Nos. 06-84 & 06-100

In the Supreme Court of the United States

SAFECO INSURANCE COMPANY OF AMERICA, *ET AL.*,
PETITIONERS
v.
CHARLES BURR, RESPONDENT

GEICO GENERAL INSURANCE COMPANY, *ET AL.*,
PETITIONERS
v.
AJENE EDO, RESPONDENT

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR FREEDOMWORKS FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

1. Whether the Fair Credit Reporting Act requires an insurance company to give notice of an "adverse action" whenever it makes an initial offer of insurance at a rate higher than the rate the company might have offered if the consumer had perfect credit.

2. Whether an insurance company may be liable for statutory and punitive damages for "willful" violation of the Fair Credit Reporting Act based upon a finding that it acted with "reckless disregard" of the statutory notice requirement, even where the company relied in good faith upon the advice of its counsel.

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INTRODUCTION AND INTEREST OF *AMICUS CURIAE*[1]

The Fair Credit Reporting Act (FCRA) has been critical to the development of an efficient national credit market, a development that has been of enormous benefit to consumers at all income levels. Indeed, "[o]ne of the hallmarks of the modern U.S. economy is quick and convenient access to consumer credit. Although it would have seemed unimaginable a generation ago, consumers can now qualify for a mortgage over the telephone, walk into a showroom and finance the purchase of a car in less than an hour, and get department store credit within minutes." H.R. Rep. No. 108-263, at 23 (2003). FCRA has facilitated these important developments by promoting information-sharing between consumers and credit providers while protecting consumer privacy.

FCRA's success in creating a more consumer-friendly credit market is threatened by the Ninth Circuit's misinterpretations of key provisions of that statute. In holding that an "adverse action" requiring notice occurs "whenever a consumer pays a higher rate because his credit rating is less than the top potential score" (*Reynolds* v. *Hartford Fin. Servs. Group, Inc.*, 435 F.3d 1081, 1093 (9th Cir. 2006)), the Ninth Circuit requires insurance companies and their affiliates to provide adverse-action notices virtually every time they make an initial offer of insurance. These gratuitous notices likely will confuse consumers, frustrating the educational objective of the statute. And in holding that a "willful" violation of FCRA occurs whenever a company acts in "reckless disregard" of consumers' rights under the statute (*id.* at 1098), the Ninth Circuit

[1] The parties have consented to the filing of this brief, and their letters of consent are on file with the Clerk. In accordance with Rule 37.6, the *amicus* states that no counsel for any party has authored this brief in whole or in part, and no person or entity, other than the *amicus*, has made a monetary contribution to the preparation or submission of this brief.

departed from the near-uniform position of other federal courts of appeals, opening the door to punitive awards even where users of credit information relied in good faith on the advice of counsel in determining their obligations under the statute.

Neither FCRA's text nor its structure nor its history compels these results, and FCRA's clear objectives counsel against them. The Ninth Circuit's gloss on the provisions at issue here thus reflects the policy judgments of that court, not the judgments of Congress, and for that reason the decisions below should be reversed.

Amicus curiae FreedomWorks Foundation has a strong interest in that result. FreedomWorks is a nonprofit, nonpartisan organization dedicated to promoting free-market solutions to economic problems at the state and national levels. For more than two decades, FreedomWorks and its predecessors and affiliates (including Citizens for a Sound Economy) have been leading voices on a range of economic policy issues, from taxation and regulation to entitlement reform, competitiveness, and consumer protection. FreedomWorks is interested in these cases because they highlight the importance of reasonable regulation by Congress, not courts, in the development of a consumer credit market that works for creditors and consumers alike.

STATEMENT

To understand the significance of the Ninth Circuit's decisions in these cases, it is necessary to have some familiarity with the realities of FCRA litigation. In the past several years, "there has been a proliferation of class action lawsuits brought under the [FCRA]," in part because of "the availability of fee shifting and statutory damages, and the lack of a class action damages cap." David L. Permut & Tamra T. Moore, *Recent Developments in Class Actions: The Fair Credit Reporting Act*, 61 Bus. Law. 931, 931 (2006). In nationwide class actions, these statutory damages—$100 to $1,000 per violation—threaten insurance companies and other covered businesses with "crushing liability" that, as Justice Kennedy has recognized, could have "adverse effects on both the national economy and * * * employees." *Trans Union LLC* v. *FTC*, 536 U.S. 915, 917 (2002) (Kennedy, J., dissenting from denial of certiorari).

The cases now before the Court fit this mold. In these class actions, the named plaintiffs sought statutory damages of $100 to $1,000 for each class member, as well as punitive damages and attorney's fees, for alleged violations of FCRA. Among other things, the named plaintiffs alleged that petitioners violated FCRA's "adverse action" notice requirement (see 15 U.S.C. § 1681m) when they failed to tell the plaintiffs that the insurance rates they were offered were higher than the rates they would have received if they had perfect credit. The named plaintiffs further alleged that petitioners' failures to provide such notice constituted "willful" violations of the statute (see 15 U.S.C. § 1681n), entitling them to statutory and punitive damages. The named plaintiffs did not allege any actual damages resulting from the alleged violations.

Although the district court granted summary judgment in favor of the insurance companies, the Ninth Circuit reversed. *First*, the court adopted an expansive definition of "adverse action" for purposes of FCRA's notice requirement. FCRA provides that any person who "takes any adverse action with respect to any customer that is based in whole or in part on any information contained in a consumer report" must give "notice of the adverse action to the consumer." 15 U.S.C. § 1681m(a). With respect to insurance, the statute defines an adverse action as "a denial or cancellation of, an increase in any charge for, or a reduction or other adverse or unfavorable change in the terms of coverage or amount of, any insurance, existing or applied for." *Id.* § 1681a(k)(1)(B)(i).

