Nos. 06-84 & 06-100

IN THE

Supreme Court of the United States

SAFECO INSURANCE CO. OF AMERICA, ET AL.,
Petitioners,
v.
CHARLES BURR, ET AL.,
Respondents.

GEICO GENERAL INSURANCE CO., ET AL.,
Petitioners,
v.
AJENE EDO,
Respondent.

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

RESPONDENTS' JOINT BRIEF ON THE MERITS

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QUESTIONS PRESENTED

1. Whether proof of "reckless disregard" of a defendant's obligations under the law is sufficient to establish a willful violation of the Fair Credit Reporting Act (FCRA), 15 U.S.C. 1681n(a)(1)(A), as it is under similar federal civil statutes that incorporate a willfulness standard of liability.

2. Whether GEICO took an adverse action against respondent Ajene Edo within the meaning of FCRA, 15 U.S.C. 1681a(k), when it denied him insurance with one of its subsidiaries and issued him a more expensive policy from another affiliate based, in part, on consideration of his credit file.

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STATEMENT OF THE CASE

Following both the clear text of the Fair Credit Reporting Act ("FCRA") and over seventy years of Supreme Court precedent, the Ninth Circuit Court of Appeals held that a "willful" violation of a civil statute, 15 U.S.C. § 1681n(a), can be established by proof that a defendant violated the statute "either knowing that the action violates the rights of consumers or in reckless disregard of those rights[.]" GEICO Pet. App. 33a-34a.[1] That was the extent of the Ninth Circuit's holding on willfulness. The court did not apply its "knowing or reckless" standard to any factual record. It remanded the case for further proceedings and provided *dicta* to guide the district court's consideration of a complete factual record, particularly should defendants *choose* to raise an advice of counsel defense. GEICO Pet. App. 34a. That *dicta* is also consistent with this Court's case law defining willfulness.

No lower court has yet considered any factual record on the issue of willfulness in these cases. Petitioners originally moved for summary judgment on several grounds. Because the district court concluded that petitioners had not taken "adverse actions" under FCRA, it never reached their argument that no reasonable juror could conclude that they acted willfully. GEICO Pet. App. 44a-47a. Safeco Pet. App. 12a-14a, 22a n 5. The Ninth Circuit reversed the district court's substantive "adverse action" ruling, defined the appropriate standard for willfulness, and remanded. The petitions for certiorari presented the question whether the Ninth Circuit's

[1] "GEICO Pet. App." refers to the appendix to the GEICO petition that contains the published Ninth Circuit opinion. The *Safeco* case was resolved by an unpublished memorandum opinion that incorporated the published Ninth Circuit Opinion in *GEICO*. Safeco Pet. App. 2a. Except where specifically noted, "GEICO" refers to all of the GEICO respondents, including the lead company Government Employees Insurance Co., which employs all GEICO employees. "Safeco" refers to the lead respondent Safeco Insurance Company of America, which employs all Safeco employees, and the affiliated Safeco companies that are also respondents.

willfulness standard was correct, but did not ask this Court to apply the standard to the facts. GEICO Pet. i; Safeco Pet. i. Nonetheless, petitioners now not only ask this Court to adopt a legal standard that contradicts the statute and the Court's case law, they also ask the Court to find that they cannot be liable *as a matter of law* based solely on their legal arguments, without review by any court of the facts concerning their state of mind when they violated the statute. This attempt to bypass all factual review, including an initial review by the district court of the summary judgment record, is particularly inappropriate because willfulness is an issue of intent properly left to a fact-finder, typically the jury.

The Ninth Circuit also concluded, again based on the clear text of FCRA and the undisputed facts, that GEICO customer Ajene Edo suffered an "adverse action" under 15 U.S.C. § 1681a(k)(1)(B)(i) when GEICO, based in part on a review of Edo's credit information, *denied* him insurance with the preferred and *lower cost* insurer GEICO General and *increased* his premiums by issuing him a more expensive policy with GEICO Indemnity. GEICO Pet. App. 20a-21a, 36a. GEICO's contention that the Ninth Circuit held that Edo was adversely treated "even when his credit score had no effect on premiums," GEICO Br. 1, misstates the Ninth Circuit's opinion and is directly contradicted by the factual record. It is undisputed that GEICO *denied* Edo insurance with one of its subsidiaries and *increased* his premiums by placing him in a more expensive affiliated company based in part on its review of *his* actual credit information. GEICO JA 80.

The Fair Credit Reporting Act. FCRA was enacted to regulate three interrelated groups: (1) consumer reporting agencies, which collect confidential consumer information, (2) suppliers of information to consumer reporting agencies, and (3) users of consumer information, such as GEICO and Safeco, that use this confidential information in business transactions with consumers. 15 U.S.C. § 1681 *et seq*.

With respect to users of consumer or credit information, FCRA is a straightforward notice statute. If users of consumer information, here insurance companies, use credit information in connection with a consumer transaction, they must give notice when they take an "adverse action" against the consumer based, at least in part, on his credit information. 15 U.S.C. §§ 1681m; 1681a(k)(1). An adverse action includes "a denial or cancellation of, [or] an increase in any charge for . . . any insurance existing or applied for, in connection with the underwriting of insurance." 15 U.S.C. § 1681a(k)(1)(B)(i). Thus, if an insurance company denies a consumer insurance or increases a charge for insurance in connection with its underwriting process (*whether for a new or existing customer*) "based in whole or part on any information contained in a consumer report," the insurer must give the consumer notice. 15 U.S.C. § 1681m(a).

Petitioners correctly state that FCRA was designed to promote efficiency for business transactions and protect consumers' privacy in their confidential information and transactions. GEICO Br. 2; Safeco Br. 5, *citing TRW Inc. v. Andrews*, 534 U.S. 19, 23 (2001). Congress granted businesses the privilege of access to vast amounts of otherwise personal and confidential consumer information, including social security numbers, business transaction histories, loan transactions, banking data and extensive personal histories such as employment information. It provided, however, that this privilege would come with the responsibility of informing consumers whenever that information resulted in an adverse action against them. 15 U.S.C. § 1681m. As Senator Proxmire, the original proponent, explained, "[i]n this way the individual is alerted to the existence of possible inaccuracies in his credit file and has an opportunity to take corrective action." 115 Cong. Rec. 2415 (Jan. 31, 1969).

FCRA's notice procedure was intended to promote the use of *accurate* credit information when businesses make decisions based on credit risks. *See* 15 U.S.C. § 1681(a)(1) ("Inaccurate credit reports directly impair the efficiency of the banking system, and unfair credit reporting methods undermine the public confidence which is essential to the continued functioning of the banking system"); 15 U.S.C. § 1681(b) (a purpose of FCRA was to create a system that was "fair and equitable to the consumer, with regard to the confidentiality, accuracy, relevancy, and proper utilization of such information"). Congress was particularly concerned that consumers not be treated adversely based on inaccurate, dated, and incomplete information. *See* S. Rep. No. 91-517 at 1 (1969) ("the purpose of the fair credit reporting bill is to prevent consumers from being unjustly damaged because of inaccurate or arbitrary information in a consumer report.").

Through the notice procedure, every consumer has a fair chance each time credit information is used against him to ensure that the business is reviewing *his* credit information and not someone else's, which often happens by mistake or through identify theft, and that the credit information used against him is accurate, current, and complete.

In crafting FCRA's liability provisions, Congress created several different levels of increasing liability with correspondingly increasing standards for proof of culpability. Plaintiffs who seek to recover only actual damages based on a violation of FCRA must prove that the defendant acted negligently. 15 U.S.C. § 1681o. Plaintiffs who seek alternative statutory damages provided by Congress of between $100 and $1,000 for each violation (as respondents do here) or punitive damages must prove that defendants "willfully fail[ed] to comply" with FCRA. 15 U.S.C. § 1681n(a)(1)(A). As discussed below, this civil willfulness standard requires more than negligence, namely at least recklessness, but falls below the standard that Congress required to prove liability under other FCRA sections, including other civil, administrative and criminal liability sections where Congress expressly required proof of a "knowing" violation. 15 U.S.C. §§ 1681n(a)(1)(B) & (b), 1681q, 1681r.

The Insurance Industry's Use of Credit in Underwriting Policies and Determining Premiums. Petitioners generally accurately describe how insurance companies use credit information when underwriting consumers' insurance policies. Insurance companies assign a version of a credit score—called an "insurance score"—to each applicant because they believe credit risk correlates with insurance risk. These scores are based on information in each consumer's credit report maintained by the various consumer reporting agencies. The insurance companies then use that credit score, in conjunction with other factors, in their underwriting to determine the insured's company placement and premium.

In GEICO's system, for example, an insured calls a 1-800 number to apply for insurance. GEICO JA 20. Typically, one lead company—here Government Employees Insurance Company and Safeco Insurance Company of America—employ the personnel who take these calls, process the information, and, in connection with the underwriting, decide the company placement and premium. GEICO JA 33, Safeco Rec., D.E. 90. The lead company's sales representative obtains information, including credit information, and a computer calculates the insured's risk based on the insurance score and other factors such as age and driving history to determine company and tier placement. GEICO JA 20. The customer is then considered for insurance in one of the affiliated companies in a descending order of preference: first in the preferred company that offers the lowest rates to those with the best credit and least associated risks; if denied insurance with the preferred company, the applicant is then considered for a higher-risk "standard" company that offers higher rates to those with slightly higher risks; and then, if the consumer has even worse credit and other related risk factors, the consumer is placed in the highest-risk company with the highest rates. GEICO JA 33; Safeco Rec., D.E. 90. The company places the consumer in the insurance company it chooses based on his credit information and other risks; the consumer likely has no knowledge of the differences in companies because he called, for instance, a 1-800 number for "GEICO" and, in fact, received "GEICO" insurance, albeit with a GEICO affiliated company with higher rates.

Contrary to the suggestion of petitioners and various insurance industry *amici*, insurance companies do not limit their best rates and placements to consumers with "perfect credit" or to "a make-believe super consumer." GEICO Br. 17. Rather, there are different ranges of credit scores that, in conjunction with other factors, the industry uses to determine those who receive the lowest premium rate. GEICO, for example, uses broad ranges of credit scores to assign consumers to one of the three companies and several tiers within those companies, and consumers with far less than perfect credit can qualify for the lowest cost policy. [2]

Moreover, each insurer itself decides the range of credit scores necessary to get the lowest rate offered and which customers are charged higher rates based on their credit scores. The range of credit scores necessary to get the lowest rate offered was not imposed by Congress or the Ninth Circuit.[3] As the United States' amicus brief notes, Congress also does not require petitioners to use consumers' credit information; petitioners have chosen to use confidential credit information in their underwriting. FCRA merely requires that users, having received the privilege of access to this confidential information, give notice when they treat consumers adversely by denying insurance or increasing the charge for insurance based in part on a review of credit information.

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[2] For instance, GEICO assigned "credit weights" corresponding to various credit scores. Credit weight is the relative weight assigned to credit when considered with other factors, such as driving history, to determine policy cost and placement. GEICO used credit scores ranging from 1 through 990. GEICO JA 67-68. The top credit weight was 105, corresponding to credit scores from 745 through 990, a broad range that does not require "perfection." *Id*. A somewhat lower credit weight might still qualify an applicant for the best rate at GEICO General if other factors, such as driving record, were very favorable. GEICO JA 67-68.

[3] GEICO decided to use credit scores "to maintain a competitive position" because "some major competitors already use credit scoring as an underwriting factor." GEICO JA 59.

Petitioners and their insurance industry *amici* complain that most people do not get the lowest rate offered—a complaint not likely to become part of any advertising slogan—but this is only because insurance companies have chosen to segment the market and risks such that they offer their lowest rate to only a part of the overall pool. There is no "perfect credit" standard, but only the relative standard that each particular insurer sets as the cut-off for obtaining that insurer's lowest available rate.

Federal Trade Commission (FTC) Guidance on FCRA Confirms the Clear Statutory Requirements That Notice Must Be Given to Insurance Applicants When They Pay Higher Premiums Based in Part on a Review of Their Credit Information. In addition to the plain text of the FCRA, the insurance companies had specific guidance from the FTC that the "adverse action" provisions were to be interpreted broadly, applied to *all* actions that could be considered to have a negative impact, and specifically applied to charging consumers higher rates in connection with initial applications. In its official commentary drafted pursuant to notice and comment rulemaking procedures, the FTC informed businesses in 1997 that "the term adverse action is defined very broadly by Section 603 of the FCRA. 'Adverse actions' include all business, credit, and employment actions affecting consumers that can be considered to have a negative impact[.]" 16 C.F.R. Pt. 601, App. C (Prescribed Notice of User Responsibilities); 62 Fed. Reg. 35586 (July 1, 1997).

More specifically, in October 1998, the FTC provided a pamphlet for insurers titled, "Consumer Reports: What Insurers Need to Know." Safeco JA 65-68. It informed insurers that amendments to the FCRA "increase the legal obligations of insurers who use consumer reports" and that the disclosure requirements apply to "new applicants as well as current policy holders." Safeco JA 65. It further stated that the decision to "charge a higher premium" to an initial applicant was an adverse action even if credit information played only a minor role in the decision. *Id*. at 66-67 (also noting that a decision to deny insurance at "standard rates" is an adverse action).

