethics imposes additional obligations on its members beyond those required by local governing state rules of professional conduct.

NCBA was organized to support the ethical practice of creditors rights law through education and advocacy. For decades, NCBA has been a provider of continuing education on topics of legal ethics, professional regulation, and consumer protection law affecting the creditors' bar, most notably the Fair Debt Collection Practices Act ("FDCPA"), 15 U.S.C. §1692, *et seq.* NCBA has also appeared as *amicus curiae* in the Supreme Court in a number of significant FDCPA cases.

Accordingly, NCBA has a strong interest in how the FDCPA is interpreted and applied. NCBA brings a wealth of knowledge concerning the balance struck by the FDCPA between protecting consumers and recognizing the rights of creditors.

NCBA is well suited to provide an analysis of the FDCPA and its impact on the practice of creditors' rights law.

RULE 29(A)(4)(E) STATEMENT

No party's counsel authored this brief in whole or in part, or contributed money intended to fund the preparation or submission of this brief. Nobody other than NCBA, its members or counsel, contributed money intended to fund the preparation or submission of this brief.

SUMMARY OF ARGUMENT

This matter involves one of the most fundamental protections in our legal system: the right to petition the government. The outcome sought by Appellants would hamstring and chill creditors' First Amendment rights to petition the government as well as their attorneys' ability to do so on their behalf.

This Circuit has held multiple times that attorneys are not liable for alleged violations of the Fair Debt Collection Practices Act ("FDCPA") arising from statements made in good faith during the course of litigation. In opposition to this Circuit's rulings, Appellants spent much of their Brief arguing that the FDCPA does not contain a "good faith litigation" exception to liability. Appellants' focus on the language of the FDCPA is misplaced because the "good faith" exception repeatedly recognized by this Circuit, and applied in this matter by the District Court, does not arise from the FDCPA itself. The exception arises from the First Amendment, which

guarantees the right to petition the government for redress of grievances. Access to the court system is an integral part of that right.

The Supreme Court has ruled that it will not impute to Congress an intent to invade the First Amendment right to petition through the restrictions of federal statutes. The Supreme Court has also made clear that the FDCPA does not infringe upon the rights of creditors to pursue judicial remedies through litigation, and should not be applied in a manner that yields absurd results, particularly to attorneys engaged in litigation. This Circuit has followed those instructions and repeatedly recognized a "good faith litigation" exception to the FDCPA. In doing so, this Circuit expressly recognized the need for that exception as arising from the First Amendment right to petition the courts.

Appellants have presented no reason for this Circuit to reject and depart from its own precedent. On the contrary, this matter presents a clear application of precedent in favor of Appellee. Instead, Appellants argue against this Circuit's interpretation of the FDCPA and, contrary to express Supreme Court precedent, that the only defense to the FDCPA is the *Bona Fide* Error Defense. Appellants are mistaken because the First Amendment overrides even strict liability statutes such as the FDCPA. Punishing creditors' counsel for violations of the FDCPA arising from good faith positions taken in litigation would discourage attorneys from taking

on their clients' work, which would chill creditors' First Amendment right to access the courts. That chilling effect requires rejection of Appellants' position.

Concluding otherwise, against the precedent of the Supreme Court and this Circuit, that attorneys FDCPA liability can arise from statements made in good faith in the course of litigation, but that are ultimately determined to be inaccurate, would violate precedent and require creditors' counsel to be auditors, guarantors, and sureties of their clients' positions. Such a result is not the purpose of the FDCPA, is incompatible with our adversarial system, and should be rejected.

ARGUMENT

I. The First Amendment Guarantees the Right to Petition the Government Through Litigation.

The First Amendment's Petition Clause provides that "Congress shall make no law ... abridging ... the right of the people ... to petition the Government for a redress of grievances." U.S. Const. amend. I. The United States Supreme Court has recognized this right to petition as one of "the most precious of the liberties safeguarded by the Bill of Rights," *Mine Workers v. Illinois Bar Assn.*, 389 U.S. 217, 222 (1967), and has explained that the right is implied by "[t]he very idea of a government, republican in form," *United States v. Cruikshank*, 92 U.S. 542, 552 (1876). That "right to petition extends to all departments of the Government," and "[t]he right of access to the courts is ... but one aspect of the right of petition." *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 510 (1972).

"As an aspect of the First Amendment right to petition, the right of access to the courts shares this 'preferred place' in our hierarchy of constitutional freedoms and values." *Harrison v. Springdale Water & Sewer Comm'n*, 780 F.2d 1422, 1427 (8th Cir. 1986)

The Supreme Court has considered the right to petition when interpreting federal statues and evaluating liability thereunder. In *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961) and *Mine Workers v. Pennington*, 381 U.S. 657 (1965) the Supreme Court ruled that the act of petitioning the government for redress is generally immune from antitrust liability under the Sherman Act. The Court declined to "impute to Congress an intent to invade" the First Amendment right to petition through the restrictions of the Sherman Act. *Noerr*, 365 U.S., at 138. The Court later clarified that this immunity arising from the right to petition included petitioning activities made to administrative agencies and to courts. *California Motor Transport*, 404 U.S. 508.

