No. 23-2181

In the United States Court of Appeals
for the Third Circuit

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MICHAEL RITZ, *et al*

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QUESTION PRESENTED

Is there an atextual exception to the Fair Credit Reporting Act, (FCRA), 15 U.S.C. § 1681 *et seq.*, that allows entities like the Nissan Motor Acceptance Corporation (Nissan or NMAC) that furnish credit information to consumer reporting agencies (CRAs) to refuse to investigate credit Re -17.017 12 72 6

about individuals. The Consumer Financial Protection Bureau (CFPB or Bureau) has exclusive rule-writing authority for most provisions of the FCRA. *Id*.

furnisher's duty to investigate this sort of "indirect dispute"—i.e., a dispute filed by a consumer with a CRA, which the CRA then forwards to the furnisher.[1]

The district court held that furnishers need not investigate indirect disputes involving purportedly "legal" questions. This decision has no basis in the text of the FCRA, unduly narrows the scope of a furnisher's obligations, and runs counter to the purpose of the FCRA to require a reasonable investigation of consumer disputes. If it stands, the decision would limit consumers' ability to ensure that potentially harmful inaccuracies on their consumer reports are corrected. Given their role in administering and enforcing the FCRA, the Bureau and the Commission have a substantial interest in correcting the decision below and clarifying the governing legal standards.

[1] In contrast, a "direct dispute," addressed by a different provision of the FCRA, 15 U.S.C. § 1681s-2(a)(8), is a dispute that the consumer submits to the relevant furnisher. The FCRA does not provide a private right of action to consumers for violations of furnishers' obligation to investigate direct disputes. *Id*. § 1681s-2(c)(1).

STATEMENT

A. The Fair Credit Reporting Act

1. Information contained in consumer reports has critical effects on Americans' daily lives.[2] Consumer reports are used to evaluate consumers' eligibility for loans and determine the interest rates they pay, ascertain their eligibility for insurance and set the premiums they pay, and assess their eligibility for rental housing and checking accounts. Prospective employers commonly use consumer reports in their hiring decisions. *See generally* Consumer Fin. Prot. Bureau, Key Dimensions and Processes in the U.S. Credit Reporting System (Dec. 2012), https://files.consumerfinance.gov/f/201212_cfpb_credit-reporting-white-paper.pdf.

Given the importance of this information, Congress enacted the FCRA to "prevent consumers from being unjustly damaged because of inaccurate or arbitrary information in a credit report." S. Rep. No. 91-517, at 1 (1969).

2. Since its enactment in 1970, the FCRA has governed the practices of CRAs that collect and compile consumer information into consumer reports for use by credit grantors, insurance companies, employers,

[2] The FCRA generally uses the term "consumer report," *see, e.g.*, 15 U.S.C. § 1681a(d) (defining "consumer report"), rather than the more common term "credit report." This brief uses the two terms interchangeably.

landlords, and other entities. To further ensure that consumer reports are accurate, in 1996 Congress amended the FCRA to also impose "duties on the sources that provide credit information to CRAs, called 'furnishers' in the statute." *Gorman v. Wolpoff & Abramson, LLP*, 584 F.3d 1147, 1153 (9th Cir. 2009). These duties incl

"review all relevant information" that the CRA provides. *Id.* § 1681s-2(b)(1)(B). After the investigation, the furnisher must "report the results of the investigation" to the CRA. *Id*. § 1681s-2(b)(1)(C). In addition, "if the investigation finds that the information is incomplete or inaccurate," the furnisher must report that "to all other consumer reporting agencies to which the person furnished the information and that compile and maintain files on consumers on a nationwide basis." *Id.* § 1681s-2(b)(1)(D). And if disputed information "is found to be inaccurate or incomplete or cannot be verified," the furnisher must also promptly modify, delete, or permanently block the reporting of that information "as appropriate, based on the result of the reinvestigation." *Id.* § 1681s-2(b)(1)(E). These responsibilities are part of the FCRA's overall framework for ensuring accuracy in credit

3. Despite Congress's repeated efforts to promote accuracy, errors persist in consumer reports. Between October 2021 and September 2022, the Bureau received nearly 1,000,000 complaints about credit or consumer reporting, and the most common issue consumers identified was incorrect information on a credit report. *See* Consumer Fin. Prot. Bureau, Annual Report of Credit and Consumer Reporting Complaints (Jan. 2023)("Annual Report"), at 11, https://files.consumerfinance.gov/f/documents/cfpb_fcra-611-e_report_2023-01.pdf (consumerfinance.gov).

