IN THE

United States Court of Appeals

FOR THE ELEVENTH CIRCUIT

Case No. 19-14434

RICHARD HUNSTEIN,
Plaintiff-Appellant,

v.

PREFERRED COLLECTION 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 OF *AMICI CURIAE* CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND RETAIL LITIGATION CENTER, INC. IN SUPPORT OF DEFENDANT-APPELLEE

Tara S. Morrissey
Tyler S. Badgley
U.S. CHAMBER LITIGATION CENTER
1615 H Street, NW
Washington, DC 20062

Deborah R. White
RETAIL LITIGATION CENTER, INC.
99 M Street, SE Suite 700
Washington, DC 20003

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

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Civil Procedure 26, *amici curiae* certify that they have no outstanding shares or debt securities in the hands of the public, and they do not have a parent company. No publicly held company has a 10% or greater ownership interest in *amici curiae.*

Pursuant to Eleventh Circuit Rule 26.1-1, *amici curiae* certify that, in addition to the persons and entities named in the parties' certificates of interested persons, the following individuals or entities may have an interest in the outcome of this case:

1. Jenner & Block LLP
2. The Chamber of Commerce of the United States of America
3. Adam G. Unikowsky
4. Tara S. Morrissey
5. Tyler S. Badgley
6. The Retail Litigation Center, Inc.
7. Deborah R. White

/s/ Adam G. Unikowsky

TABLE OF CONTENTS

TABLE OF AUTHORITIES*

CASES

* Authorities upon which we chiefly rely are marked with an asterisk.

STATUTES

OTHER AUTHORITIES

IDENTITY AND INTEREST OF AMICI[1]

The Chamber of Commerce of the United States of America (the "Chamber") is the world's largest business federation. It represents 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases, like this one, that raise issues of concern to the Nation's business community.

The Retail Litigation Center, Inc. ("RLC") is the only public policy organization dedicated to representing the retail industry in the judiciary. The RLC's members include many of the country's largest and most innovative retailers. They employ millions of workers throughout the United States, provide goods and services to tens of millions of consumers, and account for tens of billions of dollars in annual sales. The RLC seeks to provide courts with retail-

[1] Pursuant to Fed. R. App. P. 29(a)(4)(E), *amici curiae* state that no party's counsel authored this brief in whole or in part; that no party or party's counsel contributed money that was intended to fund preparing or submitting the brief; and that no person other than the *amici curiae*, their members, or their counsel contributed money that was intended to fund preparing or submitting the brief.

industry perspectives on important legal issues impacting its members, and to highlight the potential industry-wide con sequences of significant pending cases.

Amici have a significant interest in the Article III issue presented in this case because their members face putative class action lawsuits, including lawsuits alleging violations of, and seeking to recover statutory damages under, the Fair Debt Collection Practices Act. Article III requires plaintiffs to allege concrete harm bearing "a 'close relationship' to a harm traditionally recognized as providing a basis for a lawsuit in American courts." *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2200 (2021). But Hunstein and other putative class members cannot satisfy that standard because they have not sustained any injury that is remotely similar to the types of injuries that would have been traditionally recognized by American courts as actionable. Hunstein alleges that he was injured when Preferred transmitted information about his debt to a third party vendor. But *TransUnion* squarely held that purported "injuries" caused by corporations disseminating information to their vendors are not actionable. *Id.* at 2210 n.6. More fundamentally, *TransUnion* establishes that the plaintiff must plead and prove an injury that would have been recognized under the traditional common-law test for injury—a requirement that Hunstein cannot satisfy here.

If the panel's decision stands, *TransUnion* will be a near dead letter in this circuit. Other class-action plaintiffs' lawyers will be encouraged to bring the very

type of abusive class action litigation that *TransUnion* repudiated. And businesses will find themselves mired in massive lawsuits over alleged technical statutory violations that have not caused actual harm to the vast majority of the class. *Amici* therefore have a strong interest in this case and in affirmance of the decision below.

