No. 06-100

IN THE

Supreme Court of the United States

GEICO GENERAL INSURANCE COMPANY, GEICO INDEMNITY COMPANY, and GOVERNMENT EMPLOYEES INSURANCE COMPANY,

Petitioners,

v.

AJENE EDO,

Respondent.

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

BRIEF FOR PETITIONERS

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Ninth Circuit's construction of "willfully" under § 1681n of the Fair Credit Reporting Act ("FCRA"), 15 U.S.C. § 1681 *et seq.*, impermissibly permits a finding of willfulness to be based upon nothing more than negligence, gross negligence, or a completely good-faith but incorrect interpretation of the law, and upon conduct that is objectively reasonable as a matter of law, rather than requiring proof of a defendant's knowledge that its conduct violated FCRA or, at a minimum, recklessness in its subjective form.

2. Whether the Ninth Circuit improperly expanded § 1681m of FCRA by holding that an "adverse action" has occurred and notice is required thereunder, even when a consumer's credit information has had either no impact or a favorable impact on the rates and terms of the insurance that would otherwise have been offered or provided.

LIST OF PARTIES

Petitioners GEICO General Insurance Company, GEICO Indemnity Company, and Government Employees Insurance Company[1] were defendants in the district court and appellees in the court of appeals. GEICO Casualty Company was a defendant in the district court, but was not a party in the court of appeals and thus is not a party before this Court.

Respondent Ajene Edo was a plaintiff in the district court and the appellant in the court of appeals.

In the court of appeals, this case was consolidated for purposes of oral argument with another proceeding in which Jason Reynolds was the appellant and Hartford Financial Services Group, Inc. and Hartford Fire Insurance Company were the appellees.

RULE 26.9 STATEMENT

Government Employees Insurance Company is the parent corporation of GEICO General Insurance Company. GEICO Corporation is the parent corporation of Government Employees Insurance Company and GEICO Indemnity Company, and is itself an indirect subsidiary of Berkshire Hathaway. No publicly held corporation owns ten percent or more of the stock of Government Employees Insurance Company, GEICO Indemnity Company, or GEICO General Insurance Company.

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[1] In this brief, the generic "GEICO" will be used to refer collectively to all of the GEICO companies that are petitioners in the case.

TABLE OF CONTENTS

Page

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

Page(s)

FEDERAL CASES

TABLE OF AUTHORITIES—Continued

Page(s)

TABLE OF AUTHORITIES—Continued

Page(s)

TABLE OF AUTHORITIES—Continued

Page(s)

TABLE OF AUTHORITIES—Continued

Page(s)

TABLE OF AUTHORITIES—Continued

Page(s)

TABLE OF AUTHORITIES—Continued

Page(s)

TABLE OF AUTHORITIES—Continued

Page(s)

STATE STATUTES

TABLE OF AUTHORITIES—Continued

Page(s)

LEGISLATIVE HISTORY

Page(s)

OTHER AUTHORITY

TABLE OF AUTHORITIES—Continued

Page(s)

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a)[2] is reported at 435 F.3d 1081. The opinion of the district court (Pet. App. 37a) is unreported.

STATEMENT OF JURISDICTION

The judgment of the court of appeals was entered on January 25, 2006. Petitioners timely filed a petition for rehearing and rehearing *en banc*, which was denied on April 20, 2006. Pet. App. 49a. The petition for a writ of certiorari was filed on July 19, 2006, and granted on September 26, 2006. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Relevant constitutional and statutory provisions are set out in the Addendum to this brief.

STATEMENT OF THE CASE

In this case, the Ninth Circuit adopted an extraordinarily expansive view of the notice requirements of the Fair Credit Reporting Act ("FCRA" or the "Act"), 15 U.S.C. § 1681 *et seq*., ruling that an applicant for insurance must always be told that he has been treated "adverse[ly]" based on his credit report even when his credit score had no effect on his premiums, so long as the insurance company would have given him a better rate if he had a "perfect" credit score. The court then adopted an equally expansive and unprecedented view of FCRA's civil sanctions provision, holding that whenever a company acts pursuant to a statutory interpretation that is later deemed untenable, the company's conduct may be found "willfully" noncompliant, and thus subject to punitive and statutory damages. In combination, these holdings have produced an outcome that Congress certainly did not intend: an insurance company that adopted an eminently reasonable interpretation of FCRA's adverse-action notice

[2] "Pet. App." refers to the Appendix to GEICO's petition for a writ of certiorari; "JA" refers to the Joint Appendix; "ER" refers to the Excerpts of the Record in the Ninth Circuit; and "SER" refers to the Supplemental Excerpts of the Record in the Ninth Circuit.

requirement—at a time when there was no authoritative judicial or agency guidance—may be held liable for hundreds of millions of dollars in statutory penalties to a nation-wide class of consumers who suffered no harm.

FACTUAL BACKGROUND

The Fair Credit Reporting Act. In 1970, Congress enacted FCRA "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)). The Act regulates both "consumer reporting agencies"—which produce "consumer reports," including credit reports—and the "users of consumer reports," like credit providers and the insurance companies here. *See* 15 U.S.C. §§ 1681a, 1681b, 1681m. Most importantly for present purposes, the Act requires users of consumer reports to notify a consumer when they have taken an "adverse action" against that consumer based on information contained in a credit report (or other consumer report) and inform the consumer that he has the right to review a free copy of the report. *Id.* § 1681m(a).

When FCRA was enacted, consumers typically "applied for credit that was available on a fixed set of terms and … were either approved or denied on that same fixed set of terms." *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. 27 (2003) (testimony of J. Howard Beales, III, Dir., Bureau of Consumer Prot., U.S. Fed. Trade Comm'n) ("Beales Testimony"). Most creditors and insurance companies now offer varying terms depending on the risk an individual consumer presents. *Id.* at 28. The development of such risk-based pricing has led to a "much more differentiated pricing of credit and insurance products based on the risks that a particular consumer may pose." *Id.*

Credit Scores. The credit score is the foundation of modern risk-based pricing. *Fair Credit Reporting Act: How It Functions for Consumers and the Economy: Hearing*

Before the H. Subcomm. on Fin. Insts. and Consumer Credit of the Comm. on Fin. Servs., 108th Cong. 276 (2003) (testimony of Richard F. Le Febvre, On Behalf of AAA Am. Credit Bureau Inc.). Credit scoring involves the use of proprietary models that correlate the various information provided by credit reports with particular consumer behavior. Nat'l Consumer Law Center, *Fair Credit Reporting* 347 (5th ed. 2002). Although they were initially used to determine whether and on what terms to provide credit, FTC, *FTC Facts For Consumers: Credit Scoring* 1 (May 2006), *available at* http://www.ftc.gov/bcp/edu/pubs/consumer/credit/cre24.pdf,[3] credit scores are now used for a variety of purposes, including underwriting insurance policies. Pauline Smale, Congressional Research Service, CRS Rep. No. RS21298, *Credit Scores: Dev., Use, and Policy Issues* at CRS-1 (June 4, 2004).

Credit scoring models do not rate a consumer's credit report as "good" or "bad," but instead rank each consumer numerically based on factors that correlate the information in the credit report with the credit, insurance, employment, or other decision at issue. Many aspects of a credit report are considered in calculating a credit score, including the consumer's credit history, credit exposure, and mix of various types of debt. ER 172. Because the credit score is not a report card, but is instead a model for predicting particular future behavior, even consumers whose credit reports reflect no late payments or other recognizably "negative" information may have only middling scores. For example, a sparse credit history may negatively affect a score. CRS Rep. No. RS21298 at CRS-3. Likewise, a high quantity of credit inquiries may have a negative impact on a score. *Id.* Credit scores generally range from a low of 300 (most risky) to a high of approximately 850 (least risky). Lamont D. Boyd, *Ins. Risk Scores: Forecasting Claim Performance Through the Use of Credit Data*, Today's Ins.

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[3] *See also* Pauline Smale, Congressional Research Service, CRS Rep. No. RS21298, *Credit Scores: Dev., Use, and Policy Issues* (June 4, 2004).

Professionals (Fall 2001).

GEICO and most insurers rely on a variant of the standard credit score "to help evaluate the risk of insurance applicants and policyholders." *Id.* These "insurance scores" are generally calculated based on the consumer's credit report using a model designed by Fair Isaac Corporation, which pioneered the commercial use of scoring systems. *Id.* Insurance scoring is a version of credit scoring that predicts applicants' insurance risks based on their credit history, and thereby allows insurers to price policies more efficiently based on each applicant's likely ratio of payouts-to-premiums (the "loss ratio"). *Id.*[4] For purposes of this brief, GEICO will use the generic term "credit score" when referring to all scores generated from credit-based consumer reports, including insurance scores.

Credit scores "are generally not used in isolation to set pricing or to deny insurance to an individual." Boyd, *Ins. Risk Scores.* To the contrary, an insurer will typically use its own proprietary underwriting system to consider the credit score along with other factors when analyzing the risks posed by a particular applicant for insurance. *Id.; Fair Credit Reporting Act: How It Functions for Consumers and the Econ.: Hearing Before the H. Subcomm. on Fin. Inst. and Consumer Credit of the Comm. on Fin. Services,* 108th Cong. 343 (2003) (testimony of Gregory V. Serio, Superintendent of Ins. N.Y., Dep't of Ins.). These other factors may include information such as driving history, age, gender, claims report and home condition. *Fair Credit Reporting Act: How It Functions for Consumers and the Econ.: Hearing Before the H. Subcomm. on Fin. Inst. and Consumer Credit of the Comm. on Fin. Services*, 108th Cong. 67 (statement of Wayne T. Brough, Chief Economist, Citizens for a Sound Economy).

The use of credit reports (and, derivatively, credit scores) in evaluating insurance applications and determining

[4] *See also* Baird Webel, Congressional Research Service, CRS Rep. No. RS21341, *Credit Scores: Credit-Based Ins. Scores* (Jan. 19, 2005).

premiums is governed by state law. Most states now prohibit an insurer from using credit reports unless the insurer adopts a procedure that ensures that consumers with thin credit histories, and those for whom the reporting agency can find no information ("no-hits"), are not treated adversely as a result. These states expressly permit insurers to employ a mathematical factor that neutralizes the negative effect that such consumers' credit scores (or lack of credit scores) might otherwise have on their risk profiles.[5] The substitution of a neutral variable ensures that "the price of coverage to an insured with no credit history is neither increased nor decreased because of the credit history."[6] In some states, applicable laws have prohibited reliance upon credit reports altogether and thus effectively required insurers to "neutralize" all credit scores when evaluating the state residents' insurance applications. ER 165.

GEICO's Use of Credit Scores. GEICO provides automobile insurance through its four affiliated companies. GEICO General sells "preferred" automobile insurance to customers with low risk profiles. ER 114, 192. Government

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[5] *See, e.g.*, Alaska Stat. § 21.36.460; Ariz. Rev. Stat. § 20-2110; Ark. Code Ann. § 23-67-405; Colo. Rev. Stat. § 10-4-116; Fla. Stat. ch. 626.9741; Ga. Code Ann. § 33-24-91; 215 Ill. Comp. Stat. 157/20; Ind. Code Ann. § 27-2-21-16; Iowa Code § 515.109A; Kan. Stat. Ann. § 40-5104; La. Rev. Stat. Ann. § 22:1484; Mont. Code Ann. § 33-18-605; Neb. Rev. Stat. § 44-7705; Nev. Rev. Stat. § 686A.680; N.Y. Ins. Law § 2802; N.D. Cent. Code § 26.1-25.1-03; 36 Okla. Stat. tit. 36, § 953; Or. Rev. Stat. § 746.661; Tenn. Code Ann. § 56-5-402; Tex. Ins. Code § 559.052; Va. Code Ann. § 38.2-2234; South Carolina Insurance Department Bulletin 2002-04 (May 24, 2002); South Dakota Div. of Ins. Bulletin 2002-3 (Nov. 15, 2002). Many of these states, 26 or more in total, have adopted some version of the National Conference of Insurance Legislators' Model Act Regarding Use of Credit Information in Personal Insurance, which permits the use of neutral credit information to ensure that consumers with thin credit history, or no identified credit history, are not adversely treated.

