Nos. 06-84, 06-100

IN THE
Supreme Court of the United States

SAFECO INSURANCE CO. OF AMERICA, *et al.*,
Petitioners,
v.

CHARLES BURR, *et al.*,
Respondents.

GEICO GENERAL INSURANCE CO., *et al.*,
Petitioners,
v.

AJENE EDO,
Respondent.

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

BRIEF OF WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Amicus curiae addresses the following question only:

Whether the Ninth Circuit improperly expanded § 1681m of the Fair Credit Reporting Act 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?

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BRIEF OF WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

INTERESTS OF *AMICUS CURIAE*

The Washington Legal Foundation (WLF) is a non-profit public interest law and policy center with supporters in all 50 states.[1] WLF devotes a substantial portion of its resources to defending and promoting free enterprise, individual rights, and a limited and accountable government.

In particular, WLF has regularly appeared in this and other federal courts to oppose unwarranted civil damage actions against those involved in the dissemination and use of consumer information. *See, e.g., Trans Union LLC v. Federal Trade Comm'n*, 245 F.3d 809 (D.C. Cir. 2001), *cert. denied*, 534 U.S. 915 (2002). WLF also has published articles addressing some of the Fair Credit Reporting Act questions presented in this matter. *See, e.g.,* Robert Detlefsen, *Court's Ruling Applying Credit Act to Insurers Legally Unsupportable*, WLF LEGAL BACKGROUNDER, Jan. 27, 2006, available at www.wlf.org/upload/012706LBDetlefsen.pdf.

WLF believes that the free and efficient flow of consumer information is vital to the health of the American economy. WLF is concerned that the Ninth Circuit's decision, if allowed to stand, will interfere significantly with that flow by increasing the costs of obtaining such information and by creating considerable uncertainty among users of such information regarding their obligations under the Fair Credit Reporting Act (FCRA). WLF believes that as a result of the

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[1] Pursuant to Supreme Court Rule 37.6, WLF states that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than WLF and its counsel, contributed monetarily to the preparation and submission of this brief.

Ninth Circuit decision, consumers will be sent information that they neither want nor need, and the price of insurance will rise while its availability decreases.

WLF is filing this brief with the consent of all parties. Copies of the consent letters have been lodged with the Court.

STATEMENT OF THE CASE

Under the FCRA, a user of consumer reports must notify a consumer if the user "takes any adverse action with respect to [the] consumer that is based in whole or in part on any information contained in a consumer report." 15 U.S.C. § 1681m(a)(1). The FCRA defines an "adverse action" as, *inter alia*, "an increase in any charge for . . . any insurance." 15 U.S.C. § 1681a(k)(1)(B)(i).

It is uncontested that Petitioner GEICO General Insurance Co. and related corporations (collectively, "GEICO") are "users of consumer reports."[2] Like virtually all insurance companies, GEICO uses credit information gleaned from consumer reports in pricing many of its products; it finds that doing so permits it to predict with a greater degree of accuracy the extent to which an insured is likely to make claims on his or her policy. It is also uncontested that when Respondent Ajene Edo applied for automobile insurance, GEICO considered Edo's credit score in the course of pricing his policy. The issue presented is whether GEICO should be

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[2] Because WLF is focusing on an issue raised only in *GEICO General Insurance Co. v. Edo*, No. 06-100, this brief does not discuss facts relevant to the consolidated case, *Safeco Insurance Co. of America v. Burr*, No. 06-84. All citations herein to the Petition Appendix ("Pet. App.") are to the appendix attached to the petition filed in No. 06-100.

deemed to have taken "adverse action" with respect to Edo when it offered him insurance.

In December 2000, Edo called GEICO and requested a rate quote for automobile insurance. After obtaining a "credit score" for Edo from a consumer reporting agency, GEICO offered Edo an insurance policy with its standard-rate company, GEICO Indemnity Co. – an offer that Edo accepted. GEICO determined that the rate offered to Edo (whose credit score was better-than-average) was no higher than the rate he would have received had his credit report not been taken into account. Pet. App. 14a. Based on that determination, GEICO concluded (in accordance with its then-standard policy for addressing "adverse action" issues) that it had not taken any "adverse action" with respect to Edo within the meaning of 16 U.S.C. § 1681a(k)(1)(B)(i). Accordingly, GEICO did not send Edo notice of an adverse action.

Edo thereafter filed a putative class action against GEICO under the FCRA. Edo alleged that various GEICO entities violated § 615(a) of the FCRA, 15 U.S.C. § 1681m(a), by failing to provide notice of adverse action taken against him. Edo alleged that the rate offered to him constituted "adverse action" because he would have been offered a lower rate if he had had the highest-possible credit score. Although Edo did not claim to have suffered injury, he claimed entitlement to statutory damages of $100 per class member plus attorney fees because, he alleged, GEICO's violation was "willful[]" within the meaning of § 616(a) of the FCRA, 15 U.S.C. § 1681n(a).

