MAY 16 2011

No. 10-1024

IN THE

# Supreme Court of the United States

UNITED STATES DEPARTMENT OF TRANSPORTATION, FEDERAL AVIATION ADMINISTRATION, AND SOCIAL SECURITY ADMINISTRATION,
*Petitioners,*

*v.*

STANMORE CAWTHON COOPER,
*Respondent.*

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

## BRIEF IN OPPOSITION

RAYMOND A. CARDOZO
*Counsel of Record*
JAMES M. WOOD
JAMES C. MARTIN
DAVID J. BIRD
TIFFANY RENEE THOMAS
Reed Smith LLP
101 Second St., Ste. 1800
San Francisco, CA 94105
(415) 543-8700
rcardozo@reedsmith.com
*Attorneys for Respondent*

Blank Page

## QUESTION PRESENTED

Whether a plaintiff can establish "actual damages" under the Privacy Act's civil remedies provision, 5 U.S.C. §§ 552a(g)(1)(C)-(D) and (g)(4), through competent evidence of real and appreciable mental and emotional distress caused by a federal agency's intentional or willful violation of the Act.

## TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

## INTRODUCTION

In this case, the court of appeals reversed a summary judgment in petitioners' favor and held that a plaintiff can establish "actual damages" under 5 U.S.C. § 552a(g)(4) through competent evidence of real and appreciable mental and emotional injuries caused by a federal agency's intentional or willful violation of the Privacy Act of 1974, without specific evidence of a pecuniary loss. The court of appeals then remanded for further proceedings on other aspects of the asserted cause of action that had not been adjudicated by the district court.

The court of appeals' decision is simply the latest one to deal with the pecuniary loss issue. The conflict reflected in the decision has existed for 27 years, and appears to have had only transitory impacts in a few cases. Petitioners nevertheless assert that this latest decision somehow, and suddenly, will have "dramatic[]" consequences for future cases, and ask this Court to intervene now. Yet, despite this plea, this Court's review is not warranted for four independent reasons.

First, the case is in an interlocutory posture, and petitioners can obtain further review at a later date, if further review proves appropriate.

Second, the circuit split described in the petition has existed for more than 27 years without any demonstrable, practical effect on claims against the government, much less the dire consequences for the public fisc that petitioners predict.

Third, the split is neither as entrenched, nor as ripe for review, as petitioners suggest and should await further analysis and development in the circuit courts.

Fourth, the panel's decision here is correct and consistent with established precedent, including from this Court.

## STATEMENT OF THE CASE

### I. The Privacy Act Of 1974

Every day federal agencies ask individuals to volunteer personal information for a wide variety of purposes. In the Privacy Act of 1974, Congress sought to "provide certain safeguards for an individual against an invasion of personal privacy" arising from the mismanagement and misappropriation of personal information held in the records systems of federal agencies. Privacy Act of 1974, Pub. L. No. 93-579, § 2(b), 88 Stat. 1896.

Under the Act, agencies have a duty to collect and maintain information about individuals in a manner that assures that the information is current, complete, accurate for its intended use, and kept secure and confidential to protect against threats and hazards that could result in "substantial harm, embarrassment, inconvenience, or unfairness to any individual on whom information is maintained." 5 U.S.C. § 552a(e).

In order to maintain confidentiality, the Act closely regulates the disclosure of information from one agency to another and to third parties. An agency generally may not disclose information gathered about an individual to another agency or a third-party, "except pursuant to a written request by, or with the prior written consent of, the individual to whom the record pertains." 5 U.S.C. § 552a(b). Information about an individual contained in agency

records may be disclosed to another agency without the individual's prior written consent only under certain narrowly defined conditions. 5 U.S.C. §§ 552a(b)(1)-(12) (conditions of disclosure).

For those agencies who ignore the Act or its purposes, there are direct consequences. The Act provides for four distinct causes of action to enforce its terms. 5 U.S.C. § 552a(g)(1). Of particular importance here, it provides that an individual may bring a civil suit against an agency for violating the Act if the agency:

> (C) "fails to maintain [its] records with such accuracy, relevance, timeliness, and completeness as is necessary to assure fairness" in any determination relating to the individual's "qualifications, character, rights, or opportunities ..., or benefits," resulting in a "determination is made which is adverse to the individual;" or
>
> (D) "fails to comply with any other provision of this section, or any rule promulgated thereunder, in such a way as to have an adverse effect on an individual[.]"

