No. 21-2430

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Stefan Ingram,
Plaintiff-Appellant,

v.

Waypoint Resource Group, LLC,
Defendant-Appellee.

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
Hon. Mitchell S. Goldberg
Case No. 2:18-cv-3776

Brief of Amici Curiae Consumer Financial Protection Bureau and Federal Trade Commission in Support of Plaintiff-Appellant and Reversal

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INTEREST OF AMICI CURIAE

To ensure fair and accurate credit reporting, the Fair Credit Reporting Act (FCRA), 15 U.S.C. § 1681 *et seq*., imposes various requirements that consumer reporting agencies and the companies that provide those agencies information about consumers, known as furnishers, must follow. As relevant here, under Section 1681s-2(b) of the FCRA, when a consumer disputes information in her credit report with a consumer reporting agency and the agency forwards the dispute to the furnisher, the furnisher is required to conduct an investigation.

The Consumer Financial Protection Bureau (Bureau or CFPB) has exclusive rule-writing authority for most provisions of the FCRA. 15 U.S.C. § 1681s(e). The Bureau interprets and, along with various other federal and state regulators, enforces the law's requirements. *Id.* § 1681s(a)-(c). These include the provision in Section 1681s-2(b) that furnishers must investigate disputes forwarded by consumer reporting agencies, which are known as "indirect disputes."

The Federal Trade Commission (FTC) has been charged by Congress with protecting consumers from deceptive or unfair trade practices. *Id.* § 45(a). As part of that mission, the Commission has long played a key role in the implementation, enforcement, and interpretation of the FCRA. A

violation of the FCRA "constitute[s] an unfair or deceptive act or practice in commerce, in violation of section 5(a) of the Federal Trade Commission Act." *Id.* § 1681s(a)(1). And the FCRA grants the Commission "such procedural, investigative, and enforcement powers … as though the applicable terms and conditions of the Federal Trade Commission Act were part of [the FCRA]." *Id.*

The district court erred when it read an exception into Section 1681s-2(b)'s requirement that furnishers investigate indirect disputes. It held that a furnisher is obligated to investigate only "bona fide" indirect disputes and may therefore decline to investigate any indirect dispute it deems frivolous. This atextual, judge-made exception to the plain language of the FCRA would have the effect of denying consumers an investigation to which they are legally entitled as well as notice of the result of that investigation. This outcome would undercut a central remedial purpose of the FCRA, which is to ensure that consumers are able to dispute and correct inaccurate information in their credit reports. A likely consequence would be an increase in the volume of consumer complaints related to credit reporting that the Bureau receives and is required to address. For all these reasons, the Bureau and the FTC have a substantial interest in the issues presented in this case.

STATEMENT

A. Consumer Credit Reporting

Consumer credit reporting plays an important role in the lives of American consumers. The consumer credit reporting system includes: (1) consumer reporting agencies, which compile reports on consumers and make them available to lenders, insurers, employers, landlords, and other users, and (2) furnishers, which provide information about consumers to consumer reporting agencies. *See* CFPB, *Annual report of credit and consumer reporting complaints* 5 (Jan. 2022), https://files.consumerfinance.gov/f/documents/cfpb_fcra-611-e_report_2022-01.pdf. The three largest consumer reporting agencies are Equifax, Experian, and TransUnion. *Id.* These companies maintain files on over 200 million Americans. *Id.* More than 15,000 furnishers provide these companies information about consumers. *Id.* at 5–6.

The reports compiled by these companies are used to make decisions that affect every facet of consumers' lives. Lenders use credit reports, also referred to as consumer reports,[1] when determining whether to extend credit and on what terms. *Id.* at 5. Landlords use these reports when

[1] The term "credit report" is used throughout this brief to have the same meaning as the term "consumer report" as defined at 15 U.S.C. § 1681a(d).

deciding whether to rent housing to tenants. *Id.* And, employers use these reports to determine whether a job applicant should be hired. *Id.* Given how important these decisions are to consumers, it is critical that the information contained in credit reports be correct and that consumers can identify and dispute any inaccuracies.

