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

MOTION OF THE CONSUMER DATA INDUSTRY ASSOCIATION FOR LEAVE TO FILE AN *AMICUS CURIAE* BRIEF IN SUPPORT OF DEFENDANT-APPELLEE

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SUPPLEMENTAL STATEMENT OF INTERESTED PARTIES

Pursuant to Federal Rule of Appellate Procedure 26.1 and Eleventh Circuit Rule 26.1-1 through 26.1-3 and 29-2, counsel for *amicus* certifies that, in addition to the interested parties identified by Appellant in her opening brief and Appellee in its opposition brief, the following listed persons and entities have an interest in the outcome of the case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal:

Amicus Curiae

Consumer Data Industry Association

Counsel for *Amici Curiae*

Julia K. Whitelock

HUDSON COOK, LLP

/s/ Julia K. Whitelock
Julia K. Whitelock

Counsel for Amicus Curiae
Consumer Data Industry Association

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rules of Appellate Procedure 26.1 and 11th Cir. R. 26.1-1 and 29.2, counsel for *amicus* certifies that (1) *amicus* does not have a parent corporation and (2) no publicly held company holds 10% or more of the stock or ownership interest in *amicus*. *Amicus* is a nonprofit corporation under 26 U.S.C. § 501(c)(6).

/s/ Julia K. Whitelock
Julia K. Whitelock

Counsel for Amicus Curiae
Consumer Data Industry Association

MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF

Pursuant to Federal Rules of Appellate Procedure 29(a) and Eleventh Circuit Rule 29(a), *amicus* the Consumer Data Industry Association ("CDIA") moves the Court for leave to file the attached Brief of *Amicus Curiae* in Support of Defendant-Appellee. The proposed brief is attached to this Motion. In support of this Motion, *amicus* states as follows:

1. CDIA is a trade association representing consumer reporting agencies ("CRAs") including the nationwide credit bureaus, regional and specialized credit bureaus, and background check and residential screening companies. Founded in 1906, CDIA promotes the responsible use of consumer data to help consumers achieve their financial goals, and to help businesses, governments, and volunteer organizations avoid fraud and manage risk. Through data and analytics, CDIA members empower economic opportunity, helping ensure fair and safe transactions for consumers, facilitating competition, and expanding consumers' access to financial and other products suited to their unique needs.

2. CDIA members would be directly impacted by a ruling on the primary issue before the Court; namely, whether the district court erred in concluding that Defendant-Appellee Experian Information Solutions, Inc.'s interpretation that Fair Credit Reporting Act, 15 U.S.C. § 1681i did not apply to personal identifying information ("PII") (*i.e.*, "credit header" information) was not objectively

unreasonable in light of the statutory text, regulatory guidance, case law, and policies underlying industry use of PII. A ruling that the lower court erred would contradict existing authority, expand the scope of § 1681i, and possibly inhibit consumers, the government, CRAs, and data furnishers from using information that assists in identity authentication, fraud detection, and identity theft detection, prevention, and investigation. Proposed *amicus* has longstanding industry knowledge regarding the characterization, uses, and societal benefits of credit header information, and recognizes that these issues could have wide-ranging impacts well beyond the parties in this case.

3. CDIA has been the voice of the consumer reporting industry for more than a century and is therefore uniquely qualified to assist this Court in understanding the impact of the positions advocated by the parties and the implications of those on the greater credit reporting ecosystem.

4. As a "friend of the court," it is the role of an *amicus curiae* to submit briefing designed to assist the court in cases of general public interest, supplement the efforts of counsel, and draw the court's attention to law that might otherwise escape consideration. An *amicus* brief may be allowed when the *amicus* has unique information or perspective that can assist the court. *See, e.g., Ryan v. CFTC*, 125 F.3d 1062, 1062-63 (7th Cir. 1997); *Miller-Wohl Co. v. Comm'r of Lab. & Indus.*

State of Mont., 694 F.2d 203, 204 (9th Cir. 1982); 4 Am. Jur. 2d Amicus Curiae § 3 (updated Feb. 2024).

5. CDIA has read the parties' briefs and the *amici* brief filed in support of the Plaintiff-Appellant by the Consumer Financial Protection Bureau and the Federal Trade Commission. The attached *amicus* brief is necessary to fully and adequately address the scope of § 1681i and the beneficial uses of credit header information, and to assist this Court in understanding the broader implications of expanding the scope of § 1681i.

6. *Amicus*'s counsel has communicated with counsel for Appellant and counsel for Appellee. Counsel for Appellant does not consent to the filing of this *amicus* brief. Counsel for Appellee consents to the filing of this *amicus* brief.

