No. _____

IN THE

Supreme Court of the United States

SAFECO INSURANCE COMPANY OF AMERICA, ET AL.,
Petitioners,
v.

CHARLES BURR, ET AL.,
Respondents.

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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QUESTION PRESENTED

Whether the Ninth Circuit erred in holding that a defendant can be found liable for a "willful" violation of the Fair Credit Reporting Act ("FCRA") upon a finding of "reckless disregard" for FCRA's requirements, in conflict with the unanimous holdings of other circuits that "willfulness" requires actual knowledge that the defendant's conduct violates FCRA.

PARTIES TO THE PROCEEDINGS

Petitioners Safeco Insurance Company of America, American States Insurance Company, Safeco Insurance Company of Illinois, and Safeco Insurance Company of Oregon were defendants in the district court proceedings and appellees in the court of appeals proceedings.

Safeco Corporation was named as a defendant in the original complaint but subsequently was voluntarily dismissed from the case by plaintiffs during the district court proceedings.

Charles Burr and Shannon Massey were plaintiffs in the district court proceedings and appellants in the court of appeals proceedings. Lori Spano, Alan Opoien, Patricia McGrath, and Joan Horton were also at one time or another, and some still are, plaintiffs in the district court proceedings, but none of them participated in the court of appeals proceedings and thus are not respondents to this petition.

CORPORATE DISCLOSURE STATEMENTS

Pursuant to Rule 29.6 of the Rules of this Court, petitioners Safeco Insurance Company of America, American States Insurance Company, Safeco Insurance Company of Illinois, and Safeco Insurance Company of Oregon state the following:

Safeco Insurance Company of Oregon is a wholly owned subsidiary of Safeco Insurance Company of America. Safeco Insurance Company of America, American States Insurance Company, and Safeco Insurance Company of Illinois are wholly owned subsidiaries of Safeco Corporation, a publicly traded company. Safeco Corporation has no parent company, and no publicly held company owns 10% or more of its stock.

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Petitioners Safeco Insurance Company of America ("Safeco-America"), American States Insurance Company ("American States"), Safeco Insurance Company of Illinois ("Safeco-Illinois"), and Safeco Insurance Company of Oregon ("Safeco-Oregon") (collectively, "Safeco") respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

INTRODUCTION

This case presents a square circuit conflict on an important and recurring question of federal statutory construction. Under § 616 of the Fair Credit Reporting Act, 15 U.S.C. §§ 1681 *et seq.* ("FCRA"), defendants can be held liable for actual damages or statutory damages of up to $1,000 per violation, punitive damages, attorney's fees, and costs for any "willful" violation of FCRA's substantive requirements. 15 U.S.C. § 1681n.[1] Unlike other federal consumer credit provisions, such as the Truth in Lending Act, 15 U.S.C. § 1640(a)(2)(B), and the Equal Credit Opportunity Act, 15 U.S.C. § 1691e(b), FCRA contains no limit on the amount of damages (actual, statutory, or punitive) that can be recovered in a consumer class action.[2] Under the settled law of all other circuits to address the issue, liability for "willful" conduct must be based upon a showing that the defendant knew that its conduct violated FCRA. In the decision below, however, the Ninth Circuit departed from this unanimous view and held that insurers, banks, and the many other businesses covered by FCRA can be held liable under § 616 in circumstances where they act with "reckless disregard" of the law's requirements.

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[1] Under § 617 of FCRA, plaintiffs' recovery for "negligent" violations is limited to actual damages plus costs and attorney's fees. 15 U.S.C. § 1681*o*.

[2] Courts have held that actual damages are not a prerequisite to recovery of punitive damages under § 616 of FCRA. *See, e.g.*, *Yohay v. City of Alexandria Employees Credit Union, Inc.*, 827 F.2d 967, 972 (4th Cir. 1987).

The Ninth Circuit acknowledged the square conflict between its view and those of the Sixth and Eighth Circuits on this purely legal question, and noted specifically that "[t]he Eighth Circuit has rejected the reckless disregard standard and requires actual knowledge with regard to the law." Pet. App. 128a n.17. In fact, the split is considerably deeper than that: eight circuits have held that "willfulness" requires actual knowledge of what the law requires, and three circuits, namely the Sixth, Seventh, and Eighth, have specifically rejected the Ninth Circuit's "reckless disregard" alternative.

Moreover, the Ninth Circuit exacerbated the split by defining "reckless disregard" in broad fashion, such that liability may be imposed on companies for failing to anticipate future judicial decisions on issues of first impression under FCRA, notwithstanding good-faith reliance on advice of counsel. In elaborating its unprecedented "reckless disregard" standard, the Ninth Circuit held that reliance on advice of counsel is "not dispositive," out of a concern that attorneys would deliberately engage in "creative lawyering that provides indefensible answers" to unresolved legal questions. *Id.* at 129a. The Ninth Circuit's broad understanding of liability under § 616 of FCRA will require companies to incur the needless and considerable expense of attempting to conform their conduct to the broadest conceivable interpretation of the statute. Importantly, moreover, the Ninth Circuit adopted this extreme interpretation in the context of a purported nationwide class action, which would potentially impose the Ninth Circuit's minority views on the operations of these defendants as to their customers *throughout the country*, effectively overruling the contrary law of other circuits.

The Ninth Circuit's decision thus threatens to impose significantly greater liability on defendants than they would face in other circuits. Indeed, this case presents a good example of the problem. Substantively, the Ninth Circuit held, in a ruling that had never been previously adopted by any court (and in fact was contrary to prior federal court decisions), that an insurance company (or any other user of consumer information) is required to provide notice to consumers when it relies on information contained in the consumer's credit report in deciding not to offer that consumer the best possible rate in an initial policy of insurance. The Ninth Circuit so held even though the statute requires notice only where there has been "an *increase* in any charge for . . . any insurance," 15 U.S.C. § 1681a(k)(1)(B)(i) (emphasis added), and, based on that language, the district court had concluded that an initial charge for insurance could not be subject to this notice requirement. Given the absence of any prior judicial guidance that notice was required in this factual circumstance, defendants' violations could not have been "knowing" and "intentional" under the standard adopted by the other eight courts of appeals that have addressed the issue. The district court's dismissal of this action would thus have been affirmed in those circuits. In conflict with those decisions, the Ninth Circuit held that defendants could still be held liable for "reckless disregard" of the law, and it remanded the case with instructions to the district court to allow an intrusive inquiry into defendants' corporate decision-making processes and advice of counsel. *See* Pet. App. 2a; *id.* at 127a-129a.