In March 2000, before the adverse actions at issue in both cases here, the FTC staff wrote a letter in response to a question from an insurance company lawyer named James Ball. Letter from Hannah A. Stires (FTC) to James Ball (Mar. 1, 2000) ("FTC Ball Letter"). The letter, posted on the FTC website at http://www.ftc.gov/os/statutes/fcra/ball.htm, reviewed the law and reminded insurers that an "adverse action" occurs when "the applicant will have to pay more for insurance at the inception of the policy than he or she would have been charged if the consumer report had been more favorable." This included not giving a discount to an initial insurance applicant based in part on his or her credit score. The FTC concluded that an initial insurance applicant whose premium is increased due to his credit information is "precisely the type of consumer that Section 615(a) [15 U.S.C. § 1681m(a)] is designed to assist." *See also Mick v. Level Propane Gasses, Inc.*, 1999 WL 33453772 at *12 (S.D. Ohio 1999) (stating that charging initial applicants higher rates for gas contracts than if they had paid cash could be adverse actions if based in part on credit scores).

Neither petitioners nor their *amici* cite guidance from any source prior to their violations of the statute that suggests, let alone states, that insurers may use credit scores to deny applicants insurance or increase initial rates without providing adverse action notices. Further, petitioners were invited by the FTC to obtain guidance, as Mr. Ball did on behalf of his insurance company client, if "the matter involves a substantial or novel question of law or fact and there is no clear Commission or court precedent." 16 C.F.R. § 1.1(1). Even assuming for the sake of argument that the statute was not clear, petitioners at a minimum recklessly chose to proceed with their conduct by ignoring the FTC Ball Letter and failing to seek clarification from the FTC, clarification that existed and confirmed that they were violating FCRA's plain terms.

Safeco's Adverse Action Against Respondents Burr and Massey. Respondents Charles Burr and Shannon Massey applied to Safeco for automobile and renters insurance, respectively (Burr in 2002 and Massey in 2001). The undisputed facts are that Safeco checked their credit information and, based in part on that information, issued them policies at higher rates than they would have received if they had better credit. *See* Safeco Pet. App. 4a-5a.[4] Safeco gave notice to neither Burr nor Massey. The record contains no contemporaneous documentation of the reasons Safeco decided not to provide them notice. However, Safeco was aware that the FTC provided guidance regarding the Fair Credit Reporting Act. In fact, Safeco directed its employees to the FTC website that included the pamphlet "Consumer Reports: What Insurers Need to Know" and noted that the website included "information on what insurers need to know about the use of consumer reports." Safeco JA 69 (referring to FTC website as a "good resource"); Safeco JA 65-68 (FTC Pamphlet); *see also* Safeco JA 44-45 (testimony that Safeco representative "ha[d] heard about FTC with some opinions").

Following its ruling in another case that charging a higher amount to a new applicant is not an adverse action, *see Mark v. Valley Ins. Co.*, 275 F. Supp. 2d 1307 (D. Or. 2003), the district court granted Safeco summary judgment against Burr and Massey. Safeco Pet. App. 11a-12a. The Ninth Circuit reversed based on its contrary resolution of the adverse action issue in *GEICO* and remanded for consideration of willfulness under the "reckless disregard" standard announced in *GEICO*. Safeco Pet. App. 1a-2a. Safeco petitioned for certiorari solely on the question whether the Ninth Circuit "erred in holding that a defendant can be found liable for a 'willful'

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[4] Safeco's brief notes that the premium for an *earlier* policy it issued Burr was not based on credit information because he would not have qualified for a lower rate regardless of credit. Safeco Br. 7. That is not the policy at issue, so the point is irrelevant other than to contradict Safeco's position that Burr was an initial applicant to the Safeco companies.

violation of [FCRA] upon a finding of 'reckless disregard' for FCRA's requirements," and did not seek review either of the adverse action issue or the application of the willfulness standard to the facts. Safeco Pet. i.

GEICO Denied Edo Insurance and Increased His Rates Based, in Part, on His Credit Score. GEICO determined respondent Ajene Edo's rates and placement in connection with the underwriting of his policy using its standard process for considering credit information. After Edo called a 1-800 number, GEICO obtained his credit information and used it to generate his insurance score. GEICO JA 20-21. Based in part on consideration of his credit in the underwriting process, GEICO denied Edo insurance with the preferred company GEICO General, which offers the lowest rates, and issued Edo a more expensive policy with GEICO Indemnity. GEICO JA 34-35. It is undisputed that if Edo had better credit, he would have received a less expensive policy from GEICO General. GEICO JA 34-35, 80. As GEICO's "credit matrix" reveals, if Edo's insurance score were higher, he would have received a higher "credit weight" that would have qualified him for placement with the preferred and least expensive company GEICO General. GEICO JA 67-68.

GEICO Created a Separate Procedure Outside of Its Underwriting Process to Avoid Providing Notice to Adversely Impacted Consumers. Despite having already used Edo's confidential consumer information against him by denying him insurance with the lowest cost GEICO company in the underwriting process, GEICO used an entirely separate process to decide whether to give the "adverse action" notice. GEICO consciously decided to give notice based only on a comparison between how it actually treated customers based on their credit scores and how it *would* have treated some hypothetical consumer based on a purportedly "neutral" or average credit score. GEICO JA 34, ¶ 19.

Specifically, GEICO created a purportedly "neutral" score that it claims represents an average consumer with "average" loss experience. GEICO JA 45-46. GEICO has not revealed whether this is an average of just its own consumers, a segment of consumers of any particular GEICO subsidiary or affiliate, or all consumers in America; nor has GEICO provided any other purported basis for this number. *Id*. Although GEICO claims to have "neutralized" credit for the purpose of FCRA, GEICO never truly eliminates credit from consideration.[5] Rather, GEICO assigns an actual "credit weight" number to the neutral score. GEICO assigned the number 56 to their "neutral" credit weight, which is approximately half their top credit weight of 105. GEICO JA 67-68.[6] Even if GEICO denied someone insurance or increased his charge based on his credit score, GEICO decided only to give notice if the consumer's placement was worse than that of the hypothetical "average" consumer. GEICO JA 34-35. Thus, even though Edo had been *denied* insurance with GEICO General and received a higher premium from GEICO Indemnity based on GEICO's assessment of *his* credit score, GEICO decided not to send him notice because

[5] In citing various insurance statutes and agency bulletins from 23 different states (*see* GEICO Br. 5 & n. 5), GEICO posits that these states "ensure that consumers with thin credit history, or no identified credit history, are not adversely treated." Not only is GEICO's reliance on these authorities misplaced, because adverse action notice requirements are controlled by federal, and not state, law (*see* 15 U.S.C. § 1681t(b)(1)(C)), but GEICO misleadingly characterizes state laws that provide for use of "neutral" credit information in setting insurance premiums. The statutes and bulletins cited by GEICO do no more than *prohibit* use of an absence of credit history, or an inability to determine credit history, in setting insurance premiums, unless the insurance company treats those consumers as if they had neutral credit information. Edo does not contend that GEICO's procedure for assigning a neutral credit weight to "no-hits" or consumers without ascertainable credit history violated any law. Edo's insurance premium was based on a review of *his* credit information, and not the hypothetical "neutral" credit information some states permit insurance companies to use when they *cannot* locate credit information.

[6] The neutral credit weight roughly corresponded to a credit or insurance score of 600. GEICO JA 67-68. The top credit weight corresponded to an insurance score between 745-990. *Id*. Edo's score was 620. *Id*.

GEICO posits that it would have also denied him insurance with GEICO General *if* he had another person's "neutral" credit information and score. GEICO JA 34, ¶19.

GEICO Decided Not to Provide Notice to Consumers Even Though It Understood It Was Taking Adverse Actions Against Them. GEICO understandably wants this Court to decide its summary judgment motion, and be the first to decide it, without consideration of any factual record and based largely on a presumption of good faith because the facts, as they exist in the record and when more clearly developed on remand, will demonstrate GEICO knew it was taking "adverse actions" against consumers without notice or was reckless in doing so. At the very least, there is disputed evidence that would prevent summary judgment if this issue were considered by the district court.

Deposition testimony confirmed that GEICO "always" considered placing someone in a higher-premium company or tier an "adverse action." GEICO JA 49. Internal GEICO documents only recently produced also show that before GEICO designed its separate system for notice, GEICO's credit score team directly considered the question of adverse action, and, two years before Edo applied for insurance, stated that "adverse action" would include the treatment Edo suffered—i.e., placing an initial applicant in a company or tier lower than GEICO's most preferred tier, if the decision is based in part on credit.[7] The credit team expressed concern,

[7] This document was not part of the summary judgment record because GEICO delayed production until September 21, 2006, even though, as GEICO acknowledged in producing it, it was directly responsive to plaintiff's first request for production served in June 2002—long before GEICO's summary judgment motion filed in 2003. We have sought leave to lodge the document with the Clerk's Office. We refer to the document not because we believe this Court should itself consider it as evidence of GEICO's willfulness, but because it illustrates the type of evidence that will be available if, as the Ninth Circuit ordered, these cases are remanded for consideration of the factual record, and it emphasizes the (*Footnote continued*)

however, that providing notice to all applicants who received such treatment would raise cost issues and lead to inquiries and complaints from consumers. *See also* GEICO 9th Cir. Excerpts of Record 226 (discussing concerns about curbing postal expense).[8]

There is also evidence GEICO misled state regulators that it was giving *all* consumers proper FCRA notice. In 1999, before Edo's adverse treatment in this case, the Oregon Insurance Division asked GEICO if "all applicants or requesters for a quotation get written disclosure if an adverse action, including rejection, refusal to quote, or higher rate, is made based on a credit report." GEICO JA 58. GEICO falsely and misleadingly answered "Yes" without further explanation, even though it did not give all applicants notice if they received a higher rate based on their credit report. *Id*. GEICO was also specifically asked if there were any differences between how it treated someone with no discoverable credit-information (called a "no hit") and "the treatment offered to your best credit scores." GEICO succinctly replied "[t]here are none," GEICO JA 58, although the undisputed evidence from GEICO's documents is that persons assigned neutral scores were treated worse than those with the best scores.[9]

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inappropriateness of any suggestion that this Court should apply the willfulness standard, in the first instance, to an incomplete factual record.

[8] In fact, GEICO initially provided notice to all consumers who were not placed in the lowest cost company and tier (GEICO JA 19), but abandoned that practice by the time of the adverse action against Edo.

[9] GEICO assigned its "neutral" credit score and weight to "no hit" applicants. GEICO JA 60. As noted above, the neutral credit weight was approximately half the top credit weight. GEICO JA 68. GEICO also consistently instructed its counselors to enter all possible personal identifying information for an applicant, such as current address and social security number, because "[o]bviously if an applicant has a really good insurance score, and we failed to enter enough information to make a match, the score returned will not be as high as his/her real score and could possibly affect placement." GEICO JA 75 (emphasis added). Thus, GEICO acknowledged that the neutral scores assigned to "no hit" consumers "obviously" could negatively impact placement.

Despite the clear text and purpose of the FCRA, its own understanding of an "adverse action," and the specific regulatory guidance referenced above, GEICO continued to abuse the privilege of being able to review consumers' confidential information and then used that information against consumers, but did not change its practice for giving "adverse action" notice until December 2002, months after this lawsuit was filed. In December 2002, GEICO began giving notice to applicants denied insurance or whose rates were increased because they did not have the credit score necessary to qualify for the lowest cost company or rate. GEICO JA 48-49.

SUMMARY OF ARGUMENT

The Ninth Circuit Properly Defined Willfulness to Include Knowing or Reckless Disregard for the Law. The Ninth Circuit properly defined a willful violation based on the clear text and context of FCRA to include a policy or action carried out "either knowing that policy or action to be in contravention of the rights possessed by consumers pursuant to the FCRA or in reckless disregard of whether the policy or action contravened those rights." GEICO Cert. App. 31a, *quoting Cushman v. Trans Union Corp.*, 115 F.3d 220 (3d Cir. 1997) (brackets omitted). Contrary to petitioners' arguments, the Ninth Circuit never equated willfulness with mere negligence and expressly rejected negligence as the standard.

The Ninth Circuit's definition is dictated by the clear text and context of FCRA. In each instance where Congress intended to require proof of a "knowing" violation, it did so expressly. The definition is also consistent with FCRA's structure. Recovery of actual damages requires proof of only a negligent violation. 15 U.S.C. § 1681o. Recovery of minimum statutory damages or punitive damages requires proof of a willful (that is, reckless) violation. 15 U.S.C. § 1681n(a)(1)(A). Recovery of higher statutory damages for aggravated misconduct or imposition of criminal liability requires proof of a willful and *knowing* violation. 15 U.S.C. §§ 1681n(a)(1)(B), n(b); 15 U.S.C. §§ 1681q, r, s(a)(2)(A).

The Ninth Circuit's definition also closely follows this Court's precedents dating back to at least the 1930's. Since that time, this Court has consistently concluded that "willful" violations of similar civil statutes include conduct done in reckless disregard of the rights of others. This would be a particularly unusual case in which to require a higher standard given that when Congress wanted to specifty a higher *mens rea* in FCRA, it expressly required proof of a willful and knowing violation. *See e.g.*, 15 U.S.C. §§ 1681q, r.

Petitioners' proposed objective test for proving a willful violation—as well as parts of the United States' proposed test—also contradicts this Court's precedents and well-established tort law. To prove a willful violation, a plaintiff must show either knowing or reckless disregard for the rights of others. In this fact-specific inquiry, the trier of fact must consider both subjective and objective factors. Subjective factors include whether the defendant actually understood or was conscious of an unjustifiably high risk that its conduct violated FCRA. Even within this subjective inquiry, a trier of fact may infer from the obviousness of the risk that the defendant was aware of it but recklessly proceeded anyway. Because direct evidence of intent/knowledge (e.g., a memo or testimony admitting intent to violate the law) is rare, the trier of fact may also consider objective factors as part of the totality of circumstances to determine recklessness. Thus, a jury may ask if a reasonable person in defendant's position should have been aware of an objectively high risk that its conduct violated the law. Objective factors, although important in the overall mix, are not a shield or complete defense to prevent inquiry into subjective intent, as petitioners and the United States suggest, but an alternative method of proof where clear evidence of subjective intent is absent.

