No. 24-10147

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Jessica Nelson,

Plaintiff-Appellant,

v.

Experian Information Solutions, Inc.,

Defendant-Appellee.

On Appeal from the United States District Court
for the Northern District of Alabama

Case No. 4:21-cv-00894

Hon. Corey L. Maze

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

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to 11th Cir. Rule 26.1, counsel for *amici curiae* the Consumer Financial Protection Bureau (CFPB) and the Federal Trade Commission (FTC) certify that the following additional persons and entities have an interest in the outcome of these appeals:

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INTEREST OF AMICI

The Consumer Financial Protection Bureau (CFPB) and the Federal Trade Commission (FTC or Commission) file this brief pursuant to Fed. R. App. P. 29(a)(2).

To ensure fair and accurate credit reporting, the Fair Credit Reporting Act (FCRA), 15 U.S.C. § 1681 *et seq*., imposes various requirements on consumer reporting agencies (CRAs), such as Experian Information Solutions (Experian), and the companies that provide those agencies information about consumers. The CFPB has exclusive rule-writing authority for most provisions of the FCRA. *Id.* § 1681s(e). The CFPB also interprets and, along with other federal and state regulators, enforces the law's requirements. *Id.* § 1681s(a)-(c).

The Federal Trade Commission 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. The Commission enforces the FCRA through Section 5 of the FTC Act. Congress deemed a violation of the FCRA to "constitute an unfair or deceptive act or practice in commerce, in violation of section 5(a) of the [FTC Act]." *Id.* § 1681s(a). 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.*

This case concerns the FCRA’s requirement that a CRA “conduct a reasonable reinvestigation” in response to a consumer’s dispute regarding information “contained in [the] consumer’s file.” *Id.* § 1681i(a)(1)(A). The questions presented on appeal are (1) whether this requirement applies to disputes concerning personal identifying information—here, name, address, and Social Security number information—and (2) if so, whether Experian willfully or negligently violated the FCRA. The district court correctly answered the first question in the affirmative; however, the court erred in holding that Experian did not willfully or negligently violate the Act—including by applying the wrong legal standard for determining negligent violations.

Given their roles in administering and enforcing the FCRA, the CFPB and the FTC have a substantial interest in the interpretation and application of the Act’s reasonable reinvestigation requirement for CRAs.

STATEMENT

A. The Fair Credit Reporting Act

CRAs collect and assemble credit, public record, and other consumer information into consumer reports.[1] Creditors, insurers, landlords, employers, and others use the information in these reports to make decisions that can have a significant impact on consumers. For example, creditors use information in consumer reports to determine whether, and on what terms, to extend credit to a particular consumer, while landlords and employers use background screening reports in deciding whether to rent to prospective tenants and hire employees, respectively. Inaccurate, derogatory information in consumer reports therefore can have significant adverse impacts on consumers, such as lost rental, housing, and employment opportunities; higher interest rates or otherwise less favorable credit terms; or the outright denial of credit.

Congress thus passed the FCRA in 1970 in order 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). One way the Act does this is by imposing certain requirements on CRAs. Relevant here is the FCRA's requirement that CRAs conduct investigations in response to consumers' disputes. Specifically,

[1] 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.

the Act provides that "if the completeness or accuracy of any item of information contained in a consumer's file at a [CRA] is disputed by the consumer and the consumer notifies the agency . . . of such dispute, the agency shall, free of charge, conduct a reasonable reinvestigation to determine whether the disputed information is inaccurate and record the current status of the disputed information, or delete the item from the file." 15 U.S.C. § 1681i(a)(1)(A).

Following a consumer's dispute, the CRA must promptly notify the furnisher of the information that has been disputed. *Id*. § 1681i(a)(2). In conducting the reinvestigation, the CRA "shall review and consider all relevant information submitted by the consumer . . . with respect to [the] disputed information." *Id*. § 1681i(a)(4). Information in a consumer's file which is "found to be inaccurate or incomplete or cannot be verified," must be "promptly" deleted or modified as appropriate, and the CRA must notify the furnisher. *Id*. § 1681i(a)(5). Finally, "not later than 5 business days after the completion of the reinvestigation," the CRA must provide the consumer with "written notice . . . of the results of the reinvestigation." *Id*. § 1681i(a)(6).[2]

[2] Although not implicated in this appeal, the FCRA also provides that a CRA may terminate a reinvestigation "if the [CRA] reasonably determines that the dispute by the consumer is frivolous or irrelevant." 15 U.S.C. § 1681i(a)(3)(A). However, the CRA must notify the consumer "not later than 5 business days after making such a determination" and include the reasons for that determination. *Id*. § 1681i(a)(3)(B)-(C).

