No. 10-1024

In the Supreme Court of the United States

FEDERAL AVIATION ADMINISTRATION, ET AL.
PETITIONERS

v.

STANMORE CAWTHON COOPER

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR PETITIONERS

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TABLE OF AUTHORITIES

Cases: Page

Statutes: Page

Miscellaneous:

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The Ninth Circuit held in this case that by authorizing the recovery of "actual damages" for certain violations of the Privacy Act, 5 U.S.C. 552a(g)(4)(A), Congress waived the United States' sovereign immunity to claims of nonpecuniary harm. As the eight judges dissenting from the denial of rehearing en banc observed, the panel reached that conclusion "even though the opinion itself admits" that the term "actual damages" is "not defined in the statute, has no plain meaning, has no fixed legal meaning, and indeed, is a 'chameleon.'" Pet. App. 9a (O'Scannlain, J., dissenting from denial of rehearing en banc) (citation omitted). In the absence of the requisite clear textual statement, see, *e.g.*, *Lane* v. *Pena*, 518 U.S. 187, 192 (1996), the panel instead inferred the sovereign-immunity waiver from "abstract legislative intent and an interpretation of the Privacy Act that the Supreme Court recently rejected in *Doe* v.

Chao, 540 U.S. 614 [(2004)]." Pet. App. 9a (O'Scannlain, J., dissenting from denial of rehearing en banc). The decision thus contravenes both this Court's sovereign-immunity jurisprudence and its Privacy Act jurisprudence, widens a recognized circuit conflict, and exposes the government to uncapped emotional-distress damages and heightened litigation costs throughout the Ninth Circuit. This Court's review is warranted.

1. Respondent acknowledges (Br. in Opp. 12-17) the existence of a circuit conflict on the question presented. See Pet. 17-19; compare Pet. App. 14a-15a (nonpecuniary harm recoverable); *Jacobs* v. *National Drug Intelligence Ctr.*, 548 F.3d 375, 377 (5th Cir. 2008) (same), with *Fanin* v. *United States Dep't of Veterans Affairs*, 572 F.3d 868, 872 (11th Cir. 2009), cert. denied sub nom. *Perkins* v. *Department of Veterans Affairs*, 130 S. Ct. 1755 (2010) (nonpecuniary harm not recoverable); *Hudson* v. *Reno*, 130 F.3d 1193, 1207 (6th Cir. 1997) (same), cert denied, 525 U.S. 822 (1998) (not presenting this issue), abrogated in part on other grounds by *Pollard* v. *E.I. du Pont de Nemours & Co.*, 532 U.S. 843 (2001). Respondent suggests (Br. in Opp. 16-17), however, that the conflict is not "ripe" for review, because other courts of appeals may reconsider their views in light of the Ninth Circuit's decision. That suggestion is wrong. It presupposes three premises—(1) that courts of appeals are likely to revisit the issue, (2) that they are likely to be persuaded by the Ninth Circuit's conclusion, and (3) that the Ninth Circuit's conclusion is sound—each of which is incorrect.

First, courts of appeals on both sides of the conflict have declined to reevaluate their precedents. See Pet. App. 2a (denying rehearing en banc); *Fanin*, *supra* (No. 08-11102 Docket entry (11th Cir. Aug. 5, 2009)) (same); *Jacobs*, *supra* (No. 07-40776 Docket entry (5th Cir. Jan. 6, 2009)) (same);

see also Pet. 18-19 (noting that the Fifth Circuit panel in *Jacobs*, 548 F.3d at 378, declined to decide whether its earlier examination of the issue was consistent with this Court's current sovereign-immunity jurisprudence). Second, the panel opinion in this case, which was repudiated by a substantial number of judges on the Ninth Circuit itself, is unlikely to provide a persuasive model for the other courts of appeals that have already rejected recovery for nonpecuniary harm. Pet. App. 8a-13a. Third, for reasons stated in the petition (Pet. 12-17) and below (pp. 7-11, *infra*), the panel's opinion adopts an incorrect interpretation of the Privacy Act, so the problem would only be compounded in the unlikely event that those other circuits reversed field.

