No. 07-834

IN THE

Supreme Court of the United States

RADIAN GUARANTY, INC.,

Petitioner,

v.

WHITFIELD, ET AL.,

Respondents.

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

MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* AND BRIEF FOR THE CONSUMER MORTGAGE COALITION, AMERICAN FINANCIAL SERVICES ASSOCIATION, CONSUMER BANKERS ASSOCIATION, MORTGAGE BANKERS ASSOCIATION, AND THE HOUSING POLICY COUNCIL OF THE FINANCIAL SERVICES ROUNDTABLE AS *AMICI CURIAE* IN SUPPORT OF THE PETITIONER

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January 28, 2008

MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE*

Pursuant to Rule 37.2 of the Rules of this Court, the Consumer Mortgage Coalition, the American Financial Services Association, the Consumer Bankers Association, the Mortgage Bankers Association, and the Housing Policy Council of the Financial Services Roundtable (collectively the "Financial Services *Amici*" or "*amici*") move for leave to file the accompanying brief as *amici curiae* in support of the Petition for a Writ of Certiorari. *Amici* provided timely notice of their intent to file this brief. Counsel for Petitioner has consented to the filing of this brief. While counsel for Respondent has provided oral consent to the filing of this brief, counsel for Respondent has not provided written consent as requested by *amici*.

The Financial Services *Amici* frequently appear in litigation where the issues raised are of widespread importance and concern to their members. That is the case here, because the Third Circuit's holding that civil willfulness under FCRA is a factual issue unjustifiably burdens companies' abilities to defend against allegations of "willful" violations of FCRA's technical provisions, regardless of the reasonableness of the company's statutory interpretation. Given the limitless liability afforded under FCRA's damage scheme for "willful" violations and the potential for privilege-destroying inquiries into the advice of counsel on the proper application of FCRA's notice requirements, *amici* and their members in the Third

Circuit will face enormous pressure to settle even meritless lawsuits. In light of the voluminous number of FCRA class actions that already have been brought against *amici*'s members nationwide, this issue is of crucial importance to the financial services industry. In short, the decision below casts a long shadow over the legitimate business judgments of *amici* and their members.

Amici accordingly submit this brief to bring these matters to the Court's attention from the perspective of *amici* and their members which, through their substantial experience, have unique insight into the importance of universal application of the standard set forth in *Safeco Insurance Co. v. Burr*, 127 S. Ct. 2201 (2007) standard.

Amici therefore should be granted leave to file the attached *amici curiae* brief.

Respectfully submitted,

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BRIEF OF THE FINANCIAL SERVICES *AMICI* IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

QUESTION PRESENTED

Whether, under this 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.

INTEREST OF THE *AMICI* [1]

This brief is filed by the Consumer Mortgage Coalition, the American Financial Services Association, the Consumer Bankers Association, the Mortgage Bankers Association, and the Housing Policy Council of the Financial Services Roundtable (collectively the "Financial Services *Amici*" or "*amici*").

The Consumer Mortgage Coalition ("CMC") is a trade association of national mortgage lenders, mortgage servicers, and mortgage origination-service

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[1] No counsel for any party had any role in authoring this brief, and no one other than the *amici* provided any monetary contribution to its preparation or submission.

providers, committed to the nationwide rationalization of consumer mortgage laws and regulations. The CMC regularly appears as amicus curiae in litigation with implications for the national mortgage lending marketplace.

The American Financial Services Association ("AFSA") is the national trade association for the consumer credit industry protecting access to credit and consumer choice. AFSA's members include, among others, banks, mortgage lenders, credit card companies and diversified financial services firms. AFSA has provided services to its members for over ninety years.

Member institutions of the Consumer Bankers Association ("CBA") are the leaders in consumer financial services, including mortgage and home equity lending, nationwide. They include most of the nation's largest bank holding companies, as well as regional and super community banks that collectively hold two-thirds of the industry's total assets. CBA frequently appears as an amicus curiae or a party in litigation where the issues in dispute are of widespread importance or concern to the banking industry.

The Mortgage Bankers Association ("MBA") is the national association representing the real estate finance industry, an industry that employs more than 400,000 people in virtually every community in the country, headquartered in Washington, D.C. Its membership of over 3,000 companies includes all elements of real estate finance: mortgage companies, mortgage brokers, commercial banks, thrifts, Wall

Street conduits, life insurance companies and others in the mortgage lending field.