[6] Comment of the National Association of Mutual Insurance Companies to the Federal Trade Commission, point 9 (Apr. 25, 2005), *available at* http://www.ftc.gov/os/comments/FACTA-implementscorestudy/514719-00088.pdf.

Employees also sells preferred automobile insurance, ER 114-15, but only to government employees or military personnel. JA 28 ¶ 17; JA 22 ¶ 18. GEICO Indemnity sells standard automobile insurance for moderate-risk customers. ER 115. And GEICO Casualty issues non-standard policies at generally higher rates for consumers who pose greater risks. Pet. App. 11a. A customer's insurance premium depends on the company and tier in which she is placed.

In 1998, GEICO prepared to begin using credit scores as part of its initial rate-quote process. It contracted with Trans Union and Fair Isaac to get access to their "proprietary statistical insurance scoring system," which "rank orders the consumer with respect to the insurance performance measured." ER 154. The contract does not give GEICO access to an applicant's actual credit report, but provides GEICO the credit score and up to four factors from the credit report that most influenced the score. *Id.*

In 1999, GEICO began using these credit scores as a factor—along with 14 other factors (JA 53-55)—in its initial underwriting decisions. JA 19 ¶ 3. The process worked as follows. When a potential customer called GEICO's toll-free number, a GEICO sales counselor would gather basic information and, with the customer's permission, obtain the customer's credit report information in the form of a credit score. ER 60 ¶ 3. GEICO's Computer-Assisted Underwriting ("CAU") system would then translate the score into a weighted factor and combine it with other underwriting factors to determine the customer's recommended company and tier placement. ER 60-61 ¶ 3.

Initially, when GEICO lacked the technical ability to identify whether credit information had adversely affected an applicant's placement or rate, GEICO sent FCRA adverse-action notices to all applicants who did not receive a policy with one of GEICO's two preferred companies, Government Employees or GEICO General. *Id.* As GEICO's Director of Underwriting Research has explained, "with the early system's development, we didn't have the ability to identify whether [the customers] were supposed to receive an adverse action notice or not. So we sent it to more rather than fewer." SER 491, 504.

GEICO adopted the adverse-action notice methodology at issue in this case just a few months later, when Fair Isaac developed a method to neutralize an applicant's credit score. JA 19 ¶ 4. Using this methodology, the CAU system compared each applicant's company and tier placement with the company and tier placement the applicant would have received if GEICO had not considered his credit score and had relied solely on other underwriting factors. *Id.* The CAU system automatically generated an adverse-action notice whenever GEICO's consideration of the actual credit score resulted in the applicant's placement in a company or tier with higher premiums. *Id.* That way, GEICO was able to "identify and notify only those customers whose credit score has had a negative underwriting impact." SER 527.

Edo's Placement. In December 2000, Edo called GEICO for a rate quote on personal automobile insurance. Using the procedure described above, the CAU system considered Edo's credit score along with his other underwriting characteristics, and determined that Edo was eligible for a policy with the standard-rate company, GEICO Indemnity. *Id.* To determine whether Edo should receive an adverse-action notice, the CAU system then compared that result with the company and tier placement Edo would have received had his credit score not been considered. JA 21 ¶ 10. Edo's weighted credit score (62) was greater than the weight associated with a "neutral" credit report (56),[7] but not enough to improve his company or tier placement. Accordingly, the CAU system recognized that Edo would have paid the same premium regardless of whether his credit score was utilized, JA 26 ¶ 10; JA 21 ¶¶ 11, 12, and therefore determined that no adverse-action notice was required. Edo concedes that the "premium offered to [him] would have been the same had defendants not considered

[7] Mathematically, the "neutral weight" represents a "constant times the natural log of the [average] loss ratio … plus a constant." ER 132.

his credit information." JA 31 ¶ 5. He was offered a policy with GEICO Indemnity, which he accepted. ER 61-62 ¶ 5.

PROCEDURAL HISTORY

Proceedings in the District Court. Edo alleges in this putative class action that GEICO violated § 615(a) of FCRA, 15 U.S.C. § 1681m(a), by failing to notify him of "adverse actions" it took against him based on his credit report. According to Edo, GEICO treated him "adverse[ly]" by failing to place him in one of its preferred-insurance companies or offer him as good a rate within GEICO Indemnity as he would have received if, instead of his actual middle-of-the-road credit score, he had the highest possible credit score. JA 9-12. Edo does not claim that he or any other class member suffered any actual harm from not receiving an adverse-action notice, JA 31, but he nonetheless seeks statutory damages of between $100 and $1000 per class member and attorneys' fees under § 1681n(a)—on the theory that, despite its elaborate procedure for compliance, GEICO *willfully* violated the statute's notice requirements. Until recently, Edo also sought punitive damages.[8]

On February 23, 2004, the district court granted GEICO's motion for summary judgment and dismissed Edo's claims against all of the GEICO defendants. Pet. App. 37a. The court concluded that GEICO Indemnity did not take any adverse action against Edo based on his credit information since "the premium rate that GEICO Indemnity offered to [Edo] would have been the same regardless of the information contained in [his] consumer credit history." Pet. App. 39a. The court dismissed Edo's claim against Government Employees for lack of standing because Edo was not a government employee or in the military, and therefore was "not eligible for insurance coverage from Government Employees regardless of his consumer score."

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[8] In a bid to avoid this Court's review, Edo dropped his claim for punitive damages the day that he filed his Brief in Opposition to GEICO's Petition for a Writ of Certiorari. *See* Resp. Br. in Opp. to Cert. at 7.

Pet. App. 44a. Relying on its previous decisions interpreting FCRA, the court dismissed Edo's claim against GEICO General, reasoning that "the entity contracting with the policyholder is the only possible statutory taker of adverse action because only the contracting entity is capable of increasing the premium for or changing the terms of the insurance contract with the insured." Pet. App. 45a. And, finally, the court dismissed Edo's claims against GEICO Casualty because GEICO Indemnity offered Edo a better insurance rate than he could have received had he been placed with GEICO Casualty. Pet. App. 46a-47a.[9]

The Ninth Circuit's First Opinion. On August 4, 2005, the Ninth Circuit, with one member of the panel dissenting, reversed the judgment of the district court. *Reynolds v. Hartford Fin. Servs. Group, Inc.*, 416 F.3d 1097 (9th Cir. 2005).[10] Purporting to rely on the "plain language" of FCRA § 1681m(a), and without adverting to the structure or history of the statute (or considering the practical consequences of its decision), the Ninth Circuit held that an insurer takes "adverse action" against a consumer based on information in a credit report "whenever [the] consumer pays a higher rate because his credit rating is less than the top potential score." *Id.* at 1109. Under this theory, the court held that all three remaining GEICO defendants took adverse action against Edo for which notice was required—GEICO Indemnity by charging a higher rate than Edo would have paid if he had a perfect credit score; GEICO General by not offering him coverage (which it would have provided if he had a perfect credit score); and Government Employees by making Edo's company and tier determinations on behalf of the other GEICO companies. *Id.* at 1111-13.

The Ninth Circuit next rejected GEICO's alternative

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[9] Edo did not appeal the district court's dismissal of his claim against GEICO Casualty.

[10] For the purposes of oral argument and its opinion, the Ninth Circuit consolidated this case with another, *Reynolds v. Hartford Financial Services Group, Inc., et al.*, No. 03-35695.

argument that, having interpreted FCRA's notice requirement reasonably in the absence of any authoritative interpretation of the statute, it cannot be said to have violated the Act *willfully*, and thus cannot be held liable under § 1681n(a) for statutory and punitive damages and attorneys' fees. Expressly disagreeing with other courts of appeals that have applied a "knowing" standard to this willfulness requirement, the Ninth Circuit adopted a "reckless disregard" standard, which it then equated with negligence: the court held that, because GEICO's (and the district court's) interpretation of FCRA's adverse-action notice requirement was "unreasonable," GEICO had "willfully" violated FCRA as a matter of law. *Id.* at 1113-16.

The Ninth Circuit's Second Opinion. In response to GEICO's petition for rehearing and rehearing *en banc*, the Ninth Circuit withdrew its first opinion and issued a second one. *Reynolds v. Hartford Fin. Servs. Group, Inc.*, 426 F.3d 1020 (9th Cir. 2005). The court did not change its holding that Edo had suffered an adverse action. Instead, the panel majority merely word-smithed the willfulness section of its opinion, replacing most references to GEICO's "unreasonable" interpretation of the Act with similar adjectives like "implausible" and "untenable." *Id.* at 1036-40. The panel majority stood by its holding that GEICO's interpretation of the Act's adverse-action notice requirements was so unreasonable that it established GEICO's willfulness as a matter of law. *Id.*

The Ninth Circuit's Third Opinion. In response to GEICO's first amended petition for rehearing and rehearing *en banc*, the Ninth Circuit withdrew its second opinion, and issued a third and ultimately final opinion. Pet. App. 1a. As in the first two versions, this opinion held that GEICO violated § 1681m(a) by failing to send Edo an adverse-action notice. Pet. App. 20a-21a. This time, however, the panel remanded the case for the district court to consider whether GEICO's violation was willful. Pet. App. 34a. But the panel instructed the district court that GEICO may be found to have acted with reckless disregard and thereby willfully if it relied on an "[un]tenable," "creative," "unreasonable[]," or "implausible" interpretation of the Act. *Id.*

On April 20, 2006, the Ninth Circuit denied GEICO's second amended petition for rehearing and rehearing *en banc*.

Further Proceedings in the District Court. On remand, the district court has observed that, if this Court affirms the Ninth Circuit's holding that GEICO violated FCRA's notice requirement, "[t]he issue of willfulness will almost certainly remain in the case regardless of the Supreme Court's determination of the [willfulness] standard to be applied. As long as willfulness remains an issue, advice of counsel will likely remain a defense and otherwise privileged attorney-client materials will be discoverable." *See* October 5, 2006 Order Granting Stay at 9; *see also* September 13, 2006 Order Denying Motion for Protective Order at 5.

SUMMARY OF ARGUMENT

I. The Ninth Circuit held that, under FCRA, millions of insurance applicants must be sent notices informing them that they have been treated "adverse[ly]" based on information in their credit reports even though their credit reports did not actually worsen (and in many cases, actually improved) their insurance premiums. In attributing this peculiar intention to Congress, the Ninth Circuit ignored the actual impact that consideration of an applicant's credit report had on his premiums and focused instead on whether the applicant would have received an even better rate if he had the highest possible credit score. Under this standard, an applicant whose credit report was so favorable that it lowered his insurance premiums would nonetheless be deemed to have been treated adversely based on that credit report so long as he could have gotten an even better rate if he had the most extensive and pristine credit history imaginable. The text of § 1681m(a), which asks whether a consumer has been treated "adversely … on the basis of" his credit report information does not support that perverse outcome.

There is also no suggestion in the legislative record that Congress contemplated the Ninth Circuit's peculiar conception of adversity at FCRA's enactment. And in 1996 when Congress first addressed the development of differentiated pricing based on credit reports ("risk-based pricing"), it affirmatively rejected the Ninth's Circuit's view of "adverse action." The legislative history of the 1996 FCRA amendments makes clear that the use of credit reports in deciding whether to make offers to existing customers and prescreened candidates does not trigger a requirement to send adverse-action notices to consumers receiving such offers *even if other consumers were offered better rates based on superior credit.* More recent amendments from 2003 that expressly address *credit providers'* use of risk-based pricing also militate against the Ninth Circuit's position by demonstrating that Congress did not view all price variations triggered by credit scores to be "adverse action."

Despite the Ninth Circuit's assertions to the contrary, its interpretation of the adverse-action notice requirement also frustrates rather than furthers the purpose of the Act. Because few consumers have the extensive credit histories required to warrant the highest possible credit scores, the Ninth Circuit's standard would dramatically increase the number of consumers receiving adverse-action notices—and that increase would consist entirely of consumers who benefited from or were unaffected by their credit reports. The byproducts of this heavy-handed approach would be confusion and apathy. Congress designed the adverse-action provisions of FCRA to alert consumers when negative information in their credit reports produces real-life adverse consequences. The Ninth Circuit's approach would thwart this purpose entirely.