In February 2004, the district court granted summary judgment to all defendants and dismissed the action. Pet. App. 37a-48a. The district court ruled, *inter alia*, that GEICO Indemnity had not taken an "adverse action" against Edo because "Plaintiff admits the premium charged to him by

GEICO Indemnity would have been the same even if GEICO Indemnity did not consider information in Plaintiff's consumer credit history." *Id.* 46a.

The Ninth Circuit reversed. Pet. App. 1a-36a. It held that GEICO had, in fact, taken "adverse action" against Edo, stating:

> FCRA does not limit its adverse action notice requirement to actions that result in the customer paying a higher rate than he would otherwise be charged because his credit rating is worse than the average customer's. Instead, it requires such notices whenever a consumer pays a higher rate because his credit rating is less than the top potential score. In other words, if the consumer would have received a lower rate for his insurance had the information in his consumer report been more favorable, an adverse action has been taken against him.

Id. 20a-21a. The Ninth Circuit held that because Edo would have received a lower rate had he had the highest possible credit score, GEICO's rate quote constituted an adverse action and triggered § 1681m(a)'s notice requirement. *Id.* 21. After broadly defining what it means to "willfully" violate the FCRA notice requirement, the Ninth Circuit remanded the case to the district court for a determination of whether GEICO had "willfully" violated that requirement. *Id.* 30a-36a.

SUMMARY OF ARGUMENT

The Ninth Circuit's expansive definition of "adverse action" is inconsistent with both the structure and purpose of the FCRA. The appeals court based its definition on what it claimed was a straightforward understanding of the word "increase";[3] it deemed a quoted rate an "increase[d]" rate if it was higher than the rate available to a person with a perfect credit score. Pet. App. 16a-17a, 20a-21. But the statute says no such thing. Indeed, although § 1681a(k)(1)(B)(i) uses the word "increase," it includes no benchmark reference whatsoever. That is, although the provision makes reference to an "increase" in insurance rates, it does not answer the question, "What is the rate from which an increase/decrease is to be measured?"

Although the failure to include language making explicit reference to such a benchmark creates a potential statutory ambiguity, an examination of the structure and purpose of the FCRA makes clear that the relevant benchmark rate is the rate an insurance applicant would have been charged had his or her credit score not been taken into account. Thus, an insurance applicant does not face "an increase in any charge" (and thus no "adverse action") if the quoted rate is the same or lower than the rate (s)he would have been charged had his or her credit score not been taken into account. Because GEICO quoted an insurance rate to Edo that was the same rate it would have quoted had it never consulted Edo's insurance score, GEICO did not take any adverse action and thus was under no obligation to notify Edo of any such adverse action.

When construing the responsibilities imposed by the FCRA on insurance companies and other users of consumer reports, it is important to bear in mind why Congress imposed such responsibilities. Congress was *not* responding to alleged irresponsible use of consumer reports by the business community. Rather, when it adopted the FCRA in 1970,

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[3] The FCRA defines an "adverse action" as including "an *increase* in any charge for . . . any insurance." 15 U.S.C. § 1681a(k)(1)(B)(i) (emphasis added).

Congress's principal concern was to ensure the accuracy and fairness of reports issued by consumer reporting agencies. The FCRA imposed "adverse action" notification requirements on report users not because Congress deemed adverse actions to be in any way blameworthy, but because such notification would alert otherwise-unsuspecting consumers to negative information contained in those reports regarding their credit worthiness. Congress determined that if consumers were so informed, they would be in a position to contest negative credit information they deemed inaccurate and/or to take steps to rehabilitate their credit profile.

That legislative purpose indicates that Congress intended to impose notification requirements only when a consumer report user has acted in response to *negative* information contained in a report – otherwise, there is nothing in the report that needs to be "fixed." Yet, under the Ninth Circuit's interpretation, even consumers such as Edo who have good credit reports – just not as good a report as a multi-millionaire would have – must be sent "adverse action" notices any time they would have been quoted a lower insurance rate if they had had a perfect credit score. But a less-than-perfect credit score is no indication that one's file contains negative information; it may simply reflect that one is thrifty and has engaged in fewer credit transactions than creditors deem optimal. Under those circumstances, requiring consumer report users to provide "adverse action" notification serves none of Congress's intended purposes. If, alternatively, notification were required whenever consulting a consumer report results in an insurance rate quote that is higher than if no report had been consulted, Congress's purposes would be served – because under those circumstances it is highly likely that the report contains information that a reasonable consumer would deem "negative" and thus a cause for concern.

The improbability that Congress intended to require that "adverse action" notice be sent to millions of consumers with good credit is heightened when one considers the likely counter-productiveness of such notice. Consumers who receive such notices on a regular basis are likely to begin ignoring them, thereby potentially missing an opportunity to correct erroneous credit information. Alternatively, consumers with good credit who have received such notices may inaccurately conclude that their consumer reports contain negative information and may refuse business requests for permission to run a credit check, a refusal that almost surely would be against their financial interest.

