No. 07-834

IN THE

Supreme Court of the United States

RADIAN GUARANTY, INC.,
Petitioner,

v.

WHITNEY WHITFIELD, *et al.*,
Respondents.

**On Petition for Writ of Certiorari
To the United States Court of Appeals
For the Third Circuit**

**BRIEF OF WASHINGTON LEGAL FOUNDATION
AND . . .
AS *AMICI CURIAE* IN SUPPORT OF PETITIONER**

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QUESTION PRESENTED

Whether, under the Court's recent decision in *Safeco Insurance Co. v. Burr*, 127 S. Ct. 2201 (2007), which held that civil willfulness under the Fair Credit Reporting Act (FCRA) is an objective legal standard that should be determined as a matter of law, the court of appeals erred in holding that civil willfulness under FCRA is a factual issue that cannot be decided as a matter of law.

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BRIEF OF WASHINGTON LEGAL FOUNDATION
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INTERESTS OF *AMICI 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., Safeco Insurance Co. v. Burr,* 127 S. Ct. 2201 (2007); *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/012706LB Detlefsen.pdf.

WLF believes that the free and efficient flow of

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[1] Pursuant to Supreme Court Rule 37.6, *amici* state that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than *amici* and their counsel, made a monetary contribution intended to fund the preparation and submission of this brief. All parties have consented to the filing of this brief.

consumer information is vital to the health of the American economy. WLF is concerned that the Third 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), 15 U.S.C. § 1681 *et seq*. WLF believes that increased uncertainty is inevitable because, in contravention of the Court's recent *Safeco* decision, the Third Circuit has barred judges from undertaking any meaningful role in making FCRA "willfulness" determinations and instead has decreed that such determinations are to be made on a case-by-case basis by individual juries.

STATEMENT OF THE CASE

The FCRA provides that any person who "willfully" fails to comply with an FCRA requirement with respect to a consumer is liable to that consumer for specified damages and costs, including: (1) statutory damages of between \$100 and \$1,000, even in the absence of actual damages; (2) "such amount of punitive damages as the court may allow"; and (3) costs and reasonable attorney's fees. 15 U.S.C. § 1681n(a). Not surprisingly, this generous damages provision has spawned numerous class action lawsuits alleging "willful" violations of a broad array of FCRA requirements.

Last term, the Court had occasion to provide guidance regarding what constitutes a "willful" violation of the FCRA. *See Safeco Insurance Co. v. Burr,* 127 S. Ct. 2201 (2007). The Court ruled that a "willful[]" failure to comply includes acts undertaken in knowing violation of, or with reckless disregard for, a duty imposed by the FCRA. *Id*. at 2208. The court went on to define recklessness as "conduct violating an *objective* standard: action entailing 'an unjustifiably high risk of harm that is either known or so obvious that it should be known.'" *Id.* at 2215 (quoting *Farmer v. Brennan*, 511 U.S. 825, 836 (1994) (emphasis added).

The Court set forth a two-step inquiry for determining whether a defendant's violation of the FCRA should be deemed reckless. First, the plaintiff must establish that the defendant's course of conduct was based on an interpretation of the FCRA that was not only erroneous but "objectively unreasonable." *Id.* Second, the plaintiff must establish that in so acting, the defendant "ran a risk of violating the law substantially greater than the risk associated with a reading that was merely careless." *Id.* The Court identified three factors relevant to determining whether a defendant's FCRA interpretation was objectively unreasonable: (1) whether the defendant's reading has "a foundation in the statutory text"; (2) whether the defendant's reading has been adopted in a federal court decision; and (3) whether either the federal appeals courts or the Federal Trade Commission (FTC) have provided guidance on the issue. *Id.* at 2216. The Court explained that the defendant's alleged "subjective bad faith" is not relevant in determining whether the defendant's interpretation is objectively unreasonable; an objectively reasonable interpretation is not rendered unreasonable simply because the defendant allegedly had disreputable motives for adopting it. *Id*. at 2216 n.20.