The members of the Housing Policy Council of the Financial Services Roundtable ("HPC/FSR") are 23 of the nation's largest mortgage lenders. It is estimated that the members of the HPC/FSR originate over 65% of mortgages for American home buyers.

The Financial Services *Amici* frequently appear in litigation where the issues raised are of widespread importance and concern to their members. That is the case here, because the Third Circuit's holding that civil willfulness under FCRA is a factual issue unjustifiably burdens companies' abilities to defend against allegations of "willful" violations of FCRA's technical provisions, regardless of the reasonableness of the company's statutory interpretation. Given the limitless liability afforded under FCRA's damage scheme for "willful" violations and the potential for privilege-destroying inquiries into the advice of counsel on the proper application of FCRA's notice requirements, *amici* and their members in the Third Circuit will face enormous pressure to settle even meritless lawsuits. In light of the voluminous number of FCRA class actions that already have been brought against *amici*'s members nationwide, this issue is of crucial importance to the financial services industry. In short, the decision below casts a long shadow over the legitimate business judgments of *amici* and their members.

SUMMARY OF ARGUMENT

FCRA requires companies who take "adverse action" with respect to a consumer based on information contained in a "consumer report" to provide notice to the consumer. 15 U.S.C. § 1681m(a). Anyone who "willfully" fails to provide notice is liable to the consumer for statutory and punitive damages. *Id.* § 1681n(a). Just last year, this Court held in *Safeco Insurance Co. v. Burr*, 127 S. Ct. 2201 (2007), that "willful[ness]" under FCRA is an "objective" standard that does not require "factual development." *Id.* at 2215-16. The Court explained that "a company subject to FCRA does not act in reckless disregard of it unless the action is not only a violation under a reasonable reading of the statute's terms, but shows that the company ran a risk of violating the law substantially greater than the risk associated with a reading that was merely careless." *Id.* When an interpretation has "a foundation in the statutory text" and the reading is "not objectively unreasonable," a FCRA violation is not willful. *Id.* at 2216.

Less than three months later and in a case involving virtually identical facts, the Third Circuit nevertheless held here that "willful[ness]" is a "factual issue, not a question of law," and remanded to the district court to determine whether "evidence in the record supports [Petitioner's] claim that it did not willfully violate the statute." *Radian Guaranty, Inc. v. Whitfield*, 501 F.3d 262, 270-71 (3d Cir. 2007). The Third Circuit's ruling directly and irreconcilably conflicts with this Court's decision in *Safeco.*

The circuit-wide exception to the otherwise uniform standard for assessing "willfulness" under FCRA's civil liability provisions will unduly burden *amici*, their members, and indeed all consumer financial services companies doing business in the Third Circuit. Reducing civil "willfulness" to a fact-bound inquiry unjustifiably burdens companies' abilities to defend against allegations of "willful" violations of FCRA's technical provisions, regardless of the reasonableness of the company's interpretations of FCRA's "less-than pellucid" terms. *Safeco*, 127 S. Ct. at 2216. Even meritless class action complaints are all but assured to survive dismissal under this erroneous standard, thus exposing legitimate companies to potentially crushing liability and overwhelming settlement pressure for FCRA claims.

Amici agree with Petitioner that the Court of Appeals' decision should be summarily reversed, or, in the alternative, that the decision should be vacated and the case remanded for further consideration in light of *Safeco*.

ARGUMENT

THE JUDGMENT BELOW IMPOSES SUBSTANTIAL HARDSHIP ON *AMICI* AND THEIR MEMBERS.

This court held in *Safeco* that civil "willfulness" under FCRA is an objective standard that can be determined as a matter of law. 127 S. Ct. at 2216. Indeed, FCRA's liability regime makes sense only when constrained in accordance with the Court's

opinion in *Safeco*. The Third Circuit's repudiation of *Safeco* imposes substantial burdens on companies by making the defense of "willfulness" allegations unjustifiably difficult and costly. That decision has enormous practical consequences for the *amici*, their members and the financial services industry. In light of the difficulty in interpreting many of FCRA's provisions, the large volume of financial transactions subject to FCRA's requirements, and the enormous liability to which financial institutions are exposed for "willful" violations, the importance to the financial services industry of uniform adherence to the *Safeco* standard for determining willfulness cannot be overstated.

