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

REPLY BRIEF

ROBERT D. ALLEN*
MELONEY CARGIL PERRY
JAY F. UTLEY
BRANDON P. LONG
BAKER & MCKENZIE LLP
2300 Trammell Crow Center
2001 Ross Avenue
Dallas, Texas 75201
(214) 978-3000

* *Counsel of Record*

Attorneys for Petitioners

203257

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

CORPORATE DISCLOSURE STATEMENT

Petitioners' statement pursuant to Rule 29.6 was set forth at page iii of the Petition for a Writ of Certiorari, and there are no amendments to that statement.

TABLE OF CONTENTS

Contents

TABLE OF CITED AUTHORITIES

Page

CASES

STATUTES

OTHER MATERIALS

I. Preliminary Statement

Multiple groups of insurance companies—all of whom are competitors—have filed four petitions for writs of certiorari, asking this Court to review the same (or related) issues arising out of the same Ninth Circuit opinion. Diverse groups of amici curiae representing various segments of the United States economy have also submitted briefs demonstrating how the Ninth Circuit's opinion threatens to do substantial harm not only to the insurance industry but to the mortgage industry, governmental instrumentalities, employers, employees, consumers, and others as well. And on the *same day* that Respondents' Brief in Opposition was filed, Respondent Ajene Edo ("Edo") filed a "Notice of Withdrawal of Punitive Damages Claim" in the district court. His last-minute attempt to distance his willfulness claim from punitive damages is transparent. He did so in an effort to gloss over a clear split among the circuits by arguing to this Court that he does not seek punitive damages and that, therefore, the case law determining willfulness in the context of punitive damages is distinguishable. This reply is offered to address the following issues:

- **Now is the time for review.** The important questions presented in GEICO's petition are dispositive questions of pure statutory interpretation. This case comes to the Court in the same procedural posture as another case where the Court granted certiorari to determine the meaning of "willfully" in another statute. And here—as reflected by the settlements that Respondents announce in their Brief in Opposition—the stakes are much higher.
- **Even the Ninth Circuit acknowledged the circuit split.** While Respondents argue that there is no circuit split, even the Ninth Circuit acknowledged the circuit split between, at a minimum, the Third Circuit and the Sixth and Eighth Circuits regarding the standard for determining willfulness under 15 U.S.C. § 1681n.
- **A willfulness finding under the Ninth Circuit's erroneous standard still subjects a defendant to "crushing liability," even without punitive**

damages. Although Edo withdrew his punitive-damages claim, doing so did not change the fact that a willful violation of the Fair Credit Reporting Act still subjects a defendant to what Justice Kennedy has called "crushing liability" for uncapped statutory damages, *even in the complete absence of actual damages*. And even though, as of August 21, 2006, Edo no longer seeks punitive damages in this case, willfulness remains the standard for an award of punitive damages under § 1681n(a).

II. Argument and Authorities

A. Now is the time for review.

1. The willfulness question presented by GEICO is an important, clear-cut issue of pure statutory interpretation that is fundamental to the further conduct of this case and numerous other cases.[1]

Respondents' primary argument is that "[i]t would be premature to address the meaning of willfulness in the current procedural context" because, according to Respondents, the Ninth Circuit merely announced an "abstract" or "general" standard for determining willfulness and this Court purportedly needs a developed factual record before it can provide any "useful guidance" and "bind the appropriate parties."[2] But how willfulness is defined under 15 U.S.C. § 1681n of the Fair Credit Reporting Act ("FCRA") is a question of *pure statutory interpretation* that arises out of a patently incorrect Ninth Circuit opinion and that is fundamental to (if not dispositive of) the further conduct of this case, the related cases, and many other cases pending all over the country.

This Court's precedent "make[s] clear that there is no absolute bar to review of nonfinal judgments of the lower federal courts."[3] Review may be granted where "there is some

---

1. Petitioners, Government Employees Insurance Company, GEICO General Insurance Company, and GEICO Indemnity Company are collectively referred to herein as GEICO. Also, because Edo joined with Respondents in the three other related cases to file a joint Brief in Opposition, GEICO refers to Respondents collectively throughout this reply.