The *structure* of the FCRA also supports the conclusion that insurers are not required to provide "adverse action" notice unless negative information in a consumer report caused them to quote a higher rate than they would have quoted had they not consulted the report. As noted above, the FCRA imposed the notification requirement not as a means of inhibiting companies from taking adverse actions against consumers, but as a means of alerting consumers that their credit reports contain negative information. Accordingly, there is no reason to conclude that Congress would impose stricter notification requirements on one industry than on another, because Congress's purpose (alerting consumers) is identical with respect to all users of consumer reports, regardless what industry they might happen to be in. Congress recently adopted the Fair and Accurate Credit Transactions Act of 2003 (FACTA), 108 Pub. L. 159, 117 Stat. 1952 (2003), to amend the FCRA to clarify that a provider of credit who runs a credit check on a consumer need not provide FCRA notice unless the use of credit information results in an offer of credit with terms that are "materially less favorable then the most favorable terms available to a substantial portion of [the company's] consumers." The Ninth Circuit's standard – which requires that notice be sent to all but a small minority of insurance consumers with the very best credit scores – is wholly inconsistent with the FACTA standard. There is no plausible reason to suppose that Congress intended to impose so much stricter notification requirements on the insurance industry when notice from insurers and notice from creditors serve an identical congressional purpose: to alert consumers to negative credit information.

The Ninth Circuit's standard is also inconsistent with the commonly understood meaning of an "adverse" action. Certainly, the average person would not think that she has been treated "adverse[ly]" simply because it is theoretically possible that she could have received better treatment, if she nonetheless has been treated as well or better than the typical person in the large group of which she is a member. Indeed, when this Court has used the phrase "adverse action," as it has done with some frequency in connection with employment discrimination law, it has never used it in the manner that the Ninth Circuit has attributed to Congress in connection with the FCRA.

Finally, the legislative history of the FCRA is consistent with the understanding that GEICO did not take any "adverse action" with respect to Edo. An explicit definition of "adverse action" was not added to the FCRA until 1996; but nothing in the pre-1996 statutory language or committee reports supports the Ninth Circuit's view that Congress intended to require notice to consumers who, like Edo, were not disadvantaged by any the information contained in their credit reports.

ARGUMENT

I. THE NINTH CIRCUIT'S EXPANSIVE DEFINITION OF "ADVERSE ACTION" IS INCONSISTENT WITH THE STRUCTURE AND PURPOSE OF THE FCRA

The FCRA defines an "adverse action" as including "an increase in any charge for . . . any insurance." 15 U.S.C. § 1681a(k)(1)(B)(i). The Ninth Circuit concluded that an "adverse action" occurs "whenever a consumer pays a higher rate because his credit rating is less than the top potential score." Pet. App. 20a. The appeals court said that conclusion was mandated by the plain meaning of the word "increase," which "means to make something greater." *Id.* 16a (citing four dictionary definitions of the word "increase"). The court said that the rate offered to Edo was an "increase" over the rate he would have been offered if he had a perfect credit score – and thus that GEICO was required to send Edo an "adverse action" notice by virtue of § 1681m(a), which requires such notice when a person takes any "adverse action" with respect to a consumer that is "based in whole or in part on any information contained in a consumer report." *Id.* 20a-21a.

But that construction of § 1681a(k)(1)(B)(i) required the Ninth Circuit to read into the statute words that simply are not there. In particular, the statute does not state that the rate an insurance applicant "would have been offered if he had a perfect credit score" is the benchmark against which an "increase" is to be measured. Indeed, the statute includes no benchmark reference whatsoever. That is, although the statute makes reference to an "increase" in insurance rates, it does not answer the question, "What is the rate from which an increase/decrease is to be measured."

The failure to include language making explicit reference to such a benchmark creates a potential ambiguity in the meaning of § 1681a(k)(1)(B)(i). However, any ambiguity is eliminated when one considers the "adverse action" issue in light of the overall structure and purpose of the FCRA. As this Court has explained, "Ambiguity is a creature not of definitional possibilities but of statutory context." *Brown v. Gardner*, 513 U.S. 115, 118 (1994). A reviewing court should not "confine itself to examining a particular statutory provision in isolation," because "[t]he meaning – or ambiguity – of certain words or phrases may only become evident when placed in context." *Food and Drug Administration v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132 (2000). It is a "fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *Davis v. Michigan Dep't of Treasury*, 489 U.S. 803, 809 (1989).

An examination of the structure and purpose of the FCRA makes clear that the relevant benchmark rate, for purposes of § 1681a(k)(1)(B)(i), is the rate an insurance applicant would have been charged had his or her credit score not been taken into account. Thus, an insurance applicant does not face "an increase in any charge" (and thus no "adverse action") if the quoted rate is the same or lower than the rate (s)he would have been charged had his or her credit score not been taken into account. Because GEICO quoted an insurance rate to Edo that was the same rate it would have quoted had it never consulted Edo's credit score, GEICO did not take any adverse action and thus was under no obligation to notify Edo of any such adverse action.[4]

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[4] WLF takes no position on an issue raised below but not at issue before this Court: whether an insurance company can ever be said to

(continued...)

