No. 19-14434

In the
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, No. 8:19-cv-00983-TPB-TGW,
Hon. Thomas P. Barber, *United States District Judge*

EN BANC BRIEF FOR PREFERRED COLLECTION AND MANAGEMENT SERVICES, INC.

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Preferred Collection and Management Services, Inc. (Preferred) discloses that it is a private, for-profit entity. Preferred has no parent company and there are no publicly held companies that have a 10 percent or greater ownership interest in Preferred.

Pursuant to Circuit Rule 26.1, Preferred certifies that, in addition to the persons and entities named in Richard Hunstein's certificate of interested persons, *see* Hunstein En Banc Br. C-1 to C-4, the following persons or entities have or may have an interest in the outcome of this case:

1. Auld, Sam, an attorney representing Preferred in this matter;
2. Blakely, Kyser, an attorney representing Preferred in this matter;
3. Khan, Hanaa, an attorney representing Preferred in this matter;
4. Preferred Collection and Management Services, Inc., Appellee;
5. Skadden, Arps, Slate, Meagher & Flom LLP and Affiliates, the law firm representing Preferred in this matter; and
6. Tsakos, Sylvia, an attorney representing Preferred in this matter.

STATEMENT REGARDING ORAL ARGUMENT

This case is calendared for oral argument before the en banc Court on February 22, 2022.

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STATEMENT OF SUBJECT-MATTER AND APPELLATE JURISDICTION

Hunstein invoked the district court's jurisdiction under 15 U.S.C. § 1692k(d) and 28 U.S.C. § 1331, and this Court's jurisdiction under 28 U.S.C. § 1291. On October 29, 2019, the district court granted Preferred's motion to dismiss Hunstein's complaint and closed the case. The district court's order is final and appealable, *see Supreme Fuels Trading FZE v. Sargeant*, 689 F.3d 1244, 1245-46 (11th Cir. 2012) (per curiam), and Hunstein timely filed a notice of appeal on November 11, 2019. But the Court must determine both its own jurisdiction and the district court's, *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 95 (1998), and under Article III there is no case or controversy. Hunstein lacks standing because he has alleged no concrete injury. *See TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2207 (2021); *Spokeo, Inc. v. Robins*, 578 U.S. 330, 338 (2016).

INTRODUCTION

Preferred Collection and Management Services, Inc. (Preferred) sent Richard Hunstein a letter asking him to pay an outstanding debt. As countless debt collectors have done for decades, Preferred turned to an agent, a letter vendor called CompuMail, to generate and mail the letter.

Hunstein responded by suing Preferred. Not because he disputed the debt. Not because Preferred or CompuMail did anything "abusive" by sending him a letter telling him that he owed money. Not because he thought Preferred had disclosed information about his debt to his family, friends, neighbors, or the community more broadly (Preferred hadn't). And not because Preferred invaded his privacy by learning anything about him that Preferred wasn't entitled to know. No, Hunstein sued Preferred simply because Preferred used an agent to generate and send out the letter. In Hunstein's view, that violated 15 U.S.C. § 1692c(b) of the Fair Debt Collection Practices Act (FDCPA). That provision generally prohibits debt collectors from communicating, "in connection with the collection of any debt, with any person other than the consumer"—or, as the section's heading puts it, with "third parties."

There are two related problems with Hunstein's theory: He lacks standing and the statute doesn't reach his complaint. To best understand this case—and because the standing inquiry includes looking to Congress' judgment—start with the statute. Congress enacted the FDCPA to address abusive conduct by debt collectors—things like "[d]isruptive dinnertime calls" and "downright deceit," *Henson v. Santander Consumer USA Inc.*, 137 S. Ct. 1718, 1720 (2017), that might contribute to "personal bankruptcies," "marital instability," "the loss of jobs," and "invasions of individual privacy," *Trichell v. Midland Credit Mgmt., Inc.*, 964 F.3d 990, 999 (11th Cir. 2020) (quoting 15 U.S.C. § 1692(a)). Congress did not mean to prohibit debt collectors from using agents like letter vendors. For one thing, using an agent is not an abusive practice. For another, Congress contemplated corporate debt collectors, which necessarily act through employees or other agents.

Under Hunstein's account, however, § 1692c(b) prohibits communications about a debt with *literally* "any person," with a few exceptions not relevant here. That makes no sense. If that reading were right, there could be no corporate debt collectors, because debt collectors would violate the

FDCPA every single time they communicated about a debt with any employee, independent contractor, or other agent—*i.e.*, the very people a corporation needs to do *anything*.

Fortunately, "the good textualist is not a literalist," Antonin Scalia, *A Matter of Interpretation* 24 (1997), and § 1692c(b) does not reach debt collectors' communications with their agents. Congress legislates against background legal rules, including the law of agency. And for more than a century, agency principles have made clear that an agent acts for and as its principal, and is not a third party. Thus, when a debt collector sends an agent information about a debt, there is no other "person" in the picture, and so no violation of § 1692c(b).

If any question remained, constitutional avoidance resolves it in Preferred's favor. Section 1692c(b) regulates speech based on its content because it targets debt collectors' communications about debts. It thus must satisfy strict scrutiny. As the Supreme Court recently demonstrated in *Barr v. American Ass'n of Political Consultants, Inc.*, 140 S. Ct. 2335 (2020) (*AAPC*), there is no exception to strict scrutiny for commercial speech. But § 1692c(b) cannot meet that test, because, as the panel here recognized, it often does little to protect debtors' privacy, including in this very case. The Court thus would

need to construe the statute to avoid those grave First Amendment concerns. In short, Hunstein could not state a claim even if he had standing.

Now for standing. Standing comes second in this initial telling because Hunstein relies entirely on his reading of § 1692c(b) to try to satisfy the requirement under Article III of the Constitution that he suffer a "concrete injury." *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2204-05 (2021). So it makes sense to see what Congress thought that injury might be—and it wasn't what Hunstein alleges, since Congress didn't think communicating with agents caused any harm. But the problem goes deeper still. When a plaintiff relies, as Hunstein does here, solely on an intangible statutory injury, the injury is "concrete" for standing purposes only if it has "a close relationship to harms traditionally recognized as providing a basis for lawsuits in American courts." *Id.* at 2204. And Hunstein cannot satisfy that test.

Hunstein claims that his injury under § 1692c(b) is just like the harms recognized by the common law torts of public disclosure of private facts and intrusion upon seclusion. Even leaving aside the recent development of those torts (they originated in an 1890 law review article), Hunstein is wrong at the most fundamental level, and the torts' names are the first clue. Hunstein alleges that Preferred disclosed his information privately to an agent,

not to *the public*. Yet *public disclosure*, to the community at large, is the tort's "key element[]." *Muransky v. Godiva Chocolatier, Inc.*, 979 F.3d 917, 932 (11th Cir. 2020) (en banc). And intrusion upon seclusion makes even less sense, because Hunstein has identified no intrusions into his privacy. In short, Hunstein's asserted intangible statutory harm is nothing like the kind of harms those torts historically are meant to address. As a result, Hunstein's alleged intangible statutory harm isn't a concrete harm and Hunstein lacks Article III standing.

STATEMENT OF ISSUES

1. Whether Hunstein failed to establish Article III standing by claiming only intangible statutory harm under 15 U.S.C. § 1692c(b) from Preferred's communication with a supposed third party.

2. Whether a debt collector may communicate about a debt with an agent, like a letter vendor, without violating 15 U.S.C. § 1692c(b)'s prohibition on communications with third parties.

PERTINENT CONSTITUTIONAL AND STATUTORY PROVISIONS

Relevant constitutional and statutory provisions are reproduced in the addendum bound with this brief.

STATEMENT OF THE CASE

A. Statutory background

Congress enacted the FDCPA "to eliminate abusive debt collection practices by debt collectors." 15 U.S.C. § 1692(e). To that end, § 1692c(b) generally prohibits debt collectors from communicating, "in connection with the collection of any debt, with any person other than the consumer." *Id.* § 1692c(b). Congress sought to protect debtors' privacy by preventing debt collectors from shaming debtors into repayment by informing members of a debtor's community, like "friends, neighbors, relatives, or employer[s]," about the debt. S. Rep. No. 95-382, at 4 (1977). But "the [FDCPA] is not aimed at … companies that perform ministerial duties for debt collectors, such as stuffing and printing the debt collector's letters." *White v. Goodman*, 200 F.3d 1016, 1019 (7th Cir. 2000). Instead, the FDCPA addresses tactics like "[d]isruptive dinnertime calls, downright deceit," and other "wayward collection practices." *Henson*, 137 S. Ct. at 1720.

B. Hunstein's allegations

Johns Hopkins All Children's Hospital treated Richard Hunstein's son. App. 11. The hospital transferred the balance insurance didn't cover to Preferred for collection. *Id.*

Preferred worked with its letter vendor, CompuMail, to mail Hunstein a debt-collection letter. *Id.* Preferred sent CompuMail information about (a) Hunstein's status as a debtor; (b) Hunstein's debt to the hospital; (c) the reason for the debt; (d) Hunstein's son's name; and (e) "other highly personal pieces of information." *Id.* CompuMail merged that information into a preexisting letter template, printed the letter, and mailed it to Hunstein. *Id.*; *see also* App. 18 (the letter).

C. Procedural background

1. Hunstein sued Preferred. App. 9-16. He claimed that when Preferred sent information about his debt to CompuMail, it violated the FDCPA and the similar Florida Consumer Collection Practices Act by "communicat[ing], in connection with the collection of any debt, with any person other than the consumer." 15 U.S.C. § 1692c(b); *see* App. 13-15.

