No. 06-

IN THE

Supreme Court of the United States

HARTFORD FIRE INSURANCE COMPANY,
Petitioner,

v.

JASON RAY REYNOLDS,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Ninth Circuit erred in holding, in acknowledged conflict with other circuits, that a defendant may "willfully" violate Section 616 of the Fair Credit Reporting Act (FCRA), 15 U.S.C. § 1681n, by acting merely in "reckless disregard" of statutory obligations, rather than by acting with knowledge that its conduct violates FCRA.

2. Whether the Ninth Circuit erred in creating new and open-ended disclosure requirements for adverse action notices beyond the discrete list expressly set forth in Section 615 of FCRA, 15 U.S.C. § 1681m(a).

PARTIES AND RULE 29.6 STATEMENT

The parties to the proceeding in the Ninth Circuit were Hartford Fire Insurance Company and Jason Reynolds.

Petitioner Hartford Fire Insurance Company has one parent company – The Hartford Financial Services Group, Inc. – which owns 100% of its stock.

The Hartford Financial Services Group, Inc., was named in then-appellant Reynolds' notice of appeal and in the caption of the Ninth Circuit's opinion, but Reynolds did not pursue his claims on appeal against that entity.

Matthew Rausch, although named in the notice of appeal and the caption of the Ninth Circuit's opinion, abandoned his appeal in the opening brief and was not a party to the proceedings in the Ninth Circuit.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES Page

TABLE OF AUTHORITIES – continued

TABLE OF AUTHORITIES – continued

TABLE OF AUTHORITIES – continued

STATUTES AND REGULATIONS Page

LEGISLATIVE HISTORY

TABLE OF AUTHORITIES – continued

SCHOLARLY AUTHORITIES

OTHER AUTHORITIES

PETITION FOR A WRIT OF CERTIORARI

Hartford Fire Insurance Company ("Hartford Fire") respectfully submits this petition for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The final opinion of the court of appeals is reported at 435 F.3d 1081 and reproduced at Petitioner's Appendix ("Pet. App.") 1a-31a. The order of the district court granting Hartford Fire's motion for summary judgment is unpublished and reproduced at Pet. App. 32a-36a.

JURISDICTION

The original opinion and judgment of the court of appeals was entered on August 4, 2005. On October 3, 2005, the opinion was withdrawn and a substituted opinion was filed. On October 24, 2005, a corrected opinion was filed. On October 25, 2005, the court issued an unpublished correction to the opinion. On January 25, 2006, the corrected opinion was withdrawn and a new opinion was filed. On April 20, 2006, the court of appeals denied a petition for rehearing and rehearing en banc. Pet. App. 37a-38a. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS

Sections 602-603 and 615-617 of the Fair Credit Reporting Act, 15 U.S.C. §§ 1681, 1681a(k), 1681m(a), 1681n, and 1681o, are reprinted at Pet. App. 39a-43a.

STATEMENT OF THE CASE

This case involves a question of national importance under Section 616 of the Fair Credit Reporting Act ("FCRA"), 15

U.S.C. § 1681n, on which the circuits are in acknowledged conflict. In the decision below, the Ninth Circuit held that a defendant "willfully" violates FCRA if it acts in "reckless disregard" of its statutory obligations. The Ninth Circuit defined "reckless disregard" as conduct in accordance with "implausible interpretations" as opposed to a "tenable, albeit erroneous interpretation of the statute." It offered no guidance as to how to distinguish "tenable" from "implausible" statutory interpretations. The Ninth Circuit then compounded the confusion by stating that in "some cases," the evaluation of reckless disregard also must include "how the company's decision was reached, including testimony of the company's executives and counsel." Pet. App. 29a-30a.

In sharp contrast, at least five Circuits – the Fourth, Fifth, Sixth, Seventh, and Eighth – have squarely held that a "willful" violation of FCRA requires proof that the defendant acted with knowledge that its conduct was unlawful. The Second and Tenth Circuits have issued decisions consistent with this higher standard. Even the Third Circuit, whose "reckless disregard" standard the Ninth Circuit purported to follow, has never endorsed an intrusive and incoherent inquiry into the legal advice that a defendant received and whether that advice was "tenable, albeit erroneous" as opposed to "creative" but "implausible."

These other circuits would have held as a matter of law that petitioner did not willfully violate FCRA. That is because the district court resolved the underlying issues of liability, which were questions of first impression, in petitioner's favor. Under an actual knowledge standard, or even a properly defined reckless disregard standard, conduct that is consistent with a district court's construction of a question of first impression cannot support a finding of willful misconduct.

This conflict warrants this Court's plenary review. FCRA applies to millions of daily transactions involving businesses in all areas of commerce: consumer reporting agencies,

providers of consumer report information, and employers, insurers, landlords, lenders, and others who use consumer reports to make decisions about the terms and conditions of consumer transactions. The impact of a finding of willfulness is profound because FCRA allows for the recovery of statutory damages between $100 and $1,000 per violation, plus punitive damages, plus attorneys fees – with no cap on recoveries in class actions. By lowering the standard of proof for statutory and punitive damages, the Ninth Circuit's decision creates an enormous incentive for class action litigation over technical statutory violations that do not cause any actual damages, but carry the threat of massive statutory damage awards.

The Ninth Circuit's decision is all the more extraordinary because it grafts new requirements onto those Congress specified for adverse action notices. The new requirements are both ill-defined and untethered to FCRA's goals. Congress did not intend these notices, for example, to help consumers "understand how a group of affiliated insurance companies operates or how consumers are assigned to specific entities within the overall structure." Pet. App. 24a-25a. The indefinite nature of these new notice requirements makes it not only more costly but more difficult for insurers and others to comply with them. The decision needlessly promotes new litigation over whether companies "recklessly" failed to anticipate new FCRA disclosure requirements. For this reason as well, the Court should grant the petition.