I. Many Provisions of the Fair Credit Reporting Act Are Subject to Multiple Reasonable Interpretations.

As this Court has observed, FCRA is a "less-than pellucid" statute. *Safeco Ins. Co. of Am. v. Geico*, 127 S. Ct. 2201, 2216 (2007). In many cases, the interpretation of a FCRA provision and its application to a particular situation is unclear. Reasonable people—both lawyers and judges—can and do differ in how they interpret FCRA.

The difficulty in interpreting FCRA is well illustrated by the Federal Trade Commission ("FTC") staff changing its position regarding the use of consumer reports in the context of commercial loans. FCRA requires that any entity obtaining a consumer report have a permissible purpose to obtain that report. FCRA § 604(a), 15 U.S.C. § 1681b(a). In 2000, contrary to widespread industry practice, the

FTC staff expressed its opinion that no permissible purpose exists under FCRA "for a business credit grantor to obtain a consumer report on an individual who is a principal, owner, or officer of a commercial loan applicant (a sole proprietorship, partnership, or corporation), or who signs a personal guarantee in connection with a commercial credit application by a third party."[2]

In response to this opinion, the chief legal officers of the Office of the Comptroller of the Currency, the Board of Governors of the Federal Reserve System, the Federal Deposit Insurance Corporation and the Office of Thrift Supervision wrote to the FTC staff urging it to adopt an alternative interpretation of Section 604(a)(3)(A) of FCRA. The staff agreed and changed its position: "We agree that it is reasonable to view a business transaction in which an individual has accepted personal liability for the business debt as involving the consumer, thus providing a permissible purpose for the lender to obtain a consumer report under Section 604(a)(3)(A)."[3] This is just one example of a FCRA provision that could result in more than one reasonable interpretation. Clearly, if the FTC—the agency with principal

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[2] *See* Letter from David Medine, Federal Trade Commission, to Charles Tatelbaum, National Association of Credit Management (July 26, 2000), *available at* http://www.ftc.gov/os/statutes/fcra/tatelbaum.shtm ("Tatelbaum I").

[3] *See* Letter from Joel Winston, Federal Trade Commission, to Julie L. Williams, et al. (June 22, 2001), *available at* http://www.ftc.gov/os/statutes/fcra/tatelbaum2.shtm ("Tatelbaum II").

enforcement responsibility for FCRA and a staff of attorneys with extensive experience with FCRA—can change its interpretation of one of the most important provisions of the statute (with respect to the permissible purposes for obtaining consumer reports) less than one year after making its initial interpretation, it should be expected that reasonable minds could reasonably disagree about the meaning of many other provisions of FCRA.

Moreover, as this Court noted in *Safeco*, FTC informal staff interpretations are not "authoritative guidance" that could "warn . . . [a business subject to FCRA] away from" what the courts later decide is an incorrect view of the statute, but are, instead, "informal staff opinion[s] . . . not binding on the Commission." *Safeco*, 127 S. Ct. at 2216 & n.19. In the *Safeco* case itself, this Court disagreed with the interpretation of FCRA's adverse action provisions advanced in an FTC staff opinion letter. The interpretation of willfulness announced in *Safeco* recognizes that a business that interprets a "less-than-pellucid statutory text" in a manner that is not objectively unreasonable has not raised the "unjustifiably high risk of harm" necessary for a finding of a willful violation of FCRA, even if that reasonable interpretation is later found to be incorrect. *Safeco*, 127 S. Ct. at 2215, *quoting Farmer v. Brennan,* 511 U.S. 825, 836, 114 S. Ct. 1970, 128 L. Ed. 2d 811 (1994).

Amici's members, like many others in the financial services industry, take great care to ensure that their actions comply with all of FCRA's requirements. However, as this Court has

acknowledged, the obligations required under FCRA are not uniformly transparent. Interpreting those obligations in the dynamic context of the new credit and insurance innovations produced by the consumer financial services industry, even the most cautious and conservative firms cannot achieve perfect clarity on all FCRA issues. If the Third Circuit's departure from *Safeco* is allowed to stand, even highly reasonable interpretations of FCRA might be subject to unlimited statutory damages—without proof of any actual harm to consumers—and all of this care and focus on regulatory compliance would come to naught. Financial institutions would become subject to potentially crippling litigation (and accompanying litigation defense costs) even if they adopt very conservative and highly reasonable interpretations of FCRA.