The FCRA also authorizes consumers to request their information from CRAs. In particular, the Act provides that upon a consumer's request, a CRA "shall . . . clearly and accurately disclose to the consumer" six categories of information, including "[a]ll information in the consumer's file at the time of the request." *Id*. § 1681g(a)(1). However, "if the consumer . . . requests that the first 5 digits of the social security number . . . not be included in the disclosure and the [CRA] has received appropriate proof of the identity of the requester, the [CRA] shall so truncate such number" before making the disclosure to the consumer. *Id*. § 1681g(a)(1)(A).

This disclosure provision works in tandem with the FCRA's reasonable reinvestigation requirement by "enabl[ing] consumers to obtain information in order to dispute any potential inaccuracies in the[ir] file." *Selvam* v. *Experian Info. Sols., Inc.,* 651 F. App'x 29, 33 (2d Cir. 2016); *see also* Fair Credit Reporting; File Disclosure, 89 Fed. Reg. 4167, 4170 (Jan. 23, 2024) (noting that Congress designed the FCRA so that consumers could request information in their file and then "correct inaccurate or misleading data").

Finally, the FCRA creates a private right of action against CRAs for the negligent or willful violation of any duty imposed under the statute, including the Act's reasonable reinvestigation requirement. *See* 15 U.S.C. §§ 1681o, 1681n.

B. Facts and Procedural History

Plaintiff Jessica Nelson contacted Experian identifying several errors in her Experian credit report: (1) her maiden name was used and misspelled, (2) two addresses were listed that were not hers, and (3) her Social Security number (SSN) was wrong. Appendix at 516. Experian responded by letter instructing Nelson to contact either the sources of the inaccurate information or Experian if Nelson needed help identifying those sources. Experian did not delete the disputed information, notify any furnishers of Nelson's dispute, or provide the sources of the disputed information. *Id*.

Nelson then sent a second letter reiterating her dispute. *Id*. This time Experian deleted the misspelled maiden name, the incorrect SSN, and one of the two addresses. Experian did not delete the other address because it was associated with an open credit account. Experian did not notify Nelson of any of this; nor did Experian inform the furnishers that it deleted certain information. Instead, Experian again instructed Nelson to contact either the sources of the information, without providing those sources, or Experian if she needed help identifying the sources. *Id*. Thinking she had been ignored again, Nelson sent a third dispute letter. As before, Experian did not tell Nelson that it had deleted her maiden name, the incorrect SSN, and one address. Nor did Experian explain that it did not delete the

other address because it was associated with an open credit account. Experian also again did not notify any furnishers that it had deleted certain information. *Id*.

Nelson subsequently brought a putative class action alleging Experian willfully or negligently violated the FCRA's reinvestigation requirement in 15 U.S.C. § 1681i by failing to reinvestigate her dispute regarding her name, address, and SSN information. *See generally id*. at 25 (Compl.). At summary judgment, Experian argued that it was not required to conduct any reinvestigation because such information fell outside the scope of the FCRA's reinvestigation provision. *Id*. at 520-521. The court disagreed but granted Experian's motion for summary judgment. *Id*. at 523, 527.

First, the court held that the FCRA's reinvestigation requirement applies to the personal identifying information disputed here. *Id*. at 523. The court found that numerous provisions in the FCRA reflected Congress's intent to include name, address, and SSN information in the ambit of "any item of information contained in a consumer's file." *Id*. However, the court also held that Experian did not willfully or negligently violate the FCRA because Experian's interpretation of the scope of the reinvestigation requirement was, in the court's view, "based on the text of the Act, judicial precedent, or guidance from administrative agencies"—or, as the court described it, not "objectively unreasonable." *Id*. at 524.