1. The Fair Credit Reporting Act

Congress enacted FCRA in 1970 to govern the conduct of those who use or provide consumer report information, such as insurers, lenders, employers, reporting agencies, and providers of consumer report information. The statute reflected Congress's concerns, *inter alia*, that consumer reports were not always accurate, that consumers were unaware that businesses increasingly relied upon such reports,

and that consumers often were unable to correct inaccuracies in their reports.[1]

To address these issues, Congress imposed disclosure obligations on users of consumer reports. If a user "denied" a consumer's application for credit or insurance or "increased" the "charge for such credit or insurance … either wholly or partly because of information contained in a consumer report," the user was required to "advise the consumer against whom such adverse action" was taken and "supply the name and address of the consumer reporting agency making the report." Pub. L. No. 91-508, tit. VI, § 615(a), 84 Stat. 1128, 1133 (1970).

Congress amended FCRA in 1996 to expand consumers' rights to obtain and correct information in consumer reports and, at the same time, to educate consumers about their rights.[2] In particular, Congress clarified the "adverse action" notice requirements by stating precisely what information consumers should receive. As amended, FCRA provides that a "notice of the adverse action," which can be "oral, written, or electronic," must disclose:

- the "name, address, and telephone number of the consumer reporting agency";
- "that the consumer reporting agency did not make the decision to take the adverse action and is unable to provide the consumer the specific reasons why the adverse action was taken";
- that the consumer has a right to "a free copy of a consumer report" within 60 days of receiving the notice; and

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[1] *See generally* S. Rep. No. 91-517, at 1-4 (1969); *see also, e.g.*, S. Rep. No. 103-209, at 2-3 (1993); Virginia G. Maurer, *Common Law Defamation and the Fair Credit Reporting Act*, 72 Geo. L.J. 95, 97 (1983).

[2] Pub. L. No. 104-208, 110 Stat. 3009-426 (1996); *see* H.R. Rep. No. 103-486, at 41-45 (1994).

- that the consumer has a right "to dispute … the accuracy or completeness of any information in a consumer report." 15 U.S.C. § 1681m(a)(1)-(3).

Congress has never imposed strict liability for FCRA violations. Instead, Congress crafted a two-tier remedial scheme that limits civil remedies to negligent and willful violations. Proof of a negligent violation entitles a plaintiff to actual damages. *Id.* § 1681o. Proof of a willful violation entitles a plaintiff either to actual damages or statutory damages of $100 to $1,000 per violation, as well as to punitive damages. *Id.* § 1681n.

2. Proceedings in the District Court

Respondent Jason Reynolds applied for insurance from two affiliates of Hartford Fire. Because these affiliates were unable to obtain any information about Reynolds from third-party consumer credit reporting agencies, they did not offer him a discount available to applicants with favorable credit report information. Reynolds alleged that not qualifying for a discount on his initial premium amounted to an "increase" in a "charge" for insurance and therefore was an "adverse action" under FCRA. Reynolds further alleged that Hartford Fire had an obligation, independent of the affiliates that issued his policies, to provide him an adverse action notice under FCRA and that Hartford Fire "willfully" failed to do so.

Reynolds alleged no actual damages. Instead, he sought statutory damages of between $100 and $1,000 per violation, plus punitive damages and attorneys' fees, on behalf of a putative class.

Hartford Fire moved for summary judgment on several independent grounds, including:

1. Setting an initial premium for a new policy is not an "increase" in a "charge" for insurance for that consumer, as set forth in Section 602, 15 U.S.C. § 1681a(k)(1)(B);

2. Hartford Fire was not the entity that issued the insurance policies to Reynolds and thus did not "take" the purported adverse actions against him;

3. Hartford Fire did not take an adverse action based on information "contained" in a consumer report because the consumer reporting agency had no credit information on Reynolds;

4. Reynolds in any event received, from affiliates of Hartford Fire, notices that complied with FCRA; and

5. Hartford Fire could not have willfully violated FCRA because its conduct, even if it violated FCRA, was a reasonable response to complex statutory issues of first impression.

On July 31, 2003, the district court agreed with Hartford Fire on the first two points – that setting an initial premium for insurance does not "increase" a "charge" for insurance and that, in any event, other entities issued the policies to Reynolds and thus Hartford Fire did not "take" an adverse action against him. Pet. App. 33a-34a (citing *Mark* v. *Valley Ins. Co.*, 275 F. Supp. 2d 1307 (D. Or. 2003)). The district court did not reach Hartford Fire's other three arguments. The district court entered a judgment dismissing Reynolds' action with prejudice.

On August 15, 2003, Reynolds appealed the judgment.

3. Proceedings in the Ninth Circuit

A. In its original opinion, authored by Judge Reinhardt and entered on August 4, 2005, the Ninth Circuit acknowledged that the question whether FCRA applies to setting initial premiums in the insurance context is one of "first impression." 416 F.3d 1097, 1106. It concluded that setting an initial premium at a level higher than an insurer's best rate is an "increase" in a "charge" for insurance that triggers a duty to give notice under FCRA. *Id.* at 1108.

The Ninth Circuit also decided several other issues of first impression. Again disagreeing with the district court, the Ninth Circuit held that Hartford Fire had an independent obligation to give Reynolds adverse action notices under FCRA, even though Hartford Fire had no contractual relationship with Reynolds and did not issue a policy to him. *Id.* at 1111-13.

In addition to the discrete list of disclosures set forth in FCRA, the Ninth Circuit imposed new, open-ended disclosure requirements. It held that a company must not only describe, but also "specify the effect" of an adverse action on a consumer. *Id.* at 1110. It also required companies to "explain the actions each affiliated company took" so that consumers can better understand "how a group of affiliated insurance companies operates or how consumers are assigned to specific entities within their overall structure." *Id.* at 1112. The Ninth Circuit noted that it may construe FCRA to require still more, as-yet-unidentified, disclosures. *Id.* at 1110-11 & n.14 ("whether a fuller description of what specific information was adverse is required … is not before us").