However, credit reports frequently contain errors. By one estimate, one in five Americans has a verified error on at least one credit report. *See* FTC, *Report to Congress Under Section 319 of the Fair and Accurate Credit Transactions Act of 2003* i-ii (Jan. 2015), https://www.ftc.gov/system/files/documents/reports/section-319-fair-accurate-credit-transactions-act-2003-sixth-interim-final-report-federal-trade/150121factareport.pdf; *see also* Liane Fiano, CFPB, *Common errors people find on their credit report—and how to get them fixed* (Feb. 5, 2019), https://www.consumerfinance.gov/about-us/blog/common-errors-credit-report-and-how-get-them-fixed/. Another study found that over 34% of consumers were able to identify at least one error in their credit reports. *See Syed Ejaz*, Consumer Reports, *A Broken System: How the Credit Reporting System Fails Consumers and What to Do About It* 4 (June 10, 2021), https://advocacy.consumerreports.org/wp-

content/uploads/2021/06/A-Broken-System-How-the-Credit-Reporting-System-Fails-Consumers-and-What-to-Do-About-It.pdf.

Given this error rate, it is unsurprising that consumers frequently complain about the consumer credit reporting system. The CFPB receives hundreds of thousands of complaints about the consumer credit reporting industry every year. *See* CFPB, *Consumer Response Annual Report* 11 (Mar. 2022), https://files.consumerfinance.gov/f/documents/cfpb_2021-consumer-response-annual-report_2022-03.pdf. In 2021, over 70% of the complaints consumers submitted to the CFPB related to credit reporting. *Id.* That year, consumers submitted over 700,000 complaints to the CFPB related to credit reporting, more than every other industry combined. *Id.* The number of complaints the Bureau receives related to credit reporting is also dramatically increasing. The 700,000 credit-reporting complaints submitted to the Bureau in 2021 reflected a 122% increase over the previous year. *Id.*

B. The FCRA

The FCRA, 15 U.S.C. § 1681 *et seq.*, enacted in 1970, created a regulatory framework governing consumer credit reporting. The statute "was crafted to protect consumers from the transmission of inaccurate information about them, and to establish credit reporting practices that

utilize accurate, relevant, and current information in a confidential and responsible manner." *Seamans v. Temple Univ.*, 744 F.3d 853, 860 (3d Cir. 2014) (quoting *Cortez v. Trans Union, LLC*, 617 F.3d 688, 706 (3d Cir. 2010)). Consumer reporting agencies "collect consumer credit data from 'furnishers,' such as banks and other lenders, and organize that material into individualized credit reports, which are used by commercial entities to assess a particular consumer's creditworthiness." *Id.* The "FCRA imposes a variety of obligations on both furnishers and [consumer reporting agencies]," *id.*, including the obligation, under certain circumstances, to investigate disputes submitted by consumers.

The FCRA provides two avenues through which consumers can dispute the accuracy or completeness of the information in their credit reports. First, a consumer may provide notice of the dispute to the person or entity that furnished the incorrect or incomplete information to the consumer reporting agency. This is known as a "direct dispute." *See* CFPB, *Supervisory Highlights Consumer Reporting Special Edition* 4 (Dec. 2019), https://files.consumerfinance.gov/f/documents/cfpb_supervisory-highlights_issue-20_122019.pdf. Second, the consumer may provide notice of the dispute to the consumer reporting agency. This is known as an "indirect dispute." *Id.*

1. Direct Disputes

Section 1681s-2(a)(8) of the FCRA governs the duties of furnishers upon receipt of a direct dispute from a consumer. After receiving notice that a consumer disputes the accuracy of the information a furnisher provided to a consumer reporting agency, the furnisher is required to: (1) investigate the disputed information, (2) review all relevant information provided by the consumer, (3) complete the investigation and report the results to the consumer, generally within thirty days, and (4) if the investigation finds that the information reported was inaccurate, promptly notify each consumer reporting agency to which the information was furnished. 15 U.S.C. § 1681s-2(a)(8)(E)(i)-(iv); *see also* 12 C.F.R. § 1022.43(e)(1)-(4).

However, the furnisher is not required to satisfy these obligations if it "reasonably determines that the dispute is frivolous or irrelevant," including because the consumer failed "to provide sufficient information to investigate the disputed information" or the dispute is "substantially the same" as a dispute already investigated. 15 U.S.C. § 1681s-2(a)(8)(F)(i); *see also* 12 C.F.R. § 1022.43(f)(1). If the furnisher determines that the dispute is frivolous or irrelevant, it must promptly notify the consumer and the notice must include the reason for the determination and identify any additional

information necessary to investigate the disputed information. 15 U.S.C. § 1681s-2(a)(8)(F)(ii)-(iii); *see also* 12 C.F.R. § 1022.43(f)(2)-(3).

