

EXHIBIT A – ACA AMICUS MOTION AND BRIEF

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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the Supreme Court

Appellate Case No. 2023-001601

APPEAL FROM DORCHESTER COUNTY
Court of Common Pleas
Diane Goodstein, Circuit Court Judge

Case No. 2018-CP-18-00729
Appellate Case No. 2020-000935

Portfolio Recovery Associates, LLC Assignee of
Synchrony Bank/HH Gregg, Petitioner,

v.

Jennifer Campney, Respondent

and

Jennifer Campney, Third-party Plaintiff,

v.

Cooling & Winter, LLC, Third-party Defendant,
Of whom Jennifer Campney is the Respondent.

**MOTION OF AMICUS CURIAE ACA INTERNATIONAL FOR LEAVE TO
FILE BRIEF IN SUPPORT OF PETITIONER'S PETITION FOR WRIT
OF CERTIORARI**

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Amicus curiae ACA International (ACA) respectfully moves the Court, pursuant to South Carolina Rule of Appellate Procedure 213, for leave to file a brief in support of Petitioner Portfolio Recovery Asset LLC’s Petition for Writ of Certiorari. A copy of ACA’s proposed brief is attached hereto as **Exhibit 1**. In further support of this motion, ACA states as follows:

STATEMENT OF AMICUS CURIAE’S INTEREST

Founded in 1939 as the American Collections Association, ACA, a 501(c)(6) nonprofit corporation, has long been the ARM industry’s largest trade association.¹ ACA has members in every state and more than 30 countries and today represents more than 1,700 member organizations—including third-party collection agencies, asset buyers, attorneys, creditors, and vendor affiliates—and their more than 133,000 employees. ACA International, *Advocacy Booklet* (Nov. 21, 2022), available at bit.ly/3UKuh5m.

ACA’s members include sole proprietorships, partnerships, small businesses, and large corporations. Many members operate within a single state or a few states, and some maintain national or international operations. Nearly 90%

¹ Historically known as the “debt-collection industry,” the “collections” industry’s modern business paradigms have precipitated a shift to the label “Accounts Receivable Management” (ARM), a change that reflects the role that ACA’s members have come to play not only in post-delinquency collections but also in business-processing outsourcing (i.e., outsourced accounts management services for creditors that lack the infrastructure to manage those non-delinquent accounts on their own); for pre-default, post-delinquency receivables management (i.e., in servicing “pre-collection” accounts); in consumer debt settlement; and in post charge-off debt sales, which keep costs of credit down by helping credit grantors mitigate losses on significantly delinquent accounts.

of ACA's members are small businesses with limited resources. *Id.* Many of their customers are small businesses as well.

ACA's members are vital to protecting both consumers and creditors in the modern economy. ACA members work with consumers to resolve consumer debt, which saves every American household, on average, more than \$700 each year. Kaulkin Ginsberg, *2020 State of the Industry Report*, ACA Internatioanl (2020), available at bit.ly/3uxMcBC.

At the same time, ACA's members help to keep America's credit-based economy functioning by enabling creditors to continue to provide low-cost access to credit. For example, in 2018 the ARM industry returned more than \$90 billion to creditors for goods and services they had provided to their customers. *Id.* The collection of these delinquent receivables reduces the losses that credit grantors, like providers of consumer goods and services, incur and thus helps those credit grantors and goods-and-services providers maintain lower overall costs for consumers—a benefit that has particular importance at a time when rising prices have been hurting consumers throughout the country.

Additionally, by helping creditors mitigate the losses that often follow from consumer credit delinquencies, the ARM industry helps credit grantors maintain access to credit for American's most vulnerable consumers, including those with a poor credit history who want to rebuild their creditworthiness and those with little or no credit history.

In short, ACA International's members return billions of dollars to American businesses for reinvestment in the economy each year; ease consumer access to credit; and help control the ever-inflating costs of goods and services, which benefits consumers and providers of goods and services, including small businesses.

For its part, ACA provides its members with essential information, education, and guidance on compliance with industry-relevant laws and regulations so that legitimate collection agencies can continue pursuing compliance in the frequently changing modern regulatory landscape. Separately, ACA articulates the value of the ARM industry to businesses, consumers, policymakers, and courts in an effort to help them understand the critical role that ACA members play in the modern economy and how overregulation can, in fact, harm consumers. In keeping with this part of this mission, ACA regularly files amicus briefs in cases of importance to its membership, cases that implicate the critical role that ACA members play in the modern economy. *See, e.g., Nelson v. P.S.C., Inc.*, 535 P.3d 418, 420 (Wash. 2023); *Facebook, Inc. v. Duguid*, 141 S. Ct. 1163 (2021); *Glasser v. Hilton Grand Vacations, Co., LLC*, 948 F.3d 1301 (11th Cir. 2020); *ACA Int'l v. FCC*, 855 F.3d 687 (D.C. Cir. 2018).

REASONS WHY THE AMICUS CURIEA BRIEF IS DESIRABLE

ACA urges the Court to grant the Petition for Writ of Certiorari that PRA² has sought in an effort to rectify several errors in the Court of Appeals' opinion of August 23, 2023. Left unaddressed, the oversights and incomplete analysis in that opinion risk throwing South Carolina's ARM industry into chaos, a result that will ultimately harm South Carolina consumers, creditors, and businesses alike.

First, the Court of Appeals did not consider the argument that the National Bank Act preempts the South Carolina Consumer Protection Code ("SCCPC") where, as here, the assignor is a federally registered bank. Second, even if the National Bank Act does not completely preempt the SCCPC, the Court of Appeals' opinion creates an impossible situation wherein a debt buyer like PRA, which purchases charged off debts, must either comply with the SCCPC notice of right to cure requirement or open itself to liability under the Fair Debt Collection Practices Act by offering a statutory remedy that it cannot provide.

If this Court declines to reverse or narrow the Court of Appeals' opinion with respect to the application of the SCCPC to debt buyers, the debt market in South Carolina will contract significantly and will ultimately diminish South Carolina consumers' access to credit by causing lawful creditors to incur hundreds of millions of dollars in unnecessary losses, which would both drive up the overall

² Importantly, Petitioner Portfolio Recovery Associates LLC is the assignee of Synchrony Bank/HH Gregg with respect to the consumer credit-card debt at issue in this action and the underlying state court collection action; PRA had no role in granting Ms. Campney the open-ended line of credit she obtained for use with HH Gregg.

cost of consumer goods and services in South Carolina and also trigger a spike in demand for consumer credit among those most likely to default on a new line of credit.

CONCLUSION

For the reasons stated above, ACA International urges the Court to grant it leave to file the amicus brief (Exhibit 1) in support of Petitioner's Petition for the Writ of Certiorari.

Respectfully submitted on this the 14th day of November, 2023.

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CERTIFICATE OF SERVICE

I certify that I have on this day served a copy of the foregoing **MOTION OF AMICUS CURIAE ACA INTERNATIONAL FOR LEAVE TO FILE BRIEF IN SUPPORT OF PETITIONER'S PETITION FOR WRIT OF CERTIORARI** on the date given below by emailing it to counsel at the addresses listed below:

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STATEMENT OF ISSUES ON APPEAL

- I. Whether the Court of Appeals erred in reversing the circuit court’s finding that Petitioner, as the assignee of a national bank, was not required to provide a notice of right to cure because the statutory requirement under South Carolina law is preempted by the National Bank Act, 12 U.S.C. §§ 21 *et seq.*?

Answer: Yes. The National Bank Act preempts the statutory requirements of the South Carolina Consumer Protection Code, S.C. Code Ann. § 37-5-110, where the assignor of the credit card account at issue is a national bank.

