22-87

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

GIA SESSA, on behalf of herself and all others similarly situated,

Plaintiff-Appellant,

–v.–

TRANSUNION LLC,

Defendant-Appellee,

LINEAR MOTORS, LLC, DBA CURRY HYUNDAI SUBARU, HUDSON VALLEY FEDERAL CREDIT UNION, CREDIT UNION LEASING OF AMERICA, CULA, LLC,

Defendants.

On Appeal from the United States District Court
for the Southern District of New York
(No. 19-cv-9914) (The Hon. Kenneth M. Karas)

BRIEF FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, AMERICAN BANKERS ASSOCIATION, NATIONAL ASSOCIATION OF FEDERALLY-INSURED CREDIT UNIONS, INDEPENDENT COMMUNITY BANKERS OF AMERICA, AMERICAN FINANCIAL SERVICES ASSOCIATION, CREDIT UNION NATIONAL ASSOCIATION, AND CONSUMER BANKERS ASSOCIATION AS AMICI CURIAE IN SUPPORT OF DEFENDANT-APPELLEE

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1(a), amici curiae state that they have no parent corporations, and no publicly traded companies own 10% or more of their stock.

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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 by participating as an amicus curiae in cases, like this one, that raise issues of concern to the nation's business community.[1]

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

[1] The parties have consented to the filing of this brief. Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E), amici state that 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 this brief.

frequently submits amicus curiae briefs in state and federal courts in matters that significantly affect its members and the business of banking.

The National Association of Federally-Insured Credit Unions (NAFCU) advocates for all federally-insured not-for-profit credit unions that, in turn, serve over 131 million consumers with personal and small business financial service products. It provides members with representation, information, education, and assistance to meet the constant challenges that cooperative financial institutions face in today's economic environment. NAFCU proudly represents many smaller credit unions with relatively limited operations, as well as many of the largest and most sophisticated credit unions in the Nation. NAFCU represents 78 percent of total federal credit union assets and 60 percent of all federally-insured credit union assets.

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.

Founded in 1916, the American Financial Services Association (AFSA) 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.

Credit Union National Association (CUNA) is the largest trade association serving and representing the nation's 5,000 credit unions and their 130 million members. CUNA advocates for credit unions before Congress, state and federal agencies, and the courts.

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.

Amici have a significant interest in this case. Their members include consumer reporting agencies (CRAs) and furnishers covered by the Fair Credit Reporting Act (FCRA). The scope of the FCRA's commands to maintain reasonable procedures to ensure the accuracy of consumers' credit files and to investigate possible inaccuracies is of immense importance to those members. As explained below, the proposal by Sessa and its amici to expand the FCRA's obligations and require CRAs and furnishers to adjudicate legal disputes would raise operating costs for those members and lead to unpredictable and unwarranted legal liability.

INTRODUCTION

In this case, TransUnion LLC provided a bank with plaintiff Gia Sessa's credit report, which showed that Sessa owed a debt of almost $20,000 on a car that she had leased. Sessa disputed that debt with her lessors and contended that it was inconsistent with her lease agreement. She then sued TransUnion under the Fair Credit Reporting Act, 15 U.S.C. § 1681e(b), asserting that

TransUnion had failed to maintain reasonable procedures to ensure the accuracy of her credit report. She contended that the debt did not accurately reflect the terms of her lease agreement, and that TransUnion's procedures should have caught that she did not owe the debt based on obvious red flags.

The main question in this case is whether the FCRA addresses only factual accuracy in credit reports, or also requires determinations of legal validity. As the district court correctly recognized, the FCRA requires CRAs to guard against factual *inaccuracies*, not to resolve legal disputes. Every court of appeals to consider that question has reached the same conclusion, which accords with the FCRA's text, structure, purpose, and history. This Court has also reached that conclusion in an unpublished summary order. Sessa nevertheless argues, and the Consumer Financial Protection Bureau and the Federal Trade Commission echo as amici, that this Court should break from its sister circuits and expand the obligations of CRAs, so that they need to arbitrate legal disputes in addition to checking for factual accuracy. The Court should reject that approach, which is inconsistent with the statute and is neither sensible nor workable.