The Ninth Circuit acknowledged that the standard for a willful violation of FCRA was a matter of conflict within the circuits. It nominally adopted a "reckless disregard" standard for willful violations, stating that it did not want to "create perverse incentives for companies covered by FCRA to avoid learning the law's dictates by employing counsel with the deliberate purpose of obtaining opinions that provide creative but unlikely answers to 'issues of first impression.'" *Id.* at 1115. The majority then ruled that Hartford Fire's interpretations of FCRA, though accepted by the district court, nevertheless were so "objectively unmeritorious" and "unreasonable" that they established a willful violation of FCRA as a matter of law. *Id.* at 1115-16. Judge Bybee dissented on this point. *Id.* at 1117.

B. Hartford Fire petitioned for rehearing and rehearing *en banc*, challenging the Ninth Circuit's "reckless disregard"

standard, its *sua sponte* finding of a willful violation, and its unprecedented expansion of the obligations under FCRA. Several amici filed briefs in support of the petition for rehearing. They expressed alarm at the Ninth Circuit's radical expansion of FCRA, the new notice and disclosure requirements under FCRA, and the new potential the Ninth Circuit had created for extraordinary liability for statutory and punitive damages.

C. On October 3, 2005, the Ninth Circuit withdrew its initial opinion and filed an amended opinion. 426 F.3d 1020. The amended opinion used different adjectives to describe Hartford Fire's arguments before the district court; for example, instead of describing them as "objectively unmeritorious" and "unreasonable" (terms associated with negligent misconduct), the decision labeled them as "plainly unmeritorious," "untenable," "implausible," "indefensible," and "not colorable." *Id.* at 1039-40. Judge Bybee again dissented from the majority's finding of willfulness. *Id.* at 1040-41.

D. Hartford Fire, again supported by amici, filed a second petition for rehearing and rehearing *en banc*. It explained why, despite these changes, the Ninth Circuit's decision remained fundamentally flawed.

On January 25, 2006, the Ninth Circuit withdrew its second amended opinion and filed its third and final opinion. The Ninth Circuit adhered to its reckless disregard standard for willfulness, rather than the actual knowledge standard followed in other circuits. Pet. App. 27a-28a & n.17. The prior majority, however, finally abandoned its *sua sponte* finding of a willful violation.

Instead, the Ninth Circuit remanded for an inquiry into whether Hartford Fire acted in reckless disregard of FCRA. It called first for a determination whether Hartford Fire came "to a tenable, albeit erroneous, interpretation of the statute," or instead relied on "creative lawyering" to obtain

"indefensible answers" or "implausible interpretations." Pet. App. 29a. According to the Ninth Circuit, the latter type of interpretation "may constitute reckless disregard for the law," while the former will not. *Id.* The court of appeals then stated that in "some cases" reckless disregard also may "depend in part on the specific evidence as to how the company's decision was reached, including the testimony of the company's executives and counsel." *Id.* at 30a. Although the court observed that "at least some" of the many legal interpretations it had addressed were "implausible," it did not identify which those were. It also offered no guidance as to how the district court should determine which interpretations in this case were implausible, or in which cases an exploration of privileged communications is required.

Hartford Fire, with the continued support of amici, renewed its arguments in a third petition for rehearing and rehearing *en banc*. On April 20, 2006, the Ninth Circuit denied that petition.

REASONS FOR GRANTING THE PETITION

The conflict over the definition of a willful violation of FCRA by itself warrants certiorari. See *TRW Inc.* v. *Andrews*, 534 U.S. 19 (2001) (resolving a circuit split over the proper interpretation of FCRA's statute of limitations). The Ninth Circuit has adopted a "reckless disregard" standard that conflicts with the higher *mens rea* standard of actual knowledge adopted by the Fourth, Fifth, Sixth, Seventh, and Eighth Circuits. This mature conflict over the meaning of "willfully" has been acknowledged by the Third, Eighth, and now the Ninth Circuits, albeit only partially.

The Ninth Circuit's decision not only exacerbates the conflict, but also fundamentally distorts FCRA's remedial structure. Under FCRA's two-tier liability scheme, Congress permitted awards of statutory and punitive damages only upon proof of misconduct more blameworthy than

negligence. Under the Ninth Circuit's "reckless disregard" standard, however, conduct that as a matter of law would not amount even to negligence nevertheless can support a finding of willfulness. The Ninth Circuit's ruling encourages a plaintiff to allege technical FCRA violations in nationwide class actions in order to seek millions of dollars in statutory and punitive damages and demand disclosure of privileged communications. As a result, the Ninth Circuit's decision transforms FCRA into an engine of expensive and needless litigation that will chill the candid provision of legal counsel, particularly on questions of first impression, and result in costly and counterproductive overcompliance.

The practical importance of this expanded conflict over the *mens rea* standard for willfulness cannot be overstated. FCRA governs the dissemination and maintenance of more than two billion items of information transmitted each month relating to approximately one-and-a-half billion credit accounts held by approximately 190 million individuals. Robert B. Avery et al., *An Overview of Consumer Data and Credit Reporting*, Fed. Res. Bull. 47, 49 (Feb. 2003). FCRA regulates the issuance of two to three million consumer credit reports each day.[3] The scale of these and other business activities regulated by FCRA illustrates why the consequences of a finding of willfulness – statutory and punitive damages – are profound, particularly in class action litigation, where defendants confront enormous demands for statutory damages by class action plaintiffs who admittedly cannot prove that a violation caused them any actual injury.

The Ninth Circuit's decision warrants certiorari also because it radically revises FCRA's disclosure requirements. The Ninth Circuit has imposed disclosure obligations for

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[3] *The Fair Credit Reporting Act and Issues Presented by Reauthorization of the Expiring Preemption Provisions: Hearings Before the S. Comm. on Banking, Hous. & Urban Affairs*, 108th Cong. 47-48 & nn.4, 15 (2003).

which no party advocated, which are unsupported by the plain language of the statute, and which are contrary to 35 years of regulatory experience. The new requirements are not merely wrong, but confusing and costly to implement, and unconnected to FCRA's stated goals. The Ninth Circuit's new requirements leave users of consumer reports who want to comply with FCRA at a loss as to how to do so. Unless review of this aspect of the Ninth Circuit's decision is granted, millions of businesses nationwide will continue to struggle under the Ninth Circuit's open-ended and costly new requirements. For this reason as well, the Court should grant the petition.