- II. Whether the Court of Appeals erred in holding that the notice of right to cure statutory provision applies to Petitioner, and similarly situated debt buyers, because the requirement creates an impossible reading of the statute and an untenable situation in which the debt buyers must either fail to comply with the notice of right to cure or with the provisions of the federal Fair Debt Collection Practice Act, 15 U.S.C. §§ 1692 *et seq.* (“FDCPA”)?

Answer: Yes. S.C. Code Ann. § 37-5-110 cannot be read to apply to debt buyers because at the time they acquire an account it is already closed—meaning they cannot offer debtors a right to cure in which the account may continue as if default had not occurred. This impossibility means the FDCPA, which prohibits debt collectors from making false or misleading

statements, preempts the requirements of S.C. Code Ann. § 37-5-110. If the SCCPC were not preempted, the accounts-receivable (ARM) management industry in South Carolina could drastically change, which directly impacts South Carolinians’ access to credit and overall financial wellbeing.

STATEMENT OF AMICUS CURIAE’S INTEREST

Founded in 1939 as the American Collections Association, ACA International (ACA), a 501(c)(6) nonprofit corporation, has long been the ARM industry’s largest trade association.¹ ACA has members in every state and more than 30 countries and today represents more than 1,700 member organizations—including third-party collection agencies, asset buyers, attorneys, creditors, and vendor affiliates—and their more than 133,000 employees. ACA International, *Advocacy Booklet* (Nov. 21, 2022), available at bit.ly/3UKuh5m.

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In this case, ACA urges the Court to grant the Petition for Writ of Certiorari that Portfolio Recovery Associates (PRA)² has sought in an effort to rectify several

² Importantly, Petitioner Portfolio Recovery Associates LLC is the assignee of Synchrony Bank/HH Gregg with respect to the consumer credit-card debt at

errors in the Court of Appeals' opinion of August 23, 2023. Left unaddressed, the oversights and incomplete analysis in that opinion risks throwing South Carolina's ARM industry into chaos, a result that will ultimately harm South Carolina consumers, creditors, and businesses alike.

First, the Court of Appeals failed to consider the argument that the National Bank Act preempts the South Carolina Consumer Protection Code ("SCCPC") where, as here, the assignor is a federally registered bank. Second, even if the National Bank Act does not completely preempt the SCCPC, the Court of Appeals' opinion creates an impossible situation wherein a debt buyer like PRA, which purchases charged off debts, must either comply with the SCCPC notice of right to cure requirement or open itself to liability under the FDCPA by offering a statutory remedy that it cannot provide.

The Court of Appeals' failure to consider these principles also contravened another: the well-settled principle that statutes in derogation of common law must be strictly construed and not "extended beyond the clear intent of the legislature." *Grier v. AMISUB of S.C., Inc.*, 397 S.C. 532, 536, 725 S.E.2d 693, 696 (2012). In the SCCPC, the legislature expressly instructed that the use of the term "assignee," without more, should not be read to "impose on an assignee any obligation of his

issue in this action and the underlying state court collection action; PRA had no role in granting Ms. Campney the open-ended line of credit she obtained for use with HH Gregg.

assignor.” See S.C. Code Ann. § 37-1-301(11). Yet that is precisely the outcome of the Court of Appeals’ opinion.

If this Court declines to reverse or narrow the Court of Appeals’ opinion with respect to the application of the SCCPC to debt buyers, the debt market in South Carolina will contract significantly and will ultimately diminish South Carolina consumers’ access to credit by causing their lawful creditors to incur hundreds of millions of dollars in unnecessary losses, which would both drive up the overall cost of consumer goods and services in South Carolina and also trigger a spike in demand for consumer credit among those most likely to default on a new line of credit.

STATEMENT OF THE CASE

This case concerns issues that arise when a national bank (Synchrony Bank) charges off and closes a credit card account after a consumer defaults, and then subsequently the bank sells the debt to an assignee (PRA) to pursue repayment from the consumer.

I. The underlying case

Respondent Jennifer Campney (“Campney”) opened an HH Gregg-branded credit card through Synchrony Bank in 2012. (R. pp. 12, 252, lines 8–14). Sometime in 2015, Campney fell delinquent on her payments, thus defaulting on her agreement with Synchrony. (R. p. 154, lines 20–23; pp. 324–71). After at least 180 days had elapsed from the date of Campney’s default, Synchrony Bank closed and charged off Campney’s account in accordance with federal requirements. PRA

then bought the charged off account and, pursuant to the purchase documents, became the assignee of Synchrony Bank. (R. p. 184, lines 18–21; R. pp. 139, lines 5–13; 146, lines 20–25; 321; 387). In January 2017, PRA filed a complaint against Campney seeking payment of the unpaid balance and associated costs. (R. pp. 85–103). Campney ultimately filed counterclaims, including a claim that PRA failed to send her the notice of right to cure prescribed by S.C. Code Ann § 37-5-110(1)–(2). (R. pp. 104–05).

A bench trial was held on October 23, 2019. (Op. at 3). The trial court found in favor of PRA on its account stated claim and ordered Campney to pay \$4,236.87 (the amount of the charged off account) plus costs to PRA. (*Id.* at 6). The trial court also found, as relevant to this appeal, that “the right to cure notice provisions of the [SCCPC] did not apply to PRA as an assignee of Synchrony Bank.” *Id.* Campney timely appealed the district court’s order.

After oral argument, the Court of Appeals affirmed the judgment in favor of PRA but reversed as to the trial court’s findings on Campney’s counterclaims. The Court of Appeals held that “consumer credit card accounts are subject to the SCCPC and PRA was required to send [Campney] a right to cure notice before requiring repayment.” *Portfolio Recovery Assocs., LLC v. Campney*, 441 S.C. 36, 50, 892 S.E.2d 321, 328 (S.C. Ct. App. 2023); (R. Op. at 10, 12–13).

II. The statutory framework at issue

The South Carolina legislature enacted the SCCPC in 1976 in part “to simplify, clarify, and modernize the law governing retail installment sales, consumer credit and usury” and “to protect consumer buyers, lessees, and borrowers against unfair credit practices by some suppliers of consumer credit, having due regard for the interests of legitimate and scrupulous creditors.” S.C. Code Ann. § 37-1-102(2)(a), (d).

The SCCPC defines a “creditor” as “the person who grants credit in a credit transaction or, except as otherwise provided, an assignee of a creditor’s right to payment, **but use of the term does not in itself impose on an assignee any obligation of his assignor.**” S.C. Code Ann. § 37-1-301(13) (emphasis supplied). And, for credit card accounts, the SCCPC specifies that the term “creditor” “means **the card issuer** and not another person honoring the credit card.” *Id.* (emphasis supplied).

The SCCPC also provides for a notice of right to cure:

(1) With respect to a secured or unsecured consumer credit transaction payable in two or more installments, after a consumer has been in default for ten days for failure to make a required payment ..., a creditor may give the consumer notice described in this section. A creditor gives notice to the consumer under this section when he delivers the notice to the consumer or mails the notice to him at his residence.

(2) The notice shall be in writing and conspicuously state: the name, address and telephone number of the creditor to whom payment is to be made, a brief identification of

the credit transaction, the consumer’s right to cure the default, and the amount of payment and date by which payment must be made to cure the default. [...]

S.C. Code Ann § 37-5-110(1)–(2).

STANDARD OF REVIEW

When appeals present a novel question of law, appellate courts decide the case de novo. *Burke v. S.C. Dep’t of Transp.*, 429 S.C. 319, 321, 838 S.E.2d 534, 535 (Ct. App. 2020). Appellate courts are “free to decide [novel] question[s] of law with no particular deference to the lower court.” *I’On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 411, 526 S.E.2d 716, 718–19 (2000). Further, this Court “review[s] questions of statutory interpretation de novo.” *Books-A-Million, Inc. v. S.C. Dep’t of Revenue*, 437 S.C. 640, 642, 880 S.E.2d 476, 477 (2022).

