No. 23-2181

In the United States Court of Appeals for the Third Circuit

MICHAEL RITZ; ANDREW RITZ,
Plaintiffs-Appellants,

v.

EQUIFAX INFORMATION SERVICES, LLC; EXPERIAN INFORMATION SOLUTIONS, INC.; TRANSUNION, LLC; NISSAN-INFINITI LT,
Defendants-Appellees.

On Appeal from the United States District Court
for the District of New Jersey
(No. 3:20-cv-13509) (The Hon. Georgette Castner)

BRIEF FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, AMERICAN BANKERS ASSOCIATION, AMERICAN FINANCIAL SERVICES ASSOCIATION, CONSUMER BANKERS ASSOCIATION, INDEPENDENT COMMUNITY BANKERS OF AMERICA, AND MORTGAGE BANKERS ASSOCIATION AS AMICI CURIAE IN SUPPORT OF DEFENDANT-APPELLEE

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IDENTITY AND INTEREST OF AMICI CURIAE

The Chamber of Commerce of the United States of America is the world's largest business federation. The Chamber directly represents approximately 300,000 members and indirectly represents the interests of more than 3 million companies and professional organizations of every size, in every economic sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files amicus curiae briefs in cases, like this one, that raise issues of concern to the nation's business community.

The American Bankers Association (ABA) is the principal national trade association of the financial services industry in the United States. Founded in 1875, ABA is the voice for the nation's $23.7 trillion banking industry and its more than two million employees. ABA members provide banking services in each of the fifty States and the District of Columbia. Among them are banks, savings associations, and non-depository trust companies of all sizes. ABA frequently submits amicus curiae briefs in state and federal courts in matters that significantly affect its members and the business of banking.

The American Financial Services Association (AFSA), founded in 1916, is the national trade association for the consumer credit industry, protecting access to credit and consumer choice. AFSA members provide consumers with many kinds of credit, including traditional installment loans, mortgages, direct and indirect vehicle financing, payment cards, and retail sales finance.

The Consumer Bankers Association (CBA) is the only national financial trade group focused exclusively on retail banking and personal financial services—banking services geared toward consumers and small businesses. As the recognized voice on retail banking issues, CBA provides leadership, education, research, and federal representation for its members. CBA members include the nation's largest bank holding companies as well as regional and super-community banks that collectively hold two-thirds of the total assets of depository institutions.

The Independent Community Bankers of America (ICBA) creates and promotes an environment where community banks flourish. ICBA is dedicated exclusively to representing the interests of the community banking industry and its membership through effective advocacy, best-in-class education, and high-quality products and services. With nearly 50,000 locations nationwide, community banks constitute roughly 99 percent of all

banks, employ nearly 700,000 Americans, and are the only physical banking presence in one in three U.S. counties. Holding nearly $5.9 trillion in assets, over $4.9 trillion in deposits, and more than $3.5 trillion in loans to consumers, small businesses, and the agricultural community, community banks channel local deposits into the Main Streets and neighborhoods they serve, spurring job creation, fostering innovation, and fueling their customers' dreams in communities throughout America.

The Mortgage Bankers Association (MBA) represents more than 2,200 member companies in the real estate finance industry, including federally-chartered banks and savings associations. The MBA works to ensure the continued strength of the nation's residential and commercial real estate markets; to expand homeownership; and to extend access to affordable housing for all Americans.

Amici have a significant interest in this case. Their members include information furnishers and consumer reporting agencies covered by the Fair Credit Reporting Act (FCRA). The scope of the FCRA's command to investigate the accuracy of consumers' credit files is of immense importance to those members. As explained below, proposals to expand the FCRA's obligations and require furnishers and consumer reporting agencies to

adjudicate legal disputes would raise operating costs and lead to unpredictable and unwarranted legal liability.[1]

STATEMENT OF THE ISSUE

Whether the Fair Credit Reporting Act, 15 U.S.C. § 1681s-2(b), requires a furnisher to investigate the factual accuracy of reported information, or also to assess and resolve legal disputes.

INTRODUCTION AND SUMMARY OF ARGUMENT

Under the Fair Credit Reporting Act (FCRA), consumer reporting agencies (CRAs) and the entities that furnish information to them—called furnishers—have a duty to investigate whether disputed information in a credit file is "accura[te]." 15 U.S.C. §§ 1681i(a)(1)(A), 1681s-2(b)(1). If the information is "inaccurate or incomplete or cannot be verified," it must be modified or removed. 15 U.S.C. § 1681s-2(b)(1)(E). For years, courts around the country have held that the FCRA requires furnishers and CRAs to investigate and remove factually inaccurate information, but not to correctly resolve all legal disputes about a debt.

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[1] The parties have consented to the filing of this brief. No party's counsel authored this brief in whole or in part; no party or party's counsel contributed money intended to fund the preparation or submission of this brief; and no person other than the amici, their members, or their counsel contributed money that was intended to fund preparing or submitting the brief.

