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 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 the following have an interest in the outcome of *Hunstein v. Preferred Collection and Management Services, Inc.*, No. 19-14434:

- ACA International
- Alltran Financial, LP
- American Association Administrative Management
- American Bankers Association
- Arizona Creditors Bar Association
- Barber, Hon. Thomas
- Barnett, Keith J
- Bedard, John Henry, Jr.
- Bender, Leslie Carol
- Bonan, Thomas M.
- Burnette, Lauren Marshall
- California Creditors Bar Association
- Canter, Ronald S.
- Chamber of Commerce of the United States of America
- Chapman, Michael K.

- Chastain, Aaron R.
- Colorado Creditors Bar Association, Inc.
- Consumer Bankers Association
- Consumer Relations Consortium
- Credence Resource Management, LLC
- Credit Union National Association
- Creditors Rights Attorney Association Nevada
- Denius, William J.
- Dvoretzky, Shay
- Enhanced Recovery Company, LLC
- Florida Creditors Bar Association
- Gallagher, Scott Stephen
- Goldberg, Phillip R.
- Hoffman, Jonathan P.
- Hunstein, Richard
- IMS, Inc.
- Jackman, Stefanie H.
- Kaufman, Dolowich, Voluck
- LiveVox, Inc.,

- Masso, Jadd F.
- Matrix Imaging Solutions, LLC
- Maurice, Donald S., Jr.
- Missouri Creditors, Inc.
- National Association of Professional Process Servers
- Nationwide Credit, Inc.
- New York State Creditors Bar Association
- Newburger, Manuel
- Nordis, Inc.
- Ontario Systems, LLC
- Ostroff, Ethan G.
- Output Services Group, Inc.
- Parsley, Stephen Colmery
- PCI Group, Inc.
- Perr, Richard J.
- Preferred Collection and Management, Inc.
- Print and Mail Vendor Coalition
- Radius Global Solutions, LLC
- Receivables Management Association International, Inc.

- RevSpring, Inc.
- Rider-Longmaid, Parker Andrew
- Seraph Legal P.A.
- Shartle, Bryan Christopher
- Smith, Kirsten H.
- Smith, Kristen
- Solomon, Ginsberg & Vigh, P.A
- Suttell, Brit J.
- The National Creditors Bar Association
- Third Party Payment Processors Association
- Tomkins, Jason B.
- Transworld Systems, Inc.
- Tseytlin, Misha
- Vigh, Robert A
- Williamson, Mitchell L
- Yarborough, Martin B.

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

/s/ *Thomas M. Bonan*
Thomas M. Bonan

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APPELLANT *EN BANC* BRIEF

Appellant, Richard Hunstein, responds to this Court's November 23, 2021, Memorandum directing counsel brief the issue, "Does Mr. Hunstein have Article III standing to bring this lawsuit?"

STATEMENT OF JURISDICTION

This appeal arises from the October 29, 2019, Order of the United States District Court for the Middle District of Florida, Tampa Division, in Case No. 8:19-cv-00983, granting Defendant-Appellee, Preferred Collection and Management Services, Inc.'s ("**Preferred**"), Motion for Dismissal for failure to state claim, a final order that disposed of all the parties' claims. Notice of Appeal was timely filed on November 11, 2019. The District Court had federal question jurisdiction to enter the Order pursuant to 28 U.S.C. § 1331 and 15 U.S.C. § 1692k(d). This Court has jurisdiction over this appeal pursuant to 28 U.S.C. § 1291, as the District Court is located within the Eleventh Circuit.

ISSUE PRESENTED FOR REVIEW

As directed by this Court, Appellant's Brief focuses on the issue of whether Mr. Hunstein has Article III standing to bring suit under the Fair Debt Collection Practices Act ("**FDCPA**"), 15 U.S.C. § 1692c(b), a provision of the act that limits debt collector communications, for Appellee's disclosure of personal information regarding Mr. Hunstein and his son to a third-party mail house. Based on recent

decisions, the question is one of concrete injury and can be framed as follows: Does the disclosure of non-public, personal information to a limited group of people establish the existence of injury to support Article III jurisdiction of the Federal Courts?

CONCISE STATEMENT OF THE CASE

Mr. Hunstein's minor son received treatment in 2018 at a hospital which later claimed a debt for charges not covered by insurance. The hospital transferred the debt to Appellee, Preferred, for collection. Preferred then communicated with a third-party mail house, CompuMail, describing Mr. Hunstein's debt, his son's treatment, and other uniquely personal information; for the purpose of generating and mailing a dunning letter to Mr. Hunstein. Upon recognizing that a third-party was now aware of information which he considered private, Mr. Hunstein filed suit in the Middle District of Florida on April 24, 2019. Based on pleading standards at the time, Mr. Hunstein did not allege any specific injury, but rather that the third-party disclosure of private information, by itself, was cognizable as an injury under the statute.