ARGUMENT AND CITATIONS TO AUTHORITY

Assuming the SCCPC applies at all to the lender credit card at issue in this matter,³ the Court of Appeals erred in concluding that the SCCPC notice of right to cure provision applies to PRA as the assignee of Synchrony Bank. First, PRA and

³ The record indisputably establishes that Synchrony Bank issued an HH Gregg-branded credit card to Campney in 2012. (R. pp. 12, 252, lines 8–14). This type of credit card is a “lender credit card” as defined by the SCCPC. *See* S.C. Code Ann. § 37-1-301(16). A “lender credit card” is statutorily exempted from the definition of a “consumer credit sale.” *Id.* at § 37-2-104(2). And according to the U.S. District Court for the District of South Carolina, such a transaction also “does not meet the definitions of ‘consumer loan,’ ‘consumer lease,’ or a ‘consumer rental-purchase agreement.’” *Bracken v. Simmons First Nat’l Bank*, No. 6:13-1377-TMC, 2014 WL 22613175, at *5 n. 2 (D.S.C. June 9, 2014). Thus, it is not a “consumer credit transaction” that requires a notice of right to cure. *See id.* at § 37-5-110.

other debt buyers, including several members of ACA International, “step into the shoes of” the assignor for purposes of enforcing the terms of the credit account. *See, e.g., Olvera v. Blitt & Gaines, P.C.*, 431 F.3d 285, 288 (7th Cir. 2005) (an assignee “steps into the shoes of the assignor... whatever the shoe size”); *Campney*, 441 S.C. at 49, 892 S.E.2d at 328, Op. at 10 (quoting *Bank of Am., N.A. v. Draper*, 405 S.C. 214, 220, 746 S.E.2d 478, 481 (Ct. App. 2013)). The assignation is critical when the original creditor is, like here, a national bank. When the assignee of a national bank, such as PRA, seeks to enforce its rights in collecting the debt, state statutes such as the SCCPC are preempted by the National Bank Act, 12 U.S.C. §§ 21 *et seq.* (“NBA”).

Second, the Court of Appeals’ opinion places debt buyers in an impossible position: offering something they cannot provide. PRA purchased the credit card account at issue *after* Synchrony Bank had charged it off in accordance with federal law and, accordingly, closed the account. Thus, PRA could not have reinstated the account and carried on Synchrony’s relationship with Campney as though she never defaulted. If the notice of right to cure were to be required under these circumstances, debt buyers must *either* violate South Carolina’s state law by *not* issuing a notice of right to cure *or* face liability under the FDCPA for potentially misleading debt collection communications when it *does* issue a notice of right to cure.⁴ Such an impossibility threatens the debt collection market in South Carolina

⁴ A third option, of course, would be for post-charge off debt buyers for this class of consumer to stop buying charged off debts like this one. In that event,

where debt buyers will face liability in this “do or don’t” scenario created by the Court of Appeals. In light of this statutorily discordant situation, the FDCPA defensively preempts the SCCPC.

The Court of Appeals’ opinion does not exist in a vacuum and extends far beyond the single account at issue in this litigation. The impossible situation created by the Court of Appeals’ holdings has the potential to throw the ARM industry in South Carolina into chaos, which would ultimately diminish South Carolina consumers’ access to credit, threaten their overall financial stability, and jeopardize South Carolina’s credit economy.

I. The National Bank Act preempts the SCCPC when the credit card issuer is a federal bank.

The Court of Appeals did not address whether the NBA “wholly displaces the state-law cause of action through complete pre-emption” where the original creditor and assignor is, like here, a nationally chartered bank. *See Beneficial Nat’l Bank v. Anderson*, 539 U.S. 1, 8, 123 S. Ct. 2058, 2063 (2003). The Supreme Court has recognized the importance of the federal banking system since this country’s infancy:

Nearly 200 years ago, in *McCulloch v. Maryland*, 4 Wheat. 316, 431, 4 L. Ed. 579 (1819), this Court held federal law supreme over state law with respect

original creditors like Synchrony would suffer even bigger losses as a result of charge off and, ultimately, would have little choice but to tighten their eligibility guidelines, restricting consumer access to credit; to raise rates and fees to the extent permitted by law to offset the additional losses, effectively causing *all* consumers to pay the extreme default of a handful; or both.

to national banking. Though the bank at issue in *McCulloch* was short-lived, a federal banking system reemerged in the Civil War era. See *Atherton v. FDIC*, 519 U.S. 213, 221–22, 117 S. Ct. 666, 136 L. Ed. 2d 656 (1997); B. Hammond, *Banks and Politics in America: from the Revolution to the Civil War* (1957). In 1864, Congress enacted the NBA, establishing the system of national banking still in place today. National Bank Act, ch. 106, 13 Stat. 99; *Atherton*, 519 U.S. at 222, 117 S. Ct. 666; *Marquette Nat’l Bank of Minneapolis v. First Omaha Service Corp.*, 439 U.S. 299, 310, 314–15, 99 S. Ct. 540, 58 L. Ed. 2d 534 (1978). The Act vested in nationally chartered banks enumerated powers and “all such incidental powers as shall be necessary to carry on the business of banking.” 12 U.S.C. § 24 Seventh. To prevent inconsistent or intrusive state regulation from impairing the national system, Congress provided: “No national bank shall be subject to any visitorial powers except as authorized by Federal law....” § 484(a).

In the years since the NBA’s enactment, **we have repeatedly made clear that federal control shields national banking from unduly burdensome and duplicative state regulation.** See, e.g., *Beneficial Nat’l Bank v. Anderson*, 539 U.S. 1, 10, 123 S. Ct. 2058, 156 L. Ed. 2d 1 (2003) (national banking system protected from “possible unfriendly State legislation”) (quoting *Tiffany v. National Bank of Mo.*, 18 Wall. 409, 412, 21 L. Ed. 862 (1874))). Federally chartered banks are **subject to state laws of general application in their daily business to the extent such laws do not conflict with the letter or the general purposes of the NBA.** *Davis v. Elmira Savings Bank*, 161 U.S. 275, 290, 16 S. Ct. 502, 40 L. Ed 700 (1896). See also *Atherton*, 519 U.S. at 223, 117 S. Ct. 666. [...] However, **“the States can exercise no control over [national banks]**, nor in any wise affect their operation, except in so far as Congress may see

proper to permit. **Any thing beyond this is an abuse, because it is the usurpation of power which a single State cannot give.**” *Farmers’ and Mechanics’ Nat’l Bank v. Dearing*, 91 U.S. 29, 23, 23 L. Ed. 196 (1875) (internal quotation marks omitted).

Watters v. Wachovia Bank, N.A., 550 U.S. 1, 11, 127 S. Ct. 1559, 167 L. Ed. 2d 389 (2007) (emphasis supplied).

The Supreme Court and courts around the country have routinely held that the NBA completely preempts state regulation of a national bank. *See, e.g., Beneficial Nat’l Bank*, 539 U.S. at 10–11, 123 S. Ct. 2058 (holding that the NBA provides the exclusive cause of action for usury against national banks); *Barnett Bank of Marion Cnty., N.A. v. Nelson*, 517 U.S. 25, 116 S. Ct. 1103, 134 L. Ed. 2d 237 (1996) (holding that the NBA preempts state laws that prevent or “significantly interfere” with a national bank’s power, including the power to sell insurance); *Nat’l City Bank of IN v. Turnbaugh*, 463 F.3d 325, 331–33 (4th Cir. 2006) (holding there is no assumption of non-preemption with the NBA and that federal regulations promulgated under the NBA preempt Maryland law); *Cantero v. Bank of Am., N.A.*, 49 F.3d 121, 125 (2d Cir. 2022) (holding that New York law relating to mortgage lending is preempted because “it would impermissibly interfere with national banks’ exercise of . . . power”). The Supreme Court has further explained that the NBA preempts state laws that prevent or “significantly interfere” with a national bank’s exercise of its powers. *Barnett Bank*, 517 U.S. at 33, 116 S. Ct. 1103.

