No. 19-14434-HH

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

RICHARD HUNSTEIN,

Plaintiff-Appellant,

v.

PERFERRED COLLECTION AND MANAGEMENT SERVICES, INC.,

Defendant-Appellee.

On Appeal from the United States District Court
for the Middle District of Florida, Orlando Division
08:19-CV-00983-TPB-TGW

BRIEF OF *AMICUS CURIAE* RECEIVABLES MANAGEMENT ASSOCIATION INTERNATIONAL, INC. IN SUPPORT OF APPELLEE'S PETITION FOR REHEARING

Jason B. Tompkins
Jonathan P. Hoffmann
jtompkins@balch.com
jhoffmann@balch.com
BALCH & BINGHAM LLP
Post Office Box 306
Birmingham, AL 35201
Telephone: (205) 251-8100
Facsimile: (205) 226-8799

Donald S. Maurice, Jr.
M. Brent Yarborough
dmaurice@mauricewutscher.com
byarborough@mauricewutscher.com
MAURICE WUTSCHER LLP
420 North 20th Street, Suite 2200
Birmingham, AL 35203
Telephone: (205) 451-0389
Facsimile: (908) 237-4551

June 1, 2021

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Eleventh Circuit Rule 26.1-1, counsel for *Amicus* certifies that, in addition to those persons and entities contained in the Certificate of Interested Persons and Corporate Disclosure Statement in Appellee's brief, the following persons and entities are also interested in the outcome of this case:

BALCH & BINGHAM LLP; other partners, associates, "of counsel" attorneys, and lobbyists associated with the firm of Balch & Bingham LLP, P. O. Box 306, Birmingham, AL 35201-0306. See www.balch.com. (Attorneys for *Amicus*).

HOFFMANN, Jonathan P., BALCH & BINGHAM LLP; P. O. Box 306; Birmingham, AL 35201-0306; Telephone: (205) 251-8100; Facsimile: (205) 226-8799; Email: jhoffmann@balch.com (Attorney for *Amicus*).

RECEIVABLES MANAGEMENT ASSOCIATION INTERNATIONAL, INC.; 1050 Fulton Ave., Suite 120, Sacramento, CA 95825; Email: info@rmaintl.org[1]

TOMPKINS, Jason B., BALCH & BINGHAM LLP; P. O. Box 306; Birmingham, AL 35201-0306; Telephone: (205) 251-8100; Facsimile: (205) 226-8799; Email: jtompkins@balch.com (Attorney for *Amicus*).

MAURICE, Donald S. Jr., MAURICE WUTSCHER, LLP, 5 Walter Foran Blvd., Suite 2007, Flemington, NJ 08822; Telephone: (908) 237-4570; Email: dmaurice@mauricewutscher.com (Attorney for *Amicus*).

MAURICE WUTSCHER LLP; other partners, associates, and "of counsel" attorneys associated with the firm of Maurice Wutscher LLP, 420 North 20th Street, Suite 2200, Birmingham, AL 35203. See www.mauricewutscher.com. (Attorneys for *Amicus*).

YARBOROUGH, M. Brent, MAURICE WUTSCHER LLP; 420 North 20th Street, Suite 2200, 420 North 20th Street, Suite 2200, Birmingham, AL

[1] *Amicus Curiae* RMAI is a non-profit corporation with no parent entity, and no publicly held company owns 10% or more its stock.

35203; Telephone: (205) 451-0389; Facsimile: (908) 237-4551; Email: byarborough@mauricewutscher.com. (Attorney for *Amicus*).

This 1st day of June 2021.

/s/ Donald S. Maurice, Jr.
Donald S. Maurice, Jr.
Attorney for *Amicus Curiae*

OF COUNSEL:

Jason B. Tompkins
Jonathan P. Hoffmann
jtompkins@balch.com
jhoffmann@balch.com
BALCH & BINGHAM LLP
Post Office Box 306
Birmingham, AL 35201-0306
Telephone: (205) 251-8100
Facsimile: (205) 226-8799

Donald S. Maurice, Jr.
M. Brent Yarborough
dmaurice@mauricewutscher.com
byarborough@mauricewutscher.com
MAURICE WUTSCHER LLP
420 North 20th Street, Suite 2200
Birmingham, AL 35203
Telephone: (205) 451-0389
Facsimile: (908) 237-4551

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

RULES

STATEMENT OF THE ISSUES

Whether the harms animating the Fair Debt Collection Practices Act (abuse) and traditional publication of private facts (shame or humiliation)—which is not actionable *per se*—match such that bare allegations of § 1692c(b) violations confer standing.