This Court should conclude, as it has in the past, that a civil willful violation may include either a knowing or reckless violation. The Court should then remand this case for consideration of the full factual record by the district court. If this Court is to go beyond the questions presented and become the first court to apply the standard to any facts, there is sufficient evidence to raise fact issues that petitioners, subjectively, knowingly violated FCRA or ignored an unjustifiably high risk that they had taken adverse actions against respondents and failed to give notice. Even if one considers only the objective factors, petitioners' actions represented a sufficiently reckless departure from the clear requirements of FCRA and associated guidance from the FTC to create a fact issue as to whether petitioners recklessly ignored a high risk that their conduct violated FCRA.

The Ninth Circuit Properly Concluded That GEICO Took an "Adverse Action" Against Edo. The Ninth Circuit correctly held that GEICO took an "adverse action" against Edo when, based on review of his credit information, it denied him insurance with GEICO General and increased the charges for his insurance by issuing him a more expensive policy with GEICO Indemnity. GEICO's argument that Edo's credit information had no impact on his placement or decreased his charge for insurance misstates the factual record. It is undisputed that GEICO, in connection with underwriting Edo's insurance, both denied him insurance with GEICO General and increased his premiums based, in part, on a review of *his* credit information (and not some other average person's purportedly neutral credit score). That is the definition of an adverse action under FCRA. 15 U.S.C. § 1681a(k)(1)(B)(i). Nothing in FCRA permits GEICO, after already adversely treating Edo in the underwriting process, to avoid its notice obligation by positing that it would have also denied Edo insurance if he were a hypothetical consumer with a purportedly "neutral" or "average" credit score.

GEICO's argument not only contradicts FCRA's plain text, but also eviscerates a primary purpose of FCRA, which is to ensure the accuracy of the credit information that is used against consumers. Under GEICO's notice system, GEICO always presumes that it is using accurate credit information when it compares consumers to a purportedly neutral or average score and only provides notice if those consumers are treated worse than average. If a consumer actually has very good credit or even the best credit, but the information in his credit file is not accurate, as commonly occurs, GEICO will not give notice as long as that consumer is treated no worse than the hypothetical average consumer. The consumer may, in fact, qualify for the best rate based on his accurate credit information. GEICO, however, will never provide him notice, thus denying him the timely opportunity to check his consumer report for identify theft or other inaccuracies that may have resulted in negative treatment. The plain text and purpose of the statute foreclose the possibility that Congress intended to allow GEICO to avoid giving thousands of consumers proper notice based on a faulty presumption that GEICO must be reviewing accurate credit information and need not give consumers any opportunity to check.

ARGUMENT

I. A Willful Violation Includes a Knowing or Reckless Disregard For The Law.

A. The Text of 15 U.S.C. § 1681n(a) Demonstrates That a "Willful" Violation Includes a Reckless Violation.

In 15 U.S.C. § 1681n(a), Congress provided civil liability for willful non-compliance of FCRA. Under section 1681n(a)(1)(A), Congress provided that a consumer could recover, among other things, statutory damages of between $100 and $1,000 and punitive damages for any willful violation of the statute. The term "willfully" has appeared in section 1681n since FCRA's enactment in 1970. At that time, despite petitioners' claims to the contrary, it was well established that a willful violation included a reckless disregard for the rights of others. *See United States v. Murdock*, 290 U.S. 389, 396 (1933) (stating that a willful violation may include "conduct marked by careless disregard whether or not one has the right so to act"), *overruled on other grounds*, *Murphy v. Waterfront Comm'n of New York Harbor*, 378 U.S. 52, 57 (1964); *see also United States v. Illinois Cent.*

R.R., 303 U.S. 239, 242-43 (1938) (citing *Murdock*'s careless disregard standard and holding that civil defendant's conduct was "willful" if it showed either intentional disregard for statute or an "indifference to its requirements.")

To support their narrower concept of the term willful, petitioners point this Court to the legal definition of "gross negligence" and give an incomplete definition of "willful" from Black's Law Dictionary. They fail to note that the complete legal definition of "willful" in the 1968 dictionary included:

> recklessness, [a] disregard of consequences, an indifference whether a wrong or injury is done or not, and an indifference to natural and probable consequences.
>
> . . .
>
> The word "reckless" as applied to negligence is the legal equivalent of "willful" or "wanton."

Black's Law Dictionary at 1773 (4th Ed. 1968) (citations omitted). "Willful misconduct" of an employee was similarly defined to mean:

> more than mere negligence, and contemplates the intentional doing of something with knowledge that it is likely to result in serious injuries or with reckless disregard of the probable consequences.

Id. at 1774. When Congress amended section 1681n(a)(1)(A) in 1996 specifically to provide for statutory damages of between $100 and $1,000 and retained the use of the willfulness standard (Pub. L. No. 104-208, 110 Stat. 3009 (1996)), the definition of a civil willful violation continued to include recklessness. *Black's Law Dictionary* 1599-1600 (6th Ed. 1990) (*citing Murdock*, 290 U.S. at 394-95 and describing willful conduct as including "careless disregard whether or not one has the right to so act.") Thus, the common legal definition of willful at the time of enactment and amendment of section 1681n included recklessness.

B. Congress's Use of the Word "Willfully" in Context Confirms That a "Willful" Civil Violation is Less Than a Knowing Violation.

Petitioners contend that willfulness in FCRA is limited to "knowing" violations. However, even apart from the common legal definition, the text of section 1681n(a) in context makes clear Congress did not intend a civil willful violation to require proof of a knowing violation. *See General Dynamics Land Systems, Inc. v. Cline*, 540 U.S. 581, 596 (2004) (stating "the cardinal rule that statutory language must be read in context [because] a phrase gathers meaning from the words around it.") (internal quotation marks deleted).

Where Congress intended to require proof of a knowing violation in FCRA, it specifically used the word "knowing" or "knowingly." In the immediately subsequent subsections 1681n(a)(1)(B) and 1681n(b), Congress provided that in cases where a person obtains a consumer report not only "willfully" but also "under false pretenses or knowingly without a permissible purpose," the consumer could recover either actual damages or a minimum of $1,000, whichever is greater. Had Congress intended the word "willful" in the beginning of section 1681n(a) to require a knowing violation, the additional requirement in the following subsections that the defendant "know" that it did not have a permissible purpose under FCRA would be rendered insignificant if not superfluous. *Duncan v. Walker*, 533 U.S. 167, 174 (2001) (stating that this Court avoids interpretations of statutes that leave terms insignificant or superfluous). Similarly, subsequent subsections of FCRA imposing criminal penalties for conduct done not only "willfully" but also "knowingly" would be redundant if willfulness under FCRA already required knowledge of a violation. *See* 15 U.S.C. § 1681q (criminal liability section that provides liability for any person who "knowingly and willfully obtains" false information); 15 U.S.C. § 1681r (criminal liability section requiring proof of conduct done "knowingly and willfully"); *see also* 15 U.S.C. § 1681s(a)(2)(A) (providing the FTC the right to enforce civil penalties upon proof of a "knowing violation" and recovery of up to $2,500 per violation).

Safeco concedes that Congress's use of the word "knowing" in sections 1681n(a)(1)(B) and 1681n(b) must refer to a knowing violation of the law—knowledge that defendant has an impermissible purpose under FCRA—and not merely knowledge of the underlying facts or of the factual consequences of the conduct. *See* Safeco Br. at 19 (conceding that "although the term 'knowingly' sometimes implies mere factual knowledge," *citing Bryan v. United States*, 524 U.S. 184, 191 (1998), "the straightforward grammatical reading of § 1681n(a)(1)(B) is that the adverb 'knowingly' modifies 'without a permissible purpose' such that knowledge of the unlawfulness of the purpose is required.") In this context, it is not possible, as it was in *Bryan* (a criminal case), that Congress used the terms "knowing" and "willful" in the same section to distinguish between knowledge of the facts and willful "knowledge of a violation of the law." Thus, the only plausible understanding of the term "willfully" in connection with its *earlier* use in section 1681n(a) is to provide a lesser standard of culpability than a knowing violation of the law.

If "willfully" already meant "knowingly" in the opening sentence of section 1681n(a), consistency would have demanded that Congress use the term "willfully" within the statute such that the immediately subsequent references in section 1681n(a)(1)(B) and 1681n(b) would have provided liability for any person who obtained a consumer report "under false pretenses or *willfully* without a permissible purpose." Indeed, since section 1681n(a)(1)(B) is already subject to the willfulness requirement of section 1681n(a), no further reference to either knowledge or willfulness would be necessary in that subparagraph under petitioners' view of willfulness. By requiring additional proof of knowledge in subsections 1681n(a)(1)(B) and 1681n(b), Congress clearly indicated that the earlier "willful" standard necessary to prove a violation of section 1681n(a)(1)(A) meant something less than a knowing violation.[10] "[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello v. United States*, 464 U.S. 16, 23 (1983) (citation omitted); *see also United Dominion Indus. Inc. v. United States*, 532 U.S. 822, 836 (2001) (same).

Petitioners' contrary arguments violate the principle that Congress "says in a statute what it means and means in a statute what it says there[.]" *Connecticut Nat. Bank v. Germain*, 503 U.S. 249, 254 (1992). Petitioners argue that Congress's initial use of the term "willful" alone in connection with subsection 1681n(a) and 1681n(a)(1)(A) must require proof of a knowing violation because Congress subsequently required a "knowing" standard in the later subsections 1681n(a)(1)(B) and 1681n(b). *See* Safeco Br. at 20; GEICO Br. at 32 (stating that the initial use of the term "willful" must "subsume" and "encapsulate" the latter use of the term "knowing.")[11] This interpretation stands the statute on its head so that the *later* specific references requiring proof of knowledge modify the *earlier* use of the term willful. Peti-

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[10] As the United States notes, Congress also indicated the difference between "willful" and "knowing" misconduct in the titles of these subsections. U.S. Br. 14. Section 1681n's title is "**Civil liability for willful noncompliance**" and § 1681n(b)'s title specifically refers to "**Civil liability for knowing noncompliance**." Because the distinction is evident in the text of the statute, however, this Court need not refer to the titles. *See Carter v. United States*, 530 U.S. 255, 267 (2000) (stating that this Court will only consult titles of statutes to shed light on ambiguous text).

[11] GEICO claims the initial reference to willfulness in section 1681n(a) refers to conduct done with an "evil heart," or "bad intent" involving "actual knowledge of illegality." GEICO Br. at 31-32. This argument also fails to explain Congress's distinct use of the terms "willfully" and "knowingly." Moreover, this Court has held that a plaintiff, even to recover punitive damages, need not prove that defendant had an evil motive in his heart; conduct that is in reckless disregard of the rights of others suffices. *Kolstad v. American Dental Ass'n*, 527 U.S. 526, 538 (1999).

tioners cannot redraft the text to reach this result. *Dodd v. United States*, 545 U.S. 353, 359 (2005). The only logical interpretation is that the initial general reference to willful violations requires proof of less than knowing violations, such as recklessness, and where Congress wanted a higher standard of proof, it explicitly demanded proof of knowing violations in later subsections. *Russello,* 464 U.S. at 23.

C. Congress Created a Statutory Structure in Which Higher Levels of Liability Correspond to a Higher Standard of Culpability.

The structure of FCRA also demonstrates that Congress intended to have increasing levels of liability that correspond to gradually increasing requirements for proof of culpability. *See FDA v. Brown & Williamson Tobacco Co.,* 529 U.S. 120, 132-33 (2000) (stating that a court must interpret a statute as a "symmetrical and coherent regulatory scheme" and, where possible, fit "all parts into a harmonious whole"). Thus, if a plaintiff seeks recovery of actual damages only, he need only prove negligence. 15 U.S.C. § 1681o. If a plaintiff intends to seek statutory damages and the possibility of a punitive award, he must prove the defendant acted "willfully" but not necessarily with knowledge of the violation of the law; that is, recklessness is sufficient. 15 U.S.C. § 1681n(a)(1)(A). To obtain the higher per-violation damages provided by subsections 1681n(a)(1)(B) and n(b), or 1681s(a)(2)(A), the plaintiff (or the FTC) must prove a knowing violation, and if criminal liability is pursued, the government must prove a "knowing and willful" violation. 15 U.S.C. §§ 1681q, r.

Petitioners nonetheless argue that this Court should interpret the term "willfully" in the civil liability section 1681n(a) to have the same meaning as the terms "knowingly and willfully" in the criminal provisions of sections 1681q, r. GEICO Br. 31; Safeco Br. 23. Petitioners' argument that the term "willfully" requires the same standard of "knowing violation of the law" for recovery of both the lesser civil statutory penalty under section 1681n(a) and the more extreme criminal penalty under sections 1681q and 1681r is inconsistent with the logical structure of gradually increasing liability and standards of culpability as well as with Congress' considered use of the term "knowingly and willfully" in the criminal sections, but not section 1681n(a).[12] As the United States' amicus brief states, these terms, when used together, clearly indicate a higher level of culpability than the merely "willful" misconduct required for certain civil violations in Section 1681n(a)(1)(A). U.S. Br. 14-15.

