

No. _____

IN THE
Supreme Court of the United States

BUCK DOE,

Petitioner,

v.

ELAINE L. CHAO, SECRETARY OF LABOR,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether an individual who has suffered an “adverse effect” as a result of a federal agency’s “intentional or willful” violation of the Privacy Act, 5 U.S.C. § 552a *et seq.*, must further prove that he has suffered “actual damages” to be entitled to the minimum statutory damages award of \$1,000 available under Section 552a(g)(4) of the Act.

PARTIES TO THE PROCEEDINGS

The parties to the proceeding below were Buck Doe, Robert Doe, Tays Doe, Otis Doe, Thomas Doe, Joe Doe, Charles Doe, and the United States Department of Labor. Each of the Doe parties are individuals, and none has any related corporate entities.

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D. Dobbs, <i>Law of Remedies</i> (2d ed. 1993)	14, 19
S. Hoar, <i>Identity Theft: The Crime of the New Millennium</i> , 49(2) United States Attorneys' USA Bulletin (Mar. 2001)	13
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PETITION FOR A WRIT OF CERTIORARI

Buck Doe petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 3a-60a) is reported at 306 F.3d 170. The opinion of the district court (App. 61a-68a) and the report and recommendation of the magistrate judge (App. 69a-104a) are unreported.

JURISDICTION

The district court had jurisdiction under 5 U.S.C. § 552a(g)(1). The court of appeals had jurisdiction under 28 U.S.C. § 1291. The court of appeals entered its judgment on September 20, 2002, and denied petitioner's motion for rehearing and suggestion of rehearing *en banc* on November 15, 2002. App. 1a-2a. On January 23, 2003, Chief Justice Rehnquist, as Circuit Justice for the Fourth Circuit, granted petitioner's motion for extension of time to file a petition for a writ of certiorari up to and including March 15, 2003. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Pertinent provisions of the Privacy Act, 5 U.S.C. § 552a *et seq.*, are set forth in the appendix. App. 105a-106a.

STATEMENT

Section 552a(g) of the Privacy Act of 1974 provides that the "United States shall be liable" to an "individual" who proves that an agency's "intentional or willful" disclosure of private information contained in a "system of records" caused him an "adverse effect." 5 U.S.C. §§ 552a(g)(1)(D), (g)(4). The measure of liability is "the sum of" "actual damages sustained by the individual . . . but in no case shall a person entitled to recovery receive less than the sum

of \$1,000” and “the costs of the action together with reasonable attorney fees as determined by the court.” *Id.* § 552a(g)(4)(A) & (B). This case presents the question of whether an award of \$1,000 statutory damages under the Act is conditioned upon the individual’s proof of some “actual damages.” At stake is the Privacy Act’s viability as a mechanism to protect individuals against federal agencies’ disclosure of sensitive, private information.

1. Statutory and Regulatory Background

The Privacy Act of 1974 protects individuals’ “personal and fundamental right” of privacy by “regulat[ing] the collection, maintenance, use, and dissemination of information by [federal] agencies.” Pub. L. 93-579 §§ 2(a)(4), 2(a)(5), 88 Stat. 1896. Except pursuant to enumerated exceptions, an agency may not “disclose any record which is contained in a system of records by any means of communications to any person, or to another agency, 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). The Act affords individuals a right to review and, where appropriate, demand amendment of agency records that are not accurate, relevant, timely, or complete. *Id.* § 552a(d)(1)-(3). The Act also stringently regulates the manner by which an agency may collect and maintain information about individuals. *Id.* § 552a(e).

Congress enacted the Privacy Act out of concern that “the privacy of an individual is directly affected by the collection, maintenance, use, and dissemination of personal information by Federal Agencies.” Pub. L. 93-579 § 2(a)(1). Advances in computerization had “greatly magnified the harm to individual privacy that can occur from any collection, maintenance, use, or dissemination of personal information.” *Id.* § 2(a)(2). The potential harms include impairment of “opportunities for an individual to secure employment, insurance, and credit, and . . .

right to due process.” *Id.* § 2(a)(3). Congress specifically condemned federal agencies’ frequent use and disclosure of social security numbers as “one of the most serious manifestations of privacy concerns in the Nation.” S. Rep. No. 93-1183, at 28 (1974), *reprinted in* Comm. on Gov’t Operations U.S. Senate and Comm. on Gov’t Operations House of Representatives, *Legislative History of the Privacy Act of 1974 S. 3418 (Public Law 93-579) Source Book on Privacy*, 151, 181 (1976) [hereinafter “*Source Book*”]; *see* Pub. L. 93-579 § 7.