On May 10, 2019, Preferred filed a motion to dismiss on the basis that its communication with the mail house was not "in connection with the collection of a debt" – a requirement under the FDCPA. The Motion also referenced the issue of Article III standing under current consideration. The District Court agreed and

dismissed on October 29, 2019, without granting leave to Mr. Hunstein to amend his complaint. Mr. Hunstein timely filed his notice of appeal on November 6, 2019, and his Appellate Statement on November 19, 2019. After receiving the Parties' briefs, on January 25, 2021, this Court ordered the filing of supplemental briefs on the issue of Article III standing. Oral argument occurred on March 10, 2021, and on April 21, 2021, the panel reversed and remanded the District Court's decision on the standing and communication issues. Numerous amicus briefs followed. On October 28, 2021, this Court restated its prior order, albeit with the Honorable Tjoflat now dissenting. On November 17, this Court, ordered that this case be reheard *en banc*, vacating the prior orders.

SUMMARY OF THE ARGUMENT

Article III Standing, as stated by former Justice Scalia, asks the question of a potential plaintiff, "What is it to you?"[1] In the instant matter, Mr. Hunstein did not allege a specific economic or physical injury. Rather, he alleged the specific injury of invasion of privacy is inherent in the violation of the act itself – that disclosure to an unauthorized third-party of Mr. Hunstein's negative credit information, status as a debtor, and the health information of his son is injurious.[2] The Supreme Court,

[1] Scalia, The Doctrine of Standing as an Essential Element of the Separation of Powers, 17 Suffolk U. L. Rev. 881, 882 (1983).

[2] "…oppressive treatment of a debtor, including the unreasonable giving of undue publicity to private debts, has been held to be an invasion of the debtor's right of

among many others, has addressed the standing issue numerous times since Mr. Hunstein filed his complaint:

> To have Article III standing to sue in federal court, plaintiffs must demonstrate, among other things, that they suffered a concrete harm. No concrete harm, no standing. Central to assessing concreteness is whether the asserted harm has a "close relationship" to a harm traditionally recognized as providing a basis for a lawsuit in American courts—such as physical harm, monetary harm, or various intangible harms including (as relevant here) reputational harm.
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> *TransUnion LLC v. Ramirez*, No. 20-297, at *5 (June 25, 2021) (*citing Spokeo, Inc*. v. *Robins*, 578 U. S. 330, 340-341 (2016)).

An important nuance in analyzing the "close relationship" is whether a cause of action is similar in kind, but not necessarily in degree. Hence, a statutory cause of action need not be *identical* to a common law analogue in order to warrant federal court jurisdiction. Rather, it just needs to be identifiable as one of the traditional flavors.

The FDCPA, § 1692c(b), parallels the common law action for Invasion of Privacy. "Florida courts are open to invasion of privacy claims under the common law" *Resha v. Tucker,* 670 So. 2d 56, 59 (Fla. 1996)(citing Cason v. Baskin, 155 Fla. 198, 212 (Fla. 1945). And while the elements of the common law action differ from those of the FDCPA, the *kind* of right – a basic right to personal dignity through the prevention of dissemination of private information – is the same. Because §

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privacy. 138 A.L.R. 92, 93." *Cunningham v. Securities Inv. Co. of St. Louis*, 278 F.2d 600, 604 (5th Cir. 1960)

1692c(b) seeks to protect a similar interest in a similar manner, the Court should recognize that it acts to prevent a harm of the same kind as traditionally protected by American courts.

ARGUMENT

I. What is it to Mr. Hunstein?

In passing the FDCPA, Congress sought to expand the rights of consumers, deeming information regarding them and their debts to be protected from unnecessary disclosure to third-parties.[3] Indeed, the FDCPA expressly prohibits disclosures that may seem innocuous, such as envelopes revealing a *barcode*,[4] when such disclosures hint at the purpose of debt collection. Conversely, those persons who have a true need to know about the debt – the consumer, his attorney, a consumer reporting agency, the creditor, the attorney of the creditor, or the attorney

[3] "The FDCPA is designed to protect a consumer's reputation and privacy, as well as to prevent loss of jobs resulting from a debt collector's communication with parties not specifically enumerated in 15 U.S.C. § 1692b. S.Rep. No. 382, [95th Cong. 1st Sess.] at 4, 1977 U.S. Code Cong. Ad.News at 1699; 15 U.S.C. § 1692a. *Florence v. National Systems*, Civil Action No. C82-2020A, at *5 (N.D. Ga. Oct. 14, 1983); 15 U.S.C. §1692c(b). In anticipation of the question of whether §1692c(b) bears a close relationship to the common law action for public disclosure of private information, one needs to recognize that if the FDCPA were not broader – if its elements were not more expansive and inclusive – there would be no need for the Act.

