

C.A. No. 21-10199

**IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT**

SUSAN DRAZEN,
on behalf of herself and other persons similarly situated,

Plaintiff-Appellee,

GoDADDY.COM, LLC,

Defendant-Appellee,

v.

JUAN ENRIQUE PINTO,

Movant-Appellant.

On Appeal from the United States District Court
for the Southern District of Alabama, Mobile Division
D. Ct. No. 1:19-cv-00563-KD-B
The Honorable Kristi K. DuBose, District Judge

**MOTION FOR LEAVE OF RETAIL LITIGATION CENTER, INC., AND
FLORIDA RETAIL FEDERATION TO FILE EN BANC BRIEF AS *AMICI
CURIAE* IN SUPPORT OF DEFENDANT-APPELLEE AND VACATUR**

Deborah R. White
RETAIL LITIGATION CENTER, INC.
99 M Street, S.E., Suite 700
Washington, DC 20003
(202) 869-0200
deborah.white@rila.org

Adam G. Unikowsky
Counsel of Record
Jonathan J. Marshall*
JENNER & BLOCK LLP
1099 New York Ave., N.W.,
Suite 900
Washington, DC 20001
(202) 639-6000
aunikowsky@jenner.com

* *Admission in the District of Columbia
pending; practicing under direct
supervision of members of the D.C. Bar*

**CERTIFICATE OF INTERESTED PERSONS
AND CORPORATE DISCLOSURE STATEMENT**

Pursuant to Federal Rule of Appellate Procedure 26.1 and Eleventh Circuit Local Rule 26.1-1 *et seq.*, *Amici Retail Litigation Center, Inc.*, and Florida Retail Federation state that in addition to the persons listed in Movant-Appellant Pinto's principal panel brief, C.A. Doc. 32, at CIP-1 to -2 (Aug. 20, 2021); Plaintiff-Appellee Drazen's principal panel brief, C.A. Doc. 40, at i-iv (Nov. 3, 2021); Defendant-Appellee GoDaddy.com, LLC's principal panel brief, C.A. Doc. 41, at CIP-1 to -3 (Nov. 3, 2021); Movant-Appellant Pinto's panel reply brief, C.A. Doc. 51, at CIP-1 to -2 (Jan. 26, 2022); Movant-Appellant Pinto's en banc brief, C.A. Doc. 91 at CIP-1 to -2 (Apr. 14, 2023); and Florida Justice Reform Institute's motion to participate as *amicus*, C.A. Doc. 93, at CIP-1 to -3 (May 1, 2023), the following persons and entities have an interest in the outcome of this case:

1. Florida Retail Federation, *Amicus Curiae*;
2. Holley, Lorena A., *Counsel for Amicus Curiae Florida Retail Federation*;
3. Jenner & Block LLP, *Counsel for Amici Curiae Retail Litigation Center, Inc., and Florida Retail Federation*;
4. Marshall, Jonathan J., *Counsel for Amici Curiae Retail Litigation Center, Inc., and Florida Retail Federation*;
5. Retail Litigation Center, Inc., *Amicus Curiae*;

6. Unikowsky, Adam G., *Counsel of Record for Amici Curiae Retail Litigation Center, Inc., and Florida Retail Federation;*

7. White, Deborah R., *Counsel for Amicus Curiae Retail Litigation Center, Inc.*

Amicus curiae Retail Litigation Center, Inc., certifies that it has no parent corporation and that no publicly held company has 10% or greater ownership in Retail Litigation Center, Inc.

Amicus curiae Florida Retail Federation certifies that it has no parent corporation and that no publicly held company has 10% or greater ownership in the Florida Retail Federation.

Date: May 15, 2023

/s/ Adam G. Unikowsky

Adam G. Unikowsky
JENNER & BLOCK LLP
1099 New York Ave., N.W.,
Suite 900
Washington, DC 20001
(202) 639-6000
aunikowsky@jenner.com

Counsel of Record for Amici Curiae Retail Litigation Center, Inc., and Florida Retail Federation

MOTION FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE*

Prospective *amici* Retail Litigation Center, Inc. (RLC), and the Florida Retail Federation (FRF) respectfully file this motion for leave to file a brief as *amici curiae* in support of Defendant-Appellee GoDaddy.com, LLC, and vacatur of the judgment below. In the event this Court concludes that the proposed brief is untimely, *amici* ask this Court to grant leave to file the proposed brief out of time. Defendant-Appellee GoDaddy.com, LLC, consents to this motion. Plaintiff-Appellee Susan Drazen and Movant-Appellant Juan Enrique Pinto oppose this motion.

Pursuant to Federal Rule of Appellate Procedure 29(a), a motion for leave to file a brief as *amicus curiae* must state “the movant’s interest,” Fed. R. App. P. 29(a)(3)(A), and “the reason why an amicus brief is desirable and why the matters asserted are relevant to the disposition of the case,” Fed. R. App. P. 29(a)(3)(B).