B. Facts and Procedural History[4]

In this case, a father and son, Michael and Andrew Ritz, leased a Nissan Sentra. *See Ritz*, 2023 WL 3727892, at *1. Under the terms of their lease agreement with Nissan, they were obligated to return the car by August 9, 2019. *Id*. On that day, they brought the car to their local Nissan dealership. *Id*. at *2. A manager at the dealership refused to accept the car because the Ritzes had not made an appointment. *Id*. For the same reason, the dealer refused to give the Ritzes the odometer-reading verification form that they were required to sign as part of the vehicle-return process. *Id*. The

[4] The facts are drawn from the district court's opinion and documents cited there. *See Ritz v. Nissan-Infiniti LT*, No. 20-cv-13509-GC-DEA, 2023 WL 3727892 (D.N.J. May 30, 2023). The procedural background is drawn from the district court's docket and documents included in it.

Ritzes put the keys on the manager's desk and left. *Id*. They then contacted Nissan's complaint line to report what had happened. *Id*. Later, the Ritzes received a notice that they owed additional money because, Nissan asserted, they had not returned the car on time—and eventually the debt

Eventually, Nissan received notice that the Ritzes had complained to the CFPB. *Id.* Again, the Complaints Department asked the Credit Bureau Team to remove the information. *Id.* The Credit Bureau Team expressed its intent to reject the request again, but a manager from the Complaints Department overrode the Credit Bureau Team's determination. *See id.*; Plaintiffs' Responsive Statement of Facts, ECF No. 67-1, ¶ 34.Nissan then sent a letter to the CFPB explaining the following: (i) "the vehicle was returned on August 9, 2019," (ii) the dealership employees "were late in grounding the vehicle,"[5] and (iii) Nissan had submitted a request to the CRAs to remove the derogatory information from the Ritzes' consumer reports. *See Ritz*, 2023 WL 3727892, at *3.

The Ritzes sued Nissan and the CRAs, alleging violations of the FCRA, including that Nissan failed to conduct reasonable investigations of disputes referred to it by a CRA. *See* Compl., ECF No. 1, ¶ 49. The Ritzes voluntarily dismissed the CRAs. Following discovery, Nissan moved for summary judgment. It argued, among other things, that its reporting was accurate and that, in any case, it did not have to investigate the alleged inaccuracy because it related to legal issues—i.e., whether the Ritzes had

[5] "Grounding" a vehicle appears to refer to the dealer taking possession of the vehicle, inspecting it, and completing paperwork related to its return. *See* Nissan Summ. J. Br., ECF No. 66-5, at 5-6.

satisfied the lease's requirements for returning the car. *See Ritz*, 2023 WL 3727892, at *5.

The district court entered summary judgment for Nissan. It concluded that a reasonable investigation claim under the FCRA must be predicated on factual inaccuracies, and that the Ritzes had objected only to Nissan's legal conclusions. *Id.* at *5-7. The Ritzes appealed. It.

SUMMARY OF ARGUMENT

Section 1681s-2(b) of the Fair Credit Reporting Act requires entities that furnish information to consumer reporting agencies to reasonably investigate consumers' disputes regarding the completeness or accuracy of the information furnished. The statute does not distinguish between legal and factual disputes. The district court's conclusion to the contrary is not supported by the text of the statute.

Nor does the statute authorize furnishers to forgo investigating a "legal" dispute simply because there may be colorable arguments on both sides. That could be true even of purely factual disputes, and, in any event, a furnisher often cannot know whether there are colorable arguments on both sides until after it conducts some investigation (including, for example, assessing whether courts have yet resolved any legal question at issue).