Nelson then moved to amend the judgment, arguing that the district court applied the wrong standard for determining negligent violations (under Section 1681o). *See id*. at 595. Specifically, Nelson argued that the standard the court had used applies only to *willful* violations (under Section 1681n). *Id*. at 597-99. And under the proper *negligence* standard, Nelson argued, the court should not have granted summary judgment to Experian on her Section 1681o claim. *Id*. at 599-602. The court disagreed and denied Nelson's motion. *Id*. at 606. Nelson timely appealed the judgment and the denial of the motion to amend the judgment. *Id*. at 618.

SUMMARY OF ARGUMENT

The Fair Credit Reporting Act (FCRA) provides that if a consumer contacts a consumer reporting agency (CRA) to dispute the "completeness or accuracy of any item of information contained in [the] consumer's file," then the CRA shall "conduct a reasonable reinvestigation" of the disputed information. 15 U.S.C. § 1681i(a)(1)(A). This provision serves an important role in furthering the FCRA's goal of promoting "fair and accurate credit reporting," *id*. § 1681(a)(1), by giving consumers the power to ensure the accuracy of the information that CRAs compile about them that is then used by others to make significant decisions affecting consumers' lives.

The district court correctly held that this reinvestigation requirement applies to consumer disputes regarding name, address, and Social Security number (SSN) information. The relevant provision covers disputes regarding "any item of information contained in a consumer's file," *id.* § 1681i(a)(1)(A), and the FCRA defines "file" as "all of the information on [a] consumer recorded and retained by a [CRA] regardless of how the information is stored," *id*. § 1681a(g). That plainly includes identifying information such as name, address, and SSN. Various other provisions reinforce that commonsense conclusion. For example, the FCRA's disclosure provision provides that when requesting "all information in the consumer's file," the consumer can ask the CRA to redact the first five digits from her SSN before the CRA discloses the SSN it has on file. *Id.* § 1681g(a)(1).

The district court erred, however, in holding that Experian did not negligently or willfully violate the FCRA because, in the court's opinion, Experian's view was "based on the text of the Act, judicial precedent, or guidance from administrative agencies" and was thus "objectively reasonable." It was not. The text of the statute makes clear that personal identifying information, such as names, addresses, and SSNs, are "information contained in [the] consumer's file" to which the reinvestigation requirement applies. The two out-of-circuit decisions on which Experian sought to rely in the district court are not to the contrary. And administrative guidance does not provide any support for Experian's view that it

was under no obligation to investigate disputes about the accuracy of information as fundamental as name, address, and SSN.

The district court compounded its error by applying the standard for reckless (and thus willful) violations under Section 1681n to assess whether Experian's violation of the statute was negligent under Section 1681o. This Court has previously recognized that different standards govern whether a CRA recklessly (and thus willfully) or negligently violated the FCRA. In particular, as this Court held in *Losch v. Nationstar Mortg. LLC*, 995 F.3d 937, 947 (11th Cir. 2021), identifying some basis in text, precedent, or administrative guidance for an ultimately wrong interpretation is insufficient to defeat a negligence claim. Thus, even if Experian's view could find any support in text, precedent, or agency guidance, that was the wrong standard to apply to determine whether Experian's violation was negligent.

ARGUMENT

The FCRA provides that if a consumer contacts a CRA to dispute the "completeness or accuracy of any item of information contained in [the] consumer's file at [the CRA] . . ., the agency shall, free of charge, conduct a reasonable reinvestigation to determine whether the disputed information is inaccurate and record the current status of the disputed information, or delete the item from the file." 15 U.S.C. § 1681i(a)(1)(A). This provision helps further the

FCRA's goal of promoting "fair and accurate credit reporting," *id*. § 1681(a)(1), by giving consumers the ability to correct incomplete and inaccurate information compiled by CRAs.

The district court correctly held that the FCRA's reinvestigation provision applies to consumer disputes regarding personal identifying information—here, name, address, and SSN information. However, the court erred in holding that Experian did not willfully violate the Act when it reasoned that Experian's contrary view could reasonably have found support in the courts—i.e., was "based on the text of the Act, judicial precedent, or guidance from administrative agencies." Finally, the district court compounded that error when it applied this standard for reckless (and thus willful) violations to determine whether Experian negligently violated the Act.

I. The FCRA's reinvestigation requirement applies to consumer disputes regarding name, address, and Social Security number information.

