RECORD NO. 19-14434

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

RICHARD HUNSTEIN,
Plaintiff-Appellant,

v.

PREFERRED COLLECTION AND MANAGEMENT SERVICES, INC.,
Defendant-Appellee.

On Appeal from the United States District Court
for the Middle District of Florida

EN BANC BRIEF OF *AMICI CURIAE* PUBLIC JUSTICE, THE NATIONAL ASSOCIATION OF CONSUMER ADVOCATES, AND THE NATIONAL CONSUMER LAW CENTER IN SUPPORT OF PLAINTIFF-APPELLANT

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, amici curiae the Public Justice, the National Association of Consumer Advocates, the National Consumer Law Center are all non-profit entities that have no parent corporation. No publicly held corporation holds 10% or more of any stake or stock in amici curiae. Identifiable interested parties to the action are:

- ACA International – Amicus Curiae
- Alltran Financial, LP – Amicus Curiae
- American Association of Healthcare Administrative Management – Amicus Curiae
- American Bankers Association – Amicus Curiae
- American Financial Association – Amicus Curiae
- Arizona Creditors Bar Association – Amicus Curiae
- Attorneys Association of Alabama, Inc. – Amicus Curiae
- Ballard Spahr, LLP – Firm for Amicus Curiae
- Barber, the Honorable Thomas – United States District Judge
- Barnett, Keith Jerrod – Counsel for Amicus Curiae
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- Bassford Remele – Firm for Amicus Curiae
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- Canter, Ronald S. – Counsel for Amicus Curiae
- Chamber of Commerce of the United States – Amicus Curiae
- Chapman, Michael Kevin – Counsel for Amicus Curiae
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- Consumer Bankers Association – Amicus Curiae
- Consumer Relations Consortium – Amicus Curiae
- Credence Resource Management, LLC – Amicus Curiae
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- Missouri Creditors, Inc. – Amicus Curiae
- National Association of Consumer Advocates – Amicus Curiae
- National Association of Professional Process Servers – Amicus Curiae
- National Consumer Law Center – Amicus Curiae

- National Creditors Bar Association – Amicus Curiae
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- Newburger, Manuel – Counsel for Amicus Curiae
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- Public Justice – Amicus Curiae
- Radius Global Solutions, Inc. – Amicus Curiae
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- Wilson, the Honorable Thomas – United States Magistrate Judge
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Dated: December 23, 2021

/s/ Ellen Noble
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INTEREST OF AMICI CURIAE[1]

Amici are nonprofit organizations committed to ensuring access to justice. They have an interest in the proper interpretation and application of Article III standing requirements so that all people harmed by unlawful conduct can seek recourse through the civil justice system.

Public Justice is a nonprofit legal advocacy organization that specializes in precedent-setting, socially significant civil litigation, with a focus on fighting corporate and governmental misconduct. The organization maintains an Access to Justice Project that pursues litigation and advocacy efforts to remove procedural obstacles that unduly restrict the ability of workers, consumers, and people whose civil rights have been violated to seek redress in the civil court system. This case is of interest to Public Justice because it raises questions regarding Article III standing which affect the ability of injured consumers to seek remedies through the civil justice system. Public Justice has litigated dozens of cases in federal and state courts fighting for proper interpretations of Article III standing in the context of data privacy, fair lending, discriminatory business practices, and false advertising.

The National Association of Consumer Advocates ("NACA") is a nonprofit corporation whose members are lawyers, law professors, and students practicing or

[1] Counsel for the parties did not author this brief in whole or in part, and no entity or person other than the amici curiae and their counsel contributed money that was intended to fund the preparation or submission of this brief.

studying consumer-protection law. NACA's mission is to promote justice for consumers through information-sharing among consumer advocates and to serve as a voice for its members and consumers in the struggle to curb unfair and oppressive business practices.

The National Consumer Law Center ("NCLC") is a national research and advocacy organization focusing on the legal needs of consumers, especially low income and elderly consumers. The critically important protections against unfair, deceptive, and abusive practices in consumer debt collection created by the Fair Debt Collection Practices Act have long been a major focus of NCLC's work. As one way of furthering these goals, NCLC publishes *Fair Debt Collection* (9th ed. 2018 and available online as 10th ed. 2022), a comprehensive treatise on the interpretation and enforcement of the FDCPA that the Supreme Court cited as supporting authority in *Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich*, 559 U.S. 573, 591 n.12 (2010). NCLC has also advocated extensively for the preservation of consumers' ability to access the justice system, including an amicus brief in *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190 (2021), a detailed analysis in *Fair Debt Collection* of the effect of *TransUnion* on FDCPA claims, and a number of webinars and other training events.