The resolution of this issue is of enormous importance to insurance companies, credit card companies, mortgage companies, and the wide range of other businesses that are subject to the requirements of FCRA. In the context of this case alone, the Ninth Circuit's dilution of § 616's willfulness standard threatens insurance companies such as Safeco with tens of billions of dollars in statutory damages, in addition to potentially enormous punitive damages and attorney's fees, for their failure to anticipate the Ninth Circuit's novel interpretation of FCRA's adverse-action notice requirement. More broadly, FCRA continues to be the subject of substantial litigation, and there is still considerable uncertainty about basic questions regarding this statute's scope. The Ninth Circuit's erroneous interpretation of the "willfulness" requirement thus threatens to impose significant liability – including statutory and punitive damages – in cases where FCRA's requirements had yet to be established, and defendants' failure to abide by them could not be deemed knowing or intentional.

In the context of a purported nationwide class action, moreover, that decision threatens, effectively, to overrule the precedents of eight other circuits and impose liability on national insurers throughout the country. If the Ninth Circuit's aberrant view goes uncorrected, all future class-action FCRA suits against national companies will now almost inevitably be filed in the Ninth Circuit. As a result, businesses will be forced to incur potentially enormous and unnecessary compliance costs, out of concern that their good-faith judgments about the proper interpretation of FCRA will be deemed "reckless" when judged by an appellate court against a later-enunciated reading of the statute.

OPINIONS BELOW

The memorandum order of the Ninth Circuit (Pet. App. 1a-2a) is unreported (but is available at 140 F. App'x 746, 2005 WL 1865971). The Ninth Circuit's decision in this case, as well as several other related cases, was based entirely on that court's published opinion in two other related and consolidated cases, *Reynolds v. Hartford Financial Services Group, Inc.* and *Edo v. GEICO Casualty Co.* The original consolidated opinion in *Reynolds* and *Edo* was filed on August 4, 2005, and is reported at 416 F.3d 1097 (Pet. App. 37a-68a). Upon petitions for rehearing and rehearing *en banc*, the panel withdrew its original opinion and issued a modified opinion on October 3, 2005, which, as amended on October 24, 2005, is reported at 426 F.3d 1020 (Pet. App. 69a-101a). Upon defendants' second petition for rehearing and rehearing *en banc*, the panel issued yet another modified opinion on January 25, 2006, which is reported at 435 F.3d 1081 (Pet. App. 102a-131a).

JURISDICTION

The judgment of the Ninth Circuit was entered on August 4, 2005. The Ninth Circuit denied a timely petition for rehearing and rehearing *en banc* on April 20, 2006. *See* Pet. App. 36a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Relevant provisions of FCRA are set forth at Pet. App. 132a-156a.

STATEMENT OF THE CASE

1. FCRA was enacted in 1970 primarily to regulate "consumer reporting agencies," which are broadly defined to include companies that collect, compile, and furnish "consumer reports" containing information "bearing on a consumer's credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living" for use in determining the consumer's eligibility for credit, insurance, employment, and certain other purposes. 15 U.S.C. § 1681a(d), (f). Congress viewed the accurate reporting of consumer information as important "to promote efficiency in the Nation's banking system and to protect consumer privacy." *TRW Inc. v. Andrews*, 534 U.S. 19, 23 (2001). Thus, for example, FCRA requires a consumer reporting agency to: (i) maintain "reasonable procedures to assure maximum possible accuracy of the information" the agency reports on consumers; (ii) exclude obsolete information from consumer reports; (iii) disclose consumer reports only to those that have one of the specified permissible purposes to receive them; and (iv) allow consumers to access and correct information the agency maintains about them. *See* 15 U.S.C. §§ 1681c, 1681e, 1681g, 1681h.

FCRA remained largely unchanged until 1996, when Congress passed amendments that, among other things, expanded the Act to cover not only consumer reporting agencies, but also other businesses that generate consumer credit information. *See id.* § 1681s-2 (provisions governing "furnishers of information"). Furnishers of information include a wide range of businesses that deal with consumer credit, including credit card companies, auto finance companies, and mortgage banking institutions. Information furnishers must, among other things, provide accurate information to credit reporting agencies; investigate disputed information from customers; and inform customers about negative information that may be put on their consumer report. *See id.*

FCRA also imposes obligations on a third category of businesses – namely, users of consumer reports. *See id.* § 1681m. Users of consumer reports include insurance companies such as Safeco, as well as consumer credit companies and employers. As relevant here, any user of consumer credit information is required by FCRA to provide "adverse action" notices to consumers when they deny credit, insurance, or employment, or take certain other adverse actions, based on information contained in a consumer report. *Id.* § 1681m(a).

2. Safeco offers a wide range of insurance products to consumers nationwide, including automobile, homeowners, renters, and small-business policies. Safeco-America is a sister company to Safeco-Illinois and American States. Safeco-Oregon is a wholly owned subsidiary of Safeco-America. All four insurance companies are wholly owned subsidiaries of Safeco Corporation, a publicly traded holding company. All of the companies operate independently and have separate boards of directors. *See* Pet. App. 17a.

On October 2, 2001, plaintiff Lori Spano filed a purported nationwide class action against Safeco Corporation for alleged violations of § 615 of FCRA, which requires "any person" to provide notice to a consumer if that person "takes any adverse action with respect to [that] consumer that is based in whole or in part on any information contained in a consumer report." 15 U.S.C. § 1681m(a). Spano alleged that Safeco Corporation took adverse actions against her and others similarly situated with respect to the underwriting of insurance as a result of information contained in their consumer credit reports, without providing them with the notice required by § 615. *See* Pet. App. 23a. The complaint alleged no actual damages, but sought statutory damages, punitive damages, and attorney's fees. *See id.* at 4a, 26a.

As to herself, Spano claimed that she purchased an automobile insurance policy from Safeco National Insurance Company that was subsequently endorsed to Safeco-Oregon. The policy was cancelled four times for failure to pay the premium; each time, it was reinstated by Safeco-Oregon without reference to any consumer credit information. After the policy was cancelled for a fifth time, Spano requested that Safeco-Oregon reinstate it yet again. Safeco-Oregon declined to do so, based in part on information contained in a consumer credit report. Spano alleged that this decision not to reinstate was an "adverse action" under FCRA entitling her to notice. *See id.* at 4a, 5a.

Spano later added other named plaintiffs, including respondents Massey and Burr. *See* S.E.R.[3] 1-5. Burr applied for automobile insurance in July 2001, and he was issued a policy by American States. *See* Pet. App. 4a. American States underwrote the policy through InsurQuest, a program designed for high-risk drivers. *See* E.R. 4. InsurQuest places drivers into one of five pricing tiers, designated A through E, based on the totality of the driver's underwriting characteristics. *See id.* Burr was placed in Tier D, mainly because of his poor driving record. *See id.* Although his consumer credit information was consulted in placing him in Tier D, even the most favorable credit score would not have improved his tier placement and his premium would not have changed. *See id.*; Pet. App. 4a. After the American States policy lapsed for failure to pay premiums on July 7, 2002, Burr pur-

[3] References to "E.R." and "S.E.R." are to the Excerpts of Record and Supplemental Excerpts of Record, respectively, filed in the court of appeals.

chased a new policy from Safeco-Oregon, which relied on information in Burr's consumer credit report in setting the amount of Burr's initial premium. *See* Pet. App. 4a-5a.