[4] 15 U.S.C. §1692f(8); "…there is no difference between including an account number on the face of an envelope or embedding said account number in a barcode." *Link v. ARS Nat'l Servs., Inc.*, Civil Action No. 15-643, at *9 (W.D. Pa. Nov. 2, 2015).

of the debt collector – are expressly named by the statute as persons to whom a third-party communication may be made. *15 U.S.C. §1692c(b)*. The FDCPA, by closely limiting the audience for disclosure, reflects Congress' recognition that any disclosure, even to the mailman, is harmful.[5]

The failure to pay one's debts when due is generally viewed as humiliating. The derogatory term *deadbeat* is used to describe "a person who does not pay debts or financial obligations." Black's Law Dictionary (9th ed. 2009). By sharing this information with a third-party, Preferred effectively labeled Mr. Hunstein as such to an unknown group of persons who were not permitted recipients under the FDCPA. It is this *per se* offensive communication to which Mr. Hunstein objects.

II. Injury In Fact – Meaning and Elements

"An **injury in fact** consists of "an invasion of a legally protected interest" that is both "concrete and particularized" and "actual or imminent, not conjectural or hypothetical."" *Trichell v. Midland Credit Mgmt.*, 964 F.3d 996 (11th Cir. 2020) (citing *Defs. of Wildlife*, 504 U.S. at 560, 112 S.Ct. 2130 (quotation marks omitted,

[5] Per the plain language of the statute, Congress sought to set forth a list of recipients limited to those who would "need to know" and have a legitimate interest in the collection of a debt. One of the few exceptions to §1692c(b) is that described in 1692b which allows a debt collector to speak with a third-party *provided* that they only seek to locate the consumer and do not disclose that it is for the purpose of debt collection. §1692(e) states that a partial purpose of the Act is to "… promote consistent State action to protect consumers against debt collection abuses." These "hard boundaries" encourage fair and consistent practices amongst debt collectors.

emphasis added)). In *Muransky v. Godiva Chocolatier, Inc., 979 F.3d 917 (11th Cir. 2020),* the Court clarified that "concrete," requires the injury be "real" as opposed to speculative or theoretical.

A. Tangible Injuries Provide a Clear Basis for Article III Jurisdiction

Tangible injuries – injuries which are physical or quantifiable[6] – are generally treated as *per se* concrete injuries. Provided that an injury impacts a legally protected interest, personally affects the plaintiff, and has occurred or will occur imminently, such an injury is concrete enough to establish Article III jurisdiction. *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1549 (2016).

B. Intangible Injuries – Potential Basis for Art. III Jurisdiction

When an injury is intangible – neither physical nor quantifiable – it is not necessarily concrete. The Court must examine the nature of the injury itself. Violations of the right to free speech, or the free exercise of religion, have been recognized as intangible, yet concrete. *Spokeo* at 1549. Invasion of privacy, by way of violation of the Video Privacy Protection Act[7] ("**VPPA**") has also been recognized as an intangible, yet concrete injury.[8] Credit defamation, by way of

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[6] "Tangible harms are the most obvious and easiest to understand; physical injury or financial loss come to mind as examples." *Muransky* at *926

[7] 18 U.S.C. §2710 *et seq.*

[8] *Perry v. Cable News Network, Inc.*, 854 F.3d 1336, 1340 (11th Cir. 2017).

violation of the FCRA,[9] has been similarly held to be intangible, yet concrete.[10] Conversely, offenses to one's moral beliefs or speculative fear of future injury have been found to lack the requisite concrete injury element.[11]

C. Statutory Violations Add Complexity

While Congress can establish a statutory duty, Courts lack Article III jurisdiction for enforcement when a plaintiff lacks an injury-in-fact.

> [T]he existence of a "cause of action does not affect the Article III standing analysis." *Thole v. U.S. Bank N.A.*, U.S. 140 S. Ct. 1615, 1620, L.Ed.2d (2020)." Article III standing requires a concrete injury even in the context of a statutory violation," *Spokeo*, 136 S. Ct. at 1549, and Article III courts—while exercising jurisdiction to determine their own jurisdiction—must ultimately decide what injuries qualify as concrete. Congress's judgment may inform that assessment but cannot control it. *Trichell* at 999.

When an injury is based solely on a statutory violation, even though a statute may grant a statutory right and empower an individual to sue to vindicate such right, a violation of that right alone does not necessarily make that injury concrete.[12] *Spokeo*

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9 15 U.S.C. §1681 *et seq.*

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

11 See, *e.g.*, *Diamond v. Charles*, 476 U.S. 54 (1986), holding that a pediatrician's interest in abortion law to vindicate his 'value interests' was insufficient to establish injury; and, *Babbitt v. Farm Workers*, 442 U.S. 289, 298 (1979) (quoting *Pennsylvania v. West Virginia*, 262 U.S. 553, 593 (1923))" *Whitmore v. Arkansas*, 495 U.S. 149, 158 (1990) "Allegations of possible future injury do not satisfy the requirements of Art. III. A threatened injury must be "`certainly impending'" to constitute injury in fact."