Moreover, the argument that fu

(quoting vehicle lease), involves—according to Nissan—a legal question at the heart of the disagreement between the parties. NMAC SJ Br., ECF No. 66-5, at 17 ("[T]he issue is whether the activities of that day were legally sufficient to cause the vehicle to be grounded and terminate Ritz's monthly payment obligation."). And although Nissan argued in the district court that it is not "qualified" to make such legal assessments, NMAC SJ Br. at 17, Nissan deemed itself "qualified" enough to make a legal assessment of the Ritzes' obligation and continue to bill them and then, later, to assure the Bureau that it had addressed the Ritzes' concerns. Nissan became no less qualified after the Ritzes filed their suit.

Importantly, any burden imposed on furnishers is mitigated by the fact that the investigation—including into a legal dispute—need only be reasonable, a standard that considers the case-specific context of the dispute.

The district court's ruling excepting "legal" disputes risks exposing consumers to more inaccurate credit reporting, conflicts with other circuit decisions, and undercuts the remedial purpose of the FCRA. Moreover, separating "factual" disputes from "legal" ones is difficult to accomplish in practice and would allow furnishers to evade their statutory obligations by characterizing nearly any dispute as a "legal" one. This Court should clarify

that the FCRA requires furnishers to conduct a reasonable investigation when it receives an indirect dispute, regardless of whether the dispute could be described as "legal."

ARGUMENT

The FCRA Requirement for Furnishers to Reasonably Investigate Disputes Applies to Disputes that Implicate Legal Issues, Not Just Disputes Raising Purely Factual Questions

A. The FCRA Applies Equally to Disputes that Could Be Characterized as Legal

Under the FCRA, a furnisher who receives notice of a dispute about the completeness or accuracy of information it provided to a CRA is required to "conduct an investigation with respect to the disputed information," 15 U.S.C. § 1681s-2(b)(1)(A), and this Court has determined that a furnisher's "investigation into a consumer's complaint must be 'reasonable,'" *Scarbo v. Wisdom Fin.*, No. 22-1398, 2022 WL 16829371, at *1 (3d Cir. Nov. 9, 2022).[6] By its terms, the statute requires investigation of *all* such disputes—it does not distinguish disputes that pose "factual" questions from those that implicate "legal" questions.

This is precisely what the Ninth Circuit held in *Gross*. In *Gross*, the furnisher argued that it need only investigate alleged factual inaccuracies.

[6] Requiring a reasonable investigation comports with the FCRA's goal to "protect consumers from the transmi.(Tw Bait.24 .4 (able2[(ig)-5.ged factt(n)-[(Req.27

Appellee's Answering Br., *Gross v. CitiMortgage, Inc.*, No. 20-17160, 2021 WL 2672784, at *24-33 (9th Cir. June 25, 2021). The Ninth Circuit rejected that argument, however, holding that the "FCRA does not categorically exempt legal issues from the investigations that furnishers must conduct," which "means that [the] FCRA will sometimes require furnishers to investigate . . . questions of legal significance." *Gross*, 33 F.4th at 1253.[7]

Nothing in the statutory text implies that the FCRA requires furnishers to investigate only disputes that can be described as "factual." Congress required furnishers to investigate any notice of a dispute about "the completeness or accuracy of information provided by a person to a [CRA]." 1681s-2(b)(1); *see also* 15 U.S.C. § 1681i(a)(1)(A), (a)(2). Nothing about these words suggests Congress intended to exclude from the

[7] The district court here held that "*Gross*'s facts are distinguishable from this case's," because unlike in *Gross*, in which the court determined that the reporting was "patently incorrect," "no statute has made NMAC's reporting inaccurate." *Ritz*, 2023 WL 3727892, at *7. That distinction is unpersuasive and overlooks that *Gross* straightforwardly rejected the sort of law-fact distinction adopted by the district court. *See Gross*, 33 F.4th at 1253. As the Ninth Circuit explained, "[t]he distinction between legal and factual issues is ambiguous, potentially unworkable, and could invite furnishers to evade their investigation obligation by construing the relevant dispute as a legal one." *Id.* (cleaned up).

