No.

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

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a plaintiff who alleges only mental and emotional injuries can establish "actual damages" within the meaning of the civil remedies provision of the Privacy Act, 5 U.S.C. 552a(g)(4)(A).

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The Acting Solicitor General, on behalf of the United States, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 14a-37a) is reported at 622 F.3d 1016, amending and superseding on denial of rehearing the opinion reported at 596 F.3d 538. The order of the district court (App., *infra*, 38a-64a) is unreported.

JURISDICTION

The original judgment of the court of appeals was entered on February 22, 2010. The court of appeals denied the government's petition for rehearing or rehearing en banc, and issued an amended opinion, on September 16, 2010 (App., *infra*, 1a-37a). On December 6, 2010, Justice Kennedy extended the time within which to file a petition for a writ of certiorari to and including January 14, 2011. On January 12, 2011, Justice Kennedy further extended the time within which to file a petition for a writ of certiorari to and including February 13, 2011, which is a Sunday. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The civil remedies provision of the Privacy Act of 1974, 5 U.S.C. 552a(g) provides, in relevant part:

> (4) In any suit brought under the provisions of subsection (g)(1)(C) or (D) of this section in which the court determines that the agency acted in a manner which was intentional or willful, the United States shall be liable to the individual 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.

Other relevant provisions of the Privacy Act, including the full text of Section 552a, are reproduced in full in the appendix to this petition. App., *infra*, 65a-109a.

STATEMENT

1. The Privacy Act of 1974, 5 U.S.C. 552a, sets forth requirements for Executive Branch agencies in their collection, maintenance, use, and dissemination of "records" containing information about an "individual," when those records are maintained as part of a "system of records." 5 U.S.C. 552a(a)(1)-(5) and (b). One of the requirements of the Act is that, except in certain specified circumstances, "[n]o agency shall disclose any record which is contained in a system of records by any means of communication to any person" without a request by or consent from "the individual to whom the record pertains." 5 U.S.C. 552a(b).

The Privacy Act authorizes private civil actions to enforce its terms. 5 U.S.C. 552a(g). While violations of some provisions entitle a plaintiff only to declaratory or injunctive relief, violations of other provisions, including the disclosure-related provision at issue in this case, may entitle a plaintiff to an award of money damages against the government. 5 U.S.C. 552a(g)(4). Such damages may only be awarded, however, if the plaintiff demonstrates both that the violation was "intentional or willful," *ibid.*, and that he sustained "actual damages * * * as a result of" the violation, 5 U.S.C. 552a(g)(4)(A). See *Doe* v. *Chao*, 540 U.S. 614, 624-625 (2004). If those elements are satisfied, the Act subjects the government to liability for the amount of "actual damages sustained by the individual" and provides that "in no case shall a person entitled to recovery receive less than the sum of $1,000." 5 U.S.C. 552a(g)(4)(A); see *Doe*, 540 U.S. at 627; see also 5 U.S.C. 552a(g)(4)(B) (reasonable litigation costs and attorney fees may be awarded to a prevailing plaintiff). The Act does not define the term "actual damages."

2. a. Respondent is a pilot who first obtained a private pilot's certificate from the Federal Aviation Administration (FAA) in 1964. App., *infra*, 15a. In order to operate an aircraft, the FAA requires a pilot not only to have a pilot's certificate, but also to have a valid medical certificate as well. *Ibid.*; 14 C.F.R. 61.3(a) and (c). FAA regulations require a pilot periodically to renew his medical certificate and to disclose in his renewal application any medical conditions he has had and any medications he is taking. App., *infra*, 15a; 14 C.F.R. 61.23(d); 14 C.F.R. Pt. 67.

In the mid-1980s, respondent learned that he was HIV-positive and began taking antiretroviral medication. App., *infra*, 15a-16a. He knew that he would not at that time have qualified for renewal of his medical certificate if he admitted his condition. *Ibid.* He nevertheless applied for and received a medical certificate in 1994 without disclosing his HIV status or that he was taking the medication. *Id.* at 16a.

