No. 06-84

IN THE
Supreme Court of the United States

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

v.

CHARLES BURR, ET AL.,
Respondents.

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

REPLY BRIEF FOR PETITIONERS

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CORPORATE DISCLOSURE STATEMENTS

Petitioners' Statements pursuant to Rule 29.6 were set forth at page iii of the petition for a writ of certiorari, and there are no amendments to those Statements.

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For more than 20 years, it has been settled law that the extraordinary relief of statutory and punitive damages under FCRA requires that defendants have *intentionally* violated a known legal obligation. In the decision below, the Ninth Circuit explicitly broke with the settled precedent of other circuits and held that the statutory "willfulness" prerequisite can be satisfied by a showing that defendants acted with "reckless disregard" for the law. The circuit split on this question is clear, and resolution of the pure question of law presented here will not be affected by any later developments in this case.

Delaying review of this purely legal issue will cause great hardship to petitioners and to many other American businesses, as demonstrated by the large number of *amici* that have urged the Court to grant these petitions. Absent review now, petitioners will suffer needless expenses for discovery and, potentially, a full trial – as well as significant intrusion into petitioners' attorney-client relationships – all of which will be conducted under an incorrect legal standard. At least as significant, if the Court delays review, many other businesses will continue to be subject to the rapidly mounting number of nationwide FCRA class actions filed in the Ninth Circuit. Years of litigation in such cases under a Ninth Circuit standard that the other circuit courts have explicitly rejected will waste enormous judicial and private resources.

It is important to stress that the interpretation of "willfulness" defines the standard of liability for statutory and punitive damages for *all* of FCRA's requirements, not just the notice provisions of § 615. In the few years since Congress's 2003 amendments to FCRA, which respondents wrongly claim obviate the importance of the issue presented here, literally *thousands* of new FCRA actions have been filed, including a recent rash of class action cases filed in the Ninth Circuit since the decisions at issue here were released. The Court should thus grant review to resolve the frequently recurring and extremely significant question of law presented here.

I. THE CIRCUIT SPLIT ON FCRA'S WILLFULNESS REQUIREMENT IS CLEAR AND DEEP

Respondents' attempt to deny the existence of a circuit split on the meaning of "willfulness" under § 616 of FCRA is unavailing. The Ninth Circuit's opinion in the decision at issue here itself acknowledged a split with the Sixth and Eighth Circuits, both of which "rejected the reckless disregard standard and require[] actual knowledge with regard to the law." Pet. App. 128a n.17 (citing *Phillips v. Grendahl*, 312 F.3d 357, 370 (8th Cir. 2002), and *Duncan v. Handmaker*, 149 F.3d 424, 429 (6th Cir. 1998)). In fact, the split is even deeper than the decision below acknowledged. The Seventh Circuit has expressly followed the Eighth Circuit's rejection of a "reckless disregard" standard, *see Wantz v. Experian Info. Solutions*, 386 F.3d 829 (7th Cir. 2004), and five other circuits have held that § 616's willfulness requirement requires conduct that is "knowing and intentional," "deliberate and purposeful," or in "conscious disregard" of the law – all standards that are facially inconsistent with the Ninth Circuit's novel reckless disregard test. *See* Pet. 16-19.

Respondents are wrong to assert that these cases deal with a different subsection of § 616. *See* Opp. 15-16. As to the Eighth Circuit's decision in *Phillips*, respondents simply mischaracterize the opinion. The court's rejection of a "reckless disregard" standard was not limited to claims alleging impermissible use of a credit report that arise under § 616(a)(1)(B) as opposed to § 616(a)(1)(A). The court's discussion on this point was clearly addressed to § 616(a) as a whole; indeed, its opinion contains a *separate* discussion of § 616(a)(1)(B) in particular. *See Phillips*, 312 F.3d at 371. The Eighth Circuit's holding was unequivocal: "The statute's use of the word 'willfully' imports the requirement that the defendant know his or her conduct is unlawful." *Id.* at 368; *see id.* at 370 ("We conclude that our Circuit precedent is consistent with the rules that willful noncompliance under section 1681n [*i.e.*, § 616] requires knowing and intentional commission of an

act *the defendant knows to violate the law*.") (emphasis added). The Seventh Circuit's decision in *Wantz*, which followed *Phillips*, clearly arose under § 616(a)(1)(A), not § 616(a)(1)(B). *See* 386 F.3d at 832-34.[1]