2. Indirect Disputes

Section 1681*i* of the FCRA governs the duties of consumer reporting agencies upon receipt of an indirect dispute from a consumer. When a consumer notifies a consumer reporting agency that she disputes the accuracy or completeness of the information in her consumer file, the agency has two principal obligations. First, the agency is required to provide notice of the dispute to the furnisher that provided the disputed information within five days of receiving the dispute. 15 U.S.C. § 1681*i*(a)(2)(A). The notice to the furnisher must include "all relevant information regarding the dispute that the agency has received from the consumer." *Id.* Second, the agency must "conduct a reasonable reinvestigation to determine whether the disputed information is inaccurate." *Id.* § 1681*i*(a)(1)(A). The investigation generally must be complete within thirty days, *id.*, and, upon its completion, the consumer reporting agency is required, among other responsibilities, to delete any information that could not be verified from the consumer's file, *id.* § 1681*i*(a)(5)(A), and notify the consumer in writing of the results of the investigation, *id.* § 1681*i*(a)(6).

However, the consumer reporting agency is not required to satisfy either of these obligations "if the agency reasonably determines that the dispute by the consumer is frivolous or irrelevant, including by a reason of a failure by a consumer to provide sufficient information to investigate the disputed information." *Id.* § 1681*i*(a)(3)(A). If the agency determines that a dispute is frivolous or irrelevant, it must notify the consumer and provide the reasons for the determination and identify any information that is needed to investigate the dispute. *Id.* § 1681*i*(a)(3)(B)-(C).

Section 1681s-2(b) of the FCRA governs the duties of furnishers upon receipt of notice of an indirect dispute from a consumer reporting agency. After receiving notice pursuant to Section 1681*i* that a consumer has disputed the completeness or accuracy of information that a furnisher provided to a consumer reporting agency, the furnisher is required to: (1) investigate the disputed information, (2) review all relevant information provided by the consumer reporting agency, (3) report the results of the investigation to the consumer reporting agency, (4) if the investigation finds the disputed information is incomplete or inaccurate, notify all other consumer reporting agencies that were furnished the information, and (5) modify, delete, or permanently block reporting of any disputed

information that is found to be inaccurate, incomplete, or that cannot be verified. *Id.* § 1681s-2(b)(1)(A)-(E).

C. Facts

Stefan Ingram, the Plaintiff and Appellant in this case, believes he was the victim of identity theft.[2] He alleges that a Comcast account was opened in his name, without his authorization, for service at a Philadelphia address where he has never lived. According to Ingram, he first learned of the account when he noticed it was listed as delinquent on his credit report.

After learning of the account, Ingram filed a direct dispute with Comcast. On October 19, 2017, his lawyer sent a letter to Comcast advising the company that the account in Ingram's name was fraudulent. The letter requested that Comcast investigate the account's authenticity and report to the consumer reporting agencies that the account was disputed. Comcast responded and requested additional documentation including an affidavit and a police report. Ingram never submitted the requested documents, and Comcast ultimately did not find that the account was opened due to fraud. Comcast subsequently referred the delinquent account to Waypoint

[2] The description of the facts provided here is based on the district court's account of those facts in its summary judgment order. *See Ingram v. Experian Info. Sols., Inc.*, No. 18-cv-3776, 2021 WL 2681275, at *1–6 (E.D. Pa. June 30, 2021).

Resource Group LLC ("Waypoint"), the Defendant and Appellee in this case, for collections.

Next, Ingram filed an indirect dispute with Experian. After noticing that the allegedly fraudulent account remained on his credit report, Ingram had his lawyer dispute the account using Experian's website. The indirect dispute was submitted to Experian on June 29, 2018. The dispute stated, "THIS IS NOT MY ACCOUNT. PLEASE REMOVE THIS FROM MY CREDIT." On July 16, 2018, Waypoint received the dispute from Experian. In response, Waypoint updated Ingram's address in its system and confirmed that the account had his correct name and Social Security number. Because the dispute did not include the code for fraud, Waypoint did not take any additional steps to verify the authenticity of the account.[3] However, Waypoint's system did automatically mark the account with the code "XB," which indicates that the account information is disputed and an investigation of the dispute is in progress by the furnisher. As a result, the

[3] Consumer reporting agencies and furnishers communicate about disputes using standardized codes. *See generally* CFPB, *Key Dimensions and Processes in the U.S. Credit Reporting System: A Review of How the Nation's Largest Credit Bureau's Manage Consumer Data* (Dec. 2012), https://files.consumerfinance.gov/f/201212_cfpb_credit-reporting-white-paper.pdf.