STATEMENT OF ISSUE

Does a plaintiff have Article III standing when he alleges that personal information concerning his debt and son's medical condition was communicated to the employees of a third-party company without his consent in violation of the Fair Debt Collection Practices Act?

INTRODUCTION

Congress enacted the Fair Debt Collection Practices Act ("FDCPA") to stop abusive debt collection practices that contribute to invasions of individual privacy. *See* 15 U.S.C. § 1692(a). Here, Richard Hunstein has alleged that debt collector Preferred Collection & Management Services, Inc. ("Preferred") violated the FDCPA by improperly sharing his personal information, including sensitive medical information about his minor son, with a third party. A panel of this Court correctly held that Mr. Hunstein has alleged a concrete injury sufficient for Article III standing because he has alleged a harm that is closely related to an invasion of personal privacy, which was a valid basis for tort suits at common law.

The dissent to the panel decision misapplied the standard for Article III standing. Instead of assessing the nature of the harm and whether it has common law roots, the dissent looked at Mr. Hunstein's entire cause of action and asked whether he alleged facts that satisfy the elements of a common law tort. The dissent also failed to consider whether the alleged harm was similar in kind to a

harm recognized at common law and instead required the alleged harm to be similar in degree to a common law harm.

The dissent's approach strips Congress of its ability to identify a modern descendent of a harm with common law roots and enact laws that address that harm. The law of Article III standing was "built on separation-of-powers principles" and "serves to prevent the judicial process from being used to usurp the powers of the political branches." *Town of Chester, N.Y. v. Laroe Ests., Inc.*, 137 S. Ct. 1645, 1650 (2017). But the dissent's interpretation of Article III standing does the opposite. Because there is no legal right without a remedy, Judge Tjoflat's narrow interpretation of Article III standing limits the type of rights Congress can create. An interpretation of Article III standing that requires every statutory right to closely match the elements of a common law tort, or that requires there to be an analogous common law harm that is similar in *degree* and not just in *kind*, is overly restrictive of Congress' power to legislate. Such an approach enables courts to usurp legislative power and determine for themselves what legal rights Congress can and cannot recognize.

This Court should preserve the separation of powers and hold that a statutory harm that is similar in kind to a type of harm recognized at common law is a concrete injury for purposes of Article III standing. By alleging that a debt collector unlawfully shared his personal information with a third party, Mr.

Hunstein has alleged a harm similar in kind to the invasion-of-privacy harms that have long formed the basis of lawsuits in American courts.

ARGUMENT

I. The alleged disclosure of private information in violation of the FDCPA is a concrete injury that gives rise to Article III standing.

Mr. Hunstein has alleged a concrete injury sufficient to establish Article III standing. A plaintiff alleges a concrete injury when "the asserted harm has a 'close relationship' to a harm traditionally recognized as providing a basis for a lawsuit in American courts." *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2200 (2021). In making that determination, Congress' judgement is "instructive and important" because Congress "is well positioned to identify intangible harms that meet minimum Article III requirements." *Spokeo, Inc. v. Robins*, 578 U.S. 330, 341 (2016), *as revised* (May 24, 2016).

In this case, Mr. Hunstein alleges that Preferred disclosed his "highly personal" information, including his status as a debtor and the amount owed, as well as his son's name and "medical issues" in violation of § 1692c(b) of the FDCPA. Compl. ¶¶ 18, 23, 25-26. Congress enacted the FDCPA to "eliminate abusive debt collection practices" that, among other things, "contribute to . . . invasions of individual privacy." 15 U.S.C. § 1692(a); *see also Trichell v. Midland Credit Mgmt., Inc.*, 964 F.3d 990, 999 (11th Cir. 2020) (listing "invasions of individual privacy" as one of the "serious harms" enumerated in § 1692(a)).