The Office of the Comptroller of the Currency (“OCC”) issues regulations to implement the NBA, and these regulations have the same preemptive effect as the

NBA. *See* Bank Activities and Operations; Real Estate Lending and Appraisals, 69 Fed. Reg. 1904, 1907 (Jan. 13, 2004); 12 U.S.C. §§ 43, 93a, 371; *NationsBank of N.C., N.A. v. Variable Annuity Life Ins. Co.*, 513 U.S. 251, 256, 115 S. Ct. 810, 130 L. Ed. 2d 740 (1995) (holding that the OCC has the “primary responsibility for surveillance of the ‘business of banking’ authorized by [the NBA].”); *Hillsborough Cnty. v. Auto. Med. Labs., Inc.*, 471 U.S. 707, 713, 105 S. Ct. 2371, 85 L. Ed. 2d 714 (1985) (“We have held repeatedly that state laws can be pre-empted by federal regulations as well as by federal statutes.”); *Nat’l City Bank of IN*, 463 F.3d at 331–33 (“We [the Fourth Circuit] join the Second, Sixth, and Ninth Circuits in finding that the OCC did not exceed its delegated authority” and holding that the OCC regulations preempted Maryland law); *see also Wachovia Bank, N.A. v. Burke*, 414 F.3d 305, 311–14, 321 (2nd Cir. 2005) (discussing the statutory and regulatory framework and holding that “the OCC regulations reflect a consistent and well-reasoned approach to preempting state regulations of operating subsidiaries so as to avoid interference with national banks’ exercise of their powers under 12 U.S.C. § 24 (Seventh) and their ability to use operating subsidiaries in the dynamic market of banking and real estate lending.”).

A. The OCC regulations expressly preempt state laws relating to the “terms of credit” of national banks.

There is no question that Synchrony Bank is a national bank or that Synchrony Bank was the original issuer of Campney’s HH Gregg credit card. *See* (R. pp. 12, 252, lines 8–14); FDIC BankFind (showing Synchrony Bank to be FDIC

certified (# 27314), established in August 1988 as a federal savings bank, and primarily regulated by the OCC).⁵ And it is undisputed that PRA is the assignee of Synchrony Bank. (R. pp. 139, lines 5–13; 146, lines 20–25; 321; 387).

The question, then, is: Do the OCC’s regulations governing Synchrony Bank preempt the SCCPC’s notice of right to cure? As explained below, the answer, resting on decades of precedent, must be a resounding “yes.”

The OCC’s relevant regulations state that a “national bank may make non-real estate loans **without regard to state law limitations** concerning: ... (4) [t]he **terms of credit**, including the schedule for payment of principal and interest, amortization of loans, balance, payments due, minimum payments, or term to maturity of the loan, including the circumstances under which a loan may **be called due and payable** upon the passage of time or a specified event external to the loan.” 12 C.F.R. § 7.4008(d) (emphasis supplied). This same regulation, however, contains a “savings clause” expressly stating that state laws on the “[r]ight to collect debts” are *not* preempted so long as the state laws “are not inconsistent with the non-real estate lending powers of national banks and apply to national banks to the extent consistent with the decision of the Supreme Court in” *Barnett Bank*. *Id.* at § 7.4009(e). But the savings clause does not pass muster under the *Barnett Bank* analysis, and the SCCPC notice of right to cure provision,

⁵ Available at <https://banks.data.fdic.gov/bankfind-suite/bankfind/details/27314> (last accessed Oct. 24, 2023).

accordingly, is preempted as an impermissible state law limitation of the “terms of credit” applicable to credit card accounts offered by national banks.

The SCCPC’s right-to-cure provisions impose a facial limitation on a creditor’s ability to accelerate a debt after a consumer’s default for “failure to make a required payment,” S.C. Code Ann. § 37-5-111(1), unless and until the consumer receives a cure notice under S.C. Code Ann. § 37-5-110. This notice **must** provide the borrower with the opportunity to cure the default, stating that “[i]f you [debtor] pay the AMOUNT NOW DUE (above) by the LAST DAY FOR PAYMENT (above), you may **continue with the contract as though you were not late.**” *Id.* at § 37-5-110(2) (sample notice) (emphasis supplied); *see also id.* at § 3-5-111 (discussing effect of consumer’s cure of default).

When read cohesively, the SCCPC’s cure provisions in § 37-5-110 and § 37-5-111 do more than give the consumer an opportunity to cure. Instead, they reach into the relationship between the lender and borrower and impose a limitation on the *terms of credit* entered into between the two. Where, as here, the lender is a national bank, 12 C.F.R. § 7.4008(d) expressly preempts such a state law limitation because it touches upon terms of credit, specifically including “**the circumstances under which a loan may be called due and payable upon the passage of time** or a specified event external to the loan.” 12 C.F.R. § 7.4008(d) (emphasis supplied). *See also Barnett Bank*, 517 U.S. at 33, 116 S. Ct. 1103; *Watters* 550 U.S. at 11, 127 S. Ct. 1559; *Nat’l City Bank of IN*, 463 F.3d at 331–33.

While the SCCPC’s notice and cure provisions relate *in part* to debt collection, they go further by imposing conditions on the terms of credit within the lending relationship. Such limitations significantly interfere with a national bank’s exercise of its *lending* powers. Thus, the SCCPC notice and cure provisions are preempted by both the express terms of 12 C.F.R. § 7.4008(d) and under the savings clause, § 7.4008(e), because the provisions are “inconsistent with” and “significantly impair” the national bank’s lending powers. *See Barnett Bank*, 517 U.S. at 33, 116 S. Ct. 1103. This conclusion accords with guidance from the OCC and from courts around the country. *See, e.g.*, Preemption Determination and Order, 68 Fed. Reg. 46264-02 (Aug. 5, 2003) (concluding that provisions of the Georgia Fair Lending Act are preempted and do not apply to national banks); *Lako v. Portfolio Recovery Assocs.*, No. 20-cv-355-wmc, 2021 WL 3403632, at *5–8 (W.D. Wis. Aug. 4, 2021) (finding that Wisconsin Consumer Act provision requiring notice of right to cure is preempted under the NBA); *Anderson v. HSBC Bank Nevada, N.A.*, 559 F. App’x 638, 638 (9th Cir. 2014) (holding the Nevada’s “notice and opportunity-to-avoid provisions” are preempted by 12 C.F.R. § 7.4008); *Copeland v. MBNA Am., N.A.*, 883 P.2d 564 (Colo. Ct. App. 1994) (holding that NBA preempts Colorado law on delinquency or late payment charges); *SPGGC, LLC v. Ayotte*, 488 F.3d 525 (1st Cir. 2007) (holding that NBA preempted New Hampshire state law relating to prepaid gift cards, stored value gift cards, and national thrifts); *Richardson v. Citibank (South Dakota), N.A.*, 908

P.2d 532 (Colo. 1995) (en banc) (holding that NBA preempted Colorado state consumer protection law relating to late payment fee).

Accordingly, the NBA and the OCC's relevant regulations preempt the SCCPC's notice and cure provisions. Because the state law provisions are preempted, Synchrony Bank, as a national bank, had no obligation to issue Campney the notice of right to cure or offer her an opportunity to cure and, by extension, neither does Synchrony's assignee PRA.

