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
Case No. 8:19-cv-00983-TPB-TGW

MOTION OF PROPOSED AMICI CURIAE MORTGAGE BANKERS ASSOCIATION, AMERICAN BANKERS ASSOCIATION, AMERICAN FINANCIAL SERVICES ASSOCIATION, CONSUMER BANKERS ASSOCIATION, CREDIT UNION NATIONAL ASSOCIATION, AND HOUSING POLICY COUNCIL FOR LEAVE TO FILE BRIEF IN SUPPORT OF APPELLEE'S BRIEF TO THE EN BANC COURT

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January 18, 2022

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Amici Curiae Mortgage Bankers Association ("MBA"), American Bankers Association ("ABA"), American Financial Services Association ("AFSA"), Consumer Bankers Association ("CBA"), Credit Union National Association ("CUNA"), and Housing Policy Council ("HPC") each state that it is a non-profit corporation that has no parent corporation. No publicly held corporation owns 10% or more of the stock of any of the amici.

Pursuant to Eleventh Circuit Rule 26.1-2, counsel for amici curiae certify that the following is a complete list of all trial judges, attorneys, persons, associations of persons, firms, partnerships, or corporations that have an interest in the outcome of this case, including subsidiaries, conglomerates, affiliates, parent corporations, any publicly held corporation that owns 10% or more of the party's stock, and other identifiable legal entities related to a party:

American Bankers Association – Amicus Curiae

American Financial Services Association – Amicus Curiae

Barber, the Honorable Thomas – United States District Judge

Bonan, Thomas M. – Counsel for Appellant

Bradley Arant Boult Cummings LLP – Firm representing Amici Curiae

Chamber of Commerce of the United States – Amicus Curiae

Consumer Bankers Association – Amicus Curiae

Credit Union National Association– Amicus Curiae

Chastain, R. Aaron – Counsel for Amici Curiae

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Housing Policy Council– Amicus Curiae

Mortgage Bankers Association – Amicus Curiae

Parsley, Stephen C. – Counsel for Amici Curiae

Preferred Collection and Management, Inc. – Appellee

Skadden, Arps, Slate, Meagher & Flom LLP - Firm representing Appellee

Solomon, Ginsberg & Vigh, P.A. – Firm representing Appellee

Seraph Legal P.A. – Firm representing Appellant

Vigh, Robert A. – Counsel for Appellee

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MOTION TO FILE BRIEF IN SUPPORT OF APPELLEE'S BRIEF TO THE EN BANC COURT

The Mortgage Bankers Association, American Bankers Association, American Financial Services Association, Consumer Bankers Association, Credit Union National Association, and Housing Policy Council (together, "Financial Industry Amici") respectfully request leave to file the attached amicus curiae brief in support of Appellee's Brief to the En Banc Court.

The Financial Industry Amici are national trade associations that, together, represent thousands of institutions in the consumer credit, finance, banking, credit union, and mortgage sectors of the American economy. As explained in the attached amicus brief, appellant Richard Hunstein's position in this case threatens the functioning of debt collectors, mortgage servicers, and the broader financial services industry, as well as the many other sectors of the economy that depend upon access to financial services. As such, the Financial Industry Amici have an immediate and substantial interest in the legal issues presented in this appeal.

First, the Financial Industry Amici's proposed Brief addresses Hunstein's lack of standing under Article III. As the Supreme Court reaffirmed in its recent decision in *TransUnion LLC v. Ramirez*, in order for the federal courts to exercise subject-matter jurisdiction over a case, the plaintiff must demonstrate an injury that is both "concrete and particularized." 141 S. Ct. 2190, 2203 (2021). Requiring a "concrete and particularized" injury serves a critical function: when federal courts

"adjudicate hypothetical or abstract disputes," they intrude on the province of the Legislative and Executive Branches. *Id.*

Here, Hunstein has not demonstrated an injury in fact that would support standing. His complaint about the *private* disclosure of certain debt-related information from a debt collector to the debt collector's agent would not have been actionable under any of the analogous torts at common law designed to protect individuals' privacy. Without "a close relationship to harms traditionally recognized as providing a basis for lawsuits in American courts," *id.* at 2204, Hunstein's claimed injury is not concrete and thus is not a basis for asking the federal courts to exercise jurisdiction.

Hunstein's lack of an actual injury also reveals his misinterpretation of the statute on the merits. Hunstein proposes an expansive reading of 15 U.S.C. § 1692c(b) that would bar routine disclosures of debt-related information between a debt collector and its agent in a way never intended by Congress or the regulators charged with interpreting the Fair Debt Collection Practices Act ("FDCPA"). In addition to contravening congressional intent, ignoring the common law agency principles that inform the reading of the statute, and threatening severe adverse consequences for the financial services industry and for consumers, this interpretation of Section 1692b(c) runs afoul of the First Amendment. Under the interpretation advanced by Hunstein (which was adopted by the panel in its since-

vacated opinion), Section 1692c(b) is one of the broadest restrictions in the federal code, prohibiting a wide range of financial institutions from engaging in routine business communications with third parties "concern[ing]" or "with reference to" a debt. Panel Sub. Op. at 34 (quotation omitted). Yet as the panel conceded, this severe restriction on speech fails to accomplish any of the congressional goals behind the enactment of the FDCPA, as it does "not purchase much in the way of 'real' consumer privacy," and the consequences are not "particularly sensible or desirable." *Id.* at 42-43. Such a broad restriction on speech cannot withstand strict or intermediate scrutiny under the First Amendment. If it reaches the merits of this case, the Court should consider the significant constitutional implications of Hunstein's interpretation of Section 1692c(b) before adopting that reading as the law of the circuit.