In part at the suggestion of the Federal Trade Commission, the Ninth Circuit held, as a matter of first impression, that an insurance company may take an "adverse action" in its initial offer of insurance—before a contract even exists. According to the Ninth Circuit, "an increased charge is a charge that is higher than it would otherwise have been but for the existence of some factor that causes the insurer to charge a higher price." *Reynolds*, 435 F.3d at 1091. Thus, "whenever because of his credit information a company charges a consumer a higher initial rate than it would otherwise have charged, it has increased the charge within the meaning of FCRA" and must provide an adverse-action notice. *Id.* at 1092. In the Ninth Circuit's view, FCRA "requires such notices whenever a consumer pays a higher rate because his credit rating is less than the *top potential score*." *Id.* at 1093 (emphasis added).

Second, the court held that the insurance companies could be liable for "willful" violations of the notice requirement even if they sought, and relied on, the advice of counsel in determining that notice was not necessary. FCRA provides that "[a]ny person who willfully fails to comply with any requirement under [FCRA] with respect to any consumer is liable to that consumer" for statutory damages, punitive damages, and attorney's fees. 15 U.S.C. § 1681n. Contrary to the clear majority position among the courts of appeals, the Ninth Circuit held that the term "willfully" in FCRA "entails a conscious disregard of the law, which means 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." *Reynolds*, 435 F.3d at 1098 (emphasis added) (quotations omitted).

The Ninth Circuit adopted this "reckless disregard" standard based, in part, on its perception of "perverse incentives for companies covered by FCRA to avoid learning the law's dictates by employing counsel with the deliberate purpose of obtaining opinions that provide creative but unlikely answers to 'issues of first impression.'" *Id.* at 1099. "Because a reckless failure to comply with FCRA's requirements can result in punitive damages," the court reasoned, "insurance and other companies will more likely seek *objective* answers from their counsel as to the *true* meaning of the statute." *Ibid*. (emphasis added). Under the Ninth Circuit's rule, a company may be liable for statutory and punitive damages if a court determines that it relied on "creative lawyering that provides indefensible answers" even to issues of first impression. *Ibid*. "In some cases," the court warned, a finding of willfulness may be based on "specific evidence as to how the company's decision was reached, including the testimony of the company's executives *and counsel*." *Ibid*. (emphasis added).

SUMMARY OF ARGUMENT

I. The decisions below should be reversed because they adopt an overly expansive reading of FCRA's notice requirement that undermines the goal of consumer protection. Nothing in the statute suggests the Ninth Circuit's conclusion that notice of "adverse action" is required "whenever because of his credit information a company charges a consumer a *higher initial rate* than it would otherwise have charged." Nor does the statute suggest that an "adverse action" occurs whenever a consumers pays a higher rate than he would if he had *perfect credit*. Requiring insurance companies to provide notices under such circumstances will only drive up the costs of insurance while undermining the essential purpose of adverse-action notices. Without a clear textual warrant, the decisions below impose a notice requirement that is more likely to result in dilution of appropriate adverse-action notices than to enhance consumers' appreciation of their credit information.

II. The decisions below should be reversed for the additional reason that they interpret the term "willful" so broadly as to subject companies to statutory and punitive damages simply for relying upon legal advice that an appellate court later decides was mistaken. Neither the structure nor the history of this FCRA provision suggests that statutory and punitive damages should be available absent conscious and deliberate violations of the statute. The Ninth Circuit's expansive view of "willful" violations will only raise the costs of compliance with the statute and thus the costs of obtaining insurance or other financial services. This result undermines FCRA's demonstrated success in creating a consumer-friendly credit market.

ARGUMENT

I. The Ninth Circuit's Expansive Reading Of FCRA's Notice Requirement Is Far Broader Than Congress Intended And Actually Undermines Consumer Protection.

As this Court has noted, "Congress enacted the FCRA in 1970 to promote efficiency in the Nation's banking system and to protect consumer privacy." *TRW Inc.* v. *Andrews*, 534 U.S. 19, 23 (2001) (citing 15 U.S.C. § 1681(a)). To accomplish these objectives, the statute regulates "consumer reporting agencies" that generate "credit reports" for use in determining consumers' eligibility for credit, insurance, and employment. See 15 U.S.C. §§ 1681a, 1681b. Under the statute, consumer reporting agencies must take steps to assure accuracy in credit information, to limit the disclosure of credit information to appropriate parties, and to give consumers access to their credit information so they can correct any mistakes. See *id.* §§ 1681(b), 1681b, 1681g. In addition, FCRA regulates *users* of credit reports such as the insurance companies here—requiring them to give consumers notice of so-called "adverse actions" taken based on their credit information. *Id.* § 1681m(a)(1).

In the decisions below, the Ninth Circuit adopted an unduly expansive interpretation of "adverse action" that imposes new burdens on insurers while undermining the effectiveness of the notice requirement for consumers.

A. The Ninth Circuit's New Rule Requires Insurance Companies And Their Affiliates To Provide Gratuitous Adverse-Action Notices, Thereby Increasing The Costs Of FCRA Compliance And Compromising The Effectiveness Of Appropriate Notices.

The decisions below require an insurance company to provide an adverse-action notice whenever it offers insurance for a price that is higher than the price that might have been offered had the consumer enjoyed a perfect credit score. Because almost every offer of insurance is based, in part, on risks identified in the consumer's credit report, and because only a few consumers have perfect credit, nearly every offer of insurance would have to be accompanied by an adverse-action notice. Moreover, the Ninth Circuit's novel interpretation of "adverse action" requires insurers to issue many more notices than they issued before. This requirement imposes significant new costs of compliance with FCRA—costs that undoubtedly will be passed on to consumers in the form of increased prices or decreased availability of coverage or both.