Movant’s interest. The RLC provides courts with retail-industry perspective on potential industry-wide consequences of significant court cases. Since its founding in 2010, the RLC has participated as an *amicus* in more than 200 cases. The RLC’s members employ millions of workers throughout the United States, provide goods and services to hundreds of millions of consumers, and account for more than \$1 trillion in annual sales.

FRF is the leading voice representing Florida’s retail industry and is made up of a wide range of Florida retailers, including general retailers, grocers, convenience

stores, and pharmacies, among others. For more than 80 years, FRF has worked side by side with elected officials, community leaders, stakeholders, and consumers to demonstrate the value of Florida's retail industry in the Sunshine State. With 2.7 million jobs supported by Florida retailers and \$49 billion in wages paid to retail employees each year, the retail industry is critical to the State's success.

Prospective *amici* have a strong interest in this case. This Court granted rehearing en banc to consider a question with significant practical and jurisprudential implications: whether the receipt of a single unwanted text message is a sufficiently concrete injury to support a plaintiff's Article III standing. The resolution of that question is important in its own right and will have important consequences for whether other intangible injuries that are often asserted in class-action suits can support standing.

Prospective *amici* and their members have an interest in ensuring that nontraditional intangible injuries do not give rise to Article III standing, and an especially strong interest in ensuring that this position is adequately aired in this case. The question of what intangible injuries support standing can determine the size of a class. The less serious the requisite injury, the larger the class—and the larger the class, the greater the pressure on retailers to settle with class counsel to avoid the risk of bet-the-company liability. *Amici* and their members have a strong

interest in curtailing meritless class-action proceedings, and, accordingly, have a strong interest in ensuring that the contours of standing law are properly developed.

Why an amicus brief is desirable and relevant. “[A]n amicus brief may be *particularly helpful* when the party supported is unrepresented or inadequately represented.” *Neonatology Assocs. v. Comm’r*, 293 F.3d 128, 132 (3d Cir. 2002) (Alito, J., in chambers). It is a “fundamental assumption of our adversary system that strong (but fair) advocacy on behalf of opposing views promotes sound decision making.” *Id.* at 131. “Thus, an amicus who makes a strong but responsible presentation in support of a party can truly serve as the court’s friend.” *Id.* “Even when a party is very well represented, an amicus may provide important assistance to the court.” *Id.* at 132. For example, an amicus may have “particular expertise not possessed by any party to the case” or “argue points deemed too far-reaching for emphasis by a party intent on winning a particular case.” *Id.*

The importance of *amicus* assistance is particularly high here, where it is not clear that any party to the case will defend the panel’s view that receipt of a single text message is not an Article III injury. Movant-Appellant Pinto has already attacked that conclusion; Plaintiff-Appellee Drazen undoubtedly will do so as well; and Defendant-Appellee GoDaddy.com may be reluctant to undermine the settlement to which it agreed, even if holding that certain class members lack standing would decrease the class size. Prospective *amici*, by contrast, will offer a

full-throated defense of the panel’s decision and the decision in *Salcedo v. Hanna*, 936 F.3d 1162 (11th Cir. 2019). And *amici*’s brief will, among other things, thoroughly address this Court’s recent decision in *Hunstein v. Preferred Collection & Management Services, Inc.*, 48 F.4th 1236, 1244 (11th Cir. 2022) (en banc)—a decision which Pinto’s en banc brief does not cite.

Despite the tepid response to the question presented from the parties, its resolution has significant implications for nonparties, including *amici*’s members, in the TCPA context and quite possibly beyond.* Thus, *amici* and their members have a strong interest in ensuring that the position established by the panel is adequately represented in this case.

Amici’s brief is timely; even if it is not, leave to file should still be granted.

On March 15, 2023, this Court ordered that Appellant’s en banc brief would be due on April 14, 2023, and that Appellees’ en banc briefs would be due on May 15, 2023. C.A. Doc. 90. Pursuant to this Court’s Rule 35-8, therefore, *amicus* briefs in support of Appellant or neither party were due on April 14, 2023, and *amicus* briefs in support of Appellees are due on May 15, 2023.

* The result of this case may affect the standing analysis in cases arising under numerous statutory-damages laws, including the Fair Credit Reporting Act, Pub. L. No. 91-508, § 601, 84 Stat. 1127 (1970) (codified as amended at 15 U.S.C. §§ 1681–1681x); the Fair and Accurate Credit Transactions Act of 2003, Pub. L. No. 108-159, 117 Stat. 1952 (codified as amended in scattered sections of the U.S. Code); and the Electronic Communications Privacy Act of 1986, Pub. L. No. 99-508, 100 Stat. 1848 (codified as amended in scattered sections of 18 U.S.C.).

Prospective *amici* believe that this brief is properly styled as a brief in support of Defendant-Appellee GoDaddy.com. The proposed brief argues that numerous class members lack Article III standing. If that position is correct, those class members could not recover damages and the class size would be reduced. Because *amici*'s position would substantially reduce GoDaddy.com's damages exposure, this brief should be classified as a brief in support of GoDaddy.com. If that is correct, then *amici*'s brief would be timely because it would be due on May 15, 2023. 11th Cir. R. 35-8.