II. In holding that GEICO's approach was not only incorrect but potentially "willful" under § 1681n(a), the Ninth Circuit invented a novel and confused definition of that term that exposes GEICO and other companies to potentially crushing punitive sanctions for merely adopting an interpretation of FCRA with which a court later disagrees.

Though "willful" has been given diverse meanings depending on its context, the most natural reading of the term as used in FCRA is the intentional violation of a known legal duty. In criminal statutes, such as FCRA's criminal provisions, "willfully" is typically read to require a specific intent to violate the law. Applying the canon that a word should be interpreted consistently throughout a statute, "willfully" is also best read in § 1681n(a) to connote knowledge. This conclusion is further supported by the Act's other civil liability provisions and drafting history, which suggest that Congress intended "willfully" to mean something more than just reckless disregard. And finally, interpreting the provision's *mens rea* to require anything less than a knowing violation would raise serious constitutional concerns given the massive uncapped and aggregated punitive and statutory damages authorized by the Act without any need to prove actual harm.

Even if "willfully" were read to mean reckless disregard, moreover, the Ninth Circuit's articulation is not true to that standard. In the Ninth Circuit's view, where an insurer's interpretation is later deemed "implausible," "untenable," "creative" or "unreasonable," even the company's good faith reliance on counsel might not be sufficient to disprove willfulness and escape punitive sanctions. The Ninth Circuit's confusing use of these varying terms blurs the line between negligence and willfulness, ignores the established test for objective recklessness (whether the defendant's interpretation lacked any legal foundation), and erroneously suggests that a flawed statutory construction can make proof of bad faith unnecessary.

Of course, these doctrinal flaws in the Ninth Circuit's opinion are important here only because the court failed to recognize that GEICO's interpretation of FCRA's adverse action provisions was objectively reasonable. The objective merits of GEICO's interpretation on its own terms, the complete lack of prior judicial or administrative authority, the multitude and diversity of alternative interpretations, and the fact that the federal district judge *agreed* with GEICO's position establish its reasonableness—and thus the absence of willful misconduct—as a matter of law.

ARGUMENT

I. AN INSURER DOES NOT TAKE AN ADVERSE ACTION BASED ON INFORMATION IN A CONSUMER REPORT JUST BY FAILING TO TREAT THE CONSUMER AS IF HE HAD THE HIGHEST POTENTIAL CREDIT SCORE

Under FCRA, "users of consumer reports" must provide notice to consumers if they "take[] any adverse action with respect to any consumer that is based in whole on in part on any information contained in a consumer report." 15 U.S.C. § 1681m(a). FCRA defines "adverse action" slightly differently depending on the purpose for which the consumer report is used. Most importantly for present purposes, the statute provides that "adverse action … means 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, in connection with the underwriting of insurance." 15 U.S.C. § 1681a(k)(1)(B)(i).[11]

[11] In the credit context, adverse action "has the same meaning as in section 701(d)(6) of the Equal Credit Opportunity Act" (15 U.S.C. § 1681a(k)(1)(A)), *i.e.*, "a denial or revocation of credit, a change in the terms of an existing credit arrangement, or a refusal to grant credit in substantially the amount or on substantially the terms requested. Such term does not include a refusal to extend additional credit under an existing credit arrangement where the applicant is delinquent or otherwise in default, or where such additional credit would exceed a previously established credit limit." 15 U.S.C. §1691(d)(6). In the employment context, adverse action means "a denial of employment or any other decision for employment purposes that adversely affects any current or prospective employee." 15 U.S.C. §1681a(k)(1)(B)(ii). For governmental uses, adverse action means "a denial or cancellation of, an increase in any charge for, or any other adverse or unfavorable change in the terms of, any license or benefit." 15 U.S.C. § 1681a(k)(B)(iii). And for other permissible uses of consumer reports where the consumer has made

The Ninth Circuit interpreted this language to mean that an insurer must notify a consumer that it has taken adverse action against him based on information in his credit report "whenever [the] consumer pays a higher rate *because his credit rating is less than the top potential score*." Pet. App. 20a-21a (emphasis added). That is hardly the most natural reading of the text and it finds no support in FCRA's structure, legislative history or purpose.

A. The Ninth Circuit's Interpretation Departs From The Text By Classifying Neutral And Even Favorable Treatment As Adverse

The core problem with the Ninth Circuit's holding is that, instead of evaluating the actual impact of a consumer's credit information on that consumer's insurance rate, it compares the rate offered to the consumer with the rate he would have been offered if he had the best credit profile imaginable. The Ninth Circuit ruled that a consumer who benefited from consideration of his credit report must nonetheless be told he was treated adversely based on his credit report if he would have received an even better rate with the most pristine and extensive credit history imaginable. This peculiar understanding of "adverse action" is surely not what Congress had in mind.

The starting point for interpreting any statute is of course its text. *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 98 (2003). Here, the text has some ambiguity because FCRA's adverse-action notice provision does not expressly provide the benchmark of "neutral action" against which "adverse action" is to be measured. That ambiguity explains why some insurers (such as Safeco) believed the notice requirements applied only to changes made to existing policies or rate quotes, and not to initial rate quotes. But regardless of how that ambiguity is resolved, nothing in the

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an application or initiated a transaction, such as a landlord's review of a consumer's application for an apartment, or where a consumer report is considered in connection with a review of existing accounts, adverse action occurs when the user takes action or makes a determination that is "adverse to the interests of the consumer." 15 U.S.C. § 1681a(k)(1)(B)(iv).

text suggests that the premium that would have been offered someone with the highest possible credit score is the appropriate benchmark for adverse action.

The Ninth Circuit's holding to that effect ignores the ordinary meaning of "adverse" as "acting against or in opposition to, opposing, contrary, antagonistic, actively hostile … hence, unfavourable, hurtful, detrimental, injurious, calamitous, afflictive." *Oxford English Dictionary* 189 (2d ed. 1989). As a matter of plain language, a consumer has not been treated "adversely" as a result of information in her credit report when in fact she was not affected or was even benefited by the insurer's consideration of her credit score.

The Ninth Circuit's approach also ignores the relevant statutory definition of adverse action as a "denial or cancellation of, an increase in any change for, or a reduction or other *adverse or unfavorable change in the terms of coverage or amount of, any insurance.*" 15 U.S.C. § 1681a(k)(1)(B)(i) (emphasis added). The word "change" of course requires comparison to a referent or benchmark not expressly provided by the statute. The most natural reading of that term might be a "change" from the existing or quoted terms or rate (Safeco's approach) or perhaps from the terms or rate that would have applied absent consideration of the consumer's credit report (GEICO's approach). While it also may be linguistically possible to speak of a "change" from the hypothetical terms or rate that would have applied if the consumer had the best conceivable credit score, that would certainly be an odd and unconventional reading. Thus, even assuming that an initial insurance application can lead to an "increase in [a] charge" or other "unfavorable change in the terms of coverage" and thus an adverse action, *but see* Brief of Safeco at 37-40, GEICO should not be faulted for failing to inform Edo that it treated him adversely based on *his* credit score because he could have gotten a better rate or terms if he had the best possible credit score.

Edo's own facts demonstrate the fallacy of the Ninth

Circuit's approach, but it is easy to conceive of even more dramatic illustrations. For instance, assume that Adam and Bob have identical above-average—but not the absolute best—credit profiles. Assume further that Adam lives in a state that permits the use of credit reports in insurance underwriting while Bob does not. All other things being equal, if both apply for insurance with the same company, Adam may receive a better insurance rate than Bob because the consideration of Adam's above-average credit score may favorably impact his rate. Yet under the Ninth Circuit's interpretation, the insurance company must notify Adam that he has suffered an "adverse action" based on its consideration of information in his credit report, even if he is receiving a *better* rate than he would have received had his credit information *not* been considered (i.e., Bob's rate).

This perverse outcome is rooted in the Ninth Circuit's desire to graft into the definition of adverse action a comparison between the consumer's actual credit report and the credit report of a hypothetically perfect consumer. This judicial gloss strains the statutory language to its breaking point. *See Burlington N. R.R. Co. v. Okla. Tax Comm'n*, 481 U.S. 454, 462-63 (1987) (rejecting construction of statute that would depend upon the addition of words, rather than construction of the plain terms of the statute).

Under GEICO's more natural reading of the text, an insurer takes an "adverse action" against a consumer "based on" information in a consumer report only when, but for consideration of the report, the insurer would have treated the consumer more favorably. The comparison contemplated by this language focuses on the real-world impact of the insurer's consideration of the *actual consumer's* information, not on the hypothetical treatment of a make-believe super-consumer. Because GEICO placed Edo in precisely the same company and tier for which he would have qualified had his credit not been considered at all, GEICO properly concluded it had taken no adverse action against Edo "based on" information in his consumer report and properly declined to send him an adverse-action notice.

B. FCRA's Structure And Legislative History Casts Additional Doubt On The Ninth Circuit's Interpretation Of Adverse Action

As enacted in 1970, FCRA's adverse-action provision read, in relevant part, as follows:

> Whenever credit or insurance … is denied … or the charge for such credit or insurance is increased either wholly or partly because of information in a consumer report from a consumer reporting agency, the user of the consumer report shall so advise the consumer against whom such adverse action is taken.

Pub. L. No. 91-508, §615(a), 84 Stat. 1114, 1133 (Oct. 26, 1970). Prior to the district court's rulings, no court or agency authoritatively interpreted that language, and the legislative history of the 1970 enactment sheds no additional light on its meaning.

1996 Amendments. In 1996, FCRA's adverse-action notice provision was split into two separate subsections—one stating the notification requirement and the other providing distinct, industry-specific definitions of "adverse action." S. Rep. No. 104-185, at 32 (1995). The 1996 amendments did not substantively alter either the relevant definition of adverse action (which still included "denial[s]" and "increase[s] in any charge for … insurance") or the need for a causal link between the adverse action and the use of the consumer report ("because of information in a consumer report" became "based … on any information contained in a consumer report"). *Compare* Pub. L. No. 91-508, § 615(a), 84 Stat. at 1133, *with* Pub. L. No. 104-208, §§ 2402, 2411, 110 Stat. 3009, 3009-426 to 3009-430, 3009-443 to 3009-446 (1996). To the extent that an "increase[]" in the consumer's "charge for … insurance" did not initially encompass quoting a premium higher than the lowest possible rate, nothing in the 1996 amendments introduced that concept into the statute.

In other contemporaneous amendments to FCRA, moreover, Congress expressly disavowed that conception of adverse action. For example, when Congress amended § 1681a(l) to permit credit and insurance companies to use consumer report information when prescreening individuals for offers of preferred products or rates to select consumers, *see* Pub. L. No. 104-208, § 2404, 110 Stat. at 3009-431, the Senate Report explained that companies may use consumer reports in making such offers *without triggering notice obligations to other potential customers who do not receive the offer*. "[F]ailure to include a consumer in a prescreening solicitation does not constitute adverse action." S. Rep. No. 104-185, at 32.

The 1996 amendments also permitted companies to use consumer reports in their reviews of existing customer accounts. *See* § 1681a(m). The Senate Report clarifies that a decision to improve the rate or terms provided to an existing customer is not an "adverse action" *even if the accounts of other existing customers are changed in a more favorable manner*. *See* S. Rep. No. 104-185, at 32 (discussing 15 U.S.C. § 1681a(m)).

Congress's treatment of prescreened offers and account reviews of existing customers cannot be squared with the Ninth Circuit's view of initial insurance applications. Had Edo been an existing customer, GEICO's failure to lower his premium based on a review of his credit report would not have amounted to an "adverse action," regardless of whether GEICO lowered the premiums of other similarly situated customers with better credit scores. Nor would a prescreened offer to Edo at a preferred rate have constituted an "adverse action," even if Edo would have received a better rate with perfect credit. There is no reason that the exact same offer, made in response to Edo's initial application, should amount to an adverse action. The Ninth Circuit erred by failing to reconcile its construction of the Act respecting initial applicants with Congress's treatment of similarly situated prescreened consumers and existing customers.