Even within the statutory remedies available solely to consumers, Congress followed a clear structure of increasing liability upon proof of higher culpability. While section 1681n(a)(1)(A) provides for either actual damages or $100-$1,000 in statutory damages, and the chance of punitive damages, upon proof of willful, but not necessarily knowing violations, sections 1681n(a)(1)(B) and 1681n(b) both provide for actual damages *or $1,000, whichever is greater*, upon additional proof of knowing non-compliance. Thus, even though punitive damages are theoretically available under section 1681n(a)(1)(A), there is nonetheless a *minimum*

[12] Safeco argues that Congress could not have intended a lower intent threshold for failing to provide notice, something that was purportedly less central to Congress's concerns, and a higher intent standard for proving improper use of credit information, which was purportedly more central to Congress's concerns. Safeco's arguments and its attribution of relative values to Congress's intent are contradicted by the text of FCRA. Whenever Congress intended to provide additional sanctions for those who improperly use consumer credit information, it specifically required proof of knowing misconduct. *See e.g.*, 15 U.S.C. §§ 1681n(a)(1)(B), 1681n(b), 1681q, 1681r. Where other violations were at issue, including but not limited to the failure to provide simple notice of an adverse action, Congress did not require proof of knowing misconduct (but imposed lower damages). 15 U.S.C. § 1681n(a)(1)(A). Further, Safeco's judgment that notice issues were "peripheral" to Congressional concern are contradicted by Congress's statement of purpose, which stated that the central purpose of FCRA was to ensure "accuracy and fairness of credit reporting." 15 U.S.C. § 1681(a). At the time of enactment when consumers had no right to receive an annual free credit report, the notice provisions were the method for ensuring that the credit information used was accurate.

required $1,000 statutory award for violations involving greater "knowing" culpability under section 1681n(a)(1)(B) (and the chance for punitive damages as well). That is ten times the minimum statutory damages provided under section 1681n(a)(1)(A) for other civil violations of FCRA that require a lower *mens rea* standard.

Safeco argues that this logical remedial structure is somehow destroyed by the statutory penalties available to the FTC under 15 U.S.C. § 1681s(a)(2)(A). Under that section, the FTC may recover what Safeco describes as a "modest civil penalty" of up to $2,500 per violation if it proves a pattern or practice of "knowing" violations of FCRA. Safeco Br. 22. (Ironically, while Safeco describes a potential $2,500 per violation award as "modest," it describes the lower private statutory damages of $100-$1,000 per violation as creating "astronomical" exposure. Safeco Br. 34.) The $2,500 per violation statutory award is up to two-and-a-half times, and potentially twenty-five times, the $100-$1,000 statutory award available to consumers on proof of a lesser willful violation. Even with the remote possibility of a discretionary award of punitive damages, the significant multiplier available to the FTC on proof of knowing violations naturally fits into a statutory scheme where consumers may get lesser statutory remedies than the FTC on proof of lesser culpability.

Safeco also points out that before 1996, courts had held that a plaintiff could seek civil liability against a defendant for improperly obtaining a consumer report, but that civil liability derived from proof that defendant violated 15 U.S.C. § 1681q, the criminal provision dealing with impermissible use of credit reports, because there was no specifically applicable civil liability section. Safeco argues that in adding 15 U.S.C. § 1681n(a)(1)(B), which expressly provided civil liability for knowing impermissible uses of credit reports, Congress "implicitly" adopted the reasoning of pre-1996 decisions under which civil liability could be premised on a violation of 15 U.S.C. § 1681q as long as the liability was sought through the culpability standards of 15 U.S.C. §

1681n (requiring proof of willfulness) and not the lower culpability standards of 15 U.S.C. § 1681o (requiring proof of negligence). Safeco Br. 23-24, n 6, *citing* cases. Safeco's "implicit adoption" argument ignores the explicit text of the amendment to FCRA. Expressly adopting the same standard used in the criminal provision, Congress specifically required proof of a "knowing" impermissible use of a credit report to recover actual damages or $1,000, whichever is greater, in civil liability cases. 15 U.S.C. §§ 1681n(a)(1)(B) & n(b). If anything, its decision to do so solely in connection with impermissible uses of credit reports under those sections, but not to require any higher standard of proof for other civil violations of section 1681n(a)(1)(A) demonstrates that it intended to require proof of a knowing violation only for civil sections 1681n(a)(1)(B) and n(b).

D. The Ninth Circuit's Interpretation Is Consistent With This Court's Precedents.

The Ninth Circuit's "knowing or reckless disregard" standard is also consistent with this Court's precedents defining willfulness in the same manner in other similar *civil* statutes. *See Hazen Paper Co. v. Biggins*, 507 U.S. 604, 614 (1993) (holding "willful" requires only proof of a "reckless disregard for the matter of whether its conduct was prohibited by the ADEA"); *Trans World Airlines, Inc. v. Thurston,* 469 U.S. 111, 128 (1985) (same); *McLaughlin v. Richland Shoe*, 486 U.S. 128, 133 (1988) (finding same knowing or reckless standard for willful violation under Fair Labor Standards Act); *Illinois Cent. R.R*, 303 U.S. at 242-43 (holding that civil defendant's failure to unload cattle car was "willful" because it showed disregard for statute and indifference to requirements). In *McLaughlin*, this court, relying on the plain language of the FLSA, stated:

> The word "willful" is widely used in the law, and although it has not by any means been given a perfectly consistent interpretation, it is generally understood to refer to conduct that is not merely negligent. The stan-

> dard of willfulness that was adopted in *Thurston*—that the employer either knew or showed reckless disregard for the matter of whether its conduct was prohibited by the statute—is surely a fair reading of the plain language of the Act.

McLaughlin, 486 U.S. at 133.

Petitioners, particularly Safeco, argue that there are competing lines of precedent in which this Court has, on occasion, interpreted the term "willful" to include recklessness and, on other occasions, required proof that defendant knew its conduct was unlawful. Safeco Br. 17-18. Although respondents agree that the term willful has been interpreted in context, there are no truly competing lines of Supreme Court authority interpreting *civil* statutory willfulness provisions. The civil cases cited above consistently hold that recklessness is sufficient. Petitioners cite cases requiring proof of knowledge in criminal statutes where this Court has occasionally required a higher knowing standard, but this Court has also adopted a recklessness standard depending on the text and context of the criminal statutes involved.[13]

This Court's decision in *Thurston* is particularly instructive. In *Thurston*, this Court observed that the Age Discrimi-

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[13] *See United States v. Bishop*, 412 U.S. 346, 360 (1973) (requiring proof of violation of a known legal duty in criminal tax case); *Bryan*, 524 U.S. at 191 (holding that a conviction for willfully violating a statutory prohibition on unlicensed firearm sales requires proof that defendant knew its conduct was unlawful); *Ratzlaf v. United States*, 510 U.S. 135, 136-137 (1994) (holding that a willful violation of the anti-structuring provisions requiring reporting of transactions above $10,000 requires proof of knowledge of the unlawful conduct); *Cheek v. United States*, 498 U.S. 192, 201-02 (1991) (holding that a willful violation of criminal tax laws requires proof of knowledge of illegal conduct). *But see Murdock*, 290 U.S. at 396 (holding in a criminal case that willful conduct may include "conduct marked by careless disregard whether or not one has the right so to act"); *Thurston*, 469 U.S. at 126 (noting that criminal provisions of the FLSA are consistent with willful/reckless disregard standard); *Screws v. United States*, 325 U.S. 91, 104-05 (1945) (holding reckless disregard sufficient for criminal violation).

nation in Employment Act ("ADEA") had a "two-tiered" liability structure in which plaintiff could recover actual damages for non-willful violations and statutory liquidated double damages for willful violations. 469 U.S. at 125, 128. This Court concluded that interpreting "willful" to require a higher standard of either knowledge or recklessness was consistent with that two-tiered liability scheme.[14] *Id.* at 126-28.

As noted, FCRA provides more than just two tiers of liability, but several, including gradually increasing liability for (1) actual damages, (2) layers of increasing civil and administrative statutory penalties, and (3) criminal penalties for "willful and knowing violations." A "knowing or reckless" disregard standard fits even more comfortably into a three or more tiered structure in which the top tier of criminal liability is expressly dependent on knowing violations. As the amicus brief of the United States notes, petitioners' definition of willful "leaves little, if any, room between Congress's differently articulated criminal and civil provisions." U.S. Br. 15.

GEICO attempts to distinguish *Thurston* by arguing that while the ADEA double damages provision was purportedly considered "punitive,"[15] the ADEA's two-to-one statutory ratio damages "assures proportionality." GEICO Br. at 39. This argument is a non-sequitur. The proportionality of any damages ultimately awarded does not provide a basis for distinguishing the proper interpretation of willfulness under the ADEA and FCRA. Even if the statutory remedies in FCRA

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[14] In enacting the ADEA, Congress provided liquidated civil statutory damages as a compromise in place of criminal liability. *Thurston*, 469 U.S. at 124 (discussing Senator Javits amendment to replace criminal liability with liquidated damages). Despite this Court's recognition that liquidated damages were a substitute for criminal liability, it concluded that they could be obtained based only on reckless disregard for the law.

[15] GEICO argues that this Court concluded that such liquidated damages were punitive. However, the Court merely cited the legislative history that indicated that. Here, as discussed above, Congress provided for statutory damages (as an alternative to actual damages) apart from any punitive damage award.

could be considered punitive—and Congress did not so consider them, as it provided statutory damages as an alternative to actual damages and in addition to possible punitive damages—the Ninth Circuit's reckless disregard standard under FCRA is the same standard this Court has found constitutionally sufficient for awarding punitive damages. *See e.g. Kolstad v. American Dental Ass'n*, 527 U.S. 526, 535-38 (1999) (permitting punitive damages in a Title VII case on proof of "reckless indifference to the federally protected rights of an aggrieved individual"). [16] There is no distinction between *Thurston* and these cases.

GEICO also attempts to distinguish *Thurston* by arguing that the "unique" legislative history of the ADEA directed courts to interpret that statute consistently with the Fair Labor Standards Act (FLSA), whose provisions had already been interpreted to equate willfulness with reckless disregard. GEICO Br. 39. *Thurston*, however, did not rely only on legislative history, but relied on the plain text and context of the statute and this Court's interpretation of similar statutes. 469 U.S. at 128. Further, as noted above, there has been a "willful" provision in section 1681n since FCRA was enacted in 1970. The ADEA was enacted in 1967 and the extended FLSA limitation period for "willful" violations, at issue in *McLaughlin*, was added in 1966. *See* Age Discrimination in Employment Act of 1967, Pub. L. No. 90-202, 81 Stat. 602 (1967); *McLaughlin*, 486 U.S. at 132 (discussing history of FLSA limitations period). There is no reason to distinguish Congress's understanding of the term "willfully" when enacting FCRA in 1970 from its understanding when it enacted similar provisions in the civil liability provisions in the ADEA and FLSA just a few years earlier. *See Northcross v. Board of Ed. of Memphis City Schools*, 412 U.S. 427, 428

[16] *See also Smith v. Wade*, 461 U.S. 30, 56 (1983) (permitting punitive damages in Section 1983 action based on reckless disregard standard); *Gertz v. Welch, Inc.*, 418 U.S. 323, 349 (1974) (requiring proof of reckless disregard for truth to recover punitive damages in libel case).

(1973) (stating that similar statutes with similar language should be interpreted consistently).

E. The Mere Possibility of Aggregated Class Damages Based on Proof of Reckless Disregard Should Not Influence This Court's Interpretation of the Substantive Text.

GEICO contends that interpreting FCRA's willfulness requirement to be any lower than a knowing standard somehow invites "grave constitutional doubts" because of the supposed potential for crippling liability based on the aggregation of statutory damages through class certification. GEICO Br. at 34-37. GEICO's attack, however, is not directed at the meaning of "willfully" in FCRA, but at an issue not presented on this record: the possibility of both a later certification of a class and an aggregate award of class damages. Congress's intent in using the term "willfully" cannot depend on whether this is an individual case, as it stands now, or whether it ultimately may result in class certification and an aggregate class award following a finding of willfulness.

This Court has rejected the argument that the possibility of "gigantic consumer class actions" under other consumer-protective laws should influence the interpretation of substantive provisions of the statute. *Reiter v. Sonotone Corp.*, 442 U.S. 330, 344-45 (1979). In *Reiter*, this Court interpreted § 4 of the Clayton Act to provide remedies for an injury to a retail consumer's "property." The defendants argued that such an interpretation, combined with the possibility of "gigantic consumer class actions" seeking treble damages for millions of transactions "will have potentially ruinous effect on small businesses in particular and will ultimately be paid by consumers in any event." *Id*. The Court dismissed the argument as involving "policy considerations that are more properly addressed to Congress than to this Court. However accurate [defendants'] arguments may prove to be—and they are not without substance—they cannot govern our reading of the plain language in [the statute]." *Id.* at 345.

Congress was well within its powers when it provided the alternative of statutory damages of $100-1,000 as (1) a liquidated damages remedy for the violation of the statute itself (here, the failure to give notice), (2) a substitute for difficult-to-establish actual damages that result from a failure to receive notice of an "adverse action" and other FCRA violations, and (3) an incentive to encourage compliance with federal law.[17] *See St. Louis, I.M. & S. RY. Co. v. Williams*, 251 U.S. 63, 66 (1919) (holding that statutory penalties of $50 to $300 for excessive charges by railroads did not violate due process and that legislatures have authority to provide additional statutory penalties for such "public wrongs"); *Overnight Motor Transp Co. v. Missel*, 316 U.S. 572, 583-84 (1942) (holding FLSA liquidated damages were "compensation" and renumeration for difficult to prove damages); *Kenro, Inc v. Fax Daily, Inc.*, 962 F. Supp. 1162, 1166 (S.D. Ind. 1997) (holding that a $500 statutory damage award under the Telephone Consumer Protection Act was permissible because Congress may "design a remedy that will 'serve to liquidate uncertain actual damages and to encourage victims to bring suit to redress violations.'") (citations omitted).[18]

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[17] Petitioners claim that Congress could not have understood the potential exposure businesses could incur as a result of statutory penalties of $100-$1,000 is contradicted by the legislative history and common sense. When the statutory damages provision was added in 1996, Congress understood that problems with the accuracy of credit information "have been the No. 1 item of complaint at the Federal Trade Commission and States attorneys general have experienced similar levels of complaint." 142 Cong. Rec. S11869 (Sep. 30, 1996). Congress also understood that credit bureaus kept information on "more than 190 million Americans" and that such information was rife with errors. *Id*. In light of the widespread inaccuracies and Congress's understanding of the breadth of the use of consumer information, Congress must have understood the potential scope of liability it created.