B. As Synchrony Bank's assignee, PRA was not required to send a notice of right to cure.

South Carolina law indisputably establishes that PRA, as the assignee of Synchrony Bank, "stands in the shoes of its assignor" in connection with enforcing the terms of the credit card agreement. *See Campney*, 441 S.C. at 49, 892 S.E.2d at 328, (R. at Op. at 10) (quoting *Bank of Am., N.A. v. Draper*, 405 S.C. 214, 220, 746 S.E.2d 478, 481 (Ct. App. 2013)). This contractual relationship between Synchrony and PRA necessarily means that PRA, as the assignee, stands in Synchrony's "shoes" as it relates to the "terms of credit" identified in 12 C.F.R. § 7.4008(d). Because Synchrony Bank had no obligation to send a notice of right to cure, as discussed above, neither does its assignee PRA. Stated differently, the NBA and the OCC regulations preempt the SCCPC because the account was issued by a national bank, and the terms of that account cannot be governed by state law; those same federal regulations must also preempt the SCCPC as to PRA as Synchrony's assignee.

The Court of Appeals' opinion should, therefore, be reversed and the district court's order reinstated.

II. The SCCPC's notice of right to cure requirement creates an impossible situation in which a debt buyer may be liable for both sending *and* not sending the notice.

The Court of Appeals' holding at its core requires a debt buyer like PRA to *act like the original creditor*—a requirement as impossible as it is impractical. As discussed above, PRA and other debt buyers *are not* banks or other lenders. (R. p. 15). As also discussed above, the account was no longer active when assigned. A charged off account *cannot* be restored or “cured” because, once the lender has to charge off an account under federal regulations, the lender must close the account.⁶ In this case, Campney's delinquency followed a typical path: she defaulted on payments and did not pay the debt pursuant to the terms of agreement and as reflected on the monthly statements; after the account had been delinquent for 180 days, the lender “charged off” and closed the account as a “loss”; and the lender *then* sold the charged off account, in this case, to PRA. *See* (R. at pp. 12, 139, lines 5–13; 146, lines 20–25; 184, lines 18–21; 252, lines 8–14; 321; 324–71; 387).

⁶ The charge off process should not come as a surprise to the debtor, who would have received several months of statements reflecting the outstanding debt. *See* 12 C.F.R. § 1026.5(b)(2) (requiring period statements for each billing cycle). And, as discussed in this section, several federal statutes govern the ARM industry, including the Fair Debt Collection Practices Act (FDCPA); the Truth in Lending Act (TILA); and the Fair Credit Reporting Act (FCRA).

Under the Court of Appeals' view, a debt buyer like PRA has only two conflicting options: (1) send the notice of right to cure to comply with the SCCPC and face potential liability under the Fair Debt Collection Practices Act ("FDCPA"), 15 U.S.C. §§ 1692 *et seq.*, because it cannot, in fact, reinstate the account *or* (2) not send the SCCPC cure notice, thus violating the SCCPC, but avoiding liability under the FDCPA for making a misleading statement about the debt. In light of this impossible situation, in which the creditor or assignee faces a compliance catch-22 scenario, the SCCPC must be deemed to be preempted by the FDCPA.⁷

A. The Court of Appeals misunderstood the posture of the account at issue and wrote an impossibility into the law.

The SCCPC itself seems to recognize that both assignees and credit cards present unique circumstances from other types of financial transactions. After all, the definition of "creditor" is qualified in two ways: (1) that the creditor's obligations cannot be ascribed to an assignee; and (2) for credit cards in particular, the "creditor" means the "card issuer." S.C. Code Ann. § 37-1-301(13).

⁷ While the arguments presented in Sections I and II each rely on the doctrine of preemption, the arguments presented in Section I relate to complete (or federal) preemption, while the arguments in Section II relate to field and conflict preemption. If this Court decides that the NBA and OCC regulations completely preempt the SCCPC's notice of right to cure provision, as ACA International urges the Court to do, then the Court does not have to reach the question of field or conflict preemption. *See Decohen v. Capital One, N.A.*, 703 F.3d 216, 222–23 (4th Cir. 2012) (discussing the doctrine of preemption and the three types of federal preemption) (citing *Cox v. Shalala*, 112 F.3d 151, 154 (4th Cir. 1997); *Fid. Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 153, 102 S. Ct. 3014, 73 L. Ed. 2d 664 (1982); *Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 204, 103 S. Ct. 1713, 75 L. Ed. 2d 752 (1983)).

Elsewhere, “lender credit cards” are excluded from entire swaths of the SCCPC. *See supra*, n. 2. Yet, here, despite the fact that PRA is an “assignee” (and not the “card issuer”) of a closed and charged off “lender credit card” account, the Court of Appeals held that PRA must comply with the SCCPC’s notice of right to cure requirements to the same degree as they would apply to an original creditor, i.e., the “card issuer.” That conclusion ignores that assignees and creditors often find themselves in radically different positions vis-à-vis their obligations to a consumer, particularly when it comes to credit cards.

As previously discussed, Campney’s credit card account had *already* been charged off (e.g., treated as a loss and closed) when PRA acquired the account. *See* (R. at pp. 12, 139, lines 5–13; 146, lines 20–25; 184, lines 18–21; 252, lines 8–14; 321; 324–71; 387). Under the Federal Financial Institution Examination Council’s Uniform Retail Credit Classification and Account Management Policy, as adopted by the OCC, Synchrony Bank was required to charge off Campney’s account 180 cumulative days after Campney’s default. *See* OCC Bull. No. 2000-20, Policy Implementation, Uniform Retail Credit Classification and Account Management Policy, Office of the Comptroller of the Currency (2000); Uniform Retail Classification and Account Management Policy, 65 Fed. Reg. at 36904; *see also Makela v. Experian Info. Sols., Inc.*, No. 6:21-cv-386-MC, 2021 WL 5149699, at *3 (D. Or. Nov. 4, 2021) (“Banks under the purview of the Federal Reporting Agency, like Defendants here, are required to charge off delinquent accounts after 180 days or else their balance sheets would ‘misleadingly reflect accounts as assets that have

little chance of achieving their full valuation.” (quoting *Artemov v. TransUnion LLC*, No. 20-cv-1892, 2020 WL 5211068, at *3 (E.D.N.Y. Sept. 1, 2020)).

At the time Synchrony Bank charged off Campney’s account, she (like all other debtors of a credit card account obtained from a national bank) had roughly six months after her initial default to make periodic payments on her delinquent account and thus bring it current—or at least cure the initial delinquency—and keep the account open. *Compare* (R. p. 154, lines 20–23; pp. 324–71) (showing that the last date of payment was October 15, 2014), *with* (R. p. 184, lines 18–21) (showing that Synchrony Bank charged off the account on May 22, 2015), *and* (R. pp. 139, lines 5–13; 146, lines 20–25, 321, 387) (showing that PRA bought the charged off account on June 20, 2015). At not point during that extended delinquency period (six months) would the account balance have been accelerated and due in full.

Once an open-ended credit account has been charged off, i.e., “treat[ed] as a loss of expense because payment is unlikely,” Black’s Law Dictionary (11th ed. 2019) (defining “charge off”), the account will necessarily be closed to future charges. *See Am. Express Nat’l Bank v. Altayev*, 194 N.Y.S.3d 463, 80 Misc.3d 1201(A), at *1 n.2 (N.Y. Sup. Ct. 2023) (citing Equifax, *What is a Charge Off?*, available at <https://www.equifax.com/personal/education/credit/report/charge-offs-faq/>).⁸ As a result, an assignee of a closed, charged off account, cannot offer

⁸ Prior to this period, the creditor (here, Synchrony Bank) had been sending monthly statements to Campney alerting her that the account was past due. (R. pp.

the relief that the SCCPC requires of an original creditor (the “card issuer”)—“restoring the consumer to his rights under the agreement as though the defaults had not occurred,” S.C. Code Ann. § 37-5-111(1)—because the account has been closed. To require PRA, or any other assignee of a national bank’s charged off credit accounts, to *reopen* those accounts and “restore” consumers to the rights under their credit agreements not only interferes with the national bank’s ability to control the terms of credit, discussed above, but also interferes with longstanding and fundamental rights of assignment.