In *Safeco*, an insurance policy holder alleged that one of the defendants (Safeco) violated his rights under the FCRA by failing to provide him notice that it had taken an "adverse action" by charging him a higher insurance premium because of information contained in his credit report. *See* 15 U.S.C. § 1681m(a). Safeco argued that because the plaintiff was a new customer who had never before been quoted a price for insurance, the rate it quoted him could not be deemed "an *increase* in any charge for . . . any insurance," 15 U.S.C. § 1681a(k)(1)(B)(i) (emphasis added), and thus that it had not taken an adverse action that triggered the notification requirement. The Court rejected Safeco's interpretation of the FCRA; it held that an "adverse action" includes a rate quote given to a new applicant, if the applicant is quoted a "disadvantageous rate" based on information contained in his credit report. 127 S. Ct. at 2211.

The Court nonetheless held that Safeco's interpretation of the "adverse action" provision was "not objectively unreasonable" and thus that, as a matter of law, Safeco had not "willfully" violated the FCRA's notification requirement. *Id.* at 2215.[2] The Court applied the three factors identified above in arriving at its "not objectively unreasonable" determination. First, Safeco's reading of the "adverse action" provision had a "foundation in statutory text" – the FCRA's use of the phrase "increase in any charge" could plausibly have been read as precluding an "adverse action" finding in the absence of a prior, lower

[2] In light of the "not objectively unreasonable" finding, the Court saw "no need" to move to the second stage of the recklessness inquiry and "pinpoint the negligence/recklessness line." *Id.*

charge. *Id.* at 2216. Second, some federal courts had adopted Safeco's interpretation; indeed, the federal district court in Safeco's very case had granted a motion to dismiss based on a finding that Safeco had not taken adverse action. *Id.* Third, "[b]efore these cases, no court of appeals had spoken on the issue, and no authoritative guidance has yet come from the FTC." *Id.* Because the Court held as a matter of law that Safeco had not "willfully" violated the FCRA, it reversed the judgment of the appeals court, which had ordered the case remanded to the trial court "for factual development" on the issue of willfulness. *Id.*

This petition involves a nearly identical FCRA claim. Petitioner Radian Guaranty, Inc., a mortgage insurance company, is alleged to have violated the FCRA by failing to provide notice of "adverse action" after quoting a premium rate based in part on information derived from a credit report. Respondents Whitney and Celeste Whitfield allege that because of information contained in their credit report, they paid more for the mortgage insurance policy issued by Radian to their mortgage lender, yet Radian failed to send them an adverse action notification.

Radian moved for summary judgment, citing several grounds for its assertion that it had not taken any "adverse action" with respect to the Whitfields. In particular, Radian raised the very same defense asserted by Safeco: that because the Whitfields had never before been quoted a price for insurance, the rate quoted by Radian to the mortgage lender could not be deemed an "increase" in a charge for insurance. The district court rejected that defense. Pet. App. 28a-29a. It nonetheless granted summary judgment for Radian, reasoning that because the mortgage insurance contract at issue was between Radian and the Whitfields' lender, not between Radian and the Whitfields, Radian had not taken "any adverse action with respect to" the Whitfields within the meaning of 15 U.S.C. § 1681m(a). *Id*. 34a-37a. Because it determined that Radian had not violated the FCRA, the district court had no occasion to consider Radian's alternative argument that any violation was not willful.