This case illustrates why. Plaintiffs leased a car from Nissan. The lease required them to "return" the car to a Nissan dealership at the end of the lease period; if they instead "ke[pt] possession" of the car, they would be assessed a monthly fee. Nissan informed Plaintiffs of the process for returning their car, which included a mandatory vehicle inspection and related paperwork. On the final day of their lease term, Plaintiffs brought their car to a Nissan dealership without scheduling an inspection. The dealership refused to accept the return without the mandatory inspection and paperwork. So Plaintiffs threw down their keys, left the car, and stormed off. Nissan then charged a monthly fee, concluding that because Plaintiffs had not completed the requisite steps for returning a vehicle, they had not in fact "return[ed]" it under the terms of the lease. Plaintiffs refused to pay the fee, and Nissan informed CRAs that Plaintiffs had been delinquent on their payment. Rather than litigate that contract dispute directly, Plaintiffs sued Nissan under the FCRA for furnishing "inaccurate" information about their debts.

Plaintiffs, joined by the Consumer Financial Protection Bureau as amicus, argue that the FCRA requires furnishers like Nissan not merely to

investigate potential factual errors but also to correctly resolve legal disputes.[2] They are wrong: credit personnel must get to the bottom of factual *inaccuracies*, not choose the right side on debatable legal arguments. That conclusion accords with the FCRA's text, structure, purpose, and history. The contrary proposal advanced by Plaintiffs and the Bureau is neither sensible nor workable.

ARGUMENT

I. THE FCRA ADDRESSES FACTUAL INACCURACIES, NOT LEGAL DISPUTES

The FCRA provides that when a consumer disputes the accuracy or completeness of any information in his credit file, a CRA must conduct a "reasonable reinvestigation to determine whether the disputed information is inaccurate." 15 U.S.C. § 1681i(a)(1)(A). As part of that process, a CRA may notify a furnisher "of a dispute with regard to the completeness or accuracy of any information provided" by the furnisher to the CRA, which triggers an obligation by the furnisher to "conduct an investigation with respect to the disputed information." *Id.* § 1681s-2(b)(1). If a consumer believes that the furnisher has not made a reasonable investigation, she may sue for damages—

[2] The Federal Trade Commission joins the Bureau, but for convenience we refer to it as the Bureau's brief.

including punitive damages for willful violations—and attorney's fees. 15 U.S.C. §§ 1681n(a), 1681o(a).

The text, structure, history, and purpose of the FCRA require furnishers and CRAs to investigate and verify factual accuracy, not assess or resolve legal disputes. Five courts of appeals have said as much with respect to CRAs; two have agreed with respect to the identical language governing furnishers; and one is an arguable outlier. As other courts have correctly recognized, a plaintiff must show a "*factual* inaccuracy, rather than the existence of disputed legal questions" to bring suit against a furnisher under § 1681s-2(b). *Chiang* v. *Verizon New England Inc.*, 595 F.3d 26, 38 (1st Cir. 2010).

A. The FCRA's Text Requires Furnishers And CRAs To Investigate Only Factual Accuracy

Plaintiffs and the Bureau both argue that "the district court's distinction between 'factual' and 'legal' inaccuracies has no basis in the text." Pltfs. Br. 3; *see* Bureau Br. 14. That is incorrect. A careful examination of the FCRA's text demonstrates that Congress required furnishers and CRAs to investigate factual inaccuracies, not to correctly resolve legal disputes.

1. Section 1681s-2(b)(1) requires furnishers to investigate information whose "completeness or accuracy" is disputed, and to modify or

delete any "item of information" "found to be *inaccurate or incomplete*" (emphasis added). The key textual question is what it means for an "item of information" in a credit file to be "inaccurate or incomplete." Because the statute does not define those terms, they take their ordinary meaning. *BP Am. Prod. Co.* v. *Burton*, 549 U.S. 84, 91 (2006). "Inaccurate," means, of course, "not accurate." And "accurate" means "[c]onforming exactly to fact; errorless." *American Heritage Dictionary of the English Language* 12 (5th ed. 2018).[3] Similarly, "incomplete" means "not complete," and "complete" means "[h]aving all necessary or normal parts, components, or steps." *Id.* at 377.