Contractual assignments of rights has been recognized under Anglo-American law for centuries. In England, assignee’s rights have been recognized since the beginning of the 17th century. *See Sprint Comms. Co., L.P. v. APCC Servs., Inc.*, 554 U.S. 269, 276, 128 S. Ct. 2531, 171 L. Ed. 2d 424 (2008) (discussing the history of assignment in England and the United States). By 1766, Sir William Blackstone had “dismiss[ed] the ‘ancient common law’ prohibition on assigning choses in action as a ‘nicety ... now disregarded.’” *Id.* at 277 (quoting 2 W. Blackstone, Commentaries at *442). Thus, by “the latter half of the 18th century and throughout the 19th century, American courts regularly ‘exercised their powers in favor of the assignee,’ both at law and in equity.” *Id.* at 278 (quoting 9 Corbin on Contracts § 47.3 at 137 (rev. ed. 2007)). As Justice Breyer explained in

324–71). There is no dispute in the record that Synchrony Bank charged off Campney’s account *prior to* PRA’s purchase of the debt. (R. p. 184, lines 18–21; pp. 139, lines 5–13; 146, lines 20–25; 321, 387).

Sprint Communications, “history and precedent make clear that” an assignee’s right to collect an assigned choses in action, including debts like Campney’s, have long been recognized by the American courts. *Id.*

An assignee takes the value of the property assigned to it, in this case, the value of the defaulted debt. *See* Howard O. Hunter, *Modern Law of Contracts* § 21:2 (“Definition of ‘assignment’”) (updated March 2023). While the assignee takes on the *rights* of the assignor, it “may or may not agree to perform an assignor’s obligations[.]” *Id.* The South Carolina Legislature recognized this fact within the language of the SCPPC itself. To wit, the definition of “creditor” in the SCCPC recognizes the distinction between “the person who grants credit in a credit transaction” and their assignee and expressly instructs that “**use of the term [creditor] does not in itself impose on an assignee any obligation of his assignor.**” S.C. Code Ann. § 37-1-301(13) (emphasis supplied). Based on a plain reading of this definition, the South Carolina Legislature clearly envisioned that an assignee would *not* necessarily inherit or be burdened by the assignor’s obligations except as expressed elsewhere in the SCCPC. *See id.* Here, the assignee PRA *cannot* take on the obligation to issue a notice of right to cure, much less *actually* cure or restore the account, because it did not purchase an open account. The Court of Appeals’ approach, however, ignores the plain language in the SCCPC’s definition of “creditor” and effectively reads out the Legislature’s express recognition that assignation does not automatically “impose on an assignee any obligation of his assignor.” *Id.*

South Carolina law presumes that the Legislature, in enacting the SCCPC, would have been aware of these legal principles regarding assignment and the nature of credit card accounts:

The Legislature . . . is presumed to enact legislation with reference to existing law, and there is a strong presumption it does not intend, by statute, to change common law rules. *Hoogenboom v. City of Beaufort*, 315 S.C. 306, 318 n. 5, 433 S.E.2d 875, 884 n. 5 (Ct. App. 1993). Further, a statute is not to be construed as in derogation of common law rights if another interpretation is reasonable. *Id.* See also *O'Laughlin v. Windham*, 330 S.C. 379, 498 S.E.2d 689 (Ct. App. 1998) (strong presumption exists that General Assembly does not intend to supplant common law principles when enacting legislation).

Abba Equip., Inc. v. Thomason, 517 S.E.2d 235, 238 (S.C. Ct. App. 1999). Reading the plain language of the SCCPC against the backdrop of these longstanding principles, the statute cannot reasonably be read to require of debt buyers like PRA an impossible task like reinstating a charged off account. See *Ranuci v. Crain*, 409 S.C. 493, 501, 763 S.E.2d 189, 193 (2014) (quoting *Lancaster Cnty. Bar Ass'n v. S.C. Comm'n on Indigent Def.*, 380 S.C. 219, 222, 670 S.E.2d 371, 373 (2008) (“In construing a statute, this Court will reject an interpretation when such an interpretation leads to an absurd result that could not have been intended by the legislature.”); *Sandler ex rel. Sandler v. Hickey*, 5 F. App'x 233, 236 (4th Cir. 2001) (“To preclude [plaintiffs] from attempting to obtain reimbursement solely because they failed to give notice that it was impossible for them to give would be an absurd result, and we do not interpret the statute to have that effect.”).

It has long been true in South Carolina that statutes in derogation of common law must be strictly construed and not “extended beyond the clear intent of the legislature.” *Grier v. AMISUB of S.C., Inc.*, 397 S.C. 532, 536, 725 S.E.2d 693, 696 (2012) (citation and internal marks omitted). The Court of Appeals disregarded this well-settled principle. Based on the plain language of the SCCPC, the Legislature instructed that the use of the term “assignee,” without more, should not be read to “impose on an assignee any obligation of his assignor.” S.C. Code Ann. § 37-1-301(11). Instead of honoring the principle that statutes in derogation of common law not extend beyond the clear intent of the legislature, the Court of Appeals interpreted the SCCPC more broadly than the legislature ever intended by reading out the exception to the definition of “creditor” and requiring that assignees of a credit card issuer undertake the card issuer’s obligations, even though the nature of the account at the time of assignment makes that an impossibility.

B. As applied to debt collectors who are assignees of closed, charged off credit card accounts, the SCCPC’s right to cure provisions are preempted by the FDCPA.

Because of this practical impossibility created by the Court of Appeals—the requirement to offer to cure and thereby reinstate a charged off account, an action which an assignee like PRA *cannot* perform because it is not the original creditor—any notice PRA might send with the statements required by S.C. Code § 37-5-110 would necessarily be false. For example, § 37-5-110 requires the notice to state that

if the debtor makes a payment, “you may continue with the contract as though you were not late.” As noted above, however, PRA has no authority or ability to re-open a closed credit card account that the consumer obtained via national bank, as federal law required the federal bank to close the account at charge off. If PRA were to send such a notice, it would run afoul of the FDCPA, which prohibits “false, deceptive, or misleading representation[s] or means in connection with the collection of any debt.” 15 U.S.C. § 1692e. Thus, the FDCPA preempts the SCCPC’s notice requirements.

- 1. Conflict preemption precludes application of state law that makes it impossible to comply with a federal law.**

“The preemption doctrine is rooted in the Supremacy Clause of the United States Constitution and provides that any state law that conflicts with federal law is ‘without effect.’” *Priester v. Cromer*, 401 S.C. 38, 43, 736 S.E.2d 249, 252 (2012) (quoting *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516, 112 S. Ct. 2608, 120 L. Ed. 2d 407 (1992)). Congress implicitly preempts state law where Congress controls a particular field or where there is conflict between state and federal law. *Crosby v. Nat’l Foreign Trade Council*, 530 U.S. 363, 372, 120 S. Ct. 2288, 147 L. Ed. 2d 352 (2000) (“even if Congress has not occupied the field, state law is naturally preempted to the extent of any conflict with a federal statute”). It cannot be disputed that Congress controls the field of the federal banking system. The Supreme Court has long held that “grants of both enumerated powers and incidental powers to national banks as grants of authority not normally limited by,

but rather ordinarily pre-empting, contrary state law.” *Watters*, 550 U.S. at 12, 127 S. Ct. 1559 (citing *Barnett Bank*, 517 U.S. at 32, 116 S. Ct. 1103) (internal marks omitted).

