Case No. 19-14434-U

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

RICHARD HUNSTEIN,
Plaintiff-Appellant,

v.

PREFERRED COLLECTION AND MANAGEMENT SERVICES, INC.,
Defendant-Appellee.

On Appeal from the United States District Court
for the Middle District of Florida
Case No. 8:19-cv-00983-TPB-TGW

APPELLANT'S EN BANC REPLY BRIEF

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CERTIFICATE OF INTERESTRED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Eleventh Circuit Rule 26.1-1, counsel for Plaintiff-Appellant Richard Hunstein certifies that all interested Parties have been referenced in the prior briefs by both Appellant and Appellee:

In accordance with 11th Cir. R. 26.1-3, there is no additional publicly traded company or corporation with an interest in the outcome of this case.

/s/ Thomas M. Bonan
Thomas M. Bonan

Argument

Hunstein's claim is close enough.

As Appellee admits in their responsive briefing, the "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). Despite this, Appellee dives into a very detail-oriented analysis of how Mr. Hunstein's claim *might* not be successful under Florida caselaw concerning common law invasion of privacy. Specifically, Appellee focuses on "publicity." As cited in Appellee's brief, those elements are:

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).

Undeniably, Mr. Hunstein's son's medical debt information is private.[1] The details are unknown to the general public who are presumably unconcerned with it. Nonetheless, most people would prefer such information remain confidential. The failure to pay a financial obligation carries obvious negative connotations. No rational person boasts of being a "deadbeat." Congress recognized the inherent danger of disseminating such information when passing the Fair Debt Collection Practices Act[2].

Thus, it is clear the only element missing from a proper claim for invasion of privacy is publication. Yet, no test requires identification of elements – Congress is not constrained to recodify existing common law causes. Rather, Mr. Hunstein need only show his injury is of the same *nature* of an invasion of privacy. It must not be a perfect fit.

Ignoring this, Appellee seeks to dismiss its third-party disclosure as merely internal, casually referring to CompuMail as its *agent*, virtually its *employee*. Similar to *Ramirez*[3], this was a disclosure to a separate company –

1 *See, e.g.*, HIPAA, Pub.L. No. 104-191, 110 Stat. 1936 (1996).
2 15 U.S.C. 1692, *et seq.* (herein, the "FDCPA")
3 *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190 (2021).

not an agent in any traditional sense. Notably, the *Ramirez* Court made no inquiry into who received the OFAC notation when examining standing.

Transmission to a separate company establishes standing. The identity and numerosity of the audience determine severity of harm, but not standing. If just one person receives the communication, there is an abuse of the private information. The question of "who" and "how many" determines the extent and degree of harm. According to *Ramirez*, a single disclosure suffices, and the level of severity is best reserved for the trier of fact.

Ultimately, the extent of injury requires discovery – a process Mr. Hunstein was denied on the basis he did not suffer a concrete injury. Yet, the potential for injury is clear – the unnecessary disclosure of the details of a debt to unknown individuals causes embarrassment and humiliation – injuries which the FDCPA was enacted to prevent. While the FDCPA specifically permits disclosure to necessary recipients,[4] CompuMail was solely one of convenience to Appellee. CompuMail was neither an employee

[4] See 15 U.S.C. §1692c(b)

nor agent, and simply a third-party contractor used by Appellee without regard to the dissemination of legally protected information to outsiders.

Appellee protests that corporations cannot conduct their business without the use of what it liberally calls *agents* without admitting that: (i) corporations often regularly perform these functions themselves without agents; and, (ii) there is no evidence at this point CompuMail was its agent. Even if CompuMail were an agent, Congress was explicit in limiting who it authorized information to be disclosed to.

Holding consumers lack standing when private information is disclosed to third parties blocks them from identifying the extent of their injuries. Mr. Hunstein should be permitted to learn who and how many people at CompuMail were exposed to his information.[5] Requiring a plaintiff to plead these often impossible-to-know details when filing is prohibitive, preventing claims despite the clear language of the statute, reputational injury, and the long-standing right to privacy.

I. The Primary Issues

[5] If collection agencies can use agents, nothing prevents them from hiring neighbors or the UPS driver to collect debt on a one-off basis. The larger number of people privy to the details of a debt, the greater the likelihood one will be humiliated into making payment.

While the Court has asked that we focus on Article III standing, ultimately two issues are intertwined: (i) Was the communication to CompuMail allowed; and, (ii) If not, does §1692c(b) parallel a common law privacy tort. Appellee has raised the issue its disclosure was to its agent and therefore permitted. If this Court concludes Appellee's communications to CompuMail were allowed under the statute, no harm exists under the FDCPA, obviating further inquiry. However, if such communications were disallowed, then the Court must evaluate the similarity between the §1692c(b) and the common law.

