

No. 20-658

In the
Supreme Court of the United States

SHERRI COHEN,
Petitioner,
v.

TRANS UNION LLC, ET AL.,
Respondents.

**On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Second Circuit**

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Supreme Court Should Review The Second Circuit's Decision Affirming Summary Judgment In Trans Union's Favor Where The Second Circuit Explicitly "[did] not reach [Petitioner's] argument that the agencies' procedures for reinvestigating disputed information are not 'reasonable' under [FCRA] § 1681i" And The District Court's Interpretation of the FCRA's Reinvestigation Provision Is Not In Conflict With Any Circuit Court Or This Court.
2. Whether The Supreme Court Should Review The Second Circuit's Legal Conclusion That the FCRA Is Not Violated By A Consumer Reporting Agency's Routing Consumer Inquiries Through Counsel During Litigation, Where Petitioner Identifies No Conflict In The Circuit Courts On The Question And Petitioner Improperly Seeks Review Of The Correct Finding of Fact That Petitioner's Credit File Remained Accessible To Petitioner and to Potential Creditors During The Litigation.
3. Whether The Supreme Court Should Review The Second Circuit's Decision Affirming Summary Judgment In Trans Union's Favor Based on Petitioner's Unfounded Allegation That The District Court And Second Circuit Applied Unspecified "Different Standards" To Her Claims Based on Petitioner's Pro Se Status.
4. Whether The Supreme Court Should Review The District Court's Legal Conclusion – Not Challenged By Petitioner in the Second Circuit – That A

Dispute Generated By a Credit Repair Company Without Consulting The Consumer Does Not Trigger The Reinvestigation Requirements Of The FCRA, Where Petitioner Identifies No Conflict In The Circuit Courts On The Question And Petitioner Improperly Seeks Review Of The Correct Finding of Fact That Petitioner's Credit Repair Company Generated Disputes Without Petitioner's Participation.

**SUPREME COURT RULE 29.6. CORPORATE
DISCLOSURE STATEMENT**

Defendant Trans Union LLC, by counsel, pursuant to Supreme Court Rule 29.6, states as follows:

TransUnion LLC discloses that the following parent corporations and publicly held companies own 10% or more of its stock: Trans Union LLC is a wholly owned subsidiary of TransUnion Intermediate Holdings, Inc. TransUnion Intermediate Holdings, Inc. is wholly owned by TransUnion. TransUnion is a publicly traded entity with the ticker symbol TRU. Investment funds affiliated with T. Rowe Price Group, Inc., a publicly-traded entity with the ticker symbol TROW, own more than 10 percent of TransUnion's stock.

TABLE OF CONTENTS

Questions Presented	i
Corporate Disclosure Statement	iii
Table of Authorities	vi
Statement of the Case	1
Reasons For Denying The Petition	4
A. The Supreme Court Should Deny The Petition To Review The Second Circuit’s Decision Affirming Summary Judgment In Trans Union’s Favor Because The Second Circuit Explicitly “[Did] Not Reach [Petitioner’s] Argument That The Agencies’ Procedures Are Not “Reasonable” Under [FCRA] §1681i” And The District Court’s Interpretation of the FCRA’s Reinvestigation Provision Is Not In Conflict With Any Circuit Court Or This Court	4
B. The Supreme Court Should Deny The Petition To Review The Second Circuit’s Legal Conclusion That the FCRA Is Not Violated By A Consumer Reporting Agency’s Routing Consumer Inquiries Through Counsel During Litigation, Where Petitioner Identifies No Conflict In The Circuit Courts On The Question And Petitioner Improperly Seeks Review Of The Correct Findings of Fact That Petitioner’s Credit File Remained Accessible To Petitioner and to Potential Creditors During The Litigation	8