ARGUMENT

I. THE FCRA ADDRESSES FACTUAL INACCURACIES, NOT LEGAL DISPUTES

The FCRA provides that when a CRA prepares a credit report, it must "follow reasonable procedures to assure maximum possible accuracy of the information concerning the individual about whom the report relates." 15 U.S.C. § 1681e(b). If a consumer believes that the CRA has not followed reasonable procedures, she may sue for damages—including punitive damages for willful violations—and attorney's fees. 15 U.S.C. §§ 1681n(a), 1681o(a). To prevail on that FCRA claim, a plaintiff must establish that the CRA actually reported inaccurate information. *Shimon* v. *Equifax Info. Servs. LLC*, 994 F.3d 88, 92 (2d Cir. 2021). The text, structure, history, and purposes of the FCRA all demonstrate that the statute requires CRAs to maintain reasonable procedures to assure factual accuracy, not to resolve legal disputes.

A. The FCRA's Text Focuses On Factual Accuracy

Sessa and the Bureau both argue that "the factual-vs.-legal framework cannot be squared with the statute's plain text." Sessa Br. 2; Bureau Br.

13-15.[2] That is incorrect. A careful examination of the FCRA's text makes clear that Congress required CRAs to follow reasonable procedures to assure factual accuracy.

1. Section 1681e(b) requires CRAs to "follow reasonable procedures to assure maximum possible *accuracy* of the information" in an individual's credit report (emphasis added). The key textual question is what "accuracy" of "information" in a credit report means. Because the statute does not define the term "accuracy," it takes its ordinary meaning. *BP Am. Prod. Co.* v. *Burton*, 549 U.S. 84, 91 (2006). "Accuracy" means "[c]onformity to fact; [p]recision; exactness." *American Heritage Dictionary of the English Language* 12 (5th ed. 2018). And it meant the same thing in 1970 when the FCRA was enacted. *See American Heritage Dictionary of the English Language* 9 (1st ed. 1969) (defining "accuracy" as "[e]xactness; correctness" and "accurate" as "[h]aving no errors; correct").

Asking whether credit information conforms exactly to fact or truth, or has no errors, refers most naturally to matters of *fact*. It would not be natural to say, for example, that a CRA reported inaccurate mortgage information

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

because a plaintiff contends that the mortgage is invalid under state contract law. An inquiry into that legal dispute would determine the "validity" or "legality" of a debt—not its accuracy. Accuracy ordinarily involves whether information reflects correct and full facts—not whether the consumer has some legal defense to the debt.

2. Even if "accuracy" can sometimes be construed to cover both factual and legal correctness, in the context of the FCRA it should be limited to its ordinary meaning of "conformity to fact." The surrounding statutory language repeatedly speaks in terms that apply most naturally to factual disputes. For example, Section 1681e(b) requires CRAs to develop procedures to maintain "*maximum possible* accuracy." (emphasis added). That descriptor makes sense in the context of factual accuracy, but not in the context of legal validity. Factual accuracy can be objectively measured; something can be 100% accurate, or merely 50%. And the phrase "maximum possible accuracy" shows that Congress wanted CRAs to make their reports mirror as closely as possible the true facts about consumers' debts.

By contrast, legal determinations typically require the exercise of judgment in the face of competing claims or arguments. For instance, suppose a consumer contends that her debt is legally unenforceable as a matter of state

contract law. We would not treat the debt's legal validity as a question of "accuracy" that falls on a spectrum with a "maximum" and "minimum." If courts disagreed about the debt's validity, we would not say that one court had resolved the question with "maximum possible accuracy" and the other had not. Sessa contends (at 27) that Congress's use of the words "maximum possible" demonstrates that CRAs' obligations should be "substantial." *See* Bureau Br. 14-15. But whatever the extent of CRAs' obligations in verifying *factual accuracy*, that language does not expand the scope of CRAs' obligations to include resolving legal disputes.