For a period of time in the mid-1990s, respondent's HIV symptoms worsened to the point of creating a disability. App., *infra*, 16a. In 1995, he applied for long-term disability benefits from the Social Security Administration (SSA), disclosing his HIV-positive status on his application. *Ibid.* The SSA granted respondent's application and paid him disability benefits for a limited period until his health improved and he discontinued the benefits. *Ibid.*

Before applying for a medical certificate in 1998, petitioner became aware that the FAA had begun to grant medical certificates to HIV-positive pilots on a case-by-case basis through a "special issuance" procedure. App., *infra*, 114a. He nevertheless chose not to seek a special-issuance certificate and instead applied for and

obtained a medical certificate four additional times—in 1998, 2000, 2002, and 2004—without disclosing his actual medical condition. *Id.* at 114a-115a.

b. Respondent's deception of the FAA was uncovered in 2005 as a result of "Operation Safe Pilot," a joint criminal investigation by the offices of inspector general of the SSA and the FAA's parent agency, the Department of Transportation (DOT). App., *infra*, 17a-18a. The inspectors general of those agencies are law enforcement officers tasked with the responsibility for uncovering and preventing waste, fraud, or abuse in the agencies' programs or operations. Inspector General Act of 1978, 5 U.S.C. App. §§ 2, 4, 6; 42 U.S.C. 902; 49 U.S.C. 354.

Operation Safe Pilot was prompted by the discovery that a California pilot had consulted two sets of doctors in a scheme to obtain medical certification to fly while also receiving disability benefits. App., *infra*, 16a-17a. Concerned that such fraud might be more widespread, the offices of inspector general decided to investigate the veracity of medical information submitted by persons in northern California who had successfully applied for both certification to fly and disability benefits. *Id.* at 17a. The DOT provided the SSA with the names, dates of birth, social security numbers, and genders of 45,000 licensed pilots with current medical certificates in northern California. *Ibid.* The SSA compared the list with its own records of benefits recipients and summarized the results in spreadsheets, which it provided to the DOT. *Ibid.*

When agents from the DOT and SSA examined the spreadsheets, they discovered that respondent was a licensed pilot with a current medical certificate and had received disability benefits. App., *infra*, 17a-18a. FAA

flight surgeons reviewed respondent's FAA medical file and SSA disability file and concluded that respondent would not have received an unrestricted medical certificate if his true medical condition had been known. *Id.* at 18a.

When confronted with this information, respondent admitted that he had intentionally withheld his HIV status and related medical information from the FAA. App., *infra*, 18a. His pilot's license was revoked because of his misrepresentations, and he was indicted on three counts of making false statements to a government agency, in violation of 18 U.S.C. 1001. *Ibid.* Respondent eventually pleaded guilty to one count of making and delivering a false official writing, in violation of 18 U.S.C. 1018. App., *infra*, 18a. He was sentenced to two years of probation and fined $1000. *Ibid.*

3. Respondent thereafter filed suit in the District Court for the Northern District of California against the DOT, FAA, and SSA, claiming that these agencies willfully or intentionally violated the Privacy Act by sharing records as part of Operation Safe Pilot. App., *infra*, 19a; see 28 U.S.C. 1331. He alleged that the information sharing, which revealed his HIV status to the FAA, "caused him 'to suffer humiliation, embarrassment, mental anguish, fear of social ostracism, and other severe emotional distress,'" and he sought recovery for those asserted emotional harms. App., *infra*, 19a. Respondent did not, however, allege any direct or indirect pecuniary harm. *Id.* at 15a.