For these reasons, the Financial Industry Amici respectfully request that the Court grant leave to file the proposed brief in support of the Appellee's Brief to the En Banc Court.

Respectfully submitted this 18th day of January, 2022.

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CERTIFICATE OF COMPLIANCE

1. I hereby certify that the foregoing motion complies with the type-volume limitation of Federal Rule of Appellate Procedure 27(d)(2)(A) because it contains 610 words.

2. I further certify that the foregoing motion complies with 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), made applicable to the motion by Federal Rule of Appellate Procedure 27(d)(1)(E), because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman.

Dated: January 18, 2022

s/ R. Aaron Chastain
Of Counsel

CERTIFICATE OF SERVICE

I hereby certify that on January 18, 2022, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Eleventh Circuit using the Appellate Electronic Filing system, which will provide electronic notice of such filing to all parties.

s/ R. Aaron Chastain
Of Counsel

No. 19-14434

United States Court of Appeals for the Eleventh Circuit

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Plaintiff - Appellant,

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MORTGAGE BANKERS ASSOCIATION, AMERICAN BANKERS ASSOCIATION, AMERICAN FINANCIAL SERVICES ASSOCIATION, CONSUMER BANKERS ASSOCIATION, CREDIT UNION NATIONAL ASSOCIATION, AND HOUSING POLICY COUNCIL
IN SUPPORT OF APPELLEE'S BRIEF TO THE EN BANC COURT

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Hunstein, Richard - Appellant

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Mortgage Bankers Association - Amicus Curiae

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Preferred Collection and Management, Inc. - Appellee

Skadden, Arps, Slate, Meagher & Flom LLP - Firm representing Appellee

Solomon, Ginsberg & Vigh, P.A. - Firm representing Appellee

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Statements Of Interest[1]

MBA is the national association representing the real estate finance industry, an industry that employs more than 390,000 people in virtually every community in the country. Its membership of more than 2,000 companies includes all elements of real estate finance: independent mortgage banks, mortgage brokers, commercial banks, thrifts, REITs, Wall Street conduits, life insurance companies, credit unions, and others in the mortgage lending field. For additional information, visit MBA's website: www.mba.org.

ABA is the principal national trade association of the financial services industry in the United States with members in all fifty states. For more information, visit https://www.aba.com/.

AFSA, founded in 1916, is the national trade association for the consumer credit industry, protecting access to credit and consumer choice. For more information, visit https://afsaonline.org/.

CBA is the only member-driven trade association focused exclusively on retail banking. CBA members operate in all 50 states, serve more than 150 million Americans, and hold two thirds of the country's total depository assets. For more information, visit https://www.consumerbankers.com/.

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[1] For clarity, the listed amici curiae are collectively called the "Financial Industry Amici."

CUNA is the largest trade association in the United States serving America's credit unions. For more information, visit https://www.cuna.org/.

HPC is a trade association comprised of the leading national mortgage lenders and servicers, mortgage and title insurers, and technology and data companies. For more information, visit www.housingpolicycouncil.org.

No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution to fund preparation or submission of this brief. No person other than foregoing amici curiae and their counsel made a monetary contribution to this brief's preparation or submission.

Statement Of The Issues

I. Whether the appeal should be dismissed for lack of subject-matter jurisdiction due to Hunstein's failure to allege a concrete injury for purposes of Article III?

II. In the alternative, whether the Court should adopt an interpretation of Section 1692c(b) that avoids rendering it unconstitutional under the First Amendment by imposing overly broad restrictions on the free speech rights of FDCPA "debt collectors" that are not the least restrictive means for achieving the congressional purpose behind the statute?

SUMMARY OF THE ARGUMENT

This is a case that presents two issues of critical importance to the financial services industry.

First, has Appellant Richard Hunstein ("Hunstein") established an injury in fact that would provide this Court with Article III jurisdiction by alleging a mere statutory violation of the Fair Debt Collection Practices ("FDCPA") that has no analog to a common law tort? The answer is no.

In *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190 (2021), the United States Supreme Court reaffirmed the rule stated in *Spokeo, Inc. v. Robins*, 578 U.S. 330 (2016), that in order to bring suit in federal court, a plaintiff must "allege an injury that is both concrete *and* particularized." *Id.* at 334 (emphasis in original) (internal quotation marks and citation omitted). Hunstein's complaint does not fit the bill. Hunstein brought this lawsuit challenging a *private* disclosure of information from Preferred Collection and Management Services (a "debt collector" under the FDCPA) to its agent CompuMail, the vendor hired to prepare a dunning letter. Hunstein suffered no sort of harm analogous to the common law torts of *public* disclosure of private facts. Without a harm that "has traditionally been regarded as providing a basis for lawsuit in English or American courts," *id*. at 341, Hunstein lacks an injury in fact, and this appeal should be dismissed for that reason.