2. Respondents' Br. in Opp'n 2, 8-9, 11.

3. *Mazurek v. Armstrong*, 520 U.S. 968, 975 (1997).

important and clear-cut issue of law that is fundamental to the further conduct of the case . . . particularly if the lower court's decision is patently incorrect and the interlocutory decision . . . will have immediate consequences for the petitioner."[4] This case presents such important, clear-cut issues.

First, the willfulness question presented here is one of pure statutory interpretation over which the circuits are divided: What is the proper standard for determining willfulness under § 1681n of FCRA? Is actual knowledge required? Is recklessness sufficient? Or, is something less than recklessness sufficient? No facts are needed to answer these questions. Indeed, this Court is not being asked to review (nor would it be interested in) erroneous factual findings or the misapplication of a properly stated rule of law.[5] And while Respondents suggest that review at this time would somehow fail to give proper guidance to lower courts, this Court has previously granted certiorari to determine the meaning of the word "willfully" in another statute, where much less was at stake, in a case in the same procedural posture as this one. In *McLaughlin v. Richland Shoe Co.*,[6] the Third Circuit had determined the meaning of the word "willfully" as used in the Fair Labor Standards Act ("FLSA"), had vacated the district court's summary judgment, and had remanded the case for consideration under the Third-Circuit's newly defined willfulness standard.[7] The petitioner filed a petition for a writ of certiorari, asking this Court to resolve a conflict among the

4. Robert L. Stern et al., *Supreme Court Practice* § 4.18, at 259 (8th ed. 2002); *see also Cent. Bank of Denver v. First Interstate Bank of Denver*, 511 U.S. 164, 166-70 (1994) (granting review despite the interlocutory status of the case to "resolve the continuing confusion"); *Land v. Dollar*, 330 U.S. 731, 734 n.2 (1947) ("Although the judgment below was not a final one, we considered it appropriate for review because it involved an issue 'fundamental to the further conduct of the case.'"); *United States v. Gen. Motors Corp.*, 323 U.S. 373, 377 (1945) (granting certiorari despite the interlocutory status of the case because the issue was "fundamental to the further conduct of the case").

5. *See* Sup. Ct. R. 10.

6. 486 U.S. 128 (1988).

7. *Id.* at 130-31.

circuits concerning the proper standard for determining willfulness, which this Court granted.[8] Eighteen years later, despite the procedural status of the case when certiorari was granted, the Court's opinion in *Richland Shoe* has now been cited as authority in over 600 decisions by courts all across the country. Thus, as in *Richland Shoe*, review in this case at this time would resolve the circuit split and would most certainly give guidance to the courts below and to courts all across the country.

Second, the willfulness question is fundamental to the further conduct of this case. For example, GEICO has argued that, because the district court interpreted FCRA precisely as GEICO did, GEICO's interpretations and conduct were objectively reasonable and could not have constituted a willful violation of the statute.[9] If this Court grants certiorari and agrees, then this case will be over. In other words, the willfulness issue is so fundamental to the further conduct of this case that it may even be dispositive. Review at this time would hasten or finally resolve this litigation.[10]

And finally, the Ninth Circuit's erroneous willfulness standard has immediate, irreparable consequences for GEICO and other parties in numerous other cases. Because of the Ninth Circuit's holding that a company willfully violates FCRA unless it (1) has "diligently and in good faith" attempted to determine its obligations and (2) "has thereby come" to a "reasonable," "plausible" (which means reasonable), non-"creative," and "tenable" interpretation of FCRA,[11] the burden of proof in the district court has arguably been shifted from Edo (to prove willfulness) to GEICO (to prove non-willfulness). Indeed, because of the Ninth Circuit's erroneous standard, GEICO has effectively been required to assert an

---

8. *Id.* at 131.

9. GEICO's Pet. for a Writ of Cert. 24.

10. *See Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 193 (1976) (granting certiorari even though the Seventh Circuit reversed and remanded the district court's entry of summary judgment).