2. The district court held that Hunstein failed to state an FDCPA claim. *See* App. 77-80. Reasoning that Hunstein did not plausibly allege that Preferred's "transfer of information to CompuMail" was a "communication in connection with the collection of a debt" under § 1692c(b), the court dismissed the FDCPA claim and declined to assert supplemental jurisdiction over the state-law claim. *See* App. 80-81.

3. Hunstein appealed, and a panel of this Court reversed. Original Op. (Apr. 21, 2021). Preferred sought rehearing, and while that request was pending, the Supreme Court decided *TransUnion*. The panel then issued an amended opinion reversing again. This time, Judge Tjoflat dissented. Amended Op. (Oct. 28, 2021).

a. The majority held that the alleged violation of § 1692c(b) was a concrete injury under Article III and that Preferred's transmittal of information to CompuMail was a "communication in connection with the collection of a debt." Amended Op. 3.

The panel majority first held that Hunstein pleaded a concrete injury by alleging "intangible injury" resulting from a violation of § 1692c(b). In its view, that statutory injury was analogous to the common-law tort of public disclosure of private facts. Amended Op. 9-11. Hunstein had alleged "*some* level of disclosure," the panel reasoned, by claiming that Preferred sent CompuMail "what he calls 'sensitive medical information'—including his minor son's name and prior medical treatment." Amended Op. 19. The panel rejected any requirement that the disclosure be *public*. *See* Amended Op. 20-21 n.7, 22 n.8. The panel also concluded that congressional judgment supported standing because the FDCPA was designed, in part, to protect against

"invasions of individual privacy." Amended Op. 30 (quoting 15 U.S.C. § 1692(a)).

Turning to the merits, the panel held that Hunstein stated a claim because he alleged that Preferred "communicate[d], in connection with the collection of [a] debt, with" CompuMail. Amended Op. 32 (quoting 15 U.S.C. § 1692c(b)). But the majority didn't confront whether § 1692c(b) permits debtors' communications with their agents, *see* ACA Int'l Amicus Br. 7-11, even though Hunstein had raised the question, Hunstein Original Br. 19; Hunstein Original Reply 14, 16-17. Instead, the majority, in its own words, "risk[ed] … upsetting the status quo in the debt-collection industry" and imposing "great cost[s]" on debt collectors by interpreting § 1692c(b) for the first time to reach communications with letter vendors. Amended Op. 42. The panel recognized that "those costs may not purchase much in the way of 'real' consumer privacy" and that vendors like CompuMail "do not routinely read, care about, or abuse the information that debt collectors transmit to them." *Id.* But the panel failed to address the grave First Amendment concerns attending statutes regulating speech. *See, e.g.*, Mortgage Bankers Ass'n Br. 13-16.

b. Judge Tjoflat dissented. In his view, Hunstein lacked standing and the majority had "ignore[d] what *TransUnion* requires a plaintiff to allege in the context of an intangible harm—facts that allow us to find a common-law analogue to the alleged statutory violation." Dissent 5. Hunstein's alleged injury lacked a close relationship to public disclosure of private facts because he met none of the tort's three elements. Dissent 6-9. In particular, although the crux of the tort is publicity, here "[t]here was no publicity" because "[t]he only entity to which Preferred transmitted Hunstein's information was CompuMail," which is completely unlike "the public at large." Dissent 7. Moreover, Judge Tjoflat explained, § 1692c(b) did not reflect any congressional effort to address the kind of harm Hunstein alleged. Dissent 17-18.

4. On November 17, 2021, the Court sua sponte ordered rehearing en banc, vacated the amended opinion, and ordered rebriefing.

STANDARD OF REVIEW

This Court reviews jurisdictional and statutory-interpretation questions de novo. *Muransky*, 979 F.3d at 923.

SUMMARY OF ARGUMENT

I. To establish that an injury is "concrete," as required for Article III standing to sue in federal court, Hunstein alleges only intangible statutory harm under 15 U.S.C. § 1692c(b). But such intangible harm is "real" or "concrete" only if it has "a close relationship to harms traditionally recognized as providing a basis for lawsuits in American courts," *TransUnion*, 141 S. Ct. at 2204, and Hunstein's asserted injury is unlike any historical or common-law analogue. Hunstein's alleged injury isn't like the harm recognized by the tort of public disclosure of private facts because, among other things, it lacks the defining characteristic of that tort—widespread disclosure *to the public*. Nor does Hunstein's alleged injury resemble intrusion upon seclusion—there is no intrusion here. Hunstein thus has not suffered an injury resembling a harm actionable historically or at common law. What's more, even Congress did not recognize the type of harm Hunstein complains of as an injury, because the statute permits debt collectors' communications with their agents. Hunstein has suffered no concrete injury and therefore lacks standing.

II. Because Hunstein lacks standing, the Court need not reach the merits. But § 1692c(b) does not prohibit debt collectors' communications with letter vendors like CompuMail. Indeed, properly construed, § 1692c(b)

proves both that Hunstein lacks standing and that he can't state a claim. Congress legislates against the backdrop of the common law and long-established legal principles, including the law of agency. And a debt collector's agents are not "third parties" under § 1692c(b). They act for the debt collector itself and are not a different "person" with whom the debt collector is communicating. Hunstein and the panel majority's literal (not textual) reading of "any person" wouldn't allow Preferred to communicate even with its own employees about a debt—even though, of course, a company cannot do *anything* without its employees or agents. What's more, that literal construction raises grave First Amendment concerns because § 1692c(b) regulates speech based on its content. In short, § 1692c(b) does not reach a debt collector's communications with its agents, so it doesn't reach Preferred's communications with CompuMail.

ARGUMENT

I. Hunstein lacks Article III standing because his alleged injury is unlike any harm recognized as actionable at common law.

To have standing, Hunstein must show (among other things) that he has suffered a concrete injury. But the only supposed injury Hunstein alleges

is that Preferred sent information about his debt to its letter vendor, Compu-Mail, which then sent him a debt-collection notice, allegedly in violation § 1692c(b). For such an alleged intangible injury to be concrete for standing purposes, the Supreme Court recently reemphasized in *TransUnion*, it must have a close relationship with a harm actionable historically or at common law. 141 S. Ct. at 2204. In Hunstein's view, his injury is just like the harms underlying the torts of public disclosure of private facts and intrusion upon seclusion. Hunstein is wrong.

Never mind that those torts are of recent vintage, growing (at least in any recognizable form) only out of an 1890 law review article. The crucial point is that nothing about Hunstein's alleged injury resembles the most essential elements of either tort. Public disclosure of private facts requires a communication "to the public at large," Restatement (Second) of Torts § 652D (1977), because it is focused on harm to an individual vis-à-vis his community. But Hunstein alleges that Preferred sent information about his debt only to its mail vendor, not to his community. And Hunstein's arguments about intrusion upon seclusion are more perplexing still, since he alleges no intrusion, the essence of the tort. The bottom line is that Hunstein's alleged injury "has [no] 'close relationship' to a harm 'traditionally'

recognized as providing a basis for a lawsuit in American courts." *TransUnion*, 141 S. Ct. at 2204 (citation omitted).

Although the standing inquiry could end there, congressional judgment provides still more evidence that Hunstein lacks standing. The FDCPA's statutory scheme makes clear that the statute was not meant to prohibit debt collectors from engaging run-of-the-mill vendors, like those who print and mail collection letters as debt collectors' agents.

A. To confer standing, an intangible statutory injury must have a close relationship with a harm actionable at common law.

1. "[U]nder Article III" of the Constitution, "a federal court may resolve only 'a real controversy with real impact on real persons.'" *TransUnion*, 141 S. Ct. at 2203 (quoting *American Legion v. American Humanist Ass'n*, 139 S. Ct. 2067, 2103 (2019)). Thus, a plaintiff must show standing to sue in federal court. *Id.* At the pleading stage, the plaintiff must allege facts demonstrating (1) injury in fact, (2) causation, and (3) redressability. *Spokeo, Inc. v. Robins*, 578 U.S. 330, 338 (2016). "To establish injury in fact, a plaintiff must show that he or she suffered 'an invasion of a legally protected interest' that is 'concrete and particularized' and 'actual or imminent, not conjectural or hypothetical.'" *Id.* at 339.

This case centers on the concrete-harm requirement. To be concrete, a harm must be "real, and not abstract." *TransUnion*, 141 S. Ct. at 2204 (citation omitted). Tangible harms, like "physical harms and monetary harms," "readily qualify as concrete injuries under Article III." *Id.* But the inquiry is different for intangible harms. As the Supreme Court instructed in *Spokeo* and recently reiterated in *TransUnion*, a plaintiff invoking an intangible harm to establish standing must show that the alleged injury "has a 'close relationship' to a harm 'traditionally' recognized as providing a basis for a lawsuit in American courts." *Id.* (quoting *Spokeo*, 578 U.S. at 341). This "close historical or common-law analogue" test "does not require an exact duplicate in American history and tradition." *Id.* But the overlap between the alleged harm and "the harm associated with [a common-law] tort" must be significant. *Id.* at 2209. The inquiry "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.*

Although "Congress's views may be 'instructive,'" "an injury in law is not an injury in fact." *Id.* at 2204-05 (quoting *Spokeo*, 578 U.S. at 341). Federal courts bear the ultimate "responsibility to independently decide whether a plaintiff has suffered a concrete harm under Article III" and "cannot treat an

injury as 'concrete' for Article III purposes based only on Congress's say-so." *Id*. at 2204-05 (quoting *Trichell*, 964 F.3d at 999 n.2). Otherwise, Congress could use "its lawmaking power to transform something that is not remotely harmful into something that is." *Id*. at 2205 (quoting *Hagy v. Demers & Adams*, 882 F.3d 616, 622 (6th Cir. 2018) (Sutton, J.)).