Conflict preemption occurs when “it is *impossible* for a private party to comply with both state and federal law” and when, “under the circumstances of [a] particular case, [the challenged state law] stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.” *Id.* (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67, 61 S. Ct. 399, 85 L. Ed. 581 (1941)) (emphasis supplied); *Priester*, 736 S.E.2d at 252; *see also Barnett Bank*, 517 U.S. at 31, 116 S. Ct. 1103 (“[F]ederal law may be in irreconcilable conflict with state law” such that “[c]ompliance with both statutes, for example, may be a physical impossibility, or, the state law may stand as an obstacle to the accomplishment or execution of the full purposes and objectives of Congress.”) (internal marks and citations omitted). While this particular question—whether the FDCPA preempts the SCCPC notice of right to cure requirement—is an issue of first impression in South Carolina, statutory analysis and instructive decisions from other jurisdictions decisively lead to the same conclusion: yes.

In relevant part, the FDCPA prohibits a debt collector from using “any false, deceptive, or misleading representation or means in connection with the collection of any debt.” 15 U.S.C. § 1692e; *see also Heintz v. Jenkins*, 514 U.S. 291, 292, 115 S. Ct. 1489, 131 L. Ed. 2d 395 (1995) (describing prohibited conduct under the FDCPA). Such a false or misleading representation would almost certainly include

a statement that a defaulted debt can be cured when, in fact, it cannot. *See, e.g. Lako*, 2021 WL 3403632 at *4 (plaintiff claimed that “defendants falsely represented that they could accelerate his debt and file suit against him in violation of § 1692d of the FDCPA” and that the “claim is premised on an underlying alleged violation of two, related provisions of the” Wisconsin Consumer Act, including the notice of right to cure provision).

The FDCPA includes an express preemption and savings clause:

This subchapter does not annul, alter, or affect, or exempt any person subject to the provisions of this subchapter from complying with the laws of any State with respect to debt collection practices, except to the extent that those laws are inconsistent with any provision of this subchapter, and then only to the extent of the inconsistency. For purposes of this section, a State law is not inconsistent with this subchapter if the protection such law affords any consumer is greater than the protection provided by this subchapter.

15 U.S. C. § 1692n. Although the FDCPA contains an express preemption clause, many challenges seen by the courts deal specifically with implied conflict preemption between state statutes and the FDCPA. When the state law being challenged is not expressly preempted by the clause above, courts “must be guided by the goals and policies of the Act in determining whether it in fact pre-empts an action based on the law of the affected State.” *Arellano v. Clark Cnty. Collection Serv., LLC*, 875 F.3d 1213, 1218 (9th Cir. 2017) (internal citations omitted) (holding that Nevada’s writ of execution requirements are preempted by the FDCPA). Said

otherwise, in order for a state statute to be impliedly preempted under the FDCPA, a conflict or inconsistency must exist.

2. The SCCPC's notice of right to cure provision necessarily conflicts with the FDCPA's prohibition of false or misleading debt collection practices.

As explained above, the Court of Appeals' opinion requires that credit card issuers and their assignees issue the SCCPC cure notice. *Campney*, 441 S.C. at 50, 892 S.E.2d at 328; (R. Op. at 13). Consequently, a debt collector would have to notify the debtor that if payment in the amount due is made by the last day for payment, “[the debtor] may continue with the contract as though you were not late.” S.C. Code Ann. § 37-5-110; *see also id.* at § 37-5-111 (“Cure restores the consumer to his rights under the agreement as though the defaults had not occurred.”). As discussed above, however, PRA is *not* the original credit grantor in this case and does *not* issue open-ended credit. In fact, PRA and other debt buyers do not issue credit and are not regulated lenders. (R. p. 15). If PRA were to issue the required cure notice, it would necessarily run afoul of the FDCPA prohibitions on using false, deceptive, or misleading representations because PRA would be making a promise (curing the debt and restoring the credit card agreement) that it cannot possibly keep:

Hypothetical Scenario	Complies with SCCPC?	Complies with FDCAP?
PRA mails Campney a cure notice	√	FAIL PRA cannot reinstate the account.
PRA does <i>not</i> mail Campney a cure notice	FAIL (under the Court of Appeals' opinion)	√

The inherent conflict between these two statutory provisions inescapably leads to the conclusion that the FDCPA preempts the SCCPC's cure provisions. As one federal district court recently noted, "state law may impose additional restrictions [beyond those in the FDCPA], **but not contrary ones.**" *Ojogwu v. Rodenburg Law Firm*, No. 19-CV-0563 (PJS/TNL), 2019 WL 6130450, at *5 (D. Minn. Nov. 19, 2019) (emphasis supplied) (citing *Chung v. Shapiro & Denardo, LLC*, No. 14-6899, 2015 WL 3746332, at *3 (D.N.J. June 15, 2015)) (finding that the FDCPA preempts Minnesota state law where "the two requirements are in direct conflict").

Ojogwu is instructive. There, the plaintiff filed a complaint alleging violations of the FDCPA against a law firm and PRA. *Id.* at *1. *Ojogwu* allegedly owed a debt to CitiBank, which "transferred the alleged debt to [PRA], which retained Rodenburg [Law Firm] to collect the debt." *Id.* *Ojogwu* was represented by counsel, but the law firm sent correspondence relating to a garnishment summons directly to him. *Id.* *Ojogwu* alleged that PRA and Rodenburg Law Firm violated the FDCPA by sending correspondence directly to him when he was

represented by counsel. *Id.* The defendants argued, in part, that “they [were] required by Minnesota law to send a garnishment summons directly to a debtor.” *Id.* at *2. The district court determined that “the state law requires direct communication with a debtor in a situation in which the FDCPA forbids it. Because the two requirements are in **direct conflict**, state law must give way.” *Id.* at *5 (emphasis supplied).

The same conclusion is inevitable here. The SCCPC notice and cure provisions directly conflict with the FDCPA’s provisions against false or misleading representations. Given this inherent conflict, at least as to debt collectors like PRA, the SCCPC provision must be deemed to be “without effect.” *Priester*, 401 S.C. at 43, 736 S.E.2d at 252.

C. The practical implications of this impossibility will cost South Carolinians money and access to credit.

If the Court of Appeals’ opinion stands, it will undoubtedly lead to instability at best—and chaos at worst—in the debt market and related financial infrastructure in South Carolina, which could have significant economic implications. “The debt collection industry is large.” Viktor Fedaseyev and Robert Hunt, *The Economics of Debt Collections: Enforcement on Consumer Credit Contracts* 14 (Fed. Reserve Bank of Philadelphia, Working Paper No. 18-04, 2018).⁹ The ARM industry “collected approximately \$55 billion in 2013 and

⁹ Available at <https://www.philadelphiafed.org/-/media/frbp/assets/working-papers/2018/wp18-04r.pdf?la=en>.

returned about 80 percent of this amount to creditors.” *Id.* Debt buyers like PRA and other ACA International members “work with consumers to resolve consumer debt, which **saves every American household**, on average, **more than \$700 each year.**” *Consumer Financial Protection Bureau v. Community Fin. Servs. Ass’n of Am., Ltd.*, No. 22-448, Br. of Amici Curiae ACA International in Supp. of Resp’t and Stay, p. 1 (United States Supreme Court, filed July 10, 2023)¹⁰ (citing Kaulkin Ginsberg, *2020 State of the Industry Report*, ACA International (2020), available at bit.ly/3uxMcBC) (emphasis supplied). The importance of the ARM industry to the American economy cannot be understated:

ACA’s members also help keep America’s credit-based economy functioning with access to low-cost credit. For example, in **2018** the accounts receivable management (ARM) industry **returned more than \$90 billion to creditors** for goods and services they had provided to their customers. These collections benefit consumers by **lowering the costs of goods and services**, particularly at a time when rising prices are hurting consumers throughout the country.