Respondent also asserts (Br. in Opp. 12-15) that the conflict is unimportant, because the issue of recovery for nonpecuniary harm "arises only infrequently and has little practical significance in most Privacy Act cases." But the number of appellate cases addressing the issue (*id.* at 13-14) is an inappropriate measure of its frequency or significance. In the experience of the Department of Justice, which is responsible for the defense of all Privacy Act claims, the issue comes up in nearly every case, but generally plays out under the appellate radar. This Office has been informed that, unless affirmatively precluded by circuit precedent from doing so, most plaintiffs filing a 5 U.S.C. 552a(g)(4)(A) suit allege both pecuniary damages and nonpecuniary mental and/or emotional distress. District courts rarely dispose of the damages issue before the close of discovery. The government therefore must prepare for the contingency that emotional distress will be at issue, typically by hiring a psychological expert, moving for an independent medical examination, and deposing the plaintiff's treating doctor or psychologist. And despite all of the

effort required for the government to defend against allegations of nonpecuniary harm in the district court, a variety of circumstances can prevent the legal issue of whether such harm is compensable at all under the Act from reaching the court of appeals. The government may, for example, prevail on other grounds at summary judgment, disprove the allegations at trial, lose at trial in a circuit where the settled law is unfavorable to the government, or opt not to seek appellate review for other reasons.

Respondent attempts (Br. in Opp. 15) to downplay the importance of the issue of nonpecuniary Privacy Act damages by noting that the government opposed certiorari in *Perkins* v. *Department of Veterans Affairs*, 130 S. Ct. 1755 (2010) (No. 09-513), which presented this issue. The government's brief in *Perkins*, however, did not deny the issue's general practical significance, but instead opposed certiorari for other reasons (namely, that the circuit conflict at that time was narrower and the case was an inappropriate vehicle for resolving it). 09-513 Br. in Opp. 5-14. The government expressly reserved the possibility that the "currently narrow conflict in the circuits would warrant this Court's resolution in an appropriate case in the future." *Id.* at 14. After the *Perkins* brief was filed, this case was decided by the Ninth Circuit (the Nation's largest geographic circuit), which joined the Fifth Circuit in holding that the Privacy Act waives sovereign immunity for claims of nonpecuniary harm. The government informed the Court of that development by letter and noted that it was considering whether to seek rehearing en banc of the Ninth Circuit panel's decision. 09-513 Docket entry (Feb. 23, 2010). The government did later seek rehearing en banc; the court of appeals denied it (over the dissent of eight judges); and now review by this Court is the only remaining way to cor-

rect the Ninth Circuit's error and resolve the expanding circuit conflict.

2. Respondent also argues (Br. in Opp. 10-12) that certiorari is unwarranted because, as the case currently stands, further district-court proceedings would be necessary to determine whether the government ultimately would be liable to pay respondent's asserted emotional-distress damages. The interlocutory posture of this particular case, however, poses no impediment to this Court's review. See Eugene Gressman et al., *Supreme Court Practice* 281 (9th ed. 2007) (when "there is some important and clear-cut issue of law that is fundamental to the further conduct of the case and that would otherwise qualify as a basis for certiorari, the case may be reviewed despite its interlocutory status"); *id.* at 282-283 (citing examples). This case, which presents a pure question of law that otherwise would meet the criteria for certiorari and on which the viability of respondent's entire lawsuit turns, is the rare type of case that this Court should hear on an interlocutory basis. The answer to the question of law that is presented would be unaffected by any additional "factual findings" (Br. in Opp. 11 (emphasis omitted)) that the district court might make. And denying certiorari now would serve only to delay review and prolong the negative consequences of the court of appeals' decision. See *Supreme Court Practice* 282 ("In some instances, the interlocutory status of the case may be no impediment to certiorari where the opinion of the court below has decided an important issue, otherwise worthy of review, and Supreme Court intervention may serve to hasten or finally resolve the litigation.").

A full trial in this case, which would force the government to defend against respondent's uncapped and amorphous mental-distress claims, would be costly and time-consuming. And, as respondent observes (Br. in Opp. 11),

a victory for the government (or a settlement) would preclude this Court from addressing the question presented at a later stage, and would force the government to search for another suitable vehicle. In the meantime, the court of appeals' legal holding would continue to adversely affect the government in virtually every Privacy Act damages suit in the Ninth Circuit and to encourage the filing of additional suits by potential plaintiffs who have suffered little or no pecuniary harm. See Pet. 20-21; pp. 3-4, *supra*. There is no reason to subject the government and the judicial system to these burdens for an indefinite period until another opportunity presents itself for the government to ask this Court to reverse Ninth Circuit's erroneous decision.