A. Congress's Purposes in Adopting the FCRA Indicate that the Ninth Circuit Chose an Inappropriate Benchmark for Determining Whether There Has Been an "Increase" in a Charge for Insurance

Congress's purposes in adopting the FCRA are set forth in 15 U.S.C. § 1681:

> **(a) Accuracy and fairness of credit reporting.** The Congress makes the following findings:
>
> (1) The banking system is dependent upon fair and accurate reporting. Inaccurate credit reports directly impair the efficiency of the banking system, and unfair credit reporting methods undermine the public confidence which is essential to the continued functioning of the banking system.
>
> (2) An elaborate mechanism has been developed for investigating and evaluating the credit worthiness, credit standing, credit capacity, character, and general reputation of consumers.
>
> (3) Consumer reporting agencies have assumed a vital role in assembling and evaluating consumer credit and other information on consumers.

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[4](...continued)
have undertaken "an increase in any charge for . . . any insurance" within the meaning of § 1681a(k)(1)(B)(i), when a new insurance policy is at issue and the company has never previously quoted a rate to the customer. Given that the issue is not directly raised, WLF urges the Court to avoid expressing a view on the issue in its decision. Indeed, in light of the huge potential liability facing insurance companies from suits alleging willful failure to provide "adverse action" notices, WLF urges the Court to limit its ruling regarding what constitutes an "adverse action" to the precise issue raised by GEICO.

(4) There is a vital need to insure that consumer reporting agencies exercise their grave responsibilities with fairness, impartiality, and with respect for the consumer's right to privacy.

(b) Reasonable procedures. It is the purpose of this title to require that consumer reporting agencies adopt reasonable procedures for meeting the needs of commerce for consumer credit, personnel, insurance, and other information in a manner which is fair and equitable to the consumer, with regard to the confidentiality, accuracy, relevancy, and proper utilization of such information in accordance with the requirements of this title.

As § 1681 makes clear, the FCRA was adopted for the principal purpose of regulating the conduct of credit reporting agencies, not the conduct of companies that use data supplied to them by credit reporting agencies. Congress mandated that consumer reporting agencies adopt "reasonable procedures" designed to ensure the accuracy and fairness of their reports. Requirements imposed by the FCRA on report users must be viewed in that light: the purpose of those requirements was to assist in the effort to improve the accuracy and fairness of reports, not to limit users' rights to draw adverse inferences from the reports. The FCRA imposed "adverse action" notification requirements on report users not because Congress deemed adverse actions to be in any way blameworthy, but because such notification would alert otherwise-unsuspecting consumers to negative information contained in those reports regarding their credit worthiness. Congress determined that if consumers were so informed, they would be in a position to contest negative credit information they deemed inaccurate and/or to take steps to rehabilitate their credit profile. *See generally, TRW, Inc. v. Andrews,* 537 U.S. 19, 23 (2001); S.

Rep. 91-517 (Nov. 5, 1969) at 1-2 ("The purpose of the fair credit reporting bill is to prevent consumers from being unjustly damaged because of inaccurate or arbitrary information in a credit report. . . . [T]he consumer has a right to know when he is being turned down for credit, insurance, or employment because of adverse information in a credit report and to correct any erroneous information in his credit file.").

That legislative purpose presupposes, then, that the information that consumers have a right to see is *negative* information for which consumers might have reason to seek correction. As the Senate Committee on Banking and Currency explained the legislative concern that Congress sought to address in adopting the "adverse action" notification requirement:

> One problem which the hearings on S. 823 identified is the inability at times of the consumer to know he is being damaged by an adverse credit report. Standard agreements between credit reporting agencies and the users of their reports prohibit the user from disclosing the contents of the report to the consumer. In some cases, the user is even precluded from mentioning the name of the credit reporting agency. Unless the person knows he is being rejected for credit or insurance or employment because of a credit report, he has no opportunity to be confronted with the charges against him and tell his side of the story.

Id. at 3.

Neither the statutory language nor the FCRA's legislative history suggests that Congress sought to require that consumers be notified regarding innocuous information to which they are extremely unlikely to object – such as that the consumer is not a multi-millionaire. Yet, the Ninth Circuit's definition of "adverse action" will require just such notifications. According to the Ninth Circuit, even consumers such as Edo who have good credit reports – just not as good a report as a multi-millionaire would have – must be sent "adverse action" notices any time they would have been quoted a lower insurance rate if they had had a perfect credit score. But a less-than-perfect credit score is no indication that one's file contains negative information; it may simply reflect that one is thrifty and has engaged in fewer credit transactions than creditors deem optimal. Under those circumstances, requiring consumer report users to provide "adverse action" notification serves none of Congress's intended purposes.