This Court issued its *Safeco* decision while the Whitfields' appeal was pending in the Third Circuit. The appeals court permitted the parties to file letters regarding *Safeco*'s relevance. Radian's letter cited *Safeco* for the proposition that, as a matter of law, any violation of the FCRA was not "willful[]."[3]

The Third Circuit reversed the grant of summary judgment. Pet. App. 1a-20a. Relying on *Safeco*, the appeals court affirmed the district court's determination that "an initial premium can be termed an increase in any charge for insurance for purposes of the FCRA's

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[3] A finding that Radian had not acted "willfully" would essentially have ended the Whitfields' case. In the absence of a finding that an FCRA violation is willful, an FCRA plaintiff is limited to recovery of actual damages. The Whitfields have never claimed to have suffered actual damages because of Radian's failure to provide them with "adverse action" notification. Any such claim would be untenable, because the Whitfields were given a copy of their credit report by their mortgage lender *before* the lender even applied to Radian for mortgage insurance, and they wrote to the lender to explain several problematic items in the report. Pet. App. 24a. Thus, the purpose Congress sought to achieve by mandating adverse action notification (alerting a consumer to a possible need to check his/her credit report to see if it contains any inaccuracies) never even came into play in this case.

definition of adverse action." *Id*. 12a-13a. The court further held that Radian's increased insurance rates should be deemed "based . . . on" information contained in a credit report, even though Radian never saw the Whitfields' credit report but rather was simply told their credit score by the mortgage lender. *Id.* 13a-15a. The court further held that the absence of a contractual relationship between Radian and the Whitfields did not relieve Radian of an FCRA notification obligation. *Id.* 15a-18a. In support of its conclusion that Radian had taken "adverse action with respect to" the Whitfields within the meaning of 15 U.S.C. § 1681m(a), the court relied extensively on a district court decision that similarly involved an FCRA "adverse action" claim filed by a borrower against a company that had issued mortgage insurance to her mortgage lender. *Id.* 15a-17a (citing *Broessel v. Triad Guaranty Ins. Corp.*, 2005 U.S. Dist. LEXIS 20361 (W.D. Ky. Sept. 15, 2005).

The Third Circuit also rejected Radian's claim that any FCRA violation should be deemed, as a matter of law, not willful within the meaning of 15 U.S.C. § 1681n(a). Pet. App. 18a-20a. Rather, the court remanded the willfulness issue to the district court for further factual development. *Id.*[4] In particular, the appeals court directed the district court to examine

[4] As noted above, this Court held in *Safeco* that it was not objectively unreasonable in the 2002-2003 time frame to interpret the FCRA "adverse action" requirements as being inapplicable to an initial insurance premium being offered to new customers – and thus that as a matter of law, Safeco had not "willfully" violated the FCRA. *Safeco*, 127 S. Ct. at 2215-16. The appeals court did not attempt to explain how *Safeco* was distinguishable on that issue, other than to observe without explanation, "The situations might not be analogous." Pet. App. 18a.

Radian's subjective beliefs: whether Radian "reasonably believed" that an initial rate offer could not constitute "an increase for purposes of the definition of adverse action under the FCRA." *Id*. The appeals court held that it would be inappropriate for either it or the district court to decide the willfulness issue as a matter of law:

> We do not suggest that a factfinder could not or would not determine that Radian did not act willfully. Instead, we hold that whether it did so is a factual issue, not a question of law, and it therefore cannot be decided either on appeal or by the District Court as a matter of law.

Id. 20a.

REASONS FOR GRANTING THE PETITION

The petition raises issues of exceptional importance. Less than a year ago, in a case factually indistinguishable from this case, the Court held *as a matter of law* that the defendant insurance company's interpretation of the FCRA was "not objectively unreasonable" and thus that the defendant had not "willfully" violated the FCRA. Utterly disregarding that holding, the Third Circuit in this case held that neither it nor the district court was permitted to determine as a matter of law whether an identically situated insurance company had acted "willfully" and instead that the willfulness determination should be made by the trier of fact.

Amici recognize that the Court is not in a position to correct the federal appeals courts every time they fail to adhere to the Court's precedents, even when (as here) the appeals court's error is patent and the precedent at issue is of such recent vintage. The Third Circuit's decision nonetheless merits the Court's attention because, in addition to being so defiantly at odds with the Court's *Safeco* decision, it has the potential to cause havoc both in the insurance industry and among the many other industries whose activities are subject to FCRA regulation.