Since then, courts across the country have applied *Noerr-Pennington* to recognize immunity arising from the right to petition in contexts beyond antitrust. *See, e.g.*, *In re IBP Confidential Bus. Documents Litig.*, 755 F.2d 1300, 1312 (8th Cir. 1985), *on reh'g*, 797 F.2d 632 (8th Cir. 1986) (collecting cases); *Venetian Casino Resort, L.L.C. v. N.L.R.B.*, 793 F.3d 85, 87 (D.C. Cir. 2015) (ruling with respect to the application of the NLRA); *Knology, Inc. v. Insight Commc'ns Co*., 393 F.3d 656,

658 (6th Cir. 2004) (ruling with respect to Section 1983 liability); *Sosa v. DIRECTV, Inc.*, 437 F.3d 923, 932 (9th Cir. 2006) (ruling with respect to the application of RICO and stating that the immunity established by the *Noerr-Pennington* doctrine "applies equally in all contexts"). This Circuit has described the *Noerr-Pennington* doctrine as "***a defense to liability*** premised on the defendant's actions of exercising his own private rights to free speech and to petition the government." *Hinshaw v. Smith*, 436 F.3d 997, 1003 (8th Cir. 2006) (citing *Acoustic Sys., Inc. v. Wenger Corp.*, 207 F.3d 287, 294 (5th Cir.2000)) (emphasis added).

The United States Court of Appeals for the Ninth Circuit has interpreted *Noerr-Pennington* as requiring courts to "construe federal statutes so as to avoid burdening conduct that implicates the protections afforded by the Petition Clause [of the First Amendment] unless the statute clearly provides otherwise." *Sosa*, 437 F.3d at 931. "In this sense, *Noerr–Pennington* is a specific application of the rule of statutory construction known as the canon of constitutional avoidance, which requires a statute to be construed so as to avoid serious doubts as to the constitutionality of an alternate construction." *Id.* at 931 n.5. This Circuit has described the "canon of constitutional avoidance" as "permit[ting] [it] to adopt [an] interpretation [that] avoid[s] the purported constitutional infirmities that are not apparent from the text of the statute." *Iowa Safe Schs. v. Reynolds*, 172 F.4th 589, 595 (8th Cir. 2026).

While the Supreme Court has withheld immunity under *Noerr-Pennington* from "sham" petitioning activities, *Pro. Real Est. Invs., Inc. v. Columbia Pictures Indus., Inc.*, 508 U.S. 49, 56 (1993), petitioning activities that are unsuccessful are not "shams," and do not lose their First Amendment protection, simply because those activities are unsuccessful. "[E]ven unsuccessful but reasonably based suits advance some First Amendment interests. Like successful suits, unsuccessful suits allow the 'public airing of disputed facts,' and raise matters of public concern." *BE & K Const. Co. v. N.L.R.B.*, 536 U.S. 516, 532 (2002) (quoting *Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731, 741 (1983)). Unsuccessful suits also "promote the evolution of the law by supporting the development of legal theories that may not gain acceptance the first time around. Moreover, the ability to lawfully prosecute even unsuccessful suits adds legitimacy to the court system as a designated alternative to force." *Id.*

Similarly, where petitioning activities involve factual assertions, those assertions are not deemed false, simply because they are unsuccessful. "[W]hile baseless suits can be seen as analogous to false statements, that analogy does not directly extend to suits that are unsuccessful but reasonably based. For even if a suit could be seen as a kind of provable statement, the fact that it loses does not mean it is false." *BE & K*, 536 U.S. at 532-33.

II. The Fair Debt Collection Practices Act Regulates Debt Collection Activity But Does Not Abolish Creditors' Rights to Seek Judicial Remedies Through Litigation.

"The [FDCPA] prohibits 'debt collector[s]' from making false or misleading representations and from engaging in various abusive and unfair practices." *Heintz v. Jenkins*, 514 U.S. 291 (1995). For example, the FDCPA prohibits, in collection of a debt, the use of violence, obscenity, or repeated annoying phone calls, the use of unfair or unconscionable means to collect or attempt to collect, and communication with a third party about a debt. *See id.* (citing 15 U.S.C. §§1692c(b), 1692d, 1692f). The FDCPA also sets out rules that a debt collector must follow when bringing legal actions. *Id.* (citing 15 U.S.C. §1692i). If a debt collector violates the FDCPA, they are subject to civil liability. *Id.* (citing 15 U.S.C. §1692k). The FDCPA, however, contains an exception to that liability, which states:

> A debt collector may not be held liable in any action brought under this subchapter if the debt collector shows by a preponderance of evidence that the violation was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid any such error.