Second, if the Court reaches the merits, then it must decide whether to adopt Hunstein's expansive reading of Section 1692c(b) as prohibiting all communications by a debt collector "with reference to" or "concern[ing]" a debt—including a private business communication between the debt collector and its agent. *See* Panel Sub. Op. at 34 (quotation omitted). Hunstein's expansive reading should be rejected, as it contravenes the congressional intent behind the enactment of the FDCPA, a contextual reading of the statute, and years of common law addressing principles of agency.

Moreover, Hunstein's reading of Section 1692c(b) would render the statute unconstitutional under the First Amendment. Under Hunstein's proposed reading—an interpretation adopted in the panel's since-vacated substitute opinion—Section 1692c(b) is a content-based regulation on speech that is not at all tailored, much less *narrowly* tailored, to achieve the stated congressional purpose behind the statute. As the panel expressly acknowledged in its substitute opinion, its reading does "not purchase much in the way of 'real' consumer privacy," and the consequences are not "particularly sensible or desirable." Panel Sub. Op. at 42-43. That speaks for itself: a statute that outlaws a wide swath of speech, without materially benefitting consumer privacy, is not narrowly tailored. This was not the congressional purpose behind the enactment of Section 1692c(b), and nothing in the statute compels such an inappropriately literal reading.

INTRODUCTION

FDCPA compliance issues demand the attention of a wide range of financial institutions that deal with many forms of consumer debt. That is true because the FDCPA does not just apply to third-party debt collection firms. The statute's broad definition of "debt collector" encompasses servicers of consumer and mortgage loans that do not acquire ownership of the underlying debt but acquire servicing rights after the loan is in default. *See* 15 U.S.C. § 1692a(6)(F). Mortgage servicing companies acquire servicing rights to portfolios of loans without acquiring ownership—and defaulted debt comprises some fraction of those portfolios, making those servicing companies FDCPA "debt collectors" for those loans. Moreover, some state laws take the FDCPA's substantive requirements and apply them to first-party creditors, a group that is not covered by the FDCPA.

The wide reach of the FDCPA means that an interpretation of the statute can have wide-ranging consequences. And here, Hunstein's expansive interpretation of Section 1692c(b) promises catastrophic consequences for consumers and communities. National loan servicers rely on vendors to perform difficult tasks associated with contacting consumers in delinquency or default. In large part, the vendor-performed tasks were designed with pro-consumer goals, such as preventing foreclosure, limiting property abandonment and blight, minimizing costs, and preventing lapses in tax payments and property insurance coverage.

Given the significant liability that can arise from the failure to pursue these goals in compliance with federal and state regulations, vendors' expertise in these areas is critical to servicers' operations.

Hunstein's reading of Section 1692c(b) throws all these well-established and reasonable business practices into doubt, as it jeopardizes the viability of the loan servicing industry's longstanding reliance on vendors to promote compliance with existing law. Loan servicers cannot adjust their use of vendors on a loan-by-loan basis; instead, the FDCPA imposes a regulatory floor that applies to the loan servicers' entire servicing portfolio. Practically speaking, that means for all consumer and mortgage loans, loan servicers will have to reconsider whether they can engage other parties such as housing counselors, tax-and-insurance monitoring services, and property maintenance companies without violating the FDCPA.

Hunstein's reading of Section 1692c(b) also harms consumers by increasing credit costs and restricting access to financing. Under Hunstein's interpretation, Section 1692c(b) severely restricts loan servicers' and debt collectors' ability to service loans and collect debts by prohibiting them from employing business partners and vendors. As the Federal Reserve Bank of New York explained, such restrictions on debt collection practices harm creditors and consumers—

particularly consumers who have the greatest need for credit. *See generally* Fed. Rsrv. Bank of N.Y., Staff Report No. 814 (May 2017).[2]

To the extent the *en banc* Court reaches the merits of this case, it should reject Hunstein's interpretation of Section 1692c(b). Instead, as argued by Preferred, the statute should be read in light of basic common law principles and context as not precluding the private communications between a debt collector and its agent. The fundamental principle of constitutional avoidance dictates that result. A contrary reading threatens severe consequences for both the financial services industry and consumers.

ARGUMENT

I. Hunstein Lacks Article III Standing to Pursue His FDCPA Claim.

This Court should dismiss the appeal and remand with instructions for the district court to dismiss the complaint. As this Court has long recognized, the existence of a "case or controversy" "implicates [this Court's] subject-matter jurisdiction," and thus must be addressed as a "threshold matter" in every case. *Nat'l Parks Conservation Ass'n v. Norton*, 324 F.3d 1229, 1242 (11th Cir. 2003). Hunstein cannot overcome that threshold hurdle here, so his case must be dismissed.

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[2] *Available at* https://www.newyorkfed.org/medialibrary/media/research/staff_reports/sr814.pdf (May 2017).

To establish Article III standing, "a plaintiff must show (i) that he suffered an injury in fact that is concrete, particularized, and actual or imminent; (ii) that the injury was likely caused by the defendant; and (iii) that the injury would likely be redressed by judicial relief." *TransUnion*, 141 S. Ct. at 2203 (citing *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61 (1992)).

Hunstein alleges that he has Article III standing because he suffered a concrete, intangible injury-in-fact as a result of Preferred's purported FDCPA violation. When evaluating Article III's concrete-harm requirement, the Supreme Court's opinion in *Spokeo*, 578 U.S. 330, instructs courts to "assess whether the alleged injury to the plaintiff has a 'close relationship' to a harm 'traditionally' recognized as providing a basis for a lawsuit in American courts." *TransUnion*, 141 S. Ct. at 2203 (quoting *Spokeo*, 578 U.S. at 341).

