No. 07-834

In The
Supreme Court of the United States

RADIAN GUARANTY, INC.,
Petitioner

v.

WHITNEY WHITFIELD, ET AL.,

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

SUGGESTION OF MOOTNESS AND MOTION TO VACATE THE JUDGMENT OF THE COURT OF APPEALS

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Pursuant to Rule 21.2(b) of the Rules of this Court, petitioner Radian Guaranty, Inc., respectfully moves that the Court vacate the judgment of the United States Court of Appeals for the Third Circuit in this case.

Radian Guaranty filed a petition for a writ of certiorari in this case on December 19, 2007. On February 5, 2008, this Court directed the respondents to file a response to the petition. Having obtained two extensions, that response is currently due on May 5, 2008. On April 24, 2008, however, the respondents filed a motion in the United States District Court for

the Eastern District of Pennsylvania to dismiss their case against petitioner in its entirety and with prejudice. See App. A, *infra*. That same day, before petitioner filed any response to the motion, the district court granted respondents' motion and dismissed the case with prejudice. See App. B, *infra*.

That unilateral dismissal of respondents' lawsuit has rendered the petition for a writ of certiorari moot and has thereby denied petitioner the opportunity to obtain review of the Third Circuit's precedential decision, which directly conflicts with recent and controlling precedent of this Court and which has enduring adverse implications for petitioner and the innumerable business entities within the Third Circuit that are subject to the Fair Credit Reporting Act, 15 U.S.C. §§ 1681 *et seq*. See Brief of the Washington Legal Foundation, *et al.* as Amici Curiae; Brief of the Consumer Mortgage Coalition, *et al.*, as Amici Curiae; Brief of State Farm Mutual Auto. Ins. Co., as Amicus Curiae; and Brief of the Consumer Data Industry Ass'n as Amicus Curiae.

Accordingly, this Court should vacate the judgment of the court of appeals. See *U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership*, 513 U.S. 18 (1994); *United States v. Munsingwear*, 340 U.S. 36 (1950). That will "clear[] the path for future relitigation" of the important questions of federal law presented by this case and "eliminate a judgment[]" that squarely conflicts with precedent of this Court and is profoundly contrary to petitioner's and its amici's ongoing business interests, but "review of which was prevented through happenstance." *Munsingwear*, 340 U.S. at 40.

STATEMENT

1. FCRA requires "any person [who] takes any adverse action with respect to any consumer that is based in whole or in part on any information contained in a consumer report" to notify the consumer of the adverse action. 15 U.S.C. § 1681m(a). FCRA defines "adverse action" with respect to insurance companies as "a denial or cancellation of, an increase in any charge for, or a reduction or other adverse or unfavorable change in the terms of coverage or amount of, any insurance, existing or applied for, in connection with the underwriting of insurance." 15 U.S.C. § 1681a(k)(1)(B)(i).

If a company "willfully fails to comply" with FCRA's notification provision, the aggrieved party may obtain (i) either actual damages or statutory damages "of not less than $100 and not more than $1,000," (ii) "such amount of punitive damages as the court may allow," and (iii) costs and attorney's fees. 15 U.S.C. § 1681n(a)(1)(A)-(3).

2. In 2001, respondents Whitney and Celeste Whitfield obtained a mortgage to buy a new home from Countrywide Home Mortgage. Because the Whitfields were borrowing nearly the entire cost of their new home, the mortgage between the Whitfields and Countrywide allowed Countrywide to buy mortgage guaranty insurance to protect itself against the risk that the Whitfields might default and the foreclosure of the new home would not yield sufficient proceeds to pay the full amount of the mortgage loan. Pet. App. 24a. The mortgage further provided that the Whitfields would reimburse Countrywide the cost of the insurance premium. *Id.* at 2a-3a. After the

loan closed, Countrywide obtained mortgage guaranty insurance for itself from petitioner. *Id.* at 3a. Petitioner did not notify the Whitfields that Countrywide had purchased a mortgage guaranty insurance policy or that their credit report was a factor in the price of that insurance. *Ibid.*

