1 IN THE SUPREME COURT OF THE UNITED STATES

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3 SAFECO INSURANCE :

4 COMPANY OF AMERICA, ET :

5 AL., :

6 Petitioners :

7 v. : No. 06-84

8 CHARLES BURR, ET AL.; :

9 and :

10 GEICO GENERAL INSURANCE :

11 COMPANY, ET AL., :

12 Petitioners :

13 v. : No. 06-100

14 AJENE EDO. :

15 - - - - - - - - - - - - - - - - - x

16 Washington, D.C.

17 Tuesday, January 16, 2007

18

19 The above-entitled matter came on for oral

20 argument before the Supreme Court of the United States

21 at 10:04 a.m.

22 APPEARANCES:

23 MAUREEN E. MAHONEY, Washington, D.C.; on behalf of the

24 Petitioners.

25

1 PATRICIA A. MILLETT, Assistant to the Solicitor
2 General, Department of Justice, Washington, D.C.; on
3 behalf of the United States, as amicus curiae,
4 supporting the Petitioners.
5 SCOTT A. SHORR, Portland, Ore.; on behalf of the
6 Respondents.
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1 P R O C E E D I N G S

2 (10:04 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear argument

4 first this morning in 06-84, Safeco Insurance Company

5 versus Burr, and 06-100, GEICO General Insurance Company

6 versus Edo.

7 Ms. Mahoney.

8 ORAL ARGUMENT OF MAUREEN E. MAHONEY

9 ON BEHALF OF THE PETITIONERS

10 MS. MAHONEY: Mr. Chief Justice, and may it

11 please the Court:

12 I'd like to turn first to the Ninth

13 Circuit's interpretation of the term "willfully" and its

14 determination that the case had to be remanded for

15 further proceedings to permit an opportunity to explore

16 Petitioners' communications with their counsel. We ask

17 this Court to find that there is no necessity for any

18 such inquiry for waivers of attorney-client privilege

19 because summary judgment should have been affirmed in

20 this case.

21 Petitioners and their counsel, if you think

22 about what communications you might find, they could not

23 have known anything more about these statutory issues of

24 first impression than the district court did. It's

25 questions of law. And if the district court's opinion

1 does not reflect reckless disregard for the law, for the
2 reading of the statute, then it would be inappropriate
3 to characterize Petitioners' adoption of the very same
4 views as either a knowing or reckless violation of the,
5 of the FCRA.
6 The first -- the Ninth Circuit nevertheless
7 reached a contrary conclusion, and said it was time to
8 go ahead and look at privileged communications if the
9 Petitioners wanted to defend the case, because they made
10 self-interpretive errors about the meaning of willfully.
11 And the first is that they read willfully in
12 this setting to mean recklessly, and relied on several
13 cases where this Court has read the term willfully in
14 civil statutes to mean recklessly.
15 But this Court has said repeatedly that the
16 word willfully is contextual, that you have to look at
17 all of the sections of the statute to see how it's used
18 to determine whether it means with knowledge that your
19 conduct violates the law, or whether reckless violations
20 are sufficient. And in this particular statute, unlike
21 the other three that were at issue, Congress has used
22 the term willfully in other sections of the law to mean,
23 as Plaintiffs concede, that the Defendant knows that
24 their conduct violates the Act.
25 JUSTICE SCALIA: Well, it's also used in the

1 phrase "knowing and willfully." That appears in several
2 other parts of the statute, and that wouldn't make any
3 sense if the only meaning of willful is knowing.
4 MS. MAHONEY: Well, it actually says
5 "willfully and knowingly --"
6 JUSTICE SCALIA: In one formulation or
7 another, but it combines the two words, knowing and
8 willful.
9 MS. MAHONEY: Well, this Court, though, has
10 held that willfully and knowingly, when that phrase is
11 used together, it's been discussed in a number of cases
12 including Dixon recently, that it means -- willfully
13 means knowledge that the conduct violates the law, and
14 knowingly means knowledge of the relevant facts. And
15 that would make perfect sense in this setting, and so
16 the term willfully when, again, used --
17 JUSTICE SCALIA: You mean willfully alone?
18 MS. MAHONEY: It --
19 JUSTICE SCALIA: Where -- where it -- where
20 it means what you think it means, which is knowingly,
21 that does not mean knowing the facts? If you mistake
22 the facts and are laboring under a misimpression of the
23 facts, you have nonetheless willfully violated the law?
24 MS. MAHONEY: Your Honor, in Ratzlaf, the
25 phrase was willfully, not willfully and knowingly, and

1 the Court held that it meant that you knew that your
2 conduct violated the law. And that seems to be the most
3 reasonable reading here because if you look, there are
4 also sections of Section 1681n that refer to knowing
5 conduct, and that would require the conclusion that
6 Congress used willfully in this section to mean a -- a
7 less -- a more -- a less culpable mens rea than
8 knowingly. And that's --
9 CHIEF JUSTICE ROBERTS: So that if you're
10 the CEO of your company, and a lawyer -- Federal counsel
11 comes in and says we've got a real issue under the Fair
12 Credit Reporting Act, I need to brief you on that, we
13 need to make an important decision about whether we are
14 complying, you say I don't want to hear about it, I
15 don't want to know about it. That would not be
16 willfully violating the statute?
17 MS. MAHONEY: Well, under -- some cases have
18 suggested that there could be a willful blindness
19 instruction that would govern whether you define that as
20 knowing or not. Certainly --
21 CHIEF JUSTICE ROBERTS: So it doesn't have
22 to be actual knowledge?
23 MS. MAHONEY: I think that the best reading
24 of knowingly is actual knowledge or something that is,
25 that is everything but, you know, that really is --

1 JUSTICE SCALIA: How about reckless
2 disregard?
3 MS. MAHONEY: Well, conscious disregard is a
4 recklessness standard, and even if the Ninth Circuit
5 correctly determined that this should be interpreted as
6 a recklessness standard, this Court has defined
7 recklessness to mean that it has to be conscious
8 disregard, actual knowledge of a high risk of, of -- of
9 harm or in this case illegality. And in these
10 circumstances, you can't say that there was a high risk
11 of illegality because what the district court found is
12 that the Petitioners' interpretations of the statute
13 were actually not only reasonable, but correct, and
14 having --
15 JUSTICE ALITO: Since the term knowingly or
16 knowing appears in two places in 1681n, can't we infer
17 from that that willfully in that provision also means
18 something different?
19 MS. MAHONEY: I think the way it's used, it
20 says knowing, knowingly that they did not have a
21 permissible purpose. Permissible purpose, that may not
22 be knowledge of the law, it just may be knowledge that
23 your purpose wasn't permissible. And even if they were
24 using it --
25 JUSTICE ALITO: I thought the statute says

1 what the permissible purposes are.

