No. 14-1661

In the United States Court of Appeals for the Fourth Circuit

ALISHA KINGERY, f/k/a ALISHA WILKES,
on behalf of herself and those similarly situated
Plaintiff-Appellant,

v.

QUICKEN LOANS, INC.,
Defendant-Appellee.

On Appeal from the United States District Court
for the Southern District of West Virginia

OPENING BRIEF OF PLAINTIFF-APPELLANT ALISHA KINGERY

John W. Barrett
Jonathan R. Marshall
BAILEY & GLASSER, LLP
209 Capitol Street
Charleston, WV 25301
(304) 345-6555

Leonard A. Bennett
Matthew J. Erausquin
Susan M. Rotkis
CONSUMER LITIGATION ASSOCIATES
763 J. Clyde Morris Boulevard
Newport News, VA 23601
(757) 930-3660

Deepak Gupta
Jonathan E. Taylor
GUPTA BECK PLLC
1735 20th Street, NW
Washington, DC 20009
(202) 888-1741
deepak@guptabeck.com

Attorneys for Plaintiff-Appellant

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INTRODUCTION

Under the Fair Credit Reporting Act (FCRA), a lender who "uses a consumer credit score" in connection with a mortgage application must provide the consumer with certain disclosures—informing her of the credit score, its importance, and how it was calculated, among other things—"as soon as reasonably practicable." 15 U.S.C. § 1681g(g)(1). This appeal raises just one question: Could a reasonable jury conclude that Quicken Loans "used" Alisha Kingery's credit score without giving her the required notice? If so, the district court's grant of summary judgment must be reversed.

Quicken obtained three credit scores for Ms. Kingery, as a requirement to start the mortgage process. It integrated those scores into the program it uses to determine loan eligibility. It prominently displayed her scores in bold print on the first page of the credit report reviewed by its mortgage banker. It identified her qualifying score and made it available to determine her eligibility for "Second Voice," a program with a minimum-score requirement that would allow the loan process to move forward. And, after denying her entry to "Second Voice," it tried to sell her a credit-repair product called "Fresh Start" that it aggressively markets to people with credit scores below 620. At every step of the process, in other words, Quicken Loans employed Ms. Kingery's credit score to carry out its purposes.

Taken both together and in isolation, these facts overwhelmingly demonstrate that Quicken "used" Ms. Kingery's credit score in connection with a mortgage application. That conclusion is inescapable under any of the standard definitions of "use"—"'[t]o convert to one's service,' 'to employ,' 'to avail oneself of,'" or "'to carry out a purpose or action by means of.'" *Bailey v. United States*, 516 U.S. 137, 145 (1995). This Court should have little difficulty finding that a jury could have rationally determined that Quicken "used" Ms. Kingery's score because it "facilitate[d] or ha[d] a tendency to facilitate" the mortgage process. *United States v. Garnett*, 243 F.3d 824, 829 (4th Cir. 2001). The score, in fact, drives that process—from start to finish.

Quicken can escape reversal here only by distorting the statute. But the rest of the FCRA confirms that "use" indeed means 'use." Other notice requirements in the Act apply only if a lender takes action "based on" a score, indicating "a but-for causal relationship." *Safeco Ins. Co. of Am. v. Burr*, 551 U.S. 47, 63 (2007). Congress didn't add such language to the mortgage provision, and for good reason: the FCRA already required such notice. The mortgage provision, by contrast, requires notice to the consumer "as soon as reasonably practicable," so the consumer can compare, shop, negotiate mortgage terms, and correct any errors. Otherwise, the notice would come too late to provide much value and Congress's purpose would be thwarted.

JURISDICTION STATEMENT

The district court had subject-matter jurisdiction under 28 U.S.C. § 1331 and 15 U.S.C. § 1681p over the plaintiff's claims under the Fair Credit Reporting Act. The district court ordered that judgment be entered in favor of defendant Quicken Loans and dismissed this case from the docket on June 4, 2014. JA-877. The plaintiffs timely filed a notice of appeal under Federal Rule of Appellate Procedure 4(a)(1)(A) on July 2, 2014. This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUE

Under the Fair Credit Reporting Act, a mortgage lender that "uses a consumer credit score" in connection with a consumer's mortgage application must provide that consumer with certain important disclosures "as soon as reasonably practicable." 15 U.S.C. § 1681g(g)(1). The district court "conclude[d] that 'use' occurs under § 1681g(g) when the lender employs the consumer's score to achieve a purpose or objective," JA-865, and determined that Quicken Loans did not use Ms. Kingery's scores under this definition. Could a reasonable jury conclude that Quicken Loans "use[d]" Ms. Kingery's credit scores within the meaning of 15 U.S.C. § 1681g(g)(1)?

STATEMENT OF THE FACTS AND OF THE CASE

A. Quicken's mortgage-inquiry process

Quicken offers mortgages to consumers across the country. Whenever a consumer contacts Quicken to inquire about mortgage options—whether online, through email, or by phone—Quicken transmits the consumer's information to a software program (known as Loan Origination and Lead Allocation, or LOLA) that it uses to process all loan inquiries. JA-770 (Hein Dep. 27). Once Quicken has done so, the consumer's inquiry proceeds in the following series of steps:

1. Quicken pulls the credit score, which is prominently displayed on the mortgage banker's computer screen. Step one is for a Quicken mortgage banker to contact the consumer and request permission to pull the consumer's credit score. JA-770–71 (Hein Dep. 27–28); *see* JA-797. This score is "a three-digit number between 300 and 850" that is essential to the lending process because it "measures how creditworthy" a consumer is, and thus drives Quicken's determination of a consumer's eligibility and loan terms. Quicken, *Credit Score Q&A*, *available at* http://bit.ly/1CZcYnG; *see also id.* ("Banks use this number to determine how risky it is to lend you money").