INTRODUCTION AND SUMMARY OF ARGUMENT

In *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190 (2021), the Supreme Court held that Article III standing requires proof of an injury with "a 'close relationship' to a harm traditionally recognized as providing a basis for a lawsuit in American courts." *Id.* at 2200. The Supreme Court's application of that rule made clear that the "close relationship" requirement has teeth. Under *TransUnion*, Article III requires a plaintiff to prove an injury that would have satisfied the *actual test for harm* recognized at common law. The "close relationship" test does not allow a plaintiff to show that a non-traditional injury is actionable merely because it is "close" to a traditionally recognized harm in some abstract sense. Instead, the "close relationship" test merely recognizes the reality that it will sometimes be impossible for a plaintiff to find a factually indistinguishable common law case. Nonetheless, the plaintiff must still prove that the injury meets the traditional common law test for actionable harm.

This Court should reject the panel's view that injuries that differ in "degree" from traditional harms are actionable, but injuries that differ in "kind" are not. This distinction is irreconcilable with *TransUnion*'s reasoning, has no grounding in tradition, and is completely indeterminate. Applying the correct legal standard, this case is easy: Hunstein's claim fails because his injury would not have met the traditional common law test for harm.

Ruling in Hunstein's favor would result in adverse policy consequences. No-injury class actions are a drain on productive American businesses—and statutory damages class actions in which each class member sustains no traditionally recognized injury are particularly pernicious. The Court should not open the door to a form of litigation that creates massive settlement pressure while yielding little more than a transfer of funds from businesses to class action lawyers, with minimal or no benefit for the class.

ARGUMENT

I. Hunstein was not injured under Article III because his injury does not satisfy the test for injury articulated in traditional common law cases.

The Court should hold that *TransUnion* requires plaintiffs to prove that their asserted injury satisfies the *actual test for harm* articulated in common law cases. The Court should decline Hunstein's invitation to hold that an injury is actionable if it is sufficiently "close" to traditionally recognized harms in some undefined sense, and to draw unmanageable distinctions between the kind and degree of

harms. In this case, the Court should hold that Hunstein's injury is not actionable because it does not satisfy the elements of any traditional tort.

A. Under *TransUnion*, plaintiffs must prove an injury that satisfies traditional common law requirements.

In *TransUnion*, the Supreme Court held that Article III standing requires proof of an injury with "a 'close relationship' to a harm traditionally recognized as providing a basis for a lawsuit in American courts." 141 S. Ct. at 2200. Although plaintiffs need not identify an "exact duplicate in American history and tradition," they must show a "a close historical or common-law analogue for their asserted injury." *Id.* at 2204. When a plaintiff alleges an intangible injury, that injury must bear a "close relationship" to the types of intangible injuries that traditionally supported lawsuits in American courts, such as "reputational harms, disclosure of private information, and intrusion upon seclusion." *Id.*

The Supreme Court went on to apply that legal standard to the facts of the case—and, in doing so, made clear that the "close relationship" requirement has teeth. Throughout its opinion, the Court stated that while the plaintiff need not identify a factually identical common law tort case, the plaintiff must show that the asserted injury satisfies the *actual test for injury* articulated in common law tort cases.

The Court first addressed whether the plaintiffs were injured by TransUnion's transmission to third parties of credit reports characterizing the

plaintiffs as terrorists or criminals. The Court grounded its analysis in the traditional legal standard that "a person is injured when a defamatory statement 'that would subject him to hatred, contempt, or ridicule' is published to a third party." *Id.* at 2208 (citation omitted). Applying this standard, the Court had "no trouble" concluding that those who are labeled "potential terrorists, drug traffickers, or serious criminals" suffer "a harm with a 'close relationship' to the harm associated with the tort of defamation." *Id.* at 2209. TransUnion objected to this conclusion on the ground that its credit reports characterized people as *potential* terrorists rather than *actual* terrorists, and hence were not "technically false." *Id.* The Court rejected this argument, finding that "[t]he harm from being labeled a 'potential terrorist' bears a close relationship to the harm from being labeled a 'terrorist.'" *Id.*

The Court's conclusion is consistent with the common law. Common law courts would have characterized *both* the statement "this person is a terrorist," *and* the statement "this person is a potential terrorist," as defamatory if published to a third party. Under the common law, imputing a serious crime (which undoubtedly includes terrorism) to another is defamatory per se. *See Restatement (First) of Torts* § 571, Westlaw (database updated Oct. 2021) (reciting rule and collecting cases); *Carey v. Piphus*, 435 U.S. 247, 262 n.18 (1978); *see also, e.g.*, *Pensacola Motor Sales, Inc. v. Daphne Auto., LLC*, 155 So. 3d 930, 943 (Ala. 2013)