2 MS. MAHONEY: It does, but it doesn't

3 necessarily mean that the individual knew precisely what

4 the statute said. Because for instance, users are told

5 what the permissible purposes are when they get a credit

6 report from, from a credit agency. But more

7 importantly, Your Honor, I think that the use of the

8 term knowingly there can also be explained.

9 If you look at Section 1681h, it actually

10 provides that certain tort actions cannot proceed unless

11 there is a willful intent to injure, except as provided

12 in Section 1681n, and they are the same kinds of actions

13 that are carved out in 1681n.

14 And so I think it was to make clear, I think

15 it was to make clear that you didn't have to have a

16 willful intent to injure. So even if they meant it to

17 be interchangeable with a knowing violation of the law

18 there, I think there was a reason for it, it wasn't just

19 surplusage. It was to clarify that they didn't have to

20 have a willful intent to violate.

21 JUSTICE BREYER: Would you say it's all

22 right to use the model penal code definition of

23 reckless, which is basically what you -- taking it here,

24 you would have to consciously disregard a substantial

25 and unjustifiable risk that the action is unlawful?

1 MS. MAHONEY: That's correct, Your Honor.
2 JUSTICE BREYER: If you come across anything
3 that would use that, I mean "reckless" itself is
4 unclear. The model penal code tried to clarify it based
5 on this Court's opinions primarily.
6 MS. MAHONEY: But I think you can look to
7 the way this Court described recklessness in Farmer vs.
8 Brennan as well, though, as well as --
9 JUSTICE BREYER: What's the difference?
10 MS. MAHONEY: The difference is just, there
11 is two forms of recklessness. One which says that if
12 the risk is sufficiently high, if a person should have
13 known, you could be -- you could be liable. But that
14 the form of recklessness that Congress presumably used
15 here in this setting, where there is the potential for
16 very punitive sanctions, was what is referred to --
17 Farmer versus Brennan calls it "criminal," the criminal
18 recklessness standard.
19 And that means that not only do you have to
20 have an objectively high risk of illegality, but you
21 must be actually conscious of that risk. But in this
22 case, you don't even need to get to the issue of
23 consciousness.
24 JUSTICE BREYER: Well, you said there is no
25 way they couldn't have been conscious of the risk here.

1 I mean, after all, that's why they went to lawyers.
2 They know there's risk that this is unlawful.
3 MS. MAHONEY: The question is --
4 JUSTICE BREYER: But consciousness, I mean,
5 maybe it should come in in the standard, but I don't
6 know that that would help you.
7 MS. MAHONEY: I think the issue of conscious
8 -- the risk, though, it has to be a high risk. And if
9 it is a reasonable interpretation of the statute, or
10 even if it is an interpretation of the statute that is
11 fairly debatable, that you have a fair chance of
12 success, then how can you say that is a high risk of
13 illegality, so high that we should say that Congress
14 wanted to sanction you for taking that position?
15 And for saying that, you know, you shouldn't
16 be permitted to adopt a compliance program if there was
17 a fair ground for believing that it was lawful. And
18 here what the Ninth Circuit did --
19 JUSTICE SCALIA: Suppose there is a fair
20 ground for believing it was lawful. Lawyers are in
21 disagreement, but in fact, I believe the lawyers who say
22 it is unlawful, and I nonetheless go ahead and do it.
23 Is that a willful violation?
24 MS. MAHONEY: I don't, I don't think so,
25 Your Honor, if, in fact, it was a fair ground for -- -

1 JUSTICE SCALIA: But I think I'm violating.

2 MS. MAHONEY: I don't -- yes. But you

3 couldn't know you were violating it, and because if it

4 really is a fair ground for litigation --

5 JUSTICE SCALIA: I'm a better lawyer than my

6 advisors.

7 (Laughter.)

8 MS. MAHONEY: Your Honor, I think if it's an

9 area where the law is truly unsettled. And here an

10 issue of first impression, a lawyer's assessment that

11 you may lose is inherently predictive. These are not

12 true or false answers when there is almost nothing to go

13 on.

14 And so in that area, it's much like what

15 this Court did in Screws, where it said that this was a

16 case involving a willful violation of, or interference

17 with rights secured by -- by Federal law. And what the

18 Court says, well, it's not just any bad purpose that

19 Congress had in mind, it is a bad purpose to defy

20 announced rules of law. They have to be, there has to

21 be sufficient clarity in the law to say that there was a

22 high risk of illegality that you could disregard.

23 JUSTICE SCALIA: Would you look to the

24 subjective intent of the actor at all?

25 MS. MAHONEY: Only --

1 JUSTICE SCALIA: Or would you just look to
2 the outcome and say, well, you know, it was a close
3 question, so even if the actor indeed thought he was in
4 violation, it was a close question; it's okay?
5 MS. MAHONEY: I don't think you would look
6 at the intent until you found that there -- there was no
7 reasonable ground or at least no, no -- no fair ground
8 for debate about the question. And at that point, Your
9 Honor, if there was an objectively high risk of
10 illegality, then you do have to ask, what were they
11 consciously aware of; what did they do?
12 JUSTICE SCALIA: I must say that -- that is
13 not the normal meaning of willful, willfully violating
14 the law.
15 MS. MAHONEY: Well, I think in Screws --
16 JUSTICE SCALIA: You're changing it to mean
17 willfully, willfully and blatantly violating the law.
18 MS. MAHONEY: I don't think so.
19 JUSTICE SCALIA: I mean, if I know that what
20 I'm doing is in violation of the law, even if it's a
21 close question, it seems to me I am willfully violating
22 the law.
23 MS. MAHONEY: Your Honor, Screws says you
24 can't know the unknowable. And if the law, if it's
25 really, truly an issue of first impression, you may

1 think you're violating the law, but you -- you can't
2 know the unknowable. And that's why this setting is so
3 important, because you can't, you know, put -- impose
4 sanctions. Here we're talking about the potential for
5 an industry facing billions of dollars without any
6 actual harm to -- to individuals. And that --
7 JUSTICE GINSBURG: Is it really billions?
8 How many of these have been certified as class actions?
9 MS. MAHONEY: I believe that there are two
10 certified class actions. But many -- there are many
11 cases pending and it could be billions of dollars, Your
12 Honor. Certainly if the classes are certified, and --
13 JUSTICE GINSBURG: Would you, would you, as
14 representative of the insurers, would you have a sound
15 objection to class action certification in these cases?
16 MS. MAHONEY: Your Honor, I'm sure there
17 would be some bases to resist. But classes have been
18 certified, so I --
19 JUSTICE GINSBURG: And gone to, gone to
20 judgment?
21 MS. MAHONEY: I do not believe any have gone
22 to judgment, but I don't, I don't -- I think that the
23 point is that if you allow a thousand dollar penalty or
24 the potential for a thousand dollar penalty for every
25 consumer who didn't get a notice, simply because they

