No. 19-14434-HH

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

RICHARD HUNSTEIN,

Plaintiff-Appellant,

v.

PERFERRED COLLECTION AND MANAGEMENT SERVICES, INC.,

Defendant-Appellee.

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

MOTION FOR LEAVE TO FILE BRIEF OF *AMICUS CURIAE* RECEIVABLES MANAGEMENT ASSOCIATION INTERNATIONAL, INC. IN SUPPORT OF APPELLEE

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June 1, 2021

CERTIFICATE OF INTERESTED PERSONS
AND CORPORATE DISCLOSURE STATEMENT

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

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

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The undersigned expresses a belief, based on a reasoned and studied professional judgment, that the panel decision is contrary to the following decisions of the Supreme Court of the United States or the precedents of this circuit and that consideration by the full court is necessary to secure and maintain uniformity of decisions in this court:

Spokeo, Inc. v. Robbins, 136 S.Ct. 1549 (2016)

Losch v. Nationstar Mortgage LLC, 995 F.3d 937 (11th Cir. 2021)

Muransky v. Godiva Chocolatier, Inc., 979 F.3d 917 (11th Cir. 2020)

Trichell v. Midland Credit Mgmt., Inc., 964 F.3d 990 (11th Cir. 2020)

Pedro v. Equifax, 868 F.3d 1275 (11th Cir. 2017)

Perry v. Cable News Network, Inc., 854 F.3d 1336 (11th Cir. 2017)

This 1st day of June 2021.

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MOTION FOR LEAVE TO FILE BRIEF OF *AMICUS CURIAE* RECEIVABLES MANAGEMENT ASSOCIATION INTERNATIONAL, INC. IN SUPPORT OF APPELLEE

Pursuant to Federal Rule of Appellate Procedure 29 and 11th Cir. R. 29-3, Receivables Management Association International, Inc. ("RMAI") hereby requests leave from this Court to file a brief as *Amicus Curiae* urging rehearing, en banc, of the panel's decision in the above-captioned matter.

A. The interests of *amicus curaie* RMAI—an advocate for actors in the secondary market for receivables.

RMAI, a nonprofit trade association, represents more than 570 companies that purchase or support the purchase of performing and non-performing receivables on the secondary credit market.[2] The existence of this secondary market is critical to the functioning of the primary market in which credit originators extend credit to consumers.[3] An efficient secondary market lowers the cost of credit extended to consumers and increases the availability and diversity of such credit. *See* Note 2, *supra*. To be sure, a recent study of empirical data found

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

[3] *See generally*, "The Value of Resale on the Receivables Secondary Market," David E. Reid, RMAI White Paper (April 2016) publicly available at https://rmaintl.org/wp-content/uploads/2019/01/RMAI-Secondary-Market-White-Paper-2016-FINAL.pdf, last accessed May 25, 2021.

that greater barriers to debt collection activities have a direct correlation to *decreases* in both consumer access to credit and financial health.[4]

RMAI members' business practices often subject them to the Fair Debt Collection Practices Act (11 U.S.C. § 1692, et seq.) ("FDPCA") as "debt collectors." The panel's decision finding that a debt collector's every-day use of a letter vendor to send debt collection letters to customers violated the FDCPA conflicts with established law of this Circuit and the Supreme Court of the United States. In creating such conflict, the panel's decision disrupts each actor in the secondary market for consumer debt on whose behalf RMAI advocates.

RMAI has no financial interest in the outcome of this case.

B. Why RMAI's brief is desirable and relevant.

Sending a letter appears to be an innocuous, low-cost, low-risk business function. Not so for RMAI member debt buyers and debt collectors. A written debt-collection communication inadvertently directed to the wrong person not only can violate various federal and state laws, but it can also expose sensitive private information. RMAI members engage professional letter vendors to increase the

[4] Federal Reserve Bank of New York, "Access to Credit and Financial Health: Evaluating the Impact of Debt Collection," Julia Fonseca, Katherine Strair, Basit Zafar, Staff Report No. 814 (May 2017) publicly available at https://www.newyorkfed.org/medialibrary/media/research/staff_reports/sr814.pdf?la=en and last accessed May 23, 2021 and archived at https://perma.cc/M49H-5DYT.

accuracy and integrity of their written communications and avoid inadvertent disclosure of sensitive information to the wrong person. Letter vendors have demonstrated a 99.99% accuracy rate in delivering mailed communications to the right person.[5] *See docket,* Motion for Leave To File Brief Of Amici Curiae In Support Of Defendant/Appellee's Petition For Rehearing En Banc By Print and Mail Vendor Coalition*,* proposed brief, p. 2 (hereinafter the "Letter Vendor Amici Brief"). Letter vendors also engage directly with the United States Postal Service—having U.S. Postal Inspectors onsite to monitor their mailing operations—and serve as a conduit between our members and the United States Postal Service. *Id.*, at 1.

RMAI's brief explores the FDCPA, its purpose, and its disconnect with the purposes and origins of the panel's identified tort—invasion of privacy. This view helps highlight how, in holding that the use of a letter vendor to send a legitimate communication to a debtor confers standing and violates § 1692c(b) of the FDCPA, the panel's decision conflicts with Supreme Court and Eleventh Circuit law, as well as the interpretation of the federal executive agency charged with

[5] The USPS performs accuracy testing which can be requested "by submitting the mailer's address file(s) to the Postal Service for processing." *See* "99% Testing," United States Postal Service, publicly available at https://postalpro.usps.com/address-quality-solutions/99-testing, last accessed May 23, 2021 and archived at https://perma.cc/29A4-BR2Y.

administering the FDCPA. As a result, the decision has already disrupted the secondary market for consumer debt, which is largely composed of RMAI members. This disruption will decrease accuracy of debt communications, compromise consumer privacy (which the panel acknowledged wasn't furthered by its opinion), and create exposure for actions endorsed by the history and text of the FDCPA.

For the foregoing reasons, RMAI respectfully requests that this Court grant this motion for leave to file the accompanying brief.

Respectfully submitted,

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CERTIFICATE OF FILING AND SERVICE

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

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

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

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

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

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This 1st day of June 2021.

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STATEMENT OF THE ISSUES

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

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

STATEMENT OF FACTS

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

STATEMENT OF INTEREST OF *AMICUS* [2]

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

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

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

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

ARGUMENT AND CITATIONS OF AUTHORITY

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

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

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

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

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

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

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

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

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

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

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

A. Congress passed the FDPCA to prevent abuse.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

CONCLUSION

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

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

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

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CERTIFICATE OF FILING AND SERVICE

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

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