The FCRA requires CRAs to reinvestigate consumer disputes regarding "any item of information contained in a consumer's file." 15 U.S.C. § 1681i(a)(1)(A). "As in any case of statutory construction, [the] analysis begins with the language of the statute," *Santos v. Healthcare Revenue Recovery Grp., LLC*, 90 F.4th 1144, 1151 (11th Cir. 2024), and the language of the FCRA shows that name, address, and SSN information qualify as "information contained in a consumer's file."

To start, the FCRA defines "file" as "all of the information on [a] consumer recorded and retained by a [CRA] regardless of how the information is stored." 15 U.S.C. § 1681a(g). There is no dispute that CRAs, including Experian here, "record[] and retain[]" consumers' names, addresses, and SSN information. Indeed, on Experian's own website, it lists "personal information," including name, address, and SSN, under "types of information you may see on your Experian credit report." *See* Experian, Understanding Your Experian Credit Report (March 4, 2021), https://www.experian.com/blogs/ask-experian/credit-education/report-basics/understanding-your-experian-credit-report/. Experian would not be able to provide this information if it did not record and retain it.

Other provisions of the FCRA confirm this straightforward understanding of "information contained in a consumer's file." Take the FCRA's disclosure provision at 15 U.S.C. § 1681g. There, the FCRA provides that upon a consumer's request, a CRA shall "disclose to the consumer . . . [a]ll information in the consumer's *file* . . . except that . . . if the consumer to whom the *file* relates requests that the first 5 digits of the social security number . . . not be included in the disclosure . . . the [CRA] shall so truncate such number in such disclosure." *Id.* § 1681g(a)(1) (emphases added). In other words, when requesting information in the consumer's "file," the consumer can ask the CRA to redact five of her nine

SSN digits before the CRA discloses the SSN it has on file. This necessarily means that SSN information is "information contained in a consumer's file."

Similarly, 15 U.S.C. § 1681c(h) places a consumer's address inside a consumer's file. Under that provision, "[i]f a person has requested a consumer report relating to a consumer from a [nationwide CRA], the request includes an address for the consumer that substantially differs from the *addresses in the file* of the consumer, and the agency provides a consumer report in response to the request, the [CRA] shall notify the requester of the existence of the discrepancy." *Id*. (emphasis added). This provision necessarily means that address information is "information contained in a consumer's file."

Other provisions point the same way. Sections 1681f and 1681u, for example, provide that a CRA may "furnish identifying information respecting any consumer"—specifically including "name," "address," and "former addresses"—to a governmental agency. Meanwhile, Section 1681b(c) authorizes CRAs to "furnish a consumer report" in connection with certain transactions not initiated by a consumer but limits the specific information that can be furnished to, among other things, "the name and address of a consumer." These provisions demonstrate that identifying information such as name and address is information that CRAs routinely "record[] and retain[]" in a consumer's file.

Experian's contrary interpretation is not only atextual but would lead to bizarre results. In particular, the FCRA provides that a CRA "shall furnish a consumer report of a consumer and all other *information in a consumer's file* to a government agency authorized to conduct investigations of . . . international terrorism." *Id*. § 1681v(a) (emphasis added). If "information in a consumer's file" does not include identifying information, then it could produce the unlikely result that CRAs would not have to disclose basic identifying information when requested by government agencies for counterterrorism purposes.

Interpreting the FCRA according to its plain terms not only avoids that bizarre result but is consistent with the Act's broader stated purpose to ensure fair and accurate reporting about consumers. *See id*. § 1681(a)–(b). One way of doing that is by ensuring that the information furnished about a consumer is actually about that consumer. And that is precisely what FCRA's reinvestigation requirement seeks to accomplish. If a consumer's identifying information is inaccurate, then that can lead to CRAs attributing furnished information to the wrong person. *See* Fair Credit Reporting; Name-Only Matching Procedures, 86 Fed. Reg. 62468, 62469 (Nov. 10, 2021) (advisory opinion). This in turn can lead to users of consumer reports attributing incorrect information to a particular consumer. Such errors can have serious consequences for consumers, such as lost rental, housing, and employment opportunities; higher interest rates or otherwise

less favorable credit terms; or just the outright denial of credit—all because negative information about someone else was wrongly found on their credit report. But by requiring CRAs to reinvestigate disputes concerning identifying information, including name, address, and SSN, the FCRA gives consumers the power to help ensure the information that CRAs furnish is accurate.