Waypoint account was marked as disputed on Ingram's Experian credit report.

Finally, Ingram filed a second indirect dispute with Experian, which was again forwarded to Waypoint. The second indirect dispute noted that the account in Ingram's name was the subject of litigation, that Ingram believed the account was fraudulent, and that he had obtained a police report. At this point, Waypoint removed the account from Ingram's credit report and ceased collections on the account.

D. Procedural History

On September 5, 2018, Ingram filed suit against Defendants Waypoint, Experian, Equifax, and Comcast asserting claims under the FCRA. The complaint also asserts claims, against all the Defendants, under the Fair Debt Collection Practices Act, as well as claims for defamation against Experian and Equifax and a claim under the Pennsylvania Consumer Protection Law against Comcast. All Defendants other than Waypoint settled.

On May 7, 2020, Waypoint moved for summary judgment. On June 30, 2021, the district court granted summary judgment on all remaining claims to Waypoint. The district court rejected Ingram's FCRA claim because he failed to satisfy his "burden of coming forward with evidence

showing that he submitted a bona fide dispute." *Ingram v. Experian Info. Sols., Inc.*, No. 18-cv-3776, 2021 WL 2681275, at *7 (E.D. Pa. June 30, 2021). The court explained that this requirement "is inherent in the first element of an FCRA claim, which requires that a consumer give notification of a dispute." *Id.* at *5.

The court determined that the *indirect* dispute Ingram filed with Experian was "frivolous," and thus not "bona fide," by applying the statutory provisions that apply to *direct* disputes: First, it held that Ingram had "not satisfied the requirements" in Section 1681s-2(a) pertaining to what information a consumer must submit with a direct dispute "because he did not submit 'all supporting documentation or other information reasonably required to substantiate the basis of the dispute.'" *Id.* at *7 (citing 15 U.S.C. § 1681s-2(a)(8)(D)(iii)). Second, it held that Ingram's "request for an investigation may be deemed frivolous" under the provision in Section 1681s-2(a) that exempts furnishers from investigating certain direct disputes "because he failed to provide sufficient information upon which Waypoint could investigate." *Id.* (citing 15 U.S.C. § 1681s-2(a)(8)(F)(i)(I)).

On July 30, 2021, Ingram filed this appeal.

SUMMARY OF ARGUMENT

Under the FCRA's indirect dispute provisions, when a consumer reporting agency notifies a furnisher that a consumer has disputed information in her credit report, the furnisher is required to conduct an investigation. There are no exceptions to this rule to be found in the statutory text. The district court, however, found an *implicit* exception for frivolous disputes. It held that the FCRA requirement that furnishers investigate indirect disputes applies only to so-called "bona fide disputes." This Court should reject this atextual, judge-made exception to furnisher liability under the FCRA for three reasons.

First, the FCRA means what it says. There is nothing in the text of the statute that suggests a furnisher can choose not to investigate disputes if it deems them to be not "bona fide." The statutory text is unambiguous: furnishers must investigate all indirect disputes. Had Congress wished to create an exception for frivolous disputes, it knew how to do so. In two parts of the FCRA (those governing consumer reporting agencies' obligations to investigate indirect disputes and furnishers' obligations to investigate direct disputes), Congress did exactly that. But Congress intentionally chose not to include a similar exception to furnishers' obligations to investigate indirect disputes.

Second, consumers are entitled to notice of the outcome of their disputes and an opportunity to cure any deficiencies. The district court's holding would circumvent those requirements, leaving consumers in the dark. Where the FCRA allows disputes to be rejected as frivolous—such as when consumer reporting agencies reject frivolous indirect disputes or when furnishers reject frivolous direct disputes—it mandates that notice must promptly be provided to the consumer that the dispute was deemed frivolous and the consumer must be advised of the basis for that determination. There is no similar requirement for indirect disputes referred to a furnisher. Thus, under the district court's interpretation, a consumer may not be aware that a furnisher has deemed his or her indirect dispute frivolous. This interpretation is inconsistent with the statutory scheme read as a harmonious whole. And it undercuts a central remedial purpose of the FCRA: to ensure consumers are able to dispute and correct inaccurate information in their credit reports.