The district court granted summary judgment for the government. App., *infra*, 38a-64a. The court believed that Operation Safe Pilot had violated the Privacy Act (*id.* at 51a-58a) and that respondent had raised a triable issue as to whether the violation was intentional

or willful (*id.* at 58a-59a). But the court concluded that respondent had failed to make out a claim for "actual damages." *Id.* at 59a-64a. Observing that principles of sovereign immunity require strict construction of the Privacy Act's "actual damages" provision, 5 [U.S.C.] 552a(g)(4)(A), the court held that the provision cannot be satisfied where nonpecuniary harm, such as mental distress, is alleged. App., *infra*, 61a-64a. The court concluded that "the term 'actual damages' is facially ambiguous" (*id.* at 61a) and reasoned that "ambiguity as to whether 5 U.S.C. § 552a(g)(4)(A)'s provision for actual damages includes mental distress without evidence of pecuniary damages must be resolved in favor of the government defendants" (*id.* at 63a).

4. A panel of the court of appeals for the Ninth Circuit reversed and remanded. App., *infra*, 14a-37a.*

The court of appeals agreed with the district court that, because the term "actual damages" appears in the context of a provision that waives federal sovereign immunity, "any ambiguities in the statutory text * * * must be strictly construed in favor of the sovereign." App., *infra*, 32a (citing *Lane* v. *Pena*, 518 U.S. 187, 192 (1996)). "[I]f actual damages is susceptible of two plausible interpretations," the court explained, "nonpecuniary damages are not covered." *Id.* at, 34a; see also *ibid.* (discussing *United States* v. *Nordic Village, Inc.*, 503 U.S. 30 (1992)).

The court of appeals reasoned that the term "actual damages" has no "ordinary or plain" meaning because it

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* Citations herein to the panel opinion are citations to the superseding amended version of that opinion issued upon denial of rehearing. The amendment, which deleted a single footnote, did not alter the original opinion in any manner relevant to the question presented here. See p. 10, *infra*.

is a "legal term of art"; that the definition in *Black's Law Dictionary* "sheds little light" on the term's meaning in the Privacy Act; and that the use of the term in other statutory contexts reveals it to be a "chameleon," the meaning of which "changes with the specific statute in which it is found." App., *infra*, 23a-24a. The court also believed the legislative history of the Privacy Act was "of no help" in interpreting the term, both because legislative history cannot supply the requisite clarity for a waiver of sovereign immunity and because, in the court's view, the legislative history concerning the meaning of "actual damages" was "murky, ambiguous, and contradictory." *Id.* at 28a-29a. The court additionally recognized that its sister circuits were in conflict over whether "actual damages" under the Privacy Act include nonpecuniary harms, with two circuits saying no, another saying yes, and courts on both sides of the divide agreeing that the term is "ambiguous." *Id.* at 21a-23a (citing *Fitzpatrick* v. *IRS*, 665 F.2d 327, 331 (11th Cir. 1982) (nonpecuniary damages not recoverable), abrogated in part on other grounds by *Doe*, 540 U.S. 614; *Hudson* v. *Reno*, 130 F.3d 1193, 1207 (6th Cir. 1997) (nonpecuniary damages not recoverable), 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); *Johnson* v. *IRS*, 700 F.2d 971, 972 (5th Cir. 1983), abrogated in part on other grounds by *Doe*, 540 U.S. 614 (nonpecuniary damages recoverable)).

The court of appeals nevertheless concluded that the term "actual damages" was "unambiguous" and that "a construction that limits recovery to pecuniary loss" was not "plausible." App., *infra*, 34a. The court offered two bases for its conclusion: the term's "statutory context"

(*id.* at 24a) and an analogy to the Fair Credit Reporting Act (FCRA), 15 U.S.C. 1681 *et seq.* (App., *infra*, 29a-30a).