I.

The Ninth Circuit has construed Section 616(a) to permit an award of statutory and punitive damages upon proof of conduct in reckless disregard of the notice duties imposed by FCRA. This places the Ninth Circuit on the wrong side of a lopsided split among at least seven circuits. The decisions of several district courts in other circuits reflect the confusion over the correct standard, and confirm that this split involves a recurring and important legal issue.

A. The Conflict Over The *Mens Rea* Standard For Willful Violations Of FCRA Is Real And Pervasive.

The Ninth Circuit's "reckless disregard" standard for willful violations under Section 616(a) places it in conflict with, at a minimum, decisions of the Fourth, Fifth, Sixth, Seventh, and Eighth Circuits. The Ninth Circuit acknowledged the conflict, but understated its scope.

The Ninth Circuit construed "willfully" under Section 616(a) to mean "either knowing" that the action violates the rights of consumers or acting in "reckless disregard of … those rights." Pet. App. 27a (quotation marks omitted). The Ninth Circuit acknowledged that this standard squarely

conflicts with the holding of the Eighth Circuit and the "implicit" holding of the Sixth Circuit, both of which require proof of actual knowledge that challenged conduct violates FCRA. *Id.* at 28a n.17 (citing *Phillips* v. *Grendahl*, 312 F.3d 357, 370 (8th Cir. 2002), *Duncan* v. *Handmaker*, 149 F.3d 424, 429 (6th Cir. 1998)).

The Eighth Circuit, recognizing the importance of the issue, expressly considered at length in *Phillips* "what state of mind amounts to willfulness" under "Section 1681n(a)" for "willful noncompliance with any requirement of the Fair Credit Reporting Act." *Phillips*, 312 F.3d at 368-69. The court held that "use of the word 'willfully' imports the requirement that the defendant know his or her conduct is unlawful." *Id.* at 368; see *id*. (a defendant "must … be conscious that his act impinges on the rights of others"). The Eighth Circuit found support for an actual knowledge standard in decisions of the Second, Fourth, Fifth, Sixth, and Tenth Circuits. *Id*. at 368-69. At the same time, the Eighth Circuit expressly rejected the Third Circuit's reckless disregard standard as incompatible with numerous circuit decisions interpreting FCRA to preclude liability when a defendant acted under what it incorrectly "believed to be a proper purpose." *Id.* (quotation marks omitted) (quoting *Duncan*, 149 F.3d at 429).

The Seventh Circuit has expressly endorsed the Eighth Circuit's actual knowledge standard. According to the Seventh Circuit, "a defendant must knowingly and intentionally violate [FCRA], and it 'must also be conscious that [its] act impinges on the rights of others.'" *Wantz* v. *Experian Info. Solutions*, 386 F.3d 829, 834 (7th Cir. 2004) (second alteration in original) (quoting and relying upon *Phillips*, 312 F.3d at 368); see also *Ruffin-Thompkins* v. *Experian Info. Solutions, Inc.*, 422 F.3d 603, 610 (7th Cir. 2005) (reaffirming willfulness standard adopted in *Wantz*); *Bagby* v. *Experian Info. Solutions, Inc.*, 162 F. App'x 600 (7th Cir. 2006) (unpublished) (following *Wantz*).

The Fifth Circuit also requires proof that the defendant knew its conduct violated FCRA. The evidence must reveal a "conscious disregard" for FCRA and an "intention to thwart consciously" a person's rights under FCRA. *Stevenson* v. *TRW Inc.*, 987 F.2d 288, 293-94 (5th Cir. 1993). "Only defendants who engaged in 'willful misrepresentations or concealments' have committed a willful violation … under § 1681n." *Id.* (quoting and citing *Pinner* v. *Schmidt*, 805 F.2d 1258, 1263 (5th Cir. 1986)) (reversing and vacating judgment under a clearly erroneous standard because no evidence demonstrated an intent to "thwart consciously [plaintiff's] right to" remove inaccurate information from a consumer report or to "knowingly and intentionally obscure[] the [FCRA] notice in conscious disregard of consumers' rights"); see also *Cousin* v. *Trans Union Corp.*, 246 F.3d 359, 372-73 (5th Cir. 2001) (vacating jury verdict that defendant acted willfully).

The Fourth Circuit is in accord. *Dalton* v. *Capital Associated Indus., Inc.*, 257 F.3d 409, 418 (4th Cir. 2001) (adopting "conscious disregard" standard from *Stevenson*, 987 F.2d at 294, and *Pinner*, 805 F.2d at 1263); see also *Ausherman* v. *Bank of Am. Corp.*, 352 F.3d 896, 900 (4th Cir. 2003) (affirming summary judgment for defendant on willfulness because evidence revealed defendant's employees "had 'no idea why or who' was" improperly obtaining copies of consumer reports); *Yohay* v. *City of Alexandria Employees Credit Union, Inc.*, 827 F.2d 967, 969-70, 972 (4th Cir. 1987) (noting jury instruction correctly precluded a finding of willfulness if the defendant violated FCRA because of an "innocent reason").

Reflecting this broad consensus among the courts of appeals, commentators have long stated that a "willful"

violation of FCRA requires proof of actual knowledge that the conduct at issue violates FCRA.[4]

The Third Circuit stated in *Cushman* that its reckless disregard standard was not fully in accord with the standard embraced by the Fifth Circuit. See *Cushman* v. *Trans Union Corp.*, 115 F.3d 220, 226-27 (3d Cir. 1997) ("declin[ing] to adopt the Fifth Circuit's holding" in *Stevenson*); see also *Phillips*, 312 F.3d at 368-69 (contrasting the Third and Fifth Circuit standards). Unlike the Ninth Circuit, however, the Third Circuit did not consider reckless disregard to represent a radical departure from an actual knowledge standard. Rather, it agreed that a defendant had to possess a *mens rea* "on the same order as willful concealments or misrepresentations." *Cushman*, 115 F.3d at 227.