Massey applied for renters insurance from Safeco-Illinois in January 2001. Safeco-Illinois has three tiers of renters insurance. Safeco-Illinois used a consumer credit report in connection with the underwriting of Massey's policy. Based on the totality of the circumstances relevant to her application, Safeco-Illinois placed Massey in a tier with a higher premium rate. *See id.* at 4a.

After Burr and Massey were added as plaintiffs, plaintiffs voluntarily dismissed Safeco Corporation as a defendant and instead substituted Safeco-America. Safeco-America moved to dismiss on the ground that the policies purchased by the three named plaintiffs were not issued by Safeco-America, but by its affiliates, Safeco-Oregon, Safeco-Illinois, and American States ("the Issuing Companies"). In an opinion and order dated April 21, 2003, the district court granted Safeco-America's motion for summary judgment, holding that only a person who contracts with the insured can take an "adverse action" under 15 U.S.C. § 1681m(a). *See id.* at 20a-22a. The district court also granted plaintiffs' motion to file a Fourth Amended Complaint substituting the Issuing Companies as defendants. *See id.* at 34a.

As relevant to plaintiffs' claims, FCRA defines "adverse action" to mean "a denial or cancellation of," or "an increase in any charge for," any insurance. *Id.* § 1681a(k)(1)(B)(i). On March 3, 2004, the district court granted the Issuing Companies' motion for summary judgment against Burr and Massey on the ground that no "adverse action" had been taken against either of them. Pet. App. 11a-12a. Relying on its previous decision in *Mark v. Valley Insurance Co.*, 275 F. Supp. 2d 1307, 1316-17 (D. Or. 2003), which was the only reported decision to address the question, the district court agreed with the Issuing Companies that the "common and ordinary meaning of

§ 1681a(k)(1)(B)(i) is that an insurer takes an adverse action when it 'makes greater,' i.e., 'increases,' the price previously demanded of the insured for insurance." Pet. App. 11a (internal quotation marks omitted). Accordingly, the district court held that that section "unambiguously means an insurer does not increase a charge for insurance unless the insurer charges an insured one price for insurance and then subsequently increases that charge based on information in the insured's consumer credit report." *Id.* at 11a-12a (internal quotation marks omitted); *see also Mark*, 275 F. Supp. 2d at 1317 (FCRA "reasonably cannot be read to mean an insurer takes adverse action if it initially charges an insured more than its optimal rate based on information in the insured's consumer credit report"). The district court thus dismissed the claims of Burr and Massey because neither had existing policies with the issuing company at the time they applied for insurance. Pet. App. 12a.

As to plaintiff Spano, however, the district court denied the Issuing Companies' motion for summary judgment. The district court held that Spano's "request for reinstatement" of her previously cancelled policy was an "application for insurance" that was "denied" by Safeco-Oregon on the basis of information in her consumer credit report, triggering FCRA's notice requirement. *Id.* at 12a-13a.

3. After the district court entered final judgment against plaintiffs Burr and Massey under Federal Rule of Civil Procedure 54(b), they appealed. The Ninth Circuit reversed the grant of summary judgment to the Issuing Companies, based on the reasoning in its concurrently filed decision in *Reynolds* and *Edo*. Whereas the district court had concluded that the meaning of "increase" "unambiguously" required an additional charge for a preexisting policy, and thus could not apply to a "single initial charge for the insurance coverage," Pet. App. 11a-12a, the Ninth Circuit concluded that the "clear" and "ordinary meaning" of "increase" covered "a charge that is higher than it would otherwise have been but for the existence of some factor that causes the insurer to charge a higher price," *id.* at 114a-117a. *See id.* at 1a-2a.

Again relying on *Reynolds* and *Edo*, the Ninth Circuit also rejected the Issuing Companies' alternative ground for affirmance – namely, that their conduct was not "willful," and therefore could not give rise to civil liability under § 616 of FCRA. The Ninth Circuit held that a "willful" violation of FCRA could be established if a company performs an act that in fact violates FCRA "either knowing that the action violates the rights of consumers or in reckless disregard of those rights." *Id.* at 128a-129a; *id.* at 2a. Under this standard, the Ninth Circuit opined that "unlikely answers to 'issues of first impression'" could be the basis of a finding of "reckless disregard" for FCRA's requirements, even where those answers were based on advice of counsel. *Id.* at 128a. The Ninth Circuit acknowledged that its holding was at odds with that of the Sixth and Eighth Circuits, both of which have rejected a "reckless disregard" standard and require "actual knowledge with regard to the law." *Id.* at 128a n.17.

Finally, the Ninth Circuit also reversed the district court's grant of summary judgment to Safeco-America based on its holding in *Reynolds* and *Edo* that a company need not have issued an insurance policy to have taken an "adverse action" requiring notice under FCRA. *See id.* at 2a; *id.* at 122a-125a.

In its initial opinion in *Reynolds* and *Edo* dated August 4, 2005, the Ninth Circuit panel was divided on the proper disposition of the case. The panel majority, consisting of Judge Reinhardt and Judge Berzon, not only reversed the district court's grant of summary judgment to the defendant companies, but effectively granted summary judgment to the plaintiffs, despite the fact that the plaintiffs had never requested such relief. The panel majority opined that the companies' interpretation of the meaning of "adverse action" was "not reasonable," "objectively unmeritorious," and thus "in reckless disregard of the consumers' statutory rights." *Id.* at 64a-66a. Judge Bybee dissented, stating that he would remand the case because he "[could not] conclude on the basis of the record before [him] that the companies' actions . . . were so 'objectively unmeritorious' . . . that [the court] [could] decide their willfulness . . . without the benefit of findings of fact." *Id.* at 68a.

Upon petition for rehearing and rehearing *en banc*, the panel issued a modified opinion on October 3, 2005.[4] The panel majority's modified opinion merely altered several phrases in the initial opinion – for example, replacing the characterizations "unreasonable" and "not reasonable" with "indefensible" and "untenable," and "objectively unmeritorious" with "plainly unmeritorious." *Id.* at 96a-97a. In response, Judge Bybee expanded his dissent. He stated that, on the record before him, he would "not find that the companies willfully failed to comply with FCRA as a matter of law." *Id.* at 100a. Although Judge Bybee agreed with the majority that the district court's interpretation of § 1681a(k)(1)(B)(i) was incorrect, he could not conclude that "the district court's conclusion, like the companies' position, was also untenable." *Id.*

After a second petition for rehearing and rehearing *en banc*, the panel issued yet another modified opinion on January 25, 2006. This time, the panel acceded to Judge Bybee's disposition of the case. Instead of effectively granting summary judgment to the plaintiffs on the ground that the defendants' conduct was willful as a matter of law, the court remanded the case for the district court to apply the "reckless disregard" standard in the first instance. *See id.* at 129a. In so doing, the court revised its opinion to conclude only that "some" of the defendants' interpretations of FCRA were "implausible," and

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[4] The panel amended its October 3, 2005 opinion *sua sponte*, in an unpublished order issued on October 24, 2005. That amendment affected only footnote 7 and was incorporated into the October 3 opinion reported at 426 F.3d 1020 (reproduced at Pet. App. 69a-101a).

it instructed that, on remand, the "willfulness" inquiry should depend on "specific evidence as to how the company's decision was reached, including the testimony of the company's executives and counsel." *Id.* The Ninth Circuit rejected the companies' contention that their reliance on advice of counsel negated a "reckless disregard" finding, on the ground that such a holding would "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 128a.