Here, Hunstein argues that Preferred's allegedly wrongful dissemination of his personal information to a letter vendor is analogous to the common law tort of public disclosure of private facts. The Supreme Court's recent decision in *TransUnion* undermines this argument. Furthermore, *TransUnion* is consistent with earlier Eleventh Circuit precedent, which similarly requires a closer fit between a common law tort and statutory violation than Hunstein has demonstrated here. Because Hunstein has not alleged anything more than a purported violation of

statute—rather than a concrete injury in fact—he does not have Article III standing.

A. *TransUnion* forecloses Hunstein's argument that he has established a concrete injury in fact.

TransUnion involved a class of over 8,000 individuals alleging that TransUnion, a credit reporting agency, violated the Fair Credit Reporting Act ("FCRA") by "fail[ing] to use reasonable procedures to ensure the accuracy of their credit files." *TransUnion*, 141 S. Ct. at 2200. In 2002, TransUnion began using an add-on product called the "OFAC Name Screen Alert." *Id.* at 2201. "OFAC" stands for the Treasury Department's "Office of Foreign Assets Control," which "maintains a list of specially designated nationals who threaten America's national security," including "terrorists, drug traffickers, or other serious criminals." *Id.* (internal quotation marks and citation omitted). The purpose of the add-on was to alert businesses if they were transacting with someone on the OFAC list, as doing so is generally unlawful. *Id*. TransUnion's system, however, had a notable flaw—it would flag individuals as a "potential match" based solely on whether their first and last names corresponded to a name on OFAC's list. *Id.* This led to thousands of false-positive identifications—named plaintiff Sergio Ramirez, for example, was erroneously flagged as a "potential match" when trying to purchase a car. *Id.*

After the plaintiffs obtained a favorable judgment in the trial court and the Ninth Circuit affirmed, the Supreme Court granted certiorari to decide whether the class had Article III standing. *Id.* at 2203. The crux of its analysis focused on whether the plaintiffs established an "injury in fact." *Id.* at 2204. In cases involving statutory violations, "[o]nly those plaintiffs who have been *concretely harmed* by a defendant's statutory violation may sue that private defendant over that violation in federal court"—a statutory violation alone is not a sufficient "injury in fact." *Id.* at 2205 (emphasis in original). Otherwise, "Congress could authorize virtually any citizen to bring a statutory damages suit against virtually any defendant who violated virtually any federal law," which "would flout constitutional text, history, and precedent." *Id.* at 2206.

To determine whether an individual has been "concretely harmed," the Supreme Court's decision in *Spokeo* instructs courts to use "history and tradition [as] a meaningful guide to the types of cases that Article III empowers federal courts to consider." *Id.* at 2204 (quotation omitted). Specifically, "courts should assess whether the alleged injury to the plaintiff has a 'close relationship' to a harm 'traditionally' recognized as providing a basis for a lawsuit in American courts"—in other words, "whether plaintiffs have identified a close historical or common-law analogue for their asserted injury." *Id.* Applying *Spokeo*'s standard in *TransUnion*, the Court noted that while "*Spokeo* does not require an exact

duplicate in American history and tradition," it "is not an open-ended invitation for federal courts to loosen Article III based on contemporary, evolving beliefs about what kinds of suits should be heard in federal courts." *Id.*

As relevant here, "plaintiffs argue[d] that the publication to a third party of a credit report bearing a misleading OFAC alert injure[d] the subject of the report" in a way that "b[ore] a 'close relationship' to a harm traditionally recognized as providing a basis for a lawsuit in American courts—namely, the reputational harm associated with the tort of defamation." *Id.* at 2208 (citing *Spokeo*, 578 U.S. at 341). The Court agreed as to the 1,853 class members who actually had inaccurate credit reports disseminated during the relevant time period. *Id.* at 2208-09. But as to the remaining class members, the court held that "the mere existence of a misleading OFAC alert in [their] internal credit file at TransUnion [did not] constitute[] a concrete injury." *Id.* at 2209. The basis of the tort of defamation focused on a "loss of credit or fame," which necessarily required a showing of "publication of the words." *Id.* (quotation omitted). Here, though, there was no "publication of the words," and "retention of information lawfully obtained, without further disclosure, traditionally has not provided the basis for a lawsuit in American courts." *Id.* Thus, the Court held that "the mere existence of inaccurate information in a database [wa]s insufficient to confer Article III standing." *Id.*

Plaintiffs tried to raise a new, alternative argument before the Supreme Court, "that TransUnion 'published' the class members' information internally—for example, to employees within TransUnion and to the vendors that printed and sent the mailings that the class members received." *Id.* at 2210 n.6. Although plaintiffs forfeited that argument by not raising it below, the Supreme Court specifically noted that the argument was unavailing. *Id.* The Court stated that "[m]any American courts did not traditionally recognize intra-company disclosures as actionable publications for purposes of the tort of defamation." *Id.* (collecting cases). And lower courts also have not "necessarily recognized *disclosures to printing vendors* as actionable publications." *Id.* (emphasis added) (collecting cases) (citing *Mack v. Delta Air Lines, Inc.*, 639 F. App'x 582, 586 (11th Cir. 2016)). The Court therefore concluded that "plaintiffs' internal publication theory circumvent[ed] a fundamental requirement of an ordinary defamation claim—publication—and d[id] not bear a sufficiently 'close relationship' to the traditional defamation tort to qualify for Article III standing." *Id.*

