No. _____

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

EXPERIAN INFORMATION SOLUTIONS, INC.,

Petitioner,

v.

MICHAEL D. DREHER, ET AL.,

Respondent.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA, RICHMOND DIVISION (NO. 3:11-CV-624 (JAG))

PETITION FOR PERMISSION TO APPEAL

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The district court in this nationwide class action certified its summary judgment order for interlocutory review, finding that it involved a "controlling question of law as to which there is substantial ground for difference of opinion," and that an immediate appeal "may materially advance the ultimate termination of the litigation." 28 U.S.C. § 1292(b). The court did not specify the precise issue or issues meeting those criteria, and in fact the order—which subjects Experian to a minimum of $10 million and up to $100 million in statutory damages liability, plus possible punitive damages—contains two: (1) the content and scope of the "objective reasonableness" test established by *Safeco Insurance Co. v. Burr*, 551 U.S. 47 (2007), for federal claims based on recklessness, and (2) whether Congress can, by creating a statutory damages remedy, confer Article III standing on individuals to sue over alleged statutory violations that (as the district court here found) have caused them no real-world injury.

This case is an approximately 106,000-member nationwide class action under the Fair Credit Reporting Act ("FCRA"), 15 U.S.C. § 1681 *et seq.*, alleging that Experian willfully violated the FCRA's requirement that consumer disclosures identify the sources of the credit file information they contain, 15 U.S.C. § 1681g(a)(2). Experian allegedly violated this requirement with respect to credit card accounts opened with Advanta Bank, by listing those accounts under

"Advanta" rather than using the name "CardWorks" or "CardWorks Servicing LLC"—the formal corporate name of the credit card servicer that handled Advanta's accounts (and that dealt with customers under the Advanta name) after Advanta entered receivership. The class claims no actual damages; it seeks only statutory damages for an allegedly willful FCRA violation. See 15 U.S.C. § 1681o.

Despite acknowledging the unlikelihood of any actual harm—and despite this Court's holding in *David v. Alphin*, 704 F. 3d 327, 338 (4th Cir. 2013), that the mere "deprivation of [a] statutory right" is *not* "sufficient to constitute injury-in-fact for Article III standing"—the district court held that the bare statutory violation claimed here, without any alleged harm, *did* suffice to satisfy Article III.

In addition, on the merits, the district court held that under the objective reasonableness test of *Safeco*—normally understood as creating a safe harbor, not a liability standard—(1) its own reading of § 1681g as requiring the listing of the formal corporate name of the credit card servicer was the only reasonable one, and (2) that under *Safeco* this conclusion established Experian's willfulness *as a matter of law*, leaving no liability issue for the jury. In treating willfulness as a question of law, the district court rejected the relevance of, among other things, Experian's evidence that it followed the instructions of the FDIC in listing the accounts under Advanta, and that industry practice is to list the name of the credit card issuer (which is recognizable to consumers) and not the underlying corporate name of a

servicer like CardWorks (which is not). In addition, it erroneously read *Safeco* as requiring an extreme version of textualism in interpreting the FCRA, excluding any consideration of statutory purpose or of other FCRA provisions that cast light on the meaning of § 1681g.

Both of the district court's holdings warrant immediate review: the first to clarify the requirements of Article III in no-injury suits such as this one, and the second to clarify the method by which willful violations of the FCRA (and other federal claims based on alleged recklessness) are adjudged under *Safeco*.

Questions Presented

1. Does Congress's authorization of statutory damages confer Article III standing on plaintiffs and absent class members who have suffered no injury-in-fact from the alleged statutory violation?

2. Under *Safeco Insurance Co. v. Burr*, 551 U.S. 47, 68 (2007), a violation of the FCRA cannot be willful if it was not clearly established that the conduct at issue was contrary to what the FCRA requires. In making this "clearly established" determination, (a) does *Safeco* require a sole focus on the text of the operative provision, to the exclusion of other FCRA provisions, industry practice, statutory purpose, and informal regulatory guidance, and (b) does *Safeco* make willfulness a question for the court rather than a jury?

Facts

This FCRA class action is brought on behalf of over 100,000 people who claim no actual injury, but whose consumer disclosure reports listed information for credit card accounts opened with Advanta Bank under "Advanta" rather than (as allegedly required by 15 U.S.C. § 1681g) under the corporate name of the current servicer of those credit cards (CardWorks).