Congress's definition of adverse action by credit providers, incorporating the definition in § 701(d)(6) of the Equal Credit Opportunity Act ("ECOA"), 15 U.S.C. § 1691(d)(6), casts further doubt on the Ninth Circuit's interpretation. *See* 15 U.S.C. § 1681a(k)(1)(A). At the time of the 1996 amendments, the Federal Reserve Board had already promulgated legislative regulations under ECOA, which do *not* require an adverse-action notice whenever the consumer would have gotten a better rate if he had the "best possible credit score." To the contrary, the regulations provide that no adverse action occurs if a consumer applies for credit at certain terms, the creditor counteroffers with different terms, and the consumer accepts the counteroffer. *See* 12 C.F.R. § 202.2. Under the Ninth Circuit's view, Congress's incorporation of this definition of "adverse action" must have been a purposeful decision to decrease the adverse-action notice obligations of credit providers while maintaining more rigorous responsibilities for insurance companies and employers. Nothing in the legislative history supports that interpretation.

2003 Amendments. More recent legislation, post-dating the events in this case, also highlights the error in the Ninth Circuit's use of a "best possible credit score" benchmark for defining adverse action. In the Fair and Accurate Credit Transactions Act of 2003 ("FACTA"), Congress amended FCRA to require only creditors (not insurers) to provide a "risk-based-pricing notice" to a consumer whenever the use of her credit report information results in an offer of credit with "material terms that are materially less favorable than the most favorable terms available to a substantial proportion of [that creditor's] consumers."[12] Unlike § 1681m(a), this new provision (codified at 15 U.S.C. § 1681m(h)(1)) expressly applies to initial offers and specifies the benchmark against which a creditor must measure the effect that its use of credit information had on an offer.

This 2003 amendment is relevant to the present issue in

[12] *See* Pub. L. No. 108-159, § 311, 117 Stat. 1952 (2003).

three respects. First, it makes clear Congress's ability to require notification in some circumstances where, even though consideration of the credit report did not harm the consumer, a better credit report would have improved his rate. But Congress imposed that risk-based pricing notice requirement only on credit providers, and that choice is presumed to be deliberate. *See Duncan v. Walker*, 533 U.S. 167, 173 (2001).

Second, the 2003 amendment shows that even when Congress focused on risk-based pricing, it did not go as far as the Ninth Circuit did here. Instead of requiring a notice every time a consumer would have gotten better terms with perfect credit, the amendment requires a notice only when the consumer's terms are "materially less favorable than the most favorable terms available to a substantial proportion" of other applicants. 15 U.S.C. § 1681m(h)(1).

Third, the 2003 amendment reveals that Congress has not equated risk-based pricing notices with adverse-action notices. Rather than incorporate the new risk-based pricing notice requirement into § 1681m(a)'s adverse-action notice provision, Congress codified it in a new section, § 1681m(h). Nothing in the text or history of this new provision suggests that Congress considered a creditor's offer an "adverse action" just because its terms were materially less favorable than those available to a "substantial proportion of consumers." Yet the standard announced by the Ninth Circuit deems that same conduct (and conduct even more innocuous) "adverse" in the insurance context. This makes no sense. If being treated worse than a substantial proportion of consumers is not an adverse action, then being treated the same as or better than most is not either. Conduct that, in the credit context, would not even trigger a notice that risk has been considered in pricing should not in the insurance context trigger a notice that the consumer has been treated adversely.

In sum, the Ninth Circuit's approach, already in tension with the plain language of § 1681m(a), is also at odds with FCRA's structure and legislative history. GEICO's position—that Congress intended adverse action to be determined by reference to the actual impact of a consumer's credit information on the consumer's rates or terms—is a far more reasonable interpretation of the statute, read as a whole.

C. Adoption Of The Ninth Circuit's Standard Would Frustrate The Purpose Of The Notification Requirement

The Ninth Circuit's holding requires an insurance company to send an "adverse action" notice to every consumer, regardless of how good his credit score is or how positively it impacted his rate, whenever a better credit score would have lowered his premiums. In the Ninth Circuit's view, this approach would improve consumer welfare, because more frequent notices will cause more consumers to confirm the accuracy of their credit reports and appreciate the importance of maintaining good credit. Pet. App. 18a. That policy decision is of course not the Ninth Circuit's to make, but, in any event, adoption of its expansive notice rule would likely do more harm than good. Whereas Congress designed the notification requirement surgically to require notices at a time when the information in a consumer's credit report has adversely affected him—a moment when he will be particularly inclined to review the credit report and correct any errors in it—the Ninth Circuit's rule would make the notices so ubiquitous and the concept of "adverse action" so meaningless that the notices become useless, or even affirmatively confusing.

Certainly, by requiring insurers to send adverse-action notices to all but the very most creditworthy consumers, the Ninth Circuit's interpretation would dramatically increase the volume of notices. *See* Brief of Financial Services Roundtable at 29 (estimating that the Ninth Circuit's holding will require businesses to produce and send "tens or hundreds of millions of additional adverse action notices each year"). But contrary to the Ninth's Circuit's view, that result is not unequivocally in the consumer's best interests, because this vast expansion of the scope of the notice provision would diminish the utility of the notices themselves. "*Meaningful* disclosure does not mean *more* disclosure. Rather, it describes a balance between 'competing considerations of complete disclosure … and the need to avoid … [informational overload].'" *Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555, 568 (1980) (citation omitted) (discussing disclosures required by the Truth in Lending Act) (alterations in original).[13]

As the FTC has acknowledged in testimony before Congress, "if you give notices too widely and in too many circumstances … it becomes something people ignore." Beales Testimony at 95-96. Indeed, the FTC specifically cautioned Congress that it was crucial "to avoid a situation where in essence everyone is getting an adverse action notice because no one ever gets the absolute best rate." *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) (testimony of Joel Winston, Associate Director, Fin. Practices Div., Bureau of Consumer Protection, Federal Trade Comm'n). The Ninth Circuit's more-the-merrier policy view completely ignores these ramifications.

Nor is the only problem with the Ninth Circuit's rule the "white noise" that would be generated by this mass proliferation of notices. As envisioned by Congress, the notices are supposed to alert consumers to information in their credit reports that has adversely affected their interests. Yet under the Ninth Circuit's approach, consumers will receive adverse-action notices even when

[13] The Ninth Circuit also contended that, even where credit reports prove accurate, requiring extensive adverse-action notices serves an important educational goal. Pet. App. 18a. But Congress addressed that goal in a different provision, *see* 15 U.S.C. § 1681j, which gives all consumers an annual right to a free copy of their reports. Particularly in light of that provision, § 1681m(a) cannot reasonably be read to require users of consumer reports to send adverse-action notices to consumers *not* adversely affected simply to educate them about the virtues of checking their credit reports.

their insurance rates are unaffected—or even improved—by consideration of their credit scores. Even apart from the conceptual absurdity of sending an "adverse action" notice in this situation, the requirement poses serious practical problems for insurers charged with drafting such notices and consumers trying to understand them.

According to the Ninth Circuit, the notice must communicate that the consumer has experienced an adverse action, describe the action and specify why the action was adverse. *See* Pet. App. 24a. Compliance with this requirement where the consumer has above-average but not perfect credit would require almost metaphysical abstraction. Essentially, the notice would have to inform the consumer that she has been treated adversely as a result of a consumer report that favorably impacted her insurance rate. One commentator has suggested the following formulation:

> Dear Insurance Applicant: Due to your favorable credit history, we are able to offer you a premium that is considerably lower than the premium we would have charged had you not had such a favorable credit history. That said, your credit is not quite good enough to qualify for our very lowest rate. Therefore, our offer of a substantial premium discount based on your excellent credit history constitutes an adverse action against you by us.[14]

Regardless whether this makes sense to the Ninth Circuit, it will certainly confuse many consumers. And further inquiry by the consumer—which the Act is designed to encourage—may only exacerbate the problem, since having less than a perfect credit score will often have nothing to do with anything affirmatively "bad" (such as late payments) in

[14] Robert Detlefsen, *Court's Ruling Applying Credit Act to Insurers Legally Unsupportable*, Wash. Legal Found. Backgrounder, at 3 n.3 (Jan. 27, 2006), *available at* http://www.wlf.org/upload/012706LBDetlefsen.pdf.

a credit report. Credit scores can be affected by such innocuous factors as having too few or too many outstanding accounts, having too short a credit history, having too little or too much debt, or having too high a ratio of revolving to fixed loans. *See* CRS Rep. No. RS21298 at CRS-3; Brief of Consumer Data Industry Association ("CDIA"), at 23-24 (explaining that even consumers with "unblemished credit history[ies]" containing "no derogatory information" will not have the top potential credit score).[15]

Nor does this situation much improve if the requisite notice merely informs the consumer that the insurer considered credit report information in its underwriting decision. *See* 15 U.S.C. § 1681m(a) (apparently requiring no more than that). Such a notice might be less confusing, because it would not label beneficial action "adverse," but it would not be much more meaningful. When (as here) consideration of the credit report did not affect the consumer's rate or terms of service, few consumers would learn anything of consequence from the disclosure or feel any need to follow up. The ubiquity and innocuous nature of such notices would render them largely meaningless.

The Ninth Circuit's contrary view appears to be grounded in its fundamentally mistaken assumption that the credit reports of consumers with less than perfect credit scores must contain "bad" information about which consumers would want to be notified. As explained above, even consumers who have always paid their bills timely will almost never have perfect credit scores simply because they do not have the most extensive credit histories imaginable. It is doubtful that Congress, which codified the notice requirement to deal with adverse actions based on "information *contained* in a credit report," intended to highlight most consumers' failure to obtain the very best possible rates because of an *absence* of extraordinarily positive information in their credit reports. The Ninth Circuit's reading would in many cases render the notice

[15] *See also Credit Scoring* at 2-3; *Fair Credit Reporting* at 351-53.

requirement absurd and disserve the statute's core purpose.

II. GEICO'S REASONABLE COMPLIANCE POLICY WAS NOT A "WILLFUL" VIOLATION OF THE ACT

The Ninth Circuit held that, even in the absence of actual damages, violation of any of FCRA's myriad and technical requirements based on an unreasonable, untenable, implausible, or creative interpretation of the Act can expose a company to potentially crippling punitive and statutory damages. Nothing in the text, structure, or history of the Act suggests that Congress intended such a draconian result.

FCRA has two separate civil damages provisions. Section 1681o assesses actual damages against "[a]ny person who is negligent in failing to comply with any requirement" of the Act. 15 U.S.C. §1681o(a). Section 1681n addresses violations committed with greater *mens rea*. It provides that, even in the absence of actual damages, "[a]ny person who willfully fails to comply with any requirement" of the Act is liable for statutory damages between $100 and $1,000 (in lieu of actual damages) and punitive damages. 15 U.S.C. § 1681n(a). Because Edo claims no actual damages, his suit relies entirely on §1681n and thus requires proof not only that GEICO's notice practices violated the Act's adverse-action notification requirements, but also that GEICO's violation was willful.

As this Court has observed, "willful" is "'a word of many meanings.'" *Bryan v. United States*, 524 U.S. 184, 191 (1998) (citing *Spies v. United States*, 317 U.S. 492, 497 (1943)). Yet the Ninth Circuit's interpretation comports with none of them. In defining the term within the context of FCRA, the Ninth Circuit diverged from at least five other circuit courts that have concluded that willfulness requires proof of actual knowledge that the defendant's conduct violated the Act.[16]

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[16] *See Phillips v. Grendahl*, 312 F.3d 357, 364, 370 (8th Cir. 2002) ("[W]illful noncompliance under section 1681n requires knowing and intentional commission of an act *the defendant knows to violate the law*.") (emphasis added); *Wantz v. Experian Info. Solutions*, 386 F.3d 829, 834

The Ninth Circuit also departed from (even as it purported to apply) the Third Circuit's standard, which requires, at a minimum, proof of reckless disregard of the law.[17] Instead, the Ninth Circuit held that a company's conduct may be found willful—and thereby a springboard for crushing punitive sanctions— based on nothing more than simple negligence, or even just an incorrect interpretation of FCRA's complex provisions. That idiosyncratic approach cannot be reconciled with the text, structure or history of the Act.