TransUnion dictates the proper standing analysis here. While Hunstein and the panel majority have tried to analogize Preferred's alleged FDCPA violation to the common law tort of "public disclosure of private facts," neither it nor any other common law tort provide a close enough fit for purposes of identifying a concrete injury in fact. As the Supreme Court noted in *TransUnion*, simply transmitting

information to a printing vendor is not an actionable "publication" under common law. *Id.* Thus, even attempting to analogize "public disclosure of private facts" to the alleged "public disclosure" to a letter vendor here is ill-fated, given that there plainly was nothing "public" in any reasonable sense of the word in the exchange.[3] *TransUnion* makes clear that Hunstein's alleged FDCPA violation would not be actionable under common law; therefore, he lacks Article III standing.

B. The Eleventh Circuit's decisions in *Trichell* and *Muransky* further confirm that Hunstein lacks standing.

Not only is Hunstein's argument foreclosed by *TransUnion*, but it also cannot be squared with Eleventh Circuit precedent. Indeed, *Trichell v. Midland Credit Management, Inc.*, 964 F.3d 990 (11th Cir. 2020), and *Muransky v. Godiva Chocolatier, Inc.*, 979 F.3d 917 (11th Cir. 2020) (*en banc*)—cited throughout Hunstein's opening brief—demonstrate that the Eleventh Circuit requires a closer connection between a statutory violation and common-law tort than Hunstein has demonstrated.

First, *Trichell*. There, plaintiffs pursued claims under the FDCPA based on their receipt of allegedly misleading debt-collection letters. 964 F.3d at 994. Notably, though, the plaintiffs did not allege that they were actually misled by the

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[3] *See* Panel Sub. Op., Dissent by Tjoflat, J. at p. 7. ("There was no publicity in this case. The only entity to which Preferred transmitted Hunstein's information was CompuMail. This certainly is not to the public at large.")

letters in any way, but rather "asserted only intangible injuries, in the form of [the] alleged [FDCPA] violations." *Id.* at 994, 997. To determine whether these intangible injuries were sufficiently concrete to support Article III standing, the court looked both to history and the judgment of Congress. The closest common law torts were fraudulent or negligent misrepresentation, but those torts required proof of justifiable reliance, which the *Trichell* plaintiffs could not establish. *Id.* at 998. As a result, this Court concluded that "the common law furnishe[d] no analog to the FDCPA claims asserted." *Id.* at 998. Thus, plaintiffs' claims did not satisfy Article III. *Id.* at 1004; *see also, e.g.*, *Nicklaw v. Citimortgage, Inc.*, 839 F.3d 998, 1003 (11th Cir. 2016) (holding that plaintiff failed to establish standing because he "allege[d] neither a harm nor a material risk of harm that the district court could remedy").

Hunstein's proposed analogy to the tort of public disclosure of private facts is inconsistent with this Court's analysis in *Trichell*. In *Trichell*, this Court rejected the plaintiffs' argument that the misrepresentation-based torts they invoked were analogous to the alleged FDCPA violations at issue, because they could not establish justifiable reliance. Likewise, here—as made clear by *TransUnion*—Preferred's alleged FDCPA violation is not analogous to a common law claim for "public disclosure of private facts," as Hunstein has not established any kind of

"public disclosure." Under *Trichell*'s analytical framework, his allegations cannot suffice as a basis for standing.

Next, *Muransky*. There, plaintiff filed a class action on behalf of customers who were given receipts that listed too many digits of their credit card numbers, in violation of the Fair and Accurate Credit Transactions Act ("FACTA"). 979 F.3d at 921-22. The key issue on appeal *en banc* was whether the class established a concrete injury in fact. *Id.* at 923-24. The court boiled down its concreteness analysis for statutory claims, as previously applied in *Nicklaw*, into a two-part test: (1) whether the violation caused harm to the plaintiff—tangible or intangible and (2) if not, whether the statutory violation posed a material risk of harm. *Id.* at 928.

The *Muransky* plaintiff argued that the FACTA violation at issue caused both direct harm and exposed the class to an increased risk of identity theft, but the *en banc* court rejected these arguments. *Id.* at 928-29. As relevant here, with respect to his "direct harm" argument, plaintiff alleged in part "that the mishandling of his account information [wa]s actionable because it b[ore] a close resemblance to a common-law breach of confidence." *Id.* at 929. This Court disagreed. First, it noted that the tort itself had a mixed pedigree and that "the parties dispute[d] whether a breach of confidence tort can fairly be said to have 'traditionally been regarded as providing a basis for a lawsuit in English or American courts.'" *Id.* at 931 (quoting *Spokeo*, 578 U.S. at 341). But even

assuming, *arguendo*, "that a breach of confidence was traditionally redressable," this Court was still "unpersuaded by its analogy to the facts of th[e] case." *Id.* at 931-32. Indeed, it emphasized that two elements of a breach of confidence claim—"disclosure to a third party" and a "confidential relationship"—were "completely absent from the violation" at issue. *Id.* at 932. "Because no information was disclosed, and no confidential relationship existed, the relationship between [defendant's] conduct and a breach of confidence [wa]s anything but 'close.'" *Id.* While "[t]he fit between a traditionally understood harm and a more recent statutory cause of action need not be perfect," this Court concluded that "the association . . . [wa]s too strained" to succeed. *Id.*

So too, here. Again, the key element of the common law tort of public disclosure of private facts is missing from Hunstein's allegations—namely, public disclosure. As in *Muransky*, *Trichell*, and *TransUnion*, the absence of key common law elements undermines Hunstein's standing argument. His allegations do not satisfy Article III, and his complaint should be dismissed for lack of jurisdiction.