C. The Supreme Court Should Deny The Petition To Review The Second Circuit’s Decision Affirming Summary Judgment In Trans Union’s Favor Based on Petitioner’s Unfounded Allegation That The District Court And Second Circuit Applied Unspecified “Different Standards” To Her Claims Based on Petitioner’s Pro Se Status.	9
D. The Supreme Court Should Deny The Petition To Review The District Court’s Legal Conclusion – Not Challenged by Petitioner In The Second Circuit – That a Dispute Generated By A Credit Repair Company Without Consulting The Consumer Does Not Trigger The Consumer Reporting Agency’s Reinvestigation Obligations Under the FCRA, Where Petitioner Identifies No Conflict In The Circuit Courts On The Question and Petitioner Improperly Seeks Review Of The Correct Finding of Fact That The Disputes Generated By Petitioner’s Credit Repair Company Were Done Without Her Participation	10
Conclusion	12

TABLE OF AUTHORITIES

Cases

<u>Clingman v. Beaver</u> , 544 U.S. 581 (2005)	5
<u>Cushman v. Trans Union Corp.</u> , 115 F.3d 220 (3d Cir. 1997)	6, 7
<u>Exxon Shipping Co. v. Baker</u> , 554 U.S. 471, 128 S.Ct. 2605, 171 L.Ed.2d 570 (2008)	5, 11
<u>Henson v. CSC Credit Servs.</u> , 29 F.3d 280 (7th Cir. 1994)	6, 7
<u>Hinkle v. Midland Credit Management, Inc.</u> , 827 F.3d 1295 (11th Cir. 2016)	7
<u>Jones v. Experian Info. Solutions, Inc.</u> , 982 F. Supp. 2d. 268 (S.D.N.Y. Nov. 19, 2008) . .	7
<u>Singleton v. Wulff</u> , 428 U.S. 106, 96 S.Ct. 2868, 49 L.Ed.2d 826 (1976)	5
<u>Stevenson v. TRW, Inc.</u> , 987 F.2d 288 (5th Cir. 1993)	7

Rules

Sup. Ct. R. 10	3, 8, 9, 10, 11
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STATEMENT OF THE CASE

Petitioner seeks review of the Second Circuit's decision affirming the District Court's Order granting Trans Union's Motion for Summary Judgment.

Petitioner asserts claims against Consumer Reporting Agency Trans Union pursuant to the Fair Credit Reporting Act ("FCRA") alleging unsubstantiated inaccuracies in her Trans Union credit report and that Trans Union failed to conduct reasonable reinvestigations of her disputes. Petitioner also claims that Trans Union's implementation of a procedure known as a "litigation lock" – whereby communications with Petitioner regarding her Trans Union credit file are handled by Trans Union's counsel during the pendency of the lawsuit – violated the FCRA.

The District Court granted Trans Union's Motion For Summary Judgment and correctly held that: i) Plaintiff failed to present an issue of fact that there was a required inaccuracy in her Trans Union report; ii) Plaintiff failed to present evidence that Trans Union's reinvestigations were unreasonable; iii) in the absence of any violation of the FCRA, no reasonable jury could find that Trans Union willfully violated the FCRA (encompassing the litigation lock claim); and iv) a dispute generated by a credit repair company without consulting the consumer does not trigger the reinvestigation requirements of the FCRA and the disputes generated by Petitioner's credit repair company were done without Petitioner's participation. App., pp. SCP 53-57.

The Second Circuit affirmed the District Court, holding that Petitioner's FCRA claims failed in the absence of a required inaccuracy and that it therefore need not reach the question of whether Trans Union's reinvestigations were reasonable. App., p. SCP-64. The Second Circuit affirmed the District Court's holding that there was no willful violation of the FCRA (encompassing the litigation lock claim) and affirmed the District Court's factual finding that Petitioner's credit file remained accessible to Petitioner and to potential creditors during the litigation. App., pp. SCP-64-65. Finally, the Second Circuit affirmed the District Court's factual finding regarding Petitioner's lack of participation in the credit repair company's disputes to Trans Union, noting that Petitioner did not challenge the District Court's legal conclusion that such disputes are not actionable under the FCRA. App., pp. SCP-63-64.

Petitioner's Petition for Rehearing was denied by the Second Circuit. See Second Circuit Doc. No. 102.