5 U.S.C. §§ 552a(g)(1)(C)-(D). To further aid in enforcement of its provisions, the Act expressly waives sovereign immunity for the United States and its federal agencies from suit, stating that an individual "may bring a civil action against the agency, and the district courts of the United States shall have jurisdiction in the matters under the provisions of [§ 552a(g)]." *Id.* It thereafter also includes a series of paragraphs addressing the standard of review, burden of proof, and relief that

may be ordered under each of its four causes of action. 5 U.S.C. §§ 552a(g)(2)-(4).

In a suit brought under subparagraph (g)(1)(C) (for a failure to maintain records with the accuracy necessary to assure fairness in determinations of qualifications, character, rights, opportunities, and benefits) and in a suit under subparagraph (g)(1)(D) (for failure to comply with any other provision of the Act), "the United States shall be liable to the individual" for agency actions that are "intentional or willful" in "an amount equal to the sum of"—

> (A) actual damages sustained by the individual as a result of the refusal or failure, but in no case shall a person entitled to recovery receive less than the sum of $1,000; and
>
> (B) the costs of the action together with reasonable attorney fees as determined by the court.

5 U.S.C. § 552a(g)(4).

Lastly, but just as importantly, the Act includes an express statement of Congress's purpose in enacting § 552a(g)(1)(C)-(D) and (g)(4): to require that federal agencies "be subject to civil suit for *any* damages which occur as a result of willful or intentional action which violates any individual's rights under this Act." Privacy Act of 1974, Pub. L. 93-579, § 2(b)(6), 88 Stat. 1896 (emphasis added).

This Court has, on one occasion, considered the terms and scope of §§ 552a(g)(1)(C)-(D) and (g)(4). In *Doe v. Chao*, 540 U.S. 614, 618 (2004), it held that a complainant must demonstrate that he or she has sustained some "actual damages" in order to be

entitled to the minimum statutory award of $1,000. *Id.* The Court did not address "the precise definition of actual damages" under subparagraph (g)(4) and expressly cautioned that its decision should not be read to "suggest that out-of-pocket expenses are necessary for recovery of the $1,000 minimum." *Id.* at 627 n.12.

## II. Petitioners' Violations Of The Privacy Act

Respondent Stanmore Cawthon Cooper, the plaintiff in this action, was the victim of multiple Privacy Act violations by federal agencies resulting in real and substantial mental and emotional injuries with tangible consequences for his mental health, physical condition, relationships, and ability to function.

In 2003, 2004, and 2005, agents of the U.S. Department of Transportation (DOT) and Social Security Administration (SSA) disclosed and exchanged massive amounts of information contained in the confidential records of the Federal Aviation Administration (FAA) and SSA pertaining to thousands of pilots (including Mr. Cooper). These disclosures were made as part of an investigation known as "Operation Safe Pilot" (OSP). The disclosures were made without requisite notice to, or written consent from, any of the pilots. And importantly, the cross-agency disclosures were made by investigators acting without written approval from the heads of the respective agencies, thus placing the disclosures squarely outside the Privacy Act's exception for cross-agency record exchange for legitimate "civil or criminal law enforcement

activity," 5 U.S.C. § 552a(b)(7). App. 16a-17a, 40a-41a.

Certain SSA agents and counsel raised concerns, when OSP was proposed, that a wide-ranging, cross-agency exchange could violate the Privacy Act. But, rather than demanding strict compliance with the Act, the SSA instead attempted to craft internal procedures to circumvent the Act. These proposed procedures not only were flawed on their face but also were disregarded, immediately, by the agents who actually conducted OSP. App. 41a. Because of these shortcomings, a staggering amount of confidential personal information was disclosed by each agency during OSP in violation of the Privacy Act's record-keeping and confidentiality requirements. App. 17a-18a, 42a-44a (noting the disclosure of FAA records of approximately 45,000 pilots and SSA records of a subset of that group).

In the course of the sweep, agents located some evidence of violations of law, and one involved Mr. Cooper—a private, recreational pilot and aviation enthusiast who properly claimed Social Security disability benefits at one time, but who failed to disclose that he was HIV-positive on FAA medical certification forms. App. 15a, 17a-18a, 43a-44a.