With regard to the statutory context of the term "actual damages," the court first pointed to the Privacy Act's preambular statement of purpose, which states that federal agencies should "be subject to civil suit for *any damages*" resulting from an intentional or willful violation of rights under the Act. App., *infra*, 24a-25a (quoting Privacy Act of 1974, Pub. L. No. 93-579, § 2(b)(6), 88 Stat. 1896) (emphasis added by court). The court found it "difficult to see" how Congress could have achieved that goal unless the Act permitted recovery for mental or emotional distress, suggesting that it is common for privacy violations to result in such distress. *Id.* at 25a-26a. The court also claimed to find support for its interpretation of the Act in substantive provisions that list prevention of "embarrassment" and assurance of "fairness in any [record-based] determination relating to * * * character" among the purposes of the Act. *Id.* at 26a (citing 5 U.S.C. 552a(e)(10), 552a(g)(1)(C)) (emphasis omitted). The court additionally focused on 5 U.S.C. 552a(g)(1)(D), which permits suit by an individual who has suffered an "adverse effect," and reasoned that because "adverse effect" typically includes nonpecuniary harms, "actual damages" should be read in the same way. App. *infra*, 26a.

With regard to the FCRA, the court of appeals perceived similarities "in purpose and time" between the two statutes that, in its view, made the FCRA "a reliable extrinsic source" for interpreting the meaning of "actual damages" in the Privacy Act. App., *infra*, 31a. The FCRA was enacted "within a few years of" the Privacy Act and prohibited "credit reporting agencies from re-

leasing consumer credit reports" except in certain circumstances. *Id.* at 30a. According to the court of appeals, the FCRA and the Privacy Act "address[ed] an identical concern growing out of closely analogous circumstances," and circuit precedent interpreting "actual damages" recoverable under the FCRA to include emotional-distress damages "buttresse[d]" a similar construction of the term "actual damages" in the Privacy Act. *Id.* at 30a-31a.

5. The government petitioned for rehearing or rehearing en banc. The court of appeals denied the petition, but the panel issued a slightly amended opinion (which deleted a footnote not relevant here). App., *infra*, 1a-37a.

Judge O'Scannlain, joined by seven other judges, dissented from the order denying rehearing en banc. App., *infra*, 8a-14a. The dissent criticized the panel for "neglect[ing]" the canon requiring strict construction of sovereign-immunity waivers (*id.* at 9a), and cautioned that "[w]e ignore at our peril [that] well-established clear statement rule" (*id.* at 13a). "The effect of today's order," the dissent stated, "is to open wide the United States Treasury to a whole new class of claims without warrant." *Id.* at 9a. The dissent observed that "[i]n so doing," the decision "exacerbate[d] a circuit split that had been healing under the strong medicine of recent sovereign immunity jurisprudence." *Ibid.*

Judge Milan Smith, the author of the panel opinion, wrote a concurrence in the denial of rehearing en banc. See App., *infra*, 2a-8a. He defended the panel's sovereign-immunity analysis, explaining that "[t]o construe the scope of this waiver, the panel followed controlling precedent directing the panel to look to the policies or objectives underlying the Act." *Id.* at 3a.

REASONS FOR GRANTING THE PETITION

The Ninth Circuit's broad interpretation of the Privacy Act's limited waiver of sovereign immunity warrants this Court's review. The Privacy Act contains a carefully crafted remedial scheme that permits actions for monetary relief against the federal government only when intentional or willful violations of specified provisions of the Act are shown to have caused "actual damages." 5 U.S.C. 552a(g)(4); see *Doe* v. *Chao*, 540 U.S. 614, 620-621, 624 (2004). As the court of appeals recognized, "a waiver of the Federal Government's sovereign immunity must be unequivocally expressed in statutory text," and any ambiguity in the scope of such a waiver must be construed narrowly in the government's favor. App., *infra*, 32a (quoting *Lane* v. *Pena*, 518 U.S. 187, 192 (1996)). Yet despite "all but admit[ting] that the statutory term 'actual damages' does *not* unequivocally express a waiver for nonpecuniary damages," the court of appeals interpreted the Privacy Act to permit recovery of such damages from the government. *Id.* at 10a (O'Scannlain, J., dissenting from denial of rehearing en banc) (emphasis added).