The Petition For Writ Of Certiorari should be denied, as set forth more fully below, because:

- i) Petitioner improperly seeks review of an issue not reached by the Second Circuit, namely, that Trans Union's reinvestigations were reasonable under the FCRA, and Petitioner identifies no conflict between the District Court's interpretation of the FCRA's reinvestigation provision and any Circuit Court or this Court on that issue;

- ii) Petitioner identifies no conflict between the Second Circuit and any Circuit Court or this Court on the legal conclusion that the FCRA is not violated by a consumer reporting agency's routing consumer inquiries through counsel during litigation and Petitioner improperly seeks review of the findings of fact that Petitioner's credit file remained accessible to Petitioner and to potential creditors during the litigation;
- iii) Petitioner's contention that the District Court and the Second Circuit applied unspecified "different standards" to her claims based on her *pro se* status is wholly unfounded and does not meet the criteria for Supreme Court review under United States Supreme Court Rule 10; and
- iv) Petitioner improperly seeks review of a legal conclusion made by the District Court – that she did not challenge in her appeal to the Second Circuit – namely that a dispute generated by a credit repair company without consulting the consumer does not trigger the consumer reporting agency's reinvestigation obligations under the FCRA, and Petitioner identifies no conflict in the Circuit Courts on the question and Petitioner improperly seeks review of the factual finding that the disputes generated by Petitioner's credit repair company were done without her participation.

REASONS FOR DENYING THE PETITION

A. The Supreme Court Should Deny The Petition To Review The Second Circuit's Decision Affirming Summary Judgment In Trans Union's Favor Because The Second Circuit Explicitly "[Did] Not Reach [Petitioner's] Argument That The Agencies' Procedures Are Not "Reasonable" Under [FCRA] §1681i" And The District Court's Interpretation of the FCRA's Reinvestigation Provision Is Not In Conflict With Any Circuit Court Or This Court.

Petitioner seeks Supreme Court review of the Second Circuit's decision affirming Summary Judgment in Trans Union's favor on the issue of whether Trans Union conducted a reasonable reinvestigation pursuant to the FCRA. Petitioner's Brief ("Pet. Br."), p. 2.

The Second Circuit did not reach this question, however, because it affirmed the District Court's holding that Petitioner failed to establish the other required elements of her FCRA claim, including inaccurate credit reporting and a dispute that triggers the FCRA's reinvestigation obligations. The Second Circuit made clear, that "[i]n the absence of any dispute that (1) concerned information for which there is a genuine dispute of fact regarding accuracy and (2) triggers the reporting agency's reinvestigation obligations, we do not reach Cohen's argument that the agencies' procedures for reinvestigating disputed information are not 'reasonable' under § 1681i." Appendix ("App."), p. SCP-64.

The Supreme Court should decline to review this issue that explicitly was not reached by the Second Circuit. “It is the general rule, of course, that a federal appellate court does not consider an issue not passed upon below.” Exxon Shipping Co. v. Baker, 554 U.S. 471, 487 128 S.Ct. 2605, 171 L.Ed.2d 570 (2008) (citing Singleton v. Wulff, 428 U.S. 106, 120, 96 S.Ct.2868, 49 L.Ed.2d 826 (1976)); see also Clingman v. Beaver, 544 U.S. 581, 597 (2005) (“[w]e ordinarily do not consider claims neither raised nor decided below.”)

The Supreme Court should decline to review the District Court’s determination that Trans Union’s reinvestigations were reasonable pursuant to the FCRA for the additional reason that its interpretation of the FCRA’s reinvestigation provision is not in conflict with that of any Circuit Court or this Court. In fact, numerous Circuit Courts have used the very same language used by the District Court here in evaluating compliance with the reinvestigation provisions of the FCRA.