Ultimately, regardless of whether the standard for willfulness is knowledge or reckless disregard, the district court's judgment in this case should have been affirmed as a matter of law. Because GEICO's interpretation of FCRA's adverse-action notice requirement was eminently reasonable, and therefore not even negligent, GEICO cannot be found to have violated the Act willfully under any conception of that term.

(7th Cir. 2004) ("To act willfully, a defendant must knowingly and intentionally violate the Act, and *it 'must also be conscious* that [its] act impinges on the rights of others.'") (quoting *Phillips*, 312 F.3d at 368) (emphasis added); *Duncan v. Handmaker*, 149 F.3d 424, 429 (6th Cir. 1998) ("[T]he defendants cannot be held civilly liable [for willful noncompliance] if they obtained the [plaintiffs'] reports 'under what is believed to be a proper purpose under the statute but which a court … later rules to be impermissible legally under § 1681b.'") (citation omitted); *Stevenson v. TRW, Inc.*, 987 F.2d 288, 293-94 (5th Cir. 1993) (holding that to establish willful noncompliance the evidence must reveal a "conscious disregard" and an "intention to thwart consciously" a person's rights under FCRA; stating that "[o]nly defendants who engaged in 'willful misrepresentations or concealments' have committed a willful violation"); *Dalton v. Capital Associated Indus., Inc.*, 257 F.3d 409, 417-18 (4th Cir. 2001) (relying on the Fifth Circuit's "conscious disregard" standard; concluding that there was insufficient evidence of willfulness because the defendant did not possess the required "state of mind" and was not "aware").

[17] *Cushman v. Trans Union Corp.*, 115 F.3d 220, 227 (3d Cir. 1997).

A. "Willfully" In § 1681n(a) Requires, At A Minimum, An Intentional Violation Of A Known Legal Duty

As its root suggests, the term "willful" denotes the exercise of will. It refers to acts done intentionally, knowingly, purposely, or with an evil heart, as opposed to acts done carelessly or inadvertently. *Black's Law Dictionary* 1599 (6th ed. 1990).[18] That much is clear. The ambiguity lies in whether a statute proscribing a willful violation requires proof of at least knowing misconduct or instead merely reckless disregard. This Court has answered that question differently depending on the nature, structure, history and purpose of the particular statute at issue. It has frankly observed that the meaning of "willful" depends entirely on its statutory context. *See, e.g.*, *Bryan*, 524 U.S. at 191; *Ratzlaf v. United States*, 510 U.S. 135, 141 (1994).

In the context of § 1681n(a), willfulness is best understood to require at least a knowing violation of the Act. That reading best harmonizes the Act's use of a willfulness element in its criminal enforcement provision, best reconciles the varying levels of *mens rea* used in the Act's various civil and administrative enforcement provisions, is most consistent with the Act's legislative history, and takes account of the grave constitutional doubts that would accompany a statutory scheme that permitted uncapped and potentially crushing punitive and statutory damages for merely reckless conduct without any showing of actual harm.

1. The Language, Structure And Legislative History of FCRA Confirm That Congress Intended "Willfully" In § 1681n(a) To Require, At A Minimum, Proof Of Actual Knowledge

Congress' Use of the Same "Willful" Standard In The Act's Criminal Enforcement Provisions Indicates A

[18] *See, e.g., Cheek v. United States*, 498 U.S. 192, 200 (1991); *United States v. Bishop*, 412 U.S. 346, 360 (1973).

Mens Rea Greater Than Mere Recklessness. For more than 60 years, whenever willfulness has been an element of a criminal offense, this Court has read the term to require a showing that the defendant deliberately took an action that he knew violated the law.[19] Although the meaning of "willfully" in any particular criminal statute must nonetheless be determined holistically, taking into account all relevant factors, *Dolan v. U.S. Postal Serv*, 126 S. Ct. 1252, 1257 (2006), this long line of cases strongly suggests that, absent a contrary indication in the text, structure or history of a statute, Congress is presumed to have anticipated specific intent when it requires proof of willfulness as an element of a crime.

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[19] *See Bryan*, 524 U.S. at 196 (concluding that "willfully" dealing in firearms without a federal license requires "knowledge that the conduct is unlawful"); *Dixon v. United States*, 126 S. Ct. 2437, 2441 (2006) (applying *Bryan* to "willfully" receiving a firearm while under indictment); *Ratzlaf*, 510 U.S. at 137 ("To establish that a defendant 'willfully violated' the antistructuring law, the Government must prove that the defendant acted with knowledge that his conduct was unlawful."); *Cheek*, 498 U.S. at 201 (concluding that the willfulness requirement within the tax code required the '"voluntary, intentional violation of a known legal duty"' (citation omitted)); *United States v. Pomponio*, 429 U.S. 10, 12 (1976) (same); *United States v. Bishop*, 412 U.S. 346, 360 (1973) (same); *James v. United States*, 366 U.S. 213, 221 (1961) (stating that "willfully" failing to account for tax or "willfully" attempting to evade tax obligations '"involves a specific intent which must be proven by independent evidence and which cannot be inferred from the mere understatement of income"' (quoting *Holland v. United States*, 348 U.S. 121, 139 (1954)); *Heikkinen v. United States*, 355 U.S. 273 , 279 (1958) ("There can be no *willful* failure by a deportee … to apply to, and identify, a country willing to receive him in the absence of evidence, or an inference permissible under the statute, of a 'bad purpose' or 'non-justifiable excuse,' or the like."). In cases involving civil statutes with limited punitive effect, the Court has sometimes required less. *See, e.g.*, *McLaughlin v. Richland Shoe Co.*, 486 U.S. 128, 133 (1988) (concluding that a "reckless disregard standard" was appropriate for the Fair Labor Standards Act); *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 126 (1985) (applying a reckless disregard standard in the context of the Age Discrimination in Employment Act). *But see Kawaauhau v. Geiger*, 523 U.S. 57, 61 (1998) (interpreting "willful" to require knowledge in the context of a civil provision of the Bankruptcy Act).

That background is important here because in FCRA Congress made proof of a "willful" violation the sole gateway to both the punitive and statutory damages of § 1681n(a) and the criminal penalties prescribed by §§ 1681q and 1681r. These criminal enforcement provisions proscribe "knowing[] and willful[]" violations of the Act, a formulation in which the term "willful" ordinarily requires a specific intent to violate the law. For example, in *Felton v. United States*, 96 U.S. (6 Otto) 699, 702 (1878), a defendant was charged and convicted of "knowingly and willfully" failing to properly maintain pipes in a distillery in accordance with the law. This Court reversed, holding that the phrase required particularly blameworthy conduct: "Doing or omitting to do a thing knowingly and willfully, implies not only a knowledge of the thing, but a determination with a bad intent to do it or to omit doing it." *Id.* As the Court has explained in more recent cases, "knowingly" often refers to "'knowledge of the facts that constitute the offense,'" while "willfully" requires a defendant to have "'acted with knowledge that his conduct was unlawful.'" *Dixon v. United States*, 126 S. Ct. 2437, 2441 (2006) (quoting *Bryan*, 524 U.S. at 193).

The text of § 1681q, in particular, strongly supports that traditional interpretation. Section 1681q prohibits persons from "knowingly and willfully obtain[ing] information on a consumer from a consumer reporting agency under false pretenses." This proscription makes perfect sense if "knowingly" requires knowledge of the underlying conduct and "willfully" requires proof of a deliberate means or bad-purpose in the use of false pretenses. But the provision would make no sense whatever if "willful[]" meant merely reckless disregard—for a person cannot knowingly and recklessly act under false pretenses.

The Ninth Circuit acknowledged that "actual knowledge of illegality is required for a willful violation of a criminal statute," Pet. App. 32a, but it failed to appreciate that Congress's use in FCRA's criminal provisions of such a willfulness standard strongly suggests that Congress meant "actual knowledge of illegality" in §1681n(a) as well. "A term appearing in several places in a statutory text is generally read the same way each time it appears." *Ratzlaf*, 510 U.S. at 143 (interpreting "willfully" throughout the statute to require knowledge that conduct was unlawful). And this interpretative principle loses none of its force where the words in question span criminal and civil provisions. This Court has frequently employed this principle to ensure consistency in statutes that utilize the same language in their criminal and civil enforcement provisions. *See, e.g.*, *Leocal v. Ashcroft*, 543 U.S. 1, 12 n.8 (2004) (statutory term used in both criminal and civil provisions must be interpreted consistently regardless of whether "we encounter its application in a criminal or noncriminal context").[20]

Indeed, the canon that identical terms used in a statute's criminal and civil provisions share the same meaning should apply with even greater force here, because the "quasi-criminal" nature of the punitive and statutory damages authorized by §1681n(a) makes it particularly likely that Congress intended "willfully" to have the same meaning across FCRA's criminal and civil provisions. *See Cooper Indus., Inc. v Leatherman Tool Group, Inc.*, 532 U.S. 424, 432 (2001) (describing punitive damages as a "quasi-criminal" penalty and a reflection of a jury's "moral condemnation"). The same level of *mens rea*—at a minimum, knowledge of illegality—required to establish a criminal violation of FCRA should be required to establish civil liability under § 1681n(a).

[20] *See also Babcock & Wilcox Co. v. OSHRC*, 622 F.2d 1160, 1167 (3d Cir. 1980) (holding that where the term is used both criminally and civilly, "conduct more culpable than is generally required in the usual civil context is the minimum that Congress intended to be within the meaning of the term willful" in the civil context); *Bethlehem Steel Corp. v. OSHRC*, 540 F.2d 157, 161 (3d Cir. 1976) ("The genesis of 'willfully' in a criminal provision strongly suggests that it was originally meant to require a strong showing of intent.").

The Structure Of § 1681n Suggests That Congress Intended The Term "Willfully" In Subsection (a) To Require, At A Minimum, Proof Of A Knowing Violation Of The Act. The overall structure of § 1681n casts further doubt on the Ninth Circuit's view that "willfully" in subsection (a) means only reckless disregard. First, while subsection (a) generally proscribes "willfully fail[ing] to comply" with the Act, its subpart (a)(1)(B) prohibits a particular form of willful noncompliance—"obtaining a consumer report … knowingly without a permissible purpose." A "willful[] fail[ure] to comply with [the statute]" (15 U.S.C. § 1681n(a)) must therefore subsume actions done "knowingly without a permissible purpose" (15 U.S.C. § 1681n(a)(1)(B)), since the former set encapsulates the latter. That framework makes sense if willful means "with an evil heart." Yet it makes no sense under the Ninth Circuit's interpretation, because a person cannot with *reckless disregard* "knowingly obtain a consumer report without a permissible purpose."

Second, § 1681n(b) provides statutory damages of $1000, but no punitive damages, for suits by consumer reporting agencies against any person "who obtains a consumer report … knowingly without a permissible purpose." As a matter of plain language, *willfully* "obtain[ing] a consumer report … knowingly without a permissible purpose" (the conduct proscribed by § 1681n(a)(1)(B)) describes a state of culpability at least as high, if not higher, than simply "obtain[ing] a consumer report … knowingly without a permissible purpose" (the conduct described by § 1681n(b)). This reading is supported by the fact that the willfully noncompliant conduct proscribed by §1681n(a) exposes a violator to punitive damages and attorneys' fees, while the simple knowing noncompliance proscribed by § 1681n(b) does not.[21]

[21] Section 1681h(e), which specifically references Section 1681n, also militates for defining "willfully" to require proof of greater *mens rea*. That provision prohibits consumers from bringing certain actions "except as to false information furnished with *malice or willful intent to injure*

The Drafting History Of § 1681n Indicates That Congress Considered Willfulness To Mean Something More Than Recklessness. There is no reason to believe that Congress intended to authorize punitive damages and potentially crippling statutory damages for merely reckless violations of FCRA, particularly when violations of the Act's myriad technical requirements will often (as here) have caused no one any actual harm. The legislative history strongly suggests that Congress meant to reserve such severe sanctions for truly egregious misconduct.