The defendants in *Reynolds* and *Edo*, as well as the Issuing Companies, filed for rehearing and rehearing *en banc* on February 14, 2006. On April 20, 2006, the Ninth Circuit denied *en banc* review. *See id.* at 36a.

REASONS FOR GRANTING THE PETITION

This Court should grant certiorari for two reasons. First, as the Ninth Circuit acknowledged, its holding creates a split among the circuits on a pure question of law: the level of intent necessary for civil liability under § 616 of FCRA. Eight courts of appeals have held that civil liability for willful violations under § 616 requires that the defendant act "knowingly," "intentionally," or with "conscious disregard" of the law. This standard has always required actual knowledge that one's acts violate FCRA. Moreover, the Sixth, Seventh, and Eighth Circuits have correctly and specifically held that mere "reckless disregard" of the law's requirements does not constitute a "willful" violation under this standard. The Ninth Circuit's "reckless disregard" standard thus represents a significant and unwarranted departure from these longstanding precedents.

If the decision below is allowed to go unreviewed, nationwide class actions seeking statutory and punitive damages for "willful" violations of FCRA will undoubtedly be filed in the Ninth Circuit, effectively nullifying the considered opinions of eight other circuit courts and making the Ninth Circuit's decision the law of the land. Indeed, since the decision below was issued, numerous nationwide class actions, often with named plaintiffs residing in other circuits, have already been filed under § 616 of FCRA in district courts in the Ninth Circuit.[5] The need for review of this clear and acknowledged circuit split is thus especially compelling.

Second, the question presented is of enormous practical importance to the broad range of American businesses that are regulated by FCRA and, in particular, national companies that will inevitably be subject to nationwide consumer class actions brought in the Ninth Circuit. Under the standard set forth in the decision below, reliance by businesses on opinions by counsel that are later deemed "implausible" by an appellate court "may constitute reckless disregard for the law and therefore amount to a willful violation of the law," even where there is no judicial guidance as to the relevant legal issue at the time of the defendants' conduct or, as in this case, there are subsequent judicial opinions vindicating the defendants' actions. *See* Pet. App. 129a. If that ruling is allowed to stand, companies will be forced into the untenable position of second-guessing their counsel's legal advice, or else risk potentially enormous statutory and punitive damages. Moreover, they will be forced to incur significant costs to protect themselves against the broadest possible interpretations of FCRA, even though those interpretations have not, as yet, been adopted by any court and may even, as was the case here, be contrary to lower court interpretations. The decision correspondingly invites intru-

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[5] *See, e.g.*, *Vann v. Lewis Hastie Receivables Inc.*, No. 06-CV-95 (S.D. Cal. filed Jan. 17, 2006) (California named plaintiff); *Newman v. Capital One Servs., Inc.*, No. 05-CV-5409 (N.D. Cal. filed Dec. 29, 2005) (Colorado named plaintiffs); *Luther v. 1-800-BAR NONE*, No. 05-CV-4026 (N.D. Cal. filed Oct. 5, 2005) (Illinois named plaintiff); *Hogan v. PMI Mortgage Ins. Co.*, No. 05-CV-3851 (N.D. Cal. filed Sept. 23, 2005) (Texas and Georgia named plaintiffs); *Putkowski v. Irwin Home Equity Corp.*, No. 05-CV-3289 (N.D. Cal. filed Aug. 12, 2005) (Florida named plaintiff).

sive factual investigation into the attorney-client relationship – a result that FCRA's willfulness standard was designed to avoid – without even any assurance that a good-faith opinion of counsel will preclude liability. It thus provides the worst of all worlds to the many businesses that are potential FCRA defendants.

I. THE DECISION BELOW CONFLICTS WITH LONGSTANDING JUDICIAL INTERPRETATION OF FCRA'S WILLFULNESS REQUIREMENT

A. The Decision Below Conflicts with the Precedents of At Least Three Other Courts of Appeals, Which Have Specifically Rejected the Ninth Circuit's "Reckless Disregard" Standard

Three federal courts of appeals have, in square conflict with the decision below, recognized that a "willful" violation of FCRA must be committed with knowledge of what the law demands, and that reckless disregard for the law is insufficient to support civil liability under § 616.

In *Phillips v. Grendahl*, 312 F.3d 357 (8th Cir. 2002), the Eighth Circuit examined "what state of mind amounts to willfulness" under § 616 in a case alleging that the defendants obtained the plaintiff's credit report for an impermissible purpose in violation of 15 U.S.C. § 1681b(f). *Id.* at 368. Reviewing its own circuit precedent, the court noted that it had previously held that, "[t]o show willful noncompliance with the FCRA, [the plaintiff] must show that [the defendant] knowingly and intentionally committed an act in conscious disregard for the rights of others." *Id.* (citing *Bakker v. McKinnon*, 152 F.3d 1007, 1013 (8th Cir. 1998) (willfulness requires that the defendant "knowingly and intentionally committed an act in conscious disregard for the rights of others")) (internal quotation marks omitted; alterations in original). Examining this requirement, the court stated that "[t]he statute's use of the word 'willfully' imports the requirement that the defendant know his or her conduct is unlawful." *Id.* It thus concluded that "willful noncompliance under section [616] requires knowing and intentional commission of an act the defendant knows to violate the law." *Id*. at 370. The court also specifically rejected the contention – accepted by the Ninth Circuit in the decision below – that "recklessness is equivalent to willfulness under section [616]." *Id*. at 369.