For all these reasons, the FCRA's reinvestigation requirement in 15 U.S.C. § 1681i(a) applies to disputes regarding name, address, and SSN information.

II. Experian's contrary view is not supported by the FCRA's text, judicial precedent, or guidance from administrative agencies and therefore serves as no defense to the willfulness claim.

Experian argued in the district court that the FCRA's reinvestigation provision did not require it to investigate Nelson's disputes about her name, addresses, and SSN information because information contained in a consumer's "file is limited to information that might be furnished, or has been furnished in a consumer report, and a consumer's name, SSN, and address does not itself constitute a credit report because it does not bear on an individual's creditworthiness." App. at 144 (Experian's Mot. Summ. J. at 24) (cleaned up).

The district court correctly rejected this argument. However, the court then erred in concluding that Experian did not willfully violate the FCRA because, the court believed, Experian's interpretation was "based on the text of the Act, judicial precedent, or guidance from administrative agencies"—or, as the district court put

it, not "objectively unreasonable." *See id*. at 10. But Experian's interpretation does not have the support claimed by the district court.

To establish a willful violation, the consumer must show that Experian "either knowingly or recklessly" violated the FCRA. *Pedro v. Equifax, Inc.*, 868 F.3d 1275, 1280 (11th Cir. 2017). A CRA "recklessly violates the Act if it takes an action that 'is not only a violation under a reasonable reading of the statute's terms, but shows that the company ran a risk of violating the law substantially greater than the risk associated with a reading that was merely careless.'" *Losch*, 995 F.3d at 947 (11th Cir. 2021) (quoting *Safeco Ins. Co. of Am. v. Burr*, 551 U.S. 47, 69 (2007)).

As this Court has previously explained, this standard means that a defendant does not act with reckless disregard for whether its conduct violates the statute—and thus does not willfully violate the FCRA—where the defendant "followed an interpretation that could reasonably have found support in the courts." *Id*. (citing *Safeco*, 551 U.S. at 70 n.20). Such an interpretation is one "based on the text of the Act, judicial precedent, or guidance from administrative agencies." *Pedro*, 868 F.3d at 1280 (citing *Safeco*, 551 U.S. at 70). That is not the case here.

A. The FCRA's text does not support Experian's interpretation.

Experian's argument that the FCRA's reinvestigation requirement applies only to information that would itself constitute a credit report finds no support in the FCRA's text.

As discussed above, the FCRA's reinvestigation requirement explicitly applies to "any item of information contained in a consumer's *file*"—not in a consumer's credit report. *See* 15 U.S.C. § 1681i(a)(1)(A) (emphasis added). "File" and "consumer report" have distinct definitions, *compare id*. § 1681a(g), *with id*. § 1681a(d), and as this Court has recognized—in a case in which Experian was a party—"Congress chose to give different statutory definitions to the terms 'consumer report' and 'file,' and used the different terms in different subsections." *Collins v. Experian Info. Sols., Inc.*, 775 F.3d 1330, 1335 (11th Cir. 2015).

That Congress intentionally distinguished between "file" and "consumer report" in the FCRA's reinvestigation requirement is further highlighted later in that section. Congress required that a CRA's post-reinvestigation communication to the consumer include "a consumer report that is based upon the consumer's file as that file is revised as a result of the reinvestigation." 15 U.S.C. § 1681i(a)(6)(B). This sentence would make no sense if "file" somehow meant "consumer report." *See generally Iraola & CIA, SA v. Kimberly–Clark Corp.*, 232 F.3d 854, 859 (11th Cir. 2000) ("[W]hen Congress uses different language in similar sections, it intends

different meanings."). Indeed, this Court has previously explained that "[t]o conflate the meaning of "consumer report" with "file" [in Section 1681i(a)(6)(B)(ii)] would make the terms redundant." *Nunnally v. Equifax Info. Servs., LLC*, 451 F.3d 768, 773 (11th Cir. 2006).