Congress intended that a private right of action under the Privacy Act be “designed to encourage the widest possible citizen enforcement through the judicial process.” S. Rep. No. 93-1183, at 83, *reprinted in Source Book* at 236; *see also* H.R. Rep. No. 93-1416 at 15 (1974), *reprinted in Source Book* at 294, 308 (“best means” to enforce the Act is “constant vigilance of individual citizens backed by legal redress”). Accordingly, Congress subjected agencies “to civil suit for any damages which occur as a result of willful or intentional action which violates any individual’s rights under [the] Act.” Pub. L. 93-579 § 2(b)(6).

Section 552a(g) sets forth the Act’s civil remedies provisions. Section 552a(g)(1)(D) provides a private right of action for, among other things, wrongful disclosures of information:

Whenever an agency . . . 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, the 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 this subsection.¹

¹ Sections 552a(g)(1)(A) and (g)(1)(B) allow suits for injunctive relief where an agency fails to amend an inaccurate record or fails to provide access to records, respectively. *See* 5 U.S.C. §§ 552a(g)(1)(A), (g)(1)(B), (g)(2), and (g)(3). Section 552a(g)(1)(C) allows damages suits for failure to properly

Section 552a(g)(4) further defines and measures the United States' liability in such suits:

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 attorneys fees as determined by the court.

5 U.S.C. § 552a(g)(4)(A).

The Act's legislative history describes Section 552a(g)(4)(A)'s \$1,000 statutory damages clause as "liquidated damages . . . [to be] assessed against the agency for a violation of the Act." *Source Book* at 768 (report of "technical and substantive committee amendments"); *see also* H.R. Rep. No. 93-1416, at 38, *reprinted in Source Book* at 330 (pre-amendment view of various House members that the Act should "at the very least" contain a "liquidated damages" provision).

The Office of Management and Budget ("OMB"), tasked to "develop guidelines and regulations for the use of agencies in implementing the provisions of [the Act]", Pub. L. 93-579 § 6, promulgated Privacy Act Guidelines only months after the Act was passed. The Guidelines construe Section 552a(g)(4) to mean:

maintain an accurate record that forms the basis of an "adverse" determination. *See id.* §§ 552a(g)(1)(C), (g)(4).

When the court finds that an agency has acted willfully or intentionally in violation of the Act in such a manner as to have an adverse effect upon the individual, the United States will be required to pay

- actual damages or \$1,000, whichever is greater
- court costs and attorney fees.

40 Fed. Reg. 28,948, 28,970 (July 9, 1975).

2. The Litigation Below

The Department of Labor (“Department”) administers claims brought pursuant to the Black Lung Benefits Act of 1981, 30 U.S.C. § 901 *et seq.* App. 5a. The Department’s application form asks claimants to provide their social security numbers, which the Department uses as claim identifiers. *Id.* Administrative law judges (ALJs) routinely distribute hearing notices identifying multiple black-lung claims by social security number. *Id.* ALJs also routinely caption benefits decisions with claimants’ social security numbers and release them for publication. As a result, claimants’ social security numbers were widely disclosed. App. 5a-6a. The existence and operation of these policies are undisputed. App. 63a, 70a-71a, 82a.

In February 1997, Buck Doe and several other black-lung benefit claimants brought Privacy Act suits against the Department in the United States District Court for the Western District of Virginia. The suits were brought pursuant to Section 552a(g)(1)(D), and each sought \$1,000 statutory damages under Section 552a(g)(4)(A). App. 5a-6a, 82a-83a. Immediately after Doe filed suit, the Department consented to an order barring disclosure of claimants’ social security numbers on hearing notices or other documents. *Id.* Doe and the other plaintiffs then moved to certify a class of claimants, and the parties cross-moved for

summary judgment. *Id.* The district court referred the matter to a magistrate judge for report and recommendation. *Id.*

The magistrate judge received evidence and conducted hearings. In a sworn affidavit and in testimony, Doe attested that the Department's disclosure of his social security number caused him significant emotional distress, specifically fear that someone would fraudulently use his name and social security number. App. 75a-76a.