"To get the ball rolling," Quicken tells its customers, "we need your credit score. This isn't our rule; it's something every mortgage company requires." JA-227, *also available at* http://bit.ly/1zDm6bY. "It only takes a few seconds," and

"[a]t that point we're ready to discuss loan options," *id.*, including "[y]our mortgage payment, interest rate and ability to qualify for a home loan" in the first place. *Id.*; JA-208.

Once the consumer grants permission, the banker will "select the button to pull credit" in the LOLA computer program, which will instantly request credit reports from the three major credit-reporting agencies, each of which typically creates its own score. JA-177 (Muskan Dep. 37); JA-274 (Lang Decl. ¶ 9). Because these agencies use different formulas and often rely on slightly different information (some of which might be incomplete or inaccurate), their scores are usually different as well, sometimes wildly so.

Quicken enters the credit scores into LOLA, and then—within "[f]ifteen seconds" of the banker's initial request to pull credit—they "pop[] right up on the screen" for the banker to see. JA-177 (Muskan Dep. 37–38). Because credit scores are so integral to the process, *see* JA-233–34, Quicken has designed its software so that they are prominently "displayed on the first page of the credit report," in bold typeface, so the banker can't miss them. JA-178 (Muskan Dep. 38). Other information about the consumer's credit history can be found later in the report, most of which the banker must scroll down to view. *See* JA-187.

2. Quicken's mortgage banker reviews the credit report and determines loan eligibility. The next step is for the banker to review the credit

scores and other information in the credit report. According to Quicken, this is a discretionary inquiry in which the banker carefully considers the consumer's full credit profile. "Mortgage bankers," Quicken recently told the Sixth Circuit, "use their discretion and independent judgment when analyzing their clients' credit histories," "evaluating creditworthiness[,] and making other risk assessments." Quicken Br. in *Henry v. Quicken Loans, Inc.*, 2012 WL 9085524, *20–22 (6th Cir. Mar. 27, 2012). Although Quicken provides "bankers with useful technological tools to assist" these determinations, "technology is no substitute for the use of effective discretion and independent judgment." *Id.* at *24. Because assessing a consumer's credit history "requires the ability to make independent choices that no computer can definitively make," bankers "use technology as they see fit" and may go "outside [the] guidelines" when making decisions. *Id.* at *22–25.[1]

Quicken trains its bankers to determine the consumer's "qualifying loan score" when reviewing the credit report. JA-270. As the company's mortgage-

[1] *See also Henry v. Quicken Loans, Inc.*, 698 F.3d 897 (6th Cir. 2012) (affirming jury finding that Quicken mortgage bankers are exempt from the Fair Labor Standards Act because they exercise "independent discretion and judgment"); *Henry v. Quicken Loans Inc.*, No. 04-CV-40346, 2009 WL 3270768, at *12 (E.D. Mich. July 16, 2009), *report and recommendation adopted*, No.2:04-CV-40346, 2009 WL 3199788 (E.D. Mich. Sept. 30, 2009) (discussing Quicken's argument that "mortgage loan officers' use of technological tools does not diminish their exercise of discretion and independent judgment"—"the tools do not select the mortgage loan product and the mortgage loan officer is still responsible for assessing the alternatives and making recommendations to the customer" (alterations omitted)).

banker manual lays out: "To qualify a client for a loan, we use the middle score of the three. When there are only two, the lower score is the client's specific credit score. Of the middle or lowest scores for all clients on the mortgage, the lowest one is the loan score. Loan scores are used to determine program qualification." *Id.* So the banker will likely pay particular attention to the middle score while reviewing the consumer's file.

After consulting the credit scores and other credit information, the banker then determines whether the consumer is eligible for a mortgage. If the answer is yes, the banker proceeds to discuss loan options and match the consumer with particular loans depending on the consumer's qualifying loan score, among other things. *See* JA-805; Dkt. 230-22 (Lang 30(b)(6) Dep. 22–24). If the answer is no, the banker selects the "deny/withdraw" button in LOLA, provides a reason for the denial, and proceeds to the next inquiry. *See* JA-199–200.

3. If denied, the inquiry is assessed for possible further review, but only if the credit score is high enough. A preliminary denial does not end the process. Because Quicken "want[s] to make sure [it is] providing every opportunity" to sell someone a mortgage, JA-267, and because different bankers might weigh the same credit information differently, Quicken builds in the possibility of another level of review. It calls this review "Second Voice" because it brings in "another banker for a second set of eyes and a second voice." *Id.* As

Quicken told the district court, Second Voice "provides a second review by a more senior banker to determine whether circumstances exist to allow the process to move forward, thereby transforming the denial into an application." Dist. Ct. Dkt. 217, at 6 n.4; *see also* JA-275 (Lang Decl. ¶¶ 15–16) ("A lead that is manually denied in LOLA could be turned into an application through the 'Second Voice' program.").

The determination of a consumer's eligibility for Second Voice can happen manually, with another banker considering the consumer's information—including her credit scores—and potentially contacting the consumer to discuss further. *Id.* at ¶ 15). Or it can happen automatically, "in the middle of the night," when Quicken sends the information to a computer program that will "look at the characteristics" of the inquiry to determine whether to "move it or escalate it to another way of prospecting or calling that client." JA-773-74 (Hein Dep. 81–82); *see also* JA-275 (Lang Decl. ¶ 17); JA-755–56, JA-763 (Lang Dep. 42–43, 60). But however eligibility for Second Voice is determined, the consumer's middle credit score is critical: "if it is below a certain threshold, then it's not selected for Second Voice." JA-774 (Hein Dep. 82). As Quicken's top software engineer says, "we are just looking at above 640 to include" a consumer for Second Voice. JA-757 (Lang Dep. 44); *see also* JA-267 ("A second voice lead is a client with a credit score (when it has been pulled) above 620 that another Mortgage Banker has denied or withdrawn.");

JA-265 (instructing bankers not to review if "[c]redit has been pulled and the client has a credit score below 620"). If the qualifying loan score falls below this cutoff, the consumer's inquiry will be denied for Second Voice.