The benchmark proposed by GEICO – that the "adverse action" notification requirement is not triggered unless information contained in a consumer report causes an insurance rate to "increase" above the rate that would have been charged if no report had been consulted – is far more consistent with the purposes Congress sought to achieve by imposing that requirement. Under those circumstances, it is far more likely that the report contains information that a reasonable consumer would deem "negative" and thus a cause for concern. Moreover, the proposed benchmark – the rate that would have been charged if no report had been consulted – is not some "made up" number with no basis in reality. Rather, as the Ninth Circuit recognized, GEICO does in fact compute a "'neutral' credit weight" that is used in determining insurance rates for many of its customers. Pet. App. 13a.[5] Accordingly, by calculating an insurance rate for a customer

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[5] In particular, GEICO applies the "neutral" credit weight to all customers in those States that prohibit or restrict the use of customer-specific credit reports in calculating insurance rates. The "neutral" credit weight is in essence the average credit rating of all consumers.

that takes into account the customer's credit score, and then recalculating an insurance rate for the customer using a "neutral" credit weight, companies such as GEICO can quickly determine whether use of the credit score has caused the insurance rate to be higher than it would have been had no credit report been consulted. Sending "adverse action" notices to customers falling within that category provides notice to the very consumers whom the FCRA was intended to protect.

The evidence is overwhelming that adopting the Ninth Circuit's interpretation of "adverse action" will result in "adverse action" notices being sent to millions of consumers with very good credit scores. At many insurance companies, fewer than 15% of insureds receive the best rate available. *See* Michigan Office of Financial and Insurance Services, *The Use of Insurance Credit Scoring in Automobile and Homeowners Insurance,* Apps. C & D (2002). No doubt some of the 85% of consumers who are quoted higher rates fail to qualify for the best rate for reasons unrelated to their credit score. But those figures nonetheless underscore the anomaly of the Ninth Circuit's decision: it will result in millions of consumers being "alerted" to non-existent credit problems, a result not contemplated or intended by the FCRA. Indeed, such "false alarms" are likely to be counter-productive. Consumers who receive such notices on a regular basis are likely to begin ignoring them, thereby potentially missing an opportunity to correct erroneous credit information. As the Federal Trade Commission has acknowledged, "[I]f you give notices too widely and in too many circumstances, then it . . . becomes something that people ignore." *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,* 198th Cong. 95-96 (2003) (testimony of J. Howard Beales, III, Director, Bureau of Consumer Protection, U.S. Federal Trade Comm'n).

Moreover, other consumers who receive such notices may erroneously conclude that there really is something wrong with their credit rating. They may respond by refusing business requests for permission to run a credit check. For Edo and many other consumers with above-average credit scores, efforts to prevent business from learning their credit scores could only work to their financial disadvantage.

In sum, the interpretation of § 1681a(k)(1)(B)(i) adopted by the Ninth Circuit is implausible because it runs counter to the essential purpose of the FCRA: to alert consumers whenever negative information in their credit histories is interfering with their ability to obtain insurance. Indeed, by requiring "adverse action" notices to be sent in millions of instances in which no such negative information exists, the Ninth Circuit is undermining the purpose of the notice requirement by discouraging appropriate action by those whose reports really do contain negative information.

B. The Ninth Circuit's Decision Is Inconsistent with the Structure of the FCRA, Which Indicates an Intent to Impose Similar Notification Requirements on All Users of Consumer Reports, Without Regard to the Industry Involved

The *structure* of the FCRA also supports the conclusion that insurers are not required to provide "adverse action" notice unless negative information in a consumer report caused them to quote a higher rate than they would have quoted had they not consulted the report.

The FCRA requires users of consumer reports in a wide variety of industries to notify consumers whenever information contained in a report leads the user to treat the consumer less favorably. Users explicitly named in the FCRA include those using consumer reports in connection with insurance underwriting decisions (§ 1681a(k)(1)(B)(i)); hiring and other employment-related decisions (§ 1681a(k)(1)(B)(ii)); granting license benefits (§ 1681(a)(k)(1)(B)(iii)); and extending credit (§ 1681a(k)(1)(A). The FCRA also includes a miscellaneous category that extends "adverse action" notification requirements to anyone using credit reports in connection with an action taken or determination made in response to any "application," "transaction," or "review of an account" initiated by a consumer. *See* § 1681a(k)(1)(B)(iv).

But as noted above, Congress did not impose these notification requirements as a means of inhibiting users of consumer reports from taking adverse actions against consumers. Rather, the purpose of such notification requirements was *precisely the same* with respect to all the various types of users covered by the FCRA: to alert consumers that their credit reports contain negative information, thereby giving those consumers an opportunity to respond appropriately to the source of the consumer report. 15 U.S.C. § 1681(a) & (b). Because Congress's purpose (alerting consumers) is identical with respect to all users of consumer reports, there is no reason to expect that Congress would impose stricter notification requirements on one industry than on another. Rather, one would expect that the level of "negativity" required to trigger a notification requirement would be relatively uniform from industry to industry. The Ninth Circuit's decision is inconsistent with this basic structure of the FCRA because it would impose much stricter notification requirements on the insurance industry than on providers of credit.