The FCRA is a complex statute with hundreds of provisions that have never been the subject of an appellate court decision or FTC guidance. Companies subject to FCRA regulation must every day act in accordance with their best understanding of what those provisions require. As a result of the Third Circuit's decision, they risk literally billions of dollars in damages if a court later disagrees with their understanding. The Third Circuit's decision makes it virtually impossible for an FCRA defendant to obtain summary judgment on the issue of "willfulness." Moreover, most FCRA suits are filed as nationwide class actions; when a routine decision under the FCRA is replicated in tens of thousands of transactions, the statutory damages of $100 to $1000 per class member as well as the availability of punitive damages can translate into massive potential liability. The likely result will be coerced settlement of most such suits; going to trial on the issue of willfulness is not a realistic option for most FCRA defendants under those circumstances. Because the great majority of large corporations are susceptible to suit in the Third Circuit, unless the decision below is overturned one can reasonably anticipate that the Third Circuit will become the circuit of choice for most putative class actions alleging FCRA violations.

The Third Circuit decision is particularly problematic because it deviates from *Safeco*'s focus on *objective* criteria for determining whether an FRCA defendant "willfully" violated the statute. *Safeco* explained that if an incorrect interpretation of the FCRA is nonetheless "not objectively unreasonable," a finding of willfulness is precluded as a matter of law. *Safeco,* 127 S. Ct. at 2215. The Court stated that objective reasonableness is to be determined by factors extraneous to the defendant – *e.g.,* the language of the FCRA provision at issue and the existence of prior court decisions on point. *Id.* at 2216 & n.20. In contrast, the Third Circuit has instructed federal courts in Delaware, New Jersey, and Pennsylvania to focus on subjective, case-specific factors – *e.g.*, whether the FCRA defendant "was in a position to identify and notify ultimate purchasers" of its product that it has taken adverse action, Pet. App. 19a, or whether the defendant "reasonably believed" that it had fully complied with the FCRA. *Id.* Focus on such subjective factors introduces the likelihood of numerous factual disputes that will preclude resolution of the willfulness issue at the summary judgment stage. Moreover, inquiries into whether an FCRA defendant "reasonably believed" that it had complied with the FCRA inevitably will focus on conversations with counsel and thereby threaten to undermine the attorney-client privilege.

Because the Third Circuit's decision so clearly and directly conflicts with *Safeco*, it is a prime candidate for summary reversal. Alternatively, *amici* respectfully request that the Court grant the petition, vacate the decision below, and remand the case to the Third Circuit for reconsideration in light of *Safeco*.

I. THE DECISION BELOW CONFLICTS WITH THE PRECISE HOLDING OF *SAFECO*

The Third Circuit's decision directly conflicts with the Court's 2007 decision in *Safeco*. *Safeco* held as a matter of law that an insurance company interpreted the FCRA in a "not objectively unreasonable" manner (and thus had not "willfully" violated the FCRA) when it concluded that an initial insurance premium cannot be termed an "increase" in any charge for insurance (and thus does not trigger "adverse action" notification requirements under the FCRA). 127 S. Ct. at 2215. Less than three months later and in direct conflict with that holding, the Third Circuit rejected Radian's assertion that its identical interpretation of the FCRA was "not objectively unreasonable" as a matter of law. Instead, the Third Circuit held, the question was one of fact to be determined on remand based on such subjective factors as whether Radian "reasonably believed" in the accuracy of its interpretation. Pet. App. 19a. The appeals court made no effort to distinguish *Safeco*, other than to observe without explanation, "The situations might not be analogous." *Id.* 18a.[5] The petition should be granted, to overturn this blatantly

[5] The Third Circuit did not suggest any relevant factual distinctions between this case and *Safeco*. There are none. Radian sold its insurance policy to the Whitfields' mortgage lender in March 2003, just a few months after Safeco sold its insurance policy. At the time of both sales, there were no federal court decisions on point, and the FTC had issued no guidance regarding what constituted "adverse action" in the insurance context. While the two cases involved different lines of insurance (Safeco sold automobile insurance, while Radian sold mortgage insurance), nothing in *Safeco* suggests that the "adverse action" determination depends in any way on the type of insurance at issue.

erroneous interpretation of federal law.