4. If a consumer is denied for Second Voice, the credit score determines eligibility for "Fresh Start." Denial for Second Voice does not mean, however, that Quicken has abandoned any attempt to profit from the consumer's mortgage inquiry. To the contrary, Quicken sells a product called "Fresh Start" that it claims will help people "improve their credit scores." JA-269. Quicken attempts to sell this product—for which it charges hundreds of dollars—to consumers with credit scores below 620 (meaning, pretty much everyone denied by Second Voice). *Id.* Indeed, Quicken's mortgage-banker guide explicitly instructs bankers that "[t]arget clients have a credit score under the conventional 620," while giving the bankers incentives to enroll people in the program. *Id.*

5. Quicken delays notifying consumers that it has used their credit score. Several weeks after a consumer's inquiry has been denied by Second Voice, Quicken sends the consumer a formal denial letter. Only then—when it's too late for the consumer to do anything to change the outcome, or to use the information for comparison-shopping—does Quicken notify the consumer that it has used his or her credit scores during the mortgage-inquiry process. JA-838.

B. Alisha Kingery's mortgage inquiry

In late April 2010, Alisha Kingery was considering refinancing her home and sought to submit a mortgage application for that purpose. Her ex-husband had stolen her identity, used it to obtain loans without her knowledge, and absconded with the funds. As a state court later concluded, her ex-husband had "engaged in a calculated, lengthy, and for a long time successful, campaign to deceive and defraud" Ms. Kingery. JA-118. He deceived loan officers by representing that Ms. Kingery "was the owner of a business who had a very high income, when she in fact was a stay at home mother with no knowledge of the proposed loan[s]." *Id.* How he "disposed of the loan proceeds is not fully known. A significant portion went into his online investment trading business" and "[a]nother large portion went to the Bel[l]agio Casino and Hotel in Last Vegas—[he] liked to gamble." JA-119.

Ms. Kingery had informed the credit-reporting agencies about this fraud and identity theft, which she finally discovered while reviewing her credit report, and at least one agency had already removed it from her report. JA-188. She wanted to see if she qualified for refinancing. After entering her information on MortgageLoan.com, she received an email identifying Quicken as a potential mortgage lender. JA-83.

After the LOLA software created an inquiry for Ms. Kingery, a Quicken mortgage banker named Matt Muskan contacted her and asked permission to pull her credit score. JA-848. She gave it, and he did so. "Fifteen seconds" later, her scores "pop[ped] right up" on his screen. JA-178 (Muskan Dep. 38); *see* JA-199–200. Although Mr. Muskan now says that he has "no recollection" of what happened, JA-595, contemporaneous records show that he manually denied Ms. Kingery's inquiry because of "credit issues," JA-848 (one of the options for denying an inquiry in LOLA's dropdown menu, *see* JA-199–200). Selecting this option means that the consumer "is unable to obtain a loan due to their credit history or credit score." Dist. Ct. Dkt. 230-51, at 141. Ms. Kingery's credit scores at the time were 669, 614, and 566, giving her a qualifying score of 614 using Quicken's methodology. JA-102–103. She also had a foreclosure on at least one of her credit reports, which Mr. Muskan noted after selecting the "credit issues" option. JA-591; *see* JA-199–200.

Despite having no recollection of her inquiry, Mr. Muskan speculates after-the-fact that he thinks he would have "focus[ed] on the foreclosure proceedings" only, rather than the credit scores that appeared in bold on his computer screen, because "it would be irrelevant to look at her credit score." JA-592. But a 22-year veteran of the mortgage-lending industry testified below that he simply "do[es]n't agree" that Mr. Muskan "never looked at a credit score." JA-181 (McConville Dep.

240); *see* JA-238–262. As the veteran banker put it: "I don't believe in any way, shape or form that [her] credit score would not have been used or looked at to determine" her loan eligibility. "I have never seen [that] happen," unless "you want to close your eyes . . . I mean, it's bold as can be. . . . It's such a big part of the loan. I don't see how any loan officer could ever say that they don't look at those credit scores and consider them." JA-183–186 (McConville Dep. 294–97). He further explained that, because Ms. Kingery's qualifying score was "not high enough," it "would have prevented her from getting a mortgage" by itself—regardless of the other information in her file. JA-180.

After Mr. Muskan denied the inquiry, the next step was for Quicken to determine a consumer's eligibility for another level of review—what Quicken calls "Second Voice." In Ms. Kingery's case, this happened automatically. Her information was entered into the computer system—including her qualifying loan score of 614, which fell below the Second Voice cutoff of 620 or 640—and she failed to qualify for additional review.

Yet, according to a declaration by Quicken's software engineer prepared for this litigation, Quicken's process did not actually "use" Ms. Kingery's score because of how the computer program's "exclusionary" and "inclusionary" logic work: "A client's credit score," he stated, "is only viewed by the programming logic in LOLA for Second Voice *if* the lead is not first excluded. Because [Ms. Kingery's]

lead was automatically excluded from the Second Voice program based on LOLA's programming logic, her credit score was not accessed or viewed in any manner by the Second Voice programming logic." JA-276–77 (Lang Decl. ¶ 22). He did not deny, however, that the qualifying loan score was entered into the computer system for the purpose of determining eligibility for Second Voice, and that this purpose was then carried out.

Two days later, a Quicken consultant attempted to contact Ms. Kingery (by both phone and email) to try to sell her Fresh Start, the credit-repair product that the company pitches to consumers like Ms. Kingery, whose qualifying scores are below 620. JA-863. Three weeks later, Quicken sent her a formal denial. Only then did it give her the credit scores and "the key factors affecting" them, while explaining that "[c]redit scores are important because they are used to assist the lender in determining whether you will obtain a loan," as Quicken did here. JA-102–104.