The magistrate judge found that there was "little, if any dispute in the facts at issue in this case," and the "issues to be determined, therefore, are whether the undisputed facts prove that the Department violated the Privacy Act and whether the Plaintiffs are entitled to damages." App. 82a. The magistrate judge concluded that: (i) social security numbers are "records" held by the Department in a "system of records" under the Privacy Act, App. 86a; (ii) Doe had not consented to the Department's disclosure of his social security number, App. 87a-88a; (iii) no exception to the Privacy Act's restrictions excused the Department's disclosure, App. 88a-92a; (iv) as a result of the disclosure, Doe had suffered the "adverse effect" of emotional distress, App. 93a-94a; (v) "undisputed evidence" proved the Department's actions "intentional and willful," App. 96a-97a; and (vi) Doe's evidence of emotional harm could trigger at least "the statutory damages provided for in the Act" and, thus, the Department was not entitled to summary judgment. App. 99a-100a.²

² The magistrate judge recommended granting the Department summary judgment on the other plaintiffs' claims because none had produced sufficient evidence of adverse effect. App. 100a. The magistrate judge also recommended denial of class certification because named plaintiffs' claims were not "typical" of class claims as defined in the complaint. App. 79a-81a. The district court accepted these recommendations, App. 61a-62a, and the Fourth Circuit affirmed. App. 21a-23a. The resolution of these separate issues has no bearing on the question presented in this petition, and they

The district court accepted the magistrate’s report in part and rejected it in part. App. 61a-62a. It held that Doe had proven the “elements essential to prevail on a claim for damages under the Privacy Act.” App. 66a. It further held that Doe’s “incontrovertible evidence” of “emotional distress as a result of the Department disclosing his social security number to parties not specifically involved in his black lung claim” was sufficient to “allow[] granting summary judgment in his favor” for the “statutory minimum amount of \$1,000 . . . provided by 5 U.S.C. § 552a(g)(4)(A) . . .” App. 66a-67a.

A split panel of the Fourth Circuit reversed. The court framed the issue on appeal as “whether a person must suffer ‘actual damages’ in order to be considered ‘a person entitled to recovery’ within the meaning of section 552a(g)(4)(A), and therefore entitled to the statutory minimum of \$1,000 under that section.” App. 9a. Relying on “several reasons, perhaps no one of which alone would be dispositive,” the court held that “a person must sustain actual damages to be entitled to the statutory minimum damages award.” *Id.* It acknowledged, however, that this interpretation was “not strictly compelled by the statute’s language” and that the decision deepened a split of authority among the circuits. App. 12a-13a & n.3.

The decision below rested on rationales deemed convincing in the “aggregate.” App. 9a. *First*, “as a matter of statutory interpretation” Section 552a(g)(4)(A)’s juxtaposition of the phrases “person entitled to recovery” and “actual damages” “indirectly” defined “‘recovery’ . . . by its express limitation of the Government’s liability to actual damages sustained.” *Id.* (emphasis omitted). *Second*, this proximity “establishe[d] as a grammatical

are not before this Court. Accordingly, in the remainder of this petition, Doe discusses only those rulings and issues relevant to his individual Privacy Act claim.

matter” that “a person entitled to recovery” references “one who is able to show actual damages.” App. 10a (emphasis omitted). *Third*, placement of the conjunction “but” between Section 552a(g)(4)(A)’s clauses “reinforce[d] the conclusion that the second clause . . . adds a qualification with respect to the class of plaintiffs defined by the first” *Id.* *Fourth*, “Congress, with ease, could have phrased the liability provision to provide unequivocally for a statutory minimum recovery, even for those who are unable to prove actual damages.” App. 11a. *Finally*, the court conceded its interpretation “is not strictly compelled by the statute’s language,” but reasoned that because the Privacy Act is a “limited waiver of sovereign immunity,” Section 552a(g)(4)(A) must be “strictly construed.” App. 13a-14a. The court then held that Doe’s proof of emotional harm was not sufficient to establish “actual damages” under the Act, reversed the district court, and remanded with instructions to enter summary judgment for the Department. App. 14a-18a.

Judge Michael dissented. He agreed with the majority that a Privacy Act plaintiff “must prove he has suffered an adverse effect as a result of an agency’s intentional or willful violation of the Act,” that “emotional distress can qualify as an adverse effect and that Buck Doe’s statements about his emotional distress are sufficient to allow a finding that he suffered an adverse effect as a result of the Department of Labor’s wrongful disclosure of his social security number.” App. 30a. Judge Michael would have held, however, that a Privacy Act plaintiff who proves an “adverse effect” caused by an agency’s “willful or intentional” disclosure of private information can recover \$1,000 statutory damages under Section 552a(g)(4)(A) without further proving some measure of “actual damages.” App. 25a.