A. The FDCPA Clearly Prohibits Third Party Disclosure

The wording of the FDCPA is clear in both permitting and prohibiting disclosures:

> "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**." Emphasis Added. 15 U.S.C. §1692c(b).

Appellee seeks judicial amendment, creating an exemption of convenience for so-called "agents," insisting, without a basis in the record, that its communications were not *publications*, but rather nothing more than intracompany communications as absolved in *Ramirez*[6]. In doing so, Appellee ignores two facts – (i) the FDCPA doesn't require *publication* but only *communication*; and, (ii) this was not a passive storage of information, but an intentional dissemination of information enabling a third party to use it for collection purposes. By way of analogy, Appellee's letter was dictated to a stranger without concern for anyone overhearing, for the specific purpose of allowing that stranger to use the information. Realizing this, Mr. Hunstein is aware that others know of his debt, and is naturally embarrassed. Without discovery, he cannot ascertain the extent of his injury – how many people know – but merely knows he has been injured because some people know.

1. <u>Agent Disclosures Are Not Permitted Under the FDCPA</u>

[6] TransUnion LLC v. Ramirez, Footnote 6, 141 S. Ct. 2190 (2021)

"If a literal construction of the words of a statute be absurd, the act must be so construed as to avoid the absurdity. The court must restrain the words." *Holy Trinity Church v. United States*, 143 U.S. 457, 460 (1892). Courts should employ the canon against absurdities only "where the result of applying the plain language would be, in a genuine sense, absurd, i.e., where it is quite impossible that Congress could have intended the result . . . and where the alleged absurdity is so clear as to be obvious to most anyone." *Public Citizen v. Department of Justice*, 491 U.S. 440, 470-471 (1989) (Kennedy, J., concurring in judgment).

Justice Scalia's writings make clear he would not necessarily agree with the Appellee's approach to disregard the plain language of 15 U. S. C § 1692c(b) since straying from the application of the plain language would not create an absurd outcome for debt collectors but simply enable them to enjoy the "avoidance of unhappy consequences," an inadequate basis for interpreting a text. *Nixon v. Missouri Municipal League*, 541 U.S. 125, 141 (2004) (Scalia, J., concurring judgment). Preferred could have mailed Hunstein's letter itself, just as many debt collectors did and still do.

Indeed, the definitions section of the FDCPA features a lengthy definition for *Debt Collector* which would be rendered superfluous if this

Court was to read "agents" in between the lines of 15 U.S.C. §1692c(b). Congress draws its boundaries narrowly as expressed in §1692a(6)(B) where a person is declared to not be a debt collector when "related by common ownership or affiliated by corporate control" to the debt collector.

Appellee's attempt to include agents would create a serious issue in that a debt collector could hire an agent who, because their primary business is not debt collection, falls outside the definition of *Debt Collector* and, thus, the protections of the FDCPA. Pursuing Appellee's position to its logical conclusion, nothing prevents a debt collector from making a neighbor or boss its agent to procure payment, using the cover of agency to avoid any claim of wrongdoing.[7]

Appellee's examples do not undermine this conclusion. Appellee points to the fact the FDCPA authorizes communication by telegram and avers "a debt collector must disclose the content of a telegram to Western Union," insinuating the FDCPA condones communications which require

[7] Such communications would be "in connection with the collection of any debt" – but somehow not violate §1692c(b) if agents are exempted. *West v. Nationwide Credit*, 998 F. Supp. 642, 645 (W.D.N.C. 1998) (leaving message with neighbor); *Krapf v. Collectors Training Inst. of Ill., Inc.*, 09cv391, 2010 U.S. Dist. LEXIS 13063, at *13 (W.D.N.Y. Feb. 15, 2010) (leaving message with coworker); *Romano v. Williams & Fudge, Inc.*, 644 F. Supp. 2d 653, 657 (W.D.Pa. 2008) (message left with father of adult debtor).

third-party disclosure. Nothing in the FDCPA *authorizes* the use of telegrams – the Act simply places restrictions on their use. Specifically, §1692b(5) prohibits the "use [of] any language … in the contents of any communication effected by … telegram that indicates that the debt collector is in the debt collection business or that the communication relates to the collection of a debt."

Ignoring the fact disclosures to telegram agents were generally treated as confidential, Appellee's claim the FDCPA somehow *authorizes* a debt collector to use a telegram is fanciful. This court has dismissed similar logic.