If anything, the evidence that the FCRA defendant did not act "willfully" is stronger here than in *Safeco*. The Court determined that Safeco had *one* "not objectively unreasonable" basis for determining that it need not provide "adverse action" notification to a consumer. Radian had that same basis for declining to provide notification; but it also had two others: (1) it never saw the Whitfields' credit report, so it could not be said to have increased the Whitfields' insurance premium "based on" information contained in a consumer report; and (2) it did not take adverse action "with respect to" the Whitfields because its contractual relationship was with the mortgage lender, not the Whitfields. 15 U.S.C. § 1681m(a). Although the Third Circuit rejected both of those proffered interpretations of the FCRA, Pet. App. 14a-18a, it said nothing to suggest that either interpretation was "objectively unreasonable." In particular, the appeals court cited no contrary FTC guidance or federal court decisions that predated Radian's issuance of mortgage insurance to the Whitfields' lender in March 2003. The one court decision cited by the Third Circuit in support of its interpretation of § 1681m(a), *Broessel v. Triad Guaranty Ins. Corp.* ["*Broessel I*"], 2005 U.S. Dist. LEXIS 20361 (W.D. Ky. Sept. 15, 2005), was not issued until more than two years later. Moreover, the district court in this case agreed with Radian's "with respect to" argument. Pet. App. 34a-37a. Because the Court determined that Safeco did not "willfully" violate the FCRA given that the statute could reasonably be interpreted as not requiring "adverse action" notification to first-time policy holders, then *a fortiorari* Radian did not act "willfully" given that the same defense – along with two others that the Third Circuit never suggested were unreasonable – was also available to Radian.

The Third Circuit's reliance on *Broessel I* is ironic in light of the subsequent history of that case.[6] In the 2005 decision cited by the Third Circuit, the *Broessel I* court denied the defendant mortgage insurer's motion for summary judgment on the ground that the insurer had indeed taken adverse action with respect to a borrower despite the absence of any contractual relationship between the two. Following the *Safeco* decision last June, the insurer moved for summary judgment on the borrower's willfulness claim. The district court agreed that *Safeco* required a ruling *as a matter of law* that the mortgage insurer had not acted willfully:

> Following *Safeco*, the Court concludes that Triad [the mortgage insurer] did not willfully violate FCRA. Triad shared Safeco's objectively reasonable, though mistaken belief, that charging a new customer higher than its best rate did not constitute an adverse action under the statute. Additionally, at the time Triad failed to issue an adverse action notice to Ms. Broessel, no court of appeals had yet considered the issue. . . . Thus, the Court concludes, as a matter of law, that Triad did not act recklessly when it violated the statute and it is entitled to summary judgment on the willfulness claim.

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[6] Counsel for Respondents here also represents the plaintiff in *Broessel*.

Broessel v. Triad Guaranty Ins. Corp. ["*Broessel II*"], 2007 U.S. Dist. LEXIS 54426, at *7-*8 (E.D. Ky. July 25, 2007). The Court went on to deny the plaintiff's class certification motion as moot, because the plaintiff sought certification only as to the willfulness claim. *Id.* at *8.[7]

The Third Circuit issued its decision more than one month later, yet it chose to cite *Broessel I* (which agreed with the Third Circuit's decision regarding when the FCRA requires adverse action notification) while failing to mention the 2007 *Broessel II* decision (which cited *Safeco* for the proposition that mortgage insurers who interpreted the FCRA in the same manner as Safeco are entitled to a finding as a matter of law that they did not act willfully). In *Broessel II*, the district court followed *Safeco* and thus issue a decision that directly conflicts with the decision below; unless the decision below is reversed, district courts within the Third Circuit will not have that same option.