(upholding verdict finding accusations of links to terrorist activity to be defamatory per se). Moreover, using the phrase "potential terrorist" rather than "terrorist" would not have been a defense to liability. Liability attached to the mere implication of a serious crime: "[if] the imputation [was] sufficiently made, the defamer [was] liable," even if he expressed doubt or disbelief regarding the charge. *Restatement (First) of Torts* § 571, *supra*, cmt. c. Hence, under *TransUnion*, as a necessary prerequisite to satisfying the "close relationship" requirement, the asserted injury must meet the test for harm already recognized in the common law.

The Court applied the same reasoning in addressing whether the plaintiffs were injured by credit reports that were inaccurate but that were not disseminated to third parties. The Court identified the traditional legal standard for proving injury: the plaintiff must show dissemination to third parties. *TransUnion,* 141 S. Ct. at 2209 ("Publication is 'essential to liability' in a suit for defamation." (quoting *Restatement (First) of Torts), supra*, § 577, cmt. a, at 192)). The *dispositive* fact was that the plaintiff's asserted injury did not meet that traditional legal standard because the information was not published. The Court explained that "the retention of information lawfully obtained, without further disclosure, traditionally has not provided the basis for a lawsuit in American courts, meaning that the mere existence of inaccurate information in a database is insufficient to confer Article III standing." *Id.* (internal quotation marks omitted). The Court did

not undertake an abstract analysis of whether the asserted injury was "close" in some undefined sense to traditionally recognized torts. Instead, the Court held that the asserted injury would not satisfy the traditional test for harm—end of case.

Finally, the Court rejected the plaintiff's argument that he was harmed because TransUnion published the allegedly false information "to employees within TransUnion and to the vendors that printed and sent the mailings that the class members received." *Id.* at 2210 n.6. The Court again deemed it dispositive that this asserted injury did not satisfy the traditional test for harm in defamation cases. The Court explained that "American courts did not traditionally recognize intra-company disclosures as actionable publications" and have not "necessarily recognized disclosures to printing vendors as actionable publications." *Id.* It cited the Restatement of Torts for the proposition that common law cases "generally require[d] evidence that the document was actually read and not merely processed." *Id.* The Court deemed these traditional principles dispositive: because the asserted injury "circumvents a fundamental requirement of an ordinary defamation claim—publication," it "does not bear a sufficiently 'close relationship' to the traditional defamation tort to qualify for Article III standing." *Id.* Crucially, the Court conducted no additional analysis of whether the asserted injury was "close" to the traditional defamation tort. Instead, once the Court found

that the asserted injury did not meet the publication requirement as traditionally articulated, no further analysis was necessary: the harm was not actionable.

As Preferred correctly explains, that analysis is particularly pertinent to this case because Hunstein's asserted injury—disclosure to a vendor—is exactly the type of injury the *TransUnion* Court held was not actionable. Indeed, *amici* fully agree with Preferred that this portion of the Court's opinion squarely forecloses Hunstein's argument. However, the Court's broader methodology is also revealing. The Court again applied the approach of determining whether the asserted injury met the actual common law test for harm. Rather than assessing whether the asserted injury was sufficiently "close" to a traditionally recognized harm, the Court deemed it dispositive—without engaging in further reasoning—that traditional American courts would not have recognized disclosures to vendors as actionable. This Court should make clear that lower courts should apply the same methodology in adjudicating claims of Article III injury.

B. The Court should reject the panel's proposed distinction between differences in "degree" and differences in "kind."

In reaching a contrary conclusion, the panel adopted the rule that an "intangible injury" must be "of the same kind as a harm actionable at common law but not necessarily the same degree." Op. at 18-19. Applying that rule, the panel held that Hunstein's asserted injury—that Preferred disclosed his personal information to CompuMail—was the same "kind" of injury as the injury

recognized in the traditional tort for public disclosure of private facts, even though it differed in degree. Op. at 19-20. The panel acknowledged that "Preferred's disclosure of Hunstein's private information to CompuMail's employees might have been less widespread—less public—than the disclosures typical of actionable public-disclosure-of-private-facts claims," but it dismissed that distinction as merely "a matter of 'degree.'" Op. at 20. The panel concluded that Hunstein had alleged a sufficiently concrete injury because "publication of personal information to the employees of a single entity and more widespread dissemination of that same personal information remain similar in 'kind.'" *Id.*