At each stage of OSP, confidential information pertaining to Mr. Cooper was disclosed from one agency to the other, including: (1) the Social Security diagnosis code that indicated that Mr. Cooper was HIV-positive and (2) his complete Social Security disability file, with more than 230 pages of medical records that he had provided confidentially to the SSA. App. 16a-18a, 42a-45a.

In March 2005, DOT agents contacted Mr. Cooper and subsequently confronted him in public in a coffee shop, with a complete copy of his confidential Social Security disability file, including his medical records, as well as an FAA order revoking his pilot certificate. App. 18a, 44a-45a.

## III. Mr. Cooper's Injuries Sustained As A Result Of Petitioners' Privacy Act Violations

When Mr. Cooper learned that information contained in his confidential Social Security disability files had been disclosed to agents of DOT, he was emotionally devastated. His declaration, as well as those from four friends who personally observed him, and an expert psychiatrist, established his claim of real and substantial mental and emotional injury. App. 59a-61a.

The record shows that his distress was severe and had tangible consequences for his mental health, physical condition, relationships, and ability to function, including sleeplessness, loss of appetite, physical tension, agitation, isolation from friends, and anxiety. The record also shows that Mr. Cooper's anxiety symptoms prevented him from utilizing his natural sources of psychological support and seeking professional care. He ultimately was diagnosed as suffering from an anxiety disorder with many of the debilitating symptoms of acute distress disorder. *Id.*

## IV. Proceedings In The District Court

Mr. Cooper was indicted and ultimately accepted responsibility for his failure to disclose his HIV-

status to the FAA, pleading guilty to a single misdemeanor for making a false official writing.[1] He firmly believed, however, that petitioners *also* should be held accountable because the Act expressly prohibited *their* improper, intentional, and willful cross-agency disclosure of his private records. Mr. Cooper thus brought a Privacy Act suit under 5 U.S.C. § 552a(g)(1)(D), seeking a monetary award for his mental and emotional injuries. App. 18a-19a.

On cross-motions for summary judgment, the district court held: (1) petitioners violated the Act by illegally exchanging information from FAA and Social Security disability files; (2) there was a triable issue of fact on whether petitioners' violations were intentional or willful; and (3) Mr. Cooper had shown that he suffered real and appreciable mental and emotional injury from the violation. App. 18a-19a, 46a-61a.

The district court nevertheless entered summary judgment against Mr. Cooper and in favor of petitioners because it believed that his evidence of mental and emotional injuries could not, as a matter of law, be used to establish "actual damages" under § 552a(g)(4). App. 18a-19a, 61a-64a.

## V. The Court Of Appeals' Decision

The Court of Appeals for the Ninth Circuit reversed and remanded for further proceedings. The

---

[1] Following his guilty plea, Mr. Cooper applied with the FAA for re-certification as a private pilot. The FAA conducted a review of his entire medical history, including information about his HIV diagnosis and treatment, and re-issued his private pilot certificate and airman medical certificate.

court of appeals found that the district court erred in its exclusive reliance on the sovereign immunity canon and in failing to consider the "full panoply of sources available to it" for evaluating the meaning of the term "actual damages" in context. App. 34a.

To reach its result, the court of appeals alternately considered: the plain meaning of the term "actual damages" in isolation; the term as it appears in the context of the entire Act; relevant precedents from this Court concerning invasions of privacy and defamation, as well as common law authorities; the construction of other federal statutes that provide monetary awards for "actual damages" caused by violations of statutory privacy rights; and traditional canons of construction, including the aforementioned sovereign immunity canon. App. 22a-36a.

With these sources of information and tools of construction in hand, the panel unanimously concluded that petitioners' narrow construction of "actual damages" is not plausible; "actual damages" is unambiguous when read in the context of the Privacy Act; and Congress clearly intended to provide a monetary award for both pecuniary and nonpecuniary damages that are proven to have been caused by an agency's intentional or willful violation of the Act. Accordingly, it reversed and remanded for further proceedings. App. 36a-37a.

Petitioners sought rehearing and rehearing en banc. The court of appeals issued an amended opinion (deleting a footnote not relevant to the question presented) and two separate opinions respecting the denial of rehearing en banc. App. 1a-14a. Judge O'Scannlain, joined by seven other judges, dissented from the denial of rehearing en banc,

arguing that the panel had failed to apply the sovereign immunity canon to an ambiguous term and erroneously relied upon the Act's express statement of Congressional findings and purpose and its express substantive provisions to support the conclusion that "actual damages" could be proven by competent evidence of mental and emotional injury. App. 8a-14a.