[18] *See also Native American Arts, Inc. v. Bundy-Howard, Inc.*, 168 F.Supp.2d 905, 914-15 (N.D.Ill. 2001) (allowing Congress to adjust statutory damages commensurate to public wrong as opposed to private injury "meshes with the … difficulty in quantifying the amount of actual dam-

(*Footnote continued*)

The liquidated damages in FCRA substitute for actual damages that may be very difficult to prove where the consumer never gets timely notice allowing him to review the same information considered by the insurer when it took the adverse action. Once he belatedly learns of the violation, the consumer may not be able even to locate the same information considered at the time of the adverse action (because credit information is constantly revised), much less determine how any inaccuracy may have impacted the amount charged.

Congress also controls the decision to limit the availability of class actions under any particular federal statute. As Judge Easterbrook has noted, Congress chose to limit class actions under the Truth in Lending Act (TILA) and other federal statutes, but did not do so under FCRA:

> The reason that damages can be substantial [under 15 U.S.C. § 1681n], however, does not lie in an "abuse" of Rule 23; it lies in the legislative decision to authorize awards as high as $1,000 per person, 15 U.S.C. § 1681n(a)(1)(A), combined with GMACM's decision to obtain the credit scores of more than a million persons.
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> Many laws that authorize statutory damages also limit the aggregate award to any class. For example, the Fair Debt Collection Practices Act says that total recovery may not exceed "the lesser of $500,000 or 1 per centum of the net worth of the debt collector". 15 U.S.C. § 1692k(a)(2)(B)(ii). The Truth in Lending Act has an identical cap. 15 U.S.C. § 1640(a)(2)(B) (substituting "creditor" for "debt collector"). *See also* 15 U.S.C. § 1693m(a)(1)(B),12 U.S.C. § 4010(a)(2)(B), and 12 U.S.C. § 4907(a)(2)(B). Other laws, however, lack such upper bounds. See 15 U.S.C. § 1679g(a) (Credit Repair Organizations Act); 15 U.S.C. § 1667d

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ages suffered by any aggrieved plaintiff because of the statutorily defined wrong (a difficulty created by the wrongdoer's own prohibited activity)").

> (Consumer Leasing Act). The Fair Credit Reporting Act is in the cap-free group.
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> Maybe suits such as this will lead Congress to amend the Fair Credit Reporting Act; maybe not. While a statute remains on the books, however, it must be enforced rather than subverted. An award that would be unconstitutionally excessive may be reduced, *see State Farm Mutual Automobile Insurance Co. v. Campbell*, 538 U.S. 408, 123 S.Ct. 1513, 155 L.Ed.2d 585 (2003), but constitutional limits are best applied after a class has been certified. Then a judge may evaluate the defendant's overall conduct and control its total exposure. Reducing recoveries by forcing everyone to litigate independently-so that constitutional bounds are not tested, because the statute cannot be enforced by more than a handful of victims-has little to recommend it.

Murray v. GMAC Mortgage Corp., 434 F.3d 948, 953-954 (7th Cir. 2006).[19] The excessiveness of any award would only be appropriate for review, as Judge Easterbook noted, should there ever be an aggregate class award following a jury's determination that defendants willfully violated FCRA. The possibility of such an award sheds no light on Congress's intent in using the term "willfully" in FCRA.

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[19] In *Murray*, the Seventh Circuit noted that the 2003 Fair and Accurate Credit Transactions Act ("FACTA") "abolishes private remedies for violations of the clear-disclosure requirement, which in the future will be enforced administratively, but that change does not apply to offers made before its effective date and thus does not affect this litigation." 434 F.3d at 950. FACTA similarly does not apply retroactively here. If the Court now tries to bail out petitioners who cannot avail themselves of FACTA by limiting the notice obligation or changing Congress's definition of willful, that "solution" will apply not only to these defendants, but also to future defendants who are already entitled to FACTA's protection. The result will be to undo the compromise approach taken by Congress of limiting the remedy without eliminating the notice obligation or changing the definition of willful.

F. There Is No Need to Consult Legislative History, But It Supports the Ninth Circuit's Definition of Willfulness.

"When the words of a statute are unambiguous, then, this first canon is also the last: 'judicial inquiry is complete." *Connecticut Nat. Bank*, 503 U.S. at 254, *quoting Rubin v. United States*, 449 U.S. 424, 430 (1981). Because the meaning of "willful" is clear from its text and context of FCRA, there is no need to consult FCRA's legislative history.

Petitioners nevertheless argue that Congress must have considered willfulness to require a knowing violation because an initial bill contained a gross negligence standard for actual damages that was later reduced to a simple negligence standard in the enacted statute. Safeco Br. 25-26; GEICO Br. 33. It does not, however, follow that because Congress reduced the standard for actual damages from gross negligence to negligence in Section 1681o prior to enactment, it intended to increase the "willful" standard under Section 1681n to incorporate a knowing standard.[20]

In addition, as the United States' amicus brief points out, while some courts loosely grouped "gross negligence" and "recklessness" together, "most courts consider that 'gross negligence' falls short of a reckless disregard of consequences." U.S. Br. 16 (*quoting* W. Prosser, *The Law of Torts* § 34 at 183 (4th ed. 1971)); *see also Conway v. O'Brien*, 312 U.S. 492, 495 (1941) ("'Gross negligence is manifestly a smaller amount of watchfulness and circumspection than the

[20] The Conference Report noted that the "the House amendment to section 617, which was agreed to by the conferees would establish liability for actual damages sustained as a result of ordinary negligence, instead of only as a result of gross negligence as provided in the Senate bill." H. Rep. No. 91-1587 at 30 (1970). The political compromise of providing actual damages for negligence did not speak to Congress's intent with respect to willfulness. The Conference Report did not separately discuss willfulness beyond noting that it was the standard for recovering punitive damages under the Act. *Id*.

circumstances require of a prudent man. But it falls short of being such reckless disregard of probable consequences as is equivalent to a willful and intentional wrong.'") (*quoting Shaw v. Moore*, 162 A. 373, 374 (Vt. 1932)). There is no evidence in the legislative history that Congress equated "gross negligence" and "recklessness." Even if it did, however, the inference that would be drawn from the change from gross to simple negligence in section 1681o would be that Congress did not want to require plaintiffs to prove recklessness (or something closely approaching recklessness) in order to obtain actual damages, not that it wanted to require *more* than recklessness for the relief available under section 1681n.

GEICO and Safeco also point to alternative bills that proposed providing punitive damages based on either gross negligence or willfulness. H.R. 19403, § 52 , 91st Cong., 2d Sess. (1970); H.R. 19410, § 52, 91st Cong., 2d Sess. (1970). These bills were not considered by Congress; they never received any hearings and were not even reported out of Committee. *See* U.S. Br. 17, n 13. Moreover, these bills would have provided criminal liability for "whoever willfully violates any provision," (H.R. 19403, § 63, 91st Cong., 2d Sess. (1970); H.R. 19410, § 62, 91st Cong., 2d Sess. (1970)), but Congress ultimately added a more specific "knowingly and willfully" requirement to FCRA's criminal sections, indicating that willful violations were not limited to knowing violations. Thus, if anything can be gleaned from the proposed bills, it is that Congress understood that willful violations were not limited to knowing violations.

Safeco also contends that when Congress amended 15 U.S.C. § 1681n(a) to provide statutory damages, it implicitly incorporated four circuit court opinions that purportedly required actual knowledge. Safeco Br. 29. There are two flaws in this argument. First, the term "willfully" has been in section 1681n since FCRA's enactment in 1970, when section 1681n applied only to recovery of punitive damages. In 1996, Congress added new provisions in section 1681n(a)(1)(A) for statutory damages, but made no changes to the willfulness standard. As of 1970, and continuing through 1996, it was commonplace that plaintiffs could recover punitive damages based on reckless misconduct.[21] Thus, to the extent that the meaning of "willfully" is not apparent from the text and context, the legislative history indicates that the enacting Congress in 1970 would have naturally incorporated the common recklessness standard necessary for punitive damages. *See Dixon v. United States*, 126 S. Ct. 2437, 2445 (2006) (construing statutory liability term "as Congress may have contemplated it" at the time of enactment).

Second, even if 1996 were a relevant date for determining Congress's intent, there was no "unanimous opinion" of circuit courts that rejected recklessness to prove a willful violation under FCRA. Of the four circuit court FCRA cases cited by Safeco on page 29 of their brief, none considers whether recklessness may be sufficient much less reject it for proof of willfulness under Section 1681n. Two, in fact, involve *other* provisions of FCRA that expressly require proof of knowledge.[22] Indeed, there have been only three circuit court cases that have discussed whether recklessness is sufficient to prove a willful civil FCRA violation and all occurred after the 1996 amendment. The Ninth Circuit in this case and the

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[21] *General Motors Acceptance Corp. v. Froelich*, 273 F.2d 92, 94 (D.C. Cir. 1959); *Varnish v. Best Medium Publishing*, 405 F.2d 608, 612 (2d Cir. 1969); *Lanfranconi v. Tidewater Oil Co.*, 376 F.2d 91, 96 (2d Cir. 1967); *Citizens and Southern Nat. Bank of S.C. v. Dickerson, Inc.*, 370 F.2d 692, 696 (4th Cir. 1966); *Anderson v. Eagle Motor Lines, Inc.*, 423 F.2d 81, 84 (5th Cir. 1970); *Memphis Press-Scimitar Co. v. Chapman*, 62 F.2d 565, 567 (6th Cir. 1933); *Bucher v. Krause*, 200 F.2d 576, 584-85 (7th Cir. 1953); *Harrison v. Donnelly*, 153 F.2d 588, 591 (8th Cir. 1946); *Lampert v. Reynolds Metals Co.*, 372 F.2d 245, 247-48 (9th Cir. 1967); *Newman v. Nelson*, 350 F.2d 602, 604 (10th Cir. 1965).

[22] *See e.g.*, *Zamora v. Valley Fed. Sav. & Loan Ass'n of Grand Junction*, 811 F.2d 1368, 1370 (10th Cir. 1987) (applying 15 U.S.C. § 1681q); *Yohay v. City of Alexandria Employees Credit Union*, 827 F.2d 967, 971-72 (4th Cir. 1987) (applying 15 U.S.C. § 1681q standard where a consumer report was obtained under false pretenses).

Third Circuit have permitted the use of recklessness to prove a willful violation under 1681n(a)(1)(A). GEICO Pet. App. 34a; *Cushman v. Trans Union Corp.*, 115 F.3d 220, 227 (3d Cir. 1997). The Eighth Circuit criticized the use of the reckless disregard standard in *dicta*, but this was not surprising because it ultimately concluded that the claim at issue arose under 15 U.S.C. §§ 1681n(a)(1)(B) and n(b), which expressly require proof of "knowingly" obtaining a consumer report without a permissible purpose. *Phillips v. Grendahl*, 312 F.3d 357, 365 (8th Cir. 2002); *but see Bakker v. McKinnon*, 152 F.3d 1007, 1013 (8th Cir. 1998) (allowing punitives under FCRA for "trampling recklessly" on plaintiff's rights).[23]

In short, if there were any need to resort to legislative history, nothing in the history suggests Congress intended "willfully" to mean something different in FCRA than in other statutes, such as the ADEA and FLSA, which were enacted during the same period. *Northcross*, 412 U.S. at 428 (construing terms in similar statutes to have the same meaning).

G. The Rule of Lenity Does Not Apply.

Petitioners' reliance on the "rule of lenity" to bootstrap a civil willfulness standard into a higher criminal standard is unavailing. First, the rule of lenity applies only to interpretation of ambiguous statutes and, therefore, has no application here. *Bates v. United States*, 522 U.S. 23, 32-33 (1997); *Beecham v. United States*, 511 U.S. 368, 374 (1994). Indeed, this Court typically requires more than just "some" ambiguity to invoke the rule:

> The simple existence of some statutory ambiguity, however, is not sufficient to warrant application of that rule, for most statutes are ambiguous to some degree. ("The mere possibility of articulating a narrower construction ... does not by itself make the rule of lenity

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[23] Safeco also claims Congress adopted *dicta* from additional cases regarding the willfulness when enacting FACTA in 2003, but FACTA did not amend section 1681n or make any reference to willful violations.

> applicable"). "The rule of lenity applies only if, 'after seizing everything from which aid can be derived,' ... we can make 'no more than a guess as to what Congress intended.'" To invoke the rule, we must conclude that there is a "'grievous ambiguity or uncertainty' in the statute."

Muscarello v. United States, 524 U.S. 125, 138 (1998) (citations omitted). In light of the text, context and prior case law interpreting the term willful in similar civil statutes, it cannot be said that the term is so ambiguous that this Court can only hazard a guess at Congress's intent.