The conflict with the Sixth Circuit's decision in *Duncan* is just as stark. *Duncan* is not distinguishable on the ground that it was limited to cases where civil liability was premised on a violation of § 619 of FCRA, 15 U.S.C. § 1681q. As even Judge Reinhardt acknowledged, the holding of *Duncan* applies generally to *all* civil actions brought under § 616, not just those predicated on a criminal violation under § 619. *See* 149 F.3d at 429 (holding that a knowledge requirement "comports with the language of § 1681n, which imposes liability for 'willful noncompliance' with the FCRA"). Indeed, a subsequent decision of the Sixth Circuit confirms this. *See Bach v. First Union Nat'l Bank*, 149 F. App'x 354, 364 (6th Cir. 2005) (holding in an action premised on violations of § 623(a)(1)(A) of FCRA, 15 U.S.C. § 1681s-2(a)(1)(A), that willfulness under § 616(a) requires "knowingly and intentionally committing an act in conscious disregard for the rights of others"). Respondents' arguments for distinguishing these cases thus rest on mischaracterizations and false distinctions that were not accepted by Judge Reinhardt and have never been recognized by any court.

Respondents attempt to discount other cases cited in the petition because they involved claims for punitive damages whereas respondents seek only statutory damages. *See* Opp. 17. But § 616 does not distinguish between statutory and punitive damages: once a willful violation is shown, a plaintiff is eligible to receive both. *See*

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[1] Several district courts have likewise applied *Phillips* to claims arising under § 616(a)(1)(A). *See Jordan v. Equifax Info. Servs., LLC*, 410 F. Supp. 2d 1349, 1353-54 (N.D. Ga. 2006) (claims alleging failure to provide accurate credit reports); *Gohman v. Equifax Info. Servs., LLC*, 395 F. Supp. 2d 822, 826, 828 (D. Minn. 2005) (same); *Graham v. CSC Credit Servs., Inc.*, 306 F. Supp. 2d 873, 877-78, 880 (D. Minn. 2004) (same).

15 U.S.C. § 1681n(a)(1)-(2). The fact that § 616 triggers punitive as well as statutory damages strongly supports a requirement of actual knowledge. *See City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 266-67 (1981) (punitive damages are intended "to punish the tortfeasor whose wrongful action was *intentional or malicious*, and to deter him and others from similar extreme conduct") (emphasis added). At any rate, the interpretation of the willfulness requirement can hardly change from case to case based on what damages plaintiffs elect to pursue. Indeed, respondents fail to disclose that their abandonment of punitive damages did not occur until *after* the case was remanded by the Ninth Circuit, and was apparently coordinated among the respondents in all of the related FCRA cases pending before this Court.[2]

Contrary to respondents' assertion, the Third Circuit's decision in *Cushman v. Trans Union Corp.*, 115 F.3d 220, 226-27 (3d Cir. 1997), does not support the Ninth Circuit's position. As explained in the petition (at 17 n.7), *Cushman* cannot reasonably be interpreted to have established a recklessness standard because it expressly cited the Third Circuit's prior decision in *Philbin v. Trans Union Corp.*, 101 F.3d 957, 970 (3d Cir. 1996), as well as the Fifth Circuit's decision in *Pinner v. Schmidt*, 805 F.2d 1258, 1263 (5th Cir. 1986), both of which rejected such a standard in no uncertain terms. *See* 115 F.3d at 226.