WHEREFORE, proposed *amicus* respectfully requests the Court's leave to file the *Amicus Curiae* Brief in Support of Defendant-Appellee attached as an exhibit to this motion.

Dated: April 29, 2024

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CERTIFICATE OF COMPLIANCE

I hereby certify that this motion complies with the type-volume limitations of Fed. R. App. P. 32(g)(1) and 27(d)(2)(A) because this motion contains 589 words, excluding the parts of the motion exempted by Fed. R. App. P. 32(f), as counted by Microsoft Word, the word processing software used to prepare this brief.

This motion 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 motion has been prepared in a proportionally spaced typeface using Microsoft Word in Times New Roman 14-point font.

/s/ Julia K. Whitelock
Julia K. Whitelock

Counsel for Amicus Curiae
Consumer Data Industry Association

CERTIFICATE OF SERVICE

I hereby certify that on this 29th day of April 2024, I electronically filed the foregoing document was filed with the clerk of this Court using the CM/ECF system, which will send notice to all counsel of record for the parties.

/s/ Julia K. Whitelock
Julia K. Whitelock

Counsel for Amicus Curiae
Consumer Data Industry Association

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CERTIFICATE OF INTERESTED PERSONS

Pursuant to Federal Rule of Appellate Procedure 26.1 and Eleventh Circuit Rule 26.1 and 28-1(b), counsel for *amicus* certifies that, in addition to the interested parties identified by Appellant in her opening brief and Appellee in its opposition brief, the following listed persons and entities have an interest in the outcome of the case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal:

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Julia K. Whitelock

HUDSON COOK, LLP

/s/ Julia K. Whitelock
Julia K. Whitelock

Counsel for Amicus Curiae
Consumer Data Industry Association

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rules of Appellate Procedure 26.1 and 11th Cir. R. 28-1(b), counsel for *amicus* certifies that (1) *amicus* does not have a parent corporation and (2) no publicly held company holds 10% or more of the stock or ownership interest in *amicus*. *Amicus* is a nonprofit corporation under 26 U.S.C. § 501(c)(6).

/s/ Julia K. Whitelock
Julia K. Whitelock

Counsel for Amicus Curiae
Consumer Data Industry Association

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STATEMENT OF INTEREST OF *AMICUS CURAE*

The Consumer Data Industry Association ("CDIA")[1] is a trade association representing consumer reporting agencies ("CRAs"), including the nationwide credit bureaus, regional and specialized credit bureaus, and background check and residential screening companies. Founded in 1906, CDIA promotes the responsible use of consumer data to help consumers achieve their financial goals and to help businesses, governments, and volunteer organizations avoid fraud and manage risk. Through data and analytics, CDIA members empower economic opportunity, thereby helping to ensure fair and safe transactions for consumers and facilitating competition, expanding consumers' access to financial and other products suited to their unique needs.

CDIA is interested in the outcome of this appeal because CDIA's members are subject to an intricate and comprehensive regulatory scheme under the Fair Credit Reporting Act ("FCRA"), 15 U.S.C. §§ 1681 *et seq.*, which governs the

[1] Pursuant to Federal Rule of Appellate Procedure 29(a)(2), CDIA represents that Appellee Experian Information Solutions, Inc. ("Experian") consented to the filing of this brief, but Appellant Jessica Nelson ("Nelson") did not. Therefore, CDIA has filed a motion for leave to file this brief pursuant to Federal Rule of Appellate Procedure 29(a)(3). Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E), CDIA represents that no party or party's counsel has authored this brief, in whole or in part, or contributed money intended to fund the preparation or submission of this brief. Further, no person other than *amicus* CDIA and its non-party members contributed money that was intended to fund the preparation or submission of this brief.

collection, use, maintenance, and dissemination of consumer report information, and this case seeks to determine the scope of certain obligations of CRAs thereunder. CDIA members process over 50 million updates to consumer report information each day.[2] Thus, the issue raised in this appeal—whether Experian's interpretation of FCRA § 1681i as inapplicable to personal identifying information ("PII") (*i.e.*, "credit header" information) was "objectively unreasonable"—has implications reaching far beyond the parties in this case.

A ruling by this Court in favor of Nelson that the word "file" includes PII runs contrary to existing authority and would expand the scope of § 1681i, and possibly inhibit consumers, the government, CRAs, and data furnishers from using information that assists in identity authentication, or fraud or identity theft detection, prevention, or investigation. CDIA has been involved in the consumer reporting industry for more than a century and is therefore uniquely qualified to assist this Court in understanding the impact of the positions advocated by the parties and the implications of those on the greater credit reporting ecosystem.