Whether incidental conveyances of information to letter vendors to facilitate legitimate communications—which agrees with FTC guidance and the text of the FDCPA—states a claim.

STATEMENT OF FACTS

Preferred Collection and Management Services, Inc. "electronically transmitted data concerning [Richard Hunstein's] debt . . . to a third-party vendor. The [] vendor then used the data to create, print, and mail a 'dunning' letter to [Hunstein]." *Hunstein v. Preferred Collection & Mgmt. Servs.*, 994 F.3d 1341 (11th Cir. 2021).

STATEMENT OF INTEREST OF *AMICUS* [2]

Receivables Management Association International, Inc. ("RMAI") represents over 570 companies that purchase or support the purchase of receivables on the secondary credit market, which facilitates consumers' access to credit. RMAI members' business practices often subject them to the FDCPA as "debt collectors." The panel's decision that a debt collector's commonplace use of a letter vendor violated § 1692c(b) of the FDCPA conflicts with established law of this Circuit, the United States Supreme Court, and agency guidance. This conflict disrupts the operations of each actor in the consumer-debt secondary market on whose behalf RMAI advocates.

RMAI has no financial interest in this case but has an interest in the FDCPA's interpretation and when alleged violations confer standing. RMAI urges this Court to grant rehearing, en banc, of the panel's decision to clarify that—consistent with this Circuit and the Supreme Court's precedent—Hunstein lacked standing to sue and further failed to state a claim.

RMAI files this brief pursuant to Federal Rule of Appellate Procedure 29(b) and Eleventh Circuit Rule 29-1.

---

[2] Pursuant to Fed. R. App. P. 29(a)(4)(E), no counsel for a party authored this brief, in whole or in part, and no counsel, party, or person (other than *amicus curiae*, its members, or its counsel) made a monetary contribution intended to fund the preparation or submission of this brief.

ARGUMENT AND CITATIONS OF AUTHORITY

Hunstein alleged Preferred violated the FDCPA's debt-disclosure prohibition by conveying data to its vendor, who then mailed a letter directly to him on behalf of Preferred. The panel found the disclosure sufficiently analogous to traditional invasion of privacy such that the mere conveyance constituted a concrete injury conferring standing. "[B]ut this tort differs from the plaintiff's claims in fundamental ways." *Trichell v. Midland Credit Mgmt., Inc.*, 964 F.3d 990, 998 (11th Cir. 2020).

First, the statute. Congress enacted the FDCPA to prohibit *abusive* debt collection practices, concluding certain disclosures to third parties fell within that category. But no federal agency or appellate court (nor Congress) has proscribed conveyances of information incidental to legitimate communications. In fact, the Federal Trade Commission ("FTC") has concluded just the opposite through guidance relied upon by secondary-market actors for decades.

Second, the tort. Public disclosure of private facts—the panel's common law analogy—requires, as it were, *public* disclosure. That tort also protects against shame and humiliation, not abuse. And, unlike all its standing-conferring–common-law-analogy predecessors, it's not actionable *per se*.

The upshot: the panel ignored this Court's prior admonition against an "anything-hurts-so-long-as-Congress-says-it-hurts theory of Article III injury," *Trichell*, 964 F.3d at 999 n.2, thereby becoming the first appellate court in the 40+

year history of the FDCPA to conclude that the use of letter vendors violates the statute. Because that practice is neither abusive nor analogous to publicizing private facts, Hunstein lacks standing and failed to state a claim. The Court should grant rehearing, en banc, to correct *Hunstein*'s conflict with precedent.

I. The harms underlying § 1692c(b) of the FDCPA (abuse) and common law invasion of privacy (shame or humiliation) are incongruent, depriving Hunstein of standing for his allegation of a bare procedural violation.