Asking whether credit information conforms exactly to fact or truth, or has no errors, or contains all necessary parts, applies most naturally to matters of *fact*. As the Second Circuit has explained, "[t]his definition requires a focus on objectively and readily verifiable information." *Mader* v. *Experian Info. Sols., Inc.*, 56 F.4th 264, 269 (2d Cir. 2023). The term thus excludes

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[3] Accuracy meant the same thing in 1996 when the FCRA was amended to add Section 1681s-2 to the statute. *See Merriam-Webster's Collegiate Dictionary* 8 (10th ed. 2001) (defining "accurate" as "free from error esp. as the result of care; conforming exactly to truth or to a standard").

circumstances in which the parties debate a legal question that "evades objective verification." *Id.*

Here, for example, Nissan furnished factual information that Plaintiffs had not paid the monthly payment of $181.51 that Nissan had charged after the lease term ended. If Nissan had attributed that debt to "Andrew Ritz" when it was owed by "Andrew Ross," it would be natural to say that Nissan had reported "inaccurate" information. Similarly, if Nissan had reported that the Ritzes at one point owed a debt, but did not report that they had later paid it off, it would ne natural to say that Nissan had reported "incomplete" information. But it would not be natural to say that Nissan reported "inaccurate" or "incomplete" information because the Ritzes contest how a provision of their lease should be interpreted and whether they should be excused from paying the $181.51 fee. An ordinary person might describe that reported debt as disputed or even potentially invalid. But ordinary people use terms like accuracy and completeness to describe whether information reflects correct and full facts—not whether someone has an arguable legal defense.

2. The Bureau offers two examples of courts describing legal mistakes as "inaccuracies," but neither supports its argument. *See* Br. 15. In *Saranchak* v. *Secretary of Pennsylvania Department of Corrections*, 802 F.3d

579, 599 (3d Cir. 2015), this Court concluded that a Pennsylvania court's decision contained "[in]accurate characterizations of the law." That passing use of "accurate" is unremarkable in context. The Court was describing the Pennsylvania court's failure to properly recite the standard from *Strickland* v. *Washington*, 466 U.S. 668 (1984)—an error the Court appeared to view as objectively wrong. 802 F.3d at 599. The Bureau also cites *Unicolors, Inc.* v. *H&M Hennes & Mauritz, LP*, 595 U.S. 178, 185 (2022), to argue that "inaccuracies" can arise from "mistakes of law." *Unicolors* held that a copyright registrant who is unaware that his registration rests on errors of law does not have "knowledge that it was inaccurate" within the meaning of the Copyright Act. The Court in that case emphasized the specific context of the copyright statute, which requires registration applications to include "information that requires both legal and factual knowledge." *Id.*

Moreover, even if "inaccuracy" can in some contexts be construed to cover both factual and legal error, in the context of the FCRA it should be limited to its ordinary meaning of "conforming to fact." The surrounding statutory language repeatedly speaks in terms that apply most naturally to factual disputes. For example, the FCRA requires furnishers and CRAs to "investigat[e]" and "reinvestigat[e]" disputed information. 15 U.S.C.

§§ 1681i(a)(1)(A), 1681s-2(b)(1)(A). To "investigate" is "to observe or study by close examination and systematic inquiry." *Merriam-Webster's Collegiate Dictionary* 615 (10th ed. 2001). Facts can be "observe[d]" or "inquir[ed]" into, but we do not normally refer to laws that way. The Bureau highlights a single example—not involving the FCRA—where this Court referred in passing to a "factual and legal investigation." Br. 17 (citing *Wolfington* v. *Reconstructive Orthopaedic Assocs. II PC*, 935 F.3d 187, 207 (3d Cir. 2019) (emphasis added)). That formulation is far less common, and likely occurred there because the legal "investigation" was paired with a "factual" one. More commonly, ordinary speakers "assess" and "resolve" legal disputes rather than "investigating" them. *See, e.g.*, *In re McDonald*, 205 F.3d 606, 608 (3d Cir. 2000) ("[Rule] 12(b)(6) allows a court to *resolve* certain legal disputes in advance of factual disputes.") (emphasis added).

The FCRA also directs furnishers and CRAs to conduct an investigation so that they can determine whether the disputed information can "be verified"—and to remove an item if it cannot be verified. 15 U.S.C. §§ 1681i(a)(5)(A), 1681s-2(b)(1)(E). Like the word "investigate," the word "verify" connotes an inquiry into knowable facts or objective truth. *See Merriam-Webster's Collegiate Dictionary* 1308 (10th ed. 2001) (defining

"verify" as "to establish the truth, accuracy, or reality of"). Here, it would be strange to suggest that Nissan's credit personnel could objectively "verif[y]" whether the Ritzes were legally responsible for the debt in the face of competing contract interpretations. And it would be stranger still if, whenever any legal dispute exists about a debt, the debt becomes unverifiable and must be removed from a credit report.

Other surrounding terms provide further evidence that the statute requires furnishers and CRAs to look for factual inaccuracies, not assess or resolve legal disputes. For example, the statute requires CRAs to "determine whether" disputed information is inaccurate, and it contemplates that furnishers may "find[] that" disputed information is inaccurate. §§ 1681i(a)(1)(A), 1681s-2(b)(1)(D). CRAs and furnishers can readily "determine" and "find" whether disputed information is *factually* error-free. But only courts of law have the capacity to conclusively "determine" or "find" that information in a credit file is legally valid. *See Denan* v. *Trans Union LLC*, 959 F.3d 290, 295 (7th Cir. 2020) ("Only a court can fully and finally resolve the legal question of a loan's validity."). At every turn, the statutory language supports a duty to investigate factual inaccuracies, not to resolve legal disputes.