[2] *Sarver v. Experian Info. Sols.*, 390 F.3d 969, 972 (7th Cir. 2004) (noting that one CRA "processes over 50 million updates to trade information each day").

STATEMENT OF THE ISSUE

Whether the district court erred in concluding that Experian's interpretation that FCRA § 1681i did not apply to PII was not objectively unreasonable in light of the statutory text, case law, regulator guidance, and policies underlying industry use of PII. It did not err.

SUMMARY OF THE ARGUMENT

The district court did not err when it determined that Experian did not violate FCRA § 1681i because Experian's interpretation that § 1681i did not apply to PII was not objectively unreasonable. The Supreme Court has acknowledged that the FCRA is a "less-than-pellucid" statute, *Safeco Ins. Co. of Am. v. Burr*, 551 U.S. 47, 70 (2007), imposing a number of responsibilities on CRAs and other participants and containing no fewer than 31 separate sections, 145 subsections, and approximately 34,000 words. It is also well established that the FCRA is not a strict liability statute; rather the standard is one of reasonableness. 15 U.S.C. §§ 1681n, 1681o; *Bryant v. TRW, Inc.*, 689 F.2d 72, 78 (6th Cir. 1982); *Dalton v. Capital Associated Indus.*, 257 F.3d 409, 417 (4th Cir. 2001). Courts analyze whether an interpretation of the FCRA is objectively unreasonable, *i.e.*, whether a violation of the FCRA carries with it liability, by analyzing (1) the statutory text, (2) the existing regulatory guidance, (3) case law, and (4) the context surrounding the interpretation.

1. The text of 15 U.S.C. § 1681i supports an interpretation that "file" does not apply to PII. Sections 1681i(c) and (d) illustrate that the scope of "file" is narrower than its § 1681a(g) definition and is limited to information that might be furnished or has been furnished in a consumer report.

2. Long-standing regulatory guidance and the purpose of the Gramm-Leach-Bliley Act ("GLBA") establish that credit header information, which includes PII, is not "file" information under the FCRA.

3. Federal courts consistently conclude that identifying information is not a consumer report because it does not bear on any of the factors identified in § 1681a(d).

4. The consumer reporting ecosystem supports various non-credit products that use PII, such as identity verification and fraud prevention products, which are crucial for protecting consumers and businesses.

Accordingly, an interpretation that § 1681i does not apply to PII is not objectively unreasonable and the district court's judgment should be affirmed.

ARGUMENT

The central question in this appeal—whether Experian's interpretation that § 1681i's reinvestigation requirements did not apply to PII was "objectively unreasonable"—hinges on an understanding of the role and treatment of PII used in credit reports. Courts and regulators have long agreed that, because PII (*i.e.*, credit

header information[3]) does not bear on one of the FCRA's seven listed factors (credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living), credit header information is not consumer report information. Under established case law, because credit header information is not consumer report information, it then cannot and should not be deemed file information under §1681i.

I. The District Court Did Not Err Because Experian's Interpretation of § 1681i Was Not Objectively Unreasonable in Light of the Strong Public Policies Underlying the Use of PII and Judicial and Regulatory Agency Authority.

"File" in the context of § 1681i is narrower than § 1681a(g)'s definition of the word "file" and means information that has been or is in the future a consumer report. The FCRA is not a strict liability statute; rather the standard is one of reasonableness.[4] 15 U.S.C. §§ 1681n, 1681o; *Bryant*, 689 F.2d at 78; *Dalton*, 257 F.3d at 417.

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[3] "Credit header" information is a consumer's PII—"name, aliases, birth date, Social Security number, current and prior addresses, and telephone number." FTC, "Individual Reference Services – A Report to Congress" (Dec. 1997), available at https://shorturl.at/mDU12.

[4] Courts analyze FCRA violations under principles of tort law. *See e.g., Safeco*, 551 U.S. at 57 (assessing liability under the FCRA by looking to common law usage of the terms "reckless disregard" and "willful" and citing W. Keeton, D. Dobbs, R. Keeton, & D. Owen, Prosser and Keeton on Law of Torts § 34, p. 212 (5th ed. 1984)); *Syed v. M-I LLC*, 853 F.3d 492, 504-05 (9th Cir. 2017) (analyzing the negligent and willful violation of FCRA standards under tort law and "the standard of objective reasonableness"); *Chaitoff v. Experian Info. Sols., Inc.*, 79 F.4th 800,

An interpretation of § 1681i's reinvestigation requirement as not applying to PII appearing on the consumer's credit report is objectively reasonable in light of (1) the statutory text, (2) the existing regulatory guidance, (3) case law, and (4) the use and the policy reasons underlying the consumer reporting ecosystem's treatment of "credit header" information as separate and distinct from a "consumer report."[5] *See Pedro v. Equifax, Inc.*, 868 F.3d 1275, 1281 (11th Cir. 2017) (quoting *Safeco*, 551 U.S. at 69-70) (an interpretation is not objectively unreasonable where "it has a 'foundation in the statutory text and a sufficiently convincing justification'"); *Levine v. World Financial Network Nat. Bank*, 554 F.3d 1314, 1318 (11th Cir. 2009) (quoting *Safeco*, 551 U.S. at 70) (an interpretation is not objectively unreasonable in the absence of "'guidance from the courts of appeals or the Federal Trade Commission [that] might have warned [the agency] away from the view it took.'").