II. Hunstein's Construction of Section 1692c(b) Renders it an Unconstitutional Limitation on Speech.

If the Court does decide that Hunstein's allegations satisfy the minimum requirements for a concrete injury establishing Article III standing, then it cannot adopt Hunstein's proposed interpretation of Section 1692c(b). Section 1692c(b) is

a content-based regulation on speech.[4] Supreme Court precedent makes it clear that content-based speech regulations—regardless whether the speech is commercial in nature, or even if it is related to debt collection—are subject to strict scrutiny review. The panel itself acknowledged, though, that Hunstein's reading of the statute imposes tremendous costs on entities governed by the FDCPA, without "purchas[ing] much in the way of 'real' consumer privacy." Panel Sub. Op. at 42. Such an imbalance plainly fails to satisfy the exacting strict scrutiny standard.

Instead, if this Court reviews the merits of the case, it should apply the alternative interpretation of the statute advanced by Preferred, which avoids both the extreme consequences of the panel's reading, as well as the First Amendment problem. The most reasonable approach to the statute is reading it under existing background principles of common law, which—as demonstrated in *TransUnion*—would not recognize an actionable tort based on exchanges of information between a principal and its agent.

[4] The panel accepted Preferred's concession that its exchange of information with CompuMail was a "communication" for the purposes of Section 1692c(b). *See* Panel Sub. Op. at 22. A later panel of this Court may need to decide whether a transfer of data that was probably never been seen by human eyes or understood by a person is, in fact, a "communication." But if such a data exchange qualifies as a "communication," then it must also be a form of speech protected by the First Amendment.

A. Strict scrutiny applies to content-based regulation of commercial speech.

Recent decisions from the United States Supreme Court and other circuits make it clear that content-based regulations of speech are subject to strict scrutiny review, even when the speech is commercial in nature.

In *Barr v. American Association of Political Consultants, Inc.*, 140 S. Ct. 2335 (2020), the Supreme Court applied strict scrutiny to a content-based speech restriction in the Telephone Consumer Protection Act. The Court held that the law was unconstitutional because it allowed robocalls made to collect debt owed to or backed by the federal government, while prohibiting other robocalls, which constituted a content-based restriction. 140 S. Ct. at 2346-47. The Court's application of strict scrutiny followed directly from its prior holding in *Reed v. Town of Gilbert*, 576 U.S. 155 (2015), that the government "has no power to restrict expression because of its message, its ideas, its subject matter, or its content" without regard to the commercial nature of the speech. *Id.* at 163.

Following *Reed* and *Barr*, the Third, Sixth, and Eighth Circuits have applied strict scrutiny to restrictions on commercial speech. *See, e.g.*, *Free Speech Coal., Inc. v. Att'y Gen. U.S.*, 825 F.3d 149, 159-64 (3d Cir. 2016) (holding that under *Reed*, restrictions on commercial pornography were content-based restrictions subject to strict scrutiny); *Int'l Outdoor, Inc., v. City of Troy*, 974 F.3d 690, 702-06, (6th Cir. 2020) (applying *Reed* and *Barr* to hold that strict scrutiny applies to

content-based speech restrictions, even when the speech is commercial in nature); *L.D. Mgmt. Co. v. Gray*, 988 F.3d 836, 838 (6th Cir. 2021) (holding that under *Reed*, strict scrutiny applied to Kentucky's attempt to enforce law prohibiting mobile billboard that advertised off-site activities); *Telescope Media Grp. v. Lucero*, 936 F.3d 740, 748-49, 754-58 (8th Cir. 2019) (citing *Reed* to hold that strict scrutiny applied to Minnesota's interpretation of antidiscrimination statute to compel videographers to produce videos for same-sex weddings that "depict same- and opposite-sex weddings in an equally 'positive' light").

Section 1692c(b) is a content-based speech restriction. As this Court has held, "[a] content-based law is one that 'applies to particular speech because of the topic discussed or the idea or message expressed.'" *Otto v. City of Boca Raton*, 981 F.3d 854, 862 (11th Cir. 2020) (quoting *Reed*, 576 U.S. at 163). The hallmark of a content-based speech restriction is that an enforcement authority "must 'examine the content of the message that is conveyed' to know whether the law has been violated." *Id.* (quoting *McCullen v. Coakley*, 573 U.S. 464, 479 (2014)).

Here, Section 1692c(b) is a restriction on speech based on "the content of the message that is conveyed." *Id.* A debt collector may "communicate" with a mailing and printing vendor about any number of subjects. It may discuss church, politics, family life, or college football—but, under Hunstein's interpretation, it may not broach any subject falling under the broad category of communications

"with reference to" or "concern[ing]" a debt. Panel Sub. Op. at 34 (quotation omitted). Stated another way, an "enforcement authorit[y]" (here, Hunstein, as the plaintiff under the private cause of action) must point to "the content of the message that is conveyed" in the communications between Preferred and CompuMail to have an actionable claim under Section 1692b(c). *Otto*, 981 F.3d at 862 (quotation omitted); *see also Barr*, 140 S. Ct. at 2346-47 (plurality opinion) (holding that provision in the TCPA that discriminated in favor of robocalls to collect government-held debt was a content-based restriction on speech subject to strict scrutiny; "A robocall that says, 'Please pay your government debt' is legal. A robocall that says, 'Please donate to our political campaign' is illegal. That is about as content-based as it gets."). Thus, the content of that communication triggers the statute's application—and with it, strict scrutiny under the First Amendment.

B. Hunstein's reading of Section 1692c(b) fails strict scrutiny review.

Hunstein's interpretation of Section 1692c(b) cannot pass constitutional muster under the strict scrutiny standard. When applying strict scrutiny, this Court must consider whether the law in question is "narrowly tailored to serve compelling state interests." *Otto*, 981 F.3d at 861-62 (quoting *Reed*, 576 U.S. at 163). "Laws or regulations almost never survive this demanding test," as "[f]orbidding the government from choosing favored and disfavored messages is at

the core of the First Amendment's free-speech guarantee." *Id.* at 862 (citing *Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 96 (1972)).

Even if Hunstein could show that his version of Section 1692c(b) serves a "compelling state interest" (which is doubtful), the panel's own analysis precludes a conclusion that the statute is "narrowly tailored" to achieve that interest. Congress enacted the FDCPA to "eliminate abusive debt collection practices by debt collectors." 15 U.S.C. § 1692(e). But Congress did not seek wholesale restrictions on the debt collection industry, recognizing that the majority of "independent debt collectors perform a valuable service." *The Debt Collection Practices Act: Hearing on H.R. 11969 Before the H. Subcomm. on Consumer Affairs*, 94th Cong. 26 (1976) (statement of Rep. Wylie). Instead, the FDCPA's prohibitions focused on the "unscrupulous debt collectors" who "comprise only a small segment of the industry." See S. Rep. No. 95-382, at 2 (1977), *as reprinted in* 1977 U.S.C.C.A.N. 1695, 1696.

One practice of these "unscrupulous debt collectors" was to contact "a consumer's friends, neighbors, relatives, or employer" in an effort to pressure the consumer to repay the debt. *Id.* at 2, 4. Believing that the use of these pressure "contacts are not legitimate collection practices and result in serious invasions of privacy, as well as the loss of jobs," Congress enacted Section 1692c(b) to protect

consumers from unwanted publicity, paralleling the rights afforded at common law through tort claims that protect an individual's privacy. *Id.* at 4.

Yet Hunstein's reading of the statute forbids the debt collector from exchanging information *with its own agent*—a communication that shares none of the characteristics of "publicity," the threshold requirement for an action at common law. *See* Panel Sub. Op., Dissent by Tjoflat, J. at p. 8 & n.5. The legislative history makes clear that this was not intended by the enacting Congress: a legitimate debt collector's business communications with its agents does not render it "unscrupulous," and restricting such communications does not afford a consumer any additional protections from serious violations of his privacy, such as having his "friends, neighbors, relatives, or employer," S. Rep. No. 95-382, at 4, receive collection calls and letters. Indeed, in the panel's own parlance, its reading does not "purchase much in the way of 'real' consumer privacy," Panel Sub. Op. at 42, notwithstanding the severe nature of the restrictions on speech. Plainly, such an expansive restriction on speech is not "narrowly tailored" to achieve the specific goals stated by Congress. By making it fail strict scrutiny review, Hunstein's proposed reading of Section 1692c(b) would render the statute unconstitutional.

C. Hunstein's reading of Section 1692c(b) would also fail intermediate scrutiny.

While strict scrutiny should apply to Hunstein's proffered understanding of Section 1692c(b), his reading would also render the statute unconstitutional under

intermediate scrutiny. At the very least, content-based restrictions on truthful commercial speech must serve a "substantial" governmental interest, "directly advance" that asserted interest, and be "narrowly drawn" to those goals. *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557, 564-65 (1980). In other words, there must be "a fit between the restriction and the government interest that is not necessarily perfect, but reasonable." *United States v. Edge Broad. Co.*, 509 U.S. 418, 429 (1993).

Congress enacted Section 1692c(b) with the purpose of protecting debtors from harassment by debt collectors' reaching out to debtors' "friends, neighbors, relatives, or employer." *See* S.Rep. No. 95-382, at 4. Hunstein's reading of Section 1692c(b) does not "directly advance" Congress's purpose in banning abusive "pressure contacts." Rather, it extends far beyond prohibiting abusive practices of contacting bystanders such as the "consumer's friends, neighbors, relatives, or employer." S. Rep. No. 95-382, at p.2. Eliminating routine, confidential business communications is not the "substantial" interest behind Section 1692c(b), and prohibiting those communications does nothing to prohibit abusive debt collection practices. *See ACA Int'l v. Healey*, 457 F. Supp. 3d 17, 24-33 (D. Mass. 2020) (holding that plaintiff was likely to prevail on First Amendment challenge to law prohibiting debt collectors from making collection calls to consumers).

For similar reasons, under Hunstein's reading, Section 1692c(b) is far "more extensive than necessary to serve," *Cent. Hudson*, 447 U.S. at 566, the congressional interest behind the FDCPA. Per Hunstein, Section 1692c(b) applies to all communications that, in any way, "concern[]" or are "with reference to" a debt, *see* Panel Sub. Op. at 34 (quotation omitted), and it prohibits such communications to *all* third parties, save six explicitly enumerated exceptions. By contrast, the Gramm-Leach-Bliley Act ("GLBA")—perhaps the broadest national privacy-focused law—only prohibits disclosing specific "nonpublic personal information," and it does not permit consumers to opt out of disclosures between the financial institution and contractual partners with a confidentiality agreement. *See* 12 C.F.R. §§ 1016.10, 1016.13. Similarly, the Health Information Portability and Accountability Act ("HIPAA") generally prohibits sharing of protected health information, but it contains numerous exceptions, including permitting communications with others for the purposes of treatment and payment. *See* 45 C.F.R. § 164.506. GLBA and HIPAA demonstrate that Congress and designated rulemaking agencies are capable of crafting speech restrictions that are not "more extensive than necessary to serve" Congress's goal of protecting privacy. Under Hunstein's interpretation, the expansive reach and limited exceptions to Section 1692c(b) fail to meet that standard.

Despite the broad scope of Section 1692c(b)'s speech restrictions under Hunstein's interpretation, that reading of the statute does almost nothing to protect consumers' privacy. Indeed, the panel conceded that its interpretation "may not purchase much in the way of 'real' consumer privacy," as "[i]t may well turn out . . . that the CompuMails of the world do not routinely read, care about, or abuse the information that debt collectors transmit to them." Panel Sub. Op. at 42. It also noted that the "resulting consequences" of its interpretation might not be "particularly sensible or desirable." *Id*. at 42-43. These observations reinforce that prohibiting a debt collector from communicating with vendors does not "directly" advance the interests behind Section 1692c(b) and is not "narrowly drawn" to those purposes. Thus, even under the intermediate scrutiny standard stated in *Central Hudson*, Hunstein's version of Section 1692c(b) cannot survive First Amendment review.

D. The Court should employ the constitutional doubt canon and adopt an interpretation of Section 1692c(b) that avoids rendering it unconstitutional.

Rather than adopt Hunstein's expansive and impermissible reading of the statute, this Court should employ the constitutional doubt canon and adopt the reading of Section 1692c(b) that avoids rendering it unconstitutional. *Gomez v. United States*, 490 U.S. 858, 864 (1989) ("It is our settled policy to avoid an interpretation of a federal statute that engenders constitutional issues if a

reasonable alternative interpretation poses no constitutional question."); *see also Equal Emp't Opp. Comm'n v. Sw. Baptist Theological Seminary*, 651 F.2d 277, 285 (5th Cir. 1981) (If a challenged interpretation of a law "'presents a significant risk that the First Amendment will be infringed,' any ambiguity in the statute is construed in a manner to avoid such constitutional problems." (quoting *NLRB v. Catholic Bishop of Chi.*, 440 U.S. 490, 502 (1979))).[5] Preferred advances precisely such a reasonable alternative interpretation: under general principles of agency and longstanding legal understanding, private communications with a debt collector's agent do not violate Section 1692c(b). This interpretation comports with common sense and a proper textualist reading of the law, as well as the fact that the CFPB—the agency charged with interpreting the FDCPA—has recognized that debt collectors frequently exchange information "with reference to" a debt with their agents.[6]

If the *en banc* Court reaches the merits of the case, now is the time to consider the issue. Adopting Hunstein's reading of the statute without First Amendment scrutiny removes the use of the constitutional avoidance canon as a

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[5] In *Bonner v. City of Prichard*, 661 F.2d 1206, 1207 (11th Cir. 1981), this Court adopted as binding precedent all decisions of the Fifth Circuit that were handed down before September 30, 1981.

[6] *See* Debt Collection Practices (Regulation F), 86 Fed. Reg. 5766, 5845 & n.446 (Jan. 19, 2021).

tool in the court's disposal. The district courts in this Circuit, as well as any future sitting panels of this Court, will be bound by this Court's decision. At that point, the only option would be declaring the statute itself unconstitutional. In the meantime, consumers and the financial industry alike will suffer from the harsh and ultimately detrimental results of Hunstein's proffered interpretation.

CONCLUSION

For the reasons stated above, the Financial Industry Amici request that the Court dismiss the appeal and remand with orders for the district court to dismiss the complaint for lack of Article III jurisdiction. In the alternative, Financial Industry Amici request that the Court affirm the district court's judgment by adopting an interpretation of Section 1692c that avoids rendering the statute unconstitutional.

Respectfully submitted this 18th day of January, 2022.

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1. This brief complies with the type-volume limitation of Federal Rules of Appellate Procedure 29(a)(5) and 32(a)(7)(B) because it contains 5,913 words, excluding the parts of the brief exempted by 11th Cir. R. 29-3.

2. This brief complies with the typeface requirements of 11th Cir. Rule 32-4 and Federal Rules of Appellate Procedure 32(a)(5) and 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman font.

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CERTIFICATE OF SERVICE

I hereby certify that on January 18, 2022, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Eleventh Circuit using the Appellate Electronic Filing system, which will provide electronic notice of such filing to all parties.

s/ R. Aaron Chastain
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