District court decisions from other circuits further demonstrate the scope of this conflict and the need for definitive guidance from this Court. District courts in the Eleventh and D.C. Circuits have employed an actual knowledge standard expressly consistent with that in the Fifth and Eighth Circuits.[5] District courts in the First and Tenth Circuits have disagreed as to whether to employ the actual

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[4] Kevin F. O'Malley, Jay E. Grenig & William C. Lee, *Federal Jury Practice and Instructions* §§ 153.39, 153.71 (5th ed. 2001) (to act "willfully" under FCRA requires "an omission or failure to do an act voluntarily and intentionally, and with specific intent to fail to do something the law requires to be done, in other words, with a purpose either to disobey or disregard the law"); Note, *Protecting the Subjects of Credit Reports*, 80 Yale L.J. 1035, 1067 (1971) (liability for willfulness under FCRA "is dependent upon … showing intentional violation" of the law).

[5] *Jordan* v. *Equifax Info. Servs.*, 410 F. Supp. 2d 1349, 135 (D. Ga. 2006) (adopting Eighth Circuit standard); *Preston* v. *Mortgage Guar. Ins. Corp.*, No. 5:03-cv-111-Oc-10GRJ, 2004 U.S. Dist. LEXIS 28914, at *9-10 (D. Fla. June 22, 2004) (adopting Fifth Circuit standard); *Wiggins* v. *Equifax Servs.*, 848 F. Supp. 213, 219 (D.D.C. 1993) (adopting Fifth Circuit standard).

knowledge or the reckless disregard standard.[6] These conflicting constructions of an important and recurring issue of law warrant this Court's plenary review.

B. The Ninth Circuit's Definition Of Willfulness Conflicts With FCRA's History And Structure.

Review also is warranted because the Ninth Circuit's reckless disregard standard is contrary to the history and structure of FCRA. The Ninth Circuit purportedly chose a reckless disregard standard because this Court adopted such a standard when construing the term "willful" in other statutes. Pet. App. 27a-28a. The Ninth Circuit overlooked, however, this Court's repeated admonition that the meaning of "willfulness" varies depending on its statutory context and must be construed in light of that context. *Bishop* v. *United States*, 412 U.S. 346, 352 (1973); *Screws* v. *United States*, 325 U.S. 91, 101 (1945); *Spies* v. *United States*, 317 U.S. 492, 497 (1943); *United States* v. *Murdock*, 290 U.S. 389, 394 (1933), *overruled in part on other grounds by Murphy* v. *Waterfront Comm'n*, 378 U.S. 52 (1964).

In the decisions the Ninth Circuit cited, for example, this Court relied on the legislative history and structure of the statutes at issue in determining that Congress intended "willful" to encompass conduct in reckless disregard of statutory obligations. *Trans World Airlines, Inc.* v. *Thurston*, 469 U.S. 111, 126 (1985) (adopting a "reckless disregard" standard for ADEA claims "[g]iven the legislative history of the liquidated damages provision"); *Hazen Paper Co.* v. *Biggins*, 507 U.S. 604, 614-15 (1993) (reaffirming *Thurston*,

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[6] *Compare Cole* v. *Am. Family Mut. Ins. Co.*, 410 F. Supp. 2d 1020, 1024 (D. Kan. 2006) (adopting actual knowledge standard), *and Valvo* v. *Trans Union LLC*, No. 04-70S, 2005 U.S. Dist. LEXIS 39120, at *22 (D.R.I. Oct. 27, 2005) (adopting Fifth Circuit standard), *with Apodaca* v. *Discover Fin. Servs.*, 417 F. Supp. 2d 1220, 1228–29 (D.N.M. 2006) (adopting reckless disregard standard), *and Veno* v. *AT&T Corp.*, 297 F. Supp. 2d 379, 384 (D. Mass. 2003) ("reckless indifference").

citing the ADEA's legislative history); *United States* v. *Ill. Cent. R.R.*, 303 U.S. 239, 242 (1938) (construing "willfully" in light of an act's "humanitarian provisions" and statutory "exceptions"). Such a lower standard of *mens rea* was appropriate for those statutes, because the consequences of a willful violation were relatively modest and proportionate to any finding of actual damages.[7]

FCRA's history and structure, in contrast, point in precisely the opposite direction. FCRA's legislative history confirms that Congress intended to reserve statutory and punitive damages to punish only knowing, as opposed to reckless, violations of the law. The bill that became FCRA originally contained a gross negligence standard for actual damages and a willfulness standard for actual and punitive damages. S. 823, 91st Cong. §§ 616-617 (Nov. 12, 1969). After considering whether to lower the standard for recovery of actual damages to simple negligence, and to lower the standard for actual damages and punitive damages to gross negligence, H.R. 19403, 91st Cong. §§ 51-52 (1970); H.R. 19410, 91st Cong. §§ 51-52 (1970), Congress did adopt simple negligence as the standard for actual damages, but continued to require proof of a willful violation for actual and punitive damages. H.R. Rep. No. 91-1587 (1970) (Conf. Rep.). Congress thus considered, but rejected, the option of

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[7] For example, "willfully" violating the FLSA merely extends the limitations period by one year. 29 U.S.C. § 255(a). "Willfully" violating the ADEA results in liquidated damages in a civil action equal to actual damages. 29 U.S.C. § 626(b). Neither statute permits an award of punitive damages for willful violations. FCRA, in contrast, permits awards of punitive damages and imposes no proportional relationship between statutory damages and actual harm, if any. Some courts award statutory and punitive damages under FCRA even when plaintiffs offer no proof whatsoever of actual harm. *E.g.*, *Murray* v. *New Cingular Wireless Servs., Inc.*, 232 F.R.D. 295, 302-03 (N.D. Ill. 2005).

watering down the *mens rea* standard for actual and punitive damages to gross negligence. 15 U.S.C. § 1681n (1970).[8]

This history is significant because, at the time Congress enacted FCRA, "reckless disregard" and gross negligence were the same for all practical purposes. *E.g.*, *Black's Law Dictionary* 1185 (4th ed. 1968) (defining "gross negligence" as "[t]he intentional failure to perform a manifest duty in reckless disregard of the consequences"); see also *Farmer* v. *Brennan*, 511 U.S. 825, 836 n.4 (1994) (noting gross negligence "in practice typically mean[s] little different from recklessness as generally understood in the civil law"). Thus, the Ninth Circuit has adopted a reckless disregard standard that Congress rejected when it enacted FCRA.

