No. 19-14434

In the
United States Court of Appeals
for the Eleventh Circuit

RICHARD HUNSTEIN,

*Plaintiff-Appellant,*

v.

PREFERRED COLLECTION MANAGEMENT SERVICES, INC.,

*Defendant-Appellee.*

On Appeal from the United States District Court
for the Middle District of Florida, No. 8:19-cv-00983-TPB-TGW
Hon. Thomas P. Barber, *United States District Judge*

**BRIEF OF AMICUS CURIAE ACA INTERNATIONAL IN SUPPORT OF DEFENDANT-APPELLEE'S PETITION FOR REHEARING OR REHEARING EN BANC**

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# CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26, Amicus Curiae Association of Credit and Collection Professionals ("ACA International" or "ACA") certifies that it is a nonprofit, tax-exempt organization incorporated in Minnesota. ACA has no parent company and no publicly held company has 10 percent or greater ownership in ACA.

Pursuant to Federal Rule of Appellate Procedure 26.1 and Eleventh Circuit Rule 26.1-1, ACA International also certifies that, in addition to the persons and entities named in the parties' certificates of interested persons, the following individuals or entities have or may have an interest in the outcome of this case:

1. Skadden, Arps, Slate, Meagher & Flom LLP, the law firm representing Amicus Curiae ACA International in this matter;

2. Shay Dvoretzky, counsel of record for Amicus Curiae ACA International in this matter;

3. Parker A. Rider-Longmaid, an attorney representing Amicus Curiae ACA International in this matter; and

4. Sam Auld, an attorney representing Amicus Curiae ACA International in this matter.

**CIRCUIT RULE 35 STATEMENT OF COUNSEL**

I express a belief, based on a reasoned and studied professional judgment, that the panel's opinion involves two questions warranting review by the full Court.

*First*, the panel decision's conclusion that Plaintiff-Appellant Richard Hunstein has Article III standing conflicts with this Court's precedents, including *Muransky v. Godiva Chocolatier, Inc.*, 979 F.3d 917 (11th Cir. 2020) (en banc), and *Trichell v. Midland Credit Management, Inc.*, 964 F.3d 990 (11th Cir. 2020). En banc consideration is necessary to secure and maintain uniformity of the Court's decisions.

*Second*, the panel decision's erroneous construction of the Fair Debt Collection Practices Act (FDCPA), 15 U.S.C. § 1692c(b), involves a question of exceptional importance. As the panel recognized, its decision "runs the risk of upsetting the status quo in the debt-collection industry." Op. 22. As ACA explains below, if the panel decision is allowed to stand, it will impose tremendous costs on debt collectors, creditors, and consumers alike. Yet the panel had (and still has) no guidance from the parties on the critical antecedent question whether a debt collector's disclosure of a consumer's information to an agent assisting in the collection constitutes disclosure to a "third party" in light of background principles of agency law against which Congress is presumed to legislate. *See, e.g.*, *Meyer v. Holley*, 537 U.S. 280, 285-86 (2003). ACA respectfully submits that, given the parties' failure to address this critical issue, ACA can aid the Court in fulfilling its "responsibility to interpret the law correctly," *McCarthan v. Dir. of Goodwill Indus.-Suncoast, Inc.*, 851 F.3d 1076, 1099 (11th Cir. 2017) (en banc), especially when its interpretation of the law will affect numerous parties not before the Court.

*/s/ Shay Dvoretzky*

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## STATEMENT OF IDENTITY AND INTEREST OF AMICUS CURIAE*

The Association of Credit and Collection Professionals ("ACA International" or "ACA") is a leading voice of the debt-collection industry to policymakers and courts alike. ACA represents nearly 2,300 organizations and their more than 124,000 employees worldwide. *See* ACA's Mot. for Leave to File 1. ACA submits this amicus brief to address the oversights that led to an erroneous conclusion on standing and a misinterpretation of the FDCPA that, if allowed to stand, will disrupt the entire debt-collection industry.

