No. 18-3119

IN THE UNITED STATES COURT OF APPEALS FOR
THE SEVENTH CIRCUIT

Neal Preston,

Plaintiff-Appellant,

v.

Midland Credit Management, Inc.,

Defendant-Appellee.

On Appeal from the United States District Court for
the Northern District of Illinois, Eastern Division

Hon. Sara L. Ellis

Case No. 1:18-cv-01532

Brief for the Consumer Financial Protection Bureau as *Amicus Curiae*

Mary McLeod
General Counsel
John R. Coleman
Deputy General Counsel
Steven Y. Bressler
Assistant General Counsel
Kristin Bateman
Senior Litigation Counsel
Joseph Frisone
Attorney-Advisor
Consumer Financial Protection Bureau
1700 G Street, NW
Washington, D.C. 20552
(202) 435-9287 (telephone)
(202) 435-7024 (facsimile)
Joseph.Frisone@cfpb.gov

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES **PAGE**

STATUTES

OTHER AUTHORITIES

QUESTIONS PRESENTED

The Fair Debt Collection Practices Act (FDCPA) prohibits debt collectors from "using any language or symbol, other than the debt collector's address, on any envelope when communicating with a consumer by use of the mails or by telegram, except that a debt collector may use his business name if such name does not indicate that he is in the debt collection business." 15 U.S.C. § 1692f(8). The Court invited the Consumer Financial Protection Bureau (Bureau) to file an amicus brief addressing: (1) whether there is a benign language exception to this prohibition and, if so, (2) whether the phrase "TIME SENSITIVE DOCUMENT" falls within that exception as a matter of law.

INTEREST OF AMICUS CURIAE

The Bureau files this brief in response to the Court's June 7, 2019 order inviting the Bureau to file a brief in this case. ECF No. 35. The Bureau is charged with promulgating rules under the FDCPA as well as enforcing compliance with the Act's requirements. *See* 15 U.S.C. § 1692*l*(b)(6), (d); 12 U.S.C. § 5512(b)(1), (4); *see also* 12 U.S.C. § 5481(12), (14) (including the FDCPA in the list of "Federal consumer financial laws" that the Bureau administers). Pursuant to this authority, the Bureau recently issued a notice of proposed rulemaking to prescribe federal rules governing the activities of debt collectors. *See* Debt Collection Practices (Regulation F), 84 Fed. Reg. 23274 (May 21, 2019).

STATEMENT

A. Statutory and Regulatory Background

1. Congress enacted the FDCPA in 1977 in order to "eliminate abusive debt collection practices by debt collectors, to insure that those debt collectors who refrain from using abusive debt collection practices are not competitively disadvantaged, and to

promote consistent State action to protect consumers against debt collection abuses." Pub. L. No. 95-109, § 802(e), 91 Stat. 874, 874 (codified at 15 U.S.C. § 1692(e)). To achieve those ends, the FDCPA imposes various requirements on debt collectors' debt-collection activity. Relevant here is section 1692f, which provides that a "debt collector may not use unfair or unconscionable means to collect or attempt to collect any debt." 15 U.S.C. § 1692f. The provision then states that the "following conduct is a violation of this section" and enumerates eight specifically prohibited practices, including "using any language or symbol, other than the debt collector's address, on any envelope when communicating with a consumer by use of the mails or by telegram, except that a debt collector may use his business name if such name does not indicate that he is in the debt collection business." *Id.* § 1692f(8).

Also relevant here, the Act bars debt collectors, with limited exceptions, from communicating with most third parties "in connection with the collection of any debt," except for the purpose of obtaining "location information" about the consumer. *See id.* §§ 1692a(7), 1692b, 1692c(b). But when debt collectors contact third parties for that purpose, they must follow various requirements, including not using "any language or symbol on any envelope or in the contents of any communication . . . that indicates that the debt collector is in the debt collection business or that the communication relates to the collection of a debt." *Id.* § 1692b(5).

To ensure compliance with these and the FDCPA's other requirements, Congress provided a private right of action, *id.* § 1692k(a), (d), and authorized enforcement by a number of federal agencies, including the Bureau, *id.* § 1692*l*.