Amici agree with Preferred and the panel dissent that the panel's reasoning is incorrect on its own terms: disclosure to a vendor is a different "kind" of injury from disclosure to the general public. *See* Dissent at 9. More fundamentally, however, the debate between the majority and the dissent establishes that the Court should not enshrine the kind/degree distinction into circuit law. Instead, it should hold that an injury satisfies Article III only if it is sufficient in both kind and degree to meet the traditional requirements of common law claims.

First, the kind/degree distinction is indeterminate. The dialogue between the majority and dissent illustrates this point. The traditional tort of public disclosure of private facts required disclosure to the general public. Hunstein alleges that Preferred disclosed private information to a vendor. The dissent thought these

injuries were different in kind: disclosure to the general public is a different kind of harm than disclosure to a single vendor. Dissent at 9. In response, the majority pointed to the difficulty of drawing the line between degree and kind:

> And whatever that public-ness threshold is, how can it legitimately be described as a difference in "kind" rather than "degree"? Let's posit, for instance, that the magic number is 100. Does that really mean that a plaintiff in Hunstein's shoes suffers one "kind" of harm (insufficient to confer standing) if 99 employees see his private information, and an altogether different "kind" of harm (sufficient to confer standing) if just one more sees it? And can it really be that the *United States Constitution* demands that sort of bologna-slicing?

Op. at 20-21 n.7.

The majority believed that this line-drawing problem supported its view that the injuries differed in degree rather than kind. In reality, however, the majority's analysis shows that the line is incapable of being intelligibly and objectively drawn.

At some point, injuries are so different in degree that they become different in kind—but determining when that point arrives is completely subjective. Is a deep stab wound a different kind of injury, or merely a different degree of injury, than a paper cut? Both are incisions in the skin; they differ in degree because one is deeper than the other. But as a practical matter, these injuries are different in kind; one may call for a bandage, while another demands emergency medical care. The depth of cuts lies on a spectrum, and there is room for disagreement over whether two cuts differ in kind or merely in degree.

Moreover, it will always be possible to find some similarities, and some differences, between injuries. Is a fractured knee a different kind of injury, or merely a different degree of injury, than a sprained knee? In some ways they are different kinds of injuries (breaking a bone is different from spraining a muscle), while in other ways they are different degrees of the same injury (in both cases the knee has been injured, but in one case the knee is injured more). There is simply no way to predictably apply the kind/degree distinction in this situation.

Or, consider *Gadelhak v. AT&T Services, Inc.*, 950 F.3d 458 (7th Cir. 2020), *cert. denied*, 141 S. Ct. 2552 (2021), which the majority cited with approval. Op. at 13-14. In that case, the Seventh Circuit concluded that a single annoying telephone call caused a different degree of injury, but the same kind of injury, as telephone calls that are "repeated with such persistence and frequency as to amount to a course of hounding the plaintiff," which are a traditional basis for common law liability. 950 F.3d at 462 (quotation marks omitted). It is true, in one sense, that multiple phone calls cause the same kind of injury as one phone call, only repeated multiple times. But it is also true that being hounded seems like a different kind of injury than merely bearing the annoyance of a single misplaced phone call. Being hounded can be frightening; getting a single phone call is not. Being hounded can cause the victim to take extraordinary action like filing a police report or seeking a restraining order; people are unlikely to take these steps when the telephone rings

once. Balancing those similarities and differences for purposes of a kind/degree distinction is utterly subjective.

Making matters worse, there is no extant body of law that can assist courts in drawing the kind/degree distinction. By contrast, when determining whether the elements of a common law claim are satisfied, courts can seek guidance in common law cases that have grappled with similar line-drawing problems. Relying on judicial precedent provides consistency and predictability to courts and litigants. But no similar body of law can assist courts in distinguishing between the kind and degree of injuries.