12 But See *Spokeo* at 1553, "Congress can create new private rights and authorize private plaintiffs to sue based simply on the violation of those private rights.

at 1549. The determination whether an injury is sufficiently concrete turns upon a review of both history and the judgment of Congress. *Id.*

a. Historical Perspective

The Court must consider whether the intangible harm bears a close relationship to a traditionally cognizable basis for suit in English or American courts. *Id.* While an incorrect zip code disclosure in an FCRA case is not actionable (*Spokeo* at 1550), falsely reporting a plaintiff's age, employment, education, and wealth bears sufficient similarity to common law claims to support a claim of concrete injury.[13] The *Trichell* Court noted that in *Perry v. Cable News Network, Inc.*,[14] this Court determined that the Plaintiff had standing to raise claims for a statutory violation when records were disclosed in violation of the VPPA because such disclosure was analogous to the common law tort of invasion of privacy – intrusion upon seclusion.[15] The *Perry* court went further, however, stating that while the injury may

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See *Warth v. Seldin,* 422 U.S. 490, 500, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975). A plaintiff seeking to vindicate a statutorily created private right need not allege actual harm beyond the invasion of that private right. See *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 373–374, 102 S.Ct. 1114, 71 L.Ed.2d 214 (1982) (recognizing standing for a violation of the Fair Housing Act); *Tennessee Elec. Power Co. v. TVA*, 306 U.S. 118, 137–138, 59 S.Ct. 366, 83 L.Ed. 543 (1939) (recognizing that standing can exist where "the right invaded is a legal right,—one of property, one arising out of contract, one protected against tortious invasion, or one founded on a statute which confers a privilege").

[13] *Id.* at 1113-17.

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

[15] *Trichell* at 997.

perhaps be intangible, the harm itself is concrete in the sense that it involves a clear *de facto* injury – an unlawful disclosure of legally-protected information.[16] Thus, historical analysis asks whether "the statutory violation at issue led to a type of harm that has historically been recognized as actionable."[17] As noted in *TransUnion v. Ramirez, supra*, at *21, the test is not whether an asserted harm is an *exact* duplicate of other laws, but rather that it has a close relationship to a traditionally recognized injury.

Florida has long recognized the common law tort of invasion of privacy. *Cason v. Baskin*, 155 Fla. 198, 212 (Fla. 1945) ("The reading of these two cases alone is, we think, sufficient to establish that there is a right of privacy, distinct in and of itself and not merely incidental to some other recognized right, and for breach of which an action for damages will lie."). Indeed, Florida jurisprudence has established three categories of invasion of privacy: "(1) appropriation — the unauthorized use of a person's name or likeness to obtain some benefit; (2) intrusion — physically or electronically intruding into one's private quarters; (3) public disclosure of private facts — the dissemination of truthful private information which a reasonable person would find objectionable." *Jews for Jesus, Inc. v. Rapp*, 997 So.

[16] *Perry* at 1340.
[17] *Muransky* at 926.

2d 1098, 1103 (Fla. 2008)(citing Allstate Ins. Co. v. Ginsberg, 863 So. 2d 156 (Fla. 2003).

In *Jews for Jesus*, the Florida Supreme Court rejected incorporating a fourth type of common law invasion of privacy: false light. *Id* at 1103. The court rejected this fourth type of invasion of privacy not because there wasn't an injury, but rather because it was too similar to the already established tort of defamation. The court recognized its duty on the other three types of invasion of privacy to ensure the "protection of the individual in the enjoyment of all of his inherent and essential rights and to afford a legal remedy for their invasion." *Id* at 1109, (citing *Cason* at 212). Mr. Hunstein's injury stands on the fact that no reasonable person wants the information contained in the relevant collection letter disseminated. By arguing that the dissemination to the mail vendor wasn't severe enough to warrant standing, the appellees are bypassing the crux of the injury. The unlawful exposure is the wrong, while the level of exposure determines just how wrong it was.

b. Congressional Judgment

Beyond historical recognition of the injury as actionable, "congressional judgment may illuminate a concrete injury because, as a body, Congress "is well positioned to identify intangible harms that meet minimum Article III requirements.""[18] However, Congressional action alone does not relieve the

[18] *Id.* at *14, citing *Spokeo* at 1549.

judiciary of its "constitutional duty to independently determine whether the plaintiff has suffered a concrete injury."[19] This Court supported a finding of concrete injury in the Perry[20] case – a statutory violation, but infringing upon a recognized privacy right – and in *Debernardis v IQ Formulations, LLC*[21] – a statutory violation, but interpreting the violation as creating a contract-based injury. This Court found no concrete injury in the *Trichell*[22] case – statutory violation of the Fair Debt Collection Practices Act by false statement, but without reliance – and in the *Muransky*[23] case – statutory violation of the Fair and Accurate Credit Transactions Act without third party disclosure. but with no claim of actual injury or direct harm tethered to any common law tort. Thus, an "injury in fact" must exist, distinct from the statutory claim itself.