The District Court held that “the parameters of a reasonable investigation will depend on the circumstances of a particular dispute,” and that ‘a credit reporting agency may be required, in certain circumstances, to verify the accuracy of its initial source of information,’” noting that applicable factors include “whether the consumer has alerted the reporting agency to the possibility that the source may be unreliable or the reporting agency itself knows or should know that the source is unreliable,” as well as “the cost of verifying the accuracy of the source versus the possible harm inaccurately reported information

may cause the consumer.” App., p. SCP-50. The District Court held that those factors did not weigh in Petitioner’s favor here. App., p. SCP-51.¹

Petitioner claims that the District Court’s interpretation of the FCRA’s reinvestigation provisions stands alone and she misconstrues the holdings from the Third Circuit, Fifth Circuit and Seventh Circuit as conflicting with the District Court here. Pet. Br., p. 25-27. Those Circuit Courts, however, applied the very same standard to the interpretation of the FCRA’s reinvestigation provision as did the District Court in this case. As such, Petitioner fails to show a conflict between the District Court and any Circuit Court or this Court.

Petitioner cites to Cushman v. Trans Union Corp., a decision cited by and relied on by the District Court here, where the Third Circuit held that a credit reporting agency “may be required, under certain circumstances, to verify the accuracy of its initial source of information,” citing the same factors to be considered, including unreliability and cost. 115 F.3d 220, 225 (3d Cir. 1997). Petitioner also cites to Henson v. CSC Credit Servs., where the Seventh Circuit applied the very same standard, *i.e.*, that certain factors may require a consumer reporting agency to

¹ The District Court also held that Petitioner’s failure to establish the required element of an inaccuracy doomed her FCRA claims. App., p. SCP-53. Petitioner’s false representations to this Court that her allegedly inaccurate addresses and phone numbers support her claim is contrary to law which provides that personal identifying information is not actionable credit information under the FCRA. App., p. SCP-63.

verify the accuracy of its initial source of information, in that case, namely, that the consumer had a personal dispute with the agent of the creditor. 29 F.3d 280, 286 (7th Cir. 1994). Finally, Petitioner cites to Stevenson v. TRW, Inc., where the Fifth Circuit generally applied the same standard, noting in that case that there was evidence of unreliability of the creditor as it failed to respond to the agency's reinvestigations. 987 F.2d 288, 293 (5th Cir. 1993).

Other Circuit Courts, not noted by Petitioner, have also consistently applied the same standard to FCRA reinvestigations. See e.g., Hinkle v. Midland Credit Management, Inc., 827 F.3d 1295, 1302 (11th Cir. 2016) ("what constitutes a 'reasonable investigation' will vary depending on the circumstances of the case.")

Petitioner's citations to District Court cases in the Southern District of New York that she contends held differently do not create a conflict ripe for the Supreme Court's review. Pet. Br., p. 26. Nevertheless, the cases cited by Petitioner are not inconsistent with the District Court's holding here. See, e.g., Jones v. Experian Info. Solutions, Inc., 982 F. Supp. 2d 268, 273 (S.D.N.Y. Nov. 19, 2008) ("a credit reporting agency may be required, in certain circumstances to verify the accuracy of its initial source," citing the factors of unreliability and cost) (citing to Cushman and Henson).

The Court should deny the Petition to review the District Court's decision – not reached by the Second Circuit – that Trans Union complied with the FCRA's reinvestigation requirements, where Petitioners fail to identify any decision from another Circuit Court or this Court that is in conflict with the District Court's

interpretation of the FCRA. See United States Supreme Court Rule 10.

B. The Supreme Court Should Deny The Petition To Review The Second Circuit's Legal Conclusion That the FCRA Is Not Violated By A Consumer Reporting Agency's Routing Consumer Inquiries Through Counsel During Litigation, Where Petitioner Identifies No Conflict In The Circuit Courts On The Question And Petitioner Improperly Seeks Review Of The Correct Findings of Fact That Petitioner's Credit File Remained Accessible To Petitioner and to Potential Creditors During The Litigation.

Petitioner seeks review of the Second Circuit's Decision affirming Summary Judgment in Trans Union's favor, including its holding that Trans Union's use of a "litigation lock" does not violate any provision of the FCRA. Pet. Br., pp. 29-31. The Second Circuit held that the FCRA "would not be violated by routing credit queries through a legal team; nor would it be violated by refusing membership in a credit monitoring service." App., p. SCP-65. Petitioner does not identify any conflict among the Circuit Courts or with this Court on the question, but instead improperly seeks review of the factual findings of the Court below. Id.