2. From the time of the FDCPA's enactment until Congress created the Bureau in 2010, the Federal Trade Commission (FTC) was the agency that administered, and had

primary responsibility for enforcing, the FDCPA. *See* 15 U.S.C. § 1692*l*(a) (2010). Although the FTC did not have general rulemaking authority under the Act, *see id.* § 1692*l*(d) (2010), its staff issued Commentary that set forth "staff interpretations" of the statute. *See* Staff Commentary On the Fair Debt Collection Practices Act, 53 Fed. Reg. 50097-02, 50101 (Dec. 13, 1988). The Commentary specifically advised that it was "not a formal . . . rule or advisory opinion" and was "not binding on the Commission or the public." *Id.* As relevant here, the staff stated that a "rigid, literal approach to section [1692f(8)] would lead to absurd results" (namely, prohibiting including the consumer's address). *Id.* at 50099. Then, reasoning that "the legislative purpose" was to bar language and symbols on envelopes "that would reveal that the contents pertain to debt collection," FTC staff concluded that a "debt collector does not violate this section by using an envelope printed with words or notations that do not suggest the purpose of the communication," such as "telegram," "personal," or "confidential." *Id.* at 50099, 50108.

3. In 2010, Congress passed the Dodd-Frank Wall Street Reform and Consumer Protection Act, which created the Bureau and granted it authority to enforce compliance with the FDCPA. Pub. L. No. 111-203, § 1089, 124 Stat. 1376, 2092-93 (codified at 15 U.S.C. § 1692*l*(b)(6)). The Dodd-Frank Act also granted the Bureau authority to "prescribe rules with respect to the collection of debts by debt collectors, as defined in the [FDCPA]." *Id.* (codified at § 1692*l*(d)).

Pursuant to that authority, the Bureau issued a proposal to prescribe federal rules governing the activities of debt collectors earlier this year. *See* 84 Fed. Reg. 23274 (May 21, 2019). The proposed rule does not directly address either question on which the Court has invited the Bureau's views. However, related to the second question, the

proposed rule briefly addresses the phrase "time-sensitive" in the context of voicemail or text messages. The proposal would define a new term, "limited-content message," that a debt collector could leave for a consumer without engaging in a "communication" under the FDCPA. 84 Fed. Reg. at 23289. Under the proposed rule, a "limited-content message" would "not convey information about a debt directly or indirectly." *Id.* at 23287. The Bureau noted that it considered proposing to allow such "limited-content" messages to state that the "message relates to a . . . 'time-sensitive' matter." *Id.* at 23293. However, the Bureau opted not to propose permitting that language because such language "might, in at least certain contexts, be misleading or confusing to a consumer." The Bureau is seeking comment on this and other content that might be permitted in a limited-content message. *Id.* The comment period for the proposed rule is scheduled to close on September 18, 2019.

B. Facts and Procedural History

In July 2017, Plaintiff-Appellant Neal Preston received a debt collection letter enclosed in an envelope with the words "TIME SENSITIVE DOCUMENT" printed in bold font from Defendant-Appellee Midland Credit Management (MCM). Appellant's Appendix (App.) 4-6 (ECF No. 14) (Compl. ¶¶ 4, 27). The letter contained information regarding a debt that MCM sought to collect from Preston and offered options for Preston to pay off his debt at a discount if he submitted payment by a certain date. *Id.* at 4, 7 (Compl. ¶¶ 24, 33).

Preston brought suit asserting various claims under the FDCPA. As relevant to the issue on which the Court has sought the Bureau's views, Preston claimed that the inclusion of "TIME SENSITIVE DOCUMENT" on the envelope violated section 1692f(8). *Id.* at 7-8 (Compl. ¶ 42). MCM moved to dismiss this claim, arguing that the

court should "carve[] out an exception for language that is 'benign' because a literal reading . . . would not serve the FDCPA's purposes." *Id.* at 56 (Dist. Ct. Op. at 3).