C. The Fair Credit Reporting Act

1. Statutory Background. "Congress enacted [the] FCRA in 1970 out of concerns about abuses in the consumer reporting industry." *Dalton v. Capital Associated Indus., Inc.*, 257 F.3d 409, 414 (4th Cir. 2001). "Congress found that in too many instances [consumer-reporting] agencies were reporting inaccurate information," often without consumers' knowledge. *Id.*; *see* S. Rep. No. 91-157, at

3-4 (1969) (describing "inability" of consumers to discover errors). It enacted the FCRA to remedy these problems. Over the ensuing decades, as reporting inaccuracies persisted and technological advancements made "quick and convenient access to consumer credit" essential, H.R. Rep. 108–263, at 23 (2003), Congress repeatedly amended the statute to strengthen its protections and "improve the accuracy of consumer records." Pub. L. No. 108–159, 117 Stat. 1952 (2003).[2]

This case involves one of those amendments. In 2003, Congress added several provisions to the FCRA designed to "expand[] consumer access to credit information" and "provide[] consumers with important new rights for correcting inaccurate information on their credit reports." H.R. Rep. 108–263, at 22–23 (2003). These provisions include two key notice requirements.

a. The Risk-Based-Pricing Provision. The first requirement, known as the risk-based-pricing provision, applies to "any person" who "uses a

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[2] Even today, credit-reporting errors remain rampant. In one recent study, the FTC found that 25% of consumers "identified errors on their credit reports that might affect their credit scores," while 5% had errors that were so unfavorable they "could lead to [the consumer] paying more" for credit. FTC, *In FTC Study, Five Percent of Consumers Had Errors on Their Credit Reports That Could Result in Less Favorable Terms for Loans* (Feb. 11, 2013), *available at* http://1.usa.gov/1qXXAiv. As the director of the FTC's Bureau of Economics summarized: "These are eye-opening numbers for American consumers. The results of this first-of-its-kind study make it clear that consumers should check their credit reports regularly. If they don't, they are potentially putting their pocketbooks at risk." *Id.*

consumer report in connection with an application for, or . . . provision of, credit," and who charges the consumer more "based in whole or in part on [the] consumer report." 15 U.S.C. § 1681m(h)(1). This notice "must explain that information in the credit report was a factor in setting the unfavorable interest rate, how the consumer can obtain his or her credit history report, and how to correct false or incomplete data." *Nat'l Auto. Dealers Ass'n v. F.T.C.*, 864 F. Supp. 2d 65, 69–70 (D.D.C. 2012).

b. The Mortgage-Credit-Score Provision. The second notice requirement concerns the use of the consumer's credit score in the mortgage process—the "most important factor" affecting the most important financial decision most people will ever make. Dep't of the Treasury, Office of Thrift Supervision, *Consumer Booklet on Applying for a Mortgage*, Fed. Banking L. Rep. P 63-820I (C.C.H.), 2010 WL 1396197 (Mar. 31, 2010). This notice requirement applies to any mortgage lender who "uses a consumer credit score . . . in connection with an application initiated or sought by a consumer" for a qualifying mortgage. 15 U.S.C. § 1681g(g)(1). Unlike the risk-based-pricing provision, however, Congress did not condition this notice on the lender making a decision "based in whole or in part" on the score. Rather, the notice is triggered once the lender "uses" the score "in connection with" the mortgage process, after which the lender must provide the notice to the consumer "as soon as reasonably practicable," so that the consumer still has time to correct any errors. *Id.*

The required notice must inform the consumer of the particular scores "used in connection with your home loan" application, and "the key factors affecting your credit scores." 15 U.S.C. § 1681g(g)(1)(D). The notice must also explain that "[c]redit scores are important because they are used to assist the lender in determining whether you will obtain a loan," and inform the consumer that "it is very important that you review the credit-related information that is being furnished to make sure it is accurate," because the information "may vary from one company to another." *Id.* Further, the notice must "include the name, address, and telephone number of each consumer reporting agency providing a credit score that was used," so that the consumer may contact them with any questions. *Id.*

2. Regulatory Background. In addition to these notice requirements, the 2003 FCRA amendments also required the FTC and the Federal Reserve Board to issue regulations carrying out many of the law's provisions, including the risk-based-pricing provision (but not the mortgage-credit-score provision). *See id.* § 1681m(h)(6).[3] The risked-based-pricing regulations, which the agencies adopted in January 2010, define the "form, content, time, and manner of delivery of [the]

[3] With the passage of the Dodd-Frank Act in 2010, the newly created Consumer Financial Protection Bureau now has plenary regulatory authority over the FCRA. *See* Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 1088(a)(1)(E) (codified at 15 U.S.C. § 1681s).

notice," establish exceptions to the notice requirement, and "clarify the meaning of terms used" in the statutory provision. *Id.*; *see* 75 Fed. Reg. 2724-01 (Jan. 15, 2010).

In these regulations, the agencies created a safe harbor from the risk-based-pricing notice requirement; if a lender wanted to qualify for it, the "notice would be required to be provided to the consumer concurrently with the notice required by [the mortgage-credit-score provision]." 75 Fed. Reg. at 2741; *see* 12 C.F.R. § 1022.74. Because that provision requires the lender to provide notice upon "using" the score—and because the prevailing industry practice is to integrate the score into the lender's decision-making process immediately upon obtaining it—"[i]t was the Agencies' understanding that industry practice is generally to provide the credit score disclosure within three business days of obtaining a credit score and the Agencies would expect the integrated disclosure generally would be provided within the same timeframe." 75 Fed. Reg. at 2741.

3. Quicken's Response. When Quicken's in-house compliance attorney was asked about this understanding of industry practice, she responded: "the agencies got it wrong, which is not surprising." JA-727. But Quicken was aware that this was standard industry practice. Right before the 2003 FCRA amendments took effect, lawyers for the financial-services industry prepared a memo for all mortgage bankers highlighting the "major requirements." JA-155–156. On the first page was this one: "After pulling a consumer's credit score, brokers and lenders will

have to provide that score, and the key factors underlying the score, to the consumer." *Id.* It is not surprising that most lenders did so.