Judge Milan Smith, the author of the panel decision, specifically responded to these criticisms in a concurrence in the order denying rehearing en banc, noting that the panel's decision was consistent with controlling precedents, supported by multiple parts of the statutory text, and in harmony with this Court's reasoning in *Doe v. Chao*. App. 3a-8a.

Petitioners continue to claim that only those who can prove pecuniary losses may bring a private cause of action under §§ 552a(g)(1)(C) or (D), reprising the arguments raised below in support of rehearing and rehearing en banc. However, for multiple reasons, petitioners' contentions about the statute and the court of appeals' decision do not merit further review.

## REASONS FOR DENYING THE PETITION

### I. The Case Is In An Interlocutory Posture.

To begin with, the petition should be denied because this case is in an interlocutory posture. The court of appeals reversed the district court's summary judgment in favor of petitioners and remanded for further proceedings consistent with its opinion. On remand, further litigation will be necessary concerning: (1) whether petitioners' unlawful conduct was intentional or willful within

the meaning of § 552a(g)(4); (2) the sufficiency of the evidence of Mr. Cooper's mental and emotional injuries; and (3) the proper amount of any compensatory award for those injuries. These proceedings will involve *factual findings* that are likely to shed additional light on the nature, severity, and tangible consequences of Mr. Cooper's mental and emotional injuries and lead to a final adjudication of his Privacy Act claim.

Moreover, if Mr. Cooper loses on remand on any of the above grounds, the question presented in this case effectively would be moot and further consideration of the question could wait until an appropriate case arises in the future. *See* App. 19a, 36a. By the same token, if Mr. Cooper prevails and obtains a judgment in his favor on his Privacy Act claim, petitioners will be able to file a single appeal and, if necessary, a single petition for a writ of certiorari that raises the question presented, along with any other issue that may arise as a result of additional proceedings below, on a more thoroughly developed record. *See Major League Baseball Players Ass'n v. Garvey*, 532 U.S. 504, 508 n.1 (2001) (per curiam) (stating that the Court "ha[s] authority to consider questions determined in earlier stages of the litigation where certiorari is sought from" the most recent judgment).

Because of the interlocutory posture of this case, there is no reason for this Court to grant certiorari now. Indeed, the last time a party filed a petition for a writ of certiorari raising this issue in a case that was in an interlocutory posture, the government argued expressly that "[t]he interlocutory posture of [that] case 'alone furnishe[d] sufficient ground for the denial of' the petition for a writ of certiorari." *See*

Brief for the Federal Respondents in Opposition, *Perkins v. Dep't of Veterans Affairs*, No. 09-513, 2010 WL 361302, at *5-6 & n.1 (Jan. 29, 2010) (quoting *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916), and *VMI v. United States*, 508 U.S. 946 (1993) (Scalia, J., respecting the denial of the petition for a writ of certiorari)). The same argument applies here with equal or greater force.

## II. The Circuit Split Described In The Petition Has Existed For More Than 27 Years Without Any Demonstrable, Practical Effect On Privacy Act Claims Against The Government, Much Less The Dire Consequences That Petitioners Claim Will Follow.

Petitioners argue that a grant of certiorari is warranted primarily because the panel's decision extends an "existing division among the courts of appeals" on the question presented and threatens to cause a drain on the public fisc by "greatly increas[ing]" the government's potential litigation costs and liabilities under the Privacy Act. Pet. 11, 17-22. While it is true that the panel decision adds to a previously existing division among the courts of appeals on the question presented, petitioners overstate the practical significance of the circuit split and the likely effect of the panel decision on future litigation under the Act.

To begin with, the precise definition of "actual damages" is relevant in only very narrow circumstances where an individual is able to prove by competent evidence that the government has (1) violated specific record-keeping and confidentiality

provisions of the Privacy Act, (2) "acted in a manner that was intentional or willful," (3) proximately caused either an "adverse determination" concerning the "character, rights, opportunities of, or benefits to [an] individual" or some other "adverse effect" sufficient to satisfy the injury-in-fact requirement of Article III. *Doe*, 540 U.S. at 618-19, 629 (summarizing 5 U.S.C. §§ 552a(g)(1)(C)-(D) and (g)(4)), and (4) has suffered demonstrable emotional distress.