Plaintiffs contend (at 30) that a piece of the "surrounding text," Section 1681s-2(a), supports their reading. Section 1681s-2(a) provides that, for direct disputes, a furnisher "shall not furnish any information relating to a consumer" to a CRA if it "knows or has reasonable cause to believe that the information is inaccurate." 15 U.S.C. § 1681s-2(a)(1)(A). According to Plaintiffs, Congress's use of the broad term "any" means that it wanted furnishers to ensure not only the factual accuracy but also the legal validity of the debts they disclose to CRAs. But the provision suggests the opposite. A furnisher may "know[]" or have "reasonable cause to believe" that reported information is *factually* inaccurate—for example, it might recognize real doubt about whether it has listed the correct amount a debtor owes—and in that case must not furnish the information to a CRA. But that provision cannot require a furnisher to omit any debt when it has "reasonable cause to believe" that someone could mount a legal challenge to the debt. If that were the case, furnishers would not be able to report any debts that a consumer might challenge. And "the very economic purpose" of the credit reporting system "would be significantly vitiated" if "[furnishers] shaded every credit history in their files in the best possible light for the consumer." *Cahlin* v. *General Motors Acceptance Corp.*, 936 F.2d 1151, 1158 (11th Cir. 1991).

3. Plaintiffs and the Bureau also seek support in Bureau regulations interpreting a *different* statutory provision, Section 1681s-2(a). As the Bureau recognizes, however, Section 1681s-2(a) is not at issue, and the regulations they cite thus do not actually apply. Br. 21 n.12. The Bureau cannot assume that its regulations construing an inapplicable statutory provision are reasonable, and parlay those inapplicable (and thus unchallenged) regulations into the appropriate construction of the statutory provision here.

Moreover, the Bureau's made-for-litigation reading of its own regulations would not merit deference even in a case in which those regulations actually applied. The regulations define "accuracy" to require, among other things, the correct reporting of "the terms of and liability for the account," 12 C.F.R. § 1022.41(a)—a description that, in isolation, could encompass legal disputes. But the regulations elaborate with examples that overwhelmingly focus on factual accuracy. *See id.* § 1022.43(a) (disputes about "terms of a credit account" include "the type of account, principal balance, scheduled payment amount on an account, or the amount of the credit limit"; disputes about "consumer's liability" include "whether there [] has been identity theft or fraud against the consumer, whether there is individual or joint liability on an account, or whether the consumer is an authorized user"). The regulations

thus do not construe the term "accuracy" to cover disputed legal questions, and would not be reasonable if they did.

B. The FCRA's Structure, Purpose, And History Confirm The Textual Focus On Factual Accuracy

1. The FCRA's structure and purpose reinforce the natural reading of the statutory text. Congress explained that the statute was designed to ensure "fair and accurate credit reporting," because "[i]naccurate credit reports directly impair the efficiency of the banking system, and unfair credit reporting methods undermine . . . public confidence." 15 U.S.C. § 1681(a)(1). Accordingly, the FCRA's provisions work together to ensure that the information in a consumer's credit report accurately represents her creditworthiness. Furnishers have a circumscribed role under that scheme: they must reasonably investigate disputed information to guard against mistakes in a consumer's report. 15 U.S.C. § 1681s-2. Notably, they must complete their investigation in only 30 days. *Id.* §§ 1681s-2(b)(2), 1681i(a)(1)(A). That short timeframe allows furnishers to uncover objective factual inaccuracies, but it would make no sense if their task were to correctly resolve complex legal disputes, as Plaintiffs and the Bureau propose. Congress designed a careful credit-reporting scheme, not a debt-adjudication system under which consumers may mount impermissible "collateral attacks

on the legal validity of their debts in the guise of FCRA" claims. *Carvalho* v. *Equifax Info. Servs., LLC*, 629 F.3d 876, 891 (9th Cir. 2010).

Suppose a consumer complains about the mortgage balance on her credit report. Furnishers reasonably could (and are required to) investigate whether the amount is accurate, whether it is still owed by the consumer, and the like. But now suppose the consumer's complaint is that her debt is unenforceable under state law because of a state usury statute. The consumer's proper course of action would be to sue the company, asking a court to issue a declaratory judgment or to enjoin the mortgage obligation. With such a judgment in hand, "any litigant[] would have a much stronger cudgel with which to force a furnisher to stop reporting debt to a reporting agency." *Milgram* v. *Chase Bank USA, N.A.*, 72 F.4th 1212, 1222 (11th Cir. 2023) (Rosenbaum, J., concurring). Under the Bureau's regime, however, the consumer could skip all that, frame her legal challenge as an "inaccuracy" under the FCRA, and sue the furnisher for failing to reasonably investigate the "inaccuracy"—just as Plaintiffs did here. Furnishers would thus need to substitute for courts and make a judgment about the debt's permissibility under the state statute, on pain of damages and attorney's fees. None of that

can be fairly derived from a statute meant to prevent and correct factual reporting errors.