In *Edwards v. Niagara Credit Solutions, Inc.*, 584 F.3d 1350 (11th Cir. 2009), this court held the FDCPA "does not guarantee a debt collector the right to leave answering machine messages," despite the Act's multiple references to phone calls, since such messages could potentially disclose debt to third parties, even though the number of people who might share an answering machine is limited. If a debt collector wished to send a telegram to a consumer, it would have to do so against the backdrop of what the FDCPA prohibits and work within those confines, just as *Edwards* held a debt collector must do with phone calls.

Appellee's disclosures to CompuMail are diametrically opposed to this rule, communicating exactly that information which is prohibited within a telegram. Hence, Appellee's attempt to draw a parallel justifying such disclosures is disingenuous at best. It does not follow that disclosures to persons not specifically authorized and who are under no legal duty to keep information confidential are permitted here, when such a logical leap essentially requires a rewriting of the statutory language.

Appellee also argues delivery of process by public or private process servers is not authorized in §1692c(b). But Section 1692c(b) authorizes communications with third parties with "the express permission of a court of competent jurisdiction." This language includes court rules, which authorize communications. *Holcomb v. Freedman Anselmo Lindberg, LLC*, 900 F.3d 990, 991 (7th Cir. 2018). All courts have rules for the filing of pleadings and service of process. Most summons begin along the lines "You are hereby commanded to serve..." and are signed by the clerk of court.

Giving effect to the statutory text is consistent with the FDCPA's purpose of protecting consumer privacy. Due to Appellee's communication to CompuMail, information about Mr. Hunstein and his child is now within the possession of an unauthorized third party, which has intruded into his

private affairs. *Mastel v. Miniclip SA*, 2:21cv00124, 2021 U.S. Dist. LEXIS 132401, 2021 WL 2983198 (E.D. Cal. July 14, 2021). That third party is not a "debt collector."

The FDCPA does not restrict what the third party may do with Plaintiff's information, or provide Plaintiff with a remedy for improper use or disclosure of that information. Without discovery, Plaintiff has no method of learning the extent of the disclosure: who has access, is the information encrypted or stored publicly, what is the scope of information shared? Instead of addressing these complex issues, Congress sought to curtail disclosure to only those who legitimately needed to know of the debt. It penalized debt collectors for allowing such information to be wrongfully disseminated. Allowing agents to receive confidential information about debts opens the floodgates for sharing the information to the public at large without any recourse. Congress enacted the FDCPA narrowly to avoid this. Appellee may find such regulation inconvenient, but it serves to protect consumers broadly and prevent debt collectors from racing to the bottom to use unfair tactics in collection.

The scope of the FDCPA should not be curtailed by judicial amendments. "Whatever merits these and other policy arguments may have,

it is not the province of this Court to rewrite the statute to accommodate them." *Artuz v. Bennett*, 531 U.S. 4, 10 (2000). "The fact that Congress may not have foreseen all of the consequences of a statutory enactment is not a sufficient reason for refusing to give effect to its plain meaning." *Union Bank v. Wolas*, 502 U.S. 151, 158 (1991). The court's duty is "to apply, not amend, the work of the People's representatives." *Henson v. Santander Consumer USA Inc.*, 137 S. Ct. 1718, 1726 (2017).

2. Interpretation Rules Favor Mr. Hunstein

Exercises in interpretation are only necessary if the language of the statute is unclear. 15. U.S.C. §1692c(b) is clear. "Where Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of evidence of a contrary legislative intent." *Andrus v. Glover Constr. Co.*, 446 U.S. 608, 616-17 (1980); accord, *Dutton v. Wolpoff & Abramson*, 5 F.3d 649, 653-54 (3d Cir. 1993). Congress expressly considered which agents and other persons could receive disclosures, and expressly prohibited communications with all others.

Mail vendors existed long before the 1977 enactment of the FDCPA. *Smithsonian National Postal Museum*, "America's Mailing Industry Letter Shops, Mail Service Firms, and Presort Bureaus" (Appendix D) (basic equipment invented in 1902)[8]. Had Congress sought to permit debt collectors to disclose debtor information to mail vendors, it could easily have done so. It did not. Instead, it provided that a debt collector "may not communicate" with any person other than specified exceptions, which do not include mail vendors.