A. Advanta is Placed Into Receivership by the FDIC

In the wake of the 2008 financial crisis, Advanta Bank Corporation was placed into receivership by the Federal Deposit Insurance Corporation, which began managing the bank's day-to-day affairs. Memorandum Opinion (attached as Exhibit B) (hereinafter "Op."), at 3–4. To handle the bank's credit-card portfolio, the FDIC appointed CardWorks Servicing LLC to manage the credit-reporting process for all accounts and serve as the designated contact for all customer complaints and correspondence regarding Advanta.

To minimize customer disruption, CardWorks used the name "Advanta Credit Cards" when servicing the portfolio, and Advanta's website address and telephone number were forwarded to CardWorks. The FDIC further determined not to send letters to customers informing them of the change, fearing this would confuse consumers. Declaration of Tom N. Wineland (attached as Exhibit C)

(hereinafter "Wineland Decl."), at 3–4. The FDIC also determined that credit-reporting agencies such as Experian should continue to use the name "Advanta Credit Cards" in reports about the status of credit accounts, and a letter to this effect was sent to Experian. Wineland Decl. 4. Experian complied with the FDIC's wishes, which according to Experian's expert witness were consistent with standard practice in the credit-reporting industry: the creditor, rather than the servicer, is typically used to identify a debt, as this is more useful and less confusing to the customer. See Declaration of Peter Henke (attached as Exhibit D) (hereinafter "Henke Decl."), at 2–4.

B. Dreher Files Suit and Seeks Class Certification

In November 2010, plaintiff Michael Dreher learned that he had a delinquent Advanta credit account on his credit reports, and requested (and received) from Experian a disclosure of his credit file information. Dreher later sent a letter to the Advanta address listed on his disclosure; "Advanta Credit Cards" (a.k.a., CardWorks) received it and responded to Dreher with documentation. Op. 3–4.

Dreher filed suit against Experian in September 2011, asserting several class claims, including one under 15 U.S.C. §1681g(a), which requires a credit-reporting agency to, "upon request," "clearly and accurately disclose to the consumer" (1) "all information in the consumer's file at the time of the request," and (2) "the sources of the information." Dreher alleged that Experian was required to list

CardWorks as the source of the information about the Advanta credit card, and further alleged that Experian willfully failed to do so. He accordingly sought statutory and punitive damages plus attorney's fees under 15 U.S.C. §1681n(a) (providing statutory damages of "not less than $100 and not more than $1,000").

The district court certified a class of "all natural persons" who requested a copy of their credit report from Experian after August 1, 2010, received a report identifying "Advanta Bank" or "Advanta Credit Cards" as the source of information on the tradeline, and whose "date of status" (or "last reported") field was August 2010 or later. In so doing, the court candidly acknowledged that it was "unlikely that anyone suffered actual injury," and that it was "difficult to see how anyone suffered *any* injury" as a result of the alleged violation. See Op. 6.

C. Experian and Dreher Cross-Move for Summary Judgment

Experian then moved for summary judgment on two grounds: (1) lack of Article III injury, and (2) that the safe harbor of *Safeco Insurance Co. v. Burr*, 551 U.S. 47 (2007) precluded a finding of willfulness. Regarding the former, Experian noted, among other things, the court's own (correct) statements establishing lack of injury; the likely complete indifference about this information of most class members, who had requested their credit files for any number of purposes; and the fact that consumers who contacted the listed address (or attempted to contact

Advanta directly) were automatically connected with the current servicer to resolve their issues. Given all of that, no injury-in-fact had been established.

As to the latter, Experian argued that under *Safeco*, a defendant may only be liable for a willful violation where the conduct is clearly established as unlawful under the Act, such that any other reading of the FCRA is "objectively unreasonable"—i.e., where there can be no reasonable reading under which the conduct is permissible. Experian argued, among other things, that nothing in § 1681g specifies—let alone with the "pellucid" clarity required by *Safeco*, 551 U.S. at 70—whether a source must be identified by its underlying formal corporate name (here, CardWorks) or by a more familiar name under which it deals with consumers (here, Advanta). Experian also argued that the purpose of the FCRA is better served by listing the name a consumer can identify with his or her credit card issuer. Therefore, even if the statute were ultimately interpreted to require Experian listing "CardWorks" rather than "Advanta," Experian's conduct was not the kind of obvious illegality that would permit a finding of willfulness.