Prospective *amici* recognize that it is possible that GoDaddy.com will take the position that the entire class has standing so as not to jeopardize the settlement. Counsel for Movant-Appellant has advised *amici* that it believes the proposed brief is untimely, presumably on the ground that it should be classified as a brief in support of neither party (due April 14, 2023) rather than a brief in support of GoDaddy.com (due May 15, 2023).

As explained above, *amici* believe that a May 15, 2023 filing would be timely under this Court's rules. But if the Court disagrees, *amici* request leave to file this brief out of time. Two rationales support granting *amici* leave to file their brief out of time in the event the brief is adjudged to qualify as a brief in support of neither party.

First, because the standing question before the en banc Court was not addressed in the parties' briefing at the panel stage, the alignment of the parties on the standing question has been—and remains—unclear. Given *amici's* good-faith belief that their view would align with GoDaddy.com's interests (*i.e.*, the interests of an Appellee), *amici* should be permitted to file their brief according to the anticipated schedule.

Second, *amici* believe that their brief could be of considerable assistance to this Court in the event GoDaddy.com does not defend the panel opinion's standing analysis. The question before the en banc Court is one of great significance and one that has led to a split of authority among the courts of appeals. *Compare Salcedo*, 936 F.3d 1162, *with Cranor v. 5 Star Nutrition, L.L.C.*, 998 F.3d 686, 690–92 (5th Cir. 2021), *Gadelhak v. AT&T Servs., Inc.*, 950 F.3d 458, 462 (7th Cir. 2020), *Melito v. Experian Mktg. Sols., Inc.*, 923 F.3d 85, 93 (2d Cir. 2019), *and Van Patten v. Vertical Fitness Grp., LLC*, 847 F.3d 1037, 1043 (9th Cir. 2017). If all parties to this case take a unified position on standing in order to protect a parochial interest specific to this case, this Court will be deprived of the usual adversarial argumentation necessary to resolve difficult legal questions. No briefs opposing standing were filed on April 14, 2023; if the proposed briefs of *amici* and others who seek to file briefs in support of the panel decision are rejected, this Court will be left with no briefing on one side of the question presented.

For these reasons, this Court should grant the RLC and FRF's motion for leave to file a brief as *amici curiae* in this case—including, if necessary, leave to file that brief out of time.

CONCLUSION

The motion for leave to file a brief as *amici curiae* in support of Defendant-Appellee and vacatur should be granted.

Date: May 15, 2023

/s/ Adam G. Unikowsky

Adam G. Unikowsky

Counsel of Record

Jonathan J. Marshall*

JENNER & BLOCK LLP

1099 New York Ave., N.W.,

Suite 900

Washington, DC 20001

(202) 639-6000

aunikowsky@jenner.com

Counsel for Amici Curiae Retail Litigation

Center, Inc., and Florida Retail

Federation

Deborah R. White

RETAIL LITIGATION CENTER, INC.

99 M Street, S.E., Suite 700

Washington, DC 20003

(202) 869-0200

deborah.white@rila.org

Counsel for Amicus Curiae Retail Litigation

Center, Inc.

* *Admission in the District of Columbia
pending; practicing under direct
supervision of members of the D.C. Bar*

CERTIFICATE OF COMPLIANCE

I hereby certify that this document complies with the word limit set forth in Federal Rule of Appellate Procedure 27(d)(2) because, excluding the parts of the document exempted by Federal Rule of Appellate Procedure 32(f), this document contains **1,564** words.

I further certify that this document complies with the typeface requirements set forth in Federal Rule of Appellate Procedure 32(a)(5)(A) and with the type-style requirements set forth in Federal Rule of Appellate Procedure 32(a)(6).

Date: May 15, 2023

/s/ Adam G. Unikowsky

Adam G. Unikowsky
JENNER & BLOCK LLP
1099 New York Ave., N.W.,
Suite 900
Washington, DC 20001
(202) 639-6000
aunikowsky@jenner.com

*Counsel of Record for Amici Curiae Retail
Litigation Center, Inc., and Florida Retail
Federation*

CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of May, 2023, I caused the foregoing **Motion for Leave of Retail Litigation Center, Inc., and Florida Retail Federation to File En Banc Brief as *Amici Curiae* in Support of Defendant-Appellee and Vacatur** to be electronically filed with the Clerk of the Court for the United States Court of Appeals for the Eleventh Circuit using the appellate CM/ECF system.

I further certify that all participants in the case are registered CM/ECF users and that service will be effected through the CM/ECF system.

Date: May 15, 2023

/s/ Adam G. Unikowsky

Adam G. Unikowsky
JENNER & BLOCK LLP
1099 New York Ave., N.W.,
Suite 900
Washington, DC 20001
(202) 639-6000
aunikowsky@jenner.com

*Counsel of Record for Amici Curiae Retail
Litigation Center, Inc., and Florida Retail
Federation*