investigation requirement disputes about information that is incomplete or inaccurate on account of legal issues.[8]

To start, the word "accuracy" is not limited to factual accuracy. Rather, "accuracy"—defined as "freedom from mistake or error"[9]—is also naturally understood to refer to freedom from legal errors. The Supreme Court recently acknowledged as much when it explicitly recognized that "[i]naccurate information" is just as likely to "arise from a mistake of law as a mistake of fact" and that a "legal requirement" can "render[] [information] . . . inaccurate." *Unicolors, Inc. v. H&M Hennes & Mauritz, LP*, *595 U.*S. 178, 185 (2022) (explaining that it would be "inaccurate" for a copyright registrant to treat multiple works as copyright-able under a single copyright application if those works did not satisfy the regulatory

legal, as well as factual, topics. *See, e.g.*, *Wolfington v. Reconstructive Orthopaedic Assocs. II PC*, 935 F.3d 187, 207 (3d Cir. 2019) ("The reasonableness of counsel's conduct depends on a number of factors, including, the amount of time av

while the consumer claims that someone other than her agreed. So, any

no obligation to investigate at all where the dispute cannot be readily and objectively resolved—because a furnisher often cannot know whether a dispute falls in that category until *after* the furnisher conducts some investigation. How much more the furnisher must do to investigate once it determines that an issue is unsettled and there are colorable arguments on both sides is a question about what is "reasonable" under the FCRA, not a question about whether the furnisher must investigate at all.

The district court held that furnishers have no obligation to investigate "legal" disputes, relying on *Chiang v. Verizon New Eng. Inc.*, 595 F.3d 26, 38 (1st Cir. 2010), and courts that have followed that decision. *See Ritz*, 2023 WL 3727892, at *5-6, *7. But *Chiang* does not explain how the FCRA's text or purpose supports its holding that furnishers need not investigate "legal" disputes. And *Chiang* relied, in turn, on prior cases holding that the FCRA does not require *CRA*s to investigate disputes that can be characterized as "legal." Even if it were proper to interpret § 1681i as excusing *CRA*s from investigating legal disputes—which it is not—it would not follow that *furnishers*' investigatory obligations under a different provision, 15 U.S.C. § 1681s-2(b)(1), are similarly limited. *See Gross*, 33 F.4th at 1253 (CRAs' obligations under § 1681i should not control the scope of furnishers' investigatory obligations under § 1681s-2(b)(1)). While some

courts have (incorrectly) concluded that CRAs lack institutional competency to investigate legal disputes, the same could not be said for furnishers: Furnishers generally have superior access to relevant information regarding disputed debts, and furnishers are necessarily considering whether consumers owe the debt when they make decisions about billing and collections. *See Denan v. Trans Union LLC*, 959 F.3d 290, 295 (7th Cir. 2020) ("[I]t makes sense that furnishers shoulder this burden: they assumed the risk and bear the loss of unpaid debt, so they are in a better position to determine the legal validity of a debt."). Thus, furnishers' investigatory obligations "will often be more extensive." *Gross*, 33 F.4th at 1253.

This case demonstrates that furnishers are fully competent to investigate legal disputes, even where there may be colorable arguments on both sides. In choosing to continue billing the Ritzes for the car (and to report that debt to the credit bure

Nissan eventually concluded that was wrong: It determined that the dealership employees—not the Ritzes—were at fault for the dealer being late to "ground" the vehicle, and that the Ritzes had returned it on time within the meaning of the lease. *See Ritz*, 2023 WL 3727892, at *3. Accordingly, Nissan instructed the CRAs to remove the debt from the credit reports. Importantly, Nissan did not hesitate to tell the Bureau of its legal conclusion—i.e., that the dealers' employees were at fault (and that it had instructed the CRAs to remove the debt from the credit reports)—in response to a notice that the Bureau had received a complaint about the transaction. Nissan's contention that it now lacks the ability to make those same legal judgments is unpersuasive: Creditors make legal judgments every day when making decisions about what they can bill consumers for and what debts they can collect—just as Nissan did in this matter.[12] Exempting furnishers from having to in

furnishers view consumers' disputes as involving legal issues. That would be inconsistent with the FCRA's purposes.