Third, a judge-made exception is unnecessary because the statutory scheme already protects furnishers from having to investigate frivolous indirect disputes in other ways. For one, the statute charges consumer reporting agencies with determining whether a dispute is frivolous in the first instance, before forwarding it to the furnisher. Multiple other federal

courts of appeals have acknowledged that the FCRA envisions consumer reporting agencies serving as the filtering mechanism for frivolous indirect disputes. So should this Court.

Moreover, the FCRA provides furnishers an additional layer of protection insofar that it requires them only to conduct a *reasonable* investigation. What constitutes a reasonable investigation is, in part, a function of how much information and documentation the consumer provides. But whether a furnisher conducted a reasonable investigation is a fact-intensive inquiry that should almost always be resolved at trial.

ARGUMENT

I. When a consumer reporting agency forwards a dispute to a furnisher, the furnisher is required to conduct an investigation.

The text of the FCRA requires furnishers to investigate any dispute forwarded to them by a consumer reporting agency. Nothing in the text of the statute suggests that a furnisher may evade its obligation to investigate an indirect dispute simply because it deems the dispute frivolous or inadequately supported.

A. The statutory text is unambiguous.

To begin, the plain meaning of the statutory text requires furnishers to investigate all indirect disputes. Section 1681s-2(b) provides that "[a]fter receiving notice" from a consumer reporting agency "of a dispute with

regard to the completeness or accuracy of *any* information provided by a [furnisher] to a consumer reporting agency, the [furnisher] *shall* … conduct an investigation with respect to the disputed information." 15 U.S.C. § 1681s-2(b)(1)(A) (emphases added). This language does not afford furnishers any discretion to determine whether to conduct an investigation. *See SAS Inst., Inc. v. Iancu*, 138 S. Ct. 1348, 1351 (2018) ("This directive is both mandatory and comprehensive. The word 'shall' generally imposes a nondiscretionary duty. And the word 'any' naturally carries an 'expansive meaning.'" (quoting *United States v. Gonzales*, 520 U.S. 1, 5 (1997) and citing *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 35 (1998))). And there is no other language in the FCRA's indirect dispute provisions that provides a furnisher the right to decline to investigate a dispute that it has determined to be frivolous.

The statutory text is unambiguous and, therefore, conclusive: "It is axiomatic that statutory interpretation begins with the language of the statute itself … [I]f the statutory language is unambiguous, the plain meaning of the words ordinarily is regarded as conclusive." *Gov't of Virgin Islands v. Knight*, 989 F.2d 619, 633 (3d Cir. 1993) (citing *Pennsylvania Dep't of Pub. Welfare v. Davenport*, 495 U.S. 552, 557–58 (1990) and *Consumer Product Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108

(1980)); *see also In re Am. Pad & Paper Co.*, 478 F.3d 546, 554 (3d Cir. 2007) ("Congress says in a statute what it means and means in a statute what it says." (quoting *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6 (2000))).

B. If Congress intended to create an exception for frivolous disputes, it would have said so.

Further, had Congress intended to allow furnishers to decline to investigate disputes they determine to be frivolous, it knew how to say so. For one, the FCRA expressly states that if a consumer reporting agency "reasonably determines that [a] dispute … is frivolous or irrelevant" it is not required to investigate or to forward the indirect dispute to the furnisher. 15 U.S.C. § 1681*i*(a)(3)(A). Similarly, when a furnisher receives a direct dispute (that is, a dispute received directly from the consumer), the FCRA clearly provides that the furnisher is not required to investigate so long as it "reasonably determines that the dispute is frivolous or irrelevant." *Id.* § 1681s-2(a)(8)(F)(i). But this language is nowhere to be found in the FCRA's indirect dispute provisions.