III. Analysis

A. Intangible Injury

While Congressional intent will be addressed further, *infra*, the purpose of 15 U.S.C. 1692c(b) describes the *type of injury* suffered by Mr. Hunstein:

> [T]his legislation adopts an extremely important protection . . . it prohibits disclosing the consumer's personal affairs to third persons. Other than to obtain location information, a debt collector may not contact third persons such as a consumer's friends, neighbors, relatives

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19 *Id.* at *15.
20 *Perry v. Cable News Network, Inc.*, 854 F.3d 1336 (11th Cir. 2017).
21 Debernardis v. IQ Formulations, LLC, 942 F.3d 1076 (11th Cir. 2019).
22 *Trichell* at 997.
23 *Muransky* at 932.

> or employer. Such contacts are not legitimate collection practices and result in serious invasions of privacy, as well as loss of jobs. S. Rep. No. 382, 95th Cong., 1st Sess. 4, at 4, reprinted in 1977 U.S.C.C.A.N. 1695, 1696.

Preferred sent highly personal, uniquely identifiable, and legally protected information to a third-party. It revealed Mr. Hunstein's address, status as a debtor, amount of the debt, creditor, and that the debt arose medical treatment of Mr. Hunstein's minor son.[24] As with the VPPA, through the FDCPA, Congress deemed information related to the existence of a debt being in collection *privileged* and *legally protected*. Their legislation did not invent a new harm from whole cloth, but rather offered recognition to the fact that even minimal disclosure of confidential financial information results in humiliation of the debtor. Hence, the disclosure of such information to an unauthorized third-party causes a concrete *de facto* injury.

Not believing a detailed affidavit of his emotional distress was necessary at the time, Mr. Hunstein averred to this in his Complaint by stating that such disclosures have a "known, negative effect" on consumers.[25] Just so, Mr. Hunstein's own injuries are clear on their face: Humiliation, embarrassment, and anxiety from the knowledge that his private information was in the hands of a third party.[26] While

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[24] Complaint ¶18.

[25] Complaint ¶ 29. As Mr. Hunstein pled, he is a *consumer*. *Id.* ¶ 6.

[26] See 15 U.S.C. 1692c(b). Further, had Mr. Hunstein been shot, it defies logic to compel him to describe his injuries in medically precise detail – the very label "gunshot victim" describes the injury. In this matter, Mr. Hunstein was publicly exposed concerning a matter which the U.S. Congress determined was entitled to

such injuries are intangible, they are undoubtedly "real" and are realized upon communication to the third party.

The plaintiffs in *Muransky*, *Ramirez*, and *Trichell* all argued that they had standing to bring claims based on the threat of future harm. In *Muransky*, the argument for standing was that the exposure of credit card information, and the fear that such exposure might lead to identity theft. One of the factors highlighted by the *Muransky* Court in rejecting standing was that there was no third party disclosure. The plaintiff was handed the receipt and never alleged that anyone else saw it. *Id* at 932. In contrast, Mr. Hunstein has specifically alleged who the third party was and the unique, private information disclosed to them.

Likewise, in *Ramirez*, the plaintiff argued that the "existence of misleading OFAC alerts in their internal credit files exposed them to a material risk that the information would be *disseminated in the future* to third parties." *Ramirez*, No. 20-297, at *24 (June 25, 2021). The *Ramirez* Court held there was standing for the 1,853 class members who had their possible OFAC match designation actually communicated to third parties. The Court never looked into the type of third-parties who received this inherently negative information, and further rejected Trans Union's assertion that it only labeled them as "potential terrorists." *Id* at 17. The

privacy. It matters not whether that exposure was to one person or to millions – the injury occurs when any improper disclosure is made.

Court believed that even affixing the "potential terrorist" label in the third-party disclosure was enough. Similarly, Mr. Hunstein's label as a "deadbeat," via the information communicated in the collection letter is inherently negative and was transmitted to a third party.