In addition, the concern that furnishers are not "qualified" to address "legal" disputes misunderstands the nature of furnishers' obligation to investigate such disputes. Where a dispute raises an unsettled "legal"

Inc., 827 F.3d 1295, 1303 (11th Cir. 2016), a furnisher confronted with a dispute raising a "legal" question might need to review the terms of the contract, a statute, or other relevant authorities to determine whether it has a sufficient legal basis to support the conclusion that the debt is owed in the amount asserted. Thus, a merely "superficial" inquiry will not suffice, *Johnson v. MBNA Am. Bank, N.A.*, 357 F.3d 426, 430 (4th Cir. 2004), and courts reject furnishers' assertions that they satisfy their obligation to investigate simply by going through the motions of conducting an investigation. *See, e.g., Alston v. Wells Fargo Bank, N.A.*, No. 8:12-cv-03671-AW, 2013 WL 990416, at *5 (D. Md. Mar. 12, 2013). To be clear, though, what counts as a sufficient legal basis to verify a debt is context dependent and will turn on the nature of the dispute, the state of the law, and other case-specific factors. *See Hinkle*, 827 F,3d at 1303. It is not a one-size-fits-all assessment. But—and this is the most important point—the furnisher cannot disregard its obligation to reasonably investigate the dispute simply because it raises a contested legal issue.

If, after that investigation, the furnisher has a sufficient basis to reasonably conclude a sufficient b579 -26 Tc -0.eatiotfeAt6 Tbt0T

reasonable investigation of the dispute causes the furnisher to realize that the consumer does not actually owe the debt, or that the furnisher does not have a sufficient basis to verify the debt, the furnisher must delete the debt from the information it furnishes to the CRAs. 15 U.S.C. § 1681s-2(b)(1)(E) (providing that if information is found to be "inaccurate or complete" or "cannot be verified" the furnisher must modify, delete, or permanently block the information, as appropriate).

The upshot is that furnishers must consider consumers' disputes, even if they implicate "legal" questions or other unsettled questions that have colorable arguments on both sides. A court may be the ultimate

C. An Atextual Exception for "Legal" Disputes Could Swallow the Reasonable Investigation Rule

The Court should decline to excuse furnishers from investigating purportedly "legal" disputes for another reason: the exception could swallow the rule. Determining whether a dispute is legal or factual is no easy feat. The line is a fuzzy one, and many inaccurate representations pertaining to an individual's debt obligations arguably could be characterized as legal inaccuracies, particularly given that determining the truth or falsity of the representation could require review of a contract. Recognizing an atextual exception for "legal" disputes, then, could gut the reasonable investigation requirement. The Court should decline the invitation to eviscerate this statutory obligation.

Carving out legal disputes is ripe for abuse and would likely prove unworkable in practice. "[C]lassifying a dispute over a debt as 'factual' or 'legal' will usually prove a frustrating exercise." *Cornock v. Trans Union LLC*, 638 F. Supp. 2d 158, 163 (D.N.H. 2009) (recognizing that a dispute about fraudulently opening a credit card could be characterized as a factual dispute about whether the plaintiff signed the card or a legal dispute over liability for the disputed debt).

context of contracts. If a contract is ambiguous, the court must "interpret[ ]" the contract, and interpretation presents questions of fact about the parties' intent. *Wayne Land & Min. Grp. LLC v. Del. River Basin Comm'n*, 894 F.3d 509, 528 (3d Cir. 2018). But if the contract is unambiguous, then the court must engage in "construction" of the contract, which requires resolving legal questions about the effect of the provisions. *Id*. at 528, 528 n.13. "The distinction between interpretation and construction is not always easy" to apply, however. *John F. Harkins Co., Inc. v. Waldinger Corp*., 796 F.2d 657, 659 (3d Cir. 1986). Similarly, faced with disputes about the accuracy of credit reporting connected to identical contractual provisions, one court might frame the dispute as a factual one about the intent of the parties with regard to ambiguous language, whereas another might consider