In *Duncan v. Handmaker*, 149 F.3d 424 (6th Cir. 1998), the Sixth Circuit similarly held that civil liability for "willful noncompliance" requires that "the party acted knowingly and willfully." *Id.* at 429. On this basis, the court held that defendants "cannot be held civilly liable" for obtaining a consumer credit report for an improper purpose, in violation of 15 U.S.C. § 1681b, "'under what is believed to be a proper purpose under the statute but which a court . . . later rule[s] to be impermissible legally under § 1681b.'" *Id.* (quoting *Kennedy v. Border City Sav. & Loan Ass'n*, 747 F.2d 367, 370 (6th Cir. 1984) (Wellford, J., concurring)) (alterations in original); *accord Bach v. First Union Nat'l Bank*, 149 F. App'x 354, 364 (6th Cir. 2005) (for plaintiff to be eligible for punitive damages under § 616, "the defendant must have committed a willful violation by knowingly and intentionally committing an act in conscious disregard for the rights of others"). The Sixth Circuit's decision in *Duncan* is at odds with the Ninth Circuit's holding below that defendants *can* be held civilly liable for "willful noncompliance," notwithstanding the lack of any judicial decision establishing FCRA's applicability to initial policies of insurance, and therefore the lack of any knowledge that its failure to provide notice was in violation of § 615.

Likewise, the Seventh Circuit in *Wantz v. Experian Information Solutions*, 386 F.3d 829 (7th Cir. 2004), held, in agreement with the Eighth Circuit's decision in *Phillips*, that, "[t]o act willfully, a defendant must knowingly and intentionally violate the Act, and it 'must also be conscious that [its] act impinges on the rights of others.'" *Id.* at 834 (quoting *Phillips*, 312 F.3d at 368) (second alteration in original); *accord Ruffin-Thompkins v. Experian*

Info. Solutions, Inc., 422 F.3d 603, 610 (7th Cir. 2005) (quoting *Wantz*). The requirement that the defendant "be conscious" that its act is unlawful is also inconsistent with the Ninth Circuit's "reckless disregard" standard.[6]

Had this case been heard in any of these other three circuits, the district court's decision granting summary judgment to defendants would have been affirmed. As a matter of law, defendants could not have known that they were violating FCRA's notice provisions given the absence of a single judicial opinion in the 35 years since FCRA's passage holding that these provisions are triggered in the context of initial policies for insurance and, further, given the fact that defendants' legal position on that question was later adopted in multiple district court decisions. *See*, *e.g.*, *Stevenson v. TRW Inc.*, 987 F.2d 288, 296 (5th Cir. 1993) (because "[t]here was no prior guidance to suggest that [defendant's] notice was insufficient," the court "[could]not conclude that [it] knowingly and intentionally obscured the notice in conscious disregard of consumers' rights"). The Ninth Circuit's decision is thus in square conflict with the decisions of the Sixth, Seventh, and Eighth Circuits.

B. Five Other Circuits Have Also Held That "Willfulness" Requires "Knowing" or "Conscious" Disregard of the Law

The decisions of the Sixth, Seventh, and Eighth Circuits are in accord with the decisions of every other court of appeals to address the *mens rea* required under § 616 – including the Second, Third, Fourth, Fifth, and Tenth Circuits. Each of these courts has stated that "willfulness"

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[6] Indeed, the decision below is at odds with the decision of another panel of the Ninth Circuit in an unreported case. *See Arriola v. Safeco*, No. 92-35321, 1993 WL 530480 (9th Cir. Dec. 21, 1993) (judgment noted at 15 F.3d 1082). As that panel wrote, "[t]he willfulness requirement under [§ 616] is synonymous with the requirement of 'intent' in criminal statutes," which requires knowledge and specific intent to commit an unlawful act. *Id.* at *1 (affirming the district court's grant of judgment to defendants as a matter of law).

requires "knowingly and intentionally" committing an act in "conscious" or "deliberate and purposeful" disregard of the statutory requirements of FCRA. In the words of the Fourth Circuit, "[t]o prove willfulness under [§ 616 of FCRA], [p]laintiffs must 'show that the defendant knowingly and intentionally committed an act in conscious disregard for the rights of the consumer.'" *Ausherman v. Bank of Am. Corp.*, 352 F.3d 896, 900 (4th Cir. 2003) (quoting *Dalton v. Capital Assoc. Indus., Inc.*, 257 F.3d 409, 418 (4th Cir. 2001)); *see Northrop v. Hoffman of Simsbury, Inc.*, 12 F. App'x 44, 50 (2d Cir. 2001) ("[t]o show willful noncompliance, a plaintiff must show that a defendant 'knowingly and intentionally committed an act in conscious disregard for the rights of others'") (quoting *Bakker*, 152 F.3d at 1013); *Philbin v. Trans Union Corp.*, 101 F.3d 957, 970 (3d Cir. 1996) ("[t]o show willful noncompliance with the FCRA, [a plaintiff] must show that defendants 'knowingly and intentionally committed an act in conscious disregard for the rights of others'") (quoting *Pinner v. Schmidt*, 805 F.2d 1258, 1263 (5th Cir. 1986));[7] *Stevenson*, 987 F.2d at 293 ("To be found in willful noncompliance, a defendant must have 'knowingly and intentionally committed an act in conscious disregard for the rights of others.'") (quoting *Pinner*, 805 F.2d at 1263); *Cousin v. Trans Union Corp.*, 246 F.3d 359, 372 (5th Cir.

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[7] The Ninth Circuit purported to follow the Third Circuit's decision in *Cushman v. Trans Union Corp.*, 115 F.3d 220 (3d Cir. 1997). In that case, the Third Circuit panel reiterated its prior holding in *Philbin* that willful noncompliance requires that a defendant "'knowingly and intentionally committed an act in *conscious* disregard for the rights of others,'" *id.* at 226 (quoting *Philbin*, 101 F.3d at 970) (emphasis added), but it then proceeded to state, without explanation for the change, that Trans Union could be liable for punitive damages under § 616 if it acted "knowing [its actions] to be in contravention of the rights possessed by consumers pursuant to FCRA or in *reckless* disregard of whether" its actions were lawful, *id.* at 227 (emphasis added). In light of its recitation of the prior holding in *Philbin*, which clearly requires actual knowledge, the *Cushman* opinion cannot plausibly be said to hold that "reckless disregard" satisfies the "willfulness" standard under § 616.

2001) (same); *Sapia v. Regency Motors of Metairie, Inc.*, 276 F.3d 747, 753 (5th Cir. 2002) ("For [a] violation to be 'willful,' . . . a defendant's course of conduct must exhibit a 'conscious disregard' for or entail 'deliberate and purposeful' actions taken against a plaintiff's rights.") (quoting *Cousin*, 246 F.3d at 372); *Zamora v. Valley Fed. Sav. & Loan Ass'n*, 811 F.2d 1368, 1369 (10th Cir. 1987) (per curiam) (liability under § 616 must be predicated on a finding that defendant acted "willfully and knowingly").