This Court must "presume that Congress acts intentionally and purposely when it includes particular language in one section of a statute but omits it in another." *Intel Corp. Inv. Pol'y Comm. v. Sulyma*, 140 S. Ct. 768, 777 (2020) (quoting *BFP v. Resol. Tr. Corp.*, 511 U.S. 531, 537 (1994))

(alteration adopted); *see also Aristy-Rosa v. Att'y Gen. United States*, 994 F.3d 112, 115–16 (3d Cir. 2021) (same). Here, Congress *expressly* provided consumer reporting agencies the authority to assess whether an indirect dispute is frivolous or irrelevant, and it *expressly* provided furnishers the authority to assess whether a direct dispute is frivolous or irrelevant. Had Congress also intended to give furnishers the authority to assess whether an indirect dispute is frivolous or irrelevant, "it presumably would have done so expressly." *Russello v. United States*, 464 U.S. 16, 23 (1983).

The district court's reasoning is erroneous for the same reason. It held that "[t]he bona fide dispute requirement is *inherent* in the first element of an FCRA claim, which requires that a consumer give notification of a dispute." *Ingram*, 2021 WL 2681275, at *5 (emphasis added). In other words: even though nothing in the statutory text says that furnishers are required only to investigate bona fide (i.e., non-frivolous) disputes, Congress implied as much. But there is no reason to think that Congress would have impliedly created an exception for frivolous disputes when elsewhere in the statute it did so expressly. *See Aristy-Rosa*, 994 F.3d at 115 (rejecting the argument that Congress "implied" in one part of a statute what it said outright in another).

Likewise, the district court's reliance on statutory language governing direct disputes is unpersuasive. The court cites the frivolousness exception in Section 1681s-2(a), which governs direct disputes, to support its conclusion that a similar, albeit implied, exception should be read into Section 1681s-2(b), which governs indirect disputes. *E.g.*, *Ingram*, 2021 WL 2681275, at *6 (citing 15 U.S.C. § 1681s-2(a)(8)(F)(i)). The two district court cases relied on by the district court similarly import the frivolousness exception from the part of the statute governing direct disputes into the part of the statute governing indirect disputes. *See Palouian v. FIA Card Servs.*, No. 13-cv-0293, 2013 WL 1827615, at *3 (E.D. Pa. May 1, 2013) (citing the exception in Section 1681s-2(a)(8)(F) to conclude that "furnisher[s] cannot be liable to the consumer for the failure to investigate the completeness or accuracy of information under § 1681s-2(b)"); *Noel v. First Premier Bank*, No. 3:12-cv-50, 2012 WL 832992, at *9 (M.D. Pa. Mar. 12, 2012) ("[I]f a dispute is determined to be frivolous or irrelevant under § 1681s-2(a)(8)(F) … the furnisher is not subject to liability under § 1681s-2(b).").

But the presence of an exception in one part of a statute is not the basis to read an exception into another part of the statute. To the contrary, "[w]hen Congress provides exceptions in a statute, it does not follow that

courts have authority to create others." *United States v. Johnson*, 529 U.S. 53, 58 (2000). Rather, "[t]he proper inference … is that Congress considered the issue of exceptions and, in the end, limited the statute to the ones set forth." *Id.*

II. Consumers are entitled to notice of the outcome of their disputes and an opportunity to cure.

The district court's holding would also undercut an important principle underlying the FCRA: consumers are entitled to notice of the outcome of their disputes and an opportunity to cure. While the FCRA provides consumers multiple avenues to dispute information in their credit reports, a central tenet of the statute is that consumers are entitled to notice of the outcome of their dispute. The district court's holding would risk opening a loophole in this careful statutory scheme, leading to consumer disputes potentially disappearing into a proverbial "black hole," with their outcome unknown to the consumer.

If a consumer submits an indirect dispute to a consumer reporting agency and the consumer reporting agency determines it is frivolous, the agency must "notify the consumer of such determination not later than 5 business days after making such determination." 15 U.S.C. § 1681*i*(a)(3)(A). The notice must include "the reasons for the determination" and identify "any information required to investigate the disputed information." *Id.*

§ 1681*i*(a)(3)(C). Similarly, if no frivolousness determination is made and the consumer reporting agency investigates the dispute, it must "provide written notice to a consumer of the results of [the] reinvestigation … not later than 5 business days after the completion of the reinvestigation." *Id.* § 1681*i*(a)(6)(A). The notice must include, among other information, "a statement that the reinvestigation is completed" and a statement "that the consumer has the right to add a statement to the consumer's file disputing the accuracy or completeness of the investigation." *Id.* § 1681*i*(a)(6)(B).