Second, as Safeco concedes, the rule of lenity typically applies to criminal statutes. Safeco Br. 35 (citing *McNally v. United States*, 483 U.S. 350, 359-360 (1987)). Civil consumer protection statutes such as FCRA, by contrast, are generally construed broadly rather than narrowly. *Guimond v. Trans Union Credit Info. Co.*, 45 F.3d 1329, 1332 (9th Cir. 1995). Hence, the usual "recklessness" civil standard should apply. In *Thurston*, this Court noted that even the *criminal* provisions of the FLSA incorporated the standard of recklessness that the Court applied to the civil ADEA provisions before it. 469 U.S. at 126 (*quoting Nabob Oil Co. v. United States*, 190 F.2d 478, 479 (10th Cir), *cert. denied*, 342 U.S. 876 (1951)). Far from invoking the rule of lenity to apply a heightened criminal state-of-mind standard to a civil damages provision, as petitioners attempt, this Court in *Thurston* found a recklessness standard appropriate for *both* civil and criminal liability. 469 U.S. at 126.

GEICO cites one civil case in which this Court invoked the rule of lenity: *United States v. Thompson/Center Arms Co.*, 504 U.S. 505, 518 (1992). In *Thompson/Center Arms*, the Court addressed an ambiguity over what it meant to "make" a "firearm." *Id*. at 513. Although the statute before it was civil, the court looked to the rule of lenity because the same conduct also carried criminal penalties with no additional scienter requirement; thus, the court's construction of the civil statute would also set a standard for criminal liability in other cases. *Id.* at 518. Here, by contrast, the criminal provision has a separate and higher scienter requirement, requiring "knowing and willful" violation. 15 U.S.C. § 1681q. The rule of lenity is neither necessary to address any ambiguity nor to ensure a higher criminal scienter standard because that higher criminal standard already exists in FCRA.

H. The Ninth Circuit's Recklessness Standard Is Consistent With Established Tort Law and Properly Invites Inquiry Into Both Subjective and Objective Factors.

1 The Ninth Circuit's *dicta* regarding a potential advice of counsel defenses does not compel petitioners to invoke the defense.

Petitioners wrongly contend that the Ninth Circuit compelled them to raise the advice of counsel defense. GEICO Br. at 44-45; Safeco Br. at 42. The advice of counsel issue is a red herring as no advice of counsel appears in the factual record. In fact, GEICO and Safeco chose not to share their counsel's advice in opposing summary judgment and have made a tactical decision not to share that advice to this day. That is their choice. Respondents have never taken the position that petitioners must waive the privilege and provide evidence of counsel's advice in connection with respondents' affirmative case, but petitioners clearly may choose to offer the advice as part of any defense.

The Ninth Circuit also did not compel petitioners to waive the privilege, but merely stated, in *dictum*, that "in some cases" whether or not there is a finding of willfulness "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." GEICO Pet. App. 34a. This *dictum* was a direct response to GEICO's conclusory statements, unsupported by evidence, that it relied on advice of counsel.[24] Petitioners similarly argue to this Court, again without record support, that they have acted in reliance on counsel. *E.g.*, GEICO Br. 48 (asserting without record citation that its interpretation of FCRA was "produced with the assistance of reputable counsel"); Safeco Br. 42 (falsely implying that the Ninth Circuit erred in rejecting Safeco's advice of counsel defense).

The Ninth Circuit's observation that a fact finder may determine willfulness based on the subjective intent of executives and on any legal advice offered (where the defendant chooses to inject legal advice into the case) is hardly extraordinary. *See American Med Sys Inc. v. Med. Eng'g Corp.*, 6 F.3d 1523, 1531 (Fed. Cir. 1993) (discussing advice of counsel as relevant factor in proving willful patent infringement); *United States v. Wenger*, 427 F.3d 840, 853 (10th Cir. 2005) (discussing same in cases involving willful violation of federal securities laws). Nor is there anything erroneous in the Ninth Circuit's statement that conferring with counsel "may provide evidence of lack of willfulness, but is not dispositive." GEICO Pet. App. 34a. Indeed, that statement was an apt response to GEICO's self-serving affidavit in the summary judgment record that it had consulted with counsel about FCRA compliance, but not saying when the consultation took place, what facts were disclosed to counsel, or what

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[24] *See e.g.*, GEICO JA 22, ¶19. In addition, GEICO petitioned for reconsideration and argued, without factual support, that there was "no evidence" that GEICO "sought anything but sound, objective advice from its legal counsel regarding undecided legal questions." Appellees' Petition for Panel Rehearing and Rehearing En Banc (Ninth Cir. Case No. 04-35279), 11. The Ninth Circuit denied reconsideration, but added *dicta* regarding advice of counsel to leave open the possibility that petitioners could assert the defense on remand. Following remand from the Ninth Circuit, petitioners indicated that they would raise the defense, but they have not yet come forward with the advice on which they rely because the proceedings are stayed pending this Court's decision.

counsel’s advice was.[25] GEICO JA 22, ¶ 19. It is well settled that merely referring to the fact that defendant consulted counsel cannot defeat a finding of willfulness. *Amsted Indus. Incorp*, 24 F.3d at 182. *See also Padilla v. Metro-North Commuter Railroad*, 92 F.3d 117, 124 (2d Cir. 1996) (holding that “the mere fact that Nelson may have consulted with Metro-North’s legal department does not demonstrate that he acted in good faith[.]”); *Takecare Corp. v. Takecare of Oklahoma, Inc.*, 889 F.2d 955, 957-58 (10th Cir. 1989) (holding same); *United States v. Dunn*, 961 F.2d 648, 651 (7th Cir. 1992) (holding same).

To establish good faith reliance on counsel, defendants must show “(1) a request for advice of counsel on the legality of a proposed action, (2) full disclosure of the relevant facts to counsel, (3) receipt of advice from counsel that the action to be taken will be legal, and (4) reliance in good faith on counsel's advice.” *Wenger*, 427 F.3d at 853. “[G]ood faith reliance on the advice of counsel, even when those factors are met, is not a complete defense to an allegation of willful misconduct, but is merely one factor a jury may consider when determining [defendant’s] state of mind.” *United States v. United Med. and Surg. Supply Corp.*, 989 F.2d 1390, 1403 (4th Cir. 1993); s*ee also United States v. Dardi*, 330 F.2d 316, 326 (7th Cir. 1964) (holding same). Even where these factors are met, the fact-finder may inquire into the quality of the advice received to determine whether a defendant’s reliance was, in fact, in good faith. *Liquid Dynamics Corp. v. Vaughan Co., Inc.*, 449 F.3d 1209, 1226 (Fed. Cir. 2006).

Safeco goes even further and argues that the Ninth Circuit erred in its “refusal to recognize a complete advice-of-counsel defense” and exhibited a “presumption of bad faith

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[25] Among the information not provided by GEICO is whether the purported advice was received before or after GEICO’s actions, or even whether it predated the litigation. An opinion obtained after the fact is irrelevant to willfulness. *Amsted Indus. Incorp. v. Buckeye Steel Castings Co.*, 24 F.3d 178, 182 (Fed. Cir. 1994).

on the part of lawyers and clients that is unprecedented in the decisions of this Court and unwarranted as a matter of principle and policy" (Br at. 43). Safeco's argument is peculiar because (1) Safeco made no effort to raise the defense or offer advice of counsel in the lower courts; (2) Safeco cites no case where this Court or any court has recognized "a complete advice-of-counsel" defense; (3) it is commonplace that advice of counsel may be a factor considered in refuting, but not wholly negating, willfulness; and, (4) the Ninth Circuit merely (a) remanded the case for further consideration should Safeco choose to try to later raise such a defense and (b) compelled no inquiry into any advice of counsel. Petitioners' arguments that the Ninth Circuit compelled inquiry into advice of counsel or "presumed" bad faith are baseless.

Petitioners' reliance on *Thurston's* discussion of TWA's reasonable conduct and good faith is also misplaced. In *Thurston*, TWA presented substantial evidence of its attempts to comply with the ADEA immediately after its passage by designing a new retirement policy that complied almost fully with the Act. This evidence included TWA's consultations with attorneys *before* the unintentional violative conduct and changes in TWA's retirement policy as *a direct result* of that legal advice that brought TWA into substantial compliance with the ADEA for almost all of its personnel. 469 U.S. at 129-130. This Court concluded that TWA had merely "failed to focus specifically on the effect of each aspect of the new retirement policy for cockpit personnel." *Id* at 130.

In contrast to *Thurston*, petitioners do not cite any specific legal advice or explain its impact on their conduct. Nor did petitioners merely overlook a small subset of persons in an otherwise good faith attempt to comply with FCRA. Petitioners' intentional conduct removed most initial applicants from the protections of FCRA, thousands of consumers who were otherwise clearly covered by FCRA's plain terms. Further, while *Thurston* found no evidence of knowledge or recklessness, there is such evidence of petitioners' knowing or reckless conduct, as discussed in section III below.

2. The Ninth Circuit properly rejected a negligence standard.

The Ninth Circuit adopted a clear and common standard for a willful violation:

> We hold that as used in FCRA "willfully" entails a "conscious disregard" of the law, which means "either knowing that policy [or action] to be in contravention of the rights of others or in reckless disregard of whether the policy [or action] contravened those rights."
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> . . .
>
> In sum, if a company knowingly and intentionally performs an act that violates FCRA, either knowing that the action violates the rights of consumers or in reckless disregard of those rights, the company will be liable under 15 U.S.C. 1681n for willfully violating consumers' rights.

GEICO Pet. App. 31a, 34a (*quoting Cushman*, 115 F.3d at 227). By specifically relying on this Court's opinions rejecting a negligence standard to define willfulness, the Ninth Circuit made clear that its recklessness standard required more than negligence. GEICO Pet. App. 32a (*citing Hazen Paper*, 507 U.S. at 614 and *McLaughlin*, 486 U.S. at 134). The district court on remand could not possibly interpret the Ninth Circuit opinion to permit a negligence standard.

Despite this, petitioners and the United States selectively take words such as "reasonableness," "untenable," and "implausible" out of context to argue that the Ninth Circuit approved a negligence standard. The Ninth Circuit's descriptions of the types of highly unreasonable conduct that may satisfy a recklessness standard, however, is fully consistent with conventional definitions of recklessness. For instance, the court stated that "whether or not there is willful disregard in a particular case may depend in part on the obviousness or unreasonableness of the erroneous interpretation." GEICO Pet. App. 34a. In stating that recklessness is dependent "in part" on the *degree* of "unreasonableness" of the interpretation, the Ninth Circuit in no way stated that an interpretation that was merely unreasonable, but not reckless, constituted willfulness. It clearly rejected that position. GEICO Pet App 31a and 34a. Of course, an interpretation that is highly unreasonable at some point passes into recklessness and tort law defines recklessness based on this continuum:

> The usual meaning assigned to "willful," "wanton" or "reckless," according to taste as to the word used, is that the actor has intentionally done an act of *an unreasonable character* in disregard of a risk known to him or so obvious that he must be taken to have been aware of it, and so great as to make it highly probable that harm would follow.
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> . . .
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> The result is that "willful," "wanton," or "reckless" conduct tends to take on the aspect of *highly unreasonable conduct*, involving an extreme departure from ordinary care, in a situation where a high degree of danger is apparent.

W. Prosser, *Law of Torts* § 34, at 185 (4th Ed. 1971) (emphasis added); *Prosser and Keeton on Torts* § 34, at 213-214 (5th Ed. 1984) (same); *cf. Carter v. Chicago Police Officers*, 165 F.3d 1071, 1081 (7th Cir. 1998) ("although a litigant could soundly argue that willful and wanton conduct should be considered unreasonable, the inverse is not necessarily true."). Taking words such as "unreasonable" or "implausible" out of context from the sentences in which they are used does not convert the Ninth Circuit's holding into adoption of a lower negligence standard.

The United States' proposed definition of "recklessness," in fact, differs from the Ninth Circuit's largely in the occasional use of different words that have nearly equivalent meaning. The United States observes that recklessness involves inquiry into whether there was an "obvious risk of unlawfulness" or conduct "outside the range of responsible judgment" (U.S. Br. 23) while the Ninth Circuit similarly concludes that the decision "may depend in part on the obviousness or unreasonableness" of the erroneous interpretation and whether it reflects an "*implausible*" interpretation of the law. (GEICO Cert. Pet. 34a). The Ninth Circuit should not be faulted nor its decision vacated for occasionally choosing different adjectives to help describe the same standard.

Petitioners also inaccurately contend that the Ninth Circuit has prevented them from raising their good faith and purportedly reasonable attempts to follow FCRA. The Ninth Circuit directly stated that a company will *not* have acted recklessly if "it has diligently and in good faith attempted to fulfill its statutory obligations and to determine the correct legal meaning of the statute and has come to a tenable, albeit erroneous interpretation of the statute." GEICO Pet. App. 34a. Petitioners may provide evidence of such efforts on remand, but are not entitled to a presumption of good faith based solely on their legal arguments or vague and conclusory references to consulting "reputable" counsel (while hiding the actual advice given, the scope of engagement, and the conduct taken in response to that advice).

3. The Ninth Circuit properly invited the district court to consider subjective and objective factors on remand.

The Ninth Circuit properly stated that the district court on remand could consider both subjective and objective factors to determine whether there is a triable issue of fact as to willfulness. GEICO Pet. App. 34a. It is established tort law that proof of willfulness may include consideration of both subjective and objective factors. *Prosser and Keeton on Torts*, § 34 at 213-214 (5th Ed. 1984).