2. The FCRA's legislative history further confirms Congress's focus on factual inaccuracies, not legal disputes. The original Fair Credit Reporting Act of 1970 was introduced in the Senate by a bipartisan group of Senators, to "protect consumers against arbitrary, erroneous, and malicious credit information." 115 Cong. Rec. 2410 (1969) (statement of Senator Proxmire). Sponsoring Senator William Proxmire outlined the five types of inaccuracies that the bill was designed to target: confusion over individuals with similar names; biased information; malicious gossip; computer errors; and incomplete information. *Id.* at 2411. Each of those categories was intended to be factual in nature. For example, when discussing "incomplete information," Senator Proxmire mentioned credit reports that omitted delayed-payment agreements reached between consumers and their creditors, dropped charges, or favorable court judgments. *Id.* at 2411-2412.

The discussion around later FCRA amendments was similar. In 1996, Congress passed the Consumer Credit Reporting Reform Act, which created obligations for furnishers and added the provision at issue here, Section 1681s-2(b). Pub. L. No. 104-208, § 2413, 110 Stat. 3009-448 (1996). Congress was

motivated to amend the statute due to concern with "human error or computer error." 142 Cong. Rec. S11869 (daily ed. Sept. 30, 1996) (statement of Senator Bryan). Members of Congress heard extensive testimony about distinctly factual errors, like the story of Mary Lou Mobley, whose credit report reflected that she was married to a financially troubled man from Arizona, even though she had never been married or been to Arizona. *Id.* In sum, the legislative history underscores the text's focus on factual accuracy.

C. Courts Around The Country Have Correctly Interpreted The FCRA

Consistent with the FCRA's text, structure, purpose, and history, other courts of appeals have almost uniformly recognized that the FCRA focuses on factual inaccuracies.

1. This question is most frequently litigated against CRAs. In that context, the First, Seventh, Ninth, Tenth, and Eleventh Circuits have squarely held that a CRA's obligations under Sections 1681e and 1681i extend only to "factually inaccurate information, as consumer reporting agencies are neither qualified nor obligated to resolve legal issues." *Denan*, 959 F.3d at 296-297; *DeAndrade* v. *Trans Union LLC*, 523 F.3d 61, 68 (1st Cir. 2008) (distinguishing between "a factual inaccuracy" and "a legal issue that a credit agency" "is neither qualified nor obligated to resolve under the FCRA");

Carvalho, 629 F.3d at 892 (holding that CRAs need not "provide a legal opinion on the merits"); *Wright* v. *Experian Info. Sols., Inc.*, 805 F.3d 1232, 1242 (10th Cir. 2015) (explaining that CRAs are not required to "resolve legal disputes about the validity of the underlying debts they report"); *Losch* v. *Nationstar Mortgage LLC*, 995 F.3d 937, 946 (11th Cir. 2021) (quoting *Wright* for the same principle). The Second Circuit has similarly recognized that information must be "objectively and readily verifiable" to qualify as "accurate" under the FCRA, although it has left open the possibility that some legal questions could have sufficiently obvious answers under that standard. *Sessa* v. *Trans Union LLC*, 74 F.4th 38, 43 (2d Cir. 2023). No court, by contrast, has agreed with Plaintiffs and the Bureau that reporting a debt subject to a bona fide legal dispute can be "inaccurate."

2. The issue has been litigated somewhat less frequently in suits against furnishers, and has divided courts of appeals 2-1. The First Circuit has held that, "just as in suits against CRAs, a plaintiff's required showing is *factual* inaccuracy, rather than the existence of disputed legal questions." *Chiang*, 595 F.3d at 38. The Eleventh Circuit relied on *Chiang* to reach the same conclusion in an unpublished decision in *Hunt* v. *JPMorgan Chase Bank, N.A.*, 770 Fed. Appx. 452, 458 (11th Cir. 2019). As the court in *Hunt* explained,

a "plaintiff must show a factual inaccuracy rather than the existence of disputed legal questions to bring suit against a furnisher under § 1681s-2(b)." *Id.*

That conclusion makes sense: Section 1681s-2(b), which governs furnishers, uses the same "inaccurate" language as Section 1681i, which governs CRAs. And "identical words and phrases within the same statute should normally be given the same meaning." *United States* v. *Norwood*, 49 F.4th 189, 207 (3d Cir. 2022). (citation omitted). Indeed, given the statutory structure, the word "inaccuracy" *must* mean the same thing for both CRAs and furnishers. After all, "the duty of a furnisher under § 1681s-2(b) is a component of the larger reinvestigation duty imposed by § 1681i(a) on CRAs themselves." *Hinkle* v. *Midland Credit Mgmt., Inc.*, 827 F.3d 1295, 1301 (11th Cir. 2016). It would make no sense for furnishers to have a broader investigation duty when they perform one part of a CRA's overarching investigation.