("*Bona Fide* Error Defense"). *Id.* at 296 (citing 15 U.S.C. §1692k(c)).

In *Heintz v. Jenkins*, the United States Supreme Court considered whether attorneys, particularly those engaged in litigation, were subject to the FDCPA. 514 U.S. at 292. The attorney party in *Heintz* argued that many of the FDCPA's requirements would create harmfully "anomalous" results that Congress could not

have intended. *Id.* at 295. One such anomaly, endorsed by the United States Court of Appeals for the Sixth Circuit in concluding that the FDCPA *did not* apply to lawyers, was that the FDCPA's prohibition against taking "any action that cannot legally be taken" would make a lawyer liable in the event that the lawyer brought, but then lost, a collection claim against a consumer. *Id.* (citation omitted). The Supreme Court rejected the possibility of this "anomaly," noting that "we do not see how the fact that a lawsuit turns out ultimately to be unsuccessful could, by itself, make the bringing of it an 'action that cannot legally be taken.'"[1] *Id.* at 296. The Supreme Court also pointed to the *Bona Fide* Error Defense as evidence of protection against that "anomaly." *Id.* at 295.

Another "anomaly" argued by the attorney party in *Heintz* was that the FDCPA's provision, which allows a debt-owing consumer to require a debt collector to cease communications with that consumer, could be read to prohibit an attorney from pursuing litigation because doing so would necessarily involve communication with the consumer. *Id.* at 296. The Supreme Court rejected this "anomaly" by pointing to provisions of the FDCPA that allow communication to a consumer, even

[1] Despite the Supreme Court's admonition, plaintiffs' lawyers have pursued precisely such claims. *See, e.g., Hemmingsen v. Messerli & Kramer, P.A.*, 674 F.3d 814 (8th Cir. 2012) (involving claims brought by the consumer for violations of the FDCPA after the consumer prevailed in a collection action brought against the consumer); *Smith v. Stewart, Zlimen & Jungers, Ltd*., 990 F.3d 640 (8th Cir. 2021) (same).

in the event that the consumer has stopped communications, to notify the consumer that the debt collector or creditor intends to invoke a specific remedy. *Id.* The Court concluded that those provisions could be read "to imply that they authorize the actual invocation of the remedy that the collector 'intends to invoke.'" *Id.*

Yet another such anomaly, though not addressed by the Supreme Court or offered by parties, concerns another provision of the FDCPA that involves communication. The FDCPA broadly prohibits communication, regarding a debt, with third parties, *i.e.* "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. §1692c(b). That statute expressly allows communication with a third party "as reasonably necessary to effectuate a postjudgment judicial remedy." But the FDCPA does not expressly allow communication with a court. A court is a third party[2] to whom confidential debt information is provided when a debt collector brings a lawsuit, which then becomes public record available to countless third parties. Based on the Supreme Court's treatment of the anomaly discussed above, it would likely construe this prohibition against third party communications as implicitly authorizing

[2] *See In re Peters*, 642 F.3d 381 (2d Cir. 2011) (finding that an attorney violated a confidentiality order by submitting confidential materials from a New York federal court proceeding to a Massachusetts court without obtaining prior approval from the issuing court).

communication with a court because it explicitly authorizes communication in the context of post-judgment proceedings, *e.g.* to the judgment debtor's bank or employer for garnishment purposes. There can be no postjudgment proceedings without a court's judgment, and there can be no court's judgment without communication to the court.

In closing its discussion of the asserted "anomalies," the Supreme Court noted two things. First, that the FDCPA contains an "apparent objective of preserving creditors' judicial remedies," with which the Court's interpretation of the statute was consistent. *Id.* at 296. Second, that the Court:

> need not authoritatively interpret the Act's conduct-regulating provisions now, however. Rather, ***we rest our conclusions upon the fact that it is easier to read §1692c(c) as containing some such additional, implicit, exception*** than to believe that Congress intended, silently and implicitly, to create a far broader exception, for all litigating attorneys, from the Act itself.

Id. at 296-97 (emphasis added). The Court's conclusion as to the source of the implicit exceptions seems to stem from the FDCPA's express authorization of other exceptions. *See id.* However, the fact the Court recognized these implicit exceptions in the context of the FDCPA's preservation of judicial access and remedies cannot be dismissed as irrelevant.