Dreher cross-moved for summary judgment; as relevant here, he argued that Experian's conduct was clearly impermissible under the text of the FCRA—and for *that reason alone*, he was entitled to summary judgment on whether Experian had *willfully* violated the FCRA. In response, Experian emphasized that *Safeco* provides only a safe harbor—immunizing conduct that could reasonably be

thought permissible under the FCRA—but the failure to qualify for the safe harbor does *not* mean the defendant acted willfully. Rather, in that event, *Safeco* requires a jury to determine whether the defendant acted knowingly or recklessly (which renders it willful) or negligently (which does not). Experian pointed to extensive evidence relevant to that determination, including its reliance on the direction of the FDIC and expert testimony that the consistent industry practice is to use the name of the credit card issuer, not that of a servicer like CardWorks.

D. The District Court Enters Summary Judgment for Dreher and Certifies the Case for Interlocutory Review

The district court denied Experian's motion for summary judgment and, in relevant part, granted Dreher's. Regarding standing, the district court reasoned that "Congress created a legal right under the Act, the violation of which constitutes an injury sufficient for constitutional standing purposes." Op. 6. Pointing to an opinion that found Article III standing under the FCRA "without showing actual harm," Op. 6 (citing *Robins v. Spokeo*, 742 F.3d 409 (9th Cir. 2014)), the district court reasoned that by virtue of having the "source" of the Advanta account information identified differently than required, the class members had suffered "informational injuries," and that was enough.

On the merits, the district court held that the term "sources" in § 1681g unambiguously required Experian to identify the source of the information as CardWorks. Op. 7–16. The court rejected Experian's argument that—even if the

statute required identification of the servicer—the statute could reasonably be read to allow use of the Advanta name under which the servicer dealt with consumers and with which consumers were familiar. Apparently reading *Safeco*'s phrase "foundation in the statutory text" as requiring that Experian's *interpretation* of "source" must itself be specified in the FCRA's text, the court rejected Experian's reading on the ground that it "does not derive from the text of the Act."[1] Op. 11. In so holding, the court did not explain why a specific textual provision identified by Experian did not qualify in any event: § 1681i(a)(6)(B)(iii), a closely analogous provision directing that consumer notices concerning reinvestigations should identify "the *business name* and address" of furnishers contacted for information.

The court further reasoned that the FDIC's guidance to Experian was irrelevant because it had no direct regulatory authority over credit-reporting agencies. And the court concluded that industry practices were equally irrelevant: "No jury could rightly conclude that the argument of 'everyone else did it that way' is objectively reasonable." Op. 15.

Having concluded that Experian's interpretation did not qualify as "objectively reasonable" under *Safeco*—and so Experian was not entitled to summary judgment—the court held that this necessarily required summary

[1] The district court did not explain why Experian's interpretation "derive[d] from the text of the Act" any less than plaintiffs' contrary interpretation that the source must be identified by its formal corporate name.

judgment for plaintiffs, rather than submitting the question of recklessness to a jury: "The 'objective unreasonableness' standard in *Safeco* subsumes within it the determination that the defendant's conduct" was at least reckless. Op. 8 n. 7.

The court therefore concluded that Experian had willfully violated the FCRA, and entered summary judgment for the plaintiff class.[2] The court found, however, "that this Order involves a controlling question of law as to which there is substantial ground for difference of opinion" and further found "that an immediate appeal from the Order would materially advance the ultimate termination of the litigation," and accordingly certified the case for interlocutory review under 28 U.S.C. §1292(b). Order (Exh. A), at 1–2.

Reasons for Granting the Petition

This Court should grant this petition and immediately resolve two pressing questions. We first address the Article III standing question, because it goes to the court's jurisdiction: Does a plaintiff's mere allegation of a statutory violation suffice to establish Article III injury (at least where the statute at issue permits the plaintiff to recover damages)? That question is timely, and has divided courts of appeals across the country; further, although this Court has previously held that the answer is "no," the district court distinguished that holding on a novel and inapposite ground worthy of immediate consideration. And this case is an ideal

[2] Disputed issues of fact precluded summary judgment on a claim made by Dreher individually, concerning whether his individual report had been accurate.

vehicle because it presents the issue starkly—this is a class action based on an alleged semantic violation not claimed to have been of any interest to class members, and in which the alleged "violation" actually redounded to the benefit of anyone who did happen to be interested. If *that* states an Article III controversy, there is little left of the rule that "Congress cannot erase Article III's standing requirements by statutorily granting the right to sue to a plaintiff who would not otherwise have standing." *Raines v. Byrd*, 521 U.S. 811, 820 n. 3 (1997).