Judge Michael noted that the Act expressly states, in language preceding Section 552a(g)(4)(A)’s “person entitled to recovery” clause, that the United States “shall be liable” to an individual who

demonstrates an “adverse effect” caused by an “intentional or willful” violation of the Act. App. 31a-32a & n.4. Thus, “the phrase ‘person entitled to recovery’ is more naturally read to mean anyone to whom ‘the United States shall be liable’” App. 30a. Moreover, “[a]s a matter of ordinary language usage, an entitlement to ‘recovery’ is surely broader than an entitlement to actual damages.” App. 31a. This view finds support in the “text of the statute allow[ing] . . . a plaintiff who has proven an intentional or willful violation of the Privacy Act to recover costs and reasonable attorney fees even if the plaintiff has suffered no actual damages at all.” App. 32a.

Judge Michael buttressed his interpretation with three additional arguments. *First*, “most circuit courts have read the Privacy Act to allow recovery of statutory damages without proof of actual damages.” App. 33a. *Second*, the interpretation is “consistent with” the Privacy Act Guidelines, which are “due the deference accorded to the interpretation of an agency charged with oversight of implementation.” App. 35a (internal quotation marks omitted). *Third*, the interpretation conforms with that given other statutory damages provisions similar in language, structure, and purpose to Section 552a(g)(4). App. 35a-39a (citing 26 U.S.C. § 7217(c) (Supp. 1981) and 18 U.S.C. § 2707).

Judge Michael criticized the majority’s application of a sovereign immunity-based narrowing construction. He “doubt[ed]” that the canon applies when the question is “what a plaintiff must prove to obtain relief that has been unequivocally authorized” and not “whether a lawsuit may be brought at all or about the availability of certain forms of relief.” App. 46a & n.10. In any event, Judge Michael reasoned, the scales “decisively tip” in favor of his interpretation. App. 46a-47a. Congress clearly desired citizen enforcement of the Privacy Act, and damages arising from invasion of privacy wrongs “can be hard to quantify . . . because the typical injury caused . . . is mental distress.” App.

50a. Without a statutory damages remedy available in the absence of “actual damages,” few individuals would have incentive to sue, and the Act would lose its remedial and deterrent effects. App. 52a, 59a.

The Fourth Circuit denied Doe’s petition for rehearing and suggestion of rehearing *en banc*. App. 1a-2a.

REASONS FOR GRANTING THE WRIT

The Fourth Circuit conceded that, in holding that the Privacy Act awards statutory damages for an agency’s wrongful disclosure of personal data only if an individual proves some measure of actual damages, it deepened a substantial split of authority among the circuits. *See* App. 12a-13a & n.3. In doing so, the Fourth Circuit rejected the plain reading of Section 552a(g)(4) in favor of a cramped construction that ignores or renders superfluous other language in the Act, reaches a result directly contrary to the Privacy Act’s purposes as expressed in the statute’s text and legislative history, and conflicts with OMB’s administrative interpretation — even as it acknowledged that nothing in the Act’s text “compelled” the result reached. App. 12a. Moreover, the decision below erodes the civil enforcement scheme built into the Privacy Act, rendering it incapable of effectively remedying privacy invasions or deterring agency violations. For these reasons, the Court should grant certiorari and reverse the decision below.

I. THERE IS A SUBSTANTIAL CIRCUIT SPLIT ON THE QUESTION OF WHETHER A STATUTORY DAMAGES AWARD UNDER SECTION 552a(g)(4) OF THE PRIVACY ACT REQUIRES PROOF OF “ACTUAL DAMAGES”

As acknowledged in the decision below (App. 12a & n.3; App. 33a-34a (Michael, J., dissenting)), there is a multi-circuit split of authority on the question of whether a \$1,000 statutory damages award under Section 552a(g)(4) of the Privacy Act requires proof

of “actual damages.” The Fourth Circuit’s decision accords with a decision of the Sixth Circuit, but conflicts with decisions of the Fifth, Ninth, Tenth, Eleventh, and D.C. Circuits.

The Eleventh Circuit’s decision in *Fitzpatrick v. IRS*, 665 F.2d 327 (11th Cir. 1982), concerned an award of “statutory minimum \$1,000 damages” for the IRS’s willful disclosure of a disability benefits application. *Id.* at 328. After analyzing the Privacy Act’s text and legislative history, the Eleventh Circuit concluded that Section 552a(g)(4)(A) permits an award of \$1,000 statutory damages without proof of any “actual damages.” The court reasoned that “[t]o avoid a situation in which persons suffering injury had *no provable damages* and hence *no incentive to sue*, a \$1,000 damage floor was added, and costs and attorneys’ fees were included as additional elements of recovery.” *Id.* at 330 (emphasis added). Thus, because the appellant’s asserted mental injuries were not “actual damages” under the Privacy Act, and because the appellant had not proved any other “actual damages,” “he could not recover beyond the statutory \$1,000 minimum damages, costs, and attorneys fees.” *Id.* at 331.