3. The Whitfields subsequently filed suit against petitioner, alleging that petitioner had willfully violated FCRA by not providing them with an adverse action notice when it contracted with Countrywide to provide mortgage guaranty insurance to Countrywide. Pet. App. 4a. The Whitfields' complaint also sought certification of a class composed of "[a]ll consumers throughout the United States for whom [Radian] made underwriting decisions for private mortgage insurance" based on a consumer report and for whom the rate was "more than the lowest available rate offered by [Radian]." Complaint at 6, ¶ 29. According to the complaint, the class would exceed several thousand members. *Id.* at ¶ 31.

The district court granted petitioner's motion for summary judgment. Pet. App. 38a. The court held that Radian had not taken an adverse action "with respect to" the Whitfields within the meaning of 15 U.S.C. § 1681m(a) because Radian had contracted to provide insurance to Countrywide, not to the Whitfields. Pet. App. 35a-37a. While the rate for that policy is set "in part by the credit score of the borrower," the court explained, "the action is only indirectly adverse to the borrower." *Id.* at 33a. The court further explained that petitioner did not issue its insurance policy until "three days after the Whitfields settled" with Countrywide and agreed to pay the mortgage

insurance premiums. Accordingly, "[n]otice from Radian after settlement would be meaningless." *Id*. at 37a.

4. a. The Whitfields appealed. Following briefing, oral argument, and submission of the case to the Third Circuit, this Court issued its decision in *Safeco Insurance Co. v. Burr*, 127 S. Ct. 2201 (2007). In *Safeco*, this Court held that FCRA's adverse action provision applies to rates for initial applications for new insurance, and not (as Safeco had argued) only to increases in existing rates. *Id*. at 2210-2212.

This Court further held that, while Safeco's reading of the statute had been erroneous, Safeco's failure to provide an adverse action notice was not "willful" within the meaning of FCRA's civil liability provision, 15 U.S.C. § 1681n(a). In so holding, the Court concluded that FCRA's civil willfulness standard encompasses not just knowing conduct, but also conduct that is in "reckless disregard" of statutory obligations. 127 S. Ct. at 2208-2210. The Court stressed, however, that recklessness is "an objective standard" that requires a "high risk of harm, objectively assessed." *Id*. at 2215. The Court thus held that a company "does not act in reckless disregard of [FCRA] unless the action is not only a violation under a reasonable reading of the statute's terms," but also "shows that the company ran a risk of violating the law substantially greater than the risk associated with a reading that was merely careless." *Ibid*.

This Court then concluded as a matter of law that Safeco's reading of FCRA's insurance provision as not requiring an adverse action notice for initial policies of insurance "was not objectively unreasonable."

Safeco, 127 S. Ct. at 2215. The Court emphasized that (i) the statutory text was "silent on the point from which to measure 'increase'"; (ii) Safeco's argument "has a foundation in the statutory text"; (iii) the argument was sufficiently persuasive to have convinced the district court; (iv) there were no guiding decisions from the courts of appeals; and (v) there was no authoritative guidance from the Federal Trade Commission. *Id*. at 2215-2216. The Court accordingly concluded that, "[g]iven this dearth of guidance and the less-than-pellucid statutory text, Safeco's reading was not objectively unreasonable," and "falls well short of raising the 'unjustifiably high risk' of violating the statute necessary for reckless liability." *Id*. at 2216.