1 may have gotten a better price if they had even better
2 credit, across the country, if you interpret the statute
3 that way, and then you can say you can get this thousand
4 dollar, what is in essence a penalty, and you multiply
5 that by the number of consumers, then you certainly have
6 the potential for very, very substantial liability.
7 JUSTICE GINSBURG: It's a question how many
8 will sue for a thousand dollars, given the litigation
9 costs.
10 MS. MAHONEY: Well, given that these are
11 proceeding as class actions, the answer is there is
12 plenty on the line to incentivize plaintiffs' attorneys
13 to bring these class actions, and they have been
14 brought, and this is a class action. There are two
15 class actions.
16 JUSTICE GINSBURG: They haven't -- neither
17 has been certified, has it?
18 MS. MAHONEY: No, it has not. They are
19 putative class actions, Your Honor. But I, but I think
20 that whether it's a class action or not, we have to look
21 at what did, what did Congress presumably have in mind
22 when it authorized these kinds of penalties and punitive
23 damages based on a willful violation in a technical area
24 where there is no potential for harm? And certainly --
25 JUSTICE KENNEDY: I have just two, two

1 questions on, on willful and then -- because you may
2 want to talk about the other issue in the case. First,
3 you began by saying that here a district judge has come
4 to the contrary conclusion; by definition, it can't be
5 reckless. Do you have any authority, where we -- for
6 that proposition, where we have said that?
7 MS. MAHONEY: Well --
8 JUSTICE KENNEDY: We find all the time that
9 a right is not clearly established under AEDPA, and so
10 forth -- and disregard what I just said. That's my
11 first question.
12 And the second is willfully, as Screws
13 itself makes very clear, it is interpreted differently
14 in the criminal context than it is in the civil context.
15 MS. MAHONEY: Except Screws, Your Honor,
16 actually says that it was adopting a criminal
17 recklessness standard, not a knowing standard, but a
18 reckless standard. And that is the same standard that
19 has been applied in the civil cases that use willfully
20 in the punitive damages context.
21 So I think it's exactly the same standard in
22 that Screws does say that the, you can't have, it can't
23 just be a bad purpose, that it has to have been a bad
24 purpose to violate clearly defined rules. And this
25 Court has said in various contexts in the, in the

1 qualified immunity area that picking the losing side
2 does not mean that your conduct was objectively, you
3 know, wrongful.
4 And that's really -- I think that there is
5 great significance to the district court's ruling. I'm
6 not saying that in every case, it would absolutely be
7 dispositive. I think you have to look at what was the,
8 you know, the clarity of the law, what was the reasoning
9 of the district court. But what the Ninth Circuit did
10 is that it, in essence, said that you can't rely on
11 creative but unlikely answers to issues of first
12 impression.
13 Well, if an administration official goes to
14 a lawyer in the administration and asks about a course
15 of conduct, and is told, well, it's completely an issue
16 of first impression, there is probably a 40 percent
17 chance of success, do you say it's reckless to proceed
18 on that basis?
19 CHIEF JUSTICE ROBERTS: Well, just because
20 an issue is one of first impression doesn't mean there's
21 a high degree of uncertainty. The statute may be
22 clearly addressed to that issue. It hasn't come up
23 before.
24 MS. MAHONEY: Absolutely, Your Honor.
25 CHIEF JUSTICE ROBERTS: First impression.

1 MS. MAHONEY: It certainly -- this Court has
2 made clear that if the language of the statute is very
3 plain, then, of course, that can be noticed, that can be
4 adequate warning. But certainly this statute doesn't
5 satisfy that standard. Congress didn't provide the
6 benchmarks that you have to use for comparison to
7 determine whether there has been an increase in a charge
8 or whether there has been an adverse action based on the
9 consumer report. You need benchmarks to answer those
10 questions, and there aren't any regulations and there
11 were no cases.
12 If I could save the balance of my time for
13 rebuttal.
14 CHIEF JUSTICE ROBERTS: Thank you, Counsel.
15 Ms. Millett.
16 ORAL ARGUMENT OF PATRICIA A. MILLETT,
17 ON BEHALF OF THE RESPONDENTS
18 MS. MILLETT: Mr. Chief Justice, and may it
19 please the Court:
20 The Court of Appeals correctly concluded
21 that willfulness in the civil context, as is used here,
22 includes a reckless disregard component or a
23 recklessness component. That is what this Court has
24 held in a number of cases that have similar uses of
25 willfulness focused on a departure from the law, have

1 held. Thurston, Richland Shoe and Hazen Paper are the
2 three that have been most discussed in the case, in the
3 papers here.
4 But where the Ninth Circuit misstepped here
5 was in the application of that standard. And in
6 particular, we agreed with Petitioners that when it
7 concluded that a creative but unlikely position
8 constitutes recklessness, it erred. Recklessness speaks
9 an extreme deviation from an ordinary standard of care.
10 It requires that the defendant act in the face of or
11 fail to act --
12 JUSTICE STEVENS: It is a subjective
13 standard or an objective standard?
14 MS. MILLETT: It has both in this context.
15 It is, I think, first and foremost, an objective
16 component, because there is -- this is a civil case.
17 It's not purely subjective. And that objective
18 component is very important because that is what makes
19 the act or inaction reckless, and that is the risk.
20 There has to be an objectively high and obvious risk.
21 JUSTICE STEVENS: So if the potential
22 liability, as in these cases, is huge, then you have to
23 be even more careful because there is liability so
24 great. So is it the greater the liability -- the
25 greater chance of recklessness, the greater the

1 potential liability?

2 MS. MILLETT: No, to the extent you're

3 talking about dollar liability, I don't think that's

4 true. I do think it's fair to say that in recklessness

5 generally in the tort law, the more serious an injury

6 that could result, can -- we'll tolerate less risk. If

7 the risk is causing serious bodily injury or death to

8 somebody, we'll -- the law will tolerate a lesser degree

9 of risk than it will if, if it's simply causing, you

10 know, a delay in something or a sort of paper injury or

11 maybe even a dollar injury.

12 And it's not set. It's a variable

13 calculation. So in that sense, it is. I don't think

14 that when we talk about a high and objective risk in

15 this context, we are talking about the dollars that a,

16 that a company would have to pay, although I'm sure they

17 are interested in hearing about that from their lawyers.

18 What we are talking about here -- and this

19 is a very unusual statute the way it's written -- the

20 liability itself, not just the damages, but the

21 liability itself turns upon the extent of departure from

22 law. You have to -- there is no recovery here like

23 there is in almost -- or commonly in Federal statutes

24 for just a violation. That isn't it.