Section 1692c(b) specifically aims to protect consumer privacy. It prohibits debt collectors from communicating with third parties about a consumer's debt. The restriction is meant to protect a consumer's right to privacy and was considered an "extremely important protection" by Congress. *See* S. Rep. No. 95-382, at 4 (1977), *reprinted in* 1977 U.S.C.C.A.N. 1695, 1699; *see also* 122 Cong. Rec. 22,499 (1976) (statement of Rep. Annunzio on H.R. 13720) ("The bill's controls on communications are quite reasonable and strike a fair balance between the debt collector's need to contact and the consumer's right to privacy and right to be free from harassment.").

The particular harm alleged here—the unauthorized disclosure of Mr. Hunstein's private information regarding his debt and son's medical condition—is the same kind of invasion-of-privacy harm that gave rise to tort actions at common law. For over a century, American courts have recognized that "one who invades the right of privacy of another is subject to liability for the resulting harm to the interests of the other." Restatement (Second) of Torts § 652A (1977). The Supreme Court has specifically identified "disclosure of private information" as well as "reputational harms" and "intrusion upon seclusion" as intangible yet concrete injuries "with a close relationship to harms traditionally recognized as providing a basis for lawsuits in American courts." *TransUnion*, 141 S. Ct. at 2204 (citing *Davis v. Federal Election Comm'n*, 554 U.S. 724, 733 (2008)).

At common law, these privacy harms were recognized as intrinsic harms, cognizable even when there was no pecuniary or physical injury. *See* Restatement (First) of Torts § 867 cmt. *d* (1939) (noting that damages are available for privacy torts "in the same way in which general damages are given for defamation," without proof of "pecuniary loss [or] physical harm"); *see also Parks v. IRS*, 618 F.2d 677, 683 (10th Cir. 1980); *Pichler v. UNITE*, 542 F.3d 380, 398–99 (3d Cir. 2008). The common-law action against unauthorized publication, for example, "does not turn upon the form or amount of mischief or advantage, loss or gain. The author of manuscripts . . . has a right to say . . . that whether interesting or dull, light or heavy, saleable or unsaleable, [his manuscripts] shall not, without his consent, be published." Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 Harv. L. Rev. 193, 199 n.6 (1890) (quoting Knight Bruce, V. C, in *Prince Albert* v. *Strange*, 2 DeGex & Sm. 652, 694). "With respect to intrinsic privacy harms, the detriment is the invasion itself, regardless of whether the intruder actually acts on that information." Bradley A. Areheart & Jessica L. Roberts, *GINA, Big Data, and the Future of Employee Privacy*, 128 Yale L.J. 710, 779 (2019).

Because the harm alleged here involves the disclosure of private facts to third parties and similar invasions of privacy were cognizable injuries at common law, Mr. Hunstein has alleged a concrete injury sufficient to establish Article III

standing. *See DiNaples v. MRS BPO, LLC*, 934 F.3d 275, 279-80 (3d Cir. 2019) (holding disclosure of consumer's account number through barcode is a concrete injury because it's closely related to common law invasion of privacy); *St. Pierre v. Retrieval-Masters Creditors Bur., Inc.*, 898 F.3d 351, 357-58 (3d Cir. 2018) (similar); *Thomas v. Unifin, Inc.*, 2021 WL 3709184, at *2 (N.D. Ill. Aug. 20, 2021) (post-*TransUnion* decision holding collector's disclosure of information about debt to third-party mailing vendor is concrete injury because of close relationship to common law tort of public disclosure of private facts); *Keller v. Northstar Location Servs.*, 2021 WL 3709183, at *2 (N.D. Ill. Aug. 20, 2021) (same).

In other words, "the statutory violation at issue" in Mr. Hunstein's complaint "led to a type of harm that has historically been recognized as actionable." *Muransky v. Godiva Chocolatier, Inc.*, 979 F.3d 917, 926 (11th Cir. 2020). This should be the end of the inquiry. "In looking to whether a plaintiff's asserted harm has a 'close relationship' to a harm traditionally recognized as providing a basis for a lawsuit in American courts, [courts] do not require an exact duplicate." *TransUnion*, 141 S. Ct. at 2204. It is enough that a violation of § 1692c(b) results in the same type of intangible yet concrete harm to privacy long recognized at common law. Thus, "both history and the judgment of Congress"

establish that the intangible privacy harm Mr. Hunstein alleged constitutes an injury in fact. *Spokeo*, 578 U.S. at 340.