In holding that willfulness had not been established as a matter of law, this Court expressly rejected the argument that "evidence of subjective bad faith" can support a finding of willfulness. *Safeco*, 127 S. Ct. at 2216 n.20. "[W]hen the company's reading of the statute is objectively reasonable" and "the statutory text and relevant court and agency guidance allow for more than one reasonable interpretation," this Court concluded, "it would defy history and current thinking to treat a defendant who merely adopts one such interpretation as a knowing or reckless violator." *Ibid*. The Court accordingly held that "there was no need * * * to remand the cases for factual development," and reversed the Ninth Circuit's contrary judgment. *Id*. at 2216.

b. After receiving letters from the parties addressing the import of the *Safeco* decision, the court of appeals here reversed the district court's grant of sum-

mary judgment and remanded the case for a factual inquiry into petitioner's alleged willfulness. Pet. App. 20a. As relevant here, the court of appeals rejected the argument that, under *Safeco*, petitioner's erroneous interpretation of its legal obligations was not "willful." Pet. App. 19a-20a. Although petitioner had made the very same argument about FCRA's inapplicability to initial applications for insurance that Safeco had, *id.* at 19a, the court of appeals declared without explanation that "[t]he situations may not be analogous," and "le[ft] it to the District Court on remand to consider whether the evidence in the record supports Radian's claim that it did not willfully violate the statute because it reasonably believed an initial rate offer was not an increase for purposes of the definition of adverse action under the FCRA." *Ibid.*

Likewise, with respect to petitioner's arguments that it reasonably construed the statute not to apply both because it relied on Countrywide's loan-risk assessment and because it lacked a contractual relationship with the Whitfields, the court of appeals remanded for a factual inquiry into the alleged recklessness of petitioner's legal interpretation of FCRA's provisions. Pet. App. 19a-20a. The court held that the question whether petitioner's legal position amounted to willful disregard of FCRA's requirements "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." *Ibid.*

5. On December 19, 2007, petitioner filed a petition for a writ of certiorari seeking summary reversal or vacatur based on this Court's decision in *Safeco*. In January 2008, four amicus briefs were filed by

eleven different business organizations and entities supporting the petition for a writ of certiorari. This Court ordered respondents to file a brief in response to the petition, but that brief has not yet been filed. Instead, acting on respondents' motion and without awaiting any response from petitioner, the district court dismissed this lawsuit in its entirety and with prejudice on April 24, 2008.

ARGUMENT

1. An actual controversy must exist at all stages of appellate review, including before this Court. *U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership*, 513 U.S. 18, 21 (1994). Respondents' unilateral dismissal of their action, however, has mooted the petition for a writ of certiorari by eliminating the controversy between petitioner and respondents and rendering the case nonjusticiable under Article III of the Constitution. See, *e.g.*, *Preiser v. Newkirk*, 422 U.S. 395, 401-402 (1975).

When a case becomes moot pending this Court's review, "this Court may not consider its merits, but may make such disposition of the whole case as justice may require." *Bonner Mall*, 513 U.S. at 21. "[T]he established practice of the Court in dealing with a civil case from a court in the federal system which has become moot * * * pending [the Court's] decision on the merits is to reverse or vacate the judgment below and remand with a direction to dismiss." *Id.* at 22 (quoting *United States v. Munsingwear, Inc.*, 340 U.S. 36, 39 (1950)). Vacatur in such circumstances "clears the path for future relitigation of the issues between the parties and eliminates a judgment, review of which was prevented through happenstance." *Munsingwear*, 340 U.S. at 40.

2. Vacatur is warranted in this case under *Bonner Mall* and *Munsingwear* because the "unilateral action of the party who prevailed in the lower court" has denied petitioner the opportunity to seek review of the Third Circuit's judgment. *Arizonans for Official English v. Arizona*, 520 U.S. 43, 72 (1997) (quoting *Bonner Mall*, 513 U.S. at 23). Respondents' dismissal of their complaint has deprived petitioner of the opportunity to obtain this Court's review of the Third Circuit's decision and its ongoing adverse implications for petitioner's business operations. As an insurance company, petitioner is subject to FCRA's mandate – and the court of appeals' adverse and erroneous construction of that statute's operation – on a continuing basis.