In *Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA*, 559 U.S. 573 (2010), the Supreme Court considered whether the *Bona Fide* Error Defense applied to errors of law as well as errors of fact. The Supreme Court noted that it was

"unpersuaded by what seems an implicit premise of Carlisle's arguments: that the bona fide error defense is a debt collector's ***sole recourse*** to avoid potential liability." *Jerman*, 559 U.S. at 599 (emphasis added). The implicit corollary to the Court's statement is that the "bona fide error defense" is ***not*** the debt collector's sole recourse to avoid liability. *See id.* For the avoidance of doubt, the Court then pointed to its discussion of the "anomalies" argued in *Heintz* and echoed: "As in *Heintz* we need not authoritatively interpret the Act's conduct-regulating provisions to observe that those provisions should not be assumed to compel absurd results when applied to debt collecting attorneys." *Id.* at 600.

In *Heintz and Jerman*, the Supreme Court established: (1) the FDCPA applies to lawyers, even those engaged in litigation, but the FDCPA cannot be construed as restricting the rights of creditors to pursue relief from the courts; and (2) the *Bona Fide* Error Defense is not the only defense for debt collectors, particularly those engaged in litigation.

III. This Circuit has Recognized the First Amendment's Limitation on the FDCPA.

A. This Circuit has interpreted the FDCPA to avoid burdening the right to petition.

This Circuit has repeatedly recognized the distinct nature of litigation as compared to other debt collection practices, and the tension between restrictions on litigation and the First Amendment right to petition. In *Hemmingsen v. Messerli &*

Kramer, P.A., this Circuit interpreted *Heintz* as "caution[ing]" that, because of "the diverse situations in which potential FDCPA claims may arise during the course of litigation, … ***careful crafting*** may be required in applying the statute's prohibitions to attorneys engaged in litigation." 674 F.3d at 819 (emphasis added). The need for that "careful crafting" arises from the First Amendment right to petition. *See id.*; *Noerr*, 365 U.S., at 138 (rejecting "imput[ing] to Congress an intent to invade" the First Amendment right to petition through legislation).

This Circuit rejected the argument that a debt collector's factual allegations are false and misleading, yielding liability under the FDCPA, when those allegations are subsequently found to be inadequately supported in a collection suit. *Hemmingsen*, 674 F.3d at 819. In doing so, this Circuit recognized the First Amendment implications of such a result, which would be

> contrary to the FDCPA's "apparent objective of preserving creditors' judicial remedies," *Heintz*, 514 U.S. at 296, 115 S. Ct. 1489, an objective consistent with the principle "that the right of access to the courts is an aspect of the First Amendment right to petition the Government for redress of grievances." *Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731, 741, 103 S. Ct. 2161, 76 L.Ed.2d 277 (1983)."

Id. This Circuit further explained:

> If judicial proceedings are to accurately resolve factual disputes, a lawyer "must be permitted to call witnesses without fear of being sued if the witness is disbelieved and it is alleged that the lawyer knew or should have known that the witness' testimony was false." *Imbler v. Pachtman*, 424 U.S. 409, 96 S. Ct. 984, 47 L.Ed.2d 128 (1976) (White, J., concurring). Judges have ample power to award attorney's fees to a party injured by a lawyer's fraudulent or vexatious litigation tactics.

> *See, e.g., Chambers v. NASCO, Inc.*, 501 U.S. 32, 45–46, 111 S. Ct. 2123, 115 L.Ed.2d 27 (1991); 28 U.S.C. §1927. There is no need for follow-on §1692e litigation that increases the cost of resolving *bona fide* debtor-creditor disputes.

Id. at 819-20.

In *Haney v. Portfolio Recovery Assocs., L.L.C.* this Circuit again declined to hold an attorney liable for statements made in good faith during the course of litigation, specifically in a prayer for relief. 895 F.3d 974 (8th Cir. 2016). The FDCPA "does not forbid a party from stating its good faith legal position to a court in a prayer for relief." *Id.* at 989. While this Circuit did not expressly invoke the First Amendment right to petition, in noting various other courts that reached the same conclusion, this Circuit recognized that a prayer for relief is a request of the court, rather than of the debtor. *Id.*[3] A request directed to a court is a fundamental component of the First Amendment right to petition.

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[3] Citing: *Riermersma v. Messerli & Kramer, P.A.*, No. 07-cv-3898, 2008 WL 2390729, at *2 (D. Minn. June 9, 2008) ("A prayer for relief is '[a] request addressed to the court….' As such, a request ... within the prayer for relief is not directed at the debtor. Rather, it is part of the ultimate satisfaction sought by a plaintiff and asked of the court.") (citation omitted); *Winn v. Unifund CCR Partners*, No. 06-cv-447, 2007 WL 974099, at *3 (D. Ariz. Mar. 30, 2007) ("Even the 'least sophisticated debtor' would understand that this amount ... is what his creditor would like the court to conclude is reasonable. He might have to pay it; he might not. The prayer for relief is not false, deceptive, misleading or unfair."); *Argentieri v. Fisher Landscapes, Inc.*, 15 F.Supp.2d 55, 61 (D. Mass. 1998) ("A prayer for relief in a complaint, even where it specifies the quantity of attorney's fees, is just that: a request to a third party—the court—for consideration, not a demand to the debtor himself. ")