A. The Text of the Entirety of § 1681i Indicates that its Use of the Word "File" Is Narrower than § 1681a(g)'s Definition of "File."

Statutory interpretation requires that courts "try to avoid interpretations of statutes that render words, or other sections, superfluous." *Gillespie v. Trans Union*

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819 (7th Cir. 2023) (analyzing whether conduct was reckless to constitute a willful violation versus a negligent violation under tort principles); *Moran v. Screening Pros, LLC*, 25 F.4th 722, 728 (9th Cir. 2022) (quoting *Marino v. Ocwen Loan Servicing LLC*, 978 F.3d 669, 673-74 (9th Cir. 2020)) ("'To prove a negligent violation [of the FCRA], a plaintiff must show that the defendant acted pursuant to an objectively unreasonable interpretation of the statute.'").

[5] Experian's interpretation is not just objectively reasonable, the authority cited in this amicus brief evidences that Experian's interpretation is correct.

Corp., 482 F.3d 907, 909 (7th Cir. 2007) (citing *Duncan v. Walker*, 533 U.S. 167, 174 (2001)). While "file" does not have the same meaning as "consumer report" under the FCRA, the two terms are fundamentally linked as illustrated by an analysis of § 1681i. "File" in the context of § 1681i is narrower than § 1681a(g)'s definition of the word "file" and means information that has been or is in the future a consumer report. Therefore, upon reviewing the entirety of § 1681i, this Court should conclude that the word "file" in the context of § 1681i is narrower than the broad definition of the word "file" in § 1681a(g).

When a consumer disputes "the completeness or accuracy of any item of information contained in a consumer's file at a consumer reporting agency," the CRA must "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 in accordance with paragraph (5)." *Id.* at § 1681i(a)(1)(A). A complete reading of § 1681i indicates that its use of the word "file" is narrower than the § 1681a(g) definition because § 1681i ties "file" information to that which is a consumer report (in the past or planned to be in the future).

A review of subsections (c) and (d) illustrates that the scope of the "file" at issue in § 1681i is that which might be furnished or has been furnished, respectively, in a consumer report. Section 1681i(c) protects the consumer relative to the disputed

information prospectively (*i.e.*, re information that "might be furnished"). Unless the CRA has reasonable grounds to believe the dispute is frivolous or irrelevant, it "shall, in any subsequent consumer report containing the information in question, clearly note that it is disputed by the consumer and provide either the consumer's statement or a clear and accurate codification or summary thereof." *Id.* at § 1681i(c) (emphasis added).

Section 1681i(d) protects the consumer relative to the disputed information retroactively (*i.e.*, re information that "has been furnished"). Following the deletion of the disputed information, upon the consumer's request, the CRA must "furnish notification that the item has been deleted or the statement, codification or summary pursuant to subsection (b) or (c) to any person specifically designated by the consumer who has within two years prior thereto received a consumer report for employment purposes, or within six months prior thereto received a consumer report for any other purpose, which contained the deleted or disputed information." *Id.* at § 1681i(d) (emphasis added). The analysis of the statute supports an interpretation that the word "file" in the context of § 1681i is narrower than the broad definition of the word "file" in § 1681a(g).

The Seventh Circuit in *Gillespie v. Trans Union Corp.* and Ninth Circuit in *Tailford v. Experian Info. Sols., Inc.* reached this very conclusion after engaging in an analogous statutory interpretation of the word "file" in the context of

§ 1681g(a)(1), which requires certain disclosures of information to consumers. The *Gillespie* court determined that to avoid an interpretation of the word "file" in § 1681g(a)(1) that would render the additional language of the statute superfluous—the word "file" in the context of § 1681g(a)(1) could not mean "all information on the consumer recorded and retained" by a CRA, but instead has the narrower meaning of "only the information included in a consumer's credit report." 482 F.3d at 908-10 (concluding that the "purge date" of the furnisher-provided date of delinquency of a consumer account was not "file" information). The *Tailford* court agreed with *Gillespie* and reasoned: "Information that 'might be furnished' in the sense of *Shaw* is instead more reasonably interpreted to mean information similar to that shown to have been included by the CRA in a consumer report in the past or planned to be included in the future." 26 F.4th 1092, 1102 (9th Cir. 2022) (citing *Shaw v. Experian Info. Sols., Inc.*, 891 F.3d 749, 759 (9th Cir. 2018)) (concluding that ConsumerView data and the identity of parties receiving that information, soft inquiries by third parties, the identity of the parties procuring credit reports, and the date on which employment dates were reported were not "file" information.