11. *Reynolds v. Hartford Fin. Servs. Group, Inc.*, 435 F.3d 1081, 1099 (9th Cir. 2006). (App. at 34a.)

advice-of-counsel defense in the district court to prove that any alleged violation was not, in fact, willful.[12] GEICO has moved the district court to stay any obligation it may have to produce privileged documents in support of such a defense until this Court acts on GEICO's Petition for a Writ of Certiorari. But if GEICO's petition is denied, GEICO will most certainly be forced to produce privileged documents, which, but for the Ninth Circuit's erroneous willfulness standard, GEICO would not have been required to produce. Thus, the Ninth Circuit's interlocutory decision has immediate, irreparable consequences for GEICO.

2. Respondents' announcement that other cases have settled further demonstrates why review is necessary at this time.

Several times in Respondents' Brief in Opposition, Respondents announce that the Petitioner in Docket No. 06-82, Hartford Fire Insurance Company, recently agreed to settle, and that another insurance company, Nationwide Insurance Company, recently agreed to settle for $280 per class member.[13] Respondents argue that the Court should deny GEICO's petition because—they claim—this case might be resolved by settlement.[14]

But like Edo's decision to drop his punitive-damages claim on the same day that Respondents' Brief in Opposition was filed, these recent settlements actually further demonstrate why review should be granted at this time: The Ninth Circuit's willfulness standard for statutory and, yes, punitive damages is so low and so unpredictable that companies are being forced to settle cases to avoid FCRA's potential for what Justice Kennedy has called "crushing liability."[15] Indeed, even without a punitive-damages claim, FCRA allows for the recovery of statutory damages between $100 and $1,000 per class member, and FCRA has no aggregate-damages cap.[16] Thus, because of

12. GEICO's Pet. for a Writ of Cert. 18.

13. Respondents' Br. in Opp'n 7.

14. Respondents' Br. in Opp'n 10.

15. *See Trans Union LLC v. Fed. Trade Comm'n*, 536 U.S. 915, 917 (2002) (Kennedy, J., dissenting) (discussing FCRA's statutory damages of between $100 and $1,000).

16. 15 U.S.C. § 1681n(a)(1)(A) (2000).

the Ninth Circuit's vast expansion of FCRA liability, companies that acted in good faith, attempted to interpret issues of first impression, and tried to comply with FCRA are being forced to settle and pay large sums of money to class members with no actual damages, in order to avoid the potential for catastrophic liability.

Respondents argue that the Fair and Accurate Credit Transactions Act of 2003 ("FACTA") amended FCRA and eliminated all private rights of action under § 1681n for § 1681m violations.[17] They essentially argue that this Court should deny certiorari because Congress, through FACTA, put a stop to cases like this one that seek ruinous amounts of statutory damages for unknown and unintended alleged violations of § 1681m. Respondents fail to mention, however, that *FACTA only eliminated private rights of action for § 1681m violations*. Section 1681n, which allows a plaintiff or a class of plaintiffs to recover statutory and punitive damages, applies to numerous other violations of FCRA, not just § 1681m violations. Thus, the enactment did not lessen the need for review of the Ninth Circuit's opinion.

B. The circuit split is real, and Respondents offer no credible argument to the contrary.

1. Even the Ninth Circuit acknowledged the circuit split.

Respondents argue that there is no circuit split regarding the standard for determining willfulness because only one statutory *subsection* is at issue in this case, § 1681n(a)(1)(A), and the cases cited by GEICO purportedly involve other statutory *subsections* within § 1681n.[18] But what Respondents fail to recognize or point out is that the word "willfully" appears *one time* in § 1681n, and it is the governing standard for *all* of § 1681n(a)'s subsections, including § 1681n(a)(2), which allows for the recovery of punitive damages.[19] The term "willfully" does *not* appear separately in § 1681n(a)(1)(A), separately in § 1681n(a)(1)(B), and separately in § 1681n(a)(2). Again, it appears one time. Thus, the apparent basis for

17. Respondents' Br. in Opp'n 2-3, 25-27.

18. Respondents' Br. in Opp'n 2, 15.

19. 15 U.S.C. § 1681n (2000). (App. at 53a-54a.)