In *Smith v. Stewart, Zlimen & Jungers, Ltd.*, this Circuit clarified its ruling in *Haney*, making clear that its conclusion in *Haney* was not limited to statements made in a prayer for relief, because all statements in a pleading are "directed to the court and were part of [the creditors' counsel's] reasonable request for specific relief." 990 F.3d 640, 645 (8th Cir. 2021). In rejecting a claim that the creditors' counsel violated the FDCPA because the court ultimately found that the creditors had failed to demonstrate chain of title to the debt at issue, this Circuit affirmed the right to petition the government for redress, by stating that "[e]ven though [the creditors' counsel] failed to meet its evidentiary burden as set forth in the Amended Standing Order, it was nevertheless ***entitled to bring a good faith claim*** to collect the alleged debts." *Id.* at 648 (emphasis added). This Circuit concluded that, to state a claim under §1692e, the plaintiffs "must allege some conduct showing that the challenged request for disbursements was not simply [the creditors' counsel's] good faith legal position." *Id.* at 645.

In *Powers v. Credit Management Services, Inc.*, this Circuit declined to conclude that the FDCPA can ***never*** apply to discovery requests made to a consumer's attorney during the course of debt collection litigation. 776 F.3d 567, 574 (8th Cir. 2015). This Circuit noted, however, that the "unsophisticated consumer" standard does not apply; instead, the "competent lawyer" standard applies because when a consumer is represented by counsel, the court "assume[s]

the attorney, rather than the FDCPA, will protect the consumer from a debt collector's fraudulent or harassing behavior." *Id.* (citations omitted).

In *Hemmingsen,* this Circuit expressly linked the good faith litigation exception with the First Amendment right to petition. In *Haney* and *Smith*, this Circuit concluded that alleged misstatements made in pleadings, directed to the Court seeking relief, which the creditors had a right to pursue, could not yield FDCPA liability. In *Powers*, this Circuit identified a limit in its reasoning, concluding that discovery requests, which are not made to the Court, could be a basis for FDCPA liability. The rule from this Circuit, therefore, is clear: the good faith exercise of the First Amendment right to petition through litigation cannot yield FDCPA liability.

B. Appellants advocate to overturn this Circuit's long-established precedent.

Although Appellants do not directly argue that *Hemmingsen, Haney,* and *Smith* should be overturned, that conclusion is implicit in their argument. Appellants argue that this Circuit should reject the good faith litigation exception, which cannot be done without overturning this Circuit's repeated rulings. Rather than acknowledging and accepting this reality, and meeting it head on, Appellants attempt to distinguish those rulings from the matter at hand by arguing that the District Court's *application* and *extension* of those rulings in this matter is inconsistent with this Circuit's rulings that the FDCPA is a strict liability statute.

App. Brief at 16-17. Appellants, however, also argue, more broadly, that the good faith litigation exception *itself* is inconsistent with strict liability. *Id.* at 17. Appellants' arguments fail because: (1) the First Amendment limits even strict liability statutes; and (2) Appellants' attempt to distinguish the case at bar from precedent fails to identify a meaningful distinction.

1. The First Amendment limits strict liability statutes.

Strict liability cannot chill First Amendment rights. The Supreme Court first reached this conclusion in *Smith v. California*, 361 U.S. 147, 152 (1959), in which it held that a statute imposing strict liability for possession of an obscene book, without requiring knowledge of such obscenity for liability, violated the First Amendment because it chilled the dissemination of books that are not obscene. Citing *Smith*, this Circuit subsequently ruled that "any statute that chills the exercise of First Amendment rights must contain a knowledge element." *Video Software Dealers Ass'n v. Webster*, 968 F.2d 684, 690 (8th Cir. 1992).[4]

Appellants' argument, therefore, that the good faith litigation exception is inconsistent with this Circuit's rulings that the FDCPA is a strict liability statute misses the point. The First Amendment overrides strict liability. Rather than rule

[4] While the Supreme Court's ruling was made in the context of a criminal statute, *see Smith*, 361 U.S. at 150, this Circuit's ruling in *Webster* was not limited to criminal statutes, *see* 968 F.2d at 690.

that the FDCPA is unconstitutional, this Circuit declined to "impute to Congress an intent to invade" the First Amendment right to petition and has "careful[ly] craft[ed]" the good faith litigation exception so as to avoid burdening conduct that implicates the protections afforded by the Petition Clause. *See Hemmingsen*, 674 F.3d 814 at 818-19; *Noerr*, 365 U.S., at 138. The FDCPA still is a strict liability statute generally; but as it applies to litigation, or any other protected petitioning activity, it must cede to the protections of such activities.