25 You have to show either a willful violation

1 or a negligent violation, and that requires a
2 determination not only that the defendants violated the
3 law, but a determination as to how much, how far, how
4 many standard deviations from correct their position was
5 and that is an objective determination.
6 Once an objectively high risk has been found
7 by a court, then -- then the case can shift to looking
8 into subjective things. I think a plaintiff would be
9 entitled, once an objectively high and obvious risk has
10 been found by the court, to rely on that, and allow a
11 jury to, or a judge, whoever is deciding the case, to
12 infer the existence of willfulness from that. And
13 that's often when defendants -- I'm sorry.
14 JUSTICE STEVENS: May I also ask, do you
15 agree with the Petitioner on the meaning of adverse
16 action?
17 MS. MILLETT: No, we agree with Respondents
18 on the meaning of adverse action.
19 CHIEF JUSTICE ROBERTS: Correct me if I'm
20 wrong. You think if I have an insurance policy, I'm
21 paying a certain rate, they look at my credit report and
22 they say, you know, good news, we're going to lower your
23 rates, that's an adverse action because they might have
24 lowered the rates even further if they had notified me
25 about the credit report and there were some errors in

1 it?

2 MS. MILLETT: Right. It's a complicated

3 answer, in part because that assumes that you have an

4 existing account and you're not an initial account here.

5 And when you have an existing account, there's a

6 definition of adverse action for insurance provisions,

7 but in iv there is a separate, there's another

8 definition, and this is on, on page -- sorry. Excuse

9 me. On page 3A of the appendix to our brief, iv under

10 big I -- I'm sorry, there's a lot of provisions -- talks

11 about reviewing an existing account, and it

12 cross-referenced another provision which talks about

13 reviewing an account for purposes of termination. And

14 that would include, in our view, not only completely

15 canceling it, but terminating the existing and charging

16 you more for allowing you now to pay a new rate. So

17 which would govern in that particular context is a

18 little bit harder.

19 But it could, and here's logically why,

20 because I think the understanding of "increase" that's

21 at issue here is one that's very basic to the operation

22 of this statute, and that is, did the content of your

23 information in your credit report, if it had been

24 better, could you have had a better rate or a better

25 deal.

1 CHIEF JUSTICE ROBERTS: Right.

2 MS. MILLETT: So have you been hit in the

3 pocketbook.

4 CHIEF JUSTICE ROBERTS: So if they lower, if

5 they lower the rates, you still say that that fits the

6 meaning of adverse action because they might have

7 lowered them further if the information hadn't been

8 erroneous?

9 MS. MILLETT: It could have, and here -- in

10 this sense, it could be: In the same way that I, sort

11 of the flip side, but in my office, if everybody in the

12 hallway gets a 5 percent salary increase and I only get

13 a 1 percent salary increase, I am certainly better off,

14 but if the reason I got a lesser increase is because of

15 my gender or because of my credit report, it's an

16 adverse action. So the fact that you're doing somewhat

17 better doesn't mean --

18 JUSTICE BREYER: That isn't how the statute

19 defines it.

20 MS. MILLETT: Excuse me?

21 JUSTICE BREYER: The statute says an adverse

22 action is an increase in a charge for -- in connection

23 with underwriting.

24 MS. MILLETT: But it also --

25 JUSTICE BREYER: That's what it says. And

1 then it says an increase is -- and if you take an
2 adverse action, i.e., if you increase it, and your
3 increase is based in whole or in part on information
4 contained in a consumer report, you have to send the
5 thing. How did you get -- in your example, there was no
6 increase. I mean, in a charge. In your salary, it's a
7 decrease in the salary. Same thing.
8 MS. MILLETT: The definition again on 3A
9 includes not just increase, but includes an unfavorable
10 change in the terms. And so it's not settled whether --
11 JUSTICE BREYER: You mean unfavorable change
12 in terms, unfavorable change in terms.
13 MS. MILLETT: Exactly.
14 JUSTICE BREYER: Well, suppose you don't
15 have, you don't have any terms because you never did it
16 before. There's no change in terms.
17 MS. MILLETT: If you're a new customer --
18 and again, I want to reiterate that, how this applies to
19 existing accounts is complicated --
20 JUSTICE BREYER: You mean those words
21 "change in terms" refer to rates, in other words?
22 That's a rather odd way to refer to it. In one place,
23 you refer to an "increase"; in the other place, you'd
24 refer to it as a "change in terms." That's sort of an
25 odd way to write a statute.

1 MS. MILLETT: Well, you can have a change in
2 terms that is not necessarily an increase. It could be
3 you will no longer be entitled to a free rental car when
4 your car is in for repair for some reason. That's not
5 an increase.
6 JUSTICE BREYER: No, no, I understand that.
7 But what we're after is this. Everybody has a credit
8 report, just about. You put it in and you give people
9 the best possible rate conceivable, and now, how do you
10 know that maybe there could have still been a better
11 rate? And it can't be that the statute intends you to
12 send out notices in such circumstances or you'd have to
13 send notices whenever you read a credit report. Now, I
14 think that's, I've overstated slightly, but that's
15 basically the argument. So what's your response?
16 MS. MILLETT: And Justice Breyer, my
17 response is that if the content of the information in
18 your credit report would have made you -- had it been
19 better information you'd have gotten a better rate, a
20 better result, your pocketbook wouldn't have been hit as
21 hard, you have a dollars and cents injury because of the
22 content of the information, then you had an adverse
23 action.
24 JUSTICE BREYER: Okay, so your response is
25 just to repeat my question and say that's right?

1 MS. MILLETT: No. If I could continue on
2 that, if I could add on, if I could add on, the way
3 insurance companies work is they don't have 3 million
4 customers and 3 million rates. They have ranges and
5 most of them will have a top tier. They may have
6 specialized things for employees, but putting aside a
7 specialized category, there's a top range and they will
8 tell you, as they say in the briefs, that 10 to 15
9 percent of people fit in there. So they know what the
10 best rate is. They know what the next, above average
11 rate, the standard rate.
12 JUSTICE SCALIA: How do you fit, how do you
13 fit that within the language of the statute? Is it, I
14 fail -- you're a first- time customer and I fail to give
15 you a, you know, a break that maybe you could have had.
16 Is it a denial or cancellation of insurance? No. Is it
17 an increase in, an increase in any charge for insurance?
18 Is it a reduction or other adverse or unfavorable change
19 in the terms of coverage or in the amount of any
20 insurance? I find it hard to shoehorn your case into
21 that language.
22 MS. MILLETT: Well, to begin with, that may
23 be why Petitioners' position here certainly was not
24 reckless and the Ninth Circuit erred. But we do think
25 that the statutory language read as a whole supports

1 this. It could be a denial of a particular term in an
2 insurance contract. But you have to look at -- it's
3 important to understand you look --
4 JUSTICE SCALIA: I read the term as, as one
5 of the Justices here does, not referring to the rate.
6 The earlier part refers to the rate. An increase in any
7 charge for, that's the rate. And then it speaks of
8 change in the terms of coverage. I mean, that is, you
9 know, whether it covers hurricanes, or in the amount of
10 the insurance, whether you're insured for --
11 MS. MILLETT: Or it could be a reduction in
12 the terms. I mean, these things are statutory
13 construction issues to be litigated, and the important
14 issue here -- and they are presented in this case.
15 They're to be litigated and the important issue is that
16 when there is fair debate about these issues insurance
17 companies will not be held to be willfully violating the
18 statute if they got the answer wrong.
19 But I think on the, on the substantive
20 question, it's important to read "adverse action" in
21 light of, if I could just finish the sentence, in light
22 of the definition of when a notice is required to be
23 issued, which turns upon the content of the information
24 in the report.
25 Thank you.