The Second Circuit correctly noted that the litigation lock merely provided a mechanism for Petitioner's queries to be addressed by Trans Union's counsel during the pendency of the litigation. App., p. SCP-65. Petitioner's claims that the litigation lock "made [Petitioner's] credit disappear," took her "file

offline,” or prevented Petitioner from applying for credit are untrue and are improper attempts to seek appellate review of factual findings properly made by the Court below. Pet. Br., p 29. The Second Circuit found that the evidence did “not show that [Petitioner] was denied access” to her credit file or “that any request for credit information directed to the agencies’ legal teams was denied.” App., p. SCP-65.

The Court should deny the Petition to review the Second Circuit’s legal conclusion regarding the litigation lock, in the absence of any decision from another Circuit Court or this Court that is in conflict, and deny the Petitioner’s improper request for this Court’s review of the correct findings of fact made by the Court below. See United States Supreme Court Rule 10.

C. The Supreme Court Should Deny The Petition To Review The Second Circuit’s Decision Affirming Summary Judgment In Trans Union’s Favor Based on Petitioner’s Unfounded Allegation That The District Court And Second Circuit Applied Unspecified “Different Standards” To Her Claims Based on Petitioner’s Pro Se Status.

Petitioner seeks review of the Second Circuit’s decision affirming Summary Judgment in Trans Union’s favor based on wholly unfounded allegations claiming unspecified “different standards” applied to her claims based on her *pro se* status. Pet. Br., pp. 31-34.

Petitioner's contentions regarding the conduct of defense counsel and the Courts below, see Pet. Br. generally, are wholly false. Moreover, Petitioner fails to point to any specific "standard" that was applied contrary to law in this matter. Pet. Br., generally.

The Court should deny the Petition to review the Second Circuit's decision based on Petitioner's claim regarding her *pro se* status, which is both false and does not meet the criteria for consideration of a Petition for Writ of Certiorari. See United States Supreme Court Rule 10.

D. The Supreme Court Should Deny the Petition To Review The District Court's Legal Conclusion – Not Challenged by Petitioner In The Second Circuit – That a Dispute Generated By A Credit Repair Company Without Consulting The Consumer Does Not Trigger The Consumer Reporting Agency's Reinvestigation Obligations Under the FCRA, Where Petitioner Identifies No Conflict in the Circuit Courts on the Question and Petitioner Improperly Seeks Review Of The Correct Finding of Fact That The Disputes Generated By Petitioner's Credit Repair Company Were Done Without Her Participation.

Petitioner seeks Supreme Court review of the District Court's holding that credit disputes generated by a credit repair company without the participation of the consumer do not trigger the reinvestigation provisions of the FCRA. Pet. Br., pp. 34-35. The Second Circuit correctly noted that Petitioner did not challenge this holding on appeal, noting that

“[Petitioner] does not challenge the district court’s legal conclusion that a dispute generated by a credit repair company without consulting or notifying the consumer does not trigger the reporting agency’s reinvestigation obligations under § 1681i, and she has thus abandoned that challenge.” App., p. SCP-63. The Court should decline to review an issue that was not before the Second Circuit or addressed by the Circuit Court. Exxon Shipping Co. v. Baker, 554 U.S. 471, 487, 128 S.Ct. 2605, 171 L.Ed.2d 570 (2008).

Petitioner identifies no Circuit Court decisions in conflict with the Second Circuit and instead, Petitioner confuses the legal principle – that she did not challenge – with the factual issue of whether Petitioner’s credit repair company consulted her in preparing disputes to Trans Union. Pet. Br., p. 35. As to that issue, the Second Circuit noted that, “as the district court found, [Petitioner] repeatedly testified that, after she retained Creditrepair.com’s services, it generated disputes without her input or that she had no memory of being involved in initiating the disputes.” App., p. SCP-64.

Petitioner improperly seeks review of the factual determination that she was not involved in the preparation of the disputes to Trans Union prepared by the credit reporting company. Pet. Br., p. 35. The Court should deny the Petition to review the correct findings of fact affirmed by the Second Circuit. See United States Supreme Court Rule 10.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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