II. IF ALLOWED TO STAND, THE THIRD CIRCUIT DECISION WILL HAVE SEVERE NEGATIVE CONSEQUENCES FOR FIRMS SUBJECT TO THE FCRA

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[7] The decision of plaintiff's counsel to seek certification only as to the willfulness claim is typical in FCRA claims. It is § 1681n(a)'s provision of statutory damages (of from $100 to $1,000 per plaintiff), awardable without regard to proof of damages in cases involving willful FCRA violations, that provides the "commonality" that makes plausible a claim that a FCRA plaintiff class should be certified under Fed.R.Civ.P. 23(b)(3). *See also* Footnote 3, *supra.*

Amici recognize that the Court is not in a position to correct the federal appeals courts every time they fail to adhere to the Court's precedents, even when (as here) the appeals court's error is patent and the precedent at issue is of such recent vintage. The Third Circuit's decision nonetheless merits the Court's attention because, in addition to being so defiantly at odds with the Court's *Safeco* decision, it has the potential to cause havoc both in the insurance industry and among the many other industries whose activities are subject to FCRA regulation.

The FCRA – which governs all aspects of consumer reporting – is an extraordinarily complex statute with many provisions that have never been the subject of administrative or judicial interpretation. The FCRA contains 31 separate sections, 145 subsections, and about 34,000 words. Portions of the FCRA have been explained in an FTC Commentary that is now 17 years old and that does not address the provisions added to the FCRA through amendments in 1996 and 2003. Companies subject to the FCRA thus have little to guide them through the FCRA minefield.

The provisions of 15 U.S.C. § 1681n(a) make that journey particularly treacherous. Section 1681n(a) – which subjects "willful[]" violators of the FCRA to statutory damages, punitive damages, and attorney's fees – applies to *every* requirement imposed by the FCRA. Although there have been numerous suits – like both this case and *Safeco* – involving allegations that insurance companies failed to provide "adverse action" notifications required by § 1681m(a), that notification provision represents just the tip of the FCRA iceberg. For example, hundreds of putative class actions have been filed regarding the meaning of the FCRA's "firm offer of credit or insurance" provision. *See, e.g., Cole v. U.S. Capital*, 389 F3d 719 (7th Cir. 2004).[8] Hundreds of merchants have been the targets of class-action suits alleging that they "willfully" violated a recently enacted FCRA provision, 15 U.S.C. § 1681c(g)(1), that prohibits printing a receipt that includes more than the last five digits of a customer's credit card number. *See, e.g., Ehrheart v. Lifetime Brands, Inc.*, 498 F. Supp. 2d 753 (E.D. Pa. 2007). Other frequently litigated FCRA provisions include 15 U.S.C. § 1681e(b) (requiring credit reporting agencies to use "reasonable procedures to assure maximum possible accuracy" when preparing credit reports)[9] and 15 U.S.C. § 1681i (requiring credit reporting agencies to conduct a reinvestigation when a consumer disputes the accuracy of a credit report).[10]

The regulated community can cope with the inevitable FCRA litigation, so long as it has an opportunity to demonstrate its good faith when alleged

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[8] The FCRA imposes limits on the rights of lenders or insurance companies to access and use consumer credit information. One instance in which the FCRA permits such access and use is "in connection with any credit or insurance transaction that is not initiated by the consumer only if . . . the transaction consists of a firm offer of credit or insurance." 15 U.S.C. § 1681b(c)(1)(B)(1). The lower federal courts are in disarray regarding the meaning of the phrase "firm offer of credit or insurance." In every one of the hundreds of putative class actions alleging violations of that provision, the plaintiffs assert that the violation is "willful."

[9] *See, e.g. Perez v. Trans Union, LLC*, 2007 U.S. Dist. LEXIS 87430 (E.D. Pa. Nov. 27, 2007).