1 JUSTICE SCALIA: Which is where?
2 MS. MILLETT: And that's on page 6a on our
3 appendix.
4 JUSTICE SCALIA: Thank you.
5 CHIEF JUSTICE ROBERTS: Thank you, counsel.
6 Mr. Shorr.
7 ORAL ARGUMENT OF SCOTT A. SHORR
8 ON BEHALF OF THE RESPONDENTS
9 MR. SHORR: Mr. Chief Justice and may it
10 please the Court:
11 When Congress intended to require a knowing
12 violation of the Fair Credit Reporting Act, it expressly
13 said so. It did not do so in connection with the claims
14 here under Section 1681n(a)(1)(A). In each instance
15 where Congress wanted to allow -- to require a higher
16 mens rea, it said so and did so in connection with
17 liability that was greater. They required knowing mens
18 rea for the criminal provision. They required knowing
19 mens rea to obtain the even higher statutory damages
20 that are available under the act.
21 JUSTICE SOUTER: What do you say to the
22 argument from drafting history that looks at the history
23 both of little n and little o and it points out that as
24 originally, in the original bill, little o providing for
25 the actual damages required a finding of gross

1 negligence? Little n used the word "willful" just as it
2 does now, suggesting that willful would not include
3 gross negligence or something close to gross negligence
4 like recklessness. Then in, then in o, they changed the
5 standard from gross negligence to mere negligence, but
6 they made no change in n, which suggests that n stayed
7 whatever it always was, and if the argument from
8 contrast was that n probably meant knowing rather than
9 reckless, it stayed knowing even when the standard was
10 changed to negligence in o. What do you say to that
11 argument?
12 MR. SHORR: Justice Souther, I think the
13 only thing we can say about that is Congress reduced the
14 culpability for the actual damages from gross negligence
15 to negligence. I don't think that tells us much about
16 willful means, what willful means as a separate matter.
17 JUSTICE SOUTER: But the fact that they had
18 originally drafted n as it is, in contrast to the
19 original o, does tell us, doesn't it, something about
20 what they had in mind in n. And they must have had
21 something in mind, probably had in mind, something in n
22 which was a standard higher than gross negligence.
23 MR. SHORR: No, Justice Souter, I suggest
24 that what you can infer from that is that, if anything,
25 is perhaps Congress wanted to move, make clear that

1 under o the actual damages aren't close to willful or
2 reckless, so they reduced gross negligence to negligence
3 in that circumstance. But that still doesn't tell us
4 separately what "willful" meant, and of course "willful"
5 had been interpreted by this Court in similar cases
6 involving similar statutes to mean a knowing or reckless
7 disregard. And I respectfully disagree with --
8 JUSTICE SOUTER: Well, I mean, there's no
9 question it has been and that is sort of the usual
10 reading in the civil context. But we also keep
11 repeating, you know, "willful" is a word of many
12 meanings and you always look to the context. And here
13 the argument is that if you look to the context of the,
14 of the two statutory sections right up next to each
15 other, you can draw a, an inference about what "willful"
16 means.
17 MR. SHORR: I think if anything, Justice
18 Souter, here the context should be the actual statutory
19 terms used, and in Section 1681n(b) they expressly
20 required the knowing standard and that's a knowing
21 violation of the law, as Justice Alito's question seemed
22 to draw out, a knowing impermissible purpose. And the
23 statute directly defines what a permissible purpose is
24 under this law.
25 So that reference to knowing could not refer

1 to a knowing, knowing the facts. And of course, willful
2 in some sense always includes some knowledge of the
3 factual circumstances.
4 In addition, the logical structure of the
5 act -- as I mentioned, we had negligence and actual
6 damages. We have a reckless standard, a knowing or
7 reckless standard for certain statutory damages, but
8 then an even higher level for the criminal and higher
9 statutory penalty provisions. And as I started to say,
10 a willful, knowing, reckless standard is entirely
11 consistent with how this Court has interpreted the term
12 in similar civil statutes that were in fact passed about
13 the same time the Hazen Paper case and Thurston and
14 McLaughlin cases interpreting the ADA and the FLSA and
15 other similar cases.
16 CHIEF JUSTICE ROBERTS: Counsel, even if
17 you're right about the standard, how can you suggest
18 that it's willful here when you have no judicial
19 construction, you have no administrative construction,
20 you have the statutory language that at least the
21 questions this morning have suggested is not perfectly
22 clear? How can you suggest that the action of the
23 companies on this case even under your standard was
24 willful?
25 MR. SHORR: Mr. Chief Justice, of course we

1 believe and the statute is in fact clear, you do not
2 need further interpretation by the Court.
3 CHIEF JUSTICE ROBERTS: So if we don't agree
4 with you on that, you would lose on the application of
5 the willfulness standard?
6 MR. SHORR: If you don't agree with us --
7 CHIEF JUSTICE ROBERTS: In other words,
8 your, your, your conclusion that this was a willful
9 violation depends upon your assertion that the statute
10 is perfectly clear?
11 MR. SHORR: I think that there is a level of
12 objective component that the statute at least has to be
13 understood by a reasonable person at some level using
14 standard statutory construction. But that isn't to
15 suggest that the statute needs to be interpreted by a
16 higher court or even a district court for counsel to get
17 guidance. And of course, in this case, there was no
18 guidance supporting Respondents -- excuse me -- no
19 guidance supporting Petitioners', defendants', position.
20 In fact, the only guidance supported our position,
21 including guidance from the FTC.
22 CHIEF JUSTICE ROBERTS: You're talking about
23 the Ball letter?
24 MR. SHORR: I am talking about the Ball
25 letter.