But Quicken chose not to. The company had recently been forced "to settle [FTC] charges that it failed to provide 'adverse action' notices in violation of [FCRA]," and it did not take kindly to the new notice requirements. *See* Federal Trade Commission, *Quicken Loans Agrees to Settle FTC Charges That It Failed to Provide Adverse Action Notices to Online Applicants Who Were Not Preapproved for Credit* (Dec. 30, 2002), *available at* http://1.usa.gov/1wdGf7Q.

Quicken's CEO, Daniel Gilbert, wrote an email to his employees challenging one of them to "shop" a white paper concerning the new regulations to "all of the politicians who would need to reform this insanity," and complaining: "The absurdity of each year that passes that NEW INSANE AND MEANINGLESS DISCLOSURES our [*sic*] added to the loan process has got to stop." JA-728 (capitalization in original).

Shortly after Mr. Gilbert made his views known, Quicken decided against providing the credit-score notices to consumers after integrating the scores into LOLA and instead chose to have the notice "triggered by the application or the denial." JA-838. Quicken was concerned that, if it provided notice earlier, "our calls to Client Relations would sky rocket because of the spouse that didn't know about the loan." *Id.* As the company's head of compliance wondered, "can you

imagine how many client calls we would get saying they didn't know anything about the credit pull?" JA-720.

Quicken understood that the FTC might take a different position, but decided not to ask the agency. The company concluded that it was better to "leave [the agency] well enough alone," *id.*, and not provide the notice earlier "unless the governments tells us we need to," JA-175, because Quicken didn't "want to open a can of worms." JA-838. These sentiments were all expressed by Quicken's chief compliance officer, whose internal correspondence to her colleagues openly derided the FCRA as "the worst law" and the obligation to comply with both state and federal disclosure requirements as "stupid." JA-719; JA-722.

D. This case

In May 2012, Ms. Kingery brought this putative class action challenging Quicken's uniform policy of deliberately withholding information about the credit scores it employs during its mortgage-inquiry process, rather than making the disclosures "as soon as reasonably practicable," as required by FCRA, 15 U.S.C. § 1681g(g). JA-30–38.

After discovery, Quicken moved for summary judgment. It contended that "[t]he undisputed facts demonstrate that Quicken Loans did not 'use' Plaintiff's credit score when it denied her prequalification request" because the "denial was based on a foreclosure" in her report, not her credit score, and because she was

"automatically excluded" from eligibility for Second Voice "due to the existing programming logic." Dist. Ct. Dkt. 217, at 2, 13. Quicken further claimed that "the undisputed facts shows that Quicken Loans did not take *any* action that employed Plaintiff's credit score for any purpose," and did not implement the score "to achieve some end." *Id.* at 12–13. Quicken also argued that Ms. Kingery "did not seek an application for a mortgage loan" because her inquiry "never reach[ed] the application stage." *Id.* at 2.

In response, Ms. Kingery argued that Quicken's interpretation of the word "use"—as requiring a *credit decision* to be made *based on* the score—reads into the credit-score provision "specific limitations that do not appear" there. Dist. Ct. Dkt. 9–10. They are found "instead [in] an entirely different FCRA section"—the risk-based-pricing provision. *Id.* That provision, she argued, "limits the 'use' involved specifically to the rendering of credit decisions"; the provision at issue in this case does not. *Id.* at 10. "Therefore, *any* 'employment' of the score" in connection with the application sought by the consumer is sufficient to trigger the notice requirement. *Id.* That happened here: "Quicken's processes rely heavily on both the presence and processing of a credit score to drive its telephone sales activities and workflows. Simply put, without credit scores, Quicken cannot process 'leads' into loan inquiries." *Id.* at 12. As a result, she argued, Quicken "used" her scores by integrating them into LOLA to facilitate its mortgage process and employing them

to determine eligibility for Second Voice and Fresh Start. In addition, she made the separate argument that obtaining a score, by itself, would "constitute 'use' by a 'user,'" even if Quicken did not "put it to any particular 'use.'" *Id.* at 12–13.

Before the district court ruled on Quicken's summary-judgment motion, it certified the case as a class action. JA-416. Two weeks later, however, the court reversed course, decertified the class, and granted summary judgment to Quicken. JA-435; JA-865–877. The court "conclude[d] that 'use' occurs under § 1681g(g) when the lender employs the consumer's score to achieve a purpose or objective," JA-865, and determined that Quicken did not use Ms. Kingery's scores under this definition. The court interpreted her argument as being that "Quicken used her score when Loan Platform"—an intermediary computer program that requests and obtains scores for LOLA—"obtained, sorted, and stored her three credit scores," and held that "merely obtaining scores and sorting them is not use." JA-872.

The court further determined that the undisputed facts show that Quicken did not use Ms. Kingery's "score to deny her loan inquiry" because "Mr. Muskan testified that he denied her loan inquiry due to a foreclosure on her credit report," and thus might not have consulted the scores, "although he could not remember the loan transaction." JA-873–74. The court did not mention its previous recognition (when certifying the case as a class action a few weeks earlier) that "a

screenshot of a sample Quicken credit report reveals that the banker must scroll past the credit scores to get to the foreclosure information." JA-419 (Certification decision 4). Nor did the court address Ms. Kingery's other arguments for how Quicken used her credit scores in its mortgage process.

STANDARD OF REVIEW

This Court reviews a district court's grant of summary judgment de novo and will "affirm only if the record shows that there is no genuine issue as to material fact." *Patterson v. McLean Credit Union*, 39 F.3d 515, 518 (4th Cir. 1994). By contrast, the Court will reverse "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

SUMMARY OF ARGUMENT

The Fair Credit Reporting Act (FCRA) requires any mortgage lender who "uses" a credit score "in connection with" a mortgage "application initiated or sought by a consumer" to provide notice to the consumer "as soon as reasonably practicable." 15 U.S.C. § 1681g(g). Because a reasonable jury could find that Quicken "used" Ms. Kingery's credit score, the district court's grant of summary judgment must be reversed.