The Fifth, Ninth, Tenth, and D.C. Circuits all have likewise held that \$1,000 statutory damages are recoverable under Section 552a(g)(4)(A) without proof of “actual damages.” *See Johnson v. Dep’t of Treasury*, 700 F.2d 971, 977 & n.12 (5th Cir. 1983) (the “statutory minimum of \$1000, of course, is recoverable” even when a Privacy Act plaintiff has not shown “actual damages”); *Wilborn v. Dep’t of Health & Human Servs.*, 49 F.3d 597, 602 (9th Cir. 1995) (citing *Fitzpatrick*; “purpose of the minimum damage provision is to give those with ‘no provable damages’ the incentive to sue”); *Parks v. IRS*, 618 F.2d 677, 683 (10th Cir. 1980) (Privacy Act complaint is sufficient “even though the plaintiff suffered no pecuniary loss nor physical harm” where he alleges an “adverse effect” in the form of “psychological harm” and “intentional or willful misconduct”); *Waters v. Thornburgh*, 888

F.2d 870, 872 (D.C. Cir. 1989) (plaintiff who suffers an adverse effect as a result of an intentional or willful violation of the Privacy Act is “entitled to the greater of \$1,000 or the actual damages sustained”); *Tomasello v. Rubin*, 167 F.3d 612, 614, 618 & n.6 (D.C. Cir. 1999) (upholding statutory damages award even though claimant had neither proven pecuniary losses nor argued that he was entitled to emotional distress damages).

The decision below accords with the Sixth Circuit’s decision in *Hudson v. Reno*, 130 F.3d 1193 (6th Cir. 1997), *overruled in part on other grounds*, *Pollard v. E.I. du Pont de Nemours & Co.*, 532 U.S. 843 (2001). *Hudson* concerned a claim that the Department of Justice had collected information from third parties in violation of Section 552a(e)(2). *Id.* at 1204. The Sixth Circuit held that the district court had correctly rejected the claim on several grounds, among them “failure to show ‘actual damages,’ as required by the Act.” *Id.* at 1207.

In sum, the courts of appeals are now divided five-to-two on the question of whether a \$1,000 statutory damages award under Section 552a(g)(4) of the Privacy Act requires proof of “actual damages.” This Court’s review is necessary to resolve this substantial judicial conflict.

II. THE DECISION BELOW INVOLVES AN IMPORTANT AND RECURRING QUESTION OF FEDERAL LAW THAT MERITS THIS COURT’S IMMEDIATE REVIEW

It is crucial that the Privacy Act’s civil enforcement provisions be interpreted uniformly. As the frequency and risks of personal data disclosures continue to increase, individuals and the federal government must know with certainty what obligations and potential liabilities the Act’s civil enforcement provisions impose.

The very access to personal records through “computers and sophisticated information technology” that Congress anticipated in

1974, *see* Pub. L. 93-579 § 2(a)(2), accounts for the surge in personal data disclosures and their attendant risks. An example is “identity theft,” which is the “the fastest-growing financial crime in America and perhaps the fastest growing crime of any kind in our society.” S. Hoar, *Identity Theft: The Crime of the New Millennium*, 49(2) United States Attorneys’ USA Bulletin (Mar. 2001), *available at* www.usdoj.gov/criminal/cybercrime/usamarch2001_3.htm. Federal database disclosures of social security numbers have been a specific cause of identity theft’s rapid spread. D. Solove, *Access and Aggregation: Public Records, Privacy and the Constitution*, 86 Minn. L. Rev. 1137, 1138-39 (2002); *see* S. Rep. No. 93-1183, at 28, *reprinted in Source Book* at 181 (disclosure of social security numbers is “one of the most serious manifestations of privacy concerns in the Nation”).