1 CHIEF JUSTICE ROBERTS: That wasn't even
2 binding on the commission, so why would that be regarded
3 as authoritative?
4 MR. SHORR: It was not, and we are not
5 suggesting it is, although it's entitled to Chevron
6 deference. But if you get past the minimal level of
7 objective standard, the question becomes what indicia
8 and markers were out there that would have guided this
9 company as to whether there was a high risk that they
10 were violating the act. And certainly the Ball letter,
11 which was sent by the staff specifically to address this
12 exact question and to guide insurance companies, gave
13 notice and it said charging anyone a higher amount than
14 the best available rate based on their credit score was
15 an adverse action. And in addition, there was --
16 JUSTICE BREYER: Well, how could that be? I
17 mean I agree that the statute is clear, but I think it's
18 clear the other way. That is, if you look at the
19 language, as you've just heard, if you look at the
20 purpose it's very hard to reconcile with the purpose an
21 instance where a person has continuous accidents. He's
22 a reckless driver. His insurance company puts him in
23 just a category below the bottom and they read his
24 credit report and they discover, despite his faults, he
25 always pays his bills on time. So they increase it, not

1 to the top category, but they give him a much better
2 deal. And you're saying this statute means that what I
3 just described is an adverse action based on a credit
4 report?
5 MR. SHORR: Yes.
6 JUSTICE BREYER: Yes. Okay. And then if
7 you're going to say yes, I want to hear why yes, and
8 then in light of the following: The little boy who says
9 wolf. You're probably puzzled what I mean by that. I
10 mean that if you're right in that interpretation, there
11 will be tens of millions of notices going out and
12 they'll have the same effect on the public that these
13 privacy notices have today. We get them every day,
14 dozens of them, and they go right in the wastebasket,
15 because they will become meaningless because to an
16 average person that notice will not mean that he better
17 look at his credit report. It will mean throw it in the
18 wastebasket.
19 All right, now I've got the purpose, I've
20 got the language, and I have what I think of as common
21 sense. Now, you explain why it's obvious the opposite.
22 JUSTICE GINSBURG: This is a different
23 question. We've been talking about willful up to now.
24 MR. SHORR: Yes, and this is the adverse
25 action question.

1 JUSTICE GINSBURG: You haven't addressed
2 adverse action at all.
3 MR. SHORR: And I'm happy to do so now.
4 JUSTICE GINSBURG: Yes. But, was there
5 anything further on willful? You said that the statute
6 was clear enough and you had the FTC informal advice,
7 but now we know that courts have divided on this
8 question, right? On --
9 MR. SHORR: Divided in the sense -- well,
10 the Ninth Circuit of course overturned the district
11 court's ruling so there's no current division, but if
12 that's what you mean, yes, Your Honor.
13 In a -- I guess I'll address quickly your
14 question. There's additional guidance provided by the
15 FTC that was subject to formal rulemaking and that was
16 16 CFR, I believe it's Part 601 Appendix C, and in that
17 instance the FTC, again subject to formal notice and
18 comment of rulemaking, said that the statute is defined
19 very broadly and it includes any action that can even be
20 considered to have a negative impact. And that plays in
21 the subjective aspect as well, but addressing your
22 question, Justice Breyer, first on the statutory
23 language --
24 JUSTICE SCALIA: It's pretty sloppy
25 lawyering, don't you think, any action that even be

1 considered to have -- wow. This is a standard?
2 MR. SHORR: That was --
3 JUSTICE SCALIA: Any action that can even be
4 considered to have a negative impact.
5 MR. SHORR: That was guidance, Your Honor.
6 JUSTICE SCALIA: This is guidance?
7 MR. SHORR: That was guidance. That was
8 guidance to provide in the context of reading this
9 statute, it should be read broadly.
10 JUSTICE SCALIA: But you know, I would tell
11 my CEO ignore that, that it's meaningless.
12 MR. SHORR: In addition, the CEO would have
13 the guidance provided by the Ball letter.
14 But again addressing your question, Justice
15 Breyer, an increase based on credit, if we had let's say
16 an increase based on race, someone goes in and has a
17 product to buy and there's the best rate, and they
18 charge someone else based on their race a higher rate,
19 certainly that's an increase based on credit. There's
20 only one best rate.
21 CHIEF JUSTICE ROBERTS: But this is not an
22 antidiscrimination provision. It doesn't say anyone who
23 discriminates in the setting of race has to send out
24 letters. It requires an adverse action. It requires an
25 increase in the charge.

1 MR. SHORR: And Your Honor, I was only using
2 that example to try and explain the statutory language.
3 JUSTICE BREYER: It doesn't explain it
4 because if you have an increase in the charge based on
5 race, of course that's an increase based on race.
6 MR. SHORR: Well, here we have --
7 JUSTICE BREYER: And if you refuse to give a
8 person the best rate, and lower his rate but not the
9 best rate, based on race, that is not an increase based
10 on race. That is discrimination based on race.
11 MR. SHORR: You're charging someone more
12 based on credit.
13 JUSTICE BREYER: That's true, and it's a
14 discrimination, but you didn't increase the rate. You
15 decreased it.
16 MR. SHORR: I think --
17 JUSTICE BREYER: It's still a
18 discrimination, it's still unlawful.
19 MR. SHORR: Applying it to credit, a natural
20 definition that is charging someone more than you charge
21 others is an increase.
22 JUSTICE ALITO: When you say more, in order
23 for there to be an adverse action there has to be an
24 increase or an unfavorable change. And when you have an
25 initial application you have to figure out what is the

1 baseline in order to determine whether there has been an
2 increase or an adverse action. And you and the
3 Solicitor General just assert that the baseline in that
4 situation is the best possible rate that you can get,
5 but I don't understand where that comes from.
6 MR. SHORR: Because charging someone more
7 than someone else who qualifies for that better rate
8 based on their credit, is increasing them, charging them
9 more, but it's also evident from the statutory purpose,
10 which I think was a question you asked --
11 JUSTICE BREYER: Let me look at the
12 language. Go back to give me -- because in ordinary
13 English, which I hope I speak, it is not an increase,
14 but maybe there is a technical term in the technical
15 language of commercial law or in FTC law where the word
16 increase means decrease. And if you -- is there
17 anything you want -- no. It's a serious question, at
18 least if you want to cite me to some authority that uses
19 this word increase in the way you just suggested.
20 MR. SHORR: We believe that it's a standard
21 dictionary definition, to charge someone more for
22 insurance than they would otherwise qualify for is
23 increasing their charge.
24 JUSTICE BREYER: Which dictionary shall I
25 look at?

1 MR. SHORR: I think we can look at any
2 dictionary. I don't have a cite, Your Honor, but --
3 JUSTICE SOUTER: They're making this
4 argument, and I think you got close to it a minute ago
5 when you alluded to statutory purpose. I think this is
6 what's behind, and you tell me if I'm wrong. One
7 purpose of the statute is to alert a consumer that the
8 consumer's credit report may contain errors which are
9 doing the consumer some kind of damage.
10 MR. SHORR: Yes, Your Honor.
11 JUSTICE SOUTER: And you want this consumer
12 alerted so the consumer can ask to see the report and
13 correct it if possible.
14 MR. SHORR: That's exactly right.
15 JUSTICE SOUTER: Reading the adverse action
16 the way you read it, it would give the consumer or
17 consumers a tip-off in the maximum number of cases. In
18 every case in which the consumer might have done better
19 if the credit report had assumed different facts, on
20 your reading theoretically, the consumer is going to say
21 I want to look at that report and correct it if it's
22 wrong. But isn't the fallacy of that argument the
23 fallacy of saying because that is one object of the
24 statute, every term within the statute has got to be
25 read in a way that maximizes the effectuation of that