Proof that a defendant *knew* its conduct violated the law or *understood* that it was acting in the face of a substantial risk that its conduct violated the law obviously necessitates inquiry into the defendant's state of mind. *Farmer v. Brennan*, 511 U.S. 825, 838 (1994). These questions of "knowledge and belief are characteristically questions for the fact finder, in this case the jury." *Cheek v. United States*, 498 U.S. 192, 203 (1991). "Willfulness is a question of fact for the jury, raising, as it does, issues of the employer's knowledge and understanding of the relationship between certain conduct and the legal requirements of the ADEA." *United States E.E.O.C. v. Massey Yardley Chrysler Plymouth, Inc.*, 117 F.3d 1244, 1250 (11th Cir. 1997).[26] Even in those limited cases where this Court has required proof of subjective, as opposed to objective, recklessness, a factfinder may infer from circumstantial evidence that a defendant had subjective knowledge of the high risk that his conduct violated others' rights based solely on the *obviousness* of the risk involved. *Farmer*, 511 U.S. at 842; *Herbet v. Lando*, 441 U.S. 153, 156-57 (1979). And even where a subjective standard applies, a defendant's conduct need not be "egregious" or "outrageous" (i.e., objectively extreme) if defendant acted with a reckless disregard of the law—that is, acted in the face of a "perceived risk" that its conduct violated the law. *Kolstad*, 527 U.S. at 536-37.

In civil tort actions, a plaintiff may also, in the alternative, prove willfulness or recklessness by demonstrating that a reasonable person in defendant's place would have been aware of an objectively high risk that its conduct violated the statute. *Farmer*, 511 U.S. at 838, *citing Prosser and Keeton on Torts*, § 34 at 213-214 (5th Ed. 1984). As Prosser explains, it is rare that a civil defendant will admit it understood its conduct violated the law, and evidence of such intent is typically based on inference:

> Since, however, it is almost never admitted and can be proved only by the conduct and its circumstances, an objective standard must of necessity in practice be ap-

[26] *See also Hoechst Celanese Corp. v. BP Chemicals Ltd.*, 78 F.3d 1575, 1583 (Fed. Cir. 1996) ("[T]he issue of willfulness of wrongdoing is a question of fact, and was presented to the jury for decision."); *Smith v. Chase Group, Inc.*, 354 F.3d 801, 809 (8th Cir. 2004) ("The issue of willfulness is a question of fact to be determined by the jury.")

> plied. The 'willful' requirement, therefore, breaks down and receives at best lip service, where it is clear from the facts that the defendant, whatever his state of mind, has proceeded in disregard of a high and excessive degree of danger, either known to him or apparent to a reasonable person in his position . . . Reckless conduct takes on the aspect of highly unreasonable conduct, involving an extreme departure from ordinary care where a high degree of danger is apparent.

Prosser and Keeton on Torts, § 34 at 214. Similarly, in *Hazen Paper*, this Court noted that the "an employer's reluctance to acknowledge" unlawful conduct "should not cut against imposing a penalty," but that statutory damages may be imposed where "the employer more likely knows its conduct to be illegal." *Hazen Paper*, 507 U.S. at 617. Thus, a finding of willfulness may be based either on proof of subjectively knowing or reckless conduct, which a factfinder may infer from the obviousness of the risk of the violation, or, in the alternative, on objective factors showing that a reasonable defendant would have been aware of a high risk that its conduct violated the law.

Petitioners and the United States, however, argue that this Court must apply some objective standard, not as an alternative to inquiry into subjective knowledge or recklessness, but as a complete legal defense and a shield to *prohibit* inquiry into petitioners' subjective awareness or conduct reflecting on recklessness (e.g., petitioners' failure to follow FTC guidelines or even make an inquiry to the FTC to seek guidance on their illegal conduct). Petitioners and the United States inaptly rely on cases where courts presume the defendant's *immunity* and prevent subjective inquiry unless defendant has taken an "objectively baseless" litigation position. *Professional Real Estate Investors, Inc. v. Columbia Pictures Indus., Inc.*, 508 U.S. 49, 60 (1993) (involving *Noerr-Pennington* antitrust immunity that can only be overcome by showing that a lawsuit was a "sham," meaning objectively baseless). The United States also relies on the qualified immunity standard of *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982), under which, for policy reasons including the need to avoid "excessive disruption of government," *id.*, government officials may not be held individually liable for damages unless their conduct violated clearly established law. *See also Anderson v. Creighton*, 483 U.S. 635, 638 (1987) (*Harlow* immunity balances conflicting policies designed to protect government officials from "substantial social costs," including eliminating the risk that "fear of personal monetary liability and harassing litigation will unduly inhibit officials.").[27]

Civil defendants in common law and statutory tort cases are not given presumptions of immunity or similar policy protections that prevent inquiry into subjective intent. Here, a factual inquiry into defendant's intent and state of mind is at the heart of the proof of plaintiffs' affirmative case. It would be particularly unusual to prevent that inquiry where, as here, there is already substantial evidence that petitioners subjectively understood the substantial risk that their conduct violated the law. *See* Sec. III, *infra*. The immunity cases relied upon by the United States cannot prevent inquiry into respondents' subjective intent.

Even if purely objective factors could be used as a shield to prevent further inquiry into subjective intent, petitioners' litigation arguments are not objectively reasonable as a matter of law such that no reasonable juror could conclude that they did not recklessly violate FCRA. *See* Sec. III, *infra*.[28]

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[27] The federal qualified immunity standard, which is designed to *avoid* inquiry into defendant's subjective state of mind, provides a particularly poor analogy to a "willfulness" standard. By contrast, under state law immunity doctrines that turn on subjective factors such as willfulness or malice, "whether or not an officer acted willfully or maliciously is usually a question of fact to be resolved by the jury." C*raighead v. Lee*, 399 F.3d 954, 963 (8th Cir. 2005) (applying Minnesota immunity law); *Carter*, 165 F.3d at 1081 (7th Cir. 1998) (applying Illinois immunity law).

[28] GEICO argues that other insurance defendants, such as Hartford Fire and State Farm, concluded that the "adverse action" provisions did not apply to initial applications for insurance. GEICO Br. at 48, n 29, but this

(*Footnote continued*)

Indeed, the United States agrees that GEICO's interpretation of the "adverse action" provision "defies the statutory text and purpose." U.S. Br. 27. It concludes that "[b]y the statute's plain terms" GEICO took an adverse action against respondent Edo. *Id*. Oddly, the United States inconsistently argues that GEICO is entitled to a judgment as a matter of law without further inquiry into its subjective intent, even though the evidence presented below and that may be presented on remand confirms that GEICO understood at the time that it was taking "adverse actions" against consumers without notice and the FTC had, in fact, warned the industry about the very violations at issue in these cases.

The United States paradoxical position rests on the suggestion that a statute must be "pellucid," as opposed to merely plain on its face, and perhaps must be subject to prior court interpretation for any defendant to willfully violate it. U.S. Br. 29.[29] This view would give defendants' license to willfully violate any statute that has not been subject to prior interpretation and whose terms are clear, but not "pellucid."[30]

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assertion is not supported by the record in those cases. For instance, the record in *Hartford Fire* indicates that Hartford believed that it had to provide notice to initial applicants and actually did send a form of notice, albeit an inadequate one that did not mention that Hartford had taken any adverse action. *Hartford Fire Ins. Co. v. Reynolds*, No. 06-82. Hartford has settled its case and is awaiting approval of the class settlement.

[29] To the extent the United States argues that GEICO may reasonably have misunderstood the term "increase" in 15 U.S.C. § 1681a(k)(1)(B)(i), there is clearly no possibility that GEICO misunderstood the word "denial" in the same statute. It is undisputed that GEICO General denied Edo insurance based on review of his credit information. GEICO JA 80.

[30] In a similar vein, GEICO argues that punitive damages are not available if a legal theory is "novel or poorly recognized." GEICO Br. at 44, *citing Kolstad v. American Dental Ass'n*, 527 U.S. 526, 537 (1999). There is no issue of punitive damages in this case. Even if there were, *Kolstad* does not stand for a per se rule that prohibits a jury from considering defendants' knowledge or recklessness or removes this issue from a jury's consideration. *Kolstad* only states in *dicta* that a defendant *may* not be aware or reckless in its violation if the legal theory is novel (527 U.S.

(*Footnote continued*)

Such a novel approach would give license to GEICO and Safeco to willfully violate the statute even though (1) the FTC staff specifically instructed the insurance industry to provide notice to initial insurance applicants who did not get the lowest rate offered based on their credit score; (2) there was existing case law applying FCRA's adverse action provisions to other initial consumer transactions (*Mick v. Level Propane Gasses, Inc.*, 1999 WL 33453772 at *12 (S.D. Ohio 1999)); and (3) there is evidence that petitioners understood that they were taking adverse actions against consumers. *See* Sec. III, infra.

While there may be statutes that no reasonable person could understand or follow, the "adverse action" provision of FCRA, as demonstrated by the United States' own concise statutory analysis, is not one of them. Further, even if that the statute were not clear or subject to prior interpretation, the FTC has created a mechanism by which companies that genuinely sought to comply with the law could obtain guidance. Under 16 C.F.R. § 1.1:

> (a) Any person, partnership, or corporation may request advice from the Commission with respect to a course of action which the requesting party proposes to pursue. The Commission will consider such requests for advice and inform the requesting party of the Commission's views, where practicable, under the following circumstances.
>
> (1) *The matter involves a substantial or novel question of fact or law and there is no clear Commission or court precedent*; or
>
> (2) The subject matter of the request is of significant public interest.

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at 537), but that is an issue of fact typically addressed by the jury. Respondents do not contest that petitioners can present facts to the jury that they tried to comply in good faith with FCRA, but this is an issue of fact.

> (b) The Commission has authorized its staff to consider all requests for advice and to render advice, where practicable, in those circumstances in which a Commission opinion would not be warranted.

(Emphasis added.) A defendant is not subject to an FTC enforcement action if it acted in "good faith reliance on the Commission's advice under this section." 16 C.F.R. § 1.3. When Trans Union, a supplier of credit information, similarly argued that FCRA was too vague to be applied, the D.C. Circuit rejected the argument on the ground that Trans Union could have availed itself of 16 C.F.R. § 1.1 if it had any issue about the clarity of FCRA. *Trans Union Corp. v. Federal Trade Cmm'n*, 245 F.3d 809, 817 (D.C. Cir. 2001).[31] Thus, even if petitioners were unsure of the application of FCRA, they had an opportunity to seek clarification, but recklessly chose not to do so. Indeed, when Mr. Ball asked the FTC for such advice, the FTC advised insurance companies that failing to give an initial applicant the best available price based in part on credit is an adverse action. FTC Ball Letter. Petitioners also recklessly ignored this guidance.

Of course, petitioners remain free to argue on remand that the statute's text and the available guidance did not give them enough reason to believe they were violating the FCRA to render their conduct willful, but these are fact issues for a jury, not questions of law for this Court. *Farmer*, 511 U.S. at 842; *Cheek*, 498 U.S. at 203.

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[31] Even in criminal cases, where the vagueness standard is more protective of defendants, a statute is valid unless it is "so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application." *United States v. Lanier*, 520 U.S. 259, 266 (1997). With all due respect to the district court, whose analysis ignores the plain text of the statute, FCRA is not a statute so vague that petitioners were left guessing at its meaning. Indeed, they did not have to guess because the FTC had already guided them on the appropriate answer.

II. GEICO TOOK AN ADVERSE ACTION AGAINST EDO UNDER THE PLAIN TEXT OF 15 U.S.C. § 1681a(k)(1)(B)(i).

The Ninth Circuit correctly concluded that GEICO and GEICO General took an adverse action against Edo under 15 U.S.C. § 1681a(k)(1)(B)(i) when they denied Edo insurance with GEICO General based in part on a review of his credit information. GEICO Pet. App. 28a-29a. Under section 1681a(k)(1)(B)(i), an adverse action includes a "denial . . . of any insurance[.]" Under section 1681m, if a person takes such "adverse action . . . based in whole or in part on any information contained in a consumer report," it must provide notice. It is undisputed that Edo was denied insurance with GEICO General based on a review of *his* credit information. Had Edo had better credit, GEICO would have insured him within GEICO General. GEICO JA 80.

According to GEICO's argument, GEICO only had to give notice if it would not also have denied Edo insurance if he had another hypothetical consumer's purportedly neutral or average credit score. GEICO's argument cannot be squared with either the words "denial . . . of any insurance" in section 1681a(k)(1)(B)(i) or the words "based . . . in part on any information contained in a consumer report" in section 1681m. FCRA requires notice if there was an "adverse action" taken based on a review of *Edo's* credit information in connection with the underwriting of *his* insurance regardless of how GEICO might have treated a different consumer with a hypothetically neutral or average credit score. 15 U.S.C. § 1681a(k)(1)(B)(i), 1681m. Regardless of this Court's ultimate interpretation of "increase" in section 1681a(k)(1)(B)(i), this Court should affirm the Ninth Circuit's conclusion that Edo suffered an adverse action when he was "denied" insurance with GEICO General based on a review of his credit information. There is no possible ambiguity with respect to the words "denial . . . of any insurance."

GEICO's tortured argument perversely permits GEICO General to review *any* consumer's credit file, reject him as a result and *never* provide notice to a single consumer because GEICO General *only* provides the lowest cost insurance to consumers with better than average credit. GEICO's policy of providing notice only to consumers treated worse than they would have been treated if their credit scores were "neutral" will never result in notice to consumers denied coverage by GEICO General, because GEICO General does not insure consumers with average credit.[32] Congress could not have intended this absurd result when it gave companies like GEICO General the privilege to review confidential credit information with the associated responsibility to give notice when they used the information against consumers.