The Ninth Circuit's failure properly to adhere to the well-settled sovereign-immunity canon in this context dramatically increases the government's exposure to damages under the Privacy Act in the Nation's largest geographic circuit. The decision below additionally extends an existing division among the courts of appeals. Whereas the Sixth and Eleventh Circuits have correctly concluded that the Privacy Act does not subject the government to liability for nonpecuniary harm, the Fifth Circuit and now the Ninth Circuit have both held the opposite and denied petitions for en banc review. This Court's intervention is necessary to correct the errone-

ous interpretation of the Ninth Circuit and to resolve this recurring and important issue.

A. The Ninth Circuit Erred In Construing The Privacy Act To Waive Sovereign Immunity For Claims Of Nonpecuniary Harm

The court of appeals correctly recognized that the proper interpretation of "actual damages" is guided by the "common rule, with which we presume congressional familiarity," that the federal government is immune from suit unless it has expressly and unequivocally waived its immunity in the statutory text. *United States Dep't of Energy* v. *Ohio*, 503 U.S. 607, 615 (1992); see App., *infra*, 32a-36a. In keeping with this rule, the court of appeals acknowledged that "if actual damages is susceptible of two plausible interpretations," then the term must be construed "narrowly in favor of the Government," meaning "that nonpecuniary damages are not covered." App., *infra*, 34a; see *United States* v. *Nordic Village, Inc.*, 503 U.S. 30, 37 (1992) (explaining that the existence of a "plausible" reading of a statutory waiver that excludes a plaintiff's damage claim "is enough to establish that a reading imposing monetary liability on the Government is not 'unambiguous' and therefore should not be adopted"). The court of appeals proceeded to conclude, however, that the Privacy Act's reference to "actual damages" admits of only one meaning: a broad definition that encompasses nonpecuniary damages, such as damages for emotional distress and mental anxiety. App., *infra*, 34a.

The court of appeals' conclusion—that "actual damages" cannot plausibly be limited to pecuniary losses—is untenable. The Privacy Act supplies no definition for "actual damages." All four appellate courts to consider

the issue have agreed that the term "actual damages" has no single definition, and it is clear that the term can be used to refer exclusively to pecuniary harm. See App., *infra*, 23a-24a; *Johnson* v. *IRS*, 700 F.2d 971, 974 (5th Cir. 1983), abrogated in part on other grounds by *Doe*, 540 U.S. 614; *Fitzpatrick* v. *IRS*, 665 F.2d 327, 329 (11th Cir. 1982), abrogated in part on other grounds by *Doe*, 540 U.S. 614; *Hudson* v. *Reno*, 130 F.3d 1193, 1207 n.11 (6th Cir. 1997), 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). The Privacy Protection Study Commission, which was established by Congress in the Privacy Act to study, *inter alia*, the Act's damages provision, Pub. L. No. 93-579, § 5(c)(2)(B)(iii), 88 Stat. 1907 (1974), similarly concluded in its official report to Congress "that there is no generally accepted definition of 'actual damages' in American law." Privacy Protection Study Commission, *Personal Privacy in an Information Society: The Report of the Privacy Protection Study Commission* 530 (1977) (*Privacy Commission Report*). As an undefined term that permits more than one meaning, "actual damages" cannot reasonably be described as "unambiguous." App, *infra*, 34a; see, *e.g.*, *Nordic Village, Inc.*, 503 U.S. at 37; *Caminetti* v. *United States*, 242 U.S. 470, 485 (1917).

None of the sources relied upon by the court of appeals supports its holding. To begin with, one of the court of appeals' primary rationales "quite clearly" conflicts with this Court's decision in *Doe* v. *Chao*, *supra*. App., *infra*, 12a-13a (O'Scannlain, J., dissenting from denial of rehearing en banc). The court of appeals believed that because the Privacy Act permits suit by a person who has suffered an "adverse effect," and be-

cause several circuits have interpreted the term "adverse effect" to include emotional harm, it would be "unreasonable" to interpret "actual damages" to exclude such harm. *Id.* at 27a-28a.