The Senate Bill that ultimately became FCRA originally contained a gross negligence standard for actual damages and a willfulness standard for actual and punitive damages. S. 823, 91st Cong. §§ 616-17 (1969). After considering whether to lower the standard for actual damages to simple negligence, and to allow punitive damages for either willful or grossly negligent violations, Congress ultimately adopted negligence for actual damages and willfulness for punitive damages. *Compare* H.R. 19403, 91st Cong. § 52 (1970) (proposing a gross negligence standard for actual and punitive damages as an alternative to willfulness) *and* H.R. 19410, 91st Cong. § 52 (1970) (same) *with* 15 U.S.C. § 1681n (1970) (adopting "willfuly"—but not gross negligence—as the standard for actual and punitive damages). Congress thus chose expressly to limit the availability of punitive damages to willful (and not merely grossly negligent) violations.

When Congress enacted FCRA, recklessness and gross negligence were the same for all practical purposes. *See*, *e.g.*, *Black's Law Dictionary* 1185 (4th ed. 1968) (defining "gross negligence" as "[t]he intentional failure to perform a manifest duty in reckless disregard of the consequences");

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such consumer." The Ninth Circuit's definition of "willful" would be nonsensical there, since a person cannot *recklessly* "inten[d] to injure" a consumer. *Cf. Kawaauhau*, 523 U.S. at 61 (where § 523(a)(6) of Bankruptcy Code precludes discharge of debts incurred as a result of "willful and malicious injury by the debtor to another," "willful" means "deliberate or intentional").

Farmer v. Brennan, 511 U.S. 825, 836 n.4 (1994) ("[I]n practice [gross negligence] typically mean[s] little different from recklessness as generally understood in the civil law ...."). Thus, the drafting history of § 1681n indicates that, by limiting the availability of punitive damages to violations that are willful, Congress rejected the recklessness standard adopted by the Ninth Circuit.

2. The Ninth Circuit's Interpretation Of § 1681n(a)'s Willfulness Requirement Should Be Rejected Because It Raises Grave Constitutional Doubts

There is no reason to believe that Congress intended to invite the constitutional problems that would accompany adoption of the Ninth Circuit's tepid interpretation of FCRA's willfulness requirement. It is well established that, "when deciding which of two plausible statutory constructions to adopt, a court must consider the necessary consequences of its choice. If one of them would raise a multitude of constitutional problems, the other should prevail—whether or not those constitutional problems pertain to the particular litigant before the Court." *Clark v. Martinez*, 543 U.S. 371, 380-81 (2005) (Scalia, J.). That canon counseling avoidance of statutory interpretations that raise grave constitutional doubts argues powerfully for construing FCRA's willfulness requirement to require, at a minimum, proof of a knowing violation of the Act.

Even where, as here, a plaintiff concedes that the defendant's failure to send adverse-action notices caused no one any actual harm, the statutory and punitive damages authorized by § 1681n(a) aggregated in a nation-wide class action create the potential for massive and crippling liability. *See, e.g., Trans Union LLC v. FTC*, 536 U.S. 915, 917 (2002) (Kennedy, J., dissenting from denial of writ of certiorari) (noting that the petitioner, which had "been named as a defendant in a series of class actions brought under the FCRA, allegedly on behalf of the 190 million individuals ... face[d] potential liability approaching $190 billion").[22] If it is ever permissible to impose such crushing liability without evidence of actual harm, this Court's precedents suggest the need for proof of extraordinarily reprehensible misconduct. Yet, the Ninth Circuit's interpretation of the Act's "willful[ness]" requirement demands nothing of the sort. To cabin the reach of damages awards in a meaningful way, and avoid needlessly creating substantial constitutional problems, § 1681n(a) should be interpreted to require, at a minimum, proof of a knowing violation of the Act.

In *Gore* and *State Farm*, this Court confirmed that due process prohibits damages awards that are "grossly excessive" in comparison to their purposes. *BMW of N. Am. v. Gore*, 517 U.S. 559, 568 (1996); *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 417 (2003). The Court established three "guideposts" to evaluate whether punitive damages are improper: the relationship between the actual harm suffered by the plaintiff and his punitive damages award; the degree of reprehensibility of the defendant's actions; and comparison to legislative penalties for comparable misconduct. *Gore*, 517 U.S. at 575. Section 1681n(a) presents substantial constitutional challenges because it permits a consumer to recover punitive damages in the absence of any actual harm.

This lack of any assurance of a "reasonable relationship" between punitive damages and actual harm, if not by itself fatal to the statute, necessarily places great weight on the reprehensibility inquiry, because as this Court has explained a high ratio of punitive-to-actual damages demands proof of "a particularly egregious act." *Gore*, 517 U.S. at 582. But the Ninth Circuit's tepid interpretation of "willfully" fails to provide that necessary constitutional restraint. Under the Ninth Circuit's "reckless disregard" standard, a great deal of conduct that is not inherently

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[22] This is not merely a hypothetical problem as courts have already certified classes of over a million insureds under FCRA. *See* Brief of Financial Services Roundtable et al. as *amici curiae* at 20.

"egregious" or "reprehensible" may nonetheless trigger punitive damages.

The Act's provision for statutory damages of $100-$1000 per violation without any proof of actual harm likewise argues for requiring a mindset more heinous than a mere reckless disregard. Statutory damages in the absence of actual economic harm, especially when aggregated, can quickly amount to the sort of "grossly excessive or arbitrary punishments" condemned in *State Farm*. 538 U.S. at 416. The courts of appeals have accordingly expressed concerns similar to those raised by unbounded punitive damages when addressing aggregated statutory damages.

In the class action context, the multiplication of fixed statutory damages can amount to enormous penalties without proof that the defendant's conduct caused any actual harm. Several circuits have acknowledged that such statutory damages in the absence of actual damages can implicate due process concerns, especially in the context of a class action. For example, the Second Circuit has observed that "combining a statutory scheme that imposes minimum statutory damages awards on a per-consumer basis ... with the class action mechanism that aggregates many claims … may expand the potential statutory damages so far beyond the actual damages suffered that the statutory damages come to resemble punitive damages—yet ones that are awarded as a matter of strict liability, rather than for the egregious conduct typically necessary to support a punitive damages award." *Parker v. Time Warner Entertainment Co., L.P.*, 331 F.3d 13, 22 (2d Cir. 2003); *see also London v. Wal-Mart Stores, Inc.*, 340 F.3d 1246, 1255 n.5 (11th Cir. 2003) ("Under such circumstances [where the plaintiff suffered no economic harm], even though economic harm is not an element of the Florida common law claim for restitution, it may be required for superiority under the Federal Rules of Civil Procedure. This is especially likely when, as in the present suit, the defendants' potential liability would be enormous and completely out of proportion to any harm suffered by the plaintiff."); *cf.*

Ratner v. Chem. Bank N.Y. Trust Co., 54 F.R.D. 412, 416 (S.D.N.Y. 1972) (expressing alarm in a case involving the Truth in Lending Act's statutory damages provision that "the proposed recovery of $100 each for some 130,000 class members would be a horrendous, possibly annihilating punishment, unrelated to any damage to the purported class or to any benefit to defendant, for what is at most a technical and debatable violation of the Truth in Lending Act"); *Alsup v. Montgomery Ward & Co.*, 57 F.R.D. 89, 92 (N.D. Cal. 1972) (noting that aggregated statutory damages "would amount to ten times defendant's net worth and more than 230 times its total net income").

To ensure the necessary measure of proportionality in the FCRA's damages regime, the term "willfully" must refer, at a minimum, to knowing violations of the Act, and not to mere reckless disregard as interpreted by the Ninth Circuit. Certainly where actual damages are zero, only a very high degree of culpability could provide the necessary constitutional constraint. The Ninth Circuit's holding that mere recklessness will suffice fails to keep the statute's punitive and statutory damages regime within lawful bounds.[23]

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[23] A holding to this effect would not threaten the vast bulk of laws that permit statutory damages in the absence of actual injury. Most of these laws already contain some feature that adequately cabins the scope of punishment. For example, the ECOA provides damages in the absence of actual injury, but caps individual claims at $10,000, and class actions at $500,000 or 1 percent of the defendant's net worth. 15 U.S.C. § 1691e(b). Civil rights statutes may allow punitive damages without economic damages, *see* 42 U.S.C. § 1981a, but courts have described the discriminatory conduct as inherently egregious. *S. Union Co. v. Southwest Gas Corp*., 415 F.3d 1001, 1011 (9th Cir. 2005) (discrimination is "a special area of public concern where affront to human rights may require high punitives"), *cert. denied*, 126 S. Ct. 1342 (2006). And environmental laws may provide for statutory sanctions to preempt conduct that poses a risk of enormous harm. *See, e.g.,* Clean Air Act, 42 U.S.C. § 7413(b) (providing for civil penalties up to $25,000 per day per violation). But ultimately, for any such statute to satisfy constitutional norms, there must be some constraining feature, whether it is from the

Lenity—also rooted in due process—further militates against the Ninth Circuit's position. As this Court has explained, "'ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity,' and … 'when choice has to be made between two readings of what conduct Congress has made a crime, it is appropriate, before we choose the harsher alternative, to require that Congress should have spoken in language that is clear and definite.'" *Jones v. United States*, 529 U.S. 848, 858 (2000) (citations omitted). That principle should apply fully here for two reasons. First, willfulness is equally a requisite for FCRA's criminal sanctions. *See Ratzlaf*, 510 U.S. at 148 ("[W]ere we to find [the statute's] 'willfulness' requirement ambiguous … we would resolve any doubt in favor of the defendant."). And second, the civil damages provided by the Act are punitive in nature. *See United States v. Thompson/Center Arms Co.*, 504 U.S. 505, 518 (1992) (applying the rule of lenity in construing a punitive tax statute in a civil setting); *see also* Brief of Financial Services Roundtable et al. as *amici curiae* at 12-14. Application of lenity argues powerfully for reading willfulness to require proof of a knowing violation, because limiting the imposition of punitive and statutory damages to defendants "conscious of their wrongdoing sensibly allows [the statute] to reach only those with the level of 'culpability … we usually require in order to impose criminal liability.'" *Arthur Andersen LLP v. United States*, 544 U.S. 696, 706 (2005) (quoting *United States v. Aguilar*, 515 U.S. 593, 602 (1995) (alteration in original)).[24]

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standard of conduct required to trigger liability, or from a cap on the scope of punitive damages.

[24] The fact that under the Ninth Circuit's holding *any* violation of the Act's technical requirements—including any defect in the wording of the adverse-action notice—can serve as the predicate for a "willful" violation, Pet. App. 23a-25a, further counsels interpreting the term restrictively to avoid "the danger of ensnaring individuals engaged in apparently innocent conduct." *Bryan*, 524 U.S. at 194.

3. This Court's Decision In *Thurston* Provides No Support For The Ninth Circuit's Holding

In concluding that FCRA's willfulness requirement can be satisfied with a showing of mere reckless disregard, the Ninth Circuit placed great reliance on this Court's decision in *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111 (1985), and its progeny. That reliance was misplaced. In *Thurston*, this Court considered the liquidated damages provision of the Age Discrimination in Employment Act ("ADEA"), which provides double damages in the event of a "willful" violation of the statute. But the Court's adoption of a "reckless disregard" standard for the ADEA's willfulness element does not suggest a similar result here, for two reasons. First, although the Court deemed the ADEA's liquidated damages provision "punitive," *id.* at 125, the two-to-one liquidated/actual damages ratio provided by the ADEA assures proportionality. Second, the Court in *Thurston* relied heavily on the unique legislative history of the ADEA, which directed courts to interpret it in accordance with the Fair Labor Standards Act ("FLSA"), a statute that at the time of the ADEA's enactment had already been interpreted widely to equate "willfulness" with "reckless disregard." *Id.* at 126. As explained above, FCRA's legislative history contains no suggestion that Congress intended willfulness to mean less than a knowing violation of the law. *Thurston* thus provides no support for the Ninth Circuit's interpretation of this Act.

B. Regardless Of The Precise Connotation Of "Willfully," The Ninth Circuit Erred In Failing To Appreciate That, As A Matter Of Law, GEICO Committed No Willful Violation Of The Act

In rejecting the "actual knowledge" standard employed by the Fourth, Fifth, Sixth, Seventh, and Eighth Circuits, the Ninth Circuit purported to adopt the "reckless disregard" standard endorsed by the Third Circuit. Pet. App. 31a-32a. In reality, the standard articulated by the

Ninth Circuit departs radically from even the Third Circuit's view.