So too, if a consumer submits a direct dispute to a furnisher and the furnisher determines the dispute is frivolous, it must promptly "notify the consumer of such determination." *Id.* § 1681s-2(a)(8)(F)(ii). The notice must include "the reasons for the determination" and identify "any information required to investigate the disputed information." *Id.* § 1681s-2(a)(8)(F)(iii). If, on the other hand, the furnisher does not determine the dispute is frivolous and proceeds to investigate, it must "report the results of the investigation to the consumer." *Id.* § 1681s-2(a)(8)(E)(iii). And, when a furnisher investigates an indirect dispute, it is required to "report the results of the investigation to the consumer reporting agency," *id.* § 1681s-2(b)(1)(C), which is in turn required to report the results to the consumer, *id.* § 1681*i*(a)(6)(A).

But the statute has no provision clearly requiring furnishers to notify *anyone* if, as happened here, they decline to investigate an indirect dispute because they have deemed it frivolous—precisely because, as discussed above, the statute does not give furnishers discretion as to whether to investigate a dispute referred by a consumer reporting agency. The furnisher simply lacks any role in determining whether an indirect dispute that has been forwarded to it by a consumer reporting agency is frivolous. Thus, the district court's interpretation, if affirmed, would risk creating a singular exception to the rule that a consumer is entitled to notice of the outcome of her dispute. Under this interpretation, if a consumer submits an indirect dispute and the furnisher determines that the dispute is frivolous, the consumer may never receive any notice of that determination. Without being provided notice that the furnisher determined her dispute to be frivolous and the basis for that determination, consumers will have no way to know that an investigation was never conducted and no way to know what additional information may have been needed. Without this information, consumers may be unable to cure any deficiencies and, as a result, their disputes may go uninvestigated and, ultimately, erroneous information in their credit reports may go uncorrected.

This Court should not endorse that outcome for two reasons. First, it is inconsistent with the statutory scheme, which in every other regard ensures consumers are advised of the outcome of their disputes and, where a dispute is determined to be frivolous, notice of why and how to cure. *See Argueta-Orellana v. Att'y Gen. United States*, 35 F.4th 144, 148 (3d Cir. 2022) ("We must therefore interpret the statute as a symmetrical and coherent regulatory scheme and fit, if possible, all parts into a harmonious whole." (cleaned up)). Second, it denies consumers an important protection afforded by the FCRA and thus undercuts its remedial purposes. *See Cortez*, 617 F.3d at 706 (explaining that the FCRA was enacted, in part, to ensure that consumers are able to dispute and correct inaccurate information, and that "any interpretation of this remedial statute" should reflect those "consumer-oriented objectives" (cleaned up)).

III. The FCRA already protects furnishers from frivolous disputes.

Finally, the statutory scheme already protects furnishers from the burden of investigating frivolous or unsupported indirect disputes. In crafting the FCRA, Congress protected furnishers by allowing consumer reporting agencies to determine whether a dispute is frivolous in the first instance before forwarding the dispute along to the furnisher. Generally, when a consumer reporting agency receives notice of a dispute from a

consumer, the agency is required to relay the dispute to the furnisher within five days. *See id.* § 1681*i*(a)(2)(A). However, there is an exception to this rule. The agency is not required to forward the dispute to the furnisher if it "determines that the dispute by the consumer is frivolous or irrelevant, including by reason of a failure by a consumer to provide sufficient information to investigate the disputed information." *Id.* § 1681*i*(a)(3)(A). In that case, its only obligation is to notify the consumer that the dispute has been deemed frivolous and the basis for that determination. *Id.* § 1681*i*(a)(3)(B)-(C).

The FCRA envisions consumer reporting agencies "playing the role of a 'gatekeeper.'" *SimmsParris v. Countrywide Fin. Corp.*, 652 F.3d 355, 359 (3d Cir. 2011) (quoting *Chiang v. MBNA*, 620 F.3d 30, 30 (1st Cir. 2010)). Other federal courts of appeals have recognized the role that consumer reporting agencies play in shielding furnishers from frivolous disputes. For instance, in *Scott v. First Southern National Bank*, the Sixth Circuit explained that "the FCRA protects both consumers and furnishers." 936 F.3d 509, 518 (6th Cir. 2019). The FCRA does not include a private cause of action against furnishers for violating the provisions of the FCRA governing direct disputes. *Id.* at 517. That means "consumers may step in to enforce their rights [against a furnisher] *only after* [the] furnisher has received

proper notice of a dispute from a credit reporting agency." *Id.* at 517 (quoting *Boggio v. USAA Fed. Sav. Bank*, 696 F.3d 611, 615–16 (6th Cir. 2012)) (alteration adopted). Accordingly,

> [o]ne way that the FCRA protects furnishers is by requiring that a consumer file a dispute with a consumer reporting agency, and that the consumer reporting agency screen the complaint and provide notice of the dispute to a furnisher if warranted, before the consumer may assert a private right of action against the furnisher.