A. The word "use" is "variously defined as '[t]o convert to one's service,' 'to employ,' 'to avail oneself of,' and 'to carry out a purpose or action by means of.'"

Bailey v. United States, 516 U.S. 137, 145 (1995). The Federal Trade Commission, interpreting the FCRA, has emphasized the breadth of the word "use," explaining that it "signif[ies] broader coverage" even than "obtain" or "procure." *Nat'l Auto. Dealers Ass'n v. F.T.C.*, 864 F. Supp. 2d 65, 74 (D.D.C. 2012). This Court's cases likewise make clear that "'use' is defined expansively." *United States v. Garnett*, 243 F.3d 824, 828 (4th Cir. 2001). Applying that precedent, a credit score is "used" "in connection with" a mortgage application sought by a consumer "if it facilitates or has a tendency to facilitate" the mortgage process. *Id.* at 829.

Because there is no doubt that a jury could have reasonably determined that Ms. Kingery's credit score facilitated or at least had a tendency to facilitate Quicken's mortgage process, the district court's decision cannot survive this Court's review. Indeed, the credit score drove the mortgage process at every step—from the moment it flashed prominently on the mortgage banker's screen just fifteen seconds into the process, to the moment Quicken tried to sell Ms. Kingery its credit-repair product, based on her credit score, at the very end.

B. The plain meaning of "use," and its application to these facts, is further confirmed by the FCRA as a whole and federal agencies' understanding of industry practice. In contrast to the mortgage credit-score provision, other FCRA provisions trigger notice only when an adverse action is taken "based in whole or in part on [the] consumer report," which "indicates a but-for causal relationship." *Safeco Ins.*

Co. of Am. v. Burr, 551 U.S. 47, 63 (2007). Congress's decision not to add similar language to the mortgage-credit-score provision makes sense because the FCRA already required notice under such circumstances.

Thus, the mortgage-credit-score notice "applies regardless of the final action taken by the lender on the application." National Consumer Law Center, *Fair Credit Reporting* § 8.4.3.1.1 (7th ed. 2010). That reading accords with federal agencies' understanding of industry practice—that notice is provided "within three business days of obtaining a consumer's credit score." 75 Fed. Reg. at 2741. But this understanding would makes no sense if the lender first had to take some action based on the score. And "the practical effect of [such an] interpretation could greatly undermine the Act's goal of providing information about credit reports to consumers" when there is still time for the notice to be of some use. *Nat'l Auto. Dealers*, 864 F. Supp. 2d at 80.

ARGUMENT

A reasonable jury could find that Quicken "used" Ms. Kingery's credit score "in connection with" her mortgage inquiry.

The FCRA requires any mortgage lender who "uses" a credit score "in connection with" a mortgage "application initiated or sought by a consumer" to provide notice to the consumer "as soon as reasonably practicable." 15 U.S.C. § 1681g(g). This appeal turns on what it means for a lender to "use" a credit score and can be resolved by applying the district court's own definition of that expansive

term: to "employ[] the consumer's score to achieve a purpose or objective." JA-873. A reasonable jury could find that Quicken employed Ms. Kingery's credit score at *every step* of its mortgage-inquiry process to achieve a purpose in connection with that process. Indeed, her score *drove* that process. The district court's holding that a jury could not "reasonably infer that Quicken used Ms. Kingery's score" at any point in the process is reversible error. JA-876.

A. The plain meaning of "use" does not require that a credit score be the but-for cause of a credit decision.

The FCRA does not define the word "use," so it must be given the full sweep of "its 'ordinary or natural' meaning, a meaning variously defined as '[t]o convert to one's service,' 'to employ,' 'to avail oneself of,' and 'to carry out a purpose or action by means of.'" *Bailey v. United States*, 516 U.S. 137, 145 (1995) (quoting *Smith v. United States*, 508 U.S. 223, 228–29 (1993)). These broad definitions, and many others like them, all recognize the wide range of functions that the word conveys. In fact, the word is "the broadest of the terms found in the statute." *Nat'l Auto. Dealers Ass'n*, 864 F. Supp. 2d at 74–75 (interpreting FCRA). As the FTC has recently explained in the FCRA context, the word "signif[ies] broader coverage" even than "obtain" or "procure." *Id.* at 74 (describing agency's brief). And here, the word's broad meaning is limited only by the qualifier that the use be "in connection with" a mortgage application sought by a consumer. 15 U.S.C. § 1681g(g).

As this Court has held, "[s]uch 'use' is defined expansively." *United States v. Garnett*, 243 F.3d 824, 828 (4th Cir. 2001) (applying ordinary meaning of "use" and "in connection with" in federal firearms statute). A credit score is "used" "in connection with" a mortgage application sought by a consumer "if it facilitates or has a tendency to facilitate" the mortgage process. *Id.* at 829; *see also United States v. Lipford*, 203 F.3d 259, 268 (4th Cir. 2000) (reversing district court's conclusion that a firearm was not used in connection with a drug offense because "the jury could have rationally determined that the firearm had *at least the potential of facilitating* the drug transaction at issue" (emphasis added)). Put differently, the score "must have some purpose or effect with respect to" the application sought; "its presence or involvement cannot be the result of accident or coincidence." *Smith*, 508 U.S. at 238.