Even as the Ninth Circuit's rule increases the costs of FCRA compliance for insurers, it actually *undermines* the important functions that Congress intended adverse-action notices to perform by contributing to a phenomenon known as "information overload." "The psychological theory of information overload posits that humans can be overwhelmed by too much information such that their ability to cognitively process the information declines." Marie C. Pollio, *The Inadequacy of HIPAA's Privacy Rule: The Plain Language Notice of Privacy Practices and Patient Understanding*, 60 N.Y.U. Ann. Surv. Am. L. 579, 614 (2004). As Nobel Laureate Herbert Simon explained, "a wealth of information creates a poverty of attention." Herbert A. Simon, "Designing Organizations for an Information-Rich World," *in Computers, Communications, and the Public Interest* 37, 40 (Martin Greenberger ed., 1971).[2]

This theory has obvious relevance to any regulatory scheme—including FCRA—that seeks to protect consumers by emphasizing disclosure of information. In the specific context of consumer-protection notices, the "information overload" theory suggests that "if too much information is disclosed to consumers, they are easily confused, cannot use the information, and do not make better decisions as a result." Arnold S. Rosenberg, *Better Than Cash? Global Proliferation of Payment Cards and Consumer Protection Policy*, 44 Colum. J. Transnat'l L. 520, 593 (2006).

To avoid "information overload," disclosures "must be brief and simple enough to be readily assimilated" and "certain details must be omitted." Griffith L. Garwood, *et al.*, *Consumer Disclosure in the 1990s*, 9 Ga. St. U.L. Rev. 777, 782-783 (1993). Moreover, "[t]he failure to meet this prerequisite risks destroying the utility of disclosure." *Ibid.* Indeed, "[a] disclosure that is not read at all or is too complex for practical use is no disclosure" and provides no benefit to consumers. *Ibid.*

As shown below, the adverse-action notices required by the Ninth Circuit are certain to contribute to "information overload" in at least two ways. *First*, the significant increase in the volume of adverse-action notices will diminish the effectiveness of any particular notice. *Second*, the contents of these notices will be more confusing than ever before because they will describe as "adverse" actions that are not really adverse to the consumer at all and will

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[2] See also Carl Shapiro & Hal R. Varian, *Information Rules: A Strategic Guide to the Network Economy* 6 (Harvard Business School Press 1999) ("Nowadays the problem is not information access but information overload. The real value produced by an information provider comes in locating, filtering, and communicating what is useful to the consumer").

name companies with which the consumer never had any dealings.

1. Increasing the *volume* of adverse-action notices undermines FCRA's goal of educating consumers about their credit information. Common experience and social science research suggest that the more adverse-action notices a consumer receives, the less importance he will attach to any *particular* notice and the less attention he will pay to *all* such notices.

This Court recognized this phenomenon in the context of disclosures required by the Truth in Lending Act (TILA). Under TILA, certain consumer credit transactions must be accompanied by disclosures so that consumers are fully aware of the material terms of their credit agreements. See *Ford Motor Credit Co.* v. *Milhollin*, 444 U.S. 555, 559-560 (1980). The animating principle of the statute is "meaningful disclosure." *Id.* at 568. As this Court observed in *Milhollin*, "[m]eaningful disclosure does not mean *more* disclosure. Rather, it describes a balance between 'competing considerations of complete disclosure * * * and the need to avoid * * * [informational overload.]'" *Ibid.* (alterations in original). This problem of "informational overload" threatens the very objective of TILA, namely, consumer protection.

The Federal Trade Commission has recognized the same danger in the specific context of FCRA adverse-action notices. The Director of the FTC's Bureau of Consumer Protection explained to Congress that "if you give notices too widely and in too many circumstances, then it * * * becomes something that people ignore. The adverse-action notice, as it was originally envisioned, fit well in the set of circumstances where consumers needed to pay attention to the credit report and did not raise a lot of false alarms." *The Fair Credit Reporting Act and Issues Presented by Reauthorization of the Expiring Preemption Provisions: Hearings Before the S. Comm. on Banking, Hous-*

ing, & Urban Affairs, 108th Cong. 95-96 (2003) (testimony of J. Howard Beales, III).

Unfortunately, by requiring that notice be given "whenever a consumer pays a higher rate because his credit rating is less than the top potential score," *Reynolds*, 435 F.3d at 1093, the Ninth Circuit has ensured that there will be "a lot of false alarms" that will only compromise the effectiveness of appropriate adverse-action notices.

2. In addition to increasing the *volume* of adverse-action notices, the Ninth Circuit's rule promises "information overload" and consumer confusion with respect to the *contents* of adverse-action notices as well. Congress made its own judgment about the proper contents of an adverse-action notice. That judgment is reflected in the statute itself, which requires that an adverse-action notice identify the credit reporting agency; state that the credit reporting agency did not make the decision to take the adverse action; state that the consumer is entitled to a free copy of his credit report within 60 days after receiving the notice; and explain that the consumer may dispute the accuracy or completeness of any information contained in his credit report. See 15 U.S.C. § 1681m(a)(1)-(3).

Not satisfied with the notice that Congress envisioned, the Ninth Circuit imposed its own additional requirements. Under the decisions below, an adverse-action notice "at a minimum" must also "communicate to the consumer that an adverse action based on a consumer report was taken, describe the action, specify the effect of the action upon the consumer, and identify the party or parties taking the action." *Reynolds*, 435 F.3d at 1094-1095. Moreover, the decisions below require that an adverse-action notice identify *every affiliated entity* that (theoretically) participated in setting premium rates, whether or not the consumer had any contact with each entity. See *id*. at 1096. A consumer receiving the notice required by the Ninth Circuit thus will wonder why companies with which he had no dealings are sending him a notice about his credit information. Indeed, he might suspect that his insurer improperly "leaked" his credit report to other companies.