It is important to recognize that when the FCRA was adopted in 1970, the principal use of consumer reports was to determine whether to do business with a consumer at all, not to determine pricing. Thus, although pricing issues have always been subject to the FCRA, Congress was focused primarily on refusals to deal when it drafted the FCRA. *See, e.g.*, S. Rep. 91-517 (1969) at 1 (purpose of legislation was to ensure notification of the individual "whenever an individual is *rejected* for credit, insurance or employment because of an adverse credit report.") (emphasis added). In the ensuing years, there was some uncertainty regarding when providers of credit were required to provide notice of "adverse action" in cases in which they did not altogether refuse to extend credit. By at least 1996, it had been clearly established that the "adverse action" notification requirements were not triggered in at least one such circumstance: when a consumer applies for credit under one set of terms, a credit provider (after consulting a credit report) responds by offering credit on less generous terms, and the consumer accepts the counteroffer.[6]

Finally, Congress sought to provide further clarification with respect to notice requirements imposed on providers of credit that use consumer reports, by adopting FACTA in 2003. FACTA amends the FCRA to clarify that a provider of credit who runs a credit check on a consumer need not provide FCRA notice unless the use of credit information results in an offer of credit with terms that are "materially less favorable than the most favorable terms available to a substantial portion of [the company's] consumers." 15 U.S.C. § 1681m(h)(1).[7] In

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[6] That position was set forth in regulations adopted by the Federal Reserve under the Equal Credit Opportunity Act ("ECOA"). 12 C.F.R. § 202.2. The FCRA was then amended in 1996 to make clear that, with respect to providers of credit, "adverse action" was defined by reference to the definition in § 701(d)(6) of the ECOA, 15 U.S.C. § 1691(d)(6). *See* 15 U.S.C. § 1681a(k)(1)(A).

[7] Technically, the notification requirement imposed by § 1681m(h)(1) is separate from and in addition to "adverse action"

(continued...)

other words, Congress has clarified that a provider of credit is not required to notify a consumer simply because, based on his or her credit score, the consumer was offered credit terms that are not the absolutely best terms the provider of credit ever offers. Rather, notice is required only when the terms offered are "materially less favorable" than terms that are regularly offered to substantial numbers of other customers.

Because pricing issues have arisen less frequently in the insurance context, Congress has not had occasion to provide further clarification regarding when an insurance company's variable pricing policy triggers § 1681m(a)'s "adverse action" notification requirements. Nonetheless, for all the reasons stated above, there is no reason to conclude that Congress intended to impose significantly more onerous notification requirements on the insurance industry than on providers of credit. Were FACTA's rationale applied in this case, there can be no doubt that GEICO would not be required to provide "adverse action" notice to Edo: Edo may not have been quoted insurance rates that were as favorable as those that would have been offered to a multi-millionaire with an identical driving record, but the more favorable terms were not "materially" so and were not available to a "substantial" portion of GEICO's customers.

In contrast, applying the Ninth Circuit's definition of "adverse action" – which requires that notice be sent to all but a minority of insurance consumers with the very best credit scores – is wholly inconsistent with FACTA's rationale.

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[7](...continued)
notification requirements imposed on credit providers (and all other users of consumer reports) by § 1681m(a). However, the language and history of FACTA indicate that a credit provider that complies with the § 1681m(h)(1) notification requirement will also be deemed to have complied with the § 1681m(a) notification requirements.

There is no plausible reason to suppose that Congress intended to impose so much stricter notification requirements on the insurance industry when notice from insurers and notice from creditors serve an identical congressional purpose: to alert consumers to negative credit information contained in consumer reports. We recognize that FACTA was not adopted until 2003, well after the FCRA imposed "adverse action" notification requirements on insurers and well after the events giving rise to this lawsuit. Nonetheless, given the history and structure of the FCRA and that FACTA was widely understood as a clarification of existing requirements, there is every reason to consider the FACTA amendments when determining what "adverse action" notification requirements Congress intended to impose on insurers. As this Court has explained, "[I]t is well established that a court can, and should, interpret the text of one statute in the light of text of surrounding statutes, *even those subsequently enacted*." *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765, 786 (2000) (emphasis added).

The Ninth Circuit's decision is also inconsistent with another important aspect of the FCRA's overall structure. The FCRA requires that users taking "adverse actions" on the basis of information contained in consumer reports must provide consumers with:

(1) notice of the adverse action;

(2) the name, address, and telephone number of the consumer reporting agency that furnished the consumer report, and a statement that the consumer reporting agency cannot explain why adverse action was taken because it was the user, not the agency, that took the adverse action; and

(3) notice of the consumer's right to obtain a free copy of the consumer report and to dispute, with the consumer reporting agency, the accuracy or completeness of information contained in the consumer report.