These and other circumstances further distinguish this case from *Perkins*, in which the government pointed to the case's interlocutory posture as one reason to deny review. 09-513 Br. in Opp. 5-6. In that case, the court of appeals affirmed summary judgment in favor of the government on a Privacy Act claim as to which the plaintiffs had failed to produce evidence of pecuniary harm. *Id.* at 4-5. However, the court of appeals reinstated several claims arising out of the same governmental conduct as the Privacy Act damages claim. *Id.* at 5-6 & n.1. As a result, further proceedings were required on the additional claims irrespective of the nonpecuniary-harm issue; those further proceedings could have revealed that the plaintiffs' factually related Privacy Act damages claim was meritless regardless of whether nonpecuniary harm is compensable; and the individual plaintiffs lacked any systemic interest in how the Privacy Act is interpreted. *Ibid.* Here, in contrast, resolution of the question presented in the government's favor would completely dispose of the case; further proceedings if certiorari is denied would not eliminate the government's interest in the question presented; and the government

would continue to experience the repercussions of the court of appeals' decision in this and other cases unless and until the Ninth Circuit's decision is reversed.

3. Respondent finally argues (Br. in Opp. 17-24) that certiorari is unwarranted because the Ninth Circuit reached the correct result. To the extent that respondent simply defends the court of appeals' opinion, those arguments lack merit for the reasons explained in the petition. See Pet. 12-17. But respondent also introduces arguments that go further than—and in several instances conflict with—the court of appeals' decision. These additional arguments are likewise meritless.

a. First, respondent contends (Br. in Opp. 22-23) that well-settled sovereign-immunity principles "do[] not control the construction of the express civil remedies established by the Privacy Act." He raised a similar argument in the court of appeals, and the panel rejected it. Pet. App. 33a ("[Respondent] contends that the [sovereign-immunity] canon is of no use in construing the meaning of actual damages. [Respondent's] position is not supported by applicable case law."). The panel correctly recognized that "a waiver of the Federal Government's sovereign immunity must be unequivocally expressed in statutory text," *id.* at 32a (quoting *Lane*, 518 U.S. at 192) (brackets omitted); that even where Congress has waived the sovereign immunity of the United States, the same clear-statement rule applies "for purposes of gauging the scope" of that waiver, *id.* at 33a (citing *Lane*, 518 U.S. at 192); and that, as a result, "if actual damages is susceptible of two plausible interpretations, then the sovereign immunity canon requires the court to construe the term narrowly in favor of the Government, holding that nonpecuniary damages are not covered," *id.* at 34a. See also *id.* at 9a-10a (O'Scannlain, J., dissenting from denial of rehearing en banc); Pet. 12. Under these princi-

ples, the Ninth Circuit was required to construe "actual damages" narrowly, to exclude nonpecuniary harm.

This Court reaffirmed those principles earlier this Term in *Sossamon* v. *Texas*, No. 08-1438 (Apr. 20, 2011), a state sovereign-immunity case in which the Court discussed federal sovereign-immunity principles as well. See slip op. 5 & n.4 (citing *Lane*, 518 U.S. at 192, and *United States* v. *Nordic Village, Inc.*, 503 U.S. 30, 37 (1992)). Respondent is accordingly mistaken in suggesting (Br. in Opp. 22) that the Court has watered down the sovereign-immunity canon of construction in any material respect. Respondent is equally mistaken in suggesting (*ibid.*) that this Court's decision in *Doe* v. *Chao* "illustrates" the canon's inapplicability to the civil-remedies provision of the Privacy Act. *Doe* adopted the government's narrow reading of that provision and said nothing about abandoning the sovereign-immunity canon. See 540 U.S. 616-627.

b. Second, respondent implies (Br. in Opp. 20-21) that it was well-established when Congress enacted the Privacy Act, that "actual damages" included nonpecuniary harm. But respondent fails to acknowledge—as the court of appeals, other courts, and the Privacy Protection Study Commission have—that the term "actual damages" has "no plain meaning." Pet. App. 24a; see *id.* at 23a (observing that courts of appeals on both sides of the circuit conflict "agreed that the meaning of the term actual damages is ambiguous"); Privacy Protection Study Comm'n, *Personal Privacy in an Information Society: The Report of the Privacy Protection Study Commission* 530 (1977) (*Privacy Commission Report*); Pet. 12-13. Respondent's contrary arguments purport merely to track the court of appeals' decision, but they in fact go beyond even what the panel was willing to accept. Respondent attempts (Pet. 21), for example, to compare the Privacy Act to the Fair Housing

Act, 42 U.S.C. 3601 *et seq.*, when the court of appeals correctly determined that the two statutes are insufficiently "analogous in time, purpose and subject matter" to allow for a legitimate comparison. Pet. App. 32a n.2.