II. Nothing in *TransUnion* requires plaintiffs to satisfy the elements of a common law cause of action.

Arguments that Mr. Hunstein's allegations do not satisfy the elements for a specific common law tort are misplaced. To establish Article III standing, plaintiffs need to establish an analogous common law harm, not an analogous common law tort. In his dissent, however, Judge Tjoflat laid out the elements for the tort of public disclosure of private facts and assessed whether Mr. Hunstein's allegations satisfied them. *See Hunstein v. Preferred Collection & Mgmt. Servs., Inc.*, 17 F.4th 1016, 1040-42 (11th Cir.) (Tjoflat, J., dissenting), *reh'g en banc granted, opinion vacated*, 17 F.4th 1103 (11th Cir. 2021). Judge Tjoflat found that Mr. Hunstein could not satisfy the first element of the tort, publicity, because Mr. Hunstein failed to allege that his private information was shared with "the public at large." *Id.* at 1041. Judge Tjoflat concluded that, therefore, there is no close relationship with a common law tort and thus no Article III standing. *Id.* That analysis is wrong for a few reasons.

A. *TransUnion* requires an analogous harm, not cause of action.

To establish Article III standing, plaintiffs are tasked with identifying a common law analogue for "the asserted *harm*" and not for the cause of action. *TransUnion*, 141 S. Ct. at 2200 (emphasis added). Judge Tjoflat failed to recognize

this distinction and focused on whether Mr. Hunstein's claim satisfied the elements of the common law tort. Defending this approach, he noted that the Supreme Court in *TransUnion* "carefully look[ed] at key elements of the tort." *Hunstein*, 17 F.4th at 1040 n.3 (Tjoflat, J., dissenting). The Supreme Court did consider that publication is essential to liability in a suit for defamation, *Transunion*, 141 S. Ct. at 2208-09, but that is because there is no type of defamatory harm whatsoever if false information about someone is never shared with anyone. There may be some elements of a tort that, if missing, mean the general type of harm that the tort addresses—like an invasion of privacy—never occurred. *See, e.g.*, *Muransky*, 979 F.3d at 931-32 (finding no breach-of-confidence type harm because information provided was never disclosed). But most elements of a tort define specific circumstances or causal chains, levels of culpability, or degrees of harm necessary to trigger liability. Those elements are not relevant to the Court's "simple instruction" in assessing Article III standing: to "see if a new harm is similar to an old harm." *Id.* at 931. Indeed, in *TransUnion*, the Court did not require that the information be false despite that being an element of defamation, *see* 141 S. Ct. at 2209, and did not even pay lip service to other elements of defamation—like "fault by the defendant amounting at least to negligence," *Echols v. Lawton*, 913 F.3d 1313, 1321 (11th Cir. 2019). A court's concreteness inquiry should be "focused on types of harms protected at common law, not the precise point at which those

harms become actionable." *Cranor v. 5 Star Nutrition, L.L.C.*, 998 F.3d 686, 693 (5th Cir. 2021).

Here, the harm Mr. Hunstein alleges is similar to the privacy harm that common law torts address. The common law tort of public disclosure of private facts is the most direct analogy, but the tort of intrusion upon seclusion also safeguards against unauthorized access to a person's private information and has no publicity requirement. *See* Restatement (Second) of Torts § 652B cmt. b. (1977) (stating tort applies to "form[s] of investigation or examination into [plaintiff's] private concerns"); *see also Miller v. Brooks*, 472 S.E.2d 350, 355 (N.C. Ct. App. 1996) (finding intrusion upon seclusion where defendant read plaintiff's mail); *Pemberton v. Bethlehem Steel Corp.*, 502 A.2d 1101, 1117 (Md. Ct. Spec. App. 1986) (finding intrusion upon seclusion for wiretapping).

Both torts—public disclosure of private facts and intrusion upon seclusion—protect against the same harm alleged by Mr. Hunstein: an invasion of privacy. The harm, in all circumstances, is "an affront to individual dignity." *Shulman v. Group W Prods., Inc.*, 955 P.2d 469, 489 (Cal. 1998). "The law recognizes that each person has an interest in keeping certain facets of personal life from exposure to others. This interest in 'privacy' is a distinct aspect of human dignity and moral autonomy." *Snakenberg v. Hartford Cas. Ins. Co.*, 383 S.E.2d 2, 5 (S.C. Ct. App. 1989).