* No counsel for a party authored this brief in whole or in part, and no entity or person, aside from amicus curiae, its members, and its counsel, made any monetary contribution intended to fund the preparation or submission of this brief.

## INTRODUCTION AND SUMMARY OF ARGUMENT

The panel opinion warrants rehearing because it (1) conflicts with this Court's settled precedent on standing; (2) presents an exceptionally important question of statutory construction on which the panel lacked the benefit of adequate briefing; and (3), as the panel acknowledged, threatens to upset the entire debt-collection industry.

*First*, the panel's holding that Plaintiff-Appellant Richard Hunstein alleged a concrete injury satisfying Article III's injury-in-fact requirement conflicts with this Court's precedent because Hunstein's injury does not have a close relationship to any harm actionable at common law. The panel erroneously analogized to a tort whose essence is disclosure to the general public. Hunstein alleges disclosure to just a mail vendor trying to reach *him*.

*Second*, neither the parties nor the panel considered whether 15 U.S.C. § 1692c(b)'s prohibition on debt collectors' communications with "third parties" excludes debt collectors' agents, and whether a mail vendor, like Compumail here, may be such an agent. Unaided by the parties, the panel overlooked the principle that Congress legislates against the common law and long-established legal principles. *E.g., Meyer v. Holley*, 537 U.S. 280, 285-86

(2003). Under well-settled agency law, agents are not third parties to the principals for which they act.

*Finally*, rehearing is exceptionally important. The panel recognized that its "interpretation of § 1692c(b) runs the risk of upsetting the status quo in the debt-collection industry." Op. 22. The Court should not transform a regular practice—sharing information with agents—into an unlawful one, at a tremendous cost for debt collectors, creditors, and consumers alike, especially without the benefit of fulsome briefing on either issue.

## ARGUMENT

### I. The panel opinion conflicts with this Court's standing precedents because Hunstein's injury lacks a close relationship to any common-law tort.

The panel correctly determined that Hunstein failed to allege "a tangible harm" or "a risk of real harm" necessary to support Article III standing. Op. 6-7. But it contravened this Court's precedents in concluding that Hunstein alleged a concrete injury to intangible statutory rights. This Court's decisions require such an injury to bear "a close relationship to a harm that has traditionally been regarded as providing a basis for a lawsuit in English or American courts." *Muransky v. Godiva Chocolatier, Inc.*, 979 F.3d 917, 926 (11th Cir. 2020) (en banc). But the harm underlying the tort the panel identified—

public disclosure of private facts—is so fundamentally different from Hunstein's alleged harm that the Restatement uses the type of conduct Hunstein alleges as a *non*example.

**A. An intangible statutory injury must have a close relationship with a harm actionable at common law.**

Absent a tangible harm or risk of harm, Hunstein needed to show that Congress identified a concrete injury similar to one recognized at common law. *See, e.g.*, *id.* Although the fit "need not be perfect," *id.* at 932, such intangible statutory claims must not eliminate "bedrock elements" from their asserted common-law analogs, *Trichell v. Midland Credit Mgmt., Inc.*, 964 F.3d 990, 998 (11th Cir. 2020). In *Muransky*, for example, this Court held that the plaintiff lacked standing because "[t]wo key elements of a breach of confidence are completely absent from the [statutory] violation he complains of." 979 F.3d at 932.

**B. Hunstein's allegations come nowhere close to any common-law tort, differing instead by fundamental elements.**

**1.** The panel concluded that Hunstein's claim was analogous to a claim for public disclosure of private facts. But that "tort[] differ[s] from [Hunstein's] claim[] in fundamental ways." *Trichell*, 964 F.3d at 998.

To prevail on a public-disclosure-of-private-facts claim, a plaintiff must establish "1) the publication, 2) of private facts, 3) that are offensive, and 4) are not of public concern." *Cape Publ'ns, Inc. v. Hitchner*, 549 So. 2d 1374, 1377 (Fla. 1989) (citing Restatement (Second) of Torts § 652D (1977)). Publication requires disclosure "to the public at large, or to so many persons that the matter must be regarded as substantially certain to become one of public knowledge." 77 C.J.S. *Right of Privacy and Publicity* § 32. As the Restatement puts it, the tort requires "publicity," which means communication "to the public at large," not merely "to a third person." Restatement (Second) of Torts § 652D; *accord, e.g.*, *Hickson v. Home Fed. of Atlanta*, 805 F. Supp. 1567, 1575 (N.D. Ga. 1992), *aff'd*, 14 F.3d 59 (11th Cir. 1994).