In support of standing, Hunstein alleges only intangible harm, which "can be tricky: some are concrete, some are not." *Muransky v. Godiva Chocolatier, Inc.*, 979 F.3d 917, 926 (11th Cir. 2020). "Shedding some light on how to draw that difficult line, *Spokeo* instructs that we may consider 'both history and the judgment of Congress.'" *Id.* (quoting *Spokeo, Inc. v. Robins,* 136 S. Ct. 1540, 1549 (2016)).[3]

This historical search divines whether "the 'intangible harm has a close relationship to a harm that has traditionally been regarded as providing a basis for a lawsuit in English or American courts.'" *Id.* While "[t]he fit between a new statute and a pedigreed common-law cause of action need not be perfect, [the Court must]

[3] *Hunstein* didn't consider the second avenue where intangible injury may suffice: risk of harm. On rehearing, this Court should vacate the panel's analysis and conclude that Hunstein's allegations also fail the "more demanding standard" that Preferred's endorsed use of a letter vendor created a "material risk of harm." *Muransky*, 979 F.3d at 927 (quoting *Spokeo*, 136 S.Ct. at 1550); *Hunstein*, 994 F.3d at 1352 ("doubt[ing]" mail vendors 'routinely read, care about, or abuse the information . . . transmit[ed] to them").

consider at a minimum whether the *harms* matchup between the two." *Muranksy*, 979 F.3d at 926 (emphasis added). In instances where this Court has "concluded that a plaintiff had standing[, it was] because the statutory violation at issue led to a type of harm that has historically been recognized as actionable." *Muranksy*, 979 F.3d at 926; Section I.A., *infra*.

"One of the unexpected consequences of the common-law-analogy approach to identifying harms is the growing insistence on hammering square causes of action into round torts." *Muranksy*, 979 F.3d at 931. And it's precisely this pitfall that trapped the panel, which incorrectly molded the FDCPA to track invasions of privacy. But "[b]efore turning to why [Hunstein's] alleging the violation of [§ 1692c(b)] is not enough to establish standing, we should say a few words about the statute at issue here." *Id.* at 921.

A. Congress passed the FDPCA to prevent abuse.

Congress enacted the FDCPA to eliminate "abusive debt collection practices" that "contribute to the number of personal bankruptcies, to marital instability, to the loss of jobs, and to invasions of individual privacy." *Trichell*, 964 F.3d at 994, 999 (quoting 11 U.S.C. § 1692(a)); *Hart v. Credit Control, LLC*, 871 F.3d 1255, 1257 (11th Cir. 2017) (quoting *LeBlanc v. Unifund CCR Partner*, 601 F.3d 1185, 1190 (11th Cir. 2010); *Miljkovic v. Shafritz & Dinkin, P.A.*, 791 F.3d 1291, 1303 (11th Cir. 2015); *see also Rotkiske v. Klemm*, 140 S.Ct. 355, 358 (2019) (finding same).

On the nose here, "'a debt collector may not contact third persons such as a consumer's friends, neighbors, relatives, or employer. Such contacts are *not* legitimate collection practices and result in serious invasions of privacy, as well as the loss of jobs.'" *Acosta v. Campbell*, 309 F. App'x 315, 320 (11th Cir. 2009) (quoting S. Rep. No. 95-382, reprinted at 1977 U.S. Code Cong. & Admin. News 1695, 1699) (emphasis added).

Notably, Congress "viewed [the FDCPA's] statutory damages not as an independent font of standing for plaintiffs without traditional injuries, but as an 'additional' remedy for plaintiffs suffering 'actual damage' caused by a statutory violation." *Trichell*, 964 F.3d at 1000 (citing 15 U.S.C. § 1692k(a)). In other words, the FDCPA doesn't address harms that are actionable *per se*, like the Fair Credit Reporting Act ("FCRA") or Video Privacy Protection Act ("VPPA") may. *See Pedro v. Equifax*, 868 F.3d 1275, 1279–80 (11th Cir. 2017) (finding standing because FCRA protected against harm traditionally redressed via defamation, which is actionable *per se*); *Perry v. Cable News Network, Inc.*, 854 F.3d 1336, 1340–41 (11th Cir. 2017) (alleged violation of VPPA alone conferred standing because it tracked intrusion upon seclusion for which "a showing of additional harm is not necessary to create liability").[4]

[4] *Hunstein* found *Perry* "persuasive and analogous," *Hunstein*, 994 F.3d at 1348, but did so by re-casting that decision to omit reference to the actual invasion of privacy variation relied upon—intrusion upon seclusion, *not* publicizing private

In short, according to its text, the Supreme Court, and—prior to *Hunstein*—this Court, the FDCPA prevents abuse and requires additional harm.