Beyond Section 1681e(b), other provisions of the FCRA refer to "accuracy" and likewise use language that applies most naturally to factual accuracy, not legal disputes. For example, the FCRA requires furnishers and CRAs to "investigat[e]" and "reinvestigat[e]" disputed information to determine whether it is "inaccurate." 15 U.S.C. §§ 1681i(a)(1)(A), 1681s-2(b)(1). To "investigate" is "[t]o observe or inquire into in detail; examine systematically." *American Heritage Dictionary of the English Language* 689 (1st ed. 1969). Facts can be "observe[d]" or "inquire[d] into," but we do not normally refer to laws that way.

The FCRA also directs CRAs and furnishers to conduct an investigation so that they can determine whether the information can "be verified." 15 U.S.C. §§ 1681i(a)(5), 1681s-2(b)(1)(E). Like the word "investigate," the word "verify" connotes an inquiry into knowable facts or objective truth. *See American Heritage Dictionary of the English Language* 1423 (1st ed. 1969) (defining "verify" as "[t]o prove the truth of by the presentation of evidence or testimony; substantiate; [t]o determine or test the truth or accuracy of, as by comparison, investigation, or reference"). It would be strange to suggest that credit personnel at TransUnion or a furnisher could objectively "verif[y]" whether consumers are legally responsible for their debts. In any given dispute, whichever party is right about the application of legal doctrine to these facts, the question turns on interpretation and judgment—not on "verif[ying]" some objective fact in the world.

Other surrounding terms provide further evidence that the statute requires CRAs and furnishers to look for factual inaccuracies, not assess 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. 15 U.S.C. §§ 1681i(a)(1)(A), 1681s-2(b)(1)(D). CRAs and furnishers can "determine" and "find" whether

disputed information is *factually* correct and error-free. But only courts of law have the capacity to conclusively "determine" or "find" that information in a credit file is legally valid or invalid. *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, Congress's language in the FCRA is consistent with a focus on factual inaccuracies, not legal disputes.

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. In enacting the FCRA, 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. CRAs have a circumscribed role under that scheme: they must maintain reasonable procedures to assure accuracy, and they must reasonably reinvestigate disputed information to guard against mistakes in a consumer's report. 15 U.S.C. §§ 1681e, 1681i. The Bureau's proposed regime would turn Congress's careful credit-reporting scheme into

a debt-adjudication system, under which consumers may mount "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 furnisher reports to a CRA that a consumer has a mortgage balance. The CRA reasonably could (and is required to) follow procedures to assure that the amount is accurate. And if the consumer disputes the amount, the CRA and furnisher can (and must) investigate. 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 enjoin her mortgage obligations. But under the Bureau's regime, a consumer could *also* frame her legal challenge as an "inaccuracy" under the FCRA, and sue the furnisher and reporting agency for failing to maintain reasonable procedures to ensure "accuracy," or for failing to properly investigate the "inaccuracy." And in the Bureau's view, CRAs and furnishers would apparently need to substitute for courts and develop procedures to make a judgment about the meaning of 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 reporting mistakes. To be sure, the FCRA requires CRAs

to do more than merely transcribe information received from furnishers: they must follow reasonable procedures to ensure accuracy and investigate disputed information.[3] The key point remains that the required procedures and investigation must address facts, not law.

2. The FCRA's legislative history further confirms Congress's focus on factual inaccuracy, 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 inaccuracy 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. Identity confusion, malicious gossip, and computer errors, for example, are plainly factual inaccuracies.