Notably, Congress has amended FCRA several times since its enactment in 1970. The last time it amended Section 616 was in 1996. At that time, the Circuits had spoken with one voice in favor of requiring actual knowledge to establish willfulness. Indeed, by 1996, it had long been understood that "willful" violations of FCRA require proof of actual knowledge that conduct was unlawful. *Supra* note 4. Congress had an opportunity to lower the standard for a willful violation to reckless disregard if it disagreed with the courts of appeals and commentators. Its failure to do so is further evidence that the longstanding and dominant view among the circuits is correct. *Lindahl* v. *Office of Personnel Mgmt.*, 470 U.S. 768, 782 n.15 (1985) ("'Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it reenacts a statute without change.'") (quoting *Lorillard* v. *Pons*, 434 U.S. 575, 580-81 (1978)).

The Ninth Circuit's decision also turns FCRA's two-tier civil remedy structure on its head. The decision allows

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[8] When Congress amended FCRA in 1996 to give plaintiffs the option to seek actual or statutory damages for willful violations, it did not change the *mens rea* standard.

conduct that is not negligent as a mater of law to support a finding of willfulness.

Under the Ninth Circuit's unprecedented approach to FCRA liability, objectively reasonable conduct, which cannot support a finding of negligence under FCRA's lower tier, may in some circumstances support a finding of willfulness and thus liability for statutory and punitive damages under the *higher* tier of penalties that Congress reserved for willful misconduct. That result is absurd. It cannot be what Congress intended Section 616 to permit. The Second Circuit has effectively recognized this point. See *Podell* v. *Citicorp Diners Club, Inc.*, 112 F.3d 98, 104 (2d Cir. 1997) (concluding that because plaintiff could not prove a negligent violation his "claim for willful noncompliance with FCRA fail[ed] *a fortiori*"); cf. *Sapia* v. *Regency Motors of Metairie, Inc.*, 276 F.3d 747, 753 (5th Cir. 2002) (rejecting as "unfounded" and "incorrect" an argument that would potentially "allow punitive damages for all" FCRA violations).

It is elementary tort law that objectively reasonable conduct cannot support a finding of negligence. *E.g.*, 1 Dan B. Dobbs, *The Law of Torts* §§ 117, 143 (2001). It is equally well-settled that conduct found lawful by a trial court on summary judgment is objectively reasonable as a matter of law. *Prof'l Real Estate Investors, Inc.* v. *Columbia Pictures Indus.*, 508 U.S. 49, 57, 61 n.5, 63, 65 (1993); *infra* note 9. Under FCRA's first tier, therefore, conduct that a district court holds lawful under FCRA is objectively reasonable as a matter of law and cannot support an award of actual damages. It cannot be that Congress intended the same conduct to trigger an inquiry into willful noncompliance under the higher tier. Yet the Ninth Circuit permits this result.

The Ninth Circuit's approach to the *mens rea* standard under Section 616(a) thus is wrong "[r]egardless of which [Circuit] standard" for willfulness applies. See *Menton* v. *Experian Corp.*, No. 02 Civ. 4687 (NRB), 2003 WL

21692820, at *4 (S.D.N.Y. July 21, 2003). Statutory and punitive damages are "unwarranted" even where a defendant "narrowly construed" an "undefined" statutory term under FCRA without "the benefit of prior court decisions." *Id.* Under the actual-knowledge standard endorsed by almost all of the other circuits, the district court's judgment below would have been affirmed. The absence of any judicial guidance on key issues of FCRA's scope means that Hartford Fire, as a matter of law, lacked actual knowledge that its conduct violated FCRA, and thus did not act willfully. *Stevenson*, 987 F.2d at 296 (reversing because a FCRA violation cannot be deemed willful as a matter of law when "[t]here was no prior guidance to suggest that [defendant's] notice was insufficient"); cf. *Flores* v. *Carnival Cruise Lines*, 47 F.3d 1120, 1127 (11th Cir. 1995) (affirming dismissal of alleged willful violation of law "[b]ecause this is a case of first impression"); *Whitfield* v. *City of Knoxville*, 756 F.2d 455, 463-64 (6th Cir. 1985) (holding "defendants did not have actual knowledge" that their conduct violated the ADEA because the "case law was split at that time").

The same is true under a properly defined reckless disregard standard. The Third Circuit has held that the presence of unanswered questions of statutory interpretation forecloses any finding that a defendant acted in reckless disregard of the law. See *Reich* v. *Gateway Press*, 13 F.3d 685, 702-03 (3d Cir. 1994) (holding FLSA violations on issues of "first impression" did not constitute reckless disregard and thus did not result in liability for willfulness). Thus, even the Third Circuit would not hold petitioner liable for a willful violation.

In sum, FCRA's legislative history and structure confirm that actual knowledge is the correct standard for establishing willfulness under Section 616(a). But, even under a properly defined reckless disregard standard, the judgment of the district court should have been affirmed. That error on a

recurring issue of national importance warrants this Court's review.

C. The Ninth Circuit's Construction Of Reckless Disregard Is Standardless And Pernicious.

The Ninth Circuit's decision also merits review because the court's definition of reckless disregard is vague and unprincipled and invites needless waivers of the attorney-client privilege. Under the Ninth Circuit's definition of reckless disregard, the factfinder first decides whether the defendant received legal advice that was either "erroneous but tenable" on the one hand, or "creative" but "implausible" on the other. Pet. App. 29a. No guidance is provided, either procedurally or substantively, as to how to draw this indistinct line.