Furthermore, federal agencies are collecting and sharing ever-increasing amounts of personal data. The recently enacted Homeland Security Act of 2002 (“HSA”), Pub. L. 107-296, 116 Stat. 135, provides an example. As part of the effort to combat terrorism, the HSA confers tremendous power on the Department of Homeland Security (“DHS”), in concert with a number of other federal agencies, to collect, analyze, maintain, and disseminate information about individuals. *Id.* tit. II & §§ 427, 429, 801, 891-99, 1001-06. Congress recognized that DHS’s exercise of these powers would frequently implicate the Privacy Act, which it viewed as an important check on any possible misuse of information. *See* H.R. Rep. No. 107-609, at 90-91 (2002). Indeed, Congress created a DHS “Privacy Officer” responsible for “assuring that personal information contained in Privacy Act systems of records is handled in full compliance with fair information practices as set out in the Privacy Act of 1974,” and “preparing a report to Congress on an annual basis of activities of the Department that affect privacy, including complaints of privacy

violations, implementation of the Privacy Act of 1974, internal controls, and other matters.” Pub. L. 107-296 §§ 222(2)-(5).³

From the perspective of individuals, resolution of Section 552a(g)(4)’s proper interpretation will largely determine whether the Act’s civil enforcement provisions can effectively vindicate rights granted by the statute and deter agency disclosures of private information. As this Court has recognized, the type of injury most commonly associated with an invasion of privacy is inherently-difficult-to-prove and unquantifiable mental distress. *Time, Inc. v. Hill*, 385 U.S. 374, 384 n.9 (1967); *see generally* 2 D. Dobbs, *Law of Remedies* §§ 7.1, 7.3(4) (2d ed. 1993). Accordingly, the availability — or lack of availability — of \$1,000 statutory damages under Section 552a(g)(4) in the absence of provable “actual damages” will, in most instances, drive an individual’s incentive to bring a civil enforcement action.

From the perspective of the federal government, the persistent split of authority makes it difficult to gauge potential liability with any degree of certainty. “[I]ssues of substantial importance concerning the liability of the United States” ordinarily counsel review by this Court. *United States v. Mitchell*, 463 U.S. 206, 211 (1983). Without a uniform interpretation of Section 552a(g)(4), the federal government will have difficulty assessing its potential Privacy Act liability, and thus will lack information crucial

³ Other examples of recent federal efforts to increase the collection and sharing of personal data abound. *See, e.g.*, Defense Advanced Research Projects Agency, *Strategic Plan* 9-10 (Feb. 2003) (discussing Total Information Awareness project to “correlate and share data from databases maintained by our intelligence, counterintelligence, and law enforcement agencies”); *The Intensifying Scrutiny at Airports*, BusinessWeek Online (June 5, 2002), available at http://www.businessweek.com/technology/content/jun2002/tc2002065_2255.htm (discussing CAPPS II system, which compares passenger manifests with data “pull[ed] in . . . from banks, credit-reporting agencies, and other companies that aggregate personal information”).

to informed decisions about implementing data collection, analysis, maintenance, and dissemination policies.

Finally, the split of authority over the meaning of Section 552a(g)(4) raises a substantial question about the meaning of nearly identical language in the Electronic Communications Privacy Act of 1984 (“ECPA”), Pub. L. 99-508, 100 Stat. 1848. The ECPA authorizes “any provider of electronic communication service, subscriber or other person aggrieved” to file a civil action against a person or entity that wrongfully discloses stored electronic communications. 18 U.S.C. § 2707(a). In language almost identical to Section 552a(g)(4)(A) of the Privacy Act, it further provides:

The court may assess as damages in a civil action under this section the sum of the actual damages suffered by the plaintiff and any profits made by the violator as a result of the violation, but in no case shall a person entitled to recover receive less than the sum of \$1,000.

Id. § 2707(c). Congress and some lower federal courts have stated that this provision establishes a minimum recovery of \$1,000 for ECPA violations regardless of any proven actual damages or profits made by the violator. *See* S. Rep. No. 99-541, at 43 (1986), *reprinted in* 1986 U.S.C.C.A.N. 3555, 3597; *United Labs., Inc. v. Rukin*, No. 98-C-602, 1999 WL 608712, at *5 (N.D. Ill. Aug. 4, 1999); *Dawson v. Leewood Nursing Home, Inc.*, 14 F. Supp. 2d 828, 832 (E.D. Va. 1998). But the ECPA and Privacy Act “share a common *raison d’etre*” and “the similarity of language . . . is, of course, a strong indication that the two statutes should be interpreted *pari passu*.” *Northcross v. Bd. of Educ.*, 412 U.S. 427, 428 (1973). Thus, the conflicting interpretations of Section 552a(g)(4)(A) create uncertainty in the law that stretches beyond the Privacy Act.