Doe made clear, however, that the "adverse effect" and "actual damages" requirements are distinct. 540 U.S. at 624-625. The "adverse effect" requirement, the Court explained, has the "limited but specific function" of "identifying a potential plaintiff who satisfies the injury-in-fact and causation requirements of Article III standing," whereas the "actual damages" requirement addresses the right to monetary recovery. *Id.* at 625. An "adverse effect" is insufficient by itself to establish "a complete cause of action" under Section 552a(g)(1)(D); the statute also "require[s] some actual damages as well." *Id.* at 624; see *id.* at 624-625 ("[A]n individual subjected to an adverse effect has injury enough to open the courthouse door, but without more has no cause of action for damages under the Privacy Act."). The court of appeals therefore erred in equating the two requirements. See App., *infra*, 12a ("[T]he court's recourse to the Privacy Act's standing provision * * * is the most troubling [aspect of the decision], because it conflicts with the Supreme Court's interpretation of the very provision of the Privacy Act at issue in this case.") (O'Scannlain, J., dissenting from denial of rehearing en banc).

The court of appeals also erred in placing significant weight on a statement in the Privacy Act's preamble that agencies will 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." § 2(b)(6), 88 Stat. 1896; see App., *infra*, 24a-25a. That generic language neither supersedes nor accu-

rately describes the operative text of the specific remedial provisions of the Act. Many violations of the Act do not give rise to a cause of action for damages under any circumstances. 5 U.S.C. 552a(g)(2)-(3) (providing only injunctive relief, not money damages, for violations of the provisions addressed in Section 552a(g)(1)(A) and (B)). And if Congress had in fact meant to authorize the recovery of "any damages" for other types of violations, the unequivocal way to express its intent would have been to use that term, rather than the distinct and narrower term "actual damages," in the operative text of Section 552a(g)(4). See App., *infra*, 11a (O'Scannlain, J., dissenting from denial of rehearing en banc).

The court of appeals' strained effort to find an unambiguous waiver by looking to other provisions of the Act similarly falls short. The court focused on Section 552a(e)(10), which mentions potential "embarrassment" as a reason why agencies must adequately safeguard records, and Section 552a(g)(1)(C), which permits suit by a person who suffers an adverse official determination as a result of an agency's failure to properly maintain a record concerning (among other possibilities) a person's "character." App., *infra*, 26a. Neither subsection purports to interpret "actual damages," a term that applies not only to cases involving those subsections, but to a much broader set of cases (including the present case). Congress's recognition that certain Privacy Act violations may cause embarrassment does not demonstrate—let alone unequivocally demonstrate—that Congress waived sovereign immunity in any suit in which a plaintiff seeks damages for embarrassment. Had Congress intended that result, it would have drafted the Act's damages provision differently: it would not have limited recovery to "intentional or willful" violations,

5 U.S.C. 552a(g)(4), and it would have used a nonambiguous term in place of "actual damages," 5 U.S.C. 552a(g)(4)(A). Indeed, as Congress is presumed to have known, see *United States Dep't of Energy*, 503 U.S. at 615, it would have been required under this Court's cases to use such language to effect a waiver of the United States' sovereign immunity.

Finally, the court of appeals' interpretation of the FCRA cannot supply an unequivocal waiver of sovereign immunity for the Privacy Act. As the court of appeals acknowledged, the meaning of "actual damages" "changes with the specific statute in which it is found." App., *infra*, 24a. The FCRA, enacted four years before the Privacy Act, was directed at "consumer reporting agencies," not federal executive agencies. 15 U.S.C. 1681(a)(4) and (b); see App., *infra*, 29a. Even assuming that "actual damages" recoverable from the former include emotional harms, see 15 U.S.C. 1681n, 1681*o*, there is no evidence, let alone unequivocal textual evidence, that Congress intended a similar scope for the Privacy Act's waiver of sovereign immunity.