In statutory interpretation disputes, a court's proper starting point lies in a careful examination of the ordinary meaning and structure of the law itself. *Schindler Elevator Corp. v. United States ex rel. Kirk,* 563 U. S. 401, 407 (2011). Where, as here, that examination yields a clear answer, judges must stop. *Hughes Aircraft Co. v. Jacobson*, 525 U. S. 432, 438 (1999). Even legislative history should not be used to "muddy" the meaning of "clear statutory language." *Milner [Dep't of the Navy],* 562 U. S. [562], at 572 [(2011)]. Legislative history is meant to clarify, not change, statutory language.

[8] See https://accurateaz.com/blog/what-is-a-mail-house/ indicating a 1956 date for the term "mail house."

Courts have rejected attempts to construe 15 U.S.C. §1692f(8), which prohibits all extraneous markings on the outside of collection correspondence, "except that a debt collector may use his business name if such name does not indicate that he is in the debt collection business," as applying only to information which the consumer can prove damages him. *Preston v. Midland Credit Mgmt.*, 948 F.3d 772 (7th Cir. 2020); *Douglass v. Convergent Outsourcing*, 765 F.3d 299 (3d Cir. 2014). In *Preston*, the Seventh Circuit held:

> Because the statutory language neither leads to absurd results nor is ambiguous, resort to legislative history is neither necessary nor appropriate. See, e.g., *United States v. Silva,* 140 F.3d 1098, 1102 (7th Cir. 1998) ("If the language is unambiguous, we need not resort to legislative history or other sources to glean the legislative intent of the statute.").

The statutory language prohibits debt collectors from sending communications to consumers in envelopes bearing symbols indicating debt collection. The language of the statute draws a simple, clear line to ensure consumers' rights are preserved. While such interpretations may be inconvenient, the result is clarity:

> [t]his approach provides certainty to debt collectors and avoids the problem of having to decide on a case by case basis what language or symbols intrude into the privacy of the debtor or otherwise constitute "an unfair or unconscionable means to

> collect or attempt to collect a debt." [15 U.S.C.] § 1692f. Congress wrote into the law a bright-line rule with respect to markings on envelopes sent to debtors and authorized the award of damages to debtors if debt collectors violate the plain language of § 1692f(8). *Palmer v. Credit Collection Servs., Inc*., 160 F. Supp. 3d 819, 822-23 (E.D. Pa. 2015).

In providing certainty, §1692c(b) furthers the FDCPA's overall purpose of "eliminat[ing] abusive debt collection practices by debt collectors" and "insur[ing] that those debt collectors who refrain from using abusive debt collection practices are not competitively disadvantaged."

3. Alleged Authorization by the FTC / CFPB

Appellee's claims the FTC or CFPB have authorized the use of letter vendors are misleading and irrelevant. "Resort to agency interpretations ... is unnecessary when the statutory language is clear." *Preston,* Id.; *United States v. Zuniga-Galeana*, 799 F.3d 801, 805 (7th Cir. 2015) ("We defer to an administering agency's interpretation of a statute only if the statute is ambiguous.").

Despite the clarity in the statute, Appellee refers to the Federal Trade Commission Staff Commentary on the Fair Debt Collection Practices Act, 53 Fed. Reg. 50097 (Dec. 13, 1988). This document acknowledges it is "not a

formal ... rule or advisory opinion" and is "not binding on the Commission or the public." *Id.* at 50101.

Here, Appellee relies on an informal statement by agency staff – not the agency itself and not a regulation – to create an exemption from the plain meaning of the statute. Appellee then turns to the off-hand references to mail vendors in the CFPB's recently updated Regulation F as evidence mail vendors are not included in the term "any persons" of 15 U.S.C. § 1692c(b). But the Appellee ignores a critical aspect: these references concern communications which are *not* collection communications. All of the references to mail vendors in Regulation F relate to a debt collector's receipt of mail *from* the consumer, not outgoing mail which is an attempt to collect debt, as found here in Mr. Hunstein's case.

Additionally, one of the exemptions of 15 U.S.C. § 1692c(b) is when there is prior written consent by the consumer. Arguably, a consumer mailing a validation request to a mail vendor instead of the debt collector could be viewed as *consenting*.

Appellee's position also ignores the amicus brief filed by the CFPB on another FDCPA privacy issue before an *en banc* panel. *Marx v. Gen. Revenue*

Corp., 668 F.3d 1174 (10th Cir. 2011). Brief filed January 26, 2012.[9] The CFPB's view on 15 U.S.C. § 1692c(b) specifically does not bode well for the Appellee's argument:

> "All third-party contacts by debt collectors inherently pose risks to consumers. Even where a collector simply calls and asks for a consumer's employment status, an employer familiar with collection practices may well realize the communication relates to debt. And even if the employer does not realize it, the consumer may learn of the contact and be legitimately concerned about what her employer may suspect." *Id at pages 5-6*.