Second, *Safeco* holds that conduct cannot be a willful violation of the FCRA unless it was clearly established as unlawful. But the district court's radically narrow interpretation of what *Safeco* permits a court to consider in making that determination—*i.e.*, barring any interpretation of the text that does not itself "derive from the text," and excluding consideration of such matters as statutory purpose, industry practice, and regulatory guidance—as well as its extraordinary holding that willfulness is for the court rather than the jury to determine, highlights the need for this Court to provide guidance on how to apply the Supreme Court's important and (with the rise in FCRA and other statutory class actions) increasingly implicated decision in *Safeco*.

These questions are suitable for immediate review because they are questions of law and will materially advance the "ultimate termination" of this suit, 28 U.S.C. § 1292(b), as well as provide needed guidance to other courts in the

Circuit. A ruling in Experian's favor would either terminate the litigation entirely, or, at a minimum, prevent the parties and the district court from undertaking costly and time-consuming class action notice procedures, and determination of damages for a massive nationwide class, only to arrive at a later determination that the district court erred in withholding the key liability issue from the jury.

A. Plaintiffs May Not Sue Over a Violation That Has Not Injured Them

The first question—if for no other reason than that it goes to jurisdiction—is whether Article III permits a plaintiff to sue for a statutory violation that has not caused him any injury. This has divided the courts of appeals and created significant confusion, and its answer will be dispositive in this litigation, as there are *no* allegations that the members of the class suffered any real-world injury. The district court acknowledged as much, stating that it was "unlikely that anyone suffered actual injury," and that it was "difficult to see how anyone suffered *any* injury." Op. 6. This Court's immediate review would both clarify the law on an important question and materially advance the termination of this litigation.

As the district court noted, the Ninth Circuit has held that real-world injury is unnecessary, and the only question under Article III is whether the statute "prohibited Defendants' conduct; if it did, then Plaintiff has demonstrated an injury sufficient to satisfy Article III." *Edwards v. First American Corp.* 610 F.3d 514,

517 (9th Cir. 2010).[3] But in *Kendall v. Employees Retirement Plan of Avon Products*, the Second Circuit held the opposite, reasoning that "alleged breach" of a statutory duty could not "in and of [itself]" be "an injury-in-fact sufficient for constitutional standing." 561 F.3d 112, 121 (2d Cir. 2009). And in *Wilson v. Glenwood Intermountain Properties, Inc.*, the plaintiffs sued for alleged violations of the Fair Housing Act, but did not allege that the violations had injured them in any particular way; the Tenth Circuit held that the allegation of statutory violation, without more, was simply an "abstract" injury "insufficient to establish standing." 98 F.3d 590, 596 (10th Cir. 1996).

Most importantly, this Court has rejected the notion that the mere "deprivation of [a] statutory right … is sufficient to constitute injury-in-fact for Article III standing." *David v. Alphin*, 704 F. 3d 327, 338 (4th Cir. 2013). Although this holding in *David* should resolve this case, the district court thought it distinguishable because the statute in *David* did not provide for a "personal recovery," whereas the FCRA does. Op. 7 n. 5. This is no distinction at all: the availability of damages goes only to the requirement of redressability, *not* to the separate, and critical, requirement of a concrete injury in fact. *See Friends of Earth, Inc. v. Laidlaw*, 528 U.S. 167 (2000).

[3] The Supreme Court agreed to review the Ninth Circuit's judgment in *First American*, but ultimately dismissed the case without opinion. See *First Am. Fin. Corp. v. Edwards*, 132 S. Ct. 2536 (2012).

Even aside from *David*, the district court's conclusion was incorrect. The "requirement of injury in fact is a hard floor of Article III jurisdiction that cannot be removed by statute." *Summers v. Earth Island Inst.*, 555 U.S. 488, 497 (2009). Absent a concrete injury, the mere "deprivation of [a] statutory right" is not sufficient to satisfy Article III. *David*, 704 F.3d, at 338. That is a necessary consequence of the rule that "Congress cannot erase Article III's standing requirements by statutorily granting the right to sue to a plaintiff who would not otherwise have standing." *Raines v. Byrd*, 521 U.S. 811, 820 n. 3 (1997).