15 U.S.C. § 1681m(a).

But the Ninth Circuit attempted to impose additional reporting requirements on insurers, beyond those explicitly required by the statute. Under the guise of interpreting what it means to provide "notice" of the adverse action, the appeals court held that insurers were also required to "describe the [adverse] action, specify the effect of the action upon the consumer, and identify the parties or parties taking the action." Pet. App. 24a.[8] The court simply made up out of whole cloth its requirement that the notice "specify the effect of the action on the consumer." The only requirement included in the statute is that the insurer must provide "notice" – which cannot reasonably be interpreted to mean anything more than a statement that, based on information in the consumer report, the insurer has decided to "increase" the charge for insurance. Such notice is fully adequate to serve the FCRA's purpose: to put consumers on notice that there is negative information in their consumer reports that they may wish to investigate.

It is not difficult to discern why the Ninth Circuit may have felt compelled to make up additional notification requirements. Given that the Ninth Circuit's holding will require that "adverse action" notices be sent to millions of consumers with excellent credit whose consumer reports

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[8] In requiring that the party or parties taking the action be identified, the Ninth Circuit made clear that when a family of insurance companies was involved in the transaction, the notice must specify the role played by each corporate entity. *Id.* 26a.

contain no "negative" information, the Ninth Circuit undoubtedly realized that notices that did no more than track the requirements of § 1681m(a) would lead to mass confusion among consumers. The court apparently hoped to lessen that confusion by imposing additional notice requirements on the user, such as that the user "specify" the effect of the action on the consumer.[9]

The Ninth Circuit's perceived need to make up additional notification requirements suggests that Congress had something entirely different in mind when it defined "adverse action." That Congress required little more by way of notice than a simple "notice of adverse action," § 1681m(a)(1), is a strong indication that Congress contemplated that notice would be required only in those instances in which the "adverse" nature of the action taken would be readily apparent to all. GEICO's suggested interpretation of "adverse action" is consistent with that congressional intent; the Ninth Circuit's is not.

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[9] In imposing that requirement, the Ninth Circuit appears to have had in mind something like, "Your credit score was a good one. As a result, we are quoting you an insurance rate that is less than that charged someone with a driving record similar to yours but with only an average credit score. Nonetheless, we are hereby giving you notice that we took 'adverse action' against you in the sense that your quoted rate would have been lower if you had had a 'perfect' credit score, a score achieved by only a small minority of consumers."

C. The Ninth Circuit's Definition of "Adverse Action" Is Inconsistent with the Commonly Understood Meaning of that Phrase

The Ninth Circuit's ruling is also inconsistent with the commonly understood meaning of an "adverse" action. Something is deemed "adverse" if it is "hostile," "opposed to one's interests," or "unfavorable." G. & C. Merriam Co., *Webster's New Collegiate Dictionary* (1981). Those are not words that spring to mind when an insurance company offers a rate that is not its best but is nonetheless better-than-average. It is hard to imagine that Congress would have used the word "adverse" in the FCRA in describing a concept that was intended to apply to as broad an array of insurance company actions as was specified by the Ninth Circuit.

Certainly, the average person would not think that she has been treated "adverse[ly]" simply because it is theoretically possible that she could have received better treatment, if she nonetheless has been treated as well or better than the typical person in the large group of which she is a member. An applicant for insurance can in some ways be analogized to a college applicant. If Stanford University offers admission and a substantial achievement-based scholarship to a high school valedictorian, no one using normal parlance would think that Stanford has taken an "adverse action" with respect to that student because others (*e.g.*, star athletes or those from impoverished backgrounds) are offered all-expenses-paid scholarships. To the contrary, most such valedictorians would consider themselves to have received favorable treatment, particularly when compared to students who received no financial aid or were rejected for admission. WLF respectfully submits that it is equally implausible that Congress would have described analogous conduct by insurance companies as "adverse action."

Indeed, when this Court has used the phrase "adverse action," as it has done with some frequency in connection with employment discrimination law, it has never used it in the manner that the Ninth Circuit has attributed to Congress in connection with the FCRA. For example, the court regularly uses the phrase "adverse employment action" as shorthand for the types of employer actions that can be the subject of lawsuits alleging a violation of Title VII or other anti-discrimination statutes.[10] In using that phrase (or similar phrases including the word "adverse"), the Court has never intended to suggest thereby that an employer's conduct is actionable any time that it subjects the plaintiff-employee to anything less than optimal treatment. Rather, the Court has reserved the phrases "adverse action" and "adverse employment action" for situations in which the employer's conduct materially affects the employment relationship. Thus, for example, the Court held recently in *Burlington Northern & Santa Fe Ry. Co. v. White*, 126 S. Ct. 2405, 2408, 2415 (2006), that an employer does not violate 42 U.S.C. § 2000e-3(a) – which forbids an employer from "discriminating against" an employee or job applicant for participating in a Title VII proceeding against the employer – unless the employer engages in "adverse action" sufficient to dissuade a "reasonable worker from making or supporting a charge of discrimination." The Court explained that minor harms – "normal petty slights, minor annoyances, and simple lack of good manners" – do not meet that standard and thus are not actionable. *Id.* at 2415. Federal courts have been using the phrase "adverse action" in the employment context since before the FCRA was adopted by Congress in 1970. *See, e.g.*,

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[10] *See, e.g., St. Mary's Honor Center v. Hicks,* 509 U.S. 502, 523-24 (1993) (Title VII permits damage awards "against employers who are proven to have taken *adverse employment action* by reason of race.") (emphasis added).