[3] The district court stated that TransUnion was not liable because its credit report accurately transcribed the information provided by the furnisher. Op. 21. Sessa spends much of her opening brief attacking that reasoning. But this Court need not address whether the FCRA requires more of CRAs than accurate transcription. As TransUnion explains (at 50-51), the district court's decision independently rests on the conclusion that the FCRA requires a plaintiff to assert a factual inaccuracy, not merely a legal argument.

The final two categories of "biased information" and "incomplete information" also meant that the credit report gave a slanted or misleading view of the facts. For example, in the category of "biased information," Senator Proxmire explained that a consumer should have the opportunity to tell his "side of the story" to explain his nonpayment; Senator Proxmire did not suggest that a CRA or furnisher would engage in legal analysis but rather that the customer's version of events should "find its way into the files of the credit bureau." *Id.* And when discussing "incomplete information," Senator Proxmire mentioned computerized 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. Pub. L. No. 104-208, § 2413, 110 Stat. 3009-448 (1996). The motivating factor behind that amendment and the statute's other reforms was 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 and had never been to Arizona. *Id.* In later amendments, too, Congress's discussion focused on "[e]nhancing the accuracy of consumer reporting information." Pub. L. No. 108-159, tit. III, 117 Stat. 1952 (2003), including by "reconciling" inconsistent addresses in a consumer file—yet another prevalent factual inaccuracy. H.R. Rep. 108-263, at 46 (2003). In sum, the legislative history confirms that the text's focus on "accuracy" is best read as factual accuracy.

C. Courts Around The Country Have Correctly Interpreted The FCRA

Consistent with the FCRA's text, structure, purpose, and history, many of this Court's sister circuits have recognized that the FCRA focuses on factual inaccuracies, as has this Court in an unpublished order.

1. In suits like this one against CRAs, the five courts of appeals to consider the question—the First, Seventh, Ninth, Tenth, and Eleventh Circuits—have held that a reporting agency's obligations 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; *see DeAndrade* v. *Trans Union LLC*, 523 F.3d 61, 68 (1st Cir. 2008) ("This is not a factual inaccuracy that could have been uncovered by a reasonable

reinvestigation, but rather a legal issue that a credit agency such as Trans Union is neither qualified nor obligated to resolve under the FCRA."); *Carvalho,* 629 F.3d at 892 ("A CRA is not required . . . to 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); *Batterman* v. *BR Carroll Glenridge, LLC*, 829 Fed. Appx. 478, 480 (11th Cir. 2020) (requiring a "factual inaccuracy," not a "legal contractual question").

The decisions in *Denan* and *Losch* focused on both Section 1681e, the provision at issue in this case, and Section 1681i, which addresses CRAs' obligations to conduct reasonable reinvestigations when a consumer disputes "the completeness or accuracy" of information in her credit report, 15 U.S.C. § 1681i(a)(1)(A). The other decisions addressed accuracy only in the context of Section 1681i. But the logic of those cases is the same: the statute focuses on "factually inaccurate information, as consumer reporting agencies are neither qualified nor obligated to resolve legal issues." *Denan*, 959 F.3d at 296; *see DeAndrade*, 523 F.3d at 68; *Carvalho*, 629 F.3d at 892-893.

This Court has affirmed a district court decision similarly holding that CRAs are obligated to address factual inaccuracies, not resolve legal disputes. In *Okocha* v. *Trans Union LLC*, 2011 WL 2837594, at *6-7 (E.D.N.Y. Mar. 31, 2011), the district court granted summary judgment to a CRA because, among other reasons, the plaintiffs raised "a collateral legal attack on the validity of the debt, . . . not a factual inaccuracy." In an unpublished summary order, this Court affirmed "substantially for the reasons articulated by the district court in its well-reasoned order." *Okocha* v. *Trans Union LLC*, 488 Fed. Appx. 535, 536 (2d Cir. 2012). If this Court were now to depart from that unpublished ruling and adopt the Bureau's argument, it would create a lopsided circuit split, with this Court as the only court of appeals to impose legal-dispute-resolution obligations on CRAs.