One current example of such potentially crippling litigation is the approximately 250 class actions nationwide in which plaintiffs allege that financial institutions' mailers somehow do not constitute a "firm offer of credit." FCRA permits lenders to obtain or use a consumer report in a credit transaction not initiated by the consumer if the lender makes a "firm offer of credit" to the individual. *See* 15 U.S.C. §§ 1681a(l), 1681b(c)(1)(B), 1681b(f)(1). The main issues in these cases are the extent to which the offer must provide "value" to the consumer and the level of detail that must be included in the initial mailer. The long-standing view of industry lawyers and compliance professionals is that FCRA is satisfied if a creditor honors its firm offer of credit once a consumer applies and meets applicable creditworthiness and collateral requirements—and

that FCRA requires only the disclosure of collateral requirements in the initial mailer. Consistent with this view, some courts have not considered the contents of the mailer in determining whether a valid "firm offer" was extended; rather, they have focused on whether the creditor honors its "firm offer of credit" when a consumer applies and meets any conditions established by the creditor in advance of the offer. *See, e.g., Kennedy v. Chase Manhattan Bank USA*, 369 F.3d 833, 841-42 (5th Cir. 2004).[4] However, some other courts have adopted interpretations that not only are inconsistent with the industry (and *amici*'s) view, but are inconsistent with each other. *Compare Cole v. US Capital, Inc.,* 389 F.3d 719, 728 (7th Cir. 2004) (holding that allegations in consumer's complaint that offer of $300 in credit on purchase of car, at interest rates that might vary from 3.0 to 24.9%, had no real value to consumer, and that release of her consumer credit report in connection with this offer was not a permissible release in connection with any "firm offer of credit," were sufficient to state claim under FCRA),

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[4] *See also Crossman v. Chase Bank USA*, No. 07-116 2007, 2007 WL 2702699, at *6 (D.S.C. Sept. 12, 2007); *Sullivan v. Greenwood Credit Union,* 499 F. Supp. 2d 83, 88-89 (D. Mass. 2007); *Gelman v. State Farm Mutual Auto. Ins. Co.*, 2007 WL 2306578, at *5-7 (E.D. Pa. Aug. 9, 2007) (firm offer of insurance rather than credit); *Phinn v. Capital One Auto Finance, Inc.*, 502 F. Supp. 2d 625, 630-31 (E.D. Mich. 2007); *Gross v. Washington Mutual, Inc.*, 2007 WL 1404435, at *3-4 (S.D.N.Y. May 10, 2007); *Dixon v. Shamrock Financial Corp.*, 482 F. Supp. 2d 172, 176-77 (D. Mass. 2007); *Soroka v. JP Morgan Chase & Co.*, 500 F. Supp. 2d 217, 223 (S.D.N.Y. 2007); *Nasca v. J.P. Morgan Chase Bank, NA*, 2007 WL 678407, at *3 (S.D.N.Y. Mar. 5, 2007).

with Murray v. GMAC Mortgage Corp., 434 F.3d 948, 955-56 (7th Cir. 2006) (suggesting that the "four corners" of the initial mailer must describe the entire offer and that that offer must have "value" to a reasonable consumer); *and with Forrest v. Universal Savings Bank*, 507 F. 3d 540, 543 (7th Cir. 2007) (holding that not every credit term need be stated if the mailer conveys enough information to establish that the offer has a value to the consumer).[5] These cases dramatically illustrate the possibility of obtaining different and potentially conflicting interpretations of a single FCRA clause.

Despite this divergence of opinion as to the precise meaning of the "firm offer" requirement, the

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[5] *See also Cavin v. Home Loan Center Inc.*, 469 F. Supp. 2d 561, 569-70 (N.D. Ill. 2007); *Putkowski v. Irwin Home Equity Corp.*, 423 F. Supp. 2d 1053, 1060 (N.D. Cal. 2006); *Murray v. New Cingular Wireless Serv., Inc.*, 432 F. Supp. 2d 788, 792 (N.D. Ill. 2006); *Murray v. Sunrise Chevrolet, Inc.*, 441 F. Supp. 2d 940, 947 (N.D. Ill. 2006); *King v. Commerce Bancshares, Inc.*, 2007 WL 781732, at *3 (N.D. Ill. Mar. 12, 2007); *Price v. Capital One Bank*, 2007 WL 1521525, at *3-4 (E.D. Wis. May 22, 2007). *McDonald v. Nelnet, Inc.*, 477 F. Supp. 2d 1010, 1013-14 (E.D. Mo. 2007); *Poehl v. Countrywide Home Loans, Inc.*, 464 F. Supp. 2d 882, 885-86 (E.D. Mo. 2006); *Klutho v. Home Loan Center, Inc.*, 486 F. Supp. 2d 957, 960-63 (E.D. Mo. 2006); *Poehl v. Countrywide Home Loans, Inc.*, 2007 WL 2302491, at *5 (E.D. Mo. Aug. 7, 2007); *Klutho v. Corinthian Mortgage Corp.*, 2007 WL 2002495, at *2-3 (E.D. Mo. July 5, 2007); *Phinn*, 502 F. Supp. 2d at 630-31; *Klutho v. Shenandoah Valley Nat'l Bank*, 2007 WL 1527074, at *3 (E.D. Mo. May 22, 2007); *Klutho v. GE Money Bank*, 2007 WL 162291, at *3 (E.D. Mo. Jan. 17, 2007); *Ludditt-Poehl v. Capital One Auto Finance, Inc.*, 2007 WL 2428044, at * 3 (E.D. Mo. Aug. 21, 2007).