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[2] Plaintiffs in the case below did not withdraw their claim for punitive damages until they filed their Fifth Amended Complaint just before the petition in this case was filed. *See* Fifth Am. Compl., *Spano v. Safeco Ins. Co. of Am.*, No. CV 01-1464 (D. Or. filed July 6, 2006). The same was true in *State Farm*. *See* Fourth Am. Compl., *Willes v. State Farm Fire & Cas. Co.*, No. CV 01-1457 (D. Or. filed June 23, 2006). In *GEICO* and *Hartford Fire*, the plaintiffs did not amend their prayer for relief until the very day their brief in opposition was filed in this Court. *See* Plaintiffs' Notice of Withdrawal of Punitive Damages Claim, *Rausch v. The Hartford Fin. Servs. Group, Inc.*, No. CV 01-1529 (D. Or. filed Aug. 22, 2006); Plaintiffs' Notice of Withdrawal of Punitive Damages Claim, *Edo v. GEICO Cas. Co.*, No. CV 02-678 (D. Or. filed Aug. 21, 2006).

With the exception of the decision below, no other court has interpreted *Cushman* to support a reckless disregard standard. Rather, both the Second and Eighth Circuits have construed *Cushman* as requiring a knowing and intentional violation. *See Phillips*, 312 F.3d at 368; *Bakker v. McKinnon*, 152 F.3d 1007, 1013 (8th Cir. 1998); *Northrop v. Hoffman of Simsbury, Inc.*, 12 F. App'x 44, 50 (2d Cir. 2001).

At bottom, the position of respondents and the Ninth Circuit is at odds with the unanimous conclusion of eight other circuits that reckless disregard for the law is insufficient to give rise to liability under § 616. The Ninth Circuit's interpretation of § 616's willfulness requirement is inconsistent with the structure of FCRA's two-tiered liability provisions, as well as the clear legislative history of those provisions' enactment. *See* Pet. 19-23. Because the original Senate bill required "gross negligence" – *i.e.*, recklessness – to recover even *actual* damages, the willfulness requirement for statutory and punitive damages must necessarily have required a higher standard. Moreover, Congress amended FCRA several times without altering the unanimous opinion of the circuit courts that willfulness required actual knowledge.

Respondents' rejoinder focuses on the fact that § 616(a)(1)(B) uses the word "willful" in conjunction with a particular substantive cause of action that imports an actual knowledge requirement – namely, "obtaining a consumer credit report under false pretenses or knowingly without a permissible purpose." Respondents draw precisely the wrong inference from this fact. Section 616(a)(1)(B) confirms that Congress meant "willful" in the context of § 616(a) to require actual knowledge; otherwise, the combination of a "willfulness" *mens rea* standard with a "knowing" substantive liability standard would be utterly incongruous. *See* Brief for Freedomworks Foundation as *Amicus Curiae* in Support of Petitioners 14-15. Respondents' suggestion (at 14) that the substitution of the phrase "knowing and willful" for "willful" indicates

that "Congress understood 'willful' to mean something less than 'knowing and willful'" for purposes of FCRA's criminal provision, § 619, is also misplaced, given that the term "willful" is understood to import a *higher* level of intentionality than the term "knowing." *See Bryan v. United States*, 524 U.S. 184, 193-94 (1998).

Finally, respondents suggest that "reckless disregard" is really no different from "deliberate," "purposeful," or "conscious" action. As a matter of plain language, respondents' argument is implausible. *See*, *e.g.*, *Webster's II New College Dictionary* 239 (1999) (defining "conscious" as "[d]eliberately conceived or done: intentional"). Moreover, as the Eighth Circuit in *Phillips* recognized, and as this case illustrates, there is a critical difference between a requirement that the "defendant know his or her conduct is unlawful" and the Ninth Circuit's "reckless disregard" holding. Under the latter, defendants' good-faith but erroneous reliance on interpretations of the statute that are later found to be "unreasonable" or "implausible" may still give rise to statutory and punitive damages. This unprecedented holding gravely heightens "the danger of ensnaring individuals engaged in apparently innocent conduct" under a highly technical and complex statute such as FCRA. *Bryan*, 524 U.S. at 194.