To the contrary, the conclusion of the Privacy Protection Study Commission in 1977, shortly after the Act was passed, was that "Congress meant to *restrict* recovery to specific pecuniary losses." *Privacy Commission Report* 530 (emphasis added). In carrying out its congressionally assigned function to study and make recommendations regarding the remedial provisions of the Act, § 5(c)(2)(B)(iii), 88 Stat. 1907, the Commission "concluded that, within the context of the Act," the term "actual damages" was "intended as a synonym for special damages as that term is used in defamation cases." *Privacy Commission Report* 530; cf. *Doe*, 540 U.S. at 625 (observing that Privacy Act's remedial scheme mir-

rors defamation damages in certain respects). Such "special damages," the Commission explained, consist of "loss of *specific* business, employment, or promotion opportunities, or other tangible pecuniary benefits." *Privacy Commission Report* 530. They do not include injuries "which may be labeled intangible: namely, loss of reputation, chilling of constitutional rights, or mental suffering (where unaccompanied by other secondary consequences)." *Ibid.*

While the Commission's contemporaneous understanding may not be the only possible interpretation, it is, at a minimum, reasonable. See, *e.g.*, *Fitzpatrick*, 665 F.2d at 331 (considering the Commission's analysis "persuasive authority"). The most that could be said of the court of appeals' analysis is that it suggests another plausible interpretation. Under this Court's sovereign-immunity jurisprudence, that is not enough to support a broad construction of a sovereign-immunity waiver. See *Nordic Village, Inc.*, 503 U.S. at 37; see also *Department of the Army* v. *Blue Fox, Inc.*, 525 U.S. 255, 261 (1999) ("We have frequently held * * * that a waiver of sovereign immunity is to be strictly construed, in terms of its scope, in favor of the sovereign.").

B. The Ninth Circuit's Holding Deepens A Longstanding And Entrenched Conflict In The Circuits

Even before the Ninth Circuit's decision in this case, the circuits had been divided on the question presented. App., *infra*, 21a-22a. In the early 1980s, the Eleventh and Fifth Circuits reached conflicting conclusions about the meaning of "actual damages" based on the legislative history of the Privacy Act. Whereas the Eleventh Circuit held that "actual damages" are limited to "proven pecuniary losses," *Fitzpatrick*, 665 F.2d at 331, the

Fifth Circuit held the following year that "actual damages" also include "proven mental * * * injuries," *Johnson*, 700 F.2d at 972.

This Court subsequently stressed—in *Library of Congress* v. *Shaw*, 478 U.S. 310 (1986), and other cases—that the canon of strict construction applies not only to determining the existence of a waiver of sovereign immunity, but also to determining its scope. Applying that principle, the Sixth Circuit in 1997 expressly rejected the Fifth Circuit's analysis for "fail[ing] to recognize the bedrock principle that courts must strictly construe waivers of immunity in favor of the sovereign." *Hudson*, 130 F.3d at 1207 n.11. The Sixth Circuit concluded, in conflict with the Fifth Circuit but consistent with the Eleventh Circuit, "that actual damages only mean out-of-pocket losses, not emotional distress." *Ibid.*

In its *Doe* decision in 2004, this Court acknowledged the longstanding conflict, but declined to resolve it because it had not been presented in the petition for certiorari. 540 U.S. at 627 n.12; see *id.* at 622 n.5. Since *Doe*, both the Fifth and Eleventh Circuits have held that their earlier decisions remain good law. *Fanin* v. *United States Dep't of Veterans Affairs*, 572 F.3d 868, 872 (11th Cir. 2009), cert. denied, 130 S. Ct. 1755 (2010); *Jacobs* v. *National Drug Intelligence Ctr.*, 548 F.3d 375, 377 (5th Cir. 2008). The court of appeals here recognized that its holding, while in line with the Fifth Circuit, directly conflicts with the conclusions of the Sixth and Eleventh Circuits. App. *infra*, 21a-22a.

There is no reasonable prospect that the conflict will resolve itself without this Court's intervention. The Fifth Circuit has expressly declined to decide "whether a present-day analysis of damages recoverable under the Privacy Act would differ from" its earlier examina-

tion of the subject, based on the Court's current sovereign-immunity jurisprudence. *Jacobs*, 548 F.3d at 378. And both the Fifth and Ninth Circuits have refused to reconsider the issue en banc. App., *infra*, 2a; *Jacobs*, 07-40776 Docket entry (5th Cir. Jan. 6, 2009).