In *Trichell*, the Court compared the 15 U.S.C. §1692e claim to the common law analogue of misrepresentation. Although there was a misleading communication, there was no reliance on that communication alleged by the plaintiff. As such, Mr. Trichell's claims failed to establish standing because it lacked this "bedrock element" of this traditional common law tort. *Id* at 998. Mr. Hunstein's claim under 15 U.S.C. § 1692c(b) is making no such dramatic departure from the common law tort of invasion of privacy. The facts disclosed were private in nature and of the variety no reasonable person would want disclosed. These private details were specific to Mr. Hunstein, and transmitted to a member of the public in violation of the federal statue. Just because Mr. Hunstein doesn't personally know the third party, or that the information is not generally available to the public, does not automatically nullify the invasion of privacy claim. Illustrating through example, a woman who sees the flash of a peeping tom's camera as she gets out of the shower has experienced a concrete and particular harm even if she is unable to identify the perpetrator as someone she personally knows. The injury occurs upon the knowledge that her privacy has been breached. The specific number and type people who

eventually see the photo is a measure of the severity of damages, not a requirement for damages to exist in the first place.

The disclosure of information regarding Mr. Hunstein and his alleged debt was not *potential* harm, or *potential* identity theft. Rather, it was *actual* harm, suffered by Mr. Hunstein the minute the unauthorized disclosure of his private information to a third party occurred. This actual harm included Mr. Hunstein's emotional reaction upon discovering that his private information had been exposed. It is akin to the feeling of going to unlock your school locker or personal safe, only to find the door already ajar and the items rummaged through. That particular feeling in the pit of your stomach, as if a concrete block just dropped into your lower intestine, as you realize that your private items have be revealed and recorded (even if just by memory). This negative experience occurs upon discovery of the intrusion and is simply exacerbated by discovering the level of exposure. The Court in *Ramirez* recognizes this harm, stressing that standing is conferred upon the transmittal of the protected information, a transmittal which in the instant matter had already occurred.

B. The Complexity of the Statutory Violation

Because Mr. Hunstein presented the Court with a complaint based upon the FDCPA, and his injury is based on a violation thereof, it is proper for the Court to

review both the nature of the alleged violation historically and in the context of Congressional action.

a. Historical Perspective

The nature of Mr. Hunstein's complaint, while FDCPA-based, is founded in the principles of privacy law – that one has a right to be let alone,[27] to maintain confidences, and to avoid publication of his private affairs.[28] Florida, like most states, recognizes a cause of action founded in the improper disclosure of private facts.[29] The elements of Florida's cause of action – (i) publication; (ii) private facts; (iii) offensive; and, (iv) not of public concern – are of the same genus as 15 U.S.C. § 1692c(b):

> …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.

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[27] Cooley on Torts, 2d ed., p. 29.

[28] *See, generally*, Warren and Brandeis, "The Right to Privacy", 4 Harvard Law Review 193 (1890).

[29] "Florida has adopted the Restatement's test of invasion of privacy based on publication of private facts. *Cape Publ'ns, Inc. v. Hitchner*, 549 So.2d 1374 (Fla. 1989). To state a public disclosure of private facts claim, a plaintiff must allege (1) the publication, (2) of private facts, (3) that are offensive, and (4) are not of public concern. *Id.* at 1377; *Pierre–Paul v. ESPN Inc.*, 2016 WL 4530884, at *1 (S.D. Fla. 2016)." *Leach v. Dist. Bd. of Trs. of Palm Beach*, 244 F. Supp. 3d 1334, 1339 (S.D. Fla. 2017).

Indeed, § 1692c(b) shares: (i) Communication / Publication; (ii) Private Facts / Information related to a Debt; (iii) Offensive / Sensitive and Confidential; and (iv) Information which is not of a public concern. As such, this subsection of the FDCPA has "a close relationship to a harm that has traditionally been regarded as provided a basis for a lawsuit in … American courts."[30]

b. An Issue of Kind, Not Degree

It should be noted that the close relationship test seeks a close relationship in the *kind of injury* suffered, not the *degree*. Justice Barrett, while serving on the Seventh Circuit, stated:

> But when *Spokeo* instructs us to analogize to harms recognized by the common law, we are meant to look for a "close relationship" in kind, not degree. *See* 136 S. Ct. at 1549. In other words, while the common law offers guidance, it does not stake out the limits of Congress's power to identify harms deserving a remedy. Congress's power is greater than that: it may "elevat[e] to the status of legally cognizable injuries concrete, *de facto* injuries that were previously inadequate in law." *Id.* (alteration in original) (quoting *Lujan v. Defs. of Wildlife* , 504 U.S. 555, 578, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992)). A few unwanted automated text messages may be too minor an annoyance to be actionable at common law. But such texts nevertheless pose the same *kind* of harm that common law courts recognize—a concrete harm that Congress has chosen to make legally cognizable.
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> *Gadelhak v. AT&T Servs., Inc.*, 950 F.3d 458, 462-63 (7th Cir. 2020) (internal citations omitted).

[30] *Spokeo* at 1549.