Respondents' argument that there is no circuit split is fundamentally flawed.[20]

Even the Ninth Circuit acknowledged the circuit split. In its opinion, the Ninth Circuit expressly recognized a circuit split, purported to adopt the Third Circuit's knowing-or-reckless-disregard standard, and specifically rejected the Sixth and Eighth Circuits' actual-knowledge standard.[21] Every circuit identified in GEICO's petition evaluated the *same term* ("willfully") in the *same statute* (§ 1681n) that is at issue in GEICO's petition:

- Third Circuit—"[The plaintiff] also claims that she is entitled to punitive damages pursuant to 15 U.S.C. § 1681n because [the defendant's] alleged noncompliance . . . was willful."[22]
- Fourth Circuit—"FCRA imposes liability for negligent noncompliance with the Act, and it allows for enhanced penalties for willful violations. *See* 15 U.S.C. §§ 1681n, 1681o."[23]
- Fifth Circuit—"Section 1681n authorizes the court to award actual damages, punitive damages, and reasonable attorney's fees when the [defendant] has willfully failed to comply with any of FCRA's requirements."[24]
- Sixth Circuit—"[T]he language of § 1681n . . . imposes liability for 'willful noncompliance' with the FCRA."[25]

---

20. To the extent that Edo argues that the word "willfully" has different meanings depending on the statutory subsection at issue, this argument is also fundamentally flawed. Indeed, under basic principles of statutory construction, the word "willfully" cannot mean "reckless" with regard to subsection (a)(1)(A), "knowing" with regard to subsection (a)(1)(B), and something else with regard to subsection (a)(2). *See Ratzlaf v. United States*, 510 U.S. 135, 143 (1994) (stating that, when a single formulation is called into play with regard to related provisions, there is "even stronger cause" to construe that formulation "the same way each time it is called into play").

21. *Reynolds*, 435 F.3d at 1098 & n.17. (App. at 31a, 32a n.17.)

22. *Cushman v. Trans Union Corp.*, 115 F.3d 220, 226 (3d Cir. 1997).

23. *Dalton v. Capital Associated Indus., Inc.*, 257 F.3d 409, 417 (4th Cir. 2001).

24. *Stevenson v. TRW, Inc.*, 987 F.2d 288, 293 (5th Cir. 1993).

25. *Duncan v. Handmaker*, 149 F.3d 424, 429 (6th Cir. 1998).

- Seventh Circuit—"We are left with [the plaintiff's] argument that she is entitled to 'statutory and punitive damages' because [the defendant] 'willfully failed to comply with' the FCRA. 15 U.S.C. § 1681n."[26]
- Eighth Circuit—"We do not believe that . . . recklessness is equivalent to willfulness under section 1681n."[27]
- Ninth Circuit—"We must first define 'willfully' as it appears in FCRA."[28]

This case squarely presents this Court with the opportunity to resolve the deep division among the circuits on an important and recurring issue.

2. Respondents ignore the crux of the willfulness question presented.

Realizing that they have no response to GEICO's argument that the Ninth Circuit's willfulness standard is inconsistent with this Court's holding in *McLaughlin v. Richland Shoe Co.*,[29] Respondents attempt to reframe the willfulness question in a manner more hospitable to their argument that certiorari should be denied. Specifically, Respondents argue that GEICO asks the Court to review a purported failure by the Ninth Circuit to recognize an advice-of-counsel defense.[30]

But nowhere in GEICO's petition does GEICO argue that the Ninth Circuit failed to recognize an advice-of-counsel defense. Instead, GEICO challenges the Ninth Circuit's standard for determining willfulness in part because it (a) aggravates a pre-existing circuit split; (b) sets a lower legal standard than any other circuit; (c) impermissibly permits a finding of willfulness to be based on 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; (d) improperly shifts the burden of proof; (e) is not practical; and (f) should, but

26. *Ruffin-Thompkins v. Experian Info. Solutions, Inc.*, 422 F.3d 603, 610 (7th Cir. 2005).

27. *Phillips v. Grendahl*, 312 F.3d 357, 369 (8th Cir. 2002).

28. *Reynolds*, 435 F.3d at 1097. (App. at 30a.)

29. 486 U.S. 128, 134-35 (1988).