B. Common law invasion of privacy prevents shame or humiliation arising from publicized, private facts.

"In the debtor-creditor context, invasion of privacy [is] 'the wrongful intrusion into one's private activities in such a manner as to outrage or cause mental suffering, shame or humiliation to a person of ordinary sensibilities.'" *Shuler v. Ingram & Associates,* 441 F. App'x 712, 720 (11th Cir. 2011) (quoting *Jacksonville State Bank v. Barnwell*, 481 So. 2d 863, 865 (Ala. 1985)); *Cason v. Baskin*, 155 Fla. 198, 20 So. 2d 243, 249 (1944) (same under Florida law). These harms link seamlessly with the relevant species of invasion of privacy—"*public* disclosure of private facts." *Hunstein*, 994 F.3d at 1347 (quoting Black's Law Dictionary 952 (10th ed. 2014) (emphasis added). It's through making *public* what's held *private* that shame and humiliation arise. Unsurprisingly, then, what qualifies as "public" is a matter of degree. *Steele v. Offshore Shipbuilding, Inc.*, 867 F.2d 1311, 1315 (11th Cir. 1989) (Florida law requires "publication to the public in general or to a large number of persons").

---

facts—thereby deviating from this Court's own characterization: "[In *Perry*,] [t]he Court analogized this statutory cause of action to the traditional tort of intrusion upon seclusion, which makes a defendant liable for invading the plaintiff's privacy without any further harm." *Trichell*, 964 F.3d at 997.

"'Publicity,' . . . differs from 'publication,' as that term is used . . . in connection with liability for defamation." *Restatement (Second) of Torts* § 652D cmt. a (1977). 'Publication,' . . . is a word of art, which includes *any* communication by the defendant to a third person." *Id.* (emphasis added). "'Publicity,' on the other hand, means that the matter is made public, by communicating it 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." *Id.* "Thus it is not an invasion of the right of privacy, within the rule stated in this Section, to communicate a fact concerning the plaintiff's private life to a single person or even to a small group of persons." *S.B. v. Saint James School*, 959 So.2d 72, 92 (Ala. 2006) (quoting and adopting *Restatement (Second) of Torts* § 652D cmt. a (1977).

Saint James School evinces the link between publicizing private facts and the FDCPA, because both permit certain necessary transmissions without being "public" or a "communication" with a "third party." There, "only a small group of persons necessary to conduct [an] investigation" received the allegedly "public" communication. *Id.* at 92. This insufficient publicity doesn't vary from "incidental contacts with intermediaries[, like letter vendors,] who []assist[] a debt collector to communicate with the consumer," which aren't the contacts "that [§ 1692c(b)] was . . . intended to prohibit . . . ." 51 Fed. Reg. 8019, 8020, 8024 (Mar. 7, 1986) (FTC guidance discussed below); *see Acosta*, 309 F. App'x at 320 (explaining that contacts

with "third persons such as a consumer's friends, neighbors, relatives, or employer"—none of which are incidental to communicating with the consumer—"are not *legitimate collection practices*") (citations omitted).

This Court has endorsed this nuance of common law by affirming dismissal of an invasion of privacy claim, because "insufficient publication existed to support the . . . claim." *Steele*, 867 F.2d at 1315. Indeed, it's the state of common law that "there is no threshold number which constitutes 'a large number' of persons." *Robert C. Ozer, P.C. v. Borquez*, 940 P.2d 371, 378 (Colo. 1997). "Rather, the facts and circumstances of a particular case must be taken into consideration in determining whether the disclosure was sufficiently public so as to support a claim for invasion of privacy." *Id.*[5]

Missing from *Hunstein*, though, is any discussion of shame and humiliation or the fact "publicity" is a question of *degree*. That deviates from this Court's prior precedent by failing to match-up harms or addressing whether publicizing private facts aligns with torts that are actionable without additional harm. After all, it's because the Court's common-law-analogy inquiry determined "the intrusion itself"

[5] Notably, "[c]ourts have consistently rejected []public disclosure of private facts [claims] on the grounds that [a] bank disclosed [banking-customer] information to only a few individuals, not the public." *Confidentiality, Access and Certainty: Disclosure of Customer Bank Records*, 1 Ann. Rev. Banking L. 101, 118, n.157 (1982).

creates liability[6] and that defamation "was traditionally actionable *per se*"[7] that bare violations of procedural statutory rights proceeded in *Perry* and *Pedro*.

***

Hunstein misidentified the harms animating the FDCPA and failed to identify the harms associated with the publicizing private facts. It thereby became this Court's first panel to permit bare statutory violations to proceed based on analogy to a traditional tort that's not actionable *per se*.

II. Neither the FDCPA nor the FTC's interpretation of § 1692c(b) regard using letter vendors as improper third-party disclosures.