For the same reason, the Ninth Circuit also correctly concluded that GEICO took an "adverse action" under section 1681a(k)(1)(B)(i) when it "increased" Edo's charge for insurance by denying him access to the lowest cost carrier and placing him in the more expensive company GEICO Indemnity based on review of his credit information. GEICO Pet. App. 20a-21a. An adverse action under section 1681a(k)(1)(B)(i) includes "an increase in any charge for . . . any insurance . . . applied for, in connection with the underwriting of insurance." GEICO had to provide notice to Edo if this increase was made "based in whole or in part" on any information in Edo's credit report. 15 U.S.C. § 1681m(a). In connection with underwriting Edo's insurance, GEICO increased his charge for insurance based in part on review of his credit information. This is an "adverse action" under section 1681a(k)(1)(B)(i). This is also the common understanding of "increase" used in similar consumer credit notice statutes. *See Cornist v. B.J.T. Auto Sales, Inc.*, 272 F.3d 322, 327 (6th Cir. 2001) (holding that charging a buyer of a car more

[32] The Ninth Circuit correctly concluded that if a consumer would not have qualified for GEICO General even with the top credit score (for example, because his driving record disqualifies him), he has not suffered an adverse action based in part on credit. GEICO Pet. App. 21a, n 11.

if he pays with credit is an "increase" triggering TILA's disclosure requirements).

In addition, the FTC had specifically instructed insurance companies that an adverse action includes not offering the lowest rate to an *initial* applicant based on their credit score or not providing a discount available to other applicants with higher credit scores. FTC Ball Letter; *see also* 16 C.F.R. Part 601, Appendix C (stating that "'adverse action' is defined very broadly . . . and includes all business, credit and employment transactions affecting consumers that can be considered to have a negative impact").

GEICO argues that it did not take an "adverse action" against Edo because he would have been charged the same amount if his credit had not been considered and he was assigned a "neutral" credit score. As the United States notes, this argument is beside the point because GEICO had *already* used Edo's credit information against him by placing him in the more expensive carrier. U.S. Br. 26. FCRA requires notice when credit information is used "in connection with the underwriting of insurance" (15 U.S.C. § 1681a(k)(1)(B)(i)) and does not ask how consumers would have been treated if their credit information had *not* been used.

GEICO's argument not only contradicts the plain statutory text, but eviscerates the statute's stated purpose to ensure that businesses use accurate credit information in transactions with consumers. 15 U.S.C. § 1681(a)(1), (b). GEICO's strange interpretation *presumes* that it uses accurate credit information when underwriting a consumer's insurance. If a consumer's true credit information would qualify her for the lowest cost insurance, but GEICO has obtained inaccurate or dated information or information on another consumer due to identity theft, mistake or otherwise, GEICO will not provide notice if the consumer's placement or charge for insurance is no worse than the average consumer's placement or charge. Thus, GEICO can treat consumers adversely without providing notice even when they, in *fact*, qualify for the lowest rate. This practice eliminates FCRA's system of notice and checks and balances, which allows consumers to confirm that the insurer is using *their* information (and not another consumer's credit information or credit scores driven down by identity theft) and that such information is accurate. As the United States amicus brief concludes, GEICO's argument defies the plain text and purpose of the statute.[33] U.S. Br. 27.

This Court need only review the text, context, and stated statutory purpose of FCRA to conclude that GEICO took an adverse action. *Hartford Underwriters Ins. Co. v. Union Planters Bank, N. A.*, 530 U.S. 1, 6 (2000). However, should it choose to review legislative history, the history supports the Ninth Circuit's holding with respect to the meaning of "increase." The Senate Report accompanying FCRA's original enactment stated that notice was required when a consumer was charged "higher rates" based on a review of that consumer's credit information. *See* S. Rep. No. 91-517, at 7 (1969) (providing that "those who reject a consumer for credit, insurance or employment or who charge a higher rate for credit or insurance wholly or partly because of a consumer report must . . . so advise the consumer[.]") When Congress added the specific definition of "adverse action" in 1996, it not only provided that "adverse action" included an increase of the charge for insurance based on credit information, but also stated that an adverse action occurred whenever any "outcome adverse to the interests of the consumer" followed a review of credit information. 15 U.S.C. §

[33] The United States is even more dismissive of Safeco's argument that FCRA does not apply to increases in connection with initial insurance applications: Its brief dryly states that GEICO's concession that FCRA does apply to initial applications "was a wise one." U.S. Br. 25. Safeco, while trying to argue the issue in its merits brief, did not present the question in its petition for certiorari. Moreover, this Court has not granted certiorari on other petitions arising from the Ninth Circuit's decision that did present the initial application question. *See, e.g.*, State Farm Mutual Automobile Insurance Co's Petition for a Writ of Certiorari, No. 06-101. Safeco's argument that the statute does not apply to initial applications is not properly before this Court.

1681a(k)(1)(B)(iv)(II); S. Rep. No. 103-209 at 4, 8 (1993); H. Rep. No. 103-486 at 26 (1994). The legislative history also makes clear that Congress from the very inception of FCRA wanted to ensure that every consumer had the right to check to ensure that accurate information was being used against him in consumer transactions. 115 Cong. Rec. 33413 (Nov. 6, 1969) (Senator Bennet stating "I believe that every consumer is entitled to have the benefit of accurate information when decisions are made regarding his purchase of insurance, his employment, or the granting of credit to him.") The Ninth Circuit's definition of "adverse action" is consistent with Congress's intent that the term be interpreted broadly to include any negative impact on the consumer and to ensure that consumers have the opportunity to check if accurate credit information is being used against them.

GEICO relies on subsequent legislative text and history relating to the *separate* credit provisions of FCRA to contend that Congress did not intend to provide notices to consumers who did not receive the lowest cost insurance based on their credit information. *See* GEICO Br. 20-22, 23 (referencing testimony of FTC in connection with 2003 amendments to credit provisions of FCRA). The separate notice provisions for offers of credit have no application here.[34] In 2003, Con-

[34] GEICO misleadingly cites testimony by FTC staff members that the FTC was concerned in 2003 about providing notices to too many people because not everyone has the best credit. *See* GEICO Br. 23. The Fair Credit Reporting Act and Issues Presented by Reauthorization of the Expiring Preemption Provisions: Hearings Before the S. Comm. on Banking, Housing and Urban Affairs, 108th Cong. 529 (2003) at 528-529. This testimony was given in connection with 2003 FACTA amendments that changed the "adverse action" definition only with respect to credit. In fact, FTC staff member Joel Winston acknowledged in the same testimony in response to a question from Senator Sarbanes regarding whether a consumer should be provided notice if they did not get the lowest interest rate offered by a bank that "[u]nder current law, it would require an adverse action notice if you got less favorable terms unless there were a counteroffer that you accepted in the credit situation." *Id*. at 528.

gress amended 15 U.S.C. § 1681m(h) to provide solely for credit transactions, and not insurance, that when a creditor grants credit on "terms that are materially less favorable than the most favorable terms available to a substantial proportion of consumers," that creditor must provide the consumer with a so-called "risk-based pricing notice" that is defined by FCRA and implementing regulations. As the FTC explained to the Ninth Circuit, these amendments were necessary because of the more limited definitions of "adverse action" that applied to offers of credit before 2003. *See* FTC Amicus Brief in *Spano v. Safeco*, No. 04-35313 (9th Cir.), at 27, n 14. "Because . . . the FCRA contains a much broader definition of adverse action in the context of insurance transactions, no similar amendment to expand that definition was necessary." *Id*. If anything, Congress's decision to *expand* the definition of adverse action for credit transactions in 2003 to bring it closer to the expansive definition already applicable to insurance transactions[35] confirms the correctness of the Ninth Circuit's ruling. In any event, Congress's decision not to touch the definition applicable to insurance transactions while altering the definition for credit transactions suggests that Congress did not intend to affect the definition of "adverse action" in connection with initial insurance applications.[36]

Finally, GEICO says providing notice would require "almost metaphysical abstraction." On the contrary, explaining the "adverse action" would require one simple sentence:

> Dear Insurance Applicant: Based on a review of your credit information, you were denied insurance with

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[35] Even if the standard applicable to credit transactions did apply here, GEICO's treatment would still be "adverse" because GEICO treated Edo less favorably than a substantial number of customers whom it places with GEICO General.

[36] GEICO also relies on separate text and legislative history relating to the use of consumer reports in reviews of existing accounts and in so-called "pre-screened" offers. *See* 15 U.S.C. § 1681a(l) and 1681a(m). Neither provision is at issue here.

> GEICO General, our preferred insurer that offers the lowest rates, and you were then placed in a more expensive policy with GEICO Indemnity.[37]

It would then be up to the consumer to determine whether GEICO consulted accurate credit information or what would be necessary to obtain the lower rate. GEICO's contentions that such notices will only confuse consumers and that their effect would be diluted by a tidal wave of notices did not prevent GEICO from sending revised adverse action notices to all consumers who did not get the best available rate due to credit starting in December 2002. GEICO JA 42, 48-49.

III. THIS COURT SHOULD REMAND THESE CASES TO ALLOW CONSIDERATION BY THE DISTRICT COURT OF A COMPLETE FACTUAL RECORD.

This Court should affirm the Ninth Circuit's judgment to remand these cases to the district court to apply the willfulness standard to a more developed factual record, now including consideration of documents that GEICO belatedly produced after summary judgment. Petitioners ask this Court to be the first court to rule on their summary judgment motion on the issue of willfulness and the first to consider any factual record. Because the district court ruled on other substantive issues and did not rule on the willfulness issue (*See* Safeco Pet. App. 22a, n5; GEICO Pet. App. 44a-47a), it is appropriate for that court to do so in the first instance. Further, petitioners did not seek certiorari on the question of application of the legal standard to the facts, but only asked this Court to define the standard for willfulness, and, in GEICO's case, to determine whether Edo's treatment constituted an adverse action. GEICO Cert. Pet. at i; Safeco Cert. Pet. at i.

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[37] 15 U.S.C. § 1681m(a)(2), (3) provide other specific requirements for the "adverse action" notice, including, among other things, information regarding the consumer reporting agency and its role in the process and the consumer's right to obtain a free credit report to review the information used.

If this Court nevertheless decides to be the first to rule on petitioners' summary judgment motion and apply the willfulness standard to the as-yet not fully developed factual record, this Court should deny petitioners' request for summary judgment. The issue of willfulness is traditionally a fact issue to be resolved by the jury. *Cheek*, 498 U.S. at 203; *Massey Yardley Chrysler Plymouth, Inc.*, 117 F.3d at 1250. Giving respondents the benefit of all inferences, there are disputed issues of fact that prevent summary judgment. A reasonable juror could conclude based on the totality of circumstances that petitioners were either subjectively aware of FCRA's requirements or recklessly ignored a high risk that their conduct violated FCRA. A reasonable juror could so conclude based on both direct and circumstantial evidence indicating a high risk that was plainly obvious to petitioners.

The plain text of FCRA informed these insurers that it applied to a "denial" of insurance and "an increase in any charge for . . . any insurance, existing or applied for. 15 U.S.C. § 1681a(k)(1)(B)(i). The FTC told insurers FCRA applied to all "business, credit, and employment actions affecting consumers that can be considered to have a negative impact" (16 C.F.R. Pt. 601, App. C) and specifically informed insurers in March 2000 that it was an adverse action if "the applicant will have to pay more for insurance at the inception of the policy than he or she would have been charged if the consumer report were more favorable." FTC Ball Letter.

Indeed, petitioners had the ability to obtain such specific guidance, just as Mr. Ball did for his insurance client, if they thought their conduct might not violate the statute, but chose not to seek any guidance. 16 C.F.R. § 1.1. Rather than inquire whether their conduct violated the law (which should have been apparent from the statute alone), they recklessly chose to ignore FTC guidance and the safe haven that such guidance might have provided them.

Deposition testimony as well as GEICO's own internal documents demonstrates that it understood as far back as 1998 that it was an "adverse action" to place an applicant in a less--preferred company or tier based on credit.[38] In fact, GEICO "always" understood this to be the case. GEICO JA 49. And GEICO falsely represented to the Oregon Insurance Division that there was no difference between how it treated so-called "neutral" "no-hit" consumers and the consumers who had the "best credit scores." GEICO JA 58.

Both GEICO and Safeco also misleadingly and without further explanation informed the Oregon Insurance Division that "all applicants" for insurance, including those charged "higher rates" received notice if the underwriting decision was based on credit. GEICO JA 58; Safeco JA 52. This representation to government officials was false and incomplete because Safeco did not send notice to *any* initial applicant who received a higher rate and GEICO only did so in limited circumstances where the rate was higher than the rate GEICO would have charged an "average" consumer and not when it was higher than the rate that the applicant would have qualified for with better credit.

Safeco, despite being aware that the FTC's website and other materials offered compliance guidance, chose to proceed despite specific FTC guidance that FCRA applied to charging an initial applicant a "higher premium" based on credit. Safeco JA 69 (informing Safeco employees that the FTC website provided a "good resource" for information on what insurers needed to know); Safeco JA 65 (FTC pamphlet informing insurers that, charging a consumer a higher rate based in part on credit is an "adverse action" under FCRA).

In addition to the fact issues demonstrating subjective intent, a reasonable juror could conclude based solely on objective factors that a reasonable company in petitioners' position

[38] As explained above, *see supra* n. 7, the document referenced was belatedly produced, and we have sought leave to lodge it with the Clerk's Office not so that this Court can decide the issue of willfulness, but to illustrate that any factual issues concerning GEICO's subjective intent, under whatever willfulness standard the Court ultimately adopts, are properly litigated in the courts below, on a complete record.

would have understood the objectively high risk that its conduct was unlawful. Specifically, a juror could find that petitioners ignored an objectively high risk that they were violating the law based on (a) the plain terms of FCRA that apply to a "denial" or "increase" in a charge for an initial applicant's insurance when that adverse action is based in part on the applicant's credit information, (b) the specific guidance provided by the FTC, and (c) petitioners' decision to proceed without seeking guidance from the FTC. Ultimately, these fact issues should be resolved first by the trier of fact, not this Court—particularly given that they are not fairly comprised within the questions on which this Court granted certiorari.

CONCLUSION

For the reasons stated above, the Ninth Circuit's judgment should be affirmed and these cases should be remanded for further proceedings.

Respectfully submitted,

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