The Ninth Circuit is the sole court of appeals to reach the opposite conclusion in a furnisher case. It accepted the Bureau's argument that the "FCRA will sometimes require furnishers to investigate, and even to highlight or resolve, questions of legal significance." *Gross* v. *CitiMortgage, Inc.*,

33 F.4th 1246, 1253 (9th Cir. 2022). But the Ninth Circuit previously adopted the distinction between factual inaccuracies and legal disputes in *Carvalho*, and *Gross* offers no textual justification for the different results. In addition, *Gross* concluded that the furnisher's legal position was "patently incorrect," suggesting that there may have been no bona fide legal dispute. *Id.* at 1251-1252; *see* J.A. 14. This Court should join *Chiang* and *Hunt*, rather than following *Gross*'s atextual rule and distinguishable facts.

Plaintiffs—but not the Bureau—claim that two other circuit decisions align with *Gross*. Br. 36-38. They are wrong. One decision, *Denan*, held, consistent with the prevailing view, that CRAs are obligated only to investigate factual inaccuracies. 959 F.3d at 295. No furnishers were involved, and the Seventh Circuit merely speculated in dicta that furnishers might be different. The other decision, *Saunders* v. *Branch Banking & Trust Co. of Va.*, 526 F.3d 142, 149-150 (4th Cir. 2008), did not involve any allegation that a disputed debt was "inaccurate" because of a legal error. Rather, the plaintiff contended that under the specific circumstances there, the furnisher had misleadingly failed to tell the CRA that the debt was disputed. Whether a consumer has disputed a particular debt is an objectively verifiable fact, and

is fundamentally different from requiring a furnisher to correctly assess all unresolved legal disputes.

II. THE BUREAU'S CONTRARY APPROACH IS UNWORKABLE AND INEFFICIENT

The Bureau also urges the Court to reject the distinction between factual inaccuracies and legal disputes on the ground that it will be unworkable. The Bureau is wrong. The prevailing rule is administrable and is already operating well around the country. On the contrary, the Bureau's reading is unworkable, expensive, and inefficient. It would have damaging economic consequences for furnishers, CRAs, and consumers alike.

A. Distinguishing Between Fact And Law Is A Familiar Task For Courts

The Bureau contends that it will be "difficult[]" for courts deciding FCRA cases to determine whether a plaintiff has asserted a factual inaccuracy or a legal dispute. *See* Br. 25-30. But courts routinely distinguish between factual and legal matters in a variety of contexts. And with respect to the FCRA specifically, courts across the country already distinguish between factual and legal issues without the chaos that the Bureau imagines.

1. Distinguishing between fact and law is a common task for federal courts. District courts, for example, distinguish between fact and law

whenever they determine which issues they must decide and which must be reserved for a jury. *See Merck Sharp & Dohme Corp.* v. *Albrecht*, 139 S. Ct. 1668, 1679 (2019). Once the case proceeds to trial, a district court must instruct the jury on relevant issues of law and permit juries to decide questions of fact. *See United States* v. *Oliveros*, 275 F.3d 1299, 1306-1307 (11th Cir. 2001). Courts of appeals, too, "have long found it possible to separate factual from legal matters." *Teva Pharm. USA, Inc.* v. *Sandoz, Inc.*, 574 U.S. 318, 328 (2015). They both review district-court classifications and distinguish between factual and legal matters for themselves when deciding what standard of review to apply.

The Bureau contends (at 25-26) that contracts pose an especially difficult context for courts to distinguish between law and fact. But courts navigate the law-fact distinction when construing and interpreting contracts all the time. To be sure, there are hard cases at the margins. But even in cases involving mixed questions of law and fact, the principles for distinguishing legal and factual matters "are by now well established," *Miller* v. *Fenton*, 474 U.S. 104, 113 (1985), and generally concern whether a case "entails primarily legal or factual work," *U.S. Bank N.A.* v. *Village at Lakeridge*, 138 S. Ct. 960, 967 (2018). Compared to the complex questions that the Bureau's alternative

theory would raise, *see* pp. 26-31, *infra*, the fact-law distinction in the FCRA places courts on familiar footing.

2. The Bureau's warnings are especially unwarranted because courts around the country have already distinguished between fact and law for years in the FCRA context. *See* pp. 18-20, *supra*. The Bureau points (at 25-28) to just three cases over 15 years that supposedly show courts are struggling, but none does so anyway. In *Cornock* v. *Trans Union LLC*, 638 F. Supp. 2d 158 (D.N.H. 2009), the district court expressed some frustration with the exercise of distinguishing between fact and law. But *Cornock* was not a hard case: the plaintiff could not show "any inaccuracy" because an arbitrator had already affirmed the plaintiff's debt. *Id.* at 166.