Consumer confusion will be magnified in circumstances where an adverse-action notice accompanies an offer of insurance that was not actually adverse to the consumer's interests. Under the decisions below, an insurance company must give notice of an "adverse action" when it extends an offer of insurance at a rate higher than the best rate available for a consumer with perfect credit. This rule fails to account for situations in which a consumer's credit score, though less than perfect, had *no effect* on his application or even *helped* him obtain insurance.[3]

Suppose, for example, that a consumer with a long list of moving violations applies for auto insurance. Based on this consumer's age, sex, and driving record, the insurer might decline coverage altogether. Or if it does offer insurance, the rate will be relatively expensive. Now suppose the insurer reviews the applicant's credit report, which reveals that the applicant has never missed a payment on his credit cards but almost always makes the minimum payment. This applicant would not have the "top potential score" that the Ninth Circuit emphasizes, but his credit experience might change—*for the better*—the insurer's assessment of the risk he poses. So the insurer would make an offer of insurance at a rate that is

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[3] A consumer's credit score reflects payment history, amounts owed, length of credit history, new accounts, and the types of credit in use. See *Understanding Your FICO Score* 9-14 (Fair Isaac Corp. 2005), *available at* http://www.myfico.com/Downloads/Files/myFICO_UYFS_Booklet.pdf. Thus, even if a consumer's payment history was spotless, he still might not have a perfect credit score. Given the range of factors that contribute to the score, it is not surprising that only 13 percent of consumers have a credit score higher than 800 (out of a possible 850). See *id*. at 7.

lower than the rate available based solely on the applicant's non-credit-related characteristics but *higher* than the rate available to a person with perfect credit.

Giving this consumer an adverse-action notice along with his offer of insurance—as the Ninth Circuit requires—would make little sense to the insurer or the consumer. The insurer knows that the consumer's credit information is what has made it possible for the consumer to obtain insurance at all. And the consumer—who never expected to be treated as if he had perfect credit, since he never had perfect credit—will not understand what is "adverse" about his being offered insurance despite his risk characteristics.

Providing adverse-action notices with initial offers of insurance defies common sense, and will likely confuse consumers rather than educate them. As this Court has observed, *more* notice and *effective* notice are two very different things. See *Milhollin*, 444 U.S. at 569. Discerning the appropriate use of adverse-action notices requires making sensitive policy judgments based on empirical data from the fields of communications and consumer psychology—to ensure that disclosure does not result in "information overload." As the decisions below demonstrate, this policymaking task is better undertaken by legislatures than by courts.

B. Contrary To The FTC's Position Below, The Ninth Circuit's Expansive Interpretation Of "Adverse Action" Is Not Supported By The Statutory Text Or History And Is Inconsistent With The Fundamental Objectives Of The Statute.

It is bad enough that the decisions below increase the costs of FCRA compliance (and thus the costs of insurance) without providing any additional benefit to consumers. Even worse, the decisions below achieve this result without any clear textual or historical warrant and contrary to the essential purposes of the statute.

1. Nothing in the text or structure of the FCRA compels the conclusion that an adverse-action notice is required whenever an insurer offers insurance at a rate higher than the rate that would be available to a consumer with perfect credit. FCRA requires an insurance company to provide notice to the consumer of any adverse action that it takes in connection with its underwriting decisions, based in part on the consumer's credit report. 15 U.S.C. § 1681m(a)(1). In the context of insurance, FCRA defines adverse action as "a denial or cancellation of, an increase in any charge for, or a reduction or other adverse or unfavorable change in the terms of coverage or amount of, any insurance, existing or applied for." 15 U.S.C. § 1681a(k)(1)(B)(i). The cases before the Court do not involve the denial or cancellation of insurance, but only an *initial offer* of insurance. Thus, the question in these cases is whether an insurance company's initial offer of insurance can reflect "an increase in any charge for" insurance and thus an "adverse action" requiring notice.

According to the Ninth Circuit, "the statute's text is clear" and compels the conclusion that an "adverse action" occurs "whenever a consumer pays a higher rate because his credit rating is less than the top potential score." *Reynolds*, 435 F.3d at 1092-1093. But nothing in the statute's text even suggests, much less compels, a comparison between the consumer's actual credit rating and "the top potential score."

In fact, the text speaks of an "increase" in the "charge" for insurance. As the court below acknowledged, the word "increase" ordinarily means "to make something greater." *Id*. at 1091. And the word "charge" ordinarily means "the price demanded for goods or services." *Ibid*. Thus, for an insurance company to effect "an increase in any charge" for insurance, it must somehow make greater the price it demands for insurance. But "greater" is always relative to some referent. And that referent is missing from the text of the statute.

Since that specific term is missing, the Court must draw a reasonable inference from the text and structure of the statute. The obvious inference is that an insurance company can only "increase" a "charge" that already exists. Especially in the context of contractual negotiations, it would be unusual to speak of one party's "increasing" the price of its goods or services before it even offered to sell those goods or services.

The Ninth Circuit drew a different inference, relying upon the phrase "any insurance, existing or applied for." According to the Ninth Circuit, this "existing or applied for" language "demonstrates [Congress's] intent that 'adverse actions' apply to all insurance transactions—from an initial policy of insurance to a renewal of a long-held policy." *Ibid*. But this language cannot bear the weight of the Ninth Circuit's conclusion. To say that an insurance company may take an "adverse action" with respect to an application for insurance—*by denying the application*—is not to say that an insurance company may take "adverse action" with respect to an application for insurance *by other means* as well.