Nevertheless, Experian appears to argue that the FCRA's disclosure requirements in 15 U.S.C. § 1681g(a) support its interpretation. Not so. That provision provides that upon a consumer's request, a CRA "shall . . . clearly and accurately disclose to the consumer" six categories of information, including "[a]ll information in the consumer's file at the time of the request." *Id*. § 1681g(a). Because Section 1681g(a) then lists additional categories of information that CRAs must disclose to consumers (such as the sources of information provided to CRAs, *id*. § 1681g(a)(2)), Experian reasons that information contained in a consumer's "file" cannot actually mean everything in the consumer's file, i.e., everything that a CRA retains and records on a consumer. But even if that's true, that does not answer whether personal identifying information *is* information included in a consumer's "file." And, for the reasons discussed above, numerous other provisions of the FCRA's text, including Section 1681g(a) itself, confirm that "any

item of information contained in a consumer's file" includes name, address, and SSN information.[3]

The facts of this case suggest that Experian itself understands this. Nelson noticed the errors regarding her personal identifying information because she made a disclosure request pursuant to Section 1681g and, in response to that request, Experian produced (among other things) the erroneous personal identifying information. *See* App. at 542-43. Experian presumably provided this information to Nelson because it concluded that the information fell under the category of "[a]ll information in the consumer's file." *See* 15 U.S.C. § 1681g(a)(1). Nelson's name, address, and SSN information would not be covered by any of the other categories of information required to be disclosed under Section 1681g. *See id.* § 1681g(a)(2)-(6).

Finally, any argument that the FCRA's reinvestigation requirement should be limited only to information that is *in* a consumer's credit report would not help Experian in this case. Names, addresses, and SSN information are commonly

[3] For this reason, the Court does not need to identify the full scope of information covered by the FCRA's reinvestigation requirement to resolve this appeal. Nor does the Court need to address whether a CRA's communication containing only personal identifying information itself constitutes a consumer report—something that the CFPB is considering addressing in a future rulemaking. *See* CFPB, Small Business Advisory Review Panel For Consumer Reporting Rulemaking: Outline of Proposals and Alternatives Under Consideration, at 10-11 (Sept. 15, 2023), https://files.consumerfinance.gov/f/documents/cfpb_consumer-reporting-rule-sbrefa_outline-of-proposals.pdf.

found in such reports—something Experian itself advertises. *See* Experian, Understanding Your Experian Credit Report (March 4, 2021), https://www.experian.com/blogs/ask-experian/credit-education/report-basics/understanding-your-experian-credit-report/.[4]

B. Judicial precedent does not support Experian's view.

Like the FCRA's text, judicial precedent cuts against Experian's view that it had no obligation to investigate Nelson's dispute about her name, addresses, and SSN information retained by Experian. In the district court, Experian relied on two decisions by other circuits involving a different question about the meaning of "information contained in a consumer's file." *See Gillespie v. Trans Union Corp.*, 482 F.3d 907 (7th Cir. 2007); *Tailford v. Experian Info. Sols., Inc.*, 26 F.4th 1092 (9th Cir. 2022). But neither support Experian's view that personal identifying information is exempt from the FCRA's reinvestigation requirement. And this Court's decision in *Collins*—in which Experian was a party—undermines Experian's position here. *See Collins*, 775 F.3d 1330.

Neither of the two out-of-circuit decisions suggests that information in a consumer's "file" is limited to—as Experian argues—information that itself

[4] Experian is not unique in this regard. Other CRAs include personal identifying information, such as name, address, and SSN, in their consumer reports. *See, e.g.,* Equifax, Sample Consumer Report, *available at* https://assets.equifax.com/marketing/US/assets/oneview_sample_graphic_report_twn_datax_nctue_nov21.pdf.

constitutes a consumer report. At most, those cases support the view that "any item of information contained in a consumer's file" generally means information that a CRA might furnish or has furnished *in* a consumer report. *See Gillespie*, 482 F.3d at 909; *Tailford*, 26 F.4th at 1101. In *Gillespie*, the Seventh Circuit held that the FCRA's requirement that a CRA disclose to a consumer "[a]ll information in the consumer's file" under Section 1681g did not mean that a CRA had to disclose everything that the CRA recorded and maintained on the consumer; rather, the CRA had to disclose only "information included in a consumer report." 482 F.3d at 910 (holding "purge dates," i.e., when information would be deleted from consumer reports, was not "information contained in a consumer's file" subject to disclosure). Similarly, in *Tailford*, the Ninth Circuit held that the FCRA's requirement in Section 1681g that CRAs disclose "[a]ll information in the consumer's file" applied only to information that has "been included by the CRA in a consumer report in the past or planned to be included in the future." 26 F.4th at 1101-02 (holding "soft inquiries" from third-parties, behavioral data about consumers maintained in the CRA's database, and dates on which consumers' employment dates were reported to the CRA were not "information in a consumer's file" subject to disclosure). But even if those holdings are correct, they do not help Experian here because, as noted above, name, address, and SSN information are commonly found in consumer reports.