Id. (emphasis supplied).

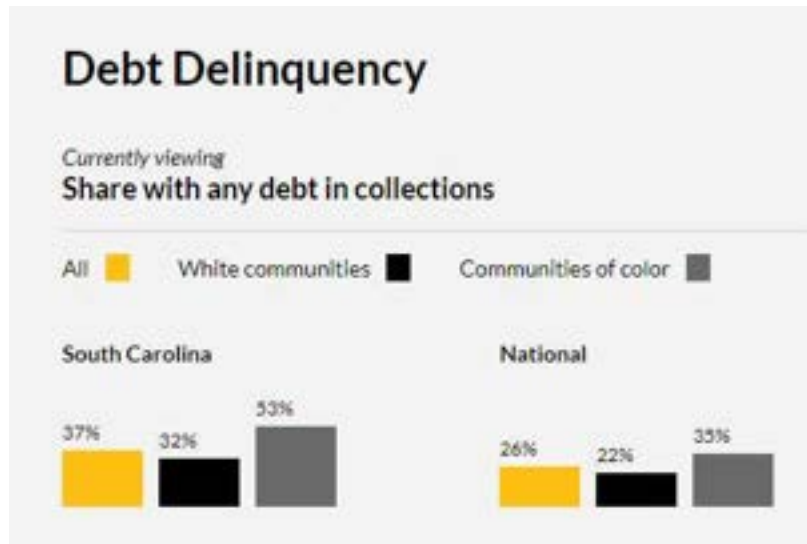
The Federal Reserve Bank of New York Staff Report studied empirical data from the fourth quarter data from the Bank’s Consumer Credit Panel, “a nationally representative 5% sample of all individuals with a credit record and a valid Social Security number,” from 1999 to 2004. Fonesca *et al.*, *Access to Credit and*

¹⁰ Available at <https://policymakers.acainternational.org/wp-content/uploads/2023/07/acainternationalamicusbrief-CFSAvCFPB.pdf>.

Financial Health: Evaluating the Impact of Debt Collection 5 (Fed. Res. Bank of N.Y. Staff Report No. 814, 2017).¹¹ This report noted a positive correlation between an appropriate level of debt collection regulation (i.e., balancing collections and consumer protections) and consumers’ access to credit and overall financial health. *Id.* at 7 (observing that overregulation of debt collection practices typically leads to a decrease in the overall supply of credit because creditors become “less willing to lend” and noting that overregulation both drives delinquencies up while driving higher credit demand among consumers most susceptible to default). The empirical evidence detailed in the New York Federal Reserve Staff Report demonstrates that where overregulation causes a decrease in access to consumer credit, the effect ultimately will be “concentrated on individuals with low credit scores.” *Id.* at 12 (citing Table 6), 15. The Staff Report concludes that “the results [regarding financial health] have important implications at the borrower level and suggest a wide-spread deleterious effect of changes in debt collection legislation on individuals who retain access to credit.” *Id.* at 15.

According to the Urban Institute, the debt delinquency rate (e.g., debt in collections) in South Carolina on all categories of debt (medical, student, and auto/retail) is 37% of the adult population; 53% of the delinquent debt is from communities of color:

¹¹ Available at https://www.newyorkfed.org/medialibrary/media/research/staff_reports/sr814.pdf?sc_lang=en&hash=7FFC5C3E25C9F317D3B842FoA2604DC3 (last accessed Nov. 10, 2023).



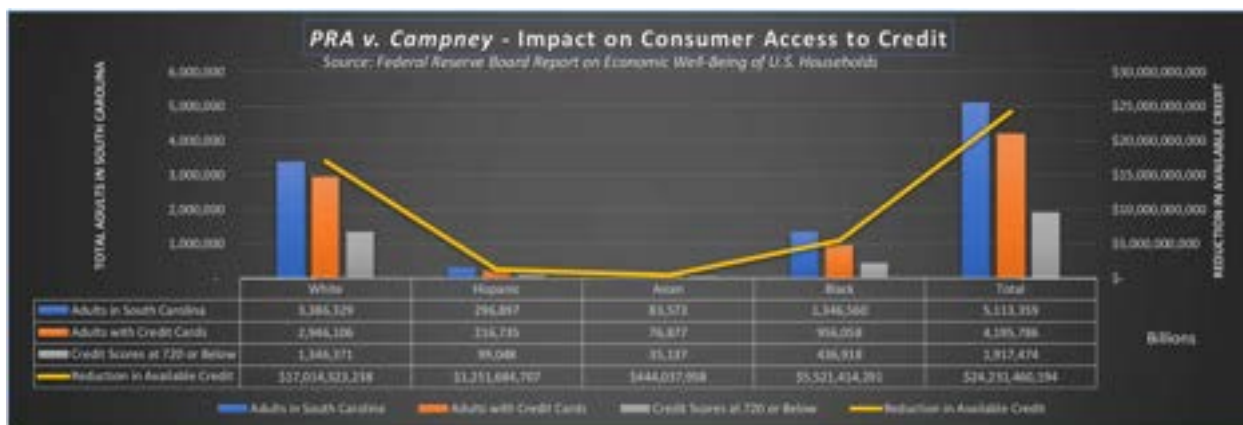
See Urban Institute, Debt in America: An Interactive Map.¹² When considering only auto and retail loan debt, the data reflects that a larger percentage of communities of color in South Carolina have delinquent debt:



Id. In both data points, the South Carolinians' average percentage of delinquent debt is higher than the national average.

¹² Available at <https://apps.urban.org/features/debt-interactive-map/?type=overall&variable=totcoll&state=45> (last accessed Oct. 24, 2023).

Given the threat of facing liability—either under the SCCPC or the FDCPA—it is possible that debt buyers, like PRA, and other debt collectors may choose not to acquire debts for South Carolina residents. Were this to happen, South Carolinians’ access to credit and overall financial health will decline. ACA International studied the potential impact of the Court of Appeals’ interpretation of the SCCPC’s notice-and-cure provisions as applied to assignees of national bank credit grantors providing open-ended consumer credit and found, in keeping with the New York Federal Reserve Staff’s empirical observations, that if the Court of Appeals’ opinion were left to stand, consumer access to credit would dramatically plummet in South Carolina:



As this graph shows, the overall reduction in consumer credit would exceed \$20 billion and likely approach \$25 billion. See also Bd. of Governors of the Fed. Reserve Sys., *Economic Well-Being of U.S. Households in 2022* (May 2023), available at <https://www.federalreserve.gov/publications/files/2022-report-economic-well-being-us-households-202305.pdf>.

One can only imagine the dire consequences for all South Carolinians—and especially for those subprime consumers who rely on readily available credit—if consumer access to credit were to contract in South Carolina in a volume anywhere close to what ACA’s data predict. In light of the negative consequences of the reduced access to credit and overall financial health that will result if debt collection practices in South Carolina were to be restricted due to the *impossible* conflict between the SCCPC and the FDCPA, ACA International urges the Court to grant PRA’s petition and to reverse the Court of Appeals’ holding that PRA, as the assignee of a national bank, was required to send a notice of right to cure prior to collecting the delinquent credit card debt.

CONCLUSION

For the reasons stated above, ACA International urges the Court to grant PRA’s petition for the writ of certiorari and to reverse the Court of Appeals’ holding that PRA, as an assignee of a national bank, was required to send a notice of right to cure prior to enforcing its rights to collect on Campney’s defaulted lender credit card account.

Respectfully submitted on this the 14th day of November, 2023.

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