The district court agreed and granted MCM's motion to dismiss that claim (as well as Preston's other claims). *Id.* at 54-55 (Dist. Ct. Op. at 1-2). The court "reject[ed] a literal interpretation of [section] 1692f(8) and held that there is a "benign language exception" to the FDCPA's prohibition on the use of "any language or symbol" other than the debt collector's address and, if non-revealing, its name on an envelope when communicating with a consumer by mail. *Id.* at 57-58 (Dist. Ct. Op. at 4-5). In particular, the court held that section 1692f(8) does not prohibit language or symbols that "suggest[] nothing about the existence of a debt." *Id.* at 59 (Dist. Ct. Op. at 6). The district court then decided that "TIME SENSITIVE DOCUMENT" falls within that exception as a matter of law because that language "does not create any privacy concerns for Preston or expose potentially embarrassing information by giving away the fact that the letter is from a debt collector." *Id.* at 58 (Dist. Ct. Op. at 5). Preston timely appealed.

SUMMARY OF ARGUMENT

1. There is no "benign language" exception to the FDCPA's prohibition on "[u]sing any language or symbol, other than the debt collector's address, on any envelope when communicating with a consumer by use of the mails or by telegram, except that a debt collector may use his business name if such name does not indicate that he is in the debt collection business." 15 U.S.C. § 1692f(8). Section 1692f(8)'s text plainly does not include such an exception. Rather, the provision expressly permits debt collectors to include two pieces of information on envelopes when using the mail or telegrams to collect debts: (1) the debt collector's address and (2) the debt collector's

business name, if that name does not indicate that it is in the debt collection business. The provision also expressly recognizes that a debt collector may "communicat[e] with a consumer by use of the mails," and thus permits language and symbols that facilitate mailing an envelope, such as the debtor's name and address and postage. By its own terms, then, section 1692f(8) does not allow debt collectors to also include any language or symbol that might be considered "benign," such as markings that do not reveal the debt-collection purpose of the communication.

Nor does section 1692f's prefatory text—which broadly prohibits debt collectors from "us[ing] unfair or unconscionable means" to collect debts—provide a basis for reading a "benign language" exception into section 1692f(8). In particular, section 1692f's prefatory text does not suggest that including language or symbols on an envelope (other than the limited items the statute permits) is prohibited only where doing so is "unfair or unconscionable" in some general sense. Section 1692f prohibits using "unfair or unconscionable" means to collect debts and separately provides that certain specified conduct, including the conduct described in subsection 8, "is a violation" of section 1692f. The text of section 1692f reflects Congress's judgment that the enumerated prohibited practices—including 1692f(8)'s restriction on using most language or symbols on a debt-collection envelope—are by definition violations of the Act. Therefore, there is no separate requirement that the prohibited language and symbols be independently "unfair or unconscionable."

Moreover, if Congress wanted to allow debt collectors to include markings on envelopes so long as they did not reveal the debt-collection purpose of the communication, then it would have done so expressly, as it did in section 1692b(5). In section 1692b, Congress provided that when debt collectors communicate with third

parties to acquire information about how to contact a debtor, they may "not use any language or symbol on any envelope" or in the communication itself "that indicates that the debt collector is in the debt collection business or *that the communication relates to the collection of a debt*." 15 U.S.C. § 1692b(5) (emphasis added). This Court should not read an implied limitation into section 1692f(8)'s prohibition where Congress explicitly incorporated such a limitation in another similar provision elsewhere in the FDCPA.

Further, the absurd results doctrine does not provide a basis for adopting a "benign language" exception. The district court reasoned that reading section 1692f(8) literally would absurdly prohibit debt collectors from including information like the debtor's name and address, or even the postage, on their debt-collection mailings. But section 1692f(8) does not produce that result. As previously mentioned, the provision expressly recognizes that debt collectors may "communicat[e] with a consumer by use of the mails," and thus necessarily allows language or symbols that facilitate mailing an envelope, such as the debtor's name and address and postage. However, even if a literal reading of section 1692f(8) produced the absurd result of preventing debt collectors from making use of the mails, the solution would be to adopt an exception that avoids that specific absurdity, not to adopt a broad exception that permits anything that may be considered "benign."

Relatedly, prohibiting language that may be considered "benign" is not an "absurdity" that justifies departing from section 1692f(8)'s plain text. In the Seventh Circuit, the absurd results doctrine is "linguistic rather than substantive"; it permits a court only to "repair" a statute when it does not "scan as written," not to improve a statute substantively. *Jaskolski v. Daniels*, 427 F.3d 456, 461-62 (7th Cir. 2005). Because section 1692f(8) allows for the inclusion of information like the debtor's

address and postage, the provision "scan[s] as written," and the absurd results doctrine does not apply.