In fact, The CFPB took an even more protectionist stance on the language in question than Mr. Hunstein:

> "Here, the statutory structure discussed above shows that the definition of "communication" is not meant to limit the ordinary meaning of "communicate" in §1692c(b). Without that qualification § 1692c(b) is properly interpreted as an absolute prohibition on third-party contacts, subject to narrow exceptions." *Id at pages 5-6*.

This briefing by the CFPB mirrors same specific harms with which Mr. Hunstein's claim is concerned. Thus, it is clear that the CFPB officially seeks to minimize third-party disclosures. There is clearly a standing on this issue.

[9] https://files.consumerfinance.gov/f/201202_cfpb_amicus-brief_marx-v-grc.pdf

4. First Amendment Issue

In what can only be fairly described as a Hail Mary pass of epic proportions, Appellee argues the FDCPA cannot restrict commercial speech without potentially being unconstitutional, somehow ignoring the fact many professions are subject to legally enforceable requirements the practitioner maintain confidentiality. Attorneys are obligated to maintain client confidences, Ill. Sup. Ct. R. Prof'l Conduct, Rule 1.6, Fed. R. Civ. P. 5.2; Ill. Sup. Ct. R. 138. Medical practitioners are obligated to maintain the confidentiality of patient information. Medical Practice Act, 225 ILCS 60/22(A)(30); Nurse Practice Act, 225 ILCS 65/70-5(a)(25). Banks and other financial institutions must maintain the confidentiality of customer financial information. Gramm-Leach-Bliley Act, 15 U.S.C. §6801 *et seq.* As a general proposition, failure to take proper measures to secure consumer financial information is actionable. *See, e.g.*, *In re Equifax, Inc., Customer Data Sec. Breach Litig.*, 362 F. Supp. 3d 1295, 1327 (N.D. Ga. 2019).

On Appellee's argument, all such prohibitions and requirements are invalid unless they meet the most stringent "strict scrutiny" standard, or at least some level of "intermediate scrutiny." When the First Amendment was ratified, the legal obligation of an attorney to maintain client confidences had

already been enforced by Anglo-American courts for at least two centuries. "The history of this privilege goes back to the reign of Elizabeth [I], where the privilege already appears as unquestioned." 8 J. Wigmore, *Evidence,* §§2290-91 (3d ed. 1940).

Nothing in the First Amendment or its history remotely suggests this obligation has interfered attorneys' freedom of speech. On the contrary, the simultaneously-adopted Sixth Amendment entitles those accused of crime the "assistance of counsel," which includes the right to privileged consultation with counsel; the Sixth Amendment provides a shield for the attorney-client privilege in criminal proceedings. *Greater Newburyport Clamshell All. v. Pub. Serv. Co.*, 838 F.2d 13, 19 (1st Cir. 1988).

Assuming, *arguendo*, this Court needs to evaluate whether such restriction is permitted under the Constitution, an inquiry that exceeds the scope of Article III standing, one might wonder if Congress believed it had a compelling governmental interest in protecting consumers and ethical collection agencies alike from unfair and unscrupulous practices – as particularly described in §1692(a)-(e).

a. Debtor Information Has No First Amendment Value

Appellee assumes the information a collection agency has about debtors is entitled to substantial First Amendment protection. However, the Supreme Court has "recognized the commonsense distinction between speech proposing a commercial transaction, which occurs in an area traditionally subject to government regulation, and other varieties of speech." *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n,* 447 U.S. 557, 562 (1980). Speech is considered "commercial" and entitled to lesser protection if the "expression related solely to the economic interests of the speaker and its audience." (447 U.S. at 561) Importantly, "[t]he First Amendment's concern for commercial speech is based on the informational function of advertising. Consequently, there can be no constitutional objection to the suppression of commercial messages that do not accurately inform the public about lawful activity." (447 U.S., at 563).

The information required to be kept confidential by 15 U.S.C. §1692c(b) relates solely to the economic interests of the speaker and the recipient of the information. But unlike commercial advertising, the communication of information about a debtor by a debt collector to persons other than those enumerated in 15 U.S.C. §1692c(b) has literally zero informational value. It

does not have even the limited economic benefit that advertising provides. It is just private information concerning a debt.

b. Incidental Restrictions on Speech are Acceptable

While the information has no First Amendment value, its disclosure poses a substantial risk of harm. It could easily be used to facilitate identity theft or fraud, or to embarrass or humiliate consumers, all of which may be rightfully prohibited.