III. THE DECISION BELOW MISCONSTRUES SECTION 552a(g)(4) OF THE PRIVACY ACT

In conditioning a statutory damages award under Section 552a(g)(4) upon proof of some “actual damages”, the decision below rejects the plain reading of the Privacy Act’s text, reaches a result directly contrary to the Privacy Act’s purposes as expressed in the statute’s text and legislative history, and ignores OMB’s contrary administrative interpretation of Section 552a(g)(4).

In language preceding Section 552a(g)(4)(A), the Act states plainly that the “United States shall be liable” to a plaintiff who proves that he suffered an “adverse effect” caused by an agency’s “intentional or willful” violation of the Act. 5 U.S.C. §§ 552a(g)(1)(D), (g)(4). As the dissent below properly recognized, App. 30a-32a, the phrase “person entitled to recovery” in Section 552a(g)(4)(A) simply encompasses all those to whom “the United States shall be liable.” Sections 552a(g)(4)(A) and (B) provide the *measure* of that liability — at a minimum, the “sum of” \$1,000 in statutory damages and attorneys’ fees. They do not set forth additional elements required to establish liability *vel non*. Certainly, a plaintiff who establishes “actual damages” may recover them, but Section 552a(g)(4)(A) does not condition the United States’ liability on such proof.

The majority below reached a contrary interpretation by ignoring the surrounding text of Section 552a(g)(4) as well as other relevant provisions of the Act and instead focusing entirely on subparagraph (A). App. 10a-12a. This acontextual construction violates the “central tenet” that “a statute is to be considered in all its parts when construing any one of them.” *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 35-36 (1998); *accord, e.g., United States v. Cleveland Indians Baseball Co.*, 532 U.S. 200, 217-18 (2001). The majority’s

failure to heed this fundamental rule of construction introduces a number of anomalies into the Act.

For one thing, it drains Section 552a(g)(1)(D)'s "adverse effect" requirement of all independent meaning. Courts have deemed this requirement to serve standing and causation functions. *See, e.g., Quinn v. Stone*, 978 F.2d 126, 135 (3d Cir. 1992). But if a "person entitled to recovery" can only be someone who has proven actual damages, then standing, causation, and an "adverse effect" have necessarily been shown. A "statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant." *Duncan v. Walker*, 533 U.S. 167, 174 (2001) (internal quotation marks omitted).

For another thing, the decision below suggests that a plaintiff who establishes the United States' liability under Section 552a(g)(1)(D) could obtain attorneys' fees even if he is entitled to no damages — actual *or* statutory. App. 32a & n.3. Such a result would be at odds with the usual rule that only a plaintiff who substantially prevails obtains attorneys' fees. The Act's structure confirms that it creates no such oddity. In actions for injunctive relief under Sections 552a(g)(1)(A) and (B), the Act conditions an award of attorneys' fees on a finding that "the complainant has substantially prevailed." 5 U.S.C. §§ 552a(g)(2)(B) & (3)(B). But Section 552a(g)(4)(B)'s attorneys' fees provision omits this qualifier, and "it is generally presumed that Congress acts intentionally and purposely when it includes particular language in one section of a statute but omits it in another. . . ." *Chicago v. Envtl. Defense Fund*, 511 U.S. 328, 338 (1994) (internal quotation marks omitted). The omission indicates that Congress deemed Section 552a(g)(1)(D) plaintiffs who demonstrate an adverse effect caused by an agency's intentional or willful action to have "substantially prevailed" because they become entitled to

damages of at least \$1,000. This damages recovery triggers a concomitant award of attorneys' fees.

The decision below's flawed construction cannot be salvaged by a sovereign immunity canon of construction. App. 13a-14a. *First*, as shown above, Section 552a(g)'s text plainly allows recovery of \$1,000 statutory damages without proof of "actual damages." *See, e.g., United States v. Williams*, 514 U.S. 527, 540 (1995) (Scalia, J., concurring) ("The rule does not, however, require explicit waivers to be given a meaning that is implausible."). *Second*, none of the authority cited below supports application of the canon where Congress has expressly waived immunity to suit and to damages liability. *See Lane v. Pena*, 518 U.S. 187, 191 (1996) (determining whether administrative agencies are liable at all for money damages under the Rehabilitation Act); *United States v. Nordic Village, Inc.*, 503 U.S. 30 (1992) (determining whether monetary relief was available at all). To the contrary, this Court has held that where, as here, a statute explicitly waives sovereign immunity to money damages, courts should not "as a self-constituted guardian of the Treasury import immunity back into a statute designed to limit it." *Indian Towing Co. v. United States*, 350 U.S. 61, 68-69 (1955) (construing the Federal Tort Claims Act); *accord Smith v. United States*, 507 U.S. 197, 203 (1993).