Finally, the FDCPA's purposes do not support adopting a "benign language" exception. As this Court has previously said, it is "the text itself" that is "the most reliable indicator of congressional intent." *Bass v. Stolper, Koritzinsky, Brewster & Neider, S.C.*, 111 F.3d 1322, 1324-25 (7th Cir. 1997). Therefore, even assuming that Congress's purpose in enacting section 1692f(8) was to protect consumers from language or symbols that could reveal the communication relates to debt collection—and that the benign language exception would better serve that purpose—that would not justify departing from the provision's plain text. The text establishes a bright-line rule that bars most language and symbols on envelopes used in debt-collection communications, without regard to whether the language or symbol could be considered "benign," and so courts should apply it that way.

2. If this Court were nonetheless to adopt a "benign language" exception, then whether "TIME SENSITIVE DOCUMENT" would fall within that exception would be a question of fact. Because the Bureau does not read section 1692f(8) to include a "benign language" exception, the Bureau does not take a position on the scope of any such exception. Nevertheless, whether language would be considered "benign"—however it might be defined—would necessarily require assessing the language's impact on an unsophisticated consumer. And, as this Court has cautioned, "judges are not good proxies for the unsophisticated consumer." *McMillan v. Collection Prof'ls Inc.*, 455 F.3d 754, 759 (7th Cir. 2006) (internal quotations omitted). Thus, how any given language will affect the "unsophisticated consumer" is often a question of fact. So too here: How the "unsophisticated consumer" would view the phrase "TIME SENSITIVE

DOCUMENT" can be determined only with the benefit of evidence about how unsophisticated consumers actually view that phrase. Therefore, if the Court adopts a "benign language" exception, it should remand the matter to give Preston an opportunity to present facts on whether "TIME SENSITIVE DOCUMENT" would be "benign."

ARGUMENT

I. There is no "benign language" exception to section 1692f(8)'s prohibition

A. Section 1692f(8)'s text does not recognize an exception for "benign language"

"As with all issues of statutory interpretation, the appropriate place to begin . . . is with the text itself." *Bass v. Stolper, Koritzinsky, Brewster & Neider, S.C.*, 111 F.3d 1322, 1324 (7th Cir. 1997) (citing *Hughey v. United States*, 495 U.S. 411, 415 (1990)). Section 1692f(8) prohibits "[u]sing any language or symbol, other than the debt collector's address, on any envelope when communicating with a consumer by use of the mails or by telegram, except that a debt collector may use his business name if such name does not indicate that he is in the debt collection business." By its own terms, section 1692f(8) expressly identifies two types of information that debt collectors may include on an envelope: (1) a debt collector's address and (2) the debt collector's business name, if such name does not indicate that it is in the debt collection business. The Act also expressly recognizes that a debt collector may "communicat[e] with a consumer by use of the mails," and thus by necessary implication allows language and symbols that facilitate mailing an envelope, such as the debtor's name and address and postage. *See Peter v. GC Servs. L.P.*, 310 F.3d 344, 351 (5th Cir. 2002). Aside from that, the provision prohibits using "any" other language or symbol, 15 U.S.C. § 1692f(8) (emphasis added)—

a word with "expansive meaning," *United States v. Gonzales*, 520 U.S. 1, 5 (1997) ("[T]he word, 'any' has an expansive meaning, that is, 'one or some indiscriminately of whatever kind.'" (quoting Webster's Third New International Dictionary 97 (1976))). Thus, a plain reading of the provision's text does not permit debt collectors also to include other language or symbols that might be considered "benign." And courts, of course, should "resist reading words or elements into a statute that do not appear on its face." *Dean v. United States*, 556 U.S. 568, 572 (2009); *see also Bass*, 111 F.3d at 1324-25 ("As the Supreme Court . . . reminded us . . ., we are prohibited from reading into clear statutory language a restriction that Congress itself did not include.").