2. Similarly, in suits against furnishers under Section 1681s-2(b), two courts of appeals have 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* v. *Verizon New England Inc.*, 595 F.3d 26, 38 (1st Cir. 2010); *see Hunt* v. *JPMorgan Chase Bank, N.A.*, 770 Fed. Appx. 452, 458 (11th Cir. 2019). That conclusion makes sense: Section 1681s-2(b), which governs furnishers, uses the same "inaccurate" language as Section 1681i.

And "identical words used in different parts of the same statute are generally presumed to have the same meaning." *United States* v. *Castillo*, 36 F.4th 431, 442 (2d Cir. 2022) (citation omitted).[4] The Ninth Circuit is the sole outlier. It recently 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), even though it reached the opposite conclusion with respect to CRAs in *Carvalho*.

* * *

Sessa and the Bureau urge this Court not to "endorse a judge-made exception" to the FCRA. Bureau Br. 14. But neither TransUnion nor its amici ask this Court to do any such thing. Instead, the text, structure, purpose, and history of the FCRA all confirm that the statute's reasonable-procedures and reasonable-investigation provisions are concerned only with inaccurate facts.

[4] The district court suggested that it might not apply the same rule to furnishers, but that conclusion would be misguided. The provision addressing furnishers uses the same "inaccurate" language as the provision addressing CRAs, and "[l]ike CRAs, furnishers are neither qualified nor obligated to resolve" legal issues. *Chiang*, 595 F.3d at 38. In any event, this Court does not need to address that question here because this case involves CRAs, which courts of appeals have unanimously agreed are obligated to address only factual inaccuracies.

As a result, and as courts around the country have recognized, a "plaintiff's required showing" in suits against both CRAs and furnishers is "*factual* inaccuracy, rather than the existence of disputed legal questions." *Chiang*, 595 F.3d at 38.

II. THE CONTRARY APPROACH ADVOCATED BY SESSA AND THE BUREAU IS UNWORKABLE AND INEFFICIENT

Sessa and the Bureau also urge the Court to reject the prevailing distinction between factual inaccuracies and legal disputes on the ground that it is unworkable. They are wrong. The prevailing rule is workable in practice and is already operating well in courts around the country. By contrast, it is Sessa and the Bureau's reading that 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

Sessa and the Bureau argue that it will be "difficult" for courts deciding FCRA cases to determine whether a plaintiff has asserted a factual inaccuracy or a legal dispute. Bureau Br. 15-20; *see* Sessa Br. 34-35. But courts routinely distinguish between factual and legal matters in a variety of contexts. It is a familiar judicial task, even if hard questions occasionally arise at the margins.

And with respect to the FCRA specifically, courts across the country already distinguish between factual and legal issues without the chaos that Sessa and the Bureau imagine.

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). When reviewing the sufficiency of a complaint, a district court must decide legal issues for itself but accept factual allegations as true. That task includes even the more nuanced assessment whether a plaintiff has asserted a legal conclusion "couched" as a factual allegation. *Ashcroft* v. *Iqbal*, 556 U.S. 662, 678 (2009) (citation omitted). And when deciding whether triable issues exist at summary judgment, a district court must determine whether the disputed questions are factual in nature. *See Scholastic, Inc.* v. *Harris*, 259 F.3d 73, 87 (2d Cir. 2001). Once the case proceeds to trial, a district court must instruct the jury on all relevant issues of law and permit juries to decide questions of fact. *See United States* v. *Stewart*, 433 F.3d 273, 311 (2d Cir. 2006).