Indeed, the phrase "existing or applied for" cannot apply wholesale to each of the components of the "adverse action" definition. As explained above, FCRA defines "adverse action" as a "denial" of insurance, a "cancellation" of insurance, an "increase in any charge" for insurance, or a "reduction or other adverse or unfavorable change in the terms of coverage or amount" of insurance. 15 U.S.C. § 1681a(k)(1)(B)(i). It makes no sense to speak of the "denial" of an existing insurance contract, or the "cancellation" of insurance that has only been applied for. And it is hardly common to speak of increasing the charge or changing the terms of insurance that has not yet been extended. Thus, the only reasonable interpretation of the "adverse action" definition is that an insurance company takes an "adverse action" when it denies a consumer's *application* for insurance; cancels his *existing* insurance; or raises the price or otherwise changes the terms of his *existing* insurance. For purposes of these cases, then, there must be an existing insurance contract before there can be any *increase* in the charge for that insurance.

Finally, even if it were possible to find an "adverse action" arising from an insurance company's initial offer of insurance, the Ninth Circuit's holding that an "adverse action" occurs whenever a consumer does not receive the terms he would have received if he had *perfect credit* is not supported by the statute. Indeed, the text itself makes no reference to the hypothetical perfect credit score. If a consumer receives an offer of insurance at a certain price and on certain terms based on non-credit-related characteristics—*e.g.*, age, sex, or driving record—then he is adversely affected by his credit rating only if the insurer, after considering the credit rating, *changes* the offer by raising the price or reducing the coverage or otherwise making the terms less favorable. The relevant comparison is between the applicant described by all his characteristics *except* his credit rating and the same applicant described by all his characteristics *including* his credit rating.

In short, there is no sound textual basis for the Ninth Circuit's expansive interpretation of "adverse action."

2. Nor is there any sound basis for that interpretation in the legislative history, including the history cited by the Federal Trade Commission below. The report accompanying the Senate bill that was ultimately enacted into law, for example, says that the bill would apply to "[t]hose who * * * *charge a higher rate for credit or insurance* wholly or partly because of a consumer report." S. Rep. No. 91-517, at 7 (1969) (emphasis added). But this phrase, like the statute itself, begs the question whether a consumer can be "charge[d] a higher rate" before a contract of insurance even exists. It surely does not answer the question.

The same is true of Congress's more recent attempts to revise the statute. In the early 1990s, Congress considered several bills designed to extend FCRA's reach to users of credit reports not mentioned in the Act. See, *e.g.*, H.R. 3596, 102d Cong. § 102(a) (1992) (extending FCRA to cover adverse actions triggered by "a report for the cashing of a check" and "an application for the leasing of real estate"). These *unsuccessful* efforts to cover specific non-insurance transactions cannot demonstrate any prior legislative intention to apply the notice requirement to initial offers of insurance.

And when, in 1995, Congress successfully broadened FCRA to cover adverse actions occurring when insurance is "applied for," it did not file a report explaining the impact of this amendment. Although a report did accompany a non-enacted proposal, S. 650, that report simply repeats the statutory language without reaching the question presented here. See S. Rep. No. 104-185, at 31-32 (1995).

In short, the legislative history does not address the question whether an "adverse action" can occur in making an initial offer of insurance, much less support the Ninth Circuit's expansive interpretation of "adverse action."

3. The Ninth Circuit's rule also upsets the careful balance of interests that Congress struck when it enacted the statute. Congress enacted FCRA recognizing that "[t]he banking system is dependent upon fair and accurate credit reporting. 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(a)(1).

Reliable credit information is essential to risk assessment and pricing decisions in the consumer credit market. Research has demonstrated a significant correlation between credit scores and the number and size of future losses. See Bureau of Business Research, *A Statistical Analysis of the Relationship Between Credit History and Insurance Losses* 10 (2003), *available at* http://bbr.icc.utexas.edu/Publications/bbr_creditstudy.pdf.. "Overall, research and creditor experience has consistently indicated that credit reporting company information, despite any limitations that it may have, generally provides an effective measure of the relative credit risk posed by prospective borrowers." Robert B. Avery, *et al.*, *An Overview of Consumer Data and Credit Reporting,* Federal Reserve Bulletin 47, 51 (Feb. 2003).[4]

Given this correlation, insurance companies frequently use credit information for legitimate risk-assessment purposes. "Risk classification allows insurers to divide individuals into groups with similar claims and set prices based on the probability of future loss. Driving history, age and gender are common variables to classify risk, but increasingly insurance scores with credit have been found to be more reliable predictors of future risk." *Fair Credit Reporting Act: How It Functions for Consumers and the Economy*, *supra*, at 67 (Statement of Wayne T. Brough).

Such risk-based pricing is beneficial to consumers. Because credit risk is a better predictor of future claims and losses than other information, insurance companies that rely on credit risk are better able to avoid setting prices unnecessarily high.[5] Moreover, just as credit information

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[4] See also *Fair Credit Reporting Act: How It Functions for Consumers and the Economy, Hearing Before the Subcomm. on Financial Institutions and Consumer Credit of the H. Comm. on Financial Services*, 108th Cong. 40 (2003) (Statement of Kevin T. Sullivan, Vice President and Deputy General Counsel, Government Relations, Allstate Insurance Company) ("the insurance industry and Allstate in particular began to recognize a strong correlation between major public record items on credit reports and future loss potential"); *id.* at 67 (Statement of Wayne T. Brough, Chief Economist, Citizens for a Sound Economy) ("there is a very strong statistically significant correlation between risk and credit scores").