This case vividly illustrates the dangers of permitting class actions to proceed without allegations of actual harm. Plaintiffs, who have the burden of showing injury, have made no claim that the labeling of one of the credit accounts in class members' consumer disclosures was of any interest to any (let alone all) of the class members. Consumers request their credit reports for many different reasons, and many of the class members here are unlikely even to have reviewed the Advanta credit card item, let alone to have any reason to care whether "Advanta" or "CardWorks" was listed. Moreover, to the extent relevant at all, the probable effect of listing Advanta as the source of the information was to *benefit* those class members who were interested in that particular debt, by identifying it with the name of a company they would actually recognize—indeed, that is why the FDIC directed the credit-reporting agencies to present the information in that

form. As CardWorks continued to operate Advanta's website and answer its phones, it is not even clear how a customer would be able to tell any difference. And yet, via the aggregation mechanism of the class-action device combined with statutory damages, the courts are faced with adjudicating the claims of, and Experian faces potential liability exceeding $100 million to, over 100,000 individuals as to whom there has been no showing any harm whatsoever.

This case is therefore completely unlike those to which the district court inappositely compared it, in which plaintiffs have sued to vindicate a right to certain information; those suits have featured plaintiffs who were *harmed* by the lack of information. Even where an individual plaintiff has sued over an alleged deprivation of information—and thereby shown that the information at issue matters to him (unlike the absent class members in this case, who have given no such indication)—a plaintiff must demonstrate some harm over and above "not knowing." In *Federal Election Commission v. Atkins*, for example, the plaintiffs were unable to obtain information necessary to evaluate candidates for public office. 524 U.S. 11 (1998). Indeed, the Court in *Atkins* specifically inquired into whether the plaintiff's harm from the deprivation of the information was "sufficiently concrete," and concluded it was: "the information would help them (and others to whom they would communicate it) to evaluate candidates for public office." 524 U.S., at 21, 24. By contrast, when faced with a plaintiff clamoring for

information but who could not explain why he had been harmed by its absence, the Court did not hesitate to conclude that he did not have standing: "While we can hardly dispute that this respondent has a genuine interest … and that his interest may be prompted by his status as a taxpayer, he has not alleged that, as a taxpayer, he is in danger of suffering any particular concrete injury." *United States v. Richardson*, 418 U.S. 166, 177 (1974).

The problem identified by *Richardson* is only deepened in a class action. When an individual plaintiff sues for himself, it can at least be assured that *he* wants the information, and so in some sense is injured by not having it—though *Richardson* plainly holds that is not enough. But there is no reason to believe that any of the absent class members here care *at all* whether the formal name of the servicer of their Advanta credit card account is "CardWorks." To the extent Article III's standing requirements protect the "vitality of the adversarial process" by ensuring that the parties before the court have been injured "in a concrete and personal way," class-action litigation over the accuracy of information that is of no interest whatsoever to the vast majority of the absent class members is the paradigm example of what not to do. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 581 (1992) (Kennedy, J., concurring).

B. The District Court's Revision of Safeco Requires Immediate Review

The second question that this Court should review concerns the meaning of the Supreme Court's pathmarking decision in *Safeco Insurance Co. v. Burr*, 551 U.S. 47 (2007). *Safeco* establishes a safe harbor, precluding willfulness liability where it is not "obvious" that the conduct violates the FCRA—i.e., where the unlawfulness has not previously been made clear by prior appellate court or regulatory authority, or by "pellucid" statutory text, *id.* at 68. That safe harbor has become increasingly meaningful, as FCRA "litigation has skyrocketed"[4]—particularly class actions claiming willful violations, which threaten classwide statutory damages running to many millions or billions of dollars. *See Trans Union LLC v. Federal Trade Comm'n*, 536 U.S. 915, 917 (2002) (Kennedy, J., dissenting from denial of cert.) (noting the potentially massive liability resulting from claims of willful FCRA violation).

This court has not previously provided guidance on the application of *Safeco*, and the order at issue here illustrates that such guidance is sorely needed. At the most basic level, the district court—perhaps misunderstanding the import of *Safeco*'s phrase "objectively reasonable," 551 U.S. at 70 n.20—failed to appreciate that *Safeco* strictly limits willfulness to conduct that is clearly established as

[4] Jonathan D. Jerison & Bradley A. Marcus, *A Brief History of the FCRA and the Potential for New Litigation After Dodd-Frank*, Consumer Fin. Services L. Rep., Apr. 13, 2011, at 3, 4.

unlawful, and does *not* permit the safe harbor to turn on the court's assessment of the *best* reading of the statute or on what it believes a reasonable defendant would have done. The Court in *Safeco* analogized to its qualified-immunity jurisprudence to make this point. 551 U.S. at 70 (citing *Saucier v. Katz*, 533 U.S. 194 (2001)).