II. THERE IS NO REASON TO POSTPONE RESOLUTION OF THE CIRCUIT SPLIT

Resolution of the circuit split is needed now. The decision below requires prompt review because it dilutes the standard of liability for statutory and punitive damages for violations of *all* of FCRA's complex and manifold requirements. Deferring the issue will subject petitioners to needless expense, potential release of materials subject to attorney-client privilege, and acute settlement pressure, thus potentially allowing the decision below to evade review. Beyond that, allowing this Ninth Circuit decision to remain in place will continue to make that circuit a magnet for nationwide FCRA class actions, leading to an enormous waste of judicial and private resources as those

cases are adjudicated under an erroneous legal standard rejected by every other circuit to consider the issue.

A. The Question Presented Is a Pure Issue of Law, the Resolution of Which Will Eliminate the Need for Further Proceedings

This Court's review is appropriate now because the issue presented is a pure question of federal statutory interpretation, and reversal of the decision below would spare petitioners the cost and risk of further proceedings. This Court has not hesitated to grant certiorari to review a nonfinal judgment, including a denial of summary judgment, where, as here, the decision below conflicts on an important question of federal law with another court of appeals. Indeed, the Court in *McLaughlin v. Richland Shoe Co.*, 486 U.S. 128, 129-31 (1988), granted certiorari in an identical posture to review the definition of willfulness under the Fair Labor Standards Act of 1938. *See also*, *e.g.*, *Cooper Indus., Inc. v. Aviall Servs., Inc.*, 543 U.S. 157, 164-65 (2004) (reviewing a reversal of a grant of summary judgment to address a question under the federal Comprehensive Environmental Response, Compensation, and Liability Act of 1980); *Norfolk S. Ry. Co. v. Kirby*, 543 U.S. 14, 21-22 (2004) (reviewing a reversal of a grant of summary judgment in order to resolve a circuit split on two questions of federal maritime law). Review in this posture is far from "extraordinary." *See generally* 17 Charles Alan Wright, *et al.*, *Federal Practice and Procedure* § 4036, at 30 & n.57 (2d ed. 1988) (citing numerous cases and noting that such review is not limited to "exceptional circumstances").

Certiorari is especially well justified in this case because resolution of the question presented will "hasten or finally resolve the litigation." Robert L. Stern, *et al.*, *Supreme Court Practice* 260 (8th ed. 2002) (citing cases); *see also United States v. General Motors Corp.*, 323 U.S. 373, 377 (1945) (certiorari is appropriate where the issue "is fundamental to the further conduct of the case"; reviewing court of appeals' reversal of judgment and

remand for new trial). No further proceedings in this case would have been needed if the Ninth Circuit had followed the unanimous decisions of its sister circuits and held that FCRA's "use of the word 'willfully' imports the requirement that the defendant know his or her conduct is unlawful." *Phillips*, 312 F.3d at 368. Under that standard, the district court's grant of summary judgment should have been affirmed. Petitioners could not have known that they were violating § 615 because there was not a single judicial opinion in the 35 years since FCRA's passage holding that notice is required in the context of initial policies for insurance.[3]

Contrary to respondents' contention, no further factual findings are needed to apply the proper "willfulness" standard to this case. Indeed, further proceedings would be inappropriate. As the Fifth Circuit held in *Stevenson v. TRW Inc.*, 987 F.2d 288 (5th Cir. 1993), because "[t]here was no prior guidance to suggest that [defendant's] notice was insufficient," the court "[could]not conclude that [it] knowingly and intentionally obscured the notice in conscious disregard of consumers' rights." *Id.* at 296. In this case, not only was there "no prior guidance" that the adverse-action notice requirement was triggered in the context of initial policies of insurance, but the district court *agreed* with petitioners' legal position that such an interpretation of FCRA was correct.[4] These facts, which

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[3] Respondents misleadingly contend (at 9 n.3) that the district court in the *Nationwide* case denied summary judgment under even a "knowing" standard, but the relevant claim was that credit information had been used to increase the premium upon renewal, not in an initial policy of insurance, and the issue was the adequacy of notice, upon which courts had provided substantial guidance. *See Razilov v. Nationwide Mut. Ins. Co.*, No. CV 01-1466, 2004 WL 3090083 (D. Or. Mar. 3, 2004).