consequences of being found liable for "willful" violations of FCRA, even in a single mass marketing campaign that causes no actual injury, could be potentially catastrophic. The minimum statutory damages of $100 per violation could be applied to each mailer sent during the marketing campaign. In the face of this potentially crushing liability, some creditors have ceased prescreened solicitations entirely while others have limited their solicitations to quoting specific, but very disadvantageous, terms that would be justified only for the least creditworthy consumer. Congress could not have intended these results, which harm both creditors who wish to extend credit efficiently and consumers seeking access to available credit products.[6] *Amici* believe that this Court's interpretation in *Safeco,* if applied here, would help return a rational view of FCRA.

The novel interpretative questions at issue here—for example, whether FCRA's notification requirements apply to the initial rate determination by an insurer, and further whether they apply in the mortgage insurance context—only underscore the point that reasonable people—and even reasonable federal judges—can and do disagree about the application of FCRA's technical requirements. The Third Circuit's decision could result in vast liability to financial institutions in one federal circuit, even though reasonable federal judges in another federal

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[6] *See generally* Board of Governors of the Federal Reserve System, "Report to the Congress on Further Restrictions on Unsolicited Written Offers of Credit and Insurance," (Dec. 2004), *available at* https://www.federalreserve.gov/boarddocs/rptcongress/UnsolicitedCreditOffers2004.pdf.

circuit (or in the district court) agree with the institutions' reasonable interpretation of FCRA. As a result, given the extraordinary volume of consumer transactions subject to FCRA annually, the potential liability exposure from a technical FCRA violation could be devastating—and easily climb into the hundreds of billions or even trillions of dollars. The objective "willfulness" requirement adopted in *Safeco* provides a critical gatekeeping function that acknowledges both the practical realities of applying FCRA's technical provisions in a dynamic consumer marketplace and the potentially crippling liability that may result from a willful violation.

II. The Decision Below Unduly Exposes the Financial Services Industry to Potentially Overwhelming Liability For Technical Violations of FCRA.

The Third Circuit's rejection of *Safeco* will have enormous consequences for the financial services industry. As an initial matter, it is important to note that the decision below affects not only insurers, but any person who uses information contained in consumer reports to make decisions. Moreover, over half of the Fortune 500 companies, many of which are members of *amici*, are incorporated in Delaware, as are nearly half of all domestic firms traded on the New York Stock Exchange. Each of those firms is potentially subject to suit in the Third Circuit under FCRA.[7] And because FCRA defendants are often

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[7] *See* Delaware Department of State, Div. of Corp., 2006 Annual Report, at 1, *available at* http://www.corp.delaware.gov/2006%20Annual%20Report%20with%20Signature%20_2_.pdf.

large corporations doing business in multiple jurisdictions, the specter of unpredictable and potentially unlimited liability in the Third Circuit is sufficient to impact businesses across the nation.

If allowed to stand, the circuit-wide exception to *Safeco* adopted by the court below will enable FCRA plaintiffs to bring nationwide class actions in the Third Circuit seeking statutory and punitive damages for "willful" violations of FCRA. And, unlike other federal consumer statutes, the total statutory damages available in a class action for a willful FCRA violation are not expressly capped. *Compare* 15 U.S.C. § 1681n(a) (willful violations subject to statutory damages of $100 to $1,000 per violation, as well as punitive damages), *with* 15 U.S.C. § 1640(a)(2) (Truth in Lending Act) (capping class action damages at the lesser of $500,000 or 1% of creditor's net worth), *and* 15 U.S.C. § 1692k(a)(1)(2)(B) (Fair Debt Collection Practices Act) (same), *and* 15 U.S.C. § 1693m (Electronic Funds Transfer Act) (same), *and* 15 U.S.C. § 1691e(b) (Equal Credit Opportunity Act), *and* 12 U.S.C. § 2605(f)(2) (Real Estate Settlement Procedures Act). When the per-violation statutory damages are multiplied by the huge volume of transactions, it is evident that potential liability for willful violations can climb well into the billions of dollars in a single case.