There can be little doubt that Ms. Kingery's credit scores facilitated or "had at least the potential of facilitating" Quicken's mortgage process, *Lipford*, 203 F.3d at 268, and that their role in the process was not "the result of accident or coincidence," *Smith*, 508 U.S. at 238. Nor can there be any doubt that Quicken "convert[ed]" the scores to its "service" to help "carry out" its mortgage-inquiry process. *Bailey*, 516 U.S. at 145 (internal quotation marks omitted). To see why, consider all that Quicken did with Ms. Kingery's scores:

First, Quicken obtained three scores from the credit-reporting agencies as a requirement to starting the mortgage process. *Second*, it integrated the scores into LOLA, the program it uses to determine loan eligibility and set loan terms. *Third*, it prominently displayed the scores in bold print on the first page of the credit report reviewed by its mortgage banker, whom Quicken had trained to look for the "qualifying loan score" while consulting the report and determining loan eligibility. JA-270. *Fourth*, Quicken identified Ms. Kingery's qualifying loan score and made it available to determine her eligibility for Second Voice—a program that has a minimum-score requirement and (only if the consumer's score meets that requirement) can "allow the process to move forward, thereby transforming the denial into an application." Dist. Ct. Dkt. 217, at 6 n.4. *Fifth*, after denying her entry to Second Voice, Quicken contacted Ms. Kingery in an attempt to sell her a credit-repair product ("Fresh Start") that Quicken aggressively markets to people with credit scores below 620. JA-269.

Taken together or in isolation, these actions constitute "use" of a credit score "in connection with" a mortgage application sought by a consumer. 15 U.S.C. § 1681g(g). Because a rational jury could have found that any one of these actions

constituted "use"—and because only one such use is necessary—it was error for the district court to grant summary judgment to Quicken.[4]

In doing so, the district court reasoned that Quicken did not "use" Ms. Kingery's credit scores because "merely obtaining scores and sorting them is not use." JA-872. And it is indeed true that "'use' must connote more than mere possession" or "storage." *Bailey*, 516 U.S. at 143, 149. To the extent that we argued otherwise below, we disclaim that argument here; the word "impl[ies] action and implementation." *Id.* at 145.

Where the district court went astray, however, is in holding that no reasonable jury could find that Quicken implemented Ms. Kingery's scores to facilitate its mortgage-application process. For starters, the court failed to consider the way in which her scores were "employ[ed]" to determine her eligibility for "Fresh Start," which by itself constitutes use. *Bailey*, 516 U.S. at 145 (internal quotation marks omitted). That alone is reversible error.

[4] It does not matter that Quicken denied Ms. Kingery's inquiry before it reached the formal application stage, as Quicken argued below. The FCRA's mortgage-credit-score provision applies to an "application initiated *or sought* by a consumer." 15 U.S.C. § 1681g(g) (emphasis added). Thus, as the FTC has explained, "[w]hen a consumer consults a broker or lender about the options available, and that broker or lender procures and uses a score as part of that process, a disclosure is required even if the consultation does not include a formal or informal application." FTC Report, *40 Years of Experience with the Fair Credit Reporting Act*, 2011 WL 3020575, at *66 (July 2011).

More fundamentally, the court based its holding almost entirely on the testimony of Matt Muskan, Ms. Kingery's mortgage banker, that "he denied her loan inquiry due to a foreclosure on her credit report," not her credit score. JA-874. But that conflates "use" with reliance. Something can be "used" to facilitate a decision-making process without being the but-for cause of the ultimate decision. A law school, for example, "uses" an applicant's LSAT score and GPA when it prepares a packet on the candidate and identifies both numbers in bold on the first page for the admissions committee to review. That is true even if the committee ultimately denies her admission because her personal statement is rife with spelling errors, or because her letters of recommendation are uninspired. What matters for "use" is not that her LSAT score and GPA *caused* the admissions decision; it's that they were "convert[ed]" to the law school's "service" and facilitated or had the potential to facilitate the discretionary admissions decision. *Bailey*, 516 U.S. at 145 (internal quotation marks omitted). So too here.

Quicken did not simply "obtain[] scores and sort[] them," as the district court thought. JA-872. It converted the scores to its service by integrating them into its system and projecting them onto Mr. Muskan's computer screen so he would be made aware of them while making his eligibility determination. That is use. And even if it weren't, a reasonable jury could find that Mr. Muskan consulted the score and took it into account in exercising his discretion to determine

eligibility, notwithstanding the fact that he later denied her inquiry because of a foreclosure.

Then there is Second Voice. Quicken claims that it didn't use Ms. Kingery's score to determine her eligibility for Second Voice because it wrote its computer program so that it would consider the score *second* (as part of the "inclusionary" logic) rather than *first* (as part of its "exclusionary" logic). But one does not need a degree in software engineering to understand that Quicken "used" the score in the ordinary sense of the word. The important thing is that Quicken inputted Ms. Kingery's credit information into a computer program that has a minimum-score requirement that she didn't meet. And the program's purpose is to determine whether to reconsider a preliminary denial—a purpose that was carried out here. A rational jury could reasonably determine that this constitutes "use" under the FCRA.

More broadly, Quicken's descriptions of having such a rigid computer-driven process are troubling given its recent representations to the Sixth Circuit: that "evaluating creditworthiness and making other risk assessments" "requires the ability to make independent choices that no computer can definitively make," and that "technology is no substitute for the use of effective discretion and independent judgment." Quicken Br. in *Henry v. Quicken Loans, Inc.*, 2012 WL 9085524, *20, *24-

25 (6th Cir. Mar. 27, 2012). Now in this litigation, Quicken seems to be singing a different tune.

B. The plain meaning of "use" is confirmed by the statutory context and consistent with the agencies' understanding of industry practice.