Thus, an interpretation that § 1681i only applies to "consumer report" information and not PII "has a foundation in the statutory text" and, accordingly, is not objectively unreasonable.

B. Regulatory Guidance Establishes that PII Is Not Consumer Report Information.

When Congress initially passed the FCRA in 1970, the Federal Trade Commission ("FTC") was the primary regulator, playing a key role in the implementation, oversight, enforcement, and interpretation of the FCRA. Under the Dodd-Frank Act, the FTC retained its enforcement role, but the newly-formed Consumer Financial Protection Bureau ("CFPB") took on primary regulatory and interpretative roles.

1. FTC guidance supports Experian's interpretation.

The FTC's long-standing and unambiguous interpretation of the FCRA is that identifying information (*i.e.*, credit header information) does not constitute a consumer report.

In the administrative action *In the Matter of Trans Union Corp.*, the FTC determined that identifying information such as name, Social Security number, and phone number are "exclude[d] from the FCRA's definition of consumer report" because they do not "bear on creditworthiness, credit capacity, credit standing, character, general reputation, personal characteristics, or mode of living, unless such terms are given an impermissibly broad meaning." Opinion of the Commission, FTC Docket No. 9255 at 30 (Feb. 10, 2000), available at https://shorturl.at/dgAN6.

In its Staff Report, FTC staff clarified its view of what is, and is not, in a consumer's file for the purpose of including such information in a file disclosure:

> 3. "ALL INFORMATION IN THE CONSUMER'S FILE"
> A. General. A CRA must disclose all items in the consumer's file, no matter how or where they are stored. A CRA is required to make the consumer disclosure regardless of whether it designates its records as "files" or "archives" or uses any other terminology for the information it retains on a consumer. A CRA that resells consumer report information from other CRAs may have no information to disclose if it has no retained file of the data at the time it receives a consumer's disclosure request; however, it still must disclose recipients of consumer reports as provided in this section.
> B. Ancillary records. Ancillary records such as a CRA's audit trail of changes it makes in the consumer's file, billing records, or the contents of a consumer relations folder, are not included in the term "information in the consumer's file" that must be disclosed to the consumer pursuant to this section.

FTC, Staff Report, "40 Years with the Fair Credit Reporting Act" at 71 (2011), available at https://shorturl.at/uyR47. The FTC further explained 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 on that consumer." *Id.* at 32 (emphasis added).

The FTC has also formally adopted a reading of the FCRA that identity verification products (which rely upon such credit header information) are not "consumer reports" under the FCRA. FTC, Letter to Marc Rotenberg p. 1, n.1 (July 29, 2008), available at https://shorturl.at/yIPQ9 (distinguishing a prior settlement on the basis that it merely involved an identification verification product, not a consumer report).

Further, the FTC excluded from the 2009 Furnisher Rule any direct disputes related to the consumer's identifying information, "such as name(s), date of birth, Social Security number, telephone number(s), or address(es)." *See* 12 C.F.R. § 1022.43(b)(1)(i); *see also* FTC, "Consumer Reports: What Information Furnishers Need to Know," FTC Business Guidance (June 2013), available at https://shorturl.at/bJKNO. This exclusion reinforces the position that such information is not regulated by the FCRA.

The FTC has also recognized that the GLBA, not the FCRA, governs credit header information. FTC, "Privacy of Consumer Financial Information," 65 Fed. Reg. 33646, 33668 (2000) ("[t]o the extent credit header information is not a consumer report, it is not regulated by the FCRA."). The GLBA and Regulation P strictly regulate the use and disclosure of credit header information from financial institutions. 15 U.S.C. §§ 6801 *et seq.*; 12 C.F.R. §§ 1016.1 *et seq.* The GLBA provides consumers with notice and opt-out rights. *See* 12 C.F.R. §§ 1016.4-1016.9. Under the GLBA, a financial institution must inform consumers of that institution's data-sharing practices. 15 U.S.C. § 6802. Consumers are empowered with the right to opt out of information-sharing unless such sharing is permitted under certain defined exceptions. *See* 12 C.F.R. §§ 1016.13-1016.15. Those exceptions apply to various types of information-sharing necessary for processing or administering a financial transaction requested or authorized by a consumer. 15 U.S.C. § 6802; 12

C.F.R. § 1016.14. This includes, for example, disclosing credit header information to service providers that mail account statements and perform other administrative activities for a consumer's account.