Instead, the district court mistakenly treated the *Safeco* inquiry as a burden-shifting process in which the court's initial reading of the statutory language gave Experian "a steep burden to prove" that its conduct "was objectively reasonable," Op. 10; perversely treated the very absence of any statutory, appellate, or FTC definition of "sources of information" as meaning that what the phrase requires is *un*ambiguous, Op. 11-12; and found the safe harbor inapplicable in part because of an alternative course it believed "Experian easily could have" adopted, Op. 15.

Of even greater concern, the district court apparently understood *Safeco*'s statement about the defendant's interpretation having a "foundation in the statutory text," 551 U.S. at 69–70, as requiring an interpretive methodology—in determining whether the statute's language is "pellucid"—that artificially excludes any interpretation of that language that is not *itself* specified in the FCRA's text. The court thus rejected Experian's interpretation of "source" as permitting a CRA to identify the business name under which a credit card servicer deals with consumers *not* on the ground that the statutory text is pellucidly to the contrary (which it

plainly is not), but on the puzzling ground that this interpretation "does not derive from the text of the Act." Op. 11.

At the same time, the district court apparently viewed the focus on statutory text as narrowly limited to the text of § 1681g, to the exclusion of the rest of the FCRA and the statutory purpose: it completely failed to address Experian's argument that a companion provision, § 16811(a)(6)(B)(iii), supported its interpretation by specifically requiring that furnishers be identified by their "business name." And it likewise refused to consider whether Experian's interpretation was the one more consistent with the purpose of the statute.

The district likewise fundamentally erred in interpreting the *Safeco* test not as a safe harbor but as a standard of liability. The district court squarely rejected Experian's submission that *Safeco* requires "a two-step analysis"—i.e., step one determines whether the safe harbor applies, and step two (if the safe harbor is found inapplicable) requires the jury to determine whether the defendant acted willfully. The district court, however, held that if a defendant is not eligible for the *Safeco* safe harbor, it is automatically established that the defendant acted (at least) recklessly. Op. 8, n.7. Accordingly, the district court found that all of Experian's evidence that it did not act with a willful state of mind—including its reliance on FDIC guidance and industry practice—was irrelevant, and its own finding of "objective unreasonableness" made Experian willful as a matter of law.

This misinterprets *Safeco*, which clearly establishes a two-step process, with the second step for the jury. As *Safeco* stated, a company does not act willfully unless its "action is *not only* a violation under a reasonable reading of the statute's terms," *and* that action ran a risk "substantially greater than the risk associated with a reading that was merely careless." 551 U.S., at 69 (emphasis added). Whether Experian was (at worst) "merely careless" was for the jury to decide. This Court has repeatedly stated that determining willfulness is for a jury. *See, e.g., Dalton v. Capital Associated Indus.*, 257 F.3d 409, 419 (4th Cir. 2001) (stating, in FCRA case, that "summary judgment is seldom appropriate on whether a party possessed a particular state of mind"). Likewise courts specifically addressing *Safeco* have overwhelmingly reserved this question for the jury. For example, in *Fuges*, the Third Circuit made clear that following a finding of no safe harbor under *Safeco* "a jury [would] be called on to determine whether violations of [the] FRCA were willful or negligent, based on the facts surrounding defendants' adoption of a particular reading of the statute." 707 F.3d, at 251 n.16. *See also Ashby v. Farmers Ins. Co.*, 565 F. Supp. 2d 1188, 1206 (D. Or. 2008) (courts have "held uniformly that whether a FCRA violation is willful is a matter for the jury").

The district court's holdings on these related points dramatically and erroneously reduce the scope and vitality of *Safeco*, and warrant immediate review.

Conclusion

For the foregoing reasons, this Court should grant permission to pursue this appeal pursuant to 28 U.S.C. §1292(b).

December 15, 2014

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on this 15th day of December, I electronically filed the original of the foregoing document with the clerk of this Court by using the CM/ECF system. I certify that service upon counsel of record for parties to the district-court action will be accomplished via United States mail postage prepaid. Pursuant to this Court's Rules, I will also file the original and three copies of the foregoing document, by UPS overnight delivery, with the clerk of this Court.

/s/ Meir Feder

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