The Bureau's reliance on *Chuluunbat* v. *Experian Information Solutions, Inc.*, 4 F.4th 562 (7th Cir. 2021), is even more puzzling, because the Seventh Circuit there accepted the very fact-law distinction that the Bureau rejects, *id.* at 567. The Bureau emphasizes that the decision was a consolidated appeal and the district courts below supposedly diverged in how they viewed the underlying disputes. But the district courts all found that CRAs were not required to adjudicate the dispute, even if their explanations varied in

immaterial ways. *Chuluunbat*, 4 F.4th at 566. The Seventh Circuit affirmed across the board. *Id.* at 569.

Finally, the Bureau points to *Sessa* v. *Linear Motors*, 74 F.4th 38 (2d Cir. 2023), but it is hard to see the Bureau's concern with that decision. In *Sessa*, a CRA reported that the plaintiff owed a "balloon payment" that was not in fact owed under her car lease. The Second Circuit concluded that the plaintiff had raised a factual inaccuracy—just as the Bureau had advocated there. *Id.* at 43 n.7.

3. Importantly, the existing regime does not, as Plaintiffs suggest (at 39), "categorically exclude[]" furnishers and CRAs from investigating all disputes that touch on legal issues or create an "exception" that would "swallow the rule," Bureau Br. 25. Rather, the key question will usually be whether a court has already authoritatively adjudicated the consumer's dispute. Once a court has ruled that a consumer's debt is legally invalid, including information about that debt in a consumer's report may render the report "inaccurate" as a matter of objective fact. Furnishers are simply not required to correctly resolve legal disputes about the validity of a debt when those disputes are brought through a collateral FCRA attack.

* * *

The point is not that the analysis of fact and law is easy in every case. There will no doubt be some hard questions. The point instead is that this distinction is firmly embedded in the American legal tradition and is familiar to every federal court in the country. It is not, as the Bureau suggests (at 30), "an unworkable standard" ginned up to "encourage furnishers to ignore their statutory obligations" under the FCRA.

B. The Bureau's Approach Is Unsound

The elimination of the accepted fact-law distinction would prove unworkable, expensive, and inefficient in practice.

1. As a threshold matter, the regime that Plaintiffs and the Bureau envision will be unadministrable. Furnishers and CRAs are "neither qualified nor obligated to resolve" legal disputes. *DeAndrade*, 523 F.3d at 68. Personnel responsible for responding to disputed information in credit reports are not typically lawyers, let alone judges. Yet under the Bureau's regime, they would need to resolve a host of extraordinarily complex legal questions—and get the answers right, on pain of suit.

Consider, for example, the *Denan* case in the Seventh Circuit. There, the legal validity of the plaintiffs' loans turned on three complex legal issues:

(1) the enforceability of choice-of-law provisions in the plaintiffs' loan agreements; (2) whether, under the applicable state law, plaintiffs' loans were void; and (3) whether, even if state law would otherwise void the loans, tribal sovereign immunity applied. 959 F.3d at 295. Those are difficult questions even for courts. Expecting credit personnel—especially those with no legal training—to resolve them, and to reach the same answer a court would, borders on the absurd. As the Seventh Circuit recognized, addressing such complex legal questions "exceeds the competencies of consumer reporting agencies." *Denan*, 959 F.3d at 295. The same goes for furnishers.

Nor was *Denan* an outlier. In *Mader*, the plaintiff argued that a debt should have been discharged in bankruptcy, which "turn[ed] on the unsettled meaning of the word 'program'" in a different Bankruptcy Code provision. 56 F.4th at 269. In *Humphrey* v. *Trans Union LLC*, 759 Fed. Appx. 484, 485 (7th Cir. 2019), the plaintiff argued that a debt was invalid under federal regulations because of a pending application for a disability discharge. *DeAndrade* concerned whether mortgage documents with an allegedly forged signature were nevertheless valid under the doctrine of ratification. 523 F.3d at 63.

In this case, Plaintiffs' challenge to Nissan's reporting of a debt turns on a contract-interpretation dispute. Plaintiffs deny responsibility for the debt because they believe that they "returned" their vehicle rather than "keeping possession" within the meaning of the lease. Nissan disagrees, contending that a vehicle is not "returned" until it is returned in compliance with a prescribed check-in process that included a vehicle inspection and paperwork. Nissan Br. 36-37. Neither Plaintiffs nor the Bureau ever explains exactly what Nissan was supposed to do with those competing legal arguments, other than accede to Plaintiffs' view of the law. The Bureau contends that Nissan might have needed to "review the terms of the contract, a statute, or other relevant authorities" to "determine whether it has a sufficient legal basis" for listing the debt. Br. 23. But under the Bureau's view of the text, listing a debt that a court later deems invalid would be "inaccurate," regardless of whether there was a "sufficient legal basis" for the furnisher's position that the debt is owed.