In addition, section 1692f's first sentence—which broadly prohibits debt collectors from "us[ing] unfair or unconscionable means to collect or attempt to collect any debt"—does not support reading section 1692f(8) to permit debt collectors to include markings on envelopes that the section does not specifically permit so long as those markings can be deemed "benign." MCM argues that, in light of section 1692f's general prohibition, section 1692f(8) can and should be read to "only prohibit[] markings on the outside of envelopes that are unfair or unconscionable." Appellee's Br. at 4 (citing *Goswami v. Am. Collections Enter., Inc.*, 377 F.3d 488, 493 (5th Cir. 2004)). And, according to MCM, "benign" markings that would not "signal that [the communication] is a debt collection letter" are not "unfair or unconscionable." *Id.* at 5.

But section 1692f's plain text does not support this reading. Section 1692f provides that certain specified conduct, including the conduct described in subsection 8, "is a violation" of section 1692f. In other words, the conduct described in subsection 8 is by definition "unfair or unconscionable." There is no separate requirement that a plaintiff demonstrate that the specifically prohibited conduct is also "unfair or

unconscionable" in some unspecified general sense. *See Turner v. J.V.D.B. & Assoc., Inc.*, 330 F.3d 991, 996 (7th Cir. 2003) (stating that whether a debt collector violated section 1692f(1) "depend[ed] solely on" the elements listed in subsection 1).

Section 1692f's text reflects Congress's judgment that the enumerated prohibited practices—including 1692f(8)'s restriction on putting language or symbols on debt-collection envelopes—are by definition violations of the Act. This much is clear by reading section 1692f(8) in connection with the preamble text in section 1692f: (1) "Using any language or symbol, other than the debt collector's address, on any envelope when communicating with a consumer by use of the mails or by telegram, except that a debt collector may use his business name if such name does not indicate that he is in the debt collection business" (2) "is a violation" of section 1692f.

B. The text of the FDCPA elsewhere confirms that Congress did not intend to include an exception for "benign language" in section 1692f(8)

The text of the FDCPA elsewhere further confirms that section 1692f(8) does not implicitly permit "benign" language or symbols that "suggest[] nothing about the existence of a debt," App. at 59 (Dist. Ct. Op. at 6). In another provision, Congress specifically barred language and symbols that reveal that a communication relates to debt collection. In particular, in section 1692b, Congress provided that when debt collectors communicate with third parties to acquire information about how to contact a debtor, they may "not use any language or symbol on any envelope" or in the communication itself "that indicates that the debt collector is in the debt collection business or *that the communication relates to the collection of a debt*." 15 U.S.C. § 1692b(5) (emphasis added); *see also id.* § 1692a(7). Had Congress intended similarly to restrict section 1692f(8)'s prohibition to language or symbols that indicate the

communication relates to debt collection, "it presumably would have done so expressly as it did in [section 1692b(5)]." *Russello v. United States*, 464 U.S. 16, 23 (1983). Accordingly, this Court should not read an implied limitation into section 1692f(8)'s prohibition where Congress explicitly incorporated such a limitation in another similar provision elsewhere in the FDCPA. *See id.* ("Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.").

C. The absurd results doctrine does not support reading a "benign language" exception into section 1692f(8)

The absurd results doctrine does not justify reading a benign language exception into section 1692f(8). The district court concluded that, read literally, the provision would absurdly prohibit debt collectors from including on an envelope the debtor's name and address, and even the postage. *See* App. at 58 (Dist. Ct. Op. at 5). However, read as a whole, section 1692f(8) does not produce that result. As this Court has held, "the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *Loja v. Main St. Acquisitions Corp.*, 906 F.3d 680, 683 (7th Cir. 2018) (quotations omitted); *see also Ortega v. Holder*, 592 U.S. 738, 743 (7th Cir. 2010) ("Context, not just literal text, will often lead a court to Congress' intent in respect to a particular statute."). Section 1692f(8) expressly recognizes that debt collectors may "communicat[e] with a consumer by use of the mails." As the Fifth Circuit recognized in *Peter v. GC Services L.P.*, this clearly contemplates that debt collectors may make "use of the mails" and thus "allow[s] for those items" that facilitate an envelope moving

through the mails. 310 F.3d at 351. Thus, when "read as a whole, no absurd result ensues." *Id.*