Thus, in assessing Article III standing, courts should not ask if a plaintiff making a statutory claim satisfies the elements for a common law tort, but should instead ask if the harm that the statute addresses is similar to a harm that a common law tort addresses. And here, Mr. Hunstein has alleged a privacy harm similar to the privacy harm addressed by at least two common law torts.

B. *TransUnion* requires that the common law harm be similar in kind, not in degree.

Not only does *TransUnion* require nothing beyond a similar harm cognizable at common law, but that harm need only be similar in kind and not in degree. Now-Justice Barrett has explained that "when *Spokeo* instructs us to analogize to harms recognized by the common law, we are meant to look for a 'close relationship' in kind, not degree." *Gadelhak v. AT&T Servs., Inc.*, 950 F.3d 458, 462 (7th Cir. 2020) (Barrett, J.), *cert. denied*, 141 S. Ct. 2552 (2021) (cited favorably in *TransUnion*). For example, in a post-*TransUnion* decision, the Tenth Circuit held that a single debt collection phone call in violation of the FDCPA was a concrete injury because although it did "not intrude to the degree required at common law, that phone call poses the same *kind* of harm recognized at common law." *Lupia v. Medicredit, Inc.*, 8 F.4th 1184, 1192 (10th Cir. 2021). The court relied on *TransUnion* and its favorable citation of *Gadelhak* in determining that the harm must be similar in kind but not in degree. *See id.* at 1191-92.

This Court has likewise held that receipt of unwanted telephone calls constitutes a concrete injury because the harm is similar in kind to common law harms. *See Cordoba v. DIRECTV, LLC*, 942 F.3d 1259, 1270 (11th Cir. 2019). This Court reasoned that "Congress identified telemarketing as a potentially 'intrusive invasion of privacy,' suggesting . . . that Congress considered the receipt of an unwanted telemarketing call to be a real injury." *Id.* It further reasoned that "this harm bore a close relationship to *the kind of harm* that would have given rise to the common law cause of action of 'intrusion upon seclusion.'" *Id.* (emphasis added).

Finally, the Third Circuit has also recognized that the common law analogue need only be similar in kind, specifically in the context of disclosing private information. The court held that although the unauthorized dissemination of personal information in violation of the Fair Credit Reporting Act would not "give rise to a cause of action under common law," it still has a "close relationship" to common law privacy harms. *See In re Horizon Healthcare Servs. Inc. Data Breach Litig.*, 846 F.3d 625, 639 (3d Cir. 2017).

Judge Tjoflat's dissent fails to recognize the distinction between similar in kind and similar in degree. The dissent reasons that Mr. Hunstein failed to allege a concrete harm because he only alleged that his private information was shared with the mail vendor's employees, and the common law tort requires that the

information be shared with more people. But that is a different *degree* of harm, not a different *kind* of harm. At common law, invasions of privacy were considered intrinsic harms; there were damages regardless of the collateral consequences of the privacy invasion. *See supra* at 7. This means that there is an intrinsic harm when someone's private information is disclosed to even just one unauthorized person, much less 100 or 1,000 people. Because common law courts recognized an inherent harm from the disclosure of private facts, that type of harm exists regardless of the extent of the disclosure. Therefore, even if Mr. Hunstein failed to allege that his private information was disclosed to the public at large (which is disputed), he still alleged the same *kind* of intangible privacy harm that was legally cognizable at common law and therefore has alleged a concrete harm.

C. The dissent's interpretation of *TransUnion* muddles the separation of powers.

Requiring plaintiffs to show more than a similar-in-kind harm recognized at common law encroaches on Congress' power to legislate. A statutory right that cannot be enforced in court is no right at all. *See Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803) (holding that "where there is a legal right, there is also a legal remedy") (quoting 3 William Blackstone, Commentaries *23). Therefore, when courts narrow Article III standing, they are narrowing the type of statutory rights that Congress can create. If courts narrow Article III standing so that Congress can only create statutory rights that closely mirror the elements of common law causes of

action and address harms similar *in degree* to harms that were actionable at common law, then Congress' power to legislate will be significantly curtailed. Indeed, if Congress cannot create rights that reach beyond those recognized at common law, then Congress can't do its job.