The decision below also reaches a result at odds with the Act's purposes as stated in the legislative history and statutory text. The legislative history confirms that Congress intended the Act to "encourage the widest possible citizen enforcement through the judicial process." S. Rep. No. 93-1183, at 83, *reprinted in Source Book* at 236; *see* H.R. Rep. No. 93-1416, at 15, *reprinted in Source Book* at 308 ("constant vigilance of individual citizens backed by legal redress" is the "best means" of enforcing the Act). But the decision below would force Privacy Act plaintiffs not only to overcome the challenges of showing an "adverse effect"

and “intentional or willful” behavior, but also to prove “actual damages,” which are seldom the injury resulting from a privacy invasion. *See supra* p. 14. Few individuals would have incentive to enforce the Privacy Act, and fewer still would have a significant chance of prevailing on their claims. The civil remedies provision would become incapable of ensuring that the Act fulfills its purposes to “permit an individual to determine what records pertaining to him are collected, maintained, used, or disseminated” and to “safeguard . . . against an invasion of privacy.” Pub. L. 93-579 § 2(b)(1).⁴

Further reinforcing these statutory purposes, the legislative history characterizes Section 552a(g)(4)(A)’s \$1,000 statutory damages remedy as “liquidated damages . . . [to be] assessed against the agency for a violation of the Act.” *Source Book* at 768; *see also* H.R. Rep. No. 93-1416, at 38, *reprinted in Source Book* at 330 (discussing the need for a “liquidated damages” provision to “deter” agency violations of the Act). As a general matter, it is “not essential” to an award of “liquidated damages” that “the plaintiff sustained actual damages.” C. McCormick, *Damages* 622 (1935); *accord* 3 D. Dobbs, *Law of Remedies* § 12.9(2) (2d ed. 1993); 25 C.J.S. *Damages* § 175 (2002). Thus, the Act allows plaintiffs to recover some liquidated damages for the dignitary harm of a privacy invasion, thereby providing incentive to sue and deterring agency violations. 2 D. Dobbs, *supra*, § 7.3(4). The \$1,000 cap on those damages, however, avoids risks of excessive liability. *Id.*; *see* App. 52a n.14.

⁴The Privacy Act creates criminal penalties for certain improper disclosures of information. 5 U.S.C. § 552a(i). The criminal provisions are “rarely employed” and, therefore, “individuals bear the burden of enforcing the Privacy Act.” 2 J. O’Reilly, *Federal Information Disclosure* § 22.1 (3d ed. 2000).

The decision below also conflicts with — and, in fact, ignores — the longstanding contemporaneous construction of Section 552a(g)(4)(A) by OMB, the agency specifically charged with administering the Act. *See* Pub. L. 93-579 § 6; *see supra* pp. 4-5. In pertinent part, the Privacy Act Guidelines provide that “actual damages or \$1,000, whichever is greater,” are awarded to an individual who suffers an adverse effect as a result of an intentional or willful violation of the Act. 40 Fed. Reg. at 28,970; *see supra* pp. 4-5. The Guidelines are thus “consistent” with an interpretation of the Privacy Act allowing an award of \$1,000 statutory damages absent proof of actual damages. App. 35a (Michael, J., dissenting). Certainly, “the well-reasoned views of the agencies implementing a statute constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance.” *Olmstead v. Zimring*, 527 U.S. 581, 598 (1999) (internal quotation marks omitted). This is especially so where, as here, OMB’s interpretation is longstanding and unchanged by numerous additions to and amendments of the Guidelines. *See NLRB. v. Bell Aerospace Co.*, 416 U.S. 267, 274-75 (1974).⁵

⁵ Other courts of appeals have afforded the Guidelines “the deference accorded to the interpretation of an agency charged with ‘oversight’ of implementation.” *Quinn*, 978 F.2d at 133; *accord, e.g., Bechhoefer v. U.S. Dep’t of Justice Drug Enforcement Admin.*, 209 F.3d 57, 61-62 (2d Cir. 2000); *Baker v. Dep’t of Navy*, 814 F.2d 1381, 1383 (9th Cir. 1987); *Perry v. FBI*, 759 F.2d 1271, 1275-76 & n.7 (7th Cir. 1985); *Clarkson v. IRS*, 678 F.2d 1368, 1374 (11th Cir. 1982); *Albright v. United States*, 631 F.2d 915, 919 n.5 (D.C. Cir. 1980).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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