The exceptions also apply to other beneficial types of information-sharing, including disclosures for purposes of preventing fraud, responding to judicial process or a subpoena, and complying with federal, state, or local laws. 15 U.S.C. § 6802; 12 C.F.R. § 1016.15. Examples of appropriate information disclosures under this exception include those made to technical service providers that maintain the security of consumer data, to attorneys or auditors, to the purchaser of a portfolio of consumer loans, and to a CRA consistent with the FCRA. The GLBA also restricts the reuse and redisclosure of information shared by a nonaffiliated entity under these exceptions. 15 U.S.C. § 6802(c); 12 C.F.R. § 1016.11. Entities receiving such information (whether or not they are financial institutions) may only disclose and use the information in the ordinary course of business to carry out the purpose for which it was received. 12 C.F.R. § 1016.11(c)(3).

This robust regulation under the GLBA and Regulation P further supports the position that credit header information is not intended to be regulated by the FCRA.

2. There is no prior CFPB guidance that "warned" Experian away from its interpretation.

Though the CFPB and the FTC argue in their *amici* brief that PII is included in the meaning of the word "file" in § 1681i, that argument is not the question before

this Court. Rather, the question here is whether Experian's actions—based on what it knew at the time—were objectively unreasonable. There is no CFPB guidance issued prior to the facts alleged below that addresses the question raised in this appeal. Indeed, the CFPB does not appear to have started to address the question of how PII should be treated under the FCRA until September 2023, when the CFPB began its FCRA rulemaking with the Small Business Regulatory Enforcement Fairness Act ("SBREFA") consultation process. CFPB, Small Business Advisory Review Panel for Consumer Reporting Rulemaking: Outline of Proposals and Alternatives Under Consideration (Sept. 15, 2023) ("SBREFA Outline"), available at https://shorturl.at/ehL46. In its SBREFA Outline, the CFPB stated that it "is considering a proposal to clarify the extent to which credit header data constitutes a consumer report," and sought feedback on what types of information "should be included or excluded as a consumer report" and "under what circumstances." SBREFA Outline at 10-11.[6]

The fact that the CFPB is considering a rulemaking related to re-classifying credit header information, including PII, as information that may be deemed consumer report information demonstrates, at a minimum, a lack of clear prior

[6] While the CFPB's SBREFA Outline seeks feedback for a proposed rulemaking on credit header data, the CFPB does not have authority over "financial products or services" used for identity authentication or fraud or identity theft detection, prevention, or investigation. 12 U.S.C. § 5481(15)(B)(i). *See* Section I(D), *infra*.

authority from the agency as to whether PII is a consumer report or subject to § 1681i—a far cry from "warning" CRAs away from their interpretation. In fact, it establishes the opposite—if the regulatory framework surrounding PII were clear, including the CFPB's pre-existing guidance, then the CFPB would need to enact a rule governing whether and how to apply the FCRA to credit header information in its proposed rulemaking. Further, for due process reasons, any rule to be implemented at some unknown time in the future could not have retroactive effect on disputes that occurred nearly four years ago.

Thus, an interpretation that § 1681i does not apply to PII has support in FTC guidance and there is an absence of "'guidance from… the Federal Trade Commission [or CFPB that] might have warned [Experian] away from the view it took.'" *Levine*, 554 F.3d at 1318. Accordingly, Experian's interpretation is not objectively unreasonable and the district court's judgment should be affirmed.

C. Case Law Establishes that PII Is Not Consumer Report Information.

There is ample case law holding that PII or "credit header" information is not a consumer report or subject to the FCRA—supporting Experian's interpretation that § 1681i did not apply to disputes about PII. An interpretation of the FCRA is not objectively unreasonable if a CRA could "reasonably have found support in the

courts."[7] *Losch v. Nationstar Mortgage LLC*, 994 F.3d 937, 947 (11th Cir. 2021) (quoting *Safeco*, 551 U.S. at 70 n.20).