30. *See* Respondents' Br. in Opp'n 1, 20-25.

does not, require actual knowledge.[31] Respondents miss the point and, in so doing, wholly ignore most if not all of GEICO's arguments that call into question the Ninth Circuit's willfulness standard.

C. Even without punitive damages, application of the Ninth Circuit's erroneous willfulness standard still subjects a defendant to the potential for "crushing liability."

In its petition, GEICO argued in part that the Ninth Circuit's willfulness standard sets too low a threshold for punitive damages because it allows a company that acted in good faith to be found willful and punished with punitive damages merely because the company arrived at an incorrect interpretation of the law.[32] In support of GEICO's petition, several amici curiae similarly argued that punitive damages serve the same purposes as criminal penalties, that the Ninth Circuit's willfulness standard sets too low a threshold for the recovery of punitive damages (and aggregated statutory damages), and that businesses will be subjected to punitive damages even without having known that their actions violated FCRA.[33]

Respondents suggest to this Court that GEICO has "create[d] the mistaken impression" that this is an action for punitive damages,[34] and state, yet again: "Respondents repeat here that they are not seeking punitive damages. Respondents only seek the statutory damages (between $100 and $1,000) . . . ."[35] What Respondents fail to recognize is that, although Edo may have dropped his punitive-damages claim from this case, the potential liability in a case like this one is staggering—even without punitive damages—because FCRA does not impose an aggregate cap on the total statutory damages

31. GEICO's Pet. for a Writ of Cert. 13-25.

32. GEICO's Pet. for a Writ of Cert. 18-24.

33. *See*, *e.g.*, Br. of the Chamber of Commerce of the U.S. of Am. & the Bus. Roundtable as *Amici Curiae* in Supp. of Petitioners 16-17; Br. of Prop. Cas. Insurers Ass'n of Am. as *Amicus Curiae* in Supp. of Petitioners 14; Br. for the Fin. Servs. Roundtable as *Amicus Curiae* in Supp. of Petitioners 16.

34. Respondents' Br. in Opp'n 7.

35. Respondents' Br. in Opp'n 7, 17.

available in class-action litigation.[36] In other words, while punitive damages are no longer part of this case, the Ninth Circuit's erroneous willfulness standard will still be applied to determine whether potentially massive statutory damages are available. Furthermore, when Edo filed his "Notice of Withdrawal of Punitive Damages Claim," doing so most certainly did not erase the availability of punitive damages from § 1681n(a)(2). For every other case brought pursuant to § 1681n, the *same* erroneous willfulness standard, unless set aside, will also be used to determine whether punitive damages are available.

D. GEICO presented two questions for review, not one.

GEICO presented *two* questions for review in its Petition for a Writ of Certiorari, one involving the Ninth Circuit's construction of "willfully" under § 1681n of FCRA, and the other involving the Ninth Circuit's construction of "adverse action" under § 1681m of FCRA. Respondents devoted 99% of their response to the first question, and roughly one paragraph of their response to the second.[37] In fact, Respondents used a good portion of their response to argue that it would be premature to review the willfulness question, but they did *not* argue that it would be premature for this Court to review the adverse-action question. And while the Ninth Circuit's erroneous standard for determining willfulness under § 1681n is very important and has drawn more national attention, the Ninth Circuit's holding that an adverse action has occurred and that notice is required under § 1681m of the Act, even when a consumer's credit information has had no adverse impact on the rates or terms provided, is just as flawed, just as important, and just as ripe for review. Indeed, like the willfulness question, the answer to the adverse-action question, by itself, may completely dispose of this entire case.

III. Conclusion

GEICO's Petition for a Writ of Certiorari should be granted.

---

36. *See Trans Union*, 536 U.S. at 917 (Kennedy, J., dissenting) (discussing FCRA's statutory damages of between $100 and $1,000, and noting the potential for "crushing liability").

37. Respondents' Br. in Opp'n 29-30.

Respectfully submitted,

ROBERT D. ALLEN*
MELONEY CARGIL PERRY
JAY F. UTLEY
BRANDON P. LONG
BAKER & MCKENZIE LLP
2300 Trammell Crow Center
2001 Ross Avenue
Dallas, Texas 75201
(214) 978-3000

Attorneys for Petitioners

* *Counsel of Record*