In addition, because of these express statutory requirements, disputes over how to define and prove "actual damages" have arisen infrequently and have never had any great practical significance for the litigation or adjudication of a significant number of Privacy Act claims.

For example, in the 37 years since the Privacy Act was passed in 1974, only four circuit courts (including the court below) have had to decide the specific question presented in this case. *See Fitzpatrick v. IRS*, 665 F.2d 327, 329-31 (11th Cir. 1982) (holding that "actual damages" are limited to proven pecuniary losses); *Johnson v. IRS*, 700 F.2d 971, 972 (5th Cir. 1983) (holding that "actual damages" may be established by evidence of either pecuniary or nonpecuniary injuries); *Hudson v. Reno*, 130 F.3d 1193, 1206-07 (6th Cir. 1997) (holding that "actual damages" may be established only by evidence of out-of-pocket losses).

In 2004 in *Doe*, this Court noted the existence of a longstanding conflict over the precise definition of "actual damages," but it declined to resolve the conflict because the issue was not raised in the certiorari petition and because the Fourth Circuit

had found that Doe had failed to proffer sufficient evidence of *any* injury (either pecuniary or nonpecuniary) arising from the alleged Privacy Act violation. 540 U.S. at 627 n.12.

Since *Doe*, the split has continued to exist, but the issue arises only infrequently and has little practical significance in most Privacy Act cases. *See also Jacobs v. Nat'l Drug Intelligence Ctr.*, 548 F.3d 375 (5th Cir. 2008) (noting that there had been no intervening change in the law since the early 1980s warranting reconsideration of circuit precedent on the meaning of actual damages); *Fanin v. U.S. Dep't of Veterans Affairs*, 572 F.3d 868 (11th Cir. 2009) (same), *cert. denied sub nom. Perkins v. Dep't of Veterans Affairs*, 130 S. Ct. 1755 (2010).

The reality thus is that the split identified in *Doe* and described in the petition now has existed for more than 27 years. For that entire time, individuals in the Fifth Circuit have been able to sue federal agencies for willful or intentional violations of the Privacy Act and use evidence of mental and emotional distress to prove "actual damages" under the Act. However, none of the threats or problems envisioned by the petitioners has materialized. Simply put, there is no evidence of the circuit split described in the petition having any demonstrable, practical effect on the number of cases brought under the Privacy Act, on the types of relief requested by Privacy Act plaintiffs, on the litigation costs incurred by the government, or on settlements or monetary awards to parties claiming any injury as a result of intentional or willful Privacy Act violations. Nor is there any reason to believe that such problems will materialize now on account of the court of appeals' decision in this case.

Moreover, the last time a party filed a petition for a writ of certiorari concerning the specific question presented in this case, the government urged the Court to deny the petition in part because the split among the circuit courts was "narrower" than the petitioner suggested and had "existed for more than 25 years." *See* Brief for the Federal Respondents in Opposition, *Perkins*, No. 09-513, 2010 WL 361302, at *11-14. Tellingly—in 2010—the government did not claim that the existing split was having *any* serious adverse consequences for the government, even though the Fifth Circuit had ruled and recently re-affirmed that "actual damages" could be established through competent proof of mental and emotional distress.

Finally, petitioners describe the government's opposition to the *Perkins* petition as a position it took before the panel issued its decision in this case. However, the record shows that the panel's original decision in this case was entered before this Court ruled on the *Perkins* petition, that the government provided the Court with a copy of the panel's original decision on the day that the decision was entered, and that the government continued to oppose the *Perkins* petition for the reasons just noted, notwithstanding the panel's decision in this case. *See* Docket, *Perkins v. Dep't of Veterans Affairs*, No. 09-513. And the *Perkins* petition was denied, notwithstanding the existence of the precise circuit split that petitioners now ask this Court to resolve.

Nothing of substance has happened since the *Perkins* petition was denied, and there remains no compelling reason for this Court to devote its resources to resolving the question presented.

## III. The Circuit Split Described In The Petition Is Not As Entrenched Or Ripe For Review As The Petition Suggests.

Petitioners also overstate the matter when they claim that the circuit split that exists concerning the precise definition of "actual damages" is entrenched and ripe for this Court's review. Pet. 18-19.