Hunstein's claim is the perfect *non*example of the tort of public disclosure. Hunstein alleges only private disclosure of his account information to just Compumail—which, the panel recognized, likely would not even routinely "read" such information, Op. 22, much less publicize it. Indeed, the commentary to the very Restatement section on which the panel relied, Op. 11, demonstrates that Hunstein's claim doesn't fit the bill: "A, a creditor, writes a letter to the employer of B, his debtor, informing him that B owes the debt and will not pay it. This is not an invasion of B's privacy under this Section." Restatement (Second) of Torts § 652D.

Hunstein also cannot satisfy the element that the publication must be "highly offensive to a reasonable person." *See, e.g.*, *Stoddard v. Wohlfahrt*, 573 So. 2d 1060, 1062-63 (Fla. 5th Dist. Ct. App. 1991), *dismissed*, 581 So. 2d 1310 (Fla. 1991). Courts have repeatedly held that disclosing account information to just a few people does not qualify as highly offensive. *See, e.g.*, *Malverty v. Equifax Info. Servs., LLC*, 407 F. Supp. 3d 1257, 1267 (M.D. Fla. 2019). Preferred's disclosure of Hunstein's debt is no different. It doesn't rise to the necessary level of disclosing the "most intimate details of a man's life in his home," such as "[s]exual relations" and "family quarrels." Restatement (Second) of Torts § 652D. Indeed, the panel acknowledged that Hunstein alleged nothing resembling humiliation or embarrassment. Op. 6-7.

In sum, Hunstein lacks "[t]wo key elements" of his alleged common-law analog. *Muransky*, 979 F.3d at 932. The panel's finding of standing despite those definitional differences conflicts with the Court's precedents.

**2.** The panel relied too (Op. 10-11) on *Perry v. Cable News Network, Inc.*, 854 F.3d 1336 (11th Cir. 2017). But *Perry* only highlights the panel decision's conflict with the Court's precedents. Perry claimed that a smartphone app unlawfully disclosed his private browsing information, and he analogized his statutory claim to the tort of intrusion upon seclusion, which requires an intrusion "upon the solitude or seclusion of another or his private affairs" that "would be highly offensive to a reasonable person." *Id.* at 1341 n.1. Examples include "opening" someone's "private and personal mail" and "searching his safe or his wallet." *Id.* (quoting Restatement (Second) of Torts § 652B cmt. b). But here, Hunstein alleges no intrusion at all, much less a highly offensive one. *Cf. Cumberland Contractors, Inc. v. State Bank & Tr. Co.*, 755 S.E.2d 511, 517-18 (Ga. App. 2014) (bank's disclosure of customer's personal information did not intrude upon customer's seclusion).

## II. The panel opinion presents the exceptionally important question of whether debt collectors' agents are "third parties" under the FDCPA, 15 U.S.C. § 1692c(b).

### A. Without guidance from the parties, the panel did not confront this important threshold question.

In holding that Preferred violated § 1692c(b), the panel concluded that the statute "broadly prohibits a debt collector from communicating with anyone other than the consumer 'in connection with the collection of any debt,' subject to several carefully crafted exceptions" inapplicable here. Op. 3. The panel focused primarily on rejecting Preferred's argument that a communication "in connection with the collection of any debt" in § 1692c(b) must include a demand for payment. Op. 13-15.

But the panel did not consider whether a debt collector's agents are among the "third parties" with whom the debt collector may not communicate under § 1692c(b). And the parties have been silent on that question. Yet that question is exceptionally important because debt collectors communicate with their agents about their customers every day.