2. Appellant's attempts to distinguish this Circuit's precedent fail.

First, Appellants distinguish *Hemmingsen* by arguing that *Hemmingsen* involved an error of law instead of an error of fact, as present here in the "overstat[ement] [of] the amount of the debt." App. Brief at 31. Appellants make no further argument on the basis of, or as to the effect of, that distinction. *See id.* This distinction is immaterial and undermines Appellant's argument because *Hemmingsen* was decided after the Supreme Court ruled in *Jerman* that errors of law were not protected by the *Bona Fide* Error Defense; *Hemmingsen* thus demonstrates that the good faith litigation exception applies more broadly than the *Bona Fide* Error Defense. Further, the United States Court of Appeals for the Sixth Circuit has demonstrated the folly of Appellant's argument that such a distinction should matter in the context of representations in good faith litigation: "Just as a lawyer does not 'misrepresent' the facts by making a factual contention later proved wrong, a lawyer

does not 'misrepresent' the law by advancing a reasonable legal position later proved wrong." *See Van Hoven v. Buckles & Buckles, P.L.C.*, 947 F.3d 889, 896 (6th Cir. 2020).

Instead of developing their distinction argument, Appellants next argue that "*Hemmingsen* teaches that the FDCPA does apply to representations made by lawyers in legal pleadings, but 'the fact that a lawsuit turns out ultimately to be unsuccessful' does not, '***by itself***' prove a violation of the FDCPA." App. Brief at 32 (emphasis in original). The first portion of this statement misstates this Circuit's conclusion because it extracts a blanket rule—inconsistent with subsequent precedent—despite this Circuit's express rejection of a "broad ruling" in favor of case-by-case approach needing "careful crafting." *See Hemmingsen*, 674 F.3d at 818-19. More importantly, however, Appellants then ignore their own emphasized words in the second portion of this statement by never defining what other circumstances *do* prove a violation, if the failure of the underlying collection suit does not. Under the good faith litigation exception, that circumstance that proves a violation is bad faith intent—precisely what Appellants argue the District Court wrongly required here. Therefore, Appellants' argument against the good faith litigation exception cannot be squared with this Circuit's ruling in *Hemmingsen*.

Second, Appellants try to distinguish *Haney* by arguing, again, that it too involved an error of law, rather than of fact, and again make no further argument on

the basis of that distinction, which, as demonstrated above, is irrelevant. App. Brief at 33. Appellants also argue that "more importantly, [this error] did not occur in the 'prayer for relief' portion of the pleading." *Id.* The relevance of the error occurring in the "prayer for relief" was expressly rejected by this Circuit in *Smith*, and all of the representations at issue here were made in pleadings, rendering this assertion also irrelevant. *See Smith*, 990 F.3d at 645.

Third, Appellants try to distinguish *Smith* by arguing that the requests at issue in *Smith*, while not included in the specific request for relief, were part of the creditor's reasonable request for specific relief; whereas in this matter, the error in the amount of the alleged debt was not part of the relief, and rather directed at the consumer, because the conciliation court "can only grant possession of the premises, but the consumer can settle the case by paying the arrearage." App. Brief at 34-35. This argument ignores the obvious fact that, in order to grant a request for an eviction action ***for nonpayment***, the creditor must plead the facts necessary to establish that nonpayment, including stating the amount owed. *See* Minn. Stat. §504B.291, subd. 3(2) (requiring an eviction for nonpayment complaint based on "nonpayment of rent [to] attach a detailed, itemized accounting or statement listing the amounts").

Appellants also try to distinguish *Smith* by arguing that, in *Smith,* the alleged FDCPA violation arose out of the failure to present sufficient evidence establishing the chain of assignment for the debt, whereas here the alleged FDCPA violation

arises out of an error in the alleged amount due. App. Brief at 35. Appellants make no effort to explain why this distinction is relevant. Nor could they. Failure to prove chain of assignment is the failure to prove ownership of the debt and therefore both standing to bring the collection action as well as the claim to payment of the debt. Those concerns are just as, if not more, foundational than the amount owed and just as relevant to claims under the FDCPA. *See, e.g.,* 15 U.S.C. 1692f (prohibiting a debt collector from using "unfair or unconscionable means to collect or attempt to collect a debt"). Appellants' argument against the good faith litigation exception, therefore, also cannot be squared with this Circuit's rulings in *Haney* and *Smith*.