The requirement that the defendant act "knowingly and intentionally" and in "conscious" or "deliberate and purposeful" disregard plainly entails an intentional refusal to abide by known legal requirements. As the Eighth Circuit explained in *Phillips*, "[u]nder this formulation the defendant must commit the act that violates the [FCRA] with knowledge that he is committing the act and with intent to do so, and he must also be conscious that his act impinges on the rights of others." 312 F.3d at 368. Indeed, whenever these circuits have applied the *mens rea* requirement of § 616 to the facts of a particular case, they have inquired whether there was evidence showing that the defendant knew that his conduct violated the law. *See*, *e.g.*, *Casella v. Equifax Credit Info. Servs.*, 56 F.3d 469, 476 (2d Cir. 1995) (rejecting plaintiffs' Rule 60(b) motion because proffered evidence "does not support the kind of 'conscious disregard' or 'deliberate and purposeful' actions necessary to make out a claim for willful noncompliance under the FCRA") (citing *Pinner*, 805 F.2d at 1263); *Yohay*, 827 F.2d at 972 & n.8 (upholding jury's verdict for plaintiff under § 616 only after finding "considerable evidence" that defendant credit union "consciously ignored" plaintiff's rights because its manager "acted purposefully and with full knowledge of what she was doing"); *Zamora*, 811 F.2d at 1370-71 (affirming jury verdict of willful violation under § 616 because trial testimony indicated that bank employees "knew the permissible purposes for obtaining consumer reports" and "knew they could not access the records of a spouse when checking the credit of an individual").

The split among the circuits is thus wide and well developed. Eight circuit courts have held that "willfulness" requires a knowing or intentional violation, and three circuits have specifically rejected the Ninth Circuit's "reckless disregard" standard. Only the First, Eleventh, and D.C. Circuits have not expressed a view on the issue.[8] There is no indication that this division will be resolved with further percolation. Moreover, given plaintiffs' ability to file nationwide class actions in the Ninth Circuit, absent review by this Court, the Ninth Circuit's decision, though adopted by no other court, is likely to become controlling for a large percentage of FCRA litigation.

C. The Court of Appeals' Rejection of the Decisions of Its Sister Circuits Was Premised on Reasoning That Conflicts with This Court's Precedents on the Meaning of "Willfulness"

In deviating from the precedents of the other circuits, the Ninth Circuit erroneously relied on this Court's interpretation of the term "willful" in two separate provisions of two other statutes: the liquidated damages provision of

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[8] District courts in these circuits are divided on the issue as well. *Compare Veno v. AT&T Corp.*, 297 F. Supp. 2d 379, 384 (D. Mass. 2003) (Gertner, J.) ("Actions showing a 'reckless indifference' to plaintiff's rights under the FCRA can also constitute willfulness.") (citing *Barron v. Trans Union Corp.*, 82 F. Supp. 2d 1288, 1298 (M.D. Ala. 2000)), *with Graziano v. TRW, Inc.*, 877 F. Supp. 53, 56 (D. Mass. 1995) (Lindsay, J.) ("[U]nder FCRA, '[t]o constitute willful noncompliance, a party must have "knowingly and intentionally committed an act in conscious disregard for the rights of others."'") (quoting *Pinner*, 805 F.2d at 1263) (second alteration in original). *See also, e.g.*, *Jordan v. Trans Union LLC*, No. 05-CV-305, 2006 WL 1663324, at *7 (N.D. Ga. June 12, 2006) ("Willful noncompliance requires a defendant to knowingly and intentionally commit an act in conscious disregard for the rights of others.") (citing *Cousin*, 246 F.3d at 372); *Jordan v. Equifax Info. Servs., LLC*, 410 F. Supp. 2d 1349, 1354 (N.D. Ga. 2006) ("A willful violation 'requires knowing and intentional commission of an act the defendant knows to violate the law.'") (quoting *Phillips*, 312 F.3d at 370).

the Age Discrimination in Employment Act of 1967 ("ADEA"), 29 U.S.C. § 626(b), and the statute of limitations provision of the Fair Labor Standards Act of 1938 ("FLSA"), 29 U.S.C. § 255(a). *See* Pet. App. 127a. With respect to those statutes, this Court concluded that "reckless disregard" was a "reasonable" reading of the term "willful" because Congress had passed the relevant provisions against the backdrop of consistent circuit precedent interpreting the term "willful" in those contexts to include "reckless disregard" for the law. *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 126 (1985) (noting that the ADEA was modeled on the FLSA, which the circuit courts had consistently interpreted to provide for criminal liability "when [the employer] 'wholly disregards the law . . . without making any reasonable effort to determine whether the plan he is following would constitute a violation of the law'") (quoting *Nabob Oil Co. v. United States*, 190 F.2d 478, 479 (10th Cir. 1951)) (ellipsis in original); *see also Hazen Paper Co. v. Biggins*, 507 U.S. 604, 614 (1993) (noting "accepted judicial interpretation of [the FLSA] at the time of the passage of the ADEA supported the 'knowledge or reckless disregard' standard").

FCRA was not passed against any such background. Instead, the legislative history of FCRA's two-tiered liability provisions indicates that Congress did not intend to permit statutory and punitive damages for reckless disregard. The Senate bill containing FCRA provided that recovery of mere *actual* damages under § 617 of FCRA required a showing of "gross[] negligen[ce]," *see* S. 3678, 91st Cong. § 617 (1970), *reprinted at* 116 Cong. Rec. 32,641 (Sept. 18, 1970), a term that was understood to be synonymous with "reckless disregard." *See*, *e.g.*, *Restatement (Second) of Torts* § 282 cmt. e (1965) (stating that the phrase "gross negligence" in statutes is usually construed to mean "reckless disregard"); *Black's Law Dictionary* 1185-86 (4th ed. 1968) ("Words 'gross negligence,' are equivalent to words 'reckless and wanton.'"). Section 616's "willfulness" standard for extraordinary statutory and punitive damages thus necessarily required a higher degree of intentionality than recklessness – namely, actual knowledge. Although the Conference Committee ultimately adopted a House amendment to the Senate bill establishing an ordinary negligence standard for actual damages under § 617, it chose not to alter the Senate's standard for recovery of statutory and punitive damages under § 616. *See* H.R. Conf. Rep. No. 91-1587, at 30 (1970). Indeed, the House had before it, and did not adopt, alternative versions of FCRA that would have expressly allowed statutory and punitive damages for either "grossly negligent or willful" violations. *See* H.R. 19403, 91st Cong. § 52 (1970); H.R. 19410, 91st Cong. § 52 (1970).

Nor were the subsequent amendments to FCRA passed against the backdrop of judicial decisions interpreting "willfulness" to include "recklessness." To the contrary, § 616 had already been interpreted by four circuits to limit "willfulness" to knowing violations when FCRA was significantly amended in 1996. *See Zamora v. Valley Fed. Sav. & Loan Ass'n*, *supra*; *Pinner v. Schmidt*, *supra*; *Yohay v. City of Alexandria Employees Credit Union, Inc.*, *supra*; *Casella v. Equifax Credit Info. Servs.*, *supra*. Moreover, after 1996, Congress revised the substantive requirements of FCRA without altering what by then was the unanimous opinion of eight circuits that actual knowledge is required to find a "willful" violation. *See* Fair and Accurate Credit Transactions Act of 2003, Pub. L. No. 108-159, § 312(f), 117 Stat. 1952, 1993; *see also* Consumer Reporting Employment Clarification Act of 1998, Pub. L. No. 105-347, 112 Stat. 3208. It is well established that Congress is presumed to know of such judicial interpretations when it amends a statute and to implicitly endorse consistent interpretations of language that it declines to change. *See, e.g.*, *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, 456 U.S. 353, 391 n.92 (1982); *Lorillard v. Pons*, 434 U.S. 575, 580-81 (1978).