[10] *See, e.g. Dennis v. REH-1, LLC*, 504 F.3d 892 (9th Cir. 2007).

to have "willfully" violated the FCRA. The Third Circuit decision threatens to eliminate that opportunity. By decreeing that the issue of willfulness is "a factual issue, not a question of law" and one that "cannot be decided either on appeal or by the District Court as a matter of law," Pet. App. 20a, the Third Circuit has made it virtually impossible for a FCRA defendant to win summary judgment on the issue of willfulness. Because the § 1681n(a) statutory damages provision alone can escalate potential damages to the millions or billions of dollars,[11] FCRA defendants cannot realistically risk allowing the issue of willfulness to be decided by a jury. The likely result will be coerced settlement of such suits, regardless of their merit and even when – as here – the plaintiffs have suffered absolutely no damages.[12]

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[11] As noted above, most FCRA suits are filed as nationwide class actions; when a routine decision under the FCRA is replicated in tens of thousands of transactions, the statutory damages of $100 to $1000 per class member as well as the availability of punitive damages can translate into massive potential liability. *See, e.g., Trans Union LLC v. Federal Trade Comm'n*, 536 U.S. 915 (2002) (Kennedy, J., dissenting from denial of certiorari) ("Because the FCRA provides for statutory damages of between $100 and $1,000 for each willful violation, petitioner faces potential liability approaching $190 billion.").

[12] As noted above at Note 3, the Whitfields suffered no actual damages in this case because they were given a copy of their credit report by their mortgage lender *before* the lender even applied to Radian for mortgage insurance. Pet. App. 24a. Thus, any adverse action notification sent by Radian to the Whitfields would only have notified them of something they knew full well: that their credit report indicated that they were less-than-optimal credit risks.

As the Petition well demonstrates, the difficulties created by the Third Circuit decision extend to businesses across the country. Any corporation incorporated in Delaware can be sued (and, in light of the decision below, likely will be sued) within the Third Circuit for alleged FCRA violations, and a huge number of corporations fit that description. *See* Pet. 17 ("Delaware is the corporate home of 61% of all Fortune 500 companies and half of all United States firms traded on the New York Stock Exchange and NASDAQ."). Virtually all large U.S. corporations do business within the Third Circuit, and thus they are amenable to suit within the circuit on that basis as well. By filing their FCRA cases as putative class actions, enterprising plaintiffs' lawyers can assert the rights of all American consumers, even those living outside the Third Circuit. Thus, if the Third Circuit decision is allowed to stand, increased FCRA litigation is likely to interfere significantly with the free and efficient flow of consumer information and thereby increase the costs of obtaining insurance, credit, and other vital services. Americans benefit greatly from the ready and relatively inexpensive accessibility to insurance, credit, and other services made possible by the availability of accurate credit information.[13] The decision below threatens to interfere with those benefits.

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[13] *See, e.g.,* Michael E. Staten and Fred H. Cate, *The Impact of National Credit Reporting Under the Fair Credit Reporting Act: The Risk of New Restrictions and State Regulation*, at 7 (May 2003), *available at* www.ftc.gov/bcp/workshops/infoflows/statements/cate02.pdf (U.S. consumers save as much as $100 billion each year due to the efficiency and liquidity made possible by the availability of consumer credit information).

III. BY FOCUSING THE "WILLFUL[NESS]" INQUIRY ON CASE-SPECIFIC FACTORS, THE DECISION BELOW THREATENS ATTORNEY-CLIENT COMMUNICATIONS

The Third Circuit decision is particularly problematic because it deviates from *Safeco*'s focus on *objective* criteria for determining whether an FRCA defendant "willfully" violated the statute. *Safeco* explained that if an incorrect interpretation of the FCRA is nonetheless "not objectively unreasonable," a finding of willfulness is precluded as a matter of law. *Safeco,* 127 S. Ct. at 2215. The Court stated that objective reasonableness is to be determined by factors extraneous to the defendant – *e.g.,* the language of the FCRA provision at issue and the existence of prior court decisions on point. *Id.* at 2216 & n.20. *See also, supra* at 3-5.[14]