The secondary market has followed the FTC's position that "a debt collector may contact an employee of a telephone or telegraph company in order to contact the consumer, without violating [§ 1692c(b)], if the only information given is that necessary to enable the collector to transmit the message to, or make the contact with the consumer." 53 Fed. Reg. 50097, 50104 (Dec. 13, 1988) ("It is staff's view that the communication is with the consumer, not the operator, and that [§ 1692c(b)] was not intended to prohibit incidental contacts with intermediaries who are assisting a debt collector to communicate with the consumer."); *see also Hawthorne v. Mac Adjustment*, 140 F.3d 1367, 1372 n.2 (11th Cir. 1998) (citing *Chevron, U.S.A. v.*

[6] *Perry*, 854 F.3d at 1341.

[7] *Losch v. Nationstar Mortgage LLC*, 995 F.3d 937, 943 (11th Cir. 2021).

Natural Resources Defense Council, Inc., 467 U.S. 837, 844 (1984)) ("[Though not binding,] because the FTC is entrusted with administering the FDCPA, its interpretation should be accorded considerable weight.").

The FDCPA itself supports this interpretation: § 1692f(8) expressly mentions "communicating with the consumer by . . . telegram," but § 1692c(b) doesn't exempt telegraph clerks from the prohibition against third-party disclosures. Likewise, § 1692c(b) doesn't exempt "debt collectors" from its disclosure prohibition. But *any* person engaged in the collection of "debt" is a "debt collector" under § 1692a(6). This includes not just business entities but each of their employees who "directly or indirectly" collect consumer debt. *See Arlozynski v. Rubin & Debski, P.A.*, 710 F. Supp. 2d 1308, 1310–11 (M.D. Fla. 2010) ("The individual Defendants' actions . . . may subject them to personal liability under the [FDCPA], regardless of the fact that they acted under the auspices of a corporate entity."). Under *Hunstein*, such intra-debt collector communications would violate § 1692c(b).

Congress, however, legislates against the backdrop of common law to avoid absurd results, which must give way to statutory constructions "in harmony with general principles of tort immunities and defenses" existing when Congress enacts a statute. *Imbler v. Pachtman*, 424 U.S. 409, 418 (1976). And to that end, the FDCPA (pre-*Hunstein* version) agrees with then-existing common law that understood agents bind principals (acting as a single legal unit) when furthering legitimate

business purposes of the principal. *Restatement (Second) of Agency*, §§ 380, 383, 385(a) (1958).

***

Incidental non-public communications made for legitimate business practices do not violate the FDCPA (nor *Hunstein*'s identified common law tort). The panel's interpretation conflicts with the statute, FTC guidance, and the common-law backdrop to Congress' FDCPA enactment.

CONCLUSION

For the foregoing reasons, this Court should grant rehearing, en banc, to correct the panel's decision.

/s/ Donald S. Maurice, Jr.
Donald S. Maurice, Jr.
Attorney for *Amicus*

OF COUNSEL:

Jason B. Tompkins
Jonathan P. Hoffmann
jtompkins@balch.com
jhoffmann@balch.com
BALCH & BINGHAM LLP
Post Office Box 306
Birmingham, AL 35201-0306
Telephone: (205) 251-8100
Facsimile: (205) 226-8799

Donald S. Maurice, Jr.
M. Brent Yarborough
dmaurice@mauricewutscher.com
byarborough@mauricewutscher.com
MAURICE WUTSCHER LLP
420 North 20th Street, Suite 2200
Birmingham, AL 35203
Telephone: (205) 451-0389
Facsimile: (908) 237-4551

CERTIFICATE OF COMPLIANCE WITH RULE 32(g)(1)

This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(g)(1) because this brief contains 2,600 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f), and taking into account the 2,600 word limitation of Federal Rule of Appellate Procedure 29(b)(4).

/s/ Donald S. Maurice, Jr.
Donald S. Maurice, Jr.
Attorney for *Amicus*

CERTIFICATE OF FILING AND SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of Court for the United States Court of Appeals for the Eleventh Circuit on June 1, 2021, by using the appellate CM/ECF system, and service was accomplished on all counsel of record by the appellate CM/ECF system.

I also certify that six (6) copies of the foregoing document were dispatched on this 1st day of June 2021, via Federal Express Overnight, to:

The Honorable David J. Smith, Clerk of Court
United States Court of Appeals for the Eleventh Circuit
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

/s/ Donald S. Maurice, Jr.
Donald S. Maurice, Jr.