For example, the right to privacy "is a principle as old as the common law; but it has been found necessary from time to time to define anew the exact nature and extent of such protection." Warren & Brandeis, *The Right to Privacy*, 4 Harv. L. Rev. at 193. Such expansion of legal rights "meet[s] the demands of society" in the face of "[p]olitical, social, and economic changes." *Id*. And members of Congress—not judges—are elected to make those determinations. It is Congress' job to define the exact nature and extent of our legal rights.

When courts assessing Article III standing require only a common law harm that is similar in kind, Congress' legislative power is preserved. Now-Justice Barrett explained it best:

> While the common law offers guidance, it does not stake out the limits of Congress's power to identify harms deserving a remedy. Congress's power is greater than that: it may 'elevate to the status of legally cognizable injuries concrete, *de facto* injuries that were previously inadequate in law.' A few unwanted automated text messages may be too minor an annoyance to be actionable at common law. But such texts nevertheless pose the same *kind* of harm that common law courts recognize—a concrete harm that Congress has chosen to make legally cognizable.

Gadelhak, 950 F.3d at 463 (citation omitted) (cited favorably in *TransUnion*).

In other words, the common law analogue requirement for Article III standing ensures that Congress does not use "its lawmaking power to transform something that is not remotely harmful into something that is." *TransUnion*, 141 S. Ct. at 2205. But the requirement should not be used by courts to cabin Congress' legislative power to create remedies that address harms similar in kind to harms cognizable at common law. If courts raise the standard for Article III standing and require plaintiffs to present analogous common law causes of action or common law harms that are more than just similar in kind to the statutory harm alleged, then courts will be engaged in highly subjective determinations that effectively dictate what laws Congress can and cannot make. Such an approach flies in the face of the separation of powers and threatens democratic values.

III. At minimum, this Court should remand for jurisdictional discovery.

Even if the degree to which Mr. Hunstein's private information was publicized matters (it doesn't), the proper course of action would be to remand the case for jurisdictional discovery. This case is only at the motion-to-dismiss stage, so Mr. Hunstein need only plausibly allege a harm with a "close relationship" to a harm traditionally recognized at common law. He has done just that, alleging that Preferred disclosed, without his consent, his status as a debtor, the amount allegedly owed, the fact that the debt concerned his son's medical treatment, his son's name, and other "highly personal pieces of information" including his son's

"medical issues." Compl. ¶¶ 18, 23, 25-26. He alleged that the information "would affect [his] reputation" and that it was disclosed to "the employees" of the third-party mail house. Compl. ¶¶ 32-33, 38.

This Court does not know the facts regarding the extent of the disclosure or the degree of reputational harm. It does not know the number of employees that received the information, the manner in which they received the information, or what policies or procedures were (or were not) in place to keep the information from being shared more widely. Mr. Hunstein has already alleged a concrete harm similar in kind to a common law harm. But if the degree of public disclosure were relevant to determining whether Mr. Hunstein suffered a harm similar to harms actionable at common law, then this Court should remand the case and allow discovery on the degree of the harm.

This case is not in the same procedural posture as *TransUnion*, which was decided in the context of post-trial litigation, after plaintiffs had ample opportunity to conduct discovery and present evidence at summary judgment and at trial. There, the Supreme Court concluded that certain class members had not suffered a defamation-type harm because they failed to *prove at trial* that their reports were actually sent to third-party businesses. *See* 141 S. Ct. at 2212. The Supreme Court also rejected the suggestion that those class members' information had been published internally or to mail vendors on the grounds that, first, that argument was

waived, and second, that argument "require[s] evidence that the document was actually read and not merely processed" and such "evidence is lacking here." *TransUnion*, 141 S. Ct. at 2210 n.6. In this case, Mr. Hunstein has not had the opportunity to present any such evidence regarding the nature or extent of the disclosure.

Thus, to the extent the degree or nature of the disclosure of private information affects this Court's determination as to whether Mr. Hunstein suffered a harm with a "close relationship" to a harm traditionally recognized at common law, this Court should remand this case and allow for limited jurisdictional discovery.