2. Both the Supreme Court and this Court have provided guidance on how to determine whether "the violation of a procedural right granted by statute" is sufficient "to constitute injury in fact." *Spokeo*, 578 U.S. at 342. The court must look to what was "essential to liability" under the supposedly analogous common-law tort, *TransUnion*, 141 S. Ct. at 2209 (quoting Restatement of Torts § 577, cmt. a (1938)), because the plaintiff's theory of harm may not "circumvent[] a fundamental requirement of an ordinary [common-law tort] claim," *id*. at 2210 n.6.

This Court's pre-*TransUnion* caselaw took the same approach. Indeed, the Supreme Court quoted *Trichell*, 964 F.3d 999 n.2, with approval. *TransUnion*, 141 S. Ct. at 2205. *Muransky* and *Trichell* ask if the alleged intangible statutory harm has the same "key elements," *Muransky*, 979 F.3d at 932, or "bedrock elements" as the common-law tort claimed to be analogous, *Trichell*, 964 F.3d at 998. Although "[t]he fit between a traditionally understood

harm and a more recent statutory cause of action need not be perfect, … the association" cannot be "too strained." *Muransky*, 979 F.3d at 932.

This "key elements" inquiry is not an "all elements" requirement because intangible statutory harms "need not actually have been actionable at common law." *Golan v. FreeEats.com, Inc.*, 930 F.3d 950, 958 (8th Cir. 2019). But the intangible statutory harm must still be the same *kind* of harm actionable at common law. *See Salcedo v. Hanna*, 936 F.3d 1162, 1171-73 (11th Cir. 2019). And the best way to assess similarity in kind is to ask whether the alleged intangible harm embodies the core of the common law tort—*i.e.*, its key or bedrock elements. *Muransky*, 979 F.3d at 932; *Trichell*, 964 F.3d at 998.

3. A few examples are instructive. In *TransUnion*, the Supreme Court held that class members had not suffered concrete injuries based solely on their claim that the defendant consumer reporting agency allegedly maintained inaccurate information in their internal credit files, in violation of the Fair Credit Reporting Act (FCRA). 141 S. Ct. at 2209-10 & n.6. The Court explained that "there is no historical or common-law analog where the mere existence of inaccurate information, absent dissemination, amounts to concrete injury." *Id.* at 2209 (citation and quotation marks omitted). To the contrary, "[p]ublication is 'essential to liability' in a suit for defamation," *id.*

(quoting Restatement of Torts § 577, cmt. a). Furthermore, "[m]any American courts did not traditionally recognize intra-company disclosures as actionable publications for purposes of the tort of defamation"; "[n]or have they necessarily recognized disclosures to printing vendors as actionable publications." *Id.* at 2210 n.6.

At the same time, the Court found that another group of class members had standing based on their allegations that their credit reports labeling them "potential terrorist[s]" were disclosed to third-party businesses. *Id.* at 2208-09. The Court reasoned that "the harm from a misleading statement of this kind bears a sufficiently close relationship to the harm from a false and defamatory statement"—that is, a statement that would subject someone "to hatred, contempt, or ridicule" when "published to a third party." *Id.*

Two of this Court's decisions provide further guidance. In *Muransky*, the en banc Court held that the plaintiff lacked standing to bring a claim under the Fair and Accurate Credit Transactions Act based solely on the allegation that Godiva gave him a printed receipt displaying the last four digits of his credit card number and the first six digits of his account number. 979 F.3d at 928-36. The Court rejected Muransky's argument that the bare

statutory harm of mishandling those digits was closely analogous to common-law breach of confidence. *Id.* at 931. After observing that breach of confidence is "a relative newcomer to the tort family" that may lack the necessary historical pedigree, *id.*, the Court found that Muransky's alleged harm was missing "[t]wo key elements of a breach of confidence," *id.* at 932. While breach of confidence "involves 'the unconsented, unprivileged disclosure to a third party of nonpublic information'" learned "within a confidential relationship," Muransky's asserted harm "share[d] very little with [that] definition" because he failed to allege a disclosure to a third party or a confidential relationship with Godiva. *Id.* The Court thus concluded that "the relationship between Godiva's conduct and a breach of confidence" was "anything but 'close.'" *Id.* Indeed, the Court lamented "the growing insistence on hammering square causes of action into round torts." *Id.* at 931.

Similarly, the Court in *Trichell* held that there was no common-law analogue to the plaintiffs' asserted intangible harm under the FDCPA. 964 F.3d at 998. Although the plaintiffs alleged that they had received misleading and unfair debt collection letters, they didn't allege that they had been misled. *Id.* at 994. "The closest historical comparison" was to the torts of fraudulent or

negligent misrepresentation. *Id.* at 998. But the plaintiffs' claims bore "no relationship to harms traditionally remediable in American or English courts" for those torts because the plaintiffs had "jettison[ed] the bedrock elements of reliance and damages." *Id.* To hold otherwise, the Court explained, would "depart dramatically from … centuries of tradition" by allowing the plaintiffs "to recover for representations that they contend were misleading or unfair, but without proving even that they relied on the representations, much less that the reliance caused them any damages"—fundamental characteristics of the torts. *Id.* So the plaintiffs' asserted intangible statutory injury could not confer Article III standing.

B. Hunstein has identified no historical or common-law analogue for his intangible statutory injury.

Hunstein alleges only bare statutory intangible harm from Preferred's disclosure of his information to CompuMail. App. 12-14. In Hunstein's view, the injury to his privacy from Preferred's disclosure of his information to CompuMail is analogous to the harms underlying public disclosure of private facts and intrusion upon seclusion. Hunstein En Banc Br. 11, 15-17. For their part, the Public Justice amici contend that the tort of intrusion upon seclusion also provides an adequate historical analogue. Public Justice Br.

11. But Hunstein's alleged injury bears no relationship to harms actionable under either of those torts. Hunstein alleges nothing resembling disclosure to the public at large, as required to come close to the tort of public disclosure of private facts. Nor does he allege any intrusion into his privacy, as required for intrusion upon seclusion.

A little context is helpful before turning to the torts individually. Both torts are "relative newcomer[s] to the tort family." *Muransky*, 979 F.3d at 931. They arise, along with two other privacy-centered torts, out of "a seminal Harvard Law Review article" published in 1890 by Samuel D. Warren and Louis D. Brandeis. *McSurely v. McClellan*, 753 F.2d 88, 110 (D.C. Cir. 1985) (citing Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 Harv. L. Rev. 193 (1890)). That article "laid the groundwork … for the development of a 'new' tort designed to protect individuals from unwarranted interference in their personal affairs." *Id.*

In the years that followed, most state courts accepted that violating someone's right to privacy could be actionable. *Id.* at 110–11; *see* William L. Prosser, *Privacy*, 48 Calif. L. Rev. 383, 386-88 (1960) (by 1960, majority of American courts recognized the right to privacy). Prosser's contribution was suggesting in 1960 that the right to privacy comprises four distinct torts:

(1) "[i]ntrusion upon the plaintiff's seclusion or solitude, or into his private affairs"; (2) "[p]ublic disclosure of embarrassing private facts about the plaintiff"; (3) "[p]ublicity which places the plaintiff in a false light in the public eye"; and (4) "[a]ppropriation, for the defendant's advantage, of the plaintiff's name or likeness." Prosser, *supra*, at 389.

To be sure, just as in *Muransky*, this Court "need not resolve whether [these privacy torts are] sufficiently ancient" to qualify as historical or common-law analogues for Article III purposes. 979 F.3d at 931. But the proper temporal frame underscores that there is no fundamental common-law right to privacy lurking beneath Hunstein and Public Justice's claimed analogues. And, as explained below, Hunstein's alleged bare statutory injury differs fundamentally from the harms actionable as public disclosure of private facts or intrusion upon seclusion.

1. Hunstein's alleged intangible injury under § 1692c(b) is not analogous to public disclosure of private facts.

Hunstein's alleged intangible injury under § 1692c(b) does not resemble the harm underlying the tort of public disclosure of private facts. The key point is that the tort requires *publicity*, which means what it sounds like—disclosure to the community or public at large. But here Hunstein alleges

only that Preferred disclosed his information to CompuMail. And it doesn't matter—despite the absence of any plausible allegations about individuals who may have learned the information—whether one CompuMail employee or 500 learned of the information, because CompuMail isn't the public or the community.

a. Start with the essence of the tort and its elements. *Public* disclosure of private information has always been the essence of the tort. Courts thus require a plaintiff to prove four elements to prevail on a claim for public disclosure of private facts: "1) the publication, 2) of private facts, 3) that are offensive, and 4) are not of public concern." *Cape Publ'ns, Inc. v. Hitchner*, 549 So. 2d 1374, 1377 (Fla. 1989) (citing Restatement (Second) of Torts § 652D).

Publicity. The very "crux" of public disclosure of private facts, and its lead element, "is publicity. Without it there is no actionable wrong." *Vogel v. W. T. Grant Co.*, 327 A.2d 133, 136 (Pa. 1974). As the Restatement puts it, the tort "depends upon publicity given to the private life of the individual." Restatement (Second) of Torts § 652D. Publicity requires disclosure "to the public at large, or to so many persons that the matter must be regarded as substantially certain to become one of public knowledge." 77 C.J.S. *Right of Privacy and Publicity* § 32 (2021). Communication merely "to a third person"

does not suffice. Restatement (Second) of Torts § 652D; *accord, e.g.*, *Hickson v. Home Fed. of Atlanta*, 805 F. Supp. 1567, 1575 (N.D. Ga. 1992), *aff'd*, 14 F.3d 59 (11th Cir. 1994); *Tureen v. Equifax, Inc.*, 571 F.2d 411, 417 (8th Cir. 1978). The communication must reach, or be "sure to reach, the public." *Tureen*, 571 F.2d at 417.

Numerous decisions confirm that publicity, also called publication, is "the essential element" of the tort. *Id.* After the Supreme Court of Georgia's seminal decision in *Pavesich v. New England Life Insurance Co.*, 50 S.E. 68 (Ga. 1905), most state courts focused primarily on whether the plaintiff had proven that the defendant had publicized closely held facts to the public at large. *See, e.g.*, *id*. at 80-81 ("the publication of one's picture without his consent by another as an advertisement" to the public violated right of privacy); *McCormack v. Oklahoma Publ'g Co.*, 613 P.2d 737, 739-40 (Okla. 1980) (publicity satisfied where newspaper accused plaintiff of being a gambler, illegally operating a casino, and being identified as associated with organized crime); *Lewis v. Physicians & Dentists Credit Bureau*, 177 P.2d 896, 899 (Wash. 1947) ("While recovery has been permitted (and likewise refused) for the giving of 'undue or oppressive publicity' to private debts, in most instances it has been because of a conspicuous posting, or publication in a newspaper."); *Mason*

v. Williams Disc. Ctr., Inc., 639 S.W.2d 836, 837 (Mo. Ct. App. 1982) (retail store "published to its customers passing through its checkout lane" that plaintiffs would write bad checks); *Melvin v. Reid*, 297 P. 91, 93 (Cal. Dist. Ct. App. 1931) ("The right of privacy can only be violated by printings, writings, pictures, or other permanent publications or reproductions, and not by word of mouth.").

The no publicity, no harm rule applies equally in the debt-collection context, requiring the plaintiff to show that a communication about a debt reached or is sure to reach the public. For instance, disclosure could be public where a creditor placed a large sign in his shop window, for all passersby to see, advertising that the plaintiff owed him money. *Brents v. Morgan*, 299 S.W. 967, 968, 971 (Ky. 1927); Prosser, *supra*, at 393-94. But the mere disclosure of a debt to another person or entity is not a cognizable harm. Indeed, that principle is so well established that the Restatement provides it as a *non-example* of invasion of privacy: where "A, a creditor, writes a letter to the employer of B, his debtor, informing him that B owes the debt and will not pay it," "[t]his is not an invasion of B's privacy." Restatement (Second) of Torts § 652D. To take one notable example, in *Patton v. Jacobs*, 78 N.E.2d 789, 791-92 (Ind. Ct. App. 1948), the court held that a plaintiff could not recover

for invasion of privacy where a debt collector sent letters to the plaintiff's employer asking for assistance in recovering a debt, even though "numerous … employees" read the letters. The court added that the mere "fact that in the usual course of business the communication may pass through the hands of clerks or stenographers, whether in the employ of the writer or the addressee, does not alter the rule." *Id.* at 792.

Importantly, "publicity" or "publication" in the context of public disclosure of private facts is very different from the concept of "publication" for defamation purposes. Restatement (Second) of Torts § 652D, cmt. a. Defamation reaches only *false* disclosures, and publication there "is a word of art, which includes *any* communication by the defendant to a third person." *Id.* (emphasis added). The different scope is understandable because providing false information to a single third party can "harm the reputation of another" or "deter [the] third person[] from associating or dealing with him." *Id.* § 559. By contrast, the "common law refused to recognize that any unjustified harm could flow from derogatory statements that were true" unless they were "highly embarrassing" and harmed the plaintiff's reputation by reaching the community at-large. *Doe v. Methodist Hosp.*, 690 N.E.2d 681, 687 (Ind. 1997). In any event, even defamatory publication has its limits: "Many American

courts did not traditionally recognize intra-company disclosures" or "disclosures to printing vendors" "as actionable publications for purposes of the tort of defamation." *TransUnion*, 141 S. Ct. at 2210 n.6.

Highly offensive to a reasonable person. Publicizing private facts is not enough if it would not be "highly offensive to a reasonable person." *See, e.g.*, *Stoddard v. Wohlfahrt*, 573 So. 2d 1060, 1062-63 (Fla. 5th Dist. Ct. App. 1991), *dismissed*, 581 So. 2d 1310 (Fla. 1991). As particularly relevant here, courts routinely hold that disclosing account information to a few people does not qualify as highly offensive. *See, e.g.*, *Malverty v. Equifax Info. Servs., LLC*, 407 F. Supp. 3d 1257, 1267 (M.D. Fla. 2019). And debt notifications to third parties, such as employers or telegraph company employees, are not considered highly offensive to a reasonable person. *See, e.g.*, *Housh v. Peth*, 133 N.E.2d 340, 344 (Ohio 1956) ("Simply informing the debtor's employer of the fact that the debt is owed, of itself, would not constitute an invasion of the right."), *affirming* 135 N.E.2d 440 (Ohio Ct. App. 1955); *Davis v. General Fin. & Thrift Corp.*, 57 S.E.2d 225, 226-27 (Ga. Ct. App. 1950) (no violation of privacy where telegraph company employees read and transmitted a telegraph threatening legal action for failure to pay outstanding debt).

Matter of legitimate public concern. Finally, the publicity is actionable only if the matter publicized is not one of "legitimate public concern." Restatement (Second) of Torts § 652D cmt. d. Matters of legitimate public concern include not only current events and other information that is considered newsworthy, but also "the use of names, likenesses or facts in giving information to the public for purposes of education, amusement or enlightenment." *Id.* § 652D cmt. j. As Judge Tjoflat explained, however, when a matter isn't even disclosed to the public, asking whether it is of public concern is "nonsensical." Dissent 13.

b. The origins, history, and purposes of the public-disclosure tort likewise highlight the importance of publicity. As noted, the tort traces back to Warren and Brandeis' 1890 article, which focused on a concern that newspapers were improperly inquiring into people's private lives. *See* Warren & Brandeis, *supra*, at 195-96; Diane L. Zimmerman, *Requiem for A Heavyweight: A Farewell to Warren and Brandeis's Privacy Tort*, 68 Cornell L. Rev. 291, 321-22 (1983). Since then, most states—but not all—have come to recognize public disclosure of private facts as tortious. Restatement (Second) of Torts § 652. *But see Messenger ex rel. Messenger v. Gruner + Jahr Printing & Pub.*, 727 N.E.2d 549, 551 (N.Y. 2000) (not recognizing a common-law right of privacy). And

the defining characteristic of the tort has remained widespread public disclosure. That essential element reflects the two types of harm the tort is meant to remedy. *First*, "the primary harm that can result from a public disclosure of private facts is an injury to a person's reputation," *Methodist Hosp.*, 690 N.E.2d at 686, because "[e]very individual has some phases of his life … that he does not expose to the public eye," Restatement (Second) of Torts § 652D cmt. b; *see id.* § 652H cmt. a. *Second*, the tort aims to address emotional distress. Prosser, *supra*, at 398. Courts have recognized that widespread disclosure of highly personal facts may inflict emotional distress, but that more limited disclosures do not. *See id.*

Because plaintiffs can seldom show that defendants disclosed details of their private life to the community, public-disclosure-of-private-facts claims rarely succeed. *Methodist Hosp.*, 690 N.E.2d at 692. And even in those rare instances in which plaintiffs can show publicity, few disclosures are "likely to cause shock, offense, or emotional distress" in the "age of talk shows, tabloids, and twelve-step programs." *Id.* What's more, courts have recognized that truthful disclosures are often protected by the First Amendment. *See, e.g.*, *The Florida Star v. B.J.F.*, 491 U.S. 524, 533 (1989). Thus, even in the few instances in which widespread disclosure causes harm, First

Amendment values usually make the tort of public disclosure of private facts unavailable in all but the most extraordinary case.

c. Hunstein's alleged injury under § 1692c(b) is unlike the harm actionable as public disclosure of private facts. Indeed, Hunstein's alleged injury illustrates the kind of scenario that the tort would *never* capture because alleged injury fails to meet the "bedrock element[]"of publicity. *Trichell*, 964 F.3d at 998. Hunstein alleges only private disclosure of his account information to CompuMail and concedes "that the information is not generally available to the public." Hunstein En Banc Br. 15. And even assuming CompuMail employees read Hunstein's information—which Hunstein doesn't allege—CompuMail and its employees are not the public. *See supra* pp. 23-28. Nor does Hunstein suggest that the alleged disclosure makes it "substantially certain" that his information will become "public knowledge." 77 C.J.S. *Right of Privacy and Publicity* § 32. Given the lack of publicity, Hunstein's alleged injury is completely unlike the reputational and emotional harms the public-disclosure tort is meant to address. *See Methodist Hosp.*, 690 N.E.2d at 686. Both of those harms result only from the

wide dissemination of private facts. Hunstein cannot show that here, no matter how many people CompuMail employs or how many of its employees may have handled Hunstein's letter.

TransUnion poses an insuperable barrier for these same reasons. *TransUnion* made clear that publishing credit files "internally" to TransUnion employees "and to the vendors that printed and sent the mailings that the class members received," was the kind of "intra-company disclosure[]" that American courts traditionally did not recognize "as actionable publications for purposes of the tort of defamation," and "disclosures to printing vendors" are of the same ilk, 141 S. Ct. at 2210 n.6. Preferred's alleged disclosure to its vendor can't meet defamation's publication standard, much less the more demanding standard for publicity under the tort of public disclosure of private facts.

Even worse, Hunstein's alleged injury doesn't come close to satisfying the other elements of public disclosure of private facts either. As explained, disclosure of account information is not considered highly offensive. *Supra* p. 28. And as Judge Tjoflat recognized, "trying to apply the third element, whether the matter is of legitimate public concern, is nonsensical because the public does not know anything about Hunstein's debt." Dissent 13. Hunstein

is trying to "hammer[] [a] square cause[] of action into [a] round tort[]." *Muransky*, 979 F.3d at 931.

2. The intangible injury under § 1692c(b) is not closely analogous to intrusion upon seclusion.

The Public Justice amici contend that the intangible harm Hunstein alleges under § 1692c(b) is analogous to the tort of intrusion upon seclusion. That argument is also wrong.

a. Once again, the tort's name is a giveaway. Intrusion upon seclusion requires a plaintiff to prove (1) an "intentional[] intru[sion], physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns," that (2) "would be highly offensive to a reasonable person." Restatement (Second) of Torts § 652B. "The intrusion itself makes the defendant subject to liability, even though there is no publication or other use of any kind of the photograph or information outlined." *Id.* cmt. b; *accord, e.g.*, *Roach v. Harper*, 105 S.E.2d 564, 568 (W. Va. 1958).

Intrusion. "A person intrudes by thrusting himself or herself in without invitation, permission, or welcome." *Mauri v. Smith*, 929 P.2d 307, 311 (Ore. 1996). The intrusion must constitute an "intentional interference" with the plaintiff's "person or as to his private affairs or concerns." Restatement

(Second) of Torts § 652B cmt. a. Generally, an intrusion involves "gathering … private facts or information through improper means." *Nader v. General Motors Corp.*, 255 N.E.2d 765, 769 (N.Y. 1970); *see Shulman v. Group W Prods., Inc.*, 955 P.2d 469, 490 (Cal. 1998) (defendant must have "penetrated some zone of physical or sensory privacy surrounding, or obtained unwanted access to data about, the plaintiff"). Thus, while unauthorized eavesdropping or wiretapping may be actionable, interviewing someone's acquaintances to learn information about the individual likely will not be. *See Nader*, 255 N.E.2d at 770-71. And disseminating information, without more, is not an intrusion. For example, the court in in *Cumberland Contractors, Inc. v. State Bank & Trust Co.*, 755 S.E.2d 511, 517-18 (Ga. Ct. App. 2014), held that publishing plaintiffs' social security numbers in a court filing, without any kind of intrusion into the plaintiffs' affairs, did not give rise to a cause of action.

Highly offensive conduct. The tort also requires the intrusion to be "of a kind that would be highly offensive to the ordinary reasonable man." Restatement (Second) of Torts § 652B cmt. d. "[S]erious annoy[ance]" doesn't cut it. *See id.* cmt. d. illus. 8. Instead, the intrusion must "outrage or cause mental suffering, shame or humiliation to a person of ordinary sensibilities."

Froelich v. Werbin, 548 P.2d 482, 485 (Kan. 1976). This requirement means "that a plaintiff might be able to establish standing where an intrusion on his privacy is objectively serious and universally condemnable." *Salcedo*, 936 F.3d at 1171.

b. The origin of intrusion upon seclusion again shows the tort's essential and limited scope. The tort requires "a direct intrusion into another person's private affairs," *Hogin v. Cottingham*, 533 So. 2d 525, 529 (Ala. 1988); its "focus is the right of a private person to be free from public gaze," *Allstate Ins. Co. v. Ginsberg*, 863 So. 2d 156, 162 (Fla. 2003). The tort ultimately traces back to pre-1890 precursors requiring a physical intrusion into a private space and thus overlapping "to a considerable extent" with trespass. Prosser, *supra*, at 389-90 (citing cases).

In *DeMay v. Roberts*, 9 N.W. 146, 146-49 (Mich. 1881), for example, the court recognized a cause of action where the defendant, who was not a medical professional, accompanied a doctor to the plaintiff's bedroom while she was giving birth and the plaintiff had no reason to believe the defendant wasn't a medical professional. Other early cases, recognizing "the gravity of a stranger invading and destroying the privacy and sacredness of the home," likewise found defendants liable for physical intrusions into private spaces.

Welsh v. Pritchard, 241 P.2d 816, 817, 819, 821 (Mont. 1952) (landlords' unlawful entry into lessees' home); *see also, e.g.*, *Newcomb Hotel Co. v. Corbett*, 108 S.E. 309, 309-10 (Ga. Ct. App. 1921) (hotel employees and police officer entered guest's room at night without reason to believe anything "improper" was occurring inside); *Thompson v. City of Jacksonville*, 130 So. 2d 105, 107-08 (Fla. Dist. Ct. App. 1961) (police officers broke into home); *Byfield v. Candler*, 125 S.E. 905, 906 (Ga. Ct. App. 1924) (entering into private room on ship for "improper purpose").

Eventually, the tort extended beyond physical invasions to include eavesdropping or wiretapping, "peeping Tom" scenarios, *Hamberger v. Eastman*, 206 A.2d 239, 241-42 (N.H. 1964); Prosser, *supra*, at 390, and unwarranted inspection of an individual's personal information, like bank account records, *see Brex v. Smith*, 146 A. 34, 37 (N.J. Ch. 1929). In all instances, however, the tort continues to require "something in the nature of prying or intrusion." Prosser, *supra*, at 390. Today, the intrusion "may be by physical intrusion," use of the senses to "oversee or overhear" private affairs, or "investigation or examination into … private concerns." Restatement (Second) of Torts § 652B cmt. b. The tort is meant to address the resulting "affront to individual dignity." *Shulman*, 955 P.2d at 489; *see*

Prosser, *supra*, at 392 ("interest protected by [intrusion upon seclusion] is primarily a mental one").

c. Hunstein's alleged statutory harm does not resemble intrusion upon seclusion. There was nothing like an intrusion. Hunstein doesn't claim that Preferred or CompuMail improperly gathered information about him. And neither Preferred's dissemination of information to CompuMail nor CompuMail's dissemination of information about Hunstein to Hunstein is an intrusion. *See supra* pp. 33-34. The defining characteristic of the harm intrusion upon seclusion is meant to address—the "affront to individual dignity," *Shulman*, 955 P.2d at 489, resulting from an "intentional interference" with the plaintiff's "person or as to his private affairs or concerns," Restatement (Second) of Torts § 652B cmt. a—is absent.

Hunstein tries to analogize to *Perry v. Cable News Network, Inc.*, 854 F.3d 1336, 1340-41 (11th Cir. 2017), where this Court held that the Video Privacy Protection Act's cause of action for an invasion of privacy had a close relationship to a common-law harm. *See* Hunstein En Banc Br. 7, 9-10, 20. But *Perry* doesn't help Hunstein—so it is no surprise that the panel majority cut its discussion of *Perry* from the amended opinion. *Compare* Original Op. 10-

12 *with* Amended Op. 10-12. Perry claimed that a smartphone app unlawfully tracked and then disclosed his private browsing information, and he analogized his claim to intrusion upon seclusion. *Perry*, 854 F.3d at 1341 n.1. Examples of that tort include "opening" someone's "private and personal mail" and "searching his safe or his wallet." *Id.* (quoting Restatement (Second) of Torts § 652B cmt. b). The Court found that allegations that the defendant "compile[d] personal information, including the user's name, location, phone number, email address, and payment information" and tracked "the user's online behavior" "across different devices and platforms" was sufficiently analogous. *Id.* at 1339. But unlike Perry, who claimed that information about his mobile activity was tracked and collected, Hunstein alleges no intrusion at all.

Finally, there is nothing "highly offensive" about engaging a mail vendor to print and mail a letter informing a debtor about his debt. *See supra* pp. 34-35. A "systematic campaign of harassment" to collect a debt may be actionable where it involves "numerous telephone calls … every day for a period of three weeks," some "late at night" to the plaintiff and some every fifteen minutes to her employer until the employer threatened to terminate the plaintiff's employment. *Housh*, 133 N.E.2d at 341, 344. But short of such

intrusive harassment, creditors are entitled "to take reasonable action to pursue [the] debtor and persuade payment." *Id.* at 344. "Simply informing the debtor's employer of the fact that the debt is owed, of itself, would not constitute an invasion of the right." *Id.*

C. Congressional judgment confirms that Hunstein has not identified a concrete harm.

Congressional judgment also cuts against Hunstein, although the Court need not consider it because Hunstein's injury is unlike any harm actionable at common law. Congress contemplated that mail vendors and other agents would have a role in the FDCPA's statutory scheme. Indeed, a debt collector does not violate § 1692c(b) when it communicates with an agent. *Infra* pp. 47-54. That means *there is no* statutory harm. And the Court cannot avoid this agency issue just because the parties have thus far given it less attention than others. "[A]ny time doubt arises as to the existence of federal jurisdiction, [the Court is] obliged to address the issue before proceeding further." *Nicklaw v. CitiMortgage, Inc.*, 839 F.3d 998, 1001 (11th Cir. 2016).

To begin, nothing in the FDCPA suggests that Congress thought that debt collectors' use of mail vendors causes debtors any harm. To the contrary, and as Judge Tjoflat recognized, Congress' overarching goal was "to

eliminate *abusive* debt collection practices by debt collectors." 15 U.S.C. § 1692(e) (emphasis added); Dissent 4-5. As this Court recently put it, "[t]he FDCPA's statutory findings contain one sentence identifying the harms against which the statute is directed: 'Abusive debt collection practices contribute to [a] number of personal bankruptcies, to marital instability, to the loss of jobs, and to invasions of individual privacy.'" *Trichell*, 964 F.3d at 999 (quoting 15 U.S.C. § 1692(a)). Merely using letter vendors doesn't cause such harms or otherwise constitute an "abusive debt collection practice."

Instead, the FDCPA suggests that debt collectors' mail vendors and other agents play important roles. For instance, debt collectors can use telegrams, which presumably require telegram operators and other employees. *See* 15 U.S.C. §§ 1692b, 1692f. And finding a violation based on the standard, industry-wide practice of using of a mail vendor to send the notices required by § 1692g would undermine Congress' goal of ensuring debtors receive important information about their debts. Put simply, "the [FDCPA] is not aimed at … companies that perform ministerial duties for debt collectors, such as stuffing and printing the debt collector's letters." *White*, 200 F.3d at 1019. It was not enacted "for imaginative attorneys" to recover "on behalf of

unharmed debtors." *Sputz v. Alltran Fin., LP*, No. 21-cv-4663, 2021 WL 5772033, at *5 (S.D.N.Y. Dec. 5, 2021).

Even more to the point, and as discussed below, § 1692c(b) does not prohibit debt collectors' communications with their agents and so does not recognize the harm Hunstein alleges. In brief, Congress legislates against background agency-law principles. A debt collector's agent, like a letter vendor, is not "any person" other than the debt collector, because the agent acts on behalf of, and therefore as, the debt collector. Concluding otherwise would raise grave First Amendment concerns attending a statute that regulates speech based on its content. *See infra* pp. 54-62.

D. The amended panel opinion's reasoning and Hunstein's and his amici's arguments are incorrect.

The amended opinion, Hunstein, and Public Justice amici make several arguments about why Hunstein's purported intangible statutory injury confers standing. Those arguments are incorrect.

1. The amended opinion (at 28-29) and Public Justice amici (at 9-12) insist that an intangible statutory harm and an analogous common-law tort need not be "exact duplicate[s]." Fair enough. But Hunstein's alleged injury

under § 1692c(b) doesn't come anywhere close to the harms underlying public disclosure of private facts or intrusion upon seclusion. Although a close relationship may be good enough—as between misleading statements under the FCRA and false statements for defamation purposes, *see TransUnion*, 141 S. Ct. at 2208—an intangible statutory harm cannot dispense with a "fundamental requirement" of the supposed analogue, *id.* at 2210 n.6. Requiring an intangible harm to share "bedrock" or "key elements" with a harm actionable at common law, *supra* pp. 17-21, does not confuse merits with standing, *but see* Public Justice Br. 18-21, or require an exact duplicate. Instead, it is necessary to determine whether the statutory harm is the same *kind* of harm actionable at common law. *Supra* pp. 18-19.

The panel and Public Justice amici nonetheless protest that too tough a test will undermine Congress' ability "to create enforceable rights," allowing Congress only to "replicate and codify *existing* common-law causes of action." Amended Op. 12 n.3, 28; *see* Public Justice Br. 14-16. But that concern conflates the "harms traditionally recognized as providing a basis for lawsuits in American courts" and which must be closely analogous to Congress' "statutory prohibition or obligation," on the one hand, with the cause of action premised on that harm, on the other. *TransUnion*, 141 S. Ct. at 2204-05.

For one thing, Congress can provide consequences that didn't exist at common law for harms closely related to harms actionable at common law. That's what consumer protection statutes like the FDCPA and Telephone Consumer Protection Act (TCPA) do. For another, *TransUnion* itself stressed the "important difference … between (i) a plaintiff's statutory cause of action to sue a defendant over the defendant's violation of federal law, and (ii) a plaintiff's suffering concrete harm because of the defendant's violation of federal law." *Id.* at 2205. A plaintiff may be able to sue to vindicate a procedural right where its violation causes tangible harm.

The amended opinion, Hunstein, and Public Justice amici cannot pound the square peg of alleged disclosure to CompuMail into the round hole of public disclosure of private facts or intrusion upon seclusion. Fixating on the "kind" rather than "degree" of harm, *see* Appellant Br. 18; Amended Op. 12-22; Public Justice Br. 12-14, does not change that. Disclosure to CompuMail or even any number of employees at CompuMail isn't plausibly disclosure to the public or community at large, or in such a way that it is substantially certain the information will become public knowledge. *See supra* pp. 31-32; Dissent 7-8 n.4. That is a question of kind, not degree. In

fact, the alleged disclosure here is a perfect *nonexample* of public disclosure. *Supra* p. 26.

2. Public Justice and the amended opinion also both founder on *TransUnion*'s instruction about "publication" in the defamation context. Public Justice tries to use that term to make the publicity required by disclosure of private facts reach disclosure privately to just a handful of people. But that doesn't work for two reasons. *First*, *TransUnion* made clear that disclosures to a letter vendor—like CompuMail—are the kinds of internal disclosures that American courts don't recognize as actionable under defamation. *Supra* p. 32. *Second*, publication in the defamation context and publicity in context of public disclosure of private facts are two different things, *supra* pp. 27-28, and tort law isn't an à la carte menu of elements from which plaintiffs can pick and choose to satisfy their hunger for standing. For example, the Supreme Court in *TransUnion* required harm that *both* was sufficiently similar to false statements *and* was published in the same way defamatory statements are published. *See* 141 S. Ct. at 2208-10. Public Justice's approach ignores these requirements, picking and choosing elements to serve up a harm unlike anything actionable historically or at common law. As discussed above, defamation and public disclosure of private facts are

distinct torts with distinct purposes and histories, not to mention critical First Amendment constraints. *Supra* pp. 27-28.

The amended opinion, for its part, fires two shots at *TransUnion*'s observations that "[m]any American courts did not traditionally recognize intra-company disclosures as actionable publications for purposes of the tort of defamation"; "[n]or have they necessarily recognized disclosures to printing vendors as actionable publications." 141 S. Ct. at 2210 n.6. *First*, the panel calls the statements dicta before conceding that they are "Supreme Court dicta." Amended Op. 27 (quoting *United States v. Watkins*, 10 F.4th 1179, 1182 (11th Cir. 2021) (en banc)). *Second*, the panel tries to limit *TransUnion*'s statement to the trial rather than motion-to-dismiss context. *See* Amended Op. 25-29. But the stage of the proceedings is irrelevant, because the disclosure here wasn't public no matter how many CompuMail employees might have read it (and Hunstein hasn't plausibly alleged that *any* employees read the information).

3. As for congressional judgment, Hunstein claims that Congress meant to address the harm that debtors suffer from "even minimal disclosure of [their] financial information." Hunstein En Banc Br. 13. And the panel concluded that the FDCPA identifies "invasion[] of individual privacy" as a

harm. Amended Op. 30 (alteration in original; quoting 15 U.S.C. § 1692(a)). Those arguments fail.

For starters, while Congress' decision to recognize a cause of action can be "instructive," federal courts "cannot treat an injury as 'concrete' for Article III purposes based only on Congress's say-so." *TransUnion*, 141 S. Ct. at 2204-05 (quoting *Trichell*, 964 F.3d at 999 n.2). In any event, the FDCPA doesn't aim to address some free-wheeling concept of invasion of privacy. Congress enacted § 1692c(b) to protect debtor privacy by preventing debt collectors from shaming the debtor into repayment by informing members of the debtor's community of the debt, *e.g.*, "a debtor's friends, neighbors, relatives, or employer." S. Rep. No. 95-382, at 4. Hunstein doesn't complain of anything like that. And the FDCPA presupposes the use of intermediaries like mail vendors, and there's no indication that their role invades debtors' privacy. *Supra* pp. 39-41; *infra* p. 49. The final nail in the coffin is that § 1692c(b) doesn't reach debt collectors' communications with their agents. *Infra* pp. 49-53.

4. Finally, Hunstein asserts (at 21-23) that just because the FDCPA permits the use of telegrams, doesn't mean it allows the use of letter vendors. *See also* Amended Op. 30-31 n.10. He argues that Congress could have—but

didn't—include letter vendors as permitted recipients of information about a debt. Those arguments lack merit. As discussed, Congress contemplated the use of intermediaries and agents like letter vendors. *See supra* pp. 39-41; *infra* pp. 48-54. Indeed, using letter vendors like CompuMail is ubiquitous, as federal agency regulations show, and Congress did not mean to prohibit that practice. *See infra* pp. 53-54. In any event, Hunstein's objection is beside the point for standing purposes, because he has failed to allege an injury with a close relationship to a harm actionable historically or at common law.

II. A debt collector does not violate the FDCPA by communicating with an agent, like a letter vendor, about a debt.

Properly construed, § 1692c(b) does not bar debt collectors' communications with their agents, including their letter vendors. Those agents are not "third parties" under § 1692c(b). A contrary reading would not only result in absurdity—preventing corporate debt collectors from communicating with any employees or other agents—it would also raise grave First Amendment concerns. Because § 1692c(b) does not reach a debt collector's communications with its agents, it doesn't reach Preferred's communications with CompuMail here.

A. Debt collectors' agents are not "third parties" with whom debt collectors may not communicate under § 1692c(b).

Section 1692c(b) does not bar debt collectors' communications with their agents. The section prohibits a "debt collector" from communicating, "in connection with the collection of any debt, with any person other than the consumer." 15 U.S.C. § 1692c(b). Several interpretive principles make clear that "any person" means "any person" *other than the debt collector*, and that an agent *who acts on the debt collector's behalf* doesn't count.

1. Basic interpretive principles show that "any person" in § 1692c(b) does not reach agents who act on the debt collector's behalf.

"[T]he good textualist is not a literalist." Scalia, *supra*, at 24. To the contrary, textual interpretation must discern the "*fair meaning* of the text," recognizing that "[t]he full body of a text contains implications that can alter the literal meaning of individual words." Antonin Scalia & Bryan Garner, *Reading Law* 356 (2012). Courts take this approach all the time. *See, e.g.*, *Andrus v. Charlestone Stone Prods. Co.*, 436 U.S. 604, 616 (1978) (refusing to read "mineral deposits" to include water because doing so would bring about a "major … alteration in established legal relationships based on nothing more than an overly literal reading of a statute"). Here, although "any person" in

§ 1692c(b) could *literally* mean any person at all, several features of the statute show that such a hyperliteral reading is wrong and that "any person" doesn't include a debt collector's agent, who acts on behalf of the debt collector itself.

First, the FDCPA's text and structure make clear that debt collectors may be corporations. *See, e.g.*, 15 U.S.C. § 1692a(6)(B) (exclusion for entities "related by common ownership or affiliated by corporate control"). And corporations "necessarily act[] by and through agents"—*i.e.*, natural persons. *Baltimore & Ohio R.R. Co. v. Baugh*, 149 U.S. 368, 382 (1893); *accord* William Meade Fletcher, *Cyclopedia of the Law of Corporations* § 30 (2020). Thus, if "any person" in § 1692c(b) included corporate debt collectors' agents or employees, there could be no corporate debt collectors because those debt collectors could never communicate with their employees or agents without violating the FDCPA. That would be an absurd result.

Second, § 1692c(b)'s heading reaffirms that Congress meant to capture only true "third parties" when using the term "any person." 15 U.S.C. § 1692c(b); *see Almendarez-Torres v. United States*, 523 U.S. 224, 234 (1998) (section headings may illuminate meaning). Neither debt collectors nor their employees or other agents are "third parties," as discussed below.

Third, well-established background principles likewise show that § 1692c(b)'s reference to "any person" does not include debt collectors' agents, like letter vendors. Congress legislates against the common law and long-established legal principles, including principles of agency law, and must speak clearly to abrogate those principles. *E.g.*, *Comcast Corp. v. National Ass'n of Afr. Am.-Owned Media*, 140 S. Ct. 1009, 1016 (2020); *Meyer v. Holley*, 537 U.S. 280, 285-87 (2003). But nothing in the FDCPA suggests that Congress deviated from traditional agency-law principles. To the contrary, courts often apply such principles under the FDCPA and other statutes.

"Agency is the fiduciary relationship that arises when one person (a 'principal') manifests assent to another person (an 'agent')" that the agent will act on behalf and under the control of the principal, "and the agent manifests assent or otherwise consents so to act." Restatement (Third) of Agency § 1.01 (2006); *accord* Restatement (Second) of Agency §§ 1, 15 (1958). The key point here is that "a principal is considered to have done himself or herself what he or she does by acting through another person." 2A C.J.S. *Agency* § 1 (2021). Thus, "a principal's agent or employee, who acts for or on behalf of the principal, is a 'party' to that principal's contractual and business relations and not a third party thereto." *Harrell v. Reynolds Metals Co.*, 495 So. 2d 1381,

1388 (Ala. 1986); *accord* Restatement (Second) of Agency § 186; *see also* Restatement (Third) of Agency § 1.01 cmt. c. So if agency principles apply to § 1692c(b), then "any person" cannot reach debt collectors' agents. "Any person" cannot mean the debt collector itself, and under agency law agents act on the debt collector's behalf, *as* the debt collector.

The FDCPA contains no indication that Congress intended to abrogate agency-law principles in § 1692c(b). In fact, federal courts have long "relied on traditional agency principles" to interpret the FDCPA, *Barbato v. Greystone All., LLC*, 916 F.3d 260, 269 (3d Cir. 2019), rejecting the notion that "the FDCPA [is] a special exception to general agency law," *Schmitt v. FMA All.*, 398 F.3d 995, 997-98 (8th Cir. 2005). *See also Clark v. Capital Credit & Collection Servs., Inc.*, 460 F.3d 1162, 1173 (9th Cir. 2006); *Sheriff v. Gillie*, 578 U.S. 317, 327 (2016) ("special counsel, as the [Ohio] Attorney General's agents, act for him in debt-related matters"). For example, courts have held that a debt collector may be vicariously liable for the acts of its agent, *see, e.g.*, *Barbato*, 916 F.3d at 269-70, precisely because the agent acts for and as the debt collector and not as a separate person in its own right.

The FDCPA isn't unusual in this respect. Federal courts interpreting other statutes have likewise "assume[d] that federal statutes are written with

familiar common law agency principles in mind." *Krakauer v. Dish Network, LLC*, 925 F.3d 643, 659 (4th Cir. 2019). Other examples in the consumer protection context include the TCPA, *see, e.g.*, *id.*; *Gomez v. Campbell-Ewald Co.*, 768 F.3d 871, 879 (9th Cir. 2014), *aff'd,* 577 U.S. 153 (2016); *Osorio v. State Farm Bank, F.S.B.*, 746 F.3d 1242, 1252-54 (11th Cir. 2014), and FCRA, *see, e.g.*, *Jones v. Federated Fin. Rsrv. Corp.,* 144 F.3d 961, 966 (6th Cir. 1998); *Yohay v. City of Alexandria Emps. Credit Union, Inc.*, 827 F.2d 967, 973 (4th Cir. 1987).

That all makes good sense. Agents often are retained "to perform specific services." Restatement (Third) of Agency § 101 cmt. c. "Indeed, most of the world's work is performed by agents," 3 William A. Gregory, *Law of Agency and Partnership* § 1 (2001), and of particular relevance here, "[s]ome industries" routinely use "nonemployee agents to communicate with customers and enter into contracts that bind the customer and a vendor," Restatement (Third) of Agency § 101 cmt. c.

Hunstein's main counterargument is that "an agent should [not] be treated as *identical* to the debt collector and therefore not a third-party." Hunstein Original Reply Br. 16. But the question isn't whether an agent and its principal are in fact identical entities. The question is whether § 1692c(b) applies to agents. Properly construed, "any person" does not include agents

because agents act on behalf of debt collectors and not as "any person" other than the debt collector in their own right. *See supra* pp. 48-51.

2. Even assuming any ambiguity remains, regulatory guidance resolves it.

If any ambiguity remained about whether § 1692c(b) prohibits debt collectors' communications with their agents, regulatory guidance would resolve it against Hunstein. As Judge Tjoflat noted (Dissent 20 n.13), Consumer Financial Protection Bureau (CFPB) regulations expressly recognize debt collectors' use of mail vendors, and so the agency cannot view the FDCPA as prohibiting debt collectors from using letter vendors. Debt Collection Practices (Regulation F), 86 Fed. Reg. 5766, 5845 & n.446 (Jan. 19, 2021). Indeed, the CFPB explained that it had surveyed debt collection firms and vendors and learned that over 85% of the participants reported using letter vendors. *Id.* at 5769, 5845 n.446. And construing the term "debt collector" to include debt collectors' agents, but not third parties, also aligns with the way the Federal Trade Commission (the previous agency charged with enforcing the FDCPA) has understood the statute. *See* Statements of General Policy or Interpretation Staff Commentary on the FDCPA, 53 Fed. Reg. 50,097, 50,104 (Dec. 13, 1988) ("A debt collector may contact an employee of a telephone or

telegraph company in order to contact the consumer, without violating the prohibition on communication to third parties ….").

B. Interpreting the FDCPA to bar debt collectors from communicating with their agents raises serious First Amendment concerns.

Interpreting § 1692c(b) to prohibit debt collectors from communicating with their agents about a debt raises grave First Amendment concerns. Because § 1692c(b) targets communications "in connection with the collection of any debt," 15 U.S.C. § 1692c(b), it is a content-based restriction and therefore subject to strict scrutiny, which it cannot satisfy. Even if it were subject only to intermediate scrutiny, it would fail that test as well. Although § 1692c(b) likely raises First Amendment concerns in many applications, the Court need not confront any of them if it interprets the provision not to reach debt collectors' communications with their agents.

1. Whenever possible, courts interpret statutes to avoid serious constitutional concerns.

Under the doctrine of constitutional avoidance, "[a] statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional but also grave doubts upon that score." *United States v. Jin Fuey Moy*, 241 U.S. 394, 401 (1916) (Holmes, J.); *accord Ashwander v. Tennessee*

Valley Auth., 297 U.S. 288, 348 (1936) (Brandeis, J., concurring). The doctrine seeks to avoid unnecessary judicial consideration of constitutional questions, assumes that Congress seeks to act within constitutional bounds, and assumes that Congress would prefer a fair construction of its statute to perhaps a better one that risks having the statute set aside as unconstitutional. *See, e.g.*, *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Const. Trades Council*, 485 U.S. 568, 575 (1988). Under the doctrine, "where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress." *Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 173 (2001); *see also Equal Emp. Opportunity Comm'n v. Southwestern Baptist Theological Seminary*, 651 F.2d 277, 285 (5th Cir. July 17, 1981) (First Amendment context). Thus, a court may refuse "to simply follow the most grammatical reading of [a] statute" "to eliminate those doubts." *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 70, 78 (1994).

2. If construed to reach debt collectors' communications with their agents, § 1692c(b) cannot satisfy strict scrutiny.

Reading § 1692c(b) to prohibit debt collectors from communicating with their agents would force the Court to confront grave concerns that the statute violates the First Amendment by restricting speech based on its content without narrow tailoring to serve a compelling government purpose. Although the panel did not address the First Amendment issue its interpretation raised, it recognized that construing the statute to reach circumstances like Hunstein's case "may not purchase much in the way of 'real' consumer privacy." Amended Op. 42. So interpreted, the statute cannot possibly satisfy strict scrutiny.

a. The "crucial first step" is deciding whether § 1692c(b) is content-based or content-neutral. *Reed v. Town of Gilbert*, 576 U.S. 155, 165 (2015). That step is crucial because a "government has no power to restrict expression because of its … content." *Otto v. City of Boca Raton*, 981 F.3d 854, 862 (11th Cir. 2020). If a law is content-based, it is "subject to strict scrutiny," meaning that it is "presumptively unconstitutional and may be justified only if the government proves that [it is] narrowly tailored to serve compelling state interests." *Reed*, 576 U.S. at 163, 165; *accord Otto*, 981 F.3d at 862. And strict

scrutiny applies even when the content-based regulation targets commercial speech, as discussed below. *International Outdoor, Inc. v. City of Troy*, 974 F.3d 690, 703 (6th Cir. 2020).

A regulation is content-based if it facially "draws distinctions based on the message a speaker conveys," or if it cannot "be justified without reference to the content of the regulated speech." *Reed*, 576 U.S. at 163, 165. As this Court has explained, "[o]ne reliable way to tell if a law restricting speech is content-based is to ask whether enforcement authorities must 'examine the content of the message that is conveyed' to know whether the law has been violated." *Otto*, 981 F.3d at 862 (quoting *McCullen v. Coakley*, 573 U.S. 464, 479 (2014)). For example, the Supreme Court held in *AAPC*, 140 S. Ct. at 2346 (plurality opinion), that an exception in the TCPA for calls to collect government debt was "about as content-based as it gets." *See also id.* at 2364 (Gorsuch, J., concurring in the judgment in part and dissenting in part). There, "the legality of a robocall turns on whether it is made solely to collect a debt owed to or guaranteed by the United States," or whether it was made for any other purpose. *Id.* at 2346 (plurality opinion).

b. Construing § 1692c(b) to reach debt collectors' agents would force the Court to confront the provision's constitutionality as a content-

based restriction. And the provision cannot satisfy strict scrutiny. As the panel implicitly recognized, applying § 1692c(b) to circumstances like Hunstein's doesn't do much to serve the asserted privacy interests. *Supra* p. 10. So construed, § 1692c(b) is not narrowly tailored to serve a compelling government interest.

Like the TCPA's exemption for calls to collect government debt in *AAPC*, § 1692c(b)'s prohibition on communications "in connection with the collection of any debt," 15 U.S.C. § 1692c(b), is "about as content-based as it gets." *AAPC*, 140 S. Ct. at 2346 (plurality opinion). Section 1692c(b) facially curtails only debt-collection speech and targets only debt collectors. *See id.* at 2347; *id.* at 2364 (Gorsuch, J., concurring in the judgment in part and dissenting in part); *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 564 (2011) (law was content-based because it restricted who could gather information for speech purposes based on speaker's commercial motivation). Just as in *AAPC*, "the legality" of the debt collector's communication turns on its content. 140 S. Ct. at 2346 (plurality opinion). Indeed, a debt collector can communicate with its vendor about any subject not "in connection with the collection of [a] debt." And because § 1692c(b) is content-based, strict scrutiny applies.

Section 1692c(b) cannot survive strict scrutiny because it is not narrowly tailored to serve a compelling government interest. A statute fails strict scrutiny if it is overinclusive or underinclusive—that is, if it "unnecessarily circumscrib[es] protected expression" or "leaves appreciable damage to [the government's] interest unprohibited." *Republican Party of Minn. v. White*, 536 U.S. 765, 775 (2002). Thus, it is "rare that a regulation restricting speech because of its content will ever be permissible," *Brown v. Entertainment Merchs. Ass'n*, 564 U.S. 786, 799 (2011), and § 1692c(b) is no exception to the general rule. Congress enacted § 1692c(b) to protect debtors' privacy by preventing debt collectors from shaming debtors into repayment by informing members of a debtor's community about the debt. S. Rep. No. 95-382, at 4. Construing § 1692c(b) to bar debt collectors from communicating with their agent letter vendors does not serve that purpose, as the panel recognized. *See supra* p. 10. If a statute designed to protect an asserted government interest in promoting privacy does "not purchase much in the way of 'real' consumer privacy," Amended Op. 42, then it isn't narrowly tailored and thus fails strict scrutiny. That concern of unconstitutionality alone warrants construing § 1692c(b) to avoid the issue.

c. Hunstein may argue that only intermediate scrutiny applies to commercial speech. As discussed below, however, § 1692c(b) cannot satisfy intermediate scrutiny if construed to reach communications with agents. In any case, the objection would be meritless. The Supreme Court's recent guidance in *Reed* and *AAPC* show that there is no commercial-speech exception to strict scrutiny for content-based regulations.

In *Reed*, the Supreme Court instructed that "strict scrutiny applies either when a law is content based on its face or when the purpose and justification for the law are content based." 576 U.S. at 166. And in *AAPC*, five members of the Supreme Court agreed that an exception to the TCPA that permitted only government debt collectors to place robocalls was a content-based restriction that failed strict scrutiny, *see* 140 S. Ct. at 2346 (plurality of Kavanaugh, J., joined by Roberts, C.J., Alito, J., and Thomas, J.); *accord id.* at 2364 (Gorsuch, J., concurring in part and dissenting in part), even though the "case primarily involves commercial regulation—namely, debt collection," *id.* at 2358 (Breyer, J., concurring in part and dissenting in part).

Unsurprisingly, the only court of appeals to consider the issue after *AAPC* has held that strict scrutiny applies to content-based regulations of commercial speech. *International Outdoor*, 974 F.3d at 703. In *International*

Outdoor, a case involving billboard regulations, the Sixth Circuit explained that the intermediate-scrutiny standard for commercial speech under *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557, 563 (1980), "applies only to a speech regulation that is content-neutral on its face." *International Outdoor*, 974 F.3d at 703.

3. Section 1692c(b) likewise could not satisfy intermediate scrutiny if construed to reach debt collectors' agents.

The Court cannot avoid these grave constitutional doubts simply by concluding that intermediate scrutiny, rather than strict scrutiny, likely applies. Under *Central Hudson*'s intermediate-scrutiny standard, courts consider whether "the asserted governmental interest is substantial"; "the regulation directly advances the governmental interest"; and the restriction "is not more extensive than is necessary to serve that interest." 447 U.S. at 566. Interpreting § 1692c(b) to reach debt collectors' communications with their agents does not satisfy intermediate scrutiny any more than it satisfies strict scrutiny. On that construction, § 1692c(b) does not advance the government's interest at all—much less do so directly—and so would violate the First Amendment.

* * *

These First Amendment concerns are serious, but they are easy to avoid. By construing § 1692c(b) not to reach debt collectors' communications with their agents—who, as agents, are not "third parties"—the Court not only would eliminate a serious First Amendment concern, it would also give the statute its fairest reading. *Supra* pp. 48-54.

C. Preferred did not violate § 1692c(b) when communicating with CompuMail about Hunstein's debt, because CompuMail was an agent rather than a "third party" or "any person" other than Preferred.

Given the proper construction of § 1692c(b) not to reach debt collectors' communications with their agents, Hunstein has failed to state a claim. Taking Hunstein's allegations as true, CompuMail, as Preferred's letter vendor, was acting as Preferred's agent when it mailed Hunstein a debt collection notice. *See* App. 11 (instead of "preparing and mailing a collection letter on its own, Preferred sent information … to a commercial mail house," which then populated "a pre-written template, printed, and mailed the letter"); Restatement (Third) of Agency § 1.01 cmt. c (agents often are retained "to perform specific services"); *Harrell*, 495 So. 2d at 1388 (referring to "a principal's agent or employee, who acts for or on behalf of the principal"); *TransUnion*, 141 S. Ct. at 2210 n.6 (equating a company's employees and its

"vendors that printed and sent the mailings that the class members received"). Preferred thus did not violate that provision when communicating with CompuMail about Hunstein's debt.

* * *

Hunstein complains that Preferred should not have used a letter vendor to contact him. But neither common sense nor standing doctrine supports his claim that he has suffered any harm. Hunstein's alleged injury is unlike any harm actionable historically or at common law. And the FDCPA itself forecloses his assertion of concrete harm. So as *TransUnion* put it, "[n]o concrete harm, no standing." 141 S. Ct. at 2214.

CONCLUSION

The Court should hold that Hunstein lacks standing. Alternatively, the Court should hold that the FDCPA does not prohibit debt collectors from communicating with their agents.

Dated: January 18, 2022

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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMIT

Pursuant to Federal Rule of Appellate Procedure 32(g) and Circuit Rule 28-1(m), I hereby certify that this brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because, as calculated by Microsoft Word, it contains 12,904 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f) and Circuit Rule 32-4. I also certify that this brief complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5) and (6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in a 14-point Book Antiqua font.

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CERTIFICATE OF SERVICE

I hereby certify that on January 18, 2022, I electronically filed this brief and following addendum with the Clerk of the Court for the United States Court of Appeals for the Eleventh Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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U.S. Const. art. III, § 2

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

…

U.S. Const. amend. I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

15 U.S.C. § 1692. Congressional findings and declaration of purpose

(a) Abusive practices

There is abundant evidence of the use of abusive, deceptive, and unfair debt collection practices by many debt collectors. Abusive debt collection practices contribute to the number of personal bankruptcies, to marital instability, to the loss of jobs, and to invasions of individual privacy.

…

(e) Purposes

It is the purpose of this subchapter to eliminate abusive debt collection practices by debt collectors, to insure that those debt collectors who refrain from using abusive debt collection practices are not competitively disadvantaged, and to promote consistent State action to protect consumers against debt collection abuses.

15 U.S.C. § 1692c. Communication in connection with debt collection

…

(b) Communication with third parties

Except as provided in section 1692b of this title, without the prior consent of the consumer given directly to the debt collector, or the express permission of a court of competent jurisdiction, or as reasonably necessary to effectuate a postjudgment judicial remedy, a debt collector may not communicate, in connection with the collection of any debt, with any person other than the consumer, his attorney, a consumer reporting agency if otherwise permitted by law, the creditor, the attorney of the creditor, or the attorney of the debt collector.

…