Federal courts have consistently found that identifying information is not "bear on" information essential to characterizing a communication as a consumer report, a necessary element for information to be consumer report information. For example, in *Parker v. Equifax Info. Servs., LLC*, the court considered whether the Equifax product "eIDcompare" that was used solely to verify the identity of a consumer was a "consumer report" under the FCRA. No. 2:15-CV-14365, 2017 WL 4003437, at *3 (E.D. Mich. Sept. 12, 2017). The plaintiffs alleged that the eIDcompare product receives from its subscribers' data packets fields for a consumer's name, phone number, Social Security number, date of birth, driver's license, current address, and time spent at that address. *Id.* at *2. However, the court explained that "[t]he accumulation of biographical information from Equifax's

[7] The cases cited by Nelson and *amici* CFPB and FTC do not address credit header information or an analysis of the word "file" in the context of § 1681i in its entirety, and are therefore inapposite. *See Collins v. Experian Info. Sols., Inc.*, 775 F.3d 1330, 1335 (11th Cir. 2015) ("A file is simply the information retained by a consumer reporting agency" contrasted with a consumer report, which "is communicated by the consumer reporting agency" to a third party); *Nunnally v. Equifax Info. Servs., LLC*, 451 F.3d 768, 772 (11th Cir. 2006) (deciding "whether the consumer report that a credit reporting agency provides to a consumer following a reinvestigation is the consumer's complete file or a description of revisions to that file"); *Ricketson v. Experian Info. Sols., Inc.*, 266 F. Supp. 3d 1083 (W.D. Mich. 2017) (rejecting argument that information must be "published" to constitute "file" information).

products does not constitute a consumer report because the information does not bear on Parker's credit worthiness." *Id.* at *3 (emphasis added). Further, "[t]he data at issue here reflects biographical information generally recognized as header data and, thus, is not a consumer report." *Id.* (emphasis added). The Sixth Circuit made a similar pronouncement in *Bickley v. Dish Network, LLC*, stating that "header information" is not a consumer report. 751 F.3d 724, 729 (6th Cir. 2014).[8]

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[8] *See also Trans Union Corp. v. FTC*, 81 F.3d 228, 229, 231–32 (D.C. Cir. 1996) (rejecting the view that "any scrap of information transmitted to credit grantors as part of a credit report must necessarily have been collected" for one of the three purposes listed in the definition of "consumer report"); *Individual Reference Servs. Group v. FTC*, 145 F. Supp. 2d 6, 17 (D.D.C. 2001) (name, address, Social Security Number, and phone number do not bear on required factors); *In re Equifax Inc., Consumer Data Security Breach Litig.*, 362 F. Supp. 3d 1295, 1313 (N.D. Ga. 2019) (holding that "header information" is not a "consumer report" because it does not bear on an individual's creditworthiness); *Dotzler v. Perot*, 914 F. Supp. 328, 330 (E.D. Mo. 1996), *aff'd*, 124 F.3d 207 (8th Cir. 1997) (name, current and former addresses, and Social Security Number do not bear on factors); *In re Equifax, Inc., Customer Data Sec. Breach Litig.*, No. 1:17-MD-2800-TWT, 2022 WL 1122841, at *10 (N.D. Ga. Apr. 13, 2022); *Weiss v. Equifax, Inc.*, No. 20-cv-1460, 2020 WL 3840981 (E.D.N.Y. July 8, 2020) (holding that personally identifiable information stolen during a data breach is not a "consumer report" within the meaning of the FCRA); *Williams-Steele v. Trans Union*, No. 12 Civ. 0310 (GBD) (JCF), 2014 WL 1407670, at *4 (S.D.N.Y. Apr. 11, 2014) ("Neither a missing area code nor an allegedly inaccurate alternate address bear on any of the factors listed in 15 U.S.C. § 1681a(d)(1), or is likely to be used in determining eligibility for any credit-related purpose…"); *Ali v. Vikar Mgmt., Ltd.*, 994 F. Supp. 492, 497 (S.D.N.Y. 1998) (address information does not bear on factors); *Smith v. Waverly Partners, LLC*, No. 3:10-CV-28, 2011 WL 3564427, at *1 (W.D.N.C. Aug. 12, 2011) (holding that "[the defendant] did not communicate any information bearing on Plaintiff's 'credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living'…Instead, it merely provided name, Social Security Number, prior addresses, date of birth, and driver's license

Thus, Experian's interpretation of § 1681i's inapplicability to PII has "support in the courts" and there is an absence of "'guidance from the courts of appeals [that] might have warned [Experian] away from the view it took.'" Accordingly, Experian's interpretation is not objectively unreasonable, and the district court's judgment should be affirmed.

D. Strong Public Policies Justify Industry's Use of PII for Non-FCRA Purposes.

The long-standing distinction between consumer report information and credit header information underpins innumerable products that use PII from consumer reporting agencies to help and protect both consumers and businesses. For example, fraud prevention products frequently rely upon comparing applicant-supplied PII with PII available from third-party sources. These products can measure the number of times the PII provided has been seen together and draw conclusions regarding the likelihood that the information provided by the applicant is accurate and that, therefore, the applicant is who they say they are. These products depend upon the determination that this PII is not consumer report information. Treating PII as "consumer report" information under the FCRA would, therefore, prevent these beneficial products from operating to help consumers avoid identity theft and fraud.