The Third Circuit's holding needlessly burdens companies' ability to eliminate unjustified claims of willfulness when the company's interpretation of the

statute is reasonable.[8] During the *Safeco* briefing, the Solicitor General eloquently explained:

> The reckless-disregard component of willfulness thus requires violation of clearly established law or indifference to an objectively high and obvious risk of unlawfulness. That purely legal inquiry into the objective recklessness of the defendant's failure to comply with the FCRA can, and generally should, be undertaken at an early stage in the case. Only if the defendant's failure to comply with the law was objectively reckless would it become necessary for a court to probe, as the court of appeals invited here, the defendant's subjective good faith. Resolving the objective recklessness of the defendant's non-compliance with the law at the outset will (i) help to develop the contours of FCRA law, thereby providing prospective guidance concerning the law's requirements and reducing violations; (ii) "permit the resolution of many insubstantial claims on summary judgment," and (iii) minimize the significant intrusions on attorney-client privilege that often attend inquiries into

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[8] *Amici* note that a plaintiff with a valid FCRA claim could still recover under FCRA's liability structure for negligent noncompliance. *See* 15 U.S.C. § 1681o.

> subjective good faith compliance with the law.[9]

Because the question of "willful[ness]" "is a factual issue, not a question of law" under the Court of Appeals' ruling, 501 F.3d at 271, plaintiffs in FCRA class action lawsuits seeking statutory and punitive damages will seek to avoid dismissal with the bare allegation that the company "willfully" violated some FCRA requirement. Unless this Court reinstates *Safeco* as controlling law in the Third Circuit, it is no legal defense to say that a statutory requirement was unclear under FCRA when applied (as here) to novel circumstances. As such, companies doing business in the Third Circuit will face potentially crippling liability and enormous settlement pressure in FCRA lawsuits, even before a responsive brief is filed. *See, e.g., Parker* v. *Time Warner Entertainment Co., L.P.*, 331 F.3d 13, 22 (2d Cir. 2003) (class actions for statutory damages "could create a potentially enormous aggregate recovery for plaintiffs, and thus an *in terrorem* effect on defendants, which may induce unfair settlements"); *Blair* v. *Equifax Check Servs., Inc.*, 181 F.3d 832, 834 (7th Cir. 1999) (class treatment "can put considerable pressure on the defendant to settle, even when the plaintiff's probability of success on the merits is slight"); *Castano* v. *American Tobacco Co.*, 84 F.3d 734, 746 (5th Cir. 1996) ("The risk of facing an all-or-nothing

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9 Brief of the United States as *Amicus Curiae*, *Safeco Insurance Company of America, et al., Petitioners v. Charles Burr, et al.*; *GEICO General Insurance Company, et al., Petitioners v. Ajene Edo*, Nos. 06-84 and 06-100, at 22-24 (U.S. filed Nov. 13, 2006) (citations omitted).

verdict presents too high a risk, even when the probability of an adverse judgment is low").

Moreover, because statutory interpretations frequently involve input from in-house and/or outside counsel, an institution defending its reasonable interpretation of a FCRA provision likely could face undue pressure to waive the attorney-client privilege with respect to documents supporting the institution's statutory interpretation just to avoid a risk that the fact-finder might conclude that a violation was willful—even if it was not—and incur the accompanying liability, which may be overwhelming. This Court has repeatedly recognized the importance of the attorney-client privilege in order to obtain effective representation by counsel. *See, e.g.*, *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981) (explaining that the purpose of the attorney-client privilege "is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice"). The Third Circuit should not be permitted to disregard this Court's precedent and damage the ability of financial institutions to consult freely with attorneys regarding FCRA issues.

CONCLUSION

For the reasons stated above and in Radian Guaranty, Inc.'s Petition for Writ of Certiorari, the Petition should be granted and the Court of Appeals' judgment summarily reversed or, in the alternative, the judgment should be vacated and the case

remanded for further consideration in light of this Court's decision in *Safeco*.

Respectfully submitted,

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