While the Eleventh Circuit reached a different decision regarding a single text-message in a similar case, the opinion concluded, "Article III standing is not a 'You must be this tall to ride' measuring stick. 'There is no minimum quantitative limit required to show injury; rather, the focus is on the qualitative nature of the injury, regardless of how small the injury may be.' *Saladin v. City of Milledgeville*, 812 F.2d 687, 691 (11th Cir. 1987)." *Salcedo v. Hanna*, 936 F.3d 1162, 1172-73 (11th Cir. 2019).

While § 1692c(b) shares a close relationship with the privacy tort of disclosure of private facts, it may be distinguished in that it does not require publication – public dissemination – of private information, but rather disclosure to *any* third-party other than those excepted under § 1692c(b). The harm to be prevented under both the common law tort and § 1692c(b) is humiliation – an injury which Congress has recognized is not a legitimate method of debt collection.[31] Thus, while the elements of each offense may differ in degree, they match in nature and kind.[32]

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[31] S. Rep. No. 382, 95th Cong., 1st Sess. 4, at 4, reprinted in 1977 U.S.C.C.A.N. 1695, 1696.

[32] In *Transunion, LLC v. Ramirez*, *supra*, the U.S. Supreme Court concluded that statements that class members were potentially terrorists made to potential creditors established harm sufficient to provide Article III standing while simply maintaining such records without dissemination of that information could not. Notably, in *dicta*, the court indicated that publication to mail vendors, without any indication that the information had actually been seen, did not support a claim of publication sufficient to establish a close relationship to traditional defamation tort. In the instant matter, Mr. Hunstein has asserted that disclosure to the mail house employees occurred.

c. Congressional Judgment

As noted, *supra*, Congress identified communications in violation of § 1692c(b) as, "serious invasions of privacy."[33] In *Perry*, the Court determined that the bare violation of the VPPA, without further claim of injury, constituted *concrete harm* on the basis that Perry's privacy rights had been violated by an unlawful disclosure of his video tape records.[34] Like Perry, the bare violation of the FDCPA supports a finding that Mr. Hunstein suffered concrete harm on the basis that Mr. Hunstein's privacy rights were violated by an unlawful disclosure of his debt and the personal information surrounding it.[35] Mr. Hunstein's injury, his humiliation, though a direct result of the Defendant's violation of the statute, stands distinct from the violation itself. As such, the harm suffered by Mr. Hunstein falls squarely within the type of injury Congress sought to prevent with the extension of existing privacy

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[33] S. Rep. No. 382, 95th Cong., 1st Sess. 4, at 4, reprinted in 1977 U.S.C.C.A.N. 1695, 1696.

[34] *Perry* at 1340.

[35] Indeed, it is reasonable to paraphrase *Perry* as follows: *The structure and purpose of the [FDCPA] supports the conclusion that it provides actionable rights. Subject to certain exceptions, the [FDCPA] prohibits the wrongful disclosure by a [debt collector. 15 U.S.C. §1692c(b).] It creates a cause of action [against] [*"*any debt collector who fails to comply with any provision of this subchapter with respect to any person" making them "liable to such person" 15 U.S.C. §1692k(a)]. The statute was enacted in response to [abusive debt collection practices for the purpose of eliminating abusive practices, protecting non-abusive debt collectors, and to protect consumers. (15 U.S.C. §1692a-e). We conclude that violation of the FDCPA constitutes a concrete harm.* ***Paraphrased*** from *Perry v. Cable News Network, Inc.*, 854 F.3d 1336, 1340 (11th Cir. 2017).

laws. Indeed, Congress specifically references "invasions of individual privacy" as one of the concerning effects of abusive debt collection practices in the opening statute of the FDCPA regarding Congressional findings and declarations of purpose. *15 U.S.C. §1692(a).*

IV. The Use of Intermediaries – The Telegram Exception

As noted in Appellee's Brief, § 1692b(5) permits the use of a telegram to communicate with a debtor, suggesting that the use of any intermediary is acceptable.[36] As an initial issue, one should note the long-held Latin rule of statutory interpretation – *inclusio unius est exclusio alterius* – the inclusion of one thing implies the exclusion of another.[37]

Mail houses existed prior to the passage of the FDCPA in 1977.[38] Since that time, Congress has amended the FDCPA numerous times, without changing the list of acceptable third-party recipients of credit information.[39] As both the technology

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[36] Appellee's brief dated May 26, 2021, P. 20, § C(1).

[37] See, e.g., *Rivera v. Singletary*, 707 So.2d 326, 326 (Fla. 1998); *Indus. Fire Cas. Ins. Co. v. Kwechin*, 447 So.2d 1337, 1339 (Fla. 1983) ("The express authorization of deductibles in the enumerated situations implies the prohibition against them in all other situations according to the rule of statutory construction *inclusio unius est exclusio alterius*.") *Smith v. State*, 982 So. 2d 69, 71 n.1 (Fla. Dist. Ct. App. 2008).