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information. Such minimal information does not bear on any of the seven enumerated factors in § 1681a(d), and is thus not a consumer report.").

For decades, companies have shared and used PII outside of what would be a "permissible purpose" under FCRA § 1681b, such as in identity verification and fraud prevention products. CRAs may only furnish a consumer report if they have a specifically-enumerated permissible purpose to do so. 15 U.S.C. § 1681b(a) "Permissible purpose" includes, for example:

- In accordance with the written instructions of the consumer to whom it relates.
- To a person which it has reason to believe intends to use the information in connection with a credit transaction involving the consumer on whom the information is to be furnished and involving the extension of credit to, or review or collection of an account of, the consumer.

15 U.S.C. § 1681b(a)(2), (3)(A).

Because credit header data is not a consumer report, it is not subject to the FCRA's permissible purpose limitations and may be used for purposes outside the FCRA, including identification verification and fraud prevention and detection. This does not mean that the data may be used without any restrictions: consumers' identifying information obtained from financial institutions is considered nonpublic personal information under the GLBA and subject to that law's sharing restrictions.

Congress has also recognized that identity verification and fraud prevention products built using credit header information are not regulated under FCRA. The

Dodd-Frank Act gave the CFPB jurisdiction over "consumer financial products or services," including credit reporting. However, Congress specifically carved out from the definition of "financial products or services" those products used for identity authentication or fraud or identity theft detection, prevention, or investigation. In doing so, Congress signaled that identity verification products that rely on credit header data are not covered by FCRA. 12 U.S.C. § 5481(15)(B)(i). *See also* FTC, "Protecting Consumer Privacy in an Era of Rapid Change: Recommendations for Businesses and Consumers" at 67 (Mar. 2012), available at https://shorturl.at/mvCH2.

In reliance on this exclusion from the definition of "consumer report" under the FCRA, industry has developed a myriad of beneficial uses for credit header information, including to investigate human trafficking; to proactively identify and locate victims of natural disasters; to ensure that packages are sent to the correct address; in claims investigations to locate responsible parties and witnesses; in the legal industry to locate witnesses and serve legal process; and to enable law enforcement to investigate crimes, exonerate innocent suspects, and locate victims, witnesses, terrorists, and fugitives.

Access to credit header information is crucial to administer fraud detection and prevention services effectively. Fraud detection and prevention services not only directly protect consumers and businesses, but by protecting consumers and

businesses, such products also promote competition and help keep costs lower for consumers and small businesses. These services may provide information on known fraudsters and fraud strategies and identify potential fraud risks based on comparing applicant-supplied data with data available from third-party sources. Fraudsters are always looking for new avenues to infiltrate systems and data, perpetuate identity theft, and create synthetic identities.

Another example of the value of credit header data is the use of Social Security numbers "in identifying and locating missing family members, owners of lost or stolen property, heirs, pension beneficiaries, organ and tissue donors, suspects, witnesses in criminal and civil matters, tax evaders, and parents and ex-spouses with delinquent child or spousal support obligations." *See generally* Hearing on Enhancing Social Security Number Privacy: Before the Subcomm. on Social Security of the House Ways and Means Comm. Subcomm. on Social Security, June 15, 2004 (107th Cong.) (statement of Prof. Fred H. Cate, Indiana University School of Law).

Thus, Experian's interpretation of § 1681i has a "sufficiently convincing justification" and, accordingly, is not objectively unreasonable.

CONCLUSION

In sum, an interpretation that § 1681i does not apply to PII is not objectively unreasonable because it is founded in the statutory text and supported by regulatory

guidance, case law, and the strong policies underlying various industries' use of PII. *Amicus* Consumer Data Industry Association urges this Court to affirm the district court's order granting summary judgment in favor of Appellee Experian Information Solutions, Inc.

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CERTIFICATE OF COMPLIANCE

Pursuant to 11th Cir. R. 28-1(m), *amicus* certifies the following:

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because: this brief contains 5,216 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii) and Fed. R. App. P. 32(f).

2. 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 in Times New Roman 14-point font.

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CERTIFICATE OF SERVICE

I hereby certify that on this 29th day of April 2024, I electronically filed the foregoing Brief of *Amicus Curiae* Consumer Data Industry Association in Support of Defendant-Appellee with the clerk of this Court using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished using the CM/ECF system.

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