Consider another example. The Seventh Circuit recently considered a set of consolidated cases in which the plaintiffs claimed they did not owe certain debts to the creditors listed on

reported that a consumer owed a large "balloon payment" at the end of her car lease, when in fact her car lease contained no such payment obligation whatsoever. Instead, the figure listed as a "balloon payment" on her credit report was simply a notation of the residual value of the car at the end of the lease, as the furnisher itself acknowledged. *Id.* Despite the reporting being clear error, the district court rejected the consumer's FCRA claim because it viewed that "contractual" issue as a "legal" dispute. *Id.* at 13-14. The district court's analysis shows how easily an exclusion for "legal" inaccuracies could create a loophole that would gut the requirement to investigate disputes. Sensibly, then, the Second Circuit reversed, explicitly rejecting a rigid distinction and holding that the FCRA does not contemplate a "threshold inquiry into whether an alleged inaccuracy was 'legal' and therefore non-cognizable under the FCRA." *Sessa*, 74 F.4th at 40.

As a result of the difficulty in cleanly distinguishing legal and factual issues, even in the context of CRAs' obligations under the FCRA, some courts have correctly rejected a formal legal-factual distinction (some even before the recent *Gross* and *Sessa* decisions). For example, "the Ninth Circuit has endorsed holding a CRA liable under [the FCRA] when it 'overlooks or misinterprets' . . . publicly available documents of *legal*

significance." *Nelson v. Ocwen Loan Servicing, LLC*, No. 3:14-cv-00419-HZ, 2014 WL 2866841, at *5 (D. Or. June 23, 2014) (emphasis added) (relying on *Dennis v. BEH-1, LLC*, 520 F.3d 1066, 1068-70 (9th Cir. 2008)). Similarly, the Second Circuit, while holding that "[t]he unresolved legal question . . . render[ed] [a] claim non-cognizable under the FCRA," explained that "this holding does not mean that credit reporting agencies are never required by the FCRA to accurately report information derived from the readily verifiable and straightforward application of law to facts." *Mader*, 56 F.4th at 270. And even courts that maintain a more rigid factual-legal distinction have found that if a legal issue already has been adjudicated by another court or otherwise resolved, a dispute raising that issue should be considered factual, rather than legal. *See, e.g.*, *Losch v. Nationstar Mortg.*, LLC, 995 F.3d 937, 946-47 (11th Cir. 2021); *Hopkins v. I.C. Sys.*, No. 18-cv-2063, 2020 WL 2557134, at *8 (E.D. Pa. May 5, 2020).

Of course, even under the framework proposed by Nissan, just because a furnisher might classify a dispute as "legal" does not necessarily mean a court would agree with that classification. But furnishers with sufficient resources could afford to raise this as a defense to every claim involving an insufficient investigation. This approach would disadvantage consumers and tie up courts with litigation about formalistic labels, even in

cases that should otherwise be easily resolved on summary judgment for the consumers (because the furnisher conducted no investigation, or such a minimal investigation that no court could consider it reasonable).

Given the difficulty in distinguishing "legal" from "factual" disputes, this Court should clarify there is no exemption in the FCRA's reasonable investigation requirement for disputes that raise legal questions. Such an exemption would undermine the purpose of the reasonable-investigation requirement to ensure accuracy in credit reports. It would also result in an unworkable standard where mixed questions of fact and law are presented, and it would encourage furnishers to ignore their statutory obligations to conduct a reasonable investigation when a dispute could be characterized as "legal."

CONCLUSION

For the foregoing reasons, this Court should hold that, under the FCRA, furnishers must reasonably investigate indirect disputes, regardless of whether the dispute can be characterized as legal.

DATED: February 07, 2024 Respectfully submitted,

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