Prior to the court of appeals' decision in this case, no court of appeals ever had engaged in a comprehensive analysis of the entire Privacy Act and the full panoply of sources of information about the term "actual damages." The Eleventh and Sixth Circuits embraced the petitioners' narrow construction of actual damages but did so in a perfunctory manner. The Eleventh Circuit's decision in *Fitzpatrick* consists of a single paragraph asserting that "actual damages" has no plain meaning, followed by a two-page analysis of legislative history that has been described as patently flawed by multiple courts. 665 F.2d at 329-31. The Sixth Circuit's analysis in *Hudson* is no broader: it consists of eight sentences—five following *Fitzpatrick* and three noting disapproval of the Fifth Circuit's decision in *Johnson* based upon the sovereign immunity canon. 130 F.3d at 1207 & n.11.

In contrast to the decisions of the Eleventh and Sixth Circuits, the panel's decision in this case thoroughly examines: (1) the full text of the Privacy Act, including the plain meaning of the term "actual damages," the Act's express statement of purpose, and other substantive and remedial provisions of the Act; (2) common law tort principles and relevant precedents from this Court concerning invasions of

privacy and defamation; (3) other federal statutes in existence at the time of the Act's passage providing relief for "actual damages" sustained due to invasions of privacy; (4) legislative history; (5) the canon of sovereign immunity; and (6) the arbitrary distinctions and results that would follow from a narrow construction limiting "actual damages" to proven pecuniary losses.

The petition, therefore, is unfair when it contends that the panel's decision "deepens" and "entrenche[s]" the existing circuit split. Rather, the panel's fresh and comprehensive analysis of the issue considers new arguments and authorities that no court of appeals previously has considered. This Court's consideration of the question presented, accordingly, should wait until other circuit courts have considered these new arguments and authorities in future cases. If the split continues and begins to have a demonstrable effect on a significant number of cases, then this Court can consider the question presented in light of such further developments in an appropriate case.

## IV. The Court Of Appeals Correctly Concluded That Evidence Of Mental And Emotional Distress Can Be Used To Establish "Actual Damages" Caused By An Intentional Or Willful Violation Of The Privacy Act.

In any event, this Court's review is not warranted because the court of appeals reached the correct result in an opinion that exhaustively and thoughtfully considers the full text of the Privacy Act and all sources and tools relevant to determining the meaning of the Act. Contrary to the petition, each

step taken by the court of appeals is firmly grounded in the Act's text and controlling precedent.

### A. The Court Of Appeals Properly Examined The Full Text Of The Privacy Act And All Sources And Tools Relevant To The Construction Of "Actual Damages."

In this case, the court of appeals started on solid ground by reiterating the indisputable objective of statutory interpretation—"to discern the intent of Congress in enacting [the] particular statute." App. 22a (internal quotations and citations omitted). The court also finished on equally solid ground by discerning that intent primarily from the Act's text, read in its entirety with each part helping to inform the other.

To that end (and in keeping with numerous precedents), the court looked first to the plain meaning of the term "actual damages" in isolation, drawing on the "ordinary, contemporary, common meaning" of the words as defined in dictionaries and other objective authorities. *Id.* (citations omitted).

The court also considered the plain meaning of "actual damages" "in its statutory context, looking to the language of the entire statute, its structure, and purpose." App. 24a. The court of appeals noted that Section 2 of the Act includes an *express* statement of Congress's purpose in providing a private cause of action for monetary damages for an intentional or willful violation of various record-keeping requirements:

> [T]o provide certain safeguards for an individual against an invasion of personal privacy by requiring federal agencies ...to ... be subject to civil suit for *any damages* which occur as a result of willful or intentional action which violates any individual's rights under this Act.

App. 24a-25a (quoting Privacy Act of 1974, Pub. L. 93-579, § 2(b)(6), 88 Stat. 1896 (Dec. 31, 1974)) (emphasis in the panel opinion).