[5] See *id.* at 233 (Testimony of Wayne T. Brough) ("Restricting credit history information as an underwriting tool would result in higher costs for insurers and higher premiums for policyholders").

helps regulate absolute pricing, it also improves the fairness of risk classification and thereby increases the availability of insurance to classes of consumers who otherwise might go without coverage. As a Federal Reserve official explained, "[c]onsumers benefit from the increased availability and lower cost of credit made possible by the use of credit scoring models. Credit scoring also may help to reduce unlawful discrimination in lending to the extent that these systems are designed to evaluate all applicants objectively and thus avoid issues of disparate treatment." *The Fair Credit Reporting Act and Issues Presented by Reauthorization of the Expiring Preemption Provisions*, *supra*, at 551 (Prepared Statement of Dolores S. Smith, Director, Division of Consumer and Community Affairs, Board of Governors of the Federal Reserve System).[6]

Encouraging the use of such risk-based information is fully consistent with the balance that Congress struck in enacting FCRA. While Congress responded to the "need to [e]nsure that consumer reporting agencies exercise their grave responsibilities with fairness, impartiality, and a respect for the consumer's right to privacy," Congress also

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[6] See also *id*. at 59 (Response to Written Questions of Senator Crapo from J. Howard Beales, III) ("Credit scoring and automated underwriting work in significant ways to minimize the bias—intentional or incidental—that can be introduced into credit decisions in a judgmental system, because credit scoring models and automated underwriting systems are based on actual performance data, not assumptions about potential risk. * * * Because these data are objective and neutral, we believe that the current scoring systems treat consumers more fairly"); *Fair Credit Reporting Act: How It Functions for Consumers and the Economy*, *supra*, at 232 (Testimony of Wayne T. Brough) ("[W]hen consumer credit histories are used as an underwriting criterion, they tend to increase the fairness and accuracy of risk classification. * * * With the ability to classify risk more accurately, insurers gain the ability to provide a wider array of products that can be offered to customers they otherwise could not serve").

recognized that "[c]onsumer reporting agencies have assumed a vital role in assembling and evaluating consumer credit and other information on consumers." 15 U.S.C. § 1681(a)(3)-(4). The statute thus "strikes a balance between the privacy interests of consumers with respect to the contents of their credit reports and the need of businesses to access the information required to make accurate real time assessments of consumer qualifications." S. Rep. No. 108-166, at 5 (2003).[7]

The Ninth Circuit's decisions threaten to upset this balance by requiring disclosure of insurer decisions that are not truly "adverse" in any meaningful sense. Because, as noted earlier, such disclosures would likely result in a blizzard of meaningless but annoying consumer notices, the Ninth Circuit's decisions tend to discourage insurers from using credit information in their initial offering decisions. By discouraging the use of that information, those decisions undermine the balance that Congress struck between financial services' need to make full use of credit information and consumers' interest in privacy and disclosure.

II. The Ninth Circuit's Expansive Interpretation Of FCRA's Willful-Violation Provision Exposes Companies To Statutory And Punitive Damages For Unwitting Violations Of The Statute And Increases The Costs Of Credit To Consumers.

The Ninth Circuit's over-regulation of consumer credit transactions is harmful enough. But the court compounded that error with another one that is perhaps even more certain to drive up the costs of credit and insur-

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[7] See also *The Fair Credit Reporting Act and Issues Presented by Reauthorization of the Expiring Preemption Provisions*, *supra*, at 6 (Statement of J. Howard Beales, III) ("The 1970 Act, along with the 1996 Amendments, provided a carefully balanced framework, making possible the benefits that result from the free, fair, and accurate flow of consumer data").

ance: The decisions below hold that an insurance company commits a "willful" violation of FCRA—and thus may be liable for statutory and punitive damages—when it acts with "reckless disregard" for consumers' rights under the statute. And according to the Ninth Circuit, a company may act recklessly even when it follows its counsel's advice concerning statutory requirements, even when that advice concerns an issue of first impression, and even when that advice is approved by at least one federal judge. This new rule is not supported by the structure of the statute or its legislative history, and it creates costly practical problems for companies and their counsel. By raising the costs of FCRA compliance in this manner, the decisions below threaten to stifle the information-sharing that has been critical to the development of a consumer-friendly credit market.

A. The Ninth Circuit's "Reckless Disregard" Standard Is Not Supported By The Structure Of The Statute Or Its Legislative History.

By its terms, FCRA subjects insurance companies to statutory and punitive damages liability only for "willful" violations of statutory requirements. See 15 U.S.C. § 1681n(a). As this Court has explained, "willful" is a term of "many meanings," and its proper interpretation is "often dependent on the context in which it appears." *Bryan* v. *United States*, 524 U.S. 184, 191 (1998); *Ratzlaf* v. *United States*, 510 U.S. 135, 141 (1994); *Spies* v. *United States*, 317 U.S. 492, 497 (1943). The textual and historical "context" in which the willfulness requirement appears confirms that Congress did not intend to make statutory and punitive damages available for anything less than knowing, deliberate violations of statutory requirements. The Ninth Circuit's contrary holding stands in sharp contrast to the majority rule among the federal circuits, and it should be reversed.

1. The text of the statute strongly suggests that statutory and punitive damages should be reserved for only the

most egregious FCRA violations. To be sure, FCRA does not expressly define "willful" in either of the two provisions where that term is used. And the context of the first provision—the one at issue here—sheds little light on the matter; it simply authorizes statutory and punitive damages for "willful" violations of most FCRA requirements. 15 U.S.C. § 1681n(a)(1)(A).

But the second provision is highly instructive: It entitles a consumer to receive the greater of his actual damages or $1,000 for a "willful" violation of FCRA's prohibition against "obtaining a consumer report *under false pretenses* or *knowingly* without a permissible purpose." *Id.* § 1681n(a)(1)(B) (emphasis added).[8] Thus, it is clear from this provision that "willful" describes misconduct that is *at least* knowing. Because a statutory term should ordinarily be deemed to have the same meaning throughout a statute (see *Ratzlaf*, 510 U.S. at 143), the term "willful" should have the same meaning in both provisions of FCRA. A company should not be liable for "willfully" violating FCRA's notice requirement absent proof that it *knew* it was violating the statute.