Distinguishing between fact and law is also a routine task for courts of appeals. *See Teva Pharm. USA, Inc.* v. *Sandoz, Inc.*, 574 U.S. 318, 328 (2015) ("Courts of appeals have long found it possible to separate factual from legal matters."). Not only do appellate courts regularly review district courts' distinctions of fact and law, but they also distinguish between factual and legal matters for themselves in every single case in deciding what standard of review to apply (clear error or de novo). 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 involve the determination 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 Sessa and the Bureau's alternative theory would raise, *see* pp. 24-27, *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. 15-18, *supra*. The Bureau points (at 18-19) to two cases that supposedly show courts are struggling, but a closer look reveals

how much it is the Bureau that is straining. For example, the Bureau observes that more than a decade ago 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 at the time of the CRA's investigation an arbitrator had already affirmed the plaintiff's debt. *Id.* at 166. The court's apparent frustration was thus not even borne out in the case before it.

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 nevertheless says (at 18-19) that *Chuluunbat* demonstrates the difficulty of distinguishing between fact and law, because the decision was a consolidated appeal and the district courts below supposedly diverged in how they viewed the underlying disputes. On the contrary, the district courts all reached consistent conclusions, even if their explanations varied in immaterial ways: they all found that CRAs were not required to adjudicate the dispute, whether because it was strictly legal, was more legal than factual, or fell outside the competency of CRAs to resolve.

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

3. Importantly, the existing regime does not "categorically exempt" CRAs from developing procedures that address legal issues, as the Bureau suggests (at 22). Rather, the key question will usually be whether a court has already authoritatively adjudicated the 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. Thus, when a plaintiff points to a legal dispute that has already been adjudicated, it may be able to show that a CRA did not develop reasonable procedures to catch that adjudication. Similarly, in that circumstance, CRAs and furnishers may be required to conduct a factual investigation based on "the status of the information contained in the public records." *Dennis* v. *BEH-1, LLC*, 520 F.3d 1066, 1069 (9th Cir. 2008) (citation omitted).

The Eleventh Circuit's decision in *Losch* is illustrative. In that case, the Eleventh Circuit explained that where the plaintiff could point to a court's judgment that left "no doubt that [the consumer's] mortgage was discharged," the dispute was not a legal one about "the validity of the underlying debt," but rather a factual inaccuracy: the report indicated that the consumer had an

outstanding mortgage, but he no longer did. 995 F.3d at 946. In that scenario, a furnisher or CRA need not "make any legal determinations about the underlying claim." *Chuluunbat*, 4 F.4th at 568.

* * *

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 Sessa and the Bureau suggest, an "unworkable" standard. Sessa Br. 34 (citation omitted); Bureau Br. 16.

B. The Contrary Approach Is Far Worse

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

1. As a threshold matter, the regime that Sessa and the Bureau envision will raise a host of complexities. CRAs and furnishers 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. Yet Sessa and the Bureau would demand that they resolve a host of extraordinarily complex legal questions.

Consider, for example, the *Denan* case in the Seventh Circuit. There, the legal validity of the plaintiffs' loans turned on the resolution of 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 shielded the creditors from the application of those state laws. 959 F.3d at 295. Those are difficult questions even for courts. Expecting credit personnel—especially those with no legal training—to resolve them borders on the absurd. In the context of reinvestigations, moreover, credit personnel would have to resolve those legal issues within a 30-day time frame. *See* 15 U.S.C. § 1681i(a)(1)(A). As the Seventh Circuit recognized, addressing such complex legal questions "exceeds the competences of consumer reporting agencies." *Id.*

Nor was *Denan* an outlier. In *Humphrey* v. *Trans Union LLC*, 759 Fed. Appx. 484, 485 (7th Cir. 2019), for example, the plaintiff argued that a certain debt in his file was invalid because of federal regulations concerning the obligations of loan collectors during a pending application for a disability discharge. *DeAndrade* raised the question whether mortgage documents with an allegedly forged signature were nevertheless valid under the doctrine of

ratification. 523 F.3d at 63. *Gross* involved the application of Arizona's Anti-Deficiency Statute, and an Arizona Supreme Court decision interpreting that statute, to the plaintiff's debt. 33 F.4th at 1251-1252. And even cases that turn only on the meaning of the underlying contracts may involve complex issues of contract law subject to legitimate debate. *See, e.g.*, *Batterman*, 829 Fed. Appx. at 481-482 (whether a landlord was entitled to liquidated damages under the terms of a lease agreement); *Carvalho*, 629 F.3d at 876 (whether an insurance-billing agreement obligated a plaintiff's insurance company to pay a particular medical bill).