Moreover, this Court's decision in *Collins v. Experian Information Solutions, Inc.*, 775 F.3d 1330 (11th Cir. 2015), further undercuts Experian's attempted reliance on *Gillespie* and *Tailford*. In that case—just as in this one—Experian attempted to defeat a consumer's reasonable reinvestigation claim under Section 1681i by reading into that provision limitations that do not appear in the text of the statute. *See id.* at 1334 (describing Experian's argument that "a plaintiff seeking damages for a negligent violation of … § 1681i(a), must show the inaccurate information was published to a third party"). The Court rejected that view, instead embracing "the plain meaning of the statutory language" and emphasizing the FCRA's carefully delineated definition of the term "file." *Id.* at 1334-35. Thus, while *Collins* did not address the specific issue raised in this case about personal identifying information, it reinforces that Experian's interpretation of that provision is inconsistent with relevant judicial precedent.

C. Administrative guidance does not support Experian's view.

Finally, guidance from administrative agencies does not support Experian's view of its obligations under Section 1681i.

In the district court, Experian pointed to a provision in the FCRA's implementing regulation, Regulation V, exempting *furnishers*—entities that provide CRAs information about consumers—from investigating a consumer's direct dispute with the furnisher that relates to "[t]he consumer's identifying

information . . . such as name(s), date of birth, Social Security number, telephone number(s), or address(es)." 12 C.F.R. § 1022.43(b)(1)(i). Despite this provision applying expressly to furnishers—and not CRAs—Experian nevertheless claims that it "makes no sense to read the FCRA to require CRAs to reinvestigate the accuracy of names, addresses, and SSNs when regulations remove the same duty from furnishers of that information." App. at 526. But it does. That provision was added to Regulation V in 2009 because Congress specifically required federal regulators to issue rules for *furnishers* to identify the circumstances under which a furnisher must investigate consumer disputes submitted directly to the furnisher. *See* Pub. L. No. 108-159, sec. 312, 117 Stat. 1952, 1989-90 (2003) (codified at 15 U.S.C. § 1681s-2(a)(8)(A)). Congress did not require regulators to do the same for CRAs, and the agencies did not do so when establishing the rules governing furnishers.

Moreover, in adopting the rule exempting furnishers from investigating personal identifying information (in the context of direct disputes), the agencies explained that it was for reasons that wouldn't apply to a CRA. The preamble to the rule noted that while a "consumer report may include identifying information about a consumer (e.g., name, address), . . . [a]ny given furnisher [would be] the source of some, but not all, of th[at] information." 74 Fed. Reg. 31484, 31498 (July 1, 2009). Thus, the agencies "believe[d] that a furnisher should be responsible for

investigating disputes only about information regarding an account or other relationship between the furnisher and consumer." *Id.* CRAs are not similarly limited. It therefore makes sense for CRAs to investigate disputes regarding personal identifying information—information that CRAs undoubtedly compile and then provide in consumer reports—while exempting furnishers who may not have been the source of the particular identifying information.

There is no doubt that Congress and federal regulators are well aware of the differences between CRAs and furnishers and the roles they play in the credit reporting market. And while the regulators exempted furnishers from investigating direct disputes concerning personal identifying information, neither the regulators nor Congress has done the same for CRAs. Thus, Experian cannot rely on Regulation V's provisions for furnishers to support the view that a CRA does not need to investigate a consumer's dispute regarding name, address, or SSN information.