Section 1692f(8) therefore permits language and symbols that facilitate "communicating with a consumer by use of the mails," such as the debtor's name and address and postage. In the view of the Bureau, section 1692f(8) would also permit other markings that facilitate making "use of the mails." For instance, debt collectors could also include language like "forwarding and address correction requested," as well as the United States Postal Service's Intelligent Mail barcode, a barcode used to make mailing more efficient by allowing for tracking, address correction, and other similar services.[1]

However, even if a plain or literal reading of section 1692f(8) produced the absurd result that the district court posited, that would not support reading a broad "benign language" exception into the provision's plain text. As this Court has explained, the absurd results doctrine applies when statutory text does not "scan as written and thus need[s] repair work." *Jaskolski v. Daniels*, 427 F.3d 456, 462 (7th Cir. 2005). Section 1692f(8) would not "scan as written" if debt collectors were unable to include postage or the debtor's address on an envelope containing a debt collection communication, because then debt collector's would not be able to "communicat[e] with a consumer by use of the mails" as the provision plainly contemplates. The provision

[1] The Third Circuit recently held that "a debt collector violates [section] 1692f(8) when it sends to a debtor an envelope displaying an unencrypted [bar]code that, when scanned, reveals the debtor's account number." *See DiNaples v. MRS BPO, LLC*, --- F.3d ---, 2019 WL 3773014, at *5 (3d Cir. 2019). The Third Circuit did not suggest that the barcode at issue in that case facilitated use of the mails, and so the Bureau does not understand that decision to conflict with its view that section 1692f(8) permits barcodes that facilitate use of the mails.

would "thus need repair work," and all that would be required to "repair" section 1692f(8) (if any repair were needed) would be to allow debt collectors to include the information that facilitates making "use of the mails" to communicate with consumers. *See id.*; *see also Soppet v. Enhanced Recovery Co., LLC*, 679 F.3d 637, 642 (7th Cir. 2012) ("[Avoiding absurdity] means . . . modest adjustments to texts that do not parse."). Thus, the absurd results doctrine provides no basis to read in a broad "benign language" exception to ensure that debt collectors can include markings that facilitate "use of the mails."

Nor should courts read in a "benign language" exception based on the notion that it is "absurd" to preclude any language and symbols that may be considered benign (but that do not facilitate use of the mails). The absurd results doctrine only allows for "linguistic" repairs when a statute, as previously mentioned, does not "scan as written"; it "does not license courts to improve statutes (or rules) substantively, so that their outcomes accord more closely with judicial beliefs about how matters ought to be resolved." *Jaskolski*, 427 F.3d at 461. Because section 1692f(8) allows for the inclusion of information like the debtor's address and postage required for "use of the mails," the provision "scan[s] as written." *See id.* at 462. Therefore, even if it could be considered unwise as a matter of policy to bar benign language, that would not warrant changing the text to effectuate what one "might think ... is the preferred result." *Id.* (quoting *Lamie v. United States Tr.*, 540 U.S. 526, 542 (2004); *see also id.* at 464 ("[J]udges are not authorized to add words . . . that would change the [statute's] substantive effect.").

D. The FDCPA's purposes do not support reading a "benign language" exception into section 1692f(8)

The FDCPA's purposes likewise do not support interpreting section 1692f(8) to include on envelopes markings that might be considered "benign." MCM argues that Congress designed section 1692f(8) to "prevent debt collectors from embarrassing debtors by announcing the delinquency on the outside of a debt collection letter envelope," Appellee's Br. at 5 (quoting *Goswami*, 377 F.3d at 494), and that the provision therefore should be interpreted not to bar language and symbols that "do[] not indicate that the contents of the letter pertain to debt collection," *id.* at 3. The non-binding FTC Staff Commentary on the FDCPA similarly recognized an exception for markings "that do not suggest the purpose of the communication" based on section 1692f(8)'s apparent "purpose" of "prohibit[ing] a debt collector from using symbols or language on envelopes that would reveal that the contents pertain to debt collection."[2]

However, the fact that a particular interpretation may better advance a statute's purpose does not provide a basis to depart from the statute's plain text. *See Kloeckner v.*