The Ninth Circuit defined "reckless disregard" inversely, stating that a company will *not* have acted with "reckless disregard" if it has (1) "diligently and in good faith" attempted to determine its obligations *and* (2) "thereby come" to a non-"creative," not "unreasonable[]," "plausible," and/or "tenable" interpretation of FCRA. Pet. App. 34a. Where, however, a company has relied on an interpretation that a court finds "unreasonable[]," [un]tenable," "implausible," or "creative," then (according to the Ninth Circuit) the company may be deemed to have acted with "reckless disregard" and subjected to massive statutory and punitive damages—even if the interpretation was derived from a legal opinion that the company sought for the very purpose of ensuring compliance with the law. *Id.* (holding that, where an interpretation is "implausible, consultation with attorneys may provide evidence of lack of willfulness, but is not dispositive").

The Ninth Circuit's articulation is flawed in two important respects: first, it mistakenly pegs the objective component of "reckless disregard" to the reasonableness of the disputed legal interpretation; and second, it suggests that the answer to the objective inquiry may overwhelm any consideration of the defendant's actual, subjective good faith. This approach cannot be what Congress intended, as it would permit a finding of willfulness—and thus liability for punitive and statutory damages—to be based on nothing more than an incorrect interpretation of FCRA's complex provisions. At a minimum, "willfulness" under FCRA should require both a showing that the defendant recklessly disregarded consumers' rights by adhering to a legally indefensible interpretation of the Act *and* that the defendant knew that it's interpretation was almost certainly wrong (and thus, was acting in bad faith).

The Ninth Circuit's error, though, went beyond a failure to *articulate* the correct legal standard. In its first two (later-vacated opinions), the Ninth Circuit held that GEICO willfully violated the Act purely because the court disagreed with GEICO's (and the district court's) interpretation. *See* 416 F.3d at 1115-16; 426 F.3d at 1038-40. Although the Ninth Circuit ultimately rescinded its holding that GEICO had acted willfully as a matter of law, it suggested for purposes of the remand that GEICO's interpretation of its FCRA obligations may have been so "implausible" that even evidence of its prior consultation with counsel might not suffice to disprove a willful violation of the Act. Pet. App. 34a.

There should have been no need for a remand in this case, because as a matter of law, under any plausible understanding of the willfulness requirement, GEICO's conduct here simply cannot be deemed willful. Even if this Court ultimately were to disagree with GEICO's interpretation of FCRA's adverse-action notice requirement and adopt the interpretation advanced by the Ninth Circuit, GEICO's view is certainly a reasonable one based on the text, structure and history of the Act. Particularly given the absence of any prior authoritative interpretation, and the district court's agreement with GEICO's legal position, there should be no need for further fact-finding here, because as a matter of law such an objectively reasonable interpretation on an issue of first impression cannot be deemed "willful"—regardless of whether that term means knowing or reckless. GEICO should not be subject to a remand in which it would be required to waive its attorney-client privilege and litigate the subjective good faith of its objectively reasonable view of the law.

1. Even Reckless Disregard Would Require A Showing That The Defendant's Interpretation Of The Act Was Legally Indefensible Or Baseless

The Ninth Circuit alternatively described the objective component of FCRA's "willful[ness]" standard as requiring a showing that the defendant's interpretation was "unreasonable[]," "implausible," "[un]tenable," or "unlikely." Pet. App. 33a-34a. The court's casual use of these similar but distinct adjectives betrays the confused nature of the Ninth Circuit's inquiry. Contrary to the Ninth Circuit's view, different shades of meaning are often critical, and the conflicting terminology used by the Ninth Circuit to describe this crucial element of proof makes reasoned application impossible.

In particular, the Ninth Circuit's suggestion that an "unreasonable[]" interpretation may be prima facie evidence of reckless disregard—and therefore willfulness—impermissibly conflates the heightened "willful[ness]" standard that Congress established in § 1681n(a) for punitive and statutory damages with the lower "negligence" standard Congress provided for solely actual damages in § 1681o. As this Court has explained, an objectively unreasonable interpretation is not the same thing as an objectively reckless one. *See Richland Shoe*, 486 U.S. at 135 n.13 (holding under FLSA that "[i]f an employer acts unreasonably, but not recklessly, in determining its legal obligation," its action would not "be considered willful"). Because Congress did not authorize punitive sanctions for merely negligent violations of the Act, conduct premised on an interpretation of the Act that is not objectively baseless cannot ground a finding of willfulness even if reckless disregard were the applicable *mens rea*.

Indeed, the notion that every "unreasonable" legal position suggests willful noncompliance borders on the ridiculous. If that were true, every agency whose statutory interpretation has been found wanting under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984),[25] has presumptively engaged in a willful distortion of the law. And the adjective "untenable" proves no greater indicator of willfulness as it is frequently hurled between majority and dissenting opinions in this Court

[25] *See, e.g., Rapanos v. United States*, 126 S. Ct. 2208, 2225 (2006) (plurality); *Gen. Dynamics Land Sys., Inc. v. Cline*, 540 U.S. 581, 600 (2004); *Ragsdale v. Wolverine World Wide, Inc.*, 535 U.S. 81, 92 (2002); *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 486 (2001); *NLRB v. Ky. River Cmty. Care, Inc.*, 532 U.S. 706, 713-17 (2001).

without any suggestion that the author believes his colleagues are engaged in reckless or willful behavior.[26]

Whatever the Ninth Circuit meant by its litany of adjectives, "[t]he civil law generally calls a person reckless who acts or (if the person has a duty to act) fails to act in the face of an *unjustifiably high risk* of harm that is either known or so obvious that it should be known." *Farmer v. Brennan*, 511 U.S. 825, 836 (1994) (emphasis added) (*citing* W. Keeton et al., *Prosser and Keeton on Torts* § 34, at 213-14 (5th ed. 1984); Restatement (Second) of Torts § 500 (1965)). For conduct to be reckless, the disregarded risk of doing harm must be "excessive." *Id.* at 837. This Court has also formulated the question as whether the defendant had no "ground for believing [its conduct was] lawful." *United States v. Murdock*, 290 U.S. 389, 394 (1933); *cf. Professional Real Estate Investors, Inc. v. Columbia Pictures Indus., Inc.*, 508 U.S. 49, 60-61 (1993) (holding that a sham lawsuit within the *Noerr-Pennington* doctrine must be "objectively baseless" with no "legal viability"); *Christian v. Mattel, Inc.*, 286 F.3d 1118, 1127 (9th Cir. 2002) (defining a "frivolous" argument in the Rule 11 context as "legally or factually baseless from an objective perspective"). In the context of this case, a reckless interpretation of FCRA must be not merely unreasonable, but utterly without foundation.

This standard effectively precludes liability where, as here, the legal duties the defendant has been accused of violating are not clearly defined, because a person cannot recklessly or willfully disregard an uncertain or ambiguous legal obligation. *See Anderson v. Creighton*, 483 U.S. 635, 640 (1987) (right must be "clearly established" to show

[26] *See, e.g.*, *Halbert v. Michigan*, 545 U.S. 605, 125 S. Ct. 2582, 2596 (2005) (Thomas, J., dissenting) (stating that the majority's interpretation of a specific case was "untenable"); *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 216 (2002) (stating that the approach of one dissenting Justice led to the same "untenable" conclusion reached by another dissenting Justice); *Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 177 (2001) (Stevens, J., dissenting) (stating that the majority's holding rested "on two equally untenable premises").

violation of § 1983); *United States v. Critzer*, 498 F.2d 1160, 1162 (4th Cir. 1974) ("It is settled that when the law is vague or highly debatable, a defendant, actually or imputedly, lacks the requisite intent to violate it."). This principle underlies the mirror requirements that the government must demonstrate a violation of a "right made definite by decision or other rule of law" under the civil rights acts, *see Screws v. United States*, 325 U.S. 91, 103 (1945), and that the plaintiff must demonstrate violation of a "clearly established" right to defeat qualified immunity under § 1983. *See Hope v. Pelzer*, 536 U.S. 730, 739 (2002). In criminal cases, the same principle grounds the concepts of lenity and fair warning. *See United States v. Harriss*, 347 U.S. 612, 617 (1954). And it also applies to preclude punitive damages where the legal right supposedly violated is "novel or otherwise poorly recognized." *Kolstad v. Am. Dental Ass'n*, 527 U.S. 526, 537 (1999) (limiting punitive damages under the ADEA to cases where the employer "'knew or showed reckless disregard'" for whether its conduct was prohibited by the statute) (citation omitted).

2. The Ninth Circuit's Decision Improperly Permits A Finding of Reckless Disregard (And Thus Willfulness) Despite A Defendant's Subjective Good Faith Efforts To Comply With The Law

The Ninth Circuit held that a company can avoid a willfulness finding only if it acts "diligently and in good faith … *and has thereby come to a tenable, albeit erroneous, interpretation*" of FCRA. Pet. App. 34a. Under that standard, a company that acted in good faith may nonetheless be found to have acted willfully just because its interpretation of FCRA is later determined by a court to be "untenable." *See id.* ("[C]onsultation with attorneys *may* provide evidence of lack of willfulness [but it] is not dispositive.") (emphasis added). At best, this turns the statute on its head by requiring the defendant to disprove its subjective recklessness by waiving the attorney-client privilege, and, at worst, it suggests that such proof may be unavailing in any event. Either way it is error. However willfully is interpreted, evidence that the defendant made good faith efforts to comply—including reliance on counsel's advice, however "tenable"—should render the defendant's conduct *not willful* as a matter of law.

To fully appreciate this point, the Court need only look to its own precedent in *Thurston*. There, the Court held that a "knew or showed reckless disregard" standard appropriately defined willfulness under ADEA. *Thurston*, 469 U.S. at 125-26. The Court further found that one of the defendant's interpretations of ADEA was "meritless." *Id.* at 124-25. Nevertheless, the Court held that the defendant had not acted in reckless disregard of its obligations because it in good faith tried to determine its obligations. *Id.* at 129-30. Importantly, the Court's inquiry centered on the *defendant's own actions and mens rea* (or lack thereof)—not the quality of the advice the defendant received from counsel.

This Court has repeatedly held in other contexts that objectively unreasonable (and even reckless) conduct cannot be willful where good faith is present. *See, e.g., Cheek*, 498 U.S. at 202 (a good faith belief that one is not violating the tax laws negates willfulness, "whether or not the claimed belief … is objectively reasonable"); *Walker Process Equip., Inc. v. Food Mach. & Chem. Corp.*, 382 U.S. 172, 177 (1965) (good faith furnishes complete defense to allegations of a knowing and willful factual misrepresentation); *FPC v. Metro. Edison Co.*, 304 U.S. 375, 387 (1938) (the qualification in § 307(c) of the Federal Power Act "that the refusal must be 'willful' fully protects one whose refusal is made in good faith"); *cf. Professional Real Estate Investors*, 508 U.S. at 60-61 (to constitute an actionable "sham" under *Noerr Pennington*, a challenged lawsuit must be both objectively baseless and motivated by a subjective intent to impede competition).

In *Richland Shoe*, the Secretary of Labor urged this Court to adopt a conception of reckless disregard that is virtually identical to the one adopted by the Ninth Circuit in this case. She asserted that an employer should be found to have acted with reckless disregard, and thus to have willfully violated the FLSA, where it "failed to seek a *reliable determination* of its obligations under the FLSA or because the advice it received afforded *no sound basis* for eliminating existing uncertainties about the employer's compliance."[27] This Court disagreed, observing that the Secretary's approach "would … permit a finding of willfulness to be based on nothing more than negligence, or, perhaps, on a completely good-faith but incorrect assumption that a pay plan complied with the FLSA in all respects." 486 U.S. at 135.