Even when respondent cites sources relied upon by the court of appeals, he fares no better than the panel in attempting to demonstrate an unequivocal textual commitment to allow Privacy Act suits alleging nonpecuniary harm. The Court's opinions in *Time, Inc.* v. *Hill*, 385 U.S. 374 (1967), and *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323 (1974), do not use the term "actual damages," let alone provide a definitive definition. See Br. in Opp. 20. Respondent's (and the court of appeals') reliance on circuit-court opinions interpreting "actual damages" in the Fair Credit Reporting Act, 15 U.S.C. 1681 *et seq.*, the earliest of which was decided eight years *after* passage of the Privacy Act, is equally unavailing. See Br. in Opp. 21-22; Pet. App 31a; see also Pet. 16 (describing why the two statutes are substantively different).

If there had in fact been a legal definition of "actual damages" so well-accepted that Congress could not have had anything else in mind, that definition would not have escaped the notice of the Privacy Protection Study Commission, which was established by the Privacy Act specifically to examine (among other things) the issue of damages under the Act. Pub. L. No. 93-579, § 5(c)(2)(B)(iii), 88 Stat. 1907. The Commission found, like the court of appeals here, "that there is no generally accepted definition of 'actual damages' in American law." *Privacy Commission Report* 530; see Pet. App. 24a ("[T]here is no plain meaning to the term actual damages, as used in the [Privacy] Act."). The Commission's 1977 report, moreover, went on to conclude that the term, as used in the Act, was "meant to restrict recovery to specific pecuniary losses," *Privacy Com-*

mission Report 530—the precise definition that respondent seeks to repudiate.

c. Finally, respondent questions (Br. in Opp. 24) the "reasonableness" of limiting monetary remedies under the Privacy Act to pecuniary harm. If he means to suggest that there is no legal precedent for such a definition of "actual damages," the suggestion is at odds with the panel's opinion (see Pet. App. 22a-24a) and overlooks numerous sources. See, *e.g.*, *Mackie* v. *Rieser*, 296 F.3d 909, 917 (9th Cir. 2002) (interpreting "actual damages" under Copyright Act to cover only economic damages), cert. denied, 537 U.S. 1189 (2003); *Ryan* v. *Foster & Marshall, Inc.*, 556 F.2d 460, 464 (9th Cir. 1977) (same under Securities Exchange Act) (cited at Pet. App. 23a); *Guzman* v. *Western State Bank*, 540 F.2d 948 (8th Cir. 1976) (using "actual damages" to mean "out-of-the-pocket pecuniary loss" but not "emotional and mental distress"); *Morvant* v. *Lumbermens Mut. Cas. Co.*, 429 F.2d 495, 496 (5th Cir. 1970) (using "actual damages" to refer to medical expenses and lost wages, as distinct from "pain and suffering"); *Black's Law Dictionary* 467-468 (Rev. 4th ed. 1968) (providing definition of "actual damages" expressly distinguishing them from "exemplary damages," which "are intended to solace the plaintiff for mental anguish, laceration of his feelings, shame, degradation, or other aggravations of the original wrong"); 25 C.J.S. *Damages* § 3 (2011) (observing that "actual damages" can be used to mean "determinate pecuniary loss"); *Privacy Commission Report* 530.

If respondent instead means to suggest that it would have been unreasonable for Congress to have intended the narrower definition of "actual damages" in the context of the Privacy Act, he fails to account for the public interest in (among other things) avoiding uncapped federal liability, filtering out non-credible claimants by requiring proof of

pecuniary losses, and assuring that damages claims are concrete and measurable. Because the narrower definition is, at a bare minimum, "plausible," the Ninth Circuit erred in construing the Privacy Act's sovereign-immunity waiver more broadly. *Nordic Village, Inc.*, 503 U.S. at 37.

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For the foregoing reasons and those stated in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted.

NEAL KUMAR KATYAL
Acting Solicitor General

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