Petitioner is not alone in that regard. The substantial and widespread concern caused by the court of appeals' holding is evidenced by the four separate amicus curiae briefs filed in this case by eleven different business organizations and entities, all seeking this Court's reversal or vacatur of the Third Circuit's decision because of the widespread and enduring consequences of its erroneous decision disregarding *Safeco*. See Brief of the Washington Legal Foundation, *et al.* as Amici Curiae; Brief of the Consumer Mortgage Coalition, *et al.*, as Amici Curiae; Brief of State Farm Mutual Auto. Ins. Co., as Amicus Curiae; and Brief of the Consumer Data Industry Ass'n as Amicus Curiae; see also Pet. 18-19 & n.5; *In re Farmers Ins. Co., Inc. FCRA Litigation*, No. 03-158-F, 2008 WL 687085 (W.D. Okla. Mar. 10, 2008) (applying Third Circuit decision).

Having gotten the Third Circuit's published decision on the books, with its wide-ranging adverse effect on the business community both within the Third

Circuit and in other jurisdictions, respondents' independent decision to dismiss their case should not have the collateral effect of forcing petitioner and its eleven amici "to acquiesce" in the now unreviewable Third Circuit decision, *Bonner Mall*, 513 U.S. at 25, and endure the "legal consequences" the Third Circuit's decision has "spawn[ed]," *Munsingwear*, 340 U.S. at 41.

3. Vacatur by this Court is further warranted because, as explained in the petition (Pet. 10-20), the court of appeals' decision is irreconcilable with this Court's recent and directly controlling decision in *Safeco Ins. Co. v. Burr*, 127 S. Ct. 2201 (2007). And if that now unreviewable judgment is left standing, the decision threatens to make the Third Circuit the forum of choice for class-action litigation aimed at the large number of businesses within that circuit that use credit reports to make business, financial, or employment decisions.

The court of appeals' holding that "willfulness" under FCRA is a factual issue that cannot be decided as a matter of law by either district courts or the court of appeals without the prior development and analysis of an evidentiary record is in irreconcilable conflict with this Court's holding just last Term in *Safeco*. Indeed, the conflict could not be more direct. In *Safeco,* this Court held *as a matter of* law that a company's position that FCRA did not apply to initial applications for insurance was not a "willful" violation of FCRA. *Id*. at 2215-2216. The Court further and specifically held that Safeco's reading of the statute was "objectively reasonable," and that the contention that such a position could "support a willfulness finding * * * is unsound." *Id*. at 2216 n.20. The Court emphasized that insurance companies did

not "ha[ve] the benefit of guidance from the court of appeals or the Federal Trade Commission," and that the argument that FCRA did not apply to initial applications for insurance "has a foundation in the statutory text." *Id*. at 2216. Because "the statutory text and relevant court and agency guidance allow for more than one reasonable interpretation," this Court concluded that "it would defy history and current thinking to treat a defendant who merely adopts one such interpretation as a knowing or reckless violator." *Id*. at 2216 n.20.

There is no dispute that petitioner here took the *exact same legal position* in this case as Safeco did, arguing that FCRA did not apply to the Whitfields' initial application for insurance. Compare *Safeco*, 127 S. Ct. at 2210-2211, with Pet. App. 13a. Indeed, the court of appeals' opinion acknowledged that petitioner's argument "follow[ed] Safeco's lead." *Id*. at 19a. Nor is there any dispute that petitioner took that same "objectively reasonable" position, *Safeco*, 127 S. Ct. at 2216 n.20, at approximately the same time as Safeco, when there was no relevant or controlling guidance from the Federal Trade Commission or the courts. See Pet. 12-13 & n.3.

However, rather than adhere to this Court's holding that its legal position was not willful as a matter of law, given its "objective reasonable[ness]" and "foundation in the statutory text," *Safeco*, 127 S. Ct. at 2216 & n.20, the court of appeals remanded the case and ordered the district court "to consider whether the evidence in the record supports Radian's claim that it did not willfully violate the statute." *Id*. at 19a. That flatly disregards *Safeco*, which specifically held that "it would defy history and current thinking to treat" an insurance company's adoption of

that same "objectively reasonable" interpretation of statutory text "as a knowing or reckless violator," *id.* at 2216 n.20, and that, as a result, "there was no need to remand the cases for factual development," *id.* at 2216.