IV. Ruling in Favor of Appellants would Chill Speech.

"[A]ccess to the courts is a fundamental right of every citizen." *Harrison*, 780 F.2d at 1427 (quoting *Inmates of the Nebraska Penal and Correctional Complex v. Greenholtz*, 436 F.Supp. 432 (D.Neb. 1976), *aff'd*, 567 F.2d 1381 (8th Cir. 1977), *cert. denied*, 439 U.S. 841 (1978). "The right to petition means more than simply the right to communicate directly with the government. It necessarily includes those activities reasonably and normally attendant to effective petitioning." *IBP*, 755 F.2d at 1310. "This right of court access cannot be impaired, either directly or indirectly."

In re Workers' Comp. Refund, 46 F.3d 813, 822 (8th Cir. 1995) (citing *Harrison*, 780 F.2d at 1428).

"[G]overnment action designed to keep a citizen from initiating legal remedies … infringes upon the First Amendment right to petition the courts" and "chill[s] exercise of that right in the future." *Id.* For example, imposition of a "litigation penalty" "is a substantial deterrent to commencing litigation" and, therefore, unconstitutional impairment on the right to petition. *Workers' Comp. Refund*, 46 F.3d at 822. "It is not necessary that the [prospective litigant] succumb entirely or even partially to the threat as long as the threat or retaliatory act was intended to limit the [litigant's] right of access." *Harrison*, 780 F.2d at 1428.

Here, Appellants' construction of the FDCPA would chill the exercise of the fundamental rights of creditors to petition the courts. Application of the FDCPA in a manner that impairs creditors from initiating legal remedies infringes creditors' right to petition and chills their exercise of that right. *See Workers' Comp. Refund*, 46 F.3d at 822. Holding lawyers liable for good faith litigation informed by clerical mistakes made by their creditor clients ultimately identified through the adversarial process would be a deterrent to lawyers taking on the representation of creditors in collection matters. *See Harrison*, 780 F.2d at 1428. That deterrent would be passed on to the creditor clients and would also limit the choice of lawyers who may be willing to take on such representation, thus impairing the creditors' ability to select

counsel of their choice to petition on their behalf. *See id.*; *IBP*, 755 F.2d at 1310. The combined effect on the lawyers and creditors would unconstitutionally chill creditors' exercise of their right to petition. *See Workers' Comp. Refund*, 46 F.3d at 822. Appellant's construction of the FDCPA, therefore, must be rejected.

V. Appellee Cannot be Held Liable Under the FDCPA

As ably and amply demonstrated by Appellee's Counsel in Appellee's Response Brief, the actions and positions at issue, taken by Appellee, were all done in good faith in the context of litigation. They fit the good faith litigation exception to the FDCPA that this Circuit has recognized and upheld time and again. Consequently, applying both Supreme Court precedent and this Circuit's precedent, Appellee cannot be held liable under the FDCPA.

VI. Appellant's Construction Would Impermissibly Turn the FDCPA from a Shield into a Sword

Appellants seek to hold Appellee liable for violations of the FDCPA for factual positions asserted on behalf of Appellee's clients ultimately determined, through the adversarial process, to be inaccurate. Such an application of the FDCPA would establish different standards for collection litigation than any other litigation, treating attorneys as *de facto* auditors, guarantors, or sureties for their clients' factual assertions. Such an application would be unprecedented and incompatible with our adversarial system.

The adversarial process presumes that facts will be tested through discovery, cross-examination, and judicial factfinding—not guaranteed by counsel *ex ante*. "It is the function of the trial court to receive evidence and testimony that has been tested through the adversarial process." *Oregon Firearms Fed'n v. Kotek*, 682 F. Supp. 3d 874, 886 (D. Or. 2023). "The system assumes that adversarial testing will ultimately advance the public interest in truth and fairness." *Polk Cnty. v. Dodson*, 454 U.S. 312, 318 (1981). As noted above, "even if a suit could be seen as a kind of provable statement, the fact that it loses does not mean it is false." *BE & K*, 536 U.S. at 532-33. "If judicial proceedings are to accurately resolve factual disputes, a lawyer 'must be permitted to call witnesses without fear of being sued if the witness is disbelieved and it is alleged that the lawyer knew or should have known that the witness' testimony was false.'" 674 F.3d at 819-20.

Rule 11 imposes a duty on attorneys to certify that they have conducted a reasonable inquiry and have determined that any papers filed with the court are well grounded in fact, legally tenable, and not presented for an improper purpose. *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 393 (1990). The standard is objective reasonableness as of the time of filing—not correctness in hindsight. *Id.* at 401-405. Every state has a functional equivalent to Rule 11. "The main objective of [Rule 11] is not to reward parties who are victimized by litigation; it is to deter baseless filings and curb abuses." *Bus. Guides, Inc. v. Chromatic Commc'ns Enters., Inc.*, 498 U.S.