Adopting this distinction would be especially incongruous because *TransUnion* was premised on the importance of respecting tradition. The Court emphasized that the Article III inquiry should look to "history and tradition." 141 S. Ct. at 2204 (quotation marks omitted). And history and tradition have long guided the Supreme Court's Article III jurisprudence. *See, e.g.*, *Coleman v. Miller*, 307 U.S. 433, 460 (1939) (opinion of Frankfurter, J.) (in crafting Article III, "the framers ... gave merely the outlines of what were to them the familiar operations of the English judicial system and its manifestations on this side of the ocean before the Union"). Yet under Hunstein's proposed kind/degree rule, federal courts will face the difficult task of adopting a complete new body of constitutional law *ex nihilo*. History will be unhelpful: the premise of the panel's decision is that

injuries may be actionable even if they are *not* historically recognized. Nor can the courts defer to Congress's judgment. In *TransUnion* itself, Congress determined that creating false credit reports, without more, was a sufficiently serious harm to warrant statutory damages, but the Supreme Court nonetheless held that this harm could not support federal jurisdiction under Article III. Courts would simply have to grapple in the dark and decide, in every case, whether an injury was different in "degree," or instead in "kind," from traditionally recognized harms. The *TransUnion* Court did not contemplate this type of standardless inquiry.

Requiring courts to engage in this line-drawing exercise would be particularly burdensome because of the remarkable variety of statutory damages provisions under both federal and state law. To give a few examples that have given rise to class actions:

- The federal Telephone Consumer Protection Act (TCPA) places limits on unsolicited telephone calls and text messages. It provides for $500 statutory damages per violation, 47 U.S.C. § 227(b)(3)(B), or up to $1,500 per violation if the defendant committed the violation "willfully or knowingly." *Id.* § 227(b)(3).

- The federal Fair Credit Reporting Act, 15 U.S.C. § 1681 *et seq.*, covers information collected by credit bureaus and other similar agencies. It allows plaintiffs to recover statutory damages between $100 and $1,000. *Id.* § 1681n(a)(1)(A).

- The federal Electronic Communications Privacy Act, 18 U.S.C. § 2510 *et seq.*, protects the privacy of certain types of information that is sent electronically. It allows plaintiffs to recover statutory damages of up to $500 for first-time offenses and up to $1,000 for repeat offenses. *Id.* §

2520(c)(1)(A)-(B). Similar statutes exist under the laws of several states, including Florida. *See* Fla. Stat. § 934.03,

- The Illinois Biometric Information Privacy Act, 740 ILCS 14/1 *et seq.*, regulates the collection and storage of biometric information. It provides $1,000 statutory damages for each negligent violation and $5,000 for each reckless or intentional violation. *Id.* § 20(1)–(2).

- The California Song-Beverly Act, Cal. Civ. Code § 1747.08(e), provides a civil penalty of $250 for the first violation and $1,000 for each subsequent violation for businesses who request and record a credit card holder's personal identifying information.

- The California "Shine the Light" Law, Cal. Civ. Code § 1798.53, provides for a minimum of $2,500 in exemplary damages for a company's failure to inform consumers that it has disclosed their personal information to a third party.

If the Court adopts the panel's proposed kind/degree distinction, litigants will have to litigate the kind/degree distinction over and over again for every other statute, with unpredictable outcomes. The Court should instead apply the clear rule that the asserted injury must meet the traditional test for harm under the common law.

C. In this case, Hunstein lacks standing because he has not sustained a traditionally recognized injury.

Applying *TransUnion* faithfully, this case is easy. Hunstein alleges that he was injured because Preferred shared information about his debt with a vendor. Would this injury satisfy any traditional common law test for intangible harm? No.

The panel analogized the asserted injury to the tort of "public disclosure of private facts." Op. at 10 (quotation marks omitted). According to the Restatement, "[o]ne who gives publicity to a matter concerning the private life of another is subject to liability to the other for invasion of his privacy, if the matter publicized is of a kind that (a) would be highly offensive to a reasonable person, and (b) is not of legitimate concern to the public." *Id.* (quoting *Restatement (Second) of Torts* § 652D, Westlaw (database updated Oct. 2021)). But this tort requires disclosure *to the general public*. "[I]t is not an invasion of the right of privacy … to communicate a fact concerning the plaintiff's private life to a single person or even to a small group of persons." *Restatement (Second) of Torts* § 652D cmt. a. The Restatement then gives the following two illustrations:

> 1. 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. This is not an invasion of B's privacy under this Section.
>
> 2. A, a creditor, posts in the window of his shop, where it is read by those passing by on the street, a statement that B owes a debt to him and has not paid it. This is an invasion of B's privacy.