2. This conclusion is confirmed by the legislative history, which shows that Congress distinguished "willful" misconduct from grossly negligent, or reckless, misconduct, and made a considered decision to reserve the drastic remedies of statutory and punitive damages for only the most egregious violations. The original Senate bill required the plaintiff to show that the defendant was "grossly negligent" to obtain *actual* damages, and that the violation was "willful" to obtain *punitive* damages. See S. 3678, 91st Cong. §§ 616, 617 (1970). Because gross negligence is "little different from recklessness as generally

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[8] FCRA also provides a criminal penalty for "any person who *knowingly and willfully* obtains information on a consumer from a consumer reporting agency under false pretenses." 15 U.S.C. § 1681q (emphasis added).

understood in the civil law" (*Farmer* v. *Brennan*, 511 U.S. 825, 836 n.4 (1994); accord *Restatement (Second) of Torts* § 282 cmt. e (1965)), the effect of the Senate bill was to distinguish misconduct that was merely reckless from misconduct that was more egregious, *i.e.*, "willful." Likewise, the House bill distinguished recklessness from willfulness, rejecting alternative proposals that would have authorized punitive damages for violations that were "grossly negligent or willful." See H.R. 19403, 91st Cong. § 52 (1970); H.R. 19410, 91st Cong. § 52 (1970). Thus, it was the unmistakable intention of Congress to set apart conduct that was more egregious than gross negligence (or recklessness) for punitive damages liability.

3. Consistent with the structure of FCRA and its legislative history, most federal circuits have concluded that statutory and punitive damages are available only where the defendant knowingly and consciously violated FCRA's requirements. See *Wantz* v. *Experian Info. Solutions*, 386 F.3d 829, 834 (7th Cir. 2004); *Phillips* v. *Grendahl*, 312 F.3d 357, 368-370 (8th Cir. 2002); *Dalton* v. *Capital Associated Indus., Inc.*, 257 F.3d 409, 418 (4th Cir. 2001); *Duncan* v. *Handmaker*, 149 F.3d 424, 429 (6th Cir. 1998); *Stevenson* v. *TRW, Inc.*, 987 F.2d 288, 293 (5th Cir. 1993).[9] As the Eighth Circuit explained in *Phillips*, "the defendant must commit the act that violates the Fair Credit Reporting Act with knowledge that he is committing the act * * * and he must *also* be conscious that his act impinges on the rights of others." 312 F.3d at 368 (emphasis added). The Ninth Circuit's relaxed standard for "willful" violations of FCRA is the outlier, and it should be rejected.

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[9] Although the Third Circuit seemed to adopt a "reckless disregard" standard, it further explained that a defendant's conduct must be "on the same order as willful concealments or misrepresentations" to warrant statutory and punitive damages. *Cushman* v. *Trans Union Corp.*, 115 F.3d 220, 227 (3d Cir. 1997).

B. The Ninth Circuit's Rule Increases The Costs Of Compliance With FCRA, Thereby Increasing The Costs Of Credit To Consumers And Jeopardizing FCRA's Success In Creating An Efficient Credit Market.

The Ninth Circuit's expansive interpretation of "willful" also increases the costs of FCRA compliance by opening the gates to statutory and punitive damages claims even where covered firms relied in good faith on the advice of counsel with respect to unsettled issues under FCRA. See *Reynolds*, 435 F.3d at 1099. The availability of statutory and punitive damages in such situations will create significant pressures to settle even dubious claims—to the ultimate detriment of consumers—even as it fundamentally alters the relationship between insurance companies (and other credit providers) and their counsel. This result promises to stifle the information-sharing that has been critical to the development of an efficient credit market under FCRA.

1. The Ninth Circuit's position leaves companies little room to defend against plaintiffs' claims for statutory and punitive damages. Under the decisions below, it is no defense that the statutory requirement was unclear; that the company relied in good faith on its counsel's interpretation of that requirement; or even that a federal district court agreed with counsel's interpretation. Indeed, the district court in these cases granted the insurance companies judgment as a matter of law on the ground that their interpretations of FCRA's notice requirements were correct. But the court of appeals disagreed, and went so far as to label those same interpretations "implausible." *Ibid.* In sum, the decisions below appear to give companies no reliable defense to a claim for statutory and punitive damages other than *a court of appeals' ultimate conclusion* that counsel correctly interpreted the statute.

This is not much of a defense, especially since the burden appears to rest on the *company* to refute an allegation of "willful" violation of the statute. According to the Ninth Circuit, a business may be liable for statutory and punitive damages *unless* it "diligently and in good faith" sought to determine its statutory obligations and "thereby" took a "reasonable" or "tenable" position under the statute. *Ibid*. Under this standard, it will be nearly impossible to obtain early resolution of meritless FCRA claims: A named plaintiff seeking statutory and punitive damages in a nationwide class action will survive a motion to dismiss based on nothing more than a bare assertion, on information and belief, that the company "willfully" violated some FCRA requirement.