The Ninth Circuit's willfulness definition likewise focuses on whether a company sought legal advice, and, if so, whether the advice that it received was "reasonable," "plausible," non-"creative," or "tenable." Pet. App. 33a-34a. The concerns expressed by this Court in *Richland Shoe* are thus implicated equally in this case—and the stakes here are much higher. Under FLSA, the consequence of a willful violation is a one-year extension of the statute of limitations; here, a class of plaintiffs *who suffered no actual harm or damages* could be entitled to recover millions of dollars in statutory and punitive damages. There is also a far greater statutory imperative to delineate the distinction between negligence and willfulness in this case because Congress provided two separate tiers of civil liability under FCRA: actual damages for negligence and punitive sanctions for willfulness. *Compare* 15 U.S.C. § 1681o *with* 15 U.S.C. § 1681n.

Indeed, it is unclear how a company seeking to comply with the Ninth Circuit's view of the law could effectively insulate itself from FCRA's punitive sanctions. It could retain an excellent lawyer with specialized knowledge of

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[27] Brief for the Petitioner, *Whitfield v. Richland Shoe Co.*, 486 U.S. 128 (1988) (No. 86-1520), 1987 U.S. S. Ct. Briefs LEXIS 905, at *62 (emphasis added); *see also* Petition for a Writ of Certiorari, *Richland Shoe*, 486 U.S. 128 (No. 86-1520), 1987 U.S. S. Ct. Briefs LEXIS 907, at *29 (urging the same standard).

FCRA, provide full disclosure to the lawyer, rely in good faith on the lawyer's interpretation of FCRA, convince a federal judge that its interpretation of FCRA is correct, and nonetheless be held to have acted willfully if a court of appeals later determines that the lawyer's interpretation of an issue of first impression fell below some undefined level of incorrectness. Far from encouraging compliance, the Ninth Circuit's standard turns compliance into a game of judicial roulette.

3. GEICO's Eminently Reasonable Interpretation Of FCRA's Adverse Action Requirements Was Not Willful As A Matter Of Law

If an interpretation of law is reasonable, it cannot form the basis of a willful violation. *See Richland Shoe*, 486 U.S. at 135 n.13 ("If an employer acts reasonably in determining its legal obligation, its action cannot be deemed willful …."); *United States v. Whiteside*, 285 F.3d 1345, 1351-53 (11th Cir. 2002) (recognizing that a defendant cannot have "knowingly" submitted a false claim where he relied upon a reasonable interpretation of the law); *Podell v. Citicorp Diners Club, Inc.*, 112 F.3d 98, 104 (2d Cir. 1997) (where conduct is not negligent, a willfulness claim "fails *a fortiori*."); *Copperweld Steel Co. v. Demag-Mannesmann-Bohler*, 578 F.2d 953, 963 n.11 (3d Cir. 1978) ("[A] finding that [defendant] had not negligently misrepresented implies *a fortiori* that the misrepresentations, if any, were not reckless.").[28] That truism underlies both FCRA's two-tier liability scheme and Congress's provision in § 1681m(c) that a defendant's adoption of reasonable compliance procedures is an absolute defense to liability. It also should have caused the Ninth Circuit to affirm the district court, regardless of whether the Ninth Circuit disagreed with GEICO's interpretation of the adverse-action notice provision, and

[28] *Cf. Professional Real Estate Investors*, 508 U.S. at 60 ("Only if challenged litigation is objectively meritless may a court examine the litigant's subjective motivation.").

regardless of the precise *mens rea* required for proof of willfulness. Because GEICO's construction of adverse action was reasonable, the Ninth Circuit should have held that GEICO's conduct was not willful as a matter of law.

Several factors confirm the reasonableness of GEICO's interpretation.

First, and most importantly, for all of the reasons explained in Part I of this Argument, even if this Court ultimately disagrees with GEICO's interpretation of FCRA's adverse-action notice requirement, GEICO's reading surely constitutes an objectively *reasonable* analysis of the text, structure and history of the statute. Even if this Court ultimately concludes that the Ninth Circuit's view is also reasonable (despite GEICO's arguments otherwise), it is certainly not the only rational way to read the statute. Indeed, this case presents numerous *other* interpretations of the provision at issue—most produced with the assistance of reputable counsel. Of the four insurance companies to seek this Court's review on the question, *all four* took different approaches in attempting to comply with the statute.[29] Nor is this proliferation of interpretations limited to private companies with a business interest in the matter. The Federal Reserve's interpretation of the similar definition of "adverse action" in ECOA would itself run afoul of the Ninth Circuit's construction. *See* 12 C.F.R. § 202.2 (providing that a creditor does not necessarily effect an "adverse action" when it offers less than the optimal terms to a consumer). Any ambiguity in the statute that may permit multiple reasonable interpretations would only highlight the Ninth

[29] Neither Safeco nor Hartford Fire Insurance interpreted the "adverse action" definition in § 1681a(k)(1) to apply to initial applications for insurance. *See* Brief of Safeco Petitioners at 38-39; Pet. App. 15a-16a. State Farm Mutual Automobile Insurance apparently operated based on its view that "adverse action" *could* be taken based on an initial *application* for insurance, but not based on an initial insurance *quote* given prior to the filing of a formal application. *See* Brief for Appellee State Farm Mutual Automobile Insurance Co. et al. at 12, *Willes v. State Farm Fire & Cas. Co.*, 143 Fed. Appx. 64 (9th Cir. 2005) (No. 03-35848).

Circuit's error in deeming GEICO's position one of willful noncompliance.

Second, the reasonableness of a legal interpretation depends in part on whether the law was well settled. *See, e.g.*, *Saucier v. Katz*, 533 U.S. 194, 202 (2001) (whether an officer was reasonable and therefore entitled to qualified immunity from a § 1983 suit is assessed in light of legal rules that were "clearly established" at time of action). In this case, the interpretation of FCRA's adverse action provision was an issue of first impression—not just in the Ninth Circuit, but within federal jurisprudence. Moreover, there was no authoritative administrative guidance on the question.[30] The absence of prior authoritative judicial or administrative interpretations renders it particularly difficult to conclude that GEICO's first-impression interpretation of FCRA's adverse-action notice requirement was so unreasonable as to be willfully noncompliant. *See Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 423-24 (1978) (affirming Fourth Circuit's holding that EEOC's action in bringing suit could not be unreasonable or meritless because the case was based on an issue of first impression).[31]

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[30] A March 1, 2000 FTC informal staff opinion letter, cited by Edo in the Ninth Circuit, opined that an "adverse action" occurs if an applicant's rate is higher than "he or she would have been charged if the consumer report had been more favorable." Letter from Hannah A. Stires to James M. Ball (Mar. 1, 2000), *available at* http://www.ftc.gov.os/statutes/fcra/ball.htm. The letter cautioned, however, that the opinion expressed was "not binding on the Commission." *Id*.

[31] *See also Bercovitch v. Baldwin Sch., Inc.*, 191 F.3d 8, 11-12 (1st Cir. 1999) (affirming district court's denial of attorneys' fees where complaint raised issues of first impression and was therefore not frivolous or unreasonable); *Princeton Univ. Press v. Mich. Document Servs., Inc.*, 99 F.3d 1381, 1392 (6th Cir. 1996) (reversing district court's finding of willfulness where law regarding doctrine at issue was so unsettled that defendant's interpretation could not be unreasonable), *cert. denied*, 520 U.S. 1156 (1997); *Flores v. Carnival Cruise Lines*, 47 F.3d 1120, 1127 (11th Cir. 1995) (holding that because case was one of first impression, defendant did not exhibit willfulness necessary under admiralty law to entitle plaintiff to punitive damages); *Reich v. Gateway Press, Inc.*, 13

Third, and perhaps most strikingly, *the district court agreed with GEICO's interpretation of the law*. Pet. App. 47a. As this Court has recognized, "[a] winning lawsuit is by definition a reasonable effort." *Prof'l Real Estate Investors*, 508 U.S. at 60 n.5. While the district court was reversed on appeal, the endorsement of an Article III judge is powerful evidence of reasonableness. *Cf.* Restatement (Second) of Torts § 675 cmt. B (1977) ("[A] decision by a competent tribunal in favor of a person initiating civil proceedings is conclusive evidence of probable cause. This is true although it is reversed on appeal and finally terminated in favor of the person against whom the proceedings were brought.").

Regardless of whether this Court ultimately agrees with GEICO's reading of the statute, the endorsement of the district court, absence of prior authoritative judicial or administrative guidance, plethora of diverse alternative interpretations, as well as the objective reasonableness of GEICO's reading judged on its own merits, compel the conclusion that GEICO did not willfully violate the Act. GEICO should not be required to waive its attorney-client privilege and litigate its subjective good faith in these circumstances.

CONCLUSION

For the reasons set forth, this Court should reverse the judgment of the Court of Appeals and dismiss Edo's claim against GEICO.

F.3d 685, 702-03 (3d Cir. 1994) (declining to find a willful violation in a case of first impression under FLSA).

Respectfully submitted,

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STATUTORY ADDENDUM

15 U.S.C. § 1681a (2000). Definitions; rules of construction

* * *

(k) Adverse action.

(1) Actions included. The term "adverse action"—

(A) has the same meaning as in section 701(d)(6) of the Equal Credit Opportunity Act [15 USCS § 1691(d)(6)]; and

(B) means—

(i) 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, in connection with the underwriting of insurance;

(ii) a denial of employment or any other decision for employment purposes that adversely affects any current or prospective employee;

(iii) a denial or cancellation of, an increase in any charge for, or any other adverse or unfavorable change in the terms of, any license or benefit described in section 604(a)(3)(D) [15 USCS § 1681b(a)(3)(D)]; and

(iv) an action taken or determination that is—

(I) made in connection with an application that was made by, or a transaction that was initiated by, any consumer, or in connection with a review of an account under section 604(a)(3)(F)(ii) [15 USCS § 1681b(a)(3)(F)(ii)]; and

(II) adverse to the interests of the consumer.

* * *

15 U.S.C. § 1681m (2000). Requirements on users of consumer reports

(a) Duties of users taking adverse actions on the basis of information contained in consumer reports. If any person takes any adverse action with respect to any consumer that is based in whole or in part on any information contained in a consumer report, the person shall—

(1) provide oral, written, or electronic notice of the adverse action to the consumer;

* * *

15 U.S.C. § 1681n (2000). Civil liability for willful noncompliance

(a) In general. Any person who willfully fails to comply with any requirement imposed under this title [15 USCS §§ 1681 et seq.] with respect to any consumer is liable to that consumer in an amount equal to the sum of--

(1) (A) any actual damages sustained by the consumer as a result of the failure or damages of not less than $100 and not more than $1,000; or

(B) in the case of liability of a natural person for obtaining a consumer report under false pretenses or knowingly without a permissible purpose, actual damages sustained by the consumer as a result of the failure or $1,000, whichever is greater;

(2) such amount of punitive damages as the court may allow; and

(3) in the case of any successful action to enforce any liability under this section, the costs of the action together with reasonable attorney's fees as determined by the court.

(b) Civil liability for knowing noncompliance. Any person who obtains a consumer report from a consumer reporting agency under false pretenses or knowingly without a permissible purpose shall be liable to the consumer reporting agency for actual damages sustained by the consumer reporting agency or $ 1,000, whichever is greater.

* * *

15 U.S.C. § 1681o (2000). Civil liability for negligent noncompliance

(a) In general. Any person who is negligent in failing to comply with any requirement imposed under this title [15 USCS §§ 1681 et seq.] with respect to any consumer is liable to that consumer in an amount equal to the sum of—

(1) any actual damages sustained by the consumer as a result of the failure; and

(2) in the case of any successful action to enforce any liability under this section, the costs of the action together with reasonable attorney's fees as determined by the court.

* * *

15 U.S.C. § 1681q (2000). Obtaining information under false pretenses

Any person who knowingly and willfully obtains information on a consumer from a consumer reporting agency under false pretenses shall be fined under title 18, United States Code, imprisoned for not more than 2 years, or both.

15 U.S.C. § 1681r (2000). Unauthorized disclosures by officers or employees

Any officer or employee of a consumer reporting agency who knowingly and willfully provides information concerning an individual from the agency's files to a person not authorized to receive that information shall be fined under title 18, United States Code, imprisoned for not more than 2 years, or both.