2. The regime that Plaintiffs and the Bureau propose also would be expensive. To avoid liability, furnishers and CRAs might feel obligated to expand their in-house legal teams to ensure that legal disputes in credit reports are all reviewed by a qualified lawyer. And the lawyers reviewing those reports would need to be trained in a host of disparate subject areas, so

that they could spot and analyze legal issues. If the existing FCRA cases are any indication, furnishers' and CRAs' lawyers would need to be trained in federal disability law, state statutory law, contract law, tax law, and even tribal sovereign immunity. Imposing such a requirement on furnishers and CRAs would, of course, "substantially increase the cost of their services." *Wright*, 805 F.3d at 1241 (rejecting interpretation of the FCRA that would require CRAs to employ tax-law experts). Furnishers and CRAs would also need to spend significant resources addressing frivolous claims, which distract from legitimate disputes. Those increased costs would "outweigh[]" the minimal "potential of harm to consumers" from leaving legal disputes to courts. *Id.*

Converting the FCRA into a vehicle to dispute the legal validity of underlying debts would also result in massive increases in litigation. FCRA suits already have "more than doubled in the last decade." Ben Kochman, *Fair Credit Reporting Act Suits Have Soared Over Last Decade*, Law 360 (Oct. 22, 2019), https://www.law360.com/articles/1210252/fair-credit-reporting-act-suits-have-soared-over-last-decade. FCRA suits not only are costly to litigate, but also carry significant potential liability, because the statute permits plaintiffs to recover statutory damages, costs and attorney's fees, and even perhaps punitive damages. 15 U.S.C. §§ 1681n(a), 1681o(a). When plaintiffs

proceed as a class, an FCRA defendant's liability may be astronomical. *See Trans Union LLC* v. *FTC*, 536 U.S. 915, 917 (2002) (Kennedy, J., dissenting from denial of cert.) ("Because the FCRA provides for statutory damages of between $100 and $1,000 for each willful violation, petitioner faces potential liability approaching $190 billion.").

To avoid that exposure, furnishers and CRAs might err on the side of omitting information from a consumer's file if it is subject to any possible legal debate, including negative information that is factually accurate. That approach would "vitiate[] . . . the very economic purpose for credit reporting companies." *Cahlin*, 936 F.2d at 1158. The reliability of the national credit-reporting industry has enabled modern creditors to extend far more credit to consumers, including to consumers with whom they have no prior experience. *See* Consumer Financial Protection Bureau, 1 *Taskforce on Federal Consumer Financial Law Report* 103 (Jan. 2021), https://files.consumerfinance.gov/f/documents/cfpb_taskforce-federal-consumer-financial-law_report-volume-1_2022-01_amended.pdf. This "democratiz[ation]" of consumer lending, *id.* at 24, has greatly benefited consumers and the American economy. If credit reports become categorically less reliable because they omit any legally disputed debt, that would have repercussions for CRAs, for furnishers, and for

the wide variety of lenders and other businesses that rely on them—and ultimately for consumers.

3. Finally, the Bureau's proposed approach would be inefficient. As discussed above, "[o]nly a court can fully and finally resolve the legal question of a loan's validity." *Denan*, 959 F.3d at 295. Yet the Bureau's theory would put furnishers and CRAs in the position of defending the legal validity of a consumer's debts when the creditor that actually has a financial stake might be absent. CRAs are not creditors. And although furnishers are often the creditors, that is not always true. Debt collectors, for example, are furnishers too. *See McIvor* v. *Credit Control Servs., Inc.*, 773 F.3d 909, 915 (8th Cir. 2014). It makes little sense to treat the credit-reporting scheme under the FCRA as a mechanism for collateral attacks on the legality of certain debts, with an entity that may not be the creditor acting as the defendant in the FCRA litigation.

The correct path for handling legally contested debts is far more straightforward: if a consumer wants a debt deemed unenforceable, she should go to court and ask the court to say so. If the court agrees, the legal question is resolved, the debt is no good, and a furnisher or CRA who fails to conduct a reasonable investigation to catch the adjudication and lists it as

outstanding commits a factual error for which it may be penalized under the FCRA.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Respectfully submitted,

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COMBINED CERTIFICATIONS

1. This brief complies with Local Rule 46.1(e) because Morgan L. Ratner and Zoe A. Jacoby are members of the bar of this Court.

2. This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 29(a)(5) because it contains 6,417 words. This brief also complies with the requirements of Federal Rule of Appellate Procedure 32(a) because it was prepared in 14-point font using a proportionally spaced typeface.

3. I certify that on April 8, 2024, I filed this brief electronically with the Clerk of Court using the Court's CM/ECF system. I further certify that all parties required to be served have been served.

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