[2] As this Court has explained, "the FTC Commentary is not binding on the courts because it is not a formal regulation and did not undergo full agency consideration." *McMillan v. Collection Professionals, Inc.*, 455 F.3d 754, 764 (7th Cir. 2006). Moreover, the Staff Commentary makes express that it reflects the view of staff, not the Commission, and "thus is not binding on the Commission or the public." 53 Fed. Reg. at 50101. Likewise, when the Bureau assumed authority to administer the FDCPA and other federal consumer financial laws in 2011, it published a notice indicating that prior agencies' guidance on those statutes would not be binding where (as with the FTC Staff Commentary on the FDCPA) the agency did not have exclusive rulemaking authority for the relevant law. *See* Identification of Enforceable Rules and Orders, 76 Fed. Reg. 43569-01, 43570 (July 21, 2011) (explaining that such interpretations would be given "due consideration" in light of factors such as "whether the agency had rulemaking authority for the law in question," the document's "formality" and "persuasiveness," "the weight afforded [the document] by the issuing agency," and "whether the document conflicts with guidance or interpretations issued by another agency").

Solis, 568 U.S. 41, 55 n.4 (2012) ("[E]ven the most formidable argument concerning the statute's purposes could not overcome the clarity . . . in the statute's text."). Here, while it "may well be that Congress, when it drafted [section 1692f(8)], had in mind" language or symbols that reveal that the communication relates to debt collection, "the language of the statute is not so limited." *See Smith v. United States*, 508 U.S. 223, 239 (1993) (quotations omitted). Therefore, even assuming that Congress's purpose in enacting section 1692f(8) was to protect consumers from language or symbols that could reveal the communication relates to debt collection—and that the benign language exception would "better" implement Congress's intent—that would not justify departing from the provision's plain text. *See EPA v. EME Homer City Generation, L.P.*, 572 U.S. 489, 508-09 (2014) ("However sensible (or not) the Court of Appeals' position, a reviewing court's task is to apply the text of the statute, not to improve upon it." (internal quotations and brackets omitted)).

Rather, as the Seventh Circuit has held, "the text itself" is "the most reliable indicator of congressional intent." *Bass*, 111 F.3d at 1324-1325. And, as explained above, the statute's plain text prohibits "any" language or symbol on an envelope used in a debt collection communication with two exceptions—neither of which is for "benign" language that does not reveal the debt-collection nature of the communication. Moreover, in drafting section 1692f(8) as it did, Congress adopted a bright-line rule that would be easy for collectors to comply with and easy for courts to administer. While a provision that allowed "benign" language on envelopes "could in principle match the outcome more closely to the legislative objective," it would be more "difficult to administer," because whether language is in fact benign could often be uncertain and require weighing of competing evidence. *See Jaskolski*, 427 F.3d at 461 (explaining why

Congress's adoption of bright-line rule was reasonable, even though it might arguably be overbroad). Because section 1692f(8) "creates a bright line," the Court should "enforce it that way." *Id.* at 462.

II. Even if there were an exception for "benign language," whether "TIME SENSITIVE DOCUMENT" would fall within that exception is a question of fact.

If the Court were nevertheless to adopt a "benign language" exception, whether "TIME SENSITIVE DOCUMENT" would fall within that exception would be a question of fact. Some courts that have recognized a "benign language" exception, including the district court, have defined it as applying to language that does not reveal the communication to be related to debt collection. *See*, *e.g.*, App. at 59 (Dist. Ct. Op. at 6 ("The addition . . . to the envelope suggests nothing about the existence of a debt."); *Strand v. Diversified Collection Serv., Inc.*, 380 F.3d 316, 319 (8th Cir. 2004) ("[W]e conclude the language and symbols were benign because they did not, individually or collectively, reveal the source or purpose of the enclosed letters."). Other courts, however, have taken a more expansive view, finding that such an exception applies where the "markings on an envelope . . . do not suggest the letter's purpose of debt collection *or* humiliate or threaten the debtor." *Douglass v. Convergent Outsourcing*, 765 F.3d 299, 303 (3d Cir. 2014) (emphasis added). Because the Bureau does not read section 1692f(8) to include a "benign language" exception, the Bureau does not take a position on the scope of any such exception. However, regardless of the exact scope, whether "TIME SENSITIVE DOCUMENT" is benign would be a question of fact because that question necessarily requires evaluating the effect of the phrase on unsophisticated consumers.