Id. at 518; *see also Boggio*, 696 F.3d at 616 ("Inasmuch as [agencies] need not forward frivolous disputes along to furnishers … this statutory framework provides consumers with a private remedy against negligent or willful misconduct by a furnisher, while it simultaneously protects furnishers from answering frivolous consumer disputes.").

Similarly, in *Nelson v. Chase Manhattan Mortgage Corporation*, the Ninth Circuit recognized that Congress created a "filtering mechanism" to protect furnishers from frivolous disputes. 282 F.3d 1057, 1060 (9th Cir. 2002). That court "inferred from the structure of the statute that Congress did not want furnishers of credit information exposed to suit by any and every consumer dissatisfied with the credit information furnished." *Id.* Accordingly, before a "disputatious consumer" can bring suit against a furnisher, the consumer must first notify the consumer reporting agency,

and the agency must then determine whether "the dispute by the consumer is frivolous or irrelevant." *Id.* (quotation omitted).

Thus, the statutory scheme charges consumer reporting agencies with filtering frivolous disputes in the first instance, and it does so intentionally, in order to protect furnishers. Having put "this filter in place," and having provided an "opportunity for the furnisher to save itself from liability by taking the steps required by § 1681s-2(b), Congress put no limit on private enforcement under §§ 1681n & o." *Id.* The district court's holding that a furnisher's liability under section 1681s-2(b) is impliedly limited to instances in which the underlying dispute is bona fide, therefore, is contrary to the scheme designed by Congress.

Furnishers also have a final layer of protection: they are not required to conduct an unreasonably onerous investigation into a conclusory or unsubstantiated dispute. *See Seamans*, 744 F.3d at 864 ("[A] furnisher's post-dispute investigation into a consumer's complaint must be 'reasonable.'" (quoting *SimmsParris*, 652 F.3d at 359)). Courts have held that determining what such an investigation looks like is a fact-intensive inquiry that requires "weighing 'the cost of verifying the accuracy of the information versus the possible harm of reporting inaccurate information.'" *Id.* at 865 (quoting *Johnson v. MBNA Am. Bank, NA*, 357 F.3d 426, 432–33

(4th Cir. 2004)). "[T]he content of the notice of dispute sent by the [consumer reporting agency] to the furnisher" is "an important factor in assessing the reasonableness of a furnisher's investigation." *Id.* It follows that "where a given notice contains only scant or vague allegations of inaccuracy, a more limited investigation may be warranted." *Id.*

Whether a furnisher has satisfied its obligation to conduct a reasonable investigation is a fact-intensive question. The district court correctly acknowledged that "genuine issues of material fact would likely preclude summary judgment on" Waypoint's argument that its "investigation … when considered in light of the scant information provided, was reasonable." *Ingram*, 2021 WL 2681275, at *8 n.3. That is because "the issue of whether a furnisher's post-dispute investigation was reasonable is 'normally a question for trial.'" *Id.* (quoting *Seamans*, 744 F.3d at 864–65).

CONCLUSION

For these reasons, the judgment of the district court as it pertains to the plaintiff's FCRA claims should be reversed.

September 13, 2022

Respectfully submitted,

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COMBINED CERTIFICATIONS

1. Government counsel are not required to be members of the bar of this Court.

2. This brief complies with the requirements of Federal Rule of Appellate Procedure 32(a)(5) and (6) because it has been prepared in 14-point Georgia, a proportionally spaced font.

3. This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 29(a)(5) because it contains 5,671 words, excluding exempt material, according to the count of Microsoft Word.

4. On September 13, 2022, I electronically filed this brief using the CM/ECF system. The participants in this appeal are registered CM/ECF users and will be served through the CM/ECF system.

5. The text of the electronic version of this document is identical to the text of the paper copies that will be provided.

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September 13, 2022 /s/ Ryan Cooper
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