Neither Sessa nor the Bureau ever explains exactly what a CRA is supposed to do with competing legal arguments. The Bureau insists (at 22) that CRAs may not need to assess "certain legal issues" if doing so would pose an unreasonable burden. Sessa even goes so far as to assert that "the plain text of the statute protects [CRAs] from having to conclusively adjudicate legal disputes over the validity of the debt," because "[i]n the typical case, it would be *unreasonable* for a credit-reporting agency to have to act as a legal tribunal." Sessa Br. 33. But that creates just as many questions as it answers. What does it mean for a CRA to "assure" the legal validity of credit-report information without actually attempting to adjudicate a legal question?

Neither Sessa nor the Bureau ever explains. Nor do they explain *why* CRAs should develop procedures to assess legal disputes but not actually resolve them. The FCRA does not require reasonable procedures (or investigation of disputes) for their own sake. The point of these procedures is to help ensure that consumers' credit reports are free from error. It is a purely box-checking exercise if furnishers and CRAs have to merely inquire into legal arguments, with no effect on the credit report itself.

Moreover, if, as Sessa and the Bureau suggest, a CRA need do less than actually adjudicate a legal argument in a manner consistent with a judicial decision, then what procedures *are* enough? Are credit personnel required to consult legal counsel, or may their own research suffice? Sessa and the Bureau do not say, so the only certainty is a new wave of litigation over when enough is enough.

2. The regime that Sessa and the Bureau propose also would be expensive. To avoid liability, CRAs and furnishers might feel obligated to expand their in-house legal teams to ensure that legal disputes in credit reports are all reviewed by qualified lawyers. 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, CRAs' and furnishers' 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 CRAs and furnishers 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). CRAs and furnishers would also need to spend significant resources addressing frivolous claims, which in turn are a distraction from legitimate disputes. Those increased costs would "outweigh[] the potential of harm to consumers" of leaving legal disputes to the court system. *Ibid.*

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 they 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)(1)(2). When

plaintiffs proceed as a class, a 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, CRAs and furnishers 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 have sweeping economic consequences as well. After all, "the very economic purpose for credit reporting companies would be significantly vitiated if they shaded every credit history in their files in the best possible light for the consumer." *Cahlin* v. *Gen. Motors Acceptance Corp.*, 936 F.2d 1151, 1158 (11th Cir. 1991). 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, in turn has greatly benefited consumers and the American economy. If credit reports became categorically less reliable because they omit subjects of legal dispute, that would have repercussions both for CRAs and for the wide variety of lenders and other businesses that rely on them—and ultimately for consumers.

3. Finally, Sessa and the Bureau's proposed rule 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 Sessa and the Bureau's theory would put CRAs and furnishers 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 who may not be the creditor acting as the defendant in subsequent FCRA litigation.

The correct path for handling legally contested debts is far more straightforward: if a consumer wants a debt deemed unenforceable, he should

first attempt to resolve that dispute directly with the creditor. In the event that fails, he 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 CRA who thereafter fails to follow reasonable procedures 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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CERTIFICATE OF COMPLIANCE

This Brief complies with Federal Rule of Appellate Procedure 29(a)(5) and Second Circuit Local Rule 29.1(c) because it contains 6,376 words.

This Petition 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.

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AUGUST 4, 2022

CERTIFICATE OF SERVICE

I certify that on August 4, 2022, the foregoing Brief was filed 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.

s/ Jeffrey B. Wall
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AUGUST 4, 2022