Id. That discussion should have resolved this case. Preferred made its disclosure to a "small group of persons"—*i.e.*, the employees of the vendor that viewed the information in the course of their employment. If there were any doubt about this, Illustration 1 dispels it. Illustration 1 provides that disclosure of a debt

to an "employer" is not actionable. This case is factually identical to Illustration 1 except that the disclosure is to a vendor rather than an employer. There is no rational reason that the disclosure in this case is *more* injurious than Illustration 1. Indeed, it is *less* injurious because the vendor is a mere agent of the creditor, whereas most people would not want their employers knowing about their private debts. Therefore, the asserted harm is not actionable under the common law—which means it should not be actionable under Article III.

The panel's efforts to overcome this reasoning do not withstand scrutiny. First, the majority suggested that the vendor might have many employees, so perhaps the disclosure *was* to a large group of people. Op. at 20 n.7. This reasoning is irreconcilable with the Restatement, which establishes that a disclosure to a single legal entity—there, the "employer" —is not disclosure to the general public. As the dissent explained, regardless of how many employees an employer happens to have, a communication to the employer is not a communication "meant to be exchanged with the world." Dissent at 7 n.4. Here, too, the vendor is not synonymous with the general public, regardless of how many people happen to work there.

Next, the majority observed that it is hard to draw the line between "the general public" and a "small group of persons." Op. at 20 n.7. This is undoubtedly true. Virtually all sections of the Restatement present line-drawing

difficulties at the margin, and Section 652D is no exception. No matter what legal standard the Court adopts, there will be some class of borderline cases.

However, it is far easier for courts to apply the legal standards already recognized by the common law, than to draw a new line on top of the old line. While there may be close cases under those legal standards, courts can draw upon a wealth of case law already in existence to guide their path. By contrast, under the majority's approach, there are now *two* blurry lines. The first is the line between harms that are traditionally actionable and harms that are not. The second is the brand-new degree/kind distinction, which has no common law antecedent. Under the majority's approach, courts will have to draw *both* lines: first to determine the scope of the common law, then to determine whether the asserted injury is close in "degree" to the common law harm. Drawing lines is never easy, but the majority's double-line-drawing approach will be impossible.

Finally, the majority explained that common law courts have sometimes differed on the precise degree of dissemination necessary to establish actionable harm. Op. at 21 n.7. That is true, and the same challenge exists any time a court attempts to discern a traditional common law standard. But that does not justify adopting a new degree/kind standard for purposes of recognizing injuries that *no* common law court would have deemed actionable.

To be sure, *TransUnion* leaves space for courts to defer to Congress's judgment in close cases, where the common law does not provide clear answers. *TransUnion*, 141 S. Ct. at 2204 (courts must "afford due respect" to Congress's judgment). In cases where courts disagree as to what the common law requires, or where a common law standard is ambiguous, Congress may have a range of options that could be said to be consistent with the common law. And, as already explained, the "close relationship" standard ensures that a plaintiff need not find a factually identical common law case in order to establish standing. But here, the Restatement expressly repudiates Hunstein's theory of injury, and there is no evidence that any common law court would have equated disclosure to a vendor with disclosure to the general public. As such, Hunstein lacks Article III standing.

II. There are strong policy reasons for rigorously enforcing Article III's injury-in-fact requirement.

Ruling in Hunstein's favor would have adverse policy consequences. Lawsuits alleging non-traditional intangible injuries nearly always arise in the context of statutory damages class actions. Because actual damages in such cases are minimal and unprovable, lawyers seek statutory damages; and because individualized statutory damages litigation yields low recoveries, lawyers bring such cases as class actions. These class actions have the potential for serious abuse and ultimately harm both businesses and consumers.