The FCRA's surrounding statutory provisions confirm that "use" does not require the mortgage lender to have made a final lending decision "based on" the score. Recall that the risk-based-pricing provision, which Congress added at the same time as the mortgage-credit-score provision, similarly applies to anyone who "uses" a credit report "in connection with an application for, or . . . provision of, credit." 15 U.S.C. § 1681m(h)(1). But it doesn't stop there: To trigger the notice requirement, the person must also take a particular action (charging the consumer more money) "based in whole or in part on [the] consumer report." *Id.*

Because "the phrase 'based on' indicates a but-for causal relationship and thus a necessary logical condition," the Supreme Court has interpreted this language in the FCRA to mean that "an increased rate is not 'based in whole or in part on' the credit report unless the report was a necessary condition of the increase." *Safeco Ins. Co. of Am. v. Burr*, 551 U.S. 47, 63 (2007). Thus, the risk-based-pricing provision requires more than just "consulting a report" (that is to say, more than just "use"); Congress's decision to "condition[] the requirement on action 'based . . . on' a report suggests that the duty to report arises from some practical

consequence of reading the report, not merely some subsequent adverse occurrence that would have happened anyway." *Id.* at 63–64.

Congress could have added similar language to the mortgage-credit-score provision. It could have required, for example, that the score not only be "used" "in connection with" a mortgage inquiry, but that the mortgage lender also deny the inquiry "based on" the score. But Congress chose not to, and for good reason: The FCRA *already required* a credit-score notice whenever "any person takes any adverse action with respect to any consumer that is based in whole or in part on any information contained in a consumer report." 15 U.S.C. § 1681m(a).[5] If the mortgage-credit-score provision did nothing more than require notice that was already required, Congress wouldn't have added it. "It is a cardinal principle of statutory construction that a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant." *TRW Inc. v. Andrews*, 534 U.S. 19 (2001) (internal quotation marks omitted).

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[5] Congress added the risk-based-pricing provision in 2003 because a regulation interpreting the Equal Credit Opportunity Act "excludes from the definition of adverse action a counteroffer that is accepted by the consumer," and mortgage lenders had "argued that no adverse action notice requirements were triggered" under the FCRA when lenders offered credit "at an increased price to consumers based on information in the individual's consumer reports." National Consumer Law Center, *Fair Credit Reporting* § 8.7.1 (7th ed. 2010). The risk-based-pricing provision closed this loophole.

Unlike the adverse-action notice, the mortgage-credit-score notice "applies regardless of the final action taken by the lender on the application," as one leading treatise explains. National Consumer Law Center, *Fair Credit Reporting* § 8.4.3.1.1 (7th ed. 2010). As soon as a score is "used" in some way that relates to the mortgage-loan process, the lender must provide notice.[6]

This interpretation is also consistent with the federal agencies' understanding of industry practice—that the notice is provided "within three business days of obtaining a consumer's credit score"—because conversion and integration of the score typically take place almost instantaneously. 75 Fed. Reg. at 2741. That understanding does not make sense, however, if the mortgage lender must take some action based on the score. Moreover, "the practical effect of [such an] interpretation could greatly undermine the Act's goal of providing information about credit reports to consumers.' *Nat'l Auto. Dealers*, 864 F. Supp. 2d at 80. The purpose of the mortgage-credit-score provision is to give the consumer notice of the score "as soon as reasonably practicable" after it has been used, so that the consumer can compare, shop, and negotiate credit terms, or correct any errors. If

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[6] In addition, as the district court observed, the form credit-score notice that mortgage lenders must send consumers states that "[c]redit scores are important because they are *used to assist* the lender in determining whether you will obtain a loan." 15 U.S.C. § 1681g(g)(1)(D) (emphasis added). Using a score "to assist" in a decision-making process does not mean that the decision is "based on" it.

the consumer doesn't receive notice until weeks after the score has been used, it is too late to provide much value.

* * * *

Ultimately, the district court's decision to grant summary judgment cannot be squared with either the text of the statute or the record in this case. The relevant provision, the FCRA as a whole, precedent under this and other statutes, agency guidance, industry practice, and common sense all point in the same direction: "use" means "use." So the only question here is whether a reasonable jury could conclude that Quicken Loans in fact used Ms. Kingery's score. And the answer is that Quicken did so not once, not twice, but multiple times—from fifteen seconds into the mortgage process to the bitter end. Whether these uses of Ms. Kingery's score are viewed in the aggregate or one-by-one, "the evidence might well persuade a reasonable juror," *Hoyle v. Freightliner, LLC*, 650 F.3d 321, 334 (4th Cir. 2011), that Ms. Kingery's credit score was used in connection with a mortgage application that she sought. The district court's decision should therefore be reversed.

CONCLUSION

The district court's grant of summary judgment should be reversed.

Respectfully submitted,

/s/ Deepak Gupta

Deepak Gupta
Jonathan E. Taylor
GUPTA BECK PLLC
1735 20th Street, NW
Washington, DC 20009
(202) 888-1741

John W. Barrett
Jonathan R. Marshall
BAILEY & GLASSER, LLP
209 Capitol Street
Charleston, WV 25301
(304) 345-6555

Leonard A. Bennett
Matthew J. Erausquin
Susan M. Rotkis
CONSUMER LITIGATION ASSOCIATES
763 J. Clyde Morris Blvd,
Suite 1-A
Newport News, VA 23601
(757) 930-3660

Ian Lyngklip
CONSUMER LAW CENTER, PLC
Suite 206
24500 Northwestern Highway
Southfield, MI 48075
(248) 208-8864

John Charles Bazaz
Suite 1100
4000 Legato Road
Fairfax, VA 22033
(703) 272-8455

December 10, 2014

Counsel for Plaintiff-Appellant

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)(7)

I hereby certify that my word processing program, Microsoft Word, counted 8,157 words in the foregoing brief, exclusive of the portions excluded by Rule 32(a)(7)(B)(iii).

/s/ Deepak Gupta

December 10, 2014 Deepak Gupta

CERTIFICATE OF SERVICE

I hereby certify that on December 10, 2014, I electronically filed the foregoing Brief for the Plaintiff-Appellant with the Clerk of the Court of the U.S. Court of Appeals for the Fourth Circuit by using the Appellate CM/ECF system. All participants are registered CM/ECF users, and will be served by the Appellate CM/ECF system.

/s/ Deepak Gupta
Deepak Gupta