1 object? And the trouble that we're having on the bench
2 is that discrimination and increase are different terms.
3 Increase says the rate actually goes up from a baseline
4 that the consumer previously had, whereas discrimination
5 does not. And your reading in effect, increase to mean
6 discrimination in order to maximize the likelihood that
7 the consumer will look at the report, isn't that the
8 basis of your argument?
9 MR. SHORR: I think it has to be an increase
10 based on some aspect, but the only way to give effect to
11 that statutory purpose is an increase above what you
12 would otherwise qualify for had you had better credit
13 and of course --
14 JUSTICE SOUTER: Well, that's a way to give
15 every conceivable effect to that policy. But the
16 statute in drafting adverse, or drafting the terms of
17 adverse action, may very well have said we don't want to
18 give every conceivable effect to this purpose because if
19 we do, we'll get into the situation that Justice Breyer
20 described. Everybody will be getting notices and the
21 notices will be meaningless.
22 MR. SHORR: I don't think the notice is
23 problematic because you're alerting the consumer to
24 check that the information that the insurance company
25 expressly relied on to increase your charge --

1 JUSTICE SOUTER: To set the charge. I mean,
2 that's circular. To set the charge that it gives you.
3 MR. SHORR: I don't think you need a prior
4 charge to suffer an increase. If I walk into a candy
5 store and I've never purchased that candy before but the
6 best price that day is 5 cents but they say we're going
7 to charge you 10 cents, I've certainly suffered an
8 increase.
9 JUSTICE BREYER: By that you're talking
10 linguistically, but I am interested in the purpose. So
11 I looked up on the Internet approximately what percent
12 of the people have the best credit score and that's
13 about 1 percent. So 99 percent of the public doesn't
14 have the best possible credit score. Now I take it that
15 means that you could in fact, if it's even roughly
16 right, have 99 percent or a little less or even perhaps
17 a little more when they look at that report that, since
18 it's not perfect in 99 percent of the cases, it's quite
19 possible that they won't get the best conceivable rate
20 which might be reserved for just perfect people. And if
21 that's so, in 99 percent of the cases they'll send out
22 notices. And that's why I asked my question about the
23 boy who calls wolf. What will happen if 99 percent of
24 the people who apply for insurance or any other thing
25 get notices? I suspect that this is only intuitive,

1 that the notices are more likely to go into the
2 wastebasket than they are if there was really a
3 decrease. Now, do you have any light you can shed on
4 that?
5 MR. SHORR: Sure. The -- as an initial
6 matter, it's not the perfect credit that is the
7 standard, it's whatever would qualify you for GEICO's
8 best rate. And that's a much broader standard. We
9 don't know the exact amounts but if you look at GEICO JA
10 6768, they have fairly broad tiers, maybe five or six.
11 And of course not everyone is going to get the notice.
12 If your driving record totally eliminates -- if you have
13 great credit but your driving record eliminates the
14 possibility that you qualify for the better rate, you
15 wouldn't get notice in that circumstance either. But
16 the key to the notice is, if I have very good credit but
17 the information that the insurance company looks at is
18 incorrect, I will be charged more based on incorrect
19 information without ever having the opportunity to tell
20 the insurance company or whoever is collecting that
21 information for them, you've charged me the wrong amount
22 and I in fact qualify for that better rate.
23 CHIEF JUSTICE ROBERTS: Don't you have that
24 right independently, though, every year to look at a
25 copy of your credit report?

1 MR. SHORR: Well, what's significant here,
2 that has been added to the statute in the last two
3 years. But since 1970, Congress's concern is giving
4 notice at a critical time, when the insurance company
5 tells you we are relying on it and we may have taken an
6 adverse action.
7 I wanted to also mention, here it's not just
8 an increase. There's also been a denial, and that
9 Mr. Edo applied for insurance from GEICO, and was denied
10 insurance with the stand-alone company GEICO General, so
11 that is also an adverse action under the act.
12 CHIEF JUSTICE ROBERTS: When you say you
13 look at the increase with respect to the best credit
14 rate, why is that? Why wouldn't you look at it relative
15 to say the average insured who walks in the door?
16 MR. SHORR: Because that -- GEICO's
17 argument, and I think that's what they want, presumes
18 they're looking at accurate credit information. And the
19 problem is, Congress has always told that there is
20 significant inadequacy in the credit information. I
21 think it's cited in the National Consumer Law Center
22 brief. In 1996, Congress was told that the error rate
23 in consumer information was 50 percent and there was a
24 20 percent serious error in the rates. Under GEICO's
25 interpretation --

1 CHIEF JUSTICE ROBERTS: I don't understand
2 what pertinence that has to my question which is, why do
3 you get to pick the best credit report as the baseline
4 from which you would measure your hypothetical increase?
5 MR. SHORR: Because under GEICO's theory of
6 the statute you may never get notice, even though you're
7 being charged more for insurance based on inaccurate
8 information, as long as you're not charge -- your charge
9 doesn't move below average. So a lot of people who are
10 in fact intended to be protected under this act will not
11 be protected until their charge goes below average, even
12 though the insurance company is continuing to charge
13 them more based on inaccurate information.
14 JUSTICE SOUTER: Why do we -- how do we know
15 that they were intended to be protected in this way by
16 getting this notice? That's the issue in the case.
17 MR. SHORR: Because going through the
18 statute and the increase based on credit, and then the
19 notice will give them the opportunity to check. Since
20 the consumer here is the -- it's a system of checks and
21 balances, and unless you give this consumer the
22 opportunity to check that they are in fact using the
23 correct information, it wasn't mistaken, it wasn't
24 driven down by identity theft, you can continue to
25 charge people more --

1 JUSTICE SOUTER: Okay. So that's --
2 MR. SHORR: -- based on inaccurate
3 information.
4 JUSTICE SOUTER: Your basic argument is the
5 statute, the definitions of adverse action have got to
6 be read in a way that maximizes the occasion upon which
7 a consumer will get a notice that may lead that consumer
8 to ask to see his credit report. That's your basic
9 premise?
10 MR. SHORR: Both based on the premise and
11 purpose of statute, yes.
12 JUSTICE SOUTER: All right.
13 MR. SHORR: Briefly addressing the
14 application of the standard to the facts in this case,
15 we do think it's appropriate to remand for further
16 consideration in light of some new developments. GEICO
17 has just recently produced documents to us that
18 addressly -- directly address the question of scienter
19 here, so if there's -- if you go past a minimum
20 threshold --
21 JUSTICE STEVENS: I've read your reference
22 to those documents. Explain why you think that's so
23 important.
24 MR. SHORR: Because those documents directly
25 address the subject of standard here, that GEICO was

1 reckless or understood their --

2 JUSTICE STEVENS: How do those documents

3 shed any light on recklessness? I didn't see that.