Statutory damages and class actions create a "perfect storm" by "combin[ing] to create commercial wreckage far greater than either could alone." *Stillmock v. Weis Mkts., Inc.*, 385 F. App'x 267, 276 (4th Cir. 2010) (Wilkinson, J., concurring). In such class action cases, each plaintiff has suffered an injury so miniscule that it was not recognized as an actionable injury at common law; yet, class-action lawyers are able to aggregate hundreds or thousands of such claims into a class action that yields potentially ruinous liability. The Court should not permit such suits.

Class-action litigation costs in the United States are huge. They totaled a staggering $2.9 billion in 2020, continuing a rising trend that started in 2015. *See 2021 Carlton Fields Class Action Survey*, at 6 (2021), https://ClassAction Survey.com. Moreover, defendants in class actions already face tremendous pressure to capitulate to what Judge Friendly termed "blackmail settlements." Henry J. Friendly, *Federal Jurisdiction: A General View* 120 (1973). The Supreme Court has long recognized the power of class-action lawsuits to induce settlement. As the Court explained over 40 years ago, "[c]ertification of a large class may so increase the defendant's potential damages liability and litigation costs that he may find it economically prudent to settle and to abandon a meritorious defense." *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 476 (1978); *see also AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 350 (2011) (noting "the

risk of 'in terrorem' settlements that class actions entail"); *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 445 n.3 (2010) (Ginsburg, J., dissenting) ("[A] class action can result in 'potentially ruinous liability.'" (quoting Advisory Committee's Notes on Fed. R. Civ. P. 23)).

It therefore is not surprising that businesses often yield to the hydraulic pressure generated by class certification to settle even meritless claims. *See 2021 Carlton Fields Class Action Survey*, *supra*, at 26 (noting that in 2018, 2019, and 2020, a majority of class action cases settled). And an abundant literature points out that those settlements tend to enrich class counsel at the expense of the class. *See, e.g.*, Martin H. Redish et al., *Cy Pres Relief and the Pathologies of the Modern Class Action: A Normative and Empirical Analysis*, 62 Fla. L. Rev. 617, 618-19 (2010); John H. Beisner et al., *Class Action 'Cops': Public Servants or Private Entrepreneurs?*, 57 Stan. L. Rev. 1441, 1471-72 (2005).

If the Court adopts Hunstein's expansive view of standing, settlement pressure will become particularly acute. Class actions where class members have sustained no traditionally-recognized injury tend to have *many* class members. *See, e.g., In re Facebook Biometric Info. Priv. Litig.*, 326 F.R.D. 535, 543 (N.D. Cal. 2018) (noting that millions of Facebook users were class members in BIPA litigation), *aff'd sub nom. Patel v. Facebook, Inc.*, 932 F.3d 1264 (9th Cir. 2019). This is so for two reasons. First, it is much easier to find class members when

courts relax the requirement that the class member actually have been harmed. Second, because actual injuries will frequently vary depending on a particular person's circumstances, it is difficult to certify a large class of plaintiffs who have sustained actual injuries while satisfying Rule 23's commonality and predominance requirements. By contrast, when courts disregard the requirement that each class member suffer a traditionally recognized injury, certifying large classes becomes much easier.

Classes composed of thousands or millions of class members are likely to yield profound unfairness to defendants. The bigger the class, the less likely it is that defendants can put on individualized defenses. Defendants have a fundamental due process right to "present every available defense." *Lindsey v. Normet*, 405 U.S. 56, 66 (1972) (quoting *American Sur. Co. v. Baldwin*, 287 U.S. 156, 168 (1932)). "The right to be heard must necessarily embody a right to . . . raise relevant issues," *Holt v. Virginia*, 381 U.S. 131, 136 (1965), and must allow the defendant to "test the sufficiency" of the plaintiff's case by offering "evidence in explanation or rebuttal," *ICC v. Louisville & Nashville Railroad Co.*, 227 U.S. 88, 93 (1913); *Saunders v. Shaw*, 244 U.S. 317, 319 (1917); *see also Bell v. Burson*, 402 U.S. 535, 542 (1971). But as the class grows, the prospect of providing individualized defenses becomes unrealistic. The practical effect of such super-large class actions is to strip defendants of defenses that would have been

available in individualized litigation—precisely what class actions are not supposed to do.