Pauley v. United States, 419 F.2d 1061, 1065 (7th Cir. 1969) (the plaintiff's transfer from an office in Chicago to an office in Washington was not sufficiently negative to constitute "adverse action" under federal civil service law, and thus did not trigger the plaintiff's right to a hearing). That understanding of the phrase "adverse action" is in sharp contrast to the understanding of the Ninth Circuit, which interpreted Congress's use of the phrase to encompass any insurance rate quote that is higher than the rate offered to those with *perfect* credit scores. WLF respectfully submits that when Congress used the phrase "adverse action" in the FCRA, it is far more likely that Congress intended that phrase to be interpreted as it is interpreted by federal courts in the employment discrimination context and in everyday usage, than that it intended an interpretation akin to the Ninth Circuit's in this case.

II. THE LEGISLATIVE HISTORY OF THE FCRA CONFIRMS THAT GEICO DID NOT TAKE ANY "ADVERSE ACTION" WITH RESPECT TO EDO

Because the purpose and overall structure of the FCRA are sufficient to demonstrate that the Ninth Circuit has misconstrued the meaning of the FCRA, there is no need to proceed further and examine the statute's legislative history. But such an examination would only confirm that the Ninth Circuit erred in its interpretation.

Prior to 1996, the FCRA did not include a definition of "adverse action," even though that phrase appeared in § 1681m(a). The pre-1996 version of that section, which set forth the notice obligations of users of consumer reports, provided as follows:

> Whenever credit or insurance for personal, family, or household purposes, or employment involving a consumer is denied or *the charge for such credit or insurance is increased either wholly or partly because of information contained 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 has been taken and supply the name and address of the consumer reporting agency making the report.

15 U.S.C. § 1681m(a) (1995) (emphasis added).

This pre-1996 version of the law is no more susceptible to the Ninth Circuit's interpretation than is the current version. The provision referred to an "increase" in the charge for insurance, but it includes no benchmark for determining whether the charge has been increased or decreased. For all the reasons articulated above in connection with the current version of the FCRA, there is no basis for concluding that the pre-1996 version intended to require notification for consumers whose rates were no higher than if their consumer reports had not been consulted.

In his Ninth Circuit brief, Edo sought to rely on House and Senate reports from the early 1990s that stated that the "adverse action" notification requirements should be read broadly. Appellant's Opening Ninth Circuit Br. 43. WLF notes initially that those reports were issued in connection with proposed legislation that was never enacted. More importantly, Edo's argument misconstrues what Congress was attempting to accomplish in the early 1990s. The authors of those reports were not seeking to broaden the "adverse action" notification requirements as they applied to insurance companies and providers of credit. Rather, they were reacting negatively to a 1990 Federal Trade Commission (FTC) determination that those requirements did not apply outside the areas of credit, insurance, or employment. In May 1990, an FTC commentary had held:

> The [FCRA] does not require that a [consumer] report user provide any notice to consumers when taking adverse action not relating to credit, insurance, or employment. For example, a landlord who refuses to rent an apartment to a consumer based on credit or other information in a consumer report need not provide the notice. Similarly, a party that uses credit or other information in a consumer report as a basis for refusing to accept payment by check need not comply with this section. Checks have historically been treated as cash items, and thus such refusal does not involve a denial of credit, insurance, or employment.

FTC Commentary on the Fair Credit Reporting Act, 55 Fed. Reg. 18804, 18826 (May 4, 1990, codified at 16 C.F.R. Part 600).

One apparent purpose of the 1996 amendments to the FCRA was to overturn that restrictive feature of the May 1990 commentary. The Consumer Credit Reporting Act of 1996 (CCRA), P.L. 104-208, included as part of its newly added section defining "adverse action," a provision defining "adverse action" in connection with miscellaneous business activities. *See* 15 U.S.C. § 1681a(k)(1)(B)(iv). Accordingly, such activities as renting apartments and deciding whether to accept checks from consumers are now subject to the FCRA's "adverse action" notification requirements. But nothing in either the CCRA or any of the congressional reports preceding adoption of the CCRA gives any indication that Congress intended the CCRA to expand the scope of the "adverse action" notification requirements that had previously been imposed on insurance companies.

CONCLUSION

Amicus curiae Washington Legal Foundation respectfully requests that the Court reverse the decision of the court of appeals.

Respectfully submitted,

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