And, the court of appeals further observed that, in the Act's substantive and remedial provisions, Congress "signaled its intent ... to extend monetary recovery beyond pure economic loss" by (1) instructing federal agencies to establish safeguards to "protect" against, inter alia, "substantial harm, *embarrassment*, *inconvenience*, or *unfairness* to any individual on whom information is maintained" and (2) providing a civil remedy, expressly including monetary relief for "actual damages," in cases where the agency's failure to provide safeguards against "substantial harm, embarrassment, inconvenience, or unfairness" is found to be "intentional or willful" and to have proximately caused either an "adverse determination" concerning "the *character*, rights, opportunities of, or benefits to [an] individual" or some other "adverse effect" sufficient to satisfy the injury-in-fact requirement of Article III. App. 26a (quoting 5 U.S.C. §§ 552a(e)(10) and (g)(1)(C) (emphasis in the panel opinion)).[2]

---

[2] The court also considered the legislative history of the Act but found it "murky, ambiguous, and contradictory." App. 28a-29a (internal quotations omitted). The court's decision to rely on the

Continued on following page

Further, the court of appeals considered two other important sources of information about the meaning of "actual damages:" (1) precedents of this Court concerning invasions of privacy and defamation and (2) the civil remedies provisions of other privacy protecting statutes enacted prior to 1974.

Seven years before the Privacy Act was enacted, in *Time, Inc. v. Hill*, this Court held that "mental distress" and other types of nonpecuniary harm are the "primary" type of damage in invasion-of-privacy cases. 385 U.S. 374, 386 n.9 (1967). Several years later, in *Gertz v. Robert Welch, Inc.*, a case that was decided shortly before the Privacy Act was enacted, the Court held that awards of presumed damages to plaintiffs suing the media for defamation would be unconstitutional in the absence of "actual malice" but that "compensatory damages" could be awarded for any "*actual injury*"—including mental distress, humiliation, embarrassment, and other nonpecuniary injuries proven by "competent evidence." 418 U.S. 323, 373 (1974) (emphasis added) (recognizing that these nonpecuniary injuries are the "natural or probable consequences of the wrongful conduct").

There is more. Prior to the passage of the Privacy Act, Congress used the term "actual damages" in other federal statutes to provide a remedy for both

---

Continued from previous page
Act's text, rather than its legislative history, was well supported by this Court's precedents, even though the drafting history of the statute further supports the conclusion that Congress used the term "actual damages" in a manner synonymous with ordinary "compensatory damages" and in contrast to punitive and nominal damages. *See Johnson*, 700 F.2d at 974-83.

pecuniary and nonpecuniary harm. *See* App. 29a-32a (citing cases construing "actual damages" under the Fair Credit Reporting Act, 15 U.S.C. §§ 1681n and 1681o, and the Fair Housing Act, 42 U.S.C. § 3612(c), as including mental and emotional distress).

Thus, the court of appeals here correctly presumed that, when Congress provided monetary awards for "actual damages" caused by an intentional or willful violation of the Privacy Act's safeguards, it was aware of this Court's decisions in *Time, Inc.* and *Gertz*, as well as the construction given to the term "actual damages" in cases under the Fair Housing Act, and the use of the same term in the Fair Credit Reporting Act. *See, e.g.*, *Cannon v. University of Chicago*, 441 U.S. 677, 696-97 (1979) (Congress legislates with full recognition of existing jurisprudence); *Smith v. City of Jackson*, 544 U.S. 228, 233 (2005) (plurality opinion) ("when Congress uses the same language in two statutes having similar purposes, particularly when one is enacted shortly after the other, it is appropriate to presume that Congress intended that text to have the same meaning in both statutes").

In sum, based on the Act's structure, its purpose, and the relevant law as applied to both, the court of appeals properly rejected the government's narrow construction of the term "actual damages" and correctly held that Congress clearly intended "actual damages" to encompass both pecuniary and nonpecuniary injuries. App. 36a-37a.

### B. Petitioners' Criticisms Of The Court Of Appeals' Decision Do Not Merit Further Review By This Court.

Petitioners disagree with the court of appeals' decision, but they do not raise any issue that merits further review by this Court.