The division of authority on the question presented is accordingly entrenched and ripe for this Court's review. Although the United States previously opposed a petition for a writ of certiorari from the Eleventh Circuit raising this issue, see Br. in Opp., *Perkins* v. *Department of Veterans Affairs* (No. 09-513), it did so before the Ninth Circuit panel had issued its decision in this case, see *id.* at 14 n.4 (noting that the case was pending), and thus at a time when only the Fifth Circuit had held that damages could be recovered for a nonpecuniary injury. Recognizing that circumstances might change, the government's brief in opposition noted 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. As Judge O'Scannlain observed for eight judges dissenting from the denial of rehearing en banc, the Ninth Circuit panel's decision "exacerbate[s] a circuit split that had been healing under the strong medicine of recent sovereign immunity jurisprudence." App., *infra*, 9a. The erroneous decision of the Ninth Circuit (the Nation's largest geographic circuit), and that court's subsequent refusal to grant rehearing en banc, demonstrate that the conflict has now reached the point where certiorari is necessary.

C. The Availability Of Privacy Act Damages For Nonpecuniary Harm Is An Important And Recurring Legal Question

The question presented also has broad significance. "The proliferation of electronic records raises the stakes of a broader waiver of sovereign immunity, increasing the fiscal exposure of the United States to the tune of a $1000 minimum statutory award per claim." App., *infra*, 13a-14a (O'Scannlain, J., dissenting from denial of rehearing en banc). The Privacy Act applies to "any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government (including the Executive Office of the President), or any independent regulatory agency." 5 U.S.C. 552(f); see 5 U.S.C. 552a(a)(1) & References In Text. Case-tracking data collected by the Department of Justice indicate that such entities have been named as defendants in more than 400 separate Privacy Act suits (seeking either damages or other relief) since the start of 2005.

The court of appeals' erroneous decision expands the impact of Privacy Act litigation in two important ways. First, the decision opens the door to additional damages suits from plaintiffs who otherwise would not have any monetary claim against the government. In this case, for example, even though respondent suffered no pecuniary losses, the court of appeals has now reinstated his claim for an unspecified amount of emotional damages, exposing the government to potential liability and requiring it to expend resources defending against the suit.

Second, by permitting such uncapped emotional-distress damages allegations to proceed, the decision great-

ly increases the government's potential exposure even in cases in which a plaintiff might have been able to claim some pecuniary loss. Damages for emotional distress or other claims of intangible injury are likely to be much more open-ended than for concrete pecuniary losses. Cf. *Privacy Commission Report* 531 (unenacted recommendation of Privacy Protection Study Commission that Act be amended to permit noneconomic damages only up to a maximum of $10,000). Such heightened damages claims would impress upon the public fisc not only by increasing the payout if the plaintiff obtains a favorable judgment, but also by enhancing the plaintiff's settlement leverage and escalating the cost of litigation. Discovery is much more expensive when emotional harms are alleged: while pecuniary damages can generally be proven through pay records, receipts, and the like, litigation over asserted mental distress could be much more extensive and typically will require expert discovery of opposing psychologists and cause the government to seek an independent medical examination of the plaintiff.

By forcing the government to bear these additional costs, in the absence of a clear waiver of sovereign immunity, the Ninth Circuit has disrupted the Privacy Act's carefully calibrated remedial scheme. It is "undisputed" that Congress, in enacting Section 552a(g)(4), sought to "deter[] violations and provid[e] remedies when violations occur," but "did not want to saddle the Government with disproportionate liability." *Doe*, 540 U.S. at 637 (Ginsburg, J., dissenting). This Court's review is warranted to correct the Ninth Circuit's misinterpretation of the Act, to resolve the conflict among the courts of appeals, and to restore the balance that Congress struck.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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