The court of appeals then compounded its disregard of controlling precedent by holding that the question whether each of petitioner's alternative legal positions construing FCRA as inapplicable to its insurance contract not with respondents, but with Countrywide "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." Pet. App. 20a. In so holding, the court of appeals has forbidden district courts within the Third Circuit to resolve questions of willfulness under FCRA "as a matter of law" – including the exact same willfulness question decided *as a matter of law* by this Court concerning initial insurance policies – and thus has commanded circuit-wide disregard of this Court's central holding in *Safeco*.

Because the Third Circuit refused to rehear this case en banc (Pet. App. 39a-40a) and respondents have now unilaterally mooted the opportunity for this Court's review, vacatur is the only way to reinstate *Safeco* as controlling precedent within the Third Circuit – a circuit of enormous importance to business generally and insurance companies in particular. 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, all of which are potentially subject to suit as employers under FCRA, see 15 U.S.C. §§ 1681a(h) & (k)(1)(B)(ii). See Delaware Dep't of State, Div. of Corps., *2006 Annual Report*, at 1, available at

http://www.corp.delaware.gov/2006%20Annual%20Report%20with%20Signature%20_2_.pdf. There thus is substantial risk that the court of appeals' now-unreviewable decision will promote forum shopping by FCRA plaintiffs seeking to circumvent this Court's decision in *Safeco*.

That risk has enormous practical consequences for business. As in *Safeco*, in the companion case against GEICO, 127 S. Ct. at 2207, and in this case, many FCRA plaintiffs seek to bring their claims as nationwide class actions, claiming millions of dollars in statutory and punitive damages for allegedly willful violations of the statute, see 15 U.S.C § 1681n(a). The nationwide class action device will permit plaintiffs to bypass the law in circuits that adhere to *Safeco*, emptying this Court's decision of the precedential force to which it is entitled. What is worse, the Third Circuit held that the willfulness of a mistaken legal interpretation "cannot be decided either on appeal or by the District Court as a matter of law." Pet. App. 20a. Because the Third Circuit has thus largely closed the door to disposition of such cases at the motion to dismiss or summary judgment stage, those putative class actions will now be able to force defendant companies either to pay out massive settlements or to endure potentially privilege-breaching discovery and trials designed to probe their formulation of objectively reasonable legal positions.

Because the unilateral action of the party who prevailed in the lower court has denied petitioner and its eleven amici the opportunity to seek review of the Third Circuit's erroneous judgment and thus to prevent the continuing adverse effects on the business community that have arisen from that court's disregard of *Safeco*, the judgment of the court of appeals

should be vacated. See *Selig v. Pediatric Specialty Care, Inc.*, 127 S. Ct. 3000 (2007) (vacating court of appeals' decision when case rendered moot during pendency of certiorari petition); *United States v. Weatherhead*, 528 U.S. 1042 (1999) (same); *Anderson v. Green*, 513 U.S. 557, 560 (1995) (same); see also *Webster v. Reproductive Health Servs.*, 492 U.S. 490, 512-513 (1989) (vacatur granted in response to withdrawal by appellees of request for relief in light of appellant's legal position); *Gray v. Board of Trustees of the Univ. of Tennessee*, 342 U.S. 517, 518 (1952) (per curiam) (vacatur where action of appellee mooted controversy). Respondents' unilateral dismissal of their complaint should not be able to deprive petitioner and the business community of the opportunity to obtain relief from the Third Circuit's disregard of directly controlling precedent and the enduring effects of that decision.

CONCLUSION

For the foregoing reasons, the Court should vacate the judgment of the United States Court of Appeals for the Third Circuit.

Respectfully submitted,

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