Moreover, the Ninth Circuit's extreme reading of the "willfulness" requirement – to permit a finding of "willfulness" if an appeals court ultimately finds the defendants' legal judgment "implausible" even in the face of advice of counsel and prior district court precedent vindicating that position – finds no analogue in any Supreme Court decision interpreting such statutory language, regardless of context. The Ninth Circuit's extraordinary holding that courts must look behind lawyers' good-faith professional advice in order to prevent companies from "employing counsel with the deliberate purpose of obtaining opinions that provide creative but unlikely answers to 'issues of first impression'" (Pet. App. 128a) is a stark departure from this Court's precedents, which have never authorized such an invasive inquiry into lawyers' work product or their relationships with their clients. On the contrary, even in the very different context of the ADEA, this Court concluded that a company's actions could not have been willful *as a matter of law* where it "sought legal advice," even though the attorneys "overlooked" the key issue. *Thurston,* 469 U.S. at 130; *see id.* at 129 (company acted "reasonably and in good faith" where it consulted with lawyers to determine lawfulness of existing policy); *see also Ratzlaf v. United States*, 510 U.S. 135, 142 n.10 (1994) ("willful" violation of the federal antistructuring laws "might be negated by, *e.g.*, proof that defendant relied in good faith on advice of counsel"). The Ninth Circuit's refusal to recognize an advice of counsel defense under § 616 rests on a presumption of bad faith on the part of both lawyers and clients that is unprecedented in the decisions of this Court.

The Ninth Circuit's extreme reading is particularly inappropriate in the context of FCRA, which Congress made clear was intended to require that "consumer reporting agencies adopt *reasonable* procedures" for ensuring the accuracy of consumer reports. 15 U.S.C. § 1681(b) (emphasis added). By construing the "willfulness" provision to encompass an extremely lax notion of "reckless disregard," the Ninth Circuit's rule forces businesses to adopt unnecessary and unreasonable compliance measures in the face of legal uncertainty, simply to guard against the risk of enormous statutory and punitive liability in the case of a finding of "reckless" disregard.

As this Court has repeatedly stated, "willful . . . is a word of many meanings, its construction often being influenced by its context." *Spies v. United States*, 317 U.S. 492, 497 (1943); *see also United States v. Murdock*, 290 U.S. 389, 394 (1933); *Screws v. United States*, 325 U.S. 91, 101 (1945) (plurality). Given the legislative history and purpose behind FCRA, and the starkly different circuit precedent interpreting § 616, the Ninth Circuit's adoption (and subsequent distortion) of the "reckless disregard" standard from the ADEA and FLSA contexts is at odds with this Court's repeated warnings against reflexively transferring the meaning of the term "willful" in one statute to a different statutory context. This Court should grant certiorari to resolve the proper meaning of the term "willful" in the distinct context of FCRA, as it has done in numerous other statutory contexts. *See McLaughlin v. Richland Shoe Co.*, 486 U.S. 128, 131 (1988) (certiorari granted to resolve a circuit split on the meaning of "willful" in the FLSA); *Thurston*, 469 U.S. at 125 (certiorari granted to interpret the term "willful" in the ADEA); *Murdock*, 290 U.S. at 391-93 (certiorari granted to review whether court properly instructed jury on willfulness requirement under § 1114(a) of the Revenue Act of 1926 and § 146(a) of the Revenue Act of 1928); *Spies*, 317 U.S. at 493 (certiorari granted to review jury instruction on the term "willful" in § 145(a) of the Revenue Act of 1936).

II. THE QUESTION PRESENTED IS OF ENORMOUS PRACTICAL SIGNIFICANCE

The issue in this case is of great significance to businesses throughout the country that are subject to regulation under FCRA. In the context of this case alone, the Ninth Circuit's decision subjects insurance companies nationwide to potential statutory damages of up to $1,000, along with punitive damages and attorney's fees, for their failure to predict the Ninth Circuit's unprecedented holding that adverse-action notices must be sent to every initial purchaser of insurance who hypothetically could have received a lower premium but for information in their credit report. Since 2001, the insurance industry has issued more than 150 million new policies. *See* Brief for Amici Curiae the American Insurance Association *et al.* in Support of Defendants' Petitions for Rehearing En Banc at 15-16, Nos. 03-35695 & 04-35279 (9th Cir. filed Feb. 24, 2006). If even half of these policies were issued without a required notice, statutory damages alone could exceed $75 billion. *See id.* at 16 & n.7.[9] As noted above, FCRA, unlike other federal consumer protection statutes, puts no statutory cap on class-action damages.

Beyond the context of FCRA's adverse-action notice requirement, moreover, the Ninth Circuit's decision will subject American businesses to potentially enormous liability. As discussed above, FCRA regulates a wide range of companies in the field of consumer banking and finance, from "consumer credit agencies" (such as Experian, Trans Union, and Equifax), "furnishers of information" (including banks, credit card companies, mortgage companies, and consumer finance companies), and "users of information" (including not only credit and insurance companies, but also employers nationwide). If the decision below is allowed to stand, such businesses will be subject to civil liability, including statutory and punitive damages, in many cases where the requirements of FCRA have not been interpreted by any court and, as a result,

[9] The adverse-action notice requirement affects far more than just insurance companies. FCRA's definition of "adverse action" makes clear that notices are required in a variety of contexts spanning a broad array of commercial transactions: extension of credit (15 U.S.C. § 1681a(k)(1)(A)), policies of insurance (*id.* § 1681a(k)(1)(B)(i)), employment decisions (*id.* § 1681a(k)(1)(B)(ii)), and granting of government licenses and benefits (*id.* § 1681a(k)(1)(B)(iii)). In addition, FCRA contains a "catch-all" provision broadly including any other "adverse" action "made in connection with an application" or "a transaction that was initiated by" a consumer. *Id.* § 1681a(k)(1)(B)(iv).

those businesses lack the *mens rea* required by Congress in § 616.