4 MR. SHORR: I'm sorry, Your Honor?

5 JUSTICE STEVENS: How do the documents that

6 you describe shed any light on the extent of their

7 recklessness, if any?

8 MR. SHORR: I want to be careful, because I

9 had presented -- I asked to lodge them with the Court

10 and I can quote them if necessary, but within those

11 documents there is direct evidence that GEICO

12 interpreted the statute exactly how we do, that not

13 putting someone in the best tier based on credit --

14 CHIEF JUSTICE ROBERTS: Who's GEICO? I

15 mean, you're talking about particular lawyers at a

16 particular level, an ongoing debate about what this law

17 means. If you get one lawyer who says, you know, I

18 think you could read it this way, does that mean that

19 GEICO reads it that way?

20 MR. SHORR: No, Your Honor. In this

21 instance, this document involves top level GEICO

22 executives. And with respect to the advice of counsel

23 issue, frankly it's a red herring. We have never asked

24 to compel the Defendants in either of these cases or any

25 of the cases we're involved in, to waive their

1 privilege. They've got the right, of course, to offer
2 advice of counsel as an affirmative -- as a defense in
3 this case, but we don't believe it's necessary to prove
4 our case to even reach what the counsel said. We
5 believe we can prove our case based on the documents and
6 subjective intent alone.
7 JUSTICE STEVENS: I still don't really
8 understand this part of the case very much. Assume that
9 a lawyer writes a letter saying you read it two or three
10 different ways, read the statute, it's very ambiguous,
11 and we think the government's reading is the better
12 reading. And the executives think about it and they say
13 no, we don't think that's right. Has that proved
14 reckless disregard?
15 MR. SHORR: If the statute was clear and the
16 guidance --
17 JUSTICE STEVENS: If the statute's clear.
18 And of course, Miss Mahoney said the district judge
19 thought it was clear, but the other way.
20 MR. SHORR: And with respect to the district
21 court, we believe the district court here clearly erred,
22 as the Ninth Circuit found. And the guidance -- that
23 opinion certainly didn't precede the conduct that's at
24 issue here. The only guidance, again, available at the
25 time supported our reading of the statute. There was no

1 guidance from and court or from the FTC, or from
2 anywhere that would have supported Defendants'
3 interpretation at that time. So that's another aspect
4 of inquiry, the subjective intent of the Defendants.
5 If there are no other questions?
6 CHIEF JUSTICE ROBERTS: Thank you, counsel.
7 Ms. Mahoney, you have four minutes remaining.
8 REBUTTAL ARGUMENT OF MAUREEN E. MAHONEY
9 ON BEHALF OF THE PETITIONERS
10 MS. MAHONEY: If I could start by just
11 responding to the issue of the new document, I just want
12 to emphasize that this document was created by people
13 who weren't lawyers. It was done before GEICO even
14 started using credit to price insurance. They were --
15 said they were brainstorming about what the statute
16 might mean. And I would point the Court to the
17 supplemental excerpt of records at 504 where when GEICO
18 implemented the policy that we're talking about here,
19 the -- they said that the intent was that we would send
20 to the people who were supposed to get the adverse
21 action notice. With the early systems development we
22 didn't have the ability to identify whether they were
23 supposed to receive the notice or not; that was because
24 they had not yet developed the way to do with what they
25 call the neutral, where they compare how the applicant

1 would have done if they hadn't taken credit, hadn't
2 taken credit into account at all. And this is a
3 procedure that's required actually in most States in
4 order to ensure that those who don't want to allow
5 access to credit reports or who don't have a sufficient
6 credit history are not treated adversely in the meaning
7 of those State laws, and that means worse than the
8 average loss ratio. So there's nothing in this record,
9 even if you take into account the documents they're
10 talking about, to suggest that there was somehow a
11 knowing or deliberate intent to try to violate the law.
12 With respect to a few of the factual or --
13 issues that came up, Safeco estimates that approximately
14 80 percent of all consumers that they are selling new
15 insurance to now have to get notice under the standards
16 established by the Ninth Circuit.
17 With respect to who can qualify for the top
18 tier of credit, it's only, at least at GEICO,
19 approximately 10 percent. So 90 percent of the
20 consumers would not qualify for that.
21 And the statute very plainly does not
22 prohibit differential treatment based on persons with
23 better credit, nor do State laws. And so the analogy as
24 to race discrimination simply don't hold water, because
25 there Congress has told you what the baseline is, you

1 can't treat any person of a different race in a
2 different way, and that's not true under this statute.
3 And instead, it's quite reasonable, as GEICO has
4 concluded, to simply say look, if we wouldn't -- if
5 we're treating you worse than we would have treated you
6 if we ever looked at your credit report, worse than if
7 you had an average loss ratio for this criteria, we'll
8 send you the notice.
9 JUSTICE KENNEDY: Why did they use credit
10 reports? Is it just a hedge against late premiums and
11 the cost of late premiums, or does it bear on risk
12 factors generally?
13 MS. MAHONEY: Well, generally there are
14 about 15 factors that they look at to try to come up
15 with a prediction of loss ratio, and someone who has a
16 good credit history is generally regarded as
17 responsible, and responsible people tend to make less
18 claims. And so, again, it's just one factor of 15
19 though.
20 JUSTICE STEVENS: Yeah. May I ask this
21 question? The reading of the statute in subsection i
22 about, in the charges for insurance advice, seems to
23 favor your view. But subsection ii about denial of
24 employment really seems to read in favor of the
25 government's reading.

1 MS. MAHONEY: Well actually, I think that
2 when you factor in employment, it has -- it has the
3 opposite effect. Because what happens here is if you're
4 using employment verification reports, consumer reports
5 about employment, there are all kinds of consumer
6 reports. How do you tell who had the optimal employment
7 history? How could the baseline be the best employment
8 history possible?
9 JUSTICE STEVENS: No. But my point is, it
10 seems to me that getting a lesser salary, it just seems
11 like the first applicant would be an adverse employment
12 action under subparagraph ii, just -- do you see what
13 I'm trying to say?
14 MS. MAHONEY: That if you -- that in other
15 words, if you gave someone a lower salary --
16 JUSTICE STEVENS: It adversely affects any
17 current or prospective employee. Now the language in i
18 isn't, it doesn't read that way. But the thing that's
19 troubling me is whether you should interpret i in the
20 light of what ii seems to say.
21 MS. MAHONEY: Your Honor, I think that if
22 GEICO in this example, if you actually pay them less
23 because you looked at their credit report, then GEICO
24 would concede that that is in fact an adverse action.
25 So I don't think it's inconsistent at all.

1 Thank you, Your Honor.
2 CHIEF JUSTICE ROBERTS: Thank you,
3 Miss Mahoney. The case is submitted.
4 (Whereupon, at 10:59 a.m., the case in the
5 above-entitled matters was submitted.)
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