The Seventh Circuit assesses FDCPA claims from the perspective of the hypothetical unsophisticated consumer. *Turner*, 330 F.3d at 997 ("The unsophisticated consumer test applies to § 1692f."). The unsophisticated consumer "may be uninformed, naïve, and trusting, but is not a dimwit, has rudimentary knowledge about the financial world, and is capable of making basic logical deductions and inferences." *Lox v. CDA, Ltd.*, 689 F.3d 818, 822 (7th Cir. 2012) (internal citations, quotations, and brackets omitted). Further, the Seventh Circuit has "cautioned that . . . judges are not good proxies for the unsophisticated consumer whose interest the statute protects." *McMillan v. Collection Prof'ls Inc.*, 455 F.3d 754, 759 (7th Cir. 2006) (internal quotations omitted). Specifically, what may "seem[] pellucid to a judge, a legally sophisticated reader, may be opaque to the unsophisticated consumer." *Id.* (citing *Johnson v. Revenue Mgmt. Corp.*, 169 F.3d 1057, 1060 (7th Cir. 1999)).

Here, it is a question of fact whether unsophisticated consumers would believe the phrase "TIME SENSITIVE DOCUMENT" suggests that the communications relates to debt collection, or whether unsophisticated consumers would view the phrase as humiliating, threatening, or otherwise harmful. While some might associate the phrase "time-sensitive" with generic junk mail, it is possible that unsophisticated consumers could have quite a different association—particularly if the "time-sensitive" mailings they are familiar with are more often than not debt collection letters. Evidence would be necessary to determine whether that is the case here. As this Court has previously held, the requisite inquiry under section 1692f is "necessarily fact-bound," *McMillan*, 455 F.3d at 760, and "[h]ow a particular notice affects its audience is a question of fact, which may be explored by testimony and devices such as consumer surveys," *Walker v. Nat'l Recovery, Inc.*, 200 F.3d 500, 501 (7th Cir. 1999). Therefore, given the fact that

"judges are not experts in the knowledge and understanding of unsophisticated consumers facing demands by debt collectors," *Evory v. RJM Acquisitions Funding LLC*, 505 F.3d 769, 776 (7th Cir. 2007), this Court should remand the matter to give Preston an opportunity to present facts on how unsophisticated consumers would perceive the phrase "TIME SENSITIVE DOCUMENT."

CONCLUSION

For the foregoing reasons, the Court should not read a benign language exception into 15 U.S.C. § 1692f(8). However, if the Court does adopt such an exception, the Court should conclude that it is a question of fact whether the phrase "TIME SENSITIVE DOCUMENT" falls within that exception.

Respectfully submitted,

September 5, 2019

/s/ Joseph Frisone

Mary McLeod
General Counsel
John R. Coleman
Deputy General Counsel
Steven Y. Bressler
Assistant General Counsel
Kristin Bateman
Senior Litigation Counsel
Joseph Frisone
Attorney-Advisor
Consumer Financial Protection Bureau
1700 G Street, NW
Washington, D.C. 20552
(202) 435-9287 (telephone)
(202) 435-7024 (facsimile)
Joseph.Frisone@cfpb.gov

Certificate of Compliance with Type-Volume Limit, Typeface Requirements, and Type-Style Requirements

This brief complies with the type-volume limit of Fed. R. App. P. 32(a)(7)(B) because, excluding the parts of the brief exempted by Fed. R. App. P. Rule 32(f), this brief contains 5620 words.

This brief 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 brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 and 12-point Georgia font.

/s/ Joseph Frisone_____

Joseph Frisone
Attorney-Advisor
Consumer Financial Protection Bureau
1700 G Street, NW
Washington, D.C. 20552
(202) 435-9287 (telephone)
Joseph.Frisone@cfpb.gov

September 5, 2019

Certificate Of Service

I hereby certify that on September 5, 2019, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the appellate CM/ECF system. The participants in the case are registered CM/ECF users and service will be accomplished by the appellate CM/ECF system.

/s/ Joseph Frisone

Joseph Frisone
Attorney-Advisor
Consumer Financial Protection Bureau
1700 G Street, NW
Washington, D.C. 20552
(202) 435-9287 (telephone)
Joseph.Frisone@cfpb.gov