The Ninth Circuit then blurs the inquiry further by stating that, in "some cases," the factfinder also must weigh the objective reasonableness of the company's statutory position against "the specific evidence of how the company's decision was reached, including the testimony of the company's executives and counsel." Pet. App. 30a. The Ninth Circuit thus holds that the defense of "some" FCRA cases routinely will require a waiver of the attorney-client privilege – though it fails to provide guidance as to which cases those would be.

This unprecedented standard is incoherent. It also needlessly intrudes on the attorney-client privilege. In other statutory contexts where this Court has applied a "reckless disregard" standard, it has not required any balancing of the merits of a legal position against the testimony of legal counsel. Rather, even where the Court has deemed a legal position "meritless," the Court has nevertheless held that the fact that a company sought and followed the advice of counsel was itself sufficient to preclude a finding that it acted in reckless disregard of its obligations. *Thurston*, 469 U.S. at 129.

Similarly, where, as here, a party has prevailed on summary judgment before the trial court, this Court has held that such a finding establishes as a matter of law that the party's legal position was objectively reasonable. *Prof'l Real Estate Investors*, 508 U.S. at 60-63 & n.5. In those circumstances, the Court has held that a party's conduct, for that reason alone, could not constitute a "sham," and has barred any proceedings into the party's subjective intent, even where that intent was alleged to be malicious. *Id*. at 57, 62, 65-66.[9]

Allowing objectively reasonable conduct to form the basis of a willful violation of FCRA is especially pernicious because it confronts defendants with the Hobson's choice of waiving the attorney-client privilege by asserting an advice-of-counsel defense, or risking an inference of willfulness that they may not be able to rebut if their objective legal position is deemed "creative but implausible" rather than merely "erroneous but tenable." The Ninth Circuit's avowed goal is to defeat "perverse incentives for companies covered by FCRA to avoid learning the law's dictates by employing counsel with the deliberate purpose of obtaining opinions that provide creative but unlikely answers to 'issues of first impression.'" Pet. App. 29a. But its reckless disregard standard goes too far.

This Court has long emphasized the critically important role that the attorney-client privilege plays in ensuring the vitality of our adversarial system. *Upjohn* v. *United States*,

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[9] *See* 508 U.S. at 60 ("Only if challenged litigation is objectively meritless may a court examine the litigant's subjective motivation."); *see also Restatement (Second) of Torts* § 675 cmt. b (1977) ("a decision by a competent tribunal in favor of the person initiating civil proceedings is conclusive evidence of probable cause"); *Wilson* v. *Parker, Covert, & Chidester*, 50 P.3d 733, 736 (Cal. 2002) (probable cause in a malicious prosecution case, which addresses the objective reasonableness of a litigant's position, is a legal question to be resolved by the court and "is determined objectively, *i.e.*, without reference to whether the attorney bringing the prior action believed the case was tenable").

449 U.S. 383, 392 (1981) ("In light of the vast and complicated array of regulatory legislation confronting the modern corporation, corporations, unlike most individuals, constantly go to lawyers to find out how to obey the law, particularly since compliance with the [statutory] law … is hardly an instinctive matter.") (quotation marks and citations omitted). To ensure the regular use of counsel, and the provision of candid advice, clients must have confidence that courts will respect the attorney-client privilege. "An uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all." *Id.* at 393. Indeed, it discourages resort to counsel.[10]

The legal system benefits from the provision of candid and thoughtful legal advice on questions of first impression relating to statutory compliance. By stating that, in some cases, waiver of the attorney-client privilege is a necessary element of a defense to allegations that a company willfully violated FCRA, the Ninth Circuit's decision needlessly threatens to chill both the provision of such advice and the vigorous advocacy that is a hallmark of our legal system.

D. Review Is Appropriate Now.

The Court should grant the petition now to resolve this longstanding and pervasive circuit split. The Ninth Circuit has simultaneously enlarged the universe of potential FCRA violations and lowered the standard for proving willfulness. This erroneous standard, applicable to businesses nationwide

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[10] *See* John William Gergacz, *Attorney-Corporate Client Privilege* § 1.12 (3d ed. 2001) ("[B]usiness executives offering consumer products on an installment basis may be satisfied with a basic form prepared in 1966. Although the form may not unduly burden the consumer, it would most likely violate federal truth-in-lending regulations. Society has an interest in minimizing such inadvertent violations of its regulations.... [M]aking business communication with counsel subject to disclosure adds an additional cost to the business decision to seek legal advice, thereby making preventive legal consultation less attractive to a client.").

in millions of dealings with consumers, will needlessly spawn new litigation and disrupt the management of hundreds of existing cases.

A review of electronic docket summaries reveals approximately 2,600 cases filed in federal district courts since January 2004 alleging FCRA violations, including hundreds of class actions. Nearly 1,000 of these cases were filed after the Ninth Circuit issued its initial opinion in this case. FCRA also is the subject of several pending Multi-District Litigation proceedings.[11] Granting review at this time therefore will promote the efficient management of numerous individual, class and MDL proceedings.

Companies subject to FCRA must now attempt to predict how the Ninth Circuit will next expand FCRA's statutory obligations, expend the resources to satisfy these predicted changes, and still operate under the threat of class action litigation for statutory and punitive damages if they fail to guess correctly. Hartford Fire will face all of these adverse consequences even if it prevails on the willfulness issue on remand. This Court should intervene now, clarify the correct standard, and restore the limits on damages for willful violations that Congress originally imposed.

II.