Nor can Experian rely on guidance from the FTC. The FTC's 2011 staff report on the FCRA notes that the "term 'file' includes all information on the consumer that is recorded and retained by a CRA . . . that has been or might be provided in a consumer report." FTC, 40 Years of Experience with the Fair Credit Reporting Act: An FTC Staff Report with Summary of Interpretations, at 32 (2011), https://www.ftc.gov/sites/default/files/documents/reports/40-years-

experience-fair-credit-reporting-act-ftc-staff-report-summary-interpretations/110720fcrareport.pdf.[5] Like the judicial precedent discussed above, this guidance cannot be reconciled with Experian's interpretation. The FTC staff report does not state or even hint that the FCRA's reinvestigation requirement is limited to information that itself *constitutes* a credit report. And any suggestion that the requirement applies only to information that a CRA has furnished or might furnish *in* a consumer report does not help Experian because, again, name, address, and SSN information routinely is included in consumer reports.

* * *

Experian's view of the FCRA's reinvestigation requirement runs counter to the FCRA's text and is not supported by judicial precedent or administrative guidance. The district court thus erred in holding that Experian did not willfully violate the FCRA because its interpretation could reasonably have found support in the courts.

III. In any event, the district court incorrectly applied the standard for recklessness to determine whether Experian was negligent.

The district court also erred in holding as a matter of law that no jury could find that Experian *negligently* violated the FCRA because it believed that

[5] The district court analyzed the FTC's 1990 commentary on the FCRA. App. at 525. However, in 2011, the FTC rescinded that commentary. *See* 76 Fed. Reg. 44462, 44463 (July 26, 2011).

Experian's interpretation was "based on the text of the Act, judicial precedent, or guidance from administrative agencies." In so holding, the district court applied the standard for determining recklessness (and thus willfulness) under the Act to negligence claims. But different standards apply to reckless (and thus willful) violations under Section 1681n and negligent violations under Section 1681o.

Indeed, the district court's holding directly conflicts with this Court's decision in *Losch*, 995 F.3d at 945-47. There, a consumer alleged that Experian willfully or negligently violated Section 1681i of the FCRA by failing to conduct a reasonable reinvestigation of disputed information. *Id.* at 941. Noting judicial precedent from other circuits that supported Experian's view in that case, this Court concluded that the consumer's willfulness claim could not proceed because "Experian's interpretation could 'reasonably have found support in the courts.'" *Id.* at 947 (quoting *Safeco*, 551 U.S. at 70 n.20). Importantly, however, the Court allowed the consumer's *negligence* claim to proceed—recognizing that merely identifying some basis in text, precedent, or administrative guidance for Experian's interpretation was insufficient to defeat a *negligence* claim. *Id.*

This Court similarly recognized in *Collins* that different standards govern whether a CRA recklessly (and thus willfully) or negligently violated the FCRA. *See* 775 F.3d at 1336. The Court explained, for example, that the district court in that case "did not err in finding that while a jury could find Experian's

reinvestigation conduct negligent" under Section 1681o, Experian's violation was not willful under Section 1681n because it "did not rise to the level of running 'a risk of violating the law substantially greater than the risk associated with a reading that was merely careless.'" *Id.* (quoting *Safeco*, 551 U.S. at 69).

Rather than following *Losch* and *Collins*, the district court applied the test for whether Experian recklessly (and thus willfully) violated the FCRA's reinvestigation requirement to determine whether Experian negligently violated the Act. In doing so, it cited this Court's decision in *Pedro v. Equifax, Inc.*, 868 F.3d 1275 (11th Cir. 2017). But that decision analyzed a claim that a CRA had willfully violated the statute; it did not consider the standard that applies to alleged negligent violations, much less hold that the same standard applies to both. *See, e.g.*, *id.* at 1277-78 (noting that "Pedro … filed a complaint that TransUnion willfully violated … the Act" and citing Section 1681n). The district court's use of a single test was therefore error.

CONCLUSION

For the foregoing reasons, the Court should hold that (1) the FCRA's reinvestigation requirement in 15 U.S.C. § 1681i applies to disputes regarding name, address, and Social Security number information; (2) Experian's contrary interpretation could not reasonably have found support in the courts; and (3) the

district court erred in applying the standard for recklessness (and thus willfulness) under the FCRA to negligence claims.

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because, excluding the parts of the brief exempted by Fed. R. App. P. Rule 32(f), this brief contains 5965 words.

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 and 14-point Times New Roman font.

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CERTIFICATE OF SERVICE

I hereby certify that on March 29, 2024, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Eleventh Circuit by using the appellate CM/ECF system. The participants in the case are registered CM/ECF users and service will be accomplished by the appellate CM/ECF system.

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