533, 553 (1991). Rule 11 and its state counterparts, therefore, already exist as a shield against baseless litigation.

Through their construction of the FDCPA, Appellants seek to expand the obligations on litigators, using the FDCPA as a sword, in excess of the shield established by Rule 11, and the shield that the FDCPA is intended to be. That is not the FDCPA's purpose.

> ***The Act was meant to shield*** debtors from abusive collection practices, but it was never intended to shift the balance of power between debtors and creditors such that a debt collector cannot work with a debtor's attorney to settle claims without exposing itself to liability out of proportion to the debt allegedly owed. ***Nor was it intended as a sword*** to be brandished by debtors who have retained counsel—the very debtors least in need of the Act's protections.

Guerrero, 499 F.3d at 941 (emphasis added).[5] "There is no need for [such] follow-on §1692e litigation that increases the cost of resolving *bona fide* debtor-creditor disputes." *Hemmingsen,* 674 F.3d at 820.

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[5] *Accord Emanuel v. Am. Credit Exch*., 870 F.2d 805, 807 (2d Cir. 1989) (quoting the District Court that the FDCPA "surely was not intended ... to place a sword in the hands of a debtor. It was intended to give him a shield against false, deceptive or misleading representation," but reversing on the merits); *Barclift v. Keystone Credit Servs., LLC*, 585 F. Supp. 3d 748, 760 (E.D. Pa. 2022) ("The FDCPA is meant to protect the vulnerable from the real harm of abusive, harassing, and deceptive debt collection practices.… In other words, the FDCPA is meant to be 'a shield for debtors, not a sword for lawyers.'"); *Turner v. Asset Acceptance, LLC*, 302 F. Supp. 2d 56, 59 (E.D.N.Y. 2004) ("Congress enacted the FDCPA in order to combat egregious abuses of debtors, abuses that are real and troubling. It is almost as troubling, however, for an attorney to take unreasonable advantage of Congress's good intentions and the sound legislation it has enacted."); *Ignatowski v. GC Servs.*, 3 F. Supp. 2d 187, 191 (D. Conn. 1998) (quoting *Emanuel*, 870 F.2d at 807); *Weisz*

This Circuit has recognized the unique role that litigation—and lawyers engaged in litigation—play in our society. Application of the FDCPA, therefore, must be mindful of that role and respect the adversarial process. This Circuit's protection of First Amendment rights through its recognition of the good faith litigation exception to the FDCPA does just that. It should not be abandoned.

CONCLUSION

For the reasons stated above, *Amicus Curiae*, the National Creditors Bar Association, respectfully requests that the Court affirm the District Court's grant of summary judgment.

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v. Sarma Collections, Inc., No. 21-CV-06230 (PMH), 2022 WL 1173822, at *3 (S.D.N.Y. Apr. 20, 2022) (quoting statement about the Fair Credit Reporting Act as applicable to the FDCPA: "The statute is a shield for debtors, not a sword for lawyers."); *Daniels v. Aldridge Pite Haan, LLP*, No. 5:20-CV-00089, 2020 WL 3866649, at *4 (M.D. Ga. July 8, 2020) ("[T]he FDCPA is a shield to protect debtors from unethical and illegal debt collectors; it is not a sword to be wielded to force defendants to pay plaintiffs who have not suffered."); *Hill v. Resurgent Cap. Servs., L.P.*, No. 20-20563-CIV, 2020 WL 4429254, at *4 (S.D. Fla. July 31, 2020) (same).

Date: June 10, 2026

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULES 29 & 32 OF THE FEDERAL RULES OF APPELLATE PROCEDURE

Pursuant to Rules 29(a)(5), 32(a)(5) and 32(a)(7)(B) of the Federal Rules of Appellate Procedure, I hereby certify that the textual portion of the foregoing brief (exclusive of the tables of contents and authorities, certificates of service and compliance, but including footnotes) contains 6,493 words in proportionately spaced Times New Roman 14-point font as determined by the word counting feature of Microsoft Word.

/s/ Peter C. Nanov

Peter C. Nanov

CERTIFICATE OF COMPLIANCE WITH CIRCUIT RULE 28A(h)

I hereby certify that the electronic files of this Brief and accompanying Addendum have been submitted to the Clerk via the Court's CM/ECF system. The files have been scanned for viruses and are virus-free.

/s/ Peter C. Nanov
Peter C. Nanov

CERTIFICATE OF SERVICE

Pursuant to Rule 25 of the Federal Rules of Appellate Procedure, and Circuit Rule 25A(a), I hereby certify that on the 10th day of June, 2026, I filed a copy of the Opening Brief of Appellants, along with an addendum, with the Clerk of the Court through the Court's CM/ECF system, which will serve electronic copies on all registered counsel.

/s/ Peter C. Nanov
Peter C. Nanov