Review is all the more important now because the Ninth Circuit used this case as a springboard to impose burdensome

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[11] *See In re The Progressive Corp. Ins. Underwriting & Rating Practices Litig.*, MDL-1519 (N.D. Fla. transferred Apr. 15, 2003); *In re Trans Union Corp. Privacy Litig.*, MDL 1350 (N.D. Ill. transferred Aug. 2, 2000); *In re Ocean Fin. Corp. Prescreening Litig.*, MDL-1778 (N.D. Ill. transferred June 21, 2006); *In re H&R Block Mortgage Corp. Prescreening Litig.*, MDL-1767 (N.D. Ind. transferred June 20, 2005); *In re Farmers Ins. Co.*, MDL-1564 (W.D. Okla. transferred Nov. 28, 2003); *In re Allstate Ins. Co. Underwriting & Rating Practices Litig.*, MDL-1457 (M.D. Tenn. transferred June 19, 2002).

new requirements for FCRA adverse action notices. No party or amici asked the Ninth Circuit to adopt these new notice requirements, and they were not necessary to the Ninth Circuit's decision. The Ninth Circuit thus imposed them without the benefit even of briefing, let alone the factual record that Congress or a federal agency would develop before creating such requirements.

As set forth above, in 1996, Congress clarified with precision the requisite contents of a "notice of the adverse action." 15 U.S.C. § 1681m(a)(1)-(3) (quoted *supra* at 4-5). Seizing upon the phrase "notice of the adverse action" in Section 615(a)(1), and relegating the express statutory requirements to a footnote, the Ninth Circuit held that users of consumer reports also must, "at a minimum … describe the [adverse] action, specify the effect of the action upon the consumer, and identify the party or parties taking the action, and their respective roles." Pet. App. 21a & nn.13-14, 24a-25a.

These new notice requirements are a dramatic shift from past FCRA decisions and regulation. In over 35 years, *no* court or federal agency has required users to go beyond the statutory requirements and describe an adverse action, specify the effect of an adverse action on a consumer, or explain the respective roles of the various affiliated companies who took such an action.

The Ninth Circuit's open-ended approach to FCRA's notice requirements is unworkable and confusing, and warrants immediate review. The Ninth Circuit does not explain the difference between "describing" an adverse action and "specifying" its effect. It also leaves unanswered the degree to which the roles of various affiliated corporations must be explained. These ambiguities frustrate efforts by users of consumer reports to comply with FCRA. Such users now must either expend substantial resources on over-compliance or incur the risk of potentially crushing statutory penalties and punitive damages. Neither choice is appropriate because

Congress intended to avoid both by specifying the contents of adverse action notices.

Second, these new requirements find no support in the language or stated goals of FCRA. The new requirement to "identify the party or parties taking the action, and their respective roles," for example, is fashioned out of whole cloth. The Ninth Circuit claims this new requirement is necessary because it "doubt[s] that many consumers understand how a group of affiliated insurance companies operates or how consumers are assigned to specific entities within their overall structure." Pet. App. 24a-25a. It therefore demands that companies now "explain the actions each affiliated company took," so that consumers can "comprehend what transpired with respect to the increased cost of their policy." *Id.* at 25a.

The goal of FCRA's notice requirements, however, is to notify consumers of their rights to obtain copies of and correct their consumer reports, not to teach consumers the intricacies of corporate structures. Pet. App. 4a, 16a ("the stated purpose of FCRA" is "to ensure the '[a]ccuracy and fairness of credit reporting'") (alteration in original). Explaining the actions that "each affiliated company took" is likely to confuse, not help, consumers. At a minimum, it either will multiply the number of adverse action notices consumers receive (because each affiliate now has an independent duty to send a notice), or multiply the names on each notice, as well as lengthen and complicate those notices. This could not have been what Congress intended, especially for notices that can be given orally or in writing. 15 U.S.C. § 1681m(a)(1).

There also is no regulatory precedent for expanding FCRA's notice duty beyond its express bounds. The FTC has repeatedly assured users of consumer reports that disclosing "only" the information expressly identified in Section 615(a) satisfies FCRA. 15 U.S.C. § 1681m(a)(2)-(3); 16 C.F.R. pt. 698, app. H; *see also* FTC Staff Opinion Letter 1 (Nov. 10,

1998) (Section 615(a) "requires disclosure only of the information specified .... The FCRA does not require insurers to disclose specific reason(s) for taking adverse action, or to identify information from a consumer report that contributed to the action."); FTC Staff Opinion Letter 2 (Mar. 3, 1998) ("A notice that includes the specific items set forth in Section 615(a) will comply with that provision...."). The FTC and Federal Reserve have distributed sample notices that mirror FCRA's express requirements.[12] Courts have agreed that FCRA requires what it says and nothing more. *E.g.*, *Thele* v. *Sunrise Chevrolet, Inc.*, No. 1:03cv2626,, 2004 U.S. Dist. LEXIS 9670, at *25-27 (N.D. Ill. May 28, 2004) (granting summary judgment because defendant complied with FCRA's express notice requirements).

In short, the Ninth Circuit's decision not only misinterprets FCRA's notice requirements, it frustrates efforts by users of consumer reports to comply with the law.

* * * *

By lowering the bar for proof of willful violations, and expanding the obligations FCRA imposes, the Ninth Circuit created an unprecedented incentive for new class action litigation. By alleging that violations of these new requirements were taken in reckless disregard for a company's obligations, class action plaintiffs who have suffered no actual injuries will seek potentially massive statutory and punitive damages and pressure defendants to defend cases by waiving the attorney-client privilege and

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[12] *See, e.g., Fair Credit Reporting Act-1973: Hearings Before the Subcomm. on Consumer Credit of the S. Comm. on Banking, Hous. & Urban Affairs on S. 2360*, 93d Cong. 56 (1973); FTC Div. of Credit Practices, *Compliance with the Fair Credit Reporting Act* (2d ed. rev'd Mar. 1979); *Fair Credit Reporting Act: Hearings Before the Subcomm. on Consumer Affairs & Coinage of the H. Comm. on Banking, Fin. & Urban Affairs*, 101st Cong. 1043-44, 1055 (1989); 12 C.F.R. pt. 202, app. C, form C-5 (2005).

exposing executives and counsel to invasive discovery. This is not remotely what Congress intended FCRA to achieve. This Court therefore should grant review and reverse the Ninth Circuit's judicial rewriting of FCRA.

CONCLUSION

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

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