This result increases the likelihood that companies subject to FCRA will bear the costs of statutory and punitive damages awards, either by paying large judgments or by entering into "blackmail settlements." As Judge Easterbrook has explained, settlement in class litigation "becomes almost inevitable—and at a price that reflects the risk of a catastrophic judgment as much as, if not more than, the actual merit of the claims." *In re Bridgestone/Firestone, Inc.*, 288 F.3d 1012, 1015-1016 (7th Cir. 2002); see also *Parker* v. *Time Warner Entertainment Co., L.P.*, 331 F.3d 13, 22 (2d Cir. 2003) (class actions for statutory damages "could create a potentially enormous aggregate recovery for plaintiffs, and thus an *in terrorem* effect on defendants, which may induce unfair settlements"); *Blair* v. *Equifax Check Servs., Inc.*, 181 F.3d 832, 834 (7th Cir. 1999) (Easterbrook, J.) (class treatment "can put considerable pressure on the defendant to settle, even when the plaintiff's probability of success on the merits is slight"); *Castano* v. *American Tobacco Co.*, 84 F.3d 734, 746 (5th Cir. 1996) ("The risk of facing an all-or-nothing verdict presents too high a risk, even when the probability of an adverse judgment is low"). Judge Friendly made the same observation, explaining that "[w]hile the benefits to the individual class members are usually minuscule, the possible consequences of a judgment to the defendant are so horrendous that these actions are almost always settled."

Henry J. Friendly, *Federal Jurisdiction: A General View* 120 (1973)).

Consumers will pay the price for covered firms' increased exposure to statutory and punitive damages liability. The increased risk will undoubtedly translate into higher rates. And it may well result in reduced coverage for certain classes of insureds.

2. More frequent statutory and punitive damages awards and blackmail settlements are not the only costs imposed by the decisions below. In addition, businesses likely will react to the Ninth Circuit's lax standard for "willful" violation either by conducting their operations in the most conservative manner possible, by obtaining "second opinions" to test their own counsel's advice, or both. This is hardly the model that the Court envisioned in *Upjohn Co.* v. *United States*, 449 U.S. 383 (1981), when it affirmed the role of corporate counsel in advising their clients how to comply with complicated, sometimes counterintuitive, statutes and regulations. Indeed, our system expects businesses to seek, *and rely on*, the advice of their counsel in determining how to comply with federal statutory requirements. The mere fact that a court of appeals later determines that counsel's advice was incorrect might be enough to warrant an award of actual damages, but it cannot be enough to justify statutory and punitive damages.

The pernicious effect of the decisions below is thus to increase the costs of the most responsible corporate behavior—consulting legal counsel before engaging in business practices regulated by federal statute. See *id.* at 392 (acknowledging the "valuable efforts of corporate counsel to ensure their client's compliance with the law"). These costs undoubtedly will be passed on to consumers, who will receive no additional benefit beyond that which ordinary remedies would provide.

3. By increasing the costs of compliance with FCRA in this manner, the Ninth Circuit effectively reduces compa-

nies' incentives to make appropriate use of credit information. This result threatens to undo the tremendous benefits that the statute has provided. The balance that Congress struck in FCRA—allowing businesses to use credit information while providing consumers with notice of genuinely adverse credit-related actions—has been vindicated by the performance of the Nation's consumer credit market. Credit is available to more consumers today than ever before, at least in part because FCRA created a uniform national system of credit reporting that promotes efficiency in information-sharing, accuracy in risk assessment, and privacy for consumers. In short, "American consumers have realized undeniable benefits from the free flow of credit reporting information to lenders and other financial services providers." H.R. Rep. No. 108-263, at 25 (2003).

Consumers benefit from the free flow of credit information in several ways. As one Federal Reserve Board official explained in testimony before a congressional committee: "The ready availability of accurate, up-to-date credit information from consumer reporting agencies benefits both creditors and consumers. Information from consumer reports gives creditors the ability to make credit decisions quickly and in a fair, safe and sound, and cost-effective manner. Consumers benefit from access to credit from different sources, vigorous competition among creditors, quick decisions on credit applications, and reasonable costs for credit." *Fair Credit Reporting Act: How It Functions for Consumers and the Economy*, *supra*, at 431 (Statement of Dolores Smith).[10]

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[10] See also *Fair Credit Reporting Act: How It Functions for Consumers and the Economy*, *supra*, at 86 (Statement of Cheryl St. John, Vice President, Fair Isaac Corporation) ("with credit scoring, more people get credit; they get it faster; and it is more affordable. By enabling lenders to extend credit quickly, while safely managing their risk, credit scores have made credit more accessible at lower rates to more people. More people can get

Moreover, the consumer credit market that FCRA has helped create is more "democratized" than ever before, with credit available to more consumers at all income levels. "Over the last 30 years, the availability of non-mortgage credit to households in the lowest quintile of income has increased by nearly 70 percent—including a nearly three-fold increase in the number of low-income households owning credit cards just in the last decade." H.R. Rep. No. 108-263, at 23 (2003). According to one congressional report, "[t]his unprecedented 'democratization' in the availability of credit to low- and moderate-income consumers has been made possible in significant measure by the emergence of a national credit reporting system" facilitated by FCRA. *Ibid.*

These important successes are jeopardized by the decisions below. Especially by making statutory and punitive damages available for unwitting violations of the statute, the Ninth Circuit has raised the costs of FCRA compliance and reduced companies' incentives to make appropriate use of credit information. In short, the decisions below threaten to stifle the information-sharing that has been critical to the development of a consumer-friendly credit market under FCRA.

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The decisions below rest on fundamental misreadings of FCRA that significantly increase the costs of compliance with the statute. Users of credit reports will pay those costs in the first instance, but consumers will pay them in the end, in the form of higher prices and reduced coverage. The decisions below thus amount to judicial over-regulation of the consumer credit market, and they should not be permitted to jeopardize FCRA's continued success

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credit because credit scores allow lenders to safely assess and account for the risk of consumers who are new to that lender and who many have been turned away by other lenders").

in promoting the free flow of credit information while protecting consumer privacy.

CONCLUSION

The decisions below should be reversed.

Respectfully submitted.

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NOVEMBER 2006