IV. This Court should not confuse Article III standing with the merits.

This Court should not allow its views on the merits of Mr. Hunstein's claim to influence its Article III standing analysis. This Court and the Supreme Court have repeatedly stressed that whether a plaintiff has stated a claim for relief or is ultimately able to prevail on the merits does not and cannot determine whether the Constitution gives federal courts jurisdiction to adjudicate that question. *See Bond v. United States*, 564 U.S. 211, 219 (2011) ("[T]he question whether a plaintiff states a claim for relief 'goes to the merits' in the typical case, not the justiciability of a dispute."); *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990) ("Our threshold inquiry into standing 'in no way depends on the merits of [plaintiff's] contention

that particular conduct is illegal'"); *Wooden v. Bd. of Regents of Univ. Sys. of Ga.*, 247 F.3d 1262, 1280 (11th Cir. 2001) ("[W]e cannot read the Court's jurisprudence as conflating the standing inquiry with resolution of the merits."); *see also Cottrell v. Alcon Labs.*, 874 F.3d 154, 166 (3d Cir. 2017) (starting from the premise the plaintiffs have no cause of action "flips the standing inquiry inside out").

Judge Tjoflat's dissent impermissibly conflated the merits with standing. The dissent expressly started from the premise that Congress did not intend to make the conduct alleged in Mr. Hunstein's complaint illegal. *See Hunstein*, 17 F.4th at 1040 (Tjoflat, J., dissenting) ("I start with the premise that the FDCPA did not mean to eliminate debt collection practices. It meant to eliminate *abusive* debt collection practices. And that difference should animate how we view standing in this case."). Judge Tjoflat went on to conclude, as part of his Article III standing analysis, that "simple transmission of information along a chain that involves one extra link because a company uses a mail vendor to send out the letters about debt is not a harm at which Congress was aiming." *Id.* at 1046.

But discerning whether Congress intended specific conduct to be unlawful is what statutory interpretation is for. Instead of assessing whether Congress intended the statute to address a harm similar in kind to harms that formed the basis of lawsuits at common law, Judge Tjoflat assessed whether Congress intended the statute to cover the specific conduct alleged. If the statute should not be read to

encompass the conduct alleged in Mr. Hunstein's complaint, then the proper course of action is to dismiss the complaint for failure to state a claim, not to dismiss it for lack of jurisdiction. In conducting the standing analysis, "the court must . . . assume that on the merits the plaintiffs would be successful in their claims." *Culverhouse v. Paulson & Co.*, 813 F.3d 991, 994 (11th Cir. 2016).

Drawing a clear line of demarcation between Article III standing and the merits is particularly important here where the merits question is exceptionally narrow and arises in a unique procedural posture. The defendant has waived arguments as to why its conduct may not be covered by the statute. For example, Judge Tjoflat suggested in a footnote that Preferred's transmission of Mr. Hunstein's personal information to the mail vendor was not a "communication" within the meaning of the statute because the mail vendor "is a medium, and not a person." *Hunstein*, 17 F.4th at 1042 n.6 (Tjoflat, J. dissenting). But Preferred waived this argument, "agree[ing] that [its] transmittal of Hunstein's personal information to [the mail vendor] constitutes a 'communication' within the meaning of the statute." *Id.* at 1033. Accordingly, "the sole question" is "whether Preferred's communication was 'in connection with the collection of any debt'" for which there are several specific exceptions, none of which apply here. *Id.*

To the extent this Court has concerns regarding the scope of § 1692c(b), it should not allay those concerns by cabining Article III standing and encroaching

on Congress' legislative prerogative. Because a Court assessing Article III standing must assume the plaintiff is right on the merits, this Court must assume that Congress intended to prohibit debt collectors from sharing information regarding the status of someone's debt and their son's medical conditions with a mail vendor. The Court then must ask whether that type of harm—having private facts about one's debt and son's medical condition disclosed—is similar in kind to a type of harm recognized at common law. The answer is undoubtedly yes.

CONCLUSION

For the reasons above, this Court should hold that Mr. Hunstein has alleged facts sufficient to establish Article III standing.

Dated: December 23, 2021

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on December 23, 2021, this amicus brief in support of plaintiff-appellant was served on all parties or their counsel through the CM/ECF system.

Dated: December 23, 2021

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CERTIFICATE OF COMPLIANCE

I certify that this motion to intervene complies with the type-volume limitation under Rule 29(a)(5) because this brief contains 5,017 words. This brief complies with the typeface and type style requirements because it has been prepared in Microsoft Word using 14-point Times New Roman font.

Dated: December 23, 2021

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