For instance, petitioners are wrong when they contend that the court of appeals failed to adhere to the sovereign immunity canon. Pet. 11. The court of appeals' decision acknowledges and applies this Court's precedents concerning the sovereign immunity canon. While this Court often has said that waivers of sovereign immunity must be expressed clearly in statutory text, the Court also repeatedly has warned federal district courts and courts of appeals that express waivers of immunity (like the one found in the Privacy Act) must be construed in a way that reflects "a realistic assessment of legislative intent" in light of full text of the statute in question and the "underlying congressional policy" that the statute aims to advance. *Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 95 (1990); *Franchise Tax Bd. of California v. U.S. Postal Serv.*, 467 U.S. 512, 521 (1984). And the Court further has cautioned that federal judges should not "assume the authority to narrow the waiver that Congress intended" or act as "self-constituted guardian[s] of the Treasury to import immunity back into a statute designed to limit it. *United States v. Kubrick*, 444 U.S. 111, 117-18 (1979); *Indian Towing Co. v. United States*, 350 U.S. 61, 68-69, (1955). Indeed, this Court's decision in *Doe* illustrates how the sovereign immunity canon does not control the construction of the express civil remedies established by the Privacy Act. 540 U.S. at 620-27 (construing §§ 552a(g)(1)(C) and (D) and (g)(4)

without any reference to the sovereign immunity canon). The court of appeals followed this Court's guidance closely.

Petitioners likewise are mistaken when they contend that the court of appeals erred in placing "significant weight" on the Act's statement of Congressional findings and purpose, its substantive requirements, and its remedial provisions. Pet. 14-15. The Act contains an express waiver of sovereign immunity. To determine the scope of that express waiver, the precedents of this Court cited in the preceding paragraph plainly require that the phrase "*actual damages*" *be evaluated in context in light of* the full text of the Act and all other sources of meaning and tools of construction. That is precisely what the court of appeals did here.

Nor is there any merit to the petitioners' contention that the court of appeals conflated the Act's "adverse effect" and "actual damages" provisions or contravened this Court's decision in *Doe*. The court of appeals' decision follows *Doe* closely and construes "adverse effect" and "actual damages" in harmony with one another, and Congress's "overall objective" in §§ 552a(g)(1)(C)-(D) and (g)(4), by allowing a plaintiff "who demonstrates a nonpecuniary adverse effect" to have an opportunity to recover damages "to the extent the plaintiff can proffer the requisite degree of competent evidence that there is a real and tangible nonpecuniary injury." App. 7a (noting that under petitioners' unduly restrictive construction of the "actual damages" a plaintiff would have nominal standing to sue but still be subject to dismissal for failure to state a claim upon which relief could be granted).

The petitioners similarly miss the mark when they fault the court of appeals for relying on the FCRA as support for its construction of actual damages. It was reasonable and appropriate for the panel to consider the FCRA when construing the Privacy Act. The FCRA was enacted four years before the Privacy Act, protects the same individual interests in confidentiality in record-keeping, includes a civil remedy allowing for the recovery of "actual damages," and has been uniformly construed to permit recovery for proven mental and emotional distress. *See supra* pp. 20-21.

Finally, petitioners fail to explain why it would be reasonable to restrict "actual damages" to pecuniary losses in this context. The only authority that they cite to support the reasonableness of such a restrictive construction is a report to Congress three years after the Privacy Act was passed which opined that "there is no generally accepted definition of 'actual damages' in American law" and that "actual damages" was "intended as a synonym for special damages." Privacy Protection Study Commission, *Personal Privacy in an Information Society: The Report of the Privacy Protection Study Commission* 530 (GPO 1977), *cited in* Pet. 13, 16-17.

The court of appeals properly considered and rejected that report, however. The report's conclusions about "actual damages" in this context were not supported by *any* citation to a case, statute, dictionary, treatise, or other legal authority purporting to define "actual" or "damage" or "actual damages;" nor did the report provide any detailed analysis of the Act's legislative history, the precedents of this Court, or other federal statutes. *Id.*

## CONCLUSION

Here, it is apparent that Congress unequivocally provided Mr. Cooper with a civil remedy against petitioners for his injuries. He should be allowed to proceed to trial where his claim may be developed and adjudicated.

The petition for a writ of certiorari should be denied.

Respectfully submitted.

RAYMOND A. CARDOZO
*Counsel of Record*
JAMES M. WOOD
JAMES C. MARTIN
DAVID J. BIRD
TIFFANY RENEE THOMAS
Reed Smith LLP
101 Second Street, Suite 1800
San Francisco, CA 94105
(415) 543-8700
rcardozo@reedsmith.com

*Attorneys for Respondent*

May 16, 2011

Blank Page