Entirely apart from the "commercial speech" doctrine, "the First Amendment does not prevent restrictions directed at commerce or conduct from imposing incidental burdens on speech." *Barr v. American Ass'n of Political Consultants,* 140 S. Ct. 2335, 2342 (2020). No one seriously suggests the restrictions placed by the Sherman Antitrust Act on price-fixing are unconstitutional because they chill the exchange of future pricing information by competitors. Similarly, restricting the disclosure of consumer financial information that can readily be used to commit fraud or other wrongful conduct, but which is devoid of any First Amendment value, is essentially a regulation of commerce or conduct that imposes a purely incidental burden on speech.

Appellee's claim that §1692c(b) is constitutionally infirm is flawed. Concerning advertising regulation, the Supreme Court has declined to apply overbreadth analysis unless the restrictions also prohibit fully protected, noncommercial speech. *Hoffman Estates v. The Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 496-497 (1982); *Bates v. State Bar of Arizona*, 433 U.S. 350, 380 (1977). Here, even if the debt data is considered commercial speech, no fully protected speech is restrained. Advertising regulations are only fatally underinclusive if (a) exceptions ensure the regulation will fail to achieve its end or (b) exceptions make distinctions among different kinds of speech but do not relate to the interests the government seeks to advance. *Metro Lights, L.L.C. v. City of L.A.*, 551 F.3d 898, 906 (9th Cir. 2009).

The analysis is not a "least restrictive means" test. The usual "underinclusivity" case involves a restriction on advertising signs that has so many exceptions that the restriction accomplishes nothing other than to hamper the promotional communications of a disfavored establishment.

Appellee claims §1692c(b) is underinclusive because the FDCPA only applies to debt collectors and consumer debts regulated by the FDCPA and not original creditors or government officials. The "original creditors" in this case are doctors, nurses and other medical professionals. The "government

officials" are those involved with the administration of Medicaid, Medicare and similar systems.

Appellee's argument fails because these "original creditors and government officials" are not free to disclose patient information. The medical profession has stringent confidentiality obligations. Confidentiality obligations of government officials are imposed under the Privacy Act and other statutes rather than the FDCPA. This reflects the historical fact federal and state regulation of professions, occupations and businesses have occurred on an *ad hoc* basis, with regulations tailored to the specific professions and businesses.

This does not mean that the FDCPA cannot achieve its goal of protecting debtor's private information or that the distinctions between debt collectors and medical practitioners are not legitimate. Courts defer to a "reasonably graduated response to different aspects of a problem." *Metro Lights* at 910, *Id*.

The HIPAA Privacy Rule allows sharing of patient information with strict safeguards, whereas once patient information gets to a debt collector, §1692c(b) essentially prohibits the debt collector from further transmission of that information. However, imposing different restrictions on medical

practitioners and debt collectors are a "reasonably graduated response to different aspects of a problem." Medical practitioners are subject to stringent professional education and licensing obligations -- far more than debt collectors.[10] The consequences to a medical professional of violating patient confidences are far more severe than those to a debt collector. Interchange of medical information is essential to patient care, whereas Appellee holds disclosures by debt collectors to letter vendors are simply convenient. Finally, legislatures have a right to place greater trust in doctors than in debt collectors; debt collection has a history of abuse which medicine does not.

Appellee also suggests an intent requirement would cure alleged constitutional infirmities. However, anything less than a blanket prohibition of debt collectors disclosing debtor information to non-exempt persons would render regulation meaningless. Consumers who are in debt are a vulnerable population. It is extremely difficult for consumers to prove what was done with their information, much less with what intent.

[10] Florida requires licensing of debt collection agencies, but such license requires little more than the ability to write a $200 check.

In short, the First Amendment doctrines invoked by Appellee do not invalidate §1692c(b) or justify an unnatural construction departing from its plain meaning.

5. The Statute Does Not Permit Mail House Disclosures

Agents are not exempt recipients of confidential debt collection information under §1692c(b). Congress allowed disclosure narrowly - only to those with a true "need-to-know" basis. The statute itself is not ambiguous, and it provides clear guidance to the Court. This Court should honor Congress' intent of protecting both consumers and collection agencies from unfair practices. While the law may prove inconvenient, nothing prevents debt collectors from in-sourcing their mailing functions (something many already do). And although Appellee seeks to rely on the CFPB, its opinion is of dubious value when framed against the clear language of the Statute.