Moreover, large classes result in a risk that the class representative will be unrepresentative of the class, causing unfairness to the defendant. A class representative may have suffered a *tangible* injury, which may be presented to a sympathetic jury. The jury may therefore be tempted to award damages to class members who were barely, if at all, harmed. As classes get bigger, the more likely it is that the class will contain an idiosyncratic, particularly sympathetic class member who will be designated as the class representative and drive up damages for the whole class.

Although this case concerns the FDCPA, the Court's decision in this case will bear on many actions seeking statutory damages. *See supra* at 14-15. The TCPA is an example of a statutory damages provision that has given rise to particularly abusive class action lawsuits. TCPA classes are typically composed of persons who received a small number of phone calls or text messages—an injury insufficient to be actionable under the common law, but which the Seventh Circuit has held to be actionable under a "close relationship" standard. *See supra* at 12. With statutory damages ranging from $500 to $1,500 for each call, TCPA class actions have yielded enormous settlements. Defendants are faced with massive uncapped per-call statutory damages, uncertainty about the true scope of the law,

and the prospect of burdensome discovery, forcing many to settle rather than fight—often for tens of millions of dollars. U.S. Chamber Inst. for Legal Reform, *TCPA Litigation Sprawl* 9-10 (2017) (detailing settlements), https://institutefor legalreform.com/research/tcpa-litigation-sprawl-a-study-of-the-sources-and-targets -of-recent-tcpa-lawsuits/; *see also* U.S. Chamber Inst. for Legal Reform, *Turning the Tide: The Effects of* Duguid (Dec. 2021), https://instituteforlegalreform. com/wp-content/uploads/2021/12/1323_ILR_TCPA_Report_FINAL_Pages.pdf (discussing continued TCPA litigation after *Facebook v. Duguid*, 141 S. Ct. 1163 (2021)). Indeed, TCPA litigation has become so lucrative that plaintiffs seek out violations in order to bring lawsuits. *See, e.g.*, *Stoops v. Wells Fargo Bank, N.A.*, 197 F. Supp. 3d 782, 788 (W.D. Pa. 2016) (plaintiff purchased "at least thirty-five cell phones … for the purpose of filing lawsuits" under the TCPA); *Nghiem v. Dick's Sporting Goods, Inc.*, 318 F.R.D. 375, 382 (C.D. Cal. 2016) (plaintiff signed up for promotional texts "for the specific purpose of finding a TCPA violation"). Ruling in Hunstein's favor encourages uninjured plaintiffs (and their lawyers) to bring even more lawsuits.

No-injury class actions harm not only businesses, but also consumers. When statutory-damages regimes and class actions are combined, the result is suits seeking massive damages awards that radically exceed any harm caused by the allegedly illegal conduct. The financially calamitous nature of these suits will lead

to over-deterrence that does not benefit consumers. For instance, such suits induce business to incur substantial compliance costs that purportedly protect consumers from nonexistent harms. They also deter practices that many consumers may find beneficial if there is even a slight risk that a creative plaintiff's lawyer will use them as the basis for a class action suit. Enforcing Article III, and ensuring that unharmed plaintiffs and their counsel cannot obtain windfall damages, would protect against these harmful outcomes.

For all these reasons, large statutory damages classes produce existential risk for class action defendants while depriving them of a meaningful opportunity to offer a defense. Adherence to Article III is necessary to ensure that class action defendants receive a fair hearing.

CONCLUSION

The Court should hold that Hunstein lacks Article III standing.

January 18, 2022

Respectfully submitted,

/s/ Adam G. Unikowsky

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

Tara S. Morrissey
Tyler S. Badgley
U.S. CHAMBER LITIGATION CENTER
1615 H Street, NW
Washington, DC 20062

Deborah R. White
RETAIL LITIGATION CENTER, INC.
99 M Street, SE Suite 700
Washington, DC 20003

CERTIFICATE OF COMPLIANCE

This document complies with the type-volume limit of Fed. R. App. P. 29(a)(5) and 11th Cir. R. 35-8 because it contains 5,928 words, excluding the parts of the document exempted by Fed. R. App. P. 32(f) and 11th Cir. R. 29-3.

This document complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this document has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in 14-point Times New Roman Font.

/s/ Adam G. Unikowsky

CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of January, 2022, a true and correct copy of the foregoing Brief was served on all counsel of record in this appeal via CM/ECF.

/s/ Adam G. Unikowsky