### B. A debt collector's agents are not "third parties" with whom communications are prohibited under § 1692c(b).

Properly read, § 1692c(b) does not reach debt collectors' communications with their agents. Section 1692c(b) prohibits a "debt collector" from communicating, "in connection with the collection of any debt, with any person other than the consumer." As the section's heading and ordinary usage make clear, "any person" does not include the "debt collector" itself—it refers to "third parties." 15 U.S.C. § 1692c(b); *see* Op. 2 (§ 1692c(b) "prohibits debt collectors from communicating consumers' personal information to third parties"); *Almendarez-Torres v. United States*, 523 U.S. 224, 234 (1998) (section headings may illuminate meaning). A debt collector's agents are not "third parties" any more than its employees are "third parties."

For starters, "the good textualist is not a literalist." Antonin Scalia, *A Matter of Interpretation* 24 (1997); *see e.g.*, *Andrus v. Charlestone Stone Prods. Co.*, 436 U.S. 604, 616 (1978) (refusing to read "mineral deposits" to include water because doing so would bring about a "major … alteration in established legal relationships based on nothing more than an overly literal reading of a statute"). And Congress could not have meant the term "any person" in § 1692c(b) to encompass literally "any person." To the contrary, Congress made clear that debt collectors could be corporations. *See, e.g.*, 15 U.S.C. § 1692a(6)(B) (exclusion for entities "related by common ownership or affiliated by corporate control"). And because corporations are not natural persons, they "necessarily act[] by and through agents." *Balt. & Ohio R.R. v. Baugh*, 149 U.S. 368, 382 (1893); *accord* William Meade Fletcher, *Cyclopedia of the Law of Private Corporations* § 30 (Sept. 2020). There is no reason to think Congress meant to sweep debt collectors' agents into § 1692c(b)'s prohibition on communications.

In fact, there is every reason not to. Congress legislates against well-established legal principles, including "the backdrop of the common law," *Comcast Corp. v. Nat'l Ass'n of African Am.–Owned Media*, 140 S. Ct. 1009, 1016 (2020), and it must speak clearly and directly to abrogate them, *e.g.*, *Meyer*, 537 U.S. at 285-86. And under longstanding background principles of agency law, "a principal is considered to have done himself or herself what he or she does by acting through another person." 2A C.J.S. *Agency* § 1. In other words, "a principal's agent or employee, who acts for or on behalf of the principal, is a 'party' to that principal's contractual and business relations and not a third party thereto." *Harrell v. Reynolds Metals Co.*, 495 So. 2d 1381, 1388 (Ala. 1986); *accord* Restatement (Second) of Agency § 186 (1958). An agency relationship "always 'contemplates three parties—the principal, the agent, and the third party with whom the agent is to deal.'" Restatement (Third) of Agency § 1.01 cmt. c (2006). The FDCPA does not contain any indication that Congress intended to abrogate these fundamental agency-law principles in § 1692c(b).

To the contrary, federal courts have long "relied on traditional agency principles" to interpret the FDCPA, *Barbato v. Greystone All., LLC*, 916 F.3d 260, 269 (3d Cir. 2019), *cert. denied sub nom. Crown Asset Mgmt. LLC v. Barbato*, 140 S. Ct. 245 (2019), as well as statutes like the Telephone Consumer Protection Act, *see, e.g., Gomez v. Campbell-Ewald Co.*, 768 F.3d 871, 879 (9th Cir.

2014), *aff'd,* 577 U.S. 153 (2016), and the Fair Credit Reporting Act, *see, e.g.*, *Jones v. Federated Fin. Rsrv. Corp.*, 144 F.3d 961, 966 (6th Cir. 1998). And construing the term "debt collector" to include debt collectors' agents, but not third parties, is likewise consistent with the way the Federal Trade Commission (at that time, the agency charged with enforcing the FDCPA) has understood the statute. *See* Statements of General Policy or Interpretation Staff Commentary on the FDCPA, 53 Fed. Reg. 50,097, 50,104 (Dec. 13, 1988) ("A debt collector may contact an employee of a telephone or telegraph company in order to contact the consumer, without violating the prohibition on communication to third parties ....").