Finally, there is no reasonable basis to argue the restrictions of §1692c(b) are unconstitutional restriction of speech when they are narrowly tailored to protect interests which Congress has specifically identified.[11]

[11] See 15 U.S.C. 1692(a)-(e).

As there is no basis for carving out an exception for disclosures to third parties, whether classified as agents or otherwise, the disclosure of confidential debt collection information to CompuMail was prohibited under §1692c(b).

B. §1692c(b) Bears a Close Relationship to Invasion of Privacy

While Appellee attempts to confuse the requirement of *publication* with *communication*, it is an important distinction. The FDCPA does not require publicity or the public release of information, but rather the mere inappropriate communication of information with persons unpermitted by the statute. And while Appellee may argue that, in order for the statute to bear a close relationship to the tort of public disclosure of private information, it must match its elements precisely, this is not the case.[12] Indeed, *Spokeo* points out that the relationship is one of kind and not degree.[13]

In this matter, Appellee made an improper disclosure of private facts which, when known to others, would be found offensive to any reasonable

[12] *Ramirez* at *21. The test is not whether it duplicates an existing cause of action, but whether it bears a close relationship to a traditionally recognized claim.

[13] *Robins v Spokeo*, 867 F.3d 1108, 1115 (9th Cir. 2017).

person and which were not of public concern. The only element which varies from the common law claim for an invasion of privacy relates to the *degree* of disclosure – that Appellee's communication was to a third-party instead of the public at large. It should be noted, once again, that Plaintiff does not know the extent of that disclosure, as discovery was foreclosed by the District Court's dismissal of this matter without amendment. Nonetheless, the parallels between the FDCPA and the common law cannot be dismissed on the basis of degree – the wrongs of are identical nature and the issues are of like kind.

1. The FDCPA Requires Communication, not Publication

"Communication" is a statutorily defined term. Statutory definitions of terms must be followed. *Western Union Tel. Co. v. Lenroot*, 323 U.S. 490, 502 (1945). The term "communication" and its variants in the FDCPA cannot be equated with "publication" as that term is used in the common law of defamation or invasion of privacy.

First, "publication" is used within the FDCPA. 15 U.S.C. §1692d(3) prohibits "The publication of a list of consumers who allegedly refuse to pay debts, except to a consumer reporting agency or to persons meeting the

requirements of 15 U.S.C. §1681a(f) or §1681b(3) of this title." When Congress uses "communication" in §1692c and "publication" in §1692d(3), the inference is that the two words do not have the same meaning. The Supreme Court recognized this concept in stating, "We refrain from concluding here that the differing language in the two subsections has the same meaning in each. We would not presume to ascribe this difference to a simple mistake in draftsmanship." *Russello v. United States*, 464 U.S. 16, 23 (1983).

Second, "[w]e presume that Congress is aware of the established meaning of legal terms." *United States v. Uriarte*, 975 F.3d 596, 602 (7th Cir. 2020), citing NLRB v. Amax Coal Co., 453 U.S. 322, 329 (1981). Congress defined and used the term "communicate," specifically.

Third, many of the "communications" expressly permitted in 15 U.S.C. §1692c(b) are clearly not "publications." A conveying of information to "the consumer" is not a "publication" within the law of defamation; a "publication" must be to a third person, not the person who is defamed. In addition, §1692c expressly permits communications involving specified principals and agents – e.g., between a collection agency and "his [the consumer's] attorney, . . . the creditor, the attorney of the creditor, or the

attorney of the debt collector." As indicated in *Ramirez*, certain conveyances of information among principals and agents may not be "publications" within the common law of defamation or invasion of privacy. Hence, "communication" covers such "conveying of information," and is much broader than "publication."

Finally, the stated purposes of the FDCPA include providing additional protection to consumers, beyond that which they have under existing law. "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. … Existing laws and procedures for redressing these injuries are inadequate to protect consumers." (15 U.S.C. §1692(a)-(b)) The stated Congressional purpose would be thwarted if specifically defined prohibitions in the FDCPA were limited based on the very common law concepts which Congress declared to be "inadequate."

According to the Appellee, Mr. Hunstein's depth of knowledge determines the success or failure of his claim. If he can establish a large audience at the outset, the requirements of publication may be met - Mr.

Hunstein can sue, ostensibly, under the FDCPA *and* common law. Yet, without prescience, Mr. Hunstein's claim is barred. Yet the nature of the claim is identical, only lacking in a measure of degree. Indeed, to require *publication* in this matter is to require the FDCPA mimic the common law, castrating Congress, preventing it from recognizing and expanding economic protections.