[38] CompuMail, the vendor used by Preferred in this matter, was established in 1994. Direct mail marketing, through the use of computers, has existed in the United States since at least the 1960s. See https://www.msp-pgh.com/history-direct-mail-marketing/, visited on December 22, 2021.

[39] The FDCPA has been amended in 1986, 1989, 1991, 1992, 1995, 1996, 2006, 2010, and 2021.

and methodology for third-party mailing existed throughout the history of the FDCPA, it is a stretch to suggest that Congress failed to include third-party mail houses, or service providers of a similar nature, as an oversight on their part, but would have intended their inclusion as similar to the use of a telegram. Therefore, Appellee's attempt to broaden the use of telegrams to include explicit permission is *inapropos*. Just so, the use of a third-party mailing house differs in two important ways: (a) Scope of the disclosure; and, (b) Necessity.

In sending a telegram, the scope of the disclosure is extremely limited – information is conveyed only to two individuals – the person typing the telegram and the person who receives and delivers the telegram, and the nature of the disclosure *excludes any references to debt collection*.[40] The use of a mail house, by contrast, affords no such protection where the number of persons afforded the information, and their further dissemination of that information, is wholly unbounded. Indeed, the dissemination of information sent to a mail house, has the

[40] Any message sent by telegram is governed by §1692b which prohibits communications that indicate a relation to debt collection. Even if Preferred's analogy to mail houses was taken at face value, Preferred would still be prohibited from communicating debt collection information exactly of the type of which Mr. Hunstein complains. Today, telegram technology is virtually obsolete. On January 27, 2006, Western Union announced that it would discontinue Telegram and commercial mailing services. https://www.atlasobscura.com/articles/telegrams visited on December 22, 2021. Just so, there are still several services which offer telegram-like services (e.g., American Telegram); however, *the content of their message is maintained in confidence.*

potential for exponential exposure – a characteristic quite different from that of the humble telegram. Further, Telegrams were generally treated as confidential, whereas agents of debt collectors are generally not deemed debt collectors themselves and are thus not subject to the disclosure requirements of the FDCPA.[41]

Moreover, the use of mail or telegram, without which a debtor had no reasonable alternative method of communicating with a debtor, is necessary to allow a debt collector to convey written information, much of which is required by the FDCPA.[42] Third-party intermediaries are not necessary to the function of debt collection, but rather are used solely for convenience, as evidenced by smaller debt collection firms which handle mailings internally.

Because Congress provided specific, narrowly tailored exceptions within the FDCPA, and the inherent differences between disclosure to a telegram company and a mail house, it is clear that Congress never intended to allow the type of disclosure made by Preferred.

V. Conclusion

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[41] See, e.g., *Ex parte Brown*, 72 Mo. 83 at 92 (1880), "Telegraph companies, it is true, are by section 13, Wagner's Statutes, 325, subjected to a penalty for disclosing the contents of any private dispatch to any person other than the person to whom it is addressed, or his agent…" (available at https://cite.case.law/mo/72/83/); *DeMaestri v. VeriFacts, Inc*., Civil Action No. 11-cv-02430-WYD-KMT (D. Colo. Apr. 10, 2012).

[42] 15 U.S.C. 1692g *requires* that a debt collector provide a debtor with written notice of their rights.

"The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws whenever he receives an injury." *Marbury v. Madison*, 1 Cranch 137, 170 (1803). Although *Trichell* and *Muransky* inform the method of analysis requisite of an Article III inquiry, *Perry* is most analogous to the instant matter. "The harm itself is concrete in the sense that it involves a clear *de facto* injury – an unlawful disclosure of legally protected information." *Perry* at 1340. Mr. Hunstein's private, legally protected information was transmitted to and manipulated by a third party not listed as except in the statute.

Congress created a clear protection of a consumer's right to privacy within the context of debt collection with the specific, limiting language of 15 U.S.C. § 1692c(b). Appellees violated this protection by exposing Mr. Hunstein's non-public information to an unauthorized third-party. This feeling of personal exposure confers standing to the Appellant. It is neither future, nor potential harm, and it is the exact type of injury Congress was seeking to prevent and remedy with the FDCPA.

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CERTIFICATE OF COMPLIANCE UNDER FRAP 32(g)1

This En Banc Brief of the Appellant complies with the length limitation of FRAP 32(a), FRAP 32(f), and this Court's Briefing Memorandum issued on November 23, 2021, as the applicable sections are **24** pages long and **6,156** words.

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CERTIFICATE OF SERVICE

I hereby certify that on December 23, 2021, I electronically filed a true and correct copy of the forgoing with the Clerk of Court for the United States Court of Appeal for the Eleventh Circuit via the ECF system. A copy was also mailed to all Parties Counsel of Record via e-service in compliance with 11th Cir. R. 25-3.

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