Section 1692c(b) does not bar debt collectors' communications with their agents, who are not "third parties." Here, without the parties' guidance, but to the detriment of countless parties not before it, the panel erred in overlooking this critical threshold issue.

## III. The panel opinion will disrupt the entire debt-collection industry, all without adequate guidance from the parties.

### A. The opinion will burden debt collectors and consumers alike.

The panel opinion effectively outlaws debt collectors' widespread and decades-long practice of contracting with vendors specializing in technical aspects of debt collection. *See* Debt Collection Practices (Reg. F), 86 Fed. Reg. 5766, 5845 n.446 (Jan. 19, 2021). The panel's construction of § 1692c(b) will require debt collectors to spend significant resources to train new employees and acquire new equipment—even though the panel identified no reason to treat agents differently from employees. *See supra* pp. 8-9.

Additionally, the panel opinion "create[s] [further] incentives to file lawsuits even where no actual harm has occurred," often with the vexatious aim of securing only attorney's fees. *Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA*, 559 U.S. 573, 616 (2010) (Kennedy, J., dissenting). Already plaintiffs have filed more than 120 copycat complaints and promise an "avalanche" still to come. Mot. for Leave to File 7. And creditors will face further litigation under state-law analogs to the FDCPA, while consumers likely will receive delayed communications while debt collectors work to retool. *See id.* at 7-8. Ultimately, consumers likely will confront higher borrowing costs.

### B. The Court should not adhere to the panel opinion and disrupt the debt-collection industry without the benefit of fulsome briefing, including from amici curiae.

In erroneously concluding that Hunstein had standing and a cause of action, the panel relied on briefing that artificially cabined the statutory-construction inquiry and failed to adequately address the standing issues discussed above. Without effective guidance from the parties, the panel traded textualism for literalism. It overlooked ordinary methods of statutory construction to reach an interpretation raising troubling constitutional concerns attending laws regulating speech based on their content. *See, e.g.*, *Barr v. Am. Ass'n of Pol. Consultants, Inc.*, 140 S. Ct. 2335, 2343, 2346 (2020) (plurality opinion) (six Justices finding First Amendment violation). If § 1692c(b) really does reach communications with agents, then, as the panel recognized, it does so without adding "much in the way of 'real' consumer privacy," Op. 22—hardly the fit needed to satisfy First Amendment scrutiny.

Given the circumstances, the panel might have declined to publish its opinion. *See, e.g., Rivas v. Midland Funding, LLC*, 842 F. App'x 483, 487 (11th Cir. 2021). Instead, the panel ran "the risk of upsetting the status quo." Op. 22. But regardless of what the parties argued, the Court "ha[s] a responsibility to interpret the law correctly," with aid from amici if necessary. *McCarthan v. Dir. of Goodwill Indus.-Suncoast, Inc.*, 851 F.3d 1076, 1099 (11th Cir. 2017) (en banc). That is especially true where the court's decision affects an entire industry.

## CONCLUSION

The Court should grant the petition for rehearing.

Dated: June 1, 2021

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

I hereby certify that this amicus brief complies with (1) the type-volume limit of Federal Rule of Appellate Procedure 29(b)(4) because, excluding the parts of the document exempted by Federal Rule of Appellate Procedure 32(f) and Eleventh Circuit Rule 35-5(a), (b), (c), (d), and (j), the brief contains 2,599 words and (2) the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6), because it has been prepared in a proportionally spaced typeface using Microsoft Word 2019 in a 14-point Book Antiqua font.

Dated: June 1, 2021

*/s/ Shay Dvoretzky*
Shay Dvoretzky

**CERTIFICATE OF SERVICE**

I hereby certify that on June 1, 2021, I electronically filed the foregoing brief with the Clerk of Court for the United States Court of Appeals for the Eleventh Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system. I further certify that copies of the foregoing brief have been mailed to the Clerk of Court for the United States Court of Appeals for the Eleventh Circuit by overnight delivery service.

Dated: June 1, 2021

*/s/ Shay Dvoretzky*
Shay Dvoretzky