2. The Standard is "Kind" Not "Degree"

The Eleventh Circuit recognizes that Article III standing does not require a quantitative evaluation of injury, but rather a qualitative evaluation, regardless of the size of the injury.[14] While Mr. Hunstein has never argued that his personal credit and medical information was publicized to the public at large, his injury remains as one of the same kind as that recognized under the common law tort of invasion of privacy by the public disclosure of private facts. Even the Appellee cannot know to whom Mr. Hunstein's information has now been shared, for having opened the vault for strangers to see, it no longer controls who may now be in receipt of it. The harm to be prevented in both tort and statute are *humiliation* – a

[14] *Salcedo v. Hanna*, 936 F.3d 1162, 1172-73 (11th Cir. 2019).

reputational harm that, according to Congress, contributes to marital instability and job loss.[15] Yet even without suffering these consequences, Mr. Hunstein had a right to be secure in the knowledge that his private credit information would not be disclosed except to those who Congress deemed had a need to know it.

As the Seventh Circuit determined in reviewing a Telephone Consumer Protection Act[16] claim in *Gadelhak v. AT&T Servs., Inc*[17], the common law may deem the receipt of a few unwanted text messages as too minor to support a cause of action, but they constitute the same type of harm the TCPA was enacted to prevent.

Here, the similarity between the disclosure of Mr. Hunstein's private information to a third-party mail house and a common law cause of action for public disclosure of private facts is undeniable. While a captious comparison between the two will reveal the disclosure required by the FDCPA is minimal as compared to common law publication, a more honest approach recognizes that Congress built upon the right to privacy in drafting

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[15] 15 U.S.C. 1692(a)-(e).
[16] 47 U.S.C. 227.
[17] *Gadelhak v. AT&T Servs., Inc.*, 950 F.3d 458, 462-63 (7th Cir. 2020).

a straight-forward rule which restricts disclosure. Hence, while not identical in degree, the two share every element in terms of their nature and the harm to be prevented. Under the Supreme Court's direction in *Ramirez*[18] and *Spokeo*[19], that is sufficient to find Article III standing.

C. Conclusion

Mr. Hunstein complains of a common practice among debt collectors – the disclosure of confidential, sensitive personal credit information to a third party, without consent and despite legal prohibition. The wording of the Act itself is clear, as are its purposes – to protect consumers from invasions of their privacy. And while Congress sought to expand the rights

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[18] 'In looking to whether a plaintiff 's asserted harm has a "close relationship" to a harm traditionally recognized as providing a basis for a lawsuit in American courts, we do not require an exact duplicate. The harm from being labeled a "potential terrorist" bears a close relationship to the harm from being labeled a "terrorist." In other words, the harm from a misleading statement of this kind bears a sufficiently close relationship to the harm from a false and defamatory statement.' *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2209 (2021)

[19] Even if there are differences between FCRA's cause of action and those recognized at common law, the relevant point is that Congress has chosen to protect against a harm that is at least closely similar *in kind* to others that have traditionally served as the basis for lawsuit. *See In re Horizon Healthcare*, 846 F.3d at 638–41. Courts have long entertained causes of action to vindicate intangible harms caused by certain untruthful disclosures about individuals, and we respect Congress's judgment that a similar harm would result from inaccurate credit reporting. *See generally Van Patten*, 847 F.3d at 1043 ("We defer in part to Congress's judgment [as to an intangible harm]."). *Robins*, Id.

of consumers, they were not creating a new cause of action, but rather strengthening existing rights in light of "abusive, deceptive, and unfair debt collection practices" and laws which were "inadequate to protect consumers."[20]

While CompuMail's status as an agent is indeterminate, the clear language of the Act makes no exception for disclosures to agents. As the Act is unambiguous, governmental agency opinions are uninformative. Finally, any claim that the Act is unconstitutional fails to consider the clear and compelling purpose of the Act.

Returning to the issue of Article III standing, Mr. Hunstein's claim is cut from the same cloth as the common law tort of public disclosure of private facts, bearing a close resemblance to it and the harms which it prevents.

For these reasons, Mr. Hunstein prays that this honorable court will reverse and remand this matter.

Dated: February 1, 2022

Respectfully Submitted,

[20] 15 U.S.C. 1692(a)-(e).

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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 reply brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B)(ii) because, as calculated by Microsoft Word, it contains 6424 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, excepting footnotes which use 12-point.

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CERTIFICATE OF SERVICE

I hereby certify that on February 1, 2022, I electronically filed this reply brief 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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