Although FCRA was passed more than 35 years ago, it has been amended several times in the last decade (*see supra* pp. 5-6), and courts continue to grapple with novel questions in interpreting its provisions. The case below addressed two issues that had not previously been addressed by any other court of appeals: (1) whether FCRA's notice requirement for "adverse actions" applies to initial policies of insurance; and (2) whether a company may be held liable for failure to issue an "adverse action" notice to a consumer when that company did not issue the relevant insurance policy. *See* Pet. App. 113a-117a, 122a-125a. On each question, the panel interpreted the substantive scope and requirements of FCRA for the first time. Moreover, even as it addressed these questions, the panel acknowledged that it was leaving unanswered another important and related question – namely, what specific information companies must include in any notice required by FCRA.[10]

Indeed, issues of first impression, as well as issues where courts are in conflict, are common under FCRA. For example, there is a split of authority as to whether the 1996 amendments to FCRA provide a private cause of action to consumers against furnishers of credit information. *See Sheffer v. Experian Info. Solutions, Inc.*, 249 F. Supp. 2d 560, 562 (E.D. Pa. 2003) (citing divided authorities). Issues pertaining to FCRA's substantive requirements also remain unresolved. For example, various Federal Trade Commission ("FTC") opinion letters suggest

[10] In addition to erroneously expanding FCRA's notice requirement by holding that a required notice must, "at a minimum," "communicate to the consumer that an adverse action based on a consumer report was taken, describe the action, specify the effect of the action upon the consumer, and identify the party or parties taking the action," the decision below expressly left open the possibility that FCRA requires "a fuller description of what specific information was adverse." Pet. App. 121a & n.14.

that outside law firms that conduct internal investigations into the conduct of company employees on behalf of their corporate clients may qualify as "consumer reporting agencies," with all the attendant obligations under FCRA, *see, e.g.*, Letter from Robert Pitofsky, Chairman, FTC, to Rep. Pete Sessions (Mar. 31, 2000), *available at* http://www.ftc.gov/os/2000/03/ltrpitofskysessions.htm; Letter from Christopher W. Keller, FTC, to Judi A. Vail (Apr. 5, 1999), *available at* http://www.ftc.gov/os/statutes/fcra/vail.htm, while several district courts have questioned the persuasiveness of this broad interpretation. *See*, *e.g.*, *Hartman v. Lisle Park Dist.*, 158 F. Supp. 2d 869, 875-77 (N.D. Ill. 2001); *Johnson v. Federal Express Corp.*, 147 F. Supp. 2d 1268, 1272 (M.D. Ala. 2001). Other issues abound.[11] On these and other unresolved questions, the Ninth Circuit's holding threatens to impose enormous liability on companies despite the fact that there has been no guidance from the courts as to FCRA's underlying requirements. And, in the class-action context, companies operating nationwide will now be held hostage to the Ninth Circuit's ruling even as to conduct occurring in circuits that have explicitly rejected that ruling. *See supra* note 5.

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[11] *See*, *e.g.*, *Nunnally v. Equifax Info. Servs., LLC*, No. 05-12029, 2006 WL 1562100, at *3-*7 (11th Cir. June 9, 2006) (holding, as a matter of first impression, that a post-reinvestigation consumer report required by 15 U.S.C. § 1681i(a)(6)(B) does not require disclosure of the consumer's entire file and reversing the district court's contrary conclusion); *Matthiesen v. Banc One Mortgage Co.*, 173 F.3d 1242, 1244-45 (10th Cir. 1999) (holding, as a matter of first impression, that FCRA does not require a mortgage company to disclose to a mortgage applicant the fact that the denial of his application was based in part on information obtained from the applicant's tax returns); *DiGianni v. Stern's*, 26 F.3d 346, 348-49 (2d Cir. 1994) (per curiam) (resolving issue of first impression as to whether retail department stores are consumer reporting agencies); *Estiverne v. Sak's Fifth Avenue*, 9 F.3d 1171, 1173-74 (5th Cir. 1993) (per curiam) (issue of first impression as to the definition of "consumer report").

The "reckless disregard" standard adopted by the Ninth Circuit will also invite intrusive inquiry into the decision-making processes of American businesses, and in particular into the legal advice given to those businesses by their counsel. According to the decision below, to rebut a finding of recklessness, companies will be required to set forth "specific evidence as to how the company's decision was reached, including the testimony of the company's executives and counsel." Pet. App. 129a.

What is more, making such a showing may not even be enough under the Ninth Circuit's view. According to the decision below, even a reasonable effort to determine what the law requires may not be sufficient to avoid liability if a court later determines that the legal position taken by the company is "implausible." *Id.* at 129a. In virtually all cases, companies will thus be faced with the Hobson's choice of either divulging attorney-client privileged communications or forfeiting their intent-based defense under § 616, all without any guarantee that a showing of subjective good faith will successfully forestall liability.

In the end, the Ninth Circuit's relaxed standard for "willfulness" will impose enormous costs on businesses that are subject to FCRA's regulations. Under the Ninth Circuit's rule, companies in Safeco's position would have no choice but to take the most expansive possible interpretation of FCRA's requirements, resulting in enormous compliance costs, even where that interpretation is unlikely to be correct. Otherwise, companies would risk facing potentially enormous statutory damages, attorney's fees, and costs, as well as possible punitive damages, which would ensue under § 616 if they are mistaken.[12]

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[12] As the reported cases illustrate, the award of punitive damages and attorney's fees and costs often dwarfs the amount of actual damages. *See*, *e.g.*, *Sheffer v. Experian Info. Solutions, Inc.*, 290 F. Supp. 2d 538, 553 (E.D. Pa. 2003) (award of $25,000 in attorney's fees and more than $7,500 in costs for claim valued at $1,000); *Bakker*, 152 F.3d at 1009 (affirming award of $500 in compensatory damages and $5,000 in punitive damages).

This Court should grant certiorari to clarify whether these serious and undesirable consequences are consistent with the definition of "willfulness" uniformly adopted by the other circuits.

There is no reason to postpone consideration of the proper interpretation of § 616 in this case. The issue is a pure question of law that will be unaffected by any proceedings on remand. Because it is undisputed that there was no contemporaneous judicial guidance interpreting "adverse action" to cover initial rates for insurance, and, further, that the Ninth Circuit's decision reversed prior district court decisions vindicating defendants' legal position, there can be no doubt that defendants' failure to provide notice was not a "knowing" or "purposeful" violation of law. *See Stevenson*, 987 F.2d at 296. Should the Ninth Circuit's interpretation of § 616's "willfulness" prerequisite be reversed, therefore, there would be no need for a remand. Nor would the harms to Safeco disappear if it ultimately persuaded the district court on remand that it did not act in "reckless disregard" of the law under the Ninth Circuit's adopted standard. As noted, the Ninth Circuit's approach forces defendants to assume that all FCRA cases will be brought under the Ninth Circuit standard and to undertake the significant expense necessary to accord their actions to the broadest possible understanding of that statute, even if that interpretation has not yet been adopted by any court. The Court should grant review to confirm, as all of the other courts of appeals have held, that "willful" violations of FCRA must be done with knowledge of the law's demands, and thereby to spare businesses throughout the country from the severe burden of incalculable punitive and statutory damages for failure to anticipate the later judicial resolution of issues of first impression.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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