[4] Contrary to respondents' suggestion (at 24), such a standard does not give defendants immunity from FCRA liability in cases where a statute's provisions have not been interpreted. The "willfulness" standard serves as a prerequisite only to the extraordinary remedies of statutory and punitive damages under § 616. *Cf.* 15 U.S.C. § 1681*o* (imposing actual damages for negligent violations of FCRA).

were fully developed in the lower courts, should have resulted in judgment as a matter of law for petitioners and should have obviated the need for a costly and intrusive investigation into Safeco's internal decision-making and the advice Safeco and its officers received from counsel.

A grant of certiorari now is also appropriate to avoid the possibility that the Ninth Circuit's decision will evade meaningful review. In this case alone, statutory damages for the purported nationwide class of insurance purchasers potentially exceed $75 billion. *See* Pet. 24. As the potential settlement by Hartford Fire indicates, the onerous prospect of discovery and trial in a case involving damages of that magnitude will put immense settlement pressure on FCRA defendants such as Safeco and will potentially prevent the Ninth Circuit's deviant and erroneous decision from being reviewed by this Court. *See In re Bridgestone/Firestone, Inc.*, 288 F.3d 1012, 1016 (7th Cir. 2002) (in mass class actions, "settlement becomes almost inevitable – and at a price that reflects the risk of a catastrophic judgment as much as, if not more than, the actual merit of the claims").

B. The Proper Definition of Willfulness Is of Enormous Importance to American Business

Delaying review will also do significant damage to American businesses because, until corrected by this Court, the Ninth Circuit will continue to be a magnet for nationwide class actions under FCRA, and its anomalous definition of willfulness will be imposed on companies nationwide. As the history of post-*Reynolds* litigation demonstrates, plaintiffs have already seized on the Ninth Circuit's unprecedented definition in an effort to obtain millions of dollars in statutory and punitive damages by filing purported nationwide class actions under § 616 in district courts in the Ninth Circuit. *See* Pet. 13 & n.5 (noting the wave of new claims after *Reynolds*).

The Ninth Circuit's novel and erroneous interpretation of "willfulness" abridges a fundamental statutory safeguard against huge windfall profits to plaintiffs at the

expense of American companies. FCRA subjects a wide range of corporations – including insurers, credit card companies, banks, and employers – to comprehensive and highly technical regulations regarding the use of consumer credit information. Section 616 of FCRA allows plaintiffs to seek up to $1,000 in statutory damages, as well as punitive damages, for each FCRA violation, without any need to prove any actual harm. Unlike other federal statutes, there is no cap on such damages in the context of a class action. Given the frequency with which credit information is commercially used, and § 616's $1,000-per-occurrence statutory damages provision, the potential exposure of American business is astronomical.

Contrary to respondents' arguments, *see* Opp. 25-27, the 2003 amendments to FCRA, the Fair and Accurate Credit Transactions Act ("FACTA"), do nothing to mitigate the impact of the Ninth Circuit's erroneous definition of willfulness. FACTA merely amended FCRA to eliminate private rights of action under § 616 and § 617 for violations of the notice provisions of § 615, leaving such violations to administrative enforcement instead. But § 616 continues to apply to causes of action arising under all of FCRA's other provisions. Notwithstanding FACTA's enactment in 2003, approximately 2,600 lawsuits, and hundreds of class actions, have been filed since January 2004 alleging FCRA violations other than § 615, including a rash of new purported nationwide class actions in district courts in the Ninth Circuit seeking statutory and punitive damages under § 616. *See* Hartford Fire Pet. 23, No. 06-82; Pet. 13 n.5. The Ninth Circuit's decision, if allowed to go uncorrected, will single-handedly permit hundreds of millions of dollars in nationwide claims for statutory and punitive damages to proceed under an erroneous and unprecedented legal standard. This Court's intervention is therefore warranted.

CONCLUSION

For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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