In contrast, the Third Circuit has instructed federal courts in Delaware, New Jersey, and Pennsylvania to focus on subjective, case-specific factors

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[14] The objective factors that *Safeco* deemed relevant to the "not objectively unreasonable" inquiry make plain that the Court envisioned that the inquiry would be undertaken by judges as a question of law, not by the trier of fact. For example, it is difficult to imagine that the Court intended to permit a jury to study the language of 15 U.S.C. §§ 1681a(k)(1)(B)(i) and 1681m(a) and determine whether Radian's erroneous interpretations of those provisions had a "foundation in statutory text." *Safeco,* 127 S. Ct. at 2216. It is similarly difficult to imagine that the Court intended to permit a jury to study the text of federal court decisions and FTC guidance documents to determine whether either courts or the FTC "had spoken on the issue" at the time Radian committed what was later determined by the Third Circuit to be a FCRA violation. *Id.*

– *e.g.*, whether the FCRA defendant "was in a position to identify and notify ultimate purchasers" of its product that it has taken adverse action, Pet. App. 19a, or whether the defendant "reasonably believed" that it had fully complied with the FCRA. *Id.* Focus on such subjective factors introduces the likelihood of numerous factual disputes that will preclude resolution of the willfulness issue at the summary judgment stage.[15]

More ominously, focus on such factors threatens the ability of FCRA defendants to protect the confidentiality of their attorney-client communications. If, as the Third Circuit stated, a defendant's "reasonable belie[fs]" regarding the meaning of a FCRA provision are relevant to the willfulness determination, then FCRA plaintiffs will seek discovery into what the plaintiffs believed. Such beliefs generally are formed on the basis of communications with counsel, so the Third Circuit's decision is an open invitation to plaintiffs to inquire into what the defendants were told by their lawyers about the meaning of various FCRA provisions.

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[15] Focus on such subjective factors was explicitly criticized by *Safeco*. *See, e.g.,* 127 S. Ct. at 2216 n.20 (if the interpretation of the FCRA adopted by the defendant is "not objectively unreasonable," the defendant has not "willfully" violated the FCRA, even if the defendant acted in "subjective bad faith" and did not really believe that the interpretation it adhered to was the correct one). Moreover, whether FCRA defendants (such as Radian) are able to identify those (such as the Whitfields) who borrow money from their mortgage insurance clients is not relevant to the issue of whether they are *required* to provide "adverse action" notifications. Nothing in *Safeco* suggests that an FCRA defendant, in order to avoid a willfulness determination, must "play it safe" by providing a notification to identifiable consumers, whenever the obligation to do so is in doubt.

The Ninth Circuit explicitly acknowldged the propriety of such discovery in its decision that was later overturned by *Safeco*. *See Reynolds v. Hartford Fin. Servs. Group, Inc.,* 435 F.3d 1081, 1099 (9th Cir. 2006) (the willfulness standard we adopt will routinely put at issue "specific evidence as to how the company's decision was reached, including the testimony of the company's executive and counsel"), *rev'd sub nom., Safeco Ins. Co. of America v. Burr*, 127 S. Ct. 2201 (2007). *Safeco* allayed fears regarding threats to the attorney-client privilege that arose following the Ninth Circuit's decision. The Third Circuit decision has revived those fears. Unless the decision below is reversed, clients are likely to be discouraged from seeking, and lawyers are likely to be discouraged from providing, frank and thoughtful advice with respect to FCRA compliance – lest such advice later be used to support a claim that the clients subjectively believed that they were not complying with the FCRA.

CONCLUSION

Amici curiae requests that the Court grant the petition for a writ of certiorari. They further request that the Court either summarily reverse the decision below or remand the